RATNASIRI AND OTHERS
v
ELLAWALA AND OTHERS

COURT OF APPEAL
MARSOOF, P.C. PCA AND
SRIPAVAN, J.
CA 16, 2004
MAY 12, AND 25 2004

Writ of certiorari / mandamus – Quash decision to – transfer – Appeal Board constituted by the Public Service Commission – Board not properly constituted? – Applicability of the Establishment Code – Constitution, 1972, sections 106 and (10) – Constitution, 1978, Articles 55, 56, 106 (s), 107 (1), 126, 140, 61A and 61B – 17th Amendment – Cluster of jurisdiction – Judicial review of a decision of Public Service Commission Barred? – Ratification of illegal act by Public Service Commission – Does it make it lawful? – Pleasure principle abolished? – Interpretation Ordinance, S 22.

The petitioner sought to quash the decision of the Transfer Appeal Board (T.A.B.) on the basis that it was not properly constituted. The Secretary, Ministry of Tertiary Education, the 4th respondent recommended the names to the Public Service Commission (PSC) which approved the same. It was contended that the T.A.B. has to be constituted as provided for in the Establishment Code.

The respondent contended that in view of Article 61A (17th Amendment) court has no jurisdiction to inquire into or call in question the impugned order and further that as the orders made by the 4th respondent Secretary are not challenged, the application is futile.

Held:

(i) Article 61A – 17th Amendment – seeks to oust the jurisdiction of courts to review determination of the P.S.C. except where there has been a violation or imminent violation of a fundamental right.

Per Saleem Marsoof, J. P/CA.

> "The seventeenth Amendment has brought about several fundamental changes in relation to the public service, the most important of which was the abolition of the pleasure principle which was recognised by our law as a fundamental norm inherent in the prerogative of the British Crown and was expressly embodied in every Constitution of this country since 1946".

(ii) 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 P.S.C. which has been made in pursuance of powers vested in the P.S.C. by Article 65 is precluded from judicial review.

(iii) However Article 55 (5) would be of no effect if the order is made by an officer who does not have legal authority to do so. In such cases it could be held that the decision of the relevant authority is null and void and the preclusive clause is no bar to review.

(iv) As the impugned decision of the 1-3 respondents who purported to act the T.A.B. was clearly not made in pursuance of any power or duty conferred or imposed on them by any provision of law or delegated to them by the P.S.C. Article 61A has no application to the impugned decision.

Per Saleem Marsoof, J. P/CA.

> "I am inclined to the view that the P.S.C. as well as a Committee of the Commission or a Public Officer exercising delegated authority may in appropriate circumstances ratify an order made or action taken by a public officer without authority; there is nothing in the Constitution or any law to prevent the respondent Secretary, from making a decision in regard to a matter where some person or body of persons has previously made some decision without any authority to do so.

(v) The decision or determination made by the 4th respondent Secretary, being the decision or determination of a public officer exercising authority delegated by the P.S.C. are precluded from judicial review by Article 61A.

(vi) It is futile to issue a writ, since what is sought to be quashed therein is the decision said to have been made by the T.A.B., however the 4th respondent to whom the power of transfer has been delegated by the P.S.C. has approved and adopted the decision of the TAB. No relief has been sought against that decision; therefore it would be futile to grant the reliefs prayed for since it would still leave intact the decision of the 4th respondent.

APPLICATION for writ of *certiorari / mandamus.*

Cases referred to:

1. *Vallipuram* v *Postmaster-General* – 50 NLR 214
2. *Silva* v *Attorney-General* – 60 NLR 145
3. *Kodeswara* v *Attorney-General* – 70 NLR 121 (SC)

3A. *Kodeswara* v *Attorney-General* – 72 NLR 337 (PC)

4. *Abeywickrema* v *Pathirana* – (1986) 1 Sri LR 120 at 182
5. *Chandrasiri* v *Attorney-General* – (1989) 1 Sri LR 115 at 121
6. *Madan Mohan* v *Carson Cumberbatch* – (1988) 2 SLR 75 at 85.
7. *The Public Service United Nurses Union* v *Montague Jayawickrama, Minister of Public Administration and others* – (1988) 1 Sri LR 229 at 230.
8. *Ramuppillai* v *Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and others* – (1991) 1 Sri LR 11

8A. *R* v *Liyanage* – 64 NLR 313.

9. *Migultenne* v *Attorney-General* – (1996) 1 Sri LR 401
10. *Wickramabau* v *Herath* – (1990) 2 Sri LR 348
11. *Wickremaratne* v *Gunawardena* – S.C. 5/95 SCM 29.5.95
12. *Gunarathne* v *Chandrananda de Silva* – (1998) 3 Sri LR 265
13. *Kotakadeniya* v *Kodithuwakku and others* – (2000) 2 Sri LR 175
14. *Rajapakse* v *Tissa Devendra, Chairman, P.S.C.* – (1999) 2 Sri LR 331
15. *Anisminic Ltd.,* v *Foreign Compensation Commissioner and another* – (1969) 1 A11 ER 208
16. *P.S. Bus Co. Ltd.,* v *Members and Secretary of the Ceylon Transport Board* – 61 NLR 491, 496
17. *Sideek* v *Jacolyn Seneviratne and others* – (1984) Sri LR 83 at 90.

S. F. A. Cooray for petitioners

Janak de Silva, State Counsel for respondents.

Cur.adv.vult

July 16, 2004

MARSOOF, PC. J (P/CA)

The petitioners are instructors in different disciplines in the Department of Technical Education and Training who are attached to several Technical Colleges situated in various parts of Sri Lanka. Admittedly, they belong to the Sri Lanka Technical Education Service, and they have invoked the jurisdiction of this court seeking an order in the nature of a writ of *certiorari* to have the decision made by the Transfer Appeal Board consisting of the 1st to 3rd respondents, quashed on the basis that the said Board was not properly constituted. While praying for a declaration from this court that the said decisions are null and void and invalid in law, the petitioners also seek an order in the nature of a writ of *mandamus* directing the respondents to convene "a fresh and a proper appeal board according to law" to determine the appeals they have lodged against the decisions of the Transfer Board, with respect to their transfer for the year 2004.

For the purpose of appreciating the case of the petitioners, it is necessary to refer to the Manual of Transfers applicable to the teaching staff in the Sri Lanka Technical Education Service marked P1 and IR1(a). In paragraph 01 of the said Manual of Transfers, it is expressly provided that transfers of the category of teaching staff to which the petitioners belong should be carried out in accordance with the provisions of Chapter III of the Establishment Code. Paragraph 03 of this Manual provides that the Transfer Board to be established for this purpose should be chaired by the Director-General of Technical Education and Training or his nominee, and that it should also include the Staff Officer heading the Establishment Unit of the Department and a representative each of every trade union which has as its membership more than 15% of the total number of officers in the service with respect to which the Board is constituted.

The bone of contention in this case is the validity of the composition of the Transfer Appeal Board which was, as evidenced by the letter dated 11th July 2003 (IR18) issued by the 7th respondent, constituted by the Public Service Commission, to hear appeals made by those who are aggrieved by the decisions of the Transfer

Board, the composition of which has been challenged in these proceedings. Although there are several references to a Transfer Appeal Board in the Manual of Transfers, none of its provisions deal with the composition of the Transfer Appeal Board. Learned Counsel for the petitioner therefore submits that in the absence of any provisions to the contrary in the Manual of Transfer Appeal Board has to be constituted as provided in clause 5.1 of Chapter III of the Establishment Code, which provides as follows:

> "A Transfer Appeal Board will consist of the Head of Department and a Senior Staff Officer nominated by the Head of the Department, other than an officer who served on the Transfer Board."

It was the main contention of learned Counsel for the petitioners that the Transfer Appeal Board that purported to determine their respective appeals against the transfers ordered by the Transfer Appeal Board was not constituted in accordance with Chapter III 5 : 1 of the Establishment Code. Learned Counsel for the petitioners submitted that the Transfer Appeal Board was improperly constituted in so far as it was not headed by the 2nd respondent who was the Director-General of Technical Education and Training, and was chaired instead by the 1st respondent Additional Secretary to the Ministry of Tertiary Education and Training, under the purview of which Ministry the 2nd respondent functioned, and Technical Colleges situated all over the island were in fact administered.

It will be useful at this stage to outline the process by which the Public Service Commission purported to approve the composition of the Transfer Board and the Transfer Appeal Board. In conformity with paragraph 03 of the Manual of Transfer marked P1 and 1R1(a) which provided that the Transfer Board should be headed by the Director-General of Technical Education and Training or his nominee, the 2nd respondent by his letter dated 28th May 2003 marked IR16, recommended to the Secretary to the Ministry of Tertiary Education and Training certain names of persons to be appointed to these Boards. In particular, he recommended that the Transfer Board should be chaired by Santha Manathunga, who then held office as Director (Administration), and the Transfer Appeal Board should be chaired by the 2nd respondent himself in his capacity as Director-General of Technical Education and

Training. The Secretary to the Ministry of Tertiary Education and Training in turn made substantially the same recommendations to the Public Service Commission in the letter dated 3rd June 2003 marked IR17 addressed by him to the Secretary to the Public Service Commission.

The Public Service Commission approved these recommendations as evidenced by its letter dated 11th July 2003 marked IR18, subject to two significant modifications. Firstly, it directed that the trade union representatives prescribed by paragraph 3 : 5 (b) of Chapter III of the Establishment Code should also be added as members of the Transfer Board. Secondly, the Public Service Commission directed that in place of Santha Manathunga, whose name had been approved for appointment to the Transfer Board, an Additional Secretary to the Ministry of Tertiary Education and Training should be appointed to the Transfer Appeal Board as its Chairman. This was how the 1st respondent, who was an Additional Secretary in the Ministry of Tertiary Education and Training, came to be appointed as the Chairman of the Transfer Appeal Board of which the other members were the 2nd respondent Director-General of Technical Education and Training and the 3rd respondent Director (Research & Development) in the Department of Technical Education and Training. The Public Service Commission has approved the appointment of the 2nd respondent to the Transfer Appeal Board only as an ordinary member thereof, and not as its Chairman.

When this matter was taken up for argument on 11th May, 2004 learned State Counsel appearing for the respondents raised two preliminary objections to the application, namely:-

(a) In view of the provisions in Article 61A of the Constitution, this court has no jurisdiction or power to inquire into, pronounce upon or in any manner call in question the impugned orders; and

(b) In any event, insofar as the orders made by the 4th respondent Secretary to the Ministry of Tertiary Education and Training are not challenged in these proceedings, the application of the petitioners is futile.

Learned Counsel for the petitioner and learned State Counsel appearing for the respondents were heard in regard to these preliminary objections, and court reserved its order to enable counsel to file their written submissions.

The Ouster of Jurisdiction by Article 61A of the Constitution

Learned State Counsel has submitted *inter alia* that this court is deprived by Article 61A of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, of jurisdiction to review the decision of the Public Service Commission marked IR18 constituting the 1st to 3rd respondents as the Transfer Appeal Board. He also contends that this court is also precluded by Article 61A of the Constitution from reviewing the decisions made by the 1st to 3rd respondents sitting as the Transfer Appeal Board. He has also submitted in paragraph 2.9 of his Written Submissions that in any event the decisions of the 1st to 3rd respondents "have been adopted" by the 4th respondent Secretary to the Ministry of Tertiary Education and Training, to whom the Public Service Commission had delegated its powers relating to the transfer of the petitioners by its order dated 27th June 2003 made in terms of Article 57 of the Constitution and published in the Gazette Extraordinary No. 1295 / 26 dated 2nd July 2003 marked 1R15 and 7R2. Learned State Counsel contends that insofar as the 4th respondent is a public officer who has purported to exercise power or duty delegated to him under Chapter IX of the Constitution, Article 61A of the Constitution prevents this court from looking into the validly of the orders made by the 4th respondent.

Learned State Counsel has submitted that in applying the provisions of Article 61A, court should bear in mind the features introduced by the Seventeenth Amendment in regard to the public service. He argues that the Seventeenth Amendment has put in place an elaborate scheme of resolving disputes relating to the appointment, promotion, transfer, disciplinary control and dismissal of public officers, and the court must apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the scheme formulated by the Seventeenth Amendment is given effect to the fullest extent. Learned Counsel submits that the elaborate scheme contained in the Seventeenth

Amendment for the resolution of disputes arising in connection with the public service justifies the retention of the ouster clause in the form of Article 61A despite the removal of the 'pleasure principle' from Article 55(1) of the Constitution. In the context of the submission made by learned State Counsel that "the preclusive clause incorporates the pleasure principle and gives effect to it" (vide paragraph 2.3 of the Written Submissions of the Respondents), it is necessary to appraise the Constitutional ouster clauses which preceded Article 61A in their historic perspective and their relationship to the 'pleasure principle'.

The principle that all public officers hold office at the pleasure of the Crown was a concept necessarily incident to sovereignty which became part of our law when Ceylon became part of the territories of the English Crown in the Eighteenth Century. The 'pleasure principle' has been recognized and given effect to in Sri Lanka in a long of decisions such as *Vallipuram* v *Postmaster-General* (1), *Silva* v *Attorney-General*(2) and *Kodeswaran* v *Attorney-General* (SC)(3) (PC)(3A). The rule was first incorporated into a Constitution in Sri Lanka in 1946. However, the Ceylon (Constitution) Order in Council of 1946 (Cap. 379), which incorporated in section 57 thereof the so called 'pleasure principle', did not seek to exclude generally the jurisdiction of courts to review all orders or decisions relating to the public service.

The origins of Constitutional ouster of jurisdiction to review orders and decisions relating to the public service can be traced to section 106(5) of the Constitution of the Republic of Sri Lanka, which also expressly provided in section 107(1) the "every state officer shall hold office during the pleasure of the President". The factors that resulted in this radical curtailment of the jurisdiction of courts were explained by Wanasundera, J. in his dissenting judgement in *Abeywickrema* v *Pathirana*(4) at 182 in the following words:-

> "Every person acquainted with post-independence period of our history, especially the constitutional and legal issues that cropped up during that period, would know how the actions of the government and the Public Service Commission dealing with practically every aspect of their control over public officers were challenged and taken to the courts. A stage came when the Government found itself practically hamstrung by injunc-

tions and court orders and not given a free hand to run the public service and thereby the administration as efficiently as it would wish. The 1972 reforms came undoubtedly as a reactions to this. The thinking behind the framers of the Constitution was that the public service must be made the exclusive domain of the Executive without interference from the courts."

Section 106(5) of the Constitution of 1972 was replaced by Article 55(5) of the Constitution of 1978. Article 55(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka provided that:-

"Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and *all public officers shall hold office at pleasure.*"

This was followed and complemented by Article 55(5) which sought to preclude the exercise of jurisdiction by courts and other tribunals to review decisions relating to the public service in the following manner:-

'Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, *in regard to any matter concerning* the appointment, transfer, dismissal or disciplinary control of a public officer.

Article 61A of the Constitution, which was introduced by the Seventeenth Amendment to the Constitution certified by the Speaker on 3rd October, 2001, seeks to oust the jurisdiction of courts to review determinations of the Public Service Commission, a committee thereof or any public officer, in the following terms:-

"Subject to the provisions of paragrahps (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or 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 on such Commission, or delegated to a Committee or public officer*, under this Chapter or any other law."

This is a preclusive clause of fair width which seeks to shut out the courts from the domain of the public service except where there has been a violation or imminent violation of a fundamental right.

Although the 'pleasure principle' had existed even prior to the advent of the Constitutional ouster clause, the close link between these two concepts prompted Mark Fernando, J. to comment in *Chandrasiri* v *The Attorney-General*[5] at 121 that-

> "The ouster clause was intended to give effect to the 'pleasure principle', and not to whittle it down. The application of the 'pleasure principle' prevents the ground of dismissal being questioned: the ouster clause complements that principle by taking away the jurisdiction of the courts to inquire into dismissal – on other grounds, such as that rules and procedures had not been complied with."

It is however necessary to emphasize that the two concepts are capable of existing independently of each other, as they did prior to 1972. In this context, it is pertinent to observe that the Seventeenth Amendment to the Constitution has brought about several fundamental changes in relation to the public service, the most important of which was the abolition of the 'pleasure principle' which was recognized by our law as a fundamental norm inherent in the prerogative of the British Crown, and was expressly embodied in every Constitution of this country since 1946. It is indeed surprising that this principle was accommodated in Constitution which claimed to be independent, republican and even democratic and socialist, and the removal of this concept by the Seventeenth Amendment of the Constitution will no doubt contribute to the independent of the public service.

The Seventeenth Amendment to the Constitution has also introduced several other features which seek to enhance the independence of the public service while providing greater security of tenure for the public officers. **Firstly**, the appointment, promotion, transfer,

disciplinary control and dismissal of public officers other than Heads of Departments, have been taken out of the Cabinet of Ministers and vested in the Public Service Commission. **Secondly**, while the Cabinet of Ministers is vested with the power of appointment and disciplinary control of Heads of Department, it also has the power of formulating policies concerning the public service. **Thirdly**, the Public Service Commission, which is bound to conduct its affairs in accordance with the policy laid down by the Cabinet of Ministers, is answerable to Parliament in regard to the exercise and discharge of its powers and functions. **Fourthly**, the Seventeenth Amendment provides for the appointment of the members of the Public Service Commission on the recommendation of the Constitutional Council established under the said Amendment. **Fifthly**, while the Public Service Commission is empowered to delegate to a Committee or a public officer its powers of appointment, promotion, transfer, disciplinary control and dismissal of specified categories of public officers, it is expressly provided that any public officer aggrieved by an order made by any such Committee or public officer may appeal first to the Public Service Commission and from there to the Administrative Appeals Tribunal which is appointed by the Judicial Service Commission. All this is in addition to the beneficial jurisdiction created by Article 126 of the Constitution which is expressly retained by Article 61A of the Constitution. These are the many pillars on which the edifice of the Public Service rests.

In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent.

The petitioners have challenged the legality of the decision of the Public Service Commission (embodied in 1R18) constituting the 1st to 3rd respondents as the Transfer Appeal Board, on the basis that the members of the said Board were not appointed in accordance with clause 5.1 of Chapter III of the Establishment Code. Learned

State Counsel argues that the judicial review of a decision of the Public Service Commission is *absolutely barred* by Article 61A of the Constitution. The response of the learned Counsel for the petitioners to this argument is that Article 61A of the Constitution applies only to preclude the questioning of any order or decision made by the Public Service Commission *"in pursuance of any power or duty conferred or imposed on such Commission*, under this Chapter or any other law." He contends that the decision of the Public Service Commission which is evidenced by 1R18 has been made in violation of clause 5.1 of Chapter III of the Establishment Code which is binding on the Public Service Commission. It was contended by learned Counsel for the petitioners that the Establishment Code has been issued by the Secretary to the Ministry of Public Administration under the authority of the Cabinet of Ministers in terms of Article 55(4) of the Constitution of 1978, and since the Code has the force of law the decision of the Public Service Commission has been made contrary to law rather than in pursuance of law.

In responding to this argument, learned State counsel appearing for the respondents referred to Article 61B of the Constitution (as amended by the Seventeenth Amendment to the Constitution) which provides that the rules, regulations and procedures relating to the public service in force on the date of the coming into operation of that Amendment (such as the Establishments Code, which was published under the authority of the Cabinet) will be deemed to continue only until the Public Service Commission "otherwise provides". It has been contended by learned State Counsel that clause 5.1 of Chapter III of the Establishment Code is not applicable to the appointment of the 1st to 3rd respondent to the Transfer Appeal Board as the Public Service Commission has made other provisions as contemplated by Article 61B of the Constitution. It is important to note that the aforesaid article is a transitional provision which enacts that:-

> "Until the Commission otherwise provides, all rules, regulations and procedures relating to the public service as are in force on the date of the coming into operation of this Chapter, shall, *mutatis mutandis*, be deemed to continue in force as rules, regulations and procedures relating to the public service, as if they had been made or provided for under this Chapter."

The attention of Court was invited by the learned State Counsel to the documents marked 1R17 and 1R18 to demonstrate that the approval of the Public Service Commission was obtained for the constitution of the Transfer Board and the Transfer Appeal Board, and that such approval amounted to what learned State Counsel described as "otherwise providing" within the meaning of Article 61B. Learned State Counsel has stressed that the Public Service Commission is vested by Article 55(1) of the Constitution with all powers and functions pertaining to the transfer of public officers of the category to which the petitioners belong, and that the said Commission has accordingly appointed the Transfer Appeal Board by its order contained in the letter dated 11th July 2003 addressed by the 7th respondent secretary to the Public Service Commission to the 4th respondent marked 1R18.

It is not possible to agree with this contention of the learned State Counsel as the document marked IR 18 only indicate that the Public Service Commission has given its approval with regard to certain recommendations relating to the constitution of the Transfer Board and Transfer Appeal Board with respect to the Technical Education Service. Such *ad hoc* approval does not replace or purport to replace in a general way, the rules, regulations and procedures relating to the public service as were in force on the date of coming into operation of the 17th Amendment to the Constitution. Article 61B is a transitional provision which was intended to keep alive "all rules, regulations and procedures relating to the public service" as were in force at the time of the coming into operation of the Seventeenth Amendment until the Public Service Commission "otherwise provides". The latter phrase is commonly used in transitional provisions found in the Constitution and in ordinary legislation to enable the continuation in force of existing laws or subordinate legislation. Interpreting Article 168(1) of the Constitution of 1978, which uses similar phraseology, the Supreme Court has observed in *Madan Mohan v Carson Cumberbatch & Co.Ltd.*(6) at 85 that-

> An "existing law" has to be expressly repealed if it has to be effaced or its existence wiped out by a specific law enacted by Parliament. Otherwise it subsists and continues to remain law."

It follows that in the absence of specific legislation or subordinate legislation which expressly repeal and replace the existing law or reg-

ulation, the latter cannot be "wiped out". What Article 61B of the Constitution contemplates is for the Public Service Commission to formulate rules, regulations, and procedures relating to the public service in a general way which will have the effect of rendering the pre-existing rules, regulations and procedures inoperative.

As Wanasundera, J. observed in *The Public Service United Nurses Union v Montague Jayewickrema, Minister of Public Administration and Others*[7] at 230-

> "..... when existing general rules are sought to be altered, this too must be done in the same manner and following the identical procedures as for their formulation, namely, by enacting an amending rule."

The approval contained in 1R18 does not constitute rules, regulations and procedures of general application which could replace the pre-existing rules, regulations and procedures including the Establishments Code. In the circumstances, the court holds that 1R18 is not in any manner sanctioned by Article 61B of the Constitution. The court is of the opinion that the Public Service Commission has not made any contrary provisions which will discontinue the application of the pre-existing rules, regulations and procedures including the provision of the manual of transfer and Chapter III of the Establishments Code.

It is, however, relevant to note that the nature of the power that was vested in the Cabinet of Ministers by Article 55(4) of the Constitution (prior to the Seventeenth Amendment), in pursuance of which the Establishments Code was formulated and issued, has been examined by our Courts in past judicial decisions. In *Abeywickrema* v *Pathirana* (*Supra*) 138 Sharvananda, C.J., has observed that-

> "Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to "public officer" comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as, provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination

of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation, though they may be applied to a particular class of public officers. *This power is a legislative power* and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character."

This approach was followed in *The Public Service United Nurses Union* v *Montague Jayewickrema, Minister of Public Administration and Others* (*Supra*). In the course of his judgement in this case Wanasundera, J. cited the above passage with approval and specifically held that the Establishments Code "has all the binding force of a statute or regulation" (page 236).

However, in *Ramuppillai* v *Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others*[8] when the question arose as to whether certain Circulars issued by the Cabinet of Ministers in terms of article 55(4) of the Constitution sanctioning the application of 'ethnic quotas' for making appointments to the Public Service were legislative or executive in character, a Bench of Seven Judges of the Supreme Court chose to differ from the approach adopted in the earlier decisions. Mark Fernando, J. observed in the course of his judgment at pages 74 and 75-

"In regard to the question whether the Circulars were made in the exercise of legislative power under Article 55(4), with respect, I cannot agree with Sharvananda, C.J., that this power is legislative power. It is, if at all, a power "to make subordinate legislation for prescribed purposes" within the meaning of Article 76(3). More likely, it is part of the executive power which the Cabinet exercises, or ancillary thereto. Such powers cannot always be neatly fitted into the traditional three-fold classification; there are residual powers which, historically or functionally, are ancillary to the legislative, the executive, or the judicial power (thus the power of nominating Judges to hear a case, seemingly executive in character, was held to be an administrative power ancillary to the judicial power: *R.* v *Liyanage*,[8A]. As Professor Wade observes, the boundary between legislative and executive power is not precisely demarcated.....

I am therefore of the view that the Circulars in question have been made in the exercise of executive power, or are "administrative legislation", and thus constitute 'executive or administrative action' within the meaning of Article 126....."

A similar approach was followed by the Supreme Court in the later case of *Migultenne* v *Attorney General*[9] where the question arose in the context of the Constitution of Sri Lanka, 1972. In this the appellant, was a 'state officer' whose services had been terminated by the State. It was contended on behalf of the appellant that the discretion implicit in the "pleasure principle" had been gradually restricted or diluted by substantive and procedural safeguards contained in administrative rules and regulations governing the terms and conditions of public service made by the Cabinet of Ministers in terms of section 106(3) of that Constitution. It was further submitted that the appellant was not liable to summary termination as the said rules and regulations had made contrary provision. In rejecting the argument that the rules made under section 106(3) prevail over the "pleasure principle" enshrined in section 107(1), Mark Fernando, J. observed at page 417 of the judgement-

"Mr.Goonesekera is right in contending that the rules made under section 106(3) have statutory force, to the same extent as those made under Artcle 55(4). However, this rule making power is not a "legislative" power, as stated by Sharvananda, C.J., in *Abeywickrema* v *Pathirana*, (*supra*) cited with approval by Wanasundera, J. in *P.S.U.N.U.* v *Jayawickrema*, (*supra*) but "executive or administrative" (as held by a bench of seven Judges in *Ramupillai* v *Perera*, (*supra*) and is therefore subject to the fundamental rights jurisdiction, like other subordinate legislation (such as Emergency Regulations: *Wickramabandu* v *Herath*.[10] The recent decision in *Wickremaratne* v *Gunawardena*[11] that the making of a regulation by the Minister is *per se* the exercise of legislative power delegated to him by Parliament, and therefore not subject to the fundamental rights jurisdiction, is inconsistent with *Ramupillai and Wickramabandu*, which do not appear to have been cited.

I am therefore of the view that rules made under section 106(3) are subordinate legislation, and cannot be regarded as legislation within the meaning of section 107(1). Subordinate

legislation, even where authorized by the Constitution, cannot prevail over (and thereby amend) the Constitution, unless the Constitution clearly authorizes such a result."

This Court is clearly bound by the decision of the Bench of seven Judges of the Supreme Court in *Ramuppillai* v *Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others* (*supra*) and is inclined to the view adopted by the Supreme Court in *Migultenne* v *Attorney-General* (*supra*) that rules and regulations such as those found in the Establishment Code, which are formulated by the Cabinet of Ministers under the above mentioned Constitutional provisions are subordinate rather than primary legislation. Such subordinate legislation, even where authorized by the Constitution, cannot prevail over (and thereby amend) the Constitution, unless the Constitution clearly authorizes such a result. Accordingly, I hold that provisions of the Establishment Code such as Chapter III:5.1 upon which the petitioners have placed so much reliance, being subordinate legislation, cannot prevail over, or inhibit the application of, Article 61A of the Constitution in terms of which the decision of the Public Service Commission embodied in 1R18, which has been made in pursuance of power vested in the Commission by Article 55 of the Constitution, is precluded from judicial review. The preliminary objection based on Article 61A against the judicial review of the validity of the order of the Public Service Commission communicated by 1R18 is therefore upheld.

The petitioners also challenge the validity of the decisions or recommendations made by the 1st to 3rd respondents sitting as the Transfer Appeal Board with respect to the transfers of the petitioners on the basis that their appointment violated various provisions of Chapter III of the Establishments Code. Here again, learned State Counsel contends that judicial review of decisions of public officers are precluded by Article 61A of the Constitution as the 1st to 3rd respondents are public officers exercising authority conferred on them by the Public Service Commission. In this context, it is relevant to observe that although it is common ground that 1st to 3rd respondents are public officers, there is no evidence to establish that they have been delegated any authority by the Public Service Commission under Article 56 or Article 57 of the Constitution. This

is important in the context of Article 61A of the Constitution as it only seeks to shut out the jurisdiction of court with respect to any order or decision made by a Committee of the Public Service Commission or any public officer, "*in pursuance of any power or duty .... delegated to a Committee or public officer, under this Chapter or under any other law.*"

In terms of Article 56(1) of the Constitution, the Commission may delegate its powers to a Committee consisting of three persons (not being members of the Commission who need not necessarily be public officers), its powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of public officers as are specified by the Commission. In terms of Article 57(1) of the Constitution, the Commission may delegate to a public officers, its powers of appointment, promotion, transfer, disciplinary control and dismissal of such categories of public officers as are specified by the Commission. Sub-article (2) of Articles 56 and 57 expressly require that information pertaining to such delegation of powers be published in the Gazette. While the respondents have not been able to show that the Constitution or any other law had conferred or imposed any power or duty on the Transfer Appeal Board or *individually* on the 1st to 3rd respondents who constituted the said Board, they have also failed to produce any Gazette to prove compliance with the requirements of Articles 56(2) or 57(2).

In any event, it appears from certain provisions of Chapter III of the Establishments Code that the role of the Transfer Board and the Transfer Appeal Board is purely advisory, and that they did not have authority to order transfers on their own right. For instance, Chapter III:3:1 of the Establishment Code provides that "The authority ordering a transfer will act on the advice of a Transfer Board". According to the tabulation in Chapter III:2:3 item 3(a) the authority that can order the transfer of a public officer in a staff grade who is not in the Combined Services is the Secretary to the relevant Ministry. According to 3:11 "The Transferring Authority may vary the decisions of the Transfer Board..." Chapter III:5:2 sets out the specific grounds on which the Transfer Appeal Board will entertain an appeal against a recommendation of the Transfer Board, any clause 5:3 provides that "full and final authority is vested in the Secretary to the Ministry to decide in cases which a Transfer

Appeal Board cannot settle." As the impugned decision of the 1st to 3rd respondents, who purported to act as the Transfer Appeal Board was clearly not made in pursuance of any power or duty conferred or imposed on them by any provision of law or delegated to them by the Public Service Commission, Article 61A has no application to their impugned decision. It is therefore not possible to uphold the preliminary objection raised by the respondents with respect to the impugned decisions of the Transfer Appeal Board consisting of the 1st to 3rd respondents with respect to the transfers of the petitioner.

This brings us to the submission made in paragraph 2.9 of the Written Submissions of the respondents to the effect the decisions of the 1st to 3rd respondents "have been adopted" by the 4th respondent Secretary to the Ministry of Tertiary Education and Training who has been delegated by the Public Service Commission certain powers relating to *inter alia* the transfer of the petitioner. Reference was made by learned State Counsel to the order of the Public Service Commission dated 27th June 2003 made in terms of Article 57 of the Constitution and published in the Gazette Extraordinary No.1295/26 dated 2nd July 2003 marked 1R15 and 7R2. Learned State Counsel contends that insofar as the 4th respondent is a public officer who has purported to exercise power or duty delegated to him under Chapter IX of the Constitution, Article 61A of the Constitution prevents this court from looking into the validity of the orders made by the 4th respondent. Learned State Counsel has submitted that the decision of the Transfer Board, as approved or varied by the Transfer Appeal Board, has been adopted or ratified by the 4th respondents in his capacity as the Secretary to the Ministry of Tertiary Education and Training as evidenced by paragraph 1 of the letter dated 17th October 2003 marked P2 and paragraph 2 of the letter dated 9th December 2003 marked P5 addressed to two of the petitioners. The learned State Counsel has argued that even if one assumes (without conceding) that the Transfer Appeal Board was not duly constituted, the adoption of the findings of the Transfer Appeal Board by a public officer duly exercising authority delegated to him by the Public Service Commission would effectively preclude judicial inquiry into the validity or correctness of the decisions of such public officer.

In this connection, learned Counsel for the petitioners has submitted that the preclusive clause contained in Article 55(5) of the Constitution prior to the Seventeenth Amendment of the Constitution was of wider scope than the provisions contained in Article 61A brought into being by the Seventeenth Amendment. He contends that Article 61A only precludes the judicial review of any order or decision made by the Public Service Commission, a Committee, or any public officer, "*in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*" He argues that this is much narrower than the formula in the old Article 55(5) which ousted jurisdiction of court *"in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer."* It is however, noteworthy that despite the material differences in the language used in the two ouster clauses to which learned Cousel have drawn the attention of Court, the legal position under both ouster clauses would appear to be similar. This is mainly because even though Article 55(5) of the Constitution did not expressly require for its application that the authority in question should have acted in pursuance of any power or duty conferred or imposed on it by law or delegated to it by Public Service Commission under the Constitution or any law, which are expressed preconditions for the application of Article 61A, our courts have implied the requirement of a similar nexus of authority even when interpreting Article 55(5).

Our courts have held that Article 55(5) would be of no effect if the order is made by an officer who does not have legal authority to do so. In such cases our courts have held that the decision of the relevant authority is null and void and the preclusive clause in the Constitution is no bar to review. For instance in *Abeywickrema* v *Pathirana* (*supra*) in the context of the alleged termination of service through acceptance of a letter of resignation, the Supreme Court observed at page 155 of the judgment that if the particular officer to whom the letter was addressed had no legal authority to make an order with respect to it, Article 55(5) did not bar a challenge of the order made by that officer. In *Gunarathna* v *Chandrananda de Silva*[12] where a public officer was sent on compulsory leave by the Secretary to the Ministry of Defence, and the

power to do so was vested in the Public Service Commission which had not delegated such power to the Secretary to the Ministry of Defence, the Court of Appeal held that the purported order of compulsory leave was *ultra vires* and could be reviewed by court despite the ouster clause. In *Kotakadeniya* v *Kodithuwakku and others*(13) the Court of Appeal once again held that the ouster of jurisdiction by Article 55(5) was of no effect to shut out the jurisdiction of court to review an order of transfer of a Senior Deputy Inspector General of Police made by the Inspector General of Police, as the latter had no power or authority delegated by the Public Service to transfer an officer belonging to that rank. It is therefore crucial to decide whether the 4th respondent has been properly delegated by the Public Service Commission the power to transfer officers such as the Petitioners who belong to the Sri Lanka Technical Education Service.

The petitioners have admitted in paragraph 14 of the counter affidavit dated 2nd May 2004 filed by them that the Public Service Commission has made an order dated 27th June 2003 published in the Gazette Extraordinary No.1295/26 dated 2nd July 2003 marked 1R15 and 7R2 in terms of Article 57 of the Constitution delegating some of its powers with respect to certain categories of public officers to certain high ranking public officers. While the respondents claim that the said order is applicable to officers in the Sri Lanka Technical Education Service, the petitioners have vehemently denied this position. To facilitate analysis of this order, the relevant parts of the order and its Schedule are quoted below:-

THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Delegation of Powers by the Public Service Commission in terms of Article 57

By virtue of the powers vested in the Public Service Commission in terms of Article 57 of the Constitution of the Democratic Socialist Republic of Sri Lanka, the said Commission does hereby-

(1) delegate to the Public Officers specified in Column 11 of the Schedule hereto, its powers of appointment, promotion, transfer, disciplinary control and dismissal as are specified in Column III of

the Schedule hereto, in respect of the categories of public officers as are specified in Column 1 of the Schedule hereto;

(2) .....

(3) .....

(4) .....

(5) This delegation will take effect from 01.08.2003.

By Order of the Commission

(H.D.L.GOONEWARDENE)
Secretary,
Public Service Commission

27th June 2003

The petitioners contend that the Sri Lanka Technical Education Service is an All Island Service which is parallel to, though distinct from, the Sri Lanka Education Administrative Services which is listed as item (e) in cage 1 of column I of the Schedule to the said order. Although the Sri Lanka Technical Education service is not listed as an All Island Service in cage 1 of the column 1 of the said order, the petitioners contend in paragraph 14 of their counter affidavit that they nevetheless belong to an All Island Service. In Paragraph 15 of their counter affidavit the petitioners expressly state that they have been wrongly classified in cage 2 of column 1 as Staff Grade Officers not belonging to any All Island Services. It is argued on behalf of the petitioners that as they belong to an All Island Service which is not listed in cage 1 of column 1, they cannot be categorized as "Staff Grade Officers not belonging to any of the All Island Services" in cage 2 of column 1 either, and that the order of delegation marked 1R15 and 7R2 has no application at all to the Sri Lanka Technical Education Services. If this argument is accepted, it would lead to the conclusion that all powers of appointment, promotions, transfers, disciplinary control and dismissal of the officers belonging to the Sri Lanka Technical Education Service is vested in and can only be exercised by the Public Service Commission, and that the 4th respondent had no delegated authority to order the transfers of the petitioners.

The position taken by the petitioners raises the question as to whether the list of All Island Service contained in cage 1 of column 1 of 1R15 / 7R2 is exhaustive. The petitioners contend that it is, but

the respondents argue with equal fury that it is not. It is relevant to note that the 7th respondent, Secretary to the Public Service Commission has in her affidavit expressly stated that the Sri Lanka Technical Education Service is not an All Island Service. She has also stated that the powers of transfer of staff grade officers belonging to the Sri Lanka Technical Education Service have been dele- 710

SCHEDULE

Column I *Categories of Officers*	Column II *Public Officers to whom the powers are delegated*	Column III *Powers to be delegated*
1. Officers belonging to any of the following all Island Services		
(a) Sri Lanka Administrative Service	Secretary to the Ministry of the Minister in charge of the subject of Public Administration	(i) Transfers according to schemes approved by the Public Service Commission
(b) Sri Lanka Accountant Service	Deputy Secretary to the Treasury	
(c) Sri Lanka Engineering Service	Secretary to the Ministry of the Minister in charge of the subject of Public Administration	(ii) Disciplinary Control in respect of offences specified in the Second Schedule of offences in Chapter XLVII of the Establishment Code
(d) Sri Lanka Scientific Service	Secretary to the Ministry of the Minister in charge of the subject of Public Administration	
(e) Sri Lanka Education Administrative Service	Secretary to the Ministry of the Minister in charge of the Subject of Education	
(f) Sri Lanka Planning Service	Secretary to the Ministry of the Minister in charge of the subject of Planning	
(g) Sri Lanka Agricultural Service	Secretary to the Ministry of the Minister in charge of the subject of Agriculture	
(h) Animal Production and Health Service	Secretary to the Ministry of the Minister in charge of the subject of Livestock Development	
(i) Sri Lanka Medical Service	Secretary to the Ministry of the Minister in charge of the subject of Health	

Column I *Categories of Officers*	Column II *Public Officers to whom the powers are delegated*	Column III *Powers to be delegated*
(j) Indigenous Medical Service	Secretary to the Ministry of the Minister in charge of the subject of Indigenous Medicine.	
(k)Sri Lanka Architecture Service	Secretary to the Ministry of the Minister in charge of the subject of Public Administration	
2. Staff Grade Officers not belonging to any of the All Island Services	Secretaries of the Ministries of the Ministers in Charge of the Respective subjects	(i) Transfers according to schemes approved by the Public Service Commission (ii) Disciplinary Control in respect of offences specified in the Second Schedule of offences in Chapter XLVII of the Establishment Code
3. Staff Grade Officers not coming under any Ministry	Respective Heads of Departments	(i) Transfers according to schemes approved by the Public Service Commission (ii) Disciplinary Control in respect of offences specified in the Second Schedule of offences in Chapter XLVII of the Establishment Code
4. Non-Staff Grade Officers belonging to the Combined Services	Director-General of Combined Services	Appointment, Promotion, Transfer, Disciplinary Control and Dismissal
5. Non-Staff Grade Officers not belonging to the Combined Services	Respective Heads of Departments	Appointment, Promotion, Transfer, Disciplinary Control and Dismissal

gated by the order made by the Public Service Commission marked 1R15 and 7R1. Even if one assumes that there could be other All Island Services functioning in Sri Lanka such as, for example, the Combined Services, another question that arises is whether the words "any of the All Island Services" found in cage 2 of column 1 is referable only to the All Island Services in cage 1 of column 1 or whether those words extend to or include other All Island Services functioning in Sri Lanka which are not listed in cage 1 of column 1. The petitioners in paragraph 15 of their counter affidavit state that they have been "wrongly listed under the 2nd category or cage under column I" which suggests that in view of their position that they belong to an All Island Service not included in cage 1 of column 1, they should be treated as not falling within any of the cages in column 1 of 1R15 or 7R2, which position is hotly contested by the respondents. I am inclined to the view that the reference in cage 2 of column 1 to "Staff Grade Officers not belonging to any of the All Island Services" was intended to cover and apply to all staff grade officers not belonging to the All Island Services mentioned in cage 1 of column I. This would mean that staff grade officers in any All Island Services such as the Combined Services and Sri Lanka Technical Education Service will come within cage 2 of column I. This conclusion is supported by the position that cage 4 and cage 5 of column I apply only to non-staff grade officers and cage 3 of column I apply only to staff grade officers not coming under any Ministry. It is significant to note that in paragraph 9 (2) of the written submission dated 25th May 2004 filed on behalf of the petitioners, learned Counsel for the petitioners has conceded that "The petitioners belong to an All Island Service which falls within not the first cage, but the 2nd cage in the 1st column to the Schedule to that Gazette". I hold that the Secretaries of the Ministries of the Ministers in charge of the respective subjects, such as the 4th respondent in the case of staff grade officers such as the petitioners clearly had delegated authority to transfer such officers, and there is evidence to find that in fact the 4th respondent has purported to adopt the decision of the Transfer Appeal Board.

The question that arises in this connection is that, assuming that the 1st to 3rd respondents did not have authority to make the impunged transfer orders, can the lack of authority be cured by

adoption or ratification by the Public Service Commission or by a public officer such as the 4th respondent exercising authority delegated by the Public Service Commission? In *Gunarathne* v *Chandrananda de Silva* (*supra*), where the Court had to decide whether a decision made without lawful authority by the Secretary to the Ministry of Defence, to send the petitoner on compulsory leave can be protected from judicial scrutiny by reason of its purported adoption by the Public Service Commission, U. De Z. Gunawardana, J. at 282 to 283 made the following observation -

> "It is worth recalling the solitary argument put forward on behalf the respondent viz. that as the Public Service Commission had "granted its approval" to the decision made by the respondent by the date that the letter P1 was, in fact, served on the petitioner – the Public Service Commission must be deemed, if not, held to have ratified the impunged decision made by the respondent. At any rate, the Public Service Commission could not, in law, "grant approval" and so ratify or impart validity and efficacy to the decision of the respondent, reasons being at least four-fold:
>
> (i) It is an inflexible and deep-rooted principle of law, which is as elementary as it is well-known, that no act or decision which is void at its inception, as is the decision of the respondent, can ever be ratified ...."

Although the above quoted *dicta* might at first sight support the view that in no case can an order made without authority be rectified by subsequent grant of authority, it must be observed that the comment was clearly *obiter* as it was made in the context of a case where the Public Service Commission had acted as a "rubber stamp" (*Per* Hector Yapa, J. at 274) and there was no genuine exercise of the mind of the Commission on the question in issue. Furthermore, the said *dicta* has overlooked the administrative practice of taking urgent action whenever exigencies of the service so demand and obtaining the necessary covering approval thereafter, a practice which is often resorted to and is sanctioned by administrative procedures and judicial decisions. *See Rajapakse* v *Tissa Devendra, Chairman, Public Service Commission and Others.*[14] More importantly, the attention of Gunawardana, J. does not

appear to have been invited to the following observations of Sharvananda, CJ. in *Abeywickrema* v *Pathirana (supra)* at 155-

> "..... but if the order / decision of the public officer, acting *ultra vires* has been adopted by the ... Public Service Commission, a Committee of the Public Service Commission or of a public officer to whom the Public Service Commission has made the necessary delegation under Article 58(1), then of course, such decision or order becomes the order of that constitutional functionary, and certainly its validity cannot be inquired into."

While I am inclined to the view that the Public Service Commission as well as a Committee of the Commission or a public officer exercising delegated authority may in appropriate circumstances ratify an order made or action taken by a public officer without authority, I also consider in the context of the present case that there is nothing in the Constitution or any law to prevent the 4th respondent from making a decision in regard to a matter where some person or body of persons has previously made some decision without any authority to do so.

In this context it is also necessary to consider the application of section 22 of the Interpretation Ordinance in applying the provisions of Article 61A of the Constitution. Section 22 of the Interpretation Ordinance sought to clarify the law in the wake of the decision of the House of Lords in *Anisminic Ltd.* v *Foreign Compensation Commission and Another.*[15] Section 22 which sought to exclude judicial review in general terms, also recognized exceptions in terms of which judicial review is permitted in limited circumstances, one of which is where the authority in question has acted without jurisdiction. I am inclined to the view that since this court exercises a supervisory jurisdiction in terms of Article 140 of the Constitution which commences with the words "Subject to the provisions of the Constitution", the constitutional ouster contained in Article 61A excludes judicial review even in the situations contemplated by the proviso to section 22 of the Interpretation Ordinance as Mark Fernando, J. observed in *Migultenne* v *The Attorney-General* (*supra*) at 419 in connection with sections 106 and 107 of the Republican Constitution of 1972.

"Finally, the contention that ouster clauses in the Constitution should be strictly interpreted restricting the ambit of the ouster, can be far more readily accepted where the Constitution itself contains other indications of an intention to permit review; such as the entrenchment of the fundamental rights and other jurisdictions of this court, and the writ jurisdiction of the Court of Appeal. It is difficult, however to read an implied exception into an ouster clause in the Constitution by reference to general provisions in ordinary laws governing the jurisdictions of the courts; the maxim *generalia specialibus nonderogant*, would apply with much greater force when the special provisions are found in the Constitution itself."

I therefore hold that the decisions or determinations made by the 4th respondent as the Secretary to the Ministry of Tertiary Education and Training, being the decisions or determinations of a public officer exercising authority delegated by the Public Service Commission, are precluded from judicial review by Article 61A of the Constitution. As noted earlier, subordinate legislation including rules and regulations made by the Cabinet of Ministers prior to the Seventeenth Amendment such as the provisions of the Establishments Code, cannot inhibit the application of Article 61A of the Constitution, in terms of which the decision of the 4th respondent taken in pursuance of power vested in him by reason of a delegation of authority lawfully made by the Public Service Commission under Article 57 of the Constitution, is precluded from judicial review. The first preliminary objection taken up by learned State Counsel has therefore to be upheld.

The Question of Futility

The other preliminary objection raised on behalf of the respondents is that insofar as the orders made by the 4th respondent Secretary to the Ministry of Tertiary Education and Training are not challenged in these proceedings, the application made by the petitioners to this court is an exercise in futility. It is evident from the first paragraph of P2 and the second paragraph of P5 that the 4th respondent has ordered the transfer of the petitioners. In the circumstances it is submitted by learned State Counsel appearing for the respondents that the present application seeking to quash only the decision of the 1st to 3rd respondents purporting to sit as the

Transfer Appeal Board should be refused on the ground of futility.

It is, however, submitted by learned Counsel for the petitioners that the petitioners were not made aware of the decision of the 4th respondent until after the present application was filed, and that since the respondents are now relying on a purported decision of the 4th respondent, the petitioners are entitled to a contend and show Court on the material filed by the respondents themselves that the purported decision of the 4th respondent is invalid. This court cannot accept the argument of the petitioners that they were not aware of the decision of the 4th respondent until these proceedings were commenced, as the petitoners themselves have produced with their affidavit dated 6th January 2004 (filed along with the petition which initiated these proceedings) the letters referred to earlier marked P2 and P5 in which it is expressly stated that the aforesaid transfers for the year 2004 in question have been approved by the 4th respondent. Furthermore, even though the petitioners have filed the counter affidavit dated 2nd May 2004, no application was made on behalf of the petitioners to amend the prayer seeking to have quashed by way of *certiorari* that the decisions of the 4th respondent, Secretary to the MInistry of Tertiary Education and Training.

This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ ... will not issue where it would be vexatious or futile." See, *P.S. Bus Co. Ltd.* v *Members and Secretary of the Ceylon Transport Board.*[16] In *Siddeek* v *Jacolyn Seneviratne and Other*[17] at 90, Soza, J. delivering the judgment of the Supreme Court observed that -

> "The Court will have regard to the special circumstances of the case before issuing a writ of *certiorari*. The writ of *certiorari* clearly will not issue where the end result will be futility, frustration, injustice and illegality.

It is manifest that it would be furtile to issue a writ of *certiorari* as prayed for in the petition since what is sought to be quashed therein is the decision said to have been made by the Transfer Appeal

Board. However, as evidenced by paragraph 1 of P2 and paragraph 2 of P5, the 4th respondent, to whom the power of transfer has been delegated by the Public Service Commission has approved and adopted the decisions of the Transfer Appeal Board. No relief has been sought against that decision although the petitioners were aware of it having received P2 and P5. In the circumstances, it would be futile to grant the relief prayed for since it would still leave in tact the decisions made by the 4th respondent. In the circumstances the court has to uphold the preliminary objection taken up by the respondents on the basis of futility. 910

Conclusion

In the result, this court makes order upholding both preliminary objections taken up on behalf of the respondents in this case on 11th May 2004 and dismissing the application filed by the petitioners. In all the circumstances of this case, there shall be no order for costs.

SRIPAVAN, J. - I agree.

Application dismissed.