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 Writs of Certiorari and Mandamus under Article 140 of the Constitution of Sri Lanka.

C.A. (Writ) Application No. 263/2013

Delapolage Lakmini Delapola
"Asoka" Horagolla,
Warakapola,
PETITIONER

-Vs-

1. **Justice S.I. Imam**
   Chairman
2. **Edmund Jayasuriya**
   Member
3. **D.P. Abeykeerthi**
   Member
   All of Administrative Appeal Tribunal,
   No.39/1 M, Horton Place,
   Colombo 07.
   1st to 3rd RESPONDENTS

4. **T.M.L.C. Seneratne**
   Secretary,
   Public Service Commission,
   No.177, Nawala Road,
   Narahenpita, Colombo 05.

5. Secretary
Ministry of Education,
"Isurupaya" Pelawatte,
Battaramulla.
RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Dr. Sunil Coorey with Buddhika Gamage and Previ Karunaratne for the Petitioner

Zuri Zain, SSC with Nayomi Kahawita, SC for the AG

Decided on : 26.07.2019

A.H.M.D. Nawaz, J.

The Petitioner seeks three remedies in this application for judicial review;

1. A writ of certiorari against the Administrative Appeals Tribunal (AAT) quashing its order dated 18.12.2012 in the Appeal bearing No.AAT/32/2012.
2. A writ of certiorari quashing the order made by the Public Service Commission (PSC) dated 26.12.2011.
3. A writ of mandamus compelling and/or directing the 4th Respondent and/or added Respondents to the post of Class III in the Sri Lanka Teachers Education Service (SLTES) with effect from 09.11.2008 with all privileges attached thereto.

The gravamen of this application is traceable to the rejection of the Petitioner's application to join the Class III of the SLTES. Having joined the teaching service as a Grade 3-(I) teacher on 03.05.1993, the Petitioner was promoted to Grade I and during her tenure as a teacher, she served as a teacher in several schools. When she made the application to join the SLTES, she had the following educational qualification;

a) Master of Science degree in Science Education awarded by the University of *Peradeniya* on 13.12.2004.

b) Bachelor of Science (2nd Class Honours) degree awarded by the University of *Kelaniya* on 01.08.1995.

c) Postgraduate Diploma in Education awarded by the University of *Colombo* on 01.02.1998.

d) She was following a Postgraduate Diploma in Information Technology at the University of *Kelaniya*, which was later awarded to her on 01.06.2009.

The Petitioner applied to become a member of the SLTES in response to an advertisement that had been published in the *Gazatte* dated 09.09.2005 by the Secretary to the Ministry of Education (5th Respondent) calling for applications for the recruitment of Officers of Class III. The Petitioner applied for a post of Class III Officer in the SLTES in the subject of Mathematics.

Prior to 09.09.2005 the date of the advertisement, SLTES had been established by its constitution (or service minute) which was published in *Gazette* Extraordinary No.1070/13 dated 11.03.1999.

The said service minute in clause 12, sets out the qualifications necessary to be appointed to a position in post of Class III of the SLTES. There are six such requirements. The first three of them are;

i. that the applicant be a citizen of Sri Lanka;

ii. that the applicant be of good character, in good health, and be prepared to serve any part of the country;

iii. that the age at the time of the application for appointment be not less than 22 years and not more than 30 years.

These three requirements were set out in clauses 5.1, 5.2 and 5.3 respectively in the advertisement published by the 5th Respondent in the *Gazette* dated 09.09.2005.

It is relevant to highlight that the fourth, fifth and sixth requirements are all educational requirements, and that they are in the alternative and it is sufficient for an applicant to possess any one of them. The fourth, fifth and sixth requirements are;

iv. the candidate should possess a first class or an upper second class degree in education, or possess a higher degree in education;

v. the candidate should possess a degree in the relevant subject and a distinction or credit pass in the post graduate diploma in education;

vi. the candidate should possess a fist class or second upper class degree in the relevant subject and post graduate diploma, or degree in the relevant subject and post graduate degree in education, with not less than 03 years of satisfactory experience in teaching and should be less than 40 years of age.

These three requirements were set out in clauses 6.1, 6.2 and 6.3 respectively in the advertisement published by the Secretary to the Ministry of Education in *Gazette* dated 09.09.2005.

As one could notice, the service minute does not itself discriminate in any way between the fourth, fifth and sixth requirements. If one looks at the qualifications set forth in clauses 6.1, 6.2 and 6.3 of the advertisement one could not but notice that whilst clauses 6.1 and 6.2 refer to academic qualifications and academic achievements, clause 6.3 requires not only academic qualifications but also an added qualification of practical experience as a teacher for 3 or more years.

So one could see that the qualifications set forth in the service minute were replicated in the advertisement put out by the Secretary, but he made an alteration. Although the service minute does not itself in any way discriminate between the fourth, fifth and sixth requirements, clause 8.4 of the advertisement stated that the vacancies will be filled, first by interviewing and appointing the candidates who possess the alternative educational qualifications under the fourth (alternative) and fifth (alternative) requirements (referred to as the qualifications under clause 6.1 and 6.2 of the advertisement and if the vacancies could not be filled by those candidates, the candidates who possess the sixth (alternative)

requirements (referred to as the qualification under clause 6.3 of the advertisement) will be interviewed.

Dr. Sunil Coorey for the Petitioner contended that clause 8.4 purported to make an unfair discrimination by making the candidates who are qualified under the sixth requirement inferior to the candidates who were qualified under the fourth or fifth requirements.

Notwithstanding clause 8.4 of the advertisement, the candidates possessing the required educational qualifications under all three alternative requirements were called for the interviews at the same time. Hence, it is clear that the provision in clause 8.4 was not followed in calling the candidates for the interview.

The Petitioner states that the service minute is a cabinet approved document. The 5th Respondent has no power or authority to interfere with, alter or modify the manner in which the service minute is to be given operation. Hence, the 5th Respondent had no authority at the time she called for applications by advertisement published in *Gazette* dated 09.09.2005, to have wrongly discriminated against the candidates because all of them satisfied the requirements of the service minute.

It would appear that clause 8.4 of the *Gazette* of 09.09.2005 was *ultra vires* the powers of the 5th Respondent as it offended the service minute. What is *ultra vires* and void is void from the outset and must be disregarded. It is the service minute that must be given effect to in preference to the advertisement calling for the applications for appointments under service minute-so submitted Dr. Coorey.

In fact, the clause 8.4 of the advertisement published in Gazette dated 09.09.2005 by the 5th Respondent purported to modify the manner in which the service minute was to be given operation, I would agree that clause 8.4 was *ultra vires* and void, and therefore the appointments to Class III in SLTES should have been made in disregard of that clause 8.4.

It was contended on behalf of the Petitioner that though she possessed all the necessary qualifications, she was deprived of the appointment on the basis that she had been placed at number 12 whereas there were only 10 vacancies.

Though she was not selected for the said post despite having obtained 37 marks, seven out of the ten selected candidates had obtained lesser marks than her such as marks 34 to 14.

Being aggrieved by this deprivation, the Petitioner preferred an appeal to the Secretary to the Ministry of Education. By the letter dated 01.12.2008, the Petitioner was informed by the Ministry Secretary that he (the Ministry Secretary) had forwarded the Petitioner's appeal to the Public Service Commission (hereinafter referred to as "the PSC").

Although her appeal was forwarded to the PSC, the PSC was not in operation at the time. After the PSC was re-activated, the Petitioner was informed by the Secretary to PSC by a letter dated 26.12.2011 that her appeal had been dismissed by the PSC on the ground that the Petitioner had obtained the 12th position whereas there were only 10 vacancies.

Being aggrieved by the said dismissal of the appeal, she filed an appeal to the Administrative Appeals Tribunal (AAT) on or around 01.02.2012. Upon hearing the appeal, the AAT delivered its order dated 13.12.2012, thereby dismissing the appeal of the Petitioner.

It is against the decision of the AAT that the Petitioner has preferred this application praying for *inter alia*:-

a) a Writ of Certiorari quashing the order of the AAT dated 13.09.2012 produced marked as P11,

b) a Writ of Certiorari quashing the order made by the PSC dated 26.12.2011 produced marked as **P7**;

c) a Writ of Mandamus compelling and/or directing the 4th Respondent and/or added Respondents to appoint the Petitioner to the post of Class III in the Sri Lanka Teachers Education Service with effect from 09.11.2008 with all the privileges attached thereto.

It is quite clear that the Petitioner was not selected because of clause 8.4 which was to the effect that the 10 vacancies would be filled, first by interviewing and appointing candidates who possessed the alternative educational qualifications under the fourth (alternative) and fifth (alternative) requirements (referred to as the qualifications under

clause 6.1 and 6.2 of the advertisement) and if vacancies could not be filled, only then those under clause 6.3 would be considered.

The service minute did not have such a requirement and as I said before, clause 8.4 is certainly *ultra vires* and both the PSC and AAT have rejected the appeals of the Petitioner.

The service minute is a Cabinet approved document in terms of Article 55(4) of the Constitution as amended by 17th Amendment which was certified on 03.10.2001. The Secretary to the Ministry acted *ultra vires* when he published the advertisement in the *Gazette* of 09.09.2005 and enacted a Clause 8.4, which unfairly discriminated against the candidates because all of them who had been called for the interview fulfilled the requirements of the service minute.

The provision in clause 8.4 of the *Gazette* of 09.09.2005 was *ultra vires* the powers of the Secretary to the Ministry as it offended against the service minute. It is the service minute that must prevail over the advertisement calling for application for appointment under the service minute.

The reason given by the PSC by letter dated 27.03.2012 was that though it emerged that the Petitioner had obtained 37 marks when the marks were arranged according to categories 6.1, 6.2 and 6.3, she has become the 12th in the recommended list. This position has come about because of the application of the wrongful provision in Clause 8.4. According to this discriminatory provision adopted by the Secretary to the Ministry, the Petitioner who had obtained 37 marks was placed even below the candidate who had only obtained 14 marks.

When the marks scored at the interviews are examined, the Petitioner is ranked within the first ten candidates and there being ten vacancies, she was clearly entitled to be appointed to one of those vacancies.

Dr. Coorey argued quite strenuously that the Petitioner had been wrongfully denied appointment to Class III in SLTES, merely because she came under a different category of qualifications, which according to the service minute had to be given the same status and position as the candidates possessing qualifications under the other two categories. On a

careful consideration it is quite manifest that the Petitioner has been disadvantageously treated and relegated to her peril. Despite this clear evidence of illegality, the PSC proceeded not to hold in favor of the Petitioner and the question arises whether the decision of the PSC is amenable to the writ jurisdiction of this Court.

Article 61A of the Constitution provides that subject to the provisions of paragraphs 1, 2, 3, 4, and 5 of Article 126, no court or tribunal shall have power to jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, Committee or any public officer, in pursuance of any power or duty conferred or impose on such commission or delegated to a Committee or public officer under this chapter or under any other law.

The constitutional ouster in Article 61A precludes this Court from calling into question, the validity of the decision of the PSC and I had occasion to comment on this provision in ***Dr. M.D.W Lokuge v. Vidyajothi Dr. Dayasiri Fernando and Others*** CA Writ Application 160/2013 (CA minutes of 16.10.2015) wherein in the context of the availability of *Certiorarified Mandamus*, I held that if PSC has acted and made a decision, the decision of the PSC would be protected by the privative clause such as Article 61A of the Constitution. The constitutional ouster comes into play because the writ jurisdiction vested in this Court is subject to constitutional ouster provisions such as Article 61A. In the circumstances, this Court would be slow to exercise its writ jurisdiction over the decision of the PSC.

An appellate procedure was established by the Administrative Appeals Tribunal Act No.4 of 2002 against the decision of the PSC and this legislation contains a statutory ouster clause in Section 8(2) to the following effect:-

> *"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."*

The ouster clause in the Administrative Appeals Tribunal Act No.4 of 2002 came up for interpretation in the case of ***Ratnayake v. Administrative Appeals Tribunal and others*** (2013) 1 Sri L.R 331 where it was held:-

1. Court of Appeal did possess jurisdiction to hear and determine the application filed before it.

2. AAT is not a body exercising any power delegated to it by the PSC and is an appellate tribunal constituted in terms of Article 59(1) having the power, to alter, vary or rescind any order or decision of the PSC.

   Per Saleem Marsoof, J.

   "In arriving at the decision this Court has not given its mind fully to the legal effect of Section 8(2) of the AAT Act 4 of 2002 and in particular to the effect of the provisions of Section22-Interprtation Ordinance 21 of 1901-as the preliminary objection was confined to Article 61A of the Constitution."

This decision makes it quite clear that a decision of the AAT on a PSC decision can be impugned under Article 140 of the Constitution. As the AAT is not a body exercising any power delegated to it by the PSC but is an appellate tribunal constituted in terms of Article 59(1) of the Constitution having the power where appropriate to alter, vary or rescind any order or decision of the PSC.

The Administrative Appeal Tribunal (AAT) has decided by its order date 18.12.2012 that it has no jurisdiction to adjudicate on the doctrine *ultra vires* because such power is vested solely in the Supreme Court. Hence the learned Chairman and the other members of the AAT have disregarded the fact that the said advertisement published by the Secretary of Ministry of Education was *ultra vires* and void.

Even in an appellate jurisdiction, the Appellate body is empowered to correct errors of law and fact and the AAT enjoys the competence to vary or rescind a decision of the PSC when it is tainted with an error of law and fact. If the PSC has given effect to a decision of a public officer who has clearly exceeded his powers, it is within the jurisdiction of the AAT to go into the merits of that decision in its appellate jurisdiction and set it right if it turns out to be erroneous on the facts or law. I find that the AAT has not exercised its jurisdiction in its full plenitude and rested it decision by merely classifying the decision of the PSC as *ultra vires.*

In the circumstances, I proceed to set aside the order of the AAT dated 18.12.2012 and direct the AAT to rehear the appeal of the Petitioner and investigate the merits of the decision of the PSC. It is not uncommon to issue a Certiorari and compel the Tribunal to exercise its jurisdiction even though Mandamus has not been prayed for in jurisdictions where Administrative Law has been on the ascendant and developed to cater to changing times, Courts have been innovative so as to permit the contours of Administrative Law to expand and in my view that in a situation such as an abdication of jurisdiction, the Court should be competent to issue what I would call '*Mandamusified Certiorari*'. A *Mandamusified Certiorari* is a Writ of Certiorari that also performs the job of a Mandamus whilst quashing a previous decision of an Administrative Tribunal-*see* Administrative Law (Eleventh Edition) by H.W.R Wade and C.F. Forsyth page 518 fn 158.

Certiorarified Mandamus and *Mandamusified Certiorari* become component parts of the Administrative Law of this country as Article 140 of the Constitution mandates the importation of English Administrative Law in its peremptory dictate to this Court-"the jurisdiction to issue writs shall be according to Law which has been held to constitute the corpus of English Administrative Law"-*see* ***Dr. M.D.W Lokuge v. Vidyajothi Dr. Dayasiri Fernando and Others*** *(supra)*.

Accordingly this Court issues a Writ of Certiorari-a *Mandamusified Certiorari* at that on the ground of Illegality and Procedural Impropriety. The case is sent back to the AAT for the AAT to recommence Appellate proceedings after noticing the parties.

JUDGE OF THE COURT OF APPEAL