

**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 Writ of Mandamus under Article 140
of the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/259/2022

R. W. W. U. D. A. Sampayo
No. 93, Keppetipola Road,
Uyandana,
Kurunegala.

PETITIONER

Vs.

1. H. M. T. N. Upuldeniya
Commissioner General of Prisons,
Prisons Head Quarters,
No. 150, Baseline Road,
Colombo 09.
2. Wasantha Perera
Secretary to the Ministry of Justice,
Prisons Affairs and Constitutional
Reforms,
Sri Sangaraja Mawatha,
Colombo 12.
3. Justice Jagath Balapatabendi
Chairman
4. Indrani Sugathadasa
Member
5. V. Shivagnanasothy

- Member
6. T.R.C. Ruberu
Member
7. Ahamed Lebbe Mohommad Saleem
Member
8. Dian Gomes
Member
9. Leelasena Liyanagama
Member
10. Dilith Jayaweera
Member
11. W.H. Piyadasa
Member
12. M.A.B. Daya Senarath
Secretary

The 3rd to 12th Respondents all of:
The Public Service Commission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Shantha Jayawardane with Wihangi Tissera for the Petitioners.

Vikum de Abrew PC, ASG with Amasara Gajadeera SC for the Respondents.

Argued on: 22.09.2023, 17.11.2023

Written Submissions- Petitioners - 17.01.2024

Respondents - 16.02.2024

Decided on: 20.02.2024

Sobhitha Rajakaruna J.

The Petitioner is a public servant and was serving as an Assistant Superintendent of Prisons under the Department of Prisons. By a letter dated 27.06.2020, marked 'P23', the Petitioner was informed that he had been interdicted with immediate effect. Such interdiction has been carried out subject to the approval of the Public Service Commission ('PSC') and conducting a formal disciplinary inquiry. The said letter 'P23' indicates that the Petitioner has been interdicted as a consequence of the matters disclosed in the report issued following a preliminary investigation against the Petitioner and also based on the alleged misconduct revealed in the report of the Acting Inspector General of Police. The PSC by letter dated 10.07.2020 marked 'P24' has granted covering approval for such interdiction. In the meantime, facts have been reported to the Magistrate's Court of Negombo in case No. M/24077, naming the Petitioner as a suspect. The Petitioner was served with a Charge Sheet marked 'P26' in view of commencing formal disciplinary proceedings against him by the Commissioner General of Prisons- 1st Respondent. Subsequently, the Petitioner was indicted in the High Court of Negombo in case bearing No. 1063/2020 and the said indictment is marked 'P25'.

The Petitioner complains that the said Charge Sheet has been framed in ignorance of the provisions of the Prisons Ordinance ('Ordinance') and the General Rules Relating to Prisons promulgated under the said Ordinance and as such the charges therein have no merit and are illegal. Further, the Petitioner contends that placing him under interdiction for over two years without salary is contrary to the provisions of the Establishments Code ('E-Code') and is illegal. Similarly, the Petitioner pleads that the continuous interdiction of the Petitioner without reinstating him in service is unreasonable, irrational and tainted with malice.

Based on the alleged grounds mentioned above, the Petitioner seeks a writ of Mandamus directing the 1st to 11th Respondents to reinstate the Petitioner in service and also to pay the Petitioner a monthly salary from the date of interdiction i.e, 27.06.2020.

The Petitioner claims that he filed the instant Application on 22.07.2022 when he was kept under interdiction and before the conclusion of the formal disciplinary inquiry. The PSC on

14.03.2023, based on the report following the formal disciplinary inquiry conducted against the Petitioner, decided: (Vide- the letter dated 05.07.2023 marked 'X1')

- a. to reduce the Petitioner's post to a lower post in terms of Clause 24:3:8 of Chapter XLVIII of Volume II of the E-Code.
- b. to Defer six salary increments.

It appears that the current Chairman and members of the PSC, based on the recommendations of the Constitutional Council, were appointed during the month of April 2023. For reasons unknown to Court the said newly constituted PSC has revisited the above decision taken on 14.03.2023. As a consequence, the PSC on 05.07.2023 took a further decision against the Petitioner as follows; (Vide- the said document marked 'X1')

- a. To continue to place the Petitioner on interdiction based on the reason that the reinstatement of the Petitioner would be detrimental to the interests of the Public Service and the case bearing No. HC 1063/2020,
- b. A decision upon the payment of arrears of salary for the period where the Petitioner was on interdiction will be taken only after the conclusion of the aforesaid High Court case and also considering the final judgement of the said case.

The Petitioner strongly argues that after the PSC took a decision on 14.03.2023, upon the formal disciplinary inquiry against the Petitioner, the members of the PSC which was constituted subsequently will have no authority or power to make a further decision to interdict the Petitioner causing a detriment to him. The main contention of the 3rd to 12th Respondents ('Respondents') is that the jurisdiction of this Court to entertain the instant Application has been constitutionally precluded under Article 61A of the Constitution. The Respondents argue that the Petitioner is not entitled to seek any of the reliefs as prayed for in the prayer of the Petition since this Court, in terms of the said Article 61A, has no power or jurisdiction to inquire into, or pronounce upon or in any manner call in question the aforesaid orders made by the PSC. In the meantime, the Petitioner referring to several decided cases contends that the said Ouster Clause in Article 61A will not be applicable in respect of the decisions of the PSC which are not taken within the powers of the PSC or its delegated bodies.

Hence, I need to examine the applicability of the said Ouster Clause in the instant Application while also examining whether this Court can grant any relief to the Petitioner amidst the decisions taken by the PSC in respect of the interdiction and arrears of salary of the Petitioner. Shiranee Tilakawardane J. (P/CA) (as she was then) held in ***Katugampola vs. Commissioner General of Excise and others (2003) 3 SLR 207 at p.210*** as follows;

*“Therefore, the ouster clauses contained in ordinary legislation would not effectively restrict or preclude the jurisdiction granted by Article 140 of the Constitution. Nevertheless, the restriction contained in Article 55 (5) and the Amended Article 61 A as these are ouster clauses stipulated in the Constitution itself, the powers of this Court would be restricted by these provisions contained in the Constitution. It was held in the case of ***Atapattu v People’s Bank 1997 1 Sri L.R. 208, Bandaranayake vs. Weeraratne 1981 1 Sri. L.R. 10 at 16***, that the ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the Constitution and would therefore such ouster clause adverted to above would be a bar to the entertaining of writ applications to invoke the writ jurisdiction by this Court.”*

The above perspective has been reflected even in ***Sirisena vs. Amarasinghe CA/PHC/94/99*** (decided on 14.10.2016), ***W.A.G Weerasinghe vs. P. N. K. Malalasekera and others CA Writ Application No. 256/2018*** (decided on 19.03.2021), ***Gamini Dayarathna vs. P.B. Wickremarathna and others CA Writ Application No. 347/2018*** (decided on 30.04.2020) and ***Management Service Officers’ Association of Sri Lanka Overseas Missions and Others vs. Admiral Prof. Jayanath Colombage, Secretary to the Foreign Ministry and Others CA/WRIT/0556/2021 decided on 27.01.2022***. On the contrary, Shiranee Tilakawardane, J. delving into the essence of judicial wisdom has observed in the above ***Katugampola*** Case that the Writ jurisdiction could be sought under circumstances where the person who made the impugned decision did not have any legal authority to make such a decision. The Petitioner based on the precedent enunciated in the judgements cited by him asserts that the decision of the PSC, dated 05.07.2023 has been taken without legal authority.

In my opinion, what should be meant by the phrase “legal authority”, that was incorporated even in the judgement of the said ***Katugampola*** case, is to address any incapacitation or disqualification to function as a member of the PSC or an instance where the PSC assumes

jurisdiction which it does not possess or exceeds its original jurisdiction. Similarly, I am mindful of the provisions of Article 54 (9) of the Constitution which declares inter alia that no decision of the PSC shall be or be deemed to be invalid by reason only of any defect in the appointment of a member. Nevertheless, even if the members of the PSC make an erroneous decision, if it is within the purview of their duties concerning the matters relating to appointment, promotion, transfer, disciplinary control and dismissal of public officers (as per Article 55(3) of the Constitution), the Court of Appeal will have no jurisdiction to inquire into, or pronounce upon or in any manner call in question such a decision as a result of the said Constitutional Ouster in Article 61A.

The Petitioner placing reliance on the case of *Abeywickrama v. Pathirana (1986) 1 Sri. L. R. 120* submits that ‘Article 55(5) of the Constitution did not protect an order or a decision of a Public Officer which is nullity or ultra vires.’ The petitioner- appellant of the said case challenged the election of the relevant Member of Parliament for the Akmeemana Electorate and thus, it was not a case dealing with the Constitutional Ouster that is discussed in the case at hand. Moreover, it was a case decided before the 16th and 17th Amendments were made to the 1978 Constitution. Anyhow, I need to draw my attention to the following phrase of the eloquent judgement of the said *Abeywickrama* Case (delivered by Sharvananda C.J. with the concurrence of Ranasinghe J., Athukorala J. and L.H. De Alwis J.); “If an authority is not competent to pass an order which can be only passed by a superior authority, then the order passed by him will amount to a nullity and is void.” I find it difficult to adopt here the said dicta enunciated in the said judgement as no adequate material has been provided by the Petitioner enabling this Court to engage in an exercise of examining whether the PSC had no jurisdiction to revisit the decision taken previously by the PSC.

As the case may be, in terms of the said Article 61A, such a decision of the PSC to revisit its earlier decisions in pursuance to disciplinary control (including appointment, promotion and transfer) of a Public Servant can only be called in question by the Supreme Court (subject to Article 126) or the Administrative Appeals Tribunal (Subject to Article 59). Nonetheless, I do not doubt that the Court of Appeal will have the writ jurisdiction to review the decisions made by the PSC when there is prima facie material which strongly suggests that the members of the PSC have exceeded their jurisdiction or one or more sitting members of the PSC are

incapacitated or disqualified to function as a member. In such an event, the Court should first be satisfied that one or more of the sitting members of the PSC are incapacitated or disqualified to function as members or that they have assumed a jurisdiction that it does not possess. I have arrived at the above conclusion enhancing the jurisprudence in the relevant area of law that was followed by the erudite Judges in the cases cited above.

The Petitioner of this case is not impugning the appointment of the members of the PSC or taking up similar objections against such members. The submissions of the Petitioner is mainly focused on the authority of the PSC to revisit a decision taken previously by another set of members of the PSC. However, it cannot be assumed that the PSC has exceeded its jurisdiction by revisiting an earlier decision taken by another set of members, as far as the PSC has not acted beyond the purview declared in Article 55 (3) of the Constitution. Thus, I am convinced that the PSC has taken both the above decisions on 14.03.2023 and 05.07.2023 with proper legal authority. In light of the above, I am of the view that this Court has no jurisdiction to review the aforesaid decisions of the PSC, made on 05.07.2023. The said decision of the PSC to revisit the earlier decision that was made on 14.03.2023 can be inquired into only by the Supreme Court.

Having considered the application of the said Ouster Clause, I must henceforth examine what reliefs can be provided to the Petitioner. In regard to this, I need to draw my attention to the legal provisions upon which the PSC has taken its decision dated 05.07.2023. It can be assumed that the PSC has taken the said decision in terms of section 27:10 of Chapter XLVIII of Volume II of the E-Code. The said section 27:10 reads;

27:10:1 However, where legal proceedings are taken against a Public Officer for a corruption or criminal offence other than a solicitation of bribe or act of antigovernment or act of terrorism, the Disciplinary Authority / Administrative Authority should conduct a preliminary investigation against such Officer within a period not more than 02 months. The respective preliminary investigation report should be submitted to the Public Service Commission by the Disciplinary Authority / Administrative Authority and if the Public Service Commission determines that the reinstatement of the Officer concerned is not detrimental to the interests of the Public

Service according to facts revealed by such report, such an Officer may be reinstated in service.

27:10:2 Where the Public Service Commission determines that the reinstatement of the Officer in service under Sub Section 27:10:1 is detrimental to the interests of the Public Service, such Officer should be further kept under interdiction pending the verdict of the Court of Law. If the delivery of the verdict of the Court takes a period more than one year against such a person, the Disciplinary Authority may authorize the payment of salary not exceeding half thereof to the Officer concerned.

Thus, it is important to take into consideration the provisions of the above section 27:10:2 in which it is stipulated unambiguously that the disciplinary authority may authorize the payment of salary not exceeding half thereof to the officer concerned if the delivery of the verdict of the Court takes a period more than one year. The Respondents cannot dispute the fact that a period of more than one year has elapsed from the date of serving the indictment to the Petitioner in the said case No. HC 1063/2020. Hence, a duty is cast upon the disciplinary authority in terms of the said section 27:10:2 to exercise its discretion to consider authorizing a payment of salary not exceeding half thereof to the Petitioner. No material has been made available to the Court as to why the disciplinary authority should not exercise its discretion in favor of the Petitioner allowing payment of half the salary to him.

It appears that the Petitioner's rights have been affected as the disciplinary authority has not arrived at any conclusion giving due effect to the said section 27:10:2, particularly about the payment of half the salary. It is to be noted that at the time of filing the instant Application, the Petitioner has not been served with the indictment and also the formal disciplinary inquiry against the Petitioner was pending. Furthermore, the PSC also made its above decision on 05.07.2023 after the Petitioner filed the instant Application. Considering the Ouster Clause reflected in Article 61A and the other constitutional provisions regarding the PSC, this Court needs to give careful consideration to the alleged grievances of the Petitioner as he being a public servant does not have many forums to seek redress. Hence, I take the view that the facts and circumstances of this Case are unique for this Court to make an appropriate order to give due effect to the said section 27:10:2 which deals with the payment of half the salary.

For the reasons set forth above, I firmly believe that this Court has jurisdiction to issue a mandatory order against the relevant disciplinary authority. What is now known as a mandatory order was originally referred to in England and Wales as a Writ of Mandamus. The Administrative Court Judicial Review Guide 2023¹ England specifically provides in its Clause 12.2.1 that a mandatory order is an order the Court can make to compel a public body to act in a particular way. This guide applies to cases heard in the Administrative Court wherever it is sitting and in the Administrative Court Offices ('ACOs') across England and Wales. I am unwaveringly of the opinion that by issuing such an order this Court will not engage in an exercise of inquiring into or pronouncing upon or in any manner call into question any order or decision made by the PSC. Article 61A of the Constitution does not preclude the Court of Appeal issuing a mandatory order, in a review application, against the PSC provided that the circumstances for such mandatory order do not stem from any order or decision previously made by the PSC.

The Rule of Law is promoted, secured and advanced if this Court's jurisdiction is expansive enough to compel the performance of a duty owed to the public. When Court compels such a performance the ideals of Rule of Law are advanced. In other words, the concept of Rule of Law will be enriched when the Court acts so as to operate the law to rule over an inactive executive or an entity like the PSC. Mark Fernando J. in *Atapattu and Others v People's Bank and others (1997) 1 Sri L.R. 208* dealt with the conflicts between the Ouster Clauses in pre-Constitution legislation and Article 140 of the Constitution. The articulation of Fernando J. in the said Case was in favor of a jurisdiction which enhances the protection of the Rule of Law and against an Ouster Clause which tends to undermine it².

Dr. M.D. W. Lokuge vs. Vidyajothi Dr. Dayasiri Fernando, Chairman of the Public Service Commission and Others CA/Writ/ 160/2013 decided on 16.10.2015 was a case where the respective petitioner has prayed for a Writ of Mandamus against the members of the PSC. His Lordship Justice A.H.M.D. Nawaz has concluded inter alia, in the said case that;

¹ The Administrative Court Judicial Review Guide (October 2023) <https://www.judiciary.uk/wp-content/uploads/2023/08/14.317_HMCTS_Administrative_Court_Guide_2023_WEB1.pdf>

² see pp.221-223 in the said *Atapattu Case*

" 1. Since the PSC has already acted in the matter it would be futile to mandate them by a mandamus to act in a particular way in the absence of certiorari that would have the effect of quashing the decision they have already made.

2. Though it is unfortunate that the Petitioner was not aware of the existence of R3, the decision of the PSC which the Petitioner possibly came to know only after statement of objection was filed demonstrates that the PSC has already performed a duty."

I take the view that His Lordship Justice Nawaz was quite emphatic that a Mandamus could be issued against the PSC provided that it has not taken a decision.

In this regard, one may argue that no Writ of Mandamus can be issued without a demand by the applicant and also a refusal by the authority. The Petitioner has certainly made a formal request to reinstate him (see 'P29'). I have decided in the Divisional Bench judgement (with the concurrence of their Lordships Justice M. T. Mohammed Laffar and Justice Mayadunne Corea) in ***Ven. K. Wacheeswara Thero v. Dharmasena Dissanayaka Chairman, The Education Service Committee of the Public Service Commission, CA/Writ/45/2019 decide on 30.03.2023*** that;

"Hence, a reasonable question arises in my mind on what grounds our Courts, such as in Haniffa's case, have attempted to limit the expansion of this prerogative remedy completely overlooking the systematic progress in the relevant field of law and the environment which prevailed at the birth of Mandamus. The scope of remedy in administrative law has been expanded with a considerable degree of judicial activism for the last three decades. At a time where the judges take a liberalized or progressive stand in their judicial creativity to control public power, I possibly cannot understand why we still need to cling to primitive principles on Mandamus whereas the English courts themselves have already broken the traditional parameters and taken drastic measures to use Mandamus as a powerful tool to issue orders in the mandatory nature against juristic persons such as local government institutions."

Therefore, bearing in mind the effect of the above Article 61A and on careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, I should exercise the inherent powers of this Court to issue a mandatory order against the disciplinary authority of the Petitioner. Hence, I proceed to issue a mandatory

order (writ of Mandamus) against the current members of the PSC compelling them to exercise their discretion, under the said section 27:10:2 of the E-Code, particularly in reference to the payment of salary not exceeding half thereof to the Petitioner.

I am aware that the Petitioner has not explicitly sought relief specifically regarding the payment of half the salary to the Petitioner. However, the legal regime reflected in the Constitutional provisions relating to the PSC together with the facts and circumstances of this case give rise for this Court to exercise its inherent powers to grant relief considering the eminent curtailment of the rights of the Petitioner.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal