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

K.N. Mankotte,

'Jayanthi',

Kirindiwela.

Petitioner

CASE NO: CA/WRIT/249/2015

Vs.

1. Justice S.I. Imam (Chairman),
2. Edmund Jayasuriya (Member).
3. G.P. Abeykeerthi (Member),
   Administrative Appeals Tribunal,
   No. 35,
   Silva Lane,
   Dharmapala Place,
   Rajagiriya.
4. Secretary,
   Public Service Commission,
   No. 177,
   Nawala Road,
   Narahenpita,
   Colombo 5.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: J.C. Weliamuna, P.C., for the Petitioner.
Sumathi Dharmawardena, D.S.G., for the Respondents.

Decided on: 06.03.2019

Samayawardhena, J.

The petitioner filed this application seeking to quash by way of writ of certiorari the decision of the Administrative Appeals Tribunal marked P11 dated 12.03.2015 whereby the Tribunal refused to ante-date the petitioner's appointment to the post of Director (Extension and Training) of the Department of Agriculture with effect from 24.10.2008; and to compel the respondents by way of writ of mandamus to do it.

There is no dispute that the petitioner had been a public officer since 1977 attached to the Department of Agriculture holding various positions. When he was a Deputy Director, he was appointed as the Acting Director (Extension and Training) effective from 24.10.2008 for three months. Then he was appointed as the Additional Director (Extension and Training) from 03.11.2008, and confirmed in the post of Director (Extension and Training) on 09.06.2010 with effect from 24.11.2009. His plea is to ante-date his appointment in the post of Director (Extension and Training) effective from 24.10.2008, i.e, from the date he was appointed as the Acting Director of the said post.

Learned President's Counsel for the petitioner and the learned Deputy Solicitor General for the respondents agreed to dispose of argument by way of written submissions. Written submissions of both parties were filed together with no right of reply. Hence heavy responsibility on the Court.

The pivotal argument of the learned Deputy Solicitor General for the respondents taken up in the written submission is that in view of section 8(2) of the Administrative Appeals Tribunal Act, No. 4 of 2002, "*the order delivered by the Administrative Appeals Tribunal is final and conclusive thus cannot be questioned in a Court of Law.*" I am unable to agree with this submission.

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 Tribunal Act 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:

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

> *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 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.*

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 second argument of the learned Deputy Solicitor General is that the petitioner after three months of acting in the post of Director (Extension and Training), was appointed to "cover up duties" in the said post from 24.01.2009 to 13.11.2009, and "cover up duties" is only a "departmental arrangement" not falling within the definition of appointment in terms of section 1.1 of Chapter I of the Establishments Code, and therefore ante-dating the appointment is contrary to the provisions of the Establishments Code.

Learned Deputy Solicitor General has quoted 13:7 in Chapter II of the Establishments Code to show the difference.

> *13:7 No additional remuneration is payable unless an officer has been appointed by the Appointing Authority to act in a post or to attend to the duties of a post. Any Departmental arrangement to cover up the duties of a vacant post will not entitle the officer covering up duties, to additional remuneration.*

The fact that the petitioner was appointed to "cover up duties" in the said post from 24.01.2009 to 13.11.2009 is factually incorrect. Such a position has not even been taken up by the

Administrative Appeals Tribunal in the impugned order. The mistake has been done by the petitioner himself in paragraph 7 of the petition. In fact, during that period the petitioner was not "covering up duties" but "attending to the duties" of the post of Director (Extension and Training).

This has correctly been stated by the Administrative Appeals Tribunal in its order in the following manner:

> *By letter dated 12.08.2011 the Additional Secretary (Administration) on behalf of the Secretary to the Ministry of Agriculture sought the approval of the PSC to appoint the Appellant to act in the post of Director (Extension and Training) from 24.10.2008 to 23.01.2009 and subsequently to be appointed to attend to the duties in the post, in addition to his permanent post of Additional Director (Extension and Training). (Annexure IV) Hence by letter dated 15.09.2011 the PSC granted approval to appoint the Appellant to (act in) the post of Director (Extension and Training) from 24.10.2008 to 23.01.2009 (a period of approximately 3 months) and subsequently from 24.01.2009 to 26.04.2011 (a period of approximately 2 years and 3 months) to attend to duties in the post. (Annexure V)*

This is supported by paragraph 6 of R1 and paragraph 2(I) of R2, which are documents filed by the respondents themselves with their objections.

If an officer is appointed to "*attend to the duties*" of a post, in terms of section 12:3 of Chapter VII of the Establishments Code,

"*such an officer should be paid two thirds of the additional remuneration he will receive had he been appointed to act in that post.*"

The second argument of the learned Deputy Solicitor General fails.

The third and final argument of the learned Deputy Solicitor General is that according to section 1:10 of Chapter II of the Establishments Code "*The Appointing Authority should not ante-date an appointment on any grounds without the authority of the Director of Establishments*", and "*the petitioner's appointment as the Director (Extension and Training) cannot be ante-dated to 24th October 2008 since the petitioner has not received the authority of the Director of Establishments to backdate his appointment as Director (Extension and Training).*"

It is on this reason alone the Administrative Appeals Tribunal dismissed the appeal of the petitioner.

> *As the Appellant has not received the authority of the Director of establishments to backdate his appointment as Director (Extension and Training) we are of the view that the appeal of the Appellant to ante-date his appointment as Director (Extension and Training) to 24.10.2008 cannot be permitted and thus the appeal of the Appellant is hereby dismissed.*

This argument of the learned Deputy Solicitor General/the above finding of the Administrative Appeals Tribunal is factually incorrect.

The complete section 1:10 of Chapter II of the Establishments Code reads as follows:

> *1:10 The Appointing Authority should not ante-date an appointment on any grounds without the authority of the Director of Establishments.*
>
> *1:10:1 Application to do so should be made by the Appointing Authority through the Secretary to the Ministry to the Director of Establishments, with reasons. The following conditions too require to be satisfied.*
>
> *1:10:2 There has been a substantive vacancy in the post from the date to which the appointment is proposed to be ante-dated.*
>
> *e.g. The post of an officer on leave prior to retirement does not become vacant until his retirement actually takes effect.*
>
> *1:10:3 On the date to which it is proposed to ante-date the appointment, the officer was fully qualified for appointment to the post in terms of the Scheme of Recruitment applicable on such date.*
>
> *1:10:4 The officer was performing all the duties of the post continuously from such earlier date on an acting appointment made by the Appointing Authority by a letter of appointment duly issued to such effect.*
>
> *1:10:5 The selection for the substantive appointment was made in terms of the "Method of Recruitment" laid down in the Scheme of Recruitment.*

It is clear from section 1:10:1 above that it is the duty of the Appointing Authority (and not the officer) through the Secretary

to the Ministry to write to the Director of Establishments seeking authority to ante-date an appointment. But both the learned Deputy Solicitor General and the Administrative Appeals Tribunal appear to have gone on the basis that it is the duty of the petitioner officer to get the approval from the Director of Establishments, which is incorrect.

By R7—which is a document tendered by the respondents—it is clear that the Secretary to the Ministry has written to the Appointing Authority—the Public Service Commission seeking approval to ante-date the appointment stating in particular that the petitioner officer has satisfied all the conditions enumerated in section 1:10 of Chapter II of the Establishments Code.

Then the next question is whether the Appointing Authority has obtained the authority from the Director of Establishments.

Before the Public Service Commission was constituted, the Cabinet of Ministers was the Appointing Authority. As seen from R6—a document tendered by the respondents themselves—at that time when the application for ante-dating was made to the Cabinet of Ministers by the Minister of Agriculture, the following recommendation has been made:

> *The above Memorandum (dated 07.09.2010 by the Minister of Agriculture on Backdating of the date of appointment to the post of Director Extension and Training Department of Agriculture) was considered along with the observations of the Minister of Finance and Planning and the report dated 27.06.2012 by the Director General of Establishments addressed to the Secretary to the Cabinet. After*

> *discussion, it was decided to recommend to the Cabinet to instruct the Secretary, Ministry of Agriculture to take up this matter with the Public Service Commission, since the matter comes under the purview of the PSC.*

From the above it is clear that: (a) the Cabinet of Ministers referred the matter to the Public Service Commission not on any other reason but because at that time the Public Service Commission has been constituted; (b) the Director of Establishments has sent the report dated 27.06.2012 to the then Appointing Authority—the Cabinet of Ministers.

What is the recommendation of the Director of establishments on that matter? The recommendation of the Director of Establishments/Minister of Public Administration, according to circle page 75 of P10, tendered by the petitioner with the petition, in summary, is that he has no objections for ante-dating the appointment provided the officer has satisfied the conditions of the Establishments Code. ("ආයතන සංග්‍රහයේ අවශ්‍යතා සපුරා ඇත්නම් විරුද්ධත්වයක් නැත. මෙතෙක් අනුගමනය කර ඇති ප්‍රතිපත්තියට අනුකූල විය යුතු අතර ජ්‍යෙෂ්ඨතා අනු පිලිවෙලෙහි වෙනසක් වේද යන්නද පරීක්ෂා කළ යුතුය.") According to paragraph 11 of the petition, this document was a part of the record before the Administrative Appeals Tribunal, which has not been disputed by the learned Deputy Solicitor General.

Then it is clear that the Administrative Appeals Tribunal has misdirected itself on primary facts when it dismissed the petitioner's appeal on the basis that "*the Appellant has not*

received the authority of the Director of establishments to backdate his appointment as Director (Extension and Training)".

Furthermore, the petitioner has tendered documents marked P12(a)-P12(h) with his counter affidavit to prove, Dr. A.A.L. Amarasinghe, another officer similarly circumstanced as the petitioner, whose appointment as the Director (Field Crop Research and Development) was ante-dated by a decision of the Cabinet of Ministers when the Public Service Commission was defunct, over two years to the time he was appointed originally to the post on acting basis. The learned Deputy Solicitor General has not disputed it.

For the aforesaid reasons, I quash the decision of the Administrative Appeals Tribunal dated 12.03.2015 by certiorari and direct the Tribunal by mandamus[2] to allow the appeal of the petitioner by ante-dating the petitioner's appointment to the post of Director (Training and Extension) effective from 24.10.2008.

Judge of the Court of Appeal

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[2] In Methodist Trust Association of Ceylon v. Divisional Director of Education of Galle, CA/WRIT/192/2015 decided on 08.01.2019 I held that "*It is a myth that mandamus can only be issued against natural persons. Mandamus, like any other prerogative writ, can be issued against natural, juristic or non-juristic persons including tribunals, corporations, public bodies, public officials identified by their official designations provided the other requirements to issue mandamus are fulfilled.*"