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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of writs of certiorari, prohibition and mandamus.

C.A (Writ) Application
No.295/2020

Halkandaliya Lekamalage Premalal Jayasekera
Gampathi Nivasa,
Halkandaliya,
Nivithgala.

Presently being held at:-
Welikada Prison,
Baseline Road,
Colombo 10.
PETITIONER

-Vs-

1. **Thushara Upuldeniya**
   Commissioner General of Prisons,
   Prison Headquarters,
   No.150, Baseline Road,
   Colombo 09.
2. **Superintendent,**
   Welikada Prison,
   Baseline Road,
   Colombo 10.

3. **Dhammika Dasanayake**
   Secretary General of Parliament,
   Parliament of the Democratic Socialist Republic of Sri Lanka,
   Sri Jayawardenapura Kotte.
   RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J. (P/CA) *and*
Sobhitha Rajakaruna, J.

COUNSEL : Romesh de Silva, PC with Sugath Caldera and Niran Anketell instructed by Paul Rathnayake Associates for the Petitioner.
Nerin Pulle, DSG for the 1st and 2nd Respondents.
Uditha Egalahewa, PC with Nisal Kohana and Miyuru Egalahewa for the 3rd Respondent.

Decided on : 07.08.2020

A.H.M.D. Nawaz, J. (P/CA)

This application for judicial review seeks to quash in the main a "decision" made by the Commissioner of Prisons (the 1st Respondent) in this case on 28th August 2020, in regard to the Petitioner Premalal Jayasekera. This decision is a sequel to a request made on behalf of the said Premalal Jayasekera by his Attorneys-at-Law that he be permitted to attend Parliamentary sessions. A relevant extract of the decision sought to be quashed by a *writ of certiorari* conveys, *inter alia*, the following:-

> "*.....The Hon. Attorney General had* ***instructed*** *the Secretary of the Ministry with a copy to me by his letter AG/21/2020 dated 19th August 2020 that the request made by the Condemned Appellant Prisoner, Premalal Jayasekera could not be permitted.*

I herewith kindly inform that Condemned Appellant Prisoner, Premalal Jayasekera was not permitted to attend parliamentary sessions based on ***the above instructions.***"*(sic)*

T.I. Uduwara

Commissioner of Prisons

For Commissioner General of Prisons"

It is quite clear that the 1st Respondent (Commissioner General of Prisons) prevents the Petitioner who has been elected as a Member of Parliament from the electoral district of *Ratnapura*, from attending Parliament solely on the basis of instructions received from the Hon. Attorney-General. Before I consider the import of this letter for purposes of administrative law and justice and whether this letter is amenable to *a writ of certiorari*, let me begin from some trite observations. In the eponymous Civil Service Union (***CISU***) case (1984) 3 All E.R.935 at 949 Lord Diplock said that: "To qualify as a subject for judicial review {a} decision must have consequences which affect some person .....either *(a)* by altering rights or obligations of that person.....or *(b)* by depriving him of some benefit or advantage which.....he can legitimately expect.....". Similarly, Professor Wade in 1988 wrote of "*whether some issue is being determined to prejudice* in law"-Wade's *Administrative Law* (6th Ed) p 638. Since the 7th Edition (1994), Wade and Forsyth have omitted reference to the words "in law". The new formulation -"*the question is whether some issue is being determined to some person's prejudice*" that began in the 7th Edition continues to date-*see* page 518 of Wade & Forsyth *Administrative Law* (11th Edition, 2014). So the question that arises in these proceedings is whether the Commissioner of Prisons is competent to prevent the Petitioner from attending Parliament on the instructions so received by him from the Attorney-General and a further question that arises is whether the "decision" that he conveyed is a decision at all provided he is empowered to take the decision.

I bear in mind that I am not called upon to decide the issue immanent in this application forthwith as the question that repays my attention at this threshold stage is whether notice should issue or not. In order to determine the question of notice I also wish to

juxtapose the scope of the petition and affidavit before this Court vis-à-vis the relief sought by the Petitioner. The Petitioner makes the prayer that he be allowed to ***attend*** Parliament. The main relief sought is to have the letter preventing him from attending Parliament quashed. Allied to this is the interim order which invokes an order on the 1st and 2nd Respondents to forthwith allow and enable him to attend Parliament. It would suffice for purposes of this application to focus on these two remedies and as I said before in CA/Writ/216/2020, CA/Writ/217/2020, CA/Writ/218/2020, CA/Writ/221/2020 and CA/Writ/222/2020 (CA minutes of 25.08.2020), an application for judicial review at the stage of notice demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice-*see* ***R v. Secretary of State for Home Department exp Begum*** (1990) COD 107. The Court will take into account the question whether the application for notice relates to a matter that ought to be resolved after full argument.

In other words, at the notice stage, the court considers whether the matter brought before it is arguable. That entails the conclusion that notice should not be granted if the application for judicial review is unarguable-*see* ***R v. Legal Aid Board exp Hughes*** (1993) 3 Admin LR 623 at 628D in which Lord Donaldson MR held that Notice should be granted if an application is *prima facie* arguable. The permission judge needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant notice without identifying an appropriate issue on which the case can properly proceed-*see* "**Arguability Principles**" by Michael Fordham QC in (2007) Judicial Review 12:4, 219-220.

As I now find upon a further survey, the modern approach to notice has also been set out in the following terms by Lords Bingham and Walker in ***Sharma v. Brown-Antoine*** (2006) UKPC 57 ; (2007) 1 WLR 780.

> *"The court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.... but arguability cannot be judged without reference*

to the nature and gravity of the issue to be argued. It is a test which is flexible in its application..... It is not enough that a case is potentially arguable."

Having thus set out the scope of the application which seeks a quashing order to invalidate the decision of the Commissioner General of Prisons vis-à-vis the remit of proceedings at this stage, I would pose the question whether the Petitioner raises a *prima facie* or arguable case before this Court.

The Petitioner contends that he contested the Parliamentary elections on 05th August 2020 and polled 142,037 votes in the *Ratnapura* District. On 31st July 2020 he was convicted *inter alia* of the offence of murder by the High Court of *Ratnapura* in Case bearing No.HCR 71/2016 and sentenced to death. On 04th August 2020 he caused to be filed a petition of appeal in respect of the aforesaid conviction and sentence. On 05th August 2020 parliamentary elections were held and he emerged second on Sri Lanka Podujana Peramuna ticket.

Subsequent to the lodgement of the said appeal he is being held in remand at the Welikada prisons.

The Petitioner further states in his pleadings that though he made several requests to the 2nd Respondent and his officers to attend Parliament which had been summoned by His Excellency the President to meet on 20th August 2020, he was not permitted to do so. If one looks at the correspondence in a chronological order, a former Attorney-General and President's Counsel Mr. Palitha Fernando wrote to the Attorney-General on 16th August 2020 urging that the Petitioner must be permitted to attend sittings of Parliament as Section 331(4) of the Code of Criminal Procedure Act, No.15 of 1979 (the Code) specifically provides that where an appeal has been lodged against a conviction, the execution of the sentence should be stayed and that the person would be held in remand custody.

This letter further pinpoints that the period, served in remand custody, pending an appeal will not be considered as a period the person has served a sentence. This letter elicited a response from the Hon. Attorney-General who stated by his letter dated 17th

August 2020 that clarifications have been sought from relevant authorities in respect of these matters.

Thereafter a communication has been sent by a firm of legal consultants to the Commissioner General of Prisons setting out the chronology of events and making a demand that the Petitioner be permitted to attend Parliament.

It is in response to this communication that Mr. T.I. Uduwara, Commissioner of Prisons representing the Commissioner General of Prisons wrote to the legal consultants the letter dated 28th August 2020, which is being impugned before this Court as *ultra vires*, unlawful and void *ab initio* among several other grounds.

Mr. Romesh de Silva, President's Counsel for the Petitioner heavily relied on Section 333 of the Code to argue that when an accused is sentenced to death, his execution is stayed and as such he cannot be classified as a person under a sentence of death. He also submitted that since an accused upon whom a death sentence is passed is received into remand prison upon the acceptance of his appeal, he would not be serving a sentence of death and therefore the constitutional stipulation spelt out in Article 91 (1)(a) of the Constitution will not apply. In fact Article 91 (1)(a) of the Constitution sets out the following:-

> *"No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament-*
>
> *(a) if he is or becomes subject to any of the disqualifications specified in Article89;"*

The relevant disqualification advanced by Mr. Nerin Pulle the learned Deputy Solicitor General is found in Article 89 (d) of the Constitution;

> *"No person shall be qualified to be an elected at an election of the president, or of the members of Parliament or to vote at any referendum, if he is subject to any of the following these qualifications, namely*
>
> *(a).....*
> *(b).....*

(c).....

(d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or ***is under sentence of death*** *or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in view of execution of such sentence :*

Provided that if any person disqualified under this paragraph is granted a free pardon such disqualification shall cease from the date on which the pardon is granted:"

In opposition to the arguments of Mr. Romesh de Silva, Mr. Nerin Pulle the learned Counsel for the State argued that if both Articles 89 (d) and 91 (1)(a) of the Constitution are sought to be interpreted in this manner, such an interpretative task lies within the domain of the Supreme Court by virtue of Article 125 (1) of the Constitution which mandates that the question must be referred to the Supreme Court forthwith. Though the learned Deputy Solicitor General did not produce for perusal of this Court the opinion of the Attorney-General which the Commissioner General of Prisons refers to as an instruction in his decision, the pith and substance of the argument of Mr. Nerin Pulle is that the crux of the advice proffered by the Attorney-General is premised on Articles 89 (d) and 91 (1)(a) of the Constitution. Before I comment on these submissions, I would allude to the submissions of Mr. Uditha Egalahewa the learned President's Counsel who appeared for the Secretary General of Parliament Mr. Dhammika Dasanayake-the 3rd Respondent to this application for judicial review.

The learned President's Counsel relied on Section 20 (3) of the Bail Act and contended that an accused who is convicted of murder and sentenced to death is received into a remand prison and as such he should be treated as a remand prisoner. In fact this submission was resonant of Section 333 (3) of the Code the essence of which is found in Section 20 (3) of the Bail Act. Mr. Uditha Egalahewa produced for perusal before this Court the letter written by the Secretary General of Parliament dated 28th August 2020,

which makes a request of the Commissioner General of Prisons that the Petitioner be brought before Parliament on 08th September 2020 in order for him to take his oaths as an Member of Parliament as he has been *gazetted* in terms of Section 62 of the Parliamentary Elections Act, No.1 of 1981 as an elected Member of Parliament.

Apart from these submissions, an arguable matter to my mind seems to be what is contained in P7, the so-called decision of the Commissioner of Prisons dated 28th August 2020. Though this was not raised by any counsel in their submissions, we deem it apposite to raise it in this order as it is pivotal to the decision making process which administrative law seeks to police.

Provided the Commissioner General of Prisons had the power to make the "decision" as he did on the 28th of August 2020 in not permitting the Petitioner to attend Parliament, the quintessential question that arises is whether the Commissioner General of Prisons has taken a decision at all in the first instance having regard to the contents of his letter. The letter raises an all important issue whether the Petitioner has been stopped from attending Parliament, not by a decision of the Commissioner General of Prisons but solely on the instructions of the Hon. Attorney-General. The letter of the Commissioner General of Prisons whose extracts I have reproduced at an anterior part of this judgment specifically refers to instructions received from the Hon. Attorney-General. In these circumstances the question also arises whether the Commissioner General of Prisons has only acted as conduit conveying the instructions of the Hon. Attorney-General. In such a situation, the arguable issue is whether the Commissioner General of Prisons has taken a decision at all on his own.

In administrative law, it is often the case that if a Respondent takes a decision by submitting to the wishes or instructions of a third party, the resulting decision is said to be *ultra vires* and void-*see* Wade and Forsyth page 269 of *Administrative Law*, 11th Edition. Therefore, this issue looms as large as life as this Court has to investigate whether the there has been a surrender of discretion which is disavowed in administrative law. Thus this Court takes the view that this issue should be gone into only at the end of a final hearing.

On a perusal of P7, the letter that is sought to be impugned in these proceedings, it is quite clear that the Commissioner of Prisons states that it was because of the instructions of the Hon. Attorney-General the request made by the Petitioner could not be permitted.

In any event this instruction that is sought to be placed before this court does overlook another important fact namely the election of this Petitioner has not been invalidated in competent proceedings. In a well known passage Lord Radcliffe said in the case of ***Smith v. East Elloe Rural District Council*** (1956) AC 736 at 769:

> *"An order, even if not made in good faith, is still an act capable of legal consequences.* ***It bears no brand of invalidity upon its forehead.*** *Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose, as the most impeccable of orders."*

Therefore, by a parity of reasoning unless the election of the Petitioner is set aside by a court of competent jurisdiction, the election remains valid and effectual and in any event, these are not proceedings in which the election of the Petitioner as an MP is sought to be invalidated. In the circumstances, we would like to hear submissions on these questions and until the election is set aside by a court of competent jurisdiction, it is the view of this Court that the Petitioner would be clothed with all the rights of an elected Member of Parliament.

What is prohibited, on the argument of the learned Deputy Solicitor General, is *sitting and voting* in Parliament, provided this disqualification is held to be operative against this elected representative. This Court is not going to look into the validity or invalidity of his election or any other disqualification as what is sought to be challenged on grounds known to administrative law is the letter issued by the Commissioner of Prisons.

It has to be pointed out that Articles 89 and 91 do not prohibit the oath taking of an elected Member of Parliament when his election remains valid and unimpeached. If at all any declaration of invalidity can only be granted by a Court of competent jurisdiction and not by a letter written by the Commissioner General of Prisons. Even if oath taking

was sought to be prohibited, should the legislature have provided for it expressly? As is axiomatic, one cannot presume prohibitions and prohibitions have to be expressly provided for and this is certainly another question that surfaces to the fore in this application.

The absence of any prohibition in the Constitution on oath taking appears to be an intentional omission and we would make the observation that as long as the election of the Petitioner remains valid and effectual, he cannot be prevented from attending Parliament and taking his oaths. When we thus apply the provisions of the Constitution to the facts of this application before us, we are certainly not embarking on any interpretation of the Constitution and in any event if surrender of discretion and dictation are taken up as grounds of judicial review, no question of interpretation of constitution arises.

So I take the firm view that arguable matters do arise in this case and notice has to issue perforce on these grounds.

Before I part with this order, let me make a few observations. **Halbury's Laws of England, Parliament (Volume 78 (2018))** containing passages on **Privileges of Parliament** recites the following observations in paragraph 891 entitled "Claims to rights and privileges"

The courts do not have jurisdiction to determine the rights of members to sit in either House of Parliament and have nothing to do with questions affecting their membership except in so far as it has been specially designated by law to act in such matters-***Baron Mereworth v. Ministry of Justice*** [2011] EWHC 1589 (Ch).

So the question of sitting and voting does not arise before us and as the passage clearly indicates, it is the province of the speaker to deal with that matter or any other competent body. What is before us is a challenge to the letter P7 which prevents the Petitioner from attending Parliament and the House has exclusive rights to make judgments concerning the conduct of members and others in relation to Parliament-*see*

Kimathi v. Foreign and Commonwealth Office [2017] EWHC 3379 (QB), [2017] All ER (D) 127 (Dec).

In a nutshell we have taken note of the important omission in the Constitutional provision namely, no person who has been elected as an MP has been prohibited from taking oaths which seems to be the first step in a sequence of events culminating in sitting and voting in Parliament, which subsequently takes place. In our view, we consider oath taking to be a deliberate omission. Therefore, since the election of this Member of Parliament has not been invalidated so far, the interim relief sought that he be permitted to attend Parliament has to be allowed, along with notice of this application.

What would subsequently take place is within the remit of the powers of the Speaker or anyone assigned by law for that purpose. In the circumstances, we issue notice on the Respondents and the interim order as prayed for in (d) and (e) of the prayer.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL