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 a Writ of Certiorari made in terms of article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

C.A. Writ Application No.

343/2009

Dona Marian Sandya Kumari
Kodduruarachchi,

Mission House, School for the Blind,

Ratmalana.

Petitioner

-Vs-

1. W. Dharmadasa,

Additional Secretary,

Education Quality Development,

For Secretary/ Ministry of Education,

" Isurupaya", Battaramulla.

1A. H.U. Prematilleke,

Additional Secretary,

Development of Quality

Education,

Ministry of Education,

" Isurupaya", Battaramulla.

And 08 (eight) others.

Respondents

Before: **Anil Gooneratne, J**

Counsel: Kalinga Indatissa PC with Ranil Samarasooriya and Himali Kularatne for the Petitioner.

Ms. M.N.B. Fernando DSG for the 1st to 3rd Respondents.

Argued on: 21.11.2012

Written Submissions

Tendered on: 25.03.2013 and 29.04.2013

Judgment delivered on: 30.05.2013

Anil Gooneratne, J

The Petitioner to this application who has applied for a Writ of Certiorari as described in the petition functions as the Principal of the School for the Blind in Ratmalana. By sub para 'b' and 'c' of the prayer to the petition a Writ of Certiorari has been sought to quash documents P25, P28 and p29 and more particularly the decision referred to therein by not approving the appointment of the Petitioner to the Post of Principal of the School and the direction to the Board of Trustees of the Ceylon School for the Deaf and Blind to appoint someone else to the Post of Principal. The crux of the case of the respondent is that the petitioner was not recognized as a " qualified teacher" and that the petitioner did not possess a pass in Mathematics at the G.C. E. Ordinary Level Examination which the Respondent states the basic qualification to be recruited as a teacher.

The material placed before this Court by way of oral/documentary submissions and the pleadings filed of record on behalf of the Petitioner have been examined and at the very beginning it must be stated that the petitioner has referred to circular P1 where changes to the existing syllabus was contemplated as from January 1972 and as pleaded in the year 1975, National Certificate of General Education Examination was held to Grade 9 students instead of G.C. E Ordinary Level (P2). Circular P3 envisage the manner in which students would be admitted to Grade 10/11 and the subject taught and the minimum qualification that is required to follow the Grade 10/11 G.C. E. ((Advanced) Level renamed as National certificates of Higher Education Examination. Petitioner also relied on P4 Circular, which seeks to make changes to the National Certificate of Higher Education Examination. The Petitioner state that she sat for National Certificate of General Education Examination in 1976 and passed the examination and was eligible to study for the National certificate of Higher Education Examination in the arts stream.

The Petitioner state that in terms of circular P3 and P4, petitioner was eligible to study certain subjects in the Arts stream and she selected the subjects Economics, History and Sinhala for the National Certificate of Higher education Examination which did not require a pass in Mathematics. The results obtained in the above examinations are produced marked P5 and P6 respectively. Emphasis by the Petitioner is that during the time she sat for the above examination unlike today a pass in maths was not mandatory. In the above context, the question is whether a writ should be issued and the extent to which writ jurisdiction would invoked by the petitioner in the context of this case..

At this point of the Judgment, having ascertained above it would be important to consider the petitioners service record. By regulation dated 24.05.1983 marked P8, which regulation was issued under section 37 of the Education Ordinance, the Minimum qualification required to be appointed as a Teacher or Principal in Government Assisted Schools, such as the School for the blind Ratmalana should have one of the qualifications stated below.

1) University degree.

2) Trained Teacher Certificate

3) Diploma Certificate in Music, Dancing, Art, Agriculture, Home Science. Technical subjects or any other notified from time to time.
4) Passes in 3 subjects in the General Certificate of Education (A/L)
5) Those in (4) above should obtain the trained teachers certificate within 10 years of joining.
6) A principal should be a University graduate with 10 years of teaching experience.

The Petitioner in order to be qualified as per regulation P8, has furnished the following material.

Petitioner was successful in the examination held in 1980 sitting for the National Certificate for Higher Education Examination with 3 passes. (P6) Eligible to be appointed under (4) above.

The above examination held in place of G.C.E (Advanced Level) consequent to education reforms. Petitioner joined the school for Blind Ratmalana as a teacher on or about 10.10.1983 (P7). By P11 the Petitioner obtained the required certificate from Maharagama Teachers Training College and passed out as a

Trained Teacher. P11 indicates that the certificate is valid with effect from 01.03.1994.

Petitioner was admitted to the Degree of Bachelor of Arts by the University of Kelaniya and conferred the degree at the convocation held on 19.10.2003 (P12)

On 01.06.2004 the Petitioner was admitted to Master of Arts degree by the University of Peradeniya and was conferred the degree at the convocation held on 04.01.2006 (P13)

In the above manner and having obtained the above qualifications the Petitioner seek to establish the requirements or qualifications necessary to be eligible to be selected as a teacher and principal of an Assisted School. In the process the Petitioner also fortify her position and , it was submitted that the Petitioner made an application to the Ministry of Education to be appointed as a qualified teacher and that appointment was approved by the Provincial Director of Education with effect from 01.02.1982 (P9 & P10)

Attention of this Court is also drawn to circular of 18.09.1995 (P14) with regard to the procedure and qualifications required to fill special posts in Government Assisted Schools, and by P15 of 03.04.1995 the Minutes of the Sri Lanka Teachers Service are also produced. (Attention drawn to 1st schedule). It is stated that with the retirement of Mr. G.C. Mendis who was the principal of the school for Blind in Ratmalana the Board of Trustees of the Ceylon School for the Deaf and Blind appointed the Petitioner as acting Principal as from 15.08.2001.

This Court also has made a note of the following which the Petitioner relies to support her case.

a) Consequent to the retirement of the then Principal of the school, one G.C.Mendis, the Provincial Director of the Western Province by letter marked P16 of 18.04.2002 called for applications for the Post of Principal and the minimum qualification as stated in the said letter indicated that the candidate should be less than 60 years who possess a degree/masters/Special training pertaining to the field. Candidate should also be a senior person of the Institute. P16 is a letter by the Director to Manager School for Blind Ratmalana.

b) Petitioner applied for the above post and the Board of Trustees selected the Petitioner by letter P17 of 23.05.2002.

P17 inter alia describes the experience and achievements made by the Petitioner in the relevant field.

c) Church of Ceylon by P18 (issued by Bishop of Colombo and Chairman of Board of Trustees) approved the appointment.

d) Appointment letter by P19 issued to petitioner by the Board of Trustees inclusive of the terms and conditions:- (signed by 4th respondent)

e) Board of Trustees by P20 confirmed the appointment and required the Directors of Special Education to recognize and approve the appointment.

f) Another important document relied upon by the Petitioner is marked and produced as P31, (04/06/2009) where the Commissioner General of Examination state that a pass in the subject of Maths was not a mandatory requirement to study the subjects in the stream of Arts for the National Certificate of Higher Education Exam. Letter P31 is self explanatory and the writer of same express the view that the Petitioner had been exempted from obtaining a pass in maths, and it is

unacceptable (යෝග්‍ය නොවන බවත්) to insist on a pass in maths at a subsequent point of time. It is some injustice caused to a candidate.

On an appeal made by the Petitioner to the Minister of Education the Director of Special Education by letter of 11.12.2006 requested for the original letter of appointment of Petitioner (P21). The Provincial Director by P22 dated 20.02.2006 sent initial letter of appointment. As the Petitioner appointment was not approved, the 7th respondent on behalf of the Board wrote P23 and P24 dated 22.02. 2007 and 17.09.2007 respectively. The 2nd respondent replied by P25 (letter of 18.01.2008) informing that petitioner's appointment cannot be approved by the Ministry as the Petitioner has failed in Maths at the G.C.E Ordinary Level Examination and that Petitioner does not possess the minimum qualifications. By letter marked P28 and P29 of 25.01. 2009 and 16.03.2009 respectively the 1st Respondent had informed that the petitioner appointment cannot be approved.

On the other hand 1A to 3rd respondents resist the petitioner application and inter alia pleads;

1) Documents P1 to P4 have no relevance to the matter in issue i.e. appointment of principal to an Assisted School. As regards P5 these respondents stress that petitioner obtained only an 'E' Pass for Maths (very weak).

2) Much emphasis is placed on letter 2R1 of 16.09.2008. This letter addressed to Secretaries of all Provincial Councils and (ii) of 2R1 state that a credit pass in Maths and Sinhala is essential and altogether should be successful in 6 subjects. The 1st para of 2R1 indicates that a decision has been taken..... තීරණ කර ඇත. (as in para 10 of the affidavit of 2nd respondent)

This Court will no doubt , need to comment on the contents of 2R1, at a subsequent point in this judgment.

In the affidavit of the 2nd respondent it is stated that eligibility to study certain subjects for the G.C.E. (Advance) level Examination is not a criteria to join the Sri Lanka Teachers Service.

3) The school in question is governed by Board of Trustees and the Code of Regulations for Assisted English Schools marked 2R2 of 31.05.1948

would apply. The Secretary Ministry of Education is the authority under the Code as regards appointment of Teachers.

4) As in document P9 in the year 1987 proposal had been submitted on behalf of the Petitioner and a recommendation made by the Provincial Director of Education. However the Secretary Education has not granted the approval. (Perusal of P9 indicates an approval granted by Provincial Director of Education. P9 document does not indicate a signature to be placed by the Secretary of Education. The place to be signed by the Education Officer had been scored off and for Provincial Director of Education had signed – (ප්‍ර .අ .ද .මවිනුවට)

5) Members of the staff of the Assisted Schools are not members of the Sri Lanka Teachers Service.

6) Correspondence between the Ministry and the Provincial Authorities 2R3, 2R4, 2R5, 2R6 , 2R7 & 2R8. Recommendation made a fresh by the Provincial Director on 23.05.2002 cannot be approved in view of Petitioner not having a pass in maths. Some emphasis placed on 2R9 and 2R10.

The submissions on behalf of the above respondents proceed on the basis that the Petitioner does not possess the threshold qualifications of a " qualified teacher" as

per the rules and regulations pertaining to assisted schools. P9 as alleged by the Respondent is only a proposal. Approval need to be given only by the Secretary to the Minister of Education. Respondent also state that approval given if any by the Provincial Authorities would not be valid.

This Court wish to make the following observations and express views on documents submitted by the 1st to 3rd respondents as follows.

2R1- Secretary Ministry of Education addressed a letter 2R1 of 16.09.2008 to all Provincial Public Service Secretaries about a decision taken by the Ministry of Education. The portion that needs to be emphasized reads as ..... අමාත්‍යාංශය තීරණය කර ඇත Necessarily it should be read to take effect as from the date reflected in 2R1 and be prospective. Prior to the date reflected in 2R1, if it was the case and the same position was prevelent there would not be a necessity to issue such a letter. Other question is whether by a mere letter, policy which existed could be changed or introduced ? This letter is prospective and has on an ordinary reasoning and reading does not suggest any retrospective operation at all.

2R2 A code for regulation for Assisted English Schools (1948). This applies to English schools and in that era it no doubt was mandatory to have such a code.

Does it apply to the school for the blind in Ratmalana ? Respondents have not drawn the attention of this Court to the applicability of the Code to the school in question. Can it apply in the manner suggested by the Respondents, when the Code specifically state English schools.

Respondents refer to regulation 51. This regulation the portion shown by the respondents have been marked in such a way, it is hardly legible. (1) to (4) separated with 'or'. As such even in ordinary usage 'or' disjunctive.

In 51 it is added that in exceptional circumstances the Director may approve the appointment of a teacher, who has not passed the Senior School certificate or equivalent. This would nullify Respondents point of view in any event . The Code cannot apply to the school in question.

The Respondent authorities concerned, having detected or realized some lapse of the petitioner exchange letters 2R3 to 2R7 There is no single document submitted by the authorities concerned which refer to the date of appointment or immediately

after that in the year 1983 where authorities were so anxious as in the above documents to request for such requirement in Mathematics.

2R9 is somewhat the same to 2R1 and prospective in operation.

2R10 refer to some other person and refer to the G.C.E. (O/L) and not to the N.C.G.E Examination offered by the Petitioner.

This Court reject letter 'x' submitted along with the written submissions of the 1st to 3rd respondents. This is no doubt an afterthought and an attempt to smuggle documents after the close of pleadings.

The 1st to 3rd respondents have not addressed their mind to the position as at the time or period the petitioner was appointed as a teacher in 1983 (in their attempt to disqualify the petitioner) one cannot ignore the beginning of a career and forget it and come to the end to destroy a legitimate expectation of the petitioner who has obtained a degree of Bachelor of Arts and a Master of Arts Degree. Petitioner also obtained good results in her secondary examinations and was successfull in both National Certificate of General Examination and at the National Certificate of Higher Examination. By document P31, it is confirmed by the Commissioner

General of Examination that there was no requirement to have a pass in Mathematics as far as the secondary education is concerned at that time or period. Even if the position is different today it is certainly no bar to the petitioner to be appointed as Principal since the respondent who are desirous of rejecting the Petitioner at any cost has not looked at or was ill advised about the modern day concept of reasonableness and irrationality. Both aspects which are relevant to administrative law and in the context of this case would be discussed in this judgment.

I would also add and stress that the petitioner who was also a trained teacher who underwent training at the Maharagama Teacher Training College and passed out as a trained teacher (apart from the above degrees) had not been faulted by the 1st to 3rd respondent as far as her teaching career is concerned. Respondents have not been able to fault or bring to the notice of this Court any slur during her period of service beginning from 1983 at least upto the point of being nominated and appointed as Acting Principal of the School. The Board of Management of the school for the blind is the authority to recommend or not recommend a candidate for a higher post, and as far as such nomination is concerned the Secretary of Education would not be competent to fathom the required qualities/experience of a candidate who has applied for the post of principal. Such a recommendation cannot

be taken lightly and any attempt to spoil the career of a person who had made a sacrifice for the sake of education and provide a service to the school for the Blind Ratmalana, need to be resisted and rejected. Therefore I totally reject the position taken up by the above respondents, it is nothing but an unreasonable position to state that P1 to P4 have no relevance, and a very narrow interpretation or a narrow unacceptable view not to consider P1-P4 as it goes to the very root of the issue. P1-P4 envisage a change in the secondary educational set up at a time when the Petitioner had to offer and sit for the NCGE level examination. Therefore it is a relevant fact/position which open up the media in which the Petitioners entire educational process commenced.

The Petitioner having joined the school for the blind Ratmalana (P7) has satisfied the requirement in regulation P8. I have no reason to doubt the petitioner submissions on this aspect and also P9 though the respondent attempt to discredit P9 (05.02.1987) after so many years. All this could have been resisted by the respondents at the correct time. Instead acquiesed in the process. All P10 to P16 are documents which support and favour the Petitioner. I agree with the submissions of learned President's counsel on same (inclusive of required qualifications) The other documents P17-P20 are documents supporting the position of the petitioner which naturally led the petitioner to have legitimate

expectation for the Post of Principal . In compliance with regulation P15 and P8 the Petitioner has satisfied the required qualifications. Document 2R1 is prospective nor can it amend or alter regulation P8 & P15. 2R1 is only correspondence between officials and not a regulation.

In Eksith Fernando Vs Manawadu & others 2000(1) SLR 78pg.

In the aforesaid case the Supreme Court, it is stated that appointment of Principals in Assisted Schools and Unassisted schools has to be appointed as per the Assisted schools and Unassisted schools Regulations, 1983, which is appended to the petition marked P8.

This is a case of the Test of Wednesbury unreasonableness which apply, to documents P25,P28 & P29. In Associated provincial Picture Houses (K Vs Wednesbury Corporation 1948 (1) KB 223. Per Lord Greene MRT referred to the rubric of unreasonableness as ' a general description of the things that must not be done ." (pg 229)

It is settled principle today, however, that judicial review for unreasonableness is not restricted to situations in which a public authority purports to make a decision which is not in accordance with the terms of the powers conferred on it and that, even if a decision on the face of it falls within the letter of these powers, it can still be successfully impugned if it is shown to be unreasonable, in the relevant sense.

The essence of this broader criterion of unreasonableness is contained in Lord Greene's observation that " there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority." It is no longer necessary to attack an administrative decision on this ground by having recourse to the principle of an inferred error of law attributable to the decision maker. In 1984, Lord Diplock recognized that unreasonableness can now stand on its own feet as an accepted ground of review. Although the terminology applicable has not escaped criticism on the basis of its inherent ambiguity, unreasonableness or irrationality is at present accorded the status of a ground for review distinct from illegality (in the sense that the decision-making authority has made an error of law for example, by purporting to exercise a power which it did not possess). The hallmark of the Wednesbury connotation of unreasonableness is that the repository of discretion, although acting within the four corners of the legislative grant of discretion, has arrived at a decision which is repugnant to all reason – Recent Developments in Adminstrative Law- G.L. Pieris pg. 189.

Judicial review has developed to a stage today which could be classified into various categories. Illegality and irrationality take the lead. Irrationality could be equated with wednesbury unreasonableness. Such a proposition could be easily applied to documents P25, P28 & P29, since it is both unreasonable and irrational.

I cannot stop at commenting on documents P25, P28 & P29 to be only unreasonable. It is also irrational to issue such letters without considering the background to the case in hand and all facts and circumstances starting from the year 1983, with the petitioners initial appointment as a teacher to the school for the blind Ratmalana. Irrationality would be interchangeable with unreasonableness . Let me refer to some authorities on irrationality, which badly affect documents P25,P28 & P29.

What does irrationality mean ? In a normal context it could be described as irrational conduct, irrational behavior, irrational thinking or irrational decision. In whatever context one may use it, in a legal sense, it could be a ground to review a decision of a public body vested with power to decided a question of fact or law.

Irrationality is one of the common law grounds of judicial review of administrative action. It is presumed that public authorities are never empowered to exercise their powers irrational, therefore irrational action by a public authority is considered to be ultra vires. Although it denotes behavior that falls short of what is to be expected of a rational public authority, the precise parameters of the term are

unclear and it has been used to describe a range of behavour. It is often used interchangeably with the term Wednesburys unreasonableness but has become the more common term since the case of Council of Civil Service UnionVs Minister for the Civil Service (1985) Ac 374 (HL) in which term irrationality, illegality and procedural impropriety were used to define the Common law grounds heads of judicial review. Oxford Dictionary of Law 6th Ed. Elizabeth A. Martin & Jonathan Law.

In Lord Diplock's formal statement on Judicial review (Wade-Administrative Law 9th Ed. Pg.1001) describes irrationality in the following manner.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd. V Wednesbury Corporation (1948) 1 KB 223). It applies to 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court's exercise of

this, role, resort I think is today no longer needed to viscount Radcliffe's ingenious explanation in Edwards V Bairstow (1956) AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision-maker, "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

In another case court took the view as follows:

R V Secretary of State Environment, ex-parte Fielder Estates (Canvey Ltd) (1989) 57 P & CR 424, is a good example of a case illustrating behavior that has been deemed to warrant the designation of irrationality. After a planning application to build houses close to Canvey Island had been refused, a public inquiry had been set up which was expected to last for three days. During the inquiry, one of the objectors, the Canvey Ratepayers Association, was to present its evidence on the second day. When it turned up to do so, the Association found that the inquiry had already been closed by the inspector. After a complaint had been made to the Secretary of State, another inquiry was set up. But this time, the other parties who had been present at the first inquiry, including Fielders Estates, were not notified about the second inquiry. It was held that the conduct of the Secretary of State was so unreasonable as to verge on the irrational and absurd. It

also amounted to a failure to act with procedural fairness. Notice that this is another useful example of where the rounds of review overlap, in that issues of natural justice are also present in the case.

Developments in administrative law usually spread all over the globe. There is no reason to doubt such development, and in Sri Lanka the Court of Appeal did not hesitate to follow the dicta in Lord Diplock's formal statement on judicial review. In Desmond Perera and Others Vs Karunaratne Commissioner of national Housing 1994(3) SLR 316.

At 318..

In the question of the right to be heard, administrative action could be made subject to control by juridical review under three heads.

i) Illegality

ii) Irrationality

iii) Procedural impropriety

Irrationality may succinctly be referred to as unreasonableness. It appears to 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.

In Fazrul Hefeera and another Vs Sokkalingampillai and others 1998 (3) SLR 60.

The decision on ' equities' is a matter where the Commissioner could exercise his discretion. Such a decision could be reviewed on the ground of 'irrationality'. As Lord Diplock in GCHQ Case Council of Civil Service Unions V Minister for the Civil Service explained " Wednesbury Unreasonableness" applies to 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." Unless ' unreasonableness' or irrationality' could be treated as an extension of the principles of ultra vires, the petitioner is faced with the obstacle of section 39(3) read with section 22 of the Interpretation Ordinance.

The above grounds on unreasonableness and irrationality would be more than sufficient to issue the writ of certiorari. Nevertheless there is also an error of law on the face of the record. The 1st to 3rd respondents deliberately or otherwise ignore documents P1-P4 merely stating that it is not relevant. This is a grave error as

stated in this judgment. Disregarding P8 & P15 and absolutely no explanation on same by the respondents is another error. The misconception of law and fact by referring to 2R1 which has no legally binding force and 2R2, which is another misleading item of evidence, whereas same applies only to English schools. Even the reference made to regulation 51 seems to be another attempt to mislead Court. When Court considers the applicability of the above documents it is clear that there is an error on the face of the record.

An error of law would constitute the following ;

(a) Erroneously refusing to admit admissible evidence and erroneously admitting inadmissible evidence,

(b) Finding of fact based on no evidence (Sirisena Cooray Vs Tissa D Bandaranayake 1999(1) SLR 1, 33,

(c) Where the Tribunal acted with manifest or clear unreasonableness or unfairness misconstruction of a document becomes an error of law. Senanayake, J in Chas. P. Hayley & Co. Ltd Vs Commercial & Industrial Workers 1995(2) SLR 42,50..

Record would usually constitute the formal order and all those documents relevant to the issue and all evidence. It is a well known principle of equity and of jurisprudence is that if a punishment is to be imposed law enacts that it must be

imposed prospectively and not retrospectively. As such documents relied upon by the above respondents have no past operation. It has to be prospective. All this must be decided on a case by case basis and not with any other standard merely to disqualify the petitioner at any cost.

This Court has considered the case of the Petitioner and the contesting respondents very carefully. It is a fit case to grant relief as per sub Paras 'b' and 'c' of the prayer to the Amended Petition. This Judgment is pronounced granting relief to the petitioner only as regards the issuance of Writ of Certiorari, having considered or having regard to the special and exceptional circumstances which is unique to this case.

Application allowed as above with costs.

JUDGE OF THE COURT OF APPEAL

Kpm/-