

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

In the nature of an application for Writs of Certiorari against the Order dated 04.05.2009 of the Administrative Appeals Tribunal and writs of Mandamus under Article 140 of the Constitution.

P.S. Weeraratne

No. 95, Kandewatte,

Galle.

Petitioner-Appellant

Case No: CA(Writ) 410/2009

Administrative Appeals Tribunal

Appeal No: AAT/44/2008 (PSC)

Vs.

Public Service Commission

No.177, Nawala Road,

Narahenpita,

Colombo 05.

Respondent-Respondent

1. Chairman

Public Service Commission,

No.177, Nawala Road,

Narahenpita,

Colombo 05.

2. Secretary
Public Service Commission,
No.356B, Carlwil Place,
Galle Road,
Colombo 03.
3. Mr. N.H. Pathirana
Member,
Public Services Commission.
4. Mrs. Kanthi Wijethunge
Member,
Public Services Commission.
5. Mr. S.C. Mannapperuma,
Member,
Public Services Commission.
6. Mr. Ananda Seneviratne
Member,
Public Services Commission.
7. Dr. I.M. Zoyza Gunasekara
Member,
Public Services Commission.
8. Mr. S. Thillanadarajah
Member,
Public Services Commission.
9. Mr. Sunil Sirisena
Member,
Public Services Commission.
10. Mr. A. Mohammed Nahiya
Member,
Public Services Commission.

11. Secretary
Ministry of Education and Higher
Education,
"Isurupaya",
Battaramulla.
12. Provincial Education Director (South)
Southern Province,
Ministry of Education,
Upper Dicksons Road,
Galle.
13. Zonal Education
Zonal Director's Office,
Olcotte Mawatha,
Galle.
14. Justice S.I. Imam,
Chairman,
Administrative Appeals Tribunal,
No.39/1,
Horton Place,
Colombo 07.
15. Mr. Edmund Jayasuriya
Member,
Administrative Appeals Tribunal,
No.39/1,
Horton Place,
Colombo 07.

Respondents

Before: Janak De Silva J.

Counsel:

Muditha Premachandra with Sharmalee S. Archchige for the Petitioner

Chaya Sri Nammuni Senior State Counsel for the Respondents

Written Submissions tendered on:

Appellant-Petitioner on 04.09.2018

Respondents on 08.10.2018

Decided on: 03.05.2019

Janak De Silva J.

The Appellant-Petitioner (Petitioner) was appointed as a teacher in 1970 and at all times material to this application was serving at Richmond College, Galle. By letter dated 22.12.1998 she requested for two weeks leave from 24.12.1998 to 07.01.1999 travel to Canada to attend the funeral of a relation (P6). This was approved by the Secretary Ministry of Education and Higher Education by letter dated 29.01.1999 (11R2).

The Petitioner claims that while she was in Canada, she fell sick and was not in a fit state to travel and informed the relevant authorities including the Sri Lankan High Commission in Canada along with medical certificates (P8, P9, P10 and P11). However, the Secretary, Ministry of Education has in his affidavit stated that there is no record of the ministry having received these documents. However, by letter dated 08.07.1999 (P12) the Southern Province Zonal Director has recommended the application of the Petitioner for the extension of overseas leave from 07.01.1999. The overseas leave of the Petitioner was then extended until 08.02.1999 (P13).

Thereafter, the Petitioner sought a further two months extension of her overseas leave by letters dated 10.02.1999 and 16.03.1999 (P14 and P15). It appears that no decision was taken on these requests. By letter dated 30.04.1999 (P18) the Petitioner applied to retire from service with effect from 23.03.1999. The Petitioner was issued a vacation of post notice dated 23.03.2001 (P23) to be effective from 08.02.1999, the last date of her approved overseas vacation leave.

The Petitioner denies receiving the vacation of post notice and states that she came to Sri Lanka for the first time on 31.03.2006 after leaving for Canada in 1998 and was interested in finding out what happened to her application for retirement and then found out that a vacation of post notice had been issued to her. The Petitioner states that thereafter she appealed to the Secretary, Ministry of Education (P26) who informed that the appeal cannot be entertained as it was not made within time (P28). She has then appealed to the Public Service Commission (PSC) by appeal dated 03.09.2007 (P30) which had been refused as it was made 8 years after the vacation of post notice (P31).

The Petitioner then appealed to the Administrative Appeals Tribunal (AAT) by letter dated 04.03.2008 (P32) which was dismissed (P35). Hence this application.

The Petitioner has sought the following reliefs:

- (b) Issue a writ of certiorari quashing and setting aside the decision of the AAT dated 04.05.2009 marked P35;
- (c) Issue a writ of certiorari quashing the decision marked as P23 issued by the Zonal Director of Education of Southern Province, vacating the post of the Petitioner;
- (d) Issue a writ of certiorari quashing the decision marked as P28 issued by the Secretary to the Ministry of Education rejecting the appeal of the Petitioner for reinstatement and retirement;
- (e) Issue a writ of certiorari quashing the decision marked P29 issued on behalf of the Southern Province Director of Education rejecting the appeal dated 20.05.2006 of the Petitioner for reinstatement and retirement;

- (f) Issue a writ of certiorari quashing the decision marked as P31 issued by the Senior Secretary of the PSC rejecting the appeal dated 03.08.2007 of the Petitioner for reinstatement and retirement;
- (g) Issue a writ of mandamus directing the Respondent-Respondent, 1st and 2nd Respondents and 11th to 13th Respondents to reinstate the Petitioner to work and to retire from 23.03.1999 with all pension rights as of 23.03.1999;
- (h) Issue a writ of mandamus directing the Respondent-Respondent, 1st and 2nd Respondents and 11th to 13th Respondents to take all necessary steps to reinstate the Petitioner to work and retire from 23.03.1999, with all pension rights as of 23.03.1999 according to the Class she was in, with all arrears of pension up to date, from 23.03.1999.

On 08.09.2015 the learned counsel for the Petitioner informed court that she is not pursuing the relief seeking to have pension rights since the Petitioner had not been made permanent in the post she held.

Before considering the merits of the application I wish to set out the scope of the judicial review that this Court must venture to perform in the circumstances of this matter. Article 61A of the Constitution reads:

“Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the 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.”

In *Ratnasiri and Others v. Ellawla and Others* [(2004) 2 Sri.L.R. 180 at 190] Marsoof J. held:

“In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the

Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent.”

However, in *Ratnayake v. Administrative Appeals Tribunal and Others* [SC (Spl/LA) No. 173/2011, S.C.M. 22.02.2013] the Supreme Court decided that Article 61A of the Constitution does not prevent the Court of Appeal from exercising judicial review in respect of orders made by the AAT since AAT is not a body exercising any power delegated to it by the PSC, and is an appellate tribunal constituted in terms of Article 59(1) of the Constitution.

Nevertheless, it is an established rule of interpretation that a court cannot do indirectly what it is prohibited from doing directly [*Bandaranaike v. Weeraratne and Others* (1981) 1 Sri.L.R. 10 at 16]. Accordingly, I hold that this Court is not empowered to grant any of the relief (c) to (h) claimed in the petition.

The Supreme Court has taken two different approaches to legislative attempts at restricting or ousting the jurisdiction of the Court of Appeal set out in Article 140 of the Constitution otherwise than by way of constitutional provisions. On one hand it has been held that section 22 of the Interpretation Ordinance restricted the Court of Appeal exercising judicial review in certain circumstances [*Edmond v. D.S. Fernando* (1995) 1 Sri.L.R. 407; *Withanaratchi v. Gunawardena and Others* (1996) 1 Sri.L.R. 253]. However, in *Atapattu v. People's Bank* [(1997) 1 Sri.L.R. 208] the Supreme Court held that the jurisdiction of the Court of Appeal set out in Article 140 of the Constitution can only be ousted by a constitutional provision. Thereafter, in *Moosajeas Limited v. Arthur and Others* [(2006) 1 Sri.L.R. 65] the Supreme Court held that Article 140 of the Constitution prevails over section 22 of the Interpretation Ordinance.

Although the earlier decisions were not overruled, I am in respectful agreement with the approach taken by the Supreme Court in *Atapattu v. People's Bank* (supra) and *Moosajeas Limited v. Arthur and Other* (supra) and hold that section 8(2) of the Administrative Appeals Tribunal Act No. 4 of 2002 which states that *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* does not oust the jurisdiction vested in the Court of Appeal in terms of Article 140 of the Constitution to exercise judicial review over orders made by the AAT.

Therefore, there is no impediment to this Court considering the relief claimed in prayer (b) to the petition. The basis of relief if any must be based on Illegality, Irrationality or Procedural Impropriety.

The AAT in its order P35 has considered the failure on the part of the Petitioner to tender an appeal against the vacation of post notice within three months from the date on which it was served on her as stipulated in Section 37.1 Chapter XLVIII of the Establishment Code. The Petitioner contends that she was never served with the vacation of post notice and obtained a copy only in 2007 when she was inquiring into her application for retirement. Her appeal to the PSC is 8 years after the date of issue of the vacation of post notice.

I find it difficult to accept the version of the Petitioner. In any event, if that is the correct position it shows a complete lack of diligence on her part in not checking on the status of her application to retire. The Petitioner has sought discretionary relief from court and it is established law that the conduct of the Petitioner is relevant in such context. The Petitioner has been sleeping over her rights and I am not inclined to exercise the discretion of court in her favour. In any event, I see no illegality, irrationality or any procedural impropriety in the order of the AAT.

Applications is dismissed with costs.

Judge of the Court of Appeal