

**KAMALAWATHIE AND OTHERS**

**v.**

**THE PROVINCIAL PUBLIC SERVICE COMMISSION,  
NORTH-WESTERN PROVINCE AND OTHERS**

SUPREME COURT  
FERNANDO, J.  
WADUGODAPITTIYA, J. AND  
ISMAIL, J.  
SC APPLICATION 300/2000  
23<sup>RD</sup> AUGUST, 2000

*Fundamental rights - Transfer of teachers by a Provincial Director of Education - Breach of National Policy - Article 12(1) of the Constitution.*

The petitioners were teachers in the Sri Lanka Teachers' Service. The 4<sup>th</sup> respondent (the Provincial Director of Education, North-Western Province) to whom the power of transferring teachers had been delegated by the 1<sup>st</sup> respondent (the Provincial Public Service Commission of the North-Western Province) transferred the petitioners with effect from 02. 05. 2000. The letters of transfer stated that in accordance with the National Teacher Transfer Policy set out in circular No. 95/11 issued by the Ministry of Education and Higher Education it had been decided to transfer teachers who had less than three years service in difficult areas. No other reason was given.

The Circular 95/11 provided that subject to certain exceptions including transfers necessitated by exigencies of service in very urgent and special circumstances transfers should be on the recommendation of a duly established Teacher Transfer Board. Even in the case of such urgency it was required that the Teacher Transfer Board be summoned and informed within two weeks. Provision was also made for an Appeal Board. Chapter III of the Establishments Code was made applicable except as otherwise expressly provided in the circular. None of the exceptions provided by the circular applied to the petitioners; no Teacher Transfer Board or Appeal Board had been set up, and accordingly the impugned transfers had been made and appeals had been dealt with, without any reference to such boards.

It was submitted on behalf of the respondents that the transfers were effected as there was an excess of teachers in certain zones and a shortage of teachers in other zones, hence transfers were on account of exigencies of service.

**Held :**

1. Even accepting that the 4<sup>th</sup> respondent did have power to make the impugned transfers, an essential pre-requisite for the exercise of that power was the recommendation of the Teacher Transfer Board. His failure to obtain those recommendations vitiated the transfer orders, which were, therefore, in violation of the petitioner's fundamental rights under Article 12(1).

*Per Fernando, J.*

"While powers in respect of education have been devolved to Provincial Councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that subject."

2. The transfer letters did not allege "exigencies of service". It is not open to the respondents to allege one reason in the transfer letters and to rely upon another when they come to court. Apart from anything else, that would be stultifying the appeal procedure.

**APPLICATION** for relief for infringement of fundamental rights.

*Upul Jayasuriya* for petitioners.

*Mahen Gopallawa*, State Counsel for respondents.

*Cur. adv. vult.*

October 03, 2000.

**FERNANDO, J.**

The twenty Petitioners are teachers in the Sri Lanka Teachers' Service. Each of them received a standard transfer letter - dated either 31. 03. 2000 or 01. 04. 2000 - issued by the 4<sup>th</sup> Respondent (the Provincial Director of Education of the North-Western Provincial Council) and captioned "Transfer of teachers who have not completed service in difficult areas", transferring him/her with effect from 02. 05. 2000. The letters stated that in accordance with the national teacher transfer policy set out in Circular No. 95/11 issued by the Ministry of Education and Higher Education, it had been decided to transfer teachers who had less than three years' service in difficult areas. No other reason was given.

Although the transfers were challenged for several different reasons, at the hearing learned Counsel for the Petitioners confined his challenge to one ground: that the transfers had been effected without recourse to a Teacher Transfer Board, as required by Circular No. 95/11 and the Establishments Code, and that consequently the Petitioners had been denied the protection thereof in violation of Article 12(1).

Circular No. 95/11 dated 31. 03. 95 stated, among other things, that in order to make education more fruitful, the Government had decided that a teacher transfer policy should be formulated so as to ensure the welfare of students and teachers to the utmost; that in order to secure the professional security and freedom of teachers, they should be able to serve without fear of unjust transfers; and that the teacher transfer policy set out therein had been approved by the Cabinet of Ministers on 18. 01. 95 as national policy, with which every official (taking action in connection with teacher transfers) must comply. The Circular specifically provided that apart from transfers in connection with pending or proposed disciplinary action, in every other instance transfers should be on the recommendation of a duly established teacher transfer board. This was subject to two exceptions: a transfer upon the request of a teacher for reasons of health, and a transfer necessitated by the exigencies of service in very urgent and special circumstances. However, even in the latter case, it was required that the teacher transfer board be summoned and informed within two weeks. Provision was also made for an appeal board. Chapter III of the Establishments Code was made applicable except as otherwise expressly provided in the Circular.

Chapter III of the Establishments Code makes detailed provision in regard to transfers. It specifies the authorities having the power to transfer public officers, and section 3:1 stipulates that "the authority ordering a transfer will act on the advice of a Transfer Board, except in cases referred to in

section 3:2 when the transfers will be ordered entirely at the discretion of the authority". Section 3:2 provides that a Transfer Board will not deal with transfers not involving a change of station, transfers on disciplinary grounds, transfers necessitated by the exigencies of service, and transfers in a Department having less than 25 transferable officers. Section 4 requires that, as far as possible, all transfers should take effect from the 1<sup>st</sup> of January, and that at least two calendar months' notice of transfer should be given.

The 4<sup>th</sup> Respondent's position, as stated in his affidavit and as submitted by State Counsel, was that the power to transfer teachers was vested in the 1<sup>st</sup> Respondent, the Provincial Public Service Commission (under section 32(2A) of the Provincial Councils Act, No. 42 of 1987, as amended by Act No. 28 of 1990); that that power had been delegated to the 4<sup>th</sup> Respondent (by the Provincial Council's Circular No. 95/2 dated 16. 02. 95); that the impugned transfers had been effected to redress an imbalance of teachers, there being an excess of teachers in five zones in the Kurunegala District, and a shortage of teachers in two zones in the Puttalam District (as revealed by surveys carried out in 1998/99); that it was those teachers who were excess **and** had not completed their mandatory period of service in difficult areas, who had been selected for transfer; that such transfers had commenced in 1999; and that fifteen Petitioners who had submitted appeals had been granted some relief.

Learned State Counsel conceded that no teacher transfer board or appeal board had been set up, and that accordingly the impugned transfers had been made, and the appeals had been dealt with, without any reference to such boards.

Circular No. 95/11 sets out national policy on an important aspect of education. A fair and impartial teacher transfer policy is essential to ensure that teachers serve with dedication in the best interests of the children entrusted to their care. A national policy regarding such transfers is most

desirable. While powers in respect of education have been devolved to Provincial Councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that same subject.

We are concerned in this case not with the question who has the **power** to transfer teachers, but rather with the proper **procedure** for the exercise of that power. The Circular, read with the Establishments Code, made it very clear that the teacher transfer board and the appeal board were essential components of that procedure. That procedure constitutes a valuable safeguard for the protection of the rights of teachers. Even accepting that the 4<sup>th</sup> Respondent did have the power to make the impugned transfers, an essential pre-requisite for the exercise of that power was the recommendations of the teacher transfer board. His failure to obtain those recommendations vitiated the transfer orders, which were therefore in violation of the Petitioners' fundamental rights under Article 12(1). It is hardly necessary to add that the failure to establish a transfer board did not enlarge the 4<sup>th</sup> Respondent's discretion or make it unconditional.

While that disposes of the issue in this case, I must refer to learned State Counsel's submission that the transfers were on account of the exigencies of service. First, Circular No. 95/11 does not dispense with the need to obtain the recommendations of the teacher transfer board in every case of "exigencies of service", but only where there is genuine urgency. Second, even in cases of urgency the board must be promptly summoned and informed. In so far as the present case is concerned, the alleged excesses and shortages were known in 1999, and should have been taken into consideration when deciding upon the annual transfers for 2000. It was not reasonable to claim in March 2000 that there was some urgency which prevented recourse to the teacher transfer board. Finally, the transfer letters did not allege

“exigencies of service”. It is not open to the Respondents to state one reason in the transfer letters and to rely upon another when they come to Court. Apart from anything else, that would stultify the appeal procedure.

Having regard to the need to avoid disrupting the education of the children involved, I do not quash the impugned transfer orders. Learned State Counsel stated that on appeal some Petitioners had been given **mutually acceptable** alternative stations, while others had been given deferments: all those orders will stand. However, it is just and equitable that the Petitioners should be fully compensated for the violation of their rights. I order the Provincial Ministry of Education of the North-Western Provincial Council to pay each of the Petitioners compensation and costs in a sum of Rs. 60,000, which shall be paid in two instalments: Rs. 20,000 on 01. 11. 2000, and Rs. 40,000 on 01. 02. 2001. If, however, in the annual transfers for the year 2001, any Petitioner is retransferred (effective not later than 01. 01. 2001, and operative for not less than one year) to the school in which he/she was serving prior to the impugned transfers, he will cease to be entitled to the second instalment of Rs. 40,000.

**WADUGODAPITIYA, J.** - I agree.

**ISMAL, J.** - I agree.

*Relief granted.*