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

1. Samastha Lanka Guru Upadheshaka
   Vurtheeya Sangamaya,
   No. E53, Dehimaduwa Road,
   Uthuwankanda Mawatha,

AND 02 OTHERS

PETITIONERS

C.A. No.315/2009

Vs.

1. Susil Premajayantha
   Minister of Education,
   Ministry of Education, 'Isurupaya',
   Battaramulla.

2. M. N. Nimal Bandara
   Secretary to the Ministry of Education
   Ministry of Education, 'Isurupaya',
   Battaramulla.

AND 15 OTHERS

RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J. Perera J.

COUNSEL: S.L. Gunasekera for Petitioners
M. N. B. Fernando D.S.G., for Respondents

ARGUED ON: 02.07.2013

DECIDED ON: 22.10.2013

GOONERATNE J.

The 1st Petitioner to this application is a registered trade union consisting of "Teacher Counselors" and it is also described in the amended petition as "In Service Advisers". The 2nd Petitioner is the President and the 3rd Petitioner is the Secretary of the 1st Petitioner Union respectively with several years of teaching service. At the hearing of this application it was revealed by both parties that very many facts are undisputed, except the interpretation given by either party to documents P2, P3 and P7. The document P2 is a Cabinet Memorandum and P3 is the Cabinet Decision pertaining to memorandum P2. Letter P7 is only a letter addressed by Secretary National Salaries and Cadres Commission, to the 3rd Petitioner. The memorandum P2 is titled 'Establishment of In Service Advisors' Service'. P2 dated 28.3.2007 refer to five recommendations. The Cabinet decision P3 dated 30.4.2007, specifically refer to the five

recommendations contained in memorandum P2 and state same approved .....
(1) සිට (5) දක්වා වූ නිර්දේශ සඳහා අනුමැතිය දෙන ලදී".

The letter P7 as stated above is a letter addressed to the 3rd Petitioner which in it's last sentence state that there is no necessity to establish a separate service for the 'In Service Advisers'. (ගුරු උපදේශකවරු සඳහා වෙනම සේවාවක් ඇති කිරීමේ අවශ්‍යතාවක් පැන නොනගින බව කාරුණිකව දන්වමි) The all important question that need to be decided in this writ application for Writs of Certiorari/Mandamus is whether, notwithstanding the relief sought, the position posed in letter P7, has clearly addressed the recommendation in P2 and the decision in P3 and as stated therein is no necessity or the need does not arise to establish a separate service. In that context does the writer of letter P7 on behalf of 2nd to 14th Respondents, have the right/authority/power and or jurisdiction to either directly or indirectly or knowingly or unknowingly or willingly or unwilling express another view, different to which was specifically approved by the Cabinet of Ministers collectively by P2 and P3? Both P2 & P3 were not revoked or amended by the Cabinet of Ministers subsequently. Further in the above circumstances can this court grant a Writ of Mandamus in the manner prayed for in the amended petition?

We had the benefit to hear both learned counsel on either side and peruse their written submissions. The learned counsel for the Petitioners submitted inter alia that the Petitioners functions are different and significant to those functions of the teaching profession. i.e as "Teacher Counselors" the Petitioners do not get involved in the exercise of teaching students directly. What they do is to teach and provide guidance to teachers performing functions of teaching students.

The learned counsel for the Petitioner drew the attention of this court to memorandum P2 and the Cabinet Decision P3. He referred to the 5 recommendations in document P2 and to certain other matters contained in the said memorandum, and emphasized that by Cabinet approval P3 Cabinet in no uncertain terms decided upon a creation of a separate service for the Petitioners. Learned Counsel stressed the point that a Cabinet Decision can only be revoked or amended only by the Cabinet of Ministers and it is ultra vires their powers for the 3rd to 14th Respondents to decide contrary to the Cabinet Decision P3 and issue letter P7. The above Cabinet Decision has not been changed or altered and it is irrelevant, that the National Salaries & Cadre Commissions' position that the Petitioners were recommended, and that they be placed in the Supra Grade of the Teaching Service.

In the written submissions of the Petitioners there is reference to the Respondent's documents, more particularly to 1R9 which the Respondents maintain had the effect of revoking the above Cabinet Decision (P3). Petitioner contend that removal of salary anomalies of the two services cannot affect the establishment of an "In Service Advisory Service". In any event the Petitioner Union had not been consulted at any point of time with regard to the decisions contained in the Respondents documents, submitted to this court. Nor does document P7 state specifically of a revocation of Cabinet Decision P3 or any reference to P2.

Petitioners contend that those who made the Cabinet Decision 1R9 and the various committees appointed to look into the questions of the grievances of teachers never consulted the 1st Petitioner union, and consider the demands of the 'In Service Advisers'. Report 1R4 makes no reference to the 1st Petitioner Union.

In the light of approvals given by the Cabinet of Ministers (P3) the task of the learned Deputy Solicitor General to impress this court was no easy task. However at the very outset the learned Deputy Solicitor General thought it fit to submit to court that the current policy approval by the Cabinet of Ministers

was to include the teachers deemed In Services Advisers, in the newly created Supra Grade of the Teacher Service. I wonder whether the idea of a separate service for the 1st Petitioner Union as in documents P2 & P3, had been completely ignored or rejected by another decision of Cabinet of Ministers? Or whether the court was called upon to surmise an inclusion of a separate service for the Petitioners by placing them in the Supra Grade?

Learned Deputy Solicitor General referred to condition No. 4 of P2, and states that the said condition in P2 contemplates to absorb "Teachers" to such service with effect from 01.01.2005 (back date) and place them on a salary scale T5 1, T6 1 & T7 1, a salary step existing a decade earlier. It is further explained by referring to letter 1R5 (Pgs. 5 & 6). Letter 1R5 (Pg.5) is somewhat critical of memorandum P2, but attempting to refer to discussion with H. E the President of the Republic, (Pg.6) regarding a unified service for the education service, with a new service minute and salary scale. It was also submitted on behalf of the Respondents that the Cabinet of Ministers had considered 1R5 along with a cabinet paper of 30.8.2007.

Respondents states that 1R4 (B.G. Karunaratne report) was released and the National Salaries and Cadres Committee submitted report R7. Based on

above the Minister of Education on 26.8.2008 submitted a Cabinet paper 1R8 which was approved on 27.8.2008 (1R9). Learned Deputy Solicitor General argues that by the approval given by 1R9 which includes the In Services Teachers' to the Supra Grade of Teachers Service effectively overruled the decision contained in Cabinet Decision P3 of 18.4.2007. Further it is submitted that the same Minister of Education who presented both Cabinet Memorandum and as such the subsequent Cabinet Decision 1R9 effectively revoked earlier Cabinet Decision P3.

The question that more particularly has to be addressed is whether the Cabinet Decision 1R9 has specifically revoked the Cabinet Decision contained in P3. The focus in decision 1R9, is the removal of salary anomalies in the Sri Lanka Teachers Service and the Sri Lanka Principals Service. This seems to be the main idea for which the Cabinet of Ministers by 1R9 gave its approval, consequent upon several representations made by several unions (except 1st Petitioner) and the B.G. Karunaratne report. If the decision in document P3 was to be revoked the Cabinet Decision 1R9 could have stated so without any difficulty. It has not been done. As such this court cannot conclude that even by implication the decision in P3 had been revoked although the Respondent party now attempt to demonstrate with reference to other documents and discussions that the authorities concerned had done away with the decision in P3. This court observes

that it is only the Cabinet of Ministers that can change a decision and not any other person in authority.

This court observes that the several documents relied upon by the Respondents do not address the issue in a meaningful manner or had made any attempt to notify the Cabinet of Ministers through proper channels to revoke decision P3. Instead in Pg. 5 (middle) of 1R5 the National Salaries and Carder Committee being critical, merely state that a creation of a separate service cannot be understood, when the Minister of Education has made the following observation in Memorandum P2.

P2 of 28.3.2007 under the heading "Establishment of In Service Advisors' Service ...

> *Monitoring is the strategic priority service in the process of human resource development and in the fruitful management of the physical resources. In developed countries in the world monitoring has been placed as a compulsory service of teacher education programs in the qualitative learning teaching process. For this purpose a group of officers endowed with service experience and professional experiences are deployed . In Sri Lanka this task is accomplished by in Service Advisors.*

In the dynamic world large scale changes are effected relating to curriculum, syllabi, learning teaching and evaluation owing to rapid development of knowledge and global expansion in the field of information technology. Accordingly, the availability of a facilitator as well as a guide is very essential for the development of teaching and evaluation process of the teacher. In service Advisors belong to the group that provide counseling for the role of the teacher and for the student's learning process.

Specially the In Service Advisor is functioning as the main communicator in introducing New Education Reforms to the class room, as a Counselor for teachers relating to new methodologies and a provider of awareness for the community relating to new concepts and in many instances and as a trainer in the field of education.

For the first time in Sri Lanka this Service was started in year 1962 titled as "In Service Teacher Advisors Service". A group possessing higher educational and professional qualifications and a seniority in teachers' service and having a wealth of experience was selected for this service by conducting a written examination and an interview. In all instances of implementing important Education Reforms these In Service Advisors had rendered a unique service and therefore recruitments to this Service had been made by conducting National Level Examinations in years 1962, 1965, 1967, 1972, 1981, 1985, 1990, 1991, 1992, 1994, 1996 and 1998. After year 1998 recruitments have been made by the Provi8ncials as well, based on their Provincial requirements.

In the above circumstances this court is of the view that the above committee comprising of 3rd to 14th Respondents have exceeded their authority and acted beyond their jurisdiction by issuing letter P7. There are numerous instances where courts have granted the remedy of certiorari where it was found as a pure matter of law, the doing of what was in fact done by the Respondents concerned was not empowered by law to do some act, and certiorari was issued to quash an order made ultra views. The following case laws to be noted.

Principles of Administrative Law in Sri Lanka 3rd Edition Vol. 2.

Dr. Cooray..

Pgs 808/809...

> At the conclusion of an inquiry held before an Assistant Director of Customs he ordered the forfeiture of a motor vehicle on the basis that the conditions subject to which it had been imported free of customs duty into Sri Lanka had been violated. Thereafter on the application of the importer the Director General of Customs made order releasing the motor vehicle to the importer on payment of total fiscal levies leviable as if the vehicle had been cleared under the normal law. Agreeing with the Petitioner's contention that the Director General of Customs had no power under the law to make such an order, the Court of Appeal issued certiorari to quash it. *Bangamuwa v. Senaratne, Director General of Customs (2000) 1 SLR 106.*
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> The Board of Governors, Zahira College, the 1st respondent, had decided to allow the 2nd respondent to run another school in the premises of Zahira College. Holding that the 1st

respondent had acted ultra vires its statutory powers the Court of Appeal issued certiorari to quash that decision.

Pgs. 814/815...

Certiorari has issued on numerous other occasions where it was found that the impugned exercise of power was ultra vires and therefore invalid. On some of those occasions the court expressly formulated the ground on which it issued certiorari to quash an order, namely that such order was ultra vires, *Kotakadeniya v. kodituwakku (2000) 2 SLR 175* on other occasions court has issued certiorari to quash an order without expressly formulating its finding that such order was ultra vires *Devananda v. Dayananda Dissanayake (2000) 3 SLR 127.*

In the above circumstances we are of the view that a Writ of Certiorari need to be issued in this application as prayed for in the prayer to the petition. We will now proceed to consider the issuance of a Writ of Mandamus. No doubt the Cabinet Decision P3, stands and remains unaltered.

Decision in P7, P3 and recommendation P2 were all made in the year 2007 and 2008 (P7). As at the date of delivery of this judgment over 5 years have lapsed from the said dates. This court is mindful of condition No. 4 in P3, which cannot apply today but a salary scale corresponding to same as at today would have to be paid. In any event Respondents state that the Petitioners are placed in

the Supra Grade salary. Cabinet decision 1R9 relate to salary anomalies in the teacher service and the principals service. Such changes effected in the educational service subsequent to the decision in P3, (though does not directly effect P3) may have an impact and cause some administrative inconvenience in the field of education. If this court had the opportunity to deliver this judgment no sooner P7 was issued there could be no bar to grant a Writ of Mandamus. However This court is reluctant to grant the remedy by way of Mandamus in view of the above observations, although the Petitioners have a legal right flowing from Cabinet Decision P3 and would have been entitled to demand the performance of a legal duty from the Respondent, against whom mandamus was sought. As such it would amount to a futile exercise if the Writ of Mandamus is issued at this point of time. On the other hand grave public/administrative inconvenience would be a ground to refuse a prerogative writ, although the term itself may be incapable of precise definition.

In all the above facts and circumstances we allow only a Writ of Certiorari as prayed for in sub paragraph (b) of the prayer to the amended petition with costs.

Application allowed as above.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree.

JUDGE OF THE COURT OF APPEAL