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

In the matter of an Application in the nature of Writs of Certiorari and Mandamus under Article 140 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

1. M.M.N. Manchanayake,
   PC 51425/RPC 8518,
   No. 253, G.P.S. Junction,
   New Town, Medirigiriya.

PETITIONER

CA No. CA/Writ/0130/2020

v.

1. National Police Commission**,**
   Building No. 9,
   Bandaranayake Memorial International
   Conference Hall, Bauddhaloka Mawatha,
   Colombo 07.

1a. P.H. Manathunga,
Chairman,
National Police Commission,
Building No. 9,
Bandaranayake Memorial International
Conference Hall,
Bauddhaloka Mawatha, Colombo 7.

1b. S.C.S. Fernando,
Chairman (Present),
National Police Commission,

Building No. 9,
Bandaranayake Memorial International
Conference Hall,
Bauddhaloka Mawatha, Colombo 7.

2. Professor S.T. Hettige
2a. M.P.P. Perera,

3. Savithri D. Wijesekara,
3a. S. Liyanagama,

4. Anton Jeyanathan,
4a. G. Wickremage,

5. Y.L.M. Zawahir,
5a. A.S.P.S.P. Sanjeewa,

6. Tilak Collure,
6a. T.P. Paramaswaran,

7. Dr. Frank de Silva,
7a. N.S.M. Samsudeen,
(2a – 7a Respondents are the Present
Members of the National Police
Commission)

8. Nishantha Anuruddha Weerasinghe,
Secretary,
National Police Commission,
Building No. 9,
Bandaranayake Memorial International
Conference Hall, Bauddhaloka Mawatha,
Colombo 7.

8a. Thamara D. Perera,
Present Secretary,
National Police Commission,
Building No. 9,
Bandaranayake Memorial International
Conference Hall, Bauddhaloka Mawatha,

Colombo 7.

9. Hon. Justice Anil Gunarathne,
   Chairman,
   Aminiatrative Appeals Tribunal,
   No. 35, Silva Lane, Dharmapala Place,
   Rajagiriya.

10. A. Gnanathasan P.C.,
    Memebr,
    Aminiatrative Appeals Tribunal,
    No. 35, Silva Lane, Dharmapala Place,
    Rajagiriya.

11. G.P. Abeykeerthi,
    Memebr,
    Aminiatrative Appeals Tribunal,
    No. 35, Silva Lane, Dharmapala Place,
    Rajagiriya.

12. C.D. Wikremaratna,
    Inspector General of Police,
    Department of Police,
    Police Head Quarters,
    Colombo 1.

13. Hon. Attorney General,
    Attorney General's Department,
    Hulftsdorp,
    Colombo 12.

14. Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla,

15. Hon. Justice Jagath Balapatabendi,
    Chairman,
    Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla.

16. M.A.B. Daya Senarath,
    Secretary,
    Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla.

17. Mrs. Indrani Sugathadasa,
    Member.

18. Mr. V. Shivagnanasothy,
    Member.

19. Dr. T.R.C. Ruberu,
    Member.

20. Mr. Ahmed Lebbe Mohamed Saleem,
    Member.
    .
21. Mr. Leelasena Liyanagama,
    Member.

22. Mr. Dian Gomas,
    Member.

23. Mr. Dilith Jayaweera,
    Member.

24. Mr. W.H. Piyadasa,
    Member,
    All of Public Service Commission,
    No. 1200/9, Rajamalwatta Road,
    Battaramulla.

RESPONDENTS

BEFORE : M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL : P. K. Prince Perera with Panchardsaran for the Petitioner.

Mihiri de Alwis, SSC for 9th – 24th Respondents.

WRITTEN SUBMISSIONS : 19.05.2023 (by the Petitioner)
23.06.2023 (by the Respondent)

DECIDED ON : 03.08.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner filed the instant application *inter-alia* seeking, a writ of *certiorari* to quash the decision of the Administrative Appeals Tribunal (hereinafter referred to as the 'AAT'), a writ of *certiorari* to quash the decision of the National Police Commission (hereinafter referred to as the 'NPC') and a writ of *mandamus* directing the 1st to 12th Respondents to pay the Petitioner's arrears of salary for the period from 28th April 1996 to 17th July 2017.

When this matter was mentioned on the 10th May 2023 to fix a date for argument, the learned Senior State Counsel for the 9th to 24th Respondents[1] raised a preliminary objection that Article 155C of the Constitution excludes the jurisdiction of this Court from hearing and determining this matter.

The learned Counsel for the Petitioner responded to the objection above and stated that he will limit his claim to the reliefs prayed for in prayer (b) (i) and (c) of the Petition. However, moved that the 1st to 8th Respondents, the NPC, the members of the NPC, and the Secretary to the NPC should remain in the case.

According to the learned Senior State Counsel, although no relief is prayed against the 1st to 8th Respondents, the fact of remaining as Respondents itself violates Article 155C of the Constitution.

[1] Journal entry dated 10th May 2023.

Both parties were allowed to tender their written submissions and the learned Counsel for the Petitioner as well as the learned Senior State Counsel for the Respondents tendered their written submissions.

Analysis

I shall begin by reproducing the relevant constitutional provision.

Article 155C of the Constitution reads as follows;

> '**155C.** *Subject to the jurisdiction conferred on the Supreme Court*[2] *[under paragraph (1) of Article 126 and the powers granted to the Administrative Appeals Tribunal under Article 155L,] no court or tribunal shall have the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission or a Committee, in pursuance of any power or duty, conferred or imposed on such Commission or Committee under this Chapter or under any other law.*'

The above is a constitutional ouster clause. This would oust the writ jurisdiction of this Court in respect of decisions of the NPC. Consequently, this Court has no jurisdiction to inquire into or pronounce upon, or in any manner call in question the decision of the NPC that the Petitioner seeks to quash under prayer (b) (ii) of the Petition.

However, other than the aforementioned relief against the NPC, the Petitioner has also sought to quash the decision of the A AT by way of a writ of *certiorari* and further have sought a writ of *mandamus* directing the 1st to 12th Respondents to pay the Petitioner's arrears of salary.

Article 155L provides that '*any Police Officer aggrieved by any order relating to promotion, transfer or any order on a disciplinary matter or dismissal made by the Commission in terms of Article 155K, in respect of such officer may appeal therefrom to the* ***Administrative Appeals Tribunal*** *established under Article 59 which shall have the power to alter, vary, rescind or confirm any order or decision made by the Commission'*. (emphasis added)

However, in contrast to the immunity granted to the NPC under Article 155C of the Constitution, the AAT does not have immunity against legal proceedings under the Constitution. Nevertheless, Section 8 (2) of the

[2] Substituted by the Twenty First Amendment to the Constitution Sec. 24.

Administrative Appeals Tribunal Act No. 4 of 2002 contains a statutory ouster clause that reads as follows;

> '**8(2)** *A decision made by the Tribunal shall be final and conclusive and* ***shall not be called in question*** *in any suit or proceedings in a Court of law'* (emphasis added)

The expression shall not be called in any Court or any other expression of similar import whether or not accompanied by the words '*whether by way of writ or otherwise'* is interpreted in Section 22 of the Interpretation Ordinance[3], as amended, to mean that no Court shall, in any proceedings and upon any grounds whatsoever have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding made or issued in the exercise or the apparent exercise of the power conferred on such person, authority Court or tribunal.

However, the Proviso of the same section states that those provisions do not apply to the Supreme Court or to the Court of Appeal as the case may be in the exercise of its powers under Article 140 of the Constitution in respect of the matters specified under (a) and (b). Accordingly, under subparagraph (a) where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal and under subparagraph (b) where such a person is bound to confirm to the rules of natural justice, or where compliance with any mandatory provision of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law; the provisions in Section 22 of the Interpretation Ordinance shall not apply.

The Petitioner alleges that the Order of the AAT is against the doctrine of unreasonableness[4]. Further, it is apparent from the Petition that the Petitioner also alleges that the decision of the AAT is irrational[5]. Accordingly, it is clear that the Petitioner's application for a writ against the AAT is not based on the breach of the principles of natural justice.

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[3] No. 21 of 1901, as amended.

[4] Paragraph 6 (c) of the Petition.

[5] Paragraph 6 (a)(i) and (v) of the Petition.

From this perspective, on the face of this application, it appears that the instant application is barred by Section 22 of the Interpretation Ordinance. In the case of *V.M Nadarajah v. Sirimeven Bibile and others (C.A.)*[6], a bench comprising of one judge of this Court held that unless the Petitioner shows that authority or tribunal acted in excess of jurisdiction in arriving at its determination or that acted in violation of principles of natural justice, a writ does not lie in view of Section 22 of the Interpretation Ordinance read along with the ouster clause in the statute. However, in the more recent case of *Jayantha Liyanage v. Commissioner of Elections*[7] *(S.C.)*, the Supreme Court having considered Section 22 of the Interpretation Ordinance held that an ordinary legislation cannot supersede Article 140 of the Constitution which grants power to the Court of Appeal to issue writs.

The above view of the Supreme Court is further confirmed by Articles 138 and 139 of the Constitution, which grant appellate jurisdiction to the Court of Appeal. In contrast to Article 140, Article 138 mandates that the Court of Appeal exercises its appellate jurisdiction *'subject to the provisions of the Constitution* ***or any law'*** (emphasis added). Therefore, the term *'according to law'* in Article 139 obviously should mean any law in force in Sri Lanka for the time being.

It is important to examine the evolution of Section 22 of the Interpretation Ordinance at this point to see if the Legislature actually enacted a provision that is redundant. Section 22 was introduced to the Interpretation Ordinance by Amendment Act No. 18 of 1972 which came into operation with effect from 11th May 1972. The Section 22 read as follows;

> **22.** *Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court", or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction*

[6] [1994] B.L.R. Vol. V, Part II, p. 78
[7] S.C. (Spl.) L.A. No. 150/2010.

or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court in the exercise of its powers under ***section 42 of the Courts ordinance*** *in respect of the following matters, and the following matters only, that is to say –*

(a) Where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b) Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:'

(...)

At that time writ jurisdiction was assigned to the Supreme Court by Section 42 of the Courts Ordinance[8]. For the first time, the writ jurisdiction of the highest Court of Sri Lanka was constitutionally recognized and provided for in the Constitution of Sri Lanka in the 1972 Constitution adopted and enacted by the Constituent Assembly. In particular, Article 121 (3) enacts that;

121. (1) (...)

(2) (...)

(3) The powers of the highest court with original jurisdiction established by law for the administration of justice shall, except in matters expressly excluded by

[8] No. 1 of 1889 as amended.

existing law or laws enacted by the National State Assembly, include the power to issue such mandates in the nature of writs as the Supreme Court is empowered to issue under the existing law. The National State Assembly shall have the power to enact such laws by a majority of the Members present and voting.'

(4) (...)

It is important to observe that the nature of the writs is not described in the Constitutional provision. However, when the National State Assembly enacted the Administration of Justice Law No. 54 of 1973 which was brought into operation with effect from 14th November 1973, repealed the Courts Ordinance[9] and introduced Section 12 in respect of writs. Section 12 (1) reads as follows;

> **12 (1)** *The Supreme Court may grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo and prohibition:*
>
> *Provided that no such mandate may be granted and issued against a Criminal Justice Commissions established under the Criminal Justice Commissions Act.'*

The 1972 Constitution was repealed by Article 171 of the 1978 Constitution. By Article 169 (1) of the 1978 Constitution, Section 12 (1) of the Administration of Justice Law[10] which is inconsistent with Articles 140 and 141 of the 1978 of Constitution is also deemed to be repealed.

Consequently, upon the introduction of the 1978 Constitution, the Court of Appeal was granted writ jurisdiction under Article 140. In 1980, an unofficial version of Legislative Enactments was published. In Section 22 of the Interpretation Ordinance in volume one of the above while the first part of the Section remained unchanged, the Proviso was modified. In the Proviso, the words *'the Court of Appeal as the case may be',* were added immediately next to the words *'Supreme Court'*, making the Proviso of the Section applicable to the Court of Appeal as well. Further, the words *'Section 42 of the Courts*

[9] Section 3 (1) (a).
[10] 44 of 1973.

Ordinance' were replaced by the words *'Article 140 of the Constitution of the Republic of Sri Lanka'*. The relevant part of the Section reads as follows;

> **22.** (…)
>
> *Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court or* ***the Court of Appeal, as the case may be****, in the exercise of its powers under* ***Article 140 of the Constitution of the Republic of Sri Lanka*** *in respect of the following matters, and the following matters only, that is to say –*
>
> *(a) Where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and*
>
> *(b) Where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or Court of Appeal, as the case may be, is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:'*
>
> *(…)*

According to the unofficial version of the Interpretation Ordinance published in the year 1980, the last Amendment to the Interpretation Ordinance was the Amendment Law No. 29 of 1974. The new Constitution was adopted in 1978. Thus, if there was an Amendment to Section 22 prior to the unofficial version of the Legislative Enactments being published, it should have to be in the years 1978, 1979, or 1980, after the enactment of new Constitution and before the publication of unofficial version of Legislative Enactments. Apart from the Amendments mentioned in the 1980 Legislative Enactments, I am unable to find any other amendment. Therefore, the only reasonable inference that this Court could arrive at, is that, when the Legislative Enactments were re-

casted in 1980, a modification to Section 22 had been made, without a Legislative Amendment.

Therefore, in my view, Section 22 of the Interpretation Ordinance in the 1980 Legislative Enactments has no legal force. Furthermore, it is an unofficial version as stated in the Enactments itself. There have been instances where this Court has concluded that the 1980 revised version of Legislative Enactments is wrong and misleading[11]. Accordingly, It should be read in its original form. Then again, since the Courts Ordinance is now repealed[12], Section 22 of the Interpretation Ordinance is now redundant.

Accordingly, it is clear that Section 22 of the Interpretation Ordinance does not apply to writ applications.

The power of the Court of Appeal to issue writs is governed by Article 140 of the Constitution. In the case of *Atapattu and others v. People's Bank and others*[13]*,* the issue before the Supreme Court was whether Article 140 is subject to the other laws which were kept alive by Article 168 (1). Article 140, unlike Article 146, has a phrase that the powers and authority of the Court of Appeal are '*subject to the provisions of the Constitution'*. The Supreme Court held that the phrase '*subject to the provisions of the Constitution*' is necessarily there to avoid conflicts between Article 140 and other Constitutional provisions such as Articles 80 (3), 120, 124, 125, and 126 (3). Consequently, it was held that the aforementioned phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws. The Supreme Court observed that the language used in Article 140 of the Constitution is broad enough to confer unfettered jurisdiction to the Court of Appeal to review, even on grounds excluded by the ouster clauses.

Furthermore, His Lordship Fernando J., observed that the presumption must always be in favour of the jurisdiction which enhances the protection of the rule of law, and against an ouster clause that tends to undermine it.

Article 140 also provides that the power of the Court of Appeal has to be exercised '*according to law'*. I am of the view that considering the phrase *'according to law'* in Article 140 of the Constitution is also relevant. In the

[11] *Sitti Maleesha and another v. Nihal Ignatious Perera and another* (1994) 2 Sri.L.R. 270.
[12] By Section 3(1) (a) of the Administration of Justice Law No. 44 of 1973.
[13] [1997] 1 Sri L. R. 208.

cases of *Goonasinghe v. de Kretser*[14], *Nakkuda Ali v. Jayaratne,*[15] and *M. D. Chandresena and two others v. S. P. de Silva (Director of Education)*[16] Court interpreted the term '*according to law'* to mean the relevant Rules of English common law. The above decisions were based on the premise that the law relating to prerogative writs originated and evolved in the United Kingdom. Our Courts have followed this in a long line of authorities.

In the cases of *B. Sirisena Cooray v. Tissa Dias Bandaranayake and two others,*[17] it was held that '*the writ jurisdiction conferred upon the Superior Courts by Article 140 of the Constitution and it cannot be lawfully restricted by the provisions of ordinary Legislation contained in the ouster clauses*.'

In the case of *Wickremasinghe Aruna Sameera v. Justice S. I. Iman, Chairman, Administrative Appeals Tribunal and others*[18], Samayawardhena J., sitting in Court of Appeal (as His Lordship then was) having considered Section 8 (2) of the Administrative Appeals Tribunal Act No. 4 of 2002 observed that '*This is a statutory ouster clause, and not a constitutional ouster clause. Ouster clauses contained in statutes, as a general rule, do not oust the writ jurisdiction conferred on Courts - in Sri Lanka*, *on the Court of Appeal by Article 140 of the Constitution. There is a presumption in favour of judicial review and courts have throughout history shown their great reluctance to accept ouster clauses at face value. The tendency of Courts has been to give ouster clauses a restrictive interpretation as much as possible so as to preserve their jurisdiction to review administrative decisions. The leading English case of Anisminic Ltd v. Foreign Compensation Commission (1969) AC 147 provides a striking illustration of this tendency. It is generally understood that the ouster/preclusive/finality clauses are there to prevent appeals and not to prevent judicial review. Those clauses do not and cannot prohibit the Court of Appeal from exercising its writ jurisdiction to look into the jurisdictional issues of the decisions of the administrative bodies or tribunals*[19] *(...)*'

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[14] (1944) 46 N. L. R. 107.
[15] (1950) 51 N. L. R. 457.
[16] [1961] 63 N. L. R. 143.
[17] [1999] 1 Sri L. R. 1, at p. 13.
[18] CA. Writ Application 73/2016, Court of Appeal minutes dated 20th February 2019.
[19] *Supra* note 18 at pp.3 and 4.

Professor H.W.R. Wade[20] states as follows regarding the phrases '*shall be final'* or '*shall be final and conclusive*'; *'Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is better.'*

'Enactments designed to oust the jurisdiction of the courts entirely in respect of all remedies have come to be known as "ouster clauses". However, they are worded, they are interpreted according to the same principle.[21]*'*

In light of the above analysis, I am of the view that the writ jurisdiction of this Court is only subject to the provisions of the Constitution, the supreme law of the country.

The ouster clause in Article 155C of the Constitution is almost identical to the ouster clause in Article 61A of the Constitution. In the aforementioned case of *Wickremasinghe Aruna Sameera v. Justice S. I. Iman, Chairman, Administrative Appeals Tribunal and others*[22] Article 61A of the Constitution was subject to scrutiny by His Lordship Samayawardhena J. This was a case where the Public Service Commission (hereinafter referred to as the 'PSC') refused the application of the Respondents seeking appointment to the post of Assistant Superintendent of Customs. In appeals to the AAT, the AAT allowed the appeal and changed the decision of the PSC. His Lordship having considered the ouster clause in Article 61 A of the Constitution held that it is the decision of the AAT that the PSC is compelled to implement and there is no independent decision by the PSC which attracts immunity in terms of Article 61 A of the Constitution.

[20] H.W.R. Wade and C. F. Forsyth, *Administrative Law,* Eleventh Edition, at p. 609.
[21] *Ibid* at p. 612.
[22] *Supra* note 18.

Accordingly, it is clear that the ouster clause contained in Article 61A of the Constitution is limited to the decisions made by the PSC and does not extend to the decision of the AAT.

An Order made by the NPC can be appealed to the AAT under Article 155L of the Constitution. In my view, the ouster clause in Article 155C is intended to prevent parties who are aggrieved by the decision of the NPC from pursuing other legal proceedings, circumventing the remedy provided in the Constitution itself. The fact that the Legislature has not introduced an ouster clause against the decision of the AAT supports this point of view.

The jurisdiction of this Court under Article 140 to review a decision of the AAT had been recognized by this Court in the case of *Locomotive Operators Engineers Union and others v. Justice N. E. Dissanayake (Chairman) Administrative Appeals Tribunal and others*[23] by His Lordship Sobhitha Rajakaruna J., (Dhammika Ganepola J., agreeing).

In light of the analysis above, I hold that the Petitioner can maintain this application for the reliefs (b) (i), and (c). The preliminary objection raised by the Respondents is therefore overruled.

The substantive application will in due course be fixed for argument.

JUDGE OF THE COURT OF APPEAL

<u>Wickum A. Kaluarachchi J.</u>

I Agree.

JUDGE OF THE COURT OF APPEAL

[23] CA. writ 339/2019, Court of Appeal minutes dated 22nd September 2021.