IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article 140 of the Constitution for mandates in the nature of a writ of Certiorari and Mandamus.

CA Writ Application No. 06/2012

S.P. Sainul Abdeen,

School Road,

Palliwasalturai,

Puttalam.

Petitioner

-Vs-

1. **Hon. Tissa Ballale,**

   The Hoverbor,

   Governor's Office,

   North Western Province Provincial Council,

   Kurunegala.

2. **Kumari Weerasekara,**

   Former Secretary,

The Governor,

Governor's Office,

North Western Province Provincial Council,

Kurunegala.

3. **N.P.M. Kariyawasam,**

   Secretary,

   The Governor,

   Governor's Office,

   North Western Province Provincial Council,

   Kurunegala.

4. **Mahinda Deshapriya,**

   Elections Commissioner,

   Elections Department,

   Rajagiriya.

5. **S. Sudaharan,**

   Assistant Commissioner of Elections,

   Wanni District.

6. **Saman Bandusena,**

   Assistant Commissioner of Elections,

   Anuradhapura.

   Presently Divisional Secretary Anuradhapura.

7. **H.A.S. Hettiarachchi,**

   Registrar of Lands,

   Colombo 07.

8. **A.O. Naffeel,**

   Assistant Commissioner of Election

   Puttalam.

9. **M.H.M. Zameel,**

   Assistant Commissioner,

   Public Service Commission,

   Colombo.

10. **D. Darmawardena,**

    Former Secretary,

    Provincial Council Public Service Commission,

    North Western Province,

    Kerunegala.

11. **D.A. Amarasiri,**

    Former Secretary,

    Provincial Council Public Service Commission,

    North Western Province,

    Kerunegala.

12. **Kanthi Wehella,**

    Secretary,

    Provincial Council Public Service Commission,

    North Western Province,

    Kerunegala.

13. **D.M.T.B. Dassanayake,**

    Inquiry Officer,

No. 21/10, 4th Lane,

Negambo Road,

Kurunegala.

14. **Gamini Wattegedara,**

Chairman.

15. **Methananda Nilame,**

16. **S. Jothirathne,**

17. **M. Iqbal,**

18. **Sarath Stanley**

14th to 18th are the Chairman and Members of the Provincial Council Public Service Commission of the North Western Province.

Respondents

BEFORE	:	Vijith K. Malalgoda, P.C. (P/CA) & A.H.M.D.Nawaz J.
COUNSEL	:	Faisz Mustapha, PC with Ashiq Hassim for the Petitioner.
		Milinda Gunetillake, DSG with N. Kahawita, SC for the Respondents.
Argued on	:	01.12.2014
Decided on	:	16.12.2015

Vijith K. Malalgoda P.C. J,

By his petition dated 3rd January 2012 the Petitioner has instituted this application praying, *inter alia* for the following reliefs:

a) a mandate in the nature of ***a Writ of Certiorari*** quashing the decision of the Provincial Public Service Commission of the North Western Province (14th to 18th Respondents) as contained in documents dated 3rd March 2011 (P-14) and the affirmation of it by the 1st Respondent or any one or more of them respectively by letters dated 11th August 2001 (P-16). 15.09.2011 (P-18), 01.10.2011 (P-19) and 02.12.2011 (P-12);

b) ***a Writ of Mandamus*** compelling the Provincial Public Service Commission of the North Western Province (14th to 18th Respondents) and/or the 1st Respondent and/or any one or more of them, to reinstate the Petitioner in Principal Service Grade II and/or Class I in the teacher service.

The narrative of antecedent facts leading to the order of dismissal made against the Petitioner can be set down as follows. Admittedly the Petitioner joined the teacher service in the year 1989 and became a Principal, Service Grade II and Class I in the Teacher Service and had served as the principal of Sirimapura Muslim Vidyalaya, Madurankuliya. The incident in question can now be set down.

On the day in question namely 14th February 2009 the Petitioner was appointed as the Senior Presiding Officer (S.P.O) of the North Western Provincial Council Election, and was attached to the polling center at P/Nayakarchcheni Tamil Mixed School, Puttalam.

Prior to 14th February 2009 it is averred that he had served as a S.P.O. for eight years and had officiated in that capacity at eight previous elections. This is no doubt admitted by the Respondents.

On the day in question namely, 14th February 2009, the Petitioner avers that polling had taken place in a very peaceful manner and references the SPO Report - the Petitioner's report itself in proof of the assertion that there was a peaceful conduct of the elections. It is asserted that after the conclusion of polling, the Petitioner along with the polling agents, police officers and staff had sealed the ballot boxes and submitted same to the Assistant Returning Officer (A.R.O). In terms of the aforesaid Report ***[P-4 at p.24]***, 1300 Ballot Papers had been issued to the said Polling Centre and 1044 voters had cast their ballot, leaving a balance of 256 Ballot Papers.

Whilst conceding the fact of service of the Petitioner as a SPO on the day in question at the North Western Provincial Council Election held on 14th February 2009, the Respondents take exception to the manner in which the election was conducted.

Respondents' version

According to the consistent version of the Respondents the dismissal of the Petitioner from public service was occasioned by the malpractices committed by the Petitioner on 14th February 2009. The main allegation cast against the Petitioner was the stuffing of ballot boxes with ballots folded together in bundles of three or four ballot papers, which the Respondents allege is a grave election related malpractice. The Respondents aver that as a result of the aforesaid act, the polling

of the said polling booth was annulled and a re-polling was held on 21st February 2009.-vide 4R1.

Preliminary Investigation

The preliminary investigation into this election related was conducted by the Officers of the Election Department – 4th, 5th, 6th and 8th Respondents since it was an election related malpractice committed by an officer while on election duty. This authority had been conferred on them by virtue of Article 104 (g) of the 17th Amendment to the Constitution. Thereafter, the said Respondents had published their P*reliminary Inquiry Report dated 29th May 2011 P-8(a) inter alia* containing their observations and recommendations.

Draft Charge Sheet

Consequent to the findings of the said preliminary inquiry report (1R2) a draft charge sheet had been prepared and dispatched to the disciplinary authority of the Petitioner namely the Secretary to the Provincial Public Service of the North Western Province.

Formal Charge Sheet and Inquiry

The formal charge sheet – **P9,** was issued by the Secretary to the Provincial Public Service Commission (10th Respondent) and served on the Petitioner through the Director of Education and Zonal Director of Education of the North Western Province. According to **P9** (page 89 of the brief) the following seven charges were laid against the Petitioner-

(i) At the Wayamba Provincial Council Elections held on 14th February 2009 the Petitioner as the SPO at P/Nayakarchcheni Tamil Mixed

School, Puttalam, had failed to comply with written or oral instructions given to him;

(ii) That by failing to comply with (i) above, the Petitioner has willfully and/or negligently caused the commission of an election malpractice;

(iii) That by reason of the malpractice mentioned in (ii) above, the Government had to conduct a re-poll on 21st February 20009 in respect of the P/Nayakarchcheni Tamil Mixed School, Puttalam polling booth, resulting in financial loss to the Government;

(iv) That approximately 300 ballot papers under the Petitioner's control and supervision had been forged and stuffed into ballot boxes;

(v) That by reason of the commission of any or more of the aforesaid charges, the Election Department was brought into dispute:

(vi) That by the commission of any one or more of the aforesaid charges Petitioner has brought into disrepute his current position and the entire public service;

(vii) That by reason of the commission of any one or more of the charges (i) to (v) above, the Petitioner has brought into disrepute his current position, the public service of the North Western Province and the entire public service.

The charge sheet had also *inter alia* listed therein 52 witnesses and several documents.

The inquiry and the order of dismissal of the Petitioner (P14)

The said inquiry proceeded over several dates and concluded on 26th October 2010 [P-12]. After the conclusion of the inquiry by letter dated 3rd March 2011 **(P14)**

originating from the 11th Respondent the Petitioner was informed that he was dismissed from the Public Service and the letter further informed him;

I. He was found guilty of six (6) of the seven (7) charges preferred against him in the Charge Sheet;
II. He was dismissed from service; and
III. The relevant officials would accordingly carry out the said order.

Appeal to the Governor of the North Western Province

The Petitioner made an appeal to the Governor of the North Western Province (the 1st Respondent– **P15**. The 2nd Respondent [Former Secretary to the Governor on behalf of the 1st Respondent] had replied the said letter [**P-15**] by her letter dated 11th August 2011 [**P-16**], wherein she had stated that the 1st Respondent acting under powers vested in him under Section 33 (08) of Provincial Council Act No. 42 of 1987, on compassionate grounds, granted relief to the Petitioner, by commuting his dismissal to that of compulsory retirement and thereby entitling him to a pension after reaching the age of 55 years.

In response to the conversion of the dismissal to one of compulsory retirement the Petitioner made an appeal dated 1st September 2011 (**P-17**) addressed to the 1st Respondent, and requested that he be exonerated of all the charges preferred against him.

The 2nd Respondent [on behalf of the 1st Respondent] replied the said letter by letter dated 15th September 2011 [P-18] and refused the Petitioner's request for re-instatement and reiterated the contents of letter dated 11th August 2011 [P-16]. The 12th Respondent had also by letter dated 1st October 2011 **[P-18A]** reiterated the contents of letter dated 11th August 2011 **[P-16]**.

The Petitioner had thereupon also submitted an appeal to the Governor of the Western Province. All these efforts proved futile and as I stated above a perusal of P18, P19 and P21 show that the order of compulsory retirement made by the 1st Respondent Governor was the resultant position when the Petitioner made this application to this Court under Article 140 of the Constitution.

At this stage I must briefly allude to the legal foundation for the order made by the 1st Respondent Governor wherein he commuted the order of dismissal to that of compulsory retirement. Section 33 (8) of the Provincial Council Act No.42 oF 1987 states as follows-

> *"The Governor of a Province shall have the power to alter, vary or rescind any appointment, order of transfer or* ***dismissal*** *or any other order relating to a disciplinary matter by the Provincial Public Service Commission of that Province."*

I observe that It is this statutory authority that has been exercised by the Governor when he converted the order of dismissal into one of compulsory retirement-vide P16 dated 11th August 2011. I also take into account another letter dated 2nd December 2011 [P-21] wherein the contents of P16 were reiterated and the Petitioner was specifically informed that in terms of Section 23:7 of the Wayamba Disciplinary Code only one appeal could be entertained by the 1st Respondent. So much for the statutory right of appeal exercised by the petitioner and the resultant position of compulsory retirement when the Petitioner moved the Court of Appeal for mandates in the nature of certiorari and mandamus.

Contentions before the Court of Appeal

(a) Preliminary Objections

When this matter was taken up for argument before us the learned Deputy Solicitor General raised some fundamental preliminary objections to the maintainability of this application for writs of certiorari and mandamus.

The preliminary objections go as follows:-

i) Whether the Petitioner has exercised the adequate alternative remedy available to him under the 13th Amendment to the Constitution in relation to decision contained in P14.

ii) Whether the Petitioner's writ application can be maintained in the Court of Appeal in view of the preclusive clause in Article 61A of the 17th Amendment to the Constitution in particularly in relation to decision contained in P16 affirmed and reiterated by P18, P19 and P21.

iii) Whether the Petitioner could seek a challenge the decision contained in P14 by way of a writ of certiorari after submitting to the jurisdiction of the process which delivered P14.

This Court would now deal with the three objections that have been raised on behalf the Respondents.

Preliminary Objections

(i) Right of Appeal provided under the 13th Amendment to the Constitution in respect of P14 vis-a-vis the statutory right of appeal

It is the contention of the learned Deputy Solicitor General that it was pursuant to the domestic inquiry held by the Provincial Public Service Commission into the

charge sheet served on the Petitioner that the decision at P14 was made dismissing the Petitioner from service.

Since item 3 in Appendix III of the Provincial Council List of the 13th Amendment to the Constitution expressly provided for a right of Appeal to the Public Service Commission, the Petitioner should have had recourse to that right of Appeal which is a constitutionally provided remedy to an aggrieved public servant, regardless of the fact whether such public servant belongs to the National Public Service or the Provincial Public Service.

Item 3 in Appendix III of the Provincial Council List of the 13th Amendment to the Constitution sets down the following-

3. The transfer and disciplinary control of all educational personnel, i.e Teachers, Principals and Education Officers. Officers belonging to a national service but serving the Provincial Authority on secondment will have the right of appeal to the Public Service Commission. Officers belonging to the Provincial Public Service will have a right to appeal to the Public Service Commission against dismissal.

It has to be noted that in the case of the Provincial Public Service the right of appeal to the Public Service Commission is limited to a dismissal from service. The argument on behalf of the Respondents was that since the Petitioner was dismissed from service by P14, the Petitioner ought to have exercised his constitutional right of appeal and preferred an Appeal to the Public Service Commission instead of invoking judicial review of the dismissal contained in P14.

Even though the Petitioner contended that he exercised a statutory right of appeal from the decision contained in P14 to the Governor of the North Western Province

under Section 33(8) of the Provincial Councils Act No.42 of 1987 and therefore there is no necessity to prefer an appeal to the Public Service Commission, the learned Deputy Solicitor General submitted that the right conferred on an aggrieved public officer to prefer an appeal to the Public Service Commission is a constitutional right of appeal which takes primacy and supremacy prevailing over any other right of appeal available under a statute, since the Constitution is always regarded as the supreme law of the country. In order to buttress this argument the learned Deputy Solicitor General submitted that the case of *Ratnasiri and Others v Ellawala* and Others has declared that;

> *"...provisions of the Establishment Code such as Cap. iii:5:1 being subordinate legislation cannot prevail over or inhibit the application of Article 61 in terms of which the decision of the PSC which had been made in pursuance of powers vested in the PSC by Article 65 is precluded from judicial review..."*[1]

The learned Deputy Solicitor General sought to equiparate the above dicta of Marsoof J to the facts of this case and contended that the same principle applies in this case and the appeal available to the Governor under the Provincial Councils Act is subordinate to the Constitutional remedy of Appeal to the Public Service Commission set out in item 3 of Appendix III of the 13th Amendment to the Constitution.

The established principle that a writ will not lie where **an alternative remedy** is available has also been invoked by the learned Deputy Solicitor General. In fact the following dicta in *Ishak v Director General of Customs and Others* 2003 3 SLR 18, at page 23 which has been relied upon by the Deputy Solicitor General to buttress his

[1] (2004) SLR 180 page 181

argument that the Petitioner must have appealed to the Public Service Commission needs to be highlighted in order to show how relevant the dicta become for the purpose of elucidating my reasoning on this preliminary objection. The Court stressing on the importance, before filing an application invoking the discretionary jurisdiction of the Court, to take steps to initiate and exhaust oneself of any alternative remedy adequately provided for in a statute, went on to hold thus in *Ishak's case-*

> *"The point urged by these respondents is that there is an alternative statutory remedy for the petitioner before a Court of law and not the availability of any administrative remedy. In these circumstances this Court finds that as there is an alternative, adequate remedy provided in Section 154 of the Customs Ordinance, and as the petitioner himself has already instituted action admittedly in the competent Court of civil jurisdiction, the Court would not exercise its discretion in favour of the issue of its writ jurisdiction..."*

His Lordship Ranasinghe J (as he then was) quoted De Smith's Judicial Review of Administrative Action (4th Edition) to buttress the above position in the case of *Thajudeen v Sri Lanka Tea Board*[2]

> *"Even though all other requirements for securing the remedy have been satisfied by the Applicant, the Court will decline to exercise its discretion in his favour if a specific alternative remedy "equally convenient, beneficial and effectual" is available..."*

So it is the contention of the Deputy Solicitor General that the Petitioner must have preferred his appeal to the Public Service Commission as it was an alternate

[2] 1987 2 Sri. LR 417

remedy. In fact I must state straight away that there is no conflict between the constitutional right of appeal and the statutory right of appeal. Whilst the 13th Amendment to the Constitution created the constitutional right of appeal, the later statute the Provincial Councils Act No.42 of 1987 conferred a statutory right of appeal. It is trite law that if Parliament created a later right of appeal to a different authority on the same subject matter, it is deemed to have been cognizant of the constitutional right of appeal but yet proceeded to confer a right of appeal to the Governor. It is not repugnant to the constitution if the same Parliament which passed the 13th Amendment had conferred a right of appeal on one subject matter enacted another law bestowing a concurrent right of appeal on the same matter. Such concurrency leaves the public servant with a choice of two concurrent appeals and I am of the view that an aggrieved public servant can choose between the two concurrent rights of appeal. There is nothing in the Constitution that precludes such an appeal being made and no supremacy or primacy of the Constitution is impugned by such a statutory appeal being preferred before the Governor who entertained the appeal and made a decision. In the circumstances this court overrules the preliminary objection that the Petitioner could not have exercised a beneficial right of appeal which the legislature bestowed him with. What has the legislature done since 1987 to abrogate that right? Neither the Constitution nor has any later statute taken away the statutory right of appeal conferred by section 33(8) of the Provincial Councils Act No.42 of 1987. In the circumstances the preliminary objection, albeit mistakenly misconceived, must be overruled. It is for this reason that the classification by the Deputy Solicitor General of the constitutional right of appeal as an alternate remedy has to be rejected. As I pointed out the constitutional right of appeal is concurrent with the statutory right

not alternate. Nor does the constitutional right of appeal subordinates the statutory right of appeal. The plea of alternate remedy is more often than not taken when there is an application for a judicial review and in those cases there usually exists a right of appeal which remains unexhausted-see **Ishak's** case (supra). Here is an instance where the Petitioner has exercised his concurrent remedy of preferring an appeal to the Governor – one of the twin appellate rights which has been granted to an aggrieved public servant. The Petitioner has chosen between the two and his choice in making use of his right of appeal under the Provincial Council Act cannot be faulted without reference to any prohibition to the contrary. In the circumstances the dicta of Justice Marsoof in *Ratnasiri and Others v Ellawala* and Others *"...provisions of the Establishment Code such as Cap.iii:5:1 being subordinate legislation cannot prevail over or inhibit the application of Article 61 in terms of which the decision of the PSC which had been made in pursuance of powers vested in the PSC by Article 65 is precluded from judicial review..."*[3] would be quite inapplicable as the dicta in *Ratnasiri and Others v Ellawala* and Others make reference to a subordinate legislation but here in the instant case we are confronted with a statutory right of appeal. So this preliminary objection fails and the next objection is based on the ouster clause in Article 61A of the Constitution.

Preliminary Objection – (ii) Applicability of the preclusive clause in Article 61A of the Constitution in relation to P16

Article 61A of the Constitution of 1978[4] reads as follows:-

> "Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or

[3] (2004) SLR 180 page 181
[4] As amended as the 17th Amendment

pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee or any public officer in pursuance of any power or duty conferred or imposed in such Commission, or delegated to a Committee or public officer under this Chapter or under any other law..."

The definition of a public officer, which is submitted to be an inclusive type of definition is found in Article 61F of the Constitution as follows:-

"For the purpose of this Chapter "public officer" does not include a member of the Army, Navy or Air Force and officer of the Election Commission appointed by such Commission, a public officer appointed by the National Police Commission or a scheduled public officer appointed by the Judicial Service Commission..."

Consequently the learned Deputy Solicitor General contends that the Governor would be a Public Officer for the purpose of Article 61A.

Pursuant to an appeal preferred by the Petitioner under Section 33(8) of the Provincial Councils Act to the Governor of the North Western Province, the decision at P16 was made converting the dismissal to a compulsory retirement.

It was the contention raised on behalf of the Respondents that the decision contained in P16 was re-confirmed by the subsequent letters marked as P18, P19 and P21. Accordingly the decision in P16 made by the Governor of the North Western Province is a decision made by a public officer who is exercising the delegated power under the any other law namely – "Provincial Council Act". Thus, by the operation of the ouster clause in Article 61A, the decision contained in P16 is not amendable to writ jurisdiction or to be questioned by any Court or Tribunal. So the contention went - [vide *Ratnasiri and Others v Ellawala and Others and*

Katugampola v Commissioner General of Excise and Others[5], where the Court declared that the ouster clause in Article 6A of the Constitution precluded the jurisdiction of the courts to review the decision except by way of an fundamental rights application filed under Article 126 in the Supreme Court]

Even if the Governor is a public officer as was contended, was it a delegated authority when he converted the order of dismissal of the Petitioner to that of compulsory retirement? P16 is quite eloquent of the power which the Governor possesses under Section 33 (8) of the Provincial Act to entertain an appeal quite independently of the powers of the PSC and quite contrary to the position that the learned DSG took that the appeal to the PSC was an alternate remedy he turned the tables on this argument when it was asserted that the power which was exercised by the Governor was delegated to him by the PSC? We do not see such a delegation anywhere in the affidavits or documents that we have perused in the case before us. In any event a statutory power cannot be a delegated power given by the PSC. The statutory power given by virtue of legislative power cannot amount to a delegated power of the PSC. So I conclude that there is no merit in this objection which is patently wrong in law.

Therefore the constitutional ouster in Article 61A does not operate as a bar to the exercise of jurisdiction under Article 140 of the Constitution because this Court is not dealing with a decision of a PSC nor are we confronted with a decision of a delegate of the PSC. I now turn to 3rd preliminary objection.

Preliminary Objection (iii) – Submission to Jurisdiction debars the Petitioner from challenging the legality of the proceedings and the validity of the decision

[5] 2003 3 SLR 208

The objection to the maintainability of this application premised on the above ground goes as follows. The Petitioner has submitted to the jurisdiction of the domestic inquiry by accepting the charge sheet served on him and taking part at the said domestic inquiry without raising any objection before the said domestic inquiry.

After submitting to the jurisdiction of the domestic inquiry, the Petitioner however, by filing the above styled writ application has sought to challenge the legality of the proceedings on five purported grounds, more fully set out in paragraph 43 of the Petition. These five grounds are 1) that the charge sheet had not been prepared in compliance with the provisions of the Establishment Code, 2) that the Deputy Commissioner of Election had admitted that he did not prepare the sad charge sheet, 3) that the Petitioner's written request for an Attorney-at-Law to be appointed as the inquiry officer was not acceded and connected therewith 4) the proceedings were held in Sinhala language and no proper translation was provided for the Petitioner and 5) the inquiry officer had relied on evidence which were devoid of probative value in coming to the findings.

On a perusal of the petition and the arguments placed before this Court the impugned decisions were sought to be assailed by the Petitioner on recognized grounds known to administrative law. There has been this traditional theory that the foundation of judicial review is based on the doctrine of *ultra vires* and this ground has been put forward by the Petitioner in paragraph 50 of the Petitioner. The Petitioner states that his livelihood has been taken away and his removal is unlawful, arbitrary and unreasonable. The complaint about the charge sheet as not having been prepared in compliance with the provisions of the Establishment Code borders on non compliance with procedural requirements stipulated for the

conduct of the disciplinary inquiry and a petitioner can legitimately complain of the procedural irregularities if they amount to procedural impropriety. No evidence rule was argued strenuously before Court but the learned Deputy Solicitor General contended it has no place in judicial review-a submission that does not hold water in the light of the developments in administrative law. In the circumstances this Court is not in agreement with the contention raised on behalf of the Respondents that the participation of the Petitioner in the proceedings of the domestic inquiry precludes him from challenging the *vires* of the procedure adopted against him at the domestic inquiry. The petition teems with allegations of illegality, irrationality and procedural impropriety. How does one make of the Petitioner's averment in paragraph 50 of the petition that he was ***unreasonably removed from his post in total contravention of the law?*** Is not Wednesbury unreasonableness alleged in the petition?

This Court possessed of its supervisory jurisdiction looks to the process and even in the seminal case of ***Ridge v Baldwin***[6] there was submission to jurisdiction. Such submission is not a bar to exercise of a supervisory jurisdiction when the grounds recognized in administrative law are alleged against decisions to affect the decision making process. In the circumstances I overrule the third preliminary objection and it behoves us to look at the merits of the application before us.

Merits of the application

It was strenuously contended that the order of dismissal as contained in P14 does not contain any reasons as to why the Provincial Public Service Commission arrived at a decision of dismissal. This Court is mindful of the scope of judicial review. We

[6] (1963) 2 AER 66

do not deal with the merits of an inquiry that has preceded. Subject of course to the no evidence rule, we would not undertake a factual analysis in judicial review. As I said before we look to the procedure adopted by the primary decision make namely the Provincial Public Service Commission. What does the decision as contained in P14 declare? It recites that they have considered the report of the domestic inquiry and the personal file of the Petitioner and since six (6) of the seven have been proved, they find the Petitioner guilty and make order to dismiss him from service.

I must lay down that this decision leaves much to be desired particularly in a case where the livelihood of a public servant is taken away. If a public servant commits a criminal offence, it lies within the domain of criminal law to deal with him. Judicial review is not akin to a criminal trial. If the employer chooses to hold a domestic inquiry administrative justice requires that the ultimate sanction of a dismissal from service is explained by the primary decision maker having regard to the serious consequences with which the primary decision maker was seeking to visit the employee. *Ex facie* no evidence has been furnished to this Court by the 14th – 18th Respondents, Chairman and members of the Provincial Public Service Commission to justify and/or explain the impugned action taken against the Petitioner.

The only supporting affidavits tendered along with the Objections of the Respondents are that of the 1st Respondent Governor and the 12th Respondent Secretary, Provincial Public Service Commission. In a case such as this where the decision of the Provincial Public Service Commission is impugned as *ultra vires* and devoid of any reason for the decision the Court must hear from them or the journalized record of the decision making process must be made available to this Court. P14 declares that charges have been proved. There is nothing in this

assertion for this Court to conclude that it is the decision making body that came to this finding after an exhaustive analysis of evidence or it simply adopted the recommendations and report of the inquiry officer. If the Petitioner is not told of the decision making process, this Court has to be apprised as to how this finding was arrived at. The affidavit of the Secretary to the Provincial Public Service Commission who is not even a member of the decision making body and is at the most a recorder assisting the commission proceedings cannot be a substitute for what this Court has to hear from the decision making body either in the form of an affidavit or a transcript of proceedings that manifests to this Court that the decision of the Provincial Public Service Commission complied with norms of administrative justice.

The affidavit of the Secretary to the Provincial Public Service Commission (the 12th Respondent) states in paragraph 10 that ...after the conclusion of the formal domestic inquiry against the Petitioner P14 was issued against the Petitioner. This bare statement hardly suffices. Did the members of the Provincial Public Service Commission evaluate the report and recommendations of the inquiry officer? As a decision making body, were the members of the Provincial Public Service Commission satisfied on their own that the charges preferred against the Petitioner had been proved? This Court finds no supporting affidavits filed by the 'decision makers, the 14th to 18th Respondents, Chairman and members of the PSC to support and/or justify the decision and the averments in the objections and affidavits remain unsubstantiated.

This Court takes the view that a primary decision maker must in fact address his/her mind to the evidence led or whether the Petitioner was afforded a hearing by the delegated inquirer before he/she proceeds to initiate the issuance of letter

of dismissal however unworthy the acts of a particular citizen might have been. The issuance of the letter dated 3rd March 2011 [P-14] which was thereafter commuted to one of compulsory retirement [P-16] does not satisfy in our view that the there has been a proper and independent analysis of the evidence led against the Petitioner at the disciplinary inquiry. The affidavits filed in this case barely helps this Court that the members of the Provincial Public Service Commission brought to bear on their decision making process the norms of administrative justice. Such a defective process would give rise to the end result that the due process was not observed when the members of the Provincial Public Service Commission made the decision to take away the livelihood of the Petitioner. In any event in view of the fact that the 12th Respondent was not the Secretary to the Provincial Public Service Commission at the time of the issuance of P14 this Court takes the view that she does not possess personal knowledge of the decision making process and there has not been forthcoming before us any record from the minutes of Provincial Public Service Commission to buttress the decision of dismissal. In such circumstances this court takes the view that decision in P14 may amount to a mere adoption of the report and recommendations of the inquiry officer that would render the decision of 14th to 18th Respondents – PSC incapable of being sustained in administrative law.

In fact the contours of administrative law of this country have developed to such an extent that the 14th to 18th Respondents are under a duty to record and give reasons for their decision contained in document P-14, especially in the light of there being no evidence placed before this Court by the said Respondents as aforesaid; This jurisprudence is reflected in cases such as;

(i) Ceylon Printers and *Another v Weerasekara* 1998 2 SLR 29

(ii) *Jayaratne v Fernando and Others* 2000 3 SLR 69 at 85, 85

Per Fernando J

"The failure to have proper documentary evidence of Ministerial orders, would encourage public officers to evade responsibility for their own acts, merely by claiming that they acted upon unrecorded Ministerial orders."

(iii) *Karunadasa v Unique Gemstones* 1997 1 SLR 256

In fact our law made the landmark milestone in *Karunadasa v Unique Gemstones*1997 1 SLR 256 requiring reasons to be given for adverse decisions and P14 is susceptible to be quashed on this ground.

This Court highlights the need for primary decision makers such as the Provincial Public Service Commission to adduce reasons by way of a truly representative affidavit or a record of proceedings to establish in judicial review proceedings that they have complied with established criteria to support their decisions affecting a citizen's rights to life, employment, property and office. An activity of a citizen may be criminal in nature but the State has the resources to bring a recalcitrant officer to book for those infractions. But when the State chooses the path of a disciplinary inquiry to deal with him, administrative justice is the bulwark against process rights being violated and I take the view that apart from all other vitiating factors that have been urged before us the Provincial Public Service Commission has acted *ultra vires* in not independently indulging in an objective analysis of the evidence and this procedural impropriety taints the decision. In addition the no evidence rule was urged before us. It was urged that Sisira Kumara a vital witness who made an incriminating statement at the preliminary inquiry was never called before the inquirer. Moreover it was contended that there was no evaluation in the inquirer's

report of the evidence given by witnesses. There was only a recitation of evidence. I have perused the report and recommendations and I find that the allegation there was no evaluation of the evidence is well founded. But the learned Deputy Solicitor General has contended that this Court cannot go into evidence. But I wish to state that administrative law has developed on such an extent that no evidence rule is well established. P14 comes within that rubric.

For the reasons given above we hold that the decision of the Provincial Public Service Commission is tainted with illegality and procedural impropriety and the Court proceeds to quash the decision contained in P14. Since the decision of the Governor as contained in P16 flowed from P14, P16 becomes invalid and of no force or effect in law as P14 is null and void.

Since P14 and P16 are quashed the Petitioner reverts to his substantive position in public service and the Court proceeds to issue a writ of certiorari as prayed for. In the circumstances the necessity for issuing a writ of mandamus does not arise.

Subject to the above I allow the application

President of the Court of appeal

A.H.M.D.Nawaz J

I agree

Judge of the Court of appeal