IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of Writs of Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case No: CA/WRIT/207/2020

1. Shanthi Aluthge
   In front of Pushparama Temple,
   Polommaruwa,
   Tangalle.

   And 90 Others.

PETITIONERS

Vs.

1. Hon. Janaka Bandara Tennakoon

   Minister of Public Administration, Home Affairs, Provincial Councils and Local Governments,

   Ministry of Public Administration, Home Affairs, Provincial Councils and Local Governments, Independence Square,

   Colombo 07.

   And 255 Others

RESPONDENTS

Before: Hon. D.N. Samarakoon, J.

Counsel: Mr. Sanjeewa Jayawardena, P.C., with Ms. Ranmalee Meepagala, for the Petitioners.

Mr. Manohara De Silva P.C., with Ms. Sasini Chandrasiri for the 13th to 223rd Respondents.

Ms. Yuresha Fernando D.S.G., for the 1st to 12th Respondents.

Argued on: 14.02.2023, 25.09.2023, 07.11.2023 (on the last day agreed to conclude the rest of the hearing by written submissions)

Written Submissions: 17.01.2024 by the Petitioners.

Decided on: 21.03.2024

D.N. Samarakoon[1], J

J U D G E M E N T

The question, in its most basic form is whether,

> the date of the letter of appointment of the petitioners should be 22.06.2009, (which is the date as of now) or whether it must be 22.12.2008?

The 91 petitioners say that the former date which now commences their appointments as Class II Grade II Officers of Sri Lanka Planning Service is there due to the negligence and or blatant error and or omission and or inaction of 01st to 12th respondents.

[1] On 12.01.2024 and 30.01.2024 all counsel consented to judgment being given by Justice D. N. Samarakoon as Single judge.

Hence the petitioners ask for a writ of mandamus to direct 03rd to 10th respondents (constituting the Public Service Commission) to ante date it to 22.12.2008.

They say that this error seriously affected and affecting their career prospects and seniority.

They seek the following reliefs,

> b) Grant a mandate in the nature of a Writ of Mandamus, directing the 3rd to 10th Respondents above named, to duly ante-date the date of appointment/ Letters of Appointment of the Petitioners, to Class Il-Grade II (presently Grade II) of the Sri Lanka Planning Service, to 22.12.2008, without back wages;
>
> c) Grant and issue a mandate in the nature of a Writ of Mandamus, directing the 3rd to 10th Respondents above named, to duly and forthwith, place the Petitioners, who were recruited to Class l-Grade Il (presently Grade Ill) of the Sri Lanka Planning Service under the Limited category, on top of the seniority list, as opposed to the candidates who were recruited with effect from 22.12.2008 to Class l1-Grade Il (presently Grade lll) of the Sri Lanka Planning Service under the Open category;
>
> d Grant a mandate in the nature of a Writ of Mandamus, directing the 3rd to 10th Respondents above named, to grant the Petitioners their consequential promotions and other benefits, except back wages, which the Petitioners are rightfully entitled to, in view of and/or consequent to the aforesaid amended date of their appointment to Class Il-Grade ll (presently Grade Ill) of the Sri Lanka Planning Service;
>
> e) Issue a Writ of Prohibition, restraining the 3rd to 10th Respondents, from effecting any promotions to Grade I of the Executive posts of the Sri Lanka Planning Service, to the candidates who were recruited with effect from 22.12.2008 to Class I|-Grade ll (presently Grade Ill) of the Sri Lanka

Planning Service under the Open category, without first, duly amending or causing to be amended and/or antedating or causing to be ante-dated, the Petitioners' Letters of appointments/dates of appointment and amending the seniority list, as prayed for in prayers (b) and (c) to this Petition;

f) lssue an Interim Order, restraining any promotions to Grade I of the Executive posts of the Sri Lanka Planning Service, to the candidates who were recruited with effect from 22.12.2008 to Class Il-Grade Il (presently Grade I) of the Sri Lanka Planning Service under the Open category, until the final determination of this Application;..."

The 01st to 12th respondents represented by the Attorney General has raised following objections,

(01) The Application is not amenable to the jurisdiction of the Court of Appeal due to Article 61A of the Constitution.

(02) The Application relates to Administrative and Executive action taken in the year 2009 and the Petitioner is guilty of Laches.

(03) The Petitioners lack uberrima fides necessary to seek prerogative relief and has withheld and/or misrepresented material facts.

(04) The Petition is frivolous, futile and vexatious and strife with prolixity of pleadings and not a fit and proper application to be considered by Your Lordships Court.

(05) The Petitioners have failed to demonstrate any legal basis to support his application.

(06) The Petitioner's application is misconceived in law.

(07) The Respondents have at all times acted justly and fairly and with accordance with applicable procedures established by law/regulation

(08) The Petitioners have failed to disclose any grounds upon which a writ would lie in the facts and circumstances of this case.

Article 61A of the Constitution says,

"61A. 43[Subject to the provisions of Article 59 and of Article 126], **no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question <u>any order or decision made</u> by the Commission**, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law".

The "commission" referred to here is "The Public Service Commission" that is referred to in Article 54 onwards in Chapter IX on "The Executive".

The above respondents rely upon a slightly different article 61A which they say is applicable when the events referred to in the present application occurred which is the version after the 17th Amendment to the Constitution. The difference is that the reference to Article 59 at the commencement in the present article being absent. That has been included by the 19th Amendment to the Constitution. That will not make a difference. That is a reference to the powers of the Administrative Appeals Tribunal to interfere with the directions of the Public Service Commission.

The respondents represented by the Attorney General have cited the following cases in this regard,

(i) Attapattu vs. Peoples' Bank (1997) 1 SLR 208
(ii) Ratnasiri and others vs. Ellawala and others (2004) 2 SLR 180 at 190
(iii) Hemantha Chamindra Ovitigama vs. Inspector General of Police and others C. A. Writ 1009/2008 dated 10.05.2019
(iv) Hemantha Abeysekera and others vs. Conservator General of Forests C. A. Writ 276/2015 dated 17.01.2020

In (ii) Marsoof J., when his lordship was the President Court of Appeal said,

"The petitioners have challenged the legality of the decision of the Public Service Commission (embodied in 1R18) constituting the 1st to 3rd

respondents as the Transfer Appeal Board, on the basis that the members of the said Board were not appointed in accordance with clause 5.1 of Chapter III of the Establishment Code".

"In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent".

In (i) Justice Mark D. H. Fernando in the Supreme Court said,

"Articles 17 and 126 constitute "express provision", because they directly confer jurisdiction; although they make no specific mention of the ouster clause in section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause.

But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the

protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also Jailabdeen v. Danina Umma (13)). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law".

In (iii) Justice Janak de Silva in the Court of Appeal (sitting as Single Judge) upheld an objection based on Article 61A, among other things.

In (iv) Justice Janak de Silva in the Court of Appeal, among other things, said,

> "Therefore, all actions or inactions of the PSC are caught up within the constitutional prohibition contained in Article 61A of the Constitution".

The petitioners draw the attention of this Court to the words, "**any order or decision made**" found in Article 61A.

Their position is, that, the date in their letters of appointment being stated as 22.06.2009 is not due to any order or decision of the commission but due to a failure on the part of the appointing authority to perform its public duty.

The petitioners argue, that, there is a critical difference between an "act" or "commission" and an "omission."

In the context of Public Law in England, an omission typically refers to a failure to act. It is generally understood that an omission does not constitute a decision in the same way that an affirmative act would. This principle is particularly

relevant in cases of negligence involving public authorities, where the distinction between acts and omissions can determine the liability of the authority[2].

The above website, referred to in the last footnote, too refer to "cases of negligence involving public authorities". Such instances are often those relating to the "failure to act."

Although the judgment in (iv) above, with respect, purported to include an "inaction" within the premise of Article 61A, an "inaction" cannot be "any order or decision **made**". In as much as, inaction (no action) does not constitute an order or a decision, it is not something that is "made." With respect "no action" is the opposite of "to act".

The petitioners allege another reason as to why their application is not precluded by Article 61A.

What is attempted to be directed to be done by mandamus is not an order or decision made.

The petitioners cite following cases to say that "ouster" clauses had been interpreted very narrowly in a manner that strives the preservation of the Rule of Law.

(i) De Silva vs. Salinda Dissanayake, Minister of Lands (2003) 1 SLR 52
(ii) Priyadarshanie vs. The Commissioner General of Inland Revenue C. A. Writ 540/2011 dated 29.06.2012
(iii) Karavita vs. Inspector General of Police (2002) 2 SLR 287
(iv) Sisil Wijitha vs. Chairman Public Service Commission 75/2013 dated 13.03.2018

To quote from (ii) above S. Sriskandharajah J. and Deepali Wijesundera J., in the Court of Appeal has not seen article 61A as a bar to

[2] Public Authority Negligence Revisited | The Cambridge Law Journal | Cambridge Core

"Issues a Writ of Mandamus directing the 1st to 14th Respondents to antedate the promotion of the Petitioner as well as the promotions of the 15th to the 17th Respondents to an equal single date, that is to be effective from 08/06/2009. I also issue a Writ of Mandamus directing the 14th to the 17th Respondents to formulate and implement a specific scheme which would be applicable in all instances where officers of equal or similar seniority are to be promoted, based purely on seniority".

The 05th to 14th respondents were the Chairman and the members of the Public Service Commission.

Hence this Court overrules the objection based on Article 61A.

The above respondents have also alleged delay from 2009 to 2020. The position of the petitioners is that there were several discussions and dialogues with authorities. This is acceptable.

One need not go further. Just take this case. The initial calling date was 07.08.2020. It came before the Bench in Court No. 108 presided by me on 25.02.2022. The argument had not commenced. The whole year of 2022 went by without the argument commencing. It commenced on 14.02.2023. Not that I blame anyone or blame this Court. For instance on 24.07.2023 there was C. A. Tax 05/2015 to be taken up. There was a power failure too. The Court room being on the first floor without windows opening to sunlight is dark. Argument concluded on 07.11.2023. Then written submissions were filed by 30.01.2024. There are delays in all systems in this country. Sometimes it reminds the Chinese proverb "A blind tortoise looking at the moon," which has in the vernacular of this country become even more difficult and impossible, giving rise to the saying that, the tortoise who is blind has to look at the moon through a hole on a pole.

It is not justifiable to blame only the petitioners. And also people come to courts as a last resort.

Besides the petitioners cite University of Peradeniya vs. Justice D. G. Jayalath and others 2008 BLR 360 in which Saleem Marsoof P/C. A. J., at page 358 – 359, quoting Justice Sharvananda in Biso Menika's case said,

> "When the Court has examined the record and is satisfied that the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically." (Emphasis added)

According to the petitioners, recruitment to their service was

(i) On open recruitment - 75% of the vacancies
(ii) On limited recruitment - 25% of the vacancies

This is not the Cadre but the existing number of vacancies.

The commission by their letter dated 11.08.2006 gave approval to fill 434 vacancies.

(a) Gazette dated 01.09.2006 was published in this regard. (P.14)
(b) Gazette dated 31.08.2007 called for the limited competitive examination (P.15)

The gap of time is 11 months.

Examinations for

(a) Was held on 05.05.2007
(b) Was held on 08.03.2008

For (a) interviews were held from 11th to 19th September 2009 (not on all days within that period) [the year as 2009 stated in paragraph 41 of petitioners' written submissions is due to a mistake. As the 13th to 223rd respondents say this was September 2008] and 230 officers were recruited. Their date of appointment is 22.12.2008.

This is the date to which petitioners now seek to ante date their appointments.

For (b) interviews were held from 21st to 23rd May 2009. 48 officers who passed Open Examination too were interviewed.

On approval of the cabinet of ministers dated 18.06.2009 a number of 132 from (b) and 35 from (a) were appointed having their date of appointment as 22.06.2009.

The petitioners say at paragraph 53 of the written submissions,

> "53 It is respectfully submitted that the time gap between the examination date and the interview date, i.e. one year and two months, and the inaction of the PSC and the appointing authority, to regularize the procedure despite they were well aware that, during the said period the candidates from the Open category were called for interview, and delaying the procedure for limited category would only result in a letter of appointment being issued belatedly, despite they all applied for the vacancies which existed at a given date cannot be justified at all. The inaction of the PSC in respect of the Limited category is apparent when one analyses the time gap between the examination held for Supernumerary and the interview, which was only 4 months, despite the gazette calling for examination for the supernumerary basis was also amended within the shortest possible time, as opposed to the Limited Category".

The petitioners say that in 2011/2012 and 2016/2017 recruits on both the categories had the same date in letters of appointment.

The petitioners further state at paragraph 73 and 74 as follows,

> "73. Thus, it is respectfully submitted that as at 22.12.2008, (which is the date on which the Petitioners seek ante dating) all the Petitioners have already faced the Limited Competitive Examination and from 22.12.2008 to 22.06.2009, all the Petitioners have been in active service in planning related works in referent Ministries, Government Department and/or Provincial Councils. Thus, the said Antedating does not give validity period to a period where the Petitioners were not in service or for a period in a vacuum, but on the contrary during the said Period the Petitioners were all in active service.
>
> 74. It is further submitted with great respect, that another argument advanced by the 13th to 233rd Respondents are to the effect that, there is no hard and fast rule of placing the candidates under the Limited Category being placed above the candidates of the Open Category".

It is further stated in paragraphs 80 and 81 that

> "80. It was the contention of the Respondents that in terms of the Procedural Rules on Promotion and Transfer of Public Officers issued by the Public Service Commission, appointment cannot be done under any circumstances. The Respondents rely on Rule 31 of the PSC rules;
>
> 81. However, it is stated with great respect, the said Argument is misconceived in law, in as much as PSC rules which is a subordinate Legislation cannot oust the Writ Jurisdiction of Your Lordships' Court, which is bestowed upon a citizen in terms of Article 140 of the Constitution. Since the Petitioners have demonstrated before Your Lordships' Court that the 1st to 12th Respondents have failed to carry out their duties in terms of the Service Minute P5, there is no bar and/or a legal impediment for Your Lordships' Court to rectify the said error by the issuance of a Writ of Mandamus".

The 13th to 223rd respondents are those recruited under (a) above. The Open Category.

They say they had the examination on 05.05.2007, they were interviewed from 11th to 19th September 2008 and they were appointed from 22.12.2008.

They will be eligible for promotion to Grade I upon completion of 12 years from 22.12.2020.

These respondents say that the above (a) and (b) were under two separate recruitment processes. But it is one service minute, one process, delayed due to "inaction."

These respondents state as follows,

> "By paragraph (d) of the Prayer to the Petition, the Petitioners seek a Writ of Mandamus compelling the appointing authority to backdate their appointments to 22.12.2008. However, as at 22.12.2008, the Petitioners have not even faced the interview on the results of the Limited Competitive Examination (which was held only on 08.03.2008) and therefore have not completed the eligibility criteria for appointment as per the Scheme of Recruitment;
>
> The Petitioners were appointed in terms of the Cabinet decision marked P17(b) very clearly specifies that the date of appointment of the Petitioners shall be 22.09.2009;...."

They also refer to paragraphs 30 and 31 of the Public Service Commission Rules.

Both sets of respondents say, that, the petitioners do not have a ground for a public law remedy.

The grounds are as follows,

(i) The "inaction" of 01st to 12th respondents amount to a "nullity". It is not only a nullity in the sense Lord Reid decided in ANISMINIC LTD.

APPELLANT AND FOREIGN COMPENSATION COMMISSION AND ANOTHER RESPONDENTS in the House of Lords on 17th December 1968; and not only a nullity in the sense Chief Justice N. D. M. Samarakoon said in RANASINGHE v. THE CEYLON STATE MORTGAGE BANK with Justices Ismail, Sharvananda and Wanasundara on 07th July 1981 (Wimalarathne J., dissenting).

Lord Reid said "If there is no legally valid decision (that is, the purported decision is legally a nullity) **there is no "decision" to which an ouster clause can apply**." Chief Justice Samarakoon Q. C., said, "The attack in this case is on the very jurisdiction of the bank and hence that was not empowered to make the impugned order. If that be so the order of the bank is a nullity. Anisminic v. Foreign Compensation Commission."

This is applicable to what was discussed at the commencement of this judgment in regard to Article 61A too. If a purported decision is a nullity, it amounts no decision and article 61A cannot protect such a nullity from court's scrutiny.

In both those cases, [Anisminic and Ceylon State Mortgage Bank**] there was an <u>empirical</u> presence of a purported "decision" which the court deemed to be a nullity**. But in the present case, there is inaction; and it need not be deemed a nullity, for it is an absolute nullity. Hence Anisminic vs. Foreign Compensation Commission applies even with more force in this case.

In both the above cases the courts issued a declaration of nullity. If it could have been done there is no reason why under Article 140 of the Constitution this court cannot issue mandamus and prohibition.

As Justice Mark D. H. Fernando said in Attapattu vs. Peoples' Bank (1997) 1 SLR 208,

"But there is one difference between those Articles [Articles 17 and 126] and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also Jailabdeen v. Danina Umma (13)). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law".

(ii) The next question is "delay."

Will it give rise to public law remedies?
Wade & Forsyth, 12th Edition says at page 498,

"DUTY TO EXERCISE JURISDICTION

A court or tribunal has a public duty to hear and decide any case within its jurisdiction which is properly brought before it. A mandatory order is frequently granted to enforce this duty on the part of inferior courts and statutory tribunals which are ordered to hear and determine according to law. Thus magistrates, licensing justices, county courts, statutory tribunals, ministers, officials, university visitors, and other jurisdictions subject to the High Court can be prevented from refusing jurisdiction wrongfully. In R v. Briant, a county court judge, who mistakenly declined to hear an action for possession by mortgagees on the ground that the county court had no jurisdiction, was ordered to hear and determine the case on a mandatory order from (what was then) the Queen's Bench Division." The same happened when a county court judge refused to investigate the correctness of jurisdictional facts upon which the validity of a rent tribunal's decision depended and which were properly disputed before him. Finally, a mandatory order was issued when a minister declined to decide an appeal about public rights of way. Refusal to receive evidence on some relevant point may also amount to refusal of jurisdiction. In these cases, a mandatory order can be issued to compel a magistrate to receive it. This situation, however, has to be distinguished from a decision by the magistrate, within the scope of their discretion, that the evidence is irrelevant.

Furthermore, refusal to consider a party's case has to be distinguished from refusal to accept the party's argument. As Lord Goddard CJ said: to allow an order of mandamus to go there must be a refusal to exercise the jurisdiction.

The line may be a very fine one between a wrong decision and a declining to exercise jurisdiction; that is to say, between finding that a

litigant has not made out a case, and refusing to consider whether there is a case.

If the inferior court or tribunal merely makes a wrong decision within its jurisdiction, as opposed to refusing to exercise it, a mandatory order cannot be employed to make it change its conclusion. This is merely the familiar rule that the court cannot interfere with action which is intra vires. An instance where a mandatory order was issued to a statutory tribunal was when a housing appeal tribunal dismissed an appeal by a company wishing to build a picture house without giving them a hearing as required by law. This was a breach of an implied statutory duty. Therefore, the decision was quashed by a quashing order and a mandatory order issued to require the tribunal to exercise its jurisdiction properly. The same remedies were also granted in a case where an immigration tribunal wrongly refused leave to appeal.

The basis of all such cases is that the court or tribunal has a legal duty to hear and determine the case which is correlative to a statutory right of some person to apply or appeal to it. However, nowadays that the courts grant a quashing order to quash decisions of non-statutory bodies (which can have no statutory duties), it seems that they would also grant a mandatory order to require the body to hear and determine--though it may be difficult to add the usual words 'according to law. Since this anomalous jurisdiction has already been established, it is only logical to extend it to a mandatory order, completing thus the system of judicial review.

A mandatory order has also been granted anomalously to enforce what the court called 'a rule of practice'. In R v. Derby Justices, magistrates had refused to authorize legal aid by counsel to a man charged with

murder. Although the statute gave them discretion as to the type of aid to be granted, it was held that there was a practice of allowing counsel in trials for murder and that that practice was obligatory. The court thus treated the magistrates' refusal as unreasonable. Effectively, it viewed that there is an implied duty in the statute, which meant that quashing and mandatory orders could be used as remedies.

The instance where there is a duty to hear and determine, but discretion as to the correct determination, must be distinguished from the instance where there is a discretion not to act in the matter at all. The Parliamentary Commissioner for Administration, who 'may investigate' complaints of maladministration and has discretion on whether to initiate an investigation, cannot, therefore, be ordered by a mandatory order to entertain a complaint since this is a matter of discretion and not of duty."

In reading the above passages from Wade & Forsyth, one has to appreciate, that, the failure to exercise jurisdiction could either manifest as an express refusal or it will materialize as "inaction".

The present case is one of the latter kinds. And hence mandamus must issue.

Furthermore, today the situation is different to than when it was decided in Rex vs. London Justices [1895] 1 Q. B. 616 where it was said that

> "If the inferior court or tribunal merely makes a wrong decision within its jurisdiction as opposed to refusing to exercise it, a

mandatory order cannot be employed to make it changes its conclusion."

The ground of proportionality is acting as a "fine tuning" of ultra vires.

Lord Steyn in *Regina (Daly) vs. Secretary for State for Home Department [2001] 2 A. C. 532* said,

"Clearly, these criteria [*which were formulated by Lord Clyde in the Privy Council in de Freitas vs. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, [1999] 1 A. C. 69 and referred to above*] are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? **Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach**: see Professor Jeffrey Jowell Q.C., "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pl 671; Professor Paul Craig, Administrative Law, 4th edition (1999) pages 561 – 563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999) pages 117, 127 et seq. **The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality.** Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. **First, the doctrine of proportionality may**

require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. **Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights**".

Article 14(g) of the Constitution says,

"the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;…."

The petitioners are in a service. They engage in a lawful occupation with others. They have a right not to be discriminated. The specific recognition of this fact in article 12(1) of the Constitution is not to confine the relief in regard to it only to an application instituted under that article. The basis of the Constitution, the Rule of Law, as referred to by Justice Mark D. H. Fernando requires that to be granted, if it has been violated, in all forms of actions and applications. All power in the state arises from the Constitution, which is the ultimate fountain of fairness.

In as much as, there is no "unfettered discretion" to act, there is no "unfettered discretion" not to act, when the law requires action to be taken.

An English case, which set a milestone in respect of what was referred to as "unfettered discretion" is **Padfield and others vs. The Minister of Agriculture, Fisheries and Food, [1968] A. C. 997**. In short, the dispute was in respect of the request of South Eastern dairy farmers that the existing "differential" was too low. That was an additional payment made to balance the cost incurred by dairy farmers in two different areas, especially in transport. They complained to the Milk Marketing Board and as they could not persuade that, to the minister. The latter refused to refer the complaint to the committee. This was the grievance of the dairy farmers when they came to the Divisional Court of the Queen's Bench Division, which held with them. The minister appealed. In the Court of Appeal, the dairy farmers lost. They had only the support of Lord Denning M. R. in a minority. The dairy farmers appealed. They won in the House of Lords.

Lord Upjohn referred to the letter in which the Minister used the word "unfettered" [*to deny which Padfield's case is often cited*] and said,

> "I will turn to his second letter, that of 03rd May 1965, which so far as relevant was in these terms:
>
> > "…You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation…" (page 1060)

Lord Upjohn added,

> "…My Lords, I believe that the introduction of the adjective "unfettered" and its reliance thereon as an answer to the appellant's claim is one of the fundamental matters

> confounding the Minister's attitude, bona fide though it be. First, the adjective nowhere appears in section 19, it is an unauthorized gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts, it is unfettered. But the use of that adjective, even in an act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives". (page 1060)

About Padfield's case, De Smith's Judicial Review, 07th Edition at page 249 – 250 says,

> "The decision in 1968 of the House of Lords in Padfield was an important landmark. The minister had refused to appoint a committee, as he was statutorily empowered to do at his discretion, to investigate complaints made by members of the Milk Marketing Board that the majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. **The House of Lords held that the minister's discretion was not unfettered and that the reasons that he had given for his refusal showed that he had acted ultra vires by taking into account factors that were legally irrelevant and by using his power in a way calculated to frustrate the policy of the Act**. The view was also expressed

by four of their Lordships that even had the minister given no reasons for his decision, the court would not have been powerless to intervene: for once a prima facie case of misuse of power had been established, it would have been open to the court to infer that the minister had acted unlawfully if he had declined to supply any justification at all for his decision. In the years that followed the Court of Appeal [*Congreve vs. Home Office [1976] Q. B. 629; Laker Airways Ltd., vs. Department of Trade [1977] Q. B. 643 etc.,*] and the House of Lords [*Daymond vs. Plymouth CC [1976] A. C. 609; Secretary of State for Education and Science vs. Tameside MBC [1977] A. C. 1014*] set aside as ultra vires the exercise of discretion that included a substantial subjective element. It is interesting to note that important as the decision in Padfield has been in the evolution of judicial attitudes, the minister was ultimately able to uphold the Board's decision without resorting to legislation. Another feature of those decisions was the willingness of the courts to assert their power to 23crutinize the factual basis upon which discretionary powers have been exercised. Nonetheless, at least in the absence of special circumstances and subject to the general point in Padfield, it is "inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters, as being somehow implicitly limited or fettered" [Regina (on the application of Rudewicz) vs. Secretary of State for Justice [2012] EWCA Civ. 499; [2012] 3 W. L. R. 901]

Hence the failure to exercise discretion in petitioners' favour which amounts to inaction is ultra vires as well as disproportionate.

In as much as, there is no "unfettered" discretion

(i) **To act** [*Laker Airways Ltd., vs. Department of Trade [1977] Q. B. 643 etc.,*]

(ii) **To refuse to act** [*Padfield and others vs. The Minister of Agriculture, Fisheries and Food, [1968] A. C. 997*]

there is no "unfettered" authority

(iii) To remain in inaction when meaningful action is required [*This case*]

"**In Laker Airways Ltd., vs. Department of Trade [1977] Q. B. 643 the Minister exercised his statutory discretion to give directions with regard to civil airways with the ulterior motive of making it impossible for one of the airlines to pursue a course of which the Minister disapproved**. In these cases judicial review was granted because the Ministers acted "unfairly" when they abused their powers by exercising or declining to exercise those powers in order to achieve objectives which were not the objectives for which the powers had been conferred…"

[Lord Templeman at page 850 – 851 in *Regina vs. Inland Revenue Commissioners, ex parte Preston [1985] A. C. 835*]

Hence this Court issues

(i) A writ of mandamus as per paragraph (b)

(ii) A writ of mandamus as per paragraph (c)

(iii) A writ of mandamus as per paragraph (d)

of the prayer to petition.

The petitioners are entitled to the costs in this application.

Judge of the Court of Appeal.