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 a Writs of Certiorari and Writs of Prohibition under and in terms of Article 140 of the Constitution of the Republic.

C. A. Writ No. 548/2023

1. Velivitiya Kankanamage Chandana Pushpamal
   No.103/12, Nugahena Waththa,
   Halpita Polgasovita

2. Witharana Manojith Wickramasinghe
   No.28/4 L, Ranasooriya Road, Paniyana,
   Ambalangoda

3. Ekanayake Wepitiya Gamage Piyal Kithsiri
   No. 772/1, Nawagamuwa South, Ranala

4. Meringhghage Udayanga Pushpa Kumara De Costha
   No.290, Gamunu Mawatha, Kotuwegoda,
   Rajagiriya

5. Peramuna Arachchige Omal Sampath
   No.422/1, Galahitiyawa, Ganemulla

PETITIONERS

Vs.

1. Dinesh Chandra Rupasingha Gunawardena
   Prime Minister
   Minister of Public Administration, Home Affairs, Provincial Councils and Local Government

2. Nimal Siripala De Silva
   Minister of Ports, Shipping and Aviation

3. Pavithra Devi Vanniarachchi
   Minister of Wildlife and Forest Resources Conservation

4. Douglas Devananda
   Minister of Fisheries

5. Achchige Don Susil Premajayanth
   Minister of Education

6. Bandula Gunawardena
   Minister of Transport and Highways
   Minister of Mass Media

7. Keheliya Rambukwella
   Minister of Health and Minister of Water Supply

8. Amaraweera Mahinda
   Minister of Agriculture
   Minister of Wildlife and Forest Resources Conservation

9. Wijayadasa Rajapaksha
   Minister of Justice, Prison Affairs and Constitutional Reforms

10. Nalaka Jude Hareen Fernando
    Minister of Tourism and Lands

11. Ramesh Pathirana
    Minister of Plantation Industries and
    Minister of Industries

12. Prasanna Ranatunga
    Minister of Urban Development and Housing

13. M.U.M. Ali Sabri
    Minister of Foreign Affairs

14. Vidura Wickaramanayaka
    Minister of Buddhasasana, Religious and Cultural Affairs

15. Kancahana Wijesekera
    Minister of Power and Energy

16. Ahamed Zenulabdeen Naseer
Minister of Environment

17. Anuruddha Ranasinghe Arachchige Roshan
Minister of Sports and Youth Affairs
Minister of Irrigation

18. Maligaspe Koralege Nalin Manusha Nanayakkara
Minister of Labour and Foreign Employment

19. Tiran Alles
Minister of Public Security

20. Kachchakaduge Nalin Ruwanjiwa Fernando
Minister of Trade, Commerce and Food Security

21. Jeevan Thondaman
Minister of Water Supply and Estate Infrastructure development

Above 1st to 21st Respondents all C/O Office of the Cabinet of Ministers
Loyd's Building, Sir Baron Jayathilaka Mw.
Colombo 01,

22. Attorney General
Attorney General's Department
Colombo 12

23. Pasanda Yapa Abeywardena
Chairman
Co-Operative Wholesale Establishment

24. Thusitha Nuwan Wanigarathne
Vice Chairman
Co-Operative Wholesale Establishment

25. D. Jeewanandan
Director
Co-Operative Wholesale Establishment

26. S.H.V. Kumara
Director
Co-Operative Wholesale Establishment

27. Piyal Nupearachchi
Director
Co-Operative Wholesale Establishment

28. Hemantha Wickramasinghe
Director
Co-Operative Wholesale Establishment

29. B.H.I.W.D Senevirathne
Director
Co-Operative Wholesale Establishment

30. P.J.A. Jayampathy Aravinda
Director
Co-Operative Wholesale Establishment

31. Board of Directors of Co-Operative Wholesale Establishment
Co-Operative Wholesale Establishment

Above 23rd to 31st Respondents all C/O CWE Secretariat Building, No 27, Vauxhall Street, Colombo 02.

RESPONDENTS

Before: Hon. D.N. Samarakoon J.,
Hon. Neil Iddawala J.,

Counsel: Manohara R. de Silva, P. C., with Boopathy Kahathuduwa for the Petitioners.

Faiszer Musthapha P. C., for the 23rd to 31st Respondents instructed by Sanjeewa Kaluarachchi.

No appearance for other Respondents.

Supported on: 02nd October 2023

Order delivered on: 03rd October 2023

D.N. Samarakoon, J.

ORDER

Sir Robert Edgar Megarry, the Vice Chancellor of the Chancery Division from 1982 to 1985 said,

> "…Sometimes I ask students to say whom they consider to be the most important person in a court room. Many pick the judge; others give a variety of answers…My answer given unhesitatingly, is that it is the litigant who is going to lose…"

("Temptations of the Bench," 16 Alberta Law Review, (1978) 406 at pp. 410-411).

He was advocating against "brevity." He recommended a "fair run and a full hearing." But he also said, "What merit can there be in not taking the shortest path that will bring about a proper decision in the case? These are cogent considerations, and they must be given due weight".

At the end of the course of supporting this application for the petitioners, at which time this court must come to a decision, whether to issue formal notice and interim orders prayed for, or not, this court has arrived at the decision not to issue notice and to dismiss the petition. But, in an act of setting off, the "brevity" of the course of action adopted by this court against the interests of the litigants who are going to lose, this court has decided to give in this order its fullest reasoning as to why it thinks the petitioners cannot succeed.

This is also why and it is because this court thought that the order should be on merits, that, the court on 02nd October 2023 (yesterday) did not uphold the technical objection raised by the learned President's Counsel for the respondents, which, despite being a technical one, yet a substantial objection.

The petitioners are five in number and their position is that they represent the entire 292 employees of the Co operative Wholesale Establishment. They say the 01st and 02nd are respectively the chairman and the secretary of the Progressive

Workers Union and the 04th and 05th are respectively, the vice chairman and the chairman of Nidahas Sevaka Sangamaya. The 03rd petitioner is another employee. They say that at a special meeting of a joint gathering of the two unions, at 10.00 a.m. on 18.09.2023 (three days before the petition was instituted on 21st September 2023) they, presumably those who were gathered, decided to authorize the petitioners to take legal action against a circular issued by the chairman of CWE dated 14.09.2023 that due to the restructuring of the CWE all employees will be sent on compulsory retirement from 30.09.2023. A letter signed by four of the petitioners regarding the emergency meeting held on 18.09.2023 is attached as P.01, whereas a copy of the said circular is attached as P.02. As per the said circular, no payment of monthly salary or any other allowance is paid after 30.09.2023 and the EPF money will be paid within 14 days from that date.

The learned President's Counsel for the 23rd to 31st respondents have cited the case of *The Ceylon Mercantile Union vs. The Insurance Corporation of Sri Lanka (1977)* to say that "a trade union has no locus standi to institute an action for relief based on the contract of its members". However, as that case was considering a district court action, but not a writ application and in the spirit of the statement of Megarry V. C. cited at the commencement of this order, this court wishes to base its order on merits.

The circular P.02 refers to a Cabinet Memorandum dated 26.06.2023 marked as P.03, the observations of the Minister of Finance, Economic Stabilization and National Policies dated 10.07.2023 marked as P.04 and the Cabinet Decision dated 18.07.2023 marked as P.05.

The petitioners, among other things, allege, that, the proposed restructuring was not a restructuring but a complete and final closure of the CWE and the grant of approval to P.03 by P.05 and thereby the closing down of the CWE is ultra vires the provisions of the Co Operative Wholesale Establishment Act No. 47 of 1949, especially its sections 35 and 36.

It is also alleged that the cumulative effect of proposals 3.5, 3.7, 3.8 and 3.9 of P.03 is to artificially deteriorate the financial position of the CWE allowing the 20th respondent, the Minister of Trade, Commerce and Food Security to make an order under section 35 of the CWE Act. It is also alleged that proposals 3.5, 3.7,3.8 and 3.9 are violations of section 37(3) of the Act.

The petitioners pray for,

(01) A writ of certiorari quashing P.05,

(02) A writ of certiorari quashing the decision of the 01st to 21st respondents (the cabinet of Ministers) to alienate the assets belonging to the CWE,

(03) A writ of certiorari quashing the decision of the cabinet of Ministers to terminate the employment of the employees,

(04) A writ of certiorari quashing the decision of the 20th respondent to restructure the CWE,

(05) A writ of certiorari quashing the decision of the 23rd to 30th and or 31st respondents, the Board of Directors of the CWE contained in P.02,

(06) A writ of prohibition prohibiting the Cabinet of Ministers and the Board of Directors from taking steps to implement the decisions contained in P.02, P.03 and P.05,

(07) A writ of prohibition prohibiting the Cabinet of Ministers from alienating the assets belonging to CWE and or to the Board of Directors,

(08) A writ of prohibition prohibiting the Cabinet of Ministers from terminating the employment of the employees of the CWE,

(09) An interim order restraining the Cabinet of Ministers from taking steps to implement P.03 and or P.05,

(10) An interim order restraining the Board of Directors from implementing the decisions contained in P. 02 and or P.03,

(11) An interim order restraining the Cabinet of Ministers and or the Board of Directors from stopping salaries and or benefits and or promotions and or any other entitlement of the employment of CWE under their respective

contracts of employment and or the appointment letters and or under the CWE Act,

(12) An interim order restraining the Cabinet of Ministers and the Board of Directors from alienating the assets of CWE to any third party but not limited to Lanka Sathosa Limited,

(13) An interim order restraining the Cabinet of Ministers and the Board of Directors from terminating the employment of any of the employees of the CWE through a Compulsory Retirement Scheme and

(14) An interim order suspending or staying the operation of P.02 and or P.03 and or P. 05

The provisions of the CWE Act, referred to by the petitioners are,

"section 37(3)

(3) Any surplus remaining after the application of the funds to the purposes specified in subsection (1) and the payment of any claim, for which an action is instituted under subsection (2) shall be credited to the Consolidated Fund".

"section 35

35. Where the Minister is not satisfied with the working and the financial position of the board, he may, by Order published in the Gazette (a) dissolve the board with effect from such date as may be specified in the Order, and (b) appoint one or more persons to be the liquidator or liquidators of the board".

"section 36

36. A liquidator appointed under section 35 shall, subject to the directions of the Minister, have power to (a) decide any questions of priority which arise between the creditors ; (b) compromise any claim by or against

the board if the sanction of the Minister has been previously obtained; (c) take possession of the books, documents and assets of the board ; (d) sell the property of the board; and (e) arrange for a distribution of the assets of the board in a convenient manner when a scheme of distribution has been approved by the Minister".

The above are provisions with regard to the Dissolution of the Board and Liquidation.

The Cabinet Memorandum, P.03 by its section 3.1, the first section under the proposals for restructuring proposes to transfer all liabilities of the CWE to the Lanka Sathosa Company. It is also proposed that the management of the assets of CWE is also to be done by Lanka Sathosa Company. The learned President's Counsel for 23rd to 31st respondents, who objected to the issuing of notice submitted that Lanka Sathosa Company is a 100% state owned company.

It appears to this court, that, the main grievance of the petitioners is the Compulsory Retirement Scheme. As the CRS is invariably connected to the restructuring (*which the petitioners allege is a closing down of the CWE*) the reliefs prayed for by the petitioners seek to stall the entire process referred to not only in P.02 (the CRS) but P.03 (Cabinet Memorandum) and P. 05 (the Cabinet Decision). Before satisfying on a prima facie basis that the petitioners are entitled to the reliefs they claim, the court has to consider two main questions, which are,

(i) Whether in judicial review this court can grant the reliefs (including the interim reliefs) prayed for, or any of them and

(ii) Whether in judicial review this court can question the Ministerial Policy or planning policy in restructuring the CWE

(i) **Prima facie consideration of the granting of reliefs:-**

P.03 at its commencement, describing the background in which proposals for restructuring are made, states that at the introduction of open economic

policies in 1978, the CWE lost the monopoly it had and as a result it faced severe financial constraints. It says that, as a result, voluntary retirement schemes were introduced in 2003 and 2006 and one half of the present work force of 292 are those who were recruited thereafter. Under justification of restructuring, it says that at present the monthly expenditure on salaries, allowances, etc., is Rs. 19 million and presently the CWE consists of a transport division having 91 lorries out of which 75 are roadworthy. The main income of the CWE at present is from renting out its stores and other buildings to state and private sectors. The loss caused in the year 2022 is Rs. 79 million.

At the oral hearing, much reference was not made by either party to P.4, the observations of the Minister of Finance, perhaps because it was not referred to in prayers to be quashed. But it is material to refer to the said observations.

The Minister of Finance says in P. 04 that he principally agrees to restructure the CWE subject to several suggestions.

The first suggestion is,

> "1. I agree to appoint an official committee as mentioned in proposal No. 3.4 for the purposes proposed in 3.2 and 3.3 regarding the Compulsory Retirement Scheme (CRS) and **it should be initiated as the first step**. However, CRS is required to finance out of the sales proceeds of movable assets and existing fixed deposits of the CWE. Further, proposed fund raising should be subject to the approval of the existing board of directors.
>
> Moreover, it is proposed not to take any decision related to new recruitments and major business decisions by the board of directors of the CWE until the liquidation process is commenced".

This shows that the CRS is the first step and that liquidation will commence thereafter.

Further section 3.6 of P.03 proposes to expunge from financial statements the debts to be paid by CWE to the Department of Food, Paddy Marketing Board and Lanka Sathosa Company.

In P.04 the Minister of Finance does not recommend this proposal. He says that all the liabilities should be addressed during the liquidation stage.

The Minister of Finance also suggests under No. 04,

> "04. In order to decide the way forward for the remaining assets and liabilities of the CWE, it is proposed to establish a high level committee by the Secretary, Ministry of Trade, Commerce and Food Security including senior officers from the Department of Public Enterprises and the Department of Legal Affairs of the General Treasury".

Documents considered by this court up to now show, that, the restructuring is not a complete closure as the petitioners allege. It may be that the name and the entity CWE will not exist, but the assets will be managed by Lanka Sathosa Company, of which too the chairman is the same as in CWE. The CRS is the first step. The liquidation, according to the suggestions of the Finance Minister, has to commence at a later stage. It appears that the petitioners connect the CRS to liquidation to take cover of sections 35 and 36, so to speak.

Hence it is too early to say whether sections 35 and 36 are infringed. As already said, the petitioners ask to stall the whole process of restructuring. It appears, on the face of it, that, it is a remedy almost disproportionate.

It is true, that, proportionality is measured, so to speak, in assessing the proportionate relationship of the act complained of to the situation it attempted to remedy. Lord Donaldson M. R. in Brind's case [1991] which will be considered, quoting Watkins L. J., in the Divisional Court said,

> "The contention arising from them is that the principle of proportionality in the law of the United Kingdom being one test or tool to be used in resolving the question, was the decision under consideration unreasonable in the sense that

the decision was one which no reasonable minister properly directing himself as to the law could have taken? Applying that test, if, for example, a sledge hammer is taken to crack a nut when there are a pair of efficient nut crackers readily available, that is a powerful indication that the decision to use the sledge hammer was absurd – unreasonable".

However, in addition to the ordinary use of the term "proportionality" in that regard, it appears to this Court, that, the cases that will be examined in this order have an analogous relationship to the facts of this case and what was decided in Brind's case on the proportion of interference being minimal will apply in this case too.

In this regard this court wishes to consider the case of **Rex vs. Secretary of State for the Home Secretary, ex parte Brind [1991] 1 A. C. 696**.

Interestingly, it is found that Ian David Turner in his 2010 article, "**Judicial Review, Irrationality and the Limits of Intervention by Courts**" published in the Central Lancashire Online Knowledge (CLoK) says, that, as per de Burca (1997 page 573) Lord Templeman employed the proportionality test in arriving at his ruling in Brind (1991)

In *Rex vs. Secretary of State for the Home Secretary ex parte Brind [1991]* the applicants for judicial review, lost in the High Court, lost in the Court of Appeal and lost in the House of Lords.

A directive of the Secretary of State prohibited BBC and IBA broadcasting footage which shows certain proscribed militants directly speaking in giving interviews, etc.

Clause 13(4) of the license and agreement dated 02nd April 1981 with the BBC said,

> "The Secretary of State may from time to time require the Corporation to refrain at any specific time or at all times from sending any matter or matters of any class specified in such notice;…"

The directive of the Secretary of State, in case of the BBC under clause 13(4) and in case of Independent Broadcasting Authority (IBA) was as follows,

"…to refrain from broadcasting any matter which consists of or includes…(a) the person speaking the words represents or purports to represent an organization specified in paragraph 2 below, or (b) the words support or solicit or invite support for such an organization…"

In the House of Lords, Lord Templeman said,

> "The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by the European Court, a margin of appreciation must be afforded to the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified".

It may be noted, that, Lord Donaldson M. R. in the Court of Appeal calculated the amount of air time affected due to the directives. His Lordship said,

> ""Furthermore, on the applicants' own evidence, if the directives had been in force during the previous 12 months, the effect would have been minimal in terms of air time. Thus, Independent Television News ("I.T.N.") say that eight minutes twenty seconds (including repeats) out of 1200 hours, or 0.01 per cent., of air time would have been affected. Furthermore, it would not have been necessary to omit these items. They could have been recast into a form which complied with the directives." (page 723)

Lord Ackner in the House of Lords said,

"I agree with Lord Donaldson M.R. who, when commenting on how limited the restrictions were, said in his judgment, ante, p. 723:

> "They have no application in the circumstances mentioned in paragraph 3 (proceedings in the United Kingdom Parliament and elections) and, by allowing reported speech either verbatim or in paraphrase, in effect put those affected in no worse a position than they would be if they had access to newspaper publicity with a circulation equal to the listening and viewing audiences of the programmes concerned. Furthermore, on the applicants' own evidence, if the directives had been in force during the previous 12 months, the effect would have been minimal in terms of air time. Thus, [I.T.N.] say that eight minutes twenty seconds (including repeats) out of 1200 hours, or 0.01 per cent., of air time would have been affected. Furthermore, it would not have been necessary to omit these items. They could have been recast into a form which complied with the directives." (page 759)

It was argued for the applicants for judicial review,

> "…that the policy and objectives of the Act of 1981, also embodied in the B.B.C.'s licence, include the following: (a) maintaining a broadcasting system which protects and encourages freedom of expression without unnecessary government interference or control;"

Lord Donaldson M. R. said that he largely accepts this argument. Had the case been tried at the **European Court of Human Rights in Strasbourg**, **France** under freedom of expression, it would have been, sometimes, difficult to refuse relief. But as Lord Donaldson M. R. decided and Lord Ackner in the House of Lords approved, the court found that the interference was minimal.

In analogy, this is akin to the petitioners (*even, if it is accepted that they represent the entire 292 of them*) due to their non acceptance of the CRS requesting to stop the entire process of restructuring.

This court also notes, that, it was said in **Regina (Daly) vs. Secretary of State for Home Department [2001] 2 A. C. 532,** by Lord Steyn,

> "The difference in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws L. J. rightly emphasized in Mahmood, at page 847, paragraph 18, "that the intensity of review in a public law case will depend on the subject matter in hand". **That is so even in cases involving Convention rights. In law context is everything**". (page 548)

This explains, as to why, in Brind's case [*in 1991 about ten years ago*] despite the right involved being "freedom of expression", the House of Lords (and the courts below too) held the view that there is no infringement of the rights of the applicants.

It was said, "The Government case is that the direction in question is not a restriction on reporting but only on direct appearances of those who use or support violence [per McCowan L. J., at page 731]

The same logic will apply to this case too. **It is the context which matters.** In the context of restructuring, CRS being only an initial component, the petitioners cannot ask this court to question the entire restructuring process.

The learned President's Counsel for petitioners cited the case of THE PUBLIC SERVICES UNITED NURSES UNION v. MONTAGUE JAYEWICKREMA, MINISTER OF PUBLIC ADMINISTRATION AND OTHERS, 1988 (1) SLR 229. In that case,

> "The Public Services United Nurses Union to which the majority of the nurses in Government Hospitals belong struck work between 18th March and 16th April 1986 demanding increase in salaries. The strike became an illegal one because the service was declared an essential service by His Excellency the President's Essential Services Order made under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1986. Notices of vacation of post were served on the strikers and those of them who occupied government quarters became liable to be evicted. The strike however was settled. The notices of vacation of post were withdrawn and the striking nurses were allowed to resume work without loss of back pay. However about 2,600 nurses who were members of the 7th respondent a rival Union to the petitioner were given the special ad hoc benefit by the Government to pay two increments to the nurses who worked during the entirety of the strike period and one increment to the nurses who reported for duty at various stages before 16.4.86".

The Supreme Court said,

> "The Cabinet proposal granting this ad hoc incremental benefit to a very limited class of officers violates the equality provisions contained in Article 12 of the Constitution. The decision is therefore null and void."

What Lord Steyn said, that "**in Law context is everything**" enables this court to distinguish that case. It was a totally different context to the circumstances in the present case.

The other case cited for the petitioners, RAMUPPILLAI V. FESTUS PERERA, MINISTER OF PUBLIC ADMINISTRATION, PROVINCIAL COUNCILS AND HOME AFFAIRS AND OTHERS, 1991 (1) SLR

11, is where a petitioner questioned before the Supreme Court "the ethnic quota system" introduced in recruitment. Fernando J., said, among other things,

> "For a variety of reasons, the purported ethnic classification is uncertain, unreasonable and inconsistent and on this ground too cannot be sustained."

That case also supports the above principle, that context is everything. The context in the present case, which was considered above, is totally different.

It is due to this proposition in law, that, whenever a case is cited, this court also addresses the facts of that case too.

In this backdrop the court also notes the submission for the 23rd to 31st respondents that under section 26 of CWE Act arbitration was possible.

Section 26 says,

> "Where any dispute arises between
>
> ……
>
> (b) the board and any of its employees, whether past or present, such dispute shall be referred to arbitration."

It is an accepted principle that when a separate remedy is available the court will be reluctant to interfere in judicial review. The reason is that judicial review is a remedy devised by judges, when there is no right of appeal. Although it is now said, that, in judicial review the court examines the legality of the decision and tests the decision making process, but not a merits review and there are elaborate principles such as ultra vires, irrationality, fairness or proportionality, etc., it was at the beginning and for most part even now remains, as a supervisory jurisdiction.

In Brind's case itself, in the House of Lords, Lord Lowry said,

"The kind of unreasonableness for which a court can set aside an administrative act or decision is popularly called "Wednesbury unreasonableness" from the name of the famous case reported at [1948] 1 K. B. 223 in which Lord Greene M. R. spoke, at page 229, of a decision "so absurd that no sensible person could ever dream that it lay within the powers of the authority". [*It may be noted, that, in Wednesbury itself, where the action of the council that was questioned was the prohibition of children under 14 years of age attending to cinema on Sunday with or without accompanied by a parent, Lord Greene did not determine it as unreasonable*] In Secretary of State for Education and Science vs. Tameside Metropolitan Borough Council [1977] A. C. 1014, 1026 Lord Denning M. R. referred to decisions "so wrong that no reasonable person could sensibly take that view". In Council of Civil Service Unions vs. Minister for the Civil Service [1985] A. C. 374, 410 Lord Diplock, having used irrationality as synonym of Wednesbury unreasonableness, said that "it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it", while in Regina vs. Secretary of State for Environment, ex parte Nottinghamshire County Council [1986] A. C. 240, 247 Lord Scarman, when invited to examine the detail and consequences of guidance given by the Secretary of State, said:

> "Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses".

These colorful statements emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction…" (page 764,765)

(ii)**Can Ministerial Policy or planning policy be questioned:-**

The next question is whether, the court, in judicial review can question the Ministerial policy or planning policy.

A case to be considered is **Save Britain's Heritage vs. Number 1 Poultry Ltd. [1991] 1 WLR 153** decided in the House of Lords.

Lord Bridge of Harwich said,

> "Perhaps the central issue in the appeal is the issue relating to planning policy." (page 168)

In this case, the application of the owners to demolish certain property in the city of London and to rebuild a new structure was rejected by the Secretary of State in 1985, who had to consider, among other things, whether the building should be one that should be preserved. They were called "listed" buildings and the building in question was listed as Grade II G. V. or Group Value, the value of the building derived by its position in a group of buildings.

Here the local planning authority refused the application of the owners and when they appealed to the Secretary of State [*on a subsequent occasion*] the Secretary of State accepting his inspector's recommendations held that the architectural merits of the proposed replacement building were such as to override his stated policy, set out in paragraph 89 of D. O. E. Circular 8/87, that listed buildings capable of economic use should not be demolished. An objector to the proposed redevelopment sought under section 245 of the Town and Country Planning Act of 1971 to quash the Secretary of State's decision on the ground that he had failed to give sufficient reasons for his decision as required by rule 17(1) of the Town and Country Planning (Inquiries Procedure) Rules 1988 and failed to had regard to, or misdirected himself as to the effect of, his policy relating to consent for demolition of listed buildings. The Divisional Court dismissed that application, but the Court of Appeal, including

Woolf J., quashed the Secretary of State's decision. On appeal to the House the appeal was allowed.

In this case, on analogy, the proposal to restructure CWE was agreed on principle by the **Minister of Finance, Economic Stabilization and National Policies**. The policies in 2003 and 2006 were a VRS. But the present policy is a CRS.

Lord Bridge of Harwich said,

> "The true gravamen of Save's complaint in relation to the policy issue is that by his decision in this case the Secretary of State has sanctioned a departure from the declared policy in Circular 8/87 without specifying in terms the limits of the exception to the general rule that a listed building may never be demolished to make way for other development if it is still capable of economic use and has thereby set a dangerous precedent for the future. Even if Circular 8/87 laid down such a general rule as admitting of no exceptions, which, as already indicated, I do not accept, it was clearly open to the Secretary of State to make an exception, the decision letter of May 1985 foreshadowed such an exception and the present decision treated the circumstances as justifying such an exception". (page 170)

Another case decided in the House of Lords which was on planning policy was **London Residuary Body vs. Lambeth London Borough Council [1990] 1 WLR 744**.

When the Greater London Council was abolished in 1986, County Hall on the South bank of the Thames became vested in the London Residuary Body which applied for planning permission to use the main block for mixed hotel, residential and general office purposes unconnected with any local government functions, After the inquiry, the Secretary of State disagreed with his inspector and decided that these general office purposes should be permitted. **The Court**

of Appeal held that this decision should be quashed because the minister had not applied the correct test of competing needs, in this case between those of local government and those of other office users. But the Law Lords unanimously decided that he was obliged to have regard only to "material considerations" and that the amount of weight to be given to these was a matter for his judgment.

Lord Templeman said,

> "In the present case, the inspector who recommends, took one view and the Secretary of State who decides, took the opposite view. Subsequently, I. L. E. A. which was the only organization worth considering, disappeared from County Hall and from existence. By the Act of 1985, Parliament decided to change the organization of the local government of Greater London in a way which, in the opinion of the Secretary of State, made County Hall redundant for local government purposes. It is not for the court to question the wisdom of Parliament. It is not for the court to order that the main building shall have a splendid future as the home of local government and that the owners from time to time of the main building shall be compelled to let the premises to local government authorities and no one else and to suffer offices to be occupied by public typists to the exclusion of private typists. Consistently with the Act of 1985, the abolition of G. L. C. and the abolition of I. L. E. A. and the dispersion of their functions, the L. R. B. has secured and the Secretary of State has approved, that the main building shall have no future as the home of local government. That is a political decision **and the planning decision follows inexorably…**" (page 755)

Therefore it appears that this court cannot, in judicial review, question the planning policy.

In the circumstances, the court refuses to issue notices and the application is dismissed, however without costs.

In the context of this order, the consideration of the application by an intended intervenient party does not arise, despite him citing an order delivered by me, that, intervention is possible in a writ application.

This order will not act as a bar for any future absorption of any one or more of the present employees, including the petitioners, in a restructured entity.

Judge of the Court of Appeal

Iddawala- J

I concur with the findings and reasons considered by my brother judge, Justice D.N. Samarakoon. However, I wish to extend my input on the subject matter concerned with regard to the government policies and restructuring of the Co-operative Wholesale Establishment (CWE).

The main contention of the petitioners in this matter is with regard to the Co-operative Wholesale Establishment Director Board Circular (P2) No: 01/2023. Prior to which, the Minister of Trade, Commerce and Food Security had presented a Cabinet Memorandum (P3) titled "Restructuring Cooperative Wholesale Establishment (CWE)" No: 23/1208/627/018 dated 26.06.2023 which was approved by the decision of the Cabinet of Ministers (P5) on 10.07.2023 and accordingly approval was given for a Compulsory Retirement Scheme (CRS) for the employees of the CWE. This was put to implementation through P2.

P2; the Co-operative Wholesale Establishment Director Board Circular No: 01/2023 was brought into force with P5; which is the Cabinet decision dated 10.07.2023 granting approval to the Cabinet Memorandum titled "Restructuring Cooperative Wholesale Establishment (CWE)". P5 was based on P3; the Cabinet Memorandum titled "Restructuring Cooperative Wholesale Establishment

(CWE)" and P4; observations of the Minister of Finance, Economic Stabilization and National Policies with regard to the Cabinet Memorandum.

According to documents marked P2 -P5 the main focus is on the restructuring of the CWE. It must be noted that the Co-operative Wholesale Establishment Director Board Circular No: 01/2023 (P2) elaborated extensively with regard to the entitlements of all employees subject to the CRS. According to the circular all employees who are terminated under the CRS will be entitled to the salary up to the month of September 2023, a compensation package according to the compensation formular **(□□□□□ □□□□□□)** as per annexure 1, and all statutory entitlements including EPF, ETF and Gratuity.

According to P3 it is evident that there are 292 employees in total. Half of these employees were subjected to the government policy of Voluntary Retirement Scheme (VRS) in 2003 and 2006 and thereafter reinstated with their employment. P3 further states that the CWE spends Rs. 19 million monthly in order to pay salaries, benefits and other payments for these 292 employees. Further it was revealed that the loss caused by the CWE during the year of 2022 alone is Rs. 79 million.

While supporting this matter, it was mentioned that the sole method of income generation of CWE is currently based on the transportation services provided by the lorries and by renting out the storage area and buildings. However, it was reiterated that the income generated is not sufficient to pay the employees and this matter is a continuing burden on the treasury as well. Given the circumstances of the economic crisis in the country it could be said that the losses incurred by CWE would be accelerating day by day.

P2, P3 and P5 are all based on the government policy considerations set forward by P4, and these policy considerations are enhanced along with the economic policy and status of the country. Therefore, I am of the view that the courts should restrain from interfering with the government's economic and restructuring policies, particularly during financial crisis, unless such policies

are illegal or patently unreasonable. It is a well rooted principle in the concept of judicial deference to executive and legislative decisions in matters of economic policy. This approach acknowledges that government authorities are better positioned to evaluate and address complex economic issues. Courts generally intervene only when these policies violate the law or are glaringly irrational. As my brother judge explained in his judgment there is no illegality or unreasonableness in the decision of P2.

This approach finds support in various English law reported cases, demonstrating the judiciary's cautious approach in matters involving government economic policies:

Liversidge v. Anderson *[1942] AC 206*: is a landmark United Kingdom administrative law case which concerned the relationship between the courts and the state, and in particular the assistance that the judiciary should give to the executive in times of national emergency or crisis. In this case, the House of Lords emphasized that courts should not intervene in matters relating to national security and war time actions unless the government's actions are clearly illegal.

Council of Civil Service Unions v. Minister for the Civil *Service [1985] AC 374:* The House of Lords, in this case, highlighted the principle of deference to the government's exercise of prerogative powers, especially in the realm of national security and public interest, provided such exercise is within the bounds of legality.

Fire Brigades Union v. Minister for the Environment *[1995] 2 AC 513:* this case underscores the principle of judicial restraint when reviewing government policies and actions, emphasizing that the courts should respect the political nature of many decisions and should not intervene unless there is a clear breach of law or irrationality. It is worthwhile to add a passage from the dissenting judgment of the Lord Mustill:

"It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country."

In these cases, the courts upheld the principle of non-interference with government policies, affirming the importance of deference to the executive branch in economic matters, particularly during times of crisis, as long as those policies remain within the bounds of legality and reasonableness.

The court also needs to examine carefully whether the employees are the vulnerable party in this matter. Furthermore, consideration must be given to see whether if the government continues without the proposed restructuring whether there will be an impact economically on the government as well as the treasury. And at such an instance where there is an impact negatively on the government, the policy change cannot be considered illegal or unreasonable. This is mainly because it would eventually impact the public/ citizens of the nation and their rights.

During times of financial crisis, the need for economic development and stability is paramount. However, the importance of upholding the rule of law and

ensuring legality and reasonableness in government actions remains crucial. The courts should adopt a balanced approach, recognizing the significance of economic development while safeguarding legal principles and individual rights through the process of judicial review.

It is essential to emphasize that the principle of judicial review does not seek to hinder economic growth but aims to ensure that re-structuring occurs within the boundaries of the law and respects the rights of individuals and the broader community. Striking the right balance between economic needs and legal safeguards is fundamental to a just and equitable society.

When matters are related to government development and restructuring activities, the courts should exercise with caution and consider the balance between allowing government actions for economic development and ensuring compliance with legal standards. English courts have upheld the principle of non-interference unless the government's decisions are deemed to be "manifestly unreasonable" or unlawful. In the case of ***Associated British Ports v. Department for Transport*** *[2001] EWCA Civ 1195*, in which the Court of Appeal discussed the principle of deference to government decisions in economic matters. This case involved the expansion of an airport and raised concerns about environmental impact. The court emphasized the need to strike a balance between judicial restraint and the right to challenge governmental decisions. The court acknowledged the importance of economic and development considerations while also highlighting the duty of the court to intervene if the decision is "manifestly unreasonable". In this instant case I cannot see any illegality or unreasonableness of the decision of the Board of Directors (P2).

The President's Counsel for the 23rd -31st respondents during his submissions further brought forward the concern over whether the trade union in this matter holds the power and status to file the action on behalf of all 292 employees of CWE. However, it is evident that in the petition, the matter is brought up by only by a handful of employees/members (or officials) of the trade union. Thus,

consideration must be given to the conflict of interest that could arise if there are employees willing to accept the CRS, its benefits and acknowledge the termination.

Considering the abovementioned I do not find any illegality nor unreasonableness in the policy implementation through P2. I agree with the views expressed by my brother judge, Justice D.N. Samarakoon in his decision to refuse the issuance of formal notice.

Refused to issue formal notice. Dismissed the application without cost.

Judge of The Court of Appeal