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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of Writs of Certiorari and prohibition.

CA WRIT 508/2022

01. Geethani Hemamala Kotikawatte
No. 196, Srimath Bandaranayake Mawatha,
Colombo 12.

02. Rathukumarage Chithra Jayawardane,
461/1, Siyambalape North,
Siyambalape.

03. Y.A.D. Gothami Dhammika Jayasinghe.
No. 13, Official Residence, Siyane National College of Education,
Pattalagedara, Veyangoda.

PETITIONERS

Vs.

1. Hon. Dinesh Gunawardena,
Prime Minister and Minister of Public Administration, Home Affairs, Provincial Councils and Local Government
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local Government, Independence Square,
Colombo 07.

2. Secretary,
Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government, Independence Square,
Colombo 07.

3. Secretary, Minister of Health,
   SUWASIRIPAYA
   No. 385, Rev. Baddegama Wimalawansa
   Thero Mawatha.
   Colombo 10.

4. Hon. Keheliya Rambukwella,
   Minister of Health,
   SUWASIRIPAYA
   No. 385, Rev. Baddegama Wimalawansa
   Thero Mawatha.
   Colombo 10.

5. Hon. Nimal Siripala De Silva,
   Minister of Ports, Shipping and Aviation
   No. 19, 1 Chaithya Road,
   Colombo 01.

6. Hon. Douglas Devananda,
   Minister of Fisheries, New Secretariat,
   Maligawatta,
   Colombo 10.

7. Hon. Achchige Don Susil Premajayanth,
   Minister of Education Ministry of Education
   Isurupaya,
   Battaramulla.

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

9. Hon. Amaraweera Mahinda,
   Minister of Agriculture Minister of Wildlife
   and Forest Resources Conservation
   No. 1090, Sri Jayawardenepura Mawatha,
   Rajagiriya.

10. Hon. Wijayadasa Rajapaksha,
    Minister of Justice, Prison Affairs and
    Constitutional Reforms
    Superior Courts Complex. Colombo 12.

11. Hon. Nalaka Jude Hareen Fernando,
Minister of Tourism and Lands
7th Floor, Sri Lanka Institute of Tourism and Hotel Management, Galle Road,
Colombo 03.

12. Hon. Ramesh Pathirana,
Minister of Plantation Industries Minister of Industries 11th Floor,
Sethsiripaya 2nd Stage,
Battaramulla.

13. Hon. Prasanna Ranatunga,
Minister of Urban Development and Housing
17th and 18th Floors, "SUHURUPAYA"
Subhuthipura Road,
Battaramulla.

14. Hon. M.U.M. Ali Sabry,
Minister of Foreign Affairs Sri Baron Jayathilake Mawatha,
Colombo 01.

15. Hon. Vidura Wikramanayaka,
Minister of Buddhasasana, Religious and Cultural Affairs
135 Srimath Anagarika Dharmapala Mawatha,
Colombo 07.

16. Hon. Kanchana Wijesekera,
Minister of Power and Energy
No. 437, Galle Road, Colombo 03

17. Hon. Ahamed Zenulabdeen Naseer,
Minister of Environment Sobadam Piyasa,
416/C/1, Robert Gunawardana Mawatha,
Battaramulla.

18. Hon. Anuruddha Ranasinghe Arachchige Roshan,
Minister of Sports and Youth Affairs Minister of Irrigation
No.500,
T.B. Jayah Mawatha, Colombo 10.

19. Hon. Maligaspe Koralege Nalin Manusha Nanayakkara,
Minister of Labour and Foreign Employment
6th Floor,
Mehewara Piyasa, Narahenpita,
Colombo 05.

20. Hon. Tiran Alles,
Minister of Public Security
B 240,
Battaramulla 10120.

21. Hon. Kachchakaduge Nalin Ruwanjiwa Fernando,
Minister of Trade, Commerce and Food Security
No 27, CWE Secretariat Building,
Vauxhall Street, Colombo 02.

22. W.M.D.J Fernando
Secretary to the Cabinet Office of Cabinet of Ministers,
Republic Building, Sir Baron Jayathilaka Mawatha, Colombo 01.

23. E. M. S. B Senanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo 01.

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

RESPONDENTS

Before: **N. Bandula Karunarathna J. P/CA**

&

M. Ahsan R. Marikar J.

Counsel: Dr. Romesh De Silva P.C, with Ruwantha Cooray AAL, instructed by Nisansala Wijesinghe AAL, with Janaka Hewasinghe AAL, for the Petitioner.

Vikum de Abrew A.S.G, PC, with Sehan Soyza SC, and Amasara Gajadeera SC, for Respondents.

Written Submissions: By the Petitioners – 25.07.2023

By the Respondent – 24.07.2023

Argued on : 13.07.2023

Decided on : **24.10.2023**

N. Bandula Karunarathna J. P/CA

The Petitioners, in this writ application by their Amended Petition dated 12.01.2023 seek *inter alia*, a Writ of Certiorari quashing the document marked P 9 and the underlying decision made therein to send public officers, inclusive of nurses on compulsory retirement at age 60 to the extent it is applicable to the nursing service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka Nursing Service. Further, the Petitioners seek a mandate in the nature of a writ of mandamus reinstating all officers of Sri Lanka Nursing Service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka Nursing Service who had been sent on compulsory retirement in terms of the impugned Gazette marked P 9.

It is evident that by Gazette Extraordinary bearing number 2235/60 dated 08.07.2021 marked P 3 the compulsory age for retirement of nursing officers was increased to 63 years which was made effective from 14.06.2021. This was preceded by the Cabinet decision dated 14.06.2021 marked P2(b) which conferred the sanction of the Cabinet of Ministers to the recommendations set out in the Cabinet Memorandum dated 17.05.2021 marked P2(a). Accordingly Gazette Notification marked P 3 was published. Thereafter, a Public Administration Circular was published on 06.01.2022 by the Secretary to the Minister of Public Administration, Provincial Councils and Local Government giving effect to a decision to extend the age of compulsory retirement up to 65 years.

However, His Excellency the President in the Interim Budget Speech-2022 dated 30.08.2022 proposed certain reforms to the Public Sector, which included a revision to the compulsory age of retirement of public officers being placed at 60 years. Pursuant to the above Budget proposal, by Circular dated 14.09.2022 (marked P 7) the compulsory age of retirement of all public officers were revised to 60 years. The Cabinet of Ministers by their decision dated 23.09.2022 (marked A 4) has granted its approval to the recommendations contained in the Cabinet Memorandum dated 09.09.2022 to restrict the age of retirement of Public Officers to 60 years. The said decision of the Cabinet of Ministers was followed by the Gazette Extraordinary bearing number 2309/04 dated 05.12.2022 (marked P9) the Minutes of Pensions pertaining to the compulsory age of retirement of all public officers was made 60 years with effect from 01.01.2023 inclusive of the nursing service.

The Petitioners aver *inter alia* that the document under challenge marked P 9 is contrary to various representations made by the Respondents and responsible officers of the State. The said document marked P9 reflecting the Minutes of Pensions is harmful to the health sector of the country and is contrary to the legitimate expectation of the nurses to serve until the age of 63 years.

The Petitioners in paragraphs 25, 26 and 27 of their amended Petition set out their grievances against any revision of the age of retirement from 63 as follows;

> 25. The Petitioners further state that relying on the said document marked P3 setting the compulsory age of retirement at age 63, several nurses had taken loans and adjusted their expenditure on the expectation that the said nurses would be employed until they reach the age 63.
>
> 26. The Petitioners further state if the said Gazette marked P 9 is left to be operative on the nursing service, the officers who would be subject to compulsory retirement as at 01.01.2023 will be left without any form of remuneration whatsoever until the pension is duly computed and approved to be paid upon following the necessary laws, regulations and protocols of the State.
>
> 27. The Petitioners further state that upon submitting the necessary papers the procedure would consume over four to six months wherein the officers representing the nursing service affected by the said Gazette marked P 9, would be left without any form of remuneration whatsoever.

The learned Counsel for the respondent argued that the Petitioners' entire case appears to be premised on a purported legitimate expectation and the alleged frustration thereof. The Public and Judicial Officers (Retirement) Ordinance, No. 11 of 1910 (as amended) and Rules made thereunder govern the age of retirement and the procedure to be adopted in the event a revision is made effective. Pursuant to Rule 1(2) of the said Rules, the compulsory age of retirement for judicial and public officers has been determined to be 60 (sixty) years and may be extended by the Competent Authority in the interest of service. In terms of Rule 5 of the said Ordinance, the approval of the Competent Authority, which is the Public Service Commission in the instant application is a mandatory requisite for the revision of the age of retirement to be effective.

The learned President's Counsel for the Petitioners argued that the revision of the age of retirement to 63 years was subject to the approval of the Public Service Commission as the appointing authority. The age of retirement of the public sector is a matter of policy and the Cabinet of Ministers is vested with the power in terms of Article 55 of the Constitution. The justifications for the revision

are entailed in the Cabinet Memorandum dated 17.05.2021. The most compelling reason which precipitated the same was the onset of Covid-19 which demanded an immediate cadre expansion in order to counter the effects of the global pandemic.

Learned Counsel for the Respondents informs Court that pursuant to the age of retirement being lawfully revised to sixty (60) years, the Cabinet of Ministers by its decision dated 29.11.2022 (marked A6(b)) has granted approval to recruit 1000 Nursing Officers with immediate effect. Not only that the Public Service Commission as the Competent Authority has granted approval (marked A6(d) and A6(e)) to fill the vacancies in the Nursing Officer-Special Grade and consistent recruitment has been made to fill vacancies in the Nursing Service.

Learned Additional Solicitor General argued on behalf of the Hon. Attorney General that at the time the instant Application was filed the Petitioners did not have a subsisting legal right to compel the Respondents to set the age of retirement at 63 years. No legitimate expectation can arise in view of the revision to the compulsory age of retirement and a change of national policy. He further says that the Petitioners cannot compel the Respondents to contravene the law and the Petitioners have not established that a public duty is cast upon the Respondents to revise the age of retirement to 63 years.

It is important to note that Section 2 (1) of the Public and Judicial Officers (Retirement) Ordinance No. 21 of 1917 confers powers on the Governor-General to make rules for compulsory retirement of public or judicial officers.

Section 2(1) reads as follows;

> "The Governor-General may make, and when made may revoke, vary or amend, rules regulating the age at which, the reasons for which, and the conditions subject to which, public or judicial officers shall be required to retire from the public or judicial service."

In terms of the Rules promulgated thereunder, the age of compulsory retirement of every public or judicial officer shall be sixty years.

Rule 1 stipulates as follows;

> "1. (I) The age of compulsory retirement of every public or judicial officer shall be sixty years:
>
> a. Provided, however, that the age of compulsory retirement shall-in the case of Presidents of Rural Courts who are not lawyers, be fifty-five years; in the case of matrons, nursing sisters, nurses and midwives in the Department of Health Services, be fifty years."

Rule 1 sub-rule (2) stipulates a proviso which reads as follows;

(2) Notwithstanding anything in paragraphs (1) of this rule, the competent authority may, if the authority considers it expedient, extend the employment of any public officer beyond the age of compulsory retirement if-

(a) the Head of the Department in which he is employed considers that his services should be retained in the interests of the service; or

(b) where that officer is the Head of a Department, the Permanent Secretary to the Ministry to which that Department is attached considers that his services should be retained in the interest of the service.

Rule 5 defines the "competent authority" to mean "the authority competent to make appointments to the office held by that -officer."

In terms of the above provisions, the power of the extension of employment of any public officer beyond the age of compulsory retirement is entirely vested in the competent authority, which is the Public Service Commission in terms of Article 55(3) and Article 55(5) read with the above provisions. The learned Counsel for the respondents submits that the Petitioners cannot rely on an invalid and no longer legally valid Minutes on Pensions, marked P3 and elevate it to the level of a statutory underpinning when the rules promulgated under the Public and Judicial Officers (Retirement) Ordinance No. 21 of 1917, set the law on age of retirement for all public officers. It is only the Parliament that can increase such age.

Another argument raised by the petitioners were the Doctrine of legitimate expectation. It is basically aimed at admirative authorities abusing their discretion contrary to the expectation of individuals. It ensures legal certainty as people ought to have planned their life secure in knowledge of the consequences of their action. Perception of legal certainty deserves protection. Public perception of legal certainty becomes negative when the authorities on their own have given assurances which give rise to their expectations and later arbitrarily infringe the same.

In the case of S. M. Samrath vs Sri Lanka Medical Council SC FR 119/ 2019 it was held as follows;

> "all the more so when the promise is not a bear promise but is made with the intention that other party should act upon it" the principal of legitimate expectation is connected with an administrative authority and an individual. It emerges in an instance where an administrative authority affects a person by depriving him of some benefit or an advantage which is had in the past being permitted by the decision maker to enjoy which he can legitimately expect to be permitted to continue"

In the said circumstances there is no real reason submitted by the Respondents before this Court for the reasons to treat the doctors, surgeons and medical officers differently to that of the nurses. The Respondents have not indicated a word, that the arbitrary imposition of compulsory retirement at 60 has not violated their legitimate expectation.

De Smith elaborated in 'Judicial Review of Administrative Action' 5th Edition as follows;

> "The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealing with the public"
>
> "The legitimate or reasonable expectation arises from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. This court decides that, the expectation which is defined in the domain of this doctrine is not merely an anticipation. It is not just a wish, desire, hope, a claim or any kind of a demand. The legitimacy of an expectation can be inferred, if it is founded on the sanction of a law or custom or assurance or an established procedure by a public authority."

It was stated in Union of India v. Hindustan Development Corporation (1993) SCC 499 at 540, that;

> "Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

When I consider all the above circumstances it is my view that the Petitioners' legitimate expectation has been violated by the Respondents. Therefore, this Court has all the rights and reasons to interfere to remedy the affectation caused by violation of their expectation. According to the Respondents, the age of retirement is set by Rules made under the Public and Judicial Officers (Retirement) Ordinance. However, this Court observe that the age of retirement of public servants is in fact set by the pension minutes and amendments made thereto.

It was argued by the learned counsel for the petitioners that in law, the Pension Minute is the instrument that fixes and changes the age of retirement. The Respondents now belatedly in these proceedings take the view that the age of retirement is set by A1- a Rule made in accordance with a 1910 Ordinance, called the Public and Judicial Officers (Retirement) Ordinance.

The Pension Minute has been specifically mentioned in the Interpretation Ordinance No 2 of 1947 as amended, which states in Section 2 that;

> "written law" shall mean and include all Ordinances, and Acts of the Parliament, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants and process of every kind made or issued by anybody or person having authority under any statutory or other enactment to make or issue the same in and for Ceylon or Ceylon or any part thereof, and the Minutes on Pensions, but shall include any statute of the United Kingdom extending expressly or by necessary implication to Ceylon, nor any order of the Queen in Council, Royal charter, or Royal letters patent (Parliamentary Elections) Order-in-Council 1946;

Thus, by an Act of Parliament in 1947, the Minutes on Pensions (Pension Minute) became written law.

Article 168 (1) of the Constitution provides that "unless Parliament otherwise provides, all laws, written laws and unwritten laws in force, immediately before the commencement of the Constitution, shall, *mutatis mutandis* and except as otherwise expressly provided in the Constitution, continue in force".

Thus, the Pension Minute has been specifically preserved and is binding law. In the circumstances, by virtue of the Interpretation Ordinance No. 2 of 1947 (read with the Constitution), the Pension Minute has superseded document marked A 1 and the 1910 Ordinance. The document marked A 1 is not a statute but is a rule made under the 1910 Ordinance. Thus, it is subordinate legislation. In the same manner, it is my view that the documents marked as P3, P6, P7 and P9 are also subordinate legislation. Consequently, the later in time prevails and clearly, it is the Pension Minute which sets the age of retirement.

The Respondents' own limited objections admits this, inasmuch as paragraph 21 references P3, P6, P7 and P9 and states "I state that the compulsory age of retirement has constantly been subject to revision as demonstrated by"...

In the circumstances, the Respondents are estopped from denying that it is the Pension Minute which sets and revises the age of retirement.

It is interesting to note that similarly, paragraph 23 of the limited objections states; "whilst the compulsory age of retirement of Nurses was placed at 63 years in 2021 by P3, the same was extended to 65 years in January 2022 by P6...."

This Court can also observe that the document A6 provides no purported approval to P 3. On the contrary it only provides recommendations and observations. In the circumstances, it is crystal clear that in law, it is the Pension Minute which sets the age of retirement.

Another argument raised by the learned Additional Solicitor General (ASG) on behalf of the Respondents, focus in terms of Article 55(3) and Article 55(5) of the constitution. It says that the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission (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. As such the PSC is the appointing authority of the Petitioners.

In terms of the aforesaid powers and in terms of the previously mentioned the PSC has granted its approval to fill the vacancies of categories on nursing officers such as special grade as it is evinced in documents A 6 (a), A 6 (b), A 6 (c), A 6 (d) and A 6 (e) attached to the Statement of Objections. Therefore, the learned ASG argued that this Court does not have jurisdiction to hear and determine this application to quash the decision made by the PSC to fill these vacancies either with or without the PSC being made a party to this instant application.

The said jurisdiction objection is based on the provisions of Article 61 A of the Constitution, which reads as follows;

> "61 A. Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law".

The learned ASG further argued that this Application is an indirect challenge to the said approval granted by the PSC. It is trite law that, one cannot do something indirectly, which he cannot do directly. The Doctrine of Colourability forbids the Petitioners from doing indirectly, what they cannot do directly. This has been recognized in several cases including the case of Bandaranayake vs. Weeraratne 1981 (1) SLR 10 where Samarawickrema J stated as follows;

> "There is a general rule in the construction of Statutes that what a court or person is prohibited from doing directly, it may not be done indirectly or in circuitous manner."

The learned counsel for the respondents submits that the Petitioners' appointment and retirement are elements that establish, that the Petitioner is seeking to affect a performance which plainly and squarely falls within the purview of the PSC. Therefore, this Application and the reliefs prayed for by the Petitioners will be resulted in challenging the said approval of the PSC, for which the Court of Appeal does not have jurisdiction. It is the contention of the learned ASG that the Petitioners cannot invoke the writ jurisdiction of this Court in an indirect manner to overcome the constitutional ouster.

If the Petitioners have any grievance, that ought to have been submitted to the Supreme Court. The Respondents say that in these circumstances, the instant Application ought to be dismissed *in limine*.

The provision of Article 140 of the Constitution is very clear that the Court of Appeal is vested with the power to hear Writ Applications subject to the provisions of the Constitution, which reads as follows;

> "140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person".

The Article 61A is a Constitutional ouster and only the Supreme Court has the jurisdiction to hear and determine the applications which involves any order or decision made by the PSC, a committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission.

In the case of Hemantha Chamindra Ovitigama Vs. IGP and 19 others, CA Writ Application 1009/2008, CA Minutes 10.05.2019, it was decided by the Court of Appeal as follows;

> "In Atapattu vs. People's Bank 1997 (1) SLR 2001 the Supreme Court held that the jurisdiction of the Court of Appeal set out in Article 140 of the Constitution can only be ousted by a constitutional provision. Article 61A of the Constitution is an example of such an ouster."

The approach this Court should take to the constitutional ouster in Article 61A of the Constitution was dealt with in great detail by Marsoof J. in Ratnasiri and others vs. Ellawala and others 2004 (2) SLR 180 at 190 where he held as follows;

> "In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service ...I have no difficulty in agreeing ... that this Court must apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."
>
> "Furthermore, the ouster clause in Article 61A of the Constitution does not insulate the PSC from all forms of judicial supervision as the fundamental rights jurisdiction vested in the Supreme Court by Article 126 of the Constitution is preserved in all its vigour and any party whose fundamental rights are infringed or is in imminent danger of infringement has recourse to that jurisdiction".
>
> "The learned President's Counsel further submits that the scope of the ouster clause is limited to the preclusion of an evaluation of merits of the decision and not to the preclusion of the jurisdiction of this Court to review whether the decision is arbitrary, violates natural justice and violates constitutional principles. I am unable to accept this position as doing so would be a frontal attack on a clear and precise constitutional ouster of the jurisdiction of this Court. A court cannot do indirectly what it is prohibited from doing directly".

Supreme Court decided clearly in the case of, Bandaranaike vs. Weeraratne and Others, 1981 (1) SLR 10 at 16, the effect of an ouster clause as follows;

> "But quite apart from such general rule of construction, there is in this preclusive clause itself express words to indicate this. It states, *inter-alia*;
>
> > "No Court or tribunal shall... in any manner call in question the validity of such resolution on any ground whatsoever."

It is the position of the petitioners themselves that they are seeking to show that the resolutions passed by Parliament are not valid and that they expect that Parliament will in due course rescind the resolutions. Having regard to the necessary effect of granting a writ and the expressed purpose of the petitioners in seeking it, cannot resist the conclusion that if this Court were to entertain the Application and go into it, it would be acting in violation of the second part of the preclusive clause. The effect of the issue of a writ quashing the recommendations and findings of the Special Presidential Commission would be in some manner to call in question the validity of the resolutions.

The same legal issue of applicability of the ouster clause of the Article 61A of the Constitution was raised in the case of Ratnasiri and Others vs. Ellawala and Others (*supra)* at page 196. After the careful consideration of long line of authorities, the Court of Appeal held that;

> "This Court is clearly bound by the decision of the Bench of seven Judges of the Supreme Court in Ramuppillai vs. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others 1991 (1) SLR 11 and is inclined to the view adopted by the Supreme Court in Migultenne vs. Attorney-General 1996 (1) SLR 408 that, rules and regulations such as those found in the Establishment Code, which are formulated by the Cabinet of Ministers under the above mentioned Constitutional provisions are subordinate rather than primary legislation. Such subordinate legislation, even where authorized by the Constitution, cannot prevail over the Constitution, unless the Constitution clearly authorizes such a result. Accordingly, I hold those provisions of the Establishment Code such as Chapter 111:5.1 upon which the petitioners have placed so much reliance, being subordinate legislation, cannot prevail over, or inhibit the application of Article 61A of the Constitution in terms of which the decision of the Public Service Commission embodied in I R18, which has been made in pursuance of power vested in the Commission by Article 55 of the Constitution, is precluded from judicial review. The preliminary objection based on Article 61A against the judicial review of the validity of the order of the Public Service Commission communicated by 1R 18 is therefore upheld".

Further This court in the same case held that;

> "As noted earlier, subordinate legislation including rules and regulations made by the Cabinet of Ministers prior to the Seventeenth Amendment such as the provisions of the Establishments Code, cannot inhibit the application of Article 61A of the Constitution, in terms of which the decision of the 4th respondent taken in pursuance of power vested in him by reason of a delegation of authority law fully made by the Public Service Commission under Article 57 of the Constitution, is precluded from judicial review. The first preliminary objection taken up by learned State Counsel has therefore to be upheld".

Accordingly, the learned Additional Solicitor General on behalf of the Respondents, says that it is apparent from the decided cases that Appellate Courts have considered the Constitutional ouster clause in its full scope and has decided that the said ouster clause removes the judicial review of the Court of Appeal. Hence, the learned ASG argued that this instant Application should be dismissed.

It is Crystal clear that Article 61A removes from the jurisdiction of the Court of Appeal, a matter in which orders or decisions made by the Commission or any Committee or officer who exercises delegated power of the Commission.

In the present case, *ex facie*, there is no attempt to impugn any order or decision of the Public Service Commission. Thus, it is my view that the preliminary objection raised by the respondents entirely misconceived.

Attention of this Court is drawn by the learned President's Counsel who appears for the petitioners that according to the caption the only parties are the Minister and Secretaries of the Health and Public Administration, the other Members of Cabinet, Cabinet Secretary, the Secretary to the President and the Attorney General. The Public Service Commission is not made a party to this case and no reliefs are sought against the PSC. Thus, it is baffling as to how the purported preliminary objection could be taken in this case.

The writ of certiorari sought is to quash P 9 and the underlying decision made therein. P 9 is a decision made to compulsorily retire all government officers at 60 years of age. Thus, the preliminary objection is entirely inappropriate to this case and it must fail. It is the contention of the respondents that the Public Service Commission being the appointing authority of the Petitioners and the nursing service has consequentially granted the approval to fill the vacancies of the Petitioners to this application. The learned ASG says that if the Petitioners intend to maintain this application, it is paramount to cite the PSC a party to the application.

I do not agree with the said argument as the petitioners never sought any relief against the PSC. The Public Service Commission and its members are not necessary parties for the present case. Accordingly, necessary parties are before this Court, which is not fatal to the maintainability of this application.

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 Public Service Commission (PSC) subject to the provisions of the Constitution. Learned ASG argued that 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 Petitioners state that "in the said circumstances the policy decision of the Cabinet of Ministers to reduce the compulsory retirement age to 60 (regarding nursing services) followed by a document marked P 9. It is.....". Hence, they admit that what is sought to be quashed is a policy decision.

This is a policy decision outlined by His Excellency the President of the Democratic Socialistic Republic of Sri Lanka in the Interim Budget Speech marked as A 2 annexed to the Statement of Objections.

11.3 Accordingly, it is proposed to reduce the retirement age of public sector and semi-governmental employees to 60 years. Those who have been employed beyond 60 years of age at present in the government and semi government sectors will be retired as of 31.12.2022.

The Petitioners seek to quash a national policy on the following grievances set out in paragraph 25 to 27 of the petition.

i. ‘‘The Petitioners further state that relying on the said document marked P 3 setting the compulsory age of retirement at age 63 the several nurses had taken loans and adjusted their expenditure on the expectation that the said nurses would be employed until age 63.’’

ii. ‘‘The Petitioners further state if the said Gazette marked P 9 is left to be operative on the nursing service, the officers who would be subject to compulsory retirement as at 01.01.2023 will be left without any form of remuneration whatsoever until the pension is duly computed and approved to be paid upon following the necessary laws, regulations and protocols of the State.’’

iii. ‘‘The Petitioners further state that upon submitting the necessary papers the procedure would consume over four to six months wherein the officers representing the nursing service affected by the said Gazette marked P 9 would be left without any form of remuneration whatsoever.’’

The case of the Petitioners’ is based on mere legitimate expectations. The nature of such expectations was fully explained by His Lordship justice Priyantha Jayawardena PC in Ginkrathgala Mohandiramlage Nimaisiri vs. Colonol P. P. J Fernando SCFR 256/2010 decided on 17.09.2015;

"The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection. Procedural expectations are protected by requiring that the promised procedure be followed save in very exceptional circumstances, for instance where national security warrants a departure from the expected procedure. However, in such instances the decision-maker must take into account all relevant considerations."

In Dayaratne vs. Minister of Health and Indigenous Medicine 1999 (1) SLR 393 Amarasinghe J. held that;

"when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against equal treatment arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the Executive. An expectation is considered to be legitimate where it is founded upon

a promise or practice by the authority that is said to be bound to fulfil the expectation.

In general terms, a legitimate expectation arises when a public authority makes a promise, representation, or commitment to an individual or a group of individuals, and these individuals rely on that promise to their detriment. In my view if the public authority subsequently acts in a way that goes against the legitimate expectation, it may be subject to judicial review. The cases in which it can be said that an established practice or policy gives rise to an expectation of consistent or equal treatment. Even if the terms of the policy do not amount to a promise aimed at any person in particular, the routine application of the policy to persons in the same category can give rise to an 'expectation' of similar treatment.

Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority. According to this doctrine, a public authority can be made accountable in lieu of a legitimate expectation. Thus, the doctrine of Legitimate Expectation pertains to the relationship between an individual and a public authority.

Legitimate expectation is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such.

It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course.

Therefore, it can be said that this doctrine is a form of a check on the administrative authority. When a representation has been made, the doctrine of legitimate expectation imposes, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectation. It also adds a duty on the public authority not to act in a way to defeat the legitimate expectation without having some reason of public policy to justify it doing so.

Applying the same principle in Aruna Roy vs. Union of India (2002) 7 SCC 368 it was held that it is for Parliament to take a decision on a national education policy one way or the other, court cannot take a decision on the good or bad points of an educational policy. Court can intervene in the implementation of policy only if it is against any statute.

Wade and Forsyth Administrative Law 10th Edition deals with the power of issuing Writs of Certiorari and Prohibition when the lower Tribunal has acted in excess of Jurisdiction is as follows;

On pages 214 and 215, it says;

‘‘where there is a breach of natural justice’’

On pages 372 to 379, it says;

‘‘where there is a lack of fair hearing’’

On pages 405 to 408 it says;

‘‘if the decision is bias.’’

Article 140 of the Constitution prescribes the Law under which this Court can issue Writs in the nature of Certiorari and Prohibition.

The Respondents argued that the contention of the Petitioners that Nurses are a special class of people in view of the compulsory age of retirement being placed at 63 years is erroneous and misplaced. The decision to retire Nurses at 63 years was a policy decision taken by the Cabinet of Ministers as evident by the Cabinet Memorandum dated 17.05.2021 marked P 2(a) and the Cabinet Decision dated 14.06.2021 marked P2(b) to the Petition, owing to a shortage of Nurses prevailing at the time. The Respondents further state that the circumstances that warranted an extension of the age of retirement of Nurses was time centric as there were 6144 vacancies at this time, and only 38.579 Nurses serving at this time.

Learned Additional Solicitor General argued on behalf of the Hon. Attorney General that in contrast, as evinced by A5, at present there are approximately 43,381 Nurses, hence, the requirement that existed in 2021, no longer exists at present and therefore the revision of the compulsory age of retirement in issue has no impact on the health sector.

The learned President’s Counsel for the petitioners says that at all times the nurses are treated in one category as the doctors, specialists and dental surgeons. The Petitioners have a legitimate expectation of being treated in the same category of doctors, specialists and dental surgeons. The doctors and medical specialists instituted proceedings, obtained interim orders and finally appear to have obtained an undertaking that they will not retire until the age of 63, in the case of CA WRIT 420/2022, CA WRIT 421/2022, CA WRIT 422/2022, CA WRIT 473/2022 and CA WRIT 54/2023. The petitioners argued that the same rule shall apply to the nurses as there is a severe shortage of experienced nurses.

It is important to note that;

i. By Gazette 2235/60 dated 8.7.2021 [P3], the retirement age of medical officers, dental surgeons, and nurses were made 63.
ii. By Circular dated 6.1.2022 [P6], the retirement age of doctors, dental surgeons and nurses were proposed to be at 65.
iii. By circular 14.9.2022 [P7], Doctors, specialists and medical officers, including nurses’ retirement age was proposed to be reduced to 60.

It is evident that according to P8[1], Nurses, medical officers and dental surgeons’ retirement age was reported to be at 63. In the aforesaid circumstances it is clear that nurses, medical officers and specialists were treated in the same way. Thereafter by Gazette 2309/04 dated 05.12.2022 the retirement age of all government officers was reduced to 60. The doctors and medical specialists filed several writ applications in this Court bearing No. CA WRIT 420/2022, CA WRIT 421/2022, CA WRIT 422/2022, CA Writ 473/22 and CA WRIT 54/2023. Interim orders in the above matters were granted by this Court. The State gave an undertaking that the retirement age of medical specialists

and doctors would be 63 years. They will be permitted to serve until 31.12.2024. But the doctors and medical specialists are not happy about the dead line introduced by the Government.

In the circumstances the petitioners argued that the retirement age of nurses should be same as retirement age of doctors and medical specialists. In these circumstances the petitioners request that this Court should quash the gazette which sets the retirement age at 60.

Attention of Court is drawn to the following documents by the petitioners, which are uncontroverted:

(a) Document marked P13 annexed to the Counter Affidavit of the Petitioners.
(b) Document marked P14, as at 31.03.2023, the total number of vacancies has increased from 2307, as at 31.12.2022 to 2835.
(c) Document marked P14 - several letters confirming the existing vacancies as at year 2023.

In those circumstances it is our view that there is a grave shortage of nursing staff in the government sector. We take judicial notice that since 31.03.2023 for the past 6 months nearly 1000 vacancies were created in the nursing staff due to various reasons. Some of them have retired and many experienced nursing staff has gone abroad. In that event the impugned age of retirement is imposed, this problem will be severely exacerbated in the government hospitals. This will have a severe impact on the healthcare sector and it will surely cause the collapse of the entire government hospital system very soon.

In any event new entrance to the nursing service will not resolve the shortages of nurses caused by the compulsory retirement. In view of the compulsory retirement, most if not all nurses are Grade 1 and Supra Grade nurses. Training nurses cannot fill the void of sudden exclusion of the Grade 1 and Supra Grade nurses. The arguments raised by the respondents are illogical, irrational and stands no logic. Therefore, it is important to note that with the compulsory age of retirement at 60 is implemented in respect of nursing service, there will be severe shortage of skilled,

senior and most experienced nurses in the country. The Respondents have not proposed a solution for the aforesaid.

Considering all the submissions and documents filed by all parties this Court decides as follows;

i. This Court issue a mandate in the nature of writ of certiorari quashing document marked P 9 and/or the underlying decision made therein to send public officers (inclusive of nurses) on compulsory retirement at age 60 **to the extent it is applicable to the nursing service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka nursing service;** under prayer (c) of the amended petition dated 12.01.2023.

ii. This Court issue a mandate in the nature of a writ of mandamus reinstating all officers of Sri Laka nursing service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka nursing service who had been sent on compulsory retirement in terms of the impugned gazette marked P 9 herein; under prayer (d) of the amended petition dated 12.01.2023.

iii. Call and quash relevant decision(s) made by 1st, 4th, 5th to 21st Respondents (Cabinet of Ministers) to send public officers (inclusive of nurses) on compulsory retirement at age 60 **to the extent it is applicable to the nursing service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka nursing service;** under prayer (e) of the amended petition dated 12.01.2023.

iv. This Court issue a writ of prohibition prohibiting the Respondents or any one or more of them, their servants, agents and those who are holding under and through them from compulsorily retiring officers **representing the nursing service especially officers in Grade I, Supra Grade, Special Grade and Executive Grade of Sri Lanka nursing service** in terms of the decision contained in document marked P 9 and/or by way of a decision(s) by the Cabinet of Ministers; under prayer (f) of the amended petition dated 12.01.2023.

No order for cost.

President of the Court of Appeal

M. Ahsan R. Marikar J

I agree.

Judge of the Court of Appeal