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

Wickramasinghe Arachchilage
Waruna Sameera,
No. 43/6,
Wattegedara Road,
Maharagama.
And 24 Others.
Petitioners

CASE NO: CA/WRIT/73/2016

Vs.

1. Justice S.I. Imam,
   Chairman,
   Administrative Appeals Tribunal,
   No. 35,
   Silva Lane,
   Dharmapala Place,
   Rajagiriya.

1A. Justice N.E. Dissanayake,
   Chairman,
   Administrative Appeals Tribunal,
   No. 35,
   Silva Lane,
   Dharmapala Place,
   Rajagiriya.
   And 50 Others
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Faisz Musthapa P.C., with Faisza Markar for the Petitioners.
Sanath Sinharage for the 25th and 33rd Respondents.
Prasantha Lal de Alwis, P.C., with Chamara Wannisekera for the 22nd, 29th, 37th. 44th, 49th Respondents.
Malik Hannan for the 30th and 43rd Respondents.

Decided on: 20.02.2019

Samayawardhena, J.

The petitioners filed this application seeking a writ of certiorari to quash the decision of the Administrative Appeals Tribunal marked P1. The 25th and 33rd respondents filed a limited statement of objections seeking dismissal of the application *in limine* on three grounds.

The first preliminary objection reads as follows:

> *The application of the petitioners is bad in law since the petitioners have sought to invoke the writ jurisdiction against the decision of the Administrative Appeals Tribunal which has varied the decision of the Public Service Commission whose decisions are not amenable for judicial review in terms of the expressed privative clause of*
>
> *(a) Section 8(2) of the Administrative Appeals Tribunal Act No. 4 of 2002*

and read together with the constitutional ouster of

(b) Article 61A (as amended) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Administrative Appeals Tribunal was created by Article 59 of the Constitution:

> *59(1) There shall be an Administrative Appeals Tribunal appointed by the Judicial Service Commission.*
>
> *(2) The Administrative Appeals Tribunal shall have the power to alter, vary or rescind any order or decision made by the Commission.*
>
> *(3) The constitution, powers and procedure of such Tribunal, including the time limits for preferring of appeals, shall be provided for by law.*

Section 8(2) of the Administrative Appeals Tribunals Act, No. 4 of 2002, reads as follows:

> *A decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.*

This is a statutory ouster clause, and not a constitutional ouster clause. Ouster clauses contained in statutes, as a general rule, do not oust the writ jurisdiction conferred on Courts—in Sri Lanka, on the Court of Appeal by Article 140 of the Constitution. There is a presumption in favour of judicial review and Courts have throughout the history shown their great reluctance to accept ouster clauses at face value. The tendency of Courts has been to give ouster clauses a restrictive interpretation as much as possible

so as to preserve their jurisdiction to review administrative decisions. The leading English case of *Anisminic Ltd v. Foreign Compensation Commission (1969) AC 147* provides a striking illustration of this tendency. It is generally understood that the ouster/preclusive/finality clauses are there to prevent appeals and not to prevent judicial review. Those clauses do not and cannot prohibit the Court of Appeal from exercising its writ jurisdiction to look into the jurisdictional issues of the decisions of the administrative bodies or tribunals.

In *St. Joseph Stock Yards Co. v. United States (1936) 298 US 38*, Brandeis J. stated that:

> *The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."*[1]

Professor Wade in his monumental work—Administrative Law, 9th Edition, at page 713 states:

> *Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative*

[1] Can also be found at https://www.law.cornell.edu/supremecourt/text/298/38

> *authorities and tribunals would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is a better.*
>
> *If a statute says that the decision or order of some administrative body or tribunal 'shall be final' or 'shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial review of legality is unimpaired. 'Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law'. This has been the consistent doctrine for three hundred years. It safeguards the whole area of judicial review, including (formerly) error on the face of the record as well as ultra vires.*

Under the sub-heading "*Shall not be questioned clauses*", Professor Wade at page 717-718 *inter alia* states:

> *Wide enactments designed to oust the jurisdiction of the courts entirely in respect of all remedies have come to be known as 'ouster clauses'. However they are worded, they are interpreted according to the same principle.*
>
> *The law as now settled by the House of Lords is that these ouster clauses are subject to exactly the same doctrine as the older no certiorari clauses, namely, that they do not prevent the court from intervening in the case of excess of jurisdiction. Violation of the principles of natural justice, for example, amounts to excess of jurisdiction, so that where a minister refused an application for citizenship without giving the applicant a fair hearing the Privy Council invalidated his*

> *decision notwithstanding a statute providing that it 'shall not be subject to appeal or review in any court'. AG v. Ryan [1980] AC 718*

Section 3(4) of the Land Redemption Ordinance, No. 61 of 1942 provided that "*The question whether any land which the Land Commissioner is authorised to acquire under subsection (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final.*"

In considering of this section, in the case of *Ladamuttu Pillai v. The Attorney General (1957) 59 NLR 313* the Supreme Court stated that when a statute provides that a decision made by a statutory functionary shall be 'final' or 'final and conclusive', the words 'final' and 'final and conclusive' do not have the effect of ousting the jurisdiction of the Courts to declare in appropriate proceedings that the decision of the public functionary, when he has acted contrary to the statute, is illegal.

Basnayake C.J. at page 329 stressed the point with vigor and force in the following terms:

> *When an Ordinance or an Act provides that a decision made by a statutory functionary to whom the task of making a decision under the enactment is entrusted shall be final, the Legislature assumes that the functionary will arrive at his decision in accordance with law and the rules of natural justice and after all the prescribed conditions precedent to the making of his decision have been fulfilled, and that where his*

jurisdiction depends on a true construction of an enactment he will construe it correctly. The Legislature also assumes that the functionary will keep to the limits of the authority committed to him and will not act in bad faith or from corrupt motives or exercise his powers for purposes other than those specified in the statute or be influenced by grounds alien or irrelevant to the powers taken by the statute or act unreasonably. To say that the word "final" has the effect of giving statutory sanction to a decision however wrong, however contrary to the statute, however unreasonable or influenced by bad faith or corrupt motives, is to give the word a meaning which it is incapable of bearing and which the Legislature could never have contemplated. The Legislature entrusts to responsible officers the task of carrying out important functions which affect the subject in the faith that the officers to whom such functions are entrusted will scrupulously observe all the requirements of the statute which authorize them to act. It is inconceivable that by using such a word as "final" the Legislature in effect said, whatever determination the Land Commissioner may make, be it within the statute or be it not, be it in accordance with it or be it not, it is final, in the sense that the legality of it cannot be agitated in the Courts. No case in which such a meaning has been given to the word 'final' was cited to us. The word "final" is not a cure for all the sins of commission and omission of a statutory functionary and does not render legal all his illegal acts and place them beyond challenge in the Courts. The word "final" and the words "final and conclusive" are familiar in enactments which seek to limit the right of appeal; but no

> *decision of either this Court or any other Court has been cited to us in which those expressions have been construed as ousting the jurisdiction of the Courts to declare in appropriate proceedings that the action of a public functionary who has acted contrary to the statute is illegal.*

Section 18(1) of the Medical Ordinance, No. 26 of 1927, as amended, reads as follows:

> *Every order or decision of the Medical Council under this Ordinance shall be subject to appeal to the Minister whose decision shall be final.*

In construing this provision, in *Wijerama v. Paul (1973) 76 NLR 241* it was held that:

> *Notwithstanding that the decision of an inferior tribunal is by a statute made final in the manner of section 18 of the Medical Council Ordinance, certiorari can still issue for excess of jurisdiction or for error of law on the face of the record or on the ground of bias or violation of the principles of natural justice. In the present case, there was error of law on the face of the record. Although the Medical Council did not give reasons for its decision, it maintained a complete record of its proceedings and incorporated all the relevant evidence. There was no evidence in support of the charge that the letter written by the respondent to the editor of the newspaper amounted to an advertisement by the respondent of his professional skill. In the circumstances, the decision of the Medical Council should be quashed.*

Regulation 55 of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971, published in Government Gazette of August 15, 1971 provided that "*Section 45 of the Courts Ordinance (which conferred jurisdiction on the Supreme Court to issue writs of habeas corpus) shall not apply in regard to any person detained or held in custody under any emergency regulation.*"

In *Hidaramani v. Ratnavale (1971) 75 NLR 67* the majority of the Supreme Court held that regulation 55 is intended to remove the court's jurisdiction to issue a writ of habeas corpus only in respect of a lawful detention under any emergency regulation and not otherwise. In other words, regulation 55 will not apply to the case of a person unlawfully detained under an invalid detention order made in abuse of the powers conferred by regulation 18(1).

In *Abeywickrema v. Pathirana [1986] 1 Sri LR 120 at 156*, Sharvananda C.J. opined that "*Ouster clauses do not prevent the court from intervening in the case of excess of jurisdiction*".

The parameters of the phrase "excess of jurisdiction" is so wide. That should not be confined to the narrow question whether the administrative body or tribunal had jurisdiction to inquire into the matter. There may be a number of instances where despite the administrative body having jurisdiction to embark upon the inquiry, in the course of the inquiry, it does or omits to do something of such a nature as to make the decision a nullity. That may include the administrative body making a decision which it has no power to make. It may have given the decision in bad faith. It may have in good faith misdirected itself in construing vital documents. It may have taken irrelevant matters into

consideration and ruled out relevant matters in the process. It may have failed in the course of the inquiry to comply with the rules of natural justice such as violation of *audi alteram partem rule*. This list is not exhaustive. These are all, in broader sense, jurisdictional issues.

In *Gunasekera v. De Mel, Commissioner of Labour (1978) 79(2) NLR 409 at 426* the Supreme Court held that:

> *Lack of jurisdiction may arise in different ways. While engaged on a proper inquiry the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction.*

It is the contention of the learned President's Counsel for the petitioners that:

> *The promotion of the 16th-51st respondents as directed by the AAT would compel the PSC to contravene its own procedural rules as published in the Government Gazette Extraordinary bearing No. 1589/30 dated 20.02.2009 and as such directs a commission of an act which is totally without jurisdiction and consequently the order sought to be impugned is ultra vires and/or vitiated by an error of law which goes to jurisdiction.*

Further the learned President's Counsel says that:

> *The said order of the AAT dated 02.11.2015 is also completely illegal and arbitrary in that it purports to breach the substantive rights of the petitioners by ante dating the*

> *promotions of the 16th-51st respondents beyond the appointment date of the petitioners-without having heard the petitioners or without having considered the fundamental flaw in the failure of the 16th-51st respondents to have made the petitioners parties to the said Appeal No. AAT/179/2014 (PSC) and as such is contrary to the principles of natural justice.*

I hold that section 8(2) of the Administrative Appeals Tribunals Act does not operate as a blanket prohibition on the Court of Appeal to exercise writ jurisdiction over the decisions of the Administrative Appeals Tribunal.

The part (a) of the first preliminary objection fails.

The part (b) of the first preliminary objection has no relevancy at all to the present dispute.

Article 61A of the Constitution reads as follows:

> *Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call into question any order or decision made by the [Public Service] Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

Article 61A of the Constitution provides immunity from legal proceedings of the decisions of the Public Service Commission and not those of the Administrative Appeals Tribunal. As held by the

Supreme Court in *Ratnayake v. Administrative Appeals Tribunal [2013] 1 Sri LR 331*, Article 61A of the Constitution has no application to the decisions of the Administrative Appeals Tribunal and there is no corresponding provision in the Constitution which ousts the jurisdiction of the Court of Appeal conferred by Article 140 of the Constitution in regard to the decisions of the Administrative Appeals Tribunal.

The part (b) of the first preliminary objection also fails.

Let me now quote the second preliminary objection of the said respondents:

> *The application of the petitioners can not be maintained since the issue before this Court has already been judicially determined by the Supreme Court with special observation that the dispute in question warrants no judicial review as a matter of a legal issue and/or violation of law to be questioned in relation to a decision of Public Service Commission but to be addressed by way of administrative procedures.*

What the respondents attempt to say here, if I understand correctly, is that the matter is *res judicata*. I have no reservation to dismiss that objection unhesitatingly. What has happened is, after the Public Service Commission refused the application of the 16th-51st respondents for promotions, the said respondents have gone before the Supreme Court by way of a Fundamental Rights Application (SC/FR/78/2013). The Supreme Court has refused to grant leave to proceed with the observation (not a ruling) that the grievance of those officers "*may be addressed by way of*

appropriate administrative procedures" thereby indirectly intimating that they can go before the Administrative Appeals Tribunal against the decision of the Public Service Commission as provided for by Article 59(2) of the Constitution. That observation can by no stretch of imagination operate as *res judicata* or judicial determination by the Supreme Court which prevents this Court from exercising writ jurisdiction in order to probe the *vires* of the decision of the Administrative Appeals Tribunal.

This leads me to consider the third preliminary objection of the respondents. It reads as follows:

> *The application of the petitioner has become redundant and therefore cannot be maintained since;*
>
> *(1) The decision of the AAT/179/2014 which is sought to be reviewed by the application of the petitioner has been already complied and acted upon and by the Public Service Commission with necessary and further directions*
>
> *and therefore,*
>
> *(2) The decision 'in force' and operative in relation to the issue before Court to be determined at present is a decision of the Public Service Commission which has been constitutionally declared to be immune from legal proceedings in any manner whatsoever other than in terms of the Article 126 of the Constitution. (vide R1)*

The Public Service Commission at the beginning refused the application of the 16th-51st respondents for appointment as

Assistant Superintendent of Customs Grade II. In appeal to the Administrative Appeals Tribunal as provided for by Article 59(2) of the Constitution, the Administrative Appeals Tribunal changed the decision of the Public Service Commission and allowed the appeal of the said respondents. It is this decision of the Administrative Appeals Tribunal which the Public Service Commission was compelled to implement. There is no independent decision taken by the Public Service Commission which attracts immunity in terms of Article 61A of the Constitution. If the decision of the Administrative Appeals Tribunal is removed, there is nothing for the Public Service Commission to implement. If the Administrative Appeals Tribunal decision is bad, everything which flaws from it also becomes bad.

Lord Denning in *Macfoy v. United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172* stated thus:

> *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void. Without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

This passage was quoted with approval by G.P.S. de Silva J. (later C.J.) in *Rajakulendran v. Wijesundera [1982] 1 Sri Kantha LR 164 at 168-169*.

This principle was applied by the Supreme Court in the recent case of *Padmal Ariyasiri Mendis v. Vijith Abraham de Silva [2016] BLR 69 at 73* where it was held that:

> *The deed No. 1551 is void ab initio and therefore the title does not pass from the plaintiff to any other person. Therefore deed which was executed thereafter, i.e. deed No. 976 is also void ab initio.*

The third preliminary objection is also unsustainable.

Preliminary objections are overruled.

The costs of this inquiry will abide the final outcome of the application.

Judge of the Court of Appeal