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DIGEST

that at the time the petitioner sought his permanent release from the public service, he had served only a period of nine (9) months at the Siyane National College of Education and one (1) year at the University of Peradeniya on a temporary release. It is therefore evident that the petitioner had not served the required obligatory period at the relevant Institution. In these circumstances, when the Secretary of the Ministry of Education has clearly refused to recommend the permanent release of the petitioner, it would not be possible to find fault with the decision of the Public Service Commission to have refused the petitioner's application to release him permanently.

The Assistant Secretary, on behalf of the Secretary to the Public Service Commission, by his letter dated 20.12.2005 had informed the Secretary, Ministry of Education that the Public Service Commission had decided to refuse the application made by the petitioner to release him permanently to the Open University (10R3). Accordingly by letter 21.12.2005 the Secretary to the Ministry of Education had informed the petitioner that since it is not possible to recommend the permanent release of the petitioner, that his temporary release to the University of Peradeniya has come to an end on 30.09.2005 and therefore the petitioner should report to the Siyane National College of Education within 14 days from 21.12.2005. The letter had further stated that,

"මෙදින සිට දින 14 කාලයක් තුළදී ඔබේ පෙර සේවා ස්ථානය වන සියනෑ ජාතික අධ්‍යාපන විද්‍යා පීඨයට වාර්තා කර ඒ බව පීඨාධිපති මගින් මා වෙත වාර්තා කළ යුතුය.

එසේ නොවන්නේ නම් විදේශ ශිෂ්‍යත්වය සඳහා ඔබ වෙනුවෙන් වැය කර ඇති සම්පූර්ණ මුදල් ආපසු අය කර ගැනීමට නීත්‍යානුකූලව කටයුතු කරන බවද කාරුණිකව දන්වමි." (10R4).

It is not disputed that the petitioner had not reported for duty within the given time period. By letter dated 27.06.2006, the President (Head) of the Siyane National College of Education had informed the petitioner (P18) that he would be treated as a person who has vacated his post.

Chapter V of the Establishments Code refers to vacation of post. Clause 7 of chapter V according states that,

"7.1 An officer who absents himself from duty without leave will be deemed to have vacated his post from the date of such absence and he should be informed accordingly at once by registered post or by personal delivery to him.

7.2 An order of vacation of post under this section can be issued by the Disciplinary Authority or a Staff Officer who is a local Head of Department.

7.3 Charges should not be framed against him nor should he be called upon to submit an explanation for his absence without leave.

7.4 If he volunteers an explanation within a reasonable time (the Disciplinary Authority can determine the 'reasonable time' for furnishing the explanation), it should be considered by the appropriate Disciplinary Authority in terms of the disciplinary rules, and permission to resume duties may be allowed or refused by that Authority."

Clauses 7:1 to 7:4 clearly establish the fact that in the event there is a vacation of post issued to an officer and in the event such officer attempts to volunteer an explanation, that should be carried out according to the procedure laid down

in Clause 7 of chapter V of the Establishment Code. If and when such an explanation is volunteered within a reasonable time, the appropriate disciplinary authority may allow or refuse permission to resume duties.

As stated earlier, by letter dated 21.12.2005 (10R4), the petitioner was requested to report for duty at the Siyane National College of Education within 14 days from that date. The petitioner had not complied with the said request and had continued to work at the Open University for a further period of six months and the President (Head) of the Siyane National College of Education had served the vacation of post notice on the petitioner on 27.06.2006 (P18).

Thereafter on 20.07.2006 the petitioner had tendered an appeal to the Public Service Commission on the notice of vacation of post. Clause 37 of chapter XLVIII of the Establishments Code states as follows:

"37.1 Where an officer who has been served with a Notice of Vacation of Post under the provisions of chapter V of Part 1 of the Establishments Code intends to tender an appeal against such Notice, such appeal should be tendered to the appropriate authority before the expiry of three months from the date on which the Notice of Vacation of Post was served on him.

37.2 If the Disciplinary Authority considers, in view of the matters represented in the appeal submitted to him in terms of sub-section 37.1 above, that the officer has not reported for duty because of acceptable reasons, he may order the reinstatement of the officer after imposing punishment for not reporting for duty without permission.

37.3 Where the Disciplinary Authority has rejected the reinstatement of the officer, he may appeal against such decision to the Cabinet of Ministers or the Public Service Commission, as the case may be within six months from the date of such decision."

The aforementioned provisions therefore are quite clear that the disciplinary authority could order the reinstatement of the officer after imposing punishment for not reporting for duty without permission.

In fact the Public Service Commission had acted in terms of the provisions laid down in Clause 37 of chapter XLVIII of the Establishments Code. The letter dated 14.11.2008 sent by the Assistant Secretary, Public Service Commission to the petitioner bears ample evidence to this position. The said letter (P25) was in the following terms:

"ඉහත කරුණට අදාලව ඔබ විසින් ඉදිරිපත් කර ඇති 2008.09.18 දිනැති ලිපිය හා බැඳේ.

එම ලිපිය හා ඒ හා සම්බන්ධයෙන් අධ්‍යාපන ලේකම් විසින් ඉදිරිපත් කරනු ලැබූ කරුණු සළකා බැලූ රාජ්‍ය සේවා කොමිෂන් සභාව පහත සඳහන් කොන්දේසි වලට යටත්ව ඔබට නැවත සේවයේ පිහිටුවීම සළකා බැලීමට තීරණය කර ඇත.

I ඔබ විසින් අනිවාර්ය සේවා කාලයක් සේවය කිරීමට රජය සමග බැඳී ඇති ගිවිසුම කඩකිරීම සම්බන්ධයෙන් ඔබගෙන් රජයට අය විය යුතු, අධ්‍යාපන ලේකම් විසින් යථා කාලයේදී ඔබ වෙත දැනුම් දෙන මුදල් ප්‍රමාණය 2008 දෙසැම්බර් 31 දිනට පෙර ගෙවා අවසන් කල යුතු වේ.

II ඔබ විසින් එසේ ගෙවීම සිදු කිරීමෙන් අනතුරුව නැවත සේවයේ පිහිටුවීම රාජ්‍ය සේවා කොමිෂන් සභාව විසින් සිදු කළහොත් ඉන්

පසු රාජ්‍ය සේවයෙන් ශ්‍රී ලංකා විවෘත විශ්ව විද්‍යාලයේ සේවය සඳහා මුදා හැරීම සලකා බැලීමට 2008.11.30 දිනට හෝ ඔබගේ සේවය එම විශ්ව විද්‍යාලයට අවශ්‍ය බවට විශ්වවිද්‍යාලය විසින් ඉල්ලීමක් අධ්‍යාපන අමාත්‍යාංශයේ ලේකම් වෙත ඉදිරිපත් කළ යුතුය. එසේ කරන්නේ නම් පමණක් රාජ්‍ය සේවයෙන් පූර්ණ කාලීනව මුදා හැරීම පිළිබඳව රාජ්‍ය සේවා කොමිෂන් සභාව තීරණය ගනු ලබන බව තව දුරටත් නියෝග කර ඇත.

A careful consideration of the relevant provisions contained in the Establishments Code and the decision conveyed to the petitioner by the Public Service Commission by its letter dated 14.11.2008 (P25) shows that, the Public Service Commission had examined the appeal tendered by the petitioner. It is to be borne in mind, as has been clearly stated by the petitioner himself, that immediately after his return to the country on 05.01.2004, the petitioner had been applying for positions in other Universities. The first of such was to the University of Peradeniya on 27.02.2004. He had assumed duties at the University of Peradeniya without obtaining his release from the Public Service in terms of the relevant provisions in the Establishments Code on 01.10.2004. As referred to earlier, since February 2004, the petitioner had accepted several other appointments without obtaining approval for a permanent release from the Appointing Authority. Having considered the aforementioned, the Public Service Commission had arrived at the decision, which was conveyed to the petitioner by letter dated 14.11.2008 (P25).

On a consideration of the totality of the aforementioned, it is evident that the decision of the Public Service Commission cannot be said to be unreasonable and unlawful.

The petitioner had stated that the Public Service Commission had allowed similarly circumstanced Teacher Educators to serve in higher educational institutions and no vacation of post notices had been served on them. Reference was made to one A.C.A.M. Mansoor, D.C.P. Perera and P.R.K.A. Vitharana.

Learned Deputy Solicitor General had made submissions on the aforementioned Teacher Educationists.

According to the said submissions, Ms. D.C.P. Perera, was **not released** to take up the appointment at the National Institute of Education. Accordingly she had retired under Circular No. 30/1988. Mrs. P.R.K.A. Vitharana had not been subject to any obligatory service. However, she had not been released from the Public Service and she had retired under Circular No. 30/1988 (X3).

A.C.A.M. Mansoor had read for a Degree in Master of Education at the University of Wollongong in Australia. He had been away on a scholarship and study leave was granted from 01.08.1998 to 31.07.1999. According to the Agreement he had entered into, Mansoor was to serve an obligatory service period of 4 years to the State. He had returned to the country one month before the due date and had resumed duties at the National College of Education at Adalachchanai on 30.06.1999 and therefore he was required to serve the State only for a period of 40 months.

After serving the said National College of Education for 33 months, he had applied for a temporary release from the Public Service to take up the post of Senior Assistant Registrar at the South Eastern University for a period of 2 years from 11.03.2002 (X7). He was permitted to take up the said

appointment on 11.07.2002 pending his appeal before the Public Service Commission. The Public Service Commission had granted approval for the said application on 24.06.2003 (X8). At the time he took up the appointment on 11.07.2002 the said Mansoor had served approximately 37 months out of his 40 months obligatory period of service. He was sanctioned a permanent release only on 11.03.2007.

It is to be noted that, Mansoor had been away in Australia only for a period of 11 months on a scholarship and had to serve an obligatory service period of 40 months whereas the petitioner was away for a period of over 3 years on two scholarships and therefore he had to serve an obligatory service period of 8 years and 7 months. As stated earlier, at the time the petitioner sought his release to the Open University, he had served the Siyane National College of Education only for a period of 9 months and had served at the University of Peradeniya for a period of 1 year. In such circumstances it would not be correct to state that the petitioner and the said Mansoor are similarly circumstanced.

The petitioner's complaint was that his fundamental rights guaranteed in terms of Article 12(1) was violated as the respondents had decided to issue a notice of vacation of post on him and the Public Service Commission had determined that the petitioner must pay to the State such sum of money in lieu of obligatory service to the Government and until such time, that he was not allowed to serve at any higher educational institute. These decisions, according to the petitioner are arbitrary, irrational and unreasonable and violative of Article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and states that,

"All persons are equal before the law and are entitled to the equal protection of the law."

Equality before the law does not mean that all should be treated alike or that the same law should be applicable to all persons. What is meant is that equals should be treated equally and similar laws should be applicable to persons, who are similarly circumstanced. Referring to the concept of equality before the law, Sir Ivor Jennings (The Law and the Constitution, 3rd edition. Pg. 49) had stated that,

"It assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike."

It is therefore evident that what Article 12(1) of the Constitution postulates is that all persons, who are similarly circumstanced should be treated alike. Accordingly, the doctrine of equality before the laws would not be applicable to persons, who are not similarly circumstanced. In other words unequals cannot be treated equally nor equals be treated unequally.

Every wrong decision cannot and would not attract the constitutional remedies guaranteed under the fundamental rights incorporated in our Constitution. As stated earlier, in reference to Article 12(1) of the Constitution it would be necessary to show that there had been unequal treatment and therefore discriminatory action against the petitioner. In *Snowden v. Hughes*(1) it was stated thus:

"The unlawful administration. . . of a state statute fair on its face, resulting in unequal application to those who

are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discretion."

When careful consideration is given to the facts of the petitioner's case, it is not even possible to state that there had been any unequal treatment since the petitioner's position is quite different to that of Mansoor, who had only 3 more months to serve as his obligatory period, whereas the petitioner had served only 9 months out of his 40 months obligatory service at the Siyane National College of Education. As has been clearly demonstrated in the well known case of *Ram Krishna Dalmia v. Justice Tendolkar*[2], classifications are permitted provided that,

"1. the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

2. that the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved."

Accordingly the classification must not be arbitrary, but should be based on substantial difference bearing a reasonable relationship to the object sought to be achieved.

It is common ground that the petitioner had obtained study leave from the Siyane National College of Education for his higher studies. Such absence from normal teaching and other related work would undoubtedly assist a lecturer to further his studies and also would provide an opportunity to enhance their skills and expertise in the relevant field. It

would also bring in an opportunity to meet scholars from other countries and exchanges views and to establish links with those Universities. The objective of granting study leave would therefore be to ensure that on his return, the lecturer would impart his experience to that institution, which had given him the opportunity to be away for a significant period.

Considering all the aforementioned facts and circumstances, it is therefore clear that the decision taken by the Public Service Commission with regard to the petitioner in no way could be categorised as arbitrary, unlawful and irrational and is not in violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforementioned I hold that the petitioner has not been successful in establishing that the respondents has violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution. This application is accordingly dismissed. There will be no costs.

RATNAYAKE, P. C., J. - I agree.

IMAM, J. - I agree.

application dismissed.

ALBI V. ATTORNEY GENERAL AND ANOTHER

COURT OF APPEAL
RANJIT SILVA, J.
LECAMWASAM, J.
CA. 43/2011
MARCH 21TH, 28TH 2011

Offensive Weapons Act 18 of 1966 as amended by Act 2 of 2011 - Does the Court of Appeal have jurisdiction to entertain or proceed or determine applications under and in terms of Section 10 with effect from 28.11.2011 - Operative date the law was certified - Interpretation Ordinance Section 6 (3) Constitution - Article 154 (P).

Held:

(1) The amending Act No. 2 of 2011 does not contain any transitional provisions. It is completely silent with regard to the pending matters.

Per Ranjith Silva, J.

> "Whatever the intention may have been of the legislature, canons and the rule of interpretation cannot be brushed aside lightly or disregarded, the Courts can ascertain the intention of the legislature only if the words of a particular section or provision are ambiguous - in the amending Act we find that there is no such ambiguity - therefore it is not necessary for the Court to go on a voyage of discovery to ascertain the intention of the legislature in enacting Act 2 of 2011 . . . ."

Per Ranjith Silva J.

> "We are not possessed of the powers or the jurisdiction to transfer those pending applications to the relevant High Courts".

APPLICATION for bail, on a preliminary objection taken.

Cases referred to :-

(1) *A.G. vs. Nilanthi* - 2 Sri LR 1997

(2) *A. G. vs. Francis* - 47 NLR 467

(3) *D. P. P. vs. Lamp* - 2 All ER 499

(4) *Thambiah Selvaratnam, Asst. Commissioner of Co-operative Development, Jaffna* - 79 (2) NLR 104 at 108.

Dr. Ranjith Fernando for Petitioner.

Yasantha Kodagoda DSG for Respondents.

Cur.adv.vult

April 01st 2011

RANJITH SILVA, J.

When this matter came up before this court on 29th March 2011 the Learned Deputy Solicitor General raised the following issue;

Should the Court of Appeal continue to exercise jurisdiction regarding applications filed in the Court of Appeal prior to 28 January 2011 seeking bail for persons charged with or accused of having committed offences in terms of the Offensive Weapons Act No. 18 of 1966 as amended by act No. 2 of 2011.

Counsel for the petitioner contended that notwithstanding the coming into operation of the Offensive Weapons Amendment Act No. 2 of 2011, the Court of Appeal should continue to exercise jurisdiction in respect of pending matters on such applications, filed before the appointed date and where the Court has issued notices in that behalf, by virtue of section 6 (3) (c) of the Interpretation Ordinance.

The position taken by the Deputy Solicitor General on behalf of the Attorney General was that the Court of Appeal does not have jurisdiction to entertain, proceed or determine applications under and in terms of section 10 of the Offensive

Weapons Act as amended by the Act No. 2 of 2011 with effect from 28 January 2011 and that the provisions of section 6(3) (c) of the Interpretation Ordinance does not have any application to the matter in hand.

The learned Deputy Solicitor General contended that this court possessed the exclusive jurisdiction of the first instance to entertain and consider applications seeking bail in respect of persons charged with or accused of having committed offences in terms of the Offensive Weapons Act till January 2011, that in early January 2011 the Offensive Weapons Act was amended by Parliament by enacting the Offensive Weapons Amendment Act. No. 2 of 2011 and the new law was certified by the Hon. Speaker on 28th of January 2011 and that it became operative on the day on which the new law was certified by the Speaker, i.e. 28 January 2011.

Section 10 of the Offensive Weapons Act as it was, reads thus;

Not withstanding any thing to the contrary in the Code of Criminal Procedure Act or any other written Law, no person charged with or accused of an offence under this Act shall be released on bail except on orders of the Supreme Court.

In *Attorney General vs. Nilanthi*[1] it was held that the reference to the Supreme Court in Act No. 18 of 1966 should be deemed and read as a reference to the Court of Appeal. The revised legislative enactments of 1980 omitted to refer to the Supreme Court and instead has referred to the Court of Appeal as the court which has the jurisdiction to deal with applications made under and in terms of section 10 of the Offensive Weapons Act.

Section 2 of Act No. 2 of 2011 reads as follows;

"Section 10 of the Offensive Weapons Act No. 18 of 1966 is hereby repealed and the following section substituted therefor;

Section 10. No Person charged with, or accused of, an offence under this Act, shall be released on bail except on the order of the High Court of the province established under Article 154p of the Constitution, for such province."

The Deputy Solicitor General contended that the law can be amended in numerous ways:

(a) by allowing the law which was brought into force for a specified period of time to lapse (expiration)

(b) by suspending the operation of law

(c) by repealing a law (only)

(d) by repealing a law and substituting the repealed provision by a new provision.

(e) by introducing a new provision in addition to the existing provisions.

He contended that section 10 of the Offensive Weapons Act has been amended using this fourth mechanism that is by repealing section 10 of Act No. 18 of 1966 and by substituting therefor a new section.

Section 6 (3) of the Interpretation Ordinance reads as follows;

Whenever any written law repeals either in whole or part a former written law, such repealing shall not, in the absence of

any express provision to that effect, affect or would be deemed to have affected -

(a) the past operation of any thing duly done or suffered under the repealed written law;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;

(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

The Learned Deputy Solicitor General admitted that the meaning or the primary purpose of Section 6 (3) of the Interpretation Ordinance was to prevent ex post facto enforcement of new legislation and to protect against having to terminate ongoing proceedings prematurely and haphazardly. He has cited *A. G. vs. Francis*[2] and *DPP vs. Lamb*[3] which have no bearing or relevance to the facts and circumstances of the instant case.

The counsel went on to argue strenuously that section 6(3)(c) of the Interpretation Ordinance will apply only to instances where a specific provision has not been made. In support of this argument he cited the judgment of Ratwatte, J. in *Thambiah Seewaratnam v. Assistant Commissioner of Cooperative Development, Jaffna*[4] at 108 wherein it was held that section 6 (3) (c) of the Interpretation Ordinance will not apply as that section would apply only in cases where there is no specific provision made in the repealing Act.

In other words if the amending Act does not contain any express provision as to how such repeal should affect the

pending or continuing matters every such action proceeding or thing may be carried on and completed as if there had been no such repeal. In other words if there is specific provision which prohibits the continuation of pending applications in a particular forum this particular section of the Interpretation Ordinance would not apply but in the absence of any such express provision Section 6(3) (c) would apply. Thus any action proceeding or thing pending or incomplete when the repealing written law comes into operation, such action proceeding or thing may be carried on and completed **as if there had been no such repeal**.

In this regard I would like to refer to certain parts of the Judgment in *Seewaratnam vs. Assistant Commissioner of Corporative Development, Jaffna, (supra)* which shows that, in that case the facts and circumstances are different from the facts and circumstances of this case. In that case an award made on 16 December 1971 under the Co-operative Societies Ordinance as amended was sought to be enforced under the provisions of section 59 of the co-operative Societies law No. 05 of 1972. It was submitted that the Magistrate's Court had no jurisdiction to entertain the application to enforce this award and that the provisions of section 70 (3) of law No. 05 of 1972 did not apply to awards made under the earlier Law. Reliance was also placed on section 6 (3) (c) of the Interpretation Ordinance.

Held: that an award made under the Co-operative Societies Ordinance as amended can be enforced under section 59 of the Co-operative Societies law, No. 05 of 1972. Section 70 (3) of the new law applies to such awards. Section 6 (3) of the Interpretation Ordinance has no application in such an instance and the Magistrate had jurisdiction to entertain such applications.

The reasoning behind his Judgment appears at page 108 of the said Judgment. Their Lordships referring to section 70 (3) opined that the Magistrate's Court had jurisdiction to entertain the application under the new law as the new law contained specific provision [Section 70 (3)] and that section 6 (3) (c) would apply only in cases where there is no specific provision made in the repealing Act.

Section 70 (3) of the Co-operative Societies Law -

"All appointments and orders made, notifications and notices issued, and suits and other proceedings instituted, or deemed to have been made, issued or instituted and all disputes that have arisen under any enactment repealed by this law, shall, so far as may be, be deemed to have been respectively made, issued and instituted and to have arisen under this law."

In the matter before us, I find that there are no such provisions made, let alone specific provisions, to deal with a situation of the sort. Amending Act No. 2 of 2011 does not contain any transitional provisions. It is completely silent with regard to the pending matters. Whatever the intention may have been of the legislature, canons and the rules of interpretation cannot be brushed aside lightly or disregarded. The courts can ascertain the intention of the legislature only if the words of a particulars section or provision are ambiguous. In the amending Act, we find that there is no such ambiguity. Therefore, it is not necessary for this court to go on a voyage of discovery to ascertain the intention of the Legislature in enacting Act No. 02 of 2011.

On the other hand there is a presumption that the legislature would always act rationally and wisely. If this

court were to assume that all the pending applications for bail should stand removed from 28 January 2011 onwards to the respective High Courts from the day of the Speaker's certification then what would be the result or the outcome or the effect of the hundreds of orders this Court made in the interim till the amendment was brought to the notice of this Court by the State on 21-03-2011. Are those orders to be declared null and void? Should they be branded as nullities? To this my answer is "No". We are not possessed of the powers or the jurisdiction to transfer those pending applications to the relevant High Courts. If the litigants were to file fresh applications or even if the pending applications were to be transferred to the relevant High courts the Litigants would have to retain the services of different lawyers from those areas at a considerable cost much against their will and at tremendous inconvenience.

For the reasons adumbrated, I hold that this court has the jurisdiction to hear and dispose those applications for bail, filed before 28th of January 2011 in this court under section 10 of the Offensive Weapons Act despite the amendment Act No. 2 of 2011.

LEKAMWASAM, J - I agree.

Preliminary Objection Overruled.

SESADI SUBASINGHE (APPEARING THROUGH HER NEXT FRIEND) VS. PRINCIPAL, VISHAKA VIDYALAYA AND 12 OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC.J (P/CA)
GOONERATNE, J.
CA. 138/2010
AUGUST 23, 2010
NOVEMBER 22, 2011

Writ of Certiorari - Admission of a child to school - Selection overturned by the appellate Panel - Site Inspection - Residence - Irrational and unreasonable decision? - Public duty cast on authorities?

The petitioner a minor child appearing through her next friend, her father complained that she was initially selected under the category of children of public servants for admission to Vishaka Vidyalaya. However the 13th respondent objected and consequent to an inquiry, the petitioner had been omitted from the final list of selection by the appeal panel. The petitioner complains that this decision not to select her by the panel is ultra vires.

Held:

(1) The appellate panel and the selection board including the principal of the school is expected to perform a public duty based on Circulars issued by the Education Department. Adopting a very adhoc method is unsatisfactory to decide ones future in education which should be decided very carefully.

Per Anil Gooneratne, J.

> "In my view the procedure and the method adopted in the instant case by the appeals panel and others who are duty bound to select and admit children appear to be highly unreasonable and irrational."

(2) Irrationality is one of the common law grounds of judicial review of administrative action. It is presumed that public authorities are

never empowered to exercise their powers irrationally therefore irrational action by a public authority is considered to be ultra-vires.

(3) The respondents have not been able to disprove the requirements of residence in terms of the Education Department Circulars as regards the petitioner.

APPLICATION for a Writ of Certiorari.

Cases referred to :-

(1) *Council of Civil Services Union vs. Minister for the Civil Service* - 1985 - AC 374 HL

(2) *Associated Provincial Picture House Ltd vs. Wednesbury Corporation* - 1948 - 1 KB 223

(3) *Edwards vs. Banstow* - 1956 AL 14

(4) *R vs Secretary of State for Environment ex parte Fieller Estate (Convey Ltd)* - 1989 - 57 P & CR 424.

(5) *R vs. Superintendent, Cheswick Police Station ex parte Sackteder* - 1918 - 118 Law Times Reports 165

S. Jayawardane for Petitioner.

Janak de Silva SSC for 1- 11 Respondents.

M. I. M. Izmullah for 13th respondent.

Cur.adv.vult

January 17th 2011

ANIL GOONERATNE, J.

This is an application for Writs of Certiorari and Mandamus in a school admission case, namely Vishaka Vidyalaya, Colombo 5. Petitioner a minor child is appearing through her next friend the father of the child. Child was in fact selected for admission by document P18 (temporary list). Petitioner was initially selected under the category of children of public servants, who secured 91 marks. However the 13th Respondent had objected to the admission of the Petitioner and

consequent to an inquiry, the Petitioner had been omitted from the final list of selection by the Appeal/Objection Panel being 7th to 10th Respondents to this application. Petitioner complains that the decision not to select by the panel is ultra vires for the reasons set out in paragraph 33 of the petition.

Petitioner has supported her application with several documents. The Interview panel named as the 2nd & 6th Respondent accepted the application of the Petitioner and selected her for admission to Vishaka Vidyalaya. It was on an objection by the 13th Respondent that the Petitioner lost her place at the said school. This court needs to consider and decide on the legality of the appeal procedure and it's decision pertaining to the Petitioner. It appears to this court that the Petitioner was deprived of entry to the school on the issue of residence. I have to observe that after the closure of all pleadings in this application 1st to 11th Respondents thought it fit to tender documents marked as A1 to A4 for which the Petitioner did not object. These documents were tendered by motion dated 07.09.2010. I wonder as to why the 1st to 11th Respondents could not tender those documents (other than the Supreme Court decision) along with their objection which were filed on 26.05.2010? It is an after thought?

The Petitioner has also sought relief against the 13th Respondent, in terms of sub paragraph (e) of the prayer to the petition.

The 1st to 11th Respondents in their objections state inter alia that subsequent to the objections of the 13th Respondent the 3rd, 7th, & 9th Respondents caused an inspection of the residence of the Petitioner and it was found that the Petitioner was not residing at the given address to qualify under clause 6.5. 1 of P8. It is also pleaded that the cut off

marks were reduced in view of the exclusion of the Petitioner and few other children and the 13th Respondent got the benefit of such exclusion. Other than the above the objection and affidavit of the above Respondents merely contain a bare statement, as to find that Petitioner was not residing at the given address. None of the documents and material required to be maintained under clause 10:4 & 10:5 of P8 was produced for perusal of this court. As such 1st to 11th Respondents seems to rely only on bare statements. The learned Counsel who appeared for the State may have thought it fit to rely only on bare statements and to fortify his position with the subsequent material submitted to court inclusive of a Supreme Court decision marked A1 - A4.

On examining the affidavit of the 7th Respondent the Chairman of the so called Appeal Panel in her statement contained in paragraph 10 of the affidavit avers that 'in pursuance of the objections, I along with 3rd and 9th Respondents caused an inspection of the place, where the child along with the father were said to have been in residence. This sentence gives the impression that only three persons visited the residence in question. The next sentence it is stated that I and the 8th - 10th Respondents found that they were not residing at the address given to qualify under clause 6.5.11 of P8. There is some inconsistency in these two sentences. Is it the position that the 10th Respondent did not visit, the residence, but found that the Petitioner was not a resident. The date and time of the so called visit is not mentioned in the affidavit of the 7th Respondent. How does one come to a conclusion that residence was not found to be the residence of the Petitioner? Where is the supporting material to accept the findings of the Appeal Panel, in the affidavit of the 7th Respondent? Before I proceed to comment on A3, in the

absence of cogent reasons and acceptable documentation placed before court, I am reluctantly compelled to reject the contents of paragraph 10 of the 7th Respondent's affidavit.

A child selected initially is to be displaced by objection of another party who is attempting to secure a placement in the school, need to be considered very seriously and carefully by the Appellate Panel. This is the child's future and the authorities have led the Petitioner and his family to entertain legitimate expectation as regards having a good education at a leading school in the island. The Appellate Panel and the selection board including the Principal of the school is expected to perform a public duty based on circulars issued by the Education Department, which are in operation for several years. Adopting very adhoc methods is unsatisfactory to decide on one's future in education and should be decided very carefully especially in the circumstances of the case in hand. In my view the procedure and the method adopted in the instant case by the Appeals Panel and others who are duty bound to select and admit children appears to be highly unreasonable and irrational.

In arriving at my conclusions the following authorities were considered and would refer to them as a guide to unreasonableness and irrationality.

> Irrationality is one of the common-law grounds of judicial review of administrative action. It is presumed that public authorities are never empowered to exercise their powers irrationally, therefore irrational action by a public authority is considered to be ultra vires. Although it denotes behavior that falls short of what is to be expected of a rational public authority, the precise parameters of

the term are unclear and it has been used to describe a range of behavior. It is often used interchangeably with the term Wednesburys unreasonableness but has become the more common term since the case of *Council of Civil Service Union vs. Minister for the Civil Service*(1) in which term irrationality, illegality and procedural impropriety were used to define the Common Law grounds heads of judicial review. Oxford Dictionary of Law 6th Ed. Elizabeth A Martin & Jonathan Law.

In Lord Diplock's formal statement on Judicial review (Wade - Administrative Law 9th Ed. Pg. 1001) describes irrationality in the following manner.

By 'irrationality' I mean what can be now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*(2). 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this, role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow*(3) of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

R v. Secretary of State for Environment, ex parte Fielder Estates (Canvey Ltd)[4] is a good example of a case illustrating behaviour that has been deemed to warrant the designation of irrationality. After a planning application to build houses close to Canvey Island had been refused, a public inquiry had been set up which was expected to last for three days. During the inquiry, one of the objectors, the Canvey Ratepayers Association, was to present its evidence on the second day. When it turned up to do so, the Association found that the inquiry had already been closed by the inspector. After a complaint had been made to the Secretary of State, another inquiry was set up. But this time, the other parties who had been present at the first inquiry, including Fielder Estates, were not notified about the second inquiry. It was held that the conduct of the Secretary of State was so unreasonable as to verge on the irrational and absurd. It also amounted to a failure to act with procedural fairness. Notice that this is another useful example of where the grounds of review overlap, in that issues of natural justice are also present in the case.

In *R. v, Superintendent, Cheswick Police Station, ex parte Sacksteder*[5] Pickford L. J. remarked that if a deportation order was "practically a sham, if the purpose behind it is so illogical as to show the order is not a genuine or bona fide order, the Court could go behind it". Although he was not prepared to say that in every case where there was an order of deportation or imprisonment, the Court was entitled to go behind that and see what the motives were for making that order.

Ordinarily the motion dated 2.9.2010 should have been rejected. However as the Petitioner did not object to same,

we will give our mind to the documents annexed to it, as follows:

(1) This court need not make any comment on A2.

(2) A4 is a unclear document, photocopy not certified

(3) A3 is some what difficult to read, A brief account of the occupant makes no sense at all only matter admitted is that Subasinghe occupies one room and a common kitchen. It is no concern of this court as to how comfortable or uncomfortable the occupant Subasinghe, but it indicates that some form of residence is suggested.

How did the panel get the above information? Who is the informant? Identity of persons giving details not established. A3 is a vague, unclear, unsigned document.

This court has no hesitation to reject documents A4 & A3. Such ambiguous documents should not be produced in a court of law, to prove a case.

I will now turn to document 'A1' which is the Supreme Court decision. The circumstances of the case in hand is different. In the Supreme Court case, the child concerned was never selected by the authorities and unlike the case in hand where the selection panel selected the Petitioner and included her in the temporary list. I would agree with the view of Petitioner that the site inspection done subsequent to objection inquiry is not valid and in any event the Apex Court does not make any pronouncement re-site inspection or provide any guide lines for such inspection. As such this court is not bound by the decision of the Supreme Court referred to in document 'A1'. The said decision of the Supreme Court does not create a binding precedent as it is distinguished

from the facts of this case. I am unable to blindly follow a judgment which is produced by the 1st to 11th Respondent, when all other aspects of the case of the said Respondents are rejected, weak, unreasonable and irrational.

This court considered the question of residence in another case namely C.A 270/08 . . . as follows:

Assuming for the sake of argument that such a course of action is available to the Appeals Panel or that circular P2 does not prohibit a site inspection. How did the panel approach this problem? The panel as pleaded in the affidavit of the 10th Respondent thought it fit to ascertain residence of the Petitioners by either verifying such proof from the residents in the area. This court observes that the Appeals panel was in grave error by verifying facts of residence from residents of the area. Can a reasonable right thinking person place any reliance on information provided by the residents? Who are these residents? Has the 10th Respondent identified the persons concerned and pleaded with certainty about the identity of the residents and placed material to establish non-residence of Petitioner in his affidavit filed in this court? This court takes the view that in the absence of cogent reasons for doing so and an absence of material and more particularly about the identity of the so called residents in the area, no reliance could be placed on this aspect of verifying residence of Petitioner by the Appeals panel. Bare statements cannot suffice. Nor has the Respondents produced any contemporaneous notes of the so called site inspection. One has to bear in mind the question of good neighbours and bad neighbours? If the persons concerned who are called residents in the area by the 10th Respondent are not so well disposed towards the petitioner, what would be the outcome of such site

inspection? There is a total lack of proof in this regard which is not acceptable to a court of law in the manner pleaded in the affidavit of the 10th Respondent. This is a manifest error on the face of the record.

I would also at this point of time advert to the following rules of the Education Department Circular in the manner submitted to this court by the learned Counsel for the Petitioner. Further it must be noted that temporary list was published on 06.11.2009; objection and Appeals Inquiry on 12.10.2009; site inspection 20.12.2009.

The site inspection is done according to the Petitioner prior to preparation of temporary list to give an opportunity to the applicant to prove or contradict a contrary position. Clause 8:3 of P8 reads thus:

"තාවකාලික ලැයිස්තුව හා පොරොත්තු ලේඛන ප්‍රසිද්ධ කිරීමට පෙර පාසලට ආසන්න පදිංචිකරුවන්ගේ ගණය යටතේ ඉහත ලේඛනවල නම් සඳහන් ළමයින්ගේ පදිංචිය ස්ථානීය පරීක්ෂණ මගින් තහවුරු කර ගත යුතුය. ස්ථානීය පරීක්ෂණයේ දී පදිංචිය තහවුරු නොවේ නම් ලේඛණයෙන් ඉවත් කොට අභියාචනා හා විරෝධතා පරීක්ෂණය සඳහා කැඳවිය යුතු ය. අවශ්‍ය වන්නේ නම් අනෙකුත් ගණ සඳහා ද ස්ථානීය පරීක්ෂණ කළ හැකිය. යම් පුද්ගලයෙකු පදිංචි බව හෝ පදිංචි නොවන බව පසුකාලීනව සනාථ කිරීමට අවශ්‍ය වුවහොත් එය සනාථ කිරීමට හැකි වන පරිදි ස්ථානීය පරීක්ෂණ පිළිබඳ සියලු තොරතුරු සමග වාර්තා සකස් කොට තබා ගත යුතුය."

Clause 10:4 reads thus:

විරෝධතා විභාග කිරීමේදී විරෝධතාවලට ලක් වූ ළමයාගේ දෙමව්පියන්ට නිත්‍යානුකූලව භාරකරුවන් විසින් ඉදිරිපත් කර ඇති ලිපි ලේඛන පමණක් (ප්‍රථම සම්මුඛ පරීක්ෂණයට ඉදිරිපත් කළ) නැවත වරක් විමර්ෂණය කරන අතර විරෝධතාව දක්වූ අය කැඳවා විරෝධතාවෙහි නිරවද්‍යතාවය විමර්ෂණයට ලක් කල යුතුය. ඉන්පසු විරෝධතාවට ලක් වූ ළමයාගේ දෙමව්පියන් නිත්‍යානුකූල භාරකරුවන් ද කැඳවා