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

In the matter of an Application for the grant of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution.

Basnayaka Mudiyanselage Madduma Bandara
No. 243, Isuru Mawatha,
Hiripitiya, Pannipitiya.

**PETITIONER**

**CA-WRIT - 161/2020**

**Vs.**

1. Justice N.E. Dissanayake
   Chairman
1A. Justice Anil Gooneratne, Chairman

2. Mr. A. Gnanathasan, PC
   Member

3. Mr. G.P. Abeykeerthi
   Member

   1st to 3rd Respondent all of:
   Administrative Appeals Tribunal,
   Silva Lane,
   Sri Jayawardenepura Kotte.

4. K.W.E. Karalliyadda
   Chairman
4A. S.C.S.Fernando, Chairman

5. Savithri Wijesekara
   Member
5A. S.Liyanagama, Member

6. Y.L.M. Zawahir
   Member

6A. A.S.P.S.P. Sanjeewa,
Member

7. Tilak Collure
Member

7A. N.S.M. Samsudeen,
Member

8. Ashoka Wijethilake
Member

8A. M.P.P. Perera,
Member

9. Gamini Nawarathne
Member.

9A. G. Wickramage,
Member

10. G. Jeyakumar
Member

10A. T.P. Paramaswaran,
Member

11. Nishantha Weerasinghe
Secretary

11A. Samanthi Mihindukula, Secretary.

11B. Thanuj Fernando, Secretary

4th to 11th Respondents all of:
National Police Commission
Block 9, BMICH Premises
Colombo 09.

12. Chandana D. Wickramartne
Inspector-General of Police (Acting)
Police Headquarters
Colombo 01

13. Waruna Jayasundara
Deputy Inspector- General of Police
Commandant- Special Task Force of Police
Police Headquarters
Colombo 01

14. A.J.D.Dias
Director General of Pensions
Maligawatta

Colombo 10

**RESPONDENTS**

15. Hon. Justice Jagath Balapatabendi
    Chairman

16. Indrani Sughthdasa
    Member

17. V. Sivagnanasothy
    Member

18. Dr. T.R.C. Ruberu
    Member

19. Ahamod Lebbe Mohamed Saleem
    Member

20. Leelasena Liyanagama
    Member

21. Dian Gomes
    Member

22. W.H. Piyadasa
    Member

23. Dilith Jayaweera
    Member

    15th to 23rd Respondents all of;
    Public Service Commission
    No. 120/9
    Rajamalwatta Road,
    Battaramulla.

**ADDED RESPONDENTS**

**Before:** **D.N. Samarakoon, J.**
**B. Sasi Mahendran, J.**

**Counsel:** Senany Dayaratne with Nisala Seniya Fernando for the Petitioner
Yuresha Fernando DSG for the Respondents.

**Written Submissions:** 05.12.2022 (by the Petitioner)
06.12.2022 (by the Respondents)
**On**

**Argued On :** 05.10.2022

**Decided On :** 15.12.2022.

**B. Sasi Mahendran, J.**

The instant application seeks to impugn an order of the Administrative Appeals Tribunal (dated 20th January 2020) which dismissed the Petitioner's appeal from the National Police Commission, disabling him from being appointed to the rank of Deputy Inspector General of Police and, thereafter, Senior Deputy Inspector General of Police. The Petitioner seeks a Writ of Certiorari to quash the said order of the Administrative Appeals Tribunal; a Writ of Mandamus to compel the Administrative Appeals Tribunal (or in the alternative to compel the National Police Commission) to promote him to the post of Deputy Inspector General of Police with effect from 1st December 2012, and thereafter to promote him to the post of Senior Deputy Inspector General of Police with effect from 1st December 2015.

Prior to determining the merits of this application, in the light of the objection that has been raised by the Respondents, it is pertinent to deal with the jurisdictional intricacies that this application entails. The objection is that the orders of the Administrative Appeals Tribunal are not subject to this Court's Writ jurisdiction. This is because of the Constitutional ouster clause found in **Article 155C** of the Constitution, originally introduced by the Seventeenth Amendment to the Constitution, which shuts out this Court's supervisory jurisdiction to inquire into decisions of the National Police Commission, similar to the ouster clause found in Article 61A in relation to the Public Service Commission. It is argued that subjecting the Administrative Appeals Tribunal's decisions to judicial review enables a disgruntled applicant an opportunity to do indirectly what cannot be done directly by calling into question the decisions of the National Police Commission which are insulated from this Court's extraordinary Writ jurisdiction. This

Article, as it stood prior to its amendment by the Twentieth Amendment to the Constitution, i.e., the provision as it stood at the time relevant to this application, reads:

> Subject to the jurisdiction conferred on the Supreme Court [under Article 126 and the powers granted to the Administrative Appeals Tribunal under Article 155L], no court or tribunal shall have the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission or a Committee, in pursuance of any power or duty, conferred or imposed on such Commission or Committee under this Chapter or under any other law.

Article 155L makes provision for a police officer aggrieved by any order made by the Commission to appeal to the Administrative Appeals Tribunal established under Article 59. The Administrative Appeals Tribunal has the power to alter, vary, rescind or confirm any order or decision made by the Commission.

Thus, any public officer aggrieved by a decision of the National Police Commission or a committee or public officer to whom the powers of the National Police 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 155L.

The Respondent's argument is not new and has been rejected. For the purpose of convenience, we will cite the relevant excerpts from the judgment of the Supreme Court in A.M. Ratnayake v. Administrative Appeals Tribunal [2013] 1 SLR 331. Although this judgment dealt with Article 61A of the Constitution which insulates the decisions of the Public Service Commission from this Court's Writ jurisdiction, the privative clause is similar to Article 155C. His Lordship Saleem Marsoof PC. J. (with their Lordships Ratnayake J. and Imam J. agreeing) observed:

> "On the face of it, the above provision of the Constitution [Article 61A, prior to the Nineteenth Amendment], 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.

**Learned State Counsel has contended strenuously that since AAT has been constituted as contemplated by Article 59 (1) of the Constitution, the Constitutional ouster of jurisdiction contained in Article 61A of the Constitution will apply to AAT as well. He has further submitted that one cannot do indirectly what he cannot do directly, and that a challenge to any order or decision of AAT would amount to indirectly putting in question an order or decision of PSC.** Learned Counsel for the Petitioner has submitted equally strenuously that what was sought to be challenged in the Court of Appeal was a decision of AAT on an appeal from PSC and therefore a decision of AAT can by no stretch of imagination be construed to be a direct or indirect challenge of a decision of the PSC.

……. 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**. When refusing notice, the Court of Appeal has not held that it has no jurisdiction to hear and determine the matter in view of Article 61A of the Constitution, and probably had other reasons for refusing notice." [emphasis added]

On this basis, the decisions and orders of the Administrative Appeals Tribunal have been subject to this Court's supervisory jurisdiction. However, as there is no guidance on the extent of review, there is no uniformity, in subsequent case law, as to the extent to which such decisions can be reviewed. On a sample of cases, it is seen that whilst some have exercised "limited review" so as to avoid overtly trespassing into Constitutionally forbidden territory, there is on the other end of the spectrum dicta which has been bold in venturing into seemingly forbidden territory. This uncertainty becomes problematic when in reality it is not possible to distinguish the contours of the decisions of the National Police Commission and that of the Tribunal. In such situations, quashing the decision of the Tribunal will have the effect of calling into question the decision of the

National Police Commission. (The same would be applicable in the context of the Public Service Commission as well).

His Lordship Janak De Silva J. in P.S. Weeraratne v. Public Service Commission, CA Writ 410/2009 decided on 03.05.2019, whilst refusing to grant reliefs that would indirectly impugn the decisions of the Public Service Commission on the basis "an established rule of interpretation that a court cannot do indirectly what it is prohibited from doing directly", held that "there was no impediment" to consider the relief which sought a Writ of Certiorari to quash and set aside the decision of the Tribunal. The basis of such relief is on the ordinary grounds of judicial review viz, Illegality, Irrationality, or Procedural Impropriety.

Having considered this judgment his Lordship Arjuna Obeyesekere, J. in W.A.G. Weerasinghe v. Director General, Department of Technical Education and Training CA Writ Application 256/2018 decided on 19.03.2021 stated thus:

"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."

His Lordship, citing the celebrated passage from the landmark judgment of Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service 1985 AC 374 went on to consider whether the decision of the Tribunal was unreasonable or illegal.

Recently, his Lordship Sobhitha Rajakaruna J. in Deepthi De Silva v. Chairman, Administrative Appeals Tribunal CA Writ 614/2021 decided on 26.05.2022 considered the "parameters" of this Court's jurisdiction when reviewing an order of the Administrative Appeals Tribunal on a decision of the Public Service Commission. The judgment of Kalamazoo Industries v. Ministry of Labour and Vocational Training [1998] 1 SLR 235 was cited in order to distinguish between this Court's role as an appellate body and its role when exercising judicial review. His Lordship while observing that this Court exercises "**a limited jurisdiction**" concluded that a decision of the Tribunal would be reviewed in the following circumstances:

"(a) where the members of the AAT who made the impugned decision did not have legal authority to make such decision or

(b) if the AAT has acted contrary to principles of natural justice or

(c) issue an order which is eminently irrational or unreasonable or tainted with illegality."

His Lordship also cautions that "the jurisdiction of the Court of Appeal under Article 140 would be limited to a review of a decision of the AAT and would not extend to quash the decisions of the PSC or of a committee or public official to whom the powers of the PSC have been delegated."

An Order of his Lordship Yasantha Kodagoda PC. J. in G.L.U. Sanjeewa Godawatte v. National Police Commission CA Writ 92/2019 delivered on 8.11.2019, also helpfully delineates the considerations this Court should bear in mind when dealing with an application of this nature. As his Lordship cautioned, this Court has to protect itself from "being used as an additional layer of appeal in the thin guise of an application seeking a Writ". The refusal to issue a Writ of Certiorari was based on the following considerations:

"(a) The Petitioner has not pointed out any ground upon which it can be concluded that the Administrative Appeals Tribunal had in the consideration of the Appeal presented to it, acted ultra-vires its statutorily conferred powers…...

(b) The Petitioner has failed to establish that the Administrative Appeals Tribunal had acted in breach of the Rules of Natural Justice or violated any other procedural or substantive legal requirement in the consideration of the Appeal presented to it by the Petitioner.

(c) There is no material indicative of the Administrative Appeals Tribunal having not taken into consideration any relevant fact or having taken into consideration any irrelevant fact.

(d) The decision of the Administrative Appeals Tribunal is cogent, and is based on reasons that cannot be validly impugned. It is rational and based on the attendant facts and circumstances.

(e) The Petitioner cannot claim that he had a legitimate entitlement to obtain redress since the Petitioner does not possess the required minimum qualifications to be absorbed into the Regular service of the Sri Lanka Police."

A case falling on the other end of the spectrum is Nishantha Tilak Minuwangoda v. National Police Commission CA Writ 58/2019 decided on 07.04.2022. His Lordship S.U.B. Karalliyadde J. issuing a Writ of Certiorari quashed the decisions of the Administrative Appeals Tribunal as well as the National Police Commission for their decisions to dismiss the Petitioner's appeal which were devoid of reasons.

Judicial Review is limited to reviewing the lawfulness of a decision or an order. The traditional grounds of review are illegality, irrationality, and procedural impropriety (which encapsulates the rules of natural justice). As his Lordship Somawansa J. generally observed in Pradeshiya Sabawa, Hingurakgoda v. Karunaratne [2006] 2 SLR 410 the grounds on which Writs of Certiorari issue are: (a) acting in excess of jurisdiction or ultra vires; (b) breach of a mandatory provision or rule; (c) breach of rules of natural justice; (d) error of law on the face of the record.

Other ancillary grounds such as proportionality and the doctrine of legitimate expectations are also now well recognised in our case law.

At this juncture, therefore, we are of the view that the extent of review that can be undertaken when a decision of an Administrative Appeals Tribunal has been impugned cannot be "limited" jurisdiction. It would involve a review that this Court would generally undertake in any other Writ matter. Because if the decision of the Administrative Appeals Tribunal which has affirmed a decision of the Commission is void, for breach of one of those grounds of review, then the decision of the Commission, which the Tribunal affirmed would in substance be called into question. To use the case facts of Delapolage Lakmini Delapola v. Justice Imam & Others CA Writ 263/2013 decided on 26.07.2019, as an example, his Lordship Nawaz J. found "on a careful consideration it is quite manifest that the Petitioner has been disadvantageously treated and relegated to her peril. **Despite this clear evidence of illegality, the PSC proceeded not to hold in favour of the Petitioner**" [emphasis added]. This may appear to be an interpretation that flies in the face of Article 155C (or even Article 61A) because it enables a disgruntled applicant to indirectly challenge a decision of the National Police Commission (or the Public Service Commission)

when such decisions cannot be directly called in question because of the respective privative clauses. Yet, as alluded to above, in substance such decisions are in fact called into question. To circumvent this difficulty his Lordship Nawaz J. issued a "Mandamusfied-Certiorari" sending the matter back to the Tribunal to rehear the appeal, having set aside the impugned order. A similar approach was adopted by his Lordship Sobhitha Rajakaruna J. in the case of Locomotive Operators Engineers Union v. Justice N.E. Dissanayake CA Writ 339/2019 decided on 22.09.2021 as well.

While bearing in mind that interpreting the Constitution is beyond this Court's Constitutional competence, a plain reading of the respective Articles itself rebuts that "rule of interpretation" since the decisions of the Commission is subject to Article 155L (in the case of the Public Service Commission, subject to Article 59). Although the Article states that "no court or tribunal" shall have the power to inquire into a decision of the National Police Commission, it deliberately creates an exception by subjecting it to the Administrative Appeals Tribunal. **That Article permits the Administrative Appeals Tribunal as an appellate body to "alter, vary, rescind or confirm" any order or decision of the National Police Commission**. To use the words of his Lordship Nawaz J. in Delapolage (supra):

"Even in an appellate jurisdiction, the Appellate body is empowered to correct errors of law and fact and the AAT enjoys the competence to vary or rescind a decision of the PSC when it is tainted with an error of law and fact. If the PSC has given effect to a decision of a public officer who has clearly exceeded his powers, it is within the jurisdiction of the AAT to go within the merits of that decision in its appellate jurisdiction and set it right if it turns out to be erroneous on the facts or law."

A view espoused by his Lordship S.N. Silva J. (as he then was), although not in the context of the present discussion, in Halwan v. Kaleelul Rahuman [2000] 3 SLR 50:

"The appellate jurisdiction save in instances where it is restricted to questions of law will encompass the merits and the legality of the impugned order. In our context it is appropriate to describe the appellate jurisdiction as the ordinary jurisdiction and review by way of Writs of Certiorari, Prohibition and Mandamus as the extraordinary jurisdiction."

As per the Constitutional provisions, whilst a decision of the National Police Commission is insulated from this Court's supervisory jurisdiction, the orders and

decisions of the Administrative Appeals Tribunal, which acts as an appellate body over the decisions of the National Police Commission are not so insulated. As observed by his Lordship Marsoof J. in Ratnayake (supra) "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 Legislature purported to insulate such decisions from judicial review by the inclusion of a preclusive clause in the ordinary legislation i.e. the Administrative Appeals Tribunal Act No. 4 of 2002, which set out the Tribunal's powers and procedures. Section 8(2) of the Act provided that the decisions of the Tribunal are "final and conclusive" and shall not be called in question in any suit or proceedings in a court of law". Yet, the well-settled proposition of law that this Court's Writ jurisdiction conferred by Article 140 of the Constitution cannot be ousted by ordinary legislation (Vide Atapattu v. People's Bank [1997] 1 SLR 208) has the effect of making that provision ineffective.

The ineffectiveness of Section 8(2) against this Court's ample Writ jurisdiction is evident from the following dicta:

His Lordship Yasantha Kodagoda PC. J. in G.L.U. Sanjeewa Godawatte (supra) observed:

"Furthermore, Section 8(2) of Act No.4 of 2002 provides that a decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in any court of law. However, it is settled law that, notwithstanding such finality and ouster clause, a person aggrieved by a decision of the Tribunal may seek judicial review from this Court by way of Writ, as it is a Constitutional remedy."

His Lordship Samayawardhena J. in Wickramasinghe Arachchilage Waruna Sameera v. Justice Imam & Others CA Writ 73/2016 decided on 20.02.2019, having analyzed a range of judicial authorities, held that Section 8(2) "does not operate as a blanket prohibition on the Court of Appeal to exercise writ jurisdiction over the decisions of the Administrative Appeals Tribunal".

Thus, either intentionally or by oversight, the Constitution has omitted to include a Constitutional Ouster against decisions of the Administrative Appeals Tribunal.

Therefore, when there is no Constitutional bar to review the decisions of the Administrative Appeals Tribunal, and when the Constitutional Ouster in Article 155C is itself subject to Article 155L, thereby appearing to refute that rule of interpretation 'What cannot be done directly cannot be done indirectly' (Quando aliquid prohibetur ex directo, prohibetur et per obliquum), this Court can exercise its Writ jurisdiction in respect of decisions and orders of Administrative Appeals Tribunals, which may also, in substance, result in examining the decision of the National Police Commission, which at times may be inseparable in reality from the decision of the Administrative Appeals Tribunal. For example, if the decision of the Commission is found to be tainted by "illegality", which is an umbrella term for an entire set of sub-grounds such as the doctrine of relevancy, improper motives, purpose, etc. and the Administrative Appeals Tribunal upholds the same then if this Court quashes the decision of the Tribunal, in reality, the propriety of the decision of the National Police Commission is called into question as well. If the Tribunal has independently, for reasons different from that of the Commission made a decision, then this Court can draw a distinction between the decision of the Tribunal and that of the Commission, and consequently, a review can be undertaken only of the Tribunal's decision. Although theoretically possible, in reality, the distinction is not neat.

However, although this Court undertakes a review of the decision of the Tribunal, and by extension a review of the decision of the National Police Commission, in situations where both those decisions are in reality not separable, we are of the view that this Court should not grant mandates in the nature of writs to quash the decisions of the National Police Commission. An approach adopted by their Lordships Nawaz J. and Rajakaruna J. is preferable to overcome this muddle until there is clarification from the Supreme Court. That is, the matter can be remitted to the Tribunal for a fresh inquiry.

The above is different from a situation where the decisions of the National Police Commission have not been appealed to the Administrative Appeals Tribunal. In such a situation, the Commission's decisions are insulated from review. If a disgruntled applicant seeks to directly have the decision of the Commission judicially reviewed, then this Court will be slow to review it as Article 61A stands firm. But the decisions of the Commission are not insulated when an appeal has been made to the Tribunal, which then undertakes a complete inquiry, as there is no Constitutional Ouster directly standing in our way.

Having appreciated the parameters of judicial review this Court can undertake when a decision or order of the Administrative Appeals Tribunal is impugned, we will now assess the claims of the Petitioner.

The Petitioner, as narrated in the Petition, is a retired Senior Superintendent of Police who joined the Police force as a Sub-Inspector in 1982. Having successfully risen to the ranks of Inspector of Police, Chief Inspector of Police, Field Assistant Superintendent of Police of the Special Task Force, Assistant Superintendent of Police, Field Superintendent of Police, and Superintendent of Police respectively in 1986,1992,1994,2000,2007 and 2008, he was finally appointed as a Senior Superintendent of Police with effect from 1st December 2013. The Petitioner, a recipient of many medals during his time of service, also functioned as, inter alia, the Acting Commandant of the Special Task Force and the Director (Training) of the Special Task Force. On the 23rd of January 2017, upon attaining the mandatory age of retirement (sixty years), he retired from the Police force.

In 2016, prior to his retirement, the Petitioner requested to ante-date his promotion as an Assistant Superintendent of Police from 1st December 2000 to 1st December 1994, the date on which he was appointed as the Field Superintendent of the Police, and to commensurately accord the Petitioner other ranks which he would be entitled to as a result of such ante-dating. The National Police Commission acceded to this request. The Petitioner, yet again, in 2017, requested the ante-dating of his promotion as Superintendent of Police from 1st December 2008 to 1st December 2002, and Senior Superintendent of Police from 1st December 2013 to 1st December 2007. The National Police Commission acceded to this request as well. As a result of ante-dating his promotion to the rank of Senior Superintendent of Police to 1st December 2007, he contends that he then became eligible to be promoted to the rank of Deputy Inspector General of Police on 1st December 2012, and the Senior Deputy Inspector General of Police with effect from 1st December 2015. This, together with his five-year service in the rank of Senior Superintendent of Police, led him to seek an opportunity to participate in an interview for the promotion to the rank of Deputy Inspector General of Police.

The National Police Commission, by letter dated 11th September 2017 ("P9") informed the Inspector General of Police that the Petitioner is not eligible to be called for the said interview. The Petitioner made an appeal to the Administrative Appeals Tribunal

but withdrew the said appeal. A fresh appeal was made to the National Police Commission. The Commission dismissed this second appeal on the basis that this matter had previously been determined by the Commission ("P11"). An appeal was made to the Tribunal. This appeal was dismissed by Order dated 20th January 2020 ("P12"). The Tribunal considered the observations of the Commission. These were, among others, that the Appellant had failed to complete five years of active and satisfactory service and earned five increments during that period; that he did not pass the relevant Efficiency Bar examinations.

The Tribunal decided that he cannot be appointed to the rank of Deputy Inspector General of Police. This is because, among other reasons, the post of Deputy Inspector General is a vacancy-based appointment made on an approved scheme of recruitment; it is not a Grade-to-Grade promotion that is not restricted to cadre vacancies. It also noted:

"An appointment is made by calling for interviews by a Panel of interviewers where marks are given for merit and seniority. Officers who had obtained the highest marks are selected for appointment, such appointments are made strictly to fill the available cadre vacancies; Appointments are given only to officers who able to serve in the said appointments in the future…"

We see no reason to interfere with the Order of the Tribunal, which appears to have duly given its mind to this appeal, independent of that of the Commission. The Administrative Appeals Tribunal has not acted illegally, irrationally, or in breach of the rules of natural justice. The Petitioner has been unable to satisfy the elementary criteria set out in Rule 10.3.1. in the applicable Scheme of Recruitment ("R1"), and it is premature to claim entitlement to such an appointment when other preliminary requisites such as efficiency examinations and interviews have not been successfully completed, the result of those cannot be assumed to be in one's favour. The promotion is not automatic, or routine. This application is therefore dismissed without costs.

**JUDGE OF THE COURT OF APPEAL**

**D. N. SAMARAKOON, J.**

**I AGREE**

**JUDGE OF THE COURT OF APPEAL**