

ABEYNAYAKE AND OTHERS
v
**RICHARD PATHIRANA, MINISTER OF EDUCATION
AND HIGHER EDUCATION AND OTHERS**

COURT OF APPEAL
TILAKAWARDENA, J. AND
WIJERATNE, J.
CA 885/99
JULY 15, 2002

Buddhist and Pali University of Sri Lanka Act, No. 74 of 1981 as amended by Act, No. 37 of 1995, sections 9, 16(2), S.23(1), 39B(4)b, 39(B)2 b and 45(2) XII – Minister appointing Competent Authority – Unreasonable and unjustifiable action – Should the Competent Authority be a Buddhist monk? Applicability of Rules framed under the Establishment Code of the University Grants Commission – Judicial review.

The petitioners complain that the Minister had acted unreasonably and unjustifiably when he appointed a Competent Authority and that the Competent Authority should be a Buddhist monk.

Held:

- (i) The Minister should be reasonably satisfied that the appointment of a Competent Authority is necessary in terms of the powers vested in him. There were substantial grounds to authorise the Minister's interference with the administration of the University.
- (ii) Though section 9 states that a Vice-Chancellor should be a venerable and it could be imputed that a regular appointment of the Vice-Chancellor should be a competent person who is a Bhikkhu, under section 39(B)(4)b the Minister has the power to appoint any person by name or by office to be a Competent Authority.
- (iii) Considering section 16(2), it is possible to assume that even with regard to disciplinary proceedings, Rules relating to such matters according to the Establishment Code of the University Grants Commission of the Higher Educational Institution can be applied.
- (iv) It is important to note that judicial review is concerned not with the decision but with the decision making process.

APPLICATION for mandates in the nature of writs of certiorari/prohibition.

Cases referred to:

1. *R v Chief Constable of the Merseyside Police, ex-parte Calweley and others* – (1986) 1 All ER 257 at 265 (CA)
2. *Preston v Inland Revenue Commissioners* – (1985) 2 All ER 327 at 337 (HL)

R.K.W. Goonesekera with J.C. Weliamuna for petitioners.

E.D. Wickramanayake with U. Abdul Najeem for 1st, 3rd, 4th and 5th respondents.

August 21, 2002

SHIRANEE TILAKAWARDANE, J.

C.A. No. 422/99, 885/99, 405/99, 1239/99 are all connected cases and at the hearing of these applications, Counsel on behalf of the parties agreed that the decision of this Court with regard to the issue of the appointment of the competent authority which forms the basic issue in all these applications would bind all the applications and would be decided therefore on the judgment in this case.

The petitioners in this application (No. 885/99) are members of the Academic Staff of the Buddhist and Pali University of Sri Lanka, the said University being established by the Buddhist and Pali University of Sri Lanka Act, No. 74 of 1981 as amended by Act, No. 37 of 1995. The C.A. Applications Nos. 885/99 and 422/99 were instituted against the order made by the Minister of Higher Education appointing a competent authority in terms of the powers vested in him under section 39B(4)b of the Act.

The gravamen of the argument of the Counsel for the petitioners was that the Minister had acted unreasonably and unjustifiably when he acted under the powers, undoubtedly vested in him

in terms of section 34B(4)b of the said Act in appointing a competent authority. The relevant portion of section 39B(4)b reads as follows:-

- 4 Where the Minister is satisfied that, due to any strike or lock-out or any other cause, the work or administration of the University has been seriously dislocated and that the authorities of the University have failed to restore normal conditions, the Minister may take all such measures as may be necessary to ensure the restoration of normal conditions in the University. Pending the restoration of normal conditions the Minister may, by order published in the Gazette, make all such provisions as he may deem necessary in respect of all or any of the following matters relating to the University:-
- (a) The closure of the University;
 - (b) The appointment of any person by name or by office, to be a competent authority for the purpose of exercising, performing or discharging *in lieu* of any officer, authority or other body of the University, any power, duty or function conferred or imposed on, or assigned to, such other authority or body under this Act or any appropriate instrument; and
 - (c) Any other matter connected with or relating to any of the matters aforesaid.

On an examination of the material before the Minister he should be reasonably satisfied that the appointment of a competent authority is necessary in terms of the powers vested in him. Thus the issue is whether there were substantial grounds to authorise the Minister's interference with the administration of the said University.

On a perusal of the documents 1R1-1R5 which set out various incidents showing that a situation had arisen at the University where the administration and management of the University had completely broken down. A number of pupil priests had forcibly disconnected a telephone from the University office and fixed it in their hostel. The officers who had been appointed to maintain discipline had not taken any disciplinary action against them. The pupil priests had refused to leave their hostel during the University vaca-

tion and had obstructed the Secretary of the University from performing his functions. The pupil priests had forcibly opened the gates of the Colombo Office of the University. The pupil priests had obstructed the use of direct telephone lines by using various obstacles and had threatened any one from leaving the said office. They had forcibly obstructed a meeting and had imprisoned some of the officers of the staff.

In January 1999 the then Vice Chancellor had made a complaint marked 1R2, wherein allegations were made that certain pupil priests having forcibly entered his office, had threatened him, in order to compel him to withdraw his application for the post of Vice Chancellor. This fact is clarified in 1R3, a letter dated 05.01.99 sent to the Minister. Also documents 1R4 and 1R5 reveal matters relating to auditing which had been questioned by the Auditor General relating to the financial matters, which had not been looked into. In the backdrop of this scenario, the obvious conclusion is, that there was more than sufficient material for the Minister to interfere in terms of the powers vested in him under section 39B(4)(b) of the aforesaid Act and on these grounds it could be reasonably inferred that he had reason to be satisfied that it was necessary to appoint a competent authority.

Professor P. Wilson who was appointed by him in terms of these powers was undoubtedly an experienced administrator in matters pertaining to the University and also a renowned scholar. It appears after such appointment, matters had taken a turn for the better. It is to be specially noted that for a period of almost 3 months, not even the petitioners to these applications challenged the said appointment.

The basis of the challenge to the Minister's appointment was that Professor P. Wilson was disqualified from being appointed as he was not a Buddhist monk. It appears in terms of section 9 of the Act, No. 37 of 1995 that a Vice Chancellor should be a venerable and it could be imputed that regular appointment of the Vice Chancellor should be a competent person who is a bhikku. However, section 39B(4)(b) referred to above refers to the appointment of *any person* by name or by office, to be a competent authority for the purpose of exercising, performing or discharging *in lieu* of any officer, authority or other body of the University, any

power, duty or function conferred or imposed on, or assigned to, such other authority or body under this Act. Undoubtedly under this Act the final appointment of Vice Chancellor was envisaged to be a Buddhist monk. However it is tenable that under the extraordinary circumstances where the Minister had to invoke his extraordinary powers of appointing a competent authority, as the appointment was not a substantive appointment but only an appointment *in lieu* of the authority, a person other than a Buddhist monk could be appointed.

It is important to note that the Government of Sri Lanka contributes over Rs. 300 Million to the running of the University and therefore it is of paramount importance that all necessary steps should be taken to contain a situation especially where the administration of the University breaks down due to lack of discipline on the part of the students. With this view in mind the Minister had been given extraordinary powers under the aforesaid Act. In terms of the powers he had appointed Professor P. Wilson as the competent authority. It appears that at the time of the appointment, perhaps in view of the gravity of the situation, and on recognising the urgent steps that necessarily had to be taken by any competent person to contain the situation even the petitioners had not complained of the appointment for a period of almost 3 months.

As to the appointment of the 3rd respondent as the specified authority section 39(B)(2)(a) reads that "the Minister may by order published in the Gazette appoint *any person* by name or office to be a specified authority". The petitioner had not revealed any substantial grounds as to why the appointment of the 3rd respondent should be quashed. Therefore it should be held that the appointment of the 3rd respondent is made according to section 39B2(a) and is lawful and *intra vires* the powers of the Minister in terms of the said section.

It is important to note section 39B 2(b) empowers the specified authority to delegate any of his powers to such standing committees or *ad hoc* committees consisting of such number of members as may be determined by the specified authority. Accordingly the 3rd respondent had appointed two *ad hoc* committees to inquire into certain matters. One such *ad hoc* committee was a one man

committee appointed to inquire into various matters relating to maladministration and financial mismanagement.

The next issue is whether the petitioner can seek relief against the decision taken to send them on compulsory leave by letter dated 29.07.1999. The reasons stated therein were that the petitioner was appointed outside the scheme of recruitment and that he had obtained a fuel allowance worth Rs. 3000/- while he was out of the country. This letter marked P5 was sent by the 2nd respondent.

In terms of letter P5 (885/99) it specifically states that the decision to send the petitioner on compulsory leave was taken after considering the Report submitted to the above referred *ad hoc* committee. The submissions of the petitioner that the above referred charge which had been framed under the Establishment Code of the University Grants Commission and other Higher Educational Institutions have no application to the Buddhist and Pali University, cannot be accepted. Section 16(2) of the amendment Act states that (ix)(a) schemes of recruitment and appointment of staff to the University should be in conformity with the schemes of recruitment and procedures for appointment to other national Universities. Therefore it is possible to assume that even with regard to disciplinary proceedings, rules relating to such matters according to the Establishment Code of the University Grants Commission of the Higher Educational Institution can be applied. The said Rules filed in Application No. 1239/99, marked P11 state:-

- 1:1 The disciplinary authorities of the University Grants Commission and of Higher Educational Institutions are-
- b. The Council of a University in respect of the staff of the University - provided that, except in the case of officers and teachers disciplinary powers may be delegated to the Vice Chancellor - section 45(2)(xii) of the Act.
- 1:2 "Disciplinary control" shall mean the power to dismiss or otherwise punish persons employed in the Commission, Higher Educational Institutions and the University Services Appeals Board in respect of "offences calling for disciplinary action" detailed in para 2 which specifically states that it is not a comprehensive list.

Therefore the letter P5 was sent with due authority. It is also important to note that section 23(1) of the Buddhist and Pali University Act itself states that the holder of any post other than the examiner may at any time be suspended by the Vice Chancellor pending an inquiry by him for misconduct, inefficiency or dereliction of duty. Rules regarding such inquiry as stated in the Establishment Code referred to above should be followed. Therefore only after a due inquiry it can be decided whether the petitioners were guilty or not guilty to the charges referred to above.

It is important to note that some of the matters appealed, relate to serious questions that have been raised by the Auditor General regarding the funds allocated to the University. It must be remembered that funds have been allocated by the government of Sri Lanka for the education of Buddhist monks. Accountability of the University mandates the requirement that any allegation of mismanagement of funds should be carefully investigated. In these circumstances the mechanism used by the authorities to look into the allegations are both necessary and within the powers vested in the authorities.

Finally in considering the competing interests in this case it is important to note that the paramount concern should be the smooth and efficient running of the University for the betterment of the larger student population of the said University, who would like to pursue their education in a peaceful environment. Especially in the case of a University which relates to the larger interest of the Buddhist community of Sri Lanka. In the absence of any basis for the allegations of undue or unwarranted political influences by the Minister, which after complete consideration of all the salient matters have not been established, this Court sees no reason to interfere with or to invoke writ jurisdiction of this Court in matters pertaining to this application.

It is important to note that judicial review is concerned not with the decision but with the decision making process (1986) 1 All E.R. 257 at p. 265⁽¹⁾. The concept of judicial review is not an appeal by challenge. An appeal deals *inter alia* with the merits of the proceedings appealed against. Judicial review is concerned with the decision making process and is available when the deci-

sion making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no responsible tribunal could have reached and/or abuses its powers (1985) 2 All E.R. 327 at P 337)⁽²⁾

Undoubtedly if there is an oppressive decision by the Minister or other officer it must be checked and balanced by the writ jurisdiction of this Court.

Since the claim is essentially abuse of power, in the sense of excessive use of power, each case must be considered in the context of the nature of the decision, the function of the particular power and the nature of the interests or rights affected. In this particular instance the petitioners have failed to establish that the Minister had abused the power vested in him.

In these circumstances, the application is dismissed with costs.

WIJAYARATNE, J. – I agree

Application dismissed.