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

C.A. WRIT/ 541/2008

In the matter of an application for mandates in the nature of *Writs of Certiorari and Mandamus* under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. **C. Samarasinghe**
   No. 211,
   Jayasiripura,
   Anuradhapura

2. **D.B. Edirisuriya**
   No. 295/5,
   Rajamaha Vihara Road,
   Mirihana,
   Kotte

3. **K.M. Karunaratne**
   Balawala,
   Bopitiya

4. **K.G. Gunapala**
   No. 128,
   Gomarankella,
   Galenbindunuwewa

5. **W.G. Dhanapala Gamage**
   Watte Gedara,
   Maradankadawela

PETITIONERS

-Vs-

1. **H.B. Ratnayake**
   Chairman,
   Provincial Public Service Commission,
   (North Central Province)
   Anuradhapura

1A. S.M. Galagoda
Chairman,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

1B. R.B. Abeysinghe
Chairman,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

2. P.E. de Silva
Member,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

2A. H.M.H.B. Ratnayake
Member,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

3. D.D. Dissanayake
Member,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

3A. H.M. Sunil Tennakoon
Member,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

3B. H.M.K. Herath
Member,
Provincial Public Service Commission,
(North Central Province)
Anuradhapura

4. S.M.S. Tennakoon
   Secretary,
   Provincial Public Service Commission,
   (North Central Province)
   Anuradhapura

4A. R.M. Wanninayake
   Secretary,
   Provincial Public Service Commission,
   (North Central Province)
   Anuradhapura

5. Hon. Karunarathna Divulgane
   Governor,
   North Central Province,
   Anuradhapura

5A. Hon. P.B. Dissanayake
   Governor,
   North Central Province,
   Anuradhapura

6. A. Talakotunage
   Chief Secretary,
   North Central Province,
   Anuradhapura

6A. W.G. Dayananda
   Chief Secretary,
   North Central Province,
   Anuradhapura

6B. H.M.R.B. Herath
   Chief Secretary,
   North Central Province,
   Anuradhapura

6C. K.A. Thilakaratne
   Chief Secretary,
   North Central Province,

Anuradhapura

7. **Hon. Berty Premalal Dissanayake**

   Chief Minister,
   North Central Provincial Council,
   Anuradhapura

7A. **Hon. S.M. Ranjith**

   Chief Minister and Minister of Law and Order, Finance and Plan Implementation, Local Government, Provincial Irrigation, Land, Provincial Road Development, Rural Infrastructure Facilities, Sports and Youth Affairs,
   North Central Provincial Council,
   Anuradhapura

7B. **Hon. S.M. Peshala Jayaratne Bandara**

   Chief Minister and Minister of Law and Order, Finance and Planning, Local Government, Provincial Road Development, Rural Infrastructure Facilities and Special Projects, Tourism, Education, Information Technology and Cultural Affairs,
   North Central Provincial Council,
   Anuradhapura

8. **Hon. H.B. Semasinghe**

   Minister of Irrigation, Land, Rural Development and Woman Affairs,
   North Central Provincial Council,
   Anuradhapura

9. **Hon. A.S.K. Ratnayake**

   Minister of Agriculture, Agro Marketing Affairs, Irrigation and Animal Welfare,
   North Central Provincial Council,
   Anuradhapura

9A. **Hon. K.H. Nandasena**
Minister of Provincial Health, Indigenous Medicine, Social Welfare, Probation and Child Care, Environment and Provincial Council Affairs,
North Central Provincial Council,
Anuradhapura

10. **Hon. R.M.P.B. Ratnayake**
Minister of Agriculture, Agro Products Marketing, Animal Production, Animal Health, Fisheries and Housing Affairs,
North Central Provincial Council,
Anuradhapura

11. **Hon. Gamage Weerasena**
Minister of Health, Indigenous Medicine, Social Welfare, Probation and Child Care,
North Central Provincial Council,
Anuradhapura

11A. **Hon. S.M. Ranjith**
Minister of Transport, Sports, Youth Affairs, Co-operative,
North Central Provincial Council,
Anuradhapura

12. **The Director General of Pensions**
Department of Pensions,
Maligawatta,
Colombo 10

13. **Provincial Road Development Authority of the North Central Province**
H.B. Semasinghe Mawatha,
Anuradhapura

14. Hon. Attorney General
Attorney General's Department,
Colombo 12
RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Riad Ameen with Rushitha Rodrigo instructed by Paul Ratnayake Associates for the Petitioner

Arjuna Obeysekere DSG for the Respondents

Decided on : 05.08.2019

A.H.M.D. Nawaz, J.

The Petitioners preferred the present application to this court seeking *inter alia;*

a) A mandate in the nature of a writ of *certiorari* to quash the letters marked "P33 (a) to P33 (f)" which contain a decision to terminate the services of the Petitioners and;
b) A mandate in the nature of a writ of *mandamus* compelling the 1st to 12th Respondents to take steps according to law to make abatements from the salaries of the Petitioners so as to make the Petitioners contributors for the Widows' and Orphans' Pensions Fund.

At the outset it is pertinent to observe that the matter related to prayer (e) of the Petition whereby the Petitioners had sought relief in respect of their pensions, was argued before the Provincial High Court and the appeal is set to be pending in case bearing No. CA PHC 173/2007. Therefore this court would not venture into the aforementioned matter. However it must be noted that the Petitioners' Counsel

indicated to court that they would reserve the right to adjudicate pension rights at an appropriate stage.

The factual matrix

It is an admitted fact that the Petitioners were initially employees of the Road Development Authority. Following the enactment of the 13th Amendment to the Constitution, in order to meet the manpower requirements of the North Central Provincial Council, the Petitioners agreed to be absorbed into the provincial public service by the letters dated 14.06.1990 marked "P1 (a) to P1 (f)".

The Petitioners claimed that following their absorption into the provincial public service they became entitled to pensions. The agitation by the Petitioners of their pension rights eventually led to the case bearing No. 29/2003 being filed in the Provincial High Court of the North Central Province in Anuradhapura. The Provincial High Court dismissed the aforementioned writ application filed by the Petitioners and the Petitioners have appealed against this order.

In the meantime the Petitioners received the letters marked "P33 (a) to P33 (f)", dated 01.04.2008, informing them that their services had been terminated. The letters stated that the decision to terminate the services of the Petitioners was arrived at by the Board of Ministers on 17.10.2007 and thereafter approved by the Governor of the North Central Province. It is this decision that the Petitioners seek to review before this court.

It was the submission of the learned Counsel for the Petitioners that the letters marked "P33 (a) to P33 (f)" are ultra vires on one or more of the following grounds, namely;

a) The fact that under section 32(2) of the Provincial Councils Act, No. 42 of 1987 the Governor does not have jurisdiction to dismiss employees of the provincial public service in the absence of a code of conduct as stipulated in section 32(3) of the same Act;

b) In any event, assuming that the Governor did have the power to so dismiss employees without reference to a code of conduct, the decision to terminate the services of the Petitioners had in fact been reached by the Board of Ministers and the Governor had failed to exercise independent discretion in respect of the matter;

c) The fact that the Petitioners were not afforded a hearing prior to their dismissal thereby violating the rules of natural justice.

On behalf of the Respondents the learned Deputy Solicitor General took up the position that the decision to terminate the services of the Petitioners was intra vires and in terms of Section 32 of the Provincial Councils Act, No. 42 of 1987.

The argument of the learned Deputy Solicitor General was that the Petitioners had been absorbed into the provincial public service under the same conditions that they had been employed in the Road Development Authority and that therefore their posts were not pensionable. In the circumstances the learned Deputy Solicitor General argued that the suppression of the posts of the Petitioners could not have been made in terms of the Pensions Minute.

Furthermore, the learned Deputy Solicitor General submitted that the decision contained in the letters marked "P33 (a) to P33 (f)" was in fact reached by the Governor. The learned Deputy Solicitor General drew the attention of the court to the documents marked "R8" and "R9" which he submitted were recommendations to the Governor by the Board of Ministers and the Provincial Public Service Commission respectively, regarding the services of the Petitioners. It was submitted that the process of terminating the services of the Petitioners culminated with the final decision of the Governor as contained in the document marked "R10" and that it is this decision that is reflected in the letters marked "P33 (a) to P33 (f)".

The final submission of the learned Deputy Solicitor General was that the termination of the services of the Petitioners had no co-relation with the case filed by the Petitioners in the Provincial High Court of Anuradhapura. In other words the learned Deputy Solicitor General submitted that the decision to issue the letters marked "P33 (a) to P33 (f)" was not arrived at because the Petitioners had invoked the writ jurisdiction of the Provincial High Court but that the decision had been taken prior to the case being filed. It was the contention of the learned Deputy Solicitor General that because the matter regarding the pensions of the Petitioners was pending in court the authorities had decided to stay their hand in respect of the decision to terminate the services of the Petitioners. Therefore when the case was concluded, the Respondents implemented the decision they had contemplated previously.

The absence of a code of conduct

In my view an appropriate starting point would be to ascertain with certainty as to who was statutorily empowered to dismiss employees of the provincial public service. In other words, who had the legal authority to dismiss employees such as the Petitioners who were officers of the provincial public service?

At this juncture reference must be made to Section 32 of the Provincial Councils Act, No. 42 of 1987 which is as follows:

> *"(1) Subject to the provisions of any other law the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service of each Province is hereby vested in the Governor of that Province.*
>
> *(2) The Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service to the Provincial Public Service Commission of that Province.*

(3) The Governor shall provide for and determine all matters relating to officers of the provincial public service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principle to be followed in, making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers. In formulating such schemes of recruitment and codes of conduct the Governor, shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service arid the codes of conduct prescribed for officers holding corresponding offices in the public service."

Section 32(1) clearly provides that powers related to the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service vests with the Governor. Furthermore, as provided for under section 32(2), the aforementioned powers may be delegated by the Governor to the Provincial Public Service Commission.

Section 32(3) is vital in respect of the present application as it empowers the Governor to formulate recruitment schemes and codes of conduct which must be followed in the exercise of transfers, dismissals and disciplinary control of officers of the provincial public service. Section 32(3) further encapsulates that such schemes of recruitment and codes of conduct must be in line with those prescribed for corresponding officers in the public service of the central government.

The first ground relied upon by the learned Counsel for the Petitioners to assert that the decision arrived at by the Respondents is ultra vires, was the fact that the Governor terminated the services of the Petitioners in the absence of a code of conduct as stipulated under section 32(3) of the Provincial Councils Act. In doing so the learned Counsel for the Petitioners contended that the Respondents had not only breached the rule of law but also acted contrary to the manifest intention of the legislature.

It is undoubtedly true that the rule of law as articulated by Dicey encompasses that any arbitrary exercise of discretionary power by administrative authorities must be prohibited and any such arbitrary decision is liable to be struck out by judicial review. – *See* Dicey, ***The Law of the Constitution***, 4th Edition and the valuable modern account by Lord Bingham titled ***"The Rule of Law"*** in Cambridge Law Journal, 66(1), March 2007 at page 67.

The learned Counsel for the Petitioners submitted that the mere vesting of the power of dismissal in the Governor is insufficient for the Governor to exercise the said power. In other words, the learned Counsel for the Petitioners submitted that in order to ensure that the power vested in a decision-maker is not exercised arbitrarily there must be rules and regulations surrounding the exercise of the power.

I bear in mind the percipient passage in ***Administrative Law*** (11th Edition, page 15) by William Wade and Christopher Forsyth which is as follows:

> *"The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognized rules and principles which restrict discretionary power. Coke spoke in picturesque language of "the golden and straight metwand" of law as opposed to "the uncertain and crooked cord of discretion". Many of the rules of administrative law are rules for restricting the wide powers which Acts of Parliament confer very freely on ministers and other authorities."*

The learned Counsel for the Petitioners also cited a host of judgments that articulate the notion that in order to ensure the protection of the rule of law, the exercise of powers by administrative authorities must be regulated by enabling laws. *See*, ***Ven. Ellawalla Medananda Thero v. District Secretary, Ampara*** (2009) 1 Sri. LR 54, ***Public Services United Nurses Union v. Montague Jayewickrema, Minister of Public Administration and Others*** (1988) 1 Sri. LR 229 and ***Abeywickerma v. Pathirana*** (1986) 1 Sri. LR 20.

In *Abeysinghe Arachchige Asoka v. P.R.P. Rajapksha and others* (CA Writ/ 208/2013, CA minutes of 02.09.2016) I had the opportunity to allude to the concept of the rule of law and its essence in a nutshell may be captured as follows:

> *"While there may be room for debate about the outer boundaries of the rule of law, there is no doubt that both public bodies and private persons and bodies are subject to the rule of law and that, as far as those who exercise public powers are concerned, the rule of law 'requires that they act within the powers that have been conferred upon them' and that all of their decisions and acts must be authorized by law."*

In the circumstances I acknowledge that in the absence of a code of conduct as stipulated in Section 32(3) of the Provincial Councils Act, the fact that the Petitioners were summarily dismissed is a clear breach of the rule of law.

It has to be noted that the dismissal of an official serving in the central government must be done in accordance with Regulation 7 of the Pensions Minute, by way of suppression of the post. This procedure is governed by rules and regulations and it can be observed that the intention of the legislature was for the Provincial Councils also to have in place similar mechanisms. This intention of the legislature is evident in Section 32(3) which provides that *"In formulating such schemes of recruitment and codes of conduct the Governor, shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service arid the codes of conduct prescribed for officers holding corresponding offices in the public service."*

If the legislature intended to confer absolute and unfettered discretion on the Governor of the Province as to the dismissal of employees, it would not have put in place section 32 (3) which specifically dictates that all matters relating to officers of the provincial public service must be dealt with in accordance with a code of conduct. Therefore if the argument posed by the Respondents that the powers under section 32(2) could be exercised without a code as stipulated in section 32 (3) was to be entertained, it would be a clear defiance of the manifest intention of the legislature.

Furthermore the requirement that the Governor must exercise his powers in accordance with a code of conduct that aligns with those prescribed for officers holding corresponding posts in the public service must be seen as a mechanism put in place to buttress the rule of law.

In the instant case it appears that there were no rules set out as to the termination of services of employees who were in excess of the provincial public service and therefore I take the view that on this ground the decision of the Respondents to terminate the services of the Petitioners is ultra vires.

Failure of the Governor to exercise independent discretion

As per section 32(1) it is evident that it is the Governor of the Province who holds the power to dismiss officials of the provincial public service. The Act does not provide statutory powers to the Board of Ministers of the Provincial Council to dismiss officers. It was the contention of the learned Counsel for the Petitioners that no law whatsoever grants powers of dismissal to the Board of Ministers and I take the view that at this juncture it is important to emphasize that in administrative law, what is not forbidden is not permitted.

I had occasion to advert to this proposition in ***Abeysinghe Arachchige Asoka v. P.R.P. Rajapksha and others*** (supra).

> *"This principle that what is not forbidden is permissible in law may hold good in procedural law. But it may not hold water in administrative law which requires public authorities to keep within the bounds of statutory powers. A statutory authority endowed with statutory powers has no common law power at all; it can legally do only what the statute permits and what is not permitted is forbidden."*

The learned Deputy Solicitor General however adopted the stance that the Board of Ministers had only made a recommendation to the Governor and by approving the recommendation made by the Board of Ministers, it was in fact the Governor who had made the decision to terminate the services of the Petitioners.

In these circumstances the question that arises is whether in approving the recommendation of the Board of Ministers, the Governor had exercised the statutory discretion conferred upon him independently. In other words, had the Governor brought his mind to bear vis-à-vis the termination of services of the Petitioners?

The letters marked "P33 (a) to P33 (f)" explicitly state that as there was an excess of staff in the Provincial Road Development Authority the Board of Ministers were in the process of deciding alternative places in the public service to absorb the excess staff, including the Petitioners and as the Provincial High Court case filed by the Petitioners was dismissed, the Board of Ministers arrived at the decision to terminate the services of the Petitioners and that the said decision was approved by the Governor. Then it would appear that the decision to dismiss the Petitioners was arrived at by the Board of Ministers and the Governor had merely rubber stamped the said decision.

I take the view that a mere approval of a decision cannot under any circumstance be approximated to independently arriving at the decision. In the context that the Governor of a Province is statutorily empowered to make a decision, the adoption of a recommendation made by a body that is not statutorily empowered to make the decision is undoubtedly frowned upon in administrative law. It appears that in the instant case, the Governor has abdicated his discretion to the Board of Ministers and such an action undoubtedly renders the decision ultra vires.

A slew of cases have reiterated this principle that a decision-maker must independently address his mind to the decision he makes. In *Gunaratne v. Chandrananada de Silva* (1998) 3 Sri. LR 265, Hector Yapa, J. postulated the following observations at page 274:

> *"Even though the Public Service Commission has granted their approval to the recommendation made by the respondent, having regard to the speed at which all these things had happened, it is obvious that the Public Service Commission has not brought their minds to bear on the facts of this case and taken a decision. All that the Public Service Commission has done is to approve the recommendation made by the respondent. Therefore, obviously it is a decision made by the respondent and what the Public Service Commission has done is to rubber stamp the respondent's recommendation. A public body which merely rubber stamps some other officer's recommendation will therefore, be acting unlawfully."*

U. DE. Z. Gunawardana, J. whilst delivering a separate judgment but agreeing with Hector Yapa, J. adverted to the rudimentary principle embedded in the maxim *delegatus non potest delegare* and declared that a statutory power must be exercised only by the body or officer in whom it has been reposed or confided- unless sub delegation of the power is authorized by express words or necessary implication. *See* page 283 of the judgment.

The case of ***Gunaratne v. Chandrananada de Silva*** (supra) was cited with approval in ***Kotakadeniya v. Kodituwakku and Others*** (2000) 2 Sri. LR 175.

In the circumstances this court takes the view that the decision to terminate the services of the Petitioners as reflected in the letters marked "P33 (a) to P33 (f)" is ultra vires on the ground that the Governor of the North Central Province failed to exercise independent discretion in arriving at the decision.

Want of Natural Justice - Procedural Impropriety

Prior to the issuance of the termination letters marked "P33 (a) to P33 (f)", the Petitioners were not afforded an opportunity to make their case as to why their services must not be terminated. In other words the Petitioners were not given a hearing prior to the termination of their services nor were they informed that the Provincial Council had decided that their services should be terminated as they were in excess.

In administrative law the rules of natural justice dictate that decision-makers must afford the aggrieved party an opportunity to make their case. In the landmark decision of ***Ridge v. Baldwin*** (1964) AC 40 it was held that where an administrative authority makes a decision that has a grave or substantial impact on an individual, then it can be said that the administrative body is bound to abide by the rules of natural justice. *See also,* ***Jayasena v. Punchiappuhamy and Another*** (1980) 2 Sri. LR 43, ***Mendis, Fowzie and Others v. Goonewardena and G.P.A. Silva*** (1978-79) 2 Sri. LR 322, ***Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others*** (2001) 1 Sri. LR 132.

The following words of Wright, J. in the case of ***General Medical Council v. Spackman*** (1943) AC 627, bear recapitulation.

> *"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of essential principles of justice. The decision must be declared no decision."*

These words were also cited and followed by Sharvananda J., in ***Amaradasa v. Land Reform Commission*** (1977) 79(1) NLR 505, 531, by M.D.H. Fernando J., in ***Gamini Dissanayake v. Kaleel*** (1993) 2 SLR 135, 185, by Yapa J., in ***Abeyaratne v. Janatha Fertilizer Enterprises Ltd.***, (2003) 1 SLR 391, 394, and by Sripavan J., in ***Ratnayake v. Commissioner General of Excise*** (2004) 1 Sri. LR 115, 118-9.

They were also cited again by Amerasinghe A.C.J., in ***Sarath Amunugama v. Karu Jayasuriya*** (2000) 1 Sri. LR 172,190, and also at 194.

The following words of Megarry J., in ***John v. Rees*** (1970) Ch. 345,402; (1969) 2 WLR 1294 are worth quoting:

> *"Those with any knowledge of human nature who pause to think for a moment (are not) likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."*

The failure of the Respondents to afford the Petitioners a hearing is a clear violation of the rules of natural justice. If the Respondents were in fact acting in accordance with the relevant statutory provisions as asserted by them, this court takes the view that they ought to have complied with the rules of natural justice before arriving at the decision to dismiss the Petitioners.

In the circumstances, this court is satisfied that the decision contained in the letters marked "P33 (a) to P33 (f)" is ultra vires on the grounds that, (a) the Governor had terminated the services of the Petitioners in the absence of a code of conduct; (b) the Governor failed to exercise independent discretion and (c) the services of the Petitioners were terminated in breach of the rules of natural justice.

Therefore this court proceeds to grant a writ of certiorari quashing the letters marked "P33 (a) to P33 (f)."

JUDGE OF THE COURT OF APPEAL