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/133/2022

1. R. A. Piyaratna,
   34E-Kanagaratna Place,
   Lakshapathiya, Moratuwa.

2. D. W. Nimal Senaratna
   No. 106, Janaudana Gama,
   Uwa Gemunupura,
   Maapakada Wewa,
   Mahiyanganaya.

3. Hettiarachchige Wijerathna
   No. 582, Gurulugomi Mawatha,
   Pitipana-North, Homagama.

4. L. B. A. Premakumara
   No. 26/1A,
   Wimala Vihara Road,
   Nawala, Rajagiriya.

5. M. U. Sanjeewa De Livera
   No.267/35,
   Ambagahapitiya Temple Road,
   Pathegama, Balapitiya.

Petitioners

Vs.

1. Buddhist and Pali University of Sri Lanka.

2. Ven. Prof. Neluwe Sumanawansa Thero
   Vice Chancellor/ Ex officio Member

3. Ven. Ilukewala Dhammaratana Thero

4. Ven. Lenagala Sirinivasa Thero

5. Ven. Prof. Moragollagama Uparathana Thero

6. Ven. Prof. Wawwe Dhammarakkhitha Thero

7. Kapila Gunawardena

8. T. K. W. T. P. Premarathna

9. Ven. Trikunamale Ananda Nayaka Thero

10. Ven. Dr. N. Vijithasiri Anunayake Thero

11. Prof. Ven. Induragare Dhammaratana Thero

12. Prof. Wimal Wijeratne

13. Prof. K. A. Weerasena

14. Prof. Uditha Gurusinghe

15. Kalyananda Thiranagama, AAL

16. Prashantha Lal de Alwis, PC

    2nd to 16th above, ALL OF:
    The University Council,

Buddhist and Pali University of Sri Lanka,
No.37, Moragaha Hena Road,
Pitipana Town,
Homagama.

17. Dinesh Gunawardana, MP
Hon. Minister of Education,
Ministry of Education,
Isurupaya,
Battaramulla.

18. Dr. S. R. Attygalle
Secretary,
Treasury/ Ministry of Finance and Planning,
Secretariat Building, Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Chrishmal Warnasuriya with Wardani Karunaratne and Selvarajah Arjunkumar for the Petitioner.

Hirosha Munasinghe for the 3rd, 5th and 6th Respondents.

Hashini Opatha, SC for the 1st, 2nd, 4th, 7th to 18th Respondents.

Supported on : 09.05.2022

Written Submissions: Petitioner - 06.06.2022

3rd, 5th and 6th Respondents - 27.05.2022

1st, 2nd, 4th, 7th to 18th Respondents- 27.05.2022

Decided on : 10.06.2022

Sobhitha Rajakaruna J.

The Petitioners are non-academic staff members of the 1st Respondent Buddhist and Pali University of Sri Lanka ('University'), which is established by the Buddhist and Pali University of Sri Lanka Act No.74 of 1981, as amended ('Act'). The said University is independent of the University Grants Commission ('UGC') and the said Act provides for its employees' retirement age which is in dispute in the instant application.

The age of retirement of the holders of any posts other than that of a teacher is governed by Section 23A of the said Act as amended by Act No. 37 of 1995. The said section 23A reads;

> 23A. The holder of any post other than that of teacher may continue in office until he completes his fifty-fifth year and shall thereafter be deemed to have voluntarily retired from service;
>
> Provided, however, that the holder of any such post may upon written request made by him, be given by the Council of the University, extension of service for a period of one year at a time until he completes his sixtieth year, and shall thereafter be deemed to have retired.
>
> Provided further that the holder of any such post may at any time be suspended, by the Venerable Vice-Chancellor pending an inquiry by the Council of the University for misconduct, inefficiency or dereliction of duty or be dismissed or compulsorily retired, if found guilty after such inquiry, on a resolution adopted by the Council.

The 1st Petitioner was due for his retirement upon reaching 60 years of age on 18.04.2022 and the 2nd Petitioner on 05.06.2022. The 3rd Petitioner is 59 years of age and the 4th and 5th Petitioners are 58 and 44 years of age respectively. Accordingly, the University Council has considered effecting the retirement of the 1st and 2nd Petitioners during the University Council's 423rd meeting held on 24.02.2022. The Petitioners have filed this application mainly against the said decision of the University.

The learned Counsel for the Petitioner brings to the attention of this Court the Public Enterprises Circular No.01/2013 dated 15.01.2013 marked 'P5' which dealt with the retirement of the employees in the Public Enterprises, where it states as follows;

I. The optional age of retirement of employees in public enterprises is 55 years of age, however, if any officer intends to serve beyond this limit, he/she may continue to serve up to the compulsory age of retirement i.e. 60 years of age without applying for an extension of service.

The Petitioners' contention is that their compulsory retirement age was in par with others who are similarly employed at Higher Educational Institutes in terms of the above Circular marked 'P5' issued by the Ministry of Finance and Planning until it was rescinded in January 2022 by the Public Enterprises Circular No.02/2021, dated 14.12.2021, marked 'P3'. The said Circular 'P3' became operative from 01.01.2022. According to the Petitioners the said Circular 'P3' purportedly sets out *inter alia* the present National Policy of the age of retirement of employees in the public sector, extending the compulsory retirement age to 62 years.

The learned Counsel for the Petitioners submits that the Petitioner's retirement age should be governed by the said Public Enterprises Circular, marked 'P3', which provides, *inter alia*, the following:

I. The optional age of the retirement of employees of the Public Enterprise is 57 years of age, however, if any officer intends to serve beyond this limit, he/she may continue to serve up to the compulsory age of retirement i.e. 62 years of age without applying for an extension of service, subject to the paragraph III of this circular.

The UGC, on 21.12.2021, issued Circular No.11/2021 marked 'P7' to Vice Chancellors of the Universities, Rectors of Campuses and Directors of Institutes under UGC, consequent to its decision to implement the said Circular 'P3' issued on 'Retirement Age of the Employees in Public Enterprises'. It is to be noted that the said Circular 'P7' has no bearing on the Buddhist and Pali University since the said University has been established by an independent Act of Parliament as observed above.

The Petitioners further assert that the Cabinet has approved a draft Bill containing the legal draftsman's number L.D.O. 1/2015 to amend the Buddhist and Pali University Act

(marked 'P8'), which would purportedly give effect to the laws governing retirement age of the holders of any post other than that of a teacher of the University. As per the Petitioners, no steps have been taken to proceed with the said proposed amendment to the Act due to purported administrative delays.

Moreover, the 2nd Respondent has referred to the Attorney General by the letter dated 10.01.2022, marked 'P10' on whether the amendment to retirement age by the Public Enterprises Circular No.02/2021 ('P3') and the Special Bill passed by Parliament on 12.10.2021 apply to the non-academic staff of the Buddhist and Pali University.

After the filing of the instant Application, the Attorney General responded to the 2nd Respondent's said letter by the letter dated 21.04.2022, marked 'X3'. The Attorney General has opined therein that the retirement age of the non-academic staff of the Buddhist and Pali University is governed by Section 23A of the Buddhist and Pali University Act and cannot be governed by the Public Enterprises Circular No.02/2021. The letter dated 01.10.2013 marked 'X2' is also another decision of the Attorney General whereby he has expressed his opinion that the Circular dated 15.01.2013 marked 'P5' was irrelevant to the operation of the said section 23A of the Act.

It is an admitted fact that the said section 23A of the Act has not been amended by the Legislature although there had been a certain move to amend the said Act in the year 2015 as per the above 'P8'. In deciding the age of retirement of the employees mentioned in the said section 23A of the Act, the Attorney General has already determined that the Circulars marked 'P3' & 'P5' have no relevance. However, the learned Counsel for the Petitioners strenuously argues that the 1st Respondent University should give effect to the State policy on retirement as enumerated in the latest Circular marked 'P3' and further, one university in the nation's university system cannot be permitted to treat its employees differently or unequally in a manner discriminatory and violative of their fundamental rights.

In light of the aforesaid, the moot point in this application is whether the retirement age of the holders of posts other than that of teachers at the University should be governed by the said Public Enterprises Circular marked 'P3' undermining the clear legislative provisions in the said section 23A of the Act.

Judicial review vis-a`-vis Fundamental Rights Jurisdiction

The primary submissions of the learned Counsel for the Petitioners on the above point are that the Respondents have violated the concept of equality as well as equal protection of law as enshrined in Article 12 of the Constitution of the Republic of Sri Lanka ('Constitution') by not absorbing the said 'P3' Circular. It is important to bear in mind that the Petitioners have filed the instant application under Article 140 of the Constitution and not under its article 126 which deals with fundamental rights jurisdiction and its exercise. The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement and imminent infringement by Executive or Administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution.

In ***Nagananda Kodithuwakku vs. Dinesh Gunawardane - Minister of Education and others CA/Writ/45/2022 (decided on 03.02.2022)***, I have held that;

> *"This is not an application filed under Article 126 of the Constitution. Judicial review is about the decision-making process, not the decision itself. The role of this Court in judicial review is supervisory. Therefore, it is not for this Court to consider whether the decision of the public authority is right or wrong but the role of this Court is to consider whether the public authority has exceeded their powers. The Court cannot be the judge of giving directions to a Government, intervening to the role of ruling the country."*

The Petitioners in the prayer of the Petition seek *inter alia* to issue in the nature of;

a) A writ of Mandamus compelling the University to give effect to the Circular marked 'P3';

b) A writ of mandamus compelling 17th and 18th Respondents to give necessary directions to the University to give effect to the said Circular marked 'P3'; and

c) A writ of Certiorari quashing the decision of the University to withhold the benefit of the provisions contained in Circular marked 'P3'.

As I have observed in the said case of Nagananda Kodithuwakku, the question before Court, in an application for judicial review, is whether a decision or an order is lawful, that is, according to law. Further, under judicial review this Court, unless there is an obvious error in law on the face of the record, will not overturn the decision on merits.

The learned Counsel for the Petitioner referring to series of decided judgements asserts that violation of Constitutional provisions dealing with '**equality'** under Article 12 has been held to be a separate ground of review in an application under Article 140 of the Constitution.

The first case that the learned Counsel strongly relies upon, in this regard, is the famous Heather Mundy case[1] which deals with 'public trust doctrine'. The lands of the Petitioners of the said case were likely to be affected as a result of the Southern Expressway. As per the said judgement, the Appellants` main grievance was as follows;

> *"The Appellants` principal grievance is that they were denied the right to be heard in regard to the Final Trace - which the Judicial Committee confirmed. The fact that some of their neighbours might have been heard, at some previous stage, does not excuse the denial of their right to be heard, and that aspect the Court of Appeal failed to consider."*

Mark Fernando J. in the said case has further held;

> *"Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes[2]; and that doctrine extends to national and natural resources[3]. Besides, executive power is also necessarily subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the "protection of the law" would include the right to notice and to be heard.* ***Administrative acts and decisions contrary to the "public trust" doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable****."*

[1] Heather Therese Mundy vs. Central Environmental Authority, SC Appeal 58/2003 (SC Minutes of 20.01.2004) (Judgment by Mark Fernando J.)

[2] See- De Silva vs. Atukorale, [1993] 1 Sri. L.R. 283, 296-297; Jayawardene vs. Wijayatilake, [2001] 1 Sri. L.R. 132, 149, 159; Bandara vs. Premachandra, [1994] 1 Sri. L.R. 301, 312

[3] such as the air-waves, Fernando vs. SLBC, [1996] 1 Sri. L.R. 157, 172, and mineral deposits, Bulankulame vs. Secretary Ministry of Industrial Development, [2000] 3 Sri. L.R. 243, 256-257

In view of the above dicta, it is no doubt that the doctrine of public trust should be taken into consideration in judicial review applications, however, it is to determine whether the impugned decision making process is lawful or not.

The traditional grounds of review adopted by our Courts are illegality, irrationality and procedural impropriety etc. In various cases, the Courts have also accepted the principles of proportionality and notion of legitimate expectation (procedural legitimate expectation /substantive legitimate expectation). In the above Heather Mundy case, our Supreme Court enhancing the scope of the writ jurisdiction held that the administrative acts and decisions contrary to the public trust doctrine and/or violative of fundamental rights would be in excess or abuse of power and therefore, void or voidable. The crucial point here is whether the Supreme Court has unambiguously recognized the public trust doctrine or any violation of fundamental rights as a direct ground of review in judicial review applications.

In this regard, it is important to refer to Article 126(4) of the Constitution by which the Supreme Court is bestowed with power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in Articles 126(2) and 126(3) of the Constitution. However, by virtue of Article 140 of the Constitution, the Court of Appeal has been given the power and authority to inspect and examine the records of any court of first instance or tribunal or other institution and grant and issue writs of Certiorari etc., only subject to the provisions of the Constitution and according to law. The writ jurisdiction of Court of Appeal is subject to the provisions of the Constitution and it should be exercised according to law and accordingly the Court of Appeal is not directly empowered to exercise its jurisdiction as it may deem just and equitable. Thus, I cannot accept the proposition of the learned Counsel for the Petitioners that the Court of Appeal is vested with wide discretion in granting reliefs for the interest of justice which "*deem to be just and equitable/ shall deem fit".*

Sisira De Abrew J. in ***Sri Lanka Telecom Limited vs. Human Rights Commission of Sri Lanka, SC Appeal No. 215/12 (decided on 01.03.2017)*** has held that if a recommendation of a public body affects the right of an individual, Superior Courts in the exercise of their writ jurisdiction have the power to quash such recommendation by issuing a writ of Certiorari.

Not only in England but also in Sri Lanka & India, the scope of remedies in the administrative law has been expanded with a considerable degree of imaginative creativity of the judges. However, though much of the scope of judicial review has been expanded through judicial creativity during past decades, I am of the view that such Superior Courts were very careful not to mix-up the fundamental rights jurisdiction and the writ jurisdiction.

By virtue of Article 126(3) of the Constitution, in the course of hearing in the Court of Appeal into an application for judicial review, if it appears to Court that there is prima facie evidence of infringement of fundamental rights, the Court of Appeal shall forthwith refer such matter to the Supreme Court. Likewise, under Article 126(4), the Supreme Court has power to refer back to the Court of Appeal, a fundamental rights application or an application made to Court under Article 126(3) if in its opinion there is no infringement of a fundamental right or a language right. This itself shows the clear demarcation of the fundamental rights jurisdiction and the writ jurisdiction.

Therefore, I am of the view that the Public Trust Doctrine and/or violation of fundamental rights or any other ground established through judicial creativity should be adopted in judicial review applications only as a conduit to make a determination by Court 'subject to the provisions of the Constitution' and 'according to law'. I find that the grounds for review in writ applications are inextricably interwoven with the fundamental rights recognized by law and however the adoption of such grounds should be carefully done by Review Courts subject to above limitations based on the respective jurisdiction of the Court. Therefore, I am compelled to focus my mind with the issues of the instant application in those lines and not make any determination just on a mere assertion of an infringement of fundamental rights of a person.

<u>The effect of section 23A of the Act</u>

My considered view is that no provision of an ordinary Circular issued by a Ministry could override the provisions of an Act of Parliament, particularly the provisions of the section 23A of the Act unless an amendment to such Act is being duly brought in and passed by the legislature. This position has to be examined with the wordings of the respective Circular which determines the date of the retirement of an employee and the same should

be interpreted by taking into consideration the actual intention of the legislature which reflects in the relevant Statute passed by the Parliament. It is important to note that the words; "notwithstanding anything to the contrary in any other law" are not found in the said Circular 'P3' and therefore, in any event, no provision in the said Circular is intended to amend any other statutory provision of an Act of Parliament.

In ***Halwan and others vs. Rahaman and others (1993) 1 Sri. L.R. 201 (at p.212),*** Ananda Grero J. has held that when there is a conflict between the provisions of a Statute and the provisions of a regulation published in a Gazette, the former prevails over the latter.

The said section 23A of the Act clearly envisages that the voluntary retirement age of employees other than the teachers is 55 years and extension of service for a period of one year at a time can be granted until such employee completes his/her 60th year. It is pertinent to note that no valid law has been passed by Parliament up to date overriding the said provisions of section 23A.

Further, it is observed that the UGC Circular marked 'P7' has no relevancy in respect of the University. It is pertinent to note that in terms of the section 47 of the Buddhist and Pali University of Sri Lanka Act No.74 of 1981 (as amended), the provisions of the Universities Act, No. 16 of 1978, shall not apply to or in relation to the Buddhist and Pali University of Sri Lanka.

Similarly, the latest Circular marked 'P3' and the Circular marked 'P7', simply cannot override the statutory provisions of the said Act. In the circumstances, I hold that any decision of the University not to adopt the said Circular 'P3' in relation to the employees who come under the said section 23A, in order to determine their retirement age, is lawful. No mandamus can be issued against any authority compelling such authority to override a statutory provision without an expressed intention of the Parliament. In terms of the Article 4(a) of the Constitution of the Republic the legislative power of the People shall be exercised by the Parliament and by the People at a Referendum and therefore, I take the view that no mandamus can be issued against the Respondents as prayed for in the prayer of the Petition. Moreover, it is observed that the grounds of review for a writ of Mandamus are quite different according to the settled law in that regard.

In the circumstances, I take the view that the Petitioners have not made out an arguable case or a prima facie case for this Court to issue notice. The learned Counsel for the

Petitioners asserts that in terms of the Rules of the Court of Appeal and the law, there is no premise for a Respondent to "Object to Notice" and however, I am not inclined to agree with those submissions.

I have extensively discussed on the arguability principle mentioned above in ***Prof. D. G. Harendra De Silva and others vs. Hon. Pavithra Wanniarachchi-Minister of Health, Nutrition and Indigenous Medicine and others, CA/Writ/422/2020 (decided on 01.02.2022)***. As I have observed in the above case;

> *"In order to determine the question of notice, it is important to consider the principles that needs to be adopted by a judge who is granting permission (Permission Judge) in view of satisfying himself that there is a proper basis for claiming judicial review. The 'arguability principle' can be considered as one such main principle".*

The effect of Article 126(3)

In addition to the above arguments, the learned Counsel for the Petitioners argues that the instant application should be referred to Supreme Court under Article 126(3) of the Constitution on the basis that it appears that there is, prima facie, an infringement of fundamental rights under Article 12(1) and 14(1)(g) of the Constitution. It is a significant question as to why the Petitioners have opted this forum, i.e., the Court of Appeal, to file the instant application when the Petitioners have pre-determined that there is an infringement of fundamental rights of the Petitioners.

The submissions of the learned Counsel for the Petitioners at the threshold stage of this case and also the pleadings of the Petitioners envisage that the Petitioner's constitutionally guaranteed equal rights and equality before the law has been manifestly denied. The Petitioners state in their written submissions (*vide*-paragraph 23) as well that, by not absorbing the said 'P3' Circular by the Respondents in to the University non-academic staff, the Respondents have violated the concept of equality as well as equal protection of law as enshrined in Article 12 of the Constitution.

In terms of Article 126 of the Constitution where any person alleges that any fundamental right or language right has been infringed, he or she may within one month thereof, in accordance with such rules of the Court apply to the Supreme Court by way of a petition.

In a nutshell, the Petitioners in view of their abovementioned pre-determination, should have straight away sought the indulgence of the fundamental rights jurisdiction subject to the rules of Court by way of filing an application in the Supreme Court. It is not reasonable, in my view, to use the provisions of the said Article 126(3) merely to overcome issues on time bar etc. and other governing rules in filling a fundamental rights application. The Petitioners have not given reasons or an excuse as to why they have sought mandates in the nature of writs of Mandamus and a writ of Certiorari from this Court when they have pre-determined that the Respondents have violated the Fundamental rights of the Petitioners.

The learned Counsel for the Petitioners relies upon the judgement in ***W. K. C. Perera vs. Prof. Daya Edirisinghe (1995) 1 Sri. L.R. 148*** and moves that this application be referred to Supreme Court under Article 126(3) of the Constitution. On a careful perusal of the said judgement, it appears that the Petitioner of the said case have lodged an appeal against the order of the Court of Appeal dismissing an application for Certiorari and Mandamus and nowhere in the said judgement does it envisage that an application has been made in the Court of Appeal by the respective Petitioner under Article 126(3).

The rationale behind Article 126(3) of the Constitution is that the Court of Appeal will be compelled to refer a writ application to Supreme Court, if it appears to the Court of Appeal **in the course of hearing** before such Court that there is prima facie evidence of an infringement or imminent infringement of provisions of Chapter III or Chapter IV (of the Constitution) by a party to such application.

Therefore, it is imperative that the Court of Appeal on its own motion or on an application by a party to a writ application, first should form an opinion satisfying that there is prima facie evidence of an infringement of fundamental rights or language rights during the course of the hearing. In other words, a Petitioner in a writ application who has pre-determined such infringement of fundamental rights or language rights should not be able to make an application under Article 126(3) at the threshold stage of the case. It is the bounden duty of litigants to identify their own grievance when selecting the forum to which he or she should recourse to. Anyhow, there cannot be any restriction for an applicant for a writ to plead in the prayer of the Petition, to refer such matter to Supreme Court on the grounds that if the Court is satisfied during the hearing that there is an infringement of fundamental rights or language rights. In the circumstances, I am of the

view that the Petitioner who has pre-determined that there is an infringement of fundamental rights is not entitled to any remedy under the said Article 126(3). Besides, I have already arrived at a conclusion above that the Petitioner has not satisfied the minimum threshold requirement which warrants this Court to issue formal notice of this application to the Respondents.

Hence, I proceed to refuse this application.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal