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

In the matter of an application for Writs in the nature of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application No. 160/2013

Dr. M.D.W. Lokuge,

No. 37/499,

Orangebill Estate, Ihala Biyanwila,

Kadawatha.

Petitioner

-Vs-

1. Vidyajothi Dr. Dayasiri Fernando, Chairman
2. S.C. Mannapperuma, Member
3. Ananda Seneviratne, Member
4. N.H. Pathirana, Member
5. Palitha M. Kumarasinghe, Member
6. Sirimavo A. Wijeratne, Member
7. S. Thillanadarajah, Member

8. A. Mohamed Nahiya, Member

9. M.D.W. Ariyawansa, Member

   1st to 9th all of the Public Service Commission,

   No. 177, Nawala Road,

   Narahenpita,

   Colombo 05.

10. T.M.L.C.S. Senaratne,

    Secretary,

    Public Service Commissions,

    No. 177,

    Nawala Road, Narahenpita,

    Colombo 05.

11. Dr. Y.D. Nihal Jayathilaka,

    Secretary to the Ministry of Health,

    No. 385,

    Rev. Baddegama Wimalawansa There Mawatha,

    Colombo 10.

12. Dr. L. Panapitiya,

    Director Medical Services,

    No. 385,

    Rev. Baddegama Wimalawansa There Mawatha,

    Colombo 10.

Respondents

BEFORE	:	**Vijith K. Malalgoda PC/J (President, CA),&**
		A.H.M.D. Nawaz, J.
COUNSEL	:	J.C. Weliamuna for the Petitioner
		Janak de Silva, D.S.G. for the Respondents
Hearing on Preliminary Objections	:	13. 01.2015
Written Submissions by both parties	:	01.04.2015
Decided on	:	16.10.2015

A.H.M.D. NAWAZ, J,

The Petitioner who is a qualified medical officer seeks several mandates in the nature of writs of mandamus in respect of entitlements which the Petitioner claims in her petition are due to her. The respective mandates are to the following effect-

(a) A writ of mandamus directing anyone or more of the Respondents to place the Petitioner as a Grade II Medical Officer at her entry point to the Public Service.

(b) A writ of mandamus directing anyone or more of the Respondents that the Petitioner be appointed to Public Service based on the concession specified in Section 17 of Chapter II of the Establishment Code.

(c) A writ of mandamus directing anyone or more of the Respondents to give the Petitioner the appropriate Seniority on her entry point to the Public Service in terms of Section 14.4 of Chapter II of the Establishment Code

and/or in terms of any other provisions of Establishment Code relevant thereto.

(d) A writ of mandamus directing anyone or more of the Respondents to backdate the Petitioner's appointment to the public service in order to avoid any discontinuation of her government service.

The factual template surrounding the case can be narrated in a nutshell.

The Petitioner joined the Army as a preliminary grade medical officer on 6th February 2007 and she had been commissioned to the rank of captain. Upon completion of 2 years of service in the preliminary grade on 6th February 2009 she secured her promotion as a grade II medical officer in the Army and thereafter successfully completed her efficiency bar examination as well for the preliminary grade medical and dental officer at the government service.

After having served in the Army for more than 6 years as a Doctor, the Petitioner retired from service on 31st May 2012. Thereafter her request to join the Ministry of Health as a Doctor was granted when she was appointed to the Ministry of Health in the ***Preliminary Grade***.

Even before the Petitioner made a request of the Health Ministry to appoint her to the Public Service she had repeatedly made a request that she be recruited to grade II. As could be apparent from the foregoing this request had not been granted and she was appointed only at the preliminary grade. It is apparent from the Petitioner's pleadings that she had made a plea to be placed at grade II even after having been recruited as a Doctor in the Health Ministry when she wrote a letter dated 17th April 2013.

It could be seen that the genesis of this application for several mandates in the nature of writs of mandamus is the failure to accommodate the request of the Petitioner to be placed at grade II which certainly would bring her by virtue of provisions of the Establishment Code entitlements to a higher salary and incremental advantages.

It is indeed a salient feature of this application that the Petitioner does not seek the invalidation or quashing of any order made by any of the Respondents. Instead the respective pleas for several mandates against the Respondents inclusive of the members of Public Service Commission (the 1st to 9th Respondents of the PSC) is predicated on the basis that anyone or more of the Respondents owes the Petitioner a duty to accord her the several reliefs that the Petitioner seeks against them.

The statement of objections that has been filed on behalf of the 1st to 10th Respondents (Members of the PSC) along with the corresponding affidavit of the Secretary to PSC (10th Respondent), whilst denying that the Petitioner is entitled to any of the writs sought, raises the preliminary objection that this court is denuded of jurisdiction to grant any of the reliefs prayed for in view of Article 61 (A) of the Constitution.

The statement of objections also appends a decision made by the PSC dated 1st August 2012 (**R3**) conveying the determination that the Petitioner could not be appointed to any grade ***on a new appointment other than the preliminary grade***.

It has to be observed that it is only consequent to this letter (P3) received by the Secretary of the Health Ministry from the Public Service Commission that the

Petitioner had been appointed in October 2012 as a Doctor at a preliminary grade to Public Service.

It is through this document R3 that this court is apprised that the Public Service Commission had considered the legal position with regard to the request of the Petitioner to be placed at grade II and accordingly informed the Secretary to the Health Ministry that the request of the Petitioner could not be granted. The document marked as R3 is addressed from one R.H.T.S. Hettiarachchi, Assistant Secretary of the Public Service Commission to the Secretary, Ministry of Health notifying the following positions:-

1) There is no possibility in medical service to place the petitioner at *any other grade on a new appointment* other than *the preliminary grade*.
2) The seniority of medical officers should be determined as provided for in Chapter XI of the Establishment Code, the PSC rules and Section 6 of the Service Minute of the Sri Lanka Medical Service.

One could observe that the PSC opined that the Petitioner was not securing a re-employment in the Public Service but rather was getting appointed for the 1st time. It was after having taken the view that the Petitioner's appointment as a Doctor in the Ministry of Health was a new appointment which entailed a placement on the preliminary grade that the PSC had approved the appointment of the Petitioner as a Preliminary Grade Medical Officer. The above position (R3) that the PSC took in regard to the Petitioner was in response to a letter (R2) written by the Acting Secretary of the Ministry of Health Mr. Mahipala to the Secretary, Public Service Commission seeking clarifications as to what grade the Petitioner could be appointed as she had retired from Sri Lanka Army from 31st May 2012.

It is apparent from this document (R3) and the affidavit filed by the Secretary to the Public Service Commission that it is only upon the receipt of R3 that the Health Ministry took the decision to place the Petitioner on the preliminary grade. In other words the Health Ministry took the decision to place the Petitioner on a preliminary grade only after getting the decision of the Public Service Commission.

The preliminary objections raised by the Respondents have been elaborated upon in the written submissions filed by the Respondents and the Petitioner has countered the preliminary objections in her written submissions.

The rival positions of both the Petitioner and the Respondents can be set down as follows:-

The preliminary objections are twofold and the Court observes that in the course of the argument the Court itself raised the issue of whether there had been a demand and refusal which now form the 2nd preliminary objection. For reasons set out later in this judgment this Court does not deem it necessary to go into the merit of the 2nd objection.

The twin objections raised on behalf of the 1st to 10th Respondents are as follows:-

1. In terms of 61A of the Constitution the constitutional ouster would denude this court of jurisdiction to hear and determine this application.
2. There doesn't appear to be a demand and refusal for the exercise of jurisdiction to issue the several writs of mandamus that have been sought.

The Petitioner has countered these objections and state that this is not a situation where the ouster clause in Article 61A of the Constitution apples. Rather the Petitioner merely seeks mandates in the nature of mandamus and mandamus is

not caught up within the ambit of Article 61A of the Constitution. In fact the position of the Petitioner is that in the past this Court has issued mandamus against the PSC. In any event the Petitioner was unaware of the PSC decision (R3) and came to know of it only when the statement of objections were filed.

As this judgment has recited at the beginning the Petitioner is seeking several writs of mandamus against the 1st to 9th Respondents who are all members of the PSC and the 10th Respondent who is the Secretary to the Public Service Commission. The 11th and 12th Respondents who belong to the Ministry of Health are both public officers. The existence of R3 – the decision of the Public Service Commission which caused the Petitioner to be placed on the preliminary grade because the Petitioner was joining the public service for the first time, has not been challenged before us by way of a writ of certiorari. Given the Petitioner's assertion that she was unaware of the existence of R3 (the PSC decision) it is explicable why there is no prayer for a writ of certiorari to quash R3.

The decision of the PSC (**R3**) demonstrates that the request of the Petitioner made to the Ministry of Health has been considered by the PSC and they have performed the duty of expressing an opinion and taken a decision on a vital request made by the Petitioner.

If this is an invalid exercise of discretionary power, it remains liable to be quashed by certiorari within the parameters of law if it is so possible for such an invalidation. So long as R3 the decision of the PSC remains *in esse*, let me hasten to observe that it would be futile to issue mandamus to the Respondents who have performed a duty rightly or otherwise. As the rule of thumb goes, certiorari has remained an

indispensable adjunct to the remedy of mandamus. As Lord Denning stated in ***Baldwin and Francis Ltd v Patents Appeal Tribunal***[1]-

> *"The cases on mandamus are clear enough; and if mandamus will go to a tribunal for such a cause, then it must follow that certiorari will go also; for when a mandamus is issued to the tribunal, it must hear and determine the case afresh, and it cannot well do this if its previous order is still standing. The previous order must either be quashed on certiorari or ignored; and* ***it is better for it to be quashed."***

Although both certiorari and mandamus are discretionary remedies, the court's discretion are limited by the basic rules of judicial control and the sources of administrative law in this country include not only English common law modified by statutes of Sri Lanka but also the Sri Lankan constitution which circumscribes the grant of mandates in the nature of writs but*subject to the provisions of the Constitution*-vide Article 140 of the Constitution. The question before this Court is whether the decision of the PSC could be quashed at all on certiorari having regard to the rules of judicial review that prevail in the country. Could this Court declare R3 – a decision made by the PSC null and void though its existence cannot be ignored by anyone else least of all by this Court? I pose this question because it is the answer to this question that determines the question whether mandamus as sought by the petitioner would be available against the PSC. Though the learned counsel for the petitioner quite forcefully argued that mandamus could go against the PSC on its own, I take the view for reasons adumbrated below that when PSC has already acted, neither certiorari nor mandamus would lie against the PSC.

---

[1] (1959) AC at 693 at 693-4

Notwithstanding the fact that there is no prayer for the invalidation of the decision of the PSC (R3), can this Court yet proceed to issue a mandamus against the PSC which has the effect of compelling the PSC to reconsider their decision (R3) and revisiting the matter afresh as the upshot of the persuasive contention of the learned Counsel for the Petitioner eventuates in such an effect? Can this Court issue a mandamus against the PSC though the fact stares quite stubbornly in the face that the PSC has already acted or performed a duty through R3? This is the first argument that this Court is confronted with.

Mandamus in the absence of certiorari-Certiorarified Mandamus

There is another argument that emerges from the contention of the learned Counsel for the petitioner. The first argument is, as the Counsel for the petitioner argued, that mandamus would independently lie against the PSC as mandamus is not prohibited by Article 61A of the Constitution. The 2nd argument is, what the Court sees as an alternative relief to certiorari where it has not been sought-namely whether in such a situation where certiorari has not been sought, this Court could grant against the PSC what has since come to be known in several jurisdictions as *certiorarified mandamus* – a hybrid remedy. Both remedies, mandamus proper as contended for by the learned counsel for the petitioner regardless of Article 61A of the Constitution and *certiorarified mandamus,* as I would presently show, would both be unavailable against the PSC when the PSC has acted as in this case. Let me hasten to point out the distinction between the two. Whilst a writ of mandamus proper would compel the statutory functionary to perform a statutory duty owed, a *certiorarified mandamus* would also quash an invalid exercise of power in such a way as certiorari would do.

The first argument namely a mandamus would lie as it is not barred by Article 61A of the Constitution becomes incapable of acceptance having regard to the inescapable antecedent fact namely PSC has already acted by embodying its decision in R3 and there is nothing further to compel the PSC by way of a duty. Thus the futility of issuing a mandamus when the PSC has already taken a decision should be dispositive of the case but on the 2nd argument of mandamus issuing against the PSC in the absence of certiorari (*certiorarified mandamus*) a few words have to be expressed.

I must observe that the question of issuing a *certiorarified mandamus* was not raised by the Petitioner but the Court deems it appropriate to discuss this relief as it has become a universal phenomenon in administrative justice. In fact mandamus has done the work of certiorari in many a jurisdiction and many moons ago our courts have been cognizant of this remedy in the past rather than being dismissive of it.[2] When mandamus is issued to quash an invalid exercise of power whilst the same writ at the same time commands the statutory functionary to retake the decision in accordance with law, it has been classified as ***certiorarified mandamus***. The question before this Court is whether this Court can grant such a ***certiorarified mandamus*** on the facts and circumstances of this case.

Certiorarified Mandamus

No doubt as **H.W.R. Wade and C.E. Forsyth** point out at page 529 of their tome **Administrative Law (10th Edition)**, a mandatory order such as a mandamus cannot be used by itself *in an elliptical way* so as to do the work of a quashing order though this has become the habitual practice in liquor licensing cases. In the United States too, many a State court has allowed mandamus to be used in place of

[2] See reference to *certioraified mandamus* by Vythialingam J in *Rasammah v Manamperi* 77 NLR 313at 324.

certiorari-a remedy which became known as ***"certiorarified mandamus"***-see a useful article by Professor Jaffe of Harvard in (1956) *Public Law,* 230. An insightful analysis by Ralph N. Kleps on the developments of *certiorarified mandamus* in the Californian jurisdiction is described in a series of two articles which were carried in two issues of Stanford Law Review[3]. India and Pakistan have embraced *certiorarified mandamus* in all earnest and invariably the petitions in those jurisdictions for *certiorarified mandamus* always contain a prayer for summoning the record of the statutory functionary[4]. As I stated above *certiorarified mandamus* has not been foreign terrain for Sri Lanka as Dr. Sunil Coorey in his monumental work on administrative law[5] cites the case of ***Rasammah v Manamperi***[6] where Vythialingam J cited and adopted the words of S.A.De Smith in *Judicial Review of Administrative Action*, 1st ed., p 434 which were as follows-

> *"Nor in general will it (mandamus) lie for the purpose of undoing that which has already been done in contravention of statute."*

The provenance of this passage is traceable to an old precedent of ***Ex parte Nash***[7] where Lord Campbell, C.J, in refusing to grant a mandamus commanding a railway company to remove its seal from the register of share holders on the ground that it has been irregularly affixed stated;

> *"The writ of Mandamus is most beneficial; but we must keep its operation within legal bounds and not grant it at the fancy of all mankind. We grant it when that has not been done which a statute orders to be done; but not for*

---

[3]See, Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49 2 Stan.L.Rev 285; Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions – 1949-1959 12 Stan.L.Rev 554

[4]See, M.A. Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh* (3rd ed.,) pp.564-567.

[5] Principles of Administrative Law in Sri Lanka (3rd Ed) p861

[6] (1974) 77 NLR 313.

[7] (1850) 15 A.B.92

the purpose of undoing what has been done. We may upon an application for a mandamus entertain the question whether a corporation not having affixed its seal, be bound to do so; but not the question whether, when they have affixed it, they have been right in doing so. I cannot give countenance to the practice of trying in this form questions whether an act professedly done in pursuance of a statute was really justified by the statute."

Much water has flowed down under the bridge since these words were echoed in the 19th century and with the expanding canvas of administrative law the aforesaid limitation on the scope of mandamus has ceased to exist. These developments are commented upon in several editions of Dr. Stanley de Smith's treatise *Judicial Review of Administrative Action*. In the Fifth Edition which was restructured quite magnificently by the Rt. Hon The Lord Woolf and Jeffrey Jowell, Q.C the vanishing of the old trails of mandamus is captured in the following passage.[8]

"Many of the narrow technicalities which once applied to the grant of mandamus, for example, that it would not lie for the purpose of undoing that which has already been done in contravention of statute no longer restrict the remedy."

Again one finds a perceptive passage which goes as follows-

"In some situations, however, mandamus has been granted to undo what has been done; the courts merely treat the unlawful act as a nullity and order the competent authority to perform its duty as if it had refused to act at all in the first place."[9]

[8] Judicial Review of Administrative Action 5th (Ed) p.699-700

[9] *ibid p 701; R v Paddington Valuation Officer, ex p Peachey Coro Ltd* (1966) 1 Q.B 380, 402-403, 413

This gladsome development has to be welcome and it has to be said that *certiorarified mandamus* would be available in Sri Lanka to quash an invalid exercise of power: But will it lie against the PSC having regard to the fact that it has already made a decision that is protected by Article 61A of the Constitution. Can this Court simply ignore R3 and go on to command the PSC to retake a decision despite Article 61A of the Constitution?

The question arises whether mandamus proper can issue or in the alternative a *certiorarified mandamus* is available to *quash a PSC decision* and compel the PSC to consider the matter afresh, in the light of the fact that **certiorari itself is unavailable to quash the decision of the PSC?**

If PSC has acted and made a decision, the decision of the PSC is protected by a privative clause such as Article 61A of the Constitution because Article 140 of the Constitution mandates this Court to defer to a constitutional ouster. In fact if I may recapitulate the rival contentions, the learned Deputy Solicitor General cited Article 61A in bar of this application since the decision of the PSC R3 is *in esse,* whilst the learned counsel for the petitioner contended that he was not seeking an invalidation of R3 but a mandamus that will compel the PSC to take a decision according to law and in any event Article 61A does not preclude the grant of mandamus against the PSC. It is in this light that I have posed the question-when certiorari itself is unavailable against the PSC and an appellate procedure has been established by the Administrative Appeals Tribunal Act No. 4 of 2002 against decisions of the PSC, subject to the fundamental rights jurisdiction of the Supreme Court, would mandamus become available when the PSC has already acted?

At this stage it is not irrelevant to indulge in a discussion of the ouster clauses that impinge on the resolution of the issue before us.

Article 55(5) Article and 61A of the Constitution

It is the 17th Amendment to the Constitution that brought in the privative clause Article 61A replacing the previous ouster found in Article 55(5) of the 1978 Constitution.

As the learned Deputy Solicitor General has submitted, in applying the provisions of Article 61A, Court must be mindful of the state of law, as reflected in the decisions of the Court of Appeal and the Supreme Court, prior to the 17th Amendment since *"the legislative language will be interpreted on the assumption that the Legislature was aware of existing statutes, the rules of statutory construction, and the judicial decisions and that if a change occurs in legislative language a change was intended in the legislative result."* [*Bindra; Interpretation of Statutes;* 8th Ed; p. 206].

Section 55(5) of the 1978 Constitution came up for interpretation in ***Abeywickrema v Pathirana***[11] where the majority (Sharvananda CJ, Ranasinghe J, Atukorale J and De Alwis J) held that Article 55(5) of the Constitution does not protect orders or decisions of a public officer which are nullities or *ultra vires* from judicial review.

Notwithstanding the challenge that could be mounted against the decision of a public officer if he had no authority to make such decision or he acted *ultra vires,* Sharvananda CJ however observed at page 155 of the majority opinion that despite the fact that the *ultra vires* decision of the public officer could be set aside, it would enjoy inviolability in the following circumstances-

> *"But if the particular officer had no legal authority under Section 58 to make that order Article 55(5) does not bar a challenge of that order, but if the*

[11] (1986) 1 Sri.LR 120

order/decision of the public officer, acting ultra vires has been adopted by the "Cabinet of Ministers", a Minister, Public Service Commission, Committee of the Public Service Commission or of a public officer to whom the Public Service Commission has made the necessary delegation under Article 58(1), then of course, such decision or order becomes the order of that constitutional functionary, and certainly its validity cannot be inquired into."

Commenting on the pith and substance of Article 55(5) of the Constitution, Wanasundera J made the following observations in his dissenting opinion at page 182-

"Every person acquainted with the post-independence period of our history, especially the constitutional and legal issues that cropped up during that period, would know how the actions of the Government and the Public Service Commission dealing with practically every aspect of their control over public officers were challenged and taken to the courts. A stage came when the Government found itself practically hamstrung by injunctions and court orders and not given a free hand to run the public service and thereby the administration as efficiently as it would wish. The 1972 reforms came undoubtedly as a reaction to this. The thinking behind the framers of the Constitution was that the public service must be made the exclusive domain of the Executive without interference from the courts. Vide section 106.

The present Constitution has only given refinement to that thinking. The present Article 55 (5), which is in effect a preclusive clause of the greatest coverage, appears to shut the courts out from this domain except for a violation of a fundamental right."

Wanasundera J's observations on the ambit of Article 55(5) are to this effect at page 186-

> *"Even a cursory look at Article 55(5) shows that it goes well beyond the usual kind of preclusive clause. Article 55(5) states that no court or tribunal shall have power or jurisdiction over any order or decision of the Cabinet of Ministers, the Public Service Commission, a Committee of the Public Service commission, or of a public officer in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer. It goes on to state specifically that a court or tribunal cannot "inquire into, pronounce upon, or in any manner call in question any such order or decision."*

Article 55 (5) of the Constitution was also gone into in ***Bandara and Another v. Premachandra, Secretary of Ministry of Lands, Irrigation and Mahaweli Development and Others***[11]at p 312 where Mark Fernando J commented on the "pleasure principle" contained in Article 55(5).

So the upshot of reasoning of Courts in regard to Article 55 (5) could be summarized as follows:-

(a) If the impugned order/decision was made by a public officer who did have legal authority to so order/decide, the preclusive clause in Article 55(5) applied and the jurisdiction of the court was ousted.

(b) If the impugned order/decision was made by a public officer who did not have legal authority to so order/decide, then the preclusive clause in Article 55(5) did not apply.

---

[11](1994) 1 Sri. LR 301

(c) But if the order/decision of the public officer, acting *ultra vires* has been adopted by a body/person to whom the Public Service Commission has made the necessary delegation, then such decision/order becomes the order of that constitutional functionary, and Article 55(5) prevents its validity being inquired into.

Article 61A of the Constitution goes as follows:-

> "Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) 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 of duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law."

Unlike previously the appointment, promotion, transfer, disciplinary control and dismissal of public officers were vested with the Public Service Commission and notthe Cabinet of Ministers [Article 55(1)]. The members of the PSC are appointed by the President on the recommendation of the Constitutional Council [Article 54(1)]. The PSC can delegate to a Committee or a public officer its power of appointment, promotion, transfer, disciplinary control and dismissal of specified categories of public officers [Article 56(1) and 57(1)]. Any public officer aggrieved by an order made by any such Committee or public officer may appeal to the PSC [Article 58(1)]. A further appeal against any order or decision made by the PSC is provided for the Administrative Appeals Tribunal which is appointed by the Judicial Service Commission [Article 59]. This is in addition to the jurisdiction created by Article 126 of the Constitution which is retained in terms of Article 61A.

In ***Ratnasiri and Others v. Ellawala and Others***[12] the Court of Appeal declared that the decision or determination made by the 4th respondent Secretary, being the decision or determination of a public officer exercising authority delegated by the PSC is precluded from judicial review by Article 61A. It has to be commented that this case discussed the ambit of Article 61A *in extenso*.

Thus it is quite clear that R3 – the existing order of the PSC is an impediment to secure a mandamus as R3 is clothed with an ouster of jurisdiction in terms of Article 63A of the Constitution. **Even if the petitioner was unaware of R3 at the time he filed this application, the issue of mandamus would carry the implication from this Court that the PSC has made an error in the first instance**-a task which this Court is constitutionally incompetent to engage in as result of Article 61A of the Constitution.

The exercise of writ jurisdiction in terms of Article 140 of the Constitution is subject to the provisions of the Constitution in that Article 61A of the Constitution would preclude judicial review of decisions of the PSC. When the jurisdiction of this Court to judicially review PSC decisions by certiorari is shut out at a threshold stage, a revisit of that decision in the guise of a mandamus or *certiorarified mandamus* will be beyond the pale of our jurisdiction and on that score we are inclined to hold with the submissions of the learned Deputy Solicitor General that mandamus will not lie in the instant case before us.

---

[12](2004) 2 SLR 180

Moreover it is axiomatic that one cannot do indirectly what cannot be done directly. In ***Bandaranaike v. Weeraratne and Others*** (1981) 1 SLR 10 at 16[13] the Supreme Court held that

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

In addition as I have stated before the issue of mandamus against the PSC would carry the implication that the decision of the PSC is invalid and if we cannot proceed to make that declaration by way of a writ of certiorari because of the constitutional ouster in Article 61A, we would be hard put to issue mandamus in the same terms and tenor. Even if the Court of Appeal has granted mandamus in the past against the PSC, I must observe whether mandamus would be available in a situation where the PSC has already acted and made a decision in the light of Article 61A has not been gone into in those decisions-see for instance the case of ***Karawita and Welikanna v Inspector of Police v Inspector General of Police.***[14]

A quashing order (certiorari) is precluded by Article 61A. Accordingly a *certiorarified mandamus,* even if it would have the imprimatur of our courts, would not be an efficacious substitute for certiorari if certiorari itself is ousted by a constitutional ouster such as Article 61A of the Constitution. That is why this Court takes the view that a *certiorarified mandamus* would not be available in a situation where there is a constitutional ouster that prohibits an impeachment of the decision that has already been made. In the same vein a mandamus proper to compel the PSC to

---

[13] *Bandaranaike v. Weeraratne and Others* (1981) 1 SLR 10 at 16

[14] (2002) 2 Sri.LR 287.

retake the decision would also not be available as the grant of that remedy too would call in question the propriety of R3 which enjoys immunity.

Demand and Refusal

In the view we have taken of this matter, we do not think that we do have to go into the further question whether the preconditions for the issue of mandamus namely demand of the PSC and refusal have been satisfied.

Thus we would summarize our conclusions in a nutshell.

Conclusions

1. Since the PSC has already acted in the matter it would be futile to mandate them by a mandamus to act in a particular way in the absence of certiorari that would have the effect of quashing the decision they have already made.
2. Though it is unfortunate that the Petitioner was not aware of the existence of R3, the decision of the PSC which the Petitioner possibly came to know only after statement of objection was filed demonstrates that the PSC has already performed a duty.
3. Article 61A of the Constitution which falls within the phrase "subject to the provisions of the Constitution" in Article 140 of the Constitution would operate as a constitutional ouster to shut out the jurisdiction of this Court to judicially review decisions of the PSC.
4. Though *certiorarified mandamus* has been available in the UK in a limited class of cases as well as in many state Courts of the United States, India and Pakistan and Sri Lanka too has been cognizant of this development, the constitutional ouster as contained in Article 61A of the Constitution would prohibit the issue of

a *certiorarified mandamus* as the PSC has already acted. We should develop this remedy provided proper pleadings are in place but on the facts and circumstances of this case when the functionary has acted and the decision is protected by a constitutional ouster, Article 140 of the Constitution would be a bar to an issue of mandamus or *certiorarified mandamus*. In both instances an impingement of the decision of the PSC would take place directly or indirectly.

5. The issue of a mandamus against the PSC would convey the implication that the decision of the PSC is invalid or *ultra vires* and such an implication cannot be created even indirectly as Article 61A of the Constitution prohibits the impugnment of PSC decisions in writ proceedings.

In light of the above, we uphold the preliminary objection raised on behalf of the Respondents and dismiss this application.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda P.C. (PCJ)

I agree

PRESIDENT OF THE COURT OF APPEAL