

**PREMACHANDRA AND DODANGODA**  
**v.**  
**JAYAWICKREMA AND BAKEER MARKAR AND OTHERS**

COURT OF APPEAL.

K. PALAKIDNAR J, (P/CA).

S. N. SILVA J. &

D. P. S. GUNASEKERA J.,

C.A. 376/93.

C.A. 377/93.

16, 17 AND 29 SEPTEMBER 1993.

*Writs of Quo Warranto, Certiorari and Mandamus – Provincial Council Elections – Governor's power – Appointment to office of Chief Minister of a Provincial Council – Article 154 F (4) of the Constitution – Area of review – Reasonable exercise of discretion – Reasonableness – Wednesbury Rules – Wednesbury's unreasonableness – Confidential inquiries – Provincial Council Election Act No. 2 of 1988 section 60.*

The People Alliance (PA) a recognised political party and DUNF had 27 elected members (18 being PA members and 9 being DUNF) in the Provincial Council of the North Western Province whilst the UNP had 25 members including two bonus seats. The PA and DUNF had 28 elected members (the PA having 24 members and DUNF four members) while the UNP had 27 elected members including the two bonus seats in the Provincial Council of the Southern Province.

**Held :**

The appointment of a Chief Minister for a Provincial Council is provided for in Article 154 F(4) of the Thirteenth Amendment to the Constitution which reads thus.

° The Governor shall appoint as Chief Minister, the member of the Provincial Council constituted for that Province, who, in his opinion, is best able to command the support of a majority of the members of that Council.

Provided that where more than one-half of the members elected to a Provincial Council are members of one political party, the Governor shall appoint the leader of that political party in the Council as Chief Minister."

This Sub-Article casts a specific duty on the Governor to appoint a Chief Minister for the Province. The proviso and the main Sub-Article regulate two distinct situations viz:

(i) The proviso regulates a situation where a single party has more than one-half of the members of the Council. Here, it is mandatory on the Governor to appoint the leader of such party as Chief Minister.

(ii) The main Sub-Article regulates a situation where a single party does not have more than one-half of the members of the Council. Here the Governor is required to appoint the member who " in his opinion is best able to command the support of that Council ".

In situation (i) it is conceded that the Governor has no discretion.

The purpose for which this power is vested in the Governor is firmly rooted in the basic mandate of Democracy that the People's will shall prevail. Viewed in this light there is no distinction in substance in the criteria for appointment in relation to the two situations stated above.

The process of ascertaining the member who is best able to command the majority in the Council, is that by which the Governor forms the opinion referred to in the main Sub-Article (situation ii). It is this process which is subject to judicial review – that is whether the decision making process was flawed.

The discretion must be exercised reasonably. A person entrusted with a discretion must so to speak direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. It might be so unreasonable that it might almost be described as being done in bad faith. In fact, all these things run into one another. These are the *Wednesbury* rules.

When the said Rules are applied in the exercise of the power, in question, by the Governor, the law to which he should direct himself is the provisions of Article 154 F (4) of the Constitution and the matters that he is bound to consider are the evidence or credible information as to the member who is best able to command the support of the majority in the Council. The foremost matter to be considered is the support expressed by the respective political parties having members in the Council. The next matter to be considered is the support expressed by the individual members who are elected. These matters have to be considered bearing in mind the objective of the constitutional provision that the will of the People should prevail.

The petitioners produced firm evidence in the form of declarations made by the secretaries of the PA and DUNF. This was followed by solemn declarations in writing (affidavits) by the individual members who were elected from these parties: Thus the petitioners adduced the best possible evidence of the support of a majority of the members of each Council.

The claim that confidential inquiries were made and assertions that individual members had expressed support for the UNP candidate were not verifiable in the absence of vital information regarding the identity and number of such persons. The bald statements of support cannot stand scrutiny in the light of solemn declarations made by the members of the two parties who constitute a majority that they support the respective petitioners for appointment as Chief Ministers. Any person would be acting grossly unreasonably, if he decided to base his decision without taking into consideration the uncontradicted evidence adduced by the petitioners and upon the hearsay and unverifiable claims made by the persons appointed as Chief Ministers.

It is not the merits of the decision that the Court will review but its reasonableness. In considering reasonableness the Court examines only whether the Governors took into account the matters that they are bound to consider. The support of the respective parties and of the elected members are the foremost matters to be taken into consideration.

The Governors made no disclosure of the nature of the confidential inquiries they carried out or their results. As all the members who do not belong to the UNP have filed affidavits that no inquiries were made from them. The appointment made on the basis of undisclosed confidential inquiries tends to cast the basis of the respective decisions into secrecy. This is repugnant to administrative law. Although non-disclosure and confidentiality may be permitted in rare instances in the public interest or good government, such a plea cannot hold water where the other side has made full disclosure of firm and verifiable evidence to the contrary.

The same matter may be viewed from the perspective of the fairness of the decision making process. Fair procedure by the Governors would have been to confront the respondents with the material in hand and asked for evidence to the contrary. Instead the Governors embarked hurriedly on confidential inquiries

to seek support for the claims of the respondents: This shows a tilt on their part in favour of the persons appointed as Chief Ministers. The irresistible inference is that the decision making process is thereby flawed. Hence the decisions were unreasonable and illegal.

Certiorari and quo warranto can go but mandamus cannot compel the appointment of any particular person. The appointment of a Chief Minister according to law however can be compelled by mandamus.

**Cases referred to:**

1. *Adegbenro v. Akintola and another* (1963) 3 All ER 544; (1963) AC 614 (P.C.).
2. *Associated Provincial Picture House Ltd. V. Wednesbury Corporation* (1948) 1 KB 223 (C.A.).
3. *Short v. Poole Corporation* (1926) 1 Ch 66.

Applications for writs of quo warranto, certiorari and mandamus.

*H. L. de Silva, P.C., with R. K. W. Goonasekera, Gomin Dayasiri, Nihal Jayamanne, Nimal Siripala de Silva, Nigel Hatch, Miss. Nurani Amarasinghe* for petitioners in all cases.

*Hon. Tilak Marapana, P.C., A. G. with K.C. Kamalabayson, D. S. G.* for 1st respondent in all cases.

*L. C. Seneviratne, P.C. with S. C. Cyosette Thambiah, D. H. N. Jayamaha, Naufel Rahuman, Daya Palpola, Lakshman Perera and Ronald Perera* for 2nd respondent in all cases.

*Cur. adv. vult.*

October 08, 1993.

**Order of Court read by Palakidnar, P/CA**

The four applications stated above were argued together by agreement of learned President's Counsel appearing for the parties, in view of the similarity of issues that arise for consideration by Court. Applications CA 376/93 and 377/93 relate to the appointment of the Chief Minister of the Provincial Council of the North Western Province. The Petitioner in both applications is Mr. G. M. Premachandra a member elected to the North Western Provincial Council from the Democratic United National Front, (DUNF), a recognised Political Party. In application CA 376/93 the main relief sought is a Writ of Quo Warranto declaring that the 2nd Respondent being a member of the United National Party (UNP) elected to the Council is not entitled to be appointed to the office of Chief Minister by the Governor.

In application CA 377/93 the reliefs sought are a Writ of Certiorari quashing the appointment of the 2nd Respondent as Chief Minister and for a Writ of Mandamus compelling the Governor to appoint the Petitioner as Chief Minister. Similarly, applications CA 378/93 and CA 379/93 relate to the appointment of the Chief Minister of the Provincial Council of the Southern Province. The Petitioner in both applications is Mr. Amarasiri Dodangodage elected to the Council from the Peoples Alliance (P.A.), a recognised Political Party. In application CA 378 the main relief sought is a Writ of Quo Warranto declaring that the 2nd Respondent, being a member of the U.N.P. elected to the Council is not entitled to be appointed to the office of Chief Minister by the Governor. In application CA 379/93 the reliefs sought are a Writ of Certiorari quashing the appointment of the 2nd Respondent as Chief Minister and for a Writ of Mandamus compelling the Governor to appoint the Petitioner as Chief Minister.

The facts relevant to each Provincial Council will be stated separately, followed by a brief statement of submissions of learned President's Counsel, a review of the relevant facts and a consideration of the issues that arise in both sets of applications.

### **Relevant Facts:**

#### **CA 376/93 & CA 377/93**

#### **Provincial Council of the North Western Province**

The P. A. and the DUNF together have 27 elected members in the Council, whilst the U.N.P. has 25 members including the two bonus seats.

After the results were known, the PA and the DUNF and the candidates thereof who were duly elected to the North Western Provincial Council decided unanimously to work together to form the Provincial Council administration of the said Province and also decided to support the Petitioner for appointment as the Chief Minister of the Council. The aforesaid decision was communicated to the 1st Respondent, the Governor of the North Western Province, in the following manner.

On 19th May, 1993 Mr. Gamini Dissanayake, Acting Leader of the DUNF and Mr. D. M. Jayaratne M.P. and Secretary of the PA

met the 1st Respondent Governor in Colombo and handed over a letter (P2) dated 19th May, 1993 signed by the Secretaries of the PA and the DUNF, to the effect inter alia that the two parties decided to form the administration in the North Western Provincial Council and since the said two parties together had the majority of the members, requested the Governor to appoint the Petitioner as the Chief Minister of the said Council. At the said meeting when the 1st Respondent Governor was apprised of the constitutional provisions pertaining to the appointment of a Chief Minister he assured Mr. Dissanayake and Mr. Jayaratne that he would do the correct thing and act according to law.

On 20th May, 1993 Messrs. Dharmasiri Senanayake, M.P. Secretary of the SLFP, D. M. Jayaratne M.P. and Secretary of the PA, the Petitioner Mr. Premachandra and Anura Fernando member of the working Committee of the DUNF met the 1st Respondent Governor around 5.00 p.m. in Colombo. Upon seeing them the 1st Respondent Governor informed them that the Petitioner could not take oaths as Chief Minister, there being no staff and that they should have obtained an appointment to see him. At this stage it was explained to the Governor that they came to hand over documents and affidavits from the elected members of the PA and the DUNF to the North Western Provincial Council and that all these members have unanimously decided to support the appointment of the Petitioner as Chief Minister of the said Council. P3, P3a, P4, P4a and the affidavits P5.1 to P5.26 are copies of the documents handed over. The Governor having noted the contents thereof reassured them that he would do the correct thing and act according to law. He acknowledged the receipt of the said documents by a writing dated 21.5.93 marked P6a (vide affidavits of Mr. Dharmasiri Senanayake M.P. and D. M. Jayaratne M.P. marked P6.).

The Commissioner of Elections acting in terms of Section 60 of the Provincial Council Elections Act No. 2 of 1988 caused the names of the members elected to each of the Provincial Councils from the Administrative Districts to be published in the Government Gazette No. 767/8 of 20th May, 1993. In terms of the said notification the UNP secured the election of 23 members, the PA 18 members and the DUNF 9 members to the North Western Provincial Council. The UNP also had two additional bonus members. Thus the PA together with the DUNF have 27 members whereas the UNP has 25 members

resulting in the PA and DUNF together having a majority of two members.

On 21st May, 1993 in view of various pronouncements made by Government Ministers that the UNP would form the administration in the North Western Province, Mrs. Sirimavo Bandaranaike M.P., Leader of the Opposition made representations to His Excellency the President regarding the appointment of Chief Ministers for North Western and Southern Provincial Councils. His Excellency advised Mrs. Bandaranaike to make necessary representations to the Governors. (Vide affidavit of Mr. D. M. Jayaratne, M.P. Secretary of the PA who was present at the said meeting with His Excellency marked P9.)

Consequent upon the aforesaid meeting with His Excellency, Mrs. Sirimavo Bandaranaike had sent two separate letters on 21.5.93 to the Governors of the North Western and Southern Provincial Councils seeking an interview with the Governors to discuss the matter of selecting a Chief Minister. The letters state that the correct course, according to the Constitution, is to appoint the PA, DUNF nominees who command the majority in each Council and to refrain from making an appointment until the interview is granted. (P9a). A reply was received to this letter on the same day at 11.55 a.m. informing Mrs. Bandaranaike that the 2nd Respondent has already taken oaths as Chief Minister and assumed duties (P10).

The 1st Respondent in his affidavit dated 12-6-93 filed in this Court on 11-6-93 admits the receipt of the letters, documents and affidavits referred by the Petitioner. He denies being unaware of the relevant constitutional provisions as alleged and giving any indication to the Petitioner that he may take oaths as Chief Minister. According to the affidavits of the 1st the 2nd Respondents, they met on 19-5-93 at which meeting the 2nd Respondent gave letter 1R1 stating that he is best able to command the support of a majority of the members of the Provincial Council. The next meeting was on 21-5-93 at which the 2nd Respondent gave letter 1R2 which states inter alia, that he " had discussions including today with certain members of the other parties elected to the Provincial Council. They are prepared to support me in the Council ".

The basis of the decision of the 1st Respondent is given in paragraph 15 (IV) of his affidavit, which reads thus :

" That since the United National Party had the highest number of seats for a single party in the said Provincial Council and having regard to the fact that PAP and DUNF together had only two more elected members than the United National Party and having made confidential inquiries in respect of the 2nd Respondent's claim I was firmly of the opinion that the 2nd Respondent should be appointed as the Chief Minister."

**CA 378/93 & CA 379/93**

### **Provincial Council of the Southern Province**

The P.A. and the DUNF have 28 elected members in the Council, whilst the UNP has 27 members including the two bonus seats.

After the results were known, the PA and the DUNF and the candidates thereof who were duly elected to the Southern Provincial Council decided unanimously to work together to form the Provincial Council administration of the said Province and also decided to support the candidature of the Petitioners Mr. Amarasiri Dodangoda for appointment as the Chief Minister of the said Council and as the Head of its administration. The aforesaid decision was communicated to the 1st Respondent Governor of the Southern Province in the following manner.

On 20th May, 1993 Mr. Palitha Pelpola, a Member of the Working Committee of the DUNF went to the residence of the 1st Respondent Governor at Beruwala and sought to hand over a letter dated 19-5-93 signed by the Secretaries of the PA and the DUNF to the effect inter alia that the said two parties had decided to form an administration in the Southern Province since they jointly had a majority of elected members over the UNP in the said Province. The said writing P2 requested the 1st Respondent Governor to appoint the Petitioner as the Chief Minister of the Southern Province.

When the Private Secretary of the 1st Respondent Governor was made aware of the contents of the letter P2 the said Secretary had informed Mr. Pelpola that the 1st Respondent Governor was indisposed. The said Secretary had gone inside the residence, came back



and requested Mr. Pelpola to deliver the said letter P2 at the office of the 1st Respondent Governor in Galle. Mr. Pelpola thereupon proceeded to Galle and handed over the original of the letter P2 to the Administrative Officer of the office of the 1st Respondent Governor who acknowledged receipt thereof. Copy of the acknowledgment is marked P2a and an affidavit of Mr. Pelpola deposing to what transpired on this day is marked P2b.

On 21-5-93 the Petitioner Mr. Dodangoda had gone to the residence of the 1st Respondent Governor at Beruwala at about 7.00 a.m. to hand over a set of letters and affidavits from the elected members of the PA and the DUNF to the provincial Council of the Southern Province unanimously signifying their support for the Petitioner's appointment as Chief Minister of the said Council. Upon arrival the Petitioner had been informed that the 1st Respondent was praying. A shortwhile thereafter the Petitioner met the 1st Respondent Governor and explained the contents of the documents that were handed over to him. Some of the documents were read over to the 1st Respondent Governor by his Secretary. The Governor had informed the Petitioner that he would call upon the 2nd Respondent Mr. M. S. Amarasiri who was the leader of the UNP to form the administration in the Southern Province Provincial Council and that if he declined to accept the office of Chief Minister then he would appoint the Petitioner as Chief Minister. The 1st Respondent Governor had acknowledged the receipt of the documents tendered by the Petitioner on a photo copy of one of the documents. Photo copies of documents signed by the elected members of the PA and the DUNF are marked P.3 and P3a. A copy of a letter signed by the Petitioner and dated 20-5-93 is marked P4 and photo copies of the affidavits deposed to by the 28 elected members of the PA and the DUNF are marked P5.1 to P5.28.

The Commissioner of Elections acting in terms of section 60 of the Provincial Councils Elections Act No. 2 of 1978 caused the names of the members elected to the Provincial Council of the Southern Province along with those who were elected to other Provincial Councils to be published in Government Gazette No. 767/8 on 20-5-93. The said gazette is marked P1. In terms of the said notification the UNP had secured the election of 25 members, the PA 24 members and the DUNF 4 members to the Southern Province Provincial Council, in addition the UNP had also secured the nomination of 2 bonus members. The resulting position was that the UNP

had secured 27 members and the PA together with the DUNF had 28 members in the Provincial Council of the Southern Province.

On 21st May, 1993 in view of various pronouncements made by Government Ministers that the UNP would form the administration of the Southern Province Provincial Council, Mrs. Sirimavo Bandaranaike M.P. and leader of the opposition had made representations to His Excellency the President regarding the appointment of the Chief Minister of the Southern Province Provincial Council. His Excellency had advised Mrs. Bandaranaike to make the necessary representations to the 1st Respondent Governor. An affidavit from Mr. D. M. Jayaratne, the Secretary of the PA who was present at the said meeting is marked P7. Consequent upon the meeting with His Excellency, the President, Mrs. Sirimavo Bandaranaike, M.P. had written a letter marked P8a dated 21-5-93 to the 1st Respondent Governor regarding the appointment of the Petitioner Mr. Dodangoda as Chief Minister of the Provincial Council of the Southern Province as he commanded the support of the majority of elected members of the said Provincial Council.

On 21-5-93 Mr. Anura Abeyratne accompanied by Mr. S. W. L. Bandara, Attorney-at-Law had gone to the office of the 1st Respondent Governor at about 2.30 p.m. to hand over the letter P8a. When the letter was handed over to the 1st Respondent Governor he had got a member of the staff to read it and thereafter informed Mr. Abeyratne that he had already appointed the 2nd Respondent Mr. M. S. Amarasiri as Chief Minister and he had been sworn in as such. Affidavit of Mr. S. W. L. Bandara, Attorney-at-Law deposing as to what transpired at the said meeting is marked P9.

The 1st Respondent Governor in his undated affidavit (filed in Court) in paragraph 7 admits that he met the persons and received the documents referred above. In his affidavit he further states that:

1. that on 21st May, 1993 around 10.00 a.m. the 2nd Respondent Mr. Amarasiri met him at his residence at Beruwala and informed him ;

- a) that he has had discussions with some of the members of the Provincial Council who are not members of the UNP and those members had assured the 2nd Respondent that they would support him in the Council.

b) that the aforesaid members together with members of the UNP had an absolute majority in that Council.

2. that the 2nd Respondent handed over to him an affidavit in support of his claim marked 1R1.

The basis of his decision is given in paragraph 14 (iii) of his affidavit which reads thus:

" that since the UNP had the highest number of seats for a single party in the said Provincial Council and having regarded to the fact that the PA and DUNF together had only one more elected member than the UNP and having made confidential inquiries in respect of the 2nd Respondent's claim I was firmly of the opinion that the 2nd Respondent should be appointed as the Chief Minister."

#### **Statement of the submissions of learned Counsel:**

Learned President's Counsel for the Petitioner submitted that the Petitioners are best able to command the support of the majority of members in each Council on the basis of the declarations of support and the affidavits submitted to the respective Governors. It was submitted that the Governors acted in violation of their constitutional duty and ultra vires Article 154 F (4) of the Constitution when they purported to appoint the Chief Ministers. It was strongly submitted that on the material placed before the Governors, they acted unreasonably, without rationality and in violation of the law. Further, that undue weight has been attached to the fact that the persons appointed as Chief Ministers are from the party having the largest number of members in the Council, whereas the true test is to ascertain which person commands the support of the majority of the Council. That, the Governors have not attached due weight to the declarations of support and affidavits submitted whereby a majority of the members in each Council pledged support to the Petitioners. The Petitioners rest their case primarily, if not solely, on the support of the numerical majority in each Council. It was submitted that the evidence of this numerical majority has not been refuted or contradicted by any acceptable evidence to the contrary.

The learned Attorney General who appears for the respective Governors submitted that they acted reasonably and in the proper exercise of their discretion. He submitted that since the Governors have acted within jurisdiction, the area of review by this Court of the material on which they acted, is limited. That, the decisions cannot be described as totally unreasonable so as to be rejected under the well known "Wednesbury Rules". He relied heavily on the confidential inquiries carried out by the Governors (as stated in their affidavits) which yielded support to the claims of the persons appointed that they have backing of members outside their party ranks.

Learned President's Counsel for the respective 2nd Respondents supported the submissions of learned Attorney General with regard to the limited area of review that is possible by this Court in relation to the decisions of the Governors. He relied heavily on the judgment of the Privy Council in the case of *Adegbenro Vs Akintola and Another* <sup>(1)</sup>. It was submitted that the decisions of the Governors cannot be equated to that of public officials who are empowered to act in their discretion. That, the decisions involve a "delicate political judgment" and that there is no legal restriction as to the persons who may be consulted or the material on which reliance may be placed for such purpose. It was also submitted that this Court may review only the legality of the decisions and not their merits.

We now pass to a consideration of the specific issues that arise in relation to both sets of applications.

### **Law applicable to the appointment of a Chief Minister and the criteria for such appointment**

The appointment of a Chief Minister for a Provincial Council is provided for in Article 154 F (4) of the Thirteenth Amendment to the Constitution, which reads thus :

" The Governor shall appoint as Chief Minister, the member of the Provincial Council constituted for that Province, who, in his opinion, is best able to command the support of a majority of the members of that Council :

Provided that where more than one-half of the members elected to a Provincial Council are members of one political party, the Governor shall appoint the leader of that political party in the Council as Chief Minister."

This Sub Article casts a specific duty on the Governor to appoint a Chief Minister for the Province. The proviso and the main Sub Article regulate two distinct situations viz :

(i) the proviso regulates a situation where a single party has more than one-half of the members of the Council. Here, it is mandatory on the Governor to appoint the leader of such party as Chief Minister.

(ii) the main Sub Article regulates a situation where a single party does not have more than one-half of the members of the Council. Here, the Governor is required to appoint the member who " in his opinion is best able to command the support of that Council ".

It is conceded that in situation (i) the Governor has no discretion. But, the argument at the initial hearing was that the appointment in situation (ii) is wholly within the discretion of the Governor and is not subject to judicial review. This argument has been considered by Their Lordships of the Supreme Court (in the Order of Court dated 16-8-93 made upon a reference by this Court), from the perspective of two basic principles of Public Law. They are, firstly, the Rule of Law and secondly, the purposes for which statutory power is conferred on public authorities. Upon a consideration of these principles Their Lordships opined that :

"There are no absolute or unfettered discretions in public law : discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.

We have no doubt whatsoever as to the purpose for which Article 154 F (4) gave the Governor a discretion. By the exercise of the franchise the people of each Province elect their representatives, for the purpose of administering their affairs. The Governor

is given a discretion in order to enable him to select as Chief Minister the representative best able to command the confidence of the Council, and thereby to give effect to the wishes of the people of the Province. That discretion is not given for any other purpose, personal or political."

(page 10 of the Order of Court).

Thus the purpose for which this power is vested in the Governor is firmly rooted in the basic mandate of Democracy that the People's will shall prevail. Viewed in this light there is no distinction in substance in the criteria for appointment in relation to the two situations stated above. In relation to both situations, in substance, the criterion is, who commands the support of the majority of the members of the Council? In situation (i) covered by the proviso, the criterion is manifest in the result of the election, itself. The leader of the political party that has more than one-half of the elected members is patently the member best able to command the support of the majority of the members of the Council. In situation (ii) where no single party has a majority, the criterion is not manifest or patent as in (i). The role of the Governor is to ascertain the member who satisfies that criterion bearing in mind the true purpose of the power, that the will of the People should prevail. When that member is ascertained, the Governor has no discretion in the matter but to appoint him as Chief Minister. The duty then becomes equally mandatory as in situation (i). The process of ascertaining the member who is best able to command the majority in the Council, is that by which the Governor forms the opinion referred in the main Sub Article. It is this process which is subject to judicial review according to the determination of the Supreme Court. That is " whether his decision making process was flawed "

(page 13 of the Order of Court).

The specific matters on which review is exercised are stated in the conclusion of Their Lordships as follows :

" The exercise of the powers vested in the Governor of a Province under Article 154F (4), excluding the proviso, is not solely a matter for his subjective assessment and judgment ; it is subject to judicial review by the Court of Appeal. In applications for Quo Warranto, Certiorari and Mandamus, the Court of Appeal has

power to review the appointment, inter alia, for unreasonableness, or if made in bad faith, or in disregard of the relevant evidence, or on irrelevant considerations, or without evidence." (page 19 of the Order of Court).

### **Review on reasonableness of the impugned decisions**

The standard of reasonableness is stated in the oft quoted dictum of Lord Greene, MR in the case of *Associated Provincial Picture Houses Ltd. Vs Wednesbury Corporation* <sup>(2)</sup>. In later cases this dictum is commonly referred to as "Wednesbury's unreasonableness". Lord Greene in that case considered the validity of certain conditions imposed by a local authority for the grant of a licence for cinematograph performances on Sundays. It was held that these conditions were imposed unreasonably. In the course of the judgment he dealt with the requirement that discretion should be exercised reasonably in the following way :

" It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short Vs. Poole Corporation* <sup>(3)</sup> gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith ; and, in fact, all these things run into one another."

Dealing with the standard of reasonableness Professor H. W. R. Wade has in his book *Administrative Law*, 1988 (6th Edition) stated that it is not the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do (at p 407). In a later section he has observed, dealing with the several grounds of unreasonableness, that "the one principle that unites them is that powers must be confined within the true scope and policy of the Act."

When the said Rules are applied to the exercise of the power, in question, by the Governor, it is seen that the law to which he should direct himself will be the provisions of Article 154 F (4) of the Constitution and the matters that he is bound to consider will be the evidence or credible information as to the member who is best able to command the support of the majority in the Council. The task of ascertaining these matters becomes less complicated considering the system of elections applicable to Provincial Councils under Act No. 2 of 1988. All candidates at such elections are members of political parties, there being no individual candidates as such, and votes are cast for the respective parties or groups in the contest by the electorate. The number of members to be returned from each party or group is determined by such vote. Thus primarily the support of the individual members is readily ascertainable from the support of the parties or groups to which they belong. Therefore, the foremost matter to be considered is the support expressed by the respective political parties having members in the Council, to the appointment of a particular member as Chief Minister. The next matter to be considered, is the support expressed by the individual members who are elected, to the appointment of a particular member as Chief Minister. These are the matters to be considered by the Governor in exercising the power of appointment of a Chief Minister that is vested in him by Article 154 F (4) of the Constitution. These matters have to be considered bearing in mind the objective of the constitutional provision that the will of the People should prevail in deciding who should be charged with the administration of the Province. Their Lordships of the Supreme Court have in the opinion dealt with these matters to be considered by the Governor as follows:



" It is true that the requisite opinion does not relate to past facts, but it is not ' pure judgment ' for that assessment of support necessarily requires a consideration of expressions of support or opposition by Councillors, whether made in the Council or outside."

(page 11 of the Order of Court of the Supreme Court).

We have to now consider whether the matters relating to expression of support by the elected members have been considered by the respective Governors in arriving at their decisions. The foregoing statement of the relevant facts shows that the Petitioners produced firm evidence in the form of declarations made by the Secretaries of the PA and the DUNF that they support the appointment of the respective Petitioners as Chief Minister. This was followed by solemn declarations in writing (affidavits) by the individual members who were elected from these two parties expressing support for the appointment of the respective Petitioners as Chief Ministers. Thus, the Petitioners adduced the best possible evidence of the support of a majority of the members in each Council. In fact, in answer to a question posed by Court, Honourable Attorney General conceded that there is no other evidence that the Petitioners could possibly have adduced in support of their respective claims. However, it has to be mentioned that he qualified his answer by stating that the confidential inquiries carried out by the Governors would prevail over this and any other evidence. Be that as it may, as far as credible, ascertainable and verifiable evidence is concerned, the Petitioners have adduced the best possible evidence in support of their respective claims that they command the support of the majority of members in each Council.

On the other hand, what credible information have the persons who were in fact appointed as Chief Ministers (2nd Respondent in each application) produced in support of their claims of being able to command the support of the majority? Being members of the UNP and former Chief Ministers it would be reasonable to assume that they have the support of the members of the UNP although no evidence was adduced to establish such support before the Governors. But, that alone is not sufficient since the UNP, by itself does not command a majority in each of the Councils. They should adduce evidence or credible information of support from outside their party ranks to claim a majority. In this respect it is seen that the

only evidence or information produced before the Governor in relation to the North Western Provincial Council is the document 1R2 which is also marked as 2R1. This letter merely states that since the 19th of May the 2nd Respondent " had discussions including today with certain members of the other parties elected to the Provincial Council. They are prepared to support me in the Council ". The identity of the persons with whom these discussions were had, the parties to which they belong and the number of such persons are significant matters that are not mentioned in this letter. It is plain to see that this claim is not one that could ever be verified, in the absence of the vital information referred above.

Similarly, in the Southern Province Provincial Council the only material adduced by the 2nd Respondent is the affidavit 1R1 (also marked 2R1) dated 21-5-93. This affidavit is by the 2nd Respondent himself. It states that,

" that after the elections, some of the elected members who are not members of the UNP group have communicated to me their desire to support me and my group within the Southern Provincial Council when there is a necessity. I am personally known to these members and I am confident that they will give their support at Council meetings in order to gain a majority at a voting "

This statement too is bereft of the vital information referred above, and is one that is not verifiable.

It is thus plain to see that where the petitioners have adduced the best possible evidence in support of their claims, the persons appointed as Chief Ministers have adduced no credible information of their claim of support by a majority of the members. The bald statements of support referred in the documents of the Respondents cannot stand scrutiny in the light of solemn declarations made by the members of the two parties who constitute a majority that they support the respective Petitioners for appointment as Chief Ministers. Any person would be acting grossly unreasonably, if he decided to base his decision without taking into consideration the uncontradicted evidence adduced by the Petitioners and upon the hearsay and unverifiable claims made by the persons appointed as Chief Ministers.

On the question of the review of reasonableness the Honourable Attorney General and Mr. Seneviratne, P.C. argued that the extent of review by this Court of the decisions of the Governors is limited and they further argued that this Court cannot go into the merits of the decisions. As noted above, the review is as to reasonableness and not to the merits of the decision. In considering reasonableness the Court examines only whether the Governors took into account the matters that they are bound to consider. The support of the respective parties and of the elected members are the foremost matters to be taken into consideration. The foregoing analysis shows that the Governors have not considered the best evidence in regard to the matters which they are bound to consider. It also shows that the Governors have chosen to act on hearsay claims that are unverifiable.

Mr. Seneviratne, P.C. placed strong reliance on the judgment of the Privy Council in the case of *Adegbenro vs Akintola and Another* <sup>(1)</sup>. This case relates to an application for a Writ in respect of an order of the Governor of Western Nigeria removing the Prime Minister from office. The order of removal was made on the basis of a signed letter given by a majority of the members of the House of Assembly. It was contended that the material was not sufficient to support the order of removal and that the Governor could act only where the Prime Minister is defeated on the floor of the House. The Privy Council held that the material before the Governor was sufficient to support the decision and that the Governor need not act only upon a negative vote on the floor of the House. In this connection, Viscount Radcliffe observed as follows, at p550 ;

" To sum up there are many good arguments to discourage a Governor from exercising his power of removal except on indisputable evidence of actual voting in the House, but it is none the less impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes."

It is thus seen that the Privy Council's decision is based upon the premise that the Governor may act on evidence other than an actual negative vote. As noted above, there was firm evidence of a writing

sent by a majority of the House, on which the Governor acted. The observations made by Viscount Radcliffe as to the nature of the decision and that there is no legal restriction as to the persons whom the Governor may consult and the material to which he may turn in aid of his decision, have to be taken into consideration in the light of the particular facts in that case. Certainly, there is no support in that judgment for a proposition that the Governor could act on unsupported claims that are plainly not verifiable. On the contrary the Governor was found correct when he acted on the written statement of the majority of the members of the House. In the cases before us the respective Governors have without any basis disregarded not a mere written statement but solemn declarations made by a majority of the members.

### **Confidential inquiries by the Governors:**

We have to finally consider the position of the respective Governors that they made their decisions on the basis of " confidential inquiries ". The basis of the respective decisions of the Governors is set out in almost identical terms, in their affidavits. The relevant paragraphs of their affidavits have been reproduced above. Honourable Attorney General submitted that the decisions are reasonable since they are based upon the confidential inquiries that were carried out by the respective Governors. The Governors have made no disclosure, at any stage, of the nature of the inquiries carried out or the results of these inquiries. The statement of facts disclose that between the 19th and the 21st the petitioners submitted to the Governors the declarations and affidavits in support of their claims. The claims of the respective persons appointed as Chief Ministers, of support from outside their party ranks, were made on the 21st. At the stage these claims were made the Governors had with them the written declarations of support and affidavits submitted by the Petitioners. Therefore, a question arises as to the nature of the confidential inquiries that the Governors claim to have carried out within the few hours available to them on the 21st itself.

The relevant criteria, as noted above, is the support of the members of the Council. Therefore one would expect such inquiries, if any, to be carried out from the members who are not of the UNP. All members who do not belong to the UNP have filed affidavits in Court

that the respective Governors made no inquiries from them. These matters have not been refuted or contradicted by the Governors. In the result, we are left to speculate as to the persons from whom the Governors made the confidential inquiries, as claimed. In view of the specific denial by the respective members of the PA and the DUNF, the only possible inference is that inquiries were made from other persons. If so the result of such inquiries would be an irrelevant consideration. It has to be borne in mind that the power of appointing a Chief Minister is vested in the Governor by the Constitution being the Supreme Law of the land. The Constitution lays down the criteria on which such appointment should be made. The discharge of this power is a matter of grave public concern. It cannot be shrouded in a veil of secrecy. We have to observe that the claim of each Governor that he made the appointment, on the basis of undisclosed confidential inquiries tends to cast the basis of the respective decisions into secrecy. Such a process of decision making is repugnant to Administrative Law. The review of decisions made in the exercise of statutory power, on the basis of reasonableness, taking into consideration proper matters, the exclusion of irrelevant matters and acting on evidence, being basic tenets of Administrative Law, would be rendered illusory, if the authority vested with power is permitted to take refuge in confidentiality and secrecy as to the true basis of his decision. Although, non-disclosure and confidentiality may be permitted in rare instances, in the public interest or that of good government, such a plea cannot hold water, where the other side has made full disclosure of firm and verifiable evidence to the contrary.

The same matter may be viewed from the perspective of the fairness of the decision making process. At the stage the persons appointed as Chief Ministers (2nd Respondent in each case) made unsupported claims of support outside their party ranks, the Governors were possessed of declarations and affidavits of all other members pledging support to the Petitioners. Therefore the fair procedure to be adopted at that stage by the Governors, consistent with the principles of Administrative Law, was to have confronted each of the 2nd Respondents with the material in hand and require them to produce evidence to the contrary, for their claims to be considered. Instead, the Governors claim to have hurriedly embarked on confidential inquiries to seek support for such claims. This shows a tilt on their part in favour of the persons appointed as Chief Ministers.

The irresistible inference is that the decision making process is thereby flawed.

On the aforesaid review of the relevant facts and the applicable law, we hold that the decision of the 1st Respondent in each of the applications being the Governor of the respective Province to appoint the 2nd Respondent in each application as Chief Minister is unreasonable and illegal. We accordingly grant to the Petitioner in CA 376/93 and CA 377/93 Writs of Quo Warranto and Certiorari as prayed for. We also grant to the Petitioner in CA 378/93 and CA 379/93 Writs of Quo Warranto and Certiorari as prayed for.

As for the Writs of Mandamus prayed for in prayer (c) in applications CA 377/93 and 379/93, learned President's Counsel for the Petitioners conceded that the Writ cannot compel the appointment of any particular person. The matter of appointment is the act of the Governor, but, to be done according to law. We accordingly issue on the 1st Respondent in each application a Writ of Mandamus to appoint a Chief Minister of the Province according to law.

Applications are allowed subject to the foregoing modification as to the prayer for a Writ Mandamus. We allow to the Petitioner in CA 376/93 and 377/93 one set of costs against the 1st and 2nd Respondents. Similarly we allow the Petitioner in CA 378/93 and 379/93 one set of costs against the 1st and 2nd Respondents.

*Writs issued*