SUPREME COURT

Wijesiri
V.
Siriwardene

S.C. 81/81 – C.A. Application No. 2329/80

Writ of Mandamus – locus standi – Minister's discretionary power articles 55 and 59 of the Constitution

P is a Member of Parliament. He took up the cause of 53 candidates who were selected for appointment to Grade II Class II of the Sri Lanka Administrative Service on the results of an Open Competitive Examination but whose letters of appointment were not issued by the Respondent.

R who was Sec. Ministry of Public Administration contended that the letters were not issued because the Cabinet decided to withhold them consequent to a number of complaints that there were certain irregularities in the conduct of the examination.

P contended that the letters were not issued because a powerful Trade Union objected that the selectees were not members of their Trade Union.

Held: *Per Wimalaratna* and *Ratwatte J* - To apply for a Writ of Mandamus it is not necessary to have a personal interest but it is sufficient if the applicant can show a genuine interest in the matter complained of and that he comes before Court as a Public spirited person, concerned to see that the law is obeyed in the interest of all.

2. That since the notice calling for applications from candidates contains a clause reserving to the Minister the right to postpone or cancel examinations or to refrain from filling any of the vacancies it would be difficult to impose on him a duty either to fill the vacancies or to make appointments of persons selected.

Mandamus will not issue if it will be futile.
Per *Wanasundara J.* Article 55 of the Constitution precludes the Court from granting relief in the matter.

APPEAL from judgment of the Court of Appeal

Before: Wanasundera J., Wimalaratne J., and Ratwatte J.
Counsel: H.L. de Silva, S/A, with E.D. Wickramanayake and Gomin Dayasiri for Petitioner-Appellant.
K.M.M.B. Kulatunga, Addl: S.G with Suri Ratnapala, S.C., for the Respondent - Respondent.

Argued and Decided on: 21st & 22nd January, 1982.
Reasons Delivered on: 4th March, 1982.

Cur. adv. vult.

WIMALARATNE J.

We heard Counsel and gave our decision on 22.1.82 dismissing this Appeal. We now state our reasons.

The Petitioner-Appellant is a Member of Parliament sitting in the Opposition Benches. He has taken up the cause of 53 candidates who were selected for appointment to class II grade II of the Sri Lanka Administrative Service on the results of an open competitive examination held in 1979 to fill 30 per cent of the vacancies, but who were not issued with letters of appointment by the Respondent, who is the Secretary to the Ministry of Public Administration. The Petitioner invoked the jurisdiction of the Court of Appeal and asked for a Writ of Mandamus to compel the Respondent to perform what he calls the public duty of appointing these successful candidates. The Respondent answered that in view of certain allegations made in respect of the holding of the Intelligence Test paper at the Nalanda College Centre where 162 candidates sat, the Cabinet of Ministers decided that that paper be cancelled, and that all the candidates be required to sit that paper once again. In conformity with that decision he took steps in November 1980, after informing all the candidates, to hold a fresh Intelligence test paper and selected 248 to face a viva voce test, but before a fresh selection could be made the Petitioner filed the present application, and the vacancies have so far not been filled.

The Court of Appeal dismissed the application with costs, but granted the Petitioner leave to appeal to this Court on the following questions:-

1. Whether Petitioner has locus standi to make this application.
2. Whether Article 55 (5) is a complete and total bar precluding this Court from inquiring into or in any manner calling into question, the orders and decisions of the Cabinet of Ministers and the Respondent pertaining to appointment of public officers to the Public Service ?
3. Whether the duty that the Petitioner is seeking to compel is of a public nature and not merely of a private character?
4. that the Respondent owes a duty to the State in making appointments and not to the 53 persons.
5. Whether the Court will not grant the Mandamus because it is futile?
6. that the Court will not issue a Mandamus if the application is not bona-fide made but made with the indirect motive of assisting the 53 persons.

The facts as are necessary for a determination of these issues are briefly these: Altogether 2997 candidates sat the written examination held on 26.5.79 and comprising papers in general intelligence, comprehension and case study, carrying 200. 100 and 100 marks respectively. At the Nalanda College Centre some of the candidates had lodged a complaint that the packet containing the general intelligence paper had been opened 25 minutes before and not 10 minutes before the commencement, and that two candidates who were accommodated near the table where the papers were opened may have had an unfair advantage; and some of the candidates refused to sit the paper at that centre. However, 248 candidates who had obtained the required marks in the three written papers were called for a viva voce test, and from them 53 were selected, and their names were published on the notice board of the Ministry of Public Administration on 24.12.79. Letters of appointment were in fact prepared to be dispatched to them, but before they were posted they were intercepted by a Ministry Official and the 53 who were so near found themselves yet so far, as they never received their letters of appointment.

The Petitioner alleges that a trade union, namely the Jathika Sevaka Sangamaya (J.S.S.) affiliated to the government in power was responsible for the interception of the letters for the reason that the majority of the 53 selected were not members of that trade union. The respondent however averred that the appointments were not made because of allegations and counter allegations about the conduct of the examination and not for the reason alleged by the petitioner. Subsequently, the Cabinet of Ministers by a decision dated 27.8.80 directed that all candidates be called upon to sit a fresh paper in general intelligence, and he took steps accordingly.

The Court of Appeal has found as a fact that the 53 candidates were not appointed because of suspicion of irregularities in the conduct of the written paper in general intelligence, and not as a result of pressure from the J.S.S. and that apart from inviting the Court to draw inferences of bad faith, no reliable material had been placed to establish that either the respondent or the Cabinet of Ministers had acted unlawfully. There is no application to this Court for leave to appeal on this finding of fact, but in spite of the Additional S.G.'s preliminary objection to the petitioner canvassing the findings of fact, we permitted learned counsel for the petitioner to refer to such facts as may be necessary for a determination of the six questions formulated above.

Much of the arguments before us related to the first question, that is whether the petitioner has the locus standi. The Court of Appeal has considered with a great degree of thoroughness the evolution in English Law, of the requirement of locus standi in applications for Mandamus - from the earliest decision in the *Queen Vs. Guardians of the Lewisham Union* (1897) 1QB 498, (where the requirement was the existence in the petitioner of a legal right to the performance of a public duty) up to the most recent decision in *Inland Revenue Commissioners Vs. National Federation of Self Employed and Small Business Ltd.*, (1981) 2 WLR 722 (where the requirement now is that the applicant should have sufficient interest in the matter to which the application relates). Tambiah J. has discerned from a study of the decided cases that two requirements must be satisfied. They are (i) that an applicant for Mandamus must show some interest over and above the interests of the community as a whole or the class of the community to which he belongs; and (ii) that even where he comes forward in the public interest he must be able to show

some personal interest in the matter complained of. In his view the present Petitioner does not satisfy either of these tests. L.H. de Alwis J. has not come to a finding as to whether the petitioner has satisfied the requirement of a sufficient interest in the performance of a public duty because in his view the respondent's duty to appoint these 53 selectees is not a public duty. There is therefore no decision by the Court of Appeal on the question as to whether Mr. R.P. Wijesiri M.P. has a sufficient standing to institute these proceedings.

In this connection it would be relevant to refer to the views of an eminent jurist on the question of locus standi. Soon after the decision of the Privy Council in *Durayappah Vs. Fernando* (1967) 3 WLR 289, in an Article entitled *Unlawful Administrative Action* in (1967) 83 L.Q.R. 499, *H. W. R. Wade* expressed the view that one of the merits of Certiorari is that it is not subject to narrow rules about Locus standi, but is available even to strangers, as the Courts have often held, because of the element of public interest. In other words it is a genuine remedy of public law, and all the more valuable for that reason (at p. 504). As regards the applications for *Mandamus* they should, in his view, in principle be no more exacting than it is in the case of the other prerogative remedies, because public authorities should be compellable to perform their duties, as a matter of public interest at the instance of any person genuinely concerned; and in suitable case, subject always to discretion, the Court should be able to award the remedy on the application of a public spirited citizen who has no other interest than a due regard for the observance of the law- *Wade – Administrative Law* (4th Ed) 608. The result of a restrictive doctrine of standing, therefore, would be to encourage the government to break the law; yet this is exactly what the prerogative writs should be able to prevent (p. 609). To restrict Mandamus to cases of personal legal right would in effect make it a private law remedy (p 610). These observations, with which I am in respectful agreement, appear to make the second requirement , insisted upon by Tambiah J. i.e.: some personal interest in the matter complained of, unnecessary. But the first requirement ought, in my view, to be satisfied, and it is satisfied if the applicant can show a genuine interest in the matter complained of, and that he comes before Court as a public spirited citizen concerned to see that the law is obeyed in the interest of all, and not merely as a busy body perhaps with a view to gain cheap publicity. As to whether an applicant satisfies this second requirement will depend on the facts

of each case. There will always be categories of persons whose interest in seeing that justice is done by public authorities is more than that of the average citizen. A Member of Parliament may under certain circumstances fall into that category because" Members of Parliament represent the whole community, responsible in the last resort, as Burke pointed out, to their own conscience. They are not mere delegates of their constituents" *Wade & Phillips – Constitutional Law* (7th Ed) p. 124.

In applying the principles we gather from decisions of the English Courts on the question of locus standi we have to bear in mind that after the adoption of a Republican Constitution our members of Parliament have a character different to M.P.'s of the pre Republican era. According to the preamble to our present Constitution they are the freely elected representatives of the people of Sri Lanka, who have mandate from, and an obligation to the people to see that a just, social, economic and cultural order may be attained.

As stated earlier, the written test was held on 26.5.78. The matter of the irregularity in the holding of the intelligence test paper at one of the centres was raised in Parliament on 9.11.79 by another opposition M.P. who demanded that the whole examination be cancelled. In reply to a question raised by the same M.P. on 1.12.79 the Minister of Public Administration assured the House and the country that there were no serious irregularities. On 22.12.79 His Excellency the President, in reply to a letter addressed to him by another Opposition M.P., replied that investigations conducted by the Minister of Education and the Commissioner of Examinations had revealed that the physical circumstances of supervision had necessitated the opening of the packet 25 minutes before instead of 10 minutes before the commencement of the paper and that no irregularities whatsoever had been committed. It is only thereafter that the names of the successful candidates were published on the notice board of the Ministry on 24.12.79. Then again the C.I.D. replied on 31.12.79 to the Railway Clerical Service Union, which had also made allegations of corruption that "there was no evidence to accept that any offence had taken place". On 12.2.80 the National Clerical Service Union wrote to H.E. the President that it had no confidence in the limited competitive examination and requested that a fresh examination be held. The letters of appointment were intercepted on 15.5.79. On 9.6.80 the Union received a reply that the U.N.P.

Working Committee had taken a decision to suspend the appointments to the S.L.A.S. based on the results of the limited competitive examination. After the Government had decided to cancel the written paper in general intelligence, an M.P. speaking on behalf of the Deputy Minister of Public Administration stated in Parliament that the letters of selection which had been signed and which had been sent to the tappal section for posting on 15.5.79 were not despatched because on representations made by the Public Service National Trade Union Federation he had requested the Respondent not to post the letters to the 53 successful candidates.

On 3.9.80 and again on 25.9.80 the Petitioner spoke in Parliament on behalf of the 53 candidates and said that it would be a grave injustice to them who had been waiting for one year with great frustration and hoping that the appointments would be given soon. He requested the government not to commit excesses against the honest, educated and efficient public servants of this country and thought the result would be the spread of frustration and disgust in the whole public service. The petitoner reverted to this matter once again in Parliament on 4.11.80. and referred to the earlier replies given by the government that inquiries conducted by the department of examination and even by the C.I.D. revealed that no irregularities had taken place, and that therefore the 53 candidates had been discriminated against.

In the light of the sequence of events, the results of the investigation conducted by the authorities and the genuine interest evinced by the Petitioner it would not be correct to label him as a mere busy body simply interfering in things which do not concern him. In instituting these proceedings he has acted bona fide as he may have thought that he was acting in the public interest; this was one of the reasons that influenced me to delete the order for costs made against him by the Court of Appeal.

The second question we are called upon to decide is less troublesome. It involves a simple application of Article 55(5) of the Constitution. In terms of papagraph (1) of Article 55 the appointment, transfer, dismissal and disciplinary control of public officers is vested in the Cabinet of Ministers, and all public officers hold office at pleasure. Paragraph (3) empowers the Cabinet to delegate such powers to the Public Service Commission (P.S.C.), except such powers as have to

be exercised over Heads of Departments. Article 58(1) empowers the P.S.C. to delegate its powers of appointments etc. to a public officer. So that the respondent, who is a public officer, holds only a delegated power, which power ultimately resides in the Cabinet of Ministers. Now paragraph (5) of Article 55 provides as follows:-

> Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 129 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, 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.

The present application not being one under Article 126(1) where a public servant is complaining that any fundamental right of his has been infringed by executive or administration action, it is the contention of the learned Additional S.G. that Article 55(5) of the Constitution completely precludes this Court from questioning in these proceedings the decision either of the respondent not to send the letters to the successful candidates or the decision of the Cabinet to cancel the Intelligence test paper.

Mr. H.L. de Silva contends, however, that the present application is not one seeking to question any decision of a public officer in regard to *an appointment*. But it seems to us, and there is no doubt, that by this application the petitioner is seeking to question the decision of the respondent *"concerning an appointment"*. The modern trend, after the decision in *Anisminic Ltd. Vs. Foreign Compensation Commission* (1969) 2 A.C. 147 is not to give effect to such preclusive clauses if the decisions sought to be quashed are proved to be unlawful; and that notwithstanding the fact that the preclusive clause is contained in a written constitution rather than in an ordinary statute it would not afford an answer to unlawful acts of the executive - *Bindra, Interpretation of Statutes* (6th Ed) P. 808. But even assuming his submission to be correct, this will not help the petitioner, in the absence of proof that the decision is clearly unlawful. The Court of Appeal has found as a fact that the decision was made not as a result of trade union pressure but because of allegations and counter allegations regarding the holding of the examination. I am therefore

of the view that Article 55(5) precludes us from granting the petitioner any relief.

In view of his answers to the first and second questions Tambiah J. has not considered it necessary to deal with the nature of the respondent's duty in making appointments to the public service. de Alwis J. has taken the view that the duty, if duty there be to appoint the selectees is a private, and not a public duty. The notice calling for applications from candidates contains a clause reserving to the Ministry the right to postpone or cancel the examination if it considers it necessary to do so. It also reserved the right to refrain from filling any of the vacancies. It is therefore difficult to impose on the respondent an obligation in the nature of a public duty either to fill the vacancies or to make the appointments of the person selected.

On the issue of "futility" the two Judges have disagreed. Tambiah J. has taken the view that as the respondent himself did not have the power to refuse to appoint if the Court were to grant a writ of Mandamus, but only an apprehension that the Cabinet of Ministers would frustrate it, de Alwis J. says that the Cabinet has the power to rescind any appointment made by the respondent in obedience to the order of Court. He bases his view on an application of Article 59(c) of the Constitution which empowers the Cabinet of Ministers to alter, vary or rescind any appointment made by a public officer holding delegated powers from the P.S.C. In view of our answers to questions 2 & 3 above it appears unnecessary to embark upon an interpretation of Article 59(c).

It has been said that the petitioner's motive in instituting these proceedings was to assist these 53 persons rather than to serve the public interest. It is not improbable that he wished to assist them, but it would be unfair by him to say that that was the sole motive. The interest taken by him from the time he knew that the appointments were not going to be made are matters of record. As I have stated earlier his actions have been bona fide and mainly in the public interest. But the law is against him. Hence our decision to dismiss this appeal without costs and also the decision to delete the order for costs made against him in the Court of Appeal.

WANASUNDERA, J.

I agree with the conclusions of Wimalaratne, J., that this appeal should be dismissed without costs and also to the direction deleting the order for costs made in the Court of Appeal.

Article 55 precludes us from granting relief in this matter and in these circumstances I do not wish to make a pronouncement on the question of *locus standi.*

Ratwatte, J. —

I agree with Wimalaratne. J..

Appeal dismissed.