

**APPAPILLAI AMIRTHALINGAM v. M. A. PIYASEKERA,
COMMISSIONER OF ELECTIONS AND ANOTHER****COURT OF APPEAL**

WIMALARATNE, J. (P/CA) & TAMBIAH, J.

C.A.596/1980

AUGUST 4, 1980.

Constitution, Articles 66, 161(d) – Nomination after the death of a Member of Parliament – Duty of the Commissioner of Elections – When do writs of certiorari and mandamus lie ?

Mylvaganam Canagaratnam was declared elected as the second Member to represent the Electoral District of Pottuvil in the National State Assembly at an election held on 12.09.77. He was the nominee of the Tamil United Liberation Front (T.U.L.F.) whose Secretary-General is the petitioner. He made a statement in the National State Assembly on 19.12.77 of his decision to join the Government Parliamentary Group, but the Petitioner avers that he remained a member of the TULF and that he did not resign nor was he expelled from the party. He died on 20.4.80 and by virtue of Article 66 of the Constitution, that seat became vacant. Article 161(d) (i) of the Constitution provides that when a vacancy in the membership of the First Parliament occurs, the Secretary-General of Parliament should forthwith inform the Commissioner of Elections of such vacancy and he should require the Secretary of the political party to which such member belonged, to nominate a member of such party, to fill such vacancy.

The petitioner made this application for writs of certiorari and mandamus on the grounds that :

- (i) the Commissioner of Elections, failed to require the Petitioner to nominate a member of the T.U.L.F. to fill the vacancy although he was under duty to do so and;
- (ii) the Commissioner of Elections has informed the petitioner that he has decided to require the Secretary of the United National Party (U.N.P.) to nominate a member of the U.N.P. to fill the vacancy.

The Commissioner of Elections resisted the application for a writ of certiorari on the ground that he had not made a decision requiring the 2nd respondent (Secretary of the U.N.P.) to nominate a member of the U.N.P. and that he was only in the process of determining the political party to which the deceased member belonged. He resisted the application for a writ of mandamus on the ground that he has not refused or declined to act in accordance with Article 161(d) (iii).

Held :

(i) There has necessarily to be a formal decision or determination by the Commissioner requiring the Secretary of a political party to nominate a member of that party to fill a vacancy in Parliament before a writ of certiorari could issue quashing that decision or determination. As that situation has not yet arisen, the application is premature.

(ii) *Mandamus* is an extraordinary residuary and supplementary remedy to be granted only when there is no other means of obtaining justice. The Court will decline to exercise its discretion in favour of a petitioner, if a specific alternative remedy "equally convenient, beneficial and effectual" is available.

Case referred to:

(1) *Ex Parte Pritchard* (1953) All E.R. 766 at 772

APPEAL for writs of certiorari of mandamus.

V. S. A. Pullenayagam with *M. Sivarajasingham*, *G. Kumaralingam*, *S. C. Chandrahasan* and *C. V. Vivekananda* for petitioner.

V. C. Gunatillaka, Solicitor-General with *Suri Ratnapala*, State Counsel for 1st respondent.

K. N. Choksy with *Daya Pelpola*, *Henry Jayamaha* and *Lakshman de Alwis* for 2nd respondent.

Cur adv vult.

11th August, 1980

WIMALARATNE, J. (President of the Court of Appeal)

Mylvaganam Canagaratnam was declared elected as the second member to represent the electoral district of Pottuvil in the National State Assembly at an election held on 12.9.77. He was the nominee of the Tamil United Liberation Front (T.U.L.F.) whose Secretary-General is the petitioner. He made a statement in the National State Assembly on 19.12.77 of his decision to join the Government Parliamentary Group, but the petitioner avers that he remained a member of the T.U.L.F., and that he did not resign nor was he expelled from that party.

He died on 20.4.80, and by virtue of Article 66 of the Constitution of the Democratic Socialist Republic of Sri Lanka, that seat became vacant. Article 161(d) (i) of the Constitution provides that where a vacancy in the membership of the first Parliament occurs, otherwise than on the election of a Member being declared void, such vacancy shall be filled in the manner provided by Article 161(d) (iii), which is in the following terms:—

"where a vacancy as is referred to in sub-paragraph (i) or (ii) has occurred, the Secretary-General of Parliament shall forthwith inform the Commissioner of Elections of such vacancy. The Commissioner of Elections shall thereupon require the Secretary of the political party to which such Member belonged to nominate a member of such party to fill such vacancy. Upon

the receipt of such nomination the Commissioner shall declare such person to be the Member for the electoral district in respect of which the vacancy occurred.”

The petitioner avers that the Commissioner of Elections, who is the 1st respondent, failed to require the petitioner to nominate a member of the T.U.L.F. to fill the vacancy, although he was under a duty to do so. Alleging that the 1st respondent had informed the petitioner that he has decided to require the Secretary of the United National Party (U.N.P.) to nominate a member of the U.N.P. to fill the vacancy, the petitioner filed this application on 21.5.80 seeking:—

- (a) a mandate in the nature of a Writ of Certiorari, quashing the decision of the 1st respondent requiring the 2nd respondent to nominate a member of the U.N.P. to fill the vacancy, on the ground that he has made the decision without jurisdiction or in excess of his jurisdiction:
- (b) an order restraining the 2nd respondent from nominating a member of the U.N.P.; and
- (c) a mandate in the nature of a Writ of Mandamus directing the 1st respondent to require the petitioner to nominate a member of the T.U.L.F.

Both respondents have filed statements of objections, supported by documentary evidence. The 1st respondent has taken up the position that when the petitioner filed this present application he had not made a decision requiring the 2nd respondent to nominate a member of the U.N.P. He was only in the process of determining the political party to which the deceased Member belonged when the petitioner addressed a letter dated 24.4.80 (1R2) requesting him to withhold action pending the decision on a letter addressed by him to His Excellency the President (1R3). As the position of the T.U.L.F. had been made known in the letter 1R3 he proceeded to make inquiries from the 2nd respondent in order to determine the political party to which the deceased Member belonged. He denies specifically that he informed the petitioner that he had decided to require the 2nd respondent to nominate a member. He resists the claim for Certiorari on the ground that he has made no decision or determination that could be quashed by way of Certiorari, and he resists the claim for Mandamus on the ground that he has not refused or declined to act in accordance with Article 161(d) (iii), and also on the ground that no Mandamus could issue to direct him to make a decision in favour of any particular party.

The objections of the 2nd respondent are directed mainly to establish that the deceased Member ceased to be a member of the

T.U.L.F. and became a member of the U.N.P. from the date he crossed over to the government group (i.e. from 19.12.77) up to the time of his demise. I shall refer to this evidence later.

In a statement of counter objections the petitioner has clarified the contents of his petition and has stated that it was when Mr. M. Sivasithamparam, the President of the T.U.L.F. met the 1st respondent on 20.5.80, that the latter told the former that he had decided that the words "the political party to which such member belonged" in Article 161(d) (iii) meant the political party to which such member belonged at the time of his death. An affidavit signed by Mr. Sivasithamparam has been filed along with the petitioner's counter-affidavit.

In a counter affidavit the 1st respondent, whilst repeating the denial that he had decided to require the 2nd respondent to nominate a member of the U.N.P. has averred that he informed Mr. Sivasithamparam that he would be making inquiries as to the party to which the deceased belonged at the time of his death.

On the question of fact as to whether the 1st respondent had already taken a decision by 20.5.80 to require the 2nd respondent to nominate a member of the U.N.P. to fill the vacancy, there could be only one answer, and that answer is supplied conclusively by the documents 1R5 to 1R8. By 1R5 dated 20.5.80 the 1st respondent inquired from the 2nd respondent as to whether the deceased became a member of the U.N.P. when he crossed over to the government group and as to whether he continued to remain as such until his death. The letter states that this information was necessary "before he decides to act." By 1R6 of 21.5.80 the 2nd respondent supplied the information asked for in 1R5. By 1R7 of 21.5.80 the 1st respondent asked the 2nd respondent to furnish the date when the deceased became a member of the U.N.P., and by 1R8 of 23.5.80 the 2nd respondent supplied that information. If the 1st respondent had by 20.5.80 already decided to require the 2nd respondent to nominate a member, there was no purpose served by the correspondence contained in the above documents.

When confronted with this situation learned Counsel for the petitioner contended that the decision he was seeking to quash was the decision of the 1st respondent that the words "the political party to which such member belonged" meant the party to which the member belonged at the time of his death. The question arises as to whether such a "decision" is one which can be quashed by way of Certiorari. The learned Solicitor-General characterised it as only a "thinking" of the 1st respondent, whilst learned Counsel for the 2nd

respondent submitted that something much more formal than that was required before a writ could issue.

Certiorari lies normally to quash the decisions or determinations of bodies or persons having a duty to act judicially. As observed by Parker, J. "It cannot be too clearly understood that the remedy by way of Certiorari only lies to bring up to this Court and quash something which is a determination or a decision." *Ex Parte Pritchard*¹¹. I am in agreement with the contention of Counsel for the respondents that in the context of Article 161(d) (iii) of the Constitution there has necessarily to be a formal decision or determination by the 1st respondent requiring the Secretary of a political party to nominate a member of that party to fill a vacancy in the membership of the First Parliament, before a Writ of Certiorari could issue quashing that decision or determination. As that situation has not as yet arisen the present application for a Writ of Certiorari is premature, and has to be refused. The next question is whether a Writ of Mandamus can issue directing the 1st respondent to require the petitioner to nominate a member of the T.U.L.F. to fill the vacancy. The petitioner could only show that the deceased was nominated as the T.U.L.F. candidate for the Pottivil Seat. Whilst conceding that the deceased made a statement in the National State Assembly that he had decided to join the Government Parliamentary Group on 19.12.77, the petitioner contends that he did not in fact join the U.N.P., but remained a member of the T.U.L.F. To contradict this averment the 2nd respondent relies on a large volume of evidence. The sequence of events was somewhat as follows:—

On 19.12.77 when the deceased made the statement in the National State Assembly, the petitioner had observed, "We are not turn coats. We have certain principles and policies. You are a disgrace. A disgraceful specimen of humanity. Resign your seat and contest if you can." (Hansard – 19.12.77)

On 23.12.77 the deceased wrote the letter 2R1 to the General Secretary of the U.N.P. applying for membership of that party, and agreeing to accept its principles, policy and programme. On the same date he was issued the membership card of the Party (X3). 2R3 shows that the subscription fee of Rs. 25/- for the month of January, 1978 had been recovered from him through the Secretary of the National State Assembly; likewise 2R3(a) is proof of payment of subscription for June 1978. The Certificate of the Secretary-General of Parliament (2R4) shows that he had paid the party subscription up to the time of his death. He was appointed a District Minister, which appointment could be held only by Members of Parliament

who belonged to the party. His involvement in organising party activities in the Pottuvil Electorate is reflected in the documents marked 2R7.

As against this mass of evidence we have not been furnished with reliable documentary evidence to demonstrate that the deceased yet remained a member of the T.U.L.F. The answer to the question "to what party did Canagaratnam belong at the time of his death?" can therefore be answered without any hesitation. Likewise, when the new Constitution was promulgated on 7.9.78 he was a Member of the First Parliament and belonged to the U.N.P.

This being the factual situation, it is difficult to see how Mandamus could issue. Mandamus has always been regarded as an extraordinary, residuary and 'supplementary' remedy, to be granted only when there is no other means of obtaining justice. The Court will decline to exercise its discretion in favour of a petitioner if a specific alternative remedy 'equally convenient, beneficial and effectual' is available. Mandamus has often been refused on the ground that another judicial remedy is equally or more appropriate. Thus, the availability of *quo warranto* has been held to operate as a bar to mandamus – **Judicial Review of Administrative Action by S. A. de Smith** (3rd Edition) pages 501, 502.

The 1st respondent's position is that he has not as yet required the Secretary of any political party to nominate a member. Had it not been for the delay occasioned by the correspondence referred to, and the filing of the present application, the 1st respondent would by now have made a request for the nomination of a member to fill the vacancy. If the 1st respondent makes the wrong decision, that decision can be questioned by way of Certiorari. Likewise, if the 1st respondent, on receiving a nomination, declares the wrong person to be the second member for the electoral district of Pottuvil, that election can be questioned by way of *Quo Warranto*. That appears to me to be the petitioner's remedy.

I would accordingly refuse the present application. Under all the circumstances, there will be no costs.

TAMBIAH, J. – I agree.

Application refused.