

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

*In the matter of an application for a mandate in
the nature of Writs of Certiorari and Writ of
Mandamus in terms of Article 140 of the
Constitution of the Democratic Socialist Republic
of Sri Lanka.*

CA/WRIT/0556/2021

1. Management Service Officers'
Association of Sri Lanka Overseas
Missions
No. 106/A, Raja Mawatha, Malapella
Pannipitiya.

2. Jayantha Dissanayake
President,
Management Service Officers'
Association of Sri Lanka Overseas
Missions,
No. 106/A, Raja Mawatha, Malapella
Pannipitiya.

3. Aruna Dasanayake
Deputy Secretary,
Management Service Officers'
Association of Sri Lanka Overseas
Missions,
No. 106/A, Raja Mawatha, Malapella
Pannipitiya.

Petitioners

Vs.

1. Admiral Prof. Jayanath Colombage
Foreign Secretary,
Foreign Ministry,
Republic Building, 1 Sir Baron
Jayatilaka Mawatha, Colombo.

2. Sesath Thambugala
Director General (Acting)
Policy Planning, Research and Human
Resources Development,
Foreign Ministry,
Republic Building, 1 Sir Baron
Jayatilaka Mawatha, Colombo.

3. M.A.B. Daya Senerath
Secretary,
Public Service Commission,
No. 1200, 9 Rajamalwatta Road,
Battaramulla.

4. G.K.D. Liyanage,
Government Printer,
Department of Government Printing,
No. 118, Dr. Danister de Silva
Mawatha,
Colombo 08.

5. Senath Pujitha
Examinations Commissioner General
Department of Examinations,
B 47, Sri Jayawardhanapura Kotte.

6. Hiransa Kaluthanthri
Director General,
Department of Management Service,
Room No. 343, 3rd Floor,
Ministry of Finance.
The Secretariat.
Colombo 01.

7. J.J. Rathnasiri
Secretary,
Ministry of Public Service, Provincial
Councils and Local Government,

Ministry of Public Service, Provincial
Council and Local Government,
Independence Square,
Colombo 07.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Dr. Jayatissa de Costa for the Petitioners

Vikum De Abrew, ASG PC with Amasara Gajadeera, SC for the 1st and
2nd Respondents

Supported on: 13.01.2022

Written submissions - tendered on behalf of Petitioners: 19.01.2022

tendered on behalf of the 1st and 2nd Respondents: 20.01.2022

Decided on: 27.01.2022

Sobhitha Rajakaruna J.

The Ministry of foreign affairs has made arrangements to conduct a competitive examination for the year 2020 (2021) for filling of vacancies in the Public Management Assistant's Service Cadre in Sri Lanka Missions Abroad (Management Service Officers' Cadre). The grievance of the Petitioners in this application is that, them being the most experienced officers who have served once or more occasions as Public Management Assistants in Sri Lanka Missions Abroad are been barred from sitting at the said competitive examination.

The Petitioners contention is that the said deprivation has occurred as a result of the purported decision taken by the 1st Respondent by virtue of the documents marked P20 and P21. Accordingly, the Petitioners are seeking inter alia the following reliefs;

- i. mandate in the nature of a writ of Certiorari quashing the decision and/or attempt of the 1st Respondent under the documents marked P20 and P21
- ii. mandate in the nature of a writ of Mandamus to compel the 1st Respondent to implement the decision and/or the draft gazette depicted in the documents marked P14, P15 and P16

The Respondents raising a preliminary objection assert that the Petitioners are not entitled to have and maintain their application and this Court has no jurisdiction to hear and determine the application for the following reasons;

- i. the jurisdiction of this Court has been constitutionally precluded by Article 61A of the Constitution, therefore, the Petitioners cannot invoke the writ jurisdiction of this Court
- ii. the Petitioners have no standing to invoke the jurisdiction of this Court
- iii. the Writ of Certiorari prayed against the decision contained in documents marked P20 and P21 is futile in as much as the decision of the Public Service Commission marked P23 remains in tact
- iv. the application and relief prayed for are misconceived in law.

The Secretary to Foreign Ministry by his letter dated 22.07.2021, marked P20, has made a request to the Public Service Commission (PSC). The said request is to amend the eligibility criteria mentioned in the relevant Gazette Notification issued in view of recruiting Public Management Assistants for Sri Lanka Missions Abroad. The said amendment sought by the said Secretary was to prevent the applicants who have served previously in Sri Lanka missions abroad from sitting at the forthcoming competitive examination.

Pursuant to the above request made by the said Secretary, the PSC by letter dated 21.10.2021, marked P23, granted approval for the amendment proposed by the said Secretary.

The Respondents contend that the jurisdiction of this Court has been precluded by the ouster clause stipulated in Article 61A of the Constitution which reads as follows;

“Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call 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.”

However, the Petitioners argue that the above constitutional ouster has no applicability on the basis that the Petitioners are only challenging the vires of the 1st Respondent. In response to the said argument, the Respondents submit that the effect of the preceding letter marked P20 is the approval of the PSC which is marked as P23 and therefore, the Petitioners are seeking to indirectly challenge the decision of the PSC to approve the amendment of the relevant gazette notification.

It is observed that the letter marked P23 is not being impugned in the instant application and the Petitioners are only seeking to quash the letter marked P20 together with the draft gazette P21. The Secretary to Foreign Ministry by P20 has made only a request to the PSC in order to get the eligibility criteria amended and moreover, the consequent decision upon such request has been made only by the PSC. Therefore, I am of the view that even if this Court decides to quash the contents of P20, the decision taken by the PSC in P23 will remain in full force and effective.

In *Ratnasiri and Others vs Ellawala and Others 2004 2 Sri L.R.* Marsoof, PCA (as he was then) held that;

“it would be futile to grant the relief prayed for since it would still leave in tact the decisions made by the 4th respondent.”

Therefore, I am of the view that challenging P20 which consists no decision will amount to an attempt to circumvent the constitutional ouster stipulated by the above Article 61A. The Respondents referring to doctrine of colourability rely upon the judgement in *Bandaranayake vs. Weeraratne 1981 1 SLR 10 (p. 16)* where Samarawickrema J stated that;

“There is a general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner.”

Additionally, Petitioners assert that Article 61A of the 1978 Constitution does not cover a situation where the decision maker was not exercising any power delegated by the PSC and also that the 1st Respondent is not the appointing authority of the members of the 1st Petitioner trade union. In view of my above findings, I am unable accept this proposition

of the Petitioners as no decision other than a mere request has been made by the 1st Respondent in P20 and the relevant decision making authority is only the PSC. By virtue of Article 55 (3) of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the PSC subject to the provisions of the Constitution.

In ***Katugampola vs. Commissioner General of Excise and others 2003 3 SLR 207 (p.210)***

*“Therefore, the ouster clauses contained in ordinary legislation would not effectively restrict or preclude the jurisdiction granted by Article 140 of the Constitution. Nevertheless, the restriction contained in Article 55 (5) and the Amended Article 61 A as these are ouster clauses stipulated in the Constitution itself, the powers of this Court would be restricted by these provisions contained in the Constitution. It was held in the case of **Atapattu v People’s Bank 1997 1 Sri L.R. 208, Bandaranayake vs. Weeraratne 1981 1 Sri. L.R. 10 at 16**, that the ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the Constitution and would therefore such ouster clause adverted to above would be a bar to the entertaining of writ applications to invoke the writ jurisdiction by this Court.”*

The above position has been emphasized in ***Sirisena vs. Amarasinghe CA/PHC/94/99 (decided on 14.10.2016), W.A.G Weerasinghe vs. P.N.K. Malalasekera and others CA Writ Application No. 256/2018 (19.03.2021) and Gamini Dayarathna vs. P.B. Wickremarathna and others CA Writ Application No. 347/2018 (30.04.2020)*** as well.

In view of foregoing, the Court of Appeal by virtue of Article 61A of the Constitution shall have no jurisdiction to inquire into or pronounce or in any manner call in question any order or decision made by the PSC in pursuance of any power or duty conferred or imposed on PSC. However, the said Article 61A is subjected to the provisions of Article 59 and Article 126. In terms of Article 59, the Administrative Appeals Tribunal shall have the power to alter, vary or rescind any order or decision made by the PSC. Further, the exclusive fundamental rights jurisdiction of the Supreme Court under Article 126, in respect of the decisions of the PSC is not precluded by the aforesaid ouster clause in Article

61A. Therefore, a person aggrieved by a decision of the PSC could invoke the jurisdiction of the Supreme Court under the said Article 126.

Furthermore, as discussed by Shiranee Tilakawardane, J. PCA (as she was then) in above judgement of *Katugampola vs. Commissioner General of Excise and others*, the Writ jurisdiction could be sought under circumstances where the person who made the impugned decision did not have any legal authority to make such a decision. However, in the instant application no claim has been made that the person who made the decision in P23 had no legal authority to make such decision.

In the circumstances, I am of the view that the Petitioners are not entitled to maintain the application in this Court based on the above jurisdictional question. Thus, I see no legal basis to issue notice of this application on the Respondents and accordingly, I proceed to refuse this application.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal