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 and Article 126 (3) of the Constitution.

A. W. T. P. Alagoda,
59, Kotuwegedara Road,
Matale.

PETITIONER

C.A. Writ – 0050-20

Vs.

1. Asela K. Dissanayaka.
Director – District General
Hospital Matale
District General Hospital
Matale.

1A.Y. M. S. S. Yapa.
Director-District General
Hospital Matale
District General Hospital
Matale.

2.Arjuna Thilakarathne.
Director,
Department of Health Services of the
Central Province,
163 Sangaraja Mawatha,
Kandy.

2A. M. N. Weerasooriya.
Director
Department of Health Services
of the Central Province
163, Sangaraja Mawatha,
Kandy.

3. B. H. N Jayawickrama.
Secretary
Ministry of Health
Indigenous Medicine Social
Welfare Probation and
Childcare Services of Central
Province,
P.O. Box 121,
Sangaraja Mawatha,
Kandy.

3A. L. A. Sujatha Wijesinghe
Secretary-
Ministry of Health
Indigenous Medicine Social
Welfare Probation and
Childcare Services of Central
Province
P.O.Box 121,
Sangaraja Mawatha,
Kandy.

4. W. M. K. K Karunarathne.
Chief Secretary – Central
Province

Office of the Chief Secretary -
Central Province,
Pallekelle,
Kundasale, 20168

4A. Gamini Rajaratne.
Chief Secretary – Central Province
Office of the Chief Secretary-
Central Province,
Pallekelle,
Kundasale, 20168

5. S. W. M. K. K. Sinha Prathapa.
Deputy Director
Department of Health Services
Central Province,
163, Sangaraja Mawatha,
Kandy.

5A. M. D Udara Gunathilake.
Deputy Director,
Department of Health Services
Central Province, 163,
Sangaraja Mawatha,
Kandy.

6. M. S. K. Wickramathilaka.
Regional Director,
Office of the Regional Director of
Health Services – Matale,
RDHS Office, MC Road,
Matale.

6A. K. G. C. Y. S. B. Weerakoon.
Regional Director
Office of the Regional
Director of
Health Services – Matale
RDHS Office, MC Road,
Matale.

7. M. G. A. Thilakaratne.
Secretary – Public Service
Commission of Central Province.

7A. T. A. D. W. Dayananda.
Secretary – Public Service
Commission of Central Province.

7B. Kumuduni S. Premachandra
Secretary – Public Service
Commission of Central Province.

8. P. G. Amarasekara.
Chairman – Public Service
Commission of Central Province.

9. Mr. W. M. S. D. Weerakoon.
Member – Public Service
Commission of Central Province.

10. A. M. Wais.
Member – Public Service
Commission of Central Province.

11. A. M. R. B. Tennakoon.
    Member – Public Service
    Commission of Central
    Province.

12. N. D. K. Piumsiri.
    Member – Public Service
    Commission of Central
    Province.

13. H. M. D. R. Herath.
    Member – Public Service
    Commission of Central
    Province.

14. K. R. Krishan.
    Member – Public Service
    Commission of Central
    Province.

    Above 7 to 14 All of;
    Public Service Commission of
    Central Province
    No. 244, Katugasthota Rd,
    Kandy.

15. Lalith U. Gamage.
    Governor – Central Province
    Governor Secretary office,
    PO Box 06, Kandy.

16. H. M. Anula Kumarihami.
Office of the Regional
Director of Health Services -
Kandy
P.O. Box 56,
Yatinuwara Veediya,
Kandy.

And now
District General Hospital,
Matale.

17. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE : M. SAMPATH K. B. WIJERATNE, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Boopathy Kahathuduwa for the Petitioner.
Nayomi Kahawita, SC for the Respondents.

ARGUED ON : 30.03.2023

DECIDED ON : 22.05.2023

WICKUM A. KALUARACHCHI, J.

The petitioner was initially recruited to the cadre of the Public Service of the Central Province and was assigned to the Ministry of Education, Local Government and Land of the province. After being enlisted to the permanent cadre on 4th January 1994, the petitioner was transferred

to the Health Service Directorate of the Central Province with effect from 31st May 2001. Subsequently, the petitioner was appointed to the Supra Grade of the Central Province Public Management Assistant Service and assigned to the Health, Indigenous Medicine and Social Welfare Ministry of the Central Province, effective from 8th April 2008. Following this, on 27th May 2008, the petitioner was assigned as the Administrative Officer of Matale District General Hospital. In accordance with letter P-10, the petitioner was granted supervisory responsibilities of the hospital maintenance unit and the minor staff, in addition to other duties assigned to her.

After completing nine years of service in the capacity of Administrative Officer, the petitioner requested to be transferred to Matale Health Services Directorate or Matale Zonal Education Division. The petitioner stated that all her requests for a transfer were denied or not responded. Furthermore, the petitioner stated that she was able to reveal various irregularities by the minor staff during that period.

As evident from the letter marked 1R-10, on a demand made by a Trade Union, the Governor of the Central Province directed to temporarily transfer the petitioner to a suitable place within the department.

However, the petitioner has been permanently transferred to the Office of the Regional Director of Health Services of Kandy by the letter dated 03.01.2020 marked P-20 under the signature of the 7th respondent, Secretary, Public Service Commission of Central Province subject to the covering approval of the Provincial Public Service Commission. Against the said transfer, the petitioner filed this application for writs and sought the following reliefs:

- A Writ of Certiorari to quash the decision contained in the document marked P-20.

- A writ of certiorari to quash the decision contained in document P-23 taken by the 8th to 14th Respondents to grant covering approval for the transfer of the petitioner.

- A writ of certiorari to quash documents marked P-21(a), P-21(b), P-21(c).

- A writ of certiorari to quash the decision of the 1st Respondent contained in the document P-22 to release the petitioner from her duties.

- A writ of certiorari to quash the decision contained in the document marked P-30 in which the 8th to 14th Respondents refused to consider the petitioner's appeal.

- A writ of mandamus directing the 7th respondent and/or 8th to 13th respondents and/or 14th respondent and/or anyone or more of them to reinstate the petitioner in the position of Administrative Officer of the Matale District General Hospital.

The statement of objections was filed on behalf of the respondents and subsequently, a counter affidavit was filed by the petitioner. At the hearing, the learned Counsel for the petitioner, and the learned State Counsel for the respondents, made oral submissions.

The learned counsel for the petitioner advanced his arguments on the following main grounds.

i. The Secretary to the Public Service Commission of the Central Province has no authority to make this transfer.
ii. This kind of transfer is not recognized by law.
iii. The transfer was made without following the principles of natural justice.

The learned State Counsel raised an objection regarding the maintainability of this application submitting that the petitioner had

the right to make an appeal against the order of transfer to the Governor in terms of the provisions of Provincial Council Act No. 42 of 1987 and without recourse to the said alternative remedy, the petitioner cannot maintain this application. I intend to deal with this objection when considering the third ground of appeal.

First Ground of Argument -

The Secretary to the Public Service Commission of the Central Province has no authority to make this transfer.

By the letter P-20, Secretary to the Public Service Commission of the Central Province conveyed the decision of transfer subject to the covering approval of the Provincial Public Service Commission as stated previously. That means, even if the Provincial Public Service Commission had the power to make the transfer, at the time of sending the said letter by the secretary to transfer the petitioner with immediate effect, the Central Provincial Public Service Commission has not approved the decision of transferring the petitioner.

Citing the case of ***Gunarathne V. Chandrananda de Silva*** – (1998) 3 Sri L.R. 275, the learned Counsel for the petitioner contended that the Secretary to the Central Provincial Public Service Commission has transferred the petitioner as per the letter P-20, but according to this judgment, even if the Central Provincial Public Service Commission has the authority to transfer the petitioner, the said power cannot be delegated to its secretary.

In the said case of ***Gunarathne V. Chandrananda de Silva***, it was held as follows: "It was very clear that it was the respondent who has decided to place the petitioner on compulsory leave and had thereafter recommended to the PSC that approval be granted to place the petitioner on compulsory leave.

The powers given to the Public Service Commission regarding disciplinary control has not been delegated, therefore the decision to place the petitioner on compulsory leave has to be a personal decision of the PSC, the decision-making body should bring their minds to bear on the matter before them and take a collective decision and further there must be evidence to support that such a decision was in fact made."

According to the said judgment, even in an instance where the Provincial Public Service Commission has the authority to make a transfer, the Secretary to the Provincial Public Service Commission has no authority to make that transfer. In the case at hand, the Secretary to the Provincial Public Service Commission has made this transfer with immediate effect expecting the covering approval of the Provincial Public Service Commission.

The learned State Counsel argued in response that the Governor of the Central Province had delegated certain powers to the Secretary to the Central Provincial Public Service Commission and other government officials by the letter dated 20.11.1990 marked 1R-1. The learned Counsel further asserted that, under item 5 of the schedule attached to 1R-1, the Secretary to the Central Provincial Public Service Commission had the authority to transfer the petitioner.

However, a careful review of document 1R-1 reveals that item 5 of the schedule does not confer upon the Secretary to the Central Provincial Public Service Commission, the authority to effect transfers within the ministry. In fact, under item 5 of the schedule, the Secretary to the Central Provincial Public Service Commission has not been given authority to make any transfer specified under item 5. Moreover, although the letter P-20 was signed by the Secretary to the Central Provincial Public Service Commission, stating that it was done under the command of the Central Provincial Public Service Commission, the

Commission could not have issued such a directive as it had not made a decision regarding the transfer at the time of sending the letter. The Secretary had sent the letter of transfer subject to the covering approval of the Commission.

According to the learned counsel for the petitioner, the secretary to the ministry has been granted the authority to effect transfers within the ministry. If the petitioner's transfer in question was considered as a transfer between two institutions within the health ministry, it is correct that the Secretary to the Health Ministry should make that transfer and the Secretary to the Central Provincial Public Service Commission has no power to effect the transfer of the petitioner. If the transfer in question is considered as a transfer within the department, Head of the Department had to make the transfer on approval of the Secretary to the Ministry according to the item 5 of the said schedule. Even though, the learned State Counsel pointed out that according to the item 5 of the schedule attached to 1R-1, the Secretary to the Provincial Public Service Commission gets power to make this transfer, no such power has been given to the Secretary according to the item 5 of the said schedule. According to the item 5, the transfers between Ministries and orders of releasing from provincial council services (පළාත් සභා සේවයෙන් මුදාහැරීම) have to be made by the Provincial Public Service Commission on the recommendation of the Chief Secretary, the 4th respondent and not the 7th respondent. Therefore, even in those occasions, the Secretary to the Public Service Commission of Central Province, the 7th respondent has no authority to make the transfer in question. Therefore, the transfer in question is unlawful.

Second Ground of Argument –

This kind of transfer is not recognized by law.

The learned State Counsel contended that the transfer was carried out in compliance with the Governor's directives. The learned State Counsel

further asserted that several complaints had been lodged against the petitioner for allegedly inflicting mental stress and trauma on hospital staff, and therefore, the temporary transfer was necessary to ensure the efficient and uninterrupted functioning of the Matale District General Hospital. The same argument was also highlighted in paragraph 21 of the statement of objections.

The learned Counsel for the petitioner submitted that the petitioner has no issue with regard to the direction given by the Governor to make a temporary transfer, but the petitioner seeks writs of certiorari to quash the decisions pertaining to a permanent transfer made by the letter P-20.

The direction of the Governor of the Central Province dated 20.12.2019 is contained in the letter marked 1R-10. It is precisely clear that the Governor directed only to give a temporary transfer. However, by the transfer order dated 03.01.2020 (P-20), the petitioner who served in the Matale District Hospital was transferred to the Regional Director of Health Services of Kandy as a permanent transfer. Hence, the transfer made by letter P-20 is totally contradictory to the directions given by the Governor in the document marked 1R-10. The petitioner has preferred this application against the decision made by letter P-20.

At the hearing, the court inquired of the learned State Counsel as to the nature of the transfer that had been effected by the 7th respondent based on the proposal made by the 2nd respondent and the request made by the 3rd respondent. In response, the learned State Counsel was unable to provide an answer as to the type of transfer. However, she did acknowledge that it could not be construed as a transfer on disciplinary grounds.

It is to be noted that for a transfer to be made on disciplinary grounds, a charge sheet must be issued, an inquiry must be conducted, and a

transfer may be made based on the findings of the inquiry. In recommendation 02 of the inquiry report marked 1R-11, it was specifically mentioned that no disciplinary action needed to be taken since the allegations against the petitioner contained in the petition had not been substantiated. (ලිඛිත සහ වාචික සාක්ෂි අනුව පරිපාලන නිලධාරිණියට එරෙහිව යොමුකොට ඇති පෙත්සමෙහි කරුණු තහවුරු නොවන බැවින් විනය ක්‍රියාමාර්ග ගැනීම අවශ්‍ය නොවන බව) Therefore, it is precisely clear that the transfer in question was not carried out on disciplinary grounds.

Undisputedly, the petitioner was employed in a position that is subject to transfers. Considering the length of time that the petitioner had served at the Matale District Hospital, it is evident that she is eligible for transfer. Moreover, it has been revealed through the documents submitted with the petition that the petitioner herself had requested a transfer. The learned Counsel for the petitioner also submitted that the petitioner agrees to be transferred to any institution within the Matale District that aligns with her qualifications and position.

The criteria and the procedure for annual transfers have been clearly defined in document P-27. The timetable pertaining to annual transfers has been explicitly laid out on page 5 of the aforementioned document. As per the stipulated schedule, an employee may apply for a transfer before the 31st of July each year. Following the decision on the transfer application, the employee may appeal, and the appeals would subsequently be assessed. Following this, the transfers would take effect from the 1st of January of the following year. In perusing document P-27, it is evident that the transfer in question was not an annual transfer as well.

Furthermore, it is clear that the transfer in question was not necessitated by service requirements. Had this been the case, the letter of transfer dispatched to the petitioner would have explicitly stated that the transfer was due to service exigencies.

According to the Gazette Extraordinary No. 1589/30 dated 20.02.2009, under the general conditions relating to transfers of public officers in the public service, transfers are fourfold as follows:

i. Transfers done annually
ii. Transfers done on exigencies of services
iii. Transfers done on disciplinary grounds
iv. Mutual transfers on requests made by officers.

The respondents have failed to demonstrate that the Provincial Public Service Commission or its Secretary is authorized to make any other type of transfer in addition to the aforementioned four categories. The transfer in question does not fall under any of the specified transfer categories.

In addition, the respondents cannot argue that they are entitled to make this transfer because this type of transfer is not forbidden by law. In the judgment of C.A. Writ/541/2008, decided on 05.08.2019 a proposition in ***Abesinghe Arachchige Asoka v. P.R.P Rajapaksha and other*** (C.A. Writ 208/2013, CA minutes of 02.09.2016) has been cited as follows: "This principle that what is not forbidden is permissible in law may hold good in procedural law. But it may not hold water in administrative law which requires public authorities to keep within the bounds of statutory powers. A statutory authority endowed with statutory powers has no common law power at all: it can legally do only what the statute permits and what is not permitted is forbidden."

As stated previously, the learned State Counsel who appeared for the respondents acknowledged before this court in reply to the question posed by the Court that she is unable to show any legal provision or authority given to the respondents to make this transfer. Thus, it is evident that neither the 7th respondent nor any other respondent

possesses the statutory power or authority to make such a transfer. Furthermore, no circular or legally acceptable document granting such authority to the respondents has been presented to this Court. Therefore, I am inclined to agree with the contention of the learned Counsel for the petitioner that this transfer has been carried out without proper statutory power or authority, rendering it unlawful. To put it simply, this order of transfer is without legal authority and thus, illegal.

Third Ground of Argument –
The transfer was made without following the principles of natural justice.

The next issue to be addressed is the argument of not following the principles of natural justice. The court sought clarification from the learned State Counsel on whether the petitioner was afforded the opportunity to make a statement concerning the matters related to the transfer in question. The learned State Counsel conceded that the petitioner was not given an opportunity to make a statement or participate in an inquiry related to her transfer.

Despite the steps that were taken by the respondents to carry out a transfer that is not recognized by law, the petitioner was not even given the opportunity to express her grievances or respond to any allegations against her. The correspondence marked P-16 and P-17 indicates that a meeting was scheduled on 24.12.2019 to discuss about the petition sent against the petitioner with the participation of relevant parties. However, a letter from the Director of Provincial Health Service in Matale marked X-2 and dated 30.01.2020, clearly states that the discussion was held without the participation of the petitioner, but with the participation of all government officials and representatives of the trade unions. The learned counsel for the petitioner stated that the petitioner came to attend the discussion as she was informed, but she was excluded from the proceedings, during which the decision to

transfer her to an institution outside the Matale District was taken. This is a clear violation of the principles of natural justice.

Lord Denning expressed his views in ***Kanda v. Government of Malaya*** [1962] A.C. 322 as follows: "if the right to be heard is to be a real right which worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them."

In the case at hand, an inquiry was conducted by a committee consisting of the Senior Assistant Secretary of the Health Ministry, the Local Government Assistant Commissioner of the Department of Local Government, and the Deputy Director (Planning) of the Health Ministry. The report pertaining to the said inquiry marked 1R-11 concluded that the allegations contained in the petition sent against the petitioner have not been proved. Disregarding this finding, the respondents allowed representatives of all trade unions who sent the petition against the petitioner to participate in the discussion while not allowing the petitioner who was found to be not at fault for the allegations contained in the said petition and who had come to attend the discussion. The respondents then decided to transfer the petitioner during this discussion without informing her of the statements that affected her, and without giving an opportunity to contradict them.

In considering the aforesaid circumstances, the decision of transfer made by letter P-20; the letter P-23, granting covering approval; letters P-21(a), P-21(b), P-21(c) communicated among the respondents regarding the transfer have to be quashed for the reason of violation of the principles of natural justice alone.

The objection of the maintainability of this application without making an appeal to the Governor of the Central Province

At this juncture, I would like to address the objection raised by the learned State Counsel that the petitioner cannot maintain this application without exhausting the alternative remedy of making an appeal to the Governor. The learned Counsel for the petitioner responded to this objection by referring to letter P-16, which indicated that the discussion in question was conducted and headed by the Governor of the Central Province. The Counsel for the petitioner argued that it would be pointless to file an appeal with the Governor, who did not allow the petitioner to take part in the discussion that culminated in the decision to transfer her.

According to Section 33(8) of the Provincial Councils Act, "The Governor of a Province shall have the power to alter, vary or rescind any appointment, order of transfer, or dismissal or any other order relating to a disciplinary matter made by the Provincial Public Service Commission of that Province."

It is correct that the remedy by way of certiorari is normally not available where an alternative remedy is open to the petitioner. This rule, however, is subject to certain limitations. It was held in ***Linus Silva Vs. The University Council of the Vidyodaya University*** – 64 NLR 104 that one limitation is that the alternative remedy must be an adequate remedy."

In the case of ***Whirlpool Corporation v Registrar of Trademarks, Mumbai,*** (1998) 8 SCC 1, it was held that "Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court

would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or **where there has been a violation of the principle of natural justice** or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (Emphasis added)

In the case of ***Harbanslal Sahnia v Indian Oil Corporation. Ltd,*** (2003) 2 SCC 107, the Supreme Court of India held that; "In an appropriate case, in spite of the availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) **where there is a failure of principles of natural justice**; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged." (Emphasis added)

In the case at hand, it is obvious that not only there was a failure to follow principles of natural justice in arriving at the impugned decision of transfer but also the Governor of the Central Province who presided over the discussion that resulted in taking the decision to transfer was responsible for violating these principles. Therefore, I concur with the assertion of the learned Counsel for the petitioner that pursuing an appeal to an individual who has defied the principles of natural justice is futile.

In considering the circumstances of this case with the decisions of the aforesaid judicial authorities, I hold that not exhausting the alternative remedy of making an appeal to the Governor of the Central Province would not operate as a legal bar to exercise the writ jurisdiction of this court.

The legal position in issuing a Writ of Certiorari

In ***Council of Civil Service Unions v. Minister for the Civil Service***]1985] AC 374 (GCHQ case), Lord Diplock classified the following three grounds as grounds for judicial review.

i. Illegality
ii. Irrationality/unreasonableness
iii. Procedural impropriety

In the case of ***Secretary of State for Education and Science v. Tameside Metropolitan Borough Council***- [1977] AC 1014 Lord Diplock described "unreasonableness" as follows: "… to fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

When no fault of the petitioner was found as evident from the findings and recommendations of the inquiry report 1R-11, it is illegal and irrational to transfer the petitioner in a manner that deviates from the legally recognized modes of transfer, simply to appease trade unions. Apart from taking the decision regarding an illegal transfer, the petitioner was not even given an opportunity to represent herself at the inquiry at the discussion held with the participation of all other relevant government officials and representatives of trade unions. This is unreasonable conduct on the part of the respondents as well as a violation of the principles of natural justice. In addition, the transfer executed by the letter P-20 is illegal, because the Secretary to the Public Service Commission of Central Province does not possess the requisite authority to make such a transfer.

For these reasons, the writs of certiorari prayed for by the petitioner must be issued.

The Writ of Mandamus prayed for by the petitioner

The learned State Counsel tendered a motion dated 23.03.2023 and drew the attention of this court to the cabinet decision dated 14.06.2021, the observations of the Public Service Commission dated 10.06.2021, and the letter addressed to the Secretary of the Ministry of Health dated 12.01.2022 and submitted that it has been decided, based on the said cabinet decision, that the Matale District General Hospital, which was hitherto governed by the Provincial Council of Central Province, to be handed over to the Central Government with effect from 31.12.2021. Considering the change of circumstances pointed out by the learned State Counsel, this court decided not to consider the Writ of Mandamus prayed for by the petitioner.

Conclusion

For the foregoing reasons, the writs of Certiorari prayed for in the prayer (b) (c) (d) and (e) to the petition are issued quashing the decisions contained in the documents P-20, P-23, P-21(a), P-21(b), P-21(c), and P-22.

However, it should be noted that this order should not be considered as an order authorizing the petitioner to remain and serve in the District Hospital, Matale indefinitely. The emphasized point in this judgment is that any transfer must adhere to the legally recognized criteria and follow the prescribed procedures.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M. Sampath K. B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL