

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

*In the matter of an application for writs of  
Certiorari and Mandamus in terms of Article  
140 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.*

**CA/WRIT/104/2022**

1. W.M.A. Bandara  
Kotuwegedara, Madanwela,  
Haguranketha.
2. Y. K. Sumanawathi  
No. 29, Samarfield, Balagolla,  
Kengalla.
3. K. W. G. Ajith De Silva  
74, Christy's Land, Kiralabokka,  
Kalugamuwa.
4. D. J. D. Samaratunga  
84, Hospital Road, Dehiwala.
5. R. Damboragama  
323/3, Main Road, Attidiya,  
Dehiwala.
6. G. M. Kodagoda  
No. P 65, Udawalawe Camp,  
Udawalawe.
7. K. T. A. P. Kodagoda,  
No. C 04, Quarters, IDH, Angoda.
8. B. D. P. Malkanthi  
404 B, Temple Road, Katukohila,  
Induruwa.

9. Kumudini Kodikara  
Nadun Uyana, Weeraduwa,  
Matara.
10. E. L. Chandrika  
Enduragala Junction, Ingiriya.
11. D. G. K. Beatrice  
456/10, Canal Road, Arangala,  
Hokandara North.
12. K. G. R. Kariyawasam  
Daluwalana, Waharaka
13. P. K. S. P. M. Jayawickrama  
130/42 A, Hettiyawatta Road,  
Elpitiwala, Welisara.
14. D. Weedagama  
31D, Mihindu Mawatha,  
Maviththara, Piliyandala.
15. R. W. K. W. M. L. W. Premaratne  
No. 94/1, Thalwatta, Gonawala,  
Kelaniya.
16. R. M. S. T. B. Rathnayake  
No. 117, Werapitiya, Kundasale
17. J. M. P. M. Jayathilaka  
No. 4/13, Nithulathanna,  
Kundasale.

**PETITIONERS**

Vs.

1. Dr. S. H. Munasinghe  
Secretary,  
Ministry of Health,  
385, Suwasiripaya,  
Ven. Baddegama Wimalawansa Thero  
Mw, Colombo 10.
2. The Public Service Commission  
No. 1200 / 9  
Rajamalwatta Road,  
Battaramulla.
3. The Attorney General  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**Before** : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

**Counsel:** Razik Zarook, PC with Rohana Deshapriya, Chanakya Liyanage for the  
Petitioners

Hashini Opatha, SSC / S. Soysa, SSC for the Respondents

**Written submissions:** Petitioners - 26.05.2023

Respondents - 26.05.2023

**Decided on:** 19.07.2023

**Sobhitha Rajakaruna J.**

A mandate in the nature of a writ of certiorari is sought by the Petitioners against the Secretary to the Ministry of Health- 1<sup>st</sup> Respondent, quashing Gazette No.2206 published on 11.12.2020 ('P3'), which contains a notice of the said 1<sup>st</sup> Respondent. The said Notice, which is impugned by the Petitioners ('Notice'), is in reference to the competitive examination for promotion to the Public Health Management Assistant Service (supra grade) on merit basis- 2018 (2020). The Petitioners are seeking an additional mandate in the nature of a writ of certiorari quashing the 'Method of Evaluation' particularly, described in paragraph marked 'P3(a)' in the said impugned Notice. The alleged grievance of the Petitioners is that the introduction of the requirement of obtaining a minimum of 50% marks in the written examination (conducted by the Commissioner General of Examinations on behalf of the Health Service Committee of the Public Service Commission) in 'P3(a)' is unreasonable, unfair and manifestly irregular. The Petitioners further plead that such a decision of the 1<sup>st</sup> Respondent has been made without lawful authority. Anyhow, it is reflected in 'P3' that the Notice, which includes the said paragraph marked 'P3(a)', has been published as per the order of the Health Service Committee of the Public Service Commission.

The Service Minute approved by the Public Service Commission ('PSC') on 06.04.2017 for the Public Health Management Assistants' Service is published in the Gazette Extraordinary No. 2053/18 dated 09.01.2018 marked 'P2' ('Service Minute'). There is no dispute among the parties that the PSC has delegated its' powers of appointment, promotion, transfer, disciplinary control and dismissal of the public officers of the Health Management Assistants' Service to the Health Service Committee of the PSC. The Respondents have annexed the Gazette Extraordinary marked 'R5' in proof of such delegation of power.

The Respondents raising a preliminary objection assert that this Court has no jurisdiction to hear and determine the instant Application in terms of Article 61A of the Constitution<sup>1</sup>, which sets out the immunity of PSC and its' committees from legal proceedings. It is no doubt that in terms of Article 61A of the Constitution, this Court has no jurisdiction to inquire into or pronounce upon or in any manner call in question any order or decision made by the Health

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<sup>1</sup> The Second Republican Constitution (1978 Constitution)

Service Committee of the PSC. When considering the said preliminary objection, this Court at the outset needs to examine whether the above Notice published by the 1<sup>st</sup> Respondent in 'P3' is tantamount to decisions taken by the PSC or its' Health Service Committee.

The 1<sup>st</sup> Respondent Secretary to the Ministry of Health affirming an affidavit has submitted that the Health Service Committee of the PSC had approved the requirement of obtaining a minimum mark of 50% in the said written examination as a criterion. It is stated on the face of the relevant Notice which contains the impugned paragraph marked 'P3(a)' that the said Notice has been published as per the order of the Health Service Committee of the PSC. The documents marked 'R3' and 'R4' imply that the said Health Service Committee has taken cognizance in specifying a minimum mark to be qualified by the respective examination. The Attorney General who represents the PSC in the instant Application has filed a motion on 28.07.2022 annexing a letter dated 21.06.2022 which is filed of record. It is a letter addressed to the Attorney General by the Secretary to the PSC endorsing the fact that the Health Service Committee of PSC had approved the impugned Notice of the 1<sup>st</sup> Respondent published in Gazette marked 'P3'. The overall circumstances of this case have influenced this Court to accept the Respondent's version that the 1<sup>st</sup> Respondent has published the impugned Notice in 'P3' after obtaining the necessary approval of the Health Service Committee of the PSC.

The contention of the Petitioners is that the 1<sup>st</sup> Respondent imposing a requirement by virtue of the impugned Notice published in the Gazette 'P3' to attain a minimum mark of 50% in the written examination is discriminatory. This reflects the fact that the Petitioners are challenging an order or decision of a committee of the PSC which was illustrated earlier. Thus, I am inclined to accept the proposition of the Respondents that this Court has no jurisdiction to inquire whether the decisions reflected in 'P3(a)' are unreasonable or unfair as pleaded by the Petitioners. In other words, reviewing the impugned decision by this Court would amount to inquiring into or pronouncing upon or in any manner calling in question an order or a decision made by the Health Service Committee of the PSC. Hence, the bedrock of the Petitioners' argument fails as this Court has no jurisdiction to review the reasonability or the legality of the impugned decision marked 'P3(a)'.

Nevertheless, it is now settled law that, despite the Constitutional ouster stipulated in Article 61A of the Constitution, the writ jurisdiction could be sought under circumstances where the

person who made the impugned decision did not have any legal authority to make such a decision. This aspect has been discussed by Shiranee Tilakawardane, J. PCA (as she was then) in *Katugampola vs. Commissioner General of Excise and others (2003) 3 SLR 207*. Hence, what needs consideration at this stage by Court is whether the said Health Service Committee has approved the requirement of the minimum mark of 50%, which is reflected in paragraph marked 'P3(a)', without any legal authority to do so. During such process of examination, it is paramount to assess whether the introduction of the said requirement of a minimum mark would amend or vary the Service Minute marked 'P2' and also whether the said Committee has authority to amend or vary a service minute approved by the PSC.

The Article 55(1) of the Constitution stipulates that the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal. In terms of Article 55(3) and Article 55(5), the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the PSC subject to the provisions of the Constitution; the PSC shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions.

The PSC is authorized to delegate its' powers to committees appointed by the PSC under Article 56(1) of the Constitution. In view of such Constitutional provisions, PSC is empowered to delegate the powers of;

- a) appointment,
  - b) promotion,
  - c) transfer,
  - d) disciplinary control and
  - e) dismissal
- of such public officers.

The exercise of delegated powers is further described in Chapter II of the 'Procedural Rules on Appointment, Promotion and Transfer of Public Officers and to Provide for Matters Connected Therewith and Incidental Thereto', published by the PSC in Gazette

Extraordinary No. 1589/30 on 20.02.2009. On a careful perusal of such Procedural Rules and the above provisions of the Constitution, it emanates that the powers of the PSC upon Service Minutes and Schemes of Recruitment are exclusively vested in the PSC. The Chapter IV of the said Procedural Rules deals with Service Minutes and Schemes of Recruitment. This illustrates that the PSC is not authorized to delegate its' powers of approving or amending Schemes of Recruitment or Service Minutes to a committee. Moreover, a committee of the PSC has no authority to amend or vary a service minute approved by the PSC.

The Petitioners contend that the impugned Gazette 'P3' amends the general conditions governing the appointments in the public service based on merit basis by adding the following provisions thereto;

05. Method of Evaluation. – About 65% of the vacancies at the top level will be filled on merit basis. For this, a **minimum of 50% marks should be obtained** in the written examination conducted by the Commissioner General of Examinations on behalf of the Health Services Committee of the Public Service Commission.....  
(Emphasis added)

It is observed that the general method of promotion is provided in Clause 10.3.1.2 and Clause 10.3.2.2 of the said Service Minute marked 'P2'.

10.3.1.2 Method of Promotion Appointments to a number of vacancies of not more than **35% of the total vacancies in Supra Grade** shall be made on the results of a **limited competitive examination**. The candidates who have satisfied the qualifications shall be appointed after verifying their qualifications by an interview board appointed by the Public Service Commission. The interview shall strictly be for examination of the certificates by which the qualifications of the candidates are proved and no marks shall be allocated in this regard. (Syllabus and the marking scheme is given in Annex 09) (Emphasis added)

10.3.2.2 Method of Promotion Appointments equivalent to **65% of the total vacancies in supra Grade** shall **be made on merit**. For this purpose, priority shall be determined on the order of the aggregate of marks of an Aptitude Test conducted by the Commissioner General of Examination on behalf of the Public Service

Commission and marks allocated on the basis of seniority and experience by the board appointed by the Commission. Candidates shall appear or an interview held by a board appointed by the Commission for verification of qualifications. No marks shall be an allocated at that interview. (Annex 10) (Emphasis added)

According to Clause 10.3.1.2 of the said Service Minute the promotions to the supra grade will be made based on limited competitive examinations, filling 35% of the vacancies of the supra grade. Further, Clause 10.3.2.2 of the said Service Minute specifies that the promotions to the supra grade will be made on merit basis, filling 65% of the vacancies of the supra grade. Based on the above criteria, the Petitioners argue that setting out a minimum mark of 50% has been done in a manner which is procedurally wrong and in violation of the aforesaid Clauses 10.3.1.2 and 10.3.2.2 of the Service Minute 'P2'.

It appears that the said Service Minute 'P2' does not prescribe a minimum mark a candidate should achieve in the competitive written examination for him/her to be eligible to be considered for the promotion. If the said 'P2' stipulates any condition in relation to the minimum mark which should be obtained by a candidate, certainly the Health Service Committee of the PSC has no authority whatsoever to make a decision which affects such provisions of the said Service Minute. The Petitioners further contend that the respective Notice in 'P3' has been published without properly amending the said 'P2' and the matters not provided in the said Service Minute should be determined by the PSC by virtue of Clause 18 of the Service Minute. In that event, a reasonable question arises: Is the said Health Service Committee to whom the abovementioned powers have been delegated, sanctioned to make any incidental or consequential decision based on the power delegated by the Principal (PSC)? It is essential to resolve such question by looking at the delegation of power to a delegate by a principal in a different but topical perspective as discussed in the following cases.

In ***Tata Iron and Steel Co. vs. Workmen, AIR 1972 SC 1917, at p. 1922*** it has been held;

*"Now, the increasing complexity of modern administration and the need for flexibility capable of rapid readjustment to meet changing circumstances which cannot always be foreseen, in implementing our socio-economic policy pursuant to the establishment of a welfare State as contemplated by our Constitution, have rendered it convenient and practical, nay, necessary, for*



*the legislatures to have frequent resort to the practice of delegating subsidiary or ancillary powers to delegates of their choice. The parliamentary procedure and discussion in getting through a legislative measure in the legislatures is usually time-consuming. Again, such measures cannot provide for all possible contingencies because one cannot visualize various permutations and combinations of human conduct and behaviour. This explains the necessity for delegated or conditional legislation. Due to the challenge of the complex socio-economic problems requiring speedy solution the power of delegation has by now as per in necessity become a constituent element of legislative power as a whole...."*

***The Registrar of Co-operative Societies and another vs. K. Kunjabmu and others AIR 1980 SC 350 at p.352*** the Supreme Court of India has held;

*"...Nor can Parliament and the State Legislatures visualise and provide for new, strange, unforeseen and unpredictable situations arising from the complexity of modern life and the ingenuity of modern man. That is the raison d'etre for delegated legislation. That is what makes delegated legislation inevitable and indispensable..."<sup>2</sup>*

It is true that our Constitution has authorized the PSC to delegate only the powers of appointments, promotions, transfers, disciplinary control and dismissal of such public officers. In a narrow interpretation, one may argue that such a Committee of the PSC has no authority to make any incidental decisions in reference to appointments, promotions, transfers, disciplinary control and dismissal. However, the discretion vested in such Committee cannot be denied with such narrow interpretation and it is to be noted that the mode of exercising such discretion should be decided by the said Committee itself.

The impugned decision refers to a promotion and as such there may be many decisions that need to be taken to fulfil the exact requirements of the relevant Ministry during the process in effecting the respective promotions. The promotions to various categories of public service should be effected carefully and also considering the socio-economic policies and exact requirements of the relevant Ministry or the Department. That should be carried out according to the strength of the existing economic and human resources and based on the

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<sup>2</sup> For further reading refer to M.P. Jain & S.N. Jain, 'Principles of Administrative Law', 9<sup>th</sup> Edition, Volume 1 (2022, LexisNexis) at p.83

most viable and reasonable method of recruiting and promoting persons by looking at a wider angle merely for the best interest of the majority of general public.

I take the view that as far as a Committee of the PSC exercises their delegated power without amending, varying or disturbing the decisions of the principal, who is the PSC, such decisions cannot be considered ultra vires. Hence, I am of the view that the Health Service Committee of the PSC has the authority to make lawful incidental decisions which do not contradict the decisions of the PSC, particularly, without superseding the Service Minute approved by the PSC. Such lawful incidental decisions are needed for carrying out the duties of the said Committee effectively within the scope of their delegated power. On a careful consideration of the whole matter, I need to conclude that the Health Service Committee has taken an incidental or consequential decision to approve the requirement of the minimum mark as reflected in 'P3(a)' with due legal authority to make such a decision and it neither affects nor creates an impact upon any of the provisions of the said Service Minute marked 'P2'.

In light of the above, I hold that the Petitioners are not entitled to any relief as prayed for in the Petition of the Petitioner. Therefore, I proceed to dismiss this Application.

*Application is dismissed.*

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**