

**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 writ of Certiorari under and in
terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

CA/WRIT/28/2021

1. Chandima Sudeshika Kumari
Dissanayake
No.56/1 D, Hingurugamuwa Road,
Badulla.

PETITIONER

Vs.

1. Uva Provincial Council
King's Street,
Badulla.
2. P.B. Wijerathna
The Chief Secretary
King's Street,
Badulla.
3. Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.
4. Wijitha Mallahava,
Attorney-at-Law

Chairman
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

5. H.M.Jeevantha Herath
Secretary
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

6. Hemathilaka Amarakoon
Attorney-at-Law
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

7. Dhanushka Weligama
Attorney-at-Law
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,

Badulla.

8. Wijitha Peries
Attorney-at-Law
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

9. Padmini Mangalika
Kandapperuma
Attorney-at-Law
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

10. K.M. Premasiri Dharmadasa
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

11. Arumugam Muththulingam
Member

Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

12. Weerakoon Banda
Member
Public Service Commission of Uva
Province
No.14/4, Peelipothagama Road,
Pingarawa,
Badulla.

13. R.H.C. Priyanthi
Deputy Chief Secretary (Control)
Uva Provincial Council
King's Street,
Badulla.

14. Hon. Attorney General
The Attorney General's Department
Hulftdrop Street,
Colombo 12.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: D.P.L.A. Kashyapa Perera for the Petitioner.
M. de Alwis, SSC for the Respondents.

Argued on: 19.07.2023

Written submissions: Petitioners - 21.03.2022 and 24.08.2023
1st to 13th Respondents - 26.09.2023

Decided on: 10.10.2023

Sobhitha Rajakaruna J.

Uva Provincial Council Public Service Commission ('Uva-PSC') has terminated the employment of the Petitioner from the post of Legal Officer of the Uva-PSC by way of a letter dated 03.11.2020 marked "P3", on the alleged grounds that the Petitioner failed to meet the requirements set out in Clause 96 of the Procedural Rules relating to Uva-PSC ('Rules'), marked 'P5'. This decision had been taken by the Uva-PSC subsequent to extending the probationary period of the Petitioner in the position of Legal Officer mainly on two occasions. Firstly, for a period of one year with effect from 28.03.2019 to 27.03.2020 by way of a letter dated 2019.12.13 ("P20"). Secondly, the probationary period of the Petitioner was extended for a period of 6 months with effect from 28.03.2020 to 27.09.2020 by way of a letter dated 03.07.2020 ("P21"). The Petitioner has been informed on several occasions to improve her performance and additionally by way of a letter dated 23.07.2020 ("P22") along with a number of other letters, the Petitioner has been provided with an opportunity to give reasons for her alleged inefficiency.

The instant Application has been filed by the Petitioner seeking a writ of Certiorari quashing the above documents marked "P3", "P20", "P21" and "P22" as well as a writ of Mandamus directing the above named Respondents to confirm the Petitioner in her post.

Primarily, what needs resolution by this Court in the instant Application is, whether the termination of the appointment of the Petitioner relating to the post of Legal Officer of the Uva -PSC is lawful and also whether the 5th Respondent - Secretary to the Uva-PSC or the 13th Respondent - Deputy Chief Secretary of the Uva Provincial Council has authority to terminate the said employment of the Petitioner.

Whether the Period of Probation Relating to the Petitioner Can be Extended Beyond Three Years

The Chapter VIII of the said Rules ('P5') deals with the a.) period of probation, b.) period of acting and c.) confirmation of appointment. According to Clause 94 of the said Rules, the appointing authority shall subject newly appointed public officers to a post in the public service (of the Uva Province) to a probationary period of 3 years. The salient feature of the said clause is that every such public officer should mandatorily be subjected to a probationary period of 3 years. A question arising from one aspect of the Petitioner's arguments, in the way in which such arguments are formulated, is whether the period of probation can be extended.

Clause 99 of the Rules stipulates a procedure that needs to be followed during the 1st and 2nd years of the probation. In view of those provisions, a final review report in relation to the probationer should be submitted along with the 1st and 2nd year reports to the appointing authority at least three months prior to the expiry of the period of probation. During the three years of probation, it is expressly intended that three review reports be made accessible. According to the said Clause 99, before the probationary period expires, the appointing authority is required to evaluate all three reports and issue an order either confirming or extending the probationary period.

Therefore, it is abundantly clear that the period of probation after three years from the appointment can be extended. The provisions relating to such extensions beyond the first three years are stipulated in Clause 101 of the Rules. The Petitioner states that it is apparent from reading 'P20', 'P21', and 'P22' that no proper extensions of the probation period have been made under the provisions of Chapter VIII of the said Rules. It is clearly a misconception to raise such an argument by reading the provisions in Clause 101 in isolation without reading it together with the other pertinent provisions in the said Chapter VIII of the Rules. What is clearly meant in the said Clause 101 is that, the appointing authority has the power to extend the period of probation by one year at a time subject to a maximum period of 03 years if the officer is not fit and suitable for confirmation. The appointing authority may even defer the officer's increments.

Even under section 11:7 of the Establishments Code (E-Code), if an officer is not judged during the first three years of the probation as fit and qualified for confirmation either his

appointment can be terminated or the period of probation can be extended subject to other specific provisions of the E-Code.

Hence, I hold that the period of probation relating to the Petitioner can be extended beyond the first three years provided that a proper assessment is carried out as per the provisions in the Rules or the E-Code.

Whether the Extension of the Period of Probation Made Effective under and in Terms of the Provisions Of the Establishment Code is Illegal

The Petitioner contends that the extension of the probationary period of her employment for a period of one year with effect from 28.03.2019 to 27.03.2020 (Vide “P20”), is bad in law. The reason given for such an assertion is that the said extension was carried out under sections 11:7 and 11:10 of Chapter II and section 10:4 of Chapter VII of the E-Code as appears in the said letter “P20”. The Petitioner’s argument is based on the preamble portion of the said Rules which declares that the E-Code provisions should be applicable for matters which are not covered under the Rules in “P5”. Sections 11:5, 11:7 and 11:10 of Chapter II of the E-Code, among other provisions, deal with the extension of the probationary period beyond three years.

11:5 “If at the end of the period of probation or at the end of the acting period, the officer’s work and conduct are judged to have been satisfactory, and if he has fulfilled all the requirement for confirmation in that appointment, he should be confirmed in his appointment by the relevant authority.”

11:7 “If the officer is not judged as fit and qualified for confirmation in all respects, either his appointment should be terminated or the period of probation or the acting period should be further extended by the appointing authority subject to section 11:9 or 11:10 and provided that,

11:7:1 where the Appointing Authority is the Head of Department to whom power of appointment has been delegated, he should not extend the period of Probation by more than one year without the approval of the Secretary.

11:7:2 In the case of an officer appointed to act in a post with a view to confirmation in terms of section 11:3, the Appointing Authority should not extend the acting period

without the concurrence of the Appointing Authority of the substantive post. If the period of extension is more than one year he should also obtain the approval of the Secretary.”

11:10 “If an officer fails to qualify for confirmation at the proper time, that is within the initial period of probation, for reasons within his control, but qualifies for confirmation during an extension of the period of probation granted to him in terms of subsection 11:7 then.....”

It is true that the particular provisions of the E-Code are noticeable on the face of the letter marked “P20”. But it is significant to observe that many provisions spelled out in the Rules are notably similar to that of the E-Code, although not identical. It appears that the extension of the period of probation is substantially covered under the Rules and however, one cannot possibly overlook the fact that the basic concept of those provisions of the Rules is embodied in the particular provisions of the E-Code. Furthermore, the above E-Code provisions also permit the appointing authority to extend the period of probation subject to an assessment. The only explicit difference that can be seen between the respective provisions of the Rules and the E-Code is that the Rules have identified a specific 3-year period up to which the probationary status can be extended upon the completion of the first three years.

Based on the circumstances of the instant Application the nexus or the relationship between the Rules and the E-Code should not be ruptured by giving effect to the aforesaid technical argument of the Petitioner. Hence, I take the view that it is not fair to employ the doctrine of ultra vires to issue an order quashing “P20” solely based on the visibility of the E-Code provisions on the face of the said letter “P20”. The several steps taken by the Respondents under and in terms of the Rules during the decision making process relevant to the instant Application are not opposed effectively by the Petitioner. Similarly, the Petitioner has failed to provide to Court the adequate material opposing the assessments carried out by the respective Respondents. I observe that no substantive prejudice has been caused to the Petitioner due to the inclusion of the E-Code provisions in the document "P20," as the ultimate outcome would remain unchanged even if the Respondents were to refer to the specific Rules.

Whether the “P3” is Illegal on the Grounds that it has been Issued under Clause 102 of the Rules

The contention of the Petitioner is that upon perusal of the document marked “P3”, in which the termination of probationary services of the Petitioner has been effected, it could be perceived that such services were terminated under Clause 102 of the Rules and the said Clause 102 is not applicable at all for such a termination.

Clause 102 of the Rules declares that at the end of each extended period of probation, the Head of the Department shall prepare a review report as per Appendix 05. Further, where such a report reveals deficiencies that may prevent the officer’s suitability for confirmation in his post, it shall be the responsibility of the appointing authority to extend or terminate the appointment of the respective officer subject to Clauses 99 and 100.

On a careful perusal of the substance of the letter marked “P3” it implies that Uva-PSC in a detailed manner has referred to Clauses 96 and 102 of the Rules. As such the Petitioner’s argument is a clear misrepresentation of facts made simply by referring to a numeral of a single Clause without giving due effect to the intention of the authorities. Once again it needs to be stressed that it is clearly a misconception to raise such an argument by reading the provisions in Clause 102 in isolation without reading it together with the other pertinent provisions in the said Chapter VIII of the Rules along with the material submitted to Court. When determining the questions relating to the instant Application, it is important to take into consideration the overall circumstances of this case for fuller and proper adjudication of this matter. In light of the above, I am convinced even with the reasons given by the Information Officer of the Uva-PSC who referred to a query made by the Petitioner in regard to the application of Clause 102 of the Rules.

I have expressed in *Lanka Canneries (Pvt) Ltd vs. Commissioner of Labour and Others CA/WRIT/385/2021 decided on 31/08.2022* when an employer takes a decision to extend the probationary period or to terminate the services, he should follow a procedure, according to law, where such decision-making power may not infringe the Rule of Law and the principles of Natural Justice. This infers that, any employer should mandatorily follow an effective procedure right throughout the period of probation if an employer needs to enjoy the benefit of not confirming probationers. On a careful consideration of the whole matter, I arrive at the conclusion that the decision making process of the relevant Respondents during the period of probation relating to the Petitioner is not violative of the principles of Natural Justice or the

Rule of Law. The decision of the Uva-PSC to terminate the appointment of the Petitioner cannot be considered unlawful as no reasonable grounds were established for this Court to consider quashing the said decision.

The clear purpose of extending the period of probation beyond three years is to provide opportunities for such officers to diligently engage in improving their performances during such an extended period. Thus, it can be clearly assumed that the extension of probationary period was eventually in favor of this Petitioner and such extension should not be used as a tool to seek from Court to employ the doctrine of ultra vires or any other ground of review in order to obtain reliefs as prayed for in the prayer of the Petition. This is especially because the Petitioner is not adequately impugning the reasons given by the Respondents to extend her period of probation but challenging only the extension per se.

Whether the 13th Respondent has Authority to make Decisions and Determinations Relating to the Employment of the Petitioner

I cannot properly understand the underpinnings of the Petitioner's argument that the 13th Respondent¹ has no authority to make decisions or determinations relating to the employment of the Petitioner based on the alleged grounds that he is not the appointing or disciplinary authority pertaining to the Petitioner. The Petitioner contends that by way of section 32 of the Provincial Council Act No.42 of 1987 the power to appoint, promote, transfer, terminate and for the disciplinary control of officers of a Provincial Public Service lies solely with the Governor of that respective province. While endorsing the contents of the said section 32 it is important to note that according to section 32(2) of the said Act, the Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service to the Public Service Commission of that Province. The Petitioner has not expressly denied that the Governor has delegated his powers to the Uva-PSC under the above section. It is not a disputed fact that the letter of termination "P3" and several other letters have been copied to the Chief Secretary of the Uva Province while some letters have originated from the office of the Chief Secretary of Uva Province itself. I need not lengthen this judgement explaining how the Chief Secretary

¹ Vide - paragraph 23 (iii) and paragraph d.) of the prayer of the Petition.

gets the authority to sign respective letters since it is obvious that those letters have been authenticated as a consequence to the decisions taken by the Governor or the Uva-PSC. Therefore, I cannot accept the proposition of the Petitioner that the decisions reflected in the letters such as "P3", "P20", "P21", "P22" are bad in law. Although the Petitioner seeks a writ of Certiorari against "P22", no reasons are given by the Petitioner to justify her challenge against the said letter "P22".

Conclusion

In light of the above, there is no necessity to make an additional effort to analyze the objections in the preliminary nature raised on behalf of the Respondents and also the issues such as the availability of alternative reliefs, contractual relationship, etc. I see no valid grounds, in view of the reasons given above, to grant any of the reliefs prayed for in the prayer of the Petition of the Petitioner. Therefore, I proceed to dismiss the Application. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal