THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2023/0003

BETWEEN:

[1] THE MINISTER OF HEALTH AND THE ENVIRONMENT
[2] THE PUBLIC SERVICE COMMISSION
[3] THE COMMISSIONER OF POLICE
[4] ATTORNEY GENERAL
[5] POLICE SERVICE COMMISSION

Appellants

and

[1] SHANIEL HOWE
[2] NOVITA ROBERTS
[3] CAVET THOMAS
[4] ALFONZO LYTTLE
[5] BRENTON SMITH
[6] SYLVORNE OLLIVER
[7] SHEFFLORN BALLANTYNE
[8] TRAVIS CUMBERBATCH
[9] ROHAN GILES

Respondents

Before:

The Hon. Mr. Eddy D. Ventose	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Gerhard Wallbank	Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan SC with him Ms. Karen Duncan, Mrs. Cerepha Harper-Joseph and Ms. Franeek Joseph for the First, Third and Fourth Appellants
Mr. Grahame Bollers for the Second and Fifth Appellants
Mrs. Cara Shillingford-Marsh, Mr. Jomo Thomas and Ms. Shirlan Barnwell for the Respondents

---

2024: May 2;
2025: February 12.

Civil Appeal - COVID-19 pandemic – Rule 8 of the Public Health (Public Bodies Special Measures) Rules 2021 ("Special Measures") – COVID-19 vaccine mandate – All employees identified in the Schedule to the Special Measures were to be vaccinated - Unvaccinated public and police officers not to enter workplace – Regulation 31 of the Public Service Commission Regulations – Section 73A of the Police Act - Respondents deemed to have vacated their posts by being absent for 10 continuous working days - Whether Rule 8 of the Special Measures is unlawful and or unconstitutional and void – Whether Minister of Health failed to act on the advice of the Chief Medical Officers in promulgating the Special Measures as required by section 43B of the Public Health Act – Whether Minister of Health usurped the functions of the Public Service Commission in making Rule 8 - Pensions benefit - Whether Rule 8 contravened the respondents' constitutional rights to protection from deprivation of property and protection of pension right – Proportionality test – Whether the termination measure should be found unlawful on account of being disproportionate - Natural justice – Procedural fairness - Whether the Commission, the Police Service Commission and the Commissioner of Police acted unlawfully and contrary to the rules of natural justice in failing to give the respondents an opportunity to be heard before issuing the letters to the respondents – Whether the Minister of Health in making Rule 8 usurped the authority of the Commission, the Police Service Commission and the Commissioner of Police to make rules governing the appointment and termination of their employees – Whether the COVID-19 (Miscellaneous Amendments) Act is unconstitutional for contravening the separation of powers doctrine.

In the year 2020, the world was thrown into a tailspin. The World Health Organisation declared the outbreak of the novel coronavirus SARS-CoV-2 ("COVID-19") to be a pandemic. Saint Vincent and the Grenadines ("SVG"), like many other Commonwealth Caribbean states and countries in the world, was not spared. By March 2020, SVG was caught up in the ravages of the COVID-19 pandemic. Many persons were falling gravely ill, being hospitalised, and in many cases dying. There was disruption to society and the economy.

In response to the COVID-19 pandemic, to prevent the spread of the COVID-19 virus, serious hospitalisation and to save lives, the Parliament of SVG enacted various laws and implemented measures and protocols to deal with the public health emergency as deemed necessary by the public health officials from time to time. In April 2020, the Parliament passed the COVID-19 (Miscellaneous Amendments) Act, 2020 (the "Amendments Act") which gave to the Minister the power to modify by Order any existing law by amending the Schedule to the Amendments Act. Also in April 2020, the Parliament amended the Public Health Act. The amendments, among other things, empowered the Minister of Health, Wellness and the Environment (the "Minister of Health") on the recommendation of the Chief Medical Officer (the "CMO") to pass or implement special measures to mitigate or remedy the public health emergency. In December 2020, the Minister of Health declared a public health emergency for SVG caused by the COVID-19 pandemic. In October 2021, the Minister of Health promulgated the Public Health (Public Bodies Special Measures) Rules, 2021 ("the Special Measures" or "SR&O 28"). The Special Measures, among other things, required frontline public officers to be vaccinated (Rule 5) unless they were exempted on medical or religious grounds (Rule 7). Those public officers to whom Rule 5 applied and who

failed to comply without reasonable excuse, were not to enter the workplace and were to be treated as being absent without leave (Rule 8(1)). Regulation 31 of the Public Service Commission Regulations which speaks to abandonment of office was to apply to the public officers to whom Rule 8(1) applied (Rule 8(2)). In November 2021, the Police Act was also amended to insert a new section 73A which provides for the application of Rule 8 of the Special Measures to the Royal Saint Vincent and Grenadines Police Force and contains provisions similar to Regulation 31.

The respondents were healthcare workers, teachers, police officers, and other public officers to whom Rule 5 applied. The respondents did not take the COVID-19 vaccine as required by Rule 5, so they were unable to lawfully attend work while unvaccinated as mandated by Rule 8. The medical exemption found in Rule 7 did not apply to them and where the religious exemption only applied to some, the employer was not able to make suitable arrangements to accommodate them elsewhere in the public service. By failing to comply with Rule 5, the respondents ceased to be public officers by the application of Rule 8 and Regulation 31. Consequently, the Public Service Commission ("the Commission"), the Police Service Commission, and the Commissioner of Police wrote to all the respondents, except one, informing them that they were deemed by operation of law to have resigned from their offices which became vacant and that they ceased to be public officers. The respondents denied that they had abandoned their jobs and claimed that they reported to work but were prevented from fulfilling their duties. Consequently, the respondents pursuant to leave previously granted by the learned trial judge brought constitutional and judicial review proceedings in the High Court challenging legislation made by the Parliament of SVG, and rules and decisions made by the appellants in response to the COVID-19 pandemic.

After a trial in the High Court, the learned High Court judge ruled in the respondents' favour. The learned trial judge in a judgment dated 13th March 2023 declared as unlawful, unconstitutional, and void, various rules, regulations, legislation passed, and decisions made, by officials in the Government and by the Parliament of SVG in response to the COVID-19 pandemic. The appellants, dissatisfied with the judgment of the High Court, appealed. The respondents resisted the appeal.

The following issues arose for consideration in the appeal based on the grounds of appeal: (i) whether Rule 8 of the Special Measures was unconstitutional and or unlawful because: (a) the Minister of Health did not act on the advice or recommendation of the CMO as required by section 43B of the Public Health (Amendment) Act in making Rule 8; (b) in making Rule 8, the Minister usurped the functions of the Commission under sections 77(13) and 78(1) of the Constitution; and (c) Rule 8 contravened the respondents' constitutional rights under sections 6 (protection from deprivation of property) and 88 (pension law and protection of pension right) of the Constitution; (ii) whether the Commission, the Police Service Commission and the Commissioner of Police: (a) acted unlawfully and contrary to the rules of natural justice in failing to give the respondents an opportunity to be heard before issuing the letters to the respondents; and (b) contravened sections 77(12) and 84(6) and (7) of the Constitution by acting under the directions of the Minister of Health; and (iii) whether the Amendments Act is unconstitutional for contravening the separation of powers doctrine.

Held: (Per Ventose JA and Webster JA [Ag.], Wallbank JA [Ag.] dissenting) allowing the appeal and setting aside the declarations, orders of *certiorari,* order for costs, and other

orders and directions for assessment of damages made by the learned judge, and making no order as to costs in the court below and on the appeal, that:

1. An appellate court ought first to be satisfied that the trial judge was 'plainly wrong' before interfering with the trial judge's findings of fact or his or her evaluations of facts. In the case at bar, the trial judge's finding that the Minister of Health acted ultra vires in that he did not as a matter of fact act on the advice of the CMO in making Rule 8, is contrary to the uncontroverted evidence of the CMO and the Minister of Health. There was no cross examination of either the Minister of Health or the CMO on this issue which meant there was no basis for the learned trial judge to reject the evidence of the CMO and the Minister of Health. Furthermore, the advice of the CMO was only relevant to the first part of Rule 8(1), that is, that an employee who without reasonable excuse fails to comply with Rules 4 or 5 must not enter the workplace. No such advice was required from the CMO before the Minister of Health could include the second part of Rule 8(1) and Rule 8(2) in the Special Measures. The second part of Rule 8(1) states that an unvaccinated public officer who cannot enter the workplace will be deemed absent from duty without leave and, Rule 8(2) merely states that Regulation 31 applies to such a public officer. These could not be and were not part of the advice given by the CMO to the Minister of Health. Regulation 31 would in any event apply to unvaccinated public officers to whom the first part of Rule 8(1) applied.

   Rule 8 of the **Public Health (Public Bodies Special Measures) Rules, 2021,** Act No. 28 of 2021 considered; Regulation 31 of the **Public Service Commission Regulations** SR&O No. 48 of 1969 as amended, considered; **Shaista Trading Company Limited d.b.a. Diamond Republic v First Caribbean International Bank (Barbados) Ltd** ANUHCVAP2018/0021 (delivered 26th April 2021, unreported) followed; **Biogen Inc v Medeva Plc** [1997] RPC 1 applied.

2. For those rules that were not made on the advice of the CMO as per section 43B of the Public Health Act, the Minister had the lawful power to make them under section 147 of the Public Health Act. Section 147 states that the Minister shall have power 'to make rules generally for the carrying out of the purposes of this Act'. There can be no doubt that the Special Measures, including Rules 8(1) and 8(2), were properly made by the Minister pursuant to section 147 of the Public Health Act. In addition, having regard to section 39 of the Interpretation and General Provisions Act, the Minister in any event has the implied power to enforce compliance with the requirement under Rule 8 that public officers must not enter the workplace while unvaccinated. This is a basis founded in law that grounds the powers of enforcement of the Minister. The learned trial judge was therefore wrong to conclude that Rules 8(1) and 8(2) are unlawful, unconstitutional, and void on this basis.

   Sections 147 and 43B of the **Public Health Act**, Cap 300 of the Laws of Saint Vincent and the Grenadines, as amended by the Public Health (Amendment)

Act, 2020 considered; Section 39 of the **Interpretation and General Provisions Act** Cap 14 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

3. Section 77(13) of the Constitution provides 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(1) gives the Commission the power to appoint, discipline, and remove persons who hold or act in offices in the public service. It is clear that these powers are vested exclusively in the Commission. The critical aspect of Rule 8 is that an employee who without reasonable excuse fails to comply with Rules 4 or 5 must not enter the workplace. The words in Rule 8(1) 'and is to be treated as being absent from duty without leave' merely reflect a fact that would exist if an employee failed to get vaccinated and was unable to enter the workplace to fulfil their contractual obligations for ten days or more. Moreover, Rule 8(2) merely makes clear the application of Regulation 31 to Rule 8(1). Rule 8 does not usurp any of the functions of the Commission and the learned trial judge also erred in finding that it did.

   Sections 77(13) and 78(1) of the **Constitution of Saint Vincent and the Grenadines** Cap 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009 considered; **Thomas v Attorney-General of Trinidad and Tobago** [1982] A.C. 113 followed.

4. Section 88 of the Constitution protects the pension benefits of persons who are entitled by law to a pension from any change in law that affects the grant of such pension benefits, or any law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended, and the law regulating the amount of any such benefits. The only constitutional right that is protected by section 88 is a pension to which a person is lawfully entitled. This Court has made plain that in order for pension benefits to be protected as a property right under section 6 of the Constitution of SVG, the applicant must either qualify for or be entitled to the pension benefit as a matter of law. Therefore, assuming the respondents are correct in their assessment that a person who has abandoned their office under Regulation 31 would not be eligible for a pension, there would be no deprivation of any property because that deprivation would arise from a lack of qualification or entitlement to the pension benefit. The fact that a person may fall generally under a category of persons who are not entitled to a pension under the pensions law, assuming this to be true, cannot be a basis for a finding that the law is unconstitutional for creating the circumstance within which a person may fall that would disentitle them to a pension.

   Sections 6 and 88 of the **Constitution of Saint Vincent and the Grenadines** Cap 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009 considered; **Elvis Daniel et al. v Public Service Commission et al** SVGHCVAP2016/0007 (delivered 29th January 2019, unreported) considered.

5. In the case at bar, there was no evidence that any of the respondents had earned the right to a pension that is protected under section 88 of the Constitution. In other words, the respondents had not shown that they had qualified for or were otherwise entitled by law to (and had lost) any pension benefits. Since the respondents have not provided any evidence of any 'pension benefit' which is protected by section 88 of the Constitution, they are therefore not able to establish that any 'property right' protected by section 6 of the Constitution. Further, there is nothing in Rule 8 which regulates in any way the 'pension benefit' to which section 88 refers such that the respondents' right to property in the 'amount of such benefits' have been contravened contrary to section 6 of the Constitution relating to protection from deprivation of property. Consequently, section 6 of the Constitution cannot be invoked to challenge the constitutionality of Rules 8(1) and 8(2). However, this does not prevent an affected employee from applying to the Government for their vested pension entitlements in accordance with the pensions laws of SVG. Once that legal entitlement is determined (as of the date of the deemed resignation), the relevant party must simply comply and apply in the normal way for any pension that is due to them from the date of the deemed resignation of any of the respondents.

6. In determining whether a law or measure infringes any of the fundamental rights or freedoms in Caribbean Constitutions, the proportionality test is used. In applying this test, it is necessary to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. When the proportionality test is applied to Rule 8(1) and Rule 8(2), both of which incorporate directly and indirectly Regulation 31 and section 73A of the Police Act, having regard to all the circumstances and the uncontradicted evidence of the appellants, including the evidence of the CMO, bearing in mind the seriousness and severity of the COVID-19 pandemic, the nature of the COVID-19 virus and the ever changing variants, the emergence of COVID-19 vaccines that would prevent the spread of the COVID-19 virus and assist in preventing severe illness, hospitalisations and any loss of life of residents, particularly children, the elderly and those persons who were immunocompromised, Rule 8 was plainly a proportionate means of protecting the public health interest in the circumstances of a dangerous COVID-19 virus. For these reasons, the respondents' claim for constitutional relief fails *in limine* and should have been rejected by the learned trial judge.

   de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1998] 3 WLR 675 followed ; **Huang v Secretary of State for the Home Department** [2007] 2 AC 167 followed; **Bank Mellat v Her Majesty's Treasury (No 2)** [2014] AC 700 followed; **Suraj and others v Attorney General of Trinidad and Tobago and Maharaj v Attorney General**

of Trinidad and Tobago [2023] AC 337 followed; **GF v Minister of COVID-19 Response** [2021] NZHC 2526 considered.

7. The issue of natural justice does not arise on the operation of Regulation 31 because the deeming of an officer to have resigned from his office is triggered immediately by that officer absenting himself from duty without leave for a continuous period of ten working days. The consequence occurs automatically on the occurrence of the triggering event. The issue in question is whether Regulation 31 satisfies the requirements of fairness. The insertion of the words 'unless declared otherwise by the Commission' in Regulation 31 allows the Commission to hear the officer, either in writing or orally, who can then explain to the Commission why the consequences of Regulation 31 should not apply to him or her. This provision in Regulation 31 allows for any person who is deemed to have abandoned his or her office by the operation of the regulation to seek to have the Commission subsequently modify its decision. None of the respondents made any request to the Commission for a review of their case. Having not availed themselves of the option of seeking from the Commission a modification of the communication concerning their abandonment of their offices, the respondents cannot now argue that there was a breach of natural justice.

Felix DaSilva v Attorney General of Saint Vincent and the Grenadines et al Suit No. 356 of 1989 (delivered 31st July 1997, unreported) considered; **R v Secretary of State for the Home Department, ex p. Doody** [1993] UKHL 8 (24th June 1993) applied; **Endell Thomas v Attorney-General of Trinidad and Tobago** [1982] AC 113 considered.

8. It cannot be said that either the Commissioner of Police or the Commission acted on the authority of the Minister of Health in applying Regulation 31 which was only triggered by non-compliance with Rule 8 by the officers to which it was applicable. The application of Regulation 31 in the case of any officer does not involve acting on the instructions of, or the dictates of, neither the Commissioner of Police nor the Chair of the Commission. Rule 8 was not a directive by the Minister of Health to the Commission or the Police Service Commission. The Commission, in issuing letters reflecting the deeming effect of Regulation 31, namely, that the officer is deemed to have resigned their office and that their office becomes vacant and that the officer ceases to be an officer, was doing no more than communicating the effect of Regulation 31. It was a directive to public and police officers concerning their terms and conditions of employment. The Executive was merely laying down additional terms of service for public officers and police officers pursuant to their contracts of employment. There was no control by the Minister of Health or anyone else of any of the functions of the Commission or the Police Service Commission. The learned trial judge was wrong to conclude that the letters issued to the respondents for breaching Regulation 31, for failing to comply with Rule 8, contravened sections 77(12), 77(13), 84(6) and 84(7) of the Constitution.

Endell Thomas v Attorney-General of Trinidad and Tobago [1982] AC 113 followed.

9. The separation of powers doctrine is a fundamental pillar of constitutional law in the Commonwealth Caribbean**.** This Court has made clear that for any delegation of legislative power to be lawful the legislature must retain effective control over the delegated power by either: (1) circumscribing the power; or (2) by prescribing guidelines or a policy for the exercise of the power. In the context of the COVID-19 pandemic, the Amendments Act was made during a period of emergency for the purpose of delegating authority on the Minister to amend certain laws to swiftly respond to the ever-changing and fluid COVID-19 pandemic. Parliament retained control by: (1) restricting the application of the Amendments Act to responses to the COVID-19 pandemic, and (2) confining the Minister's power to amend laws for the sole purpose of responding to the COVID-19 pandemic. Only on a strained reading of the Amendments Act could one conclude that the Legislature gave the Minister of Health the power to amend laws passed by Parliament *carte blanche.* It would rather be contrary to common sense if such a power could not be delegated in such a time of a public health emergency and serious danger, subject to Parliamentary control, that was occasioned by the onset of the COVID-19 pandemic. These factors constitute sufficient Parliamentary control for the purpose of circumscribing the power delegated to the Minister by Parliament. The learned trial judge was wrong to hold that the Amendments Act was unlawful for contravening the separation of powers doctrine.

   Section 2(2) of the **COVID-19 (Miscellaneous Amendments) Act,** Act No. 5 of 2020 considered; **J. Astaphan and Co. (1970) Ltd v the Comptroller of Customs and The Attorney General of the Commonwealth of Dominica** Civil Appeal No. 8 of 1994 (delivered 28th May 1996, unreported) followed; **Kwok Wing Hang & Ors v Chief Executive in Council and another** [2020] HKCFA 42 applied.

Per Wallbank JA [Ag.] (dissenting):

10. Abandonment of employment is a voluntary relinquishment of the employment through non-user with the actual or imputed intention on the part of the office holder to abandon and relinquish that office. The combined effect incorporating Regulation 31 by way of Rule 8(2) and the deeming provision in Rule 8(1) was to redefine what had been considered 'abandonment of office'. It was not simply the case of the Minister merely repeating what was already the law. The deeming provision was not 'mere surplusage' neither was the inclusion of reference to Regulation 31 in Rule 8(2). It was a new measure that changed the meaning of a legal concept. In laying down that an officer who has not taken the vaccine and who has not presented proof of vaccination 'is to be treated as being absent from duty without leave', Rule 8(1) had the effect of disapplying the common law criteria for abandonment of office, including the requirement that absence should be voluntary. Rule 8(1) has the effect of imposing a completely different set of artificial criteria for resignation from employment through abandonment and

overrides the well and long-established law as to what constitutes abandonment of employment, as a form of resignation.

11. Moreover, the prohibition in Rule 8(1) from entering the workplace does not automatically entail absence from duty. Whether or not such an officer indeed went absent from duty without leave is a question of fact within the context of the particular case. In this case, the evidence showed that although restricted from entering the workplace the respondents continued to perform their duties until they received their letters of termination. It was not the failure to present themselves for work, but non-vaccination, that earned the respondents their termination letters. Similarly, Regulation 31 would not 'automatically' apply to unvaccinated public officers to whom the first part of Rule 8(1) applied had it not been inserted in Rule 8(2), because mere non-vaccination and inability to show proof of vaccination, and prohibition to enter the workplace, do not of themselves equate to absence from duty without leave.

    Huggins Neal Nicholas v Attorney General & The Teaching Service Commission St Lucia Civil Appeal HCVAP 2008/018 (delivered 22nd March 2010, unreported) followed; **Seetohul v Omni Projects Ltd** [2015] UKPC 5 distinguished.

12. The application of SR&O 28 did not offend against the right to a fair hearing within a reasonable time pursuant to section 8(8) of the Constitution. That is because, in taking the entire procedure of the application of SR&O 28 as a whole, the respondents did not avail themselves of the entirety of the in-built opportunity to be heard. The respondents were not precluded from making representations to the Commissions, which could have changed the overall result after they received their termination letters. However, the Public and Police Service Commissions' decision-making process was flawed in that they prejudged the factual issue of whether the respondents, in each individual case, had a reasonable excuse for non-vaccination against them, without affording the respondents an opportunity to be heard. Those bodies simply assumed from the fact of non-vaccination that the respondents had no reasonable excuse. It was not open to them to state unconditionally and definitively, as they did, that the employees had no reasonable excuse when those bodies did not know and could not have known that without conducting an inquiry into the fact-specific question and without affording the respondents an opportunity to be heard before pronouncing their decision. This was inherently a breach of fundamental principles of natural justice and rendered the decisions of the Public and Police Service Commissions void and of no effect.

    Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 applied; **Ridge v Baldwin et al** [1964] AC 40 applied.

13. There is no scope for the court below, or this Court, to consider the proportionality of the measure introduced by Rule 8 of SR&O 28 divorced from the protection of a fundamental right. The four-step proportionality test cannot

be used without reference to a fundamental right. Pension rights are a form of personal property protected under section 6 of the Constitution. Loss of the respondents' pension rights was a form of deprivation of property without compensation, triggering the court's powers of intervention because a constitutionally protected right is arguably being infringed. The uncontradicted evidence is that the respondents' deemed resignation deprived them of their accrued entitlement to be paid a public service pension, i.e. that their deemed resignations cancelled their accrued pension entitlements. That evidence of the respondents could have been contradicted by the appellants with reference to factual matters (i.e. evidence) and/or the law on pensions, but it was not. The Court therefore has sufficient jurisdiction to consider the proportionality of the impugned termination measure in so far as it affected those respondents who had accrued pension rights.

Elvis Daniel et al v Public Service Commission et al SVGHCVAP2016/0007 (delivered 29th January 2019, unreported) followed.

14. The impugned termination measure in the present case, i.e. giving public and police service employees an ultimatum that if they did not get vaccinated, they would lose their jobs, was draconian. It deprived employees of their employment, of their livelihoods for themselves and their dependents, of their financial benefits, socially marginalised them and traumatised them. There were less intrusive measures which could have been used without unacceptably compromising the objective of SR&O 28.

15. Section 6 of the Constitution permits limitation of property rights but draws the line that if property rights are removed, then adequate compensation within a reasonable time must be paid. That line is absolute and cannot be crossed. There is no evidence the Government intended to compensate any of those terminated for loss of their pension rights. The impugned termination measure therefore crossed the line drawn by section 6 of the Constitution, was too intrusive, and consequently was inherently disproportionate. Additionally, SR&O 28 already contained an adequate solution to achieve the stated legislative purpose. Two such measures were already included in SR&O 28 itself – prohibition from entering the workplace and disciplinary action in misconduct for failure to comply with that prohibition. The addition of the impugned termination measure exceeded what was necessary and did not strike a fair balance between the rights of the individual and the interests of the community. For all these reasons, the decisions made by the Public and Police Service Commissions to treat the respondents as having resigned their positions pursuant to SR&O 28 were void and of no effect.

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1998] 3 WLR 675 followed; **Bank Mellat v Her Majesty's Treasury (No. 2)** [2013] UKSC 39 applied; **Suraj and others v Attorney General of Trinidad and Tobago** [2023] AC 337 followed.

JUDGMENT

[1] **VENTOSE JA:** This is an appeal against the decision of the learned trial judge dated 13th March 2023 in which she declared as unlawful, unconstitutional, and void various rules, regulations, legislation passed, and decisions made, by officials in the Government and by the Parliament of Saint Vincent and the Grenadines to contain the spread of the novel coronavirus (SARS-CoV-2) (the "COVID-19 virus") and to preserve the life and health of the residents and citizens of the State of Saint Vincent and the Grenadines.

[2] The **Constitution of Saint Vincent and the Grenadines** (the "**Constitution**"),[1] like the constitutions of other Commonwealth Caribbean states, establishes the three branches of Government, namely the Executive, Parliament, and the Judiciary, each with its own functions and responsibilities in the constitutional democracy that is approaching its 45th anniversary this year. The limits of those functions were tested in the period commencing in or around March 2020 with the onset of the COVID-19 pandemic that brought the world to its knees, damaged economies, and not to mention the significant loss of life of approximately 7 million worldwide with approximately 700,000,000 persons contracting the COVID-19 virus over the globe. To say the world was not prepared for a pandemic would be a gross understatement. Commonwealth Caribbean states with limited financial or other resources had to ensure that they did the best they could to save the lives of all citizens, particularly the elderly, children and those who were immunocompromised. In the early stages of the COVID-19 pandemic, there was no vaccine, and the race had started for one to be developed, providing the only hope to ensure that hospitalisations and contraction of the COVID-19 virus were kept low and that lives were saved, and that some semblance of normality would eventually return to the society and economy.

[1] Cap 10 of the Revised Laws of Saint Vincent and the Grenadines 2009.

Background

[3] The respondents, who were the claimants in the court below, were healthcare workers, teachers, police officers, and other public officers. Saint Vincent and the Grenadines was no exception to the loss of life and the disruption to society and the economy caused by the COVID-19 pandemic. In response to the COVID-19 pandemic, to prevent the spread of the COVID-19 virus, and serious hospitalisation and to save lives, the Parliament of Saint Vincent and the Grenadines enacted various laws and implemented measures and protocols to deal with the public health emergency as deemed necessary by the public health officials from time to time, to deal with the ever-changing public health emergency. In April 2020, the Parliament passed the **COVID-19 (Miscellaneous Amendments) Act, 2020**[2] (the "**Amendments Act**") which gave the Minister the power to modify by Order any existing law by amending the Schedule to the Amendments Act. Also in April 2020, the Parliament amended the **Public Health Act**.[3] The amendments, among other things, empowered the Minister of Health, Wellness and the Environment (the "Minister of Health") on the recommendation of the Chief Medical Officer (the "CMO") to declare that a public health emergency exists in Saint Vincent and the Grenadines if the CMO believes this is the case and that it cannot be mitigated or remedied without the implementation of special measures (section 43B(1) of the **Public Health Act**).

[4] In December 2020, the Minister of Health, acting on the advice and recommendations of the CMO and pursuant to section 43B(1) of the **Public Health Act** published the **Public Health Emergency (Declaration) Notice, 2020**[4] in the Official Gazette in which he declared a public health emergency for Saint Vincent and the Grenadines caused by the COVID-19 pandemic. The disruption to the society and economy included disruption to public services, including in the health sector, the police force, and the education sector. Consequently, in October 2021, the Minister of Health

[2] Act No. 5 of 2020.
[3] By virtue of the Public Health (Amendment) Act, 2020, Act No. 6 of 2020.
[4] SR&O No. 38 of 2020.

promulgated the **Public Health (Public Bodies Special Measures) Rules, 2021**[5] (the "**Special Measures**") pursuant to section 43B(2) and section 147 of the **Public Health Act**. In the preamble to the **Special Measures**, it is expressly stated as follows:

> "**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 –"

[5] The power to make the **Special Measures** was stated expressly by the Minister to be made by the powers conferred on him by both section 43B of the **Public Health Act** and section 147 of the **Public Health Act**,[6] which provides as follows:

> "**General power to make rules.**
> 147. The Minister shall have power to make rules generally for the carrying out of the purposes of this Act."

[6] Section 43B of the **Public Health Act** provides as follows:

> "43B. (1) Where the Chief Medical Officer believes that a public health emergency exists in Saint Vincent and the Grenadines and believes that the public health emergency cannot be mitigated or remedied without the implementation of special measures under this section, the Chief Medical Officer shall recommend to the Minister that a public 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.
> (2) Where the Minister has declared a public health emergency, the Minister, on the advice of the Chief Medical Officer, may implement special measures to mitigate or remedy the emergency including –
> …"

[7] The **Special Measures**, among other things, required frontline public officers to be vaccinated (Rule 5) unless they were exempted on medical or religious grounds (Rule 7). Those public officers to whom Rule 5 applied and who failed to comply without reasonable excuse, were not to enter the workplace and were to be treated as being absent without leave (Rule 8(1)). Regulation 31 of the **Public Service Commission Regulations**[7] which speaks to abandonment of office was to apply to

---

[5] SR&O No. 28 of 2021.
[6] Act No. 9 of 1977.
[7] SR&O No. 48 of 1969 as amended.

the public officers to whom Rule 8(1) applied (Rule 8(2)). In November 2021, the **Police Act**[8] was also amended to insert a new section 73A which provides for the application of Rule 8 of the **Special Measures** to the Royal Saint Vincent and Grenadines Police Force and contains provisions similar to Regulation 31.

[8] The respondents did not take the COVID-19 vaccine as required by Rule 5, so they were unable to lawfully attend work while unvaccinated as mandated by Rule 8. The medical exemption found in Rule 7 did not apply to them and where the religious exemption only applied to some, the employer was not able to make suitable arrangements to accommodate them elsewhere in the public service. By failing to comply with Rule 5, the respondents ceased to be public officers by the application of Rule 8 and Regulation 31. Consequently, the Public Service Commission, the Police Service Commission, and the Commissioner of Police wrote to all the respondents, except one, informing them that they were deemed by operation of law to have resigned from their offices which became vacant, and that they ceased to be public officers.

[9] The respondents denied they had abandoned their jobs and claimed that they reported to work but were prevented from fulfilling their duties. Consequently, the respondents pursuant to leave previously granted by the learned trial judge brought constitutional and judicial review proceedings in the High Court challenging legislation made by Parliament, and rules and decisions made by the appellants in response to the COVID-19 pandemic. The context of the issues raised in this appeal is aptly described by the learned trial judge as follows:

> "[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**

[8] Cap 391 of the Revised Laws of Saint Vincent and the Grenadines, as amended.

evidence that they retained the choice 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." (Emphasis added)

The decision of the court below

[10] The learned trial judge in a lengthy written judgment dated 13th March 2023 found in favour of the respondents on most of their grounds of challenges. The learned trial judge held, among other things, that: (1) the Amendments Act was unconstitutional because it contravened the separation of powers doctrine by giving the Minister limitless legislative authority to arbitrarily or otherwise amend 'any existing law'. This meant that section 73A which was inserted in the **Police Act** by order made under section 2(2) of the **Amendments Act** was null and void; (2) the Minister did not act on the advice of the CMO as required by section 43B of the **Public Health Act** thereby exceeding his authority and acting unlawfully. Rules 8(1) and 8(2) were therefore void; (3) Rule 8 was unconstitutional because the Minister of Health in promulgating them usurped the powers and functions of the Public Service Commission (the "Commission") under section 77(13) and 78(1) of the **Constitution**; (4) the Commission, the Police Service Commission and the Commissioner of Police: (a) acted unlawfully and contrary to the rules of natural justice in failing to give the respondents an opportunity to be heard before issuing the letters to the respondents; and (b) contravened sections 77(12) and 84(6) and (7) of the **Constitution** by acting under the directions of the Minister of Health. This meant that the decisions taken by the Commission, the Police Service Commission, and the Commissioner of Police pursuant to Regulation 31 were unlawful and unconstitutional. The learned trial judge accordingly made fourteen declarations and granted three orders of *certiorari* to reflect her decisions on the judicial review and constitutional claims.

The Appeal

[11] The appellants filed an appeal on 29th March 2023 against the decision of the learned trial judge dated 13th March 2023 advancing 17 grounds of appeal. The following issues arise for consideration based on the grounds of appeal: (1) whether Rule 8 of

the **Special Measures** was unconstitutional and or unlawful because: (a) the Minister of Health did not act on the advice or recommendation of the CMO as required by section 43B of the **Public Health Act** in making Rule 8; (b) in making Rule 8, the Minister usurped the functions of the Commission under sections 77(13) and 78(1) of the **Constitution**; and (c) Rule 8 contravened the respondents' constitutional rights under sections 6 (protection from deprivation of property) and 88 (pension law and protection of pension right) of the **Constitution**; (2) whether the Commission, the Police Service Commission and the Commissioner of Police (a) acted unlawfully and contrary to the rules of natural justice in failing to give the respondents an opportunity to be heard before issuing the letters to the respondents; and (b) contravened sections 77(12) and 84(6) and (7) of the **Constitution** by acting under the directions of the Minister of Health; and (3) whether the **Amendments Act** is unconstitutional for contravening the separation of powers doctrine.

Issue (1) - Whether Rule 8 of the Special Measures is unlawful and or unconstitutional

[12] Rules 4, 5, and 7, as applicable, of the **Special Measures,** provide as follows:

> "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 to his employer a negative rapid test or PCR test on reporting to work.
>
> (2) A determination by the Chief Medical Officer under sub-rule (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.
>
> …
>
> 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."

[13] Also forming part of the **Special Measures** are Rules 8(1) and 8(2), which are at the heart of this appeal, that state as follows:

> "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)."

[14] Regulation 31 of the **Public Service Commission Regulations** states that:

> *"Determination of Appointments*
>
> **31. Abandonment of office**
>
> An officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer."

[15] It must be noted at the outset that, in the proceedings in the court below, there was no challenge to any of the other rules contained in the **Special Measures.** Rule 5

which required every employee specified in the Schedule to be vaccinated against the COVID-19 virus, except if exempted on medical and religious grounds in accordance with Rule 7, was not challenged in these proceedings. Consequently, it remained a legal, and presumptively constitutional, requirement for all such public officers to be vaccinated. This appeal, it must be emphasised, does not concern the mandatory requirement for public officers to be vaccinated against the COVID-19 virus. This judgment therefore is not concerned with the arguments for and against mandatory or compulsory COVID-19 vaccination found in Rule 5. Since the purpose of the **Special Measures** were to combat the spread of the COVID-19 virus, Rule 5 would be made redundant if it was not accompanied by Rule 8 which required all employees not to enter the workplace while unvaccinated. Similarly, Regulation 31 has existed as part of the law of Saint Vincent and the Grenadines since 1969 and has also not been challenged in these proceedings. The same analysis below in respect of Rule 8 and Regulation 31 therefore applies to section 73A of the **Police Act** which expressly applies Regulation 31 to police officers.

[16] In the court below, the respondents did not argue that they were not absent from duty for a period of ten working days or more without leave to engage the application of Regulation 31 to them. The uncontroverted evidence of the Commissioner of Police is that he determined that the unvaccinated police officers should be deemed to have resigned their posts having been absent from their posts without leave for a period of 10 consecutive days. It was on that basis that police officers were issued with letters from the Commissioner of Police informing them that they were deemed to have resigned from office under section 73A of the **Police Act**. Similarly, the uncontroverted evidence of the Commission was that the Commission granted approval for the unvaccinated public officers to be deemed to have resigned from their posts having been absent from their posts without leave for a continuous period of 10 days in accordance with Rule 8(2). The factual basis for the determinations by the Commissioner of Police and the Commission was not challenged by the respondents. In the court below, the respondents chose not to cross-examine any of the witnesses for the appellants. The respondents' case was that Rule 8, by deeming

them to have vacated their office, is unlawful for reasons accepted by the learned trial judge that will be explored fully later in this judgment. Rule 8 must be read in the context of Regulation 31 to which it impliedly and expressly refers. It is pellucid that the drafters of Rule 8 wanted to make certain that Regulation 31 applied to the situation where an employee is absent from duty because they are unvaccinated. The drafters did so in two ways.

Rule 8(1)

[17] The first was by stating expressly in Rule 8(1) that an employee who fails to present to his employer a negative rapid test or PCR test on reporting to work or who is unvaccinated and therefore cannot enter the workplace 'is to be treated as being absent from duty without leave'. Noncompliance with Rule 5 and the inability to enter the workplace is the basis for the second part of Rule 8(1). As the uncontradicted evidence of the Commission shows, a person who is unvaccinated but is on sick leave, maternity leave, or vacation leave would not contravene Rule 8(1) because they would not be absent from duty without leave. Noncompliance with Rule 5 must be followed by inability of that officer to enter the workplace for that reason alone, and therefore absent from duty without leave for a period of ten working days or more.

[18] The second part of Rule 8(1) was inserted arguably to remind public officers that if they are unable to enter the workplace to perform their duties, they will be treated as absent from duty without leave. It seemingly borrows language from Regulation 31. Unless that unvaccinated public officer has official leave (sick leave, vacation leave, or maternity leave) he or she would, as a matter of fact, be absent from duty without leave if they are unable to enter the workplace to perform their duties for a period of over 10 days. Following a line of questioning from myself at the hearing of the appeal, counsel for the appellants accepted that these additional words in Rule 8(1) – 'and is to be treated as being absent from duty without leave' – are mere surplusage. I completely agree. They do not add or subtract from the core public health measure designed to mitigate or remedy the public health emergency. In my view, nothing in

law turns on these additional words when Regulation 31 is engaged by Rule 8(2) to which I now turn.

Rule 8(2)

[19] The second way in which the drafters of Rule 8 made clear that Regulation 31 applied to an employee who contravened Rule 5 and was consequently not able to enter the workplace for a continuous period of 10 working days was by stating expressly in Rule 8(2) that Regulation 31 of the **Public Service Commission Regulations** applies to a public officer who is absent from duty without leave under subrule (1). In my view, the insertion of Rule 8(2) in the **Special Measures** was not necessary because Regulation 31 applies to every situation where an employee so absents himself or herself from duty without leave for at least ten working days. These situations, for good reason, were not spelt out in Regulation 31. As mentioned above, it may be that reference to Regulation 31 was stated expressly in Rule 8(2) to make it plain to any officers who do not comply with Rule 5, that if they do not get vaccinated and were therefore absent from work for a period of ten working days or more without leave, then, Regulation 31 would be applied with the consequence that: (1) the officers shall be deemed to have resigned from their office; (2) the offices that they hold shall become vacant; and (3) those officers shall cease to be officers. In the end, although unnecessary, it made practical sense to alert officers to the consequences of their non-compliance with Rule 8 and their consequential inability to perform their duties to their employer for the relevant period without leave so that those officers could make informed decisions if they wished to continue to be officers or remain steadfast in their noncompliance with Rule 5 with the result that they cease to be officers.

Summary of effect of Rules 8(1) and 8(2)

[20] The first part of Rule 8(1) prohibits public officers from entering the workplace while unvaccinated. That is the critical and important part of Rule 8(1). It was this measure recommended by the CMO that was designed to mitigate or remedy the public health emergency brought about by the spread of the COVID-19 virus. The effects of the

second part of Rule 8(1) and Rule 8(2) are as follows. First, the second part of Rule 8(1) borrows language from Regulation 31 stating that an unvaccinated public officer who cannot enter the workplace will be absent from duty without leave and, second, Rule 8(2) merely states that Regulation 31 applies to such a public officer.

[21] If the Commission had applied Regulation 31 to any public officer who had been absent from duty without leave for a period less than ten working days, the Commission would have acted unlawfully for Regulation 31 would simply not have applied. Since none of the respondents have argued that they had not been absent from duty without leave for a period of less than ten working days, I will proceed on the basis that Regulation 31 was properly engaged by the Commission, the Police Service Commission, and the Commissioner of Police in relation to the respondents.

[22] The learned trial judge held that Rule 8 is unconstitutional and/or unlawful for at least three main reasons as follows.

Issue (1)(a) – The Minister of Health and the advice of the CMO

[23] The first reason was that the Minister of Health did not act on the advice of the CMO in making Rule 8 of the **Special Measures** as is required under section 43B(2) of the **Public Health Act**. Section 43B(2) states as follows:

> "(2) Where the Minister has declared a public health emergency, the Minister, on the advice of the Chief Medical Officer, may implement special measures to mitigate or remedy the public health emergency including –
>
> ...
>
> (i) any other measure the Minister, on the advice of the Chief Medical Officer considers necessary, considers necessary for the protection of public health during the public health emergency."

[24] Of critical importance is the uncontroverted evidence of the Minister of Health at paragraph [10] of his affidavit[9] that the CMO advised that frontline public officers must be vaccinated against COVID-19 to work in their workplaces and should not enter

[9] Affidavit of Mr. St. Clair Prince, Minister of Health, filed 11th October 2022.

the workplace because if an unvaccinated worker entered the identified high-risk workplace, they would present a risk of infection to others or risk being infected. I note that the CMO at paragraph [85] of her affidavit[10] expressly stated that she advised the Minister of Health that essential workers like the respondents should not enter the workplace because they would present a risk of infection to or risk being infected by patients, students, prisoners, travellers etc. The same recommendation was also made in paragraph [85] in relation to all health care workers in order to work in a Government health care facility. These are clear references to the first part of Rule 8(1).

[25] The principles that guide an appellate court in affording particular respect or deference to the decision of a trial judge on findings of fact are plainly applicable here since the affidavits of the deponents stood as their evidence in chief and there was no cross-examination on any of the witnesses for the parties. In **Shaista Trading Company Limited d.b.a. Diamond Republic v First Caribbean International Bank (Barbados) Ltd**,[11] this Court, after quoting from the well-known passage in **Biogen Inc v Medeva Plc**[12] stated that:

> "[33] Lord Hodge, in the judgment of the Board in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**, cautioned that the Court of Appeal ought first to be satisfied that the trial judge was 'plainly wrong' before interfering with the judge's findings of primary fact or his or her evaluation of facts. His Lordship explained that the issue of whether the trial judge was 'plainly wrong' directs the appellate court to consider whether it was permissible for the trial judge to make the findings of fact which he or she did in the face of the evidence as a whole. In other words, the court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his or her conclusions. Indeed, a quintessential example of circumstances in which the appellate court ought properly to interfere with the trial judge's findings of fact is where the judge failed to properly analyse the entirety of the evidence."

[26] There was no cross-examination of either the Minister of Health or the CMO on this issue which meant there was no basis for the learned trial judge to reject the evidence

[10] Affidavit of Dr. Simone Keizer- Beache, Chief Medical Officer.
[11] ANUHCVAP2018/0021 (delivered 26th April 2021, unreported) at paragraph 33.
[12] [1997] RPC 1.

of the CMO and the Minister of Health. Consequently, the trial judge was incorrect to state that the Minister of Health did not as a matter of fact act on the advice of the CMO in making Rule 8. This finding is contrary to the uncontroverted evidence of the CMO and the Minister of Health and there was no basis for the learned trial judge not to accept it. It seemed that the learned trial judge failed to make a proper distinction between, on the one hand, the prohibition of unvaccinated public officers to enter the workplace found in the first part of Rule 8(1) and, on the other hand, the reference to treating those unvaccinated public officers as absent from duty without leave (the second part of Rule 8(1)) and the express reference in Rule 8(2) to Regulation 31. The advice of the CMO was only relevant to the first part of Rule 8(1). No such advice was required from the CMO before the Minister of Health could include the second part of Rule 8(1) and Rule 8(2) in the **Special Measures**. The factual findings on this issue by the learned trial judge at paragraphs [143], [147]-[148], [150]-[151], [168], and [170], that the Minister did not act on the advice of the CMO in respect of Rule 8 contradict, without any foundation, the uncontradicted evidence of the Minister of Health found at paragraph [10] of his affidavit mentioned above and that of the CMO at paragraph [85] of her affidavit also mentioned above. Consequently, I am satisfied that the learned trial judge was plainly wrong in finding otherwise

Minister acting on the advice of CMO for some but not all rules in the Special Measures

[27] The respondents misunderstand the issue in this appeal. Contrary to their submission, the question is whether the CMO advised the Minister of Health that unvaccinated persons should not enter the workplace rather than whether the CMO advised the Minister of Health that Regulation 31 should apply to such persons. I agree that the Minister of Health is required to act on the advice of the CMO for some, but not all of the rules contained in the **Special Measures**. However, one must carefully scrutinise any rule to determine whether it is one that can properly be considered a measure that was designed to mitigate or remedy the public health emergency, namely, the spread of the COVID-19 virus or whether it is one that includes a deeming provision or merely refers to existing law. As concluded above, and accepted by the appellants, the second part of Rule 8(1) and Rule 8(2) merely

do just that – first, the second part of Rule 8(1) states that an unvaccinated public officer who cannot enter the workplace will be deemed to absent from duty without leave and, second, Rule 8(2) merely states that Regulation 31 applies to such a public officer. These could not be and were not part of the advice given by the CMO to the Minister of Health. There was no need for them to form part of that advice because the first uses language borrowed from Regulation 31 and the second merely references existing law (Regulation 31) that would apply to that circumstance once it exists.

[28] The deeming aspect of Rule 8(1) uses language borrowed from Regulation 31 and is arguably narrower than the scope of Regulation 31. For Regulation 31 to apply, a public officer must have absented themselves from duty without leave for a period of 10 days or more. Rule 8(1), by its curious drafting deems an unvaccinated public officer who cannot enter the workplace as being absent from duty without leave. However, one cannot lose sight of the fact that Rule 5 makes clear that for public health all public officers must be vaccinated against the COVID-19 virus, and Rule 8 effectively states that any unvaccinated public officer must not enter the workplace. Importantly, the respondents have not challenged the application of Regulation 31 to any unvaccinated public officer who absented themselves from duty without obtaining leave for a period of 10 days or more. Similarly, while the respondents challenge Rules 8(1) and (2) their main challenge is essentially to the deeming aspect found in Rule 8(1). As I mentioned earlier, the application of Regulation 31 to any unvaccinated public or police officer who was not able to enter the workplace for a period of 10 days or more would be unassailable, for the deeming provision would apply and that unvaccinated public or police officer would be deemed to have resigned from office.

[29] It must be noted that while Rule 8(1) states that such an unvaccinated public officer who must not enter the workplace will be absent from duty without leave, it was no part of the respondents' case that, apart from Rule 8(1), they did not absent themselves from duty without leave for a period of 10 days or more, thereby engaging

Regulation 31 by virtue of Rule 8(2). Even if the deeming aspect of Rule 8(1) was unlawful, that would not avail the respondents as Regulation 31 would still be engaged and the result would be the same. Merely stating that they were available to work, or that they did not abandon their jobs, cannot be a sufficient answer to the requirement that all public officers must be vaccinated in accordance with Rule 5, and a failure to be vaccinated meant that they must not enter the workplace pursuant to Rule 8(1). It is true that Regulation 31 speaks of being 'absent from duty'; while Rule 8(1) refers to not entering the workplace. However, as a practical matter, it hardly needs explaining that a public officer who is unable to enter the workplace by virtue of Rule 8(1) for noncompliance with a valid Rule 5 which required him or her to be vaccinated, would not be able to report to his or her workstation and would therefore be 'absent from duty' for the purposes of Regulation 31.

[30] More importantly, it was not part of the mandate of the CMO under section 43B(2) of the **Public Health Act** to advise the Minister of Health in respect of anything other than providing the Minister of Health with advice relating to measures designed to mitigate or remedy the public health emergency. Neither the evidence of the CMO nor the Minister of Health mentioned any advice given by the CMO in relation to the second part of Rule 8(1) or Rule 8(2). The uncontradicted evidence of the Minister of Health was that the CMO advised that frontline public officers must be vaccinated against the COVID-19 virus to work in their workplaces and should not enter the workplace if unvaccinated. It is arguable that the inclusion of the second part of Rule 8(1) or Rule 8(2) in the **Special Measures** was done out of an abundance of caution or were mere surplusage as the counsel for the appellants put it at the hearing of the appeal. While some parts of Rules 8(1) or 8(2) were not based on the advice of the CMO, it is not doubted that they were measures to mitigate or remedy a public health emergency by ensuring compliance with the requirement in that police officers and public workers must be vaccinated before entering the workplace.

[31] The appellants submit that Rule 8 was a reasonably necessary rule to ensure the efficacy of the mandatory vaccination rule found in Rule 5. As mentioned earlier, the

prohibition on unvaccinated public officers from entering the workplace was one of the measures recommended by the CMO to the Minister of Health to mitigate or remedy the public health emergency brought about by the spread of the COVID-19 virus. Rule 8 is not an enforcement mechanism for Rule 5 per se. It is the application of Regulation 31 to an unvaccinated public officer who is unable to enter the workplace that ensures the efficacy of the first part of Rule 8(1). Regulation 31 would in any event apply to unvaccinated public officers to whom the first part of Rule 8(1) applied. The enforcement of Rule 8 is achieved through the operation of Regulation 31.

[32] Without the enforcement mechanism of Regulation 31, Rules 5 and 8 would have been rendered meaningless by those public officers who were adamant that they would not get vaccinated and wish to continue to be able to enter the workplace to perform their duties. The learned trial judge was wrong to conclude that the Minister of Health was required to act on the advice given or the recommendation made to him by the CMO before making Rule 8 when the uncontroverted evidence of the Minister of Health was that he so acted in making the first part of Rule 8(1). The second part of Rule 8(1) and Rule 8(2) do not form part of the recommendation of the CMO and for reasons already explained and for the additional reasons below, there was no need for them to have been.

The deeming aspect of Rule 8(1)

[33] Rule 8(1) purports to be a deeming provision. While we do not hear argument on this point, what is the effect of this aspect of Rule 8(1)? In **Fowler v Revenue and Customs Commissioners**,[13] the United Kingdom Supreme Court provided some guidance on how deeming provisions are to be interpreted and applied as follows:

> "**Deeming provisions**
> 27 There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker of

[13] [2020] 1 WLR 2227 at 2236, paragraph 27.

Gestingthorpe JSC in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs [2011] 1 WLR 44, paras 37–39*, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd [1981] 1 WLR 637*, *Marshall v Kerr [1995] 1 AC 148* and *Jenks v Dickinson [1997] STC 853*. They include the following guidance, which has remained consistent over many years:

> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council[1952] AC 109, 133*:
>
> > "The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.""

[34] It seems to be that in so far as Rule 8(1) states that an unvaccinated person must not enter the workplace and "is to be treated as being absent from duty without leave", it is a deeming provision. Rule 8(1), therefore, deemed an unvaccinated person as being absent from duty when absence from duty is a matter of fact. In my view, this aspect of the deeming provision of Rule 8(1) should not be applied insofar as it may produce unjust, absurd or anomalous results. Something is missing from the last part of Rule 8(1). It should read as follows: "and [if any employee is consequently unable to enter the workplace, they are] to be treated as being absent from duty without leave". This, to my mind, resolves the absurd result that may be occasioned without the insertion of those words. However, I prefer the guidance provided by the UKSC in **Fowler** to the effect that the deeming aspect should not be

applied where it leads to the result that is unjust, absurd or anomalous as in the case here. Rule 8(2) as I have earlier explained merely, out of an abundance of caution, states that Regulation 31 applies any unvaccinated employee who is unable to enter the workplace.

Minister's general power to make rules

[35] As mentioned above, in the preamble to the **Special Measures**, it was stated that the Minister in the exercise of the powers conferred by both sections 43B of the **Public Health Act** and section 147 of the **Public Health Act** made the rules contained in the **Special Measures**. As explained above, section 147 states that the Minister shall have power 'to make rules generally for the carrying out of the purposes of this Act'. There can be no doubt that the **Special Measures**, including Rules 8(1) and 8(2), were properly made by the Minister pursuant to section 147 of the **Public Health Act**. It matters little that not every rule in the **Special Measures** were not made by the Minister based on the advice of the CMO, because the Minister had the general power under section 147 of the **Public Health Act** to make the **Special Measures** without reference to section 43B(2) of the **Public Health Act**. It is not doubted that the Minister acted on the advice of the CMO in making most of the **Special Measures**. However, for those rules that were not made on the advice of the CMO, the Minister had the lawful power to make them under section 147 of the

Public Health Act.

[36] It is not the case that the **Special Measures** were made pursuant to section 43B(2) of the **Public Health Act**, and the Minister now submits that he could have made them pursuant to section 147. In the **Special Measures**, it is expressly stated that the Minister made them pursuant to section 43B and section 147 of the **Public Health Act**. I agree that the source of the power of the Minister is statutory and that he does not have any inherent power to make rules. The source of the power of the Minister to make any rule in the **Special Measures** that were not based on the advice of the CMO is section 147 of the **Public Health Act**. There is no limit on the wider powers granted to the Minister under section 147 of the **Public Health Act** and there is

nothing in section 43B that limits that power. To the contrary, section 43B merely provides additional powers to the Minister but it does not in any way limit his general rule making power in section 147 of the **Public Health Act**. The learned trial judge at paragraph [105] accepted that the Minister would have the power under section 147 of the **Public Health Act** to implement the **Special Measures**, stating that:

> "[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 s 147 (that also predated s 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 ss 43B and 147 of the Act."

[37] The learned trial judge appreciated that the wide powers granted to the Minister under section 147 of the **Public Health Act** were in fact used to make the **Special Measures**. Having noted this, the learned trial judge was wrong to conclude that Rules 8(1) and 8(2) were not made under the advice of the CMO and for that reason were unlawful. The Minister lawfully exercised his rule making power under section 147 of the **Public Health Act** in respect of any matter found in the **Special Measures** that the CMO did not advise him directly on. In my view, there is no need to reconcile the rule-making powers of the Minister under section 43B and section 147 of the **Public Health Act**. The respondents have not challenged the power of the Minister to make any of the Rules, including Rules 8(1) or 8(2), or any part therefore, under section 147 of the **Public Health Act**. In making the **Special Measures** under both sections the Minister lawfully made Rules 8(1) and 8(2) under the power conferred on him generally under section 147 and based on the advice of the CMO under section 43B of the **Public Health Act**.

[38] In addition, one must also have regard to section 39 of the **Interpretation and General Provisions Act**[14] ("the **Interpretation Act**") which provides as follows:

> "39. Construction of enabling words
>
> Where any written law confers power upon any person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also

[14] Cap 14 of the Revised Laws of Saint Vincent and the Grenadines,2009.

conferred as are necessary to enable the person to do, or to enforce the doing of, that act or thing."

[39] Therefore, in exercising his power under section 43B, the Minister would also have the power to enforce compliance with the part of Rule 8 which was based on the advice of the CMO. I also agree with the appellants' submission that under section 39 of the **Interpretation Act**, the Minister in any event has the implied power to enforce compliance with the requirement under Rule 8 that public officers must not enter the workplace while unvaccinated. This is a basis founded in law that grounds the powers of enforcement of the Minister.

Regulation 31 not challenged

[40] It is not in dispute that the application of Regulation 31 requires a fact-specific inquiry. However, the respondents have not challenged Regulation 31 in their constitutional and judicial review proceedings. Their challenge is to the lawfulness of Rule 8(1) and Rule 8(2) which, out of an abundance of caution, state that Regulation 31 applies to a public officer who fails to be vaccinated in accordance with Rule 5 and is deemed to be absent from duty. The effect of Regulation 31 is to deem anyone who has absented themselves from duty without leave for a period of 10 working days to have resigned from office. This requires three factual determinations. The first is the person has absented themself from duty. Second, the absence from duty lasted for at least 10 days. The third is they did not obtain leave before being absent from duty. As I mentioned earlier, none of the respondents challenged the factual bases for the application of Regulation 31 in their respective cases. Their challenge to Rules 8(1) and Rule 8(2) were broadly stated and seemingly applied in respect of each of the respondents.

[41] In the letters to the public officers, it was stated expressly that by failing to comply with Rule 5 that they were absent from duty without leave pursuant to Rule 8 and that in accordance with Regulation 31 they ceased to be an officer. Similarly, in the letter to police officers, it was stated expressly that section 73A of the **Police Act** provides that a police officer who is absent from duty without leave for ten (10) consecutive

days is deemed to have resigned from his or her office. This makes pellucid that Regulation 31 is the lawful basis on which the appellants were deemed to have resigned their offices. A failure to comply with Rule 5 and Rule 8 is the factual background which provided the context in which they were deemed to have resigned from their offices. In my view while it is arguable that Regulation 31 would apply in any event, what is clear is that Regulation 31 was the driving force behind the letters received by the respondents for failing to be vaccinated in accordance with Rule 5, and being unable to enter the workplace pursuant to Rule 8, and by satisfying the requirements, according to the appellants , of Regulation 31. Having not challenged the application of Regulation 31 to them, it is not open to this Court in this appeal to entertain any argument as to whether the requirements were satisfied for its deployment in the case of each respondent. That was not their pleaded case in the court below and cannot be their case on this appeal.

[42] For the purposes of this appeal, Regulation 31 must be taken to be valid and properly applied in the case of the respondents. None of them challenged the constitutionality of Regulation 31 or its application to any of them. On this appeal, it would not be appropriate for this Court to make pronouncements on a law that has not been challenged in the court below. Our remit in this appeal is confined to a determination of the lawfulness or otherwise of Rules 8(1) and 8(2). Any concerns that might be had with Regulation 31 must wait another day when its constitutionality is properly before this Court for determination. In any event, it is for the respondents to prove that the requirements of Regulation 31 were not satisfied in each case. In the proceedings in the court below the respondents have not challenged the application of Regulation 31 to them. To do so, I accept would require a factual enquiry as to whether the requirements of Regulation 31 have been satisfied. It is improper on this appeal where the learned trial judge has made no findings of fact in respect of whether the requirements of Regulation 31 and where the respondents do not challenge the application of Regulation 31 to them, for this Court to embark on a factual determination as to whether the requirements were satisfied in the case of one or two respondents and make generalisations therefrom.

[43] It is important to make pellucid that it is the relevant body or person that made the decision concerning the application of Regulation 31 or section 73A of the **Police Act**. In the letter to the public officers from the Chief Personal Officer it was stated that "I have to inform you that the Public Service Commission has noted that …" and "[a]ccordingly, on behalf of the Public Service Commission, I have to inform you that you are deemed to have resigned your office …". This makes clear that it is the Commission, and not any person or body, that made the determination concerning Regulation 31. The letter to the police officers was directly from the Commissioner of Police and it is not doubted that it was the Commissioner of Police who made the decision. In light of this, it cannot reasonably be disputed that the Commission and the Commissioner of Police made the decisions concerning the application of Regulation 31 and section 73A respectively. There is nothing in the evidence to show that the Commission and the Commissioner of Police did not exercise their independent judgment concerning whether the requirements of Regulation 31 and section 73A of the **Police Act** were satisfied.

Abandonment at common law irrelevant

[44] The decision of this Court in **Huggins Neal Nicholas v Attorney General & The Teaching Service Commission**[15] is not material to a resolution of any of the issues in the court below or in this appeal because in that case this Court was not there dealing with the application of an equivalent deeming provision such as Regulation 31 and section 73A of the **Police Act**. It concerned whether the trial judge misdirected himself and therefore erred in law by finding that the appellant resigned his post and abandoned his post when he went abroad to study which created the cause of action and the running of time leading to the prescription of his action for recovery of salary due to him. The Court in **Nicholas** had to consider the meaning of abandonment of office and accepted at paragraph [12] that abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that

[15] SLUHCVAP 2008/018 (delivered 22nd March 2010, unreported).

office. Regulation 31 and section 73A of the **Police Act** makes provision for when a public officer or police officer is deemed to have abandoned his or her office. Once the requirements of Regulation 31 and section 73A of the **Police Act** have been satisfied, the public officer or police officer is deemed to have abandoned his or her office. There is no room for the secondary question of whether the public officer has in fact abandoned his or her office at common law.

[45] The decisions cited by the respondents concerning abandonment of office do not plainly apply where the abandonment of office is covered by Regulation 31 and section 73A of the **Police Act**. It is not the respondents' case in the court below that Regulation 31 unlawfully disapplied the criteria for abandonment at common law.

Conclusions on Issue 1(a)

[46] In my view, Rule 8 was made on the advice of the CMO in accordance with section 43B of the **Public Health Act**. The additional words in Rules 8(1) and 8(2) were not needed to be made on the advice of the CMO as they either merely repeated language already used in Regulation 31 (Rule 8(1)) or made express reference to the application of Regulation 31 (Rule 8(2)). Even if I am wrong on this, there can be no doubt that the Minister also made the **Special Measures**, of which Rule 8 is a part, under the powers granted to him by section 147 of the **Public Health Act**. This means that Rules 8(1) and 8(2) in full were also lawfully made under section 147 and for the avoidance of doubt, any part of Rules 8(1) and 8(2) that the CMO did not advise the Minister on were properly made by the Minister under section 147 of the **Public Health Act**. The Minister therefore had the: (1) express power under section 147 to make Rules 8(1) and 8(2); and (2) the implied power under section 43B of the **Public Health Act** and section 39 of the **Interpretation Act** to make Rules 8(1) and (2). The learned trial judge was therefore wrong to conclude that Rules 8(1) and 8(2) made pursuant to the purported power of the Minister under section 43B of the **Public Health Act** are unlawful, unconstitutional and void.

Issue (1)(b) – Minister of Health usurping the functions of the Commission

[47] The second reason given by the learned trial judge to hold that Rule 8 is unconstitutional and/or unlawful was that Rule 8 is contrary to: (1) section 77(13) of the **Constitution** which states that in the exercise of its functions the Commission shall not be subject to the direction or control of any person or authority; and (2) section 78(1) which gives the Commission the power to appoint, discipline and remove persons who hold or act in offices in the public service. It cannot be doubted that these powers are vested exclusively in the Commission: **Thomas v Attorney-General of Trinidad and Tobago**.[16] Without adequate explanation, the learned trial judge concluded at paragraph [162] that the Minister of Health trespassed on the exclusive jurisdiction of the Commission when he made Rule 8 of the **Special Measures.**

[48] In this regard, it is important to remember what Rule 8 really does. Rule 8(1) states that an employee who without reasonable excuse fails to comply with Rules 4 or 5 must not enter the workplace and is to be treated as being absent from duty without leave. It is doubtful whether the words 'and is to be treated as being absent from duty without leave' adds anything to Rule 8(1) because any employee who is unvaccinated cannot enter the workplace and consequently cannot perform their duties and as such would be absent from duty without leave. As already noted, counsel for the appellants at the hearing of the appeal accepted that these additional words are mere surplusage. These words merely reflect a fact that would exist if an employee failed to get vaccinated and was unable to enter the workplace to fulfil their contractual obligations for ten days or more. Rule 8(2) states that Regulation 31 of the **Public Service Commission Regulations** applies to a public officer who is absent from duty without leave under subrule (1). As I explained earlier, Rule 8(2) merely makes clear the application of Regulation 31 to Rule 8(1). The critical aspect of Rule 8 is therefore that an employee who without reasonable excuse fails to comply with Rules 4 or 5 must not enter the workplace. The rest operates as a matter

[16] [1982] A.C. 113.

of fact and law by the operation and application of Regulation 31. The decision in **Thomas** is not relevant to the analysis. It is difficult to see how Rule 8 usurps any of the functions of the Commission. The learned trial judge also erred in so finding.5

Issue (1)(c) – Rule 8 and the alleged deprivation of property and pension rights

[49] The third reason given by the learned trial judge to hold that Rule 8 is unconstitutional and/or unlawful was that Rule 8 was not proportionate because of the loss of pension rights which are entitled to constitutional protection under sections 6 (protection from deprivation of property) and 88 (pension law and protection of pension right) of the **Constitution**. It is important to note that this is the only constitutional right that the respondent alleged was contravened by Rule 8.

No evidence of a constitutional infringement

[50] I am of the view that, first, the only constitutional right that is protected by section 88 is a pension to which a person is lawfully entitled. In the application by way of originating motion and judicial review application, the respondents sought a declaration that Rule 8 insofar as it has the effect of providing for the deprivation of the respondents' accrued benefits associated with their employment, infringes the rights of the respondents to protection from deprivation of property without compensation under sections 1 and 6 of the **Constitution** and contravenes section 88 of the **Constitution** which protects pension rights and is therefore void. In the grounds in support of the declarations sought, the respondents stated that Regulation 31 has the effect of depriving them of their accrued pension rights arising from decades of service, pursuant to section 6 of the **Pensions Act**,[17] contrary to sections 1, 6 and 88 of the **Constitution**.

[51] The affidavit evidence of Brenton Smith, a former police officer, states that he is 'going to lose out on [his] social benefits in both [his] pension and gratuity benefits because of losing [his] job' because of Rule 8. Nothing is found in the affidavit of Cavet Thomas, a former customs officer, about loss of pension except that in his

[17] Cap 272 of the Revised Laws of St. Vincent and the Grenadines.

appointment letter dated 23rd July 2010, it is stated that the post Senior Customs Officer to which he was appointed was pensionable. Shaniel Howe, a former primary school teacher, made no mention of loss of any pension rights in her affidavit evidence. Alfanso Lyttle, a former public officer, averred that because of his termination, he 'will also lose [his] pension and gratuity benefits accrued over his years of dedicated service to his employer'. In his undated appointment letter as Assistant Supervisor, Customs and Excise Department, it is stated that the post is pensionable. In the affidavit of Sylvonne Olliver, former police officer, she states that the decision of the Commissioner of Police to terminate her under the guise that she had resigned from her job in accordance with Rule 8 and section 73A of the **Police Act** means that she 'may be denied [her] social security benefits in terms of [her] pension of gratuity'. In the joint affidavit of Shefflorn Ballantyne, Travis Cumberbatch and Rohan Giles, they state that there exists the 'probability that [they] stand to lose benefits such as pension and gratuity' and that the loss of these 'is a most painful thought given that many of [them] have given longstanding committed service to [their] respective employers'.

[52] It must be noted that in none of the affidavits filed by the respondents did they state that they have lost their pension or gratuity benefits. Moreover, none of them explained the basis on which they: (1) 'may be denied'; (2) 'probably stand to lose'; (3) 'will also lose'; or (4) are 'going to lose' their pension benefits. It was not surprising therefore that none of the affidavits filed in response to the constitutional and judicial review applications made mention of any alleged loss of pension rights or benefits by the respondents.

[53] Regulation 31 is found in the section of the **Public Service Commission Regulations** entitled 'Determination of Appointments' and is entitled 'Abandonment of Office'. Regulation 32 makes provision for the only circumstances where the services of a public officer may be terminated. While there are circumstances which result in a deemed resignation in accordance with Regulation 31, it is not a

termination as this is specifically provided for in Regulation 32. Regulation 38 states as follows:

> **"38. Pensions**
>
> Where the appointment of an officer is terminated under regulation 35, 36 or 37, his service shall terminate on such date as the Commission may determine and the question of his pension shall be dealt with in accordance with the Provisions of the Pensions Law."

[54] The existence of Regulation 38 does not mean that where the appointment of an officer is terminated based on his deemed resignation pursuant to Regulation 31, he will lose his or her pension. In this Court and in the court below the respondents argued that the application of Regulation 31 meant that the respondents would not qualify for a pension under the pension laws of Saint Vincent and the Grenadines. In the court below, the respondents submitted that by changing the definition of abandonment in Regulation 31 or by purporting to change the definition of abandonment, indirectly Rule 8 had the effect of changing the law or changing the respondents' rights to their pension because the pension legislation -- the **Pensions Act** specifies the situations in which or the circumstances in which an individual would qualify for a pension and that these do not include circumstances where a person has abandoned their job.

[55] The respondents do not submit that the effect of Rule 8 is to withhold, reduce or suspend any of their pension benefits contrary to section 88 of the **Constitution**. In the oral arguments before the learned trial judge, the respondents did not point to any specific provision of the pension law that would prevent any of the respondents from obtaining a pension to which they were lawfully entitled. The learned trial judge, after citing from paragraphs [55] and [57] of the decision of this Court in **Elvis Daniel et al. v Public Service Commission et al**,[18] observed at paragraph [172] that the pronouncements in those paragraphs are just as applicable in the case at bar and that she endorsed them and applied them to the facts of the case. The learned trial judge concluded that any respondent in the consolidated cases before the court who

[18] SVGHCVAP2016/0007 (delivered 29th January 2019, unreported).

had accrued any pension benefits was entitled to receive them. This is not a finding that the respondents had any accrued pension benefits. The learned trial judge was merely stating that if any respondent can establish that he or she had any accrued pension benefits they would be entitled to receive them.

[56] The learned trial judge applied the learning of this Court in **Daniel** that pension benefits can be protected under section 6 of the **Constitution**. It must be noted that this Court in **Daniel** explained that a person is entitled to their pension benefits 'unless the deprivation of benefits arises from a lack of qualification or entitlement to it'. Assuming the respondents are correct in their assessment that a person who has abandoned their office under Regulation 31 would not be eligible for a pension, there would be no deprivation of any property because that deprivation would arise from a lack of qualification or entitlement to the pension benefit. The fact that a person may fall generally under a category of persons who are not entitled to a pension under the pensions law, assuming this to be true, cannot be a basis for a finding that, that law is unconstitutional for creating the circumstance within which a person may fall that would disentitle them to a pension.

[57] In **Daniel**, this Court had to consider whether the Government of Saint Vincent and the Grenadines (the "Government") breached Article 16 of a Collective Agreement entered with the Saint Vincent and the Grenadines Union of Teachers (the "Union") which provided for a no pay leave of absence of up to six months for certain Union members to contest elections. It also provided that in the event that the member is unsuccessful in the elections, that member shall return to his or her original post or one of equivalent status, all benefits intact.

[58] The appellants sought leave to contest general elections but were denied leave, so they resigned their posts as teachers in the public service. After unsuccessfully contesting the general elections, the appellants sought reinstatement to their posts as teachers, but this was denied by the Chief Personnel Officer who responded that there was no vacancy to which the appellants could have been appointed. The

appellants brought proceedings in the High Court seeking a declaration that Article 16 of the Collective Agreement does not breach section 26(1)(d) of the **Constitution** which provides that no person shall be qualified to be elected as a representative if he holds or is acting in any public office.

[59] One of the declarations the appellants sought in the court below was that the respondents continued to act in bad faith in refusing to honour the terms of the Collective Agreement and to restore them to their teaching posts or posts of equivalent status within the public service, thereby violating the Collective Agreement and depriving them of their fundamental right to property guaranteed by section 6 of the **Constitution**. As this Court noted, the appellants also sought an order directing the respondents to restore them to their original teaching posts or to posts of equivalent status; damages for losses suffered as a consequence of the respondents' failure to honour the terms of the Collective Agreement and for breach of their constitutional rights. One of the issues considered by this Court was whether the appellants were deprived of their fundamental right not to be deprived of property as guaranteed by section 6 of the **Constitution**.

[60] The Court dealt with the issue of pension rights as follows:

> "[55] To my mind, the critical issue arising in respect of the appellants' property rights violation argument concerns pension benefits. 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. The issue of the loss of pension benefits was in fact foreshadowed by the learned judge in paragraph 15 of his judgment, when he stated that the small pool of persons qualified to run for office as parliamentary representatives is diminished further if persons who are willing to serve can only do so on pain of loss of all benefits accrued over decades if their bid for political office fails.
>
> …
>
> [57] It appears to me that the learned judge made a determination that having resigned, contested and lost, the appellants also lost their pension benefits. 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.

…

[59] On the state of the evidence, this Court is not equipped to make the assessment required. Apart from evidence of length of service of the appellants - 32, 30 and 39 years respectively - there is an evidential lacuna. I would therefore remit the matter to the High Court for assessment of damages. The judge would give such directions with respect to evidence and disclosure as required to facilitate the process. It would really involve a computative exercise reflecting expected pension benefits up to the date of the appellants' resignation."[19]

[61] Although at first blush, it seems as if this Court in **Daniel** was equating property rights with 'accrued pension benefits', this must be placed in the context of the statement by this Court at paragraph [55] that "[p]ension 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". Therefore, the Court makes plain that to be protected as a property right under section 6 of the **Constitution** of Saint Vincent and the Grenadines the applicant must either qualify for or be entitled to the pension benefit.

[62] Additionally, this Court at paragraph [59] was mindful not to disturb the findings of fact of the trial judge when it stated that the trial judge made a determination that having resigned, contested and lost, the appellants also lost their pension benefits. This Court continued that once that was accepted as a fact, the appellants were 'entitled to pension benefits' that they qualified for or were in law entitled to. I do not read the decision of this Court in **Daniel** as saying anything other than a pension benefit is protected under section 6 of the **Constitution** once a person is qualified for that pension benefit or is otherwise entitled to it as a matter of law. An accrued pension benefit means nothing more than the pension benefit (as defined by the relevant pension law) that an employee has earned based on their years or service.

[19] *Supra.* n. 19, paragraphs 55,56 and 59.

Therefore, the content of any accrued pension right is determined by the applicable pensions law relevant to the employment of the respondents. One cannot speak about an accrued benefit without referring to the relevant legislative provisions by which any such pension benefit would be earned. It was no surprise that this Court held that unless the State had a lawful basis for depriving the appellants of any accrued pension rights, they were entitled to their pension benefits.

[63] Having noted this finding of fact by the learned trial judge, this Court in **Daniel** had no difficulty in granting the appellants a declaration that that their property right guaranteed by section 6 of the **Constitution** had been breached. However, this Court observed at paragraph [57] that a mere declaration would not be adequate given the nature of the breach, so it further granted an order for an assessment of damages for that breach. Importantly, this Court noted at paragraph [59] that the only information it had before it was the years of service of the appellants so it could not conduct the assessment of damages because of this 'evidential lacuna'. The Court therefore remitted the matter to the High Court for the assessment of damages noting that the trial judge would give such directions with respect to evidence and disclosure as required to facilitate that process. The Court concluded that this assessment 'would really involve a computative exercise reflecting expected pension benefits up to the date of the appellants' resignation.' Importantly, in determining the 'expected pension benefits' of a public officer regard must be had to the relevant pension law.

[64] The learned trial judge did not make any finding that the respondents had qualified for any benefit as a matter of law. As mentioned, the holding of the learned trial judge at paragraph [172] was that the respondents were entitled to receive any pension benefit that have accrued to them. This is not the same thing as saying that the respondents were in fact entitled to or had qualified for or were otherwise entitled by law to any such pension benefits. In neither the court below nor this Court did the respondents provide any evidence that they had qualified for or were otherwise entitled by law to (and had lost) any pension benefits at the date on which they

received the letters relating to their deemed resignations from the Commission or the Commissioner of Police.

[65] I agree with the submission of the appellants, as mentioned above, that there was no evidence that any of the respondents had earned the right to a pension that is protected under section 88 of the **Constitution**. In other words, the respondents had not shown that they had qualified for or were otherwise entitled by law to (and had lost) any pension benefits. If there is no evidence of a right to a pension protected by section 88, then there is nothing to engage the jurisdiction of the court under section 16(1) of the **Constitution** in respect of any alleged contravention of section 6 of the Constitution relating to protection from deprivation of property. Section 16(1) provides as follows:

> **Enforcement of protective provisions.**
> "16. (1) If any person allege that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other acting with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress."

[66] Since the respondents have not provided any evidence of any 'pension benefit' which is protected by section 88 of the **Constitution**, they are therefore not able to establish that any 'property right' protected by section 6 of the **Constitution**: (1) has been; (2) is being; or (3) is likely to be contravened in relation to them. It is for the respondents to establish their entitlement to redress under the Constitution. It is not for the court below or this Court to speculate that some pension right or benefit of the respondents have been infringed. They failed to prove that they had any pension right or benefit that could be protected under section 6 and enforced under section 16(1) of the **Constitution**. The value of the redress clause will be a thing writ in water if any court can grant redress under section 16(1) to a claimant who has not established the basis of any alleged infringement. The respondents' claim for constitutional relief fails *in limine* and should have been rejected by the learned trial judge. The learned trial judge was wrong to grant any of the declarations sought by the respondents in

respect of any contraventions by Rule 8 of their right to property in their alleged accrued pension benefits.

No regulation of pension benefits

[67] There is nothing in Rule 8 which regulates in any way the 'pension benefit' to which section 88 refers and that is arguably protected under section 6 of the **Constitution** relating to protection from deprivation of property. It is important to state in full section 88 of the Constitution which provides as follows:

> "**88. Pensions laws and protection of pensions rights**
>
> 1. The law to be applied with respect to any pensions benefits that were granted to any person before the commencement of this Constitution shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.
> 2. The law to be applied with respect to any pensions benefits (not being benefits to which subsection (1) of this section applies) shall-
>
> a. in so far as those benefits are wholly in respect of a period of service as a judge or officer of the Supreme Court or a public officer or a member of the House of Assembly that commenced before the commencement of this Constitution, be the law that was in force at such commencement; and
>
> b. in so far as those benefits are wholly or partly in respect of a period of service as a judge or officer of the Supreme Court or a public officer or a member of the House of Assembly that commenced after the commencement of this Constitution, be the law in force on the date on which that period of service commenced, or any law in force at a later date that is not less favourable to that person.
>
> 3. Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law for which he opts shall for the purposes of this section, be deemed to be more favourable to him than the other law or laws.
> 4. All pensions benefits shall (except to the extent that they are by law charged upon and duly paid out of some other fund) be a charge on the Consolidated Fund.
> 5. In this section "pensions benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their service as members of the House, judges or officers of the Supreme Court or public officers or for the widows, children, dependants or personal representatives of such persons in respect of such service.

> 6. References in this section to the law with respect to pensions benefits include (without prejudice to their generality) references to the law regulating the circumstances in which such benefits may be granted or in which the grant of such benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits."

[68] The effect of section 88 of the **Constitution** is to ensure that the pension law to be applied to any person in respect of their pension benefits is the law that obtained at the commencement of the **Constitution** or any later pension law that is not less favourable to that person (section 88(1)). The other subsections relate to that primary objective of section 88(1). Section 88(2) makes provision for pension benefits in respect of periods of service not covered by section 88(1). Section 88(3) contains a deeming provision concerning the exercise of an option where two or more laws applies in a case of a person. Section 88(4) states that all pension benefits (which is defined in section 88(5)) shall be a charge on the Consolidated Fund. Section 88(6) makes provision for what is included in the reference in this section to the law with respect to pension benefits.

[69] Section 88 of the **Constitution** therefore protects the pension benefits of persons who are entitled by law to a pension from any change in law that affects the grant of such pension benefits, or any law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits.

[70] There is nothing in Rule 8(1) or Rule 8(2) that in any way regulates: (1) the circumstances in which pensions benefits of the respondents may be granted or in which the grant of pension benefits of the respondents may be refused; (2) circumstances in which any pension benefits that have been granted to the appellants may be withheld, reduced in amount or suspended; or (3) the amount of any pension benefits of the respondents. While the pension benefits which any particular public officer or police officer is entitled to under the relevant pension law might be affected once the requirements of Regulation 31 of the **Public Service**

Commission Regulations and section 73A of the **Police Act** are met, it is not Regulation 31 of the **Public Service Commission Regulations** and section 73A of the **Police Act** that affect their pension benefits. Their pension benefits under the relevant pension law remains the same and is not affected or regulated by Regulation 31 of the **Public Service Commission Regulations** and section 73A of the **Police Act**. Consequently, the respondents have not established that Regulation 31 of the **Public Service Commission Regulations** and section 73A of the **Police Act** regulate any of the three circumstances outlined in section 88(6) of the **Constitution** to even engage the application of section 88 of the **Constitution**.

[71] Even if one accepts that section 88(6) of the **Constitution** protects the amount of person's pension benefits, the respondents have not alleged that anything in Rules 8(1) and (2) regulate the amount of such benefit such that their right to property in the 'amount of such benefits' have been contravened contrary to section 6 of the **Constitution**. Sections 6 (protection from deprivation of property) and 88 (pension law and protection of pension right) of the **Constitution** are plainly not applicable to Rule 8(1), Rule 8(2), Regulation 31 or section 73A of the **Police Act**. They have nothing whatsoever to do with regulating anything concerning pension benefits.

[72] Additionally, as mentioned above, I agree with the submission of the appellants that there was no evidence before the learned trial judge that any of the respondents had earned a right to a pension required by section 88 of the **Constitution**. Clearly, if this issue was properly engaged the respondents would have to show that they had standing to challenge any law that affected their pension benefits.

[73] The case for the respondents on the issue of pension rights was and remains misconceived. They simply had to provide evidence that they qualified for or were otherwise entitled by law to (and had lost) any pension benefits based on the pensions law of Saint Vincent and the Grenadines. Nothing in the preceding and subsequent paragraphs should be taken to mean that any respondent who can show that they qualify for or are otherwise entitled according to the pensions law in Saint

Vincent and the Grenadines to any pension benefit would lose anything. Any such pension rights are protected by section 88 of the **Constitution** and no person can be deprived of them. It is incumbent on the respondents to seek legal advice to determine in each of their case as to whether they qualify for or are otherwise entitled to any pension benefit under the pensions law of Saint Vincent and the Grenadines. Once that legal entitlement is determined (as of the date of the deemed resignation), the relevant party must simply comply and apply in the normal way for any pension that is due from the date of the deemed resignation of the respondents.

The question of proportionality

[74] These two bases are sufficient to dispose of this aspect of the finding by the learned trial judge but assuming, without deciding, that the respondents had earned a right to a pension under the **Constitution** and that the issue was properly engaged, the learned judge nonetheless erred in law in her conclusion. In making this finding on proportionality, the learned trial judge purported to apply the test set out by the Privy Council in **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing**.[20] That test is as follows:

> "… whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

[75] It has been made clear that added to these three criteria is a fourth, namely, "the need to balance the interests of society with those of individuals and groups": **Huang v Secretary of State for the Home Department**.[21] The test in **de Freitas** has been restated in **Bank Mellat v Her Majesty's Treasury (No 2)**[22] as follows:

> "**74** The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify

[20] [1998] 3 WLR 675 at 684.
[21] [2007] 2 AC 167 at [19].
[22] [2014] AC 700.

> different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine 47hetherr the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *de Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

[76] If an additional restatement of the test was needed, it is to be found in the decision of the Privy Council in **Suraj and others v Attorney General of Trinidad and Tobago and Maharaj v Attorney General of Trinidad and Tobago**[23] where the following was stated:

> "**51** The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. That case concerned the constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the case law since then: see T Robinson, A Bulkan and A Saunders, *Fundamentals of Caribbean Constitutional Law*, 2nd ed (2021), pp 473–475. It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury* (No 2) [2014] AC 700, paras 20 (Lord Sumption JSC) and 73–74 (Lord Reed JSC)."

[23] [2023] AC 337.

[77] It is not necessary in this judgment to elaborate further on these judicial pronouncements by the United Kingdom Supreme Court and the Privy Council on the test to be applied when determining whether a law or measure infringes any of the fundamental rights or freedoms. In my view, for reasons stated earlier, it does not, in any event, matter whether any of the respondents had accrued any pension benefits or were temporary or on contract which meant they did not have any pension benefits at all. Neither Rule 8(1), Rule 8(2), Regulation 31 nor section 73A of the **Police Act** regulates any aspect of the pension benefits which are protected by section 88 of the **Constitution**. Consequently, section 6 of the **Constitution** cannot be invoked to challenge the constitutionality of Rules 8(1) and 8(2). Insofar as Rules 8(1) and 8(2) are not laws designed to regulate any aspect of the respondents' pension rights or that of any public officers or police officers, the court below had no jurisdiction to entertain that aspect of their application by way of originating motion and judicial review application. The inapplicability of the proportionality principle in this case will be laid bare when the test is applied to Rule 8(1) and Rule 8(2), both of which incorporates directly and indirectly Regulation 31 and section 73A of the **Police Act**.

[78] The analysis and conclusions of the learned trial judge can be gleaned from paragraphs [168] to [169] of her judgment as follows:

> "[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."

[79] The learned trial judge did not assess Rules 8(1) and (2) in accordance with the four-stage test set out in **de Freitas** and explained further in **Bank Mellat**. The protected right at issue is alleged to be the right to property in the respondents' pension entitlements. Assuming, without deciding that this is correct, the measure does not directly affect any such property rights. In the first place, Rule 8 prohibits an employee who without reasonable excuse does not get vaccinated from entering the workplace. That employee can get an exemption for medical or religious reasons. Even then, that employee must decide whether their objection to vaccination against the COVID-19 virus is so strong that they are willing not to get vaccinated with the consequence that they cannot enter the workplace, thereby triggering the effect of Regulation 31 as explained above if they are absent from duty without leave for 10 days or more.

The evidence of the CMO and the Minister of Health

[80] The CMO at paragraph [54] of her affidavit noted the importance of reducing the risk of infection, hospitalisation or death among front line workers and teachers. This cannot be underestimated because the highly infectious nature of the COVID-19 virus had the potential to cause serious illness and death among the public and employees. The CMO continued that there was no question in her mind of the seriousness of the risk of infection and, more importantly, hospitalisations or deaths. In her view, these could result in the shutdown of schools, day care centres, police and fire stations, public services and cripple and paralyse hospitals negatively affecting non-COVID-19 patients seeking emergency case and lifesaving interventions, such as chemotherapy. The CMO explained that every reasonable effort should be made, and was being made, to prevent or reduce such catastrophes.

[81] The CMO at paragraph [58] explained the public education measures that were undertaken to educate the public about the COVID-19 vaccines, which included press conferences, zoom sessions, vaccination caravans going to neighbourhoods

and teams going to business places and government offices. Despite the efforts, the CMO explained that their efforts to improve vaccination rates failed, and that Saint Vincent and the Grenadines had one of the lowest vaccination rates in the Caribbean due to misinformation on the efficacy and safety of the COVID-19 vaccines and the associated hesitancy. The CMO stated at paragraph [64] that she then recommended the testing of unvaccinated public sector workers based on their levels of risk in their employment. The CMO noted at paragraph [79] that voluntary masking and sanitising were not sufficiently effective within workplaces, shelters and school hubs, so stronger measures were recommended to the Ministry of Health, including, at paragraph [80] stricter enforcement of protocols regarding wearing of masks in public and private spaces, mass gathering and entry into Saint Vincent and the Grenadines. The CMO concluded at paragraph [83] that the protocols for mask use, spacing and sanitising depended on compliance by most residents of Saint Vincent and the Grenadines and were of limited effectiveness.

[82] The measures outlined in the last few paragraphs are the essential measures implemented by the Government as outlined in the affidavit of the CMO and the appellants. The measures also included: (1) delaying the opening of schools, protocols for early detection and isolation, use of masks, spacing and sanitisation; (2) establishing nationwide immunity to the COVID-19 virus by vaccination as the safest and most effective method of controlling the spread of the disease and preventing serious illness and death; (3) substantial Government investment including, the acquisition of equipment such as ultra-cold freezers; (4) hiring of extra nurses; (5) allowing public officers to work from home to reduce risks; (6) the provision of psychosocial services for staff and patients to combat mental health stresses; (7) the acquisition, commissioning, and utilisation of facilities to isolate ill patients; (8) strengthening medical, health and laboratory support; (9) the use of personal protective equipment by all health facilities; (10) undertaking mass testing; (11) interaction with the international community facilitating bulk acquisition and deployment of a range of vaccines; (12) continued research and use of technology; (13) the establishment of a goal to vaccinate 70 per cent of the population to obtain

herd immunity for the protection of the public; and (14) vaccination on a voluntary basis.

[83] What is clear is that there was a systematic ongoing consideration by the CMO, the Ministry of Health and other public health officials, of various measures to meet the changing circumstances surrounding the COVID-19 virus, monitoring of what measures worked and which ones were not as effective, and changing the nature of the recommendations to suit the urgency of the time and the response of the public to the various measures introduced. What emerges from the detailed affidavit of the CMO and others, is that the various public health officials were monitoring and assessing the public health emergency brought by the COVID-19 pandemic with great care, to assess, to evaluate and re-evaluate and make necessary changes and improvements to better prevent the spread of the COVID-19 virus, prevent severe illness, hospitalisations and, importantly, to prevent death. It is against that background that the CMO explained why she made recommendations to the Minister of Health that formed the basis of the **Special Measures**, particularly, at paragraph [85] that healthcare workers, other frontline workers, teachers and special essential service workers should be vaccinated and that these "officers should not enter the workplace because if an unvaccinated worker entered the identified high-risk workplace, they would present a risk of infection to or risk being infected by patients, students, prisoners, travellers, and so on".

[84] The CMO explained at paragraph [86] that the **Special Measures** were made to protect the health and safety of frontline public officers, and the public, by seeking to reduce the spread of the COVID-19 virus, particularly the Delta variant, with the associated hospitalisations and deaths. The CMO stated at paragraph [87] that: (1) she was satisfied that the vaccines were safe and would reduce the risk of transmission of the COVID-19 virus including the Delta variant, and the associated severe illness, hospitalisations and death; (2) the risk of a negative reaction to the vaccines would have been, and were, minimal; (3) the rates of hospitalisations and

deaths were highest among the unvaccinated; and (4) the expectation based on worldwide monitoring was that a spike was imminent.

[85] The Minister of Health in his affidavit explained at paragraph [7] that, after receiving the updates from the CMO of the rising COVID-19 cases including community spread, hospitalisations and deaths especially among the unvaccinated, as to the effectiveness of existing measures implemented to prevent or control the spread of the COVID-19 virus in public bodies and protect the health and safety of public officers and employees who she considered most at risk, he accepted the advice and recommendations of the CMO. The Minister of Health further explained at paragraph [8] that: (1) the CMO indicated that the earlier protocols were not working as effectively as they should because infections and hospitalisations were on the rise, considerable vaccine hesitancy existed in the country and in the public service and the infection rate of the COVID-19 virus was very likely to peak; (2) these matters were of considerable concern to her; and (3) the CMO was particularly concerned about the vulnerability of frontline employees, and teachers and students to the COVID-19 virus, especially as the younger students could not then be vaccinated. The Minister of Health concluded at paragraph [10] that the CMO advised that these frontline employees must be vaccinated against COVID-19 to work in their workplaces and should not enter the workplace because if an unvaccinated worker entered the identified high-risk workplace, they would present a risk of infection to others or risk being infected.

The application of the de Freitas test

[86] In answering the first question of whether the objective of Rule 8 is sufficiently important to justify the limitation of a fundamental right, based on the uncontroverted evidence of the CMO it cannot be doubted that the public health objective of Rule 8, namely, of preventing the spread of the COVID-19 virus and ensuring the public services continued to be offered to the public in a manner that minimised the risk of infection by the COVID-19 virus and any resulting hospitalisations, severe illness, death of residents, particularly, children, the elderly and those who were

immunocompromised, was sufficiently important to justify the limitation of the protected right, namely, the right to property in a pension benefit. It was stated specifically in Rule 3 that the purpose of the **Special Measures** was to (a) prevent, control, contain and suppress the risk of the spread of the COVID-19 virus in public bodies and (b) protect the health and safety of employees.

[87] In respect of the second question, namely, whether Rule 8 is rationally connected to the objective, in my view, there was a rational connection between Rule 8 and preventing the spread of the COVID-19 virus and any resulting death of residents, particularly, children, the elderly and those who were immunocompromised. It is not correct to state that Rule 8(1) and (2) terminated the employment of those public officers and police officers who did not take the vaccine as they were lawfully required to by virtue of Rule 5.

[88] In answering the third question of whether a less intrusive measure could have been used, the unchallenged evidence of the CMO at paragraphs [31]-[40] and [73]-[83] of her affidavit was that other less intrusive measures were tried and did not achieve the anticipated levels of success and, more importantly, the uncontradicted evidence was that the public health officials started out with much less intrusive measures, gauging their success in achieving the intended public health objectives and only if those measures were not successful, would a more intrusive measure be implemented. The uncontroverted evidence shows that no less intrusive measures than Rule 8 could have been used without unacceptably compromising the achievement of the ultimate and important objective of safeguarding the public health by ensuring that public sector workers do not enter the workplace unvaccinated.

[89] The respondents submit that in their application for leave, they cited 14 less intrusive ways in which the State could have satisfied its duty to protect citizens without resorting to Rule 8. The learned trial judge cited four of these at paragraph [125] of her judgment, noting that three of them "would achieve the public health objective of

keeping the workplace free of unvaccinated persons while not depriving public officers of their pension benefit rights". It is for policy makers using scientific evidence to gauge various responses to the measures implemented and vary them according to their success rate. There was no expert scientific evidence led by the respondents in the court below to show that those measures they suggested would work.

[90] The test under this head is whether a less intrusive measure could have been used. It is not whether in all the circumstances Rule 8 was 'too draconian', for that question does not first establish how Rule 8 is 'draconian' and reaches a conclusion on Rule 8 before the complete application of the four-pronged proportionality test. Nowhere in the jurisprudence applied by the Judicial Committee is there any reference to whether or not a law is 'draconian' as a threshold test in the proportionality analysis. The loss of any pension benefits is not a consequence of Rule 8 which applies Regulation 31. A person who is deemed to have abandoned their office by the application of Regulation 31 cannot argue that it is Regulation 31 that affects their pension benefits. The pension benefits to which they are entitled exist and do not thereby magically disappear. By abandoning their office pursuant to Regulation 31 simply means that they may not be entitled to the pension benefits. The question is a matter for the pensions law of Saint Vincent and the Grenadines which the respondents have not referred to in the court below or before this Court in this appeal. It bears repeating that the respondents have not challenged the deeming provisions of Regulation 31. Neither Rules 8(1), 8(2), Regulation 31 or section 73A of the **Police Act**, as mentioned above, have affected any property rights that the respondents may have in their pension benefits for the application of section 6 of the **Constitution**. Consequently, the issue of the payment to the respondents of adequate compensation within a reasonable time simply does not arise

.

[91] To ask if there are less intrusive measures invites the party challenging the measure to provide expert scientific evidence that such less intrusive measures exist and that they can work. What then of mere conjecture by that party without any concrete scientific evidence? It is the latter that invites the court also to engage in this

impermissible speculation in respect of alternative untested measures. The case law does not suggest how the court is to assess the 'least intrusive measures' particularly where these are proffered without being supported by expert scientific evidence by the party challenging the measures in question. The difficulty here is that to answer the question regard must be had to the content of the fundamental human right in question. It is alleged to be the right to property guaranteed by section 6 of the **Constitution**. As mentioned, neither Rule 8 nor Regulation 31 limits any right to property of the respondents. It is at this juncture that applying the third test seems artificial since it requires an assessment of whether there existed alternative means of achieving the purpose of Rule 8. Two elements are required: (1) whether hypothetical alternative means exist that can achieve at least the same purpose; and (2) whether that hypothetical alternative limits the fundamental right to a lesser extent than Rule 8. The difficulty here is that Rule 8 does not limit at all any fundamental right for reasons already explored above.

[92] What is clear, however, is that whether any measures can be considered equally effective (and least intrusive) must be based on expert scientific evidence and advice. In the court below, the respondents did not adduce any expert scientific evidence to justify any of their assertions concerning proportionality. That was fatal to any of their suggested fourteen least intrusive measures. Without any expert scientific evidence guiding her conclusions, the learned trial judge was wrong to accept that any of the measures suggested by the respondents would achieve the public health objective of keeping the workplace free of unvaccinated persons. This lack of expert evidence was the basis on which the learned trial judge in her judgment dated 10th March 2022 refused leave to the respondents in respect of their proportionality challenge to Rule 5. The learned trial judge stated as follows:

> "[95] The applicants' complaint that the Minister could have employed less restrictive measures than a mandatory vaccine regime under rule 5 (1) to address the health and medical challenges posed by the pandemic, is not supported by the affidavit testimony. Mr. Smith's affidavit contained no suggestions or ideas about the less stringent measures that the applicants implied and argued could have been deployed instead of rule 5(1). The Court is not permitted to embark on a search for such material. It has to be presented by the applicants. Their contention that it would have

> necessitated them seeking an order to adduce expert testimony does not absolve them from the evidential demands of judicial review proceedings referred to earlier.
>
> [96] The applicants' failure to supply evidence of those alternative measures fatally undermines this aspect of their application. Without the factual underpinnings to support their assertions, there is simply no arguable ground advanced by them which provides a realistic prospect of success in relation to their irrationality and proportionality attack on rule 5 (1). Their application for leave to seek judicial review of rule 5 (1) of SR&O 28 of 2021 is therefore dismissed."

[93] In my view, these statements apply equally here as there is no expert evidence that the respondents could point to in respect of those alternative measures in respect of Rule 8. In the court below, the respondents' application to file expert evidence in the proceedings was refused and there was no appeal from that ruling. The requirement that there must be equally effective measures was stated in the New Zealand case of **GF v Minister of COVID-19 Response**.[24] In that decision, the applicant was a former employee of the New Zealand Customs Service but had her employment terminated as a result of the implementation of the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order). Clause 7 of the Vaccinations Order provided that an affected person must not carry out work or otherwise conduct an activity at a place unless they are vaccinated. The claimant's employer terminated her employment because she was unwilling to be vaccinated. She brought judicial review proceedings challenging the lawfulness of the Vaccinations Order on the following two grounds: (1) that the Vaccinations Order is ultra vires the COVID-19 Public Health Response Act 2020 (the "Response Act"), because section 9 imposes conditions on the COVID-19 Response Minister making an order and one or more of those conditions were not met; and (b) that the Vaccinations Order is irrational, and therefore unlawful, principally because of the consequences it has for unvaccinated employees.

[24] [2021] NZHC 2526.

[94] The court rejected the first ground on the basis that all the conditions under section 9 of the Response Act were met before then the Vaccinations Order was made. In relation to the second ground, the court explained as follows:

> "[83] The question for determination is therefore whether other, less intrusive means could have achieved a similar result to the Vaccinations Order. For example, whether the combined effect of mandatory wearing of PPE, social distancing, cleaning of surfaces and other environments and regular testing and monitoring (such as monitoring temperatures using thermal imaging cameras) could have had a similar result to compulsory vaccination.
> …
> [89] The Court's task in this case is to balance the benefit of the vaccine and the risk of being unvaccinated against any discrimination in relation to those affected. In this case, it would entail considering the potential for discrimination in relation to affected workers in light of:
>
> (a) the scientific support that vaccines reduce the risk of transmission of COVID-19 and its harm to the vaccinated person;
> (b) the benefit of the vaccine reducing transmission to affected workers who in turn, are less likely to transmit the virus into the community; and
> (c) the economic, social, and health benefits of a reduced risk of the virus being transmitted to the community.
>
> [90] If these benefits outweigh the potential discrimination, the limitation is proportionate, and demonstrably justified under s 5 of NZBORA.
> …
> [92] The applicant has not identified any alternative method of addressing the spread of the virus that could be said to be equally as effective. While lockdowns are potentially one such alternative, they have social and economic consequences that are far greater than those of vaccination.
> [93] On the basis of the evidence of the respondents, I conclude that, to the extent that requiring affected workers to be vaccinated before carrying certain duties might amount to discrimination, the benefits of that requirement outweigh any discrimination and that the limitation is proportional and demonstrably justified."[25]

[95] In **Suraj**, the Privy Council considered the question of whether public health regulations that prohibited gatherings of more than five people in any public place and imposed restrictions on the number of persons attending religious services during the COVID-19 pandemic contravened the appellants' constitutional rights to

[25] [2021] NZHC 2526 at paragraphs 83,89,90,92,93.

freedom of assembly and of religious belief and observance. The Privy Council in concluding applied the proportionality test as follows:

> "**99**. In the Board's judgment, the Rules were passed for a legitimate aim of the public interest, to protect the public from the spread of a virulent and dangerous disease. The Rules made some allowance for religious gatherings, but on any view they represented a very substantial interference with the right of freedom of assembly and the Board will assume that the interference with the other rights relied on was substantial as well.
>
> **100**. Despite this, the Board is satisfied that the interference with the appellants' rights was proportionate and hence consistent with those rights and involved no violation of them. 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. The Board takes the same view of this as the Court of Appeal of England and Wales in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326 in relation to similar restrictions on gatherings."

[96] Assuming that any constitutional right of the respondents have been affected by Rule 8, having regard to all the circumstances and the uncontradicted evidence of the appellants, including the evidence of the CMO, bearing in mind the seriousness and severity of the COVID-19 pandemic, the nature of the COVID-19 virus and the ever changing variants, the emergence of COVID-19 vaccines that would prevent the spread of the COVID-19 virus and assist in preventing severe illness, hospitalisations and any loss of life of residents, particularly children, the elderly and those persons who were immunocompromised, I am of the view that balancing the severity of the effect of Rule 8 on the 'constitutional rights' of the respondents against the critical importance of the public health objective as just mentioned, to the extent that the measure will contribute to its achievement, the maintenance of Rule 8 in all the circumstances significantly outweighed the latter. A fair and appropriate balance was therefore struck by the Minister of Health in promulgating Rule 8 of the **Special Measures** between the rights of the respondents and the general and specific public

health interests of the community. Rule 8 was plainly a proportionate means of protecting the public health interest in the circumstances of a dangerous COVID-19 virus. Had the learned trial judge applied the **de Freitas** test and had done so properly, having regard to the uncontradicted evidence of the CMO and the Minister of Health, the learned trial judge would have concluded that Rule 8 was a proportionate response to protecting the right to life and health of the whole population, including the public officers and police officers who would be interacting with the general public. Having found otherwise without applying the **de Freitas** test to the uncontradicted evidence presented by the appellants the learned trial judge erred in principle.

[97] In my view, the learned trial judge was wrong to suggest that the respondents had to point to legislation or decided cases which assert that the State had a duty or obligation to protect the health and lives of citizens especially in the face of a pandemic, particularly one which resulted severe illness and loss of lives such as the COVID-19 pandemic. The obligation of the State to protect the health and lives of citizens is so self-evident that it goes without saying. Why do States provide health centres (or polyclinics) or public hospitals exist if such an obligation does not exist? That obligation is heightened in a pandemic when the reliance on the limited health care resources of the State would be at its peak and the spectre of many persons becoming severely ill, being hospitalized and the numbers of persons suffering death was at its greatest. Moreover, under section 105 of the **Public Health Act**, 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. With the greatest of respect to the learned trial judge, that was simply not what was required in the application of the proportionality test in **de Freitas**. The learned trial judge, as mentioned earlier, did not engage directly with the proportionality test in **de Freitas** but in responding to submissions by the appellants at paragraphs [224] to [231], under the heading, 'Duty to protect public health and private rights', the learned trial judge attempted to do so but failed to

appreciate that this was a critical aspect of the analysis required of her to determine the constitutionality of Rule 8.

Issue (2)(a) – Regulation 31 and the principle of natural justice

[98] As explained earlier, Regulation 31 states that an officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereon the office becomes vacant, and the officer ceases to be an officer. Natural justice plainly cannot apply to Regulation 31 because the deeming of an officer to have resigned his office is triggered immediately by that officer absenting himself from duty without leave for a continuous period of ten working days. The consequence occurs automatically on the occurrence of the triggering event. Rule 8 is no more than another circumstance that would lead to the triggering event contemplated by Regulation 31 which would result in the engagement of the deeming provision of Regulation 31.

[99] Once a public officer is deemed to have resigned his office, there is scope for him or her to be heard by the Commission because of the operation of the words 'unless declared otherwise by the Commission' in Regulation 31. This allows the Commission to hear the officer, either in writing or orally, who can then explain to the Commission why the consequences of Regulation 31 should not apply to them. The learned trial judge was aware of the decision of **Felix DaSilva v Attorney General of Saint Vincent and the Grenadines et al**[26] where Joseph J stated at page 13 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 learned trial judge quoted the same passage at paragraph [185] of her judgment. I fail therefore to understand her conclusion at paragraph [192] that:

[26] Suit No. 356 of 1989 (delivered 31st July 1997, unreported).

> "[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."

[100] The issue as I see it is whether the operation of Regulation 31 satisfies the requirements of fairness. In a deeming provision such as Regulation 31, the requirement of fairness is plainly satisfied by the insertion in Regulation 31 of the words "unless declared otherwise by the Commission". The House of Lords in **R v Secretary of State for the Home Department, ex p. Doody**[27] accepted that "[f]airness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; **or after it is taken, with a view to procuring its modification**"(emphasis added). The communication by the Commission to the appellants that the requirements of Regulation 31 have been satisfied is ameliorated by the provision in Regulation 31 that allows for any person who is deemed to have abandoned his or her office by the operation of Regulation 31 to have the Commission subsequently modify its decision. The operation of Regulation 31 is not a termination of the employment of any public officer or police officer. The Privy Council held in **Endell Thomas v Attorney-General of Trinidad and Tobago**[28] that public officers can only be removed from office for cause in accordance with the disciplinary process.

[101] While Rule 8(1) mentions 'without reasonable excuse', any such excuse cannot be based on the very requirement for public and police officers to be vaccinated in accordance with Rule 5. It needs emphasising that in the court below there was no challenge to Rule 5 that required all public and police officers to be vaccinated

[27] [1993] UKHL 8 (24th June 1993); [1994] 1 A.C. 531 at 560.
[28] [1982] AC 113.

against the COVID-19 virus. A public officer or police officer cannot then rely on the very non-compliance with Rule 5 to submit that they had a 'reasonable excuse' for their absence from duty for a period of 10 days or more when Regulation 31 relating to abandonment of office is triggered. In any event, as mentioned, there was nothing preventing any of the respondents from writing to the Commission to secure a modification of the communication received by them concerning their abandonment of office. They could argue that they had a reasonable excuse for being absent from duty or that they had obtained leave.

[102] The uncontroverted evidence of the Commission was that none of the respondents made any request of the Commission for a review of their case. Having not availed themselves of the option of seeking from the Commission a modification of the communication concerning their abandonment of their office, the respondents cannot now argue that there was a breach of natural justice. Critically, the Commission's evidence was that 24 public officers who were deemed to have abandoned their office wrote to the Commission seeking a modification of its decision under Regulation 31 and in each case the Commission rescinded its previous decision and granted approval for reinstatement in the public service. The latest such letter was dated 9th September 2022, approximately six (6) months after the constitutional and judicial review applications were filed by the respondents in March 2022 in the High Court.

[103] Having regard to the operation of the deeming aspect of Regulation 31 and the inclusion of an avenue by which an officer can make a case to the Commission that they have not abandoned their office, I do not see any issue of natural justice arising. It is important to note that none of the respondents, like other public officers for whom Regulation 31 applied, availed themselves of the option of writing to the Commission explaining why they should continue to remain public officers. The learned trial judge therefore erred in finding that the Commission acted contrary to natural justice and section 8(8) of the **Constitution** in sending letters to officers to whom Regulation 31 properly applied.

Issue (2)(b) – Abdication and acting on directions of the Minister of Health

[104] Sections 77(12) and 77(13) of the **Constitution** states as follows:

> "(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.
> (13) The Commission may by regulation or otherwise regulate its own procedure and, with 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."

Sections 84(6) and 84(7) are in similar terms in respect of the Police Service Commission.

[105] Once it is determined that an officer is absent from duty without leave for a continuous period of ten working days, the officer is deemed to have resigned their office, unless declared otherwise by the Commission. There is no decision to be made except if the Commission decides to declare otherwise on its own initiative or at the request of the officer to whom Regulation 31 applies. The Commission, in issuing letters reflecting the deeming effect of Regulation 31, namely, that the officer is deemed to have resigned their office and that their office becomes vacant and that the officer ceases to be an officer, is doing no more than communicating the effect of Regulation 31. The learned trial judge erred in stating at paragraph [210] of her judgment that the Minister of Health in making Rule 8 had usurped the authority of the Commission. For reasons already explained, Rule 8 does not expressly or implicitly relate to an area of the public service exclusively reserved to the Commission. It concerns an aspect of the employment by public officers, namely, their vaccination status to enable them to attend to their workplace to carry out their duties for which they have been employed.

[106] By requiring public officers to be vaccinated against the COVID-19 virus before entering the workplace pursuant to Rule 8, the Executive was merely laying down additional terms of service for public officers and police offers pursuant to their contracts of employment. The Privy Council in **Thomas** made clear at page 128 that

the Commission or the Police Service Commission has no power to lay down terms of service for public officers or police officers as follows:

> "The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the police service, including their transfer and promotion and confirmation in appointments and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation, whether primary or subordinate, it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, e.g., for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to 'confirmation of appointments' in section 99 (1); (b) remuneration and pensions; and (c) what their Lordships have called the 'code of conduct' that the police officer is under a duty to observe."

[107] Section 9 of the **Public Service Management Act, 2021**[29] states, among other things, that 'a public officer holds office subject to the provisions of this Act, the regulations and any other written law'. Rule 8 is no doubt: (1) such a written law that binds all public and police officers; and (2) part of the 'code of conduct' to which Lord Diplock in **Thomas** refers that governs the actions of public and police officers that they are under a duty to observe. These are matters for the Executive or Parliament and not the Commission or the Police Service Commission. It is no answer to say that any breach of Rule 8 must be followed by the disciplinary procedures found in the **Public Service Commission Regulations**. First, if the matter is covered by Regulation 31, I do not see why the Commission should engage the disciplinary procedures in Regulations 39-58 when by operation of law, the officer to which Regulation 31 properly applies would have already ceased to be an officer. Second, there would be no room to deploy Regulations 39-58 as that officer by operation of law would no longer be an officer so these regulations would no longer apply to him or her.

[108] The learned trial judge made much of the fact that in some cases, Community Colleges or line managers communicated the effect of Regulation 31 to those officers

[29] Act No. 17 of 2021.

to whom it applied. As mentioned above, the effect of Regulation 31 is engaged automatically on the occurrence of the triggering event – absence from duty without leave for a continuous period of ten working days – without the need for the Commission specifically to communicate this to the officer. It is of no consequence in law that those Community Colleges or line managers informed some of the respondents of the effect of Regulation 31 and Rule 8. The learned trial judge was wrong to find otherwise.

[109] It cannot be said that either the Commissioner of Police or the Commission acted on the authority of the Minister of Health in applying Regulation 31 which was only triggered by non-compliance with Rule 8 by the officers to which it was applicable. The application of Regulation 31 in the case of any officer does not involve acting on the instructions of, or the dictates of, neither Commissioner of Police nor the Chair of the Commission. Rule 8 was not a directive by the Minister of Health to the Commission or the Police Service Commission. It was a directive to public and police officers concerning their terms and conditions of employment. I agree with the appellants that the finding otherwise by the learned trial judge was extraordinary. The learned trial judge stated at paragraph [210] that:

> "[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 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."

[110] The learned trial judge was correct in her conclusion that there was no direct control over the Commission, the Police Service Commission or the Commissioner of Police. However, the learned trial judge was incorrect to continue that the Minister of Health usurped their authority in making Rule 8. There was no evidence in the court below

of any instruction given by the Minister of Health to either the Commissioner of Police or the Chair of the Commission. The learned trial judge erred in law and in fact in stating at paragraph [211] that the application of Rule 8 by the Commissioner of Police or the Chairman of the Commission can only be characterised as the abdication of their jurisdiction and responsibility in favour of the Minister of Health. There was no control by the Minister of Health or anyone else of any of the functions of the Commission or the Police Service Commission. The learned trial judge was wrong to conclude that the letters issued to the respondents for breaching Regulation 31, for failing to comply with Rule 8, contravened sections 77(12), 77(13), 84(6) and 84(7) of the **Constitution**.

Issue (3) – The Constitutionality of the COVID-19 (Miscellaneous Amendments) Act

[111] The other main issue raised in this appeal is whether the **Amendments Act** was unconstitutional. It is necessary to state the entirety of the **Amendments Act** as follows:

> "**AN ACT** respecting certain existing laws in response to the COVID-19 pandemic.
>
> **BE IT ENACTED** by the Queen's Most Excellent Majesty, by and with the advice and consent of the House of Assembly of Saint Vincent and the Grenadines and by the authority of the same, as follows:
>
> **Short title**
> 1. This Act may be cited as the COVID-19 (Miscellaneous Amendments) Act 2020.
>
> **Schedule of Amended Laws**
> 2. (1) The laws set out in the Schedule are amended to the extent specified therein.
> (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.
> (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.

Expiration dates
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."

[112] Section 3(1) of the **Interpretation Act** provides that:

> "… "Minister" means 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.
> …
> (3) In every written law, 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."

[113] The learned trial judge held that section 2(2) of the **Amendments Act** 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 existing law that concerns any subject for which that office holder is for the time being responsible. Much was made by the respondents about whether the **Amendments Act** refers to 'the Minister' or 'Minister'. It seems to me that section 3(1) of the **Interpretation Act** is conclusive on the definition of 'the Minister'. If it is the relevant Minister who is responsible for the matter in question, then, that Minister can exercise the power granted under section 3(1). There is nothing unlawful about this. Consequently, the **COVID-19 (Miscellaneous Amendments) Order 2021**[30] (the "**Amendments Order**"), which amended the **Police Act** to include section 73A, was lawfully made by the Prime Minister and Minister of National Security pursuant to the power under section 2(2) of the **Amendments Act**. The respondents have not suggested that any Minister other than the Minister of National Security would be more appropriate to have made the **Amendments Order** in respect of amending the **Police Act**. As is required by section 2(3) of the **Amendments Act**, the

[30] Act No. 32 of 2021.

Amendments Order was approved by Parliament by negative resolution on 31st March 2022.

[114] The learned trial judge correctly noted that the separation of powers doctrine is a fundamental pillar of constitutional law in the Commonwealth Caribbean, citing **Hinds v The Queen**.[31] Citing the decision of this Court in **J. Astaphan and Co. (1970) Ltd v the Comptroller of Customs and The Attorney General of the Commonwealth of Dominica**,[32] the learned trial judge held at paragraph [75] that, since the **Amendments Act**: (1) contained no provisions which expressly or implicitly delineate the parameters within which the delegated law-making power thereby conferred on the 'Minister' is to operate; and (2) did not point to any policy prescriptions which delimit the exercise of such power and no guidelines were set out or incorporated to govern such law-making authority, it was unconstitutional and void for contravening section 101 (supreme law) of the **Constitution**. The learned trial judge explained that the stipulation that such amendments be subjected to a positive resolution within two months was nothing more than a requirement for *ex post facto* scrutiny or ratification, which does not amount to effective control by the Legislature.

[115] In **Astaphan**, the question for this Court was, first, whether the 'further sum' which section 27(4) of the **Customs (Control and Management) Act**[33] authorised the proper officer to demand is a tax or a duty; and, second, if so, whether the legislature of the Commonwealth of Dominica had delegated or transferred its legislative power of taxation to the executive (i.e. the proper officer). In the Court's opinion, the essential question was whether such delegation or transfer of legislative power offends the basic principle of separation of powers. This Court explained at pages 5-6 that:

> "I concede 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. There is no such inconsistency if the Legislature retains effective control over the Executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be

[31] [1977] AC 195.
[32] Civil Appeal No. 8 of 1994 (delivered 28th May 1996, unreported).
[33] Cap 69:01 of the Laws of Dominica (Revised Edition 1990).

> retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.
>
> I also concede that the Legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the Executive. To that extent, 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 the basic principle of separation of powers."

[116] This Court made clear that for any delegation of legislative power to be lawful the legislature must retain effective control over the delegated power by either: (1) circumscribing the power; or (2) by prescribing guidelines or a policy for the exercise of the power. It is difficult to understand what this Court meant when it stated that the separation of powers "should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates ex post facto" and that there "must be some parliamentary control at the time of the exercise of the power". In relation to the first sentence, this Court did not mean to suggest that *ex post facto* control cannot be one of the methods by which Parliament *circumscribes* that power so delegated. Clearly, *ex post facto* control is no control at all when the power has already been exercised. The second sentence makes the point that there must be *some* – not complete – parliamentary control at the time of the exercise of the power. Otherwise, there would be no point in delegating the power in the first place.

[117] I agree with the appellants that by virtue of: (1) the title and description of the **Amendments Act**; and (2) sections 2 and/or section 3 of the **Amendments Act**,

Parliament had in fact retained control of the law-making process, and of the orders made by the Minister. I also agree with the appellants that Parliament retained control by: (1) restricting the application of the **Amendments Act** to responses to the COVID-19 pandemic, and (2) confining the Minister's power to amend laws for the sole purpose of responding to the COVID-19 pandemic. It is difficult to see any other purpose of the **Amendments Act**. Only on a strained reading of the **Amendments Act** could one conclude that the Legislature gave the Minister of Health the *carte blanche* power to amend laws passed by Parliament. The decision in **Astaphan** was not made during a period of emergency so this Court did not have to confront the issue of delegation in this context of the State dealing with a deadly pandemic and the pressing need for Parliament to respond urgently to an ever-changing situation in a public health emergency.

[118] Additionally, there is support from the Court of Final Appeal of Hong Kong in **Kwok Wing Hang & Ors v Chief Executive in Council and another**[34] that one of the methods by which Parliament retains control of subsidiary legislation is the negative procedure rule. The decision in **Kwok Wing Hang** concerned the passing of the Emergency Regulations Ordinance (the "ERO") following serious social unrest and public disorder in Hong Kong in June 2019. One of the issues considered by the Court of Final Appeal was whether the ERO was compatible with the Basic Law of the Hong Kong Special Administrative Region (the "Basic Law"). Section 2(1) of the ERO gave the Governor in Council power to make regulations in case of emergency or public danger, as follows:

> "On any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest."

[119] Section 2(2)(g) stipulates that regulations made by the Chief Executive in Council may provide for: "amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification." Pursuant to section 1, the Chief Executive in Council made the Prohibition on Face Covering

[34] [2020] HKCFA 42.

Regulation 2019. The issue for the Court of Final Appeal was whether the Legislative Council had impermissibly delegated to the Chief Executive in Council the power to make primary legislation.

[120] The Court of Final Appeal, quoting from **Bennion on Statutory Interpretation**,[35] accepted at paragraph [41] (scenario (e)) that one of the reasons why a legislature may find it necessary or desirable to delegate legislative power is if a sudden emergency arises where it would be essential to give the executive wide and flexible legislative powers to deal with that sudden emergency whether or not Parliament is sitting. In explaining this reason, the Court of Final Appeal of Hong Kong in **Kwok Wing Hang** explained that:

> "**B.3.4 Emergency subordinate legislation**
> 44. … It is recognised that in such situations, it is "essential" to give the executive "wide and flexible legislative powers" whether or not the legislature is sitting. Such situations must, we think, also include circumstances of public danger.
>
> 45. In this regard, the Court of Appeal was right to emphasise that under situation (e) concerning emergency (or public danger), the considerations are entirely different:
>
> > "For scenario (e), the legislative approach can be different for a number of reasons. By nature, emergency or public danger is not capable of exhaustive definition, which means that usually a general or broad definition is used. It ordinarily requires an urgent and effective response to avoid an imminent threat, prevent a worsening of the situation or mitigate the effects of the emergency. The executive needs wide and flexible powers to deal with every and all exigencies expeditiously and effectually. It follows that emergency regulations which the primary legislation delegated to the executive to make are necessarily wide and extensive in scope. They may even by virtue of the so-called 'Henry VIII Clauses' dis-apply or amend a primary legislation…
>
> 46. As Hogan CJ pointed out in Li Bun:
>
> > "That it may be desirable for the sake of 'peace, order and good government' to have, on occasions of emergency or public danger, a delegated power to legislate speedily and effectively in order to meet any and every kind of problem is, I think, obvious. That such power should, as the Attorney General has argued, extend to all

[35] 7th Edition 2019 at page 68.

> existing legislation seems equally apparent, since otherwise its capacity to make adequate provision for some unexpected danger or emergency might be hampered or limited by its inability to alter an existing Ordinance and that, possibly, at a time when the ordinary legislature could not, as a result of the emergency or state of public danger, be brought into session or meet."
>
> 47. This is not to say that the delegated power to make emergency regulations can be totally untrammelled and unguided, not subject to control by the legislature or the courts, or may ignore constitutional protection of fundamental rights. What it does mean, however, is that in deciding whether the ERO purports to delegate to the CEIC general primary legislative power (and is thus unconstitutional under the Basic Law), one must firmly bear in mind the subject matter concerned, namely occasions of emergency or public danger, which, by definition, require the delegation of "wide and flexible legislative powers" to the executive in order to meet them."

[121] The evidence in the court below was that the form of control using the negative procedure rule was in fact used by Parliament. The appellants are correct in submitting that Saint Vincent and the Grenadines was confronted with an ever-changing pandemic emergency, in which the COVID-19 virus was infecting, killing and hospitalising persons, especially the unvaccinated. Consequently, Parliament was entitled to make the **Amendments Act** to delegate authority on the Minister to amend certain laws to swiftly respond to the ever-changing and fluid COVID-19 pandemic. I also agree with the submission of the appellants that the power delegated to the Minister under the **Amendments Act** was not only subject to control by Parliament, but also by the High Court for the Minister would be acting unlawfully if any amendments were made to any existing law that were otherwise than in response to the COVID-19 pandemic. In this regard, the Court of Final Appeal of Hong Kong in **Kwok Wing Hang** stated as follows:

> "55. All this is not to say that the power given to the CEIC is unrestrained and uncontrolled. The courts control the exercise of the power to make regulations on three bases. First, the CEIC has to consider that an occasion of emergency or public danger has arisen. This must be a bona fide conclusion which is not Wednesbury unreasonable. There can be no arbitrary exercise of the power. Secondly, no matter how desirable the CEIC may consider them to be, the regulations made must be for the purpose of dealing with the emergency or public danger in question, and for no other irrelevant purpose. Thirdly, the regulations must be made "in the public

> interest", subject to the margin of discretion accorded to the CEIC's judgment of what is "desirable". We disagree with the applicants' contention that these facets do not amount to meaningful judicial control."

[122] The respondents have not alleged that the power granted to the Minister was exercised in bad faith or unreasonably. In respect of this, the following words of the Court of Final Appeal of Hong Kong in **Kwok Wing Hang** bears mentioning:

> "50. The power to make emergency regulations can only be invoked if and when there exists an occasion which the CEIC considers to be one of emergency or public danger, as laid down in section 2(1) of the Ordinance. This imports a requirement of good faith on the part of the CEIC which is judicially reviewable in court. It also requires the CEIC's conclusion that an occasion of emergency or public danger has arisen to be a reasonable one in the public law sense, such that it may withstand a challenge in court for Wednesbury unreasonableness. That there should be some leeway, or margin of discretion, accorded to the CEIC in determining whether an occasion of emergency or public danger exists is fully consistent with the very nature of the Ordinance, which requires the conferring of "wide and flexible powers" on the executive to deal with emergencies or public dangers of all kinds."

[123] The respondents sought to distinguish the decision of the Court of Final Appeal of Hong Kong in **Kwok Wing Hang** in that the **Amendments Act** can be distinguished from the ERO for the following reasons: (1) no purpose for which the amending power is to be used by members of the Executive is set out in the **Amendments Act**; (2) no limitation on the power of the Governor General to decide how long the amending power would remain is contained in the **Amendments Act**; (3) no circumstances in which the amending power contained in the **Amendments Act** is to be invoked is set out in the Act; (4) there is nothing which limits any penalty which can be imposed by the Executive through use of the power contained in the **Amendments Act**; and (5) the source of legality of the **Amendments Act** is an Act of Parliament. None of those reasons (even taken together) are compelling. What matters here is that there is some effective control by Parliament of the exercise of the delegated power and in this regard, context is everything! The public health emergency in the context of the COVID-19 pandemic brought about by the dangerous COVID-19 virus is the relevant and critically important context.

[124] It would rather be contrary to common sense if such a power could not be delegated by Parliament in such a time of a public health emergency and serious danger, subject to Parliamentary control, that was occasioned by the onset of the COVID-19 pandemic. When questioned by the Court at the hearing of the appeal as to what other means of control could Parliament have introduced in this context to ensure that the **Amendments Act** would not contravene of the separation of powers doctrine, counsel for the respondents could not provide any. Consequently, I am satisfied that the above-mentioned factors contained in the **Amendments Act** constitute sufficient Parliamentary control for the purpose of circumscribing the power delegated to the Minister by Parliament under section 2(2) of the **Amendments Act**. The learned trial judge was wrong to hold that the **Amendments Act** was unlawful for contravening the separation of powers doctrine.

[125] Consequently, the Minister of National Security acted lawfully in making the **COVID-19 (Miscellaneous Amendments) Order, 2021** that amended the **Police Act**, by inserting a new section 73A to which reference was made earlier.

Disposition

[126] Based on the foregoing, the appellants have succeeded in persuading me that the learned trial judge was wrong in making most of the orders she made in her judgment. Accordingly, I would allow the appeal and make the following orders:

(1) The declarations made by the learned trial judge at sub-paragraphs 1(a) to (j) and 2(a) and (b) of both paragraphs [234] and [246] of the judgment are set aside.

(2) The orders of *certiorari* granted by the learned trial judge at sub-paragraphs 1(a) to (c) and 2 of paragraph [236] and at sub-paragraphs 4(a) to (c) and 5 of paragraph [246] of the judgment are set aside.

(3) The declarations made by the learned trial judge at paragraph [237], the consequential orders made at paragraph [238], and the orders

made at sub-paragraphs 6(a) and (b) and 7 of paragraphs [246] of the judgment are set aside.

(4) The directions for assessment of damages made by the learned trial judge at paragraph [242] and at sub-paragraph 8 of paragraph [246] of the judgment are set aside.

(5) The order made by the learned trial judge in the last sentence of paragraph [244] and at sub-paragraph 9 of paragraph [246] of the judgment are set aside.

(6) The order for costs made by the learned trial judge at paragraph [245] and at sub-paragraph 10 of paragraph [246] of the judgment are set aside.

[127] For reasons explained at paragraphs [49]-[72], I disagreed with the learned trial judge that there was any breach of the respondents right to property under section 6 of the **Constitution**. However, at paragraph [238] of her written judgment, the learned trial judge accepted that the respondents were entitled to any accrued pension benefits. That part of the order is consistent with my explanation provided at paragraph [73] above, based on any proven lawful entitlement to any pension benefits under the pensions law of Saint Vincent and the Grenadines.

[128] I would order that there should be no order as to costs in the court below and in this appeal.

[129] **WEBSTER JA [AG.]:** I have had the benefit of reading the draft judgments prepared by my learned brothers Ventose JA allowing the appeal and Wallbank JA [Ag.] dismissing the appeal. I agree with the reasoning and conclusions of Ventose JA and I will add just a few comments of my own.

[130] The background to this appeal is set out in detail in the evidence, written submissions of counsel and the draft judgments of my brother judges. I will not repeat the details except to say that by March 2020 Saint Vincent and the Grenadines (SVG), like most countries in the world, was caught up in the ravages of the Covid-19 pandemic. Many persons were falling gravely ill, being hospitalised, and in many cases dying. It was a public health emergency of vast proportions.

[131] The Government had to take drastic measures to cope with the disaster. In April 2020 Parliament passed the **Covid 19 (Miscellaneous Amendments) Act** ("the **Amendment Act**") which gave the Minister power to amend any existing law by Order. Parliament also amended the **Public Health Act** to give the Minister of Health and the Environment ("the Minister"), on the recommendation of the Chief Medical Officer ("CMO"), power to pass special measures to deal with the crisis.

[132] In December 2020, the Minister of Health declared a public health emergency for SVG caused by the Covid-19 pandemic. In October 2021, the Minister of Health promulgated the **Public Health (Public Bodies Special Measures) Rules, 2021** ("the **Special Measures**"). The **Special Measures** included Rules 4, 5, 7 and 8 which are material in this appeal and are set out in paragraphs 12 -13 in the judgment of Ventose JA and are reproduced in this judgment only to illustrate the points which are being made.

[133] Rules 8 provides:

> "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)."

[134] The learned judge found that Rules 8(1) and 8(2) were unconstitutional, ultra vires, disproportionate, and tainted by procedural impropriety. The first reason for this finding was that there was no basis or no adequate factual basis to find that the

Minister acted on the advice of the CMO, as is required by section 43B of the **Public Health Act**, in making the **Special Measures**. This was a finding of fact by the trial judge that was heavily criticised by the appellants. Ventose JA agreed with the criticisms and found that as a matter of fact, the Rules were made by the Minister on the advice of the CMO. I agree with Ventose JA's finding and conclusion. There is uncontradicted evidence that the CMO advised the Minister about the need for the measures that were necessary to deal with the pandemic. The fact that the CMO's advice did not use the words that were used in the Rules does not mean that appropriate advice was not given to the Minister. For example, the advice did not include any reference to Regulation 31 and the consequence of being absent from duty without leave. This does not mean that the Minister did not act on the advice of the CMO or that the regulations that he made based on the advice went beyond the advice that he was given. Section 39 of the **Interpretation Act** gives the Minister the latitude to do whatever is necessary to make the **Special Measures** effective. Section 39 of the **Interpretation Act** provides under the heading "Construction of enabling words" that:

> "Where any written law confers power upon any person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are necessary to enable the person to do, or to enforce the doing of, that act or thing."

[135] The section is clear authority that the Minster can interpret and apply the advice that was given to him by the CMO to achieve the aim of the **Special Measures**. He was not confined to the specific matters mentioned in the advice so long as his formulation of the rules did not go beyond the substance of the advice that he was given by the CMO.

[136] The rules, when read in context, show that the Minister was acting on the advice of the CMO in formulating the **Special Measures**. As the rule maker, he was entitled to use language that was necessary to make the rules effective. In the circumstances, I find that this is an appropriate case for appellate interference with the trial judge's finding of fact. I would set aside the finding that that there was no adequate basis to

find that the Minister acted on the advice of the CMO when he promulgated the **Special Measures**.[36]

[137] The learned judge's second reason for finding that Rule 8 was unconstitutional was that the Minister usurped the functions of the Public Service Commission under sections 77(13) and 78(1) of the **Constitution** by making Rule 8. I do not accept this finding. Rule 8 states that an employee who is unvaccinated without reasonable cause must not enter the workplace, and that such an employee is to be treated as being absent without leave. It then incorporates Regulation 31 of the **Public Service Commission Regulations**, which is a standard provision in Public Service Commission Regulations in the Eastern Caribbean which applies to all public officers. Regulation 31 states that:

> *"Determination of Appointments*
>
> **31. Abandonment of office**
> An officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer."

[138] Regulation 31 deems an employee who is absent without leave for ten days as having resigned his office which thereupon becomes vacant. The Regulation applies once the employee is absent without leave for ten days or more. The Public Service Commission only comes into play if the affected employee seeks to challenge his deemed resignation (as he is entitled to do). It is difficult to see how Rule 8 usurps the role of the Commission.

[139] The learned judge's third criticism of Rule 8 is that it contravenes the employees' protected rights in section 6 of the **Constitution** which provides protection from deprivation of property, and section 88 which provides protection of pension rights. The criticisms and findings of the learned judge's finding on this issue are dealt with

[36] Paragraph 150 of the judgment.

in the judgment of Ventose JA with which I agree. There is nothing useful that I can add.

[140] The learned judge also found that the rules of natural justice were breached by the Public Service Commission and the Police Service Commission because the employees were not given an opportunity to be heard before letters were sent to them informing them of their deemed resignation. The evidence shows that the letters were sent to the employees after they were absent without leave for 10 working days (thereby triggering the deeming resignation in Regulation 31). The affected employees could have applied for exemption under Rule 7 of the **Special Measures** or challenge their deemed resignation under Regulation 31 after the letters were issued. Instead, they chose to not comply with the requirements of the new Rules or to challenge the deemed resignations after the letters were issued. Ventose JA found that in the circumstances the rules of natural justice were not breached and set aside the learned judge's finding. I agree with Ventose JA's reasoning and conclusion and I would also set aside the finding of breaches of the rules of natural justice.

Pensions

[141] My final substantive point concerns the employees' alleged loss of their pension and gratuity entitlements. At the outset, I make the trite point that a person can be a member of a pension scheme and accrue rights which do not become vested in the person and therefore his property until certain qualifications are met. The terms of the scheme usually set out the qualifications. The evidence is that many of the employees were given letters of employment that immediately put them on the Government's pension scheme ("the Pension Scheme"). They would have started accruing pension rights as soon as they started working and many of them have worked for long periods. As such, they have accrued rights under the Pension Scheme. What is missing from the evidence is the terms of the Pension Scheme and when the accrued rights became vested rights in the employees under the Scheme. There is no evidence of the vesting period under or that there is no vesting requirement. This is why I accept the submission of Mr. Astaphan SC that "there was

no evidence that any of the [employees] had earned the right to pensions as required under the Constitution."[37] I also accept and adopt the findings of Ventose JA that the employees' statements of an entitlement to pension benefits that was not grounded in the pensions law of Saint Vincent and the Grenadines was not an entitlement to property that could be protected by section 6 of the **Constitution**.

[142] In the circumstances, I find that there is no proof that the employees suffered any loss of their pension entitlements by the deemed resignations. However, nothing that I say in this judgment should be taken as preventing an affected employee from applying to the Government for their vested pension entitlements in accordance with the pensions laws of Saint Vincent and the Grenadines.

Other findings

[143] Ventose JA made findings that the letters issued to the affected employees regarding their failure to comply with Rule 5 and breaching Regulation 31 did not contravene sections 77(12), 77(13), 84(6) and 84(7) of the **Constitution** and that the **Amendment Act** is not unconstitutional for contravening the separation of powers doctrine and how the term 'the Minister' is to be defined. I agree with these findings and there is nothing useful that I can add.

Conclusion

[144] My overall conclusion is that it is unfortunate that the actions of the employees resulted in their deemed resignations from their employment. However, the Government was faced with a drastic crisis of unprecedented proportions that was causing significant health issues and loss of life. Measures had to be taken to address the situation. In the circumstances that were prevailing during the pandemic the measures that were taken were not disproportionate, unconstitutional, ultra vires or procedurally unfair. Those who chose to not comply, no matter how conscientious their objections, had to deal with the consequences of their non-compliance.

[37] Appellants' skeleton argument filed 9th October 2023 at paragraph 74.

[145] I would make the same orders that Ventose JA proposes in paragraphs [126] and [128] of his judgment.

Paul Webster
Justice of Appeal [Ag.]

[146] **WALLBANK JA [AG.]**: I have had the benefit of considering drafts of the judgments of my honourable and learned colleagues, his Lordship the Honourable Justice of Appeal Ventose, and his Lordship the Honourable Justice of Appeal Webster, as they have of mine. I respectfully dissent from their judgments. For the reasons set out below, in my respectful judgment this appeal should be dismissed and the judgment of the learned judge in the court below should be affirmed.

1. Introduction

[147] The learned judge in the court below, in my respectful judgment, delivered a judgment which was for the most part carefully and closely reasoned. It was, in my view, open to her to reach most of the conclusions she did and I see no reason for this Court to disturb her findings and her ultimate decision.

[148] There are, in my respectful judgment, two areas in which it is particularly clear to me that her conclusions were correct:

(1) key parts of **Public Health (Public Bodies Special Measures) Rules, 2021 SR&O No. 28 of 2021**, which I will refer to as '**SR&O 28**', were unconstitutional because they were disproportionate; and

(2) the decisions of the Public and Police Service Commissions that the respondents had remained unvaccinated without reasonable excuse and were thus to be treated pursuant to **SR&O 28** as having resigned their positions were invalidated by reason of elementary principles of natural justice or fairness.

[149] For ease of reference, I will devote segments of this judgment to each. I will be making a number of other observations, as it would be remiss of me not to address various matters propounded by the parties, the learned judge and by my learned colleagues in their judgments, and I apologise in advance for the length.

[150] Before explaining why I have come to my views on the two particularly determinative aspects summarised above, it is apt to record that the visitation of COVID-19 upon the world and the issues surrounding vaccination have evoked strong emotions and opinions and continues to do so.

[151] It should also be recalled that Constitutions and legal safeguards of a State are important. They are typically expressed to embody the supreme law of a State already subject to the absolute rule of law. Constitutions have only one function: to protect the residents of a State from abuses of power and excess of authority by those who are supposed to serve them. Constitutions are not some pious symbol adorning the facade of an independent nation State; Constitutions are there to protect the residents of a State including and especially when times are difficult – and that includes in that period of recent history often referred to as 'during COVID'. The magnitude and gravity of 'COVID', as perceived by many, including the decision makers in government, did not, and cannot, trump the application of constitutional and legal safeguards. It would set an extremely dangerous precedent if governments can assume they will not be held by the courts to adhere to the demands of a Constitution or of the law if a situation is represented by the government and the media as sufficiently serious to warrant this. If a measure breaches legal or constitutional principles, then the gravity of a situation cannot save it. Constitutions typically contain mechanisms for dealing with emergency situations. As we will see, the **Constitution of Saint Vincent and the Grenadines** is no different. Where, as in this case, such mechanisms have not been used, the full force of constitutional and legal protections continue to apply.

2. Background

[152] The matter before this Court concerns a dispute over the constitutionality and/or legality of a measure introduced to enforce a COVID-19 vaccine mandate imposed on frontline public service employees and Police Officers by the Government of Saint Vincent and the Grenadines on 19th October 2021. My learned colleague, Ventose JA, correctly postulates that the vaccine mandate itself, i.e. the requirement for certain sectors of the Public and Police Services to be vaccinated, is 'presumptively constitutional', but I would add that that is so only for the case before this Court, because the respondents did not have permission to argue otherwise. Presumptive constitutionality is not necessarily the case for any future vaccine mandate where its legality or constitutionality might be challenged.

[153] The evidence before the Court indicates the following. In doing so, I take care to present a balance.

[154] On 30th January 2020, the World Health Organisation ('WHO') had declared a Public Health Emergency of International Concern in respect of an outbreak of a virus referred to as 'COVID-19'.[38] The WHO declared this to be a 'pandemic' on 11th March 2020.[39]

[155] The Chief Medical Officer ('CMO') of Saint Vincent and the Grenadines has given evidence in these proceedings that COVID-19 was 'highly contagious'.[40]

[156] The CMO gave evidence that COVID-19 caused a wide range of symptoms 'from the majority of persons having very minimal or no symptoms, to hospitalisation with severe multi-organ dysfunction and death'.[41]

[38] See Affidavit of Dr. Simone Keizer-Beache at paragraph 15.
[39] Ibid.
[40] See Affidavit of Dr. Simone Keizer-Beache at paragraph 16.
[41] Ibid.

[157] The CMO gave evidence that she recommended the importation and use of vaccines. She attested that she did so because it was her 'considered view that vaccines were at that time the most effective means of controlling the spread of an infectious agent, and preventing serious illness, hospitalisations, and death.'[42]

[158] Tragically, there would be deaths in Saint Vincent and the Grenadines, as well as hospitalisations, naturally entailing great suffering.

[159] Various types of sera for injection were procured. For convenience I shall refer to these, without distinction between them (although they fell into two technical categories, 'mRNA' and 'viral vector' respectively[43]) as "the Vaccine".

[160] Between June and October 2021, the CMO advised and recommended to the Minister of Health and the Government generally that frontline public sector employees 'must be required to be vaccinated'.[44]

[161] The CMO also advised that unvaccinated public sector employees 'should not enter the workplace because if an unvaccinated worker entered the identified high-risk workplace, they would present a risk of infection to, or risk being infected by, the patients, students, prisoners, travellers, and so on'.[45]

[162] The vaccine mandate was imposed pursuant to the CMO's advice and recommendations.

[163] Appurtenant to this vaccine mandate was a measure which had the effect of giving unvaccinated public and police service frontline workers an ultimatum to take the Vaccine to avoid being treated as having resigned their employment. In the straight-forward words of one of the respondents, Mr. Alfonso Lyttle, in his affidavit:

---

[42] See Affidavit of Dr. Simone Keizer-Beache at paragraph 27.
[43] See Affidavit of Dr. Simone Keizer-Beache at paragraph 46.
[44] See Affidavit of Dr. Simone Keizer-Beache at paragraph 85.
[45] See Affidavit of Dr. Simone Keizer-Beache at paragraph 85 (v).

> "The position of the Minister of Health is take a Covid vaccine or lose your job."[46]

Or, again, in the equally direct words of the respondents Mr. Shefflorn Ballantyne, Mr. Travis Cumberbatch and Mr. Ronan Giles:

> "We were not given any options to save our jobs. We were told and expected to take the jab or lose our jobs."[47]

[164] This measure proved highly controversial, attracting both local and international criticism.[48]

[165] It is notable that this was the only such measure in the Caribbean region at the time.[49]

[166] By 14th October 2021 (i.e. 5 days before the vaccine mandate was imposed on 19th October 2021), Saint Vincent and the Grenadines Government's figures placed in evidence before the Court show that there had been 4217 reported cases of infection with COVID-19[50] representing approximately 3.83% of the population of 109,999, as estimated by the Government.[51] Conversely 96.17% of the population had reportedly not become infected with COVID-19 yet.

[167] The Government's figures showed that by 14th October 2021, there had been 42 deaths 'from'[52] COVID-19, representing a mortality rate of approximately 0.04% of the population and approximately 0.99% of the reported infections with COVID-19.

[168] The regional position, some 10 days earlier, as reported in a Situation Report, number 198, dated 4th October 2021 of the Caribbean Public Health Agency

---

[46] See Affidavit of Mr. Alfonso Lyttle at paragraph 10.
[47] See Affidavit of Mr. Shefflorn Ballantyne, Mr. Travis Cumberbatch and Mr. Rohan Giles at paragraph 15.
[48] See e.g. the letter dated 6th December 2021 from the Caribbean Union of Teachers to the Prime Minister at Record of Appeal Bundle 3, pages 299 to 300 and the letter dated 9th August 2022 to the Prime Minister from the 'First Wave Movement' in Trinidad & Tobago at Record of Appeal Bundle 3, pages 301 to 305.
[49] See uncontested evidence of Supplemental Affidavit of Alfonso Lyttle, paragraph 16 at Record of Appeal Bundle 3, page 285.
[50] Record of Appeal Bundle 7, page 1210.
[51] Record of Appeal Bundle 6, page 1018.
[52] Record of Appeal Bundle 7, page 1210.

('CARPHA')[53] was that there had been a total of 1,944,608 confirmed cases of COVID-19 infection in 35 Caribbean countries/territories, including the 26 CARPHA Member States, with 24,354 deaths recorded.[54] This represented a mortality rate for those 35 countries/territories of approximately 1.25% of those who had reportedly tested positive for the disease. For the 26 CARPHA Member States, there were a total of 362,694 reported cases and 7,786 reported deaths,[55] representing a mortality rate of approximately 2.15% of reported cases of infection. At the time, the mortality rate of the reported infections with COVID-19 for Saint Vincent and the Grenadines stood at less than half of this, at approximately 0.99%.[56]

[169] In terms of the incidence rate for COVID-19 per 100,000 of population amongst CARPHA Member States, the three highest were Jamaica, Trinidad & Tobago and Suriname. Saint Vincent and the Grenadines was surpassed by twelve States/Territories: Aruba, Bahamas, Barbados, Belize, Bermuda, Curacao, Guyana, Haiti, Jamaica, Saint Lucia, Surname and Trinidad and Tobago, all of which had a higher incidence per 100,000 than Saint Vincent and the Grenadines.[57] This warrants observation, as it presents the circumstance that the Government of Saint Vincent and the Grenadines uniquely, in the region, adopted the severe measure of requiring public officers to take the Vaccine on pain of losing their jobs, despite being surpassed in terms of incidence per 100,000 by twelve other States/Territories.

[170] The evidence does not disclose any reason why such a uniquely severe measure should be adopted in Saint Vincent and the Grenadines.

[171] The CMO testified that she actively monitored national and international data, including CARPHA reports, such as the one mentioned above, which she had put

[53] Record of Appeal Bundle 6, page 1042 to 1050.
[54] Record of Appeal Bundle 6, page 1043.
[55] Ibid.
[56] Record of Appeal Bundle 7, page 1210.
[57] Record of Appeal Bundle 6, page 1044.

into evidence.[58] It was this, and other, information which informed the CMO's recommendations for the implementation of the vaccine mandate in October 2021.

[172] Ultimately, as at 27th September 2022 (about a year later), the Government reported that there had been a total number of 9,448 positive tested cases.[59] This represented approximately 8.59% of the population as having reportedly tested positive with COVID-19, and approximately 91.41% of the population who had not. The Government reported 116 'COVID-19 deaths',[60] a term broad enough to include those who died of COVID-19, as well as directly or indirectly in connection with COVID-19. This represented a mortality rate of approximately 1.28% of those who had tested positive for COVID-19, and a recovery rate of approximately 98.72% of those who had tested positive. The 116 deaths represented approximately 0.1% of the population. Conversely, 99.9% of the population did not die of COVID-19 and survived. It must be borne in mind that the Government would not have known this a year earlier in October 2021 when it imposed the vaccine mandate.

[173] No evidence was led in these proceedings to show how these figures compare with infection and mortality rates during historical international epidemics and pandemics. This gap in the evidence is significant, because this prevents an assessment of the gravity of COVID-19 in relation to other epidemics and pandemics.

[174] Equally, these figures are not gradiated with reference to the age of the deceased.

[175] The figures given do not include hospitalisations. The Government did not put in evidence data for the number of persons hospitalised, nor for the number of hospital beds that had been available or made available. This is a gap in the evidence of some significance, as one of the Government's stated concerns had been that the

[58] See Affidavit of Dr. Simone Keizer-Beache at paragraph 11.
[59] Record of Appeal Bundle 6, page 1006.
[60] Ibid.

hospital system and social services should not become overwhelmed with persons requiring treatment.[61] The Court thus has no vision over that aspect of the matter.

[176] The CMO gave evidence that the first reported case of COVID-19 infection occurred on 11th March 2020.[62] The CMO likewise gave evidence that Saint Vincent and the Grenadines received its first shipment of COVID-19 vaccines in early February 2021, and that a vaccine 'roll-out' began on 14th February 2021[63] (i.e. some 8 months before the vaccine mandate was imposed).

[177] The Government allocated a budget of US$1,369,380.00 to its vaccination roll-out campaign. Of this, US$234,380.00 was budgeted to come from the Government's own funding; US$460,000.00 from external sources, including US$410,000.00 from an unnamed 'Friendly Government Source', and the balance of US$789,380.00 was to be financed further. The Government disclosed its 'strategy to address the gap of $789,380.00' as including raising a bank loan of US$100,000.00, a payment of US$368,000.00 from a trust known as the Mustique Charitable Trust, a payment of US$200,000.00 by way of an 'Alba Grant' and a further US$600,000.00 from a 'Friendly Government Source', the identity of which was also withheld.[64] The terms and conditions for the various financing sources, including in respect of funds supplied by foreign 'Friendly Government Sources', were not put in evidence.

[178] The Vaccine roll-out was accompanied by an information communication campaign, as detailed in a document called the 'Saint Vincent and the Grenadines National COV-19 Vaccine Introduction and Deployment Plan' dated 22nd February 2024. In the words of the Plan:

> "This plan describes the strategies, and vaccination tactics to be taken for the introduction of COVID-19 vaccine."[65]

---

[61] See Affidavit of Dr. Simone Keizer-Beache at paragraph 101.
[62] See Affidavit of Dr. Simone Keizer-Beache at paragraph 17.
[63] See Affidavit of Dr. Simone Keizer-Beache at paragraph 41.
[64] Record of Appeal Bundle 6, pages 1076 and 1077.
[65] Record of Appeal Bundle 6, page 1059.

[179] The Plan recorded, in the context of potential legislation, that:

> "The policy position of the Ministry of Health, Wellness and Environment is that COVID-19 vaccinations should be voluntary rather than mandatory in the first instance."[66]

[180] The Plan recorded the following methodology:[67]

> "Risk Communications
>
> The success of the vaccination with the COVID vaccines will require a strong and comprehensive risk communication program guided by a risk communications plan which utilizes gate keepers of the various target groups. Teachers, Church Leaders, Political Party Leaders, Trade Union Leaders, Talk Radio Personalities, Entertainers, private and public sector HCWs must be coopted to take the message to the entire population to ensure the required vaccine acceptance and uptake. Early and consistent messaging utilizing all available media and appropriate in person sessions will be utilized. Persons who request the vaccine even if outside the target groups should be considered as a mechanism to build positive reinforcement experiences.
>
> Appropriate messages and jingles will be developed for the media providing accurate information for the target population. Interactive Sessions, power point presentations are some things that will be done to inform people about the vaccine. The capacity of the frontline workers will be built by doing presentations and providing reading materials, answer their questions about the vaccines to support their roles as recipients and vaccinators."

[181] It is apparent from this that the Government anticipated that it would be difficult to persuade members of the public to take the Vaccine in the observable circumstances of COVID-19.

[182] Moreover, the Plan recounted as part of the purpose of the Government's communication plan:

> "(b) to build vaccine confidence and dispel myths and rumors among the general population
>
> (c) to positively influences [*sic*] vaccine uptake among the target population."[68]

---

[66] Record of Appeal Bundle 6, page 1059.
[67] Record of Appeal Bundle 6, pages 1066 to 1067.
[68] Record of Appeal Bundle 6, page 1095.

[183] The CMO gave evidence that her recommendation to the Government had been 'the urgent and aggressive procurement of effective vaccines and the immediate vaccination of 70% of the population of Saint Vincent and the Grenadines' in order to achieve 'herd immunity' amongst the public. [69]

[184] By early June 2021, the Government's Health Services Subcommittee recommended additional measures to overcome 'vaccine hesitancy':[70]

> "Vaccine hesitancy:
>
> I. New Vaccine reintroduction campaign by communications group informed by market research;
>
> II. Incentivize:
>
> i. General Public:
>
> 1. Lottery – cash, land, car, accessible by all vaccinated persons;
> 2. Phone cards – on receipt of first and second doses;
> 3. Services at private and public entities – vouchers, discounts.
>
> ***ii. Health Care Workers***
>
> ***1. Grant paid to first and second dose vaccinated health care workers within a set period e.g. June 27, 2021 & August 30, 2021. (14,000 doses available).***
>
> 2. ***Increments, training opportunities including acceptance in the Midwifery programme, attendance at meetings, promotions dependent upon vaccination status.***" (Emphasis in original.)

[185] The CMO gave evidence that the outcome of the information communication campaign was not as successful as the Government had hoped:[71]

> "Regrettably, our efforts to improve vaccination rates in order to prevent serious illness and save lives failed. Saint Vincent and the Grenadines has one of the lowest vaccination rates in the region due to misinformation on the efficacy and safety of the vaccines and associated hesitancy."

---

[69] Affidavit of Dr. Simone Keizer-Beache at paragraph 49.
[70] Record of Appeal Bundle 6, pages 1182 to 1183.
[71] See Affidavit of Dr. Simone Keizer-Beache at paragraph 58 (xii).

[186] The CMO did not specify what the 'misinformation' was.

[187] The CMO's attributing refusal to take the vaccine to unspecified 'misinformation' is ironic. The facts of the matter before the Court paradoxically present us with a situation where the two main groups of respondents who persisted in refusing to take the Vaccine comprise educated members of the population (predominantly medical doctors and other medical workers and teachers) and professionally trained critical observers (Police Officers), categories of workers one might think least likely to be swayed by 'misinformation'.

[188] Moreover, the Government's own 'Saint Vincent and the Grenadines National COVID-19 Vaccine Introduction and Deployment Plan' was purposefully slanted 'to positively influences [*sic*] vaccine uptake among the target population'. Dispassionately, one is bound to ask oneself why the Government's narrative was not itself 'misinformation'; since the Government's goal was not to provide the public with a balanced, informed and informative view to assist persons in deciding for themselves whether or not to take the Vaccine, but to influence them positively to do so. Ultimately, for the CMO to have ascribed low vaccine uptake to unspecified 'misinformation' was easy to do but meaningless.

[189] The reasons given by the respondents in their evidence for refusing to take the Vaccine were various. Upon their face, these were good reasons, in the sense of being serious and substantial. Predominantly, the following main reasons can be identified, whether solely or in combination:

(1) Religious principles;[72]
(2) Bodily autonomy principles;[73]
(3) The Vaccine did not prevent infection of COVID-19;[74]
(4) The Vaccine did not prevent transmission of COVID-19:[75]

[72] See e.g. the Affidavit of Sgt Brenton Smith at paragraph 6, the Affidavit of Alfonso Lyttle at paragraph 14, and in many places in the documents before the court for the 271 respondents.
[73] See e.g. the Affidavit of Ms. Shaniel Howe obo herself and Ms. Novita Roberts at paragraph 8 and in other places in the documents before the court for the 271 respondents.
[74] Ibid.
[75] Ibid.

(5) The Vaccine was experimental;[76]

(6) The Vaccine came with risk of adverse effects such as blood clotting disorders, for example thrombotic thrombocytopenia and cerebral venous thrombosis, neurological disorders such as Guillain-Barre syndrome, and heart diseases such as myocarditis and pericarditis;[77]

(7) The disease was not so serious as reasonably and justifiably to warrant the vaccine mandate imposed by the Government;[78]

(8) Early treatment was available to address COVID-19.[79]

[190] The witnesses for the appellants, including the CMO, did not contest that the Vaccine did not prevent infection or transmission and that it was experimental, and that it carried the risk of adverse reactions.

[191] The CMO did not, though, in terms, acknowledge the blood, neurological and cardiological disorders mentioned by the respondents.

[192] The CMO gave evidence that the various types of the Vaccine used 'were reported by the World Health Organisation, Pan-American Health Organization, CARPHA and others to be safe, highly effective and efficacious'.[80] The CMO attested that the types of the Vaccine used in Saint Vincent and the Grenadines 'all had reported initial efficacy levels of greater than 65% - 75% and effectiveness of greater than 80%'.[81] By 'initial' efficacy, the evidence was that the efficacy levels would decrease, requiring booster injections at five-month intervals after the initial two dose series of the Vaccine.[82] In respect of one variant of COVID-19 (the Beta variant), CARPHA reported the Vaccine was '57% - 92%' effective at preventing severe disease and death'.[83]

---

[76] See e.g. Affidavit of Mr. Shefflorn Ballantyne, Mr. Travis Cumberbatch and Mr. Rohan Giles at paragraph 15 and in other places in the documents before the court for the 271 respondents.
[77] See e.g. Affidavit of Mr. Shefflorn Ballantyne, Mr. Travis Cumberbatch and Mr. Rohan Giles at paragraph 15 and in other places in the documents before the court for the 271 respondents.
[78] Record of Appeal Bundle 4, page 771 at paragraph 2(a).
[79] Ibid.
[80] See the Affidavit of Dr. Simone Keizer-Beache at paragraph 44.
[81] See the Affidavit of Dr. Simone Keizer-Beache at paragraph 49.
[82] See the Supplemental Affidavit of Mr. Alfonso Lyttle at paragraph 13.
[83] Record of Appeal Bundle 6, page 1047.

[193] The CMO did not lead evidence to show how the 'highly effective and efficacious' percentage range for the Vaccine compared with vaccines for other diseases. This is significant because 'highly effective and efficacious' are relative concepts.

[194] The CMO gave evidence that the types of vaccine used:

> "…were also reported by the FDA, WHO, PAHO, CARPHA and others to have rare and minimal serious adverse effects relative to the risks of contracting COVID-19 with the possibility of serious long-term complications."[84]

[195] It is not clear whether the CMO was saying here that the Vaccine entailed the 'possibility of serious long-term complications' or whether it was COVID-19 that had this possibility.

[196] The CMO cited that by 26th November 2021, of more than 53,852 doses of the Vaccine administered, there had been 25 documented cases of adverse effects, most of which were slight to moderate, showing a risk of an adverse effect in Saint Vincent and the Grenadines of 0.046%.[85] The CMO also gave evidence that included in these figures was one death possibly caused by the Vaccine.[86] The CMO did not lead evidence of the international safety record relating to the types of vaccine used, which had all been internationally sourced, nor in relation to vaccine adverse events pertaining to vaccines used to immunize against other diseases by way of comparison.

[197] The CMO gave evidence, in relation to safety of the Vaccine, that 'the technology used in the mRNA COVID-19 vaccines and the viral vector vaccines are 20 years and 40 years old respectively'.[87] She did not give evidence whether these technologies had been used in respect of other coronaviruses before the arrival of

[84] See the Affidavit of Dr. Simone Keizer-Beache at paragraph 44.
[85] Ibid.
[86] See the Affidavit of Dr. Simone Keizer-Beache at paragraph 45.
[87] See the Affidavit of Dr. Simone Keizer-Beache at paragraph 46.

the COVID-19 virus, and if so, how these technologies performed in terms of safety and efficacy. Equally, she did not mention whether the novel COVID-19 virus required an equally novel set or combination of vaccine components, which might give each type of the Vaccine its own new safety and/or risk and efficacity profile.

[198] In respect of alternative treatments for addressing COVID-19, the Ministry of Health, Wellness and the Environment simply stated in a Press Release dated 27th August 2021[88] that:

> "The drugs Ivermectin and Hydroxychloroquine are not recommended for the treatment for COVID-19".

[199] Neither the Minister of Health, Wellness and the Environment, nor the CMO, explained in their evidence why these drugs were not recommended, begging the questions, by whom were they not recommended, and why not, particularly since the number of cases were rising and the Government was not achieving its hoped-for vaccination target.

[200] Ultimately, the 271 respondents persisted in their refusal to take the Vaccine. The courage of their convictions was not swayed by the Government's communications campaign calculated 'to positively influences [*sic*] vaccine uptake', nor bought over by the prospect of monetary grants and other financial and/or professional advancement incentives, nor moved by the *in terrorem* prospect of job termination with loss of livelihood for the unvaccinated public employees, their families and dependents and the loss of pension rights if they still did not comply with the Government's vaccination plan.

[201] That is not to say the 271 respondents did not suffer as a result. They gave evidence that they did, and seriously so, both in material as well as in psychological terms. They turned to the courts seeking to vindicate what they understood to be their rights and, so far as possible, to be made whole.

[88] Record of Appeal Bundle 7, page 1201.

[202] After a trial in the High Court, the High Court judge ruled in the respondents' favour. The appellants, dissatisfied with the judgment of the High Court, appealed. The respondents resisted the appeal.

[203] The parties to these proceedings decided to forego cross-examination of each other's witnesses at the trial in the court below. In consequence, neither side took the opportunity to question or seek clarification of the affidavit evidence given. This Court, not being the trial court, must therefore proceed of the basis of, and follow the evidence as presented to the court, although the Court does not need to suspend its critical faculties in doing so.

3. These proceedings

[204] This appeal derives from two claims filed in the High Court, which were consolidated. The claim which was commenced first, claim number SVGHCV2021/1033, was brought by six claimants who were all public servants (Ms. Shaniel Howe, Ms. Cavet Thomas, Mr. Alfonso Lyttle, Sgt. Brenton Smith and PC Sylvorne Olliver) against the Minister of Health and The Environment ('the Minister of Health'), the Public Service Commission, the Commissioner of Police, the Attorney General and the Police Service Commission.

[205] Ms. Shaniel Howe was a primary school teacher. She gave affidavit evidence in those proceedings on behalf of herself, and on behalf of the second respondent, Ms. Novita Roberts, who was also a primary school teacher. Mr. Alfonso Lyttle was a boarding officer, after serving as an Inland Revenue Department clerk. Sgt. Brenton Smith was a Police Officer, latterly serving as a Station Sargeant of Police. PC Sylvorne Olliver was a Police Officer.

[206] The second claim, with claim number SVGHCV2022/0053, was brought by three claimants, Mr. Shefflorn Ballantyne, Mr. Travis Cumberbatch and Mr. Rohan Giles. They did so on behalf of themselves and in a formal representative capacity on behalf of 262 other public officers. These comprised some 9 police officers, some 182 teachers (including 1 chemistry teacher) and a number of other public servants.

The latter included 3 medical doctors, 31 nursing professionals including midwives, 1 pharmacist, and 3 electrocardiograph technicians, as well as a number of representatives of various trades and other practical functions. The defendants to this second claim were, again, the Minister of Health, the Public Service Commission, the Commissioner of Police, and the Attorney General.

[207] The key common factors to these claims were that the claimants, and those they represent, in total some 271 individuals, all had their public service employment terminated because they refused to take the Vaccine.

[208] It is apparent from the judgment of the court below[89] that these 271 claimants were not the totality of the public servants terminated on that ground, with there being at least 32 additional terminated public officers who did not join these proceedings. The number of public employees terminated for refusing to take the Vaccine was at least 303.

[209] The claimants had all received very similar, indeed nearly identical, termination letters. Those who were not police officers generally received a termination letter from the 'Service Commissions Department', or another government department, mostly in the following terms, by way of illustration:[90]

> "
>
> December 8th, 2021
>
> Ms. Cavet Thomas
> (u.f.s. Director General, Finance and Planning)
>
> Dear Madam,
>
> I have to inform you that the Public Service Commission has noted that you, without reasonable excuse, failed to comply with Rule 5 of the Public Health (Public Bodies Special Measures) Rules 2021.
>
> As a result of your failure to comply with Rule 5, you have been absent from duty without leave since November 22nd, 2021, pursuant to Rule 8 of the Rules.
>
> Accordingly, on behalf of the Public Service Commission, I have to inform you that you are deemed to have resigned your office with effect from

[89] See paragraph [186] of the judgment.
[90] Record of Appeal Bundle 2, page 195.

December 7th, 2021, and to 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.

On behalf of the Government of Saint Vincent and the Grenadines, I would like to thank you for the service you have rendered during your period of employment, and, also, to wish you success in the future.

Yours sincerely
Arlene Regisford-Sam
Chief Personnel Officer"

[210] Generally, the only details to change were the names of the addressees, and the dates. The date of the letter was, however, generally on or fairly shortly after 8th December 2021.

[211] The police officer claimants received letters closely in the following terms, again by way of general illustration:[91]

"Royal St. Vincent and the Grenadines Police Force
Office of the Commissioner of Police
…
December 06, 2021
Ms. Donna Kennedy
Corporal of Police #503
…
Dear Cpl Kennedy,

Please be advised that you, without reasonable excuse, failed to comply with ***Rule 5 of the Public Health (Public Bodies Special Measures) Rules 2021 ("Rules")***.

As a result of your failure to comply with ***Rule 5***, you have been absent from duty without leave since November 22, 2021 to December 03, 2021, pursuant to ***Rule 8*** of the Rules.

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.

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

[91] Record of Appeal Bundle 3, pages 274 and 275.

Force. You are to ensure your kit and accoutrements are properly accounted for and handed in to the storekeeper.

Please be advised that your personal file will be processed. This is to ensure that you receive any benefits to which you may be entitled under the Police Act.

I will like to thank you for the service you have rendered to the State during your period of employment. Also, I wish you success in your future endeavours.

Yours faithfully,
Colin O. John
Commissioner of Police." (Emphasis in the original.)

[212] It can be seen that both categories of public servants were having Rules 5 and 8 of **SR&O 28**, invoked against them. The police officers also had Section 73A of the **Police Act** invoked against them.

[213] Section 73A of the **Police Act** was enacted by Statutory Rule and Order number 32 of 2021 (for convenience '**SR&O 32**'), **COVID-19 (Miscellaneous Amendments) Order, 2021**. **SR&O 32** was gazetted on 12th November 2021.

[214] Section 73A(1) expressly applied Rule 8 of **SR&O 28** to police officers.

[215] Section 73A(2) extends the wording and effect of Regulation 31 of the **Public Service Commission Regulations** to police officers. The nub of section 73A(2) is that a police officer 'who is absent from duty without leave for ten consecutive days is deemed to have resigned his office unless declared otherwise by' his or her competent superior.

[216] Paragraph 2 provides for the expiry of these provisions upon the day the public health emergency is declared by 'the Minister' to have ended.

[217] It can be seen that **SR&O 28** applied to public servants other than police officers. The purpose of **SR&O 32** was to make the same rules contained in **SR&O 28** apply to police officers.

[218] Moreover, if Rule 8 of **SR&O 28** is to be struck down in whole or part as illegal and/or void, the struck down parts of Rule 8 cannot have an independent existence in section 73A of the **Police Act**. That is because section 73A purports to apply Rule 8 to police officers. If Rule 8 is void in whole or part, such parts have no application, whether to public servants or to police officers.

[219] The legality and/or constitutionality of Rule 8 is thus fundamental to this appeal. It is appropriate to address this first.

4. SR&O 28

[220] If **SR&O 28** is found to be unlawful or unconstitutional, then the impugned terminations founded upon breach of **SR&O 28** fall to be set aside.

[221] **SR&O 28** took effect 30 days after it was gazetted. It was gazetted on 19th October 2021. So, **SR&O 28** came into force on or about 18th November 2021.

[222] **SR&O 28** materially provided as follows:

> "**WHEREAS** on 11th of March 2020, the World Health Organization declared a worldwide outbreak of COVID-19 (Coronavirus Disease-2019);
> **AND WHEREAS**, by the Public Health Emergency (Declaration) Notice 2020, No. 38 of 2020, a public health emergency for the pandemic caused by COVID-19 was declared for Saint Vincent and the Grenadines;
>
> **AND WHEREAS**, under section 43B of the Public Health Act, Chapter 300, the Minister may on the 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 -
> …
> 3. The purpose of these Rules is to –

(a) prevent, control, contain and suppress the risk of the spread of the coronavirus-disease 2019 in public bodies; and

(b) protect the health and safety of employees

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 to 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.

…

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.

Failure to comply with Rules

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 sub-rule (1).

(3) **An employee who enters the workplace in contravention of sub-rule (1) commits an act of misconduct and is liable to be disciplined** in accordance with the –

(a) Public Service Commission Regulation or any other relevant written law, in the case of a public officer;
or
(b) relevant laws that regulate the service of the employee, in the case of every other employee.

9. **These Rules expire on the day the Minister declares that the public health emergency has ended**." (Emphasis added.)

[223] The parts of **SR&O 28** that I have quoted include:

(1) the fact that a 'public health emergency' had been declared for Saint Vincent and the Grenadines;

(2) express reference to the underlying empowering provisions, sections 43B and 147 of the **Public Health Act**, Chapter 300;

(3) the stated purpose of **SR&O 28** (at Rule 3);

(4) a negative rapid test requirement (at Rule 4);

(5) the mandatory vaccination requirement (at Rule 5);

(6) provisions for medical and religious exemptions (at Rule 7);

(7) provisions concerning 'Failure to comply with Rules' (at Rule 8);

(8) A provision for the expiry of **SR&O 28**, expressly indicating their temporary nature (at Rule 9).

[224] Regulation 31 of the **Public Service Commission Regulations** provides:

"Determination of Appointments

31. Abandonment of office
An officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer."

[225] The **Public Health Act**, a statute dating from 1977, included the following provision at section 147:

"General power to make rules.
147. The Minister shall have power to make rules generally for the carrying out of the purposes of this Act."

[226] The **Public Health Act** was (materially) amended in 2020 by the **Public Health (Amendment) Act**,[92] to make provision for 'Public Health Emergencies'. One of the amendments was to insert section 43B into the **Public Health Act**.

[227] Section 43B of the **Public Health Act**, referred to in the preamble to **SR&O 28**, materially provides as follows:

> "43B. (1) Where the Chief Medical Officer believes that a public health emergency exists in Saint Vincent and the Grenadines and believes that the public health emergency cannot be mitigated or remedied without the implementation of special measures under this section, the Chief Medical Officer shall recommend to the Minister that a public 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."
>
> (2) Where the Minister has declared a public health emergency, **the Minister, on the advice of the Chief Medical Officer, may implement special measures to mitigate or remedy the emergency including –**
>
> [various measures]" (Emphasis added.)

[228] Concerning these various measures, the learned judge related, at paragraph [143] of her judgment with reference to 'special measures' mentioned in section 43B:

> "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 [i.e. Chief Medical Officer's] advice is mandated. No witness indicated that the CMO recommended the measures for resignation of officers by operation of law or otherwise for permanent exclusion of workers from the workplace."

[92] Act No. 6 of 2020.

[229] Pausing here, it is the permanent exclusion of public servants and police officers from their jobs, with attendant loss of livelihood, pension entitlements and gratuity, by way of deemed resignation from their employment for refusal to take the Vaccine, which forms the heart of the respondents' complaint in the present consolidated proceedings. I shall refer for convenience to this as the 'impugned termination measure'.

[230] Concerning the religious exemption afforded by Rules 7(1)(b) and 7(6), it warrants observation that **SR&O 28** in its draft public consultation form provided that religious exemption would be available if a public officer:

> "[7](1)(b) objects in good faith and in writing that vaccination is contrary to his religious beliefs and the employer is able to make alternative arrangements to accommodate the employee."[93]

[231] In the final, gazetted, version of **SR&O 28**, we have seen that the second part (the condition that alternative arrangements can be made by the employer) remained, whilst the first part was replaced with simply 'application for exemption on religious grounds must be in a form approved by the Cabinet'.

[232] When regard is had to that Cabinet approved form,[94] it requires a declaration by an applicant's 'religious leader' in, *inter alia*, the following terms:

> "I, the undersigned, hereby declare that vaccination (including vaccination against COVID-19) is contrary to the doctrine of my religious body …"

[233] The obvious effect of this is that it is only public officers who adhere to a religion which is doctrinally against all forms of vaccination, not just the Vaccine, who qualify for religious exemption.

[234] This requirement is inherently exclusive. It excludes from religious exemption all global mainstream religions that do not prohibit vaccination *per se*. It is unclear to me why a particular religion's stance in relation to vaccination in general has

[93] Record of Appeal Bundle 4, page 602.
[94] Record of Appeal Bundle 4, pages 603 to 604.

anything to do with its position in respect of the Vaccine. Those other vaccines are not in issue. Not all vaccines present the same moral and/or ethical issues: for example, not all vaccines are experimental when administered to the general public and not all vaccines are developed or tested in the same way.

[235] The Government's religious exemption provision is also extraordinarily narrow when read alongside section 9 of the **Saint Vincent and the Grenadines Constitution Order 1979** ('the **Constitution**'),[95] which materially provides:

> "9. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance."

[236] Section 9(1) protects, as a fundamental right and freedom, the right to hold any religious beliefs. That is so, regardless of whether the religion in question is an organised religion, or whether an adherent to a religion accepts all the tenets thereof. Section 9 leaves it to the individual to decide what religious beliefs, if any, that person may have. The government is given no power to decide which religious beliefs it will give exemptions in favour or to deny exemptions for.

[237] There is also section 13 of the **Constitution**, which provides at section 13(1) that, subject to certain specified exceptions:

> "…no law shall make any provision that is discriminatory either of itself or in its effect."

[238] 'Discriminatory' is defined in section 13(3) as:

> "… affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed".

[239] It forms no part of this Appeal for the Court to determine whether or not the religious exemption provision in **SR&O28** was itself unconstitutional. That said, it is apparent

[95] Cap 10 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

that the exclusive narrowness of the religious exemption provision is in stark contrast to the broad liberty of 'creed' and guarantees against discrimination expressed in the **Constitution**.

[240] The exclusive narrowness of religious exemption is also illustrated by the evidence. The Chief Personnel Officer, Mrs. Arlene Regisford-Sam, gave evidence that there were 186 applications for religious exemption, of which only 6 were approved, but only ***one (1)*** person accepted the additional conditions imposed by the Government of regular testing and mask wearing.[96]

[241] This exclusive narrowness, coupled with the non-religious condition that exemption could only be granted if the alternative employment arrangements could be made by the public service employer, led the respondents to complain that:

> "The condition in rule 7(1)(b) redefines exemption on religious grounds, to the point where it makes religious exemption null and void, because the determination to grant religious exemption is not based on religious reasons and qualifications under Section 9 of the Constitution of Saint Vincent and the Grenadines (Protection of Freedom of Conscience). Rather, it is based on the employer's subjective decision on if alternative arrangements can be made to accommodate the employee, and there are no checks on the employer to ensure no breach of the constitution. This is NOT religious exemption."

[242] Since the constitutionality of the religious exemption provision was not an issue for determination by this Court of Appeal, and since it was not the subject of argument by counsel, it would not be appropriate for me to express a legal opinion on it. I do accept, however, that obtaining religious exemption was not a realistic option for the vast majority of public officers: it was not intended by the Government to be a realistic option, and the evidence shows that it was not.

[96] See the Affidavit of Mrs. Arlene Regisford-Sam at paragraphs 18 and 19.

5. Whether Rule 8(1) and (2) were valid although not advised by the CMO

[243] In my respectful judgment, those parts of **SR&O 28** Rule 8(1) and (2) which had not been enacted on the advice of the CMO were valid, because of the effect of section 39 of the **Interpretation and General Provisions Act**.[97] This provides:

> "39. **Construction of enabling words**
> Where any written law confers power upon any person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are necessary to enable the person to do, or to enforce the doing of, that act or thing."

[244] In my respectful judgment, this applies to **SR&O 28**, as an 'act or thing' that 'the Minister' was empowered to 'do'. Before returning to this, it would be helpful to look more generally at the surrounding legal circumstances.

[245] The learned judge found at paragraph [150] of her judgment that 'there is inadequate or no factual basis to support a finding that Rules 8(1) and/or (2) were made by the Minister on advice of the CMO'.

[246] This became the basis for one of the grounds upon which the learned judge considered Rules 8(1) and (2) to have been invalid, void and unconstitutional. One of the issues in this appeal is whether the learned judge was correct.

[247] The learned judge's finding at paragraph [150] was correct. In fact, the evidence on behalf of the appellants went further, to confirm that Rules 8(1) and (2) were categorically not made on the CMO's advice.

[248] I will pause here to: (a) make good how the evidence shows that the learned judge's finding was correct and (b) identify precisely which provisions in Rules 8(1) and (2) were inserted without the CMO's advice.

---

[97] Cap. 14 of the Revised Laws of Saint Vincent and the Grenadines.

[249] Mr. Frederick Stephenson, who was Minister of the Public Service, Consumer Affairs and Sports, stated in his affidavit dated 10th October 2022 at paragraph 9:

> "The Minister of Health and the other members of the Cabinet including me accepted the advice and recommendations of the Chief Medical Officer as required in the interest of public health namely to prevent or control the spread of the virus in public bodies, and protect the health and safety of employees. Accordingly, in or about the month of June [2021] the Cabinet instructed the Attorney General **to have the Special Measures SRO drafted by the legal drafters in accordance with the Chief Medical Officer's recommendations**. The draft also included **other rules like Regulation 8** which were approved by the Cabinet including myself **in order to ensure compliance with the SRO and particularly Regulation 5**." (Emphasis added.)

[250] Mr. Stephenson was obviously referring to Rules 5 and 8 when he spoke of 'Regulation' 5 and 8.

[251] The Minister of Health, Mr. St. Clair Prince, attested in his affidavit dated 10th October 2022, in similar terms:

> "8. In or about June 2021, the Chief Medical Officer advised that there should be a requirement for frontline workers to be vaccinated against the COVID-19 virus in order to prevent or the risk [*sic*] of the spread of COVID-19 in public bodies, and importantly protect the health and safety of employees. She indicated that the earlier protocols were not working as effectively as they should because infections and hospitalizations were on the rise, considerable vaccine hesitancy existed in the country and in the Public Service and the virus was very likely to peak. These matters were of considerable concern to her. She was particularly concerned about the vulnerability of frontline employees, and teachers and students especially as the younger students could not be vaccinated.
>
> …
>
> 15. Following the decision of the Cabinet to approve the draft, I caused the Special Measures SRO 28 of 2021 **which contained the recommendations of the Chief Medical Officer, and rules recommended and approved by the Cabinet to ensure compliance with the core medical recommendation especially Regulation 5,** to be published in the Gazette in accordance with the Public Health Ordinance as amended." (Emphasis added.)

[252] It is clear from this evidence of the two Ministers that **SR&O 28** in part contained rules made upon the advice and recommendation of the CMO as well as other rules **not** made upon her advice and recommendation, in order to ensure compliance with

the **SR&O** and in particular the mandatory vaccination requirement in 'Regulation 5'.

[253] The CMO, Dr. Simone Keizer-Beache, gave details in her affidavit evidence at paragraphs 85 and 86 of the recommendations she made. We will see that the Rules promulgated in order 'to ensure compliance' with the **SR&O** and the mandatory vaccination requirement in Rule 5 were not among them. This is not controversial between the parties.

[254] She stated in these paragraphs:

> "85. I was in no doubt that the growing threat of COVID 19 in the island posed a real and growing threat to frontline employees. Therefore, during the period June to October 2021, as part of the Special Measures, I advised the Minister of Health, the Minister of the Public Service and the Cabinet mostly orally that:
>
> (i) All healthcare workers must be vaccinated in order to work in a Government health care facility. Health care workers present a higher risk of infecting their vulnerable patients, fellow care givers and families, and of being infected by sick persons presenting to their work places;
> (ii) Other frontline workers must be required to be vaccinated – port of entry workers as they frequently interact with travelers who are a major source of the virus and its variants entering the country, prison officers as they have high-frequency exposure to prisoners who are confined in close quarters, police officers who interact often with members of the public and are housed in close quarters in police stations, workers at the Golden Zage Homes and employees with the Home Help for the Elderly programme because of their interaction with the elderly who make up a particularly high-risk group, and all programmes of the Ministry of Health (except some officers in Policy and Planning and Central Medical Stores who did not interact with the patients). The frontline workers were included because their workplaces included clinical settings or high-frequency interaction with patients and the public;
> (iii) Teachers must be required to be vaccinated due to their high level of risk and exposure and for the reasons which made them among the first group identified for vaccination as outlined in paragraphs 49 – 52 above. …;
> (iv) Special essential service officers whose work is critical to the functioning of the Government, such as officers of Parliament,

permanent secretaries and chief technical officers must be required to vaccinate (October 11, 2021). There is typically only one permanent secretary and one chief technical officer in each Ministry and single officers of the Parliament for each task. Therefore, if one of these officers contracted COVID-19 and had to be isolated and the contacts quarantined, there would be great difficulty in replacing the officers and thus the functioning of the Ministry/entity. This situation did occur as relates Parliament, as outlined earlier;

(v) These officers should not enter the workplace because if an unvaccinated worker entered the identified high-risk workplace, they would present a risk of infection to or risk being infected by the patents, students, prisoners, travellers, and so on;

(vi) Qualifying frontline employees should be exempted from the requirement for vaccination on certain medical bases, and religious grounds. …;

(vii) The recommendations were made over the period of June to October 2021 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.

86. These recommendations, which formed the Special Measures, were made in order to protect the health of the public, and the health and safety of frontline public officers, by seeking to reduce the spread of the COVID-19 virus, in particular the Delta variant, with the associated hospitalizations and deaths. I did so after monitoring the rate of infections, hospitalizations and death in Saint Vincent and the Grenadines, and the regional and international trends and measures over weeks and months. It was observed that COVID-19 spikes occurred in cycles of 2 – 4 months. The monitoring, along with the low vaccination rates and high NCDs [non-communicable diseases], put us at risk for a major spike."

[255] We can see from this that the CMO did not advise or recommend at least the following emphasised terms in respect of Rule 8 and in particular 8(1), (2) and (3):

"**Failure to comply with Rules**

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 sub-rule (1).**

(3) An employee who enters the workplace **in contravention of sub-rule (1) commits an act of misconduct** and **is liable to be disciplined** in accordance with the –

(a) Public Service Commission Regulation or any other relevant written law, in the case of a public officer;
or

(b) relevant laws that regulate the service of the employee, in the case of every other employee." (Emphasis added.)

[256] The evidence shows that the CMO did not advise or recommend inclusion of at least the following provisions in Rule 8:

(1) '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)";

(3) 'An employee who enters the workplace in contravention of sub-rule (1) commits an act of misconduct and is liable to be disciplined …'.

[257] Not being vaccinated, contrary to Rule 5(1), and/or not presenting proof of vaccination, contrary to Rule 5(3), is not designated as misconduct or a disciplinary matter.

[258] However, where an employee has no 'reasonable excuse' for not being vaccinated and/or not presenting proof of vaccination, and where he has no medical or religious exemption, a deeming provision is applied to him by Rule 8(1). It is to be noticed though, that:

(1) Rule 8 is silent about the procedure to be used by the employer or competent authority to ascertain whether an employee had no reasonable excuse;

(2) Rule 8 is also silent as to what opportunity to be heard or to make representations should be afforded to unvaccinated employees; and

(3) nothing in **SR&O 28** dispenses the employer or competent authority from giving an employee an opportunity to be heard or to make representations;

(4) **SR&O 28** does not circumscribe what would, or would not, constitute a 'reasonable excuse';

(5) nothing in **SR&O 28** creates a presumption that an employee has no reasonable excuse.

[259] **SR&O 28** provides for a scheme which stipulates that a public service employer is permitted to exempt an employee from taking the Vaccine and from showing proof of vaccination on only two grounds: medical and religious exemption. This appears to have been intended by the Government to have the effect of preventing the public service employers from allowing employees to work unvaccinated, except where they have obtained medical or religious exemption from the Government. Whilst **SR&O 28** would appear to be intended to impose that restriction upon the **employer**, it does not rule out the **employee** having some other reasonable excuse for non-compliance. Indeed, **SR&O 28** expressly allows for such a possibility.

[260] For present purposes it is not necessary to decide who devised the idea for those other elements. The appellants' evidence stopped short of revealing the identity of the individual(s). Learned senior counsel for the appellants informed the Court at the hearing of this appeal that it was 'the Minister'.

[261] The learned judge held that the introduction of provisions in Rules 8(1) and (2) which had not been introduced on the advice of the CMO fell outside the authority conferred upon the Minister by sections 43B and 147 of the **Public Health Act**: see paragraphs [150] and [151] of her judgment.

[262] I have already set out the material text of section 43B in some detail. It is clear from section 43B(2) that the Minister did not have unfettered discretion to implement any special measure to mitigate or remedy the declared public health emergency. Section 43B gave the Minister authority and discretion to promulgate measures in the event a 'public health emergency' has been declared, but with the fetter that any

such measures had to be advised by the CMO. That constraint permeates section 43B.

[263] The source of the Minister's authority is statutory. The Minister does not have any inherent power, authority or discretion to make rules designed to 'ensure compliance with the SRO'.

[264] Equally, the Minister is not somehow clothed with power because Cabinet approved that the Minister should impose measures not advised or recommended by the CMO. The Minister's authority is conferred upon him or her by statute, not by way of *ad hoc* Cabinet approval.

[265] I do not read section 147 of the **Public Health Act** as conferring a power upon the Minister that is wider than that conferred by section 43B. Nor did the learned judge, as she made clear in paragraph [163] of her judgment. I read section 147 as conferring upon the Minister the general power to make rules, such as an SR&O.

[266] Section 147 made provision as to **what** the Minister could do, which was (a) to make rules for (b) a specified purpose. The much later introduced section 43B made provision for the **conditions** that had to be satisfied in making rules during a 'public health emergency'; that is to say, **how** and **when** he could do so.

[267] I derive support for this conjunctive effect of sections 147 and 43B from the fact that if section 147 is to be read as enabling 'the Minister' to make any rules for the specified purpose that he wanted, and when he wanted, then there would have been no need for section 43B at all.

[268] I agree with the learned judge, at paragraph [141] of her judgment, that '[c]entral to a determination of whether [Rule] 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.' Upon my review of the evidence, which I have summarized above, it was open to the learned judge to find at paragraph [151] of her judgment that 'when making Rules 8(1) and (2), the Minister was neither motivated by nor acting on any advice given or recommendation made to him by the [CMO] pursuant to section 43B(2) of the Act', precisely because the Minister had not followed the advice of the CMO in promulgating these measures.

[269] I understand the learned judge to have been referring to the provisions of Rules 8(1) and (2), taken as a whole, as being intended to ensure compliance with mandatory vaccination. I accept that the requirement expressed in Rule 8(1) that unvaccinated public workers 'must not enter the workplace' was something the CMO advised and recommended. However, the ensuing legislative mechanism, introduced to provide for constructive resignation of employment, was not.

[270] That said, I accept that section 39 of the **Interpretation and General Provisions Act**[98] applies in the present case to empower the Minister to enact those parts of **SR&O 28** intended to ensure compliance with the mandatory vaccination requirement laid down in Rule 5.

[271] Section 39 is a provision with, patently, broad application. Its application appears designed to supply legislative power where other laws, strictly or literally construed, are rendered impotent due to an omission to confer some express power upon a legislative body to render the law in question effective. Such appears to me, to be the case here.

[272] The learned judge in the court below appears not to have taken this section into consideration.

[98] Cap 14 of the Revised Laws of Saint Vincent and the Grenadines,2009.

5.1 Conclusion on whether SR&O 28 Rules 8(1) and (2) were valid although not advised by the CMO

[273] In my respectful judgment the learned judge was incorrect to find at paragraph [151] of her judgment that the Minister had acted outside his authority in imposing those special measures of Rule 8 (1) and (2) which were not matters that the CMO had advised.

[274] As we have seen earlier, section 73A of the **Police Act** extended Rule 8 of **SR&O 28** to police officers. To the extent that these parts of Rule 8 are valid, they applied to police officers as well.

6. Whether inclusion of the deeming provision in Rule 8(1) and Regulation 31 in Rule 8(2) was 'mere surplusage'.

[275] During the appeal hearing, the appellants adopted a position propounded by my learned colleague Ventose JA that even if the words 'and is to be treated as being absent from duty without leave' were absent from Rule 8(1), Regulation 31 would still have applied automatically, even if Regulation 31 had not been expressly made applicable by Rule 8(2).

[276] In other words, the argument is that even if the deeming provision in Rule 8(1) and the express incorporation of Regulation 31 fall to be excluded, Regulation 31 would anyway produce the same result. Put differently, the deeming provision in Rule 8(1) and the express incorporation of Regulation 31 are 'mere surplusage'.

[277] I disagree with this conclusion.

[278] We can best see how the adoption by the appellants of this position occurred by referring to the recording of the hearing before this Court, between 01:02:10 and 01:13:14, absent a formal transcript. The following is my note of what I understand to be the material parts of that recording – this is not to be taken as an official record:

"**Ventose JA**: …I have a question on the regulation 8.

…
I was asking …if regulation 8 did not exist, what would have happened?

Anthony Astaphan SC:
They would have turned up to work.
There would have been no consequences for noncompliance. None.
There would be no basis to enforce the rules to protect the integrity of the public service.

Ventose JA:
…
So I'm looking at the first part of regulation 8.
If you don't comply with regulation 4 or 5, you mustn't enter the workplace.
That's just the first part, let's just leave that part.
That part is a prohibition on entering the workplace.
…
If the second part of the words after 'and' did not exist, and regulation 2 did not exist, what would have happened?

Anthony Astaphan SC:
If, if there was no regulation 2 and 3, what would have happened?

Ventose JA:
No, no, no. If the second part of regulation one did not exist, and regulation 2 did not exist, if the prohibition was simply if you don't get vaccinated you don't enter the workplace, if that alone was the regulation, what would be the consequence?

Anthony Astaphan SC:
Well, I don't know. If, if [non-responsive answer].

Ventose JA:
… What I'm getting at is, if a person does not enter the workplace, and that's a prohibition in regulation 8, you can't enter the workplace without being vaccinated, the person is not vaccinated so therefore they can't enter the workplace, wouldn't the regulation 31 still kick in as a matter of law? Without reference to regulation 2, because you would still have public servant who would not turn up to work with no leave and if for more than ten days, regulation 31, which is not challenged as far as I see it, would have still kicked in. And the Respondents have also not challenged the mandatory requirement for vaccination. So I'm trying to figure out, if without the second sentence of regulation 8(1), regulation 31 would have still kicked in, because that regulation is the regulation, it seems to me, to say that if a public servant does not come to work for a period of more than ten days, without leave, the consequences therefore follow; that regulation has been on the books for a number of years.

Anthony Astaphan SC:
I think your lordship is right.
That's my simple response, my lord, I think you're right, because the other words in regulation 8(1) would tend to be superfluous in view of the language of regulation 31.

Ventose JA:
But that is what I am thinking …
[cross-talk]
Yes, go on, go on.

Anthony Astaphan SC:
… I think you're right, because the effect of leaving out the latter part would be almost the same, is the same consequentially even if it's not there, because you would be absent from your work, and absence from work by itself for more than ten days, you would have been deemed to have abandoned your job.

Ventose JA:
Right.

Anthony Astaphan SC:
I take, I take that point my lord president.

Ventose JA:
And the reference in 2, what does it add to what exists in the law right now?

Anthony Astaphan SC:

It doesn't. It doesn't add anything. In fact, part of our submissions in our written case in reply and in our oral submission was that all that it did, consistently with what Madam Justice Monica Joseph said the case of DaSilva vs The Attorney General, the whole purpose of regulation 31 is to provide some flexibility and fairness to the deemed abandonment provision [refers further to that case]…

Ventose JA:
Yes because, as I see, the challenge essentially is to the consequences of not coming to work … once you had the prohibition from entering the workplace, if a person does not do so and is not vaccinated and that is the reason for their not entering the workplace the regulation 31 would automatically kick in, irrespective of the deeming provisions there, that they were not necessary.

Anthony Astaphan SC:
I think your lordship is right.
…

> My instructing team is emphasizing the point that, my lord president, that your observations are correct about the words being mere surplusage."

[279] My learned colleague Ventose JA appears to take this line of argument a stage further in his draft judgment by postulating that it could not have been *ultra vires* for the Minister merely to have inserted language into Rule 8 which reflected the legal effect of application of Regulation 31 anyway.

[280] The respondents disagreed that inclusion of the deeming provision in Rule 8(1) and the express application of Regulation 31 in Rule 8(2) were 'surplusage'.

[281] Learned counsel for the respondents, Mrs. Cara Shillingford-Marsh, orally submitted[99] that Regulation 31 would not apply if it were not to be included in Rule 8. She pointed out that that Regulation 31 is entitled 'Abandonment of Office'.

[282] Mrs. Shillingford-Marsh then submitted that:

> "You cannot tell your employee: do not come to work; and then say to the employee: you have abandoned your job by not coming to work. That is illogical; that makes absolutely no sense in my respectful view."

[283] In my respectful judgment, learned counsel for the respondents was correct with that submission. I agree with it.

[284] The respondents' position was most clearly articulated in the evidence in a letter prepared (so it would appear) on behalf of the terminated teachers by their union and adopted with minimal changes by most of them. This letter became known in these proceedings as the 'counter-offer letter', generally sent by the terminated teachers in the latter part of August 2022 in response to an 'offer' made on 9th August 2022 by the Government to consider applications for re-employment by

[99] See the Zoom recording from 04:28:13 to 04:29:15.

unvaccinated, previously terminated, workers. The 'counter-offer letter'[100] stated, *inter alia*, as follows:[101]

> "**I did not abandon** [footnote16] **my job** because I was present up to the time that the government issued a dismissal letter to me; many even continued teaching students via additional classes outside of the educational institutions, on the request of parents who expressed need for our services to adequately prepare their children for exams. I have always shown myself to be desirous of continuing to teach, before and after the government dismissed me.
> [Footnote] 16: This term ['abandon'] was unilaterally redefined by the government to take on an unnatural and absurd meaning." (Emphasis in the original.)

[285] This passage, and in particular footnote 16, leads us to see that the combined effect of incorporating Regulation 31 provisions concerning 'abandonment of office', by way of Rule 8(2), and of the deeming provision in Rule 8(1), was to redefine what had, up to then, been considered 'abandonment of office'. It was not simply the case of the Minister merely repeating what was already the law. His new measure was doing something new – changing the meaning of a legal concept. It is unattractive for the appellants to suggest that the legislative draftsmen had included surplus wording in their legislation. Legislative draftsmen can usually be assumed to have crafted their wordings with a degree of verbal economy, care and attention.

[286] It is far more probable, in my respectful judgment, that the legislative draftsmen intended Rule 8 to be, and to operate as, an entire package, with nothing too little and nothing unnecessary included for its intended effect.

[287] The wording of Rule 8, to my mind, confirms that this was the case.

[288] It is convenient to look first at Regulation 31, which is referred to in Rule 8(2).

---

[100] Record of Appeal Bundle 5, pages 785 to 790.
[101] Record of Appeal Bundle 5, page 789.

[289] Regulation 31 provides that an officer '**who is absent from duty without leave**' for a 'continuous period of ten working days, unless declared otherwise by the Commission, **shall be deemed** to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer.' The 'Commission' is the Public Service Commission.

[290] I note that Regulation 31 speaks in terms of being 'absent from duty'. **Being 'absent from duty' is conceptually different from not entering the workplace –** Rule 8(1) decreed that an unvaccinated employee '**must not enter the workplace**'.

[291] This distinction can be illustrated by the evidence of one of the police officer respondents, Sgt. Brenton Smith, who had refused to take the Vaccine. His evidence was that on 22nd November 2021 (i.e. a few days after **SR&O 28** came into force, mandating vaccination and that unvaccinated employees 'must not enter the workplace') he attended the Police Station as usual and was working in his office there (i.e. he had entered his workplace) when he was summoned to the office of his supervising officer. The supervising officer told Sgt. Smith that he had to leave the compound 'based on his instructions and in conformity with SRO 28'. Sgt. Smith attested that he had no choice but to obey. But then, a week later, on 29th November 2021, Sgt. Smith received instructions and orders to report for duty at a Magistrate Court to give evidence in his capacity as Station Sargeant of Police. He did so, as instructed. Another week later, on 6th December 2021, he received and executed similar orders. He did not, though, go back to his Police Station workplace, having been instructed by his supervising officer not to do so. Sgt. Smith attests that he then received a letter from the Chief Personnel Officer, Mrs. Arlene Regisford-Sam dated 8th December 2021 informing him he had resigned his job. Sgt. Smith took the position in these proceedings that he had not been absent without leave, because his supervisor had given him leave to absent himself by instructing him to stay away.

[292] I relate this not to frame a debate whether Sgt. Smith was or was not correct that he had been 'absent from duty' 'with leave'. But the circumstances beg the question:

was Sgt. Smith, on these facts, 'absent from duty' at all before 7th December 2021? He was present for duty at his usual place of work, even if he had not been allowed by law to be there, until instructed to leave the compound. He continued to present himself for duty when instructed to attend the Magistrate Courts to give evidence. In consequence, how and when was he absent from duty?

[293] Then, what about those teachers, like the respondents Ms. Shaniel Howe and Ms. Novita Roberts, who gave evidence that they had not abandoned their jobs, faithfully showing up for work at their respective schools until they were issued with letters dated 13th December 2021 informing them that they had resigned their employment?[102] This begs the question: how can it sensibly be said that they were 'absent from duty' when they had presented themselves for duty?

[294] Or, what about those teacher respondents mentioned in the Supplemental Affidavit of Shefflorn Ballantyne,[103] who had been fulfilling their duties virtually through an on-line portal until their access was denied by their employer? How had they been absent from duty, if they tried to log on to the online portal and did not have to leave their homes in order to perform their duties?

[295] It is not for this Court to resolve these issues here. The point, rather, is that Regulation 31 entails a **fact-specific inquiry** whether or not an officer has been 'absent from duty' and 'without leave'. The words, 'absent', 'duty', 'without' and 'leave' are all and each of them terms whose interpretation and application involve questions of mixed law and fact. How each of these words is to be applied depends upon their factual context on a case-by-case basis.

[296] Regulation 31 itself answers one of the questions it begs: who decides whether an officer has been 'absent', 'from duty', 'without', 'leave'? Regulation 31 pronounces that it is 'the Commission' that has the power to decide this issue, interpreting and

[102] Record of Appeal Bundle 2, page 203 at paragraph 12.
[103] Record of Appeal Bundle 3, pages 311 to 313.

applying the said terms as necessary, because it can declare that an officer has not been absent from duty without leave. As the learned judge observed at paragraphs [127] and [128] of her judgment, the appellants accept this proposition.

[297] It is clear to me that if **SR&O 28** is shorn of those parts of Rule 8 other than the first part of Rule 8(1) ordaining that '[a]n employee who …fails to comply with rule 4 or 5 must not enter the workplace', **there is nothing in the rest of SR&O 28 or Regulation 31 which requires a conclusion that an officer has been absent from duty**. The rest of **SR&O 28** or Regulation 31 do not purport to render taking the Vaccine as part of the employment duties of a police officer, teacher, etc.

[298] Moreover, the prohibition against entering the workplace if not vaccinated might well have been breached by, for example, Sgt Smith by going to his office at the Police Station as normal after **SR&O 28** had come into force, but he was patently not absent from duty. He was present and, according to his affidavit evidence, going about his normal duties as a Station Sargeant of Police. Even after he had been instructed to leave the Police Station compound, he continued to go where he was ordered by his superiors to go, and to do what he had been ordered to do. In short, the prohibition at Rule 8(1) from entering the workplace does not **automatically** entail absence from duty. Whether or not such an officer indeed went absent from duty is a question of fact.

[299] Similarly, whether or not an officer had been granted leave to be absent from duty is also a question of fact. The considerations the adjudicating authority (the Public Service Commission) would have to take into account in determining whether an officer had been accorded leave of absence include what the officer's superiors had informed him, whether orally or in writing.

[300] Thus, in my respectful judgment Regulation 31 would **not** apply 'automatically' to unvaccinated public officers to whom the first part of Rule 8(1) applied – it might, or it might not, depending upon the facts of each case.

[301] Once it is appreciated that the question of whether or not Regulation 31 is triggered involves a determination of a fact-specific inquiry by the Public Service Commission, and moreover that the Public Service Commission was set up to be politically independent of the Government of the day, it becomes clear what the Government, through Cabinet and the relevant Ministers, were trying to do with **SR&O 28**. It is clear the Government wanted to minimize the risk that the Public Service Commission might be more generous in its determinations as to whether unvaccinated employees had been absent from duty without leave than the Government desired.

[302] So, the Government, by the deeming provision in Rule 8(1), sought to impose upon the Public Service Commission a new definition of what the Government wished it to mean for a public servant to resign and/or abandon his or her employment. The Government set out to remove the Commission's exercise of any judgment in this regard. The Government did so by having 'the Minister' make Rule 8(1) in terms that an employee who did not take the Vaccine and who did not present proof of vaccination by submitting his vaccination card to his employer '**is to be treated as** being absent from duty without leave'.

[303] That this is so, is precisely reflected in the termination letters sent by the Public and Police Service Commissions. It is to be recalled that they stated that '*As a result of your failure to comply with Rule 5, you have been absent from duty without leave*…'. Rule 5 was the rule requiring vaccination. The termination letters equated non-vaccination with absence from duty without leave. Absent the deeming provision in Rule 8(1), that equation was a non-sequitur. It was not failure to present themselves for work, but non-vaccination, that earned the respondents their termination letters

– indeed, their evidence included that they had continued to present themselves for work until they received the termination letters.

[304] Dictating that an officer who has not taken the Vaccine and who has not presented proof of vaccination '**is to be treated as** being absent from duty without leave' overrides what the actual facts of a particular case might be. The deeming provision was not 'mere surplusage' at all.

[305] Deeming that non-vaccination '**is to be treated as** being absent from duty without leave' with the consequential application of Regulation 31 also overrides the well and long-established law as to what constitutes abandonment of employment, as a form of resignation.

[306] The learned judge sets this out at paragraphs [121] and [122] of her judgment, and confirmed her reliance upon these principles at paragraph [165]. As the learned judge explained, the principles are set out in the Court of Appeal case of **Huggins Neal Nicholas v Attorney General & The Teaching Service Commission**.[104] It is instructive to set out the material passages from **Nicholas** in full:

> "[10] It is necessary to consider the concept of abandonment of office. What does that concept entail? I adopt the following definition of abandonment of office as stated in Black's Law Dictionary 13 (14th Ed. 1951):
>
> > "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 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

[104] St Lucia Civil Appeal HCVAP 2008/018 (delivered 22nd March 2010, unreported) - (Baptiste JA (Ag) giving the Judgment of the Court, Rawlins CJ and Gordon QC JA (Ag) concurring).

> duties pertaining to the office must be with actual or imputed intention on the part of the officer to abandon and relinquish the office."
>
> [11] It appears to me that to sustain a finding of resignation there must be evidence which unequivocally establishes that the appellant formally relinquished his job as a teacher. In the absence of such evidence, the most eloquent manifestation of which would be of a documentary nature, it cannot be said that the appellant resigned. He never tendered his resignation and never formally relinquished his post as a teacher. Au contraire, he was seeking reinstatement. On the evidence presented there is no basis for a finding that the appellant resigned. Accordingly, the learned judge's findings that the appellant resigned must be set aside.
>
> [12] Abandonment connotes a voluntary relinquishment of the performance of the duties of an office with the actual or imputed intention on the part of the office holder to abandon and relinquish that office. When one considers the pertinent facts it is clear that the road to abandonment is littered with insurmountable hurdles. A fact of great significance is that the appellant never voluntarily relinquished the performance of the duties of his office. He was unable to execute the functions of his office because of the failure to reinstate him to his job after the criminal charges against him were dismissed."

[307] Thus, to summarize the principles here expressed, abandonment of employment is **a voluntary relinquishment** of the employment **through non-user** with **the actual or imputed intention** on the part of the office holder **to abandon and relinquish that office**.

[308] In contrast, the respondents' case is that they did not relinquish their employments voluntarily through non-user and they had no actual intention to abandon and relinquish their office. To my mind, on the evidence before the Court that is clearly correct.

[309] Learned counsel for the appellants, in the court below, sought to rely instead upon the Privy Council decision of **Seetohul v Omni Projects Ltd**[105] as recorded by the learned judge at paragraph [132] of her judgment. It appears that learned counsel for the appellants had picked out two sentences from that decision, which was an appeal out of Mauritius, to argue that an employee might be found to have abandoned his employment even if he intended to return. The sentences in question were:

> "9. … 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."

[310] The appellants take these sentences out of their peculiar legal context, which is different from the present case.

[311] In **Seetohul**, the Board opined that the employee had been lawfully dismissed, in circumstances where he had absented himself from the employment in question for about a fortnight, in order to attend a conference pertinent to another job he had. He had known that he did not have, and would not be given, vacation leave from his employment in question to attend the conference. Mauritius had, at the material time, a statutory provision deriving from French law which deemed unjustified absence of two consecutive days to constitute repudiation of a contract of employment. The employee had taken himself off to the conference and re-presented himself for work upon his return, apparently in the hope that 'he will get away with it and remain in his employment'.[106] The Board proceeded on the basis that the employee had committed a repudiatory breach of his contract of employment – 'repudiatory breach, that is to say one which brings the contract to an end, whether the employee wishes to do so or not'.[107] He had committed this repudiatory breach even though he intended to return to his employment.

---

[105] [2015] UKPC 5.
[106] [2015] UKPC 5 at paragraph 9 (Hughes LJ).
[107] Ibid.

[312] **Seetohul** was not a case where the Board had to decide whether the employee had abandoned his employment. The Board had to apply a statutory deeming provision in the area of the law of contracts. At most, **Seetohul** may be read as relaxing the element identified in **Nicholas** for the employee to have 'the actual or imputed intention on the part of the office holder to abandon and relinquish' his employment **if some other rule of law governs the factual situation in issue**.[108]

[313] **Seetohul** did not concern the requirement for abandonment to be voluntary. The Board made no pronouncements in respect of this. It did not have to, because the employee had acted entirely voluntarily all along. The requirement for voluntary relinquishment pronounced by our Court of Appeal in **Nicholas** remains good law.

[314] In laying down that an officer who has not taken the Vaccine and who has not presented proof of vaccination 'is to be treated as being absent from duty without leave', Rule 8(1) has the effect of disapplying the common law criteria for abandonment of office, including the requirement that absence should be voluntary. Rule 8(1) has the effect of imposing a completely different set of artificial criteria for resignation from employment through abandonment.

[315] In the scheme of Rule 8, it was therefore essential to the Government's purposes to include reference to Regulation 31**,** because not taking the Vaccine and not presenting proof of vaccination do not of themselves amount to being absent from duty without leave.

[316] Including a specific statement to this effect at Rule 8(2) was intended to remove any room for argument on the application of Regulation 31 in the Public Service Commission's determination of cases.

---

[108] Huggins Neal Nicholas v Attorney General & The Teaching Service Commission St Lucia Civil Appeal HCVAP 2008/018 (unreported, delivered 22nd March 2010) at paragraph 12 (Baptiste JA (Ag.).

[317] I have come to the firm view that inclusion of reference to Regulation 31 in Rule 8(2) was not a case of surplusage, and the inclusion of both Rule 8(2) and the deeming provision in Rule 8(1) were intended to do something different than the existing law already provided for.

6.1 Conclusion on whether inclusion of the deeming provision in Rule 8(1) and Regulation 31 in Rule 8(2) was 'mere surplusage'

[318] I am of the considered view that shorn of the deeming provision in Rule 8(1) and of Rule 8(2), Regulation 31 would not **automatically** apply, because mere non-vaccination and inability to show proof of vaccination, and prohibition to enter the workplace, do not of themselves equate to absence from duty without leave. A person who shows up for work but is forbidden by his employer or the government to enter or stay at the workplace cannot sensibly, on the natural and common law meaning of the word 'abandon', be said to have abandoned his or her office.

7. Whether the application of SR&O 28 was invalidated by lack of procedural fairness

7.1 Introduction and summary

[319] The learned judge held[109] that the respondents had not been afforded an opportunity to be heard by the material body (whether Public Service Commission, Police Service Commission and/or Commissioner of Police) before they had been issued with their termination letters. The learned judge held that this denial amounted to a breach of their right to be heard and constituted a procedural irregularity that invalidated the respective decisions to deem the public servants and police officers to have been absent from work and that they had resigned their offices and that their offices were vacant. The learned judge held that the letters amounted to a termination of their employment in a manner contrary to section 8(8) of the **Constitution**, which safeguards a right to a fair hearing within a reasonable time.

[109] At paragraph [193] of the judgment.

[320] In the lower court's disposition record of 13th March 2023, the learned judge recorded *inter alia* that:

> "Rules 8(1) and 8(2) of the Special Measures Rules are unlawful, unconstitutional, ultra vires, disproportionate and tainted by procedural irregularity."[110]

[321] It is to be appreciated that the concepts of unlawfulness and unconstitutionality are not the same thing. They can, and do, overlap, even to a very considerable extent, but they are not co-extensive. Not all unlawful acts or measures offend against the Constitution.

[322] In the present case, in my respectful judgment, the application of **SR&O 28** did not offend against section 8(8) of the **Constitution**. That is because, in taking the entire procedure of the application of **SR&O 28** as a whole, the respondents did not avail themselves of the entirety of the in-built opportunity to be heard. In consequence, the Court cannot tell whether or not the decision-making bodies (i.e. the Public and Police Service Commissions) had, overall, denied the respondents a fair hearing within a reasonable time.

[323] However, the evidence reveals that those decision-making bodies prejudged the factual issue of whether the respondents, in each individual case, had a reasonable excuse for non-vaccination against them, without affording the respondents an opportunity to be heard. Those bodies determined that issue without inquiry whether the respondents had a reasonable excuse. Those bodies simply assumed from the fact of non-vaccination that the respondents had no reasonable excuse. That was a complete non-sequitur. It was a factually and logically wrong assumption to make. In making that assumption, those bodies jumped to the conclusion that the respondents had no reasonable excuse without giving them an opportunity to be heard. Such pre-judgment and denial of an opportunity to be heard on whether the respondents had a reasonable excuse for non-vaccination were breaches of fundamental principles of natural justice. Put differently, the decision-making

[110] Record of Appeal Bundle 1, page 39.

process undertaken by the Public and Police Service Commissions to treat the respondents as having resigned pursuant to **SR&O 28** was inherently and fundamentally unfair.

[324] Those decisions of the Public and Police Service Commissions were consequently void as a matter of law.

[325] I will explain these matters further below.

7.2 Analysis

[326] It first warrants observation that this aspect of the matter proceeds on a postulation that Rules 8(1) and (2) were valid. Obviously, if they were void (which I hold them to be, for reasons of disproportionality), then any application of **SR&O 28** reliant upon Rules 8(1) and (2) would be intrinsically invalid.

[327] Turning first to the **Constitution,** section 8(8) comes within Chapter 1 of the **Constitution,** headed **Protection of Fundamental Rights and Freedoms**.

[328] Section 8(8) of the **Constitution** provides:

> "(8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, **the case shall be given a fair hearing within a reasonable time**." (Emphasis added.)

[329] The right to a fair hearing within a reasonable time is thus a constitutionally protected right.

[330] It warrants observation here that not every civil right or obligation is afforded protection under the **Constitution**. Employment rights and obligations arising pursuant to a statutory appointment are protected by primary or secondary legislation or other official measures such as rules or regulations. Employment rights and obligations arising pursuant to a contract of employment are protected by the law of contract, be it common law or by way of statutory modification. Thus,

employment rights do not enjoy the elevated status of constitutionally protected rights, because they already have legal protection.

[331] That said, employees do enjoy the fundamental right under the **Constitution** to a fair hearing within a reasonable time – by section 8(8) of the **Constitution** – where the existence or extent of such employment rights falls to be determined.

[332] The appellants had argued[111] that procedural fairness issues did not arise because the respondents' termination occurred by operation of law and, anyway, the respondents did have the opportunity to apply **after** the event to have their deemed terminations declared otherwise. The learned judge rejected these arguments. In my respectful judgment she was correct to reject the argument that the termination occurred by operation of law, but partially wrong to reject the argument that the respondents did have the opportunity to apply **after** the event to have their deemed terminations declared otherwise.

[333] Before I explain why I have reached this view, I would observe that neither section 8(8) of the **Constitution**, nor the main authorities referred to by the parties (specifically, **Felix DaSilva v Attorney General et al.**[112] and **R v Secretary of State for the Home Department, ex p. Doody**[113]) lay down an immutable rule that a person who is subject to a decision by an authority is entitled to a hearing before the decision is made. Whether a person should be given an opportunity to be heard before a decision affecting him is made, depends upon the circumstances of each case.

[334] Section 8(8) of the **Constitution** simply requires that 'the case shall be given a fair hearing within a reasonable time', which could be before or after a decision is made.

---

[111] See paragraphs [184], [185] and [186] of the judgment.
[112] St. Vincent & the Grenadines Suit No. 356/1989 (delivered 31st July 1997, unreported).
[113] [1993] UKHL 8 (24th June 1993).

[335] In **Felix DaSilva v Attorney General et al**., the High Court stated the proposition, with reference to Regulation 31, that:

> "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."

As a proposition, this is not controversial. It warrants observation that the Commission would have no power or authority to hold that someone had abandoned his or her employment before the expiry of ten days. Like section 8(8) of the **Constitution**, the passage in question says nothing about whether the Commission should exercise its discretion before or after the Commission informs the employee of the Commission's ruling that he or she has abandoned the employment.

[336] Fairly recent guidance is provided by the House of Lords in **R v Secretary of State for the Home Department, ex p. Doody**. That case concerned a challenge to decisions made by the Secretary of State for the Home Department fixing the length of the penal element for life sentences of a number of prisoners convicted of murder. Lord Mustill, giving the judgment of the House, postulated that:

> "The only issue is whether the way **in which the scheme is administered** falls below **the minimum standard of fairness**."[114] (Emphasis added.)

[337] The 'minimum standard of fairness' here is for an employee to have a fair hearing within a reasonable time.

[338] Lord Mustill then set out a number of considerations of general application in an administrative law context:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) **Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances**. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their

[114] [1993] UKHL 8 (24th June 1993) at paragraph 13 (Mustill LJ).

application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. **What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects**. (4). An essential feature of the context is the statute which creates the discretion, **as regards both its language and the shape of the legal and administrative system within which the decision is taken**. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. **Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."**[115] (Emphasis added.)

[339] Considerations of fairness were treated further by the United Kingdom Supreme Court ('UKSC') in **Bank Mellat v Her Majesty's Treasury (No. 2)**[116] by a nine-member panel. Whilst there were three dissentions, in part, the basic principles were broadly common ground. The main differences concerned their application, as a result of some differences of emphasis on aspects of the legal principles and on the facts. I take guidance from the judgments in that case. The guidance given by the UKSC is inherently general, at the level of principle. In this jurisdiction, such guidance is not binding, but, coming from the UKSC, strongly persuasive.

[340] Of particular relevance, to the issue of fairness, was the following summary of Lord Sumption, giving the judgment of the majority of the court:

> "29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 143 ER 414, the defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "**I apprehend", said Willes J at 190,**
>
> > **"that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds,**

[115] Ibid at paragraph 14 (Mustill LJ).
[116] [2013] UKSC 39; [2014] AC 700.

and that rule is of universal application and founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that
>
> (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. **What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects**.
>
> (4) **An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.**
>
> (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

31. It follows that, **unless the statute deals with the point**, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made …

32. In my opinion, **unless the Act expressly or impliedly excluded any relevant duty of consultation**, **it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made**. In the **first** place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact **a targeted measure** directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective

use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. **Secondly**, it came into effect almost **immediately**. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. **Third**, for the reasons which I have given, **there were no practical difficulties in the way of an effective consultation exercise**."

[341] These principles are hardly surprising. They are also reflected in ordinary litigation - it is possible, in certain cases, to obtain relief without notice to another party, who then has an opportunity to return to court to argue for the variation or discharge of the relief granted. But it is trite that this is sub-optimal, as it deprives the other party of an opportunity to be heard before the relief is granted, an applicant is rarely in a position to present the tribunal with a sufficiently balanced or complete view, and it places the other party on the back foot, having to rise to the challenge of displacing decisions already made rather than to forestall them being made in the first place. It is not surprising that the law of civil procedure narrowly restricts the availability of without notice procedure, in general terms, to situations where there is so much urgency that a decision needs to be made before the other side can be heard, even on a shortened notice basis, or where giving the other side notice would risk defeating the purpose of the application. The fundamental principle of natural justice, since time immemorial, has been and still is *audi alteram partem* – hear the other party – before reaching a decision.

[342] For present purposes, and with reference to this case, immediate noteworthy points seem to me to be:

(1) the constitutional law issue is whether the **termination process as a whole reflected by the termination letters and Regulation 31, and such opportunity as there was to make representations** fell below a minimum standard of fairness. Put differently, the question is whether the Public and Police Service Commissions deprived the respondents of a fair hearing within a reasonable time – to which the overall answer, as we will see, is

'no', although they did deprive the respondents of a fair hearing in relation to an important aspect;

(2) what constitutes a minimum standard of fairness depends upon the circumstances of each case;

(3) fairness might be achieved by affording a person affected by a decision to make representations after the decision has been made, although very often fairness requires him to be informed of the gist of the case which he has to answer before the decision is made;

(4) **SR&O 28** did not expressly or impliedly exclude any relevant duty of consultation with the employees before they were issued with termination letters;

(5) the measure of mandating vaccination on pain of losing one's employment with the salary and financial benefits attendant to it had, and was intended to have, a serious effect upon the livelihoods and personal property, in the form of loss of salary and loss of accrued pension rights, of unvaccinated employees – this was a specifically targeted measure against unvaccinated public and police service employees;

(6) this serious effect, of loss of employment and attendant financial benefits was permanent. Upon its terms the application of **SR&O 28** by the relevant Commission had the effect of terminating the employees' employment completely. It is irrelevant to the fairness of the application of **SR&O 28** and the termination letters that subsequently, after the purported terminations, the Government went some way towards re-employing some of the terminated former employees;

(7) the termination letters were dated almost immediately, or at any rate, extremely soon, after the vaccine mandate effected by **SR&O 28** came into force;

(8) there is no evidence that there were any practical difficulties in the way of giving the employees an opportunity to be heard or to make representations before the competent authority determined that the employees had resigned their employment.

[343] Against this background, we need to consider further what happened.

[344] We have already seen the termination letters.

[345] For the most part, they were dated on or about 8th December, 2021 or shortly afterwards.

[346] **Careful consideration must be given to what the termination letters said**. The pertinent passages generally read as follows, with logical amendments to be borne in mind for police officers:

> "I have to inform you that the Public Service Commission has noted that **you**, **without reasonable excuse**, **failed to comply with Rule 5** of the Public Health (Public Bodies Special Measures) Rules 2021.
> **As a result of your failure to comply with Rule 5**, **you have been** absent from duty **without leave** since November 22nd, 2021, pursuant to Rule 8 of the Rules."
> Accordingly, on **behalf of the Public Service Commission**, I have to inform you that **you are deemed to have resigned your office** with effect from December 7th, 2021. (Emphasis added.)

[347] **It is uncontroversial that none of the respondents were given an opportunity to be heard on whether they did have a reasonable excuse for failing to comply with Rule 5** before they were issued with the termination letters. The evidence shows that the relevant Commission simply saw the respondents' names on a list of unvaccinated public servants and sent them this termination letter.

[348] The affidavit evidence of the Chairman of the Public Service Commission, Mr. Stephen Williams, relates the following:

> "14. The [Public Service Commission], through its secretary, received correspondence from several ministries and Government Departments

including the Ministry of Education and National Reconciliation, Customs and Excise Department, Passport and Immigration Department and the Ministry of Health, Wellness and the Environment, containing a list of names of Public Officers who were unvaccinated as at 6 December 2021.

16. The [Public Service Commission] held a special meeting on 7th December 2021, and reviewed the memoranda from the various ministries and government departments. The [Public Service Commission] 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 [**SRO 28**]. The [Public Service Commission] therefore granted approval for the unvaccinated pubic [*sic*] officers to be deemed to have resigned their posts without leave for a continuous period of 10 days in accordance with Rule 8(2) of [**SRO 28**] …"[117]

[349] The termination letters were sent out the following day, or, in some cases, shortly thereafter.

[350] The short – roughly one (1) day – period between the Public Service Commission's review of lists of unvaccinated public officers as at 6th December 2021 on 7th December 2021 and the sending out of termination letters on or about 8th December 2021 is itself proof that no opportunity to be heard was being accorded to the employees.

[351] Furthermore, it is clear the Public Services Commission treated non-vaccination as automatically triggering the deemed abandonment provisions in Rule 8(1) and (2) – without any regard at all to whether the employees had a reasonable excuse. No mention at all was made in Mr. Williams' evidence that any consideration was given as to whether or not unvaccinated employees had a reasonable excuse. **It is apparent that no such consideration was in fact given**. **The Public Service Commission thereby failed to take into account an indispensable element** that it was required to consider for the purposes of its determination that an employee was to be treated as having resigned his or her employment. I find it impossible to understand how, sensibly, the Public Service Commission could have determined

[117] Record of Appeal Bundle 3, pages 336-337.

that none of the respondents had a reasonable excuse (a) without inquiring into that question and (b) without asking the individual respondents before determining that they did not – i.e. without giving the respondents an opportunity to be heard on that issue before deciding it against them.

[352] Before the issue whether or not unvaccinated employees had a reasonable excuse is determined, basic principles of natural justice require the employee to have been given a reasonable opportunity to be heard.

[353] As I have already mentioned, **SR&O 28** did not create a presumption that employees would have no reasonable excuse. Yet, the Public Service Commission appears simply to have assumed that none of the employees had a reasonable excuse. That pre-judged the issue without hearing the employees.

[354] However, contrary to the obvious inference to be drawn from the timing of the termination letters that the Public Service Commission (and by extension the Police Service Commission) did not give consideration to whether the employees in fact had a reasonable excuse for non-compliance with Rule 5, the termination letters themselves purported that the relevant competent authorities **had** considered this question and **had** determined that the employees did not have a reasonable excuse.

[355] We see this from the fact that despite not having accorded the employees any opportunity at all to be heard on whether they had a reasonable excuse before terminating them, the Public Service Commission nonetheless informed them that 'you, **without reasonable excuse**, failed to comply with Rule 5'. This is unmistakable language. It can only be taken by the employees and any reasonably objective observer to signify that the Public Service Commission had indeed considered whether the employees had a reasonable excuse and had determined that they had none. It cannot sensibly be read as giving the respondents an opportunity to present excuses for non-vaccination before the Commission determines whether or not they have a reasonable excuse.

[356] Having, ostensibly, undertaken such a consideration and determination, but without affording the employees any hearing or opportunity to make representations before pronouncing the employments to have been terminated, that was inherently a breach of fundamental principles of natural justice.

[357] I cannot conceive that it would have been difficult for the Public (or by extension the Police) Service Commission to have informed unvaccinated employees that unless they communicated what they considered to be a reasonable excuse for remaining unvaccinated within a certain deadline then it would be understood that they did not have any. But that is not how the Public Service Commission (or for that matter the Police Service Commission) proceeded.

[358] I will relate what the evidence shows happened in relation to the Police Officers.

[359] The Commissioner of Police stated at paragraph 21 of his affidavit:

> "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) … 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 these officers with letters informing them that had [*sic*] resigned their offices and had ceased to be members of the … Force." (Emphasis added.)[118]

[360] As with the Public Service Commission's evidence, **conspicuous by its absence** was any opportunity accorded to police officers listed as unvaccinated to explain **whether they had a reasonable excuse** for non-vaccination before they were sent the termination letters. Instead, it is apparent that the Commissioner of Police concluded from **the fact of non-vaccination alone** that the listed police officers had no reasonable excuse for non-compliance with Rule 5 and were to be treated as having been absent from duty without leave. It was not open to him to do so. That is because the treatment by Rule 8(1)[119] of absence from duty without leave

[118] Record of Appeal Bundle 7, page 1311.
[119] Ignoring its partial invalidity for present purposes.

depends upon the employee having no reasonable excuse. It bears recalling that Rule 8(1) provided:

> "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." (Emphasis added.)

[361] **Conspicuous by its presence**, though, was the Commissioner of Police's (entirely correct) understanding that he was making a **determination**. The termination letters to unvaccinated police officers inform us what that determination was:

> "**Please be advised that you, without reasonable excuse, failed to comply with *Rule 5* of the Public Health (Public Bodies Special Measures) Rules 2021 ("Rules")**.
>
> As a result of your failure to comply with *Rule 5*, **you have been absent from duty without leave** since November 22, 2021 to December 03, 2021, pursuant to *Rule 8* of the Rules.
>
> *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." (Emphasis added, and presently immaterial emphasis in the original removed.)

[362] It can be seen from this that the Commissioner of Police determined that the police officers concerned had no reasonable excuse for non-compliance with Rule 5. He said so, in terms: 'you, without reasonable excuse, failed to comply with' Rule 5. That is an unequivocal, unconditional, definitive statement. As we have seen however, to the extent he applied his mind at all to the meaning of those words, he made that determination without considering whether any factual basis for such a finding existed and without according the police officer employees an opportunity to explain their positions.

[363] That was inherently unfair. The issue of whether or not a public officer had a reasonable excuse for non-compliance with Rule 5 was a separate and indeed prior issue to whether or not he or she had been absent from duty without leave. The issue of whether the employee had a reasonable excuse is not determined by operation of law. The issue entails a fact-specific inquiry. The Public and Police

Service Commissions wrongly ignored this. It was not open to them to state unconditionally and definitively, as they did, that the employees had no reasonable excuse when those bodies did not know and could not have known that. In simply stating that the employees had no reasonable excuse without any basis for doing so, this was an illegitimate short-cut past the necessary fact-specific inquiry. The termination letters, in stating that this issue had already been decided, when it could not properly have been, pre-judged the matter. That itself is a fundamental breach of the principles of procedural fairness.

[364] These were serious procedural irregularities. This begs the question whether these breaches of elementary legal principles are sufficient of themselves to invalidate the terminations as unconstitutional or unlawful, or both, and how the victims of such irregularities can obtain vindication of their rights.

[365] The respondents seem to have assumed that they could come straight to court. None of them attempted to use the process embedded in Regulation 31 of applying to the Commissions to declare that they had not abandoned their jobs. It is understandable if they assumed that bodies such as the Public and Police Service Commissions can hardly be expected to engage properly with a request for recourse when they have already prejudged the matter and they appear not to understand the basic proposition that the issue of the existence or otherwise of a 'reasonable excuse' self-evidently requires a fact-specific inquiry. It is also understandable if the terminated employees should say that it is unfair that by having a contrary determination imposed upon them, without hearing them, they are placed at a disadvantage, and not on an equal, neutral footing, in having to displace an unjust decision. But such reservations do not appear in the respondents' evidence.

[366] The termination letters, however procedurally flawed and logically incoherent they were, did communicate the gist of the points the employees could make representations on if they were to avail themselves of their right and opportunity to

apply to the Commissions for them to 'declare otherwise'. To that extent, the termination letters complied with that requirement of fairness.

[367] Then, because the respondents did not seek further relief from the Commissions, they did not seek a hearing. They cannot complain that they were not given a hearing within a reasonable time, i.e., that their constitutional rights protected by section 8(8) of the **Constitution** had been infringed.

[368] In assessing the overall fairness of an administrative scheme, the Court has to consider the scheme in its totality, not just parts of the process. The Court cannot assume the Commissions would fail to engage properly or fairly with a request under Regulation 31 to 'declare otherwise' just because the rest of the prior process was marked with irregularities and logical impossibilities. It is possible that upon such a request the Commissions might 'declare otherwise' for any number of reasons, even if parts of the Commissions' earlier decision-making processes had been tainted with illegality.

[369] Where this leaves the matter is that the Court cannot tell if the administration of the scheme as a whole fell below minimum standards of fairness protected by the **Constitution**, precisely because the entire scheme was not allowed by the respondents to be put into effect. Had that been allowed to take place, and had the Commissions conducted the rest of the scheme unfairly, then, but only then, would the respondents have a complaint of procedural unfairness offensive to the **Constitution** justiciable before the courts.

[370] The position in relation to the Commissions' decision that the respondents had no reasonable excuse for non-vaccination is different.

[371] As I have sought to explain, the Commissions decided that the respondents had resigned their positions pursuant to **SR&O 28** without regard to the principles of natural justice. The Commissions did so because they had determined that the

respondents had no reasonable excuse for being unvaccinated without having conducted that fact-specific inquiry and without affording the respondents an opportunity to be heard on that issue before sending them the termination letters.

[372] In the seminal House of Lords case of **Ridge v Baldwin et al.**,[120] Lord Reid, giving the leading judgment of the majority, explained:

> "Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in *Wood* v. *Woad.* I see no reason to doubt these authorities."

[373] That such decisions are void, as opposed to voidable, was the subject of judicial disagreement in **Ridge v Baldwin**. The view that such decisions are void prevailed, being the majority view.

[374] The legal effect of this is that the Public and Police Service Commissions' determinations that the respondents had been absent from duty without reasonable excuse was void. The termination letters issued as a consequence were thus also void.

[375] That being so, there was no need for the respondents to go through with the rest of the procedure, of requesting the Commissions to 'declare otherwise'. The respondents could come straight to court to seek a declaration that the determinations had been void. Bodies such as the Commissions are subject to the supervisory jurisdiction of the High Court and this Court. It is pre-eminently the function of the courts to decide whether or not bodies subject to them have conducted themselves lawfully. It is not the exclusive prior function of the Commissions to decide whether they have acted lawfully.

7.3 Two other aspects

[376] I can deal more briefly with two misconceived arguments advanced by the appellants.

---

[120] [1964] AC 40.

[377] The appellants suggested that the publication in draft on 3rd September 2021 of **SR&O 28** for public consultation, as well as the gazetting of **SR&O28** prior to it coming into force, gave the public servants likely to be affected an opportunity to be heard before it would be applied to them, satisfying the requirement for a fair hearing.

[378] The suggestion that the draft **SR&O 28** consultation process gave the respondents an opportunity to be heard was fatally flawed:

(1) **SR&O 28** in its final form was materially different, and indeed far more radical, from the consultation draft with regard to definition of 'workplace' and availability of religious exemptions;

(2) The consultation draft stipulated a deadline for responses to be submitted **a mere five (5) days later** on 8th September 2021.[121]

[379] It cannot seriously be contended that that public consultation exercise, involving as it did a short response period in respect of a complex piece of proposed legislation, which was in different terms anyway from the final form of **SR&O 28**, should be treated as an adequate substitute for a real, adequate, and employee-specific opportunity to be heard before his job, salary and benefits are to be taken away from him.

[380] The gazetting of a prospective legislative measure by the government cannot be confused with a personalised, individual approach to an employee, not by the government, but by his or her employer, the Public or Police Service Commission, as part of a termination process pertaining to him or her individually. An employee is entitled by principles of natural justice to be accorded an individual, personal approach before his employment is definitively taken away from him

[121] Record of Appeal Bundle 4, page 602.

7.4 Conclusion on whether application of SR&O 28 was invalidated by lack of procedural fairness

[381] For the reasons given, the respondents cannot make out a case that **SR&O 28** should be treated as unconstitutional on grounds of lack of procedural fairness. The learned judge in the court below fell into error in this respect, because she omitted to factor into her analysis that Regulation 31 provided the respondents with an opportunity to be heard, albeit after the event of their termination. Whilst an opportunity after the event is far from ideal, particularly in circumstances where there is no evidence that it was so urgent and so necessary to terminate unvaccinated employees that a prior hearing should be denied, the respondents were not precluded from making representations to the Commissions, which could have changed the overall result. The minimum standard of justice of a fair hearing within a reasonable time was still possible, but, for whatever reason, the respondents did not avail themselves of it.

[382] The Public and Police Service Commissions' decision-making process was however fundamentally flawed, in that the Commissions purported to determine that the respondents had had no reasonable excuse for being unvaccinated without conducting an inquiry into that fact-specific question and without affording the respondents any opportunity to be heard on it before pronouncing the Commission's decision. That was contrary to the elementary principles of justice. It was a denial of justice which cannot be justified.

[383] This rendered the Commissions' decisions to treat the respondents as having resigned their positions pursuant to **SR&O 28** as void and of no effect.

8. Whether the impugned termination measure was proportionate

8.1 Introduction

[384] I will now turn to the issue of proportionality, which is whether the impugned termination measure should be found to be unlawful on account of being disproportionate.

[385] The issue of proportionality goes to the constitutionality of **SR&O 28** itself and equivalent legislation for the Police.

[386] In my respectful judgment, the Court's jurisdiction to consider proportionality is engaged only with regard to those respondents who claimed to have had their pension rights removed by reason of their termination, and not in respect of those respondents who had no pension rights.

[387] In respect of those respondents in respect of whose pension rights the Court's jurisdiction was engaged, in my respectful judgment the impugned termination measure was disproportionate and thus unconstitutional.

[388] The learned judge dealt relatively briefly with the issue of proportionality. She explained[122] that she did so because she had already found Rule 8(1) and (2) to have been *ultra vires* and unconstitutional.

[389] The learned judge's main treatment of proportionality is to be found at paragraphs [167] to [171] of her judgment. The learned judge found[123] that measures introduced by Rule 8(1) and (2) were disproportionate and thereby invalidated. She explained:

> "[167] … 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

[122] At paragraph [166] of the judgment.
[123] At paragraph [171] of the judgment.

> Cabinet and passed. Nowhere in his or Minister Stephenson's account is any indication that any 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."

[390] As a short-form decision, which (correctly) focusses upon the Minister's obligation to avoid imposing disproportionate measures, the learned judge's approach and conclusion are not necessarily wrong. However, the common law postulates a more exacting approach for the courts to take in considering the proportionality of legislative measures imposed by a member of the executive branch of government.

8.2 Proportionality: the principles

[391] The most comprehensive recent guidance on how a court should deal with the issue of proportionality appears to be provided by the UKSC in **Bank Mellat**. I apprehend the following passages which usefully condense the main principles. They are not all from the majority judgment, but for the purpose of identifying principles that does not matter here.

[392] The context of these pronouncements was that an Iranian bank, Bank Mellat, and another entity, had been targeted by measures taken by the United Kingdom's H.M. Treasury to restrict access to the United Kingdom's financial markets, on the account of their alleged connection with Iran's nuclear weapons and ballistic missile programmes. The measure in question, in essence, prevented Bank Mellat from conducting its ordinary course of business and interfered with its property. The measure was in the first instance temporary in nature. Bank Mellat had not been given an opportunity to be heard or to make representations before this deliberately draconian measure was imposed.

[393] The description of 'draconian' was specifically used in the leading judgment of Lord Sumption[124] as well as elsewhere[125] as part of their Lordships' analyses. I point this out because my learned colleague, Ventose JA, at paragraph 90 observes that 'Nowhere in the jurisprudence applied by the Judicial Committee [I take this to be in **de Freitas** and/or **Suraj**] is there any reference to whether or not a law is draconian'.' To be clear, speaking for myself, I regard it as self-evident and indisputable, requiring no further establishment, that the impugned termination measure in the present case was draconian, or severe, or drastic, or intrusive, or whatever other similar description might be applied to it. That is because it deprived employees of their employments, of their livelihoods for themselves and their dependents, of their financial benefits, socially marginalised them and traumatised them. Not many measures could be more draconian than that life-destroying measure. Lord Sumption in **Bank Mellat** also framed the matter in terms of 'severity'.[126] The impugned termination measure cannot be seen as if it were merely some option between preferences open to the respondents.

[394] Returning to the **Bank Mellat** case, Bank Mellat complained to the English Courts about the measure there and raised objections that the measure infringed its legally protected rights to peaceful enjoyment of business assets under the European Human Rights Convention. Bank Mellat also complained that the measure was disproportionate.

[395] Lord Sumption, who gave the leading judgment of the court, stated:

> "20. The requirements of rationality and proportionality, as applied to decisions engaging the **human rights** of applicants, inevitably overlap. The **classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas* v** *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the

[124] See [2013] UKSC 39 at paragraph 5.
[125] See [2013] UKSC 39 at paragraphs 29 and 37.
[126] See [2013] UKSC 39 at paragraph 20.

way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. **Their effect** can be **sufficiently summarised** for present purposes by saying **that the question depends on an exacting analysis of the factual case advanced in defence of the measure**, in order to determine **(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community**. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. … For my part, I agree with the view expressed in this case by Maurice Kay LJ that **this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other**. **The question is whether a less intrusive measure could have been used without unacceptably compromising the objective**. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.

21. None of this means that the court is to take over the function of the decision-maker, least of all in a case like this one. … [**A]ny assessment of the rationality and proportionality** of [the legislative measure imposed by the Treasury] **must recognise that the nature of the issue requires the Treasury to be allowed a large margin of judgment**. It is difficult to think of a public interest as important as nuclear non-proliferation. **The potential consequences of nuclear proliferation are quite serious enough to justify a precautionary approach**. **In addition, the question whether some measure is apt to limit the risk posed for the national interest by nuclear proliferation in a foreign country, depends on an experienced judgment of the international implications of a wide range of information, some of which may be secret. This is pre-eminently a matter for the executive.** For my part, I wholly endorse the view of Lord Reed [one of the dissenting members of the panel] that "**the**

making of government and legislative policy cannot be turned into a judicial process." (Emphasis added.)

…

25. **A measure may respond to a real problem but nevertheless be irrational or disproportionate** by reason of its being discriminatory in some respect that is incapable of objective justification. The classic illustration is *A v Secretary of State for the Home Department* [2005] 2 AC 68, another case in which the executive was entitled to a wide margin of judgment for reasons very similar to those which I have acknowledged apply in the present case. The House of Lords was concerned with a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat which provoked it: see in particular paras 31, 43-44 (Lord Bingham of Cornhill), 132 (Lord Hope of Craighead), and 228 (Baroness Hale of Richmond). No one disputed that the executive had been entitled to regard the applicants as a threat to national security. **Plainly, therefore, the legislation in question contributed something to the statutory purpose of protecting the United Kingdom against terrorism, if only by keeping some potential terrorists in prison. It was nevertheless disproportionate, principally because it applied only to foreign nationals**. That was relevant for two reasons. One was that the **distinction was arbitrary**, because **the threat posed** by comparable UK nationals, to whom the legislation did not apply, was qualitatively similar, although quantitatively smaller. The other was that it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary. This was because if (as the Committee assumed) the threat from UK nationals could be adequately addressed without depriving them of their liberty, no reason was shown why the same should not be true of foreign nationals. As Lord Hope put it at para 132, "the distinction raises an issue of discrimination, ... but as the distinction is irrational, it goes to the heart of the issue about proportionality also."

26. Every case turns on its own facts, and analogies with other decided cases can be misleading." (Emphasis added.)

[396] Lord Reed dissented on the application of these principles, but largely agreed upon their formulation.[127] He added, however, additional commentary at paragraphs 66 to 76. At risk of doing violence to Lord Reed's nuanced and profound multi-faceted

[127] [2013] UKSC 39 at paragraph 65 (Lord Reed).

perspective, he in essence endorsed the three-step test for proportionality pronounced by the Privy Council in **de Freitas** and confirmed the need to add a fourth step. Lord Reed stated:

> "73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a **further element** mentioned in that judgment was **the need to balance the interests of society with those of individuals and groups**. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45." (Emphasis added.)

[397] Lord Reed reminded us that the three-part test in **de Freitas** was as follows:

> "72. The three-limb test set out by Lord Clyde in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 has been influential:
>
> > "whether: (i) **the legislative objective is sufficiently important to justify limiting a fundamental right**; (ii) **the measures designed to meet the legislative objective are rationally connected to it**; and (iii) the **means used to impair the right or freedom are no more than is necessary to accomplish the objective**."
>
> *De Freitas* was a Privy Council case concerned with fundamental rights under the constitution of Antigua and Barbuda, and the dictum drew on South African, Canadian and Zimbabwean authority. The three criteria have however an affinity to those formulated by the Strasbourg court in cases concerned with the requirement under articles 8 to 11 that an interference with the protected right should be necessary in a democratic society (eg *Jersild v Denmark* (1994) Publications of the ECtHR Series A No 298, para 31), provided the third limb of the test is understood as permitting the primary decision-maker an area within which its judgment will be respected." (Emphasis added.)

[398] The formulation in **de Freitas** was slightly different than the way Lord Sumption summarized the test in **Bank Mellat**. **de Freitas** included specific reference to necessity in the third part of the test, whereas Lord Sumption stopped short of using necessity as a benchmark.

[399] In relation to the application of the further, or fourth, part of the test, Lord Reed observed:

> "76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (**step one**), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (**step four**)."

[400] In relation to the balance to be struck between the court's own assessment of proportionality and that of the government officials who imposed a particular measure, Lord Dyson observed:

> "200. As Lord Sumption acknowledges at para 21, any assessment of the rationality and proportionality of the direction must recognise that the nature of the issue **requires that the Treasury be allowed a large area of judgment or margin of appreciation**. The court is in a poor position to weigh the effectiveness of a measure whose object is to reduce (if not eliminate) Iran's ability to fund its weapons programmes. This is not an area in which the court has any expertise. **Accordingly, it should only hold that such a measure is irrational or disproportionate if it is confident that this has been clearly demonstrated**. …." (Emphasis added.)

[401] In relation to the second step of the test – '(ii) whether it is rationally connected to the objective' – Lord Reed observed and stressed at paragraphs [92] to [98] that this purely concerns a question whether 'the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt', following **Lavigne v Ontario Public Service Employees Union**.[128]

[402] Lord Reed's point was that the second step of the test is not concerned with how much, nor how well, the measure furthers the legislative purpose, as long as that purpose is advanced by the measure in some way.

[128] [1991] 2 SCR 211, 291 (Wilson J.).

[403] The present expression of the test for proportionality, which binds this Court, has been confirmed by the Privy Council in **Suraj and others v Attorney General of Trinidad and Tobago**[129] at paragraph 51:

> "51. The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. That case concerned the constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the caselaw since then: see T Robinson, A Bulkan and A Saunders, Fundamentals of Caribbean Constitutional Law, 2nd ed (2021), pp 473-475. **It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community**: see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed)." (Emphasis added.)

[404] In light of this, it is in my respectful judgment also appropriate to adopt the observations and guidance provided in **Bank Mellat** concerning the application of these principles.

[405] It warrants observing that this four-step proportionality test is not a simple balance between two factors. Rather, under this test, proportionality is a balance between four sets of factors, operating at different levels.

8.3 The measure in question

[406] Before the Court embarks upon the exercise of considering proportionality in this case, it first has to identify the measure that is said to be disproportionate

[129] [2022] UKPC 26.

.

[407] Here, **the measure challenged is the deeming provision contained in Rule 8(1) and (2) of SR&O 28 (and the equivalent provisions applicable to Police Officers) that a public service employee is to be treated as having resigned his office unless he takes the Vaccine** and presents proof of his vaccination status, save where he has been granted a medical or religious exemption or has 'a reasonable excuse'. Put more briefly, it was the rule giving public and police service employees an ultimatum that if they did not get vaccinated, they would lose their jobs. I have already referred to this as the 'impugned termination measure'.

8.4 The Court's jurisdiction to apply the proportionality test

[408] Before the Court can consider the proportionality of this measure, it has to be satisfied that its jurisdiction to do so has been engaged. Without jurisdiction, a court cannot act. The courts have a limited remit. Courts of law have only one function, namely, to protect legal rights. The courts have no remit beyond that. The upshot of this is that the court cannot opine in a vacuum on the validity of a particular legislative measure. It can only do so if a complainant comes forward who has, or claims to have, some kind of legal or equitable right which he or she seeks to vindicate before the court in question.

[409] It is in this context that a sub-dispute in this matter over the existence of pension rights had its genesis

.

[410] All the respondents, and by extension those they formally represent, claim to have suffered loss of livelihood as a result of having decided not to comply with the government's vaccination ultimatum. In some cases, the evidence is that such loss of livelihood was devastating and far reaching, affecting not just the terminated employee but also his or her immediate family and other dependents. Individually and socially grave though that undoubtedly is, the **Constitution** does not include a right to a livelihood as a protected constitutional right. The reason is plain: to include such a right would serve as a charter to the indolent to demand that the State should

financially sustain an individual from the cradle to the grave. So, the court's intervention is not triggered by loss of livelihood. That is not to say loss of livelihood is not serious, or can be ignored, either by the executive branch of government or the courts. Loss of livelihood is serious and cannot be ignored but it is not a legal factor which triggers the court's powers of intervention on grounds of alleged disproportionality.

[411] The respondents, or many of them, claimed that loss of their employment also entailed loss of accrued pension rights. Pension rights are a form of personal property protected under the **Constitution**, as stated by the learned judge at paragraph [172] of her judgment, following the decision of this Court in **Elvis Daniel et al. v Public Service Commission et al**.[130]

[412] Section 6 of the **Constitution** sets out the protection of property rights, in a complex provision.

[413] Section 6(1) sets out a scheme, familiarly to be found in many other constitutions, stipulating that:

> "6. (1) **No property of any description** shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, **except for a public purpose** and **except** where provision is made by a law applicable to that taking of possession or acquisition for the payment, **within a reasonable time**, of **adequate compensation**." (Emphasis added.)

[414] Section 6(8) of the **Constitution** defines property as follows:

> "(8) In this section- **"property" means 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**;" (Emphasis added.)

[415] The other subsections of section 6 provide for rights of direct recourse to the High Court (section 6(2)) and other provisions, including various stipulated exceptions to the scheme in section 6(1). This is important to bear in mind, because section 6 lays

[130] SVGHCVAP2016/0007 (delivered 29th January 2019, unreported).

down a self-contained, detailed code for: (a) upholding the fundamental right to property; (b) a claimant's procedural rights for seeking redress; and (c) a limited set of conditions and circumstances in which the fundamental right to property can be derogated from. We will return to this.

[416] The respondents argue that loss of their pension rights was a form of deprivation of property without compensation. The significance of this argument is that such a loss **does** trigger the court's powers of intervention, because a constitutionally protected right is being infringed.

[417] The affidavit evidence filed on behalf of the respondents contained the following statement of one of the respondents, Mr. Alfonso Lyttle:[131]

> "My income is not the only thing that I lose. I will also lose my pension and gratuity benefits accrued over my years of dedicated service to my employer."

[418] The affidavit of Sgt. Brenton Smith stated:[132]

> "In addition to the aforementioned financial hardships which will come to bear upon me this decision by my employers being the State therefore means that I am now going to lose out on my social benefits in both my pension and gratuity benefits because of losing my job and being deemed to have resigned from my job in accordance with the Statutory Rules and Order 2021 No 28."

[419] This evidence was not contradicted by any evidence from the appellants.

[420] Nor was it challenged by the appellants as a matter of fact or law. The appellants did not address the Court to explain why it was not correct. It was not the subject of argument between Counsel in the hearing before this Court.

[421] I apprehend Mr. Lyttle and Sgt. Smith to be saying that because they were deemed to have resigned their positions, they would not, upon reaching their retirement age,

[131] See Affidavit of Alfonso Lyttle at paragraph 13.
[132] See Affidavit of Brenton Smith at paragraph 8.

be entitled to receive the State public service pension that had accrued to them until their termination.

[422] That is precisely the same position that this Court was presented with in **Elvis Daniel** also out of Saint Vincent and the Grenadines.

[423] We see this from the following passages in the leading judgment of Baptiste JA:

> "27. …The learned judge saliently observed that the civil service position the appellants occupied require no sensitivity; the pool of persons qualified to run for office as parliamentary representatives is small; and is further diminished **if persons willing to serve can only do so on pain of loss of all benefits to pensions and rights accrued over decades** if the bid for political office fails. …
>
> **Breach of Constitutional Right to Protection of Property**
> [52] The appellants seek relief under the constitution alleging breach of their property rights. …the appellants state that the failure to restore them to the original post or a post of equivalent status has **caused them to lose all their benefits, including pension, accumulated after long and outstanding years of service in the teaching profession.**
> …
>
> [55] To my mind, the critical issue arising in respect of the appellants' property rights violation argument concerns pension benefits. **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**. The issue of the loss of pension benefits was in fact foreshadowed by the learned judge in paragraph 15 of his judgment, when he stated that the small pool of persons qualified to run for office as parliamentary representatives is diminished further if persons who are willing to serve can only do so **on pain of loss of all benefits accrued over decades** if their bid for political office fails.
>
> [56] The judge then asked the question whether **the loser ought to be doubly penalised for his lack of success by depriving him of his expected pension rights**. …
>
> [57] It appears to me that the learned judge made a determination that having resigned, contested and lost, the appellants also lost their pension rights. **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." (Emphasis added.)

[424] **Elvis Daniel** concerned the effects on pension rights of resignation by public service teachers in this very same jurisdiction, Saint Vincent and the Grenadines. Indeed, the majority of respondents in this case are also public service teachers who were deemed to have resigned from pensionable posts. There is no reason to assume the pension entitlement position here is any different from in **Elvis Daniel**

.

[425] A very large number of the 271 public servants who became the present respondents had, according to the affidavit and documentary evidence filed in these proceedings, been employed in their positions for many years, and their appointment letters stated in clear and unambiguous terms that their posts were pensionable or that they were entitled to a pension and other benefits under the National Insurance Scheme.[133] In many cases, respondents appear to have fulfilled years, and in some cases, decades, of pensionable employment service.

[426] The Chief Personnel Officer, Mrs. Arlene Regisford-Sam, exhibited a number of the appointment letters for those persons on whose behalf the claims had been brought. Of the appointment letters which stated that the posts concerned were 'pensionable', or that the appointee was entitled to a pension, some 50 such letters demonstrated employment in the public service of between 10 and 19 years. Some 11 of those letters demonstrated employment in the public service of 20 years or more.

[427] The Chief Personnel Officer could have given evidence that any of these persons did not qualify for a pension, for whatever reason, at the same time as she supplied all these appointment letters, or subsequently, but she did not do so.

[133] See, e.g. Record of Appeal Bundle 2, page 179, or page194, Bundle 4, page 446 and in numerous other places, mainly in Record of Appeal Bundle 4.

[428] Of the respondents and representative respondents themselves, two gave explicit evidence of ten years or more of pensionable service. Ms. Cavet Thomas gave evidence that she had served as a Customs Officer for 19 years, 11 of which as a Senior Customs Officer in a pensionable post.

[429] Mr. Alfonso Lyttle gave evidence that he had worked for the Government for some 30 years, of which more than 10 years had, since 26th September 2011, been in a pensionable position.

[430] In terms of giving evidence, such respondents needed to do no more than give evidence, whether by way of statement on oath and/or by way of documentary evidence, that their posts had been pensionable and the number of years of such pensionable service prior to their termination.

[431] In adversarial litigation, such as the case at Bar, it is for the opponent to take a point and to articulate it, if he so wishes. Here, the appellants did neither. The appellants put in no evidence that none of the respondents were entitled to a pension or that they were disqualified from the pension scheme. The respondents have given *prima facie* evidence of their entitlement to receive a pension. The appellants have not contradicted that, either with factual evidence or by way of legal submissions. It is not for the respondents to demonstrate, either in law or in fact that they are not disqualified from receiving a pension. Their entitlements were stated expressly and clearly. The burden is squarely on the appellants to have shown that the respondents were either not entitled to receive a pension or disqualified from receiving one. It is not sufficient for the appellants simply to have submitted that the respondents have not proven that they are entitled to receive a pension, without articulating why, in fact and/or in law, that was so. The appellants merely left that assertion unsupported and hanging. It is not for the Bench to fill the appellants' void.

[432] The appellants' learned counsel submitted before this Court[134] that there was no evidence that any of the respondents had accrued pension rights.

[433] Before this Court, the appellants submitted this in their written skeleton, and no more:

> "74. There is also the erroneous finding by the Judge of the threat of loss of pensions, which was part of her consideration in finding the Special Measures including Regulation 8 illegal and unconstitutional. However, there was no evidence that any of the Respondents had earned the right to pensions as required under the Constitution."

[434] The appellants did not elaborate on, nor support, this in their oral submissions before this Court.

[435] If the appellants are correct that there is no evidence that any of the respondents had earned the right to pensions, then the respondents will not have shown that the court below and this Court have jurisdiction to consider the issue of proportionality.

[436] It is, in my respectful judgment, apt to reject such a suggestion, as the learned judge in the court below also did.[135] It would be extraordinary, indeed vanishingly improbable, if all the very many respondents whose pension entitlement had been confirmed in their appointment letters should somehow have fallen afoul of some exception, with the result that they were all to be denied their statutory pensions upon completion of their service. It is more probable than not that at least one of the many respondents in pensionable posts had accrued pension rights. The appellants put in no evidence of any of the respondents having fallen into any such exceptions and the appellants did not argue that such exceptions applied. It is clear from paragraph [172] of the learned judge's judgment in the court below that she proceeded on the basis that respondents had accrued pension rights, even though she made no express findings in this regard. She was correct, in my respectful judgment, to do so.

---

[134] At paragraph 74 of the Appellants' Skeleton Submissions for the Appeal.
[135] At paragraph [172] of the Judgment.

[437] Moreover, the appellants advanced no coherent or, to me at any rate, comprehensible, case before this Court that **Elvis Daniel** should be distinguished either upon the fact of loss of accrued pension entitlements upon resignation or upon the law of protection of this type of property right.

[438] Some of the public servants – it would appear a minority of the respondents – had been informed in their appointment letters that their positions were temporary or on contractual terms which excluded a pension. Clearly those employees would not be able to invoke section 6 of the **Constitution**.

[439] Thus, it is abundantly clear to me that in respect of a great many of the respondents and those they represent, they had fundamental property rights guaranteed by section 6 of the **Constitution** that they wished the court to vindicate. As we have seen, section 6(8) of the **Constitution** includes future or conditional property rights. I am satisfied that those respondents who produced evidence of their pension entitlement have produced sufficient evidence that they held either a future or conditional property right, or both, which they would lose if they should be deemed to have resigned by reason of **SR&O28**. They did not need to go further to prove that their pension rights had 'vested', as my learned colleague Webster JA opines. Indeed, the appellants did not argue for such a proposition. The protection of future or conditional property rights negates the need to prove that pension rights had already 'vested' or been acquired.

[440] For my part, I accept the uncontradicted evidence that the respondents' deemed resignation deprived them of their accrued entitlement to be paid a public service pension, i.e. that their deemed resignations cancelled their accrued pension entitlements. That evidence of the respondents could have been contradicted by the appellants with reference to factual matters (i.e. evidence) and/or the law on pensions, but it was not. This is adversarial litigation. Whilst the appellants did submit, through counsel, that there is no evidence that any of the respondents had

earned the right to a pension, they did not make that submission good by proffering any reason. For my part, I see no ground why I should not accept the respondents' clearly expressed, unambiguous, documentarily supported and uncontradicted evidence upon oath, in circumstances where the appellants were unable or unwilling to articulate why such evidence is insufficient.

[441] If any strength needs to be added to the respondents' already uncontradicted evidence on affidavit and as shown by their appointment letters which stand as documentary evidence before the Court, then this Court's judgment in **Elvis Daniel** amply provides it**.** The premise of that judgment was that resignation deprives a public service employee in a pensionable post of an accrued pension entitlement. That judgment is not clearly and obviously wrong. It was written by experienced, full-time Justices of Appeal - Justice of Appeal Baptiste, Chief Justice the Hon. Dame Janice M. Pereira, DBE, (as she then was, before her elevation to the Judicial Committee of the Privy Council) and Justice of Appeal Thom. Indeed, it would be extraordinary if it had been allowed by both sides and the courts to proceed on a false legal basis in the court below and in this Court.

[442] My learned colleague Ventose JA reasoned that '[A]ssuming the respondents (i.e. the respondents) are correct in their assessment that a person who has abandoned their office under Regulation 31 would not be eligible for a pension, there would be no deprivation of any property because that deprivation would arise from a lack of qualification or entitlement to the pension benefit'. In my respectful view, a flaw in this reasoning is that it assumes **SR&O28**, with its incorporation and unnatural application of **Regulation 31**, is valid, such that no person who had been deemed to have resigned pursuant to **SR&O28** would be able to invoke loss of pension rights. None of the respondents would in that case have had standing to challenge the proportionality of the impugned termination measure. But, if that measure is void for whatever reason, including disproportionality, it cannot deprive anyone of a pension qualification or entitlement in the first place. The correct approach, in my respectful judgment, is for the Court to ask itself first whether, but for deemed

resignation pursuant to **SR&O28**, any of the respondents more probably than not had pension rights which they would lose through resignation. If, as I hold that it is, the answer to that question is 'yes', then the Court should ask itself whether the impugned termination measure in **SR&O28** was proportionate.

[443] Turning to the application of the **Constitution**, it warrants observation that the **Constitution** had not, to use popular parlance, been 'suspended'. The learned judge touches on this at paragraph [85] of her judgment, adverting to the fact that the Governor-General had the constitutional power by section 17 of the **Constitution** to declare a state of emergency, but, as she went on to explain, such a state of emergency had not been declared and the Government proceeded to deal with the onset of COVID-19 in a different legislative manner. The point I wish to stress here is that the legislative measures adopted by the Government, by way of 'the Minister', were made under the **Constitution**. They therefore had to comply with the **Constitution** in order to be valid, because the **Constitution** was still in full force.

[444] It is thus clear to me that the Court has sufficient jurisdiction to consider the proportionality of the impugned termination measure in so far as it affected those respondents who had accrued pension rights.

8.5 Legislative purpose of SRO 28

[445] Having satisfied itself that the Court has jurisdiction, it then has to consider the legislative purpose behind the impugned termination measure. **SR&O 28** formally and categorically states its own purpose to be:

> "3. The purpose of these Rules is to –
> (a) prevent, control, contain and suppress the risk of the spread of the coronavirus-disease 2019 in public bodies; and
> (b) protect the health and safety of employees."

[446] The term 'these Rules' includes the impugned termination measure at Rule 8(1) and (2).

[447] It is also important to bear in mind what the stated legislative purpose was not. It was not to increase the general numbers of vaccinated members of the population. It was also not to mitigate the effect of COVID-19 in the general population. The legislative purpose was focused upon remedying and preventing the effects of COVID-19 in public bodies and amongst public service employees.

[448] This narrowly focused purpose is also attested to in the Affidavit evidence given on behalf of the Appellants. This warrants observation, because in reading their evidence it is easy to become swept along in the rather general overall impressionistic picture. The Court needs to keep firmly in mind the admonition of Lord Sumption in the leading, majority, judgment in **Bank Mellat**[136] that determining proportionality 'depends on an exacting analysis of the factual case advanced in defence of the measure'.

[449] The appellants' witnesses were consistent and clear in identifying the stated legislative purpose for **SR&O 28** as a whole.

[450] The Government's Chief Personnel Officer, Mrs. Arlene Regisford-Sam, explained at paragraph 10 of her Affidavit, as the background to the making of **SR&O 28**, that:

> "During the period January to October 2021, as Chief Personnel Officer there were forced closures of several offices in the public service. I know of the high rate of staff shortages in different departments and ministries due to sick leave, infections, exposure to Covid-19 and/or quarantine measures."

[451] The Minister for the Public Service, Mr. Frederick Stephenson, supported this in his affidavit, stating that the CMO advised Cabinet in June 2021 that:

> "…because of the serious health risks the frontline employees and country faced from the COVID-19 virus, there needed to be special measures to provide for the administration of vaccines for frontline employees in public bodies. She advised that this was necessary in order to prevent or control

[136] [2013] UKSC 39 at paragraph 20 (Lord Sumption).

> the spread of the virus in public bodies, and protect the health and safety of public employees."

[452] Mr. Stephenson also related that 'the vaccination rate was low', and the virus was very likely to 'peak with community spread'. He did not say how low the vaccination rate was. He did not give figures, nor percentages, whether for the public service as a whole or for groups, such as teachers. Since 'low' is a relative concept, his statement to this effect is impressionistic rather than an empirical aid to comprehension. Moreover, he did not say how many frontline public employees there were, nor how many would potentially be affected by the impugned measure. I take from it, though, that he meant that a considerable proportion of public service employees had, as at June 2021, not been vaccinated.

[453] The Minister of Health, Mr. St. Clair Prince, gave evidence to the same general effect, again, without figures or percentages. He added that the CMO in or about June 2021:

> "…indicated that the earlier protocols were not working as effectively as they should because infections and hospitalizations were on the rise, considerable vaccine hesitancy existed in the country and in the Public Service and the virus was very likely to peak. … She was particularly concerned about the vulnerability of frontline workers… ."

[454] The CMO's evidence was to the same effect. She said that she 'was in no doubt the growing threat of COVID 19 in the island posed a real and growing threat to frontline employees' and thus between June and October 2021 recommended their mandatory vaccination and that they 'should not enter the workplace'.[137] She had earlier[138] explained that at her various cabinet meetings she:

> "..made recommendations orally or in writing premised on the need to protect the health of the public, health of the public officers especially the frontline and essential workers, the health care system, and functionality of the Government."

[137] See Affidavit of Dr. Simone Keizer-Beache at paragraph 85.
[138] See Affidavit of Dr. Simone Keizer-Beache at paragraph 14.

[455] We thus have a consistently stated legislative purpose for **SR&O 28**, which can logically be extended to the provisions which applied the measures contained therein, including the impugned measure, to Police Officers.

[456] Additionally, as we have already seen, the evidence of the Appellants was that the purpose of the impugned termination measure was to ensure compliance with **SR&O 28** and in particular the vaccine mandate in Rule 5.[139]

[457] We also have an express Rule in **SR&O 28**, namely Rule 9, which provided for the expiration of **SR&O 28** 'on the day the Minister declares that the public health emergency has ended'. This indicates a legislative purpose (and indeed a legislative constraint upon the Minister), that **SR&O 28** was to have temporary duration and application. Unlike in the **Bank Mellat** case, no set expiry or review period was set forth in **SR&O 28** itself, but **SR&O 28** (and its Police equivalent) was nonetheless a temporary measure.

[458] Having set out these preliminary matters, I will now turn to the main issue of whether the impugned measure was proportionate to the legislative purpose.

8.6 Proportionality – for respondents with constitutionally protected property rights

[459] I will deal first with the position relating to those respondents who complained that their property rights, in the form of pension entitlements, had been unconstitutionally breached.

[139] See Affidavit of Frederick Stephenson at paragraph 9 and Affidavit of Mr. St. Clair Prince at paragraph 15.

The four step test

8.6.1 Step one

[460] Applying the four-step test required by the authorities, I must first ask '**whether the objective of the impugned measure was sufficiently important to justify the limitation of a fundamental right**'.

[461] The fundamental right was the right protected by section 6(1) of the **Constitution** not to have any property taken away from such respondents except for a public purpose and except for adequate compensation within a reasonable time.

[462] A preliminary issue in this part of the inquiry is whether the respondents' fundamental property rights were limited by the impugned measure. The answer, upon the respondents' uncontested evidence, is clearly in the affirmative.

[463] The next question is whether the objective of the impugned measure was 'sufficiently important' to justify some form of limitation to the respondents' property rights.

[464] This is debatable, in the rationally and objectively observable circumstances of COVID-19. That said, none of the respondents argued that the stated legislative purpose of **SR&O 28** was not important. Furthermore, none of the respondents argued, before this Court at least, that the purposes of **SR&O 28** were insufficiently important to justify some limitation on their property rights. For purposes of conducting this four-step analysis, we can proceed on the basis that the answer to step one is in the affirmative.

8.6.2 Step two

[465] In considering step two of the proportionality test, the Court has to ask itself '**whether [the impugned measure] is rationally connected to the objective**'.

[466] The impugned measure was termination of employment for those public employees who would not take the Vaccine.

[467] The problem **SR&O 28** was intended to address was helpfully summarized in Rule 3 to have been to '(a) prevent, control, contain and suppress the risk of the spread of the coronavirus-disease 2019 in public bodies; and (b) protect the health and safety of employees.'

[468] The solution to the problem, mandated by the Minister in **SR&O 28**, was twofold: to require public employees to take the Vaccine (by Rule 5) and to order that unvaccinated employees must not enter the workplace (by Rule 8(1)).

[469] As we have seen, **Bank Mellat** clarified that a rational connection exists where 'the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt'.[140] As we have also seen, by 'rational connection' in step two meant simply a logical connection. The word 'rational' in the context of step two goes no further than that. It does not, in this context, mean 'reasonable'.

[470] The question for step two simply comes down to whether compelling public employees to take the Vaccine on pain of termination in some way furthers the purpose of **SR&O 28** as expressed in Rule 3. If one assumes that the Vaccine would assist, even to some extent, in furthering this stated purpose, and that giving public employees an ultimatum to take the Vaccine or be terminated would go some way towards achieving this, then the answer to the question at step two is clearly 'yes'.

[471] In fact, the CMO put into evidence[141] documents showing that a number of public employees, who had initially refused to take the Vaccine and had been terminated, had recanted, took the Vaccine and were reinstated in their jobs. The pressure of

[140] [2013] UKSC 39 at paragraphs 92 to 98 (Lord Reed).
[141] See e.g. Record of Appeal Bundle 4, pages 755, 756, 758, 759.

the ultimatum, and the unpleasant reality of loss of livelihood with all that that entails, appears to have worked with those employees.

[472] The answer to step two can therefore be given in the affirmative.

8.6.3 Step three

[473] Moving on to step three, this requires the Court to consider '**whether a less intrusive measure could have been used**' to meet the objective of the impugned termination measure.

[474] As stated in the majority judgment of Lord Sumption in **Bank Mellat**:[142]

> "The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

[475] I am persuaded that less intrusive measures could have been used without unacceptably compromising the objective of **SR&O 28**, for two sets of reasons.

8.6.3.1 Constitutional limitation

[476] It can be stated with confidence that the impugned termination measure was draconian. The appellants have never denied that. Terminating unvaccinated public officers, with loss of accrued pension rights, was obviously 'intrusive', to track the language of the four-step test.

[477] The question of proportionality of the impugned termination measure comes down to whether, in all of the circumstances, it was too 'intrusive', in the sense that a less intrusive measure could have been used without unacceptably compromising the objective.

[142] [2013] UKSC 39 at paragraph 20 (Lord Sumption).

[478] In the case of the respondents whose pension entitlements were lost upon their termination, section 6 of the **Constitution** provides an immediate and unequivocal legal answer. This answer obviates the need for this Court to make a value judgment.

[479] The answer is that the only limitation on property rights allowed by the **Constitution** (so far as is material in the present case) is, that if public service employees are to have their pension rights removed, then the Government has to provide them with adequate compensation within a reasonable time. Section 6 of the **Constitution** permits limitation of property rights but draws the line that if property rights are removed, then adequate compensation within a reasonable time must be paid. That line is absolute and cannot be crossed.

[480] Crucially, neither **SR&O 28** nor any other legislation made any provision for any compensation for loss of pension rights upon termination under Rule 8(1) and (2).

[481] Moreover, there is no evidence that the Government intended to compensate any of those terminated for loss of their pension rights. Indeed, there is evidence pointing the other way – the Government in terms ruled out paying any of the terminated public employees compensation even if they should be re-employed upon the Government relaxing its vaccine mandate.[143]

[482] The impugned termination measure crossed the line drawn by section 6 of the **Constitution**, with a purported limitation on property rights going beyond that permitted by section 6. Consequently, the impugned measure was more intrusive than the **Constitution** permitted. It was thus too intrusive. It was, in consequence,

[143] See an example of a respondent's 'counter-offer' at Record of Appeal Bundle 5 at page 901 with reference to the demand for compensation at paragraph 5, and the Government's rejection of the demand for compensation at Record of Appeal Bundle 5 at page 903 in terms simply that 'Item 5 of your Counter-Offer is not acceptable'.

inherently disproportionate. That is a complete answer to the entire proportionality inquiry.

[483] It is axiomatic that if a measure seeks to impose a limitation on property rights beyond that which is permitted by section 6 of the **Constitution**, then a less intrusive measure complying with the limitation permitted by the section could, and indeed must, have been used.

8.6.3.2 An adequate measure already exists in Rule 8

[484] The second set of reasons revolves around there already being an adequate measure contained in Rule 8.

[485] We have also seen that the means for achieving the purpose stated in Rule 3 was (a) to require public employees to take the Vaccine (by Rule 5) and (b) to order that employees who had no reasonable excuse for not being vaccinated must not enter the workplace (by Rule 8(1)).

[486] We have also already seen that the evidence of the appellants was that apart from the Rules advised by the CMO, **SR&O 28** 'included **other rules like Regulation 8** which were approved by the Cabinet including myself [i.e. the Minister] **in order to ensure compliance with the SRO and particularly** [the vaccine mandate in] **Regulation 5.'**[144] These 'other rules' included:

(1) the prohibition upon unvaccinated employees entering the workplace (Rule 8(1));

(2) termination of unvaccinated employees through deemed abandonment of office (Rule 8(1) and (2) read together); and

[144] See Affidavit of Mr. Frederick Stephenson at paragraph 9.

(3) Rule 8(3): 'An employee who enters the workplace in contravention of sub-rule (1) commits an act of misconduct and is liable to be disciplined…'.

[487] The stated purpose of **SR&O 28** therefore had (at least) these three compliance ensuring measures.

[488] Of these, the prohibition against entry into the workplace itself had its own express compliance ensuring provision with the imposition of a charge of misconduct and disciplinary proceedings.

[489] The idea underpinning both the prohibition from entering the workplace and termination for failing to take the Vaccine was the same: **if unvaccinated employees are considered to represent a heightened risk for transmitting and contracting the disease, the risk is removed if they are removed from the workplace.**

[490] Turning to the manner in which step three is to be applied, step three requires a court to consider an impugned measure in relation to its legislative objective, and not, in relation to some other, or wider objective which might conceivably validate it.

[491] It forms no part of the court's remit, when considering step three, to consider whether a less intrusive measure could have been used to further **some other objective** than the particular legislative purpose. Thus, the Court is **not** here concerned with whether mandating 100% of various categories of public employees get vaccinated would assist the Government to attain the CMO's goal of getting 70% of the population vaccinated.[145] Nor was increasing the numbers of vaccinated persons in general a stated purpose for **SR&O 28**. Nor whether the CMO's measures in general were succeeding in reducing the incidence of COVID-19 in the general population.

[145] Affidavit of Dr. Simone Keizer-Beache at paragraph 49.

[492] Moreover, it forms no part of the court's remit, when considering step three, to embark upon a general, high-level, assessment whether the perceived gravity of the public health emergency warranted the radical measure of depriving public employees of their jobs and their livelihoods for themselves, their families and their dependents. That would entail the court adjudicating on matters of public policy, political expediency and private ethics and morals, which it is not equipped to do and stretches beyond the scope of its legal judgment function. Instead, step three urges a specifically focused, objective, factual inquiry upon the court.

[493] Thus, what this Court needs to do is consider whether a less drastic measure than termination could have been used **to ensure compliance with the legislative purpose of SR&O 28 stated in Rule 3, including the vaccine mandate in Rule 5.**

[494] The Court is presented with a convenient starting point for this inquiry with the text of **SR&O 28** itself.

[495] As we have seen, **SR&O 28** laid down three purported compliance measures. The Minister's twofold solution to the problem summarized in Rule 3 was (a) to prohibit unvaccinated employees from entering the workplace and (b) to remove them from the public service altogether.

[496] Prohibition from entering the workplace was a compliance measure that was made subject to a further measure of misconduct disciplinary proceedings pursuant to Rule 8(3).

[497] Termination was **not** expressed to be a sanction **for entering the workplace unvaccinated**. The effect of including termination was to remove unvaccinated public employees permanently from the public service altogether.

[498] These legislative provisions beg questions:

(1) why was the prohibition from entering the workplace, on pain of misconduct disciplinary sanctions insufficient to meet the stated legislative purpose; and
(2) why it was additionally necessary to terminate the unvaccinated?

[499] The appellants proffered no explanation for these questions.

[500] The appellants did not advance a case that prohibition from entering the workplace, on pain of misconduct disciplinary sanctions, was not enough.

[501] The appellants led no evidence that such a prohibition, backed by misconduct sanctions, had been tried but had not worked to keep unvaccinated workers out of the workplace.

[502] The appellants led no evidence that terminating unvaccinated employees, in addition to prohibiting them from the workplace, would render public bodies or public servants any safer.

[503] I have emphasised these points because they are critical, and they are specific to the enquiry the Court needs to concern itself with. The appellants seek to excuse the imposition of the impugned measure on grounds that the CMO's 'earlier protocols were not working as effectively as they should because infections and hospitalizations were on the rise, considerable vaccine hesitancy existed in the country and in the Public Service and the virus was likely to peak'. That was the CMO's reason for imposing a mandatory vaccine requirement. **But it does not explain why unvaccinated public service employees had to be terminated and not just kept away from their places of work.** The appellants have no answer to that question.

[504] Removing unvaccinated employees from the workplace for, at most, the temporary duration of the public health emergency would have been a less intrusive, sufficient measure to meet the self-proclaimed purpose of **SR&O 28**.

[505] I agree with the respondents that the legislative purpose of **SR&O 28**, including ensuring that unvaccinated employees would not enter the workplace during the inherently temporary duration of the public health emergency, could be achieved without terminating employees with permanent loss of their pension property rights and employment.

[506] There would appear to be no reason why unvaccinated public employees, if they were to be regarded as a threat to health, could not have been removed from the workplace by placing them on leave, and even on unpaid leave, during the inherently temporary duration of the public health emergency.

[507] No expert or scientific evidence is required to support such a remedy, because it is self-evident. One can ask rhetorically, how unvaccinated employees could transmit the disease to co-workers and others in the workplace if they are not there? Equally, how could unvaccinated employees contract the disease at the workplace if they are not there? It stands to reason that they cannot.

[508] The appellants have led no evidence that such a measure would not have been feasible, nor effective, nor enough to meet the stated legislative purpose of **SR&O 28**.

[509] A measure such as placing unvaccinated employees on leave would have been a less drastic or intrusive means of achieving the stated legislative purpose than terminating the unvaccinated. At the same time, the employees' pension rights would be preserved. Unpaid leave would interfere with their livelihoods, but livelihoods are not a constitutionally protected right, so such employees affected by a requirement to take unpaid leave could not be heard to complain about the temporary loss of livelihood.

[510] Moreover, temporary leave would keep the human resource of the public employees, with their years and decades of knowledge and experience, available to the public service for the time when the inherently temporary restrictive measures could be lifted, instead of discarding them permanently.

[511] In this regard, it warrants observation that the appellants included in their disclosed documents some 135 appointment or employment letters for the 271 respondents – i.e. for around one half of the respondents. The letters demonstrated the periods of service. For the 135 terminated employees concerned, the letters show these employees had, between them, **over 1,213 years** of public and/or police service. By terminating these employees, the Government permanently deleted over 1,213 years of institutional knowledge and experience from the public and police services as if it was of no moment. The actual number of years lost must have been much higher, since these appointment letters covered the service periods for just under half of the respondents. Placing unvaccinated public employees upon leave would have preserved this large body of institutional knowledge and experience.

[512] In short, **SR&O 28** already contained an adequate solution to achieve the stated legislative purpose. The addition of the impugned termination measure exceeded what was necessary.

[513] The answer I arrive at for step three of the proportionality test is that less intrusive measures than termination were available without compromising the stated legislative objective of **SR&O 28**.

[514] Two such measures were already included in **SR&O 28** itself – prohibition from entering the workplace and disciplinary action in misconduct for failure to comply with that prohibition.

8.6.4 Step four

[515] Step four of the **de Freitas** proportionality test requires the Court to consider '**whether, having regard to [the matters considered in steps 1 to 3] and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community'.**

[516] The **rights of the individual** here can be taken to be the unvaccinated employees' pension property rights.

[517] Concerning the **severity of the consequences** of the impugned termination measure, these property rights and their loss are sufficiently important to be expressly protected under the **Constitution**.

[518] We have already seen that no provision had been made by the Government to provide any, let alone adequate and reasonably prompt, compensation for the loss of property rights, contrary to section 6 of the **Constitution**.

[519] This consequence was unconstitutionally severe.

[520] The inquiry into the severity of consequences is not limited to infringement of fundamentally protected rights. Once the Court's jurisdiction to carry out the proportionality test has been established, the Court can and should take into account all consequences. Here, those consequences included primordially the loss of employment (with attendant social marginalization, unemployment, and, for lifelong public servants the challenge of finding equivalently paying employment in the private sector at a time when the economy as a whole had crashed due to the effects of politico-medical measures imposed in response to COVID-19), and loss of livelihood for the employees, their families and dependents.

8.6.4.1 The interests of the community

[521] The interests of the community that **SR&O 28** was legislated to advance were explained in Rule 3 of **SR&O 28**.

[522] That said, the **Constitution** itself, as the supreme law of the state, also expresses the interests of the community.

[523] Where, as here, constitutional protections apply, it is illegitimate to hold that the interests of the community nonetheless take precedence over the rules laid down by the **Constitution**. The rule of law is not subservient to a government's views as to what serves the interests of the community.

[524] Much could be said how the interests of individuals affected by the impugned termination measure should be weighed against the interests of the wider community.

[525] Breach of the **Constitution** by the impugned termination measure is a complete answer to the inquiry at step four.

[526] The scheme of section 6 of the **Constitution** legislates what the framers of the **Constitution** considered to be the fair balance to be struck between the rights of the individual and the interests of the community. Any measure which upsets this balance in favour of the interests of the community away from the individual is not what section 6 treats as a fair balance.

[527] Breach of Section 6 of the **Constitution** aside, the interests of the wider community could have been served by placing unvaccinated public officers on leave for the inherently temporary duration of the public health emergency. It was not necessary to remove them from the public/police services altogether, with the attendant loss to the public and police services of hundreds of years of institutional knowledge and experience.

[528] The inevitable consequence is that the impugned termination measure did not strike a fair balance between the rights of the individual and the interests of the community.

[529] Consequently, the impugned termination measure in Rule 8(1) and (2) was unconstitutional, disproportionate and thus invalid.

8.7 Respondents who do not claim infringement of a fundamental protected right

[530] The legal position concerning those respondents who do not claim to have lost pension rights, the position is different.

[531] Outside the context of infringement of property rights by the impugned measure, the respondents do not advance a case (before this Court at least) that some other fundamental protected right had been infringed by the protected measure. In my respectful judgment, there is no scope for the court below, or this Court, to consider the proportionality of the impugned measure divorced from protection of a fundamental right. To that extent, I respectfully disagree with the reasoning of the learned judge at paragraph [167] of her judgment, 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."

[532] The learned judge cited no authority for this proposition. This is unfortunate, because the legal position is by no means trite. Indeed, in my understanding of law, the weight of authorities does not support such a proposition.

[533] My understanding of the law is that the four-step proportionality test cannot be used without reference to a fundamental right. Step one inherently makes this clear:

> "Whether its objective is sufficiently important to justify the limitation **of a fundamental right**" (Emphasis added.)

[534] At its simplest, without a fundamental right being limited, there is nothing to trigger the Court's jurisdiction to embark upon step one of the test. As we shall see, a different legal test applies in such situations.

[535] The concept of, and test for, proportionality pronounced upon by the Privy Council in the seminal case of **de Freitas**[146] concerned the protection of what the Privy Council referred to as a 'guaranteed right'.[147]

[536] The 'guaranteed right' in that case was the constitutionally protected right to freedom of expression and to freedom of assembly. The subsequent development of the law, of which recent developmental expressions include the **Bank Mellat** and **Suraj** cases, has also remained within the same track of ascertaining proportionality of measures which purport to make inroads into, or negate, fundamental rights. Purely for shorthand convenience, I will refer to this proportionality test, even in its latest developed form, as the **de Freitas** proportionality test.

[537] The Privy Council's decision in **de Freitas** was delivered in 1998. Some fifty years earlier, the English Court of Appeal in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**[148] was faced with an issue whether conditions imposed upon the grant of a cinema license should be quashed upon an application for judicial review by the cinema operator. That factual matrix did not concern breach of any fundamental, protected, or guaranteed rights. It is to be recalled that at the time the United Kingdom had no Human Rights Act, and no European Convention on Human Rights applied in the United Kingdom. That case concerned whether the measure could or should be struck down on common law principles pertaining to the proper ambit of administrative discretion.

---

[146] [1999] 1 AC 69 at paragraphs 25 and 26 (Lord Clyde).
[147] Ibid.
[148] [1947] EWCA Civ 1.

[538] The English Court of Appeal pronounced what has subsequently been referred to as the '**Wednesbury** test', which essentially has three elements. Thus, Lord Greene M.R. stated:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, **a person entrusted with a discretion must**, so to speak, **direct himself properly in law**. **He must** [1] **call his own attention to the matters which he is bound to consider. He must** [2] **exclude from his consideration matters which are irrelevant to what he has to consider**. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." **Similarly,** [3] **there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.** Warrington L.J. in Short v. Poole Corporation [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (Emphasis and [numbering] added.)

[539] The **Wednesbury** test has been applied by English Common Law based courts when considering whether measures imposed following the exercise of discretion by an emanation of the state are so unreasonable as to be impermissible.

[540] As can be seen from the test's formulation it is – or at least initially was – considerably different from the **de Freitas** proportionality test. In the decades following the decision in **Wednesbury**, the somewhat bluntly worded (by today's standards) but crystal-clear **Wednesbury** test has been honed until it passes for a test almost, but not quite, identical to the **de Freitas** proportionality test. Thus, in **Pham v Secretary of State for the Home Department**[149] Lord Sumption dissected the similarities and differences succinctly as follows:

> "But I doubt whether it is either possible or desirable to distinguish categorically between ordinary and fundamental rights, applying different principles to the latter. There is in reality a sliding scale, in which the cogency of the justification required for interfering with a right will be

[149] [2015] UKSC 19 at [106] (Lord Sumption).

proportionate to its perceived importance and the extent of the interference. As Lord Bridge of Harwich observed in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, at pp 748-749, the courts are "perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it." In *R v Ministry of Defence, Ex p Smith* [1996] QB 517, the Court of Appeal adopted the following statement of principle from the argument of counsel (Mr David Pannick QC) at p 554:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

This is in substance a proportionality test, but with the important difference that the court declined to judge for itself whether the decision was proportionate, instead asking itself whether a rational minister could think that it was. This is why when the case came before the European Court of Human Rights (*Smith and Grady v United Kingdom* (1999) 29 EHRR 493, at para 138) it was held that the test applied by the English courts was not sufficient to protect human rights." (Emphasis added.)

[541] We see from this that the **Wednesbury** test was not subsumed into the **de Freitas** proportionality test so as to lose its own identity and characteristics. The proportionality test derived from **de Freitas** involves a broader, more stringent, more structured inquiry into legislative purpose, necessity and the balance of private rights against community interests than the **Wednesbury** test, which is concerned with rationality and reasonableness. In the **de Freitas** proportionality test, rationality is part of the inquiry, but there it takes the form of a relatively low threshold to establish a basic logical link between the administrative measure in question and its official purpose. In the **Wednesbury** test, rationality has a different focus: of requiring the administrative decision maker to take into account relevant factors and to disregard irrelevant factors and to avoid absurdity. The test that derived from **Wednesbury**, and not the **de Freitas** proportionality test, has remained the test to be applied to a

measure which does not concern infringement of a fundamental, protected or guaranteed right.

[542] There is no need of me to comment more profoundly on the differences and similarities between the two tests, nor on other well-known decisions of high authority and persuasiveness such as **Kennedy v Information Commissioner**[150] and **R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs**[151] which manifest a trend towards converging the two tests, but without going so far as to sideline the **Wednesbury** test into retirement. The **Wednesbury** test remains in service

.

[543] If my understanding is correct in this regard, this means that it would be conceptually incorrect for this Court to attempt to apply the **de Freitas** proportionality test to a situation where no infringement of a fundamental right is in issue. That is so, quite apart from the fact that trying to apply that test would require doing violence to step one, which requires there to be a fundamental right to trigger it.

[544] Moreover, whilst the appellants touched upon **Wednesbury** unreasonableness in their skeleton submissions for this appeal[152] in order to argue that the impugned measure was not irrational, the respondents pointed out[153] that irrationality of the impugned measure was not an issue before the court below at trial, and the learned judge made no finding that the impugned measure had been irrational.

[545] I will therefore not try to do the impossible of applying the proportionality test to the situation of those respondents who do not claim breach of a protected fundamental right.

---

[150] [2014] UKSC 20.
[151] [2015] UKSC 19.
[152] At paragraph 66.
[153] At paragraph 9 of their skeleton argument.

9. Conclusion

[546] For the reasons I have given, I am of the view that the following provisions in Rule 8 of **SR&O 28**, underlined, were unconstitutional on grounds of disproportionality:

> 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).**

[547] Moreover, for the reasons I have given, the decisions made by the Public and Police Service Commissions to treat the respondents as having resigned their positions pursuant to **SR&O 28** were void and of no effect, for breach of elementary principles of natural justice or fairness.

[548] For these reasons I sustain the learned judge's overall conclusion and orders, vindicating the rights of the respondents, who have been grievously wronged by the unconstitutional and unlawful acts of the executive branch of the Government. I would dismiss the appeal.

Gerhard Wallbank
Justice of Appeal [Ag.]

By the Court

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

Chief Registrar