

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

*In the matter of an application for Orders 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/37/2023

1. Electricity and Renewable Energy
Association
No. 191 F, Jayanthi Mawatha,
Himbutana,
Mulleriyawa New Town.
2. Mahesha Bandara Illangasinghe
Chairman,
Electricity and Renewable Energy
Consumers Association,
No. 191 F, Jayanthi Mawatha,
Himbutana,
Mulleriyawa New Town.
3. Prasad Bathiya Amarakoon
Secretary,
Electricity and Renewable Energy
Consumers Association,
No. 256/35 Welivata,
Kaduwela.
4. Rasika Madusanka Jayasingha
Attorney-at-Law,
145/1A, Galborella,
Kelaniya.
5. Madapathage Don Ranjith Athula
73/2,
Yahampath Mawatha, Piliyandala.
6. Koggala Hewage Sanjeewa
Dhammika Hemasiri,
35/8 A, Hadigama, Piliyandala.

7. Centre for Environmental Justice
(Guarantee) Limited
No. 20/A, Kuruppu Road,
Colombo 08.
8. Withanage Withanage Don Hemantha
Ranjith Sisira Kumara
Director and Senior Advisor,
Centre for Environmental Justice,
20A, Kuruppu Road,
Colombo 08.
9. Pathragoda Kankanamge Dilena
Executive Director,
Centre for Environmental Justice,
No. 20A, Kuruppu Road,
Colombo 08.

Petitioners

Vs.

1. Ceylon Electricity Board
50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 00200.
- 1A. Chairman
Ceylon Electricity Board,
50, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 00200.
2. Public Utilities Commission of Sri
Lanka
6th Floor, BOC Merchant Tower,
St. Michael's Road, Colombo 3.
- 2A. Janaka Rathnayaka
Chairman,
Public Utilities Commission of Sri
Lanka, 6th Floor, BOC Merchant
Tower, St. Michael's Road,
Colombo 3.

3. Kanchana Wijesekara
Ministry of Power and Renewable
Energy,
437, Galle Road,
Colombo 03.
4. Hon. Dinesh Gunawardena
Prime Minister and Minister of Public
Administration, Home Affairs,
Provincial Councils and Local
Government,
Ministry of Public Administration,
Home Affairs, Provincial Councils and
Local Government,
Independence Square, Colombo 07.
5. Hon. Keheliya Rambukwella
Minister of Health,
SUWASIRIPAYA,
No. 385, Rev. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
6. Hon. Nimal Siripala De Silva
Minister of Ports, Shipping and
Aviation,
No. 19, 1 Chaithya Road,
Colombo 01.
7. Hon. Susil Premajyantha
Minister of Education,
Ministry of Education,
Isurupaya, Battaramulla.
8. Hon. Mahinda Amaraweera
Minister of Agriculture,
80/5,
“Govijana Mandiraya”,
Rajamalwatta Lane, Battaramulla.

9. Hon. Pavithra Wanniarachchi
Minister of Wild Life and Forest
Resources Conservation,
No. 1090, Sri Jayawardenapura
Mawatha, Rajagiriya.
10. Hon. Jeevan Thondaman
Minister of Water supply and Estate
Infrastructure,
Ministry of Water Supply,
1st Floor, Lakdiya Medura, No. 35,
New Parliament Rd., Battaramulla.
11. Hon. Nalaka Jude Hareen Fernando
Minister of Tourism and Lands,
7th Floor,
Sri Lanka Institute of Tourism and
Hotel Management,
Galle Road, Colombo 3.
12. Hon. Ramesh Pathirana
Minister of Plantation Industries,
Minister of Industries,
11th Floor, Sethsiripaya 2nd Stage,
Battaramulla.
13. Hon. Prasanna Ranathunga
Minister of Urban Development and
Housing
17th and 18th Floors,
SUHURUPAYA,
Subhuthipura Road, Battaramulla.
14. Hon. M. U. M. Ali Sabry
Minister of Foreign Affairs,
Sri Baron Jayathilake Mawatha,
Colombo 01.
15. Hon. Vidura Wickremanayake
Minister of Buddhasasana, Religious
and Cultural Affairs,
135, Srimath Anagarika Darmapala
Mawatha, Colombo 07.

16. Hon. Ahamed Zenulabdeen Naseer
Minister of Environment,
Sobadam Piyasa,
416/C/1, Robert Gunawardena
Mawatha,
Battaramulla.
17. Hon. Maligaspe Koralage Naleen
Manusha Nanayakkara
Minister of Labour and Foreign
Employment,
6th Floor, Mehewara Piyasa,
Narahenpita, Colombo 05.
18. Hon. Anuruddha Ranasinghe
Arachchige Roshan
Minister of Sports and Youth Affairs
and Irrigation,
No. 500, T.B. Jaya Mawatha,
Colombo 10.
19. Hon. Tiran Alles
Minister of Public Security,
14th Floor, Suhurupaya,
Battaramulla.
20. Hon. Kachchakaduge Nalin
Ruwanjiwa Fernando
Minister of Trade, Commerce, and
Food Security,
No. 27, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
21. Hon. Wijayadasa Rajapaksha
Minister of Justice, Prison Affairs and
Constitutional Reforms,
19, Sri Sangaraja Mawatha,
Colombo 10.
22. Hon. Douglas Devananda
Minister of Fisheries,
New Secretariat,
Maligawatta, Colombo 10.

23. Hon. Bandula Gunawardena
Minister of Transport and Highways
and Minister of Mass Media,
Ministry of Transport and Highway,
7th Floor,
Sethsiripaya Stage II, Battaramulla.

24. His Excellency
Ranil Wickramasinghe

In his capacity as the
Minister of Ministry of Finance,
Economic Stabilization and National
Policies,
Minister of Defence,
Minister of Women, Child Affairs and
Social Empowerment,
Minister of Technology

Through
Hon. Attorney General,
Attorney General's Department,
Colombo 12.

25. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Ravindranath Dabare with Savanthi Ponnampereuma for the Petitioners.

Viveka Siriwardena PC, ASG with Mahen Gopallawa DSG and Amasara
Gajadeera SC for the 1st, 1A and 3rd to 25th Respondents.

Neranjana Arulpragasam with Rasara Jayasuriya for the 2A Respondent.

Supported on : 06.02.2023

Written Submissions: Petitioners - 13.02.2023

1st, 1A and 3rd to 25th Respondents - 13.02.2023

2A Respondent - 13.02.2023

Decided on : 17.02.2023

Sobhitha Rajakaruna J.

The Petitioners are seeking, inter alia, for a mandate in the nature of a writ of Certiorari quashing the decision of the Cabinet of Ministers ('Cabinet') dated 09.01.2023 ('P14') and the General Policy Guidelines on the Electricity Industry ('Annexure 01' to 'P12') as much as it relates to Item No. 7 of the minutes of the Cabinet meeting held on 09.01.2023.

The Cabinet at its meeting held on 09.01.2023 considering a joint Memorandum dated 02.01.2023 submitted by the Minister of Finance, Economic Stabilization & National Policies and the Minister of Power & Energy on "*Proposal for the Revision of Electricity Tariffs in the year 2023*" has decided to amend the existing General Policy Guidelines on the Electricity Industry ('Guidelines'). The Petitioners plead that the said Guidelines have bypassed the provisions of the Sri Lanka Electricity Act No. 20 of 2009, as amended ('Electricity Act') and the Public Utilities Commission of Sri Lanka Act No. 35 of 2002 ('PUCSL Act') and accordingly, the said Cabinet decision 'P14' is ultra vires.

The learned Counsel for the Petitioners making submissions in support of the instant Application categorically limited his claim only to the provisions in Clauses 12 and 13 of the amendment to the said Guidelines¹. Firstly, the Petitioners raise concerns on the impugned amendment which provides that the Public Utilities Commission of Sri Lanka ('PUCSL') is expected to verify the published power purchase cost and determine the power purchase cost to be allowed to the transmission licensee within 15 days of the receipt

¹ at p. 140 of the set of documents of the Petition.

of the power purchase cost date from the transmission licensee. The Petitioners complain that such provisions disrupt the general powers of PUCSL to hold a public hearing in order to investigate and determine a tariff hike.

The other main concern of the Petitioners is based on the impugned amendment by which the PUCSL will be compelled to take immediate action when the Cabinet grants, considering the National importance, special approval for a revision of price and tariffs based on a transmission and distribution cost. The Petitioners contend that the said amendment overrides the general powers of the PUCSL as it will be bound to effectuate such decisions of the Cabinet with immediate effect.

The Court heard the learned Counsel for the Petitioners in support of this Application and the learned Additional Solicitor General ('ASG') who appears for the 1st, 1A and 3rd to 25th Respondents opposing the instant Application. On the date of the support of this Application, the PUCSL-1st Respondent was absent and unrepresented and however, the learned Counsel who represented the Chairman of PUCSL-2A Respondent ('Chairman') sought to make submissions only on behalf of the said Chairman but not on behalf of the PUCSL. The Chairman was present in Court without a proxy or sanction of the PUCSL. The learned Counsel for the said Chairman clearly indicated that he was supporting the Application of the Petitioners. Thus, this Court is unable to accept the issues raised by the said Chairman as the opinion of the PUCSL, however, the submissions made on behalf of the said Chairman may provide an influential effect when this Court arrives at a conclusion in this Order.

The learned ASG referring to several provisions of law submits that the relevant Minister has the power to formulate Guidelines and the Cabinet has not taken any unlawful decision in reference to the affairs mentioned in the instant Application.

Now, I need to consider whether this Court should fully consider the facts and circumstances of this case on affidavits of the Respondents at a final hearing or whether there is an arguable case which warrants this court to issue formal notice on the Respondents at this threshold stage.

Primarily, what needs consideration of this Court is whether the relevant Minister or the Cabinet has the power to amend the Guidelines and whether the amendments approved thereto by the Cabinet are lawful.

Copies of two legal opinions expressed by the Attorney General on 28.07.2022 and 04.11.2022 are annexed to 'P12'. Those opinions have been issued under the heading of *"Request for clarifications on the powers vested with the Minister in-charge of the Electricity Industry on revision of electricity tariffs"*. Those opinions of the Attorney General illustrate the legal background to his reason why the PUCSL is duty bound and obliged to give effect to policy Guidelines issued with the approval of the Cabinet.

In terms of Section 5(1) of the Electricity Act, the relevant Minister shall have the power to formulate general policy guidelines in respect of the electricity industry. The Section 5(3) of the said Act provides that the Minister has the authority to forward the general policy guidelines formulated under subsection (1) to the Cabinet for its approval. All amendments sought to be made to the guidelines approved by the Cabinet, shall also be required to be approved by the Cabinet. The Minister by virtue of Section 5(2)(d), in formulating the general policy guidelines, should take into consideration, among other matters, pricing policy in respect of the supply of electricity to facilitate the sustainable economic growth.

As per Section 30(1)(a) of the PUCSL Act, the Cabinet of Ministers shall in consultation with the Minister in charge of a public utilities industry, formulate where it sees fit, general policy guidelines and issue such guidelines to the PUCSL through the Minister, inter alia, on any matter identified in or under such industry Act for which general policy guidelines may be made.

The Section 30 of the Electricity Act deals with tariffs whilst the section 30 of the PUCSL Act deals with Policy Guidelines. In terms of Section 30(2)(b) of the Electricity Act, transmission and bulk sale tariffs and distribution and supply tariffs, as the case may be, shall, in accordance with conditions specified in the relevant licence permit the relevant licensee to recover all reasonable costs incurred in the carrying out of the activities authorized by its licence on an efficient basis.

The provisions in Section 30(2)(c) of the Electricity Act is also pertinent to the issues of this Application and in terms of such provisions the PUCSL is duty bound to approve transmission and bulk sale tariffs and distribution and supply tariffs in accordance with the policy guideline approved by the Cabinet under Section 5. Hence, I am inclined to accept the contention of the learned ASG that neither the Electricity Act nor the PUCSL

Act empowers the PUCSL to act in variance of such Guidelines. The Petitioners have not raised any contrary argument on this point of view.

The learned ASG emphasizing this point drew the attention of this Court to the Preamble of the Electricity Act and also to Section 55 of the said Act. The contention of the learned ASG is that both the Electricity Act and the PUCSL Act should be read in conjunction and in a harmonized manner.

The learned Counsel for the Chairman sought to explain why the said Chairman is raising objections against the said amendments to the existing Guidelines approved by the Cabinet. His claim is based on the following paragraph of the Cabinet Decision, marked 'P14' (at p.02);

“(b) to request the Public Utilities Commission of Sri Lanka-

- (ii) to permit the CEB to implement the proposed electricity tariff revision as indicated in Annex-03 to the Memorandum dated 2023-01-02 with effect from 2023-01-01, as an interim measure until the PUCSL takes a decision as per (b)(i) above; and”

The Chairman contends that the Cabinet is not empowered to amend those Guidelines with a retrospective effect. The learned ASG asserts the wordings in 'P14' clearly envisage that the Cabinet has made only a request to the PUCSL and not a direction and that request is to permit the Ceylon Electricity Board ('CEB') to implement the proposed Tariff revision with effect from 01.01.2023 as an interim measure until PUCSL takes a decision in respect of the said Tariff revision. The learned ASG relying on the dicta enunciated by the Supreme Court of India in the case of *Kanoria Chemicals and Industries Ltd. and another vs. State of Uttar Pradesh and others and Vice Versa 1992 SCR (1) 151* submits that there is no statutory bar to implement tariff revisions with retrospective effect.

Anyhow, upon an inquiry made by Court on 17.02.2023 in open Court, the learned ASG confirmed that the PUCSL had approved the proposed Tariff Revision with effect from 15.02.2023 and the relevant decision had already been communicated to CEB. In such a backdrop, there is no necessity for this Court to make an examination whether the said decision of the Cabinet is merely a request or whether any amendment has been effected retrospectively violating the law. I consider it as a futile exercise at this stage to consider

such issues as the PUCSL has not approved the revised tariff revision with effect from 01.01.2023 as proposed by the Cabinet. It appears that CEB also has implemented such tariff revision only with effect from 15.02.2023.

Further, the Chairman is in disagreement with the words; ‘National Importance’ embodied in Clause 13 of the said amendment to the Guidelines. The effect of the decision taken by the Cabinet therein, to my mind, is that there should be a mechanism to approve a revision of price and tariff based on a transmission and distribution cost without any delay, on an exigency arising on an important National issue. For the purpose of assaying the effect of such words in the said Clause 13, one must draw the attention to the justification reflected in the Cabinet Memorandum dated 02.01.2023 and the Joint Cabinet Memorandum dated 06.02.2023. The said Joint Cabinet Memorandum, marked ‘C’, tendered to Court by the learned ASG declares, inter alia;

“01. Electricity Tariff revision-2023”

“Ceylon Electricity Board (CEB) has made a proposal to revise the electricity tariff to recover the cost of operation in line with the tariff methodology introduced by the Public Utilities Commission of Sri Lanka (PUCSL). The Cabinet of Ministers via the decision on 10th January 2023 requested Public Utilities Commission to implement the proposed tariff revision by 15th February 2023, with effect from 01st January 2023. This tariff revision is imperative as the General Treasury is not in a position to provide funds to cover the costs of the Ceylon Electricity Board as CEB cannot maintain an uninterrupted power supply without having a cost recovery tariff structure.

The absence of a cost recovery pricing structure has created financial distress for CEB and borrowing itself is not an alternative solution as the high cost of borrowing will be a further burden to the electricity consumers ultimately. CEB has already defaulted the payments to Non-Conventional Renewable Energy (NCRE) generators leading the entire NCRE sector unsustainable. This will further worsen the financial situation of CEB by losing their low-cost NCRE sources while the gap is again filled by high-cost thermal sources. The delay in the implementation of cost-reflective tariff will create a spiraling effect on the sectors including, CEB, Ceylon Petroleum Corporation (CPC) and all the other connected organizations

such as state banks. The state banks have already in liquidity constraints due to pressure coming from the CEB and the CPC. Therefore, it is essential to revise the existing tariff to achieve cost reflection in order to ensure sustainability to the power sector and to arrest the inevitable trickle-down effect on the entire economy.

Having recognized the seriousness of this situation, the National Economic Council Chaired by the Hon. Speaker of the Parliament, with the participation of the Prime Minister and leaders of represented by the political parties of the Parliament, has reviewed the tariff proposal and difficulties faced by the CEB and has instructed the PUCSL to implement this proposal on 15th February 2023 following the due process. Accordingly, the PUCSL has agreed to implement the proposed tariff revision by following the due process by 15th February 2023. In this context, it is essential to implement the tariff revision with effect from 15th February 2023 and the residual losses shall be taken into account in the next tariff revision i.e. tariff revision to be done with effect from July 1, 2023. As such, it is emphasized to the PUCSL to make their internal process in line with this time frame in order for CEB to be financially viable in order to ensure uninterrupted power supply.”

In light of the above, I need to bear in mind, for proper adjudication of this matter, the severe economic crisis prevailed in the country very recently as I have pronounced and explained in my order, *Public Utilities Commission of Sri Lanka vs. Kanchana Wijesekera Minister of Power and Energy and others, CA/Writ/56/2023 dated 10.02.2023*. The Preamble of the PUCSL Act declares that it's an Act for the establishment of the PUCSL to regulate certain utilities industries pursuant to a coherent national policy. If the PUCSL issues a direction against the coherent national policy, then a reasonable doubt arises whether such direction is practical and also sometimes whether lawful. I take the view that it is the duty of the Authorities under both above Electricity Act and the PUCSL Act to strike a proper balance and take a coordinated effort for the best interest of the consumers. It is to be noted that the Cabinet in 'P14' has requested the PUCSL [see-paragraph (b)(i)] to take necessary actions, as mentioned therein, subject to adjusting any difference between the proposed tariff and the tariff is to be decided by the PUCSL through subsequent electricity bills of consumers. Hence, it seems that the immediate implementation of the said tariff revision (as per Clause 12 of the said Guidelines) does not create any adverse effect to the relevant provisions of the PUCSL Act.

In the circumstances, I take the view, based on the legal provisions referred to above and on the circumstances of this case, I cannot assume that the amendments introduced to the Guidelines in the said Clauses 12 and 13² have been adopted exceeding the jurisdiction and by violating a statutory requirement which eventually comes under any of the established grounds of judicial review. For the reasons set out above, I am of the view that the Cabinet has the authority to amend the existing Guidelines as mentioned above and the Petitioners & the Chairman have failed to establish that the impugned decisions are guilty of an illegality. Further, no viable legal ground has been presented by the Petitioners, for this Court to declare the impugned amendments to the Guidelines ultra vires.

In view of the foregoing, I take the view that there are no other facts and circumstances of this case which need examination on affidavits of the Respondents at a final hearing. Further, I am convinced that there is no arguable ground for judicial review which has a realistic prospect of success which warrants this Court to issue formal notice of this Application on the Respondents. Therefore, I proceed to refuse this Application.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal

² Supra note 1