

**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, Mandamus and  
Prohibition in terms of Article 140 of the  
Constitution of the Democratic Socialist Republic of  
Sri Lanka.*

**CA/WRIT/56/2023**

Public Utilities Commission of Sri Lanka  
6<sup>th</sup> Floor, BOC Merchant Tower,  
St. Micheal's Road,  
Colombo 03.

**Petitioner**

Vs.

1. Kanchana Wijesekera  
Minister of Power and Energy,  
Ministry of Power and Energy,  
437, Galle Road,  
Colombo 03.
2. Secretary  
Ministry of Power and Energy,  
437, Galle Road,  
Colombo 03.
3. Ceylon Electricity Board  
No. 50, Sir Chittampalam A. Gardiner  
Mawatha,  
Colombo 02.

4. Chairman  
Ceylon Electricity Board,  
No. 50, Sir Chittampalam A. Gardiner  
Mawatha,  
Colombo 02.
5. H. J. M. C. A Jayasundera  
Commissioner-General of Examinations,  
Department of Examinations,  
Palawatte, Battaramulla.
6. Ceylon Petroleum Corporation  
No. 609, Dr. Danister de Silva Mawatha,  
Colombo 9.
7. Chairman  
Ceylon Petroleum Corporation,  
No. 609, Dr. Danister de Silva Mawatha,  
Colombo 9.
8. Mahaweli Authority of Sri Lanka  
No. 500, T. B. Jaya Mawatha,  
Colombo 10.
9. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

**Respondents**

**Before** : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

**Counsel** : Neil Unamboowa, PC with T. Nanayakkara and Lakdev Unamboowa for the  
Petitioner.

Kanishka de Silva Balapatabendi DSG for the 1<sup>st</sup>, 2<sup>nd</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents.

Dr. Romesh de Silva, PC with Ruwantha Cooray, Niran Anketell and Namiq  
Nafath for the 3<sup>rd</sup> Respondent.

Sanjeewa Jayawardana, PC with Rukshan Senadheera for the 6<sup>th</sup> and 7<sup>th</sup>  
Respondents.

**Supported on** : 08.02.2023

**Decided on** : 10.02.2023

**Sobhitha Rajakaruna J.**

The Public Utilities Commission of Sri Lanka ('PUCSL') under the hand of its Chairman has directed the Ceylon Electricity Board ('CEB') by letter dated 27.01.2023 ('P22') to provide an uninterrupted power supply until 17.02.2023. Mr. Janaka Ratnayake, Chairman of PUCSL ('Chairman'), has informed CEB in his said letter that the PUCSL will not approve any scheduled power interruption from 26.01.2023 until 17.02.2023 in order to safeguard the rights of the candidates who are sitting for the General Certificate of Education-Advanced Level Examination ('A/L Examination'). The CEB by letter dated 27.01.2023 ('P23') has informed the PUCSL that the CEB had decided to continue with the scheduled demand

management program. The following paragraph of the decision of the CEB taken in this regard is reproduced in the said letter.

*“The Board also directed the General Manager to seek permission from the PUCSL for the “scheduled power interruptions” explaining clearly the difficulties faced in obtaining fuel from CPC to operate thermal power plants, aggravated financial position etc. The Board also decided to continue with planned power interruptions until further notice.”*

The primary relief sought by the PUCSL is for a writ of Certiorari quashing the said decision of the CEB reflected in ‘P23’. A writ of Mandamus is also sought to direct the 1<sup>st</sup> to 4<sup>th</sup> and the 6<sup>th</sup> Respondents to comply with the agreement and undertaking made at the Human Rights Commission of Sri Lanka (‘HRC’) to grant uninterrupted power supply during the A/L Examination as described and set out in the recommendation (‘P17’) made by HRC.

The learned President’s Counsel for the Petitioner categorically informed Court that the instant Application has been filed for the best interest of the students who are currently sitting for the A/L Examination which will end on 17.02.2023 and if no interim relief as prayed for in the prayer of the Petition is issued, the instant Application would be rendered nugatory. I observe that in an event the Court declines to issue an interim relief at this stage, the instant Application would become futile and academic. Therefore, what needs consideration at this threshold stage is whether a prima facie case with a substantive question to be examined at a full hearing of this Application has been made available warranting this Court to issue such interim relief. When considering this issue, the Court is guided by the principles that should be adhered to when granting an interim relief in an application for judicial review.

Now, I need to examine the reasons given by CEB for not complying with the said direction ‘P22’ of the PUCSL. The background to the reasons given in the aforesaid letter ‘P23’ can be discovered through several other documents annexed to the Petition.

Firstly, the letter dated 05.01.2023 (‘P1’) addressed to PUCSL by the General Manager of CEB indicates that;

*“It is noteworthy to see that CEB is in an extremely difficult position to honour the payments to procure Coal and other fuels for the coming months. Currently, CEB is purchasing fuel for*

*thermal power plants from CPC on day-to-day basis in small quantities without resorting for power interruptions. However, it often leads to situations of insufficient fuel quantities preventing continuous operation of thermal power plants. The situation of fuel supply is reported to PUCSL through Generation Summary report sent daily by the National System Control Center of CEB. At the same time, due to prevailing insufficient fuel quantities, power plants are operated violating economic merit order in many a times. Also, the ultimate objective of introducing the Time of Use Tariff is being violated especially since off peak is not run by cheapest power plants due to unavailability of fuel. This has incurred a huge cost to CEB and for the country. In the circumstance it is necessary that CEB be ready with cash upfront as a topmost priority in order to enable CEB for timely ordering of fuel without accumulation of fuel bills.”*

*“The accumulated total of major payable balances stands at LKR 658 billion as at November 30, 2022 as follows.....[a Table is given].”*

*“.....In the context of present financial situation, it is impossible to settle the outstanding payments of most fuel Suppliers CPC and Lanka Coal, IPP, NCRE suppliers and Material Suppliers on time, which in turn has affected the financial independence of those external entities and the present renewable power policy of the Government. Further, CEB has been operating without due subsidies as per the SLEA even though the amount of subsidy has been communicated to PUCSL for more than 10 years on monthly basis.”*

The observations (‘P2’) made by the Cabinet at its meeting held on 09.01.2023 is also important in this regard;

*“After discussion, the Cabinet observed –*

- (i) that, due to the constraints in the available fiscal space, the General Treasury is not in a position to provide funds to the Ceylon Electricity Board (CEB) to cover its losses or grant concessions / reliefs to the electricity consumers; and”*

It is stated in Cabinet Memorandum dated 02.01.2023;

*“It is to be noted that the electricity demand growth rate has a direct correlation with the growth rate of the country’s economy. If the GDP growth rate is dropped by 4%, the electricity growth rate may follow the same pattern, and the required generation units for the year 2023 could be*

*reduced to 16,500 GWh approximately. In such a case 36 Bn LKR cost reduction is envisioned and the required tariff increase would be marginally less and Government can decide on which tariff categories are to be benefited from the cost reduction.”*

Also the attention should be drawn to Clauses 23 & 24 of the amendment to the General Policy Guidelines for the Electricity Industry 2022 (annexure 1 to Cabinet Memorandum dated 02.01.2023) [part and parcel of ‘P2’)];

Clause 23 “Commercial enterprises such as banks, financial institutions, capital investment entities, and real estate entities, shall not be granted any subsidy and shall be charged with at least the actual cost of supply of electricity.”

Clause 24 “No government subsidies are provided for the electricity industry in the future. However, the utilities may follow the cross-subsidy policy to facilitate the low-income group and industrial consumers.”

The excerpts from the comments made by CEB in annexure I to P8(B) is also important to understand the surroundings of the CEB’s version;

2 & 2 a):

- *“As per the World Bank, with the ongoing economic reform, it is envisioned that GDP of 2023 will experience a drop of 4%.*
- *According to the policy instruction was received from MOPE, Generation Dispatch forecast was prepared without power cuts and no subsidy will be given to CEB from the General Treasury for 2023.*
- *Generation dispatch forecast study was carried out using SDDP and PSSE software with considering the main generation and transmission concerns as follows:*
  - Availability of Coal for LVPS operation.*
  - Inflow variation to hydro catchment areas*
  - Scheduled plant outages.*
  - Avoidance of transmission constraints.*

*-Possible NCRE generation variations.”*

2 c):

*“Based on the recorded generation figures up to September 2022 and the estimated energy for remaining three months, annual energy of this year excluding planned power interruptions is estimated to be around 16,425 GWh. Accordingly, annual energy forecast for year 2023 has been calculated based on following approach.*

*The expected energy forecast for 2022 excluding planned power interruptions  
-16,425 GWh*

*The estimated unserved energy due to planned power interruptions for 2022  
-785 GWh*

*The expected total energy forecast including planned power interruptions in 2022  
-17,210 GWh*

*Accordingly, assuming 4% drop in GDP, equivalent drop in annual energy forecast for year 2023 is calculated to be **16,520 GWh.**”*

The main contention of the Petitioner is that it is mandatory for the Petitioner to follow and adhere to the provisions of Section 30 of the Sri Lanka Electricity Act No. 20 of 2009, as amended ('Electricity Act') regarding tariff revision applications and the procedure to be followed by the Petitioner regarding such tariff revision applications are laid down in the Rules, made under the Electricity Act, published in Gazette Extraordinary No. 1978/21 dated 02.08.2016 ('P3') and in the tariff methodology ('P3(a)') approved by the PUCSL. The Petitioner further asserts that as per the Condition 30(10) of the Electricity Transmission and Bulk Supply Licence ('P27'), the Licensee shall obtain prior approval of the Commission for every scheduled interruption of electricity supply throughout the island/or major part of the island irrespective of the cause of the same, other than the interruptions necessary due to maintenance in respect of which prior notice is given to the general public.

The Director General of PUCSL by letter dated 11.01.2023 ('P4') has informed that a public consultation was scheduled to commence on 16.01.2023, but the Court observes that such

public consultation is in reference to 'Bulk Supply Tariff Filing' for the period 01.01.2023 to 31.06.2023 and not on the power interruption during the A/L Examination. The Public Notice, marked 'P9', is also in reference to the said proposed Electricity Tariff Revision 2023.

The reason given by PUCSL in its letter dated 22.01.2023 ('P16') addressed to the CEB for the requirement of avoiding power interruptions during the period of A/L Examination is that it's a national requirement. The other paramount reason set out in the Petition as to why CEB should not interrupt power during such period is the Agreement ('P17') entered into before the HRC on 25.01.2023. On a careful perusal of the said 'P17', it clearly implies that the said Agreement has been reached to ensure uninterrupted power supply during the period from 23.01.2023 to 17.02.2023 based on a definite condition. Such condition was that the CEB should give priority for settling such cost of fuel when revising the tariffs.

When the learned President's Counsel for the Petitioner was making submissions upon 'P17', the Court inquired whether he was aware about the Writ Application bearing No. 37/2023 where the PUCSL and the Chairman are the 2<sup>nd</sup> and 2A Respondents, respectively. However, the learned President's Counsel indicated that he was unaware about such an application. Based on the circumstances of this case, it is essential for this Court to take judicial notice of the said application to a certain extent in arriving at decisions in the instant Application. In the said application, the Petitioners are challenging, inter alia, the Cabinet decision dated 09.01.2023 approving the proposed electricity tariff revision as indicated in Annexure 3 to the Cabinet Memorandum dated 02.01.2023. The said documents are part and parcel of the instant Application as well (P2).

When the said application CA/Writ/37/2023 was supported before me and my brother on 06.02.2023 in this Court, we conspicuously inquired from Mr. Janaka Ratnayake-the Chairman PUCSL, who was present in Court, whether the PUCSL could authorize the forthcoming tariff revision. The learned Counsel who appeared for said Mr. Ratnayake at the outset informed Court that no proxy has been filed on behalf of the PUCSL and he was appearing only on behalf of the said Mr. Ratnayake. Answering the question raised by us, the said learned Counsel informed Court that the proposed electricity tariff revision cannot be authorized as Mr. Ratnayake is objecting to it on a point of law.



In light of the above and based on the documents examined by Court, it appears that the CEB is not in a position to find adequate funds to procure fuel from the Ceylon Petroleum Corporation (6<sup>th</sup> Respondent) unless and until the proposed electricity tariff revision is set up. This position is evinced by the contents of the letter 'P1' issued by the General Manager of CEB. What was transmitted to Court by the learned President's Counsel for the CEB was that the CEB is planning to supply electricity uninterruptedly to the whole country if the said electricity tariff revisions are implemented. It is an admitted fact that there is no interruption to power supply during the Examination hours. In such a backdrop, when looking at the said Agreement reflected in 'P17' from the perspective of a reasonable person of ordinary prudence, it appears that the whole issue in the instant Application will be resolved if the PUCSL authorizes the proposed electricity tariff revision as requested by the Cabinet, complying with the provisions of the Electricity Act and the Public Utilities Commission of Sri Lanka Act No. 35 of 2002 ('PUCSL Act').

Thus, it is clear that until the tussle in the said CA/Writ/37/2023 is disentangled, the CEB is unable to find necessary resources for uninterrupted power supply. The CEB by letter dated 20.01.2023 ('P14') has informed the PUCSL that the estimated cost for uninterrupted power supply for 'Option 1' proposed by the PUCSL is a sum of Rs. 4.1 Billion and for 'Option 2' the additional cost will be approximately a sum of Rs. 2.4 Billion. The CEB in 'P14' informs the PUCSL;

*“At present, Ceylon Petroleum Corporation (CPC) is not providing credit facilities to CEB for supply of fuel as the credit level has exceeded. CEB is not in a position to make regular payments due to the insufficient cash flow. Peoples Bank or other banks are also refusing to give credit facilities to CEB as CEB is already indebted and they do not foresee a capability for CEB to payback any loans based on CEB's earning/cash flow forecast without a tariff increase.”*

In view of the above circumstances, it is manifestly clear that the CEB is not competent within the available resources to procure fuel from Ceylon Petroleum Corporation. The learned President's Counsel who appears for the Ceylon Petroleum Corporation as well as the learned Deputy Solicitor General categorically informed Court that the Ceylon Petroleum Corporation has no means to assist the process of providing fuel without accepting payments for the purpose of supplying electricity uninterruptedly during the A/L Examination. Both

the said learned Counsel submitted that the Mahaweli Authority of Sri Lanka also has no capacity to release extra water in order to facilitate such process.

I need to examine at this stage whether the above-mentioned incapacity of the CEB would pave the way to relinquish the CEB from the liability of not complying with the directions issued by the PUCSL in 'P22'. The United Nations Development Programme and United Nations Disaster Risk Reduction Offices define 'institutional capacity' as the capability of an institution to set and achieve social and economic goals, through knowledge, skills, systems, and institutions. While institutional capacity is often mentioned in development contexts and is well understood in general terms, it can be difficult to define in specific terms and in measurable ways.<sup>1</sup> Various scholars have given several definitions for institutional capacity and accordingly, it has been identified even as the ability and competence of an institution to carry out mandated operations and produce outcomes by deploying the necessary resources within an appropriate structural context<sup>2</sup>.

The PUCSL being the regulatory body is ought to take a practical approach when assaying the institutional limitations or capacity of the Licensee before making strict directions. There may be numerous occasions where the regulatory body should not take decisions on its own without consulting specialists with related expertise. I am convinced that the scheme of the PUCSL Act is to strike a proper balance among the respective public institutions by way of a coordinated effort for the benefit of the consumers. The Preamble of the said 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 without assaying the said institutional capacity of the Licensee and also against the coherent national policy, then a reasonable doubt arises whether such direction is practical and also sometimes whether lawful.

Although, this Court is bound to exercise its jurisdiction in terms of Article 140 of the Constitution, I trust that this Court is competent to take notice of the severe economic crisis prevailed in the Country very recently and the immense suffering underwent by the people.

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<sup>1</sup> <https://www.itdp.org/2016/04/01/the-secret-ingredient-institutional-capacity/>

<sup>2</sup> See- Bhagavan & Virgin, 2004; VanSant, 2000.

This Court is not competent to assess and pronounce whether the effects of the said economic crisis has ceased or diminished by now. Following the judicial precedent laid down by Superior Courts, the Court of Appeal exercises an unfettered discretion in judicial review subject to the said Article of the Constitution. Therefore, I take the view that this is a fit and proper case to adopt the notion of institutional capacity when reviewing the impugned decision of the CEB. The cornerstone of this notion should be that an adequate and a reasonable explanation based on the institution's incapacity, particularly on the non-availability of resources and expertise, should be taken into consideration by a regulatory body before making any adverse order against a Licensee upon a non-compliance of a direction issued by such regulatory body. This notion should be adopted only in rare occasions like in this case and no public institution should take refuge under this defence after misusing public power by mismanagement or maladministration.

Moreover, the circumstances of this case lead this Court as well to delegate a considerable portion of its decision making power upon the availability of resources of the respective institution/ electricity industry to another organ of the Government which has the specialization and the expertise. The PUCSL not challenging the institutional incapacity reflected in the letters of the CEB at an appropriate forum facilitated me to boldly embrace the notion of institutional incapacity in the instant Application.

Hence, I take the view that no interim order as prayed for in the prayer of the Petition could be issued. The principles of balance of convenience can be clearly employed in making this decision as the issuance of an interim order would cause irreparable damages to the CEB and eventually, majority of the public including the students who are sitting for the A/L Examination will have to be in dark for several months in the near future. This Court is unable to allow such damage to be caused by clinging on to narrow interpretations of law relating to judicial review.

Having considered the issuance of interim relief, it is important to ascertain whether this Petition can be further maintained. As mentioned earlier, the learned President's Counsel for the Petitioner in no uncertain terms admitted that this Application would be rendered nugatory if no interim relief is issued. Thus, once the interim order is rejected, I need to

consider whether there would be any other legal question that needs to be examined at a full hearing of this case.

I am unable to ascertain any such question that needs consideration of this Court other than the issues well discussed above. In view of the foregoing, I hold that the decision reflected in 'P23' has been well justified based on their incapacity to carry out the direction given through 'P22' and thus, this Court is not inclined to quash the said decision by way of a writ of Certiorari and to issue any directions to the Respondents to comply with the direction in 'P22' which will be effective approximately for another 168 hours (7 days) and that is until the end of A/L Examination.

At this stage, I must take into consideration the vital submissions made by the learned President's Counsel for the 3<sup>rd</sup> Respondent who raised several objections on the maintainability of this Application. The said learned President's Counsel pointed out that no valid seal has been affixed on the purported proxy submitted on behalf of PUCSL as the Petitioner has failed to submit the proof of sanction of the PUCSL in terms of Section 10 of the PUCSL Act to affix the seal. Further, it is argued that several other members of the PUCSL are not agreeable to maintain the instant Application and therefore, this Application should be dismissed in limine with heavy costs. Although, the Petitioner by way of a motion dated 07.02.2023 has tendered a document purported to be the minutes of a meeting attended by three members and the Chairman of the PUCSL, the learned DSG referring to the letter dated 08.02.2023 (addressed to the Attorney General by the Secretary to the Ministry of Power & Energy) and also to the letter dated 07.02.2023 (addressed to the Attorney General by the Director General of Legal Affairs Department of Ministry of Finance) submitted that two members of the PUCSL (Mrs. Chathurika Wijesinghe and Mr. Douglas N. Nanayakkara) were in disagreement with the institution of the instant Application in this Court.

It is to be noted that this Application has been filed without taking steps in terms of Section 48 of the Electricity Act. The Condition 14: 1(c) deals with revocation of license in the event the Licensee fails to comply with an enforcement order issued by PUCSL whereas the Condition 22 deals with Dispute Resolution. It seems that the PUCSL has not given effect to any of those conditions against the CEB. No acceptable reason was given for filing this Review Application when an alternative remedy was available to deal with a non-compliance

of a direction given by PUCSL. It has not been established as to why the alternative relief available to the PUCSL is not adequate and not efficacious. I take the view that when the Respondents are raising a serious objection upon the competence of the Chairman of PUCSL to institute this Application on his own accord without due sanction of the PUCSL, then it is mandatory to investigate as to whether the said Chairman has obtained necessary sanctions in that regard. I am convinced that no adequate proof of sanction of the PUCSL to affix the seal on the proxy, according to law, has been tendered to Court.

This kind of conduct of responsible officers of public institutions may erode the basic principles of good governance. The majority decision of the PUCSL should not be overridden by a single member or by a minority to amplify a personal view on an official matter to win the hearts of a certain portion of the public. Hence, such conduct simply cannot be identified as steps taken for the interest of public and similarly, this Application cannot be considered as public interest litigation.

The following passage by Lord Hoffman in *“The COMBAR Lecture 2001: Separation of Powers<sup>3</sup>”* referred to by Jeffrey Jowell in *“Judicial deference: servility, civility or institutional capacity<sup>4</sup>”* states;

*“The courts should not, under cover of interpretation of the human rights of the individual, make decisions about what the general public interest requires. There is no individual right to have the law changed to accord with the court's perception of the general public interest. Once this happens, we have government by judges rather than government by the people.”*

In addition to the above, I need to mention that the following passage in *‘Administrative Law’ (11<sup>th</sup> Edition) Oxford (at p. 426) by H. W. R. Wade and C. F. Forsyth* aroused my curiosity;

*“The remedies most used in natural justice cases- the quashing order, the prohibiting order, the mandatory order, the injunction and the declaration- are discretionary, so that the court has*

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<sup>3</sup>“Separation of Powers” (2002) J.R. 137

<sup>4</sup> P.L. 2003, Win, 592-601

*power to withhold them if it thinks fit; and from time to time the court will do so for some special reason, even though there has been a clear violation of natural justice.<sup>5</sup>*

In the circumstances, bearing both the above statements in mind and on a careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, this Court should make a strong observation that the cost of litigation in respect of the instant Application should not be borne out of the funds allocated by the Treasury to the PUCSL. Further, I should exercise my discretion to direct the Registrar of this Court to communicate a copy of this order to the Auditor General for his information.

I proceed to refuse issuing formal notice of this Application on the Respondents.

*Application is dismissed.*

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**

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<sup>5</sup> For a general statement see Hoffman- La Roche vs. Secretary of State for Trade and Industry (1975) AC 295 at 320 (Lord Denning MR).