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

In the matter of an application for Orders in the nature of writs of Certiorari, Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:

CA/Writ/167/2018

L. H. Nandawathie

Delwalakanda, Udaranwala

Ranwala Godakawela

Petitioner

-Vs-

1. Anuradha Jayakody Divisional Secretary Weligepola Divisional Secretariat Weligepola
2. K. D. Kusumawathie

   Delwalakanda Ranwala

Respondents

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

Counsel: P. Radhakrishnan instructed by S. W. Weerasooria for the Petitioner.

Mihiri de Alwis, Senior State Counsel for the 1st Respondent

The 02nd respondent absent and unrepresented.

Argued on: 17.01.2024

Written submission tendered on: 22.02.2024 and 16.10.2019 by the Petitioner.

05.02.2024 and 21.10.2020 by the 01st Respondent.

Decided on: 29.02.2024

Hon. D. N. Samarakoon J.,

The written submissions of the petitioner says,

"1. It is respectfully submitted that the Petitioner invoked the jurisdiction of Your Lordships' Court under Article 140 of the Constitution seeking,

a. a writ of mandamus compelling the 1st Respondent -Divisional Secretary, of Weligapola Divisional Secretariat to act in terms of Land Ministry Circular No. 10 of 15.06.1995 (marked P2) and to grant a permit and legalize the Petitioner's ad hoc and or unauthorized occupation and possession of State land depicted as lot Nos. 180 and 181 in Cadastral Map No. 620237 (marked P6):

and

b. a writ of Certiorari quashing any permit or other written authority given to the 2nd Respondent or to any other person in respect of the said State lands depicted as lot Nos. 180 and or 181 in Cadastral Map No. 620237 (P6).

The petitioner also submits that

Whereas, the 2nd Respondent named in the Petition as K.D. Kusumawathi filed proxy by the name Kadawathage Kusumawathi and was represented in Court on 31.10.2018 (vide proxy dated 31.10.2018). Thereafter her proxy had been revoked. Thereafter with permission of Court by motion dated 23.01.2020 the caption was amended to read as Kadawathage Kusumawathi and Notice was re-issued repeatedly on the 2nd Respondent and finally in or about June 2020 Notice was served on the 2nd Respondent through the Fiscal of the Embilipitiya District Court (vide Fiscal's Report), nevertheless the 2nd Respondent was absent and unrepresented, as such Court proceeded to fix the case for Argument, apparently ex parte against the 2nd Respondent.

The position of the petitioner is that

i. Since about 1980 the Petitioner was in ad hoc or unauthorized occupation and possession of approximately 95 perches of State land identified as an undivided portion of a larger land marked 'Block A' in lot No. 123 in Final Village Plan (FVP) No. 679 of the land called "Ranwala Henyaya Karandolahena" - [vide Plan P3 FVP 679 for lot 123 and vide Advance Tracing 1R9 demarcating "lot A" within "lot 123"];

ii. the Petitioner had cultivated a tea plantation with some coconut trees on the said land [vide schedule in FVP 679 lot 123 is "Chena" cultivation]

iii. the Petitioner married Ganithage Premadasa in 1984 and the Petitioner and her said husband continued to possess and cultivate on the said land;

iv. between May and August 2010 the entire "Ranwala Henyaya Karandolahena" including lot 123 in FVP No. 679 was surveyed by the Surveyor General, and the Petitioner and her husband pointed out the boundaries of the land occupied by them as done by the rest of the villagers accordingly boundary stones were placed demarcating “Block A” the part of land actually possessed by the petitioner.

V. Villagers who were in similar possession of State land had been granted Permits and or Grants and their ad hoc possession was legalized in terms of Land Ministry Circular No. 10 of 15.06.1995 (P2);

vi. as such the Petitioner too was legitimately entitled for a Permit or any other State Document to regularize and legalize the land possessed and cultivated by her;

vii. although the Petitioner was summoned from time to time for land kacheri meetings she was never granted a Permit;

viii. at one such land kacheri held in 2017 it had transpired that the Petitioner's land marked 'Block A' had been divided in to two lots during the said Survey that was carried out in 2010;

ix. after much endeavor the Petitioner obtained a certified copy of Surveyor General's Cadastral Map No.620237 and only then the Petitioner became aware that the single plot of land that was possessed and cultivated by the Petitioner namely 'Block A' in FVP NO.679 had been divided in to two lots bearing lot Nos.180 and 181;

x. since the 1st Respondent Divisional Secretary failed to consider the Petitioner's requests and appeals, the Petitioner preferred an appeal to the Prime Minister [the present Executive President] on 30.07.2017 when he visited the Godakawela Divisional Secretariat;

xi. in response thereto the Divisional Secretary replied that a permit cannot be granted for lot No. 180 and closed the appeal file- vide P7d, but had tacitly admitted therein that the Petitioner is in possession of lot 181;

xii. the Divisional Secretary had denied and ignored the Petitioner's request for a permit with malicious intent furthering to hand over possession thereof to some prominent private individuals in the area who had never possessed or cultivated the land;

xiii. attempts were made by such third parties and by the Divisional Secretary to eject the Petitioner and her husband by way of a section 66 application, but the Embilipitiya Magistrate's Court handed over possession to the Petitioner and two other application made under the State Lands (Recovery of Possession) Act were also dismissed - vide P8a, P9a, P9c, P10a, CA4b;

xiv. a Magisterial action of Criminal Trespass against the Petitioner's husband was also dismissed;

xv. whereupon the Petitioner continued to peacefully possess the land;

xvi. in 2009 private individuals interested in the land sought to forcibly eject the Petitioner and her husband, resulting in the Magistrate's court handed over possession to the Petitioner's husband- vide P10a;

xvii. soon after the learned Magistrate's Order on 29-09-2009, the Divisional Secretary acting in collusion issued a Quit Notice dated 24-12-2009 and went before the Magistrates Court which application too was dismissed vide., P.11a and CA4b

xviii. thereafter the Petitioner and her husband continued to peacefully possess the land until in August 2017 the 2nd Respondent (a private person) forcibly entered the land, bulldozed and cleared part of the tea plantation within hours, at the police inquiry the 2nd Respondent was unable to produce any written authority as such the 2nd Respondent was warned by the police not to disturb the peaceful possession of the petitioner - vide P13a;

xix. thereafter in November 2017 once again the 2nd Respondent forcibly entered the cleared portion of land and commenced construction, at the police inquiry very much surprisingly this time the 2nd Respondent was in possession of a letter issued by the 1st Respondent Divisional Secretary granting lot 180 to the 2nd Respondent- vide letter 1 R3 dated 08.11.2017;

xx. as such the police directed the Petitioner to resolve the issue with the Divisional Secretary;

xxi. the Divisional Secretary's action to issue a letter to the 2nd Respondent to possess a portion of the land is collusive, illegal and ultra vires;

xxii. the Petitioner had been deprived of her legitimate expectation of a permit or a Grant as it is promised in terms of Land Ministry Circular No.10 of 1995.

xxiii. As such the Petitioner preferred this application by petition dated 25.04.2018 and Your Lordships' Court was inclined to issue Notice on the Respondent."

The position of the 01st respondent, the Divisional Secretary represented by learned Senior State Counsel is that the petitioner was never in possession of the land in question and if at all the petitioner's husband was in unauthorized occupation.

Then several decided cases have been cited on alleged delay.

In the earlier written submissions tendered for the 01st respondent dated 21.10.2020, the position of the 01st respondent was stated as follows,

"1st Respondent has taken up the position consistently, throughout the history that the in issue are State Lands and one Ganithage Premadasa (the husband of the Petitioner) was in unlawful occupation in the said lands. Therefore, steps have been taken by the Respondent to evict him under State Land (Recovery of possession) Act No 07 of 1979 in No 867, 7839 and 3333/10 in which the applications were dismissed due to technical errors in the application and the quit notice[p9(b) and p9(c), CA 4(b)]. However, it is pertinent to note that the issue of prescription will not apply for applications under State Land Recovery of possession act as long as the unlawful occupants are continuing in unlawful occupation. The Petitioner nor her husband cannot claim any entitlement to State Land over prescription as per the law.

It is pertinent to know that issuance of a permit to a state land is done after a selection procedure in a 'land Kachcheri' as per Section 20 of the Land Development Ordinance. The procedural requirement of holding a 'land Kachcheri is set out from Section 21 ,24 of the Land Development Ordinance and regulation 83 to 108 of the land Regulations in the Land Manual. It is imperative to posses a permit, Grant or a written authority

issued by the competent Authority to lawfully possess a State Land in terms of the developments under State Lands Recovery of Possession Act.

However, there has been a regularization procedure initiated by the State as a part of State policy in order to achieve certain objectives like development purposes, giving land rights to landless citizens etc., This procedure of regularization of unlawful occupants are set out by Circulars issued by the Commissioner General of Lands and the Ministry of Lands. The procedure in existence now is set out in Circular No 2008/4 (annexure l1). Accordingly, only ELIGIBLE Persons under the Procedure governing the Circular could be regularized. It is noteworthy to mention that only persons who do not have any land to reside is among one requirement to be satisfied in order to gain eligibility under this scheme. The Petitioner has been given a land grant in the same village under Section 19(4) of the Land Development Ordinance|IR2(a) and 1R 2(b)11, The Petitioners' husband has been [given] a separate grant lRI(A) and 1R(b). The Petitioner has totally suppresses the said facts from Your Lordships Court and therefore is not eligible to invoke a discretionary remedy from this court".

In the recent written submissions dated 22.02.2024 the petitioner submits that

"It is respectfully submitted that although in the statement of objections the Divisional Secretary claims that the Petitioner had already been granted permit marked 1R2A for another block of land as such is not entitled for a second Grant, the said contention was not taken up for consideration by the counsel for the 1st Respondent at the argument.

It is respectfully submitted that the land identified in 1R2A is not possessed by the Petitioner in fact it is a land possessed by another villager, this fact has been pleaded in paragraph 25 of the Petition, that a mere paper grant has been purportedly made to the Petitioner in order to circumvent and deprive the Petitioner of her lawful entitlement for permit to the land she actually possessed.

It is respectfully submitted that in any event the purported permit 1R2A bears Permit No. 16282 whereas it differs in the corresponding Land Ledger marked 1R2B wherein the Permit Number is stated as No.393, as such it is respectfully submitted that Your Lordships' Court cannot place any credibility and evidential value in the purported Permit marked 1R2A.

It is respectfully submitted that it is pertinent to note that in none of the previous letters or correspondence has the Divisional Secretary ever taken up the position that the Petitioner was previously granted a permit and therefore not entitled to a second permit, specifically in P7d dated 28.06.2017. [Emphasis added in this judgment]

It is respectfully submitted that notwithstanding that the Petitioner had specifically pleaded in her petition that she is not possessing the land described in the purported permit 1R2A the Divisional Secretary has failed to submit any investigation report from the relevant Grama Niladhari as to the correctness of the possession and cultivation of the land described in 1R2A.

It is further submitted that there is no proof to show that the Petitioner had formally signed and accepted permit 1R2A.

As such it is respectfully submitted that the contention of the Divisional Secretary that a plot of land has already been granted to the Petitioner by 1R2A is unfounded and such contention warrants to be rejected.

It is respectfully submitted that it is not open for the Divisional Secretary to allege one reason in the correspondence with the Petitioner and rely on another reason in Court, this ratio decidendai or principle of law was up held by the Supreme Court in Kamalawathie and Others vs. The Provincial Public Service commission (2001) 1 SLR 2" . [corrected up to here]

However in the Synopsis of oral submissions filed for the 01st respondent dated 05.04.2024 the position that 1R2A and 1R2B have been issued to petitioner's

husband and hence the petitioner is not entitled to any more state land has been raised.

Why the 01st respondent's position cannot be accepted:

There are three reasons as to why the position of the 01st respondent, that, the petitioner and or her husband has been given the above grants cannot be accepted. They are,

(i) The petitioner submits that the land identified in 1R2A is not possessed by the Petitioner in fact it is a land possessed by another villager and that this fact has been pleaded in paragraph 25 of the Petition and that a mere paper grant has been purportedly made to the Petitioner in order to circumvent and deprive the Petitioner of her lawful entitlement for a permit to the land she actually possesses.

The petitioner has stated in her petition dated 26.04.2018 that

> "25. The Petitioner states that in order to circumvent and deprive her of a permit in respect of the land actually possessed by her the Divisional Secretary has issued a permit to the petitioner in respect of an allotment of land that she never possessed, which is in fact possessed and cultivated by one K.K.Gayan Weerasinghe.
>
> Annexed hereto marked P16 is an Affidavit of the said K.K. Gayan Weerasinghe and is pleaded as part and parcel hereof".

The response of the 01st respondent in the statement of objections dated 07.01.2019 is as follows,

> "2 Answering the averments contained in paragraph 25 of the said petition, the respondent only admits that a Grant had been issued in the name of the Petitioner (1R2-A) as already averred hereinbefore but denies any knowledge of the document marked as P-16, which in event, is not a valid document in law".

(ii) The petitioner has stated that,

> "It is respectfully submitted that it is pertinent to note that in none of the previous letters or correspondence has the Divisional Secretary ever taken up the position that the Petitioner was previously granted a permit and therefore not entitled to a second permit, specifically in P7d dated 28.06.2017".

1R2A is dated 28.09.1996. The copy submitted for the 01st respondent itself is a photocopy which has a seal and signature, but the contents especially as to the description of the land is almost illegible. Actually cannot be read.

Now P.07D which the petitioner mentions is dated 28.06.2017. It is a letter addressed on behalf of the 01st respondent to the petitioner. It says lot 180 cannot be given to her. It is 22.4 perches. The reason is that she has attempted from time to time to clear the adjoining land. It says as per circular dated 15.06.1995 state land cannot be encroached upon. It says in one court case she was asked not to enter into that land.

But it does not mention that the land cannot be given to her due to 1R2A or any such state land already granted to her or her husband.

The first thing, in 2017, that must show the 01st respondent, when he starts writing P.07D is that a state grant has been given in 1996.

01st respondent's position is that as 1R2A and 1R2B have been issued to petitioner's husband the petitioner is not entitled to any more state land. This is not stated in P.07D or in any other correspondence between the petitioner and the 01st respondent.

This, coupled with what the petitioner stated in paragraph 25 of the petition in April 2018 shows that the position of the 01st respondent in regard to the state grant cannot be accepted.

(iii) As per Kamalawathie and Others vs. The Provincial Public Service commission (2001) 1 SLR 2, the Supreme Court said,

> "….It is not open to the respondents to allege one reason in the transfer letters and to rely upon another when they come to court. Apart from anything else that would be stultifying the appeal procedure."

Although appeal procedure was referred to, that was a fundamental rights application. The same principle will apply to a writ application as in this case.

With respect, the above principle is not limited to appeal procedure. In Chapter XIX of the Civil Procedure Code of 1889 (the rules embodied in which are having an even older origin) it is said in explanation 02 in section 150, that,

> "The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings."

In addition to (i) (ii) and (iii) the petitioner says, that, the purported grant 1R2A bears permit No. 16282 which differs with that in the corresponding land ledger marked 1R2B, which says, permit number is 393.

The petitioner raises two more valid points. They are,

(i) P.07D in 2017 expressly admits, that, the petitioner is in possession of the adjoining land to lot 180; what adjoins 180 is 181

(ii) The 01st respondent admits in paragraph 5(iv) of the statement of objections, that, circular No. 10 of 1995 applies to unauthorized occupation prior to 1995; the schedule to the cadastral map P.06 dated

> August 2010 shows in lots 180 and 181 a 15-20 year old tea cultivation and petitioner's husband has been identified as unauthorized cultivator

Paragraph 5(iv) of 01st respondent's statement of objections say

> "The 1st respondent states further that Ministry of Lands circular 10 dated 15.06.1995 was applicable to state lands where unauthorized occupation was prior to the year 1995".

It is a truth, that, ownership is a fiction and possession is real. Ownership means a pact with every other person in society and state that they will agree not to claim ownership to that property subject to a decision of a Superior Court.

In reality, land belongs to the community. The Genevan philosopher Jean-Jacques Rousseau said,

> "The first man who, having enclosed a piece of ground, bethought himself of saying This is mine, and found people simple enough to believe him, was the real founder of civil society. **From how many crimes, wars and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody**[1]."

Actually, the present anthropologists, biologists and historians have found[2], that, it is the commonly shared beliefs, such as religion, that made large numbers of people get together to corporate to build monuments, which required mass scale food production and hence the concept of ownership of land, "this is mine", arose. What Rousseau said in the second sentence takes place, without abeyance, even now.

[11] https://www.goodreads.com/quotes/102375-the-first-man-who-having-enclosed-a-piece-of-ground
[2] "Sapiens, A Brief History of Humankind", Yuval Noah Harari and "Ultra Society" by Peter Turchin.

According to Claude-Frédéric Bastiat (30 June 1801 – 24 December 1850), the French economist, writer and a prominent member of the French Liberal School, who published his work "The Law[3]" in 1850, there are only two ways of creating wealth, one is to work, especially the work of the agriculturalist and the other is to plunder[4].

It is said in an article published on Lankaweb on 18th April 2016, that,

> "British injustice in the enactment of waste land laws
>
> Kandyan peasants were made landless. They were reduced to a landless state by the take over of their lands for the plantation industry (initially coffee, then tea) by the British colonial government under a series of waste land laws commencing with the Crown Lands (Encroachments) Ordinance, No. 12 of 1840 which stipulated that ' all forest, waste, unoccupied or uncultivated land was to be presumed to be the property of the Crown until the contrary is proved'. By this one stroke of legislation, "bread" was taken out of the poor cultivator's mouth and enormous hardship imposed on the Kandyan peasantry.
>
> Lack of educational facilities in the Kandyan areas also contributed to the creation of a large functionally illiterate adult population. The Report of the Kandyan Peasantry Commission (1951) highlighted a peasant's response to this issue as follows "**No land, no money; no money, no education; no education, no jobs; no jobs, no money for education or for the purchase of cultivable land**[5]".

[3] The Law (Dean Russell Translation, The Foundation for Economic Education, Tnc., 1950). The original book was published in 1850.

[4] Bastiat believes that there are only two ways of acquiring wealth, either by production or by plunder. The history of the world is a history of how one group of people have plundered others, often in a systematic way, by means of war, slavery, theocracy, monopoly, economic privileges, and control of the government to distribute favors.

[5] British Crimes in the enactment and implementation of waste lands laws during colonial rule in Sri Lanka (1796 – 1948) Posted on April 18th, 2016 by Senaka Weeraratna Attorney – at – Law https://www.lankaweb.com/news/items/2016/04/18/british-crimes-in-the-enactment-and-implementation-of-waste-lands-laws-during-colonial-rule-in-sri-lanka-1796-1948/

But, if not for coffee, tea or any other cultivation, the land in the ownership of the state does not produce wealth. It lies barren. The subsequent legislation such as Land Development Ordinance of 1935 having recognized this truth introduced provisions to grant temporary permits to “unauthorized” users. Under the Ordinance there is an excellent scheme to encourage such users to cultivate and to make land productive of wealth which culminates in the Crown grant.

P.02, the circular dated 15.06.1995 regularizes “unauthorized” occupation prior to 15.06.1995, which is an arbitrarily set and hence unreasonably decided date. But that is not the question in this case. The petitioner has established that she has been cultivating since 1980s. If she is not granted the permit under the law, then, that inaction could be remedied by mandamus issued by this Court.

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".

In as much as, there is no "unfettered discretion" to act, there is no "unfettered discretion" not to act, when the law requires meaningful 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 scrutinize 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 (c)

(ii) A writ of certiorari as per paragraph (d)

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

of the prayer to petition.

The petitioner is entitled to the costs of this application.

Judge of the Court of Appeal