

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

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

CA (Writ) Application No: 256/2018

W.A.G Weerasinghe
Pahala Kaligamuwa, Kuliypitiya.

PETITIONER

Vs.

1. P.N.K. Malalasekera,
Director General,
Department of Technical Education and Training.
2. M.R.P Muthunayake,
Deputy Director General,
Department of Technical Education and Training.
3. Sandya Vijayabandara,
Secretary,
Ministry of Science and Technology,
Research Skills and Development and
Vocational Training.
4. Justice N.E Dissanayake,
Chairman,
Administrative Appeals Tribunal.
5. A. Gnanathanan,
Member,
Administrative Appeals Tribunal.
6. G.P. Abeykeerthi,
Member,

Administrative Appeals Tribunal,

4th – 6th Respondents at
No. 35, Silva Lane, Dharmapala Place,
Rajagiriya.

7. W.A Jayawickrama,
Former Director General,
Department of Technical Education and Training.
8. W.A Jayawickrama,
Former Additional Secretary,
Ministry of Youth Affairs and Skills
Development.
9. K.J.T Jayatilleke,
Former Director General,
Department of Technical Education and
Training.
10. B.P.C Kularatne,
Former Director,
Department of Technical Education and
Training.

1st, 2nd, 7th, 9th and 10th Respondents at No.
557, Olcott Mawatha, Colombo 10.

11. V. Sivagnanasothy,
Secretary,
Ministry of Skills Development.
12. P.N.D.M Sarath Abeygunawardena,
Secretary,
Ministry of Skills Development.

3rd, 8th, 11th and 12th Respondents at
Nipunatha Piyasa, Elvitigala Mawatha,
Colombo 5.

RESPONDENTS

Before: Arjuna Obeyesekere, J/ President of the Court of Appeal

Counsel: Manohara De Silva, P.C., with Nimal Hippola for the Petitioner

Ms. Chaya Sri Nammuni, Senior State Counsel for the 1st – 6th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 3rd September 2020

Tendered on behalf of the 1st – 6th Respondents on 3rd November 2020

Decided on: 19th March 2021

Arjuna Obeyesekere, J., P/CA

By a letter dated 14th August 1997 marked '**P1**', the Petitioner had been appointed to the Sri Lanka Technical Educational Service with effect from 1st September 1997, and had been assigned to the Sri Lanka College of Technology, Colombo, situated in Maradana. It is admitted that the Petitioner continued to serve at the said College of Technology, Maradana, until the dispute that culminated in this application arose in 2013.

The dispute in this application relates to:

- (a) the transfer of the Petitioner to the Technical College, Beliatta with effect from 1st February 2013, which was conveyed to the Petitioner by letter dated 31st January 2013 marked '**P13**'; and
- (b) the refusal by the Petitioner to comply with the said transfer order, which led the Respondents to treat the Petitioner as having vacated his post.

I shall commence by considering the Scheme of Transfer applicable to the Petitioner, marked '**P5**'. In terms of the said Scheme, all transfers must be carried out under the Annual Transfer Scheme set out therein, subject to situations where a transfer needs to be made due to the exigencies of service or due to unavoidable circumstances of an officer.

'P5' contains the following provisions relating to annual transfers:

- (a) The Annual Transfer Committee must be established by 1st June;
- (b) Applications for annual transfers must be called before 30th June, with the closing date of applications being 31st July;
- (c) All annual transfer orders must be issued by 1st November; and
- (d) Annual transfer orders must be implemented on 1st January of each year.

In terms of Paragraph 7 read with paragraph 5.1(a) of **'P5'**, an Officer must serve a minimum period of three years at a particular station prior to applying for an annual transfer.¹ Paragraph 5(1)(b) provides that an officer who has completed three years of service at a particular station is liable to be transferred, even though such officer has not made an application seeking an annual transfer.

By virtue of having served over three years at Maradana, the Petitioner was liable in terms of **'P5'** to be transferred under the above annual transfer scheme in 2013. The Petitioner had however been appointed as the Joint Secretary of the Technical Education Teachers' Union in September 2012.² Paragraph 5.10 of **'P5'** requires the observations of the Secretary of a Trade Union to be considered when considering the transfer of an Officer who is holding the post of President, Secretary or Treasurer of a Trade Union, or where such Officer is a member of the Executive Committee of a Trade Union. Accordingly, by a letter dated 10th September 2012 marked **'P6'**, the President of the Trade Union had recommended that the Petitioner be retained at the Technical College, Maradana.

Similar provision is found in Sections 7.1 and 7.4 of Chapter XXV of the Establishments Code provides as follows:

"7.1: Key office bearers of parent organisations of a Union should be posted to stations where their services are required for the work of the Union, and will not be liable to transfer under the normal transfer rules."

¹ In respect of Stations that have been identified as remote or difficult, the period is two years.

² Vide letter dated 3rd October 2012 issued by the Petitioner in his capacity as Secretary of the said Union.

7.4: The grant of this concession should, at all times, be subject to the exigencies of service and to disciplinary requirements. If the transfer of an officer enjoying this concession becomes necessary for such reasons, the approval of the Minister in charge of that Department should be obtained.”

The Petitioner, by virtue of being the Secretary of a Trade Union, was therefore eligible to be exempted from being transferred under the said Scheme. The Petitioner had however submitted a transfer application marked 'P4' on 31st July 2012, as he had completed more than three years at the Technical College, Maradana. In 'P4', the Petitioner had specifically stated that he is holding the post of Secretary of a Union, and that he is not seeking a transfer. The Petitioner states that he submitted the application as a mere formality. It is admitted that the Petitioner's name was not included in the Annual Transfer List marked 'P7' even though the Petitioner was among the list of Officers who were considered for transfer.³

The Petitioner states that the Public Service Commission has delegated its powers of transfer to the Secretary, Ministry of Vocational Training and Skills Development, as evidenced by the notice published in Extraordinary Gazette No. 1733/52 dated 25th November 2011 marked 'P8'. The Petitioner states further that the List of Annual Transfers for 2013 had been approved by the Secretary, Ministry of Vocational Training and Skills Development.

In terms of the Annual Transfer List 'P7', S.D. Buthpitiya was to be transferred to the Technical College, Beliatta. By letter dated 26th November 2012 marked 'P10', the Additional Director General of the Department of Technical Education and Training had brought to the attention of the Secretary, Ministry of Youth Affairs and Skills Development that even though the College of Technology at Maradana and the Technical College at Beliatta have facilities to conduct a course on jewellery design, the said Course was only being conducted at Maradana. It was stated further in 'P10' that although arrangements have been made to commence a course on jewellery design at the Technical College, Beliatta in 2013, they have an issue in selecting a suitable Instructor for Beliatta out of the three Instructors who have the expertise to conduct the said course, as all of them were based in Maradana.

³ Vide letter dated 31st July 2012 marked 'P10a'.

'P10' goes on to state that the Petitioner, who has served in Maradana since 1997 is the Secretary of a Union, and a request has been made to retain the Petitioner in Maradana, while the other two Instructors (namely, S.D.Buthpitiya and H.S.P Perera) have completed their degree in Technical Education and therefore are required to serve in the College of Technology at Maradana.⁴ It has been stated further that the President of the Union of which the Petitioner is the Secretary is also serving within Colombo, at the Technical College, Homagama. In these circumstances, the recommendation of the Secretary, Ministry of Youth Affairs and Skills Development had been sought on which Instructor should be transferred to Beliatta. The contents of 'P10' clearly show that there existed a requirement in Beliatta for an instructor in jewellery design. The Secretary, Ministry of Youth Affairs and Skills Development had responded to 'P10' by releasing Buthpitiya to the Technical College, Beliatta.

Rules 218 – 221 of the “Procedural Rules on the Appointment, Promotion and Transfer of Public Officers”, published by the Public Service Commission in Extraordinary Gazette No. 1589/30 dated 20th February 2009 contains the following provisions relating to transfers on exigencies of service:

“218. A Public Officer may be transferred on exigencies of service by the Appointing Authority for any one of the following reasons:

- (i) Where the services of an officer is no longer needed at his present station;*
- (ii) Where an officer is needed for service in another station or that particular officer himself is needed;*
- (iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable.*

219. Before a Public Officer is transferred on exigencies of service, the Authority with Delegated Power shall personally satisfy himself that need has

⁴ According to 'P10', even though S.D.Buthpitiya had assumed duties in Beliatta on 31st January 2008, he had been assigned to Maradana on 9th September 2010, while H.S.P Perera had assumed duties at Maradana on 5th January 2005, to enable the said officers to complete their degree.

actually arisen as specified in Section 218 above and that the transfer cannot be deferred till the next annual transfers.

220. *Depending on the nature of the need for services that has arisen, the Appointing Authority may transfer an officer at short notice.*

221. *The Appointing Authority shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. The Appointing Authority shall convey the reasons to the officer concerned."*

Dissatisfied with the said decision to transfer him to Beliatta, Buthpitiya had filed an appeal with the Appeals Board on the basis that he possesses a degree and that he can therefore be attached only to a College of Technology, as opposed to a Technical College. Acting on his appeal and taking into account the fact that the Petitioner had served in Maradana for a period of fifteen years, the Department of Technical Education and Training, by its letter dated 30th January 2013 marked 'P11' had sought the approval of the Secretary, Ministry of Youth Affairs and Skills Development to transfer the Petitioner to Beliatta with effect from 1st February 2013. By its letter dated 30th January 2013 marked 'P12', the Secretary, Ministry of Youth Affairs and Skills Development had approved the transfer of the Petitioner to Beliatta with effect from 1st February 2013. This decision has been conveyed to the Petitioner by letter dated 31st January 2013 marked 'P13', and the Petitioner had been directed to report to Beliatta on 5th February 2013. By his letter dated 13th February 2013, marked 'P14A', the Director, College of Technology had released the Petitioner thus enabling the Petitioner to report for duty in Beliatta.

The Petitioner had requested that the transfer be deferred until such time that he files an appeal with the Public Service Commission and the decision of the Public Service Commission is made known. The Petitioner's request had been rejected by the Department of Technical Education and Training, who had directed the Petitioner to report to Beliatta on 14th February 2013.⁵ The 7th Respondent, in his capacity as Acting Director General of the Department of Technical Education and Training by his letter dated 4th March 2013 marked 'P18A' had directed the Petitioner to report immediately to Beliatta. By letter dated 6th March 2013 marked 'P19', the Petitioner

⁵ Vide letter marked 'P16A'.

had claimed that due process has not been followed in transferring him to Beliatta. As the Petitioner had not reported to Beliatta as directed, the Department of Technical Education and Training, by letter dated 11th March 2013 marked 'P20' had informed the Petitioner that he will be considered to have vacated post with effect from 18th February 2013.

By letter dated 22nd April 2014 marked 'P22', the Department of Technical Education and Training had informed the Petitioner that his appeal to the Public Service Commission had been considered and that the following decision had been taken by the Public Service Commission:

“ස්ථාන මාරු නියෝගය සම්බන්ධයෙන් රාජ්‍ය සේවා කොමිෂන් සභාවට කර ඇති අභියාචනය සඳහා කොමිෂන් සභාවේ තීරණය ලබා දීමට තිබියදී, එම ස්ථාන මාරු නියෝගයට අවනත නොවී සිටීමට ඔබට අයිතියක් නොමැති බවත් එබැවින් සේවය හැරයාමේ නිවේදනය වලංගු වන බවත් නිරීක්ෂණය කර ඔබගේ අභියාචනය නිශ්චයා කිරීමට නියෝග කර ඇති බවට රාජ්‍ය සේවා කොමිෂන් සභාවේ ලේකමගේ අංකට PSC/DIS/138/2013 හා 2014.03.10 දිනැති ලිපියෙන් දැනුම්දී ඇති බව කාරුණිකව දන්වමි.”

Thus, the decisions contained in 'P12', 'P13', 'P14A', 'P16A' and 'P18A' have been confirmed by the above decision of the Public Service Commission.

Dissatisfied by 'P22', the Petitioner had filed an appeal – vide 'P23' - with the Administrative Appeals Tribunal. Having afforded the Petitioner a hearing, the Administrative Appeals Tribunal delivered its Order on 23rd January 2018 marked 'P24', by which it held as follows:

- a) Reinstate the Petitioner in service in Technical College, Beliatta with effect from a prospective date;
- b) Treat the period of absence from service as no pay leave upto the date of reinstatement;
- c) Not to pay any salaries and allowances for the period under the VOP Order;
- d) For the Department of Technical Education and Training to consider any appeal of the Petitioner for a transfer to the College of Technology, Maradana in 2019.

The Petitioner thereafter filed this application on 3rd August 2018, seeking *inter alia* the following relief:

- a) A Writ of Mandamus directing the 1st Respondent, the Director General of the Department of Technical Education and Training to implement the order for reinstatement – vide paragraph (b) of the prayer;
- b) A Writ of Mandamus to transfer the Petitioner to the College of Technology, Maradana – vide paragraph (b) of the prayer;
- c) A Writ of Mandamus directing the 1st Respondent to reinstate the Petitioner with all arrears of salary from the date of termination of his services – vide paragraph (f) of the prayer;
- d) Writs of Certiorari quashing the decisions contained in 'P12', 'P13', 'P14A', 'P16A', 'P18A', 'P20', and 'P22' – vide paragraphs (c), (d) and (e) of the prayer;
- e) A Writ of Certiorari to quash that part of the order of the AAT which directs that the Petitioner be transferred to Beliatta– vide paragraph (g) of the prayer.

It must be noted that the Petitioner is not seeking a Writ of Certiorari to quash the decision of the Administrative Appeals Tribunal to treat the period of absence from service as no pay leave, as well as the decision not to pay any salaries and allowances for the period under the VOP Order.

By a motion filed on 10th April 2019, the 1st Respondent informed this Court that by a letter dated 18th December 2018 marked '1R1', the Petitioner has been informed that he has been reinstated in service with effect from 24th January 2018, and that an application for a transfer to Maradana can be considered, if such a request is made. The Petitioner had accordingly reported for duty on 27th December 2018 and had made a request for a transfer to Maradana.

The Petitioner had thereafter submitted his papers to retire from the Public Service. His application for retirement having been accepted, the Petitioner had retired from service on 1st June 2019. In view of this change in circumstances, the learned President's Counsel for the Petitioner has stated in paragraph 6 of the written

submissions that whilst the Petitioner is not pursuing the relief for reinstatement (*vide paragraph (b) of the prayer to the petition*), the Petitioner is pursuing the relief set out in paragraphs (c), (d), (e), (f) and (h) of the prayer including *arrears of salary from the date of termination of service and other benefits as if there was no break in service, upto the date of retirement.*

In essence, the Petitioner is seeking to quash by Certiorari the decisions taken from January 2013 to transfer the Petitioner to Beliatta, the vacation of post notice served on the Petitioner and the decision of the Public Service Commission. It is significant that other than the Writ of Certiorari to quash that part of the order of the Administrative Appeals Tribunal transferring the Petitioner to Beliatta (*vide paragraph (g) of the prayer*), the Petitioner has not sought a Writ of Certiorari to quash any other part/s of the Order of the Administrative Appeals Tribunal, especially the decision of the Administrative Appeals Tribunal to treat the period of absence from service as no pay leave and for that reason the decision not to pay any salaries and allowances for the period under the VOP Order.

Before considering the arguments of the learned President's Counsel for the Petitioner, it would be important to identify, first, the jurisdiction of the Court of Appeal to review decisions of the Public Service Commission, and second, the jurisdiction of the Court of Appeal to review decisions of the Administrative Appeals Tribunal, for the reason that the Administrative Appeals Tribunal has granted the Petitioner only part of the relief that was sought and the Petitioner, in order to seek the balance relief, is seeking Writs of Certiorari to quash decisions which have been taken by a person to whom the power of transfer of the Public Service Commission has been delegated and which decisions have been confirmed by the Public Service Commission.

The starting point of this discussion would be the amendments made to the Constitution in 2013 by the 17th Amendment. In terms of Article 55(3) of the Constitution, the appointment, promotion, transfer, functions of disciplinary control and dismissal of public officers were vested in the Public Service Commission. While Article 56 provided for the said powers to be delegated to a Committee consisting of three persons appointed by the Commission, Article 57 provided for the delegation of such powers to a public officer.

In terms of Article 58(1):

'Any public officer aggrieved by an order relating to a promotion, transfer, dismissal or an order on a disciplinary matter made by a Committee or any public officer under Article 56 or Article 57, in respect of the officer so aggrieved, may appeal to the Commission against such order'

Article 58(2) provides as follows:

'The Commission shall have the power upon such appeal to alter, vary, rescind or confirm an order against which an appeal is made, or to give directions in relation thereto, or to order such further or other inquiry as to the Commission shall seem fit.'

Article 61A of the Constitution reads as follows:

"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."

Article 61A therefore acts as a Constitutional ouster of the Writ Jurisdiction of this Court in respect of decisions of the Public Service Commission, a Committee, or any public officer, as provided for in Articles 56-58. Article 61A was later amended by the 19th Amendment to the Constitution, by the inclusion of Article 59 prior to Article 126.

In terms of Article 59 of the Constitution, there shall be an Administrative Appeals Tribunal appointed by the Judicial Service Commission, which shall have the power to alter, vary or rescind any order or decision made by the Public Service Commission.⁶

⁶ Article 155L which provided for an appeal against a decision of the National Police Commission to the Administrative Appeals Tribunal has been repealed by the 20th Amendment to the Constitution.

The Administrative Appeals Tribunal Act No. 4 of 2002 (the AAT Act) was thereafter enacted to:

- (a) provide for the constitution of the Administrative Appeals Tribunal;
- (b) specify the powers of the Administrative Appeals Tribunal and the procedure to be adhered to by the Administrative Appeals Tribunal in respect of appeals.

In terms of Section 3(a) of the Act, *“The Tribunal shall have the power to hear and determine any appeal preferred to it from any order or decision made by the Public Service Commission in the exercise of its powers under Chapter IX of the Constitution...”*.

Thus, any public officer aggrieved by a decision of the Public Service Commission or a committee or public officer to whom the powers of the Public Service Commission have been delegated, could challenge such decision, either by way of a fundamental rights application in terms of Article 126 of the Constitution, or by preferring an appeal to the Administrative Appeals Tribunal in terms of Article 59.

In **Ratnasiri and Others v. Ellawala and Others**,⁷ which is one the first cases decided after the introduction of Article 61A, Saleem Marsoof, P.C., J/ President of the Court of Appeal (as he then was) held as follows:

“The Seventeenth Amendment to the Constitution has also introduced several other features which seek to enhance the independence of the public service while providing greater security of tenure for the public officers. Firstly, the appointment, promotion, transfer, disciplinary control and dismissal of public officers other than Heads of Departments, have been taken out of the Cabinet of Ministers and vested in the Public Service Commission. Secondly, while the Cabinet of Ministers is vested with the power of appointment and disciplinary control of Heads of Department, it also has the power of formulating policies concerning the public service. Thirdly, the Public Service Commission, which is bound to conduct its affairs in accordance with the policy laid down by the Cabinet of Ministers, is answerable to Parliament in regard to the exercise and

⁷ [2004] 2 Sri L.R. 180 at page 190.

discharge of its powers and functions. Fourthly, the Seventeenth Amendment provides for the appointment of the members of the Public Service Commission on the recommendation of the Constitutional Council established under the said Amendment. Fifthly, while the Public Service Commission is empowered to delegate to a Committee or a public officer its powers of appointment, promotion, transfer, disciplinary control and dismissal of specified categories of public officers, it is expressly provided that any public officer aggrieved by an order made by any such Committee or public officer may appeal first to the Public Service Commission and from there to the Administrative Appeals Tribunal which is appointed by the Judicial Service Commission. All this is in addition to the beneficial jurisdiction created by Article 126 of the Constitution which is expressly retained by Article 61A of the Constitution. These are the many pillars on which the edifice of the Public Service rests."

"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."

In **Hewa Pedige Ranasingha and Others vs Secretary Ministry of Agricultural Development and Others**,⁸ the petitioners had challenged the manner in which a competitive examination to select Agricultural Instructors had been conducted by the Secretary, Ministry of Agricultural Development in terms of the powers delegated by the Public Service Commission. Sisira De Abrew, J upheld the argument of the Respondents that in view of the provisions of Article 61A of the Constitution, the Court of Appeal has no jurisdiction to inquire into the conducting of the examination, and that the petitioners could not have invoked the jurisdiction of the Court of Appeal to quash the results of the said examination.

⁸ SC Appeal 177/2013; SC Minutes of 18th July 2018.

The applicability of Article 61A to a decision of the Administrative Appeals Tribunal was considered by the Supreme Court in **Ratnayake v. Administrative Appeals Tribunal and Others**,⁹ where, after referring to Article 61A, the Court held as follows:

“On the face of it, the above quoted provision of the Constitution (Article 61A), which constitutes a Constitutional ouster of jurisdiction, does not apply to the impugned decision of AAT, it being specifically confined in its application to the orders or decisions of the Public Services Commission, a Committee or any public officer made in pursuance of any power or duty conferred or imposed on such Commission, or delegated to such Committee or public officer under the relevant Chapter of the Constitution. There is no corresponding provision in the Constitution, which seeks to oust the jurisdiction of the Court of Appeal under Article 140 of the Constitution in regard to a decision of AAT. The Administrative Appeals Tribunal (AAT) was established in terms of Article 59 (1) of the Constitution, and its powers and procedures have been further elaborated in the Administrative Appeals Tribunal Act No.4 of 2002, which contained in Section 8 (2) thereof an ouster clause which is quoted below:-

‘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.’

...we are of the view that in all the circumstances of this case, the Court of Appeal did possess jurisdiction to hear and determine the application filed before it. AAT is not a body exercising any power delegated to it by PSC, and is an appellate tribunal constituted in terms of Article 59 (1) of the Constitution having the power, where appropriate, to alter, vary or rescind any order or decision of the PSC.”

The above authorities therefore makes it abundantly clear that while this Court can exercise judicial review in respect of decisions of the Administrative Appeals Tribunal, it cannot do so in respect of decisions of the Public Service Commission, or of a committee or public official to whom the powers of the Public Service Commission have been delegated.

⁹ SC (Spl/LA) No. 173/2011; SC Minutes of 22nd February 2013.

The next question is where the decision of the Administrative Appeals Tribunal is challenged, whether this Court can review the previous decisions of the Public Service Commission or of a committee or public official to whom the powers of the Public Service Commission have been delegated.

This issue was considered in **P.S. Weeraratne v. Public Service Commission and Others**,¹⁰ where, having considered the aforementioned provisions in the context of whether the Court of Appeal, in reviewing a decision of the Administrative Appeals Tribunal can review the decisions of the Public Service Commission, it was held that:

*“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]”, and that, “this Court is not empowered to grant any of the relief (c) to (h) claimed in the petition.”*¹¹

While agreeing with the above reasoning, I take the view that the jurisdiction of this Court under Article 140 would be limited to a review of the decision of the Administrative Appeals Tribunal, and would not extend to quashing decisions of the Public Service Commission or of a committee or public official to whom the powers of the Public Service Commission have been delegated. Therefore, this Court does not have the jurisdiction to quash the decisions in **P12**, **P13**, **P14A**, **P16A**, **P18A**, **P20**, and **P22**.

The only relief that I need to consider is the Writ of Mandamus on the 1st Respondent for reinstatement of the Petitioner with all arrears of salary. It is trite law that for a Writ of Mandamus to issue, the public authority must not only be under a legal or public duty to carry out the act which the petitioner demands, but also have the power to carry out the said duty, while the petitioner in turn must have a legal right to the performance of such public duty.

In **Kaluarachchi vs Ceylon Petroleum Corporation and Others**,¹² Fernando J, referring to the judgment in **Credit Information Bureau of Sri Lanka vs M/s Jafferjee**

¹⁰ CA (Writ) Application No. 410/2009; CA Minutes of 3rd May 2019 – Janak De Silva, J.

¹¹ The reliefs in paragraphs (c) – (h) of the prayer relate to decisions taken by the Public Service Commission or by persons to whom the power of the Public Service Commission had been delegated.

¹² SC Appeal No. 43/2013; SC Minutes of 19th June 2019.

and Jafferjee (Pvt) Limited¹³ reiterated that, “*the foundation of mandamus is the existence of a legal right. A court should not grant a Writ of Mandamus to enforce a right which is not legal and not based upon a public duty.*”

I have already observed that a Public Servant who is dissatisfied with a transfer order could make an appeal to the Public Service Commission, and thereafter to the Administrative Appeals Tribunal. The 1st Respondent is only under a legal duty to implement decisions of the Administrative Appeals Tribunal, with the Petitioner having a corresponding right to have such decision implemented. The decision of the Administrative Appeals Tribunal was that the Petitioner be reinstated and for his period of absence to be considered as no-pay leave. The 1st Respondent has complied with this decision. In view of the decision of the Administrative Appeals Tribunal that the Petitioner shall not be entitled to the payment of arrears in salary, I am of the view that the 1st Respondent owes no legal duty to the Petitioner to reinstate him with back wages.

I shall nonetheless consider the complaint of the learned President’s Counsel for the Petitioner, as morefully set out in paragraph 44 of his written submissions,¹⁴ that the Administrative Appeals Tribunal failed to properly consider that the transfer of the Petitioner to Beliatta was illegal, and that the issuance of the vacation of post notice in such circumstances is illegal and unreasonable.

In **Council of Civil Service Unions vs Minister for the Civil Service**,¹⁵ Lord Diplock described *illegality* and *irrationality* as follows:

“By ‘illegality’ as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

“By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’¹⁶. It applies to a decision which is so outrageous in its

¹³ [2005] 1 Sri LR 89.

¹⁴ These grounds have been set out in the appeal of the Petitioner to the Administrative Appeals Tribunal.

¹⁵ 1985 AC 374

defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

While the decision of the Administrative Appeals Tribunal is within the powers conferred on it by the Act, let me now consider whether the Administrative Appeals Tribunal acted unreasonably or illegally when it failed to award back wages to the Petitioner for the period that he was under the VOP order, even though the Petitioner has not sought a Writ of Certiorari to quash the refusal of the Administrative Appeals Tribunal to grant such relief.

The test to determine the reasonableness of a decision was laid down by Lord Greene in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** when he defined unreasonableness as *‘something so absurd that no sensible person could ever dream that it lay within the powers of the authority.’*¹⁷ In **Council of Civil Service Unions vs Minister for the Civil Service**¹⁸ Lord Diplock described irrationality by reference to **Wednesbury**, when he stated that, *“By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”*

A consideration of the argument of the learned President’s Counsel for the Petitioner requires me to examine the Order of the Administrative Appeals Tribunal marked **‘P24’**. Having narrated the facts, the Administrative Appeals Tribunal has identified the following as being the relief sought by the Petitioner from the Administrative Appeals Tribunal:

- (a) Declare that the transfer order issued on the Petitioner transferring him to Technical College, Beliatta is unlawful;
- (b) Declare that the VOP Order issued on the appellant is against the law and to reinstate him in service.

¹⁶ Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948(1)KB 223.

¹⁷ Ibid.

¹⁸ Supra.

With regard to (a) above, the Administrative Appeals Tribunal has held as follows:

“he (Mr. Buthpitiya) had completed only 2 years and 7 months in Technical College, Beliatta before release to Technical College, Maradana. He could have been sent back to Beliatta to complete the maximum period of 3 years to qualify to apply for a transfer. However this has not been considered.

It appears that the transfer of the appellant to Beliatta had been effected considering the exigency of his services to commence a training course on jewellery design there. This decision should have been taken under (the) annual transfer programme for the year 2013 without waiting till 31.01.2013.

*It should also be noted that in terms of the conditions of the letter of appointment of all public officers, they are **liable to serve in any part of the island at short notice. The appellant had also assumed duties in his post agreeing to such conditions. Therefore, it would not be possible for him to reject a transfer order given by the Head of Department, specially with the approval of the Secretary to the relevant Ministry.***”

The Administrative Appeals Tribunal has therefore taken the view that the Petitioner must comply with the transfer order.

Although the Administrative Appeals Tribunal took the view that Buthpitiya could have been sent to Beliatta to complete the balance period of his three years in Beliatta, it has not considered the fact that Buthpitiya could not have been transferred to a Technical College as he had acquired a degree by then and that Buthpitiya is required to serve in a College of Technology. This is in addition to the fact that Buthpitiya only had five more months in Beliatta, and would have been entitled to a transfer.

On the other hand, the Petitioner having served his entire career at Maradana was liable to be transferred. The Petitioner holding office in a Trade Union was not an absolute prohibition on him being transferred but was a factor to be considered, so that the affairs of the Union would not be affected. In that regard, the observations in **‘P10’** that the President of the Union is also serving in the Colombo District would

have been pertinent. In any event, it is clear from 'P10' and 'P11' that the Respondents did not want to transfer the Petitioner to Beliatta, but as correctly identified by the Administrative Appeals Tribunal, did so due to exigency of service, namely the necessity to commence a programme on Jewellery Design in Beliatta. In these circumstances, the decision of the Administrative Appeals Tribunal that the Petitioner was required to comply with the transfer order is, in my view, reasonable and legal.

This brings me to the decision of the Respondents where the Petitioner was considered as having vacated his post, by not complying with the transfer order. Although 'P10' and 'P11' carry the caption of 'annual transfer', it is clear that the transfer of the Petitioner to Beliatta was due to the exigency of service that prevailed in Beliatta, namely the necessity to commence a course on Jewellery design at Beliatta and the necessity to have the services of an instructor with the necessary expertise to carry out the said course. Even assuming that the decision of the Respondents to transfer the Petitioner was wrong, the Petitioner was required to comply with the transfer and then complain. This is the thinking of the Administrative Appeals Tribunal and is reflected in the following paragraph in its Order 'P24':

*"Since the appeal of the appellant had been rejected by the DG of the DTET, it is the responsibility of the appellant to follow the **Comply and Complain Principle**. This has not been followed by the appellant **and I am of the view that the VOP order issued to the Appellant by the DG of the DTET is in order.**"*

It is only after holding that the transfer and vacation of post is legal and reasonable that the Administrative Appeals Tribunal made an order that the Petitioner be reinstated in service, but in Beliatta, and that too on the basis that his period of absence be treated as no pay leave. While I am not called upon to comment on the correctness of the decision of the Administrative Appeals Tribunal to reinstate the Petitioner, as noted earlier, the Petitioner has not sought a Writ of Certiorari to quash the decision of the Administrative Appeals Tribunal relating to the period of absence being treated as no pay leave.

Having considered '**P24**', it is clear to me that the decision of the Administrative Appeals Tribunal not to pay the salary and allowances for the period under which the Petitioner was under the VOP Order has been taken as the Administrative Appeals Tribunal was of the view that the Petitioner ought to have complied and complained. In other words, in the view of the Administrative Appeals Tribunal, it is paramount that discipline is maintained at all times by Public Servants. The situation may have been different had the Petitioner complied. The thinking of the Administrative Appeals Tribunal is that a Public Servant who has not complied and complained of an order served on him/her cannot be compared with a Public Servant who has complied and then complained.

I am therefore of the view that the decision of the Administrative Appeals Tribunal to treat the period of absence as no pay leave is reasonable and rational. Applying the description given to *irrationality* by Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**,¹⁹ it is certainly not a *decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*

In the above circumstances, I do not see any legal basis to grant the relief prayed for by the Petitioner. This application is accordingly dismissed, without costs.

President of the Court of Appeal

¹⁹ Supra.