

**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 Certiorari, Mandamus and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 191/2015

Ahamed Lebbe Mohomed Mukthar,
478 A/4, Alim Road,
Sainthamaruthu 16.

PETITIONER

Vs.

1. H.E.M.W.G. Dissanayake
Secretary,
Ministry of Education cum Secretary,
Provincial Public Service Commission,
Eastern Province, Trincomalee.
2. M.T.A. Nizam
Provincial Director,
Provincial Department of Education,
Trincomalee.
3. S. Kumarakuru,
Deputy Chief Secretary (Finance),
Department Chief Secretary.
4. D.M.S. Abeygunawardena
Chief Secretary,
Secretariat, Eastern Province,
Trincomalee.

5. Mrs. T.M.L.C. Senaratne,
Secretary, Public Service Commission,
177, Nawala Road, Colombo 5.
6. Upali Marasinghe,
Secretary,
Ministry of Education,
Isurupaya, Battaramulla.
7. Hon. Attorney General
Attorney General's Department,
Colombo 12.
8. Dr. R.H.S. Samaratunge,
Secretary,
Ministry of Finance and Planning,
Colombo 1.

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Dr. U.L. Ali Zacky with A.L.Azath, M.I.M.Riyas and
H.R.A.Haleem for the Petitioner

Nirmalan Wigneswaran, Senior State Counsel for the
Respondents

Written Submissions: Tendered on behalf of the Petitioner on 1st June 2020.

Tendered on behalf of the Respondents on 16th
September 2019 and 11th June 2020

Decided on: 10th July 2020

Arjuna Obeyesekere, J

The Petitioner, having been appointed as a teacher in 1979, joined Class III of the Sri Lanka Education Administrative Service in November 1999, and was promoted to Class II of that Service in 2014. The Petitioner states that the Government introduced a scheme in 2013 whereby Public Servants were permitted to import a motor vehicle or purchase a locally assembled motor vehicle at a concessionary duty rate (the Scheme). The Petitioner has annexed to the petition marked '**P8a**', Circular No. 1/2013 dated 2nd August 2013 issued by the Ministry of Finance and Planning, which sets out the terms and conditions applicable to the said Scheme.

The Petitioner, being eligible to import a motor vehicle in terms of '**P8a**' had submitted an application to the 1st Respondent, the Secretary, Ministry of Education, Eastern Province, on 7th April 2014.¹ The Petitioner states that by a letter dated 19th May 2014, the 3rd Respondent, Deputy Chief Secretary (Finance), Eastern Province, prior to processing the application of the Petitioner, had inquired from the 1st Respondent whether there are any disciplinary inquiries pending against the Petitioner. In reply, 1st Respondent had informed by a letter dated 19th June 2014, annexed to the petition marked '**P13**' that a disciplinary inquiry against the Petitioner is pending at the Ministry of Education. The 3rd Respondent had accordingly informed the 1st Respondent by letter dated 14th July 2014 annexed to the petition marked '**P14**' that the Petitioner's application cannot be processed as there is a disciplinary inquiry pending against the Petitioner. This position has been conveyed to the Petitioner by the 1st Respondent, by letter dated 28th July 2014, annexed to the petition marked '**P15**'.

¹ Vide application annexed to the petition marked 'P7'.

Dissatisfied by the said decision, the Petitioner filed this application on 28th April 2015. By an amended petition filed on 27th November 2015, the Petitioner has sought *inter alia* the following relief:

- (a) A Writ of Prohibition prohibiting the 1st and/or 6th Respondent from issuing a charge sheet to the Petitioner;
- (b) A Writ of Certiorari quashing the decision contained in 'P13', 'P14' and 'P15' not to issue the Petitioner with a vehicle permit in terms of 'P8a';
- (c) A Writ of Mandamus to compel the 1st, 3rd or the 4th Respondents to issue the Petitioner a vehicle permit in terms of 'P8a'.

The aforementioned Writ of Prohibition has been sought to prevent the charge sheet relating to the disciplinary action referred to in 'P13' – 'P15', from being served on the Petitioner. By a motion filed on 18th September 2019, the Attorney-at-Law for the Petitioner had submitted that the disciplinary inquiry against the Petitioner has been concluded and that he has filed an appeal against the findings of the Disciplinary Authority with the Administrative Appeals Tribunal. The Respondents have filed a copy of the Order of the Administrative Appeals Tribunal delivered on 8th October 2019, which has upheld the findings of the Inquiry Officer and the punishments imposed on the Petitioner by the Disciplinary Authority. Thus, the necessity to consider the Writ of Prohibition does not arise.

While Section 01.01 of Circular 'P8a' sets out the list of persons who are eligible to apply for a permit, and the number of active years of service that each category of persons must have prior to the date of the application in order to be eligible to apply for the concession, paragraph 01.02 of 'P8a' contains the list of items that disqualify a person from applying under the said

Scheme. The disqualification that has given rise to this application is found at Paragraph 01.02(v) and reads as follows:

“යම් නිලධාරියෙකුට වරදේදව වනය ක්‍රියාමාර්ගයක් ආරම්භ කර දැනට එම ක්‍රියාමාර්ගය අවසන් කර නොමැති නිලධාරීන්”²

The word, ‘ක්‍රියාමාර්ගය’ means ‘*procedure*’, and therefore, the requirement in ‘**P8a**’ is that a person against whom disciplinary procedures have commenced is not eligible to be issued a permit under the Scheme.³ The question that needs to be determined in this application therefore is whether any disciplinary procedures had commenced against the Petitioner at the time ‘**P15**’ was issued to the Petitioner.

The learned Counsel for the Petitioner is equating the commencement of disciplinary procedure against the Petitioner to the issuance of a charge sheet followed by the commencement of a ‘*formal disciplinary inquiry*’. There is no dispute that a charge sheet had not been served on the Petitioner at the time the letter ‘**P15**’ was issued on the Petitioner, and even at the time this application was filed. The primary argument of the learned Counsel for the Petitioner therefore was that his application for the vehicle permit could not have been refused as no *formal disciplinary inquiry* had been initiated against him at the time ‘**P15**’ was issued.

The position of the Respondents however is that at the time ‘**P15**’ was issued to the Petitioner, a preliminary investigation had been held against the Petitioner and a decision had been taken to initiate disciplinary action against the Petitioner, and that such a decision would satisfy the requirements set out in ‘**P8a**’. The learned Senior State Counsel has also submitted that ‘**P8a**’ does

² ‘P8a’ has been issued only in Sinhala and Tamil.

³ See English – Sinhala Dictionary by Professor G.P. Malalasekera [2004, 4th Edition] page 788.

not make reference to disciplinary action being commenced nor is the reference to a commencement of a formal disciplinary action. His submission was that applicants are disqualified from claiming benefits under the said Scheme if steps have been initiated with a view to taking disciplinary action, or in other words, the disciplinary procedures set out in the Establishments Code have been set in motion.

The Respondents have submitted that a preliminary investigation into several acts of misconduct said to have been committed by the Petitioner had been investigated by a Committee appointed by the 4th Respondent, the Chief Secretary of the Eastern Province in 2012, and that the Committee had submitted its report, together with a draft charge sheet to the 4th Respondent, who in turn had forwarded the said charge sheet to the 1st Respondent, by a letter dated 7th December 2012.⁴

The said charge sheet against the Petitioner contained 24 charges. The Petitioner was subsequently found guilty by the Inquiry Officer of the following charges:

Charge No. I

1. That while in Government Service, without approval of the Secretary of the Ministry, the Petitioner had worked as Sainthamaruthu reporter of the “Lake House Institution”, reporter of the “Sri Lanka Broadcasting Corporation” and a freelance reporter of “Navamany” newspaper, thereby violating Section 1:3 and 1:4 of Chapter XXX of the Establishments Code.

⁴ This letter has been marked ‘R7A’.

Charge No. III

2. That while working in the Government service the Petitioner has kept the office key without approval and thereby interrupted the duty of the office employees.

Charge No. VII

3. That while working in the Government service, the Petitioner had sent a letter addressed to the principal, Janab M.H. Sediq Oraf by using the name of a terrorist movement (LTTE) and threatening him attempted to create problems in administration of the school.

Charge No. XXIV

4. That the Petitioner had committed all of the above offences or some of them or any of them, by which the Petitioner had dishonoured the Government Service.

Having received the aforementioned report and the draft charge sheet, the 1st Respondent had thereafter sent the following letter dated 20th December 2012, marked 'R7B' to the Secretary, Ministry of Education:

“ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයේ නිලධාරී ඒ.එල්.එම්. මුක්තාර් මහතා නැගෙනහිර පළාත් අධ්‍යාපන අමාත්‍යාංශය යටතේ පිහිටි කොට්ඨාශ අධ්‍යාපන කාර්යාල කිහිපයක සේවය කරමින් සිටියදී ඔහු විසින් කරන ලදැයි පැවසෙන රාජකාරි පැහැර හැරීම, විෂමචාර ක්‍රියා සහ ව්‍යය විරෝධී ක්‍රියා සම්බන්ධයෙන් මූලික විමර්ශනයක් නැගෙනහිර පළාත් ප්‍රධාන ලේකම් කාර්යාලයෙන් පවත්වා ඔහුට එරෙහිව චෝදනා පත්‍රයක් කෙටුම් පත් කර මා වෙත එවා තිබේ.

නමුත් මෙම නිලධාරියා දිප ව්‍යාප්ත සේවාවක් වන ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයට අයත් බැවින් එකී චෝදනා පත්‍රය සම්බන්ධයෙන් ඉදිරි කටයුතු සඳහා මූලික විමර්ශන

වාර්තාව හා චෝදනා පත්‍රයේ කෙටුම් පතට අදාළ ලිපි ලේඛන මේ සමග ඔබ වෙත එවන බව කාරුණිකව දන්වමි.”

Thus, as at 7th December 2012:

- (a) There was a recommendation that disciplinary action must be initiated against the Petitioner;
- (b) There was a decision that the Petitioner must be issued with a charge sheet in respect of the above acts of misconduct.

What followed thereafter demonstrates bureaucratic red tape at its best, with the Ministry of Education, and the Public Service Commission taking 35 months to decide who is the Disciplinary Authority of the Petitioner.⁵ As a result, the charge sheet that eventually led to the aforementioned decision of the Administrative Appeals Tribunal, was issued to the Petitioner only in 2016, even though a decision had been taken to issue the Petitioner with a charge sheet 16 months before the Petitioner made the application 'P7' under the said Scheme.

While the Ministry of Education was taking its time deciding who has the power to issue the Petitioner with a charge sheet, the Petitioner had been involved in a further incident with the Principal, Zahira College, Kalmunai on 29th October 2013, resulting in assault and destruction of property. The Petitioner had been transferred after this incident, but as he failed to report to the new place of work, the Petitioner had been served with a vacation of post notice, which had subsequently been withdrawn on an appeal filed by the Petitioner, subject to a warning.

⁵ Vide documents marked 'R7C' to 'R7X'.

It is in this background that I must consider whether the decision of the 3rd Respondent not to process the application of the Petitioner is *ultra vires* and unreasonable.

Chapter XLVIII of the Establishments Code contains the “**Rules of Disciplinary Procedure**” applicable to the Petitioner. While Part 3 contains the Procedure for disciplinary action by the Cabinet of Ministers, Parts 4, 5 and 6 contain the Procedure for disciplinary action by the Public Service Commission, by a Secretary to a Ministry holding delegated powers from the Public Service Commission, and Procedure for disciplinary action by a Head of Department or other Officer holding delegated authority from the Public Service Commission, respectively.

Section 6:2 of Chapter XLVIII reads as follows:

*“Where a Head of Department or other Public Officer holding delegated authority in terms of sub-section 6:1 above contemplates disciplinary action against an officer in a category of officers coming within his disciplinary authority, he should hold a preliminary investigation himself or cause to be made a preliminary investigation by another officer or a group of officers appointed by him.”*⁶

Similar provision is found in paragraphs 3:1, 4:1 and 5:2 of the Establishments Code.

Section 13:1 of Chapter XLVIII sets out what is meant by a *preliminary investigation*, and reads as follows:

⁶ Section 6:2 reads as follows: “උක්ත 6:1 උප වගන්තිය මගින් පවරන ලද, බලය ලැබූ දෙපාර්තමේන්තු ප්‍රධානියකු සහ වෙනත් නිලධාරියකු විසින් තම විනය බලධාරීත්වය යටතට වැටෙන නිලධාරී කාණ්ඩයකට අයත් නිලධාරියකුට විරුද්ධව විනයානුකූලව ක්‍රියා කිරීමට අදහස් කර ඇති විටක, අදාළ විනය බලධාරියාම විසින් හෝ ඔහු විසින් පත්කරනු ලබන වෙනත් නිලධාරියකු හෝ නිලධාරී කණ්ඩායමක් හෝ මගින් හෝ මූලික විමර්ශනයක් පැවැත්විය යුතුය.”

*“A preliminary investigation is that which is conducted by a disciplinary authority or Head of Institution...to find facts as are necessary to ascertain the truth of a suspicion or information that an act of misconduct has been committed by an officer or several officers and to find out and report whether there are, **prima facie**, sufficient material and evidence to prefer charges and **take disciplinary action** against the officer/officers under suspicion.”⁷*

In terms of Section 6:3, *“If a prima-facie case is disclosed against the officer by the preliminary investigation held in terms of sub-section 6:2 above, the relevant Disciplinary Authority should prepare a charge sheet and duly issue it on the officer. However, in the case of an officer in the Combined Services, the Head of the Department in which the officer works should forward, without delay, the draft charge sheet and other documents to the Director of Combined Services.”*⁸ Similar provision is found in paragraphs 3:2, 4:2, and 5:3 thereof.

Section 13:12 reads as follows:

“After the completion of the preliminary investigation, the officer conducting the investigation should forward the report of the preliminary investigation together with the statements obtained from the relevant parties, documents, etc. taken into his custody and his observations and recommendations to the appropriate authority. The officer conducting the

⁷ Section 13:1 reads as follows: “කිසියම් රජයේ නිලධාරියෙක් හෝ නිලධාරයන් කිප දෙනෙකු හෝ විසින් විෂමාචාරයක් සිදු කර තිබේ ද යන්න පිළිබඳව සැකයක් ඇති වූ විට හෝ තොරතුරු ලද වහාම හෝ ඒ පිළිබඳව නියම තතු හෙළිදරව් කර ගැනීමට අවශ්‍ය මූලික සාධක සොයා ගැනීමත්, සැකයට පාත්‍රව සිටින නිලධාරයාට හෝ නිලධාරයන්ට හෝ විරුද්ධව චෝදනා ඉදිරිපත් කර ව්‍යාජකල්පනා ක්‍රියා කිරීමට තරම් බැල බැල්මට පෙනී යන ආකාරයේ ප්‍රමාණයක් කරුණු හා සාක්ෂි සොයාගත හැකි ද යන්න සොයා ගැනීම සඳහාත් ව්‍යය බලධරයකු හෝ ආයතන ප්‍රධානියකු හෝ වෙනත් නිසි බලධරයකු හෝ විසින් ද නොඑසේ නම් එකී බලධරයන්ගේ නියෝග මත ඒ සඳහා පත් කරනු ලැබූ නිලධාරයකු විසින් හෝ නිලධර කමිටුවක් විසින් ද ඒ පිළිබඳව සොයා බලා වාර්තා කිරීම මූලික වගකීමක් නම් වේ.”

⁸ Section 6.3 reads as follows: උක්ත 6:2 උප වගන්තිය ප්‍රකාරව නිලධාරයාට විරුද්ධව චෝදනා නැගීමට තරම් ප්‍රමාණවත් හේතු සාධක ඇති බව එම මූලික වගකීම මගින් බැල බැල්මට පෙනී යන්නේ නම්, අදාළ ව්‍යය බලධරයා විසින්, චෝදනා පත්‍රයක් සකස් කර අදාළ නිලධාරයා වෙත විධිමත්ව නිකුත් කළ යුතුය. එසේ වුව ද ඒකාබද්ධ සේවාවන්ට අයත් නිලධාරයකු සම්බන්ධයෙන් වන කල්හි නිලධාරයා සේවය කරන දෙපාර්තමේන්තු ප්‍රධානියා විසින් චෝදනා කෙටුම්පත ඇතුළු අනෙකුත් ලියවිලි ඒකාබද්ධ සේවා අධ්‍යක්ෂවරයා වෙත නොපමාවම ඉදිරිපත් කළ යුතුය.

*preliminary investigation should also prepare a draft charge sheet...and forward it to the relevant authority in the event that sufficient material is disclosed **that call for disciplinary action against the suspect officer or officers.**"*

The fact that the Preliminary Investigation forms part of the disciplinary procedures set out in the Establishments Code is evident from the provisions of Section 1:4 of Chapter XLVIII, which reads as follows:

"If a formal disciplinary inquiry has been held, the proceedings should be arranged in chronological order and the various stages of the proceedings such as relevant material of the preliminary investigation, charges, answers thereto, the inquiry proceedings, findings and the disciplinary orders flagged or labeled separately."

The material that has been placed before this Court by the Respondents demonstrate that as at 7th December 2012, the preliminary investigation had been concluded, and based on its findings, a decision had been taken to issue a charge sheet to the Petitioner. The 1st Respondent was personally aware of the said decision as he is the person who had written '**R7B**', and when the 3rd Respondent inquired from him whether there were any disciplinary proceedings pending against the Petitioner, it was his duty to set out the accurate factual position.⁹

A public servant is not entitled to import a motor vehicle on concessionary duty terms as of right. The Circular '**P8a**', and all circulars similar to it, before and after, afforded a public servant a privilege, which could only be used once in five years, or such other time period that the Government may decide, and

⁹ Vide 'P13'.

on terms and conditions determined by the Government. ‘**P8a**’ makes it clear that an officer against whom disciplinary procedures have been initiated (විනය ක්‍රියාමාර්ගයක් ආරම්භ කර) is not eligible to receive the said privilege. Similar provision is found in the Minutes of Pension,¹⁰ whereas suspension of salary increments, promotions, foreign trips and scholarships would require a formal charge sheet to have been issued.¹¹

It is noted that ‘**P8a**’ has been replaced with Circular No. 01/2016 dated 14th July 2016 marked ‘**8R2**’. Clause 2.5 thereof reads as follows:

“ආයතන සංග්‍රහයේ විධි විධානයන් අනුව හෝ ඒ ඒ ආයතනයන්හි බාවිතයට ගනු ලබන පාලන විධිවිධාන හෝ නීති රීති අනුව මූලික විමර්ශනයක් හෝ විධිමත් විනය පරීක්ෂනයක් ආරම්භ කර දැනට එම ක්‍රියාමාර්ගය අවසන් කර නොමැති නිලධාරීන්.”

It is therefore my view that, unless the Disciplinary Authority acts in terms of Section 25¹² or Sections 31:5 and 31:6 of Chapter XLVIII¹³:

- a) A preliminary investigation is the first step that would be taken where commencement of disciplinary action is contemplated;
- b) The purpose of a preliminary investigation is to ascertain if there is sufficient material to initiate disciplinary action;
- c) Whether disciplinary action could be initiated would be known by the report submitted by the Officer conducting the preliminary investigation.

¹⁰ Vide Section 12(1) where disciplinary proceedings are pending or contemplated at the time of retirement, the pension may be withheld or reduced.

¹¹ Vide Section 14:12 of Chapter XLVIII - “When a formal charge sheet has been issued against an officer for disciplinary action against him, granting him salary increments, promotions, foreign trips and scholarship, study leave with pay, loans and advances, no pay leave locally and abroad and secondments should forthwith be suspended until the final outcome of the inquiry.”

¹² Summary Disciplinary Procedure.

¹³ Interdiction pending a preliminary investigation.

- d) If the preliminary investigation does not disclose any material that warrants the initiation of disciplinary action, the matter obviously ends there.
- e) If disciplinary action is called for on the material that is disclosed during the preliminary investigation, the Officer conducting the investigation is required to submit a draft charge sheet together with his report;
- f) The issuance of the charge sheet on the officer concerned would follow thereafter, followed by the holding of a formal disciplinary inquiry.
- g) The preliminary investigation, the report of the Officer conducting the preliminary investigation, the charge sheet, the inquiry and the disciplinary order forms part of the disciplinary procedure set out in the Establishments Code for the taking of disciplinary action against a public servant.

Thus, by the time 'P15' was issued, the disciplinary procedure against the Petitioner had commenced, thereby bringing the aforementioned steps that had been taken within the limitation contained in 'P8a', namely “යම් නිලධාරියෙකුට විරුද්ධව විනය ක්‍රියාමාර්ගයක් ආරම්භ කර දැනට එම ක්‍රියාමාර්ගය අවසන් කර නොමැති නිලධාරීන්”.

In the circumstances of this case, it is my view that the decision of the Respondents to withhold the issuance of the permit is within the provisions of paragraph 01.02(v) of the Circular 'P8a', and is therefore not *ultra vires* the powers of the 3rd Respondent. It is not a decision which *is so outrageous in its*

*defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*¹⁴

The application of the Petitioner is accordingly dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal

¹⁴ Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985 AC 374].