

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2021/1033

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL PROCEDURE RULES 2000 (As Amended) PURSUANT TO LEAVE GRANTED BY THE HONOURABLE JUSTICE ESCO HENRY BY ORDER DATED 10th MARCH 2022

and

IN THE MATTER OF REGULATIONS 8(1) and 8(2) OF THE PUBLIC HEALTH (PUBLIC BODIES SPECIAL MEASURES) RULES 2021

and

IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION TO TERMINATE THE EMPLOYMENT OF THE 1st, 2nd, 3rd and 4th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY RESIGNED FROM THEIR RESPECTIVE POSTS

and

IN THE MATTER OF THE DECISION OF THE POLICE SERVICE COMMISSION TO TERMINATE THE EMPLOYMENT OF THE 5th CLAIMANT WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANT TO HAVE ABANDONED HIS POST AND THEREBY RESIGNED

IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE TO TERMINATE THE EMPLOYMENT OF THE 6th CLAIMANT WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANT TO HAVE ABANDONED HER POST AND THEREBY RESIGNED

and

IN THE MATTER OF SECTIONS 1, 5, 6, 8, 16, 17, 37, 38, 77, 78, 84, 96 and section 101 OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES

and

IN THE MATTER OF COVID-19 (MISCELLANEOUS AMENDMENTS) ACT NO. 5 OF 2020 and SRO NO.
32 OF 2021 ENTITLED THE COVID-19 (MISCELLANEOUS AMENDMENTS) ORDER 2021

BETWEEN

SHANILE HOWE

1st CLAIMANT

NOVITA ROBERTS

2nd CLAIMANT

CAVET THOMAS

3rd CLAIMANT

ALFONZO LYTTLE

4th CLAIMANT

BRENTON SMITH

5th CLAIMANT

SYLVORNE OLLIVER

6th CLAIMANT

and

THE MINISTER OF HEALTH AND THE ENVIRONMENT

1st DEFENDANT

THE PUBLIC SERVICE COMMISSION

2nd DEFENDANT

THE COMMISSIONER OF POLICE

3rd DEFENDANT

ATTORNEY GENERAL

4th DEFENDANT

POLICE SERVICE COMMISSION

5th DEFENDANT

CONSOLIDATED WITH

SVGHCV2022/0053

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL PROCEDURE
RULES 2000 (As Amended) PURSUANT TO LEAVE GRANTED BY THE HONOURABLE JUSTICE ESCO

HENRY BY ORDER DATED 8th JUNE 2022

and

IN THE MATTER OF REGULATIONS 8(1) and 8(2) OF THE PUBLIC HEALTH (PUBLIC BODIES SPECIAL MEASURES) RULES 2021

and

IN THE MATTER OF THE DECISION OF THE PUBLIC SERVICE COMMISSION TO TERMINATE THE EMPLOYMENT OF THE 1st – 265th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY RESIGNED FROM THEIR RESPECTIVE POSTS

and

IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF POLICE TO TERMINATE THE EMPLOYMENT OF THE 257th – 265th CLAIMANTS WITHOUT AN OPPORTUNITY TO BE HEARD HAVING DEEMED THE SAID CLAIMANTS TO HAVE ABANDONED THEIR POST AND THEREBY RESIGNED

and

IN THE MATTER OF SECTIONS 1, 5, 6, 8, 16, 17, 37, 38, 77,78, 84, 88, 96 and section 101 OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES

and

IN THE MATTER OF COVID-19 (MISCELLANEOUS AMENDMENTS) ACT NO. 5 OF 2020 and SRO NO. 32 OF 2021 ENTITLED THE COVID-19 (MISCELLANEOUS AMENDMENTS) ORDER 2021

BETWEEN:

SHEFFLORN BALLANTYNE

(in his representative capacity pursuant to Court order dated 8th June 2022)

1st CLAIMANT

TRAVIS CUMBERBATCH

(in his representative capacity pursuant to Court order dated 8th June 2022)

2nd CLAIMANT

ROHAN GILES

(in his representative capacity pursuant to Court order dated 8th June 2022)

3rd CLAIMANT

and

THE MINISTER OF HEALTH AND THE ENVIRONMENT

1st DEFENDANT

THE PUBLIC SERVICE COMMISSION

2nd DEFENDANT

THE COMMISSIONER OF POLICE

3rd DEFENDANT

ATTORNEY GENERAL

4th DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Ms. Cara Shillingford-Marsh with her Mr. Jomo Thomas and Ms. Shirlan Barnwell for the claimants.
Mr. Anthony Astaphan SC, with him Solicitor General Ms. Karen Duncan and Mrs. Cerepha Harper-Joseph for the 1st, 3rd and 4th defendants.
Mr. Grahame Bollers for the 2nd and 5th defendants.

2022: Nov. 29
Dec. 1
2023: Mar. 13

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** Three years ago, much of the world was thrown into a tailspin with the pronouncement by the World Health Organization ('WHO') that a pandemic had arisen, attributable to the spread of what has become known as the SARS COVID-19 disease or COVID-19. To curb the spread and the devastating toll on the health of their populations, countries introduced measures ranging from moral suasion to legislation.

- [2] In Saint Vincent and the Grenadines ('the State'), the government implemented a variety of protocols which were revised from time to time as deemed necessary by the authorities. The Legislature enacted amendments to a number of primary legislation in response to the Covid-19 pandemic. On April 9th 2020 the **COVID-19 (Miscellaneous Amendments) Act 2020** ('the **1st COVID-19 Miscellaneous Act**')¹ was passed. It empowered 'the Minister' to modify any law by amending the Schedule by Order.
- [3] On April 9th 2020, Parliament also amended the **Public Health Act**² by the **Public Health (Amendment) Act No. 6 of 2020**³ (referred to collectively as '**the Act**'). The amendments among other things empowered the Minister of Health, Wellness and the Environment ('the Minister') on the recommendation of the Chief Medical Officer ('the CMO') to declare that a public health emergency exists in the State if the CMO believes this is the case and that it cannot be mitigated or remedied without the implementation of special measures⁴.
- [4] On being so advised the Minister may seek to mitigate and remedy the public health emergency by implementing any special measures considered necessary for the protection of public health during the public health emergency⁵. Special measures under **the Act** may include the establishment of a voluntary immunization programme in the State.
- [5] Having received advice from the CMO, the Minister on December 3rd 2020 issued the **Public Health Emergency (Declaration) Notice 2020**⁶ ('the **Emergency (Declaration) Notice**') pursuant to

¹ Act No. 5 of 2020.

² Cap. 300 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

³ Assented to by the Governor General on April 9th 2020.

⁴ By section 43B(1) of the Act.

⁵ As provided by section 43B(2) of the Act.

⁶ SRO No. 38 of 2020 – published in the Official Gazette on and effective from Dec. 4th 2020.

section 43B of **the Act**, declaring that a public health emergency exists in the State for the pandemic caused by COVID-19. The public health emergency declared by the Minister is still ongoing.

- [6] On 19th October 2021, the Minister made the **Public Health (Public Bodies Special Measures) Rules**⁷ (**the Special Measures SR&O**) which among other things mandated the vaccination⁸ of frontline public service employees, unless exempted⁹ by the employer on medical or religious grounds. By rule 8(1), unvaccinated public officers who did not have an exemption were forbidden from entering the workplace and were to be ‘treated as being absent from duty without leave’. Rule 8(2) provides that regulation 31 of the **Public Service Regulations** (**‘PS Regulations’**)¹⁰ would apply to such public officers who were deemed by rule 8(1) to be absent from duty without leave.
- [7] Regulation 31 of the **PS Regulations** states that a public officer who is absent from duty without leave for 10 continuous days shall be deemed to have resigned his office, (unless declared otherwise by the Public Service Commission (‘the PSC’)). It provides further that the office thereby becomes vacant and the officer ceases to be an officer. When the **Special Measures SR&O** were made, no similar provision was in place in respect of members of the police force. However, an amendment was introduced to **the Police Act**¹¹ on 12th November 2021 by the insertion of a new section 73A to such effect, in respect of police officers.
- [8] The amendment was effected by the **COVID-19 (Miscellaneous Amendments) Order 2021**¹² made by the Honourable Prime Minister, who holds the portfolio as the Minister of National Security, with ministerial responsibility for the police force. By that amendment, the authority charged with declaring ‘otherwise’ under section 73A is the Governor-General, the Police Service Commission (‘the Police

⁷ SRO 28 of 2021 made pursuant to section 43B(2) of the Act.

⁸ By rule 5(1).

⁹ Under Rule 7.

¹⁰ SRO 48 of 1969 and included in Cap. 10 of the Saint Vincent and the Grenadines Revised Laws of 2009 as Subsidiary Legislation arising from the Constitution Order 1979.

¹¹ Cap. 391 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹² SRO No. 32 of 2021.

SC'), or the Commissioner of Police ('the COP') based on the rank of the subject police officer. Section 73A(1) extended the application of rule 8 of the **Special Measures SR&O** to all police officers.

- [9] The claimants are 271 police officers and public officers (including teachers) to whom the referenced provisions applied. They elected not to take the COVID-19 vaccine. The PSC, the Police SC and the COP decided that the respective officers were thereby deemed to have resigned their offices and posts and that their offices were deemed vacant by operation of law. By letters issued in December 2021 the PSC, the Police SC and the COP so notified all but one of the claimants. In some cases, applications had been made by the officers for exemptions. Those who could not be accommodated elsewhere within the public service or police service were so informed. Mr. Shefflorn Ballantyne, a teacher, did not receive a letter that he was deemed to have resigned or that his office was deemed vacant. However, his access to the online teaching portal was barred. In two separate actions, the claimants applied to the High Court¹³ for leave to seek judicial review. Leave was granted.
- [10] By Fixed Date Claim Forms filed respectively on March 24th and June 23rd 2022, they applied for judicial review of the impugned decisions and for constitutional relief. The claimants sought orders against the Minister, the PSC, the Police SC, the COP and the Honourable Attorney General quashing the impugned decisions, declaring the impugned legislation to be unconstitutional, disproportionate, unlawful and tainted by procedural impropriety. They also claimed damages with interest and costs. On application by the claimants in Claim SVGHCV2022/0053, the Court appointed four¹⁴ of them to represent the entire group. The claims were consolidated and heard together.
- [11] The claimants contend that rule 8 of the **Special Measures SR&O** is unconstitutional, ultra vires, disproportionate and tainted with procedural irregularity as are the PSC's, the Police SC's and the COP's decisions to deem that the respective public and police officers have resigned their offices. They asserted further that **the Emergency (Declaration) Notice** and section 43B of **the Act** are

¹³ By Originating Motions filed respectively on 20th December 2021 and 24th April 2022.

¹⁴ By order of court dated June 8th 2022, Shefflorn Ballantyne, Travis Cumberbatch and Rohan Giles were appointed to represent themselves and the other claimants in claim number SVGHCV2022/0053.

inconsistent with section 17 of the **Constitution** and are therefore null and void; and that the **Special Measures SR&O** is unlawful, unconstitutional and void.

- [12] The claimants argued that the **Special Measures SR&O** is contrary to section 5 of the Constitution to the extent that it purports to make the taking of the Covid-19 vaccine mandatory on pain of suffering the loss of livelihood, loss of pension rights and being exposed to criminal sanctions. They submitted that it contravenes section 88 of the **Constitution** to the extent that it has the effect of depriving them of their accrued benefits associated with their employment and that it infringes their right to protection from deprivation of property without compensation under sections 1 and 6 of the **Constitution**.
- [13] Another aspect of the claims relate to rule 8 of the **Special Measures SR&O**. The claimants submitted that it contravenes sections 77 and 78 of the **Constitution** by purporting to declare circumstances under which **PS Regulation 31** applies. They maintained that such matters are reserved for regulation by the PSC. They pleaded further that by purporting to empower the Minister to amend an existing law, the **1st COVID-19 Miscellaneous Act** violates section 37 of the **Constitution** and the doctrine of separation of powers and is therefore null and void.
- [14] The claimants contended further that by purporting to confer sweeping powers on the Minister to amend existing laws, the **1st COVID-19 Miscellaneous Act** is ambiguous, vague, contravenes the rule of law doctrine and is void. In the alternative, they averred that section 2(2) which defines ‘the Minister’ should be construed to mean the Minister of Health. They argued that section 73A of the **Police Act** is likewise void.
- [15] The Minister, the PSC, the COP, the Honourable Attorney General and the Police SC (referred to collectively as ‘the defendants’) resisted the claim. They contended that the impugned legislative provisions and decisions do not violate constitutional provisions, are not unlawful, null, void, procedurally improper and/or disproportionate. They asserted that the doctrines of separation of powers and the rule of law have not been violated as alleged and that the allegations of vagueness and ambiguity in the impugned provisions are not made out. The defendants submitted that the claims should be dismissed. For the reasons outlined below, I found that the claimants have established their judicial review and constitutional claims.

ISSUES

[16] The parties submitted a list of 14 agreed issues. The claimants identified 2 additional issues while the defendants presented 6 additional ones. Those 22 issues may conveniently be condensed into 10 as follows: -

1. Whether:

- a) 'Minister' in **1st COVID-19 Miscellaneous Act** means 'the Minister of Health';
- b) **1st COVID-19 Miscellaneous Act** violates section 37 of the Constitution (by granting the Minister power to amend any existing law by making an order) and/or is unconstitutional in that it violates the separation of powers and the rule of law doctrines;
- c) section 73A of the **Police Act** is void?

2. Whether section 43B of the **Act** (which empowers the Minister to declare a public health emergency) is inconsistent with section 17 of the Constitution?

3. Whether:

- a) Rule 8(1) and (2) of the **Special Measure Rules** are illegal, disproportionate or unconstitutional and whether the Minister exceeded his mandate by making them?
- b) Section 43B of the **Act** or rules 8(1) and (2) of **Special Measures SR&O** and/or **1st COVID-19 Miscellaneous Act** are unconstitutional and null and void.

4. Whether the PSC, the COP and/or the Police SC by invoking PS regulation 31 and section 73A of the **Police Act**: -

- a) acted in a procedurally improper manner; and/or
- b) terminated the claimants' employment without affording them an opportunity to be heard under section 8(8) of the **Constitution** and/or in breach of natural justice principles?

5. Whether:

- (a) the letters deeming the claimants to have resigned violated sections 77(12) and (13), 78, 84(6) and (7) of the **Constitution**?
- b) the PSC, the COP and/or the Police SC misdirected themselves and acted illegally by acting on the Minister's directions?

6. Whether:

- a) the State has a duty or obligation to protect public health including through legislation and if so, whether the claimants' contractual and constitutional rights are subject to any such legislation and whether the claimants by virtue of such rights were obliged to comply with the **Special Measures SR&O** and the **Act**?
 - b) the Cabinet or Minister was authorized by the terms and conditions of the claimants' appointment and/or section 147 of **the Act** to make and approve Rule 8 of the **Special Measures SR&O** and incorporate PS Regulation 31 to ensure compliance with Rules 5 and 7 of the **Special Measures SR&O** and to ensure that the PSC maintained the jurisdiction to 'declare otherwise'?
7. Whether in all the circumstances it was open to the CMO to recommend the vaccine regime with exemptions for frontline workers and whether the Special measures were precautionary, proportional and reasonably required to protect public bodies?
 8. Whether the claimants made a choice not to get vaccinated or seek exemption and must stand or fall on their own deliberate choice?
 9. Whether the Cabinet or Minister was authorized by the terms and conditions of the claimants' appointment and/or section 147 of **the Act** to make and approve Rule 8 of the **Special Measures SR&O** and incorporate PS Regulation 31 to ensure compliance with Rules 5 and 7 of the **Special Measures SR&O** and to ensure that the PSC maintained the jurisdiction to 'declare otherwise'?
 10. To what remedies (if any) are the claimants entitled?

[17] Initially, the defendants submitted that the claimants have approached the Court for judicial review which affords them an alternative remedy in respect of their several complaints of constitutional breach. They reasoned that the Court should therefore refuse to entertain the constitutional claims since there is an alternative remedy which has triggered the application of section 16(2) of the Constitution. During oral arguments, the defendants resiled from that argument. It is therefore not entertained for present purposes.

FACTUAL BACKGROUND

[18] It is helpful to set out a more expansive background to the claim at this stage, to frame the context and the issues. I now do so. Shefflor Ballantyne, Travis Cumberbatch, Rohan Giles, Alfonso Lyttle, Cavet Thomas, Brenton Smith, Shanile Howe, Sylvorne Olliver and Oswald Robinson supplied

affidavit testimony on the claimants' behalf. The Minister St. Clair Prince, Minister Frederick Stephenson, the COP Colin John, PSC chairman Stephen Williams and Dr. Simone Keizer-Beach gave evidence on the defendants' behalf.

[19] The claimants averred that the claims are brought by 270 police officers and public officers. Among the public officers were several teachers, customs officers and others. Their names are set out in a Schedule¹⁵ to a joint affidavit of Mr. Ballantyne, Mr. Cumberbatch and Mr. Giles¹⁶. They averred that they were terminated by letters respectively issued by the PSC and the COP on a day between 6th December 2021 and March 16th 2022. Copies of the letters were produced¹⁷.

[20] The letters from the respective defendants were similar except for certain identifying details. To those public officers who did not apply for or were refused exemptions on application, the PSC and COP wrote respectively:

‘... as a result of your failure to comply with rule 5, you have been absent from duty without leave ... pursuant to Rule 8 of the Rules..., you are deemed to have resigned your office ... and have ceased to be an officer, in accordance with Regulation 31 of the Public Service Commission Regulations, Chapter 10 of the Laws of Saint Vincent and the Grenadines.’¹⁸

‘... as a result of your failure to comply with Rule 5, you have been absent from duty without leave ... pursuant to Rule 8 of the Rules.’¹⁸

Section 73A of the Police Act Chapter 391 provides that a member of the Royal St. Vincent and the Grenadines Police Force (RSVGPF) who is absent from duty without leave for ten (10) consecutive days is deemed to have resigned his/her office.¹⁹

¹⁵ Marked SBTCRG-1.

¹⁶ Filed on June 23rd 2022.

¹⁷ Marked SBTCRG-2 and SBTCRG-3. See sub-paragraphs 9(i) and (ii) of the June 23rd joint affidavit.

¹⁸ Text of letters from the PSC.

¹⁹ Text of letters from the Police SC and COP.

In this regard, you are informed that you have resigned your office and have ceased to be a member of the Royal St. Vincent and the Grenadines Police Force.’¹⁹

[21] In other cases, officers who had applied for a religious exemption and who were seen as qualifying for the same but who failed to receive an exemption were informed that the employer was unable to accommodate them and received letters in the following terms:

‘... your application under rule 7(1)(b) of the Public Health (Public Bodies Special Measures) Rule 2021 under which an employer may exempt an employee on religious grounds if the employer is able to make alternative arrangements to accommodate the employee, has not been approved for the following reason: upon review, it was determined that there are no staffing, administrative or other arrangements that can be made to accommodate you. Therefore, you are required to comply with Rule 5 of the Statutory Rules and Orders...’²⁰

[22] The claimants averred that they had not abandoned their jobs or resigned from their respective offices and remained committed to serve as public officers in those posts until they were prevented from performing their duties by the respective employers. They summarized how they operated from during the pandemic up until the date they received the impugned letters.

[23] With respect to the teachers they indicated that in March 2020 all schools were closed because of the COVID-19 pandemic. However, in May 2020, teachers who taught Grade 6 Caribbean Primary Exit Assessment (CPEA) classes were requested by the Ministry of Education to meet face to face with their Grade 6 students to continue the students’ preparation for the CPEA exams which were scheduled for May 2020. Due to the pandemic, exams were postponed to and were administered in June 2020. In the intervening period the Grade 6 teachers dedicated their time and effort to teaching those students face to face.

[24] In person teaching resumed for all schools in September 2020 and continued until December 2020. Schools were held fully online between December 2020 and October 2021. By November 2021 a blended approach to teaching and learning was adopted by the Ministry of Education and other

²⁰ See copy of letter is exhibited as ‘SBTCRG-4.

institutions such as the Community College. The claimants explained that ‘a blended approach’ entailed holding some school classes online and others face to face. This was to address issues emanating from the spikes in COVID-19 disease and the fact that some school buildings were used as shelters for persons who were dislocated from their homes because of the eruption of the Soufriere Hills volcano. The court takes judicial notice that the eruption took place between 9th April 2021 and 22nd April 2021.

[25] The teacher-claimants²¹ asserted that between October 19th 2021²² and 10th December 2021 they continued to report to duty to the physical location of their school or where relevant sought to access the online portal, but were denied access to the physical location and the online platforms. They averred that they were and remain willing and ready to carry out their contractual employment obligations but were debarred from doing so.

[26] Those claimants who were employed in various other ministries and departments, and the police officers averred that they reported for work and dutifully performed until they were prevented from doing so. They denied abandoning their jobs and stated that they were not given an opportunity to be heard before or after they were ‘terminated’. They averred that they are now without jobs and salaries to live, are consequently unable to meet their financial obligations with banks and other institutions with respect to loans and are not able to meet expenses to take care of their families or themselves. They asserted that the negative financial impact is compounded by the deep emotional and psychological trauma occasioned by the significant loss of their salaries, because working in the public service is the only job known by many of them.

[27] They said that even worse is the probability that they stand to lose benefits such as pension and gratuity which for them is a most painful thought, given that many of them have given longstanding committed service to their respective employers. They attest that it has been difficult for them to cope financially, psychologically and emotionally. The claimants stated that they were not given any

²¹ Namely the 2-10, 12-41, 43-62, 64-89, 91-94, 96-100, 102-110, 112-201 and 203-256 and 11, 42, 63, 90, 95, 101, 111, and 202 claimants in claim number SVGHCV2022/0053.

²² When the Special Measures SR&O was gazetted.

options to save their jobs but instead had to either take the job or lose their jobs. They maintained that they expressed their right to bodily autonomy and integrity. They expressed the view that to lose their jobs in the manner in which they did was cruel and inhumane. They reasoned that the COVID-19 vaccines are experimental and are commonly known and declared by the Center for Disease Control (CDC), to cause adverse effects such as blood clots and Guillain-Barre syndrome, and heart diseases such as myocarditis and pericarditis.

[28] Mr. Ballantyne stated²³ that he and eight other claimants applied on religious grounds for exemption from taking the vaccine. He said that their applications were accompanied by supporting documentation from the Thusia Seventh Day Adventist Church clearly outlining their liberty of conscience, health reform positions and practices against Covid-19 vaccination and testing with invasive methods using swabs treated with Ethylene Oxide. A copy of the letter was produced as exhibit 'SB-9'. Mr. Ballantyne explained that following the denial of exemptions, those teachers have not been paid by the government as teachers or at all and were not given an opportunity to be heard regarding not being accommodated by the PSC.

[29] They averred that they are aware that the Government of Saint Vincent and the Grenadines ('the government') issued a document entitled '**COVID-19 Rapid Antigen Testing Guidance**' in April 2021²⁴ that provided for a regime of testing as a way of managing the COVID-19 pandemic among public sector workers. He stated that he is aware that as at June 24th, 2021 the WHO issued guidelines stating that widescreen testing of asymptomatic persons is a waste of money and that data is lacking as to its operational effectiveness. He explained that to the best of his information and belief, there was no follow through with those guidelines. The government later abandoned the Guidance and implemented the **Special Measures SR&O** requiring teachers to take COVID-19 vaccinations failing which their employment as teachers would be terminated under the guise that they have abandoned their jobs.

²³ See paragraph 6 of Shefflorn Ballantyne's affidavit filed on 9th September 2022. Claimants 11, 42, 63, 90, 95, 101, 111, and 202.

²⁴ Included in the defendants' List of Documents as 'Document #2'.

- [30] Commenting on 'Documents #8 and #9' in the Defendants' List of Documents, Mr. Ballantyne stated that based on information contained in those documents, the Minister and Honourable Attorney General would have been aware at least from September 2021, that the COVID-19 vaccines did not prevent persons from getting infected with the Corona virus or from spreading it. He pointed out that those documents reveal respectively that as of 13th September, 2021 and 21st September, 2021, there were 21 and 39 breakthrough cases of COVID-19. He noted that a breakthrough case is characterized as one in which a person who has been vaccinated contracts Corona virus. He said that further, the data globally, especially in the most vaccinated countries, revealed that COVID-19 vaccinations do not stop infection, transmission, serious illness, hospitalization or death.
- [31] With respect to Document #18²⁵ in the Defendants' List of Documents, he observed that it records Cabinet Decision #2718, made on 29th September, 2021 whereby Cabinet approved the inclusion of teachers as frontline workers for the purpose of the **Special Measures SR&O** thereby requiring them to take the COVID-19 vaccine on pain of dismissal under the guise of abandoning their jobs. He noted further that Document #20²⁶ of the Defendants' List of Documents records Cabinet Decision #2914, made on 28th October, 2021 which provides a policy for the re-opening of schools. He noted further that it states that schools with a vaccination rate for teachers of 'plus 60%' are to re-open for face-to-face learning and schools where the vaccination rate for teachers is below 60% will utilize the blended learning approach.
- [32] Mr. Alfonso Lyttle, one of the representative claimants stated that he began his 31-year career with the government in 1990 as a Junior Clerk at the Inland Revenue Department in the Ministry of Finance. By 2004 he was promoted to Senior Clerk and around 24th September 2004 was transferred from the Inland Revenue Department to the Customs & Excise Department. A copy of his job letter was produced²⁷ to substantiate his appointment. In 2015 he was appointed as Assistant Supervisor and since that time has held several acting supervisory positions such as Supervisor of Preventative Department and Supervisor of Air Cargo. He also held the position of Boarding Officer

²⁵ Dated 6th October, 2021.

²⁶ Dated 3rd November, 2021.

²⁷ As ex. 'AL-1'.

concurrently with his substantive post of Assistant Supervisor. He explained that Boarding Officers are special officers who are charged with boarding and clearing ships that dock at ports in the State.

[33] Mr. Lyttle asserted that after 31 years of dedicated service and commitment to his employer, he was terminated from his job under the **Special Measures SR&O**. He stated that on November 24th 2021 he applied for religious exemption which was denied. He said that this was communicated to him by letter dated 1st December, 2021, from the PSC's Chief Personnel Officer ('the CPO') Mrs. Arlene Sam. He quoting her as saying that his 'religious institution does not have a doctrinal objection/prohibition against vaccination (including the Covid-19 vaccine)'. This is reflected in the letter which was tendered²⁸ into evidence.

[34] Mr. Lyttle said that he faithfully showed up and was ready to work even after being denied a religious exemption and after the ten (10) days grace period given by his employer had ended on 3rd December, 2021. He recalled that on December 3rd 2021 his employer issued a circular to staff that stated among other things, that 'effective December 6th, 2021 all un-vaccinated members of staff who were not granted an exemption on medical or religious grounds will be required to present their vaccination card on or before reporting to work.' A copy was produced.²⁹

[35] He explained that despite being denied the exemption he was scheduled on the weekly roster to work as a Boarding Officer until December 5th, 2021, however, on November 23rd, 2021 his name was removed from the ASYCUDA system – which is the Ministry of Finance's automated computer management system. He said that removal of his name meant that he could no longer access the automated operational and management system of work. He claimed that he is now unemployed because his employer terminated his employment. He asserted that he has been deemed to have resigned from his office and ceased to be an officer with effect from December 8th, 2021. He maintained the he did not resign or abandon his job, but rather showed up to work up to the day that he was issued the letter and was instructed not to come to his workplace. He indicated that he has

²⁸ As ex. 'AL-2'.

²⁹ As ex. 'AL-3'.

taken video footage of his presence on the job and would be more than willing to provide it to the court if required to do so.

[36] Like the other claimants, he asserted that he has not been given an opportunity to be heard by the PSC on the loss of his job; and that no option of saving his job or pension has been offered or made available to him. He averred that by the time that he was terminated it was common knowledge in the worldwide news that regardless of vaccination status every human was at risk to contract or transmit the coronavirus. He expressed the belief that the Minister's and PSC's actions are disproportionate.

[37] Mr. Lyttle noted that on June 23rd, 2020 he was presented with an award in recognition of my 30 years of service and was awarded a certificate of appreciation for being a valuable member of the public service. He presented a copy of the certificate.³⁰ He explained that all of his working life has been in the public service and attached a copy of his salary slip as at December 3rd 2021.³¹ He testified that the loss of his salary impacts on his ability to pay his home mortgage of \$1090.00 at Building and Loan. He explained that he has shared the utilities and other living expenses with his wife, and pointed out that having organized their lives over the years around two incomes it would be very difficult for them to cope financially. He averred that he has not held any employment other than the positions within the public service. He said that his income is not the only thing that he has lost. He said that he will also lose his pension and gratuity benefits accrued over many years of dedicated service to his employer.

[38] Mr. Lyttle stated that the job has been his life. He asserted that he has been concerned about his mental health because he has been suffering from immense stress and anxiety around losing his lifelong career, pension and gratuity that are otherwise due to him. He said that he is at a loss as to how he and his family will be able to traverse life going forward. He maintained that the vaccine mandate goes against his deeply held religious beliefs and that he does not believe that he must be made to suffer loss of the quality and his way of life. He added that his dignity as a man, as a husband

³⁰ Exhibited as 'AL-4'.

³¹ Exhibited as 'AL-5' showing a gross salary of \$3662.00.

and father has been offended by his employer's action and position. He averred that his ability to provide for his family as a husband and father has been taken away from him without compassion by his employer.

- [39] He stressed that he was not given an option to save his job, pension and any other employment benefit that may be due to him. He added that he is deeply pained by his employer's actions and believes that it is great injustice to be tossed aside after serving the public service with pride and diligence.
- [40] In claim SVGHCV2021/1033, Mr. Brenton Smith also testified on his and the other claimants' behalf. He is a police officer by profession and was a police officer for 27 years, having joined the RSVGPF on July 15th 1994. He served as Acting Corporal of Police from 2009 until 2012 when he was confirmed in that position. The following year he was assigned the rank of Acting Sergeant and was appointed to that rank in 2014. Three years later, in 2017 he was elevated to the rank of Station Sergeant of Police. He produced an appointment letter to such effect.³²
- [41] He received extensive training during the time he served as a police officer as a part of the policing training assignments and partly by virtue of his personal development as an officer. These training initiatives included Junior N.C.O's Management Development, International Law Enforcement, Financial Management and Good Governance & International Development. He also served as team leader and non-commissioned officer (NCO) at several out-stations across the State.
- [42] By letter dated the 8th of December 2021 and signed by the CPO Mrs. Arlene Regisford-Sam he was notified that he had resigned his job, he having failed to take the Covid-19 vaccination as stipulated in the **Special Measures SR&O**. He recounted that on November 22, 2021 he reported as usual for his duties at the Georgetown Police Station and assumed his position in the office. He spoke to the junior officers under his command. About 30 minutes later he was summoned to the office of his supervising officer Inspector Providence who informed him that he had to leave the compound in conformity with the **Special Measures SR&O**. He said he had no choice in light of the nature of RSVGPF and the culture of responding loyally to instructions of superior officers.

³² Exhibited as 'BS-1'.

- [43] Mr. Smith testified that on November 29th 2021, he received traffic from the RSVGPF instructing and ordering him to report for duty at the Georgetown Magistrate Court to appear before the Magistrate to give evidence in his capacity as Station Sergeant of Police in the matter of **Commissioner of Police -v- Terry Baptiste**. He said that he promptly responded to his superiors' instructions and appeared in court to do as instructed. Once again, on 6th of December 2021 he received another traffic instructing him to report for duty at the courthouse in Georgetown to give evidence in the Magistrate's Court in his capacity as Station Sergeant of Police in the matter of **Commissioner of Police -v- Donte Boyea** and he did so.
- [44] Mr. Smith stated that he did not take the vaccine and was not willing to have a charge of misconduct against his name. Therefore, as instructed by his superior officer Inspector Providence he did not show up at the office. He indicated that he performed duties as instructed by senior officers contrary to the contents of the December 8th letter from the CPO. He explained that he was instructed by his superior officer not to show up until he had a vaccination card and accordingly his absence was 'not without leave'. A copy of the referenced letter was exhibited to his affidavit.³³
- [45] He stated that in his mind, being a police is what he was built for and at no time did his commitment to the RSVGPF ever waiver. He explained that he had no known medical condition at the time to suggest that he should seek exemption under medical grounds. He said however that he is deeply rooted nonetheless in his religious beliefs and subscribes to the notion that his body is the temple of the living God and he decides what he puts inside it. He averred that because of his decision not to take the vaccine into his body, he is one of the sacrificial lambs and is now deemed unemployed.
- [46] Mr. Smith stated that his and his family's lives have been affected in significant ways since he no longer earns a salary. He said that at the time of his 'termination' his salary grossed at \$4217.00; his household expenses including mortgage totaled \$2475.00 per month, inclusive of monthly loan repayments of \$1475.00, hire purchase of \$300.00 and \$80.00 monthly, food bill of \$450.00 and transportation of \$365.00 monthly. He exhibited a copy of his salary slip.³⁴

³³ As 'BS-2'.

³⁴ As 'BS-3'.

- [47] Like the other claimants, he highlighted his concern that an additional financial hardship which is likely to flow from this situation is the loss to him of his pension and gratuity benefits because of losing his job and being deemed to have resigned. He declared that this is the worst that he has experienced as a human being. He explained that for the first time in 27 years he is uncertain as to how he will meet his commitments and take care of his family. He asserted that he has ventured out into a small business as a result of which his loan payments are in jeopardy as is his small business. He averred that the significant financial and emotional embarrassment he encounters on a daily basis since his job' was wrongly curtailed by the State cannot be measured'. He stated that he has converted the master bedroom at his house into a possible accommodation for a bed and breakfast facility as another option.
- [48] He said that he must now 'find a place to squeeze [his] head'. He stated that the stress of not having a comfortable place to sleep when the night comes that was brought on by the economic hardship of this decision by his employers, has left him in a wretched place. He said that he does not want night to come and when it does come, he does not want the daylight to come. He asserted that he has been experiencing mental strains of a magnitude he never envisaged in all his life. He said that he would get up in the middle of the night when he cannot sleep, and would be 'lost to this world'. He said that there is no doubt in his mind that he is 'so not me'. He concluded that who he is at the moment is directly and solely due to the unconscionable position implemented by his employers. He averred that the Police SC fired him without giving him a hearing.
- [49] Mr. Smith stated that his dreams and aspirations of one day becoming the Commissioner of Police in his beloved country has been swiftly taken away at the stroke of a pen. He expressed the sentiment that he has done all that he could to keep his country safe, to fight crimes and criminals and in doing so exposed his own life. He surmised that he is now discarded in the most carefree of way, his 'only crime being or so it appears is [his] decision not to be vaccinated.

[50] The affidavit testimony of other claimants in both claims were along the same lines. They are not rehearsed in this judgment for sake of brevity and because there is much similarity in the claimants' respective assertions with respect to the central issues in these cases. Affiants are assured that the contents were reviewed by the Court and were factored into consideration in arriving at the determination. Mr. Ballantyne's position is somewhat different from other claimants because he did not receive a letter from the PSC or his immediate supervisors notifying him that he was deemed to have resigned and/or that his office was deemed to be vacant. I shall return to this later.

[51] The Minister acknowledged making the **Special Measures SR&O**. He averred that he did so on recommendation of the CMO. He stated that he has responsibility for health in the State including declarations of public health emergencies and the implementation of special measures under **the Act**. He recalled Covid-19 cases and hospitalizations began to increase in the State in the late months of 2020 and that deaths from the disease were occurring in the region. He asserted that the CMO and he were very concerned that the Christmas season would lead to an increase in Covid-19 cases with arrivals of travelers from other countries. He and the Cabinet obtained advice from the CMO to declare a public health emergency which he did. He also was advised to and did issue special measures under **the Act** on advice from the CMO.

[52] Minister Stephenson stated that he has ministerial responsibility for the public service. He was present in June 2021 when the CMO attended Cabinet and advised that due to the serious health risks faced by frontline workers and the country from the Covid 19 virus, special measures should be introduced to provide for the administration of vaccinations to prevent and control the spread to public bodies and protect the health and safety of public employees. He recalled that part of her reasons was that the vaccine rate was low. He averred that it is his understanding that public officers are required by their terms and conditions of appointment and by law, to obey the laws in the State including regulations enacted under **the Act** as amended.

[53] The COP averred that under section 85(3) of the Constitution he is vested with power to appoint persons to hold and act in offices within the RSVGPF below the rank of sergeant and to exercise disciplinary control over them. He acknowledged that he read the **Special Measures SR&O** and section 73A of the **Police Act**. He made inquiries as to the vaccination status of police officers below

the rank of sergeant and determined that those who were unvaccinated should be deemed to have resigned their posts pursuant to regulation 8 of the Special Measures SR&O. He therefore issued letters to such effect.

[54] Mr. Stephen Williams asserted that the PSC received correspondence from several ministries and government departments containing a list of names of public officers who were vaccinated as at December 6th 2021. The PSC held a meeting on December 7th 2021, satisfied itself that the unvaccinated officers were by virtue of regulation 8 of the **Special Measures SR&O** were to be treated as being absent from duty without leave, were deemed thereby to have resigned their jobs and issued letters to them to such effect. A number of persons were employed arising from that invitation.

[55] Mrs. Arlene Sam produced copies of the letters that were issued by the PSC and Police SC to the unvaccinated public and police officers. She indicated that the Cabinet decided on July 27th 2022 that unvaccinated individuals including those who had refused to get vaccinated who wished to apply for positions within the public service or any public enterprise for which a vaccine was required under the **Special Measures SR&O** may be considered for work on a case-by-case basis subject to terms and conditions as advised by the CMO and approved by the Cabinet.

[56] Dr. Keizer-Beach averred that she was in no doubt that the growing threat of Covid-19 in the island posed a real and growing threat to frontline employees. Therefore, between June and October 2021 as part of the special measures she made certain recommendations to the Minister and the Minister of the Public Service as the 'high-risk classification of the various groups became greater and no feasible, practical alternative measures to protect them and reduce their risk could be found. She advised the Minister and the Minister of the Public Service and Cabinet mostly orally³⁵ that:

- a) All healthcare workers must be vaccinated to work in a government health care facility.
- She explained that they present a higher risk of infecting their vulnerable patients, fellow

³⁵ See paragraph 85 of her affidavit.

care givers and families and of being infected by sick persons presenting to their workplaces.

- b) Other frontline workers must be vaccinated (teachers, port of entry workers, prison officers, police officers, workers at Golden Age Homes and employees with the Home Help for the Elderly programme and all programmes of the Ministry of Health with limited exceptions)
- c) special essential service workers whose work is critical to the functioning of government (such as officers of Parliament, permanent secretaries and chief technical officers) must be vaccinated;
- d) Such frontline and special essential service workers officers should not enter the workplace (because if they enter a high-risk workplace, they would present a risk of infection to or risk being infected by patients, students, prisoners, travelers or others)
- e) qualifying frontline employees should be exempted from the requirement for vaccination on certain medical bases and religious grounds.

LAW AND ANALYSIS

Issue 1 – Meaning of ‘Minister’ in the Miscellaneous Amendments Act; Is section 37 of the Constitution violated by conferment of power on the Minister to amend any existing law; separation of powers and the rule of law doctrines; validity of 73A of the Police Act.

Meaning of ‘Minister’

[57] The **1st COVID-19 Miscellaneous Act** provides in section 2(2):

‘(2) The Minister may by Order amend the Schedule to provide for the modification of any existing law and such law, unless a contrary intention is indicated, shall be deemed to be amended from the date of publication of the Order in the *Gazette*.’

‘Minister’ is not defined in the **1st COVID-19 Miscellaneous Act**.

[58] **The Interpretation and General Provisions Act**³⁶ is of general applicability in the interpretation of legislation, unless otherwise stated in the relevant statute, or ‘except where there is something in the

³⁶ Cap. 14 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

subject or context repugnant to or inconsistent with such construction or interpretation'. It defines 'Minister' as meaning:

'... a person appointed to the office of Prime Minister or Minister under the Constitution and includes the Attorney-General; and "**the Minister**" means the Minister for the time being responsible for the matter in question, or the Governor-General where any executive authority for the matter in question is held by him, or the Attorney-General where executive authority for the matter in question has been conferred on him.'³⁷ (Emphasis added)

[59] On the claimants' behalf, learned counsel Mrs. Shillingford-Marsh submitted that in order for the law to conform with the fundamental of certainty, a definition must be given for 'Minister'. She argued that to empower all Ministers to amend an Act of Parliament is unconstitutional. She reasoned that the **1st COVID-19 Miscellaneous Act** is unconstitutional to the extent that it gives all Ministers the power to amend any existing law. She submitted that it must be struck down for uncertainty and unconstitutionality as it offends the rule of law principle.

[60] Learned counsel relied on the textbook **Fundamentals of Caribbean Constitutional Law**³⁸ in which the learned authors opined:

'the rule of law demands that laws be certain so that citizens can regulate their conduct. This is a dimension of accessibility of law to the public. We must be able to adequately discover what is permitted and what our duties and rights are. Legislation that is 'hopelessly vague must be struck down as unconstitutional' ...'.³⁹

She also cited **Sabapathie v The State**⁴⁰. She submitted that citizens should not be left to guess whether 'the Minister' means the Minister of Health, Prime Minister or some other Minister, as there can be little or no parliamentary supervision of legislation which is so vague.

³⁷ Section 3(1).

³⁸ 2nd Ed. (2021) by Tracy Robinson, Arif Bulkan and Adrian Saunders.

³⁹ Ibid. at pg. 270. by Tracy Robinson, Arif Bulkan and Adrian Saunders at page 270

⁴⁰ [1999] 1 WLR 1836 (PC Maur) at 1843, 1840.

[61] Learned Senior Counsel Mr. Astaphan countered that the definition in the **Interpretation and General Provisions Act** is to be applied in the absence of a definition in the **1st COVID-19 Miscellaneous Act**. He submitted that in each instance of an amendment of the Schedule by Order, the relevant Minister with responsibility for the subject matter would be the applicable Minister. He submitted further that 'Minister' may mean 'Ministers' since the singular includes the plural and similarly 'Minister' may include the Cabinet. These submissions (and all others made by learned Senior Counsel) were adopted by learned counsel Mr. Grahame Bollers on behalf of the PSC and Police SC.

Discussion

[62] The **Interpretation and General Provisions Act** states that 'except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular'⁴¹. It follows that a contrary intention may appear implicitly or expressly from the language used in the relevant provision or from the factual, grammatical, historical, legislative or other context within which the words to be construed are used.

[63] The precise words used in the subject section are expressed to confer on the 'Minister' power to amend any existing law by Order. Strictly speaking, the subsection provides for the legislative modification of primary legislation by the Minister, Governor-General or Attorney General where the legislation deals with a subject area over which that office holder is endowed with responsibility or superintendence by virtue of his ministerial or official jurisdiction. From a purely historical, practical and legislative perspective, a plurality of Ministers and/or members of the executive are not usually endowed with delegated legislative powers in the manner contended for by the defendants. The usual procedure is for one functionary to be vested with such power.

[64] When construed in light of the interpretation given to 'Minister' in the **Interpretation and General Provisions** and the historical, pragmatic and legislative context within which delegated authority is bestowed, the sub-section leads to a construction which confers on each Minister of government, the Attorney-General and the Governor-General unfettered power to make any modification to any

⁴¹ Section 3(3).

existing law that concerns any subject for which that office holder is for the time being responsible. This accords with applicable legal principles and long-established parliamentary protocols. 'Minister' in section 2(2) of the **1st Miscellaneous Amendments Act** therefore means the Minister (including Attorney-General and Governor-General) for the time being responsible for the relevant subject.

Violation of section 37 of the **Constitution**, separation of powers and the rule of law

[65] Sections 37 and 101 of the **Constitution** provide respectively:

'37. Power to make laws

Subject to the provisions of this Constitution. Parliament may make laws for the peace, order and good government of Saint Vincent and the Grenadines.

101. Supreme law

This Constitution is the supreme law of Saint Vincent and the Grenadines and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

[66] The claimants argued that the separation of powers doctrine is well established in Commonwealth Caribbean constitutional law as discussed in **Hinds v AG**⁴². They submitted that the **1st Miscellaneous Amendments Act** contravenes the separation of powers doctrine insofar as it permits a Minister through an Order, to amend legislation created by Parliament. They contended that by making Orders under the impugned **Act**, the Minister and the Minister of National Security usurped the functions of Parliament. They cited **Executive Council of Western Cape Legislature v President of the Republic of South Africa**⁴³.

[67] They also referred to the text **Commonwealth Caribbean Constitutional Law** where the learned authors noted:

'There is no strong separation between legislative and executive power in the Anglophone

⁴² (1975) 24 WIR 326 at 331.

⁴³ 1995 (4) SA 877, (1995) SACLR 274 at [62] per Chaskalson P.

Caribbean. While the power to make laws is constitutionally vested in Parliament, there can be voluntary redistribution of powers. Floissac CJ in **J. Astaphan & Co. (1970) Ltd. v Comptroller of Customs and another** recognised that ‘the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers provided that the legislature “retains effective control” of its powers.... Caribbean courts have a duty “to strike down administrative or executive action that exceeds jurisdiction or undermines the authority of the legislature.”⁴⁴ and

‘Parliament’s power to delegate its core functions like law-making is not unfettered but is subject to certain constitutional requirements. In general delegated legislation cannot amend or conflict with the parent Act. The South African Constitutional Court has held that to delegate to the executive the power to amend or repeal Acts of Parliament is subversive of the mandatory scheme laid down in the Constitution for the amendment of laws’.⁴⁵

[68] Learned counsel Mrs. Shillingford-Marsh submitted that Parliament may delegate its law-making powers but such delegation is governed by certain rules. She said that the delegated authority cannot usurp the Parliament’s powers which must be appropriately circumscribed. She submitted that due to the uncertainty and vagueness of the meaning of ‘Minister’ in the impugned legislation, there can be little or no parliamentary supervision of legislation which is so vague.

[69] Learned Senior Counsel Mr. Astaphan argued that Parliament retained authority of any Order made by a Minister by virtue of the delegated authority under the impugned **Act**. He submitted that section 2(3) of the **1st COVID-19 Miscellaneous Act** expressly provided that any Order so made would cease to be effective unless confirmed by a resolution of the House of Assembly that is passed within 2 months of commencement of that Order or such other extended period declared by the Governor-General by Order. Learned Senior Counsel submitted further that the **Miscellaneous Amendment Orders** made by the Minister and the Minister of National Security were laid as stipulated by law and

⁴⁴ Commonwealth of Dominica Civil Appeal No. 8 of 1994.

⁴⁵ Ibid. at pg. 309.

the claimants' arguments should be rejected.

Discussion

[70] The legal concept known as 'the separation of powers doctrine' is a fundamental pillar of constitutional law. It is implicitly recognized as an integral element of all Commonwealth Caribbean Constitutions. Any law which violates this principle is null and void and unconstitutional. The concept was explained and the applicable principles enunciated by Chief Justice Floissac in **Astaphan v Comptroller of Customs** as rehearsed by the Board in **Hinds v The Queen**⁴⁶, **John v Director of Public Prosecution**⁴⁷ and by the Punjab Appellate Court in **Devi Das v Punjab**⁴⁸. It suffices for present purposes to highlighted the learning from those seminal decisions.

[71] The constitutional principle of separation of powers encompasses the entrenched concept that the three organs of government (the legislature, the executive and the judiciary) function in their discrete areas exclusively from interference or encroachment in relation to the exercise of such powers by the other arms of government, except in clearly defined circumstances as between the legislature and the executive. In this regard, Lord Diplock noted in **Hinds v The Queen** that:

'... it is established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.'⁴⁹

[72] It is widely accepted that the legislature may delegate to the executive branch, authority to make primary and subsidiary legislation. However, in such instances Parliament must retain 'ultimate

⁴⁶ (1977) A.C. 195.

⁴⁷ (1985) 32 W.I.R. 230.

⁴⁸ (1967) 3 SCR 557.

⁴⁹ Ibid. at pg. 212.

control' over the exercise of such delegated authority. As explained by Floissac CJ in **Astaphan v The Comptroller of Customs**:

'... the Legislature retains ultimate control over the Executive in relation to the exercise by the Executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the Executive. If the basic principle of separation of legislative and executive powers is intended to be meaningful and effective, the basic principle should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates ex post facto. There must be some Parliamentary control at the time of the exercise of the power. For these reasons, I am firmly of the opinion that **if the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the Legislature should be deemed to have surrendered or abdicated the power**. In that event, the delegation or transfer of legislative power is inconsistent with basic principle of separation of powers.'⁵⁰ (Emphasis added)

[73] Chief Justice Floissac pointed to some of the potential dangers which could emanate from such unrestricted exercise of delegated legislative power by the executive. He did so by quoting approvingly, dictum uttered by Hubba Rao C.J. in **Devi Das v Punjab**, where the learned jurist observed:

'**An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favor of another agency either in whole or in part is beyond the permissible limits of delegation.** It is for a Court to hold on a fair, generous and liberal construction of an impugned statute

⁵⁰ At pgs. 5 and 6.

whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.⁵¹ (Emphasis added)

[74] The **1st Miscellaneous Amendments Act** contains 3 short sections, the first of which sets out the short title. The explanatory note to **the Act** states simply ‘An Act respecting certain existing laws in response to the COVID-19 pandemic.’ It is useful to outline those parts of **the Act** which were not recited above. Sub-sections (1) and (3) of section 2 and section 3 provide respectively:

‘(1) The laws set out in the Schedule are amended to the extent specified therein.

(2) ...

(3) An Order made under subsection (2) shall cease to have effect if a resolution confirming the Order is not passed in the House of Assembly within two months of the commencement of the Order:

Provided that the Governor-General where necessary may by Order, extend the period of two months up to, but not exceeding, six months.

3. Unless otherwise provided in the Schedule, this Act expires on such date as the Governor-General may by Proclamation appoint and different dates may be prescribed for different parts of the Act.’ (Emphasis added)

[75] It is readily apparent that the impugned **Act - 1st Miscellaneous Amendments Act** - contains no provisions which expressly or implicitly delineate the parameters within which the delegated law-making power thereby conferred on the ‘Minister’ is to operate. The impugned **Act** does not point to any policy prescriptions which delimit the exercise of such power and no guidelines are set out or incorporated to govern such law-making authority. The stipulation that such amendments be subjected to a positive resolution within 2 months is nothing more than a requirement for *ex post facto* scrutiny or ratification, which does not amount to effective control by the Legislature.

⁵¹ At pg. 565.

- [76] Those deficits in the impugned **Act** evidence that Parliament has by section 2(2) granted a *carte blanche* mandate to the Minister, the Governor-General and the Attorney General to amend any laws within his jurisdiction in any way he in his deliberate and unrestrained thinking considers appropriate. The Parliament has thereby committed the cardinal error of not maintaining control over the exercise of such power and has by doing so ‘stepped outside the permissible limits of delegation’. This cannot be cured by requiring merely that the such Orders be made the subject of a parliamentary resolution afterwards.
- [77] It is worth reiterating that while Parliament could empower the Minister to amend an existing law by Order, it must do so in accordance with established principles and protocols. In all of the circumstances in this case, the Legislature by virtue of section 2(2) of the **1st Miscellaneous Amendments Act** has arbitrarily endued the executive (i.e. the ‘Minister’) with limitless legislative authority to arbitrarily or otherwise amend ‘any existing law’. This is inconsistent with the constitutional principle of separation of powers and section 37 of the **Constitution**. Section 2(2) of the **1st Miscellaneous Amendments Act** is therefore void to the extent that it seeks to confer such authority on the Ministers, the Governor-General and the Attorney General.
- [78] The concept of the rule of law was explored by the Court of Appeal in **Sonia Williams v Conrad Charles et al**⁵². In the judgment written by Rawlins J.A., the Court noted:
- ‘The rule of law has its roots in the writings of Aristotle, who stated that where laws do not rule there is no constitution. [See Aristotle’s *The Politics*, Sinclair, TA (Trans) (Penguin, London, 1962)bk iv 1292a31] The concept crystallized into contemporary legal theory in the 19th Century work of Albert Venn Dicey. [In *An Introduction to the Study of the Law and the Constitution* (10th Edition, MacMillan Press Ltd. London 1982), particularly Chapters 4 and 13] He identified, as **its basic tenets**, the kindred principles that no person is above the law, in that every person must be equally subjected to the laws of the land, [The idea of legal equality] and that **those who make laws** and those who exercise discretion under the law

⁵² Commonwealth of Dominica Civil Appeal No. 29 of 2004.

must do so only in accordance with law. [The idea that government should not make laws that are secret or arbitrary or retrospective penal laws] In its modern perspective, particularly after the Declaration of Delhi, **the concept is regarded as requiring a legal system, which provides procedural fairness**, and courts, which are presided over by impartial judicial officers and which are easily accessible to all persons. [See “Declaration of Delhi” (1959-61) 2-3 Int’l C.J. at pages 2-3 and 19-42. See also the Report of the International Congress of Jurists on The Rule of Law in A free Society, (New Delhi, 1959 prepared by N.S. Marsh.)] (Emphasis added)

- [79] The claimants’ contentions that the delegated law-making power granted in the impugned law violates the rule of law must be examined in light of the foregoing elucidation of the principle. In the context of this case, the question which arises is whether the impugned provision was made in accordance with law or whether it was done in an arbitrary manner. Having concluded earlier that the delegated power under the impugned law to amend any existing law was characterized by arbitrariness, I find that the impugned law (section 2(2) of the **1st Miscellaneous Amendments Act** contravenes the rule of law and is for this reason unconstitutional, is contrary to section 101 of the **Constitution**, and is void.

Section 73A of the **Police Act**

- [80] By Order made on 12th November 2021, the Honourable Prime Minister and Minister of Foreign Affairs, National Security, Legal Affairs and Information ‘in exercise of the powers conferred by section 2(2) of the **1st Miscellaneous Amendments Act** made Statutory Rule and Order No. 32 of 2021, cited as the **COVID-19 (Miscellaneous Amendments) Order**. On 17th December 2021, Her Excellency the Governor-General made an Order (SR&O 41 of 2021) by which she extended for a further 2 months, the period within which SR&O 32 of 2021 was to be submitted to the House of Assembly for a positive resolution under section 2(3) of the **1st Miscellaneous Amendments Act**.
- [81] The **COVID-19 (Miscellaneous Amendments) Order** purported to amend the Schedule to the **1st Miscellaneous Amendments Act** by adding a new part 5 after the existing part 4. The amendment sought to insert a new section 73A in the **Police Act**. The new section 73A provides:

'73A. (1) This section applies to a member of the Force or Auxiliary Police who is to be treated as being absent from duty without leave under rule 8 of the Public Health (Public Bodies Special Measures) Rules 2021.

(2) Notwithstanding anything in sections 17, 20 and 62, a member of the Force or Auxiliary Police who is absent from duty without leave for ten consecutive days is deemed to have resigned his office unless declared otherwise by –

- (a) the Governor-General, acting in accordance with the advice of the Police Service Commission, in the case of the Commissioner and the Deputy Commissioner of Police;
- (b) The Police Service Commission, in the case of an officer below the rank of Deputy Commissioner of Police but above the rank of sergeant;
- (c) The Commissioner, in the case of an officer of or below the rank of sergeant; and
- (d) The Governor-General or the Commissioner, in the case of a member of the Auxiliary Police.

(3) Where a member of the Force or Auxiliary Police is deemed to have resigned his office under sub-section (2), the office becomes vacant and the member ceases to be a member of the Force or Auxiliary Police.'

[82] The claimants submitted that due to the failure of the **1st Miscellaneous Amendments Act** to define 'Minister', the Honourable Prime Minister did not have the requisite authority to amend the **Police Act**. That he has usurped the functions of Parliament by dint of the fact that the impugned legislation contravenes the separation of powers and rule of law doctrines. The defendants disagreed.

[83] Having found that section 2(2) of the **1st Miscellaneous Amendments Act** is void for unconstitutionality and violation of the separation of powers and rule of law doctrines, it follows that any Order made pursuant to the legislative 'power' purportedly granted by that section, is equally invalidated. The Honourable Prime Minister could not validly exercise law-making authority under a

provision which is null and void. The logical consequence is that section 73A of the **Police Act** is null and void having been made under a legislative provision that contravenes the separation of powers and rule of law doctrines and it is thereby rendered unconstitutional.

- [84] Moreover, any decisions or actions purportedly undertaken by virtue of that 'amending legislation' are consequently invalidated. This includes the decisions of the Police SC and the COP communicated in their letter to those claimants who are police officers, to the effect that they are deemed to have been away from duty without leave and to resigned their respective offices by operation of section 73A of the **Police Act**.

Issue 2 - Is section 43B of the Act which empowers the Minister to declare a public health emergency inconsistent with section 17 of the Constitution?

- [85] Section 17 of the **Constitution** provides for the declaration of a state of emergency in part or all of the State by proclamation of the Governor-General. Before making such a declaration, the Governor-General must be satisfied that a public emergency has arisen as a result of an impending war; the occurrence of a natural disaster such as a volcanic eruption, earthquake, hurricane flood, fire, outbreak of pestilence or infectious disease or other calamity; or where the public safety is being endangered by some significant threat or from which the community might be deprived of supplies or services that are essential to life.

- [86] In the regard, the **Constitution** states at section 17(1), (2) and (3):

'17. Declaration of emergency

(1) The Governor-General may, by proclamation which shall be published in the *Official Gazette*, declare that a state of emergency exists for the purposes of this Chapter.

(2) A proclamation under this section shall not be effective unless it contains a declaration that the Governor-General is satisfied-

(a) that a public emergency has arisen as a result of the imminence of a state of war between Saint Vincent and the Grenadines and a foreign state;

- (b) that a public emergency has arisen as a result of the occurrence of any volcanic eruption, earthquake, hurricane, flood, fire, outbreak of pestilence or of infectious diseases, or other calamity whether similar to the foregoing or not; or
 - (c) that action has been taken, or is immediately threatened by any person, of such a nature and on so extensive a scale, as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life.
- (3) Every declaration of emergency shall lapse-
- (a) in the case of a declaration made when the House is sitting, at the expiration of a period of seven days beginning with the date of publication of the declaration; and
 - (b) in any other case, at the expiration of a period of twenty-one days beginning with the date of publication of the declaration.'

[87] The Governor-General is authorized to revoke a declaration of a public emergency by proclamation in the *Official Gazette*.⁵³ Provision is also made that the state of public emergency shall last no longer than the period of the mandatory approval of a declaration of public emergency by the House under sub-section (3) and in any event not beyond 12 months or such further extended period.⁵⁴ A resolution approving a state of emergency or its expiry cannot be passed unless supported respectively by the votes of 2/3 of all representatives or the majority of them.⁵⁵

[88] Section 43B (1) of the **Act**⁵⁶ provides:

'43B. (1) Where the Chief Medical Officer believes that a public health emergency exists in Saint Vincent and the Grenadines and believes that the health emergency cannot be mitigated or remedied without the implementation of special health measures under this section, the Chief Medical Officer shall recommend to the Minister that a public

⁵³ By section 17(4) of the Constitution.

⁵⁴ By section 17(5) and (6) of the Constitution.

⁵⁵ By section 17(7) of the Constitution.

⁵⁶ An amendment inserted into the Act by the Public Health Amendment Act No. 6 of 2020.

health emergency be declared for all or part of Saint Vincent and the Grenadines and the Minister may, by Notice, declare a public health emergency for all or part of Saint Vincent and the Grenadines.’

[89] Section 43B(2) empowers the Minister to (on the advice of the CMO) implement special measures to mitigate or remedy the emergency. Sub-section (3) of section 43B provides for the Minister on advice from the CMO, to make a declaration that the public health emergency has ended.

[90] The claimants contended that section 43B removes the:

1. power to declare a public health emergency solely out of the hands of the Governor-General and vests a parallel power in the Minister;
2. role of the special majority in parliament to superintend a public health emergency in cases where it is declared by the Minister; and
3. restriction on the length of time for which a public health of emergency can last.

They submitted further that section 43B was not passed in accordance with section 38 of the **Constitution**.

[91] The claimants argued that in **Hinds v. The DPP**⁵⁷ the Board referred to the nature and structure of the family of Caribbean Constitutions (including that of Saint Vincent and the Grenadines’) and characterized them as embodying:

‘... what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.’⁵⁸

and,

‘The more recent constitutions on the Westminster Model, unlike their earlier prototypes, include a Chapter dealing with Fundamental Rights and Freedoms. The provisions of this Chapter form part of the substantive law of the state and until amended by whatever special

⁵⁷ Privy Council Appeals Nos. 4 and 5 of 1975.

⁵⁸ *Supra*. at pg. 4.

procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the Legislature, the Executive and the Judiciary of the plenitude of their respective powers.’⁵⁹

[92] Citing **Andy Mitchell v. The Attorney General**⁶⁰ the claimants commended to this Court as a general principle that:

‘... in construing the powers of parliament, the court will look at the true nature and character of the [legislation] in order to ensure that the legislature does not achieve indirectly what it could not do directly. This is a principle which ... should guide this court in construing the effect of the Second Proclamation. In Gallagher Lord Atkin stated that the court should look at the pith and substance of the legislation; and in *Ladmore v Bennett* his words were “.... the courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail”. Mahajan J. speaking for the Supreme Court of India in *Dwarkadas* had this to say: “..... it is necessary to examine with some strictness the substance of the legislation ... the court, when such questions arise, is not over persuaded by the mere appearance of the legislation. In relation to prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing an indirect method of achieving exactly the same result. ... the court has to look behind the names, forms and appearances to discern the true character and nature of the legislation.”⁶¹

[93] Learned counsel Mrs. Shillingford-Marsh submitted that it is trite law that the legislature must follow the procedure contained in the **Constitution** to validly alter the **Constitution**. She acknowledged that section 43B makes no reference to and expresses no intention to alter section 17 of the **Constitution** or to alter the structure of the **Constitution**. She argued however that the issue is

⁵⁹ Supra. at pg. 5.

⁶⁰ Grenada Civil Appeal No. 1 of 1992.

⁶¹ Supra. at pg. 21.

whether section 43B is a colourable device and amounts to a fraud on the **Constitution** by seeking to amend section 17 of the **Constitution** and to indirectly alter the structure of the **Constitution**.

- [94] Learned counsel submitted that the **Constitution** being an embodiment of ‘an agreement ... between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future’, incorporates an agreement that a) the power to declare a public health emergency (inter alia) for a limited period and to impose restrictions on the enjoyment of rights and freedoms that go with it such a declaration, was placed in the hands of the Governor General, and b) the power to extend the state of emergency for a further limited period was placed in the hands of a special majority of parliament. She submitted that section 43B of **the Act** alters that agreement (the **Constitution**) by providing for the power under section 17 to be shared with the government of the day by placing the power in the hands of a Minister. She added that section 43B also removes the restrictions as regards time limits and automatic expiration of the declaration of emergency contained in the **Constitution**.
- [95] Learned counsel concluded that the government of the day with its simple majority in parliament could not achieve directly, by amending section 17, what it has sought to achieve indirectly by way of section 43B. She submitted that section 43B alters the very structure of the **Constitution** by diluting the power of the Governor-General and of the special majority in Parliament by providing for that power to be exercised by a Minister. She contended that this renders section 43B of **the Act** unlawful and void.
- [96] The defendants submitted that the contention that the Minister has no authority to declare an emergency under **the Act** is without merit and was rejected by the Board in **Suraj and others v The Attorney General of Trinidad and Tobago**⁶². They argued that as held in **Suraj**, the public emergency regime in the **Constitution** is not a *lex specialis* Code which excludes the operation of the **Act**. Learned Senior Counsel Mr. Astaphan stated that **Suraj** is authority for the proposition that the Minister may declare a public health emergency pursuant to section 43B of the **Act**. He argued

⁶² [2022] 3 WLR 309.

that section 43B is not inconsistent with section 17 of the **Constitution** and is not void. He stated that this Court should give full force and effect to **Suraj**.

Discussion

[97] It is important to refer to other provisions of the **Constitution** in this State which are relevant to this issue.

Section 18 (2) of the **Constitution** defines 'period of public emergency' as being:

'... any period during which-

(a) [His Majesty] is at war; or

(b) A declaration of emergency is in force under section 17 of this Constitution.' (emphasis added)

[98] The facts in **Suraj** arise from the COVID-19 pandemic and are similar in some respects to the instant case but differ in others. In that case, the Court had to examine sections of the **Constitution of the Republic of Trinidad and Tobago** ('the Constitution')⁶³. It makes provision in section 8 for the President to declare that a state of emergency exists in certain situations including in the event of an outbreak of pestilence or of infectious disease. Under the **Public Health Ordinance** ('the Ordinance')⁶⁴, the President is empowered to add to the list of infectious diseases in the **Ordinance** by declaring any disease to be an infectious or dangerous infectious disease. The Minister of Health is charged with directing all measures deemed necessary for dealing with all such dangerous infectious diseases (including making regulations to control them) not limited to the restraint, segregation and isolation of persons suffering from such diseases.⁶⁵ The **Ordinance** provides for publication of such Regulations in the Royal Gazette whereupon they become effective as part of the **Ordinance**.⁶⁶

⁶³ Act No. 4 of 1976.

⁶⁴ Act No. cc of 1940, by section 103.

⁶⁵ By section 105 of the Ordinance.

⁶⁶ By section 132 of the Ordinance.

[99] The Minister of Health made Regulations under the Ordinance limiting the number of persons in any public gathering to 5 and imposing a penalty of a fine and imprisonment, on summary conviction ('the Gatherings Rule').⁶⁷ He also made regulations which effectively limit the number of persons gathering at religious and ecclesiastical services to ten, unless certain precautions were complied with ('the Religious Gatherings Rule').⁶⁸ The respective appellants challenged the Gatherings Rule and the Religious Gatherings Rule (collectively 'the Rules') in proceedings in the High Court of Trinidad and Tobago. Among other things, they contended that the Rules were 'unconstitutional, null, void and of no legal effect'.

[100] The issue which emerged (also pertinent to the instant matter) was whether the Rule could only have been made under the constitutional provisions dealing with public emergencies. The Board rejected the appellants' arguments that the Rules had no proper legal basis and were void because they were made by the Minister of Health under the **Ordinance** and not by virtue of a public emergency declaration under the Constitution.⁶⁹ The Board reasoned that there is no inconsistency between the regime in the **Ordinance** and the one in the Constitution.

[101] The Board noted that the Ordinance confers general powers for dealing with emergencies while the Constitution bestows on the President a 'range of exceptional powers, subject to special controls, which may be used where necessary to override individual rights.' It opined that there was extensive overlap between the two parallel regimes. Further, the **Ordinance** predated the Constitution in that it was enacted in 1940, several years before the Constitution was brought into force in 1965 and the Constitution did not mention the **Ordinance**. Moreover, the Board held that the inference to be drawn from any reference to the **Ordinance** in the Constitution is that the two regimes were intended to co-exist and the regime in the **Ordinance** was not excluded by the Constitution.

[102] Another consideration was that section 7(1) of the Constitution expressly provides that the public

⁶⁷ By the Public Health [2019 Novel Coronavirus (2019-nCoV)] (No 9) Regulations 2020, regulation 3(1)(b) '.

⁶⁸ By the Public Health [2019 Novel Coronavirus (2019-nCoV)] (No 23) Regulations 2020, regulation 3(1)(b).

⁶⁹ Supra at para. 102.

emergency regime in it is 'Without prejudice to the power of Parliament to make provision' to deal with health emergencies.⁷⁰ The Board was of the view that the creation of an exception regime in the Constitution to deal with public emergencies did not thereby create 'an exclusive *lex specialis* for dealing with issues where individual rights may need to be overridden, because the general power in section 13 [of the Ordinance] to do that exists alongside it.'⁷⁰

[103] The Privy Council concluded:

'Both regimes set out useful powers which provide the government with options about how to proceed in the face of a public health emergency. It would be undesirable to drive government to seek to suspend individual rights too readily by forcing it to use the powers under the constitutional regime. A government which decides to respond to a difficult public health issue cautiously and with restraint, by employing powers under the Ordinance which have to comply with the individual rights in section 4, should not then be exposed to legal challenges based on the contention that the President ought instead to have declared a public emergency under section 8. The public interest requires that the government should be able to respond flexibly and with confidence that the measures it takes will not be unduly at risk of legal challenge. The framers of the Constitution cannot have intended that the authorities would be presented with a difficult dilemma about which powers they should use in the face of a public health crisis.'⁷¹

[104] The similarities in the legislative framework have to be considered in light of the major differences between them. In this regard, it is striking that unlike the Trinidad and Tobago reality in which two discrete but parallel regimes exist, the **Act** in this State appears to have added not a second but a third option for management of public health challenges. In this regard, it is noteworthy that sections 17 and 37 of the Act contain several provisions which may be activated by the Minister to manage and control infectious diseases. The question is whether section 43B amounts to a third option or just a variation on the second mechanism in the **Act** that predated the enactment of section 43B.

⁷⁰ Supra at para. 104.

⁷¹ Supra at para. 105.

- [105] Section 43B of the **Act** empowers the Minister to among other things 'implement special measures to mitigate or remedy the emergency'. It is worth noting that section 147 (that also predated section 43B) of the **Act** empowers the Minister to make rules generally for the carrying out of the purposes' of the **Act**. This would include implementation of special measures. In fact, the **Special Measures SR&O** was made pursuant to sections 43B and 147 of the **Act**.
- [106] The special measures permitted by section 43B(2) run the gamut of establishing a voluntary immunization program, creation of lists of persons to be prioritized for such program and for quarantining persons exposed to infectious diseases, among others. These measures seem to expand on the extensive powers conferred on the Minister by sections 17 and 37 of the **Act** for the express purposes of preventing, suppressing and controlling infectious diseases and dangerous infectious diseases. It might be that use of the words 'public' and 'emergency' relative to the declaration which the Minister is empowered to make under section 43B may have led to the present challenge on the ground of constitutionality.
- [107] In my judgment, section 43B of the **Act** does not create an opportunity for the Minister to declare a state of emergency akin to that which is contemplated by section 17 of the **Constitution**. I am of the considered opinion that what section 43B seeks to achieve is to expand on the areas in which the Minister may make rules to manage a public health emergency during any period when the State is affected by an infectious disease or dangerous infectious disease which is not severe enough for the deployment of a state of emergency under section 17 of the **Constitution**. This expansion in my view does not introduce a third option for management of health crises by the Minister or his Ministry, but merely supplements that which exists in the **Act**, quite like the scenario in **Suraj**.
- [108] It is to be noted that like the **Ordinance** in Trinidad and Tobago, **the Act** in this State predated the **Constitution** and is therefore an existing **Act**, although section 43B is a more recent legislative measure. In the premises, notwithstanding the dissimilarities between the facts and law of **Suraj** and the instant case, there are enough similarities which make it a useful precedent from which to extract guiding principles or guidance in resolving the present issue.

[109] The issue in both cases is identical – namely, whether the ‘public emergency’ legislative regime in the **Constitution** is the only one to be utilized in the State in the event of a public health crisis or pandemic. The two main differences in the cases is that in Trinidad and Tobago, it is the President who is empowered by the **Constitution** to declare that a state of emergency exists; and to add to the list of infectious diseases under the Ordinance, while the Minister of Health is authorized by the **Ordinance** to make Regulations.

[110] In this State, the declaration of a public emergency is made by the Governor-General under the **Constitution**, while the Minister may under **the Act** declare any disease to be a ‘formidable epidemic disease’⁷² and make rules for a number of matters including ‘preventing any person from leaving any infected area’ and ‘any other purpose, whether of the same kind or nature ... having for its object the prevention, control or suppression of communicable diseases.’⁷³ Those provisions are of the same import as the ones under consideration in **Suraj**. Of further note, is that section 16(1) of the **Act** states:

‘Save as is specially provided in this Act, the provisions of this Act shall be in addition to and not in substitution for any provisions for the time being in force of any other Act or Ordinance which are not in conflict or inconsistent with this Act.’

[111] In view of the referenced similarities in the legislative scheme in Trinidad and Tobago and in this State regarding the management of serious public health crises, the pronouncements by the Board are just as applicable in the instant case as in **Suraj** in relation to the issue of whether section 43B is unconstitutional and void. I adopt and bring them to bear on the present issue. In my judgment, it is clear that the **Act** establishes a regime for the management and control of regular as well as extraordinary public health crises. Furthermore, in the case of serious public health situations that they can be managed and controlled by rules reasonably issued by the Minister be it during a public

⁷² Section 37(d) of the Act.

⁷³ Section 37(m) of the Act.

health emergency or not, and without the need for declaration of a state of emergency pursuant to section 17 of the **Constitution**.

[112] It is evident that the framers of the **Act** and the **Constitution** intended both regimes to operate as parallel systems, each to be activated as necessary depending on any number of foreseeable or unforeseen factors. For those reasons, I am satisfied that section 43B of **the Act** does not permit the Minister to establish a state of emergency of the kind contemplated by section 17 of the **Constitution**. Section 43B of **the Act** is therefore not inconsistent with section 17 of the **Constitution** and is not void on this basis.

[113] The foregoing holding impacts the claimants' contention that section 43B of **the Act** violates section 38 of the **Constitution**. Section 38 of the **Constitution** provides in part:

'38. Alteration of Constitution and Supreme Court Order

- (1) Parliament may alter any of the provisions of this Constitution ... in the manner specified in the follow provisions of this section.
- (2) A bill to alter any of the provisions of this Constitution ... shall not be regarded as being passed by the House unless on its final reading the bill is supported by the votes of not less than two-thirds of all the Representatives.
- (3) A bill to alter this section, the Schedule to this Constitution or any of the provisions of this Constitution specified in part 1 of that Schedule or any of the provisions of the Courts Order specified in Part 2 of that Schedule, shall not be submitted to the Governor-General for his assent unless-
 - (a) There has been an interval of not less than ninety days between the introduction of the bill in the House and the beginning of the proceedings in the House on the second reading of the bill; and
 - (b) After it has been passed by the house the bill has been approved on a referendum by not less than two-thirds of all the votes validly cast on that referendum.'

[114] In view of the holding that section 43B of **the Act** does not contravene section 37 of the **Constitution**

(the basis on which the claimants hinge their argument of unconstitutionality by virtue of section 38 of the **Constitution**) it follows that section 43B of **the Act** does not offend section 38 of the **Constitution**. I so find.

JUDICIAL REVIEW

Issue 3 – Rules 8 (1) and (2) of the Special Measures SR&O and section 43B of the Act – illegality, proportionality, constitutionality and excess of authority by the Minister

[115] The claimants contended that regulations 8(1) and (2) of the **Special Measures SR&O** are illegal, disproportionate and resulted in actions by the PSC, COP and Police SC which were characterized by procedural impropriety. Those regulations state:

‘8 (1) An employee who without reasonable excuse fails to comply with rule 4 or 5 must not enter the workplace and is to be treated as being absent from duty without leave.

(2) Regulation 31 of the Public Service Commission Regulations applies to a public officer who is absent from duty without leave under subrule (1).’

[116] Rules 4 (1) and (2) and 5 (1) and (3) of the **Special Measures SR&O** are relevant. They state:

‘4. (1) Subject to rule 6, every employee must, at the times or periods as may be determined by the Chief Medical Officer and notified in writing to the employee by his employer, present his employer a negative rapid test or PCR test on reporting to work.

(2) A determination by the Chief Medical Officer under subrule (1) may be made in relation to different categories of employees.

5. (1) Subject to rule 7, every employee specified in the Schedule must be vaccinated against the coronavirus-disease 2019.

(2) ...

(3) An employee must provide proof of vaccination by submitting his vaccination card to his employer.’

[117] Rule 7 which deals with exemptions, provides:

‘7. (1) An employer may exempt an employee to whom rule 5 applies from the requirement for vaccination-

- (a) if the employee provides a written certificate from a medical practitioner approved by the Medical Officer of Health certifying that vaccination is not advisable on the medical ground stipulated in the certificate; or
 - (b) on religious grounds if the employer is able to make alternative arrangements to accommodate the employee.
- (2) In determining whether to grant an exemption under sub-rule (1) (a), an employer may submit a request for exemption to the Chief Medical Officer for review and advice and for this purpose the Chief Medical Officer may seek the advice of one or more medical practitioners.
- (3) An employee who is exempted under this rule must comply with rule 4.
- (4) An exemption may be given on conditions and if so, the person given the exemption must comply with the conditions.
- (5) The written certificate referred to in sub-rule 7 (1) (a) must be in a form approved by the Chief Medical Officer.
- (6) The application for exemption on religious grounds must be in a form approved by the Cabinet.'

[118] The claimants submitted that the CMO listed at paragraph 85 of her affidavit, the recommendations she made for the **Special Measures**, and made no mention of recommending the 'special measure' of termination of the employment of unvaccinated persons. They argued that based on the evidence, the Minister when making regulations 8(1) and 8(2) did not act on the CMO's advice as he was required to do by statute. They contended further that the stipulation under regulation 8 (1) that a person who fails to take a Covid vaccine is to be treated as absent without leave, touches and concerns the terms and conditions of their employment. They submitted that the making of such regulations is not expressly provided for under section 43B of the **Act**, is not incidental to the purpose for mitigating or remedying a health emergency and therefore the Minister exceeded his legislative power by making those regulations. They cited **Felima Davis v The Commissioner of Police**⁷⁴ in support.

⁷⁴ Antigua and Barbuda Magisterial Criminal Appeal No. 11 of 1991.

- [119] Learned counsel Mrs. Shillingford-Marsh argued further that section 43B of the **Act** conferred no authority on the Minister to vary the claimants' terms and conditions of service by declaring circumstances under which they must be treated as being absent from duty without leave and to have abandoned their office, as was purportedly done by regulations 8(1) and (2). She submitted that those regulations are therefore unlawful to that extent.
- [120] Learned counsel stated that the Minister by regulation 8(1) and (2) purported to enlarge the meaning of 'abandonment' and 'deemed resigned' and thereby alter Regulation 31 of the **PS regulations**. She submitted that on a proper interpretation of section 25 of the **Interpretation and General Provisions Act**, power to make, vary and revoke **PS Regulations** is vested in the PSC by section 77 of the **Constitution**. She submitted that the Minister exceeded his authority by making regulation 8(1) and (2) which seek to amend regulation 31 of the PS regulation.
- [121] Learned counsel argued further that in any event, a proper construction of 'resign' and cognate expressions reveal that a resignation is established only if it is proved that there has been a 'voluntary relinquishment of the performance of duties accompanied by actual or imputed intention on the part of the officer to abandon and relinquish the office'⁷⁵. She submitted that it does not arise in circumstances where an employee is prevented from executing the functions of his office. She cited **Huggins Neal Nichols v Attorney General and The Teaching Service Commission**.
- [122] As to what constitutes 'abandonment' learned counsel said that the legal meaning is not the one created by the Minister by regulation 8(1) and (2). She submitted that in **Nichols** the Court of Appeal adopted the definition set out in **Black's Law Dictionary** as follows:
- 'Abandonment of a public office is a species of resignation, but differs from resignation in that resignation is a formal relinquishment, while abandonment is a voluntary relinquishment through non-user.
- It is not wholly a matter of intention, but may result from the complete abandonment of duties of such continuance that the law will infer a relinquishment. It must be total, and under such

⁷⁵ See *Huggins Neal Nichols v Attorney General and The Teaching Service Commission* SLUHCVP2008/0018.

circumstances as clearly to indicate an absolute relinquishment and whether an officer has abandoned an office depends on his overt acts rather than his declared intention. It implies non-user, but non-user does not of itself constitute abandonment. The failure to perform the duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office.’

[123] The claimants submitted further that power to appoint, transfer, promote, discipline or remove a public officer from office vests exclusively in the PSC pursuant to section 78 of the **Constitution**. They argued that the Minister by Rule 8(2) purported to prescribe circumstances in which regulation 31 of the PS Regulations applies and by doing so usurped the PSC’s function to make such a determination. They relied on the decision in **Endel Thomas v The Attorney General**⁷⁶. They submitted that regulation 8(2) is therefore ultra vires and unlawful.

[124] The claimants submitted that in respect of those among them who have given pensionable service, the Minister’s decision to make the impugned regulation, effectively deprives them of their constitutionally protected pension rights and for this reason was excessive and disproportionate. They argued that the measure adopted by the Minister does not strike a balance between mitigating the public health emergency objective and interference with their constitutional rights. They contended that there is a clear imbalance between adopting temporary measures to address the pandemic and thereby permanently depriving them of their livelihood and pension benefits which are protected under sections 6 and 88 of the **Constitution**. They argued that the public health objective of keeping the workplace safe could have been achieved in less intrusive ways and without interfering with their property rights embodied in their pensions.

[125] The claimants suggested that those objectives could have been attained by (a) exploring alternative modes of work for public officers, such as working online; (b) giving unvaccinated persons the option of taking regular tests and wear masks; (c) prohibiting the attendance of unvaccinated workers at the workplace without interfering with the employment relationship and their remuneration; or (d)

⁷⁶ Privy Council Appeal No. 47 of 1980.

prohibiting the attendance of unvaccinated workers at their work place and treating time spent out of work as part of their entitlement to annual vacation leave. They argued that those suggestions with the exception of (b) would achieve the public health objective of keeping the workplace free of unvaccinated persons while not depriving public officers of their pension benefit rights.

[126] The claimants submitted that the applicability of the proportionality test when considering allegations of interference with constitutional rights, was re-affirmed in **Dominic Suraj v The Attorney General**⁷⁷, having been recognized and applied in **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing**⁷⁸ and **Yardley & others v The Minister of Workplace Safety & others**⁷⁹. They maintained that rule 8(1) and (2) deprived the relevant claimants of their constitutionally protected pension rights to receive such benefits in the future, in accordance with the applicable law that existed when they entered the public service. They advanced **Elvis Daniel v the PSC and the Attorney General**⁸⁰ as authority for this proposition.

[127] The defendants submitted that the legal effect and consequences of Rules 8(1) and (2) are that an officer is treated as absent from work and/or deemed to have resigned by operation of law unless the PSC declares otherwise. As such the final decision is vested in the PSC and not the Minister. They submitted that the conjoint effect of Rule 8(2) and Regulation 31 is that it is for the PSC on application from a public officer to declare otherwise than that he is deemed to have resigned. They acknowledged that the PSC has absolute oversight as to whether someone is deemed to have resigned.⁸¹

[128] They contended that Rules 8(1) and (2) are consistent with the PSC's constitutional powers. Placing

⁷⁷ Supra. at para. 51.

⁷⁸ [1999] 1 AC 69.

⁷⁹ [2022] NZHC 291.

⁸⁰ Saint Vincent and the Grenadines Civil Appeal No. 7 of 2016.

⁸¹ Defendants' written submissions, para. 43 ii.

reliance on **Felix DaSilva v The Attorney General of Saint Vincent and Kenneth John et al**⁸², the defendants submitted that in the event that regulation 8(1) of the **Special Measures SR&O** and Regulation 31 of the **PS Regulations** are triggered, it is for the PSC and not the Executive to declare otherwise. They observed that in **DaSilva**, the learned judge held that the PSC is required to keep the door open for any application by someone who has been treated as absent, or deemed to have resigned his post. They also relied on **Thomas v The Attorney General** and **David Penn v The Governor of the Virgin Islands**⁸³ where consideration was given to a provision similar to Reg. 31. They reasoned that it was not necessary for the PSC to make any delegation of rulemaking powers to the Minister in the circumstances.

- [129] Commenting on the Court's observation at the leave stage that one of the issues was potentially that the claimants may argue that regulations 8(1) and (2) enlarge the effect of PS Regulation 31 'contrary to the PSC's exclusive constitutionally bestowed rule-making authority', the defendants submitted that there is no legal or factual basis for that statement. They argued that the PSC's rule-making authority is limited under section 78(13) of the **Constitution** to procedural matters required for the exercise of its powers under section 78(1) of the **Constitution**; and therefore it was not necessary for the PSC to delegate to the Minister matters which were purely employment matters not for the PSC but for the Executive and Legislature to determine.
- [130] They submitted that section 77 (12) of the **Constitution** is not applicable because Rules 8(1) and (2) makes clear that the PSC may declare otherwise. They contended that there is no pleaded case or evidence that the Minister 'sought to interfere or direct the PSC in its determination as to whether it should declare otherwise.'
- [131] The defendants submitted further that the rule making power vested in the PSC by section 77(1) of the **Constitution** does not extend to the terms and conditions of employment of public officers. In support they quoted from **Thomas v The Attorney General** where it was stated:

⁸² Saint Vincent and the Grenadines Civil Claim No. 356 of 1989.

⁸³ BVIHCV2013/0215.

‘The functions of the Police Service Commission fall into two classes: ... It has not 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.’⁸⁴

[132] On the issue of abandonment, learned Senior Counsel argued the Board’s ruling in **Seetohul v Omni Projects Ltd**⁸⁵ is instructive. The Board opined:

‘Nor is it correct that abandonment is necessarily absence coupled with intention not to return. That is only one form of abandonment, which could equally involve no absence at all, for example where an employee denounces his job in the course of a heated argument with his employer.’⁸⁶

He submitted further that it is entirely a matter for the Executive or the Legislature to determine the other circumstances which could lead to a public officer being treated as having left his office or deemed to have resigned.

[133] Learned Senior Counsel argued that in the midst of a pandemic it was ‘manifestly reasonable to require frontline officers, who simply refused to get vaccinated and/or seek or obtain an exemption, not to enter the workplace for safety or health reasons, especially at a time when COVID-19 posed a continuing threat and the available vaccines were effective in reducing transmission, and preventing serious illness and death. He said that it was also reasonable and legitimate to require a reasonable excuse for non-compliance with Regulation 4 or 5 as part of a public health measure required to create or maintain a safe and healthy system or place of work. He pointed out that ‘reasonable excuse’ means a good explanation for not getting tested under Regulation 4; or (in case of regulation 5) not getting an exemption under regulation 7 if not vaccinated. He submitted that this argument also applies in the case of the COP.

⁸⁴ Supra at. page 611 to 612.

⁸⁵ [2015] UKPC 5.

⁸⁶ Supra at. para. 9.

[134] In relation to the issues of proportionality and constitutionality, the defendants submitted that they and the CMO were entitled in the evolving circumstances and uncertainties surrounding the COVID-19 virus to rely on the precautionary principle espoused and relied on by Canadian and New Zealand courts. In this regard, in the case of **Spencer and others v The Attorney General of Canada**, Justice Pentney was quoted as saying:

‘The precautionary principle is a foundational approach to decision-making under uncertainty that points to the importance of acting on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad ... it gives effect to the precautionary principle in a manner that reflects the Government of Canada’s overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate the current state of knowledge of the virus.

[114] ... The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection. This in turn would have a significant – perhaps deadly – effect on the wider Canadian public, based on the experience thus far.’⁸⁷

[135] The defendants noted that this principle was applied in **Four Aviation Security Services v Minister for COVID 19 Response**⁸⁸, **Yardley and others** and **NZDSOS Inc and Others v Minister for COVID 19 Response**⁸⁹. They submitted that they are equally applicable in the instant case.

[136] They submitted further that a core factor for any proper consideration and determination of the issue of proportionality or constitutionality is that the CMO’s advice and recommendations were premised on medical and scientific issues and data. They commended for the court’s consideration the

⁸⁷ (2021) FC 361 at paras. 113 – 114.

⁸⁸ [2022] 2 NZLR 26. paras. 110 and [111.

⁸⁹ [2022] NZHC 716. paras. 92 and 93.

pronouncement by Lord Bingham of Cornhill CJ in **R v Secretary of State for Health ex p Eastside Cheese Co.** that:

‘... on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers.’⁹⁰

[137] The defendants further commended as meritorious, Justice Churchman’s perspective in **GF v Minister of COVID Response** that in respect of a challenge to the Minister’s assessment of specialist medical advice, that:

‘... the Court cannot substitute its own assessment of the evidence, provided the Minister’s decision was a rational interpretation of that advice.’⁹¹

They submitted further that the similar opinion of the Board in **Suraj and others v The Attorney General of Trinidad and Tobago** is just as instructive. There, the learned Law Lords opined:

‘The Rules were promulgated on the basis of expert scientific advice against a background of considerable uncertainty about how the disease was transmitted and how best to counter its spread. The public interest in issue, the protection of the right to life and the health of the whole population, was an especially important one. In the Board’s view, the Rules struck a fair balance between the rights of the appellants and the general interest of the community and were plainly a proportionate means of protecting the public interest in the circumstances.’⁹²

[138] The defendants highlighted other decisions emanating respectively from the European Court of Human Rights (‘ECHR’) and New Zealand Courts where among other issues, the effectiveness of the COVID 19 vaccines were raised. They argued that invariably the courts held that vaccine mandates in response to COVID were reasonable, proportional and in accordance with human rights legislation. They cited in this regard, **New Health New Zealand Inc v South Tataaki District**

⁹⁰ [1999] 3 CMLR 123 at para. 47.

⁹¹ [2022] 2 NZLR 1.

⁹² Supra at paras. 99 and 100.

Council⁹³, Case of Vavricka and others v The Czech Republic⁹⁴, GF v Minister of COVID 19 Response, Four Aviation Security Services v Minister for COVID 19 Response and NZDSOS Inc and Others v Minister for COVID 19 Response.

[139] The defendants argued that the declared purposes under Regulation 3 of the **Special Measures** are legitimate public health interests and objectives and that regulations 5 and 7 create a flexible regime with exemptions. They submitted that for the reasons advanced by the CMO, there can be no serious dispute that in the face of a pandemic which creates a serious threat to safety and health in public bodies and frontline employees that she acted reasonably in recommending the vaccine regime in the **Special Measures**. This included weighing the effectiveness of the previous protocols, the dashboards and other relevant information such as the fact that the majority of hospitalized or dead were unvaccinated and the safety, effectiveness and benefits of the vaccines in relation to the transmission of the virus and preventing hospitalizations and death.

[140] The defendants contended that it would seem inconceivable that in the face of a pandemic that fundamental rights are made subject to laws and regulations made in the interest of public health, but that private and contractual rights are not and could if the claimants are right, override or frustrate the right to preserve public health.

Discussion

[141] Central to a determination of whether Regulation 8(1) and/or (2) of the **Special Measures** are illegal is an examination of the source of the Minister's authority to make those regulations. This is indispensable to assessing whether he exceeded his authority by making the impugned rules. The recitals at the commencement of the **Special Measures SR&O** make clear that the Minister acted pursuant to powers conferred on him by sections 43B and 147 of **the Act**. The Third Recital and Introductory clause state:

'AND WHEREAS, under section 43B of the Public Health Act, Chapter 300, the Minister may

⁹³ [2018] 1 NZLR 948. at para 114.

⁹⁴ (Applications nos. 47621/13 and 5 others.

on advice of the Chief Medical Officer implement special measures to mitigate or remedy a public health emergency;

NOW THEREFORE, IN EXERCISE of the powers conferred by sections 43B and 147 of the Public Health Act, Chapter 300, the Minister makes the following Rules-‘ (Emphasis added)

- [142] Section 43B (2) of the **Act** expressly stipulates that the implementation of special measures by the Minister are conditional and based on the CMO’s advice. While the subsection lists 8 specific type of measures, among those there is none which covers deeming a non-compliant employee to have resigned his office and his office to have ceased and no clause exists under which they may be appropriately subsumed without recommendation by the CMO. Subsection 43B (2)(d) authorizes the creation of special measures ‘prohibiting or limiting access to certain areas of the country or evacuating persons from an area of Saint Vincent and the Grenadines’. It is self-evident that ‘area’ is to be construed as a ‘geographical section’ of the country as opposed to a ‘venue or place’. This point was not taken by either side.
- [143] Item 9 of the special measures is a catch-all category at subsection (i) which explicitly encompasses ‘any other measure the Minister on the advice of the Chief Medical Officer, considers necessary for the protection of public health during the public health emergency. Subsection (i) states: ‘any other measure the Minister’ on the advice of the Chief Medical Officer, considers necessary for the protection of public health during the public health emergency.’ As with the preceding measures it is stipulated that the CMO’s advice is mandated. No witness indicated that the CMO recommended measures for resignation of officers by operation of law or otherwise or for permanent exclusion of workers from the workplace.
- [144] In her affidavit, the CMO outlined⁹⁵ the recommendations that she said were made to the Minister, mostly orally. As outlined above, these include the mandatory vaccination of health workers, other frontline workers, teachers and special essential service officers; the exclusion of unvaccinated

⁹⁵ At para. 85.

frontline workers from their workplace and the exemption of qualifying frontline employees from the requirement for vaccination on certain medical or religious grounds.

[145] Mr. Frederick Stephenson, Minister of Public Service, Consumer Affairs and Sports in his affidavit⁹⁶ averred that he was present when the CMO made her recommendations and provided advice, all of which were accepted by Cabinet, including the Minister. He indicated that instructions were issued to the Attorney General's chambers to draft the special measures in accordance with the CMO's recommendations. He stated that the draft 'included other rules like Regulations 8 which were approved by the Cabinet [including him] in order to ensure compliance with the SRO and particularly regulation 5.' He asserted that the draft SRO was reviewed and discussed at a number of Cabinet meetings at which the CMO was present, and was approved by the Cabinet for publication by the Minister.

[146] In like manner, the Minister⁹⁷ averred that he attended a number of Cabinet meetings which were also attended by the CMO in June-October 2021, at which the CMO advised that in view of the rising cases including community spread, hospitalizations and death especially among the unvaccinated that special measures needed to be implemented to prevent or control the spread of the virus in public bodies and protect the health and safety of public officers and employees that she considered most at risk. He indicated that she advised about the requirement for vaccination of frontline workers. Like Minister Stephenson he averred that Cabinet accepted the CMO's advice and recommendations and directed that a draft SRO be prepared to incorporate those recommendations. Signaling that Rule 8 was no part of the special measures recommended by the CMO, he mentioned that it was another provision which Cabinet approved that was included in the **Special Measures SR&O**.

[147] The Minister testified that the **Special Measures SR&O** were approved by Cabinet and passed after widespread consultation. Neither the Minister or Minister Stephenson nor the CMO indicated what

⁹⁶ Filed on 11th October 2022.

⁹⁷ By affidavit filed on 11th October 2022.

informed the inclusion of regulation 8 (1) or (2) in the special measures or the factors which were taken into account in formulating and promulgating it into law.

[148] Significantly, neither Minister claimed responsibility for formulating the policy behind or for giving instructions for inclusion of Rule 8(1) or (2) in the **Special Measures SR&O** nor did they expressly ascribe responsibility to Cabinet. This was implied in their evidence. It is clear from the CMO's testimony that she made no recommendations that they be included or implemented as a special measure. This begs the question as to what advice led the Minister to include them as part of the **Special Measures SR&O**. He did not say.

[149] Both Ministers appeared to recognize that those regulations impact on the employment of the public officer-claimants and the police officer-claimants. In this regard, they referred to aspects of the terms and conditions of employment which formed part of the contractual documents undergirding the employment of the claimants. For example, they alluded to the letters of appointment issued to all public officers and to the **Public Service Management Act 2021, No. 17 of 2021**. The former expressly states that the officer is subject to the **PS Regulations**, the Civil Service Orders and all applicable laws. The latter incorporates a provision that a public officer holds office subject to its provisions, regulations and other written law.

[150] Based on the foregoing and in particular the evidence before the Court, there is inadequate or no factual basis to support a finding that rule 8(1) and/or (2) were made by the Minister on the advice of the CMO. Further, the evidence on the face of the impugned **SR&O**, establishes that the Minister made the **Special Measures SR&O** pursuant to his authority under sections 43B and 147 of the **Act** and he signified this by executing it in his capacity as 'Minister of Health, Wellness and the Environment' and not as another Minister or by or on behalf of the Cabinet. I find that he did so. I therefore make no finding that regulation 8(1) and/or (2) were made by the Cabinet or by the Minister by or on behalf of Cabinet or on behalf of the Minister of the Public Service, or by the Cabinet or any other person or authority.

[151] I am satisfied on the evidence that when making rule 8(1) and (2), the Minister was neither motivated

by nor acting on any advice given or recommendations made to him by the CMO pursuant to section 43B(2) of **the Act**. In fact, he referenced no aspect of the advice and/or recommendations on which he so acted or which led him reasonably or otherwise to make those rules. He provided insufficient basis for the Court to determine whether his decision was a rational interpretation of the advice. There is little or no evidence to support this. I hold therefore that the Minister acted outside of his authority by making rules 8(1) and (2) of the **Special Measures SR&O**. For this reason, I find that he exceeded his authority in making them. They are therefore *ultra vires* his authority and unlawful. All measures or actions flowing from them are accordingly void.

[152] I turn now to examine whether rules 8(1) and (2) are unconstitutional and void on that basis. Section 77 of the **Constitution** provides for the creation of the PSC, appointment and removal of its chairman and members and the regulation of its proceedings. Subsection (12) states that in the exercise of its functions the Commission shall not be subject to the direction or control of any person or authority. Section 78 of the **Constitution** outlines the functions of the PSC. Subsection (1) states:

‘(1) The power to appoint persons to hold or act in offices in the public service including the power to confirm appointments), and, subject to the provisions of section 87 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the public Service Commission.’

[153] The PS Regulations on their face indicate that they were made on 4th November 1969⁹⁸ by the PSC with the consent of the Premier pursuant to section 77(13) of the **Constitution**. They were enacted as **SR&O 48 of 1969**. PS Regulation 31 existed in the 1969 version as Regulation 30. The only difference between it and the current version is that the period ‘10 working days’ has replaced the period of ‘one month’. A series of amendments⁹⁹ have been made to the PS Regulations since 1969.

[154] Significantly, section 25 (c) of the **Interpretation and General Provisions Act** makes clear that

⁹⁸ The date on which they were Gazetted.

⁹⁹ See SR&Os 49 of 1969, 36 of 1970, 38 of 1971, 31 of 1974, 13 of 1975, 16 of 1976, 33 of 1976, 38 of 1980, 52 of 1982 and 12 of 1988.

subsidiary legislation may be amended at any time by the same authority and in the same manner in which it was made. However, where such authority has been replaced wholly or in part by another authority, that power is exercisable by the replacing authority. It follows that unless the PSC has been replaced by another authority, it retains power to make amendments to the PS Regulations that were promulgated as **SRO 48 of 1969**.

- [155] From all accounts and from decisions such as **DaSilva**, the provisions of **SR&O 48 of 1969** has been applied and given full force and effect without objection being taken that they were not validly made by the PSC or based on any suggestion that they were made by the Cabinet or Parliament. In fact, the very letters relied on by the parties as to existence of a contractual relationship of employment between the State and the claimants, incorporate the PS Regulations as forming part of the conditions of service.
- [156] The defendants' contention that the PSC's rule-making power under section 77(1) of the **Constitution** does not empower it to establish terms and conditions of employment for public officers while correct ignores two realities. Firstly, sections 77(13) and 78(1) of the **Constitution** contain the PSC's rule-making powers. Secondly, the PSC's authority or jurisdiction under section 78(1) to 'exercise disciplinary control over [public officers] ... and the power to remove such persons from office', confers authority to make rules or regulations for such purposes. In fact, this was made clear by the Board in **Thomas v The Attorney General**.
- [157] In that case, the Board was considering provisions in the Trinidad and Tobago Constitution¹⁰⁰ which are similar to those in the **Constitution** in this State, save that the former relate instead to the police service and not the public service. The principles are nevertheless applicable. Sections 99 and 102 respectively of the Constitution of Trinidad and Tobago that were under consideration use similar language as appears in sections 78(1) and 77(13) of the **Constitution**, save for the reference to the Police Service.

¹⁰⁰ 1962 (S.I. 1962 No. 1875).

[158] To the extent relevant, those sections of the Trinidad and Tobago Constitution provide:

'99 (1) Power to appoint persons to hold or act in offices in the police force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission:

102 (1) Subject to the provisions of subsection (3) of this section, a commission to which this section applies may, with the consent of the Prime Minister, by regulation or otherwise regulate its own procedure, including the procedure for the consultation with persons with whom it is required by this Constitution to consult, and confer powers and impose duties on any public officer or on any authority of the Government of Trinidad and Tobago for the purpose of the discharge of its functions.' (Emphasis added)

[159] Commenting on the import of section 99 (1), the Board remarked:

'... their Lordships should say something about what is inherent in the grant itself of powers "to remove and exercise disciplinary control over" members of the police service quite apart from any regulations that may be made under section 102 (1) and (2) of the Constitution. Their Lordships have already explained why "remove" must be construed as meaning remove for what in the judgment of the commission constitutes reasonable cause. Reasonable cause is not confined to wilful misconduct; it would embrace reasons such as ill-health or unsuitability of temperament or even some personal characteristic, any one of which, through no fault of his own, had rendered a particular officer unfitted to perform with reasonable efficiency the duties of a policeman. Removal for causes such as these is included among the functions of the commission to decide what causes justify removal even although it is not carried out in the exercise of the commission's powers of disciplinary control.'¹⁰¹ (Emphasis added)

[160] The Board opined further:

¹⁰¹ [1981] 1 WLR at page 615-616.

‘For the sake of completeness their Lordships would add that regulation 99 and those other regulations contained in chapter VIII, which prescribe the various penalties which the commission may impose and the circumstances in which it may impose them, are properly classified as regulating the commission's own procedure and are intra vires section 102 of the Constitution.’¹⁰²

- [161] From the foregoing, it is clear that even without words expressly specifying that the power to appoint and remove includes the power to make regulations governing such appointment and removal, those powers are inherent in section 78 (1) of the **Constitution**. That is the effect of the Board’s statement at pages 615-616 of **Thomas** quoted to above. Further, the expression ‘regulate its own procedure’ encompasses rules that deal with the circumstances in and by which penalties (including by operation of law) are applicable and imposed. The Board quite succinctly elucidated this learning at in the extract at page 617 of **Thomas**, that is quoted immediately above. Accordingly, regulation 31 of the PS Regulation is one that the PSC was authorized to make by section 77(13) of the **Constitution**. Furthermore, that power is vested exclusively in the PSC with respect to public officers as is the power to determine when such a sanction arises. It is within the exclusive remit of the PSC and does not fall to the Executive.
- [162] Contrary to the contentions by the parties, Regulation 31 of the **PS Regulations** does not outline any term or condition of employment of public officers. It is wholly a regulation governing an aspect of the PSC’s procedures. I am of the considered opinion that the Minister trespassed into the PSC’s exclusive jurisdiction when he purported to make regulation 8(1) and (2) of the **Special Measures SR&O**. He thereby exceeded his authority with the result that those provisions are *ultra vires* section 43B of **the Act** and sections 77(13) and 78(1) of the **Constitution**. They are accordingly unconstitutional, void and ineffective on this basis.
- [163] The defendants’ implicit contention that rules 8(1) and (2) were wholly made pursuant to section 147 of the **Act** does not assist them for three reasons. Firstly, the rules are expressed to be made under

¹⁰² Supra at pg. 617.

sections 43B and 147. This attracts the undeniable conjunctive construction based on rules of statutory interpretation. In such circumstances, the Minister must be able to point to some provision in section 43B which empowers him to make such rules. In any event, by itself, section 147 does not confer any specialized power on the Minister to regulate any aspect of the operation of the public service and, no other provisions in the **Act** contain such authority. Secondly, the Minister does not have responsibility for the public service under his ministerial portfolio. Without delegation by the PSC of its constitutionally endowed rule-making power under sections 77 (1) and 78 (13) of the **Constitution** the Minister had no authority of his own to promulgate such rules. Thirdly, and as a corollary to the second reason, I entertain no doubt at all that the PSC made **SR&O 48 of 1969** pursuant to its powers under the **1969 Constitution Order**, that it continued to make amendments to the **PS Regulations**, no other authority having been authorized to replace it in that regard. I so hold.

[164] I make the observation that as regards offices within the RSVGPF below the rank of Deputy COP and above the rank of Sergeant, power is vested in the Police SC to appoint and remove such police officers and exercise disciplinary control over them. Jurisdiction in relation to those below the rank of Sergeant vests in the COP. The Police SC is established by section 84 (1) of the **Constitution** which is drafted in similar language to section 77(1). The same principles emanating from **Thomas v The Attorney General** are therefore equally applicable in relation to police officers. I shall return to this later in the judgment.

[165] The defendants' submission that it is for the PSC on application by a public officer to make a final decision (when regulation 31 is invoked pursuant to rules 8(1) and (2) of the **Special Measures SR&O**) by declaring otherwise, ignores the obvious state of affairs, that if the impugned provisions are null and void, no question arises of an application being made to the PSC to declare otherwise. Any such application would constitute an acknowledgement of the *vires* or legitimacy of the impugned rules and potentially a waiver of any related right to protest or object to their implementation and application to the officer; or even an estoppel. Furthermore, in face of the unlawfulness and unconstitutionality of the provision, the PSC would be legally impotent to lawfully declare otherwise. This aspect of the defendants' case and their reliance on **DaSilva** and **David Penn v The Governor**

of the Virgin Islands do not assist them. I adopt the reasoning and learning in **Nichols** and find that the claimants did not abandon their jobs.

Proportionality and Pension Rights

[166] The claimants' invocation of sections 6 and 88 of the **Constitution** in their argument that the measures introduced by Rules 8(1) and (2) were excessive and disproportionate raises 2 issues. I shall consider first the matter of proportionality and then the pension rights angle. Having found that regulation 8(1) and (2) are *ultra vires* and unconstitutional for the reasons explained, the side issue of proportionality is rendered moot.

[167] For what it is worth however, suffice it to say that disproportionality is now recognized as a ground on which a decision made by a public administrator can be invalidated, if a judicial review judge concludes that a sanction applied by the decision maker is excessive and disproportionate to the legitimate objective being pursued. The onus rests on such decision makers to examine in advance of introduction, whether such objective can be reached through less intrusive measures.

[168] In the case at bar, the Minister makes no attempt to explain why deeming an officer to have resigned and his office to be vacant were part of the measures introduced to prevent and control the spread of the coronavirus among frontline public officers and the public with whom they would interact. His explanation appears to be simply that the rule appeared in the draft from the Attorney General's chambers, was discussed by Cabinet and passed. Nowhere in his or Minister Stephenson's account is any indication that any other less intrusive measures were considered and discarded for whatever reason.

[169] By his account, it seems that the Minister failed to appreciate that he had a duty to objectively analyze available reasonable options for achieving the objective of keeping the frontline public officers out of the workplace and away from the public during the course of their day-to-day duties, if his decision was to satisfy the requirement of proportionality. It seems that he focused entirely on the objective without regard to fairness to the frontline workers or consider other less intrusive

measures for reaching his goal. This approach epitomizes what is now viewed in administrative law as a disproportionate response.

[170] The defendants' argument that the Minister's decision to enact rules 8 (1) and (2) was based on the CMO's advice is not borne out by his affidavit account or that of any other affiant. He simply did not address this in his affidavit. There is therefore insufficient basis for this court to conclude that he relied on the CMO's advice to inform the enactment of rules 8(1) and (2). I find that he did not. There is abundant evidence from the CMO, the Minister and Minister Stephenson with respect to the vaccine requirement and the thinking that informed its introduction and implementation. It is entirely a different matter with rules 8 (1) and (2).

[171] Accordingly, I hold that for the foregoing reasons the Minister's decision to make those impugned rules is for this reason flawed as are the rules 8(1) and (2). The measures introduced thereby were also disproportionate to the objective being pursued. Rules 8(1) and (2) are thereby invalidated and I so hold.

Pension

[172] In the **Elvis Daniel** case, Justice of Appeal Baptiste opined:

'Pension benefits would be amenable to protection as property rights under section 6 of the Constitution unless the deprivation of benefits arises from a lack of qualification or entitlement to it. ...

In my view, once the appellants are entitled to pension benefits, in the absence of some lawful basis for its deprivation, in respect of which none has been advanced in this case, the appellants are entitled, not only to a declaration that their property right guaranteed by section 6 of the Constitution has been breached, but an assessment of damages for that breach, as a mere declaration would not be adequate given the nature of the breach.'

Those pronouncements are just as applicable in the case at bar. I endorse them and apply them to the facts of this case. Any claimant in the consolidated cases before this Court who has accrued any pension benefits is entitled to receive them at the appropriate time, even though such relief is not explicitly claimed.

Inhuman and degrading treatment

[173] The claimants submitted that rules 8(1) and (2) of the **Special Measures SR&O** and section 73A of the **Police Act** amount to inhumane and degrading treatment, contrary to section 5 of the **Constitution**. They argued that those laws constitute inhumane and degrading treatment because they make the taking of the Covid-19 vaccine mandatory on pain of suffering loss of livelihood, loss of retirement benefits including pension rights and being exposed to criminal sanctions.

[174] They contended that forcing an individual to take a newly developed intravenous drug which may have adverse side effects on him or her amounts to inhumane and degrading treatment within the meaning of section 5 of the **Constitution**. They reasoned that the consequences of not taking the vaccine as stipulated by Regulation 8 are so severe and life changing that it is equivalent to forcing the claimants to become vaccinated. They submitted that the Court should give a generous and purposive interpretation to section 5 of the **Constitution**, in keeping with the decision in **Minister of Home Affairs v. Fisher**¹⁰³ where the Board encouraged such an approach to fully recognize and protect the fundamental rights and freedoms enshrined within the Constitutions.

[175] They argued for an interpretation that has been applied consistently by the ECHR and the United Nations Human Rights Council ('UNHRC') where they have held that inhumane or degrading treatment arises where an individual is subjected to mental and/or physical suffering that reaches a certain level of severity as in **Pretty v the United Kingdom**¹⁰⁴, **Soering v. the United Kingdom**¹⁰⁵ and **Vuolanne v. Finland**¹⁰⁶.

[176] They submitted that such severity is established where: -
(1) treatment, ranging from torture to other types of humiliation or cruel, inhumane and degrading

¹⁰³ [1980] A.C. 319 at 329.

¹⁰⁴ (2002) Application no. 2346/02 at para 52.

¹⁰⁵ (1989) Application no. 14038/88.

¹⁰⁶ CCPR/C/35/D/265/1987. See also UN Human Rights Committee (HRC), 2 May 1989, 35; Prosecutor v. Zejnil Delalic et al. Case No. IT-96-21-T, Judgement (TC), 16 November 1998.

treatment with various degrees of physical and psychological effects, constitutes a serious attack on human dignity; or

(2) an atmosphere of terror causes persons to live in constant anguish and fear of being subjected to physical abuse and/or immense psychological pressure/suffering. They held up as an example the case of **Nevmerzhitsky v. Ukraine**¹⁰⁷ in which the ECHR held 'In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture.'¹⁰⁸

[177] They also cited the English Court of Appeal's case of **Regina (Wilkinson) v Broadmoor Special Hospital Authority and others** where the Court stated:

'If in truth this claimant has the capacity to refuse consent to the treatment proposed here, it is difficult to suppose that he should nevertheless be forcibly subjected to it... its impact on the claimant's rights above all to autonomy and bodily inviolability is immense and its prospective benefits (not least given his extreme opposition) appear decidedly speculative.'¹⁰⁹

[178] The claimants argued that they have presented evidence that they have suffered tremendously as set out in Affidavit and Supplemental affidavit¹¹⁰ of Alfonso Lyttle¹¹¹ They submitted that depriving them of their livelihoods and their accrued employment benefits including pension rights, is inhumane especially in relation those who are near the age of retirement and who have financial commitments such as mortgages and medical expenses.

[179] The defendants submitted that the claimants have not pleaded or led evidence of torture or inhuman

¹⁰⁷ 54825/00.

¹⁰⁸ Supra at paragraphs 98.

¹⁰⁹ [2002] 1 WLR 419 held at paragraph 30.

¹¹⁰ Filed on 9th September 2022, paragraphs 4-7.

¹¹¹ Filed on 25th December 2022, paragraphs 13-15.

and degrading punishment. They argued that in any case ‘inhuman punishment or other treatment and degrading punishment and treatment’ in relation to section 7 of the Saint Lucia Constitution which is similar section 5, was defined by the Court of Appeal in **Ian Harding v Superintendent of Prisons and Attorney General**¹¹². The Court opined that those words should be given their natural and ordinary meaning; and that degrading punishment is treatment that humiliates or debases. Delivering the judgment, Justice of Appeal Satrohan Singh remarked:

‘Inhuman punishment or other treatment means or requires punishment or treatment which causes a minimum level of intense physical or mental suffering, whether or not inflicted deliberately or intentionally, or results in the complete or substantial deprivation of the elementary necessities of life over an extended period of time (see *Hilton -v- United Kingdom*; *Thomas -v- Baptiste* and *Ireland -v- United Kingdom*)’¹¹³

[180] The claimants did plead¹¹⁴ as one ground for their claims that **SR&O 28 of 2021** amounts to inhumane and degrading treatment contrary to section 5 of the **Constitution**. As to whether they have led evidence of such treatment, the Court must first make a determination as to what constitutes inhumane and degrading treatment. I adopt the definition ascribed by the Court of Appeal in **Ian Harding**.

[181] The claimants have outlined certain details about the financial, emotional and psychological hardship they and their families have endured since they were deemed to have resigned their offices. In a word, it has not been easy for any of them. However, their contention that they were forced to take the Covid vaccine does not accord with reality. The very reason why this case is ongoing is because they elected not to take the vaccine as a matter of principle or conscience related to their claim to bodily autonomy and that the ‘vaccine mandate’ in the **Special Measures SR&O** was illegal and unconstitutional. The fact that they declined to take it is itself evidence that they retained the choice

¹¹² Saint Lucia Civil Appeal No. 13 of 2000.

¹¹³ *Supra* at para. 32..

¹¹⁴ At para. 17 of the general grounds in claim SVGHCV2022/0053 and at para. 21 of the general grounds in claim SVGHCV2021/1033.

to opt out of taking it, albeit being fully aware of the stated consequences which were operationalized by the Minister, the PSC, the Police SC and the COP.

- [182] Whilst I accept the claimants' evidence that they have largely experienced dire financial and other stresses and difficulties arising from the application of **SR&O 28 of 2021**, I am not satisfied that it amounted to 'intense physical and mental suffering or resulted in the complete or substantial deprivation of the elementary necessities of life over an extended period of time.' I make no finding that the **Special Measures SR&O** contravenes section 5 of the **Constitution**.

Issue 4 - Procedural impropriety an natural justice

- [183] The claimants submitted that even if rules 8(1) and (2) are valid, they were not given an opportunity to be heard before they were deemed to have abandoned their offices and letters to such effect were issued to them. They submitted that the letters amounted to a termination of their employment in breach of that right. They argued that they were entitled to be heard and this failure constituted procedural impropriety and a breach of the rules of natural justice, fairness and section 8 (8) of the **Constitution**. They submitted that this is a fatal error which invalidates the decision to deem that they had resigned from their offices. They cited in support **Lloyd v McMahon**¹¹⁵, **Fairmont Investments Ltd v Secretary of State for the Environment**¹¹⁶, **Annamunthodo v Oilfield Workers Trade Union**¹¹⁷, **Doody v The Secretary of State for the Home Department**¹¹⁸ and **R (On the Application of Edwards and another) v Environment Agency and others**¹¹⁹.
- [184] The defendants countered that no right to be heard existed in the circumstances of this case because the officers were treated as absent and deemed to be have resigned by operation of law. They

¹¹⁵ [1987] 1 A.C. 625.

¹¹⁶ [1976] 2 All E.R. 865.

¹¹⁷ [1961] UKPC 41.

¹¹⁸ [1993] 3 All E.R. 92.

¹¹⁹ [2008] UKHL 22.

submitted that even if such right existed, a hearing on whether rule 5 was complied with or not would have been an exercise in futility since the facts are not disputed.

[185] Relying on **DaSilva**, the defendants contended that the claimants had a right to apply to the PSC and Police SC to declare otherwise. Joseph J. is quoted as stating the legal position in this way:

‘It is my view that the expression ‘unless declared otherwise by the Commission’ was inserted to ease the rigidity of that regulation and to give the Commission a discretion after the passage of ten days to hold that there has not been an abandonment.

... the Commission has a discretion that may be exercised without a limitation as to time.’¹²⁰

[186] The defendants submitted that the right to be heard could and would arise after an officer was deemed to have resigned by operation of law, if he approaches the PSC or Police SC. They argued that 32 other public officers in a similar position as the claimants have applied to the PSC or the Police SC, as the case may be, to declare otherwise. They argued that there is no evidence that any of the claimants have done so.

[187] This issue highlights once more the unlawfulness of rules 8 (1) and (2) by virtue of the earlier holdings and findings that the **1st Miscellaneous (Amendments) Act** from which they emanate is void for unconstitutionality by reason that (a) they were made in breach of the separation of powers and rule of law doctrines; and (b) the impugned rules are unlawful, disproportionate and unconstitutional. It is also important at this juncture to examine section 73A of the **Police Act** in light of sections 84(1) and (7) and 85 (2) and (3) of the **Constitution**.

[188] Section 84(1) and (7) of the **Constitution** provide:

‘(1) There shall be a Police Service Commission for Saint Vincent and the Grenadines which shall consist of – ...

(7) The Commission may by regulation or otherwise regulate its own procedure and, with

¹²⁰ Supra at pgs. 13 and 14.

the consent of the Prime Minister, may confer powers or impose duties on any public officer or on any authority of the Government for the purpose of the exercise of its functions.’

[189] Section 85 (2) and (3) state:

‘(2) The power to appoint persons to hold or act in offices in the Police Force below the rank of Deputy Commissioner of Police but above the rank of Sergeant (including the power to confirm appointments) and, subject to the provisions of section 87 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Police Service Commission.

(3) The power to appoint persons to hold or act in offices in the Police Force of or below the rank of Sergeant (including the power to confirm appointments) and, subject to the provisions of section 87 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Commissioner of Police.’

Section 87 of the **Constitution** deals with appeals in respect of cases involving disciplinary matters.

[190] In view of the similarities between the provisions of sections 77(13) and 78(1) of the **Constitution** on the one hand and sections 84 (1) and (7) and 85 (2) and (3) on the other, it is pellucid that power to make regulations as to the appointment, removal and discipline of police officers below the rank of Deputy COP and above the rank of Sergeant vests exclusively in the Police SC by express constitutional provision. In like manner, in relation to police officers below the rank of Sergeant, it is the COP who is solely authorized to make regulations for such matters.

[191] There is no evidence that either the Police SC or the COP made any regulation which has the effect of regulation 8 (1) and/or (2) of the **Special Measures SR&O** with respect to the officers over whom they exercise such jurisdiction under the **Constitution**, or any law akin to section 73A of the **Miscellaneous (Amendments) Act**. Applying the reasoning outlined earlier in relation to the interplay between sections 77 and 78 of the **Constitution**, PS Regulation 31 and Regulation 8 (1) and (2) of the **Special Measures SR&O**, I hold that section 73A of the **Police Act** was not made by the Police SC or the COP. It is therefore unconstitutional, null and void and unlawful. It has no

applicability to any of the police officer-claimants.

[192] The practical effect of this finding is that the issue as to whether the PSC, the COP and the Police SC acted procedurally irregularly by not giving the respective claimants an opportunity to be heard before concluding that they had resigned their offices is alive as is their conclusion that the respective officers ceased to hold those offices. This is contrary to the rules of natural justice as alleged by the claimants. It is irrefutable that for the reasons explained earlier, no legal basis existed for those functionaries to so conclude. It is well-established and is perhaps trite law that the exercise of administrative powers must be characterized by fairness.

[193] A central pillar of natural justice and fairness in democratic societies where the rule of law prevails is that a person to be affected by a decision must be given an opportunity to be heard before the decision is taken.¹²¹ This is exemplified in numerous cases including **Doody** on which the claimants rely. The claimants were not afforded such an opportunity before issuance of the letters. This denial amounted to a breach of their right to be heard and constituted a procedural irregularity by the PSC, the Police SC and the COP that invalidated their respective decisions to deem that the officers were absent from work, that they had resigned their offices and that their offices were vacant. Undoubtedly, in all of the circumstances, without such due process the letters issued to them by the PSC, the Police SC and the COP amounted to a termination of their employment contrary to section 8 (8) of the **Constitution**.

Issue 5 - Constitutional breach – sections 77, 78, 84 and 85 of the Constitution

[194] The claimants submitted further that the letters deeming that they have resigned their offices violated sections 77 (12) and (13), 78, 84 (6) and 84 (7) of the **Constitution**. Section 77 (12) relates to the PSC while section 84 (6) and (7) deal with the Police SC. Pronouncements have already been made in relation to sections 77 (13) and 78. I turn now to the other provisions.

[195] Sections 77 (12) and 84 (6) provide:

¹²¹

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

84. (6) The Commission shall, in the exercise of its functions under this Constitution, not be subject to the direction or control of any other person or authority.’

[196] Learned counsel Mrs. Shillingford-Marsh argued that the PSC, the COP and the Police SC misdirected themselves in applying rules 8 (1) and (2) to the claimants and as a result proceeded on the basis that they had to follow the Minister’s directive in those regulations. She argued that the PSC, COP and Police SC did not give consideration to the exercise of their discretion under regulation 31 of the PS Regulations and section 73A of the **Police Act** not to treat the enforced absence as deemed resignations. She submitted that had they properly exercised their discretion, they likely would not have concluded as they did. She argued that they therefore subjected themselves to the control of the Minister (in respect of regulation 31) or the Prime Minister (in relation to section 73A).

[197] Learned counsel reasoned that the letters accordingly violated sections 77 (12), 84 (6) and (7) of the **Constitution**. She relied on **R v. Parole Board, Ex parte David Adam Watson**¹²² and **R v. Parole Board, ex parte Smith & ex parte West**¹²³. In the latter, the English Court of Appeal noted that the Parole Board as an independent and impartial tribunal is ‘not entitled to defer to the opinion of the Secretary of State or a probation officer.’

[198] Learned Senior Counsel argued that the burden is on the claimants to establish a breach of the constitutional provisions. He submitted that there is no pleaded case or evidence that the Minister sought to interfere or direct the PSC, the Police SC or the COP on their determination as to whether they should declare otherwise. He refuted the claimants’ contention that the letters amounted to a breach of sections 77 (12) and 84 (6) and (7) of the **Constitution**.

[199] The claimants pleaded among other things:

¹²² [1996] EWCA Civ 1321.

¹²³ [2005] UKHL 1.

'10. The 2nd Defendant acted unlawfully, in contravention of section 77(12), 77 (13) and 78 of the Constitution, in issuing the letters to the 1st, 2nd, 3rd and 4th Claimants in that in so doing it was acting under the direction of the 1st Defendant. The issuance of the said letters is therefore void of legal effect.

13. The 3rd Defendant acted unlawfully, in contravention of section 84(6) and 84 (7) of the Constitution, in issuing the letter dated December 6th 2021 to the 6th Claimants in that in so doing it was acting under the direction of the 1st Defendant. The issuance of the said letters is therefore void of legal effect.

17. The 5th Defendant acted unlawfully, in contravention of section 84(6) and 84 (7) of the Constitution, in issuing the letter dated December 6th 2021 to the 5th Claimants in that in so doing it was acting under the direction of the 1st Defendant. The issuance of the said letters (sic) is therefore void of legal effect.'¹²⁴

[200] They pleaded further:

"10. The 2nd Defendant acted unlawfully, in contravention of section 77(12), 77 (13) and 78 of the Constitution, in issuing the letters to the relevant Claimants in that in so doing it was acting under the direction of the 1st Defendant. The issuance of the said letters is therefore void of legal effect.

13. The 3rd Defendant acted unlawfully, in contravention of section 84(6) and 84 (7) of the Constitution, in issuing the letters dated December 6th 2021 to the relevant Claimants, in that, in so doing it was acting under the direction of the 1st Defendant. The issuance of the said letters are therefore void of legal effect.'¹²⁵

[201] In the referenced paragraphs of their claims, the claimants have articulated these specific allegations against the PSC, the COP and the Police SC. Mr. Cavet Thomas averred in his affidavit:

¹²⁴ See paragraphs 10, 13 and 17 of the grounds in Claim SVGHCV2021/1033.

¹²⁵ See paragraphs 10 and 13 of the grounds in Claim SVGHCV2022/0053.

‘On the 6th December, 2021 my supervisor Eddie DeFreitas spoke with me and said that he does not think that I should conduct any (sic) physical examination duties. On this same day the Comptroller of Customs Selwyn DaSilva spoke with a group of us and informed us that our salary had been cut already, that the prime minister was inquiring into our presence on the workplace, and that he does not think that it makes sense for us to report to work.’¹²⁶

[202] Shanile Howe referring to Novita Roberts and herself averred:

‘... We were prevented from doing our jobs once the Minister of Health introduced the Statutory Rules and Orders No. 28 of 2021 cited as the Public Health (Public Bodies Special Measures) Rules 2021. The Public Service Commission fired us without giving us a hearing.’¹²⁷

[203] Alfanzo Lyttle had this to say:

‘... I believe that the action of the Public Service Commission and the Minister of Health is disproportionate. The position of the Minister of Health is take a Covid vaccine or lose your job.’¹²⁸

[204] The COP referenced the provisions of rules 3, 5, 7 and 8 of the **Special Measures SR&O**, indicated that he had read them and that he is also aware of section 73A of the **Police Act**. He recited portions of those provisions. He stated that one police officer had died from Covid-19 and there was a reallocation of funds within the organization to purchase hand sanitizers, soaps and sanitizing machines. He indicated that police officers are frontline workers and would have direct contact with members of the general public.

[205] The COP asserted:

¹²⁶ See paragraph 8 of his affidavit filed on 25th March 2022.

¹²⁷ See paragraph 12 of her affidavit filed on 25th March 2022.

¹²⁸ See paragraph 10 of his affidavit filed on 25th March 2022.

'In accordance with section 85(3) of ... Constitution ... I am vested with the power to appoint persons to hold ... offices in the ... Police Force of or below the rank of Sergeant and the power to exercise disciplinary control... I act independently in the exercise of my functions and I am not subject to the direction and control of any other person or authority.

20. As Commissioner of Police, I made the relevant enquiries as to the vaccination status of the Police Officers with their Divisional Commander and the Human Resources Department. I received information from my officers and was given a list of officers who were unvaccinated. I spoke to the unvaccinated officers, and they were advised about ... the likely consequences of not taking the vaccine as a police officer. ... They were made aware of the likely consequences of the unvaccinated officers not taking the vaccine which would eventually result in the severing of the relationship between the individual and the Saint Vincent and the Grenadines Police Force.

21. I reviewed the information, and I was satisfied that the police officers contained in the lists were unvaccinated and as such were to be treated as being absent from duty without leave in accordance with Rule 8(1) of the ... (... Special Measures) Rules ... I determined that the unvaccinated police officers should be deemed to have resigned their posts having been absent from their posts without leave for a consecutive period of 10 days. I issued those officers with letters informing them that had had resigned their officers and had ceased to be members of the Royal Saint Vincent and the Grenadines Police Force.¹²⁹

[206] The CPO Mrs. Regisford-Sam testified that the PSC and the Police SC held a Special Meeting on December 7th 2021 at which certain unvaccinated employees who had not received medical or religious exemptions were deemed to have resigned their posts in accordance with PSC regulation 31 and rule 8 of the **Special Measures SR&O**. She stated that the Personnel Department subsequently issued letters under her hand to the affected employees informing them that they were deemed to have resigned their offices. She exhibited copies of some of those letters, the confirmed minutes of the referenced PSC meeting and draft minutes from the referenced Police SC meeting. She explained that when her affidavit was filed, the

¹²⁹ See paragraphs 20 and 21 of his affidavit filed on 12th October 2022.

Police SC had not met and confirmed those minutes.

[207] The PSC's Chairman, Mr. Stephen Williams provided affidavit testimony which in some respects was similar to the COP's. He averred that the PSC acts independently in the discharge of its functions and is not subject to control or direction from anyone. He pointed out that the **Public Service Management Act No. 17 of 2021 ('PSMA')** applies to all public officers whether they are appointed before or after its commencement, and that it governs the administration and management of the public service. In this regard, he noted that the PSMA provides that a public officer holds office subject to the provisions of the PSMA, the regulations and any other written law.

[208] Mr. Williams averred that he is aware of PS Regulation 31 and the relevant rules in the **Special Measures SR&O**. He stated that no decision was taken by the PSC that Shefflorn Ballantyne had resigned his job.

[209] He asserted:

'The 2nd Defendant held a special meeting on 7th December 2021, and reviewed the memorandum from the various ministries and government departments. The 2nd Defendant was satisfied that the period of time for being vaccinated had expired and the public officers mentioned in the lists were unvaccinated as mandated by the SR&O, therefore they were to be treated as being absent from duty without leave in accordance with Rule 8(1) of the ... Special Measures) Rules 2021. The 2nd Defendant therefore granted approval for the unvaccinated public (sic) officers to be deemed to have resigned their posts having been absent from their posts without leave for a continuous period of 10 days in accordance with Rule 8(2) of the SR&O...'130

[210] While there is no direct evidence of direction or control over the PSC, the Police SC or the COP from any person, the COP and PSC and Police SC demonstrated that they did not address their collective

¹³⁰ See paragraph 15 of his affidavit filed on 7th October 2022.

minds to the reality that they were vested with exclusive authority to make rules governing appointment and termination of employment of their employees and that the Minister by making rule 8(1) and (2) had usurped their authority, by purporting to introduce procedural rules dictating circumstances in which a public officer or police officer is to be deemed to have resigned his office and that by virtue of which the office is deemed to be vacant. This function was explicitly reserved for the relevant Commissions and in appropriate cases the COP pursuant to sections 77(13) and 84(2), (6) and (7) of the **Constitution**.

[211] By their own evidence, the COP and the Chairman of the PSC admitted that they ceded that authority to the Minister when they applied regulation 8(1) and (2) without debate or challenge. In my opinion, this can only be characterized as the abdication of their jurisdiction and responsibility in favour of the Minister. This abdication resulted in this case in what the framers of the **Constitution** were seeking to avoid, by insulating public officers and police officers from the interference in their employment relationship with the State by political or other actors.

[212] Based on all the circumstances of this case, I am satisfied that by issuing the impugned letters to the claimants, that the PSC, the Police SC and the COP, despite their averments to the contrary ceded to the Minister, their exclusive obligation and jurisdiction to make procedural rules and guard against incursion by a third party. They thereby misdirected themselves and acted unlawfully by acting under the Minister's and the Minister of National Security's directions. The result is that all letters issued to the claimants pursuant to rules 8(1) and (2) violated respectively sections 77(12) and 84 (6) and (7) of the **Constitution**.

[213] Mr. Williams noted that Mr. Ballantyne did not receive such a letter. Mr. Ballantyne testified¹³¹ that his application for religious exemption dated 12th November 2021 was denied by letter dated 3rd December 2021. He produced a letter¹³² from the Saint Vincent and the Grenadines Community College advising him that his application under rule 7(1)(b) of the **Public Health (Public Bodies**

¹³¹ See para. 9 of his affidavit filed on 26th April 2022 in support of the application for leave to apply for judicial review in claim SVGHCV2022/0053.

¹³² Ex. SB7.

Special Measures) Rules 2021, was not approved because 'The College is currently unable to make alternative arrangements to accommodate [him].' He was told to be guided accordingly.

[214] Mr. Ballantyne stated that on receiving that letter he followed up with his employer by email inquiring into his employment status at the College and seeking clarity on the expression 'Please be guided accordingly'. He exhibited the emails between him and the College. He was directed by email dated December 8 2021 from the HR Manager Divia Lewis to refer to **SR&O 28 of 2021**, to which he sought clarity. He asked whether his employment with the College has been terminated and if so, when he would be informed formally.

[215] He stated that on Friday December 10th 2021 he was denied access to the school's online teaching portal. Before then he had been permitted to teach online without issue. He averred that his letter of dismissal was dated February 8th 2022.

[216] Mr. Ballantyne, Mr. Cumberbatch and Mr. Giles testified:

'Those of us who applied for an exemption and whose religious denomination was seen as qualifying for an exemption by the authorities but still did not receive an exemption were issued letters which informed us that our employer could not accommodate us. ...'¹³³

[217] They exhibited a copy of the letter sent to Mr. Ballantyne dated 8th February 2022 on the letterhead of the St. Vincent and the Grenadines Community College. It is signed by Prof. S. Joel Warrican Chairman Board of Governors. It states:

'Following our request to the Service Commissions Department, for your re-transfer to the Public Service, under the Public Officers (transfer to Undertakings) Act, please note that the Service Commissions has responded that our request cannot be accommodated at this time.

The reasons given are:

- Due to your vaccination status, consideration cannot be given to your return to the teaching system;

¹³³ See paragraph 10 of his affidavit filed on 23rd June 2022 and ex. 'SBTCRG-3'.

- There are currently no available vacancies within the administrative stream of the public Service suited to your current grade and qualifications.

Please be guided accordingly.’ (Underlining added)

[218] The PSC’s Chairman did not address the import of the letter or whether it was sanctioned by the PSC or what was the PSC’s position regarding Prof. Warrican’s letter or Mr. Ballantyne’s status with the College and by extension within the public service. Those are matters which are exclusively within the PSC.’s remit. It must be in a position at all times to account for any decisions taken regarding appointment to or cessation of the service of a public officer. As the PSC chairman, Mr. Williams’ silence on this matter is disconcerting.

[219] In the case of Mr. Ballantyne, while it appears that theoretically he qualified for a religious exemption from taking the vaccine, he was told that he could not be accommodated within the College or the public service either because his vaccination status precluded his re-entry into the teaching system or by reason that there were no available vacancies within which he could be assimilated. In the first letter, he was told that his application for religious exemption was refused. It is not clear if he made an application for a transfer. He does not say so, neither did the PSC Chairman. The bottom line was that he was being released from the public service because of his vaccine status coupled with the referenced limitations within the public service.

[220] The common denominator in Mr. Ballantyne’s and other similarly affected claimants’ cases was that on religious grounds they had not taken the vaccine and were denied a religious exemption or if granted one were not accommodated within the public service. In accordance with rule 8(1), logically they must have been deemed not to have had reasonable excuse for failing to take a vaccine. This treatment automatically triggered rule 8(2) with the result that Mr. Ballantyne and similarly placed claimants are entitled to rely on the argument that the PSC’s treatment or disregard of them in such circumstances constituted a hands-off posture in light of the immediate supervisor’s or direct report’s decision to ignore them and not notify them formally of their employment status while denying them access to the workplace.

- [221] Here again the PSC allowed another authority to seize from them control and superintendence of this constitutional function. By so doing, they passively ran afoul of section 84(6) and (7) of the **Constitution**. Any such letters issued by the Community College or other line managers to the respective claimants violated sections 84(6) and (7) of the **Constitution** since the PSC became aware of those decisions at the very latest when the application for leave to apply for judicial review was filed in this matter and yet failed to address their minds to the irregularities inherent in them. They are taken to have endorsed and adopted any such letters and decisions and granted tacit approval to and ratified them implicitly with the referenced consequences. I so hold.
- [222] The defendants raised as a live issue whether the Cabinet and/or the Minister had the authority under the terms and conditions of the claimants' appointment and/or section 147 of the **Act** to make and approve rule 8 of the **Special Measures SR&O** and incorporate Regulation 31 of the **PS Regulations** in order to ensure compliance with regulations 5 and 7. This issue as worded may be asking whether the Minister and Cabinet are theoretically able to achieve such a result. For obvious reasons, I refrain from engaging with that side-issue. If the issue seeks to elicit a finding as to whether the law-making powers conferred by section 147 empowered the Minister or the Cabinet to make those laws, section 147 speaks to Minister not Cabinet. In relation to regulation 31 being incorporated in rule 8 by the Minister, this has been ventilated and dealt with elsewhere in relation to the constitutionality in light of sections 77(12) and (13), 78, 84 (6) and (7) and 85 of the **Constitution**.
- [223] A related and similar issue advanced by the defendants is whether the Cabinet and/or Minister by section 147 of **the Act** had the authority to make Rule 8 and incorporate Regulation 31 of the PS Regulations in order to ensure that the PSC maintained jurisdiction to 'declare otherwise' that someone who was deemed to have resigned, ought not to have been so deemed. In addressing the issue of constitutionality of Rule 8 of the **Special Measures SR&O** vis-à-vis sections 77 (12) and (13), 78, 84 (6) and (7) and 85 of the **Constitution** it was held that those matters engage the PSC's, the Police SC's and COP's respective exclusive rule-making authority. The Minister usurped that authority when he made Rule 8. Neither he nor the Cabinet or any other person or authority had power to make such rules.

Issues 6, 7, 8 and 9 - Duty to protect public health and private rights

- [224] The defendants submitted that the State is duty bound to make laws and measures in the interest of public health. They submitted further that the rights and freedoms of others are subject to laws made in the interest of public health and therefore the collective rights of the public interest and public health interests are paramount vis-à-vis private rights. They contended that subjecting the rights and freedoms of all to the interest of public health means that the Executive and Legislative Branches are vested with the duty and obligation to protect the health and lives of citizens especially in the face of a pandemic. They did not point to any legislation or decided cases which assert that the State has such duty or obligation. What is clear from the **Act** is that Parliament has endowed the Minister, the Public Health Department and other functionaries in the Ministry of Health to take necessary action to protect public health¹³⁴.
- [225] What is also pellucid from the authorities is that any laws made by the Minister or other person or authority whether by rules, regulations, Orders or otherwise, must satisfy certain established legal parameters in order to pass the validity test. They may be invalidated for being *ultra vires* the rule-making power or other reasons, for unconstitutionality and even for irrationality. Some of those principles have been discussed and considered earlier in this decision.
- [226] As to whether public health and the public interest trump private rights in a pandemic, the conjoint effect of the supreme law clause of and sections 1 and 3 to 15 the **Constitution** expressly provide that the enjoyment of fundamental rights and freedoms are subject to what is reasonably required and reasonably justifiable in a democratic society to preserve the relevant public interests. It seems to me that in giving effect to the constitutional dictates that law-makers must maintain a fine balance between on the one hand, what is reasonably required and reasonably justifiable in a democratic society in the public interest and on the other hand, private rights.
- [227] With respect to whether the claimants' contractual and constitutional rights are subject to the impugned laws made by the Minister and Minister of National Security in the interest of public health,

¹³⁴ For example, sections 10, 11, 13, 43B and 147.

those issues have been explored and addressed earlier. The short answer is that to the extent that any of the impugned laws violate the **Constitution** or are for any other reason unlawful, they cannot form the basis of an enforceable contract of employment for the simple reason that it is a trite principle of law that an illegality in a contract is not enforceable in a court of law. Therefore, even in face of the claimants' terms and conditions of employment, their status as public officers and/or police officers the decision by Cabinet to approve the **Special Measures SR&O**, the claimants were not obliged to comply with any unlawful or invalid term or condition set out in the **Special Measures SR&O**.

[228] The defendants submitted that the claimants made a choice not to take the Covid-19 vaccine and in some cases not to seek exemption and hence the consequences flowed from Rule 8 as a result of their own actions in view of the terms and conditions of their employment. They cited **The Queen (on the application of (1) Julie Peters and (2) Nicola Jane Findlay v Secretary of State and Others**¹³⁵, **Adam Wohdan and Others v Attorney General of Canada**¹³⁶, **Amalgamated Transit Union Local 113 and others v Toronto Transit Commission**¹³⁷, **Kadon Parkins and Others v KirkFP Limited**¹³⁸ and **NZDSOS Inc v Minister for Covid Response**¹³⁹.

[229] It is self-evident that but for the enactment of rule 8 of the **Special Measures SR&O**, the issue of whether the claimants were obligated to take the Covid-19 vaccine to remain in their employment did not arise. To the extent that the Minister, the Minister of National Security, the PSC, the Police SC and the COP committed errors in executing the legislative and administrative aspects of the underlying policy, the claimants cannot be blamed. Those consequences lie squarely at the feet of the decision makers. The claimants were entitled to refuse to take the vaccine and rely on the referenced errors to vindicate their claims. It must be noted too that in view of the procedural and

¹³⁵ Claims CO/3118/2021 and CO/2652/2021 at paras. 8 and 9.

¹³⁶ [2021] FC 2341 at paragraphs 32-36.

¹³⁷ [2021] ONSC 7658 at paras. 50 to 53.

¹³⁸ [2021] JMSC Civ 195 at paras. 75 to 79.

other errors by the Minister, Minister of National Security and other defendants, the precautionary principle is not applicable.

[230] The defendants argued that Cabinet and the Minister approved the **Special Measures SR&O** as they had a duty and authority to do in the public interest. They argued that in view of the circumstances existing at the time it was open to the CMO to make the recommendations she did, as a last resort in view of the ineffectiveness of the measures adopted before then, the increasing hospitalizations and deaths among the unvaccinated; that the measures were precautionary, proportional and/or reasonably required to protect public bodies by seeking to control the spread of the virus and protect the safety and health of the frontline employees and public officers. They invited the Court to find that they were.

[231] It is worth noting that section 43B of **the Act** does not stipulate that the CMO make recommendations to the Minister that are reasonably required in the interest of public health or that she deemed reasonably required to effect that purpose. Her testimony is that they were. The claimants have not taken issue *per se* with her recommendations in relation to whether they were proportional, and or reasonably required to protect public bodies. It is therefore not necessary to make a pronouncement with respect thereto. I refrain from so doing.

Issue 10 – To what remedies are the claimants entitled?

[232] The claimants have prevailed in most aspects of their claims. They seek declaratory relief, certiorari in respect of certain decisions, damages, interest and costs.

Declaration

[233] Declaratory relief is an equitable remedy which is conferred at the Court's discretion based on the circumstances of each case. Among the factors which are considered by the Court are the defendant's behaviour and any effects on the claimant. In the case at bar, the Minister, the PSC and Police SC and the COP all displayed a lack of consideration for the respective claimants' constitutional and private rights as discussed earlier. They also had little or no regard to investigate and factor into their decisions any concerns that the claimants may have had in relation to the drastic

measures which were introduced by rule 8 of the **Special Measures SR&O**. The fact that the referenced decisions impinged on multiple constitutional protected rights, freedoms and provisions is also pertinent. The overall situation justifies in my opinion, the grant of declaratory relief of the kind sought by the claimants.

[234] For all of the foregoing reasons outlined in this decision,:

1. In relation to both consolidated claims it is hereby declared that:

- (a) Rules 8(1) and 8(2) of the **Special Measures SR&O** are unlawful by reason that they are unconstitutional, ultra vires, disproportionate and tainted by procedural impropriety.
- (b) the Minister's decision to deem the claimants who are public officers to have resigned their offices pursuant to Regulation 31 of the PS Regulations as a consequence of failing to take the Covid 19 vaccine without affording them an opportunity to be heard constitutes a breach of natural justice, contravenes section 8(8) of the **Constitution**, is unlawful, procedurally improper, and void.
- (c) the PSC's decision to deem the claimants who are public officers to have resigned their offices pursuant to Regulation 31 of the PS Regulations as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** and that they ceased to be public officers, is unlawful and disproportionate.
- (d) the COP's decision to deem the claimants who are police officers below the rank of Sergeant to have resigned their offices pursuant to Section 73A of the **Police Act** as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** is unconstitutional and ultra vires.
- (e) the COP's decision to deem the Claimants who are police officers below the rank of Sergeant to have resigned his office pursuant to Section 73A of the **Police Act** as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** without affording them an opportunity to be heard constitutes a breach of natural justice, contravenes section 8(8) of the **Constitution**, is unlawful, procedurally improper, and void.
- (f) **SR&O No. 28 of 2021 – the Special Measures Rules, 2021** made pursuant to the purported power of the Minister under section 43B of the **Act** is unlawful, unconstitutional and void.

- (g) **SRO 28 of 2021 – the Special Measures Rules, 2021** insofar as it has the effect of providing for deprivation of the Claimants' accrued pension benefits associated with their employment infringes the rights of the Claimants to protection from deprivation of property without compensation under section 1 and section 6 of the **Constitution**, contravenes section 88 of the **Constitution** which protects pension rights and is therefore void.
- (h) Regulations 8 (1) and (2) of **SRO 28 of 2021** were made in violation of sections 77 and 78 of the **Constitution** and are void.
- (i) the **COVID-19 (Miscellaneous Amendments) Act 5 of 2020** insofar as it empowers the Minister to amend any existing law by making an Order violates section 37 of the **Constitution** and the constitutional doctrines of separation of powers and the rule of law and is unconstitutional and void.
- (j) Section 73A of the **Police Act** made by the Prime Minister and Minister of National Security purportedly pursuant to the power under section 2(2) of the **COVID-19 (Miscellaneous Amendments) Act 2020** is void.

2. In relation to claim SVGHCV2021/1033, it is declared that:

- (a) the Police SC's decisions to deem the 5th Claimant to have resigned his office pursuant to section 73A of the **Police Act** as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** and that he ceased to be police officers is unlawful and disproportionate.
- (b) the Police SC's decision to deem the 5th Claimant to have resigned his office pursuant to Section 73A of the **Police Act** as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** without affording him an opportunity to be heard constitutes a breach of natural justice, contravenes section 8(8) of the **Constitution**, is unlawful, procedurally improper, and void.

3. No declaration is made that: -

- (a) section 43B of the **Public Health Act** insofar as it grants power to the Minister to declare a public health emergency, is inconsistent with section 17 of the **Constitution** is null and void.

- (b) **SR&O No. 38 of 2020** cited as **the Public Health Emergency (Declaration) Notice 2020** made pursuant to the power of the Minister to declare a public health emergency under section 43B of the **Act**, is inconsistent with section 17 of the **Constitution** or is null and void.
- (c) **SRO 28 of 2021** insofar as it purports to make the taking of the Covid-19 vaccine mandatory on pain of suffering the loss of livelihood, loss of pension rights and being exposed to criminal sanctions amounts to inhuman and degrading treatment of the Claimants contrary to section 5 of the **Constitution** or is void.
- (d) the **COVID-19 (Miscellaneous Amendments) Act 2020** insofar as it fails to define 'the Minister' in the context of providing 'the Minister' with sweeping powers to amend any existing law is ambiguous, vague, contravenes the constitutional rule of law doctrine or is void.
- (e) 'the Minister' within the meaning of section 2(2) of the **COVID-19 (Miscellaneous Amendments) Act 2020** means the 'Minister of Health'.

Certiorari

[235] Certiorari is available in appropriate cases to quash decisions that are arrived at by procedurally improper routes or by other unlawful means. A number of decisions made by the Minister, the PSC, the Police SC, the COP and the Minister of National Security fall within those categories as outlined earlier. It is therefore appropriate to quash them.

[236] 1. An order of certiorari is therefore issued in the consolidated claims to quash:

- (a) the Minister's decision to make Regulations 8 (1) and 8 (2) of the **Special Measures SR&O**.
- (b) the PSC's to deem the Claimants who are public officers to have resigned their offices as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** and to cease to be public officers in accordance with Regulation 31 of the PS Regulations.
- (c) the COP's decision to deem the Claimants who are police officers below the rank of Sergeant to have resigned their offices pursuant to section 73A of the **Police Act** and to cease to be a members of the Royal St. Vincent and the Grenadines Police Force.

2. An order of certiorari is issued in claim SVGHCV2021/1033 to quash the Police SC's decision to deem the 5th Claimant to have resigned his office as a consequence of failing to take the Covid 19 vaccine as required by Regulation 5 of the **Special Measures SR&O** and to cease to be a police officer pursuant to Section 73A of the **Police Act**.

[237] In view of the preceding declarations and orders of certiorari, it is further declared that the public officer-claimants and police officer- claimants who are affected by the orders of certiorari and related declarations never ceased to be entitled to hold the respective offices of public officers¹⁴⁰ and police officers within the relevant Ministries, Departments or the Royal Saint Vincent and the Grenadines Police Force to which they were appointed respectively by the PSC, the Police SC and the COP, and occupied on the date that they received the notifications that they were deemed to have resigned their offices. The same applies in the case of Mr. Ballantyne (and other similarly affected officers) who may not have received such letters but rather letters informing them that their applications for exemption from the requirement to take the vaccine were denied. They have remained since that time, entitled to hold those respective offices.

[238] They are accordingly entitled to their full pay and all benefits due and payable to them in their respective capacities as public officers or police officers inclusive of any accrued pension and gratuity benefits or rights from the respective dates on which they were deemed to have resigned. For this purpose, the names of all affected public officers and police officers appear as named parties in the original filing of the consolidated claims and with respect to claim SVGHCV2022/0053 are except for the representative parties almost all captured in exhibit '**SBTCRG1**'.

Damages

[239] Damages may be recovered in judicial review claims if a recognized private law cause of action is pleaded and proved.¹⁴¹ In the same way, what has been referred to as 'compensatory' damages may be awarded to a claimant who has established constitutional breach of his rights by reason of which he has suffered some wrong. 'Punitive' or 'exemplary' damages is another category of award which

¹⁴⁰ Be it as a teacher, customs officer or otherwise.

¹⁴¹ *Elmoalis Ltd. v. The Attorney General of Anguilla* AXAHCVP2019/0002, delivered on May 21st, 2021, at. para. [63].

may be granted as a further relief in appropriate cases 'to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.'¹⁴²

[240] In **Ramanoop**, Lord Nichols of Birkenhead discouraged the use of the terms 'punitive' and exemplary damages and suggested instead reference to an additional sum. As to the compensatory element of an award, he said: -

'When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation.'¹⁴³

[241] Applying those principles and dictum to the case at bar, this case in my opinion is a suitable one in which compensatory damages and an additional sum ought to be awarded to emphasize the significance of the constitutional rights that have been vindicated by the claimants and to deter further breaches. This Court is not in a position to determine the quantum in the case of every officer, because of the number of claimants and the lack of adequate evidence in relation to each such as the length of service, seniority and other relevant data.

[242] In the premises, it is proper to defer such assessment to a later date, to be determined on application. Such awards will attract interest at the statutory rate. It is therefore ordered that each claimant is entitled to recover from the Crown for the referenced constitutional breaches, damages inclusive of an additional award to reflect the seriousness of the breaches and deter any recurrence with interest at the statutory rate of 6% per annum. The claimants must file and serve their application for assessment of damages within 3 months of today's date, or on or before June 14th 2023. The PSC,

¹⁴² The Attorney General of Trinidad and Tobago v Siewchand Ramanoop [2005] UKPC 15.

¹⁴³ Supra at paragraph 18.

the Police SC, the COP and the Honourable Attorney General are directed to make the necessary arrangements for the respective claimants to receive all payments and benefits to which they are entitled or that may be awarded to them arising from any subsequent assessment of damages.

Miscellaneous - Re-instatement and Pension Rights

[243] The claimants included no prayer for re-instatement in their claims. This perhaps reflects their appreciation that the Court would for good reason be reluctant to make such an order. As explained by the Court of Appeal in **Elvis Daniel and Others v Public Service Commission and Attorney General**¹⁴⁴:

‘It is a matter of judicial discretion whether a litigant who has been unlawfully dismissed or compelled to resign, and has in fact ceased to perform any of the duties of his office, should be granted an order of reinstatement. The circumstances of the appellants’ resignation from the teaching service in 2010, the length of time which has expired since their resignation, plus the court’s lack of competence to determine the needs and requirements of the public service would make it inappropriate to permit the appellants to invoke the principle of legitimate expectation to compel their reinstatement to the original post or post of equivalence in the public service.’¹⁴⁵

It is for similar reasons why this Court would not contemplate the making of such an order in respect of any of the claimants.

[244] Section 6 (8) of the Constitution defines ‘property’ to mean ‘ any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional.’ The claimants’ contentions that some of them have suffered or are likely to suffer the loss of pension rights by virtue of the impugned special measures which were applied to them attracts this Court’s consideration as outlined earlier. The Court has a duty to protect those accrued rights. The claimants are entitled to

¹⁴⁴ SVGHC VAP2016/0007.

¹⁴⁵ At para. 45.

recover or receive all benefits that are incidental to their employment when they fall due, including accrued pension benefits, in accordance with the applicable pension legislation.

Costs

[245] The claimants are entitled to recover their costs pursuant to rule 56.13 of the CPR. Costs will need to be assessed if not agreed. The claimants are required to file an application for assessment of costs within 45 days of today's date, i.e. on or before 28th April 2023.

DISPOSITION

[246] 1. In relation to the consolidated claims, it is hereby declared that:

- (a) Regulations 8(1) and 8(2) of the **Special Measures Rules** are unlawful, unconstitutional, ultra vires, disproportionate and tainted by procedural impropriety.
- (b) the Minister's decision by regulation 8 of the **Special Measures Rules** to deem the public officer-Claimants to have resigned their offices pursuant to Regulation 31 of the PS Regulations, without affording them an opportunity to be heard, constitutes a breach of natural justice, contravenes section 8(8) of the **Constitution**, is unlawful, procedurally improper and void.
- (c) the PSC's decision to deem the public officer-Claimants to have resigned their offices pursuant to Regulation 31 of the PS Regulations and ceased to be public officers by operation of law under regulation 8 of the **Special Measures SR&O**, is unlawful and disproportionate.
- (d) the COP's decision to deem the Claimants who are police officers below the rank of Sergeant to have resigned their offices pursuant to Section 73A of the **Police Act** and by operation of law under regulation 8 of the **Special Measures SR&O** is unconstitutional and ultra vires.
- (e) the COP's decision to deem the Claimants who are police officers below the rank of Sergeant to have resigned his office pursuant to Section 73A of the **Police Act** and by operation of law under regulation 8 of the **Special Measures SR&O**, without affording them an

opportunity to be heard, constitutes a breach of natural justice, contravenes section 8(8) of the Constitution, is unlawful, procedurally improper and void.

- (f) **The Special Measures Rules, 2021 - SR&O No. 28 of 2021** made pursuant to the purported power of the Minister under section 43B of the **Public Health Act** is unlawful, unconstitutional and void.
- (g) **The Special Measures Rules, 2021 - SRO 28 of 2021** to the extent that it has the effect of providing for deprivation of any of the Claimants' accrued pension benefits or rights under their contracts of employment, infringes their rights to protection from deprivation of property without compensation under section 6 of the **Constitution** and is therefore void.
- (h) Regulation 8 (1), (2) and (3) of **SRO 28 of 2021** were made in violation of sections 77 and 78 of the **Constitution** and are void.
- (i) The **COVID-19 (Miscellaneous Amendments) Act 5 of 2020** insofar as it empowers the Minister to amend any existing law by making an Order violates section 37 of the **Constitution** and the constitutional doctrine of separation of powers, is unconstitutional and void.
- (j) Section 73A of the **Police Act** made by the Prime Minister and Minister of National Security purportedly pursuant to the power under section 2(2) of the **COVID-19 (Miscellaneous Amendments) Act 2020** is unlawful and void.

2. In relation to claim SVGHCV2021/1033, it is declared that:

- (a) the Police SC's decisions to deem the 5th Claimant to have resigned his office and ceased to be a police officer pursuant to section 73A of the **Police Act**, by operation of law under regulation 8 of the **Special Measures SR&O** is unlawful and disproportionate.
- (b) the Police SC's decision to deem the 5th Claimant to have resigned his office pursuant to Section 73A of the **Police Act** and by operation of law under regulation 8 of the **Special Measures SR&O**, without affording him an opportunity to be heard, constitutes a breach of natural justice, contravenes section 8(8) of the **Constitution**, is unlawful, procedurally improper, and void.

3. No declaration is made that: -

- (a) section 43B of the **Public Health Act** insofar as it grants power to the Minister to declare a public health emergency, is inconsistent with section 17 of the **Constitution** or is null and void.
- (b) **SR&O No. 38 of 2020** cited as **the Public Health Emergency (Declaration) Notice 2020** made under section 43B of the **Public Health Act**, is inconsistent with section 17 of the **Constitution** or is null and void.
- (c) **SRO 28 of 2021** insofar as it purports to make the taking of the Covid-19 vaccine mandatory on pain of suffering the loss of livelihood, loss of pension rights and being exposed to criminal sanctions amounts to inhuman and degrading treatment of the Claimants, is contrary to section 5 of the **Constitution** or is void.
- (d) the **COVID-19 (Miscellaneous Amendments) Act 2020** insofar as it fails to define 'the Minister' is ambiguous, vague, contravenes the constitutional rule of law doctrine or is void.
- (e) 'the Minister' within the meaning of section 2(2) of the **COVID-19 (Miscellaneous Amendments) Act 2020** means the 'Minister of Health'.
- (f) **The Special Measures Rules, 2021 - SRO 28 of 2021** contravenes section 88 of the **Constitution**.

4. An order of certiorari is issued in the consolidated claims to quash:

- (a) the Minister's decision to make Regulations 8 (1) and 8 (2) of the **Special Measures SR&O**.
- (b) the PSC's decision to deem the Claimants who are public officers to have resigned their offices by operation of law under the **Special Measures SR&O** and to cease to be public officers in accordance with Regulation 31 of the PS Regulations.
- (c) the COP's decision to deem the Claimants who are police officers below the rank of Sergeant to have resigned their offices by operation of law under section 73A of the **Police Act** and to cease to be a members of the Royal St. Vincent and the Grenadines Police Force.

5. An order of certiorari is issued in claim SVGHCV2021/1033 to quash the Police SC's decision to

deem the 5th Claimant to have resigned his office by operation of law under the **Special Measures SR&O** and to cease to be a police officer pursuant to Section 73A of the **Police Act**.

6. It is further declared that:
 - (a) none of the claimants ceased to be entitled to hold the respective offices of public officers¹⁴⁶ or police officers within the relevant Ministries, Departments or the Royal Saint Vincent and the Grenadines Police Force to which they were appointed respectively by the PSC, the Police SC and the COP, and held at the relevant times. They remain entitled to hold those respective offices.
 - (b) The claimants are entitled to their full pay and all benefits due and payable to them in their respective capacities as public officers or police officers inclusive of any accrued pension and gratuity benefits or rights from the respective dates on which they were deemed to have resigned.
7. The Crown is liable to each claimant for damages for the referenced constitutional breaches inclusive of an additional award to reflect the seriousness of the breaches and deter any recurrence, with interest at the statutory rate of 6% per annum.
8. The claimants must file and serve their application for assessment of damages within 3 months of today's date, i.e. on or before June 14th 2023.
9. The PSC, the Police SC, the COP and the Honourable Attorney General are directed to make the necessary arrangements for the respective claimants to receive all payments and benefits to which they are or may become entitled or that may be awarded to them arising from any subsequent assessment of damages.
10. The defendants shall pay to the claimants costs pursuant to rule 56.13 of the CPR to be assessed if not agreed. The claimants are required to file the application for assessment of costs within 45 days of today's date, i.e., on or before 28th April 2023.

¹⁴⁶ Be it as a teacher, customs officer or otherwise.

[247] The issues in this case touch and concern matters of considerable public importance and interest. While the applicable principles are largely settled, the subject matter lends itself to the presentation of interesting legal perspectives which undoubtedly will engage the interest of Courts and serious students of law for many years hence. I wish to place on record my gratitude to counsel for their very comprehensive written and oral submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar