IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an Appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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Athauda Arachchige Patrine Dilrukshi Dias Wickremasinghe,
No. 377/2, Thalawathugoda Road,
Hokandara South.

Plaintiff

S.C. Appeal No.89/2024
SC/HCCA/LA No. 165/2022 **Vs.**
HCCA Case No.WP/HCCA/Col/137/22(LA)
D.C. Colombo Case No.DMR 3675/21.

01. Mr. Dharmasena Dissanayake,
No.21/1, Dr. Sydney Premithirathne Mawatha, Seeduwa.

02. Dr. Prathap Ramanujam,
No.12/2, Vihara Mawatha,
Kolonnawa.

03. Mrs. V. Jegarajasingam,
Kandy Road, Krishnapuram 10,
Trincomalee.

04. Mr. G.S.A. de Silva,
No. D ½ , Charles Apartments,
De Silva Cross Road,
Kalubowila.

05. Mr. S. Ranugge,
No.34A, Wijaya Road,
Kolonnawa.

06. Mr. D. Laksiri Mendis,
No.7A, Cambridge Place,
Colombo 07.

07. Mr. Sarath Jayathilaka,
No.117/30, Ananda Rajakaruna Mawatha,
Colombo 10.

08. Mrs. Sudharma Karunarathna,
No. 93/1, Elhena Road,
Maharagama.

Defendants

AND

Dr. Prathap Ramanujam,
No.12/2, Vihara Mawatha,
Kolonnawa.

2nd Defendant-Petitioner

Vs.

Athauda Arachchige Patrine Dilrukshi Dias Wickremasinghe,
No. 372/2, Thalawathugoda Road, Hokandara South.

Plaintiff-Respondent

01. Mr. Dharmasena Dissanayake,
No.21/1, Dr. Sydney Premithirathne Mawatha, Seeduwa.

03. Mrs. V. Jegarajasingam,
Kandy Road, Krishnapuram 10,
Trincomalee.
Correct Address
No.1/3, 265/115,
Torrington Hague Residencies,
Torrington Avenue,
Colombo 05.

04. Mr. G.S.A. de Silva,
No. D ½ , Charles Apartments,
De Silva Cross Road,
Kalubowila.
Correct Address
4G, 189 Residencies,
Baseline Road, Colombo 09.

05. Mr. S. Ranugge,
No.34A, Wijaya Road,
Kolonnawa.

06. Mr. D. Laksiri Mendis,

No.7A, Cambridge Place,
Colombo 07.
Correct Address
B/10/4, Empire Residencies,
51, Braybrooke Place
Colombo 02.

07. Mr. Sarath Jayathilaka,
No.117/30, Ananda Rajakaruna Mawatha,
Colombo 10.

08. Mrs. Sudharma Karunarathna,
No. 93/1, Elhena Road,
Maharagama.
Correct Address
No.63/1, Elhena Road,
Maharagama

Defendant-Respondents

AND NOW BETWEEN

Athauda Arachchige Patrine Dilrukshi Dias Wickremasinghe,
No. 372/2, Thalawathugoda Road,
Hokandara South.
Plaintiff-Respondent-Appellant

Vs.

Dr. Prathap Ramanujam,
No.12/2, Vihara Mawatha,
Kolonnawa.
2nd Defendant-Petitioner-Respondent

01. Mr. Dharmasena Dissanayake,
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Maharagama.
Correct Address
No.63/1, Elhena Road,
Maharagama
Defendant-Respondent-Respondents

BEFORE : **HON. E.A.G.R. AMARASEKARA,J.**
HON. ACHALA WENGAPPULI,J.
HON. MAHINDA SAMAYAWARDHENA,J.

COUNSEL : Romesh de Silva, PC with Thishya Weragoda with Dulmini De Alwis instructed by Sanath Wijewardane for the Plaintiff-Respondent-Appellant.
Nerin Pulle. PC ASG with Ishara Madarasinghe, SC for the 1st, 3rd, 4th and 8th Respondent-Respondent-Respondents.
Chamantha Weerakoon Unamboowe, PC with Tersha Nanayakkara Instructed by Chithra Jayasinghe for the 2nd Defendant-Petitioner-Respondent.
Uditha Egalahewa PC with Tharushi Buddhadasa instructed by H. Chandrakumara de Silva for the 5th Defendant-Respondent-Respondent.

Dr. Sunil F.A. Cooray instructed by Tissa Bandara for the 6th Defendant-Respondent-Respondent.

ARGUED ON : 11th October, 2024

DECIDED ON : 04th June, 2025

HON. ACHALA WENGAPPULI, J.

These two appeals stem from an action, instituted by the Plaintiff in the District Court of *Colombo* (Case No. DMR/3675/2021) on 21.09.2021, against the 1st to 8th Defendants. In that action, the Plaintiff claimed damages in a sum of Rs. 1,000,000,000.00, individually as well as jointly from the Defendants. The Plaint of the Plaintiff was presented to the District Court on the basis that the Defendants, while functioning as members of the Public Service Commission (hereinafter referred to as the "PSC") and, in the excise of disciplinary control over her, have acted negligently/wrongfully/illegally/ *ultra vires/ mala fide/* maliciously and, thereby were in breach of duty of care they owed her, resulting in

a. interrupting her career as a public servant and,
b. depriving legitimate entitlements of her, including salary,

which, in turn had culminated in the deprivation her of opportunities for career progression, and thereby causing her an *injuria,* a "*delictual wrong*", due to which she suffered damages personally, socially and professionally.

Upon being served with summons of Court and notice of interim relief, the 1st, 3rd to 8th Defendants filed their Statement of Objections on 22.10.2021, through their Attorney. In that Statement of Objection, the Defendants have raised an objection to the assumption of jurisdiction by that Court. Their objection was primarily based on the provisions of Article 61A of the Constitution of the Republic. They claimed that Article 61A effectively deprived the District Court of any jurisdiction to adjudicate upon a "*decision*" or an "*order*" made by the Public Service Commission (hereinafter referred to as the "PSC").

The District Court, after conducting an inquiry into the said objection, and by its order delivered on 21.02.2022, overruled same. The District Court was of the view that the Defendants, being members of the PSC, were not conferred with any "*immunity*" (මුක්තිය) akin to what was conferred on the President of the Republic or on the members of the Judicial Service Commission and therefore that Court is not barred from proceeding with the action of the Plaintiff.

The 2nd Defendant, thereupon moved the High Court of Civil Appeal by seeking Leave to Appeal against the said order, in Case No. WP/HCCA/137/2022/LA. The High Court of Civil Appeal, by its order dated 26.05.2022, whilst granting Leave to Proceed, also permitted the trial Court to proceed with the action instituted by the Plaintiff, after denying the Defendants of the interim relief of a stay of proceedings.

Consequent to the delivery of the said order of the High Court of Civil Appeal, the 2nd Defendant moved this Court seeking Leave to Appeal against the said order in case No. SC/HCCA/LA/144/2022 by his petition tendered to the Registry on 15.06.2022. The Plaintiff too, in case No. SC/HCCA/LA/165/2022,

moved this Court on 05.07.2022, seeking Leave to Appeal against the said order of the High Court of Civil Appeal.

His Lordship the Chief Justice was pleased, by a direction issued on 30.01.2024, to nominate a bench to hear these two applications. When both these matters were taken up before the nominated bench, for consideration of Leave to Appeal on 03.07.2024, all the contesting parties invited this Court to consider the following question of law, which the Court thereupon accepted:

> "*Can the Plaintiff have maintained this action in view of the Article 61A of the Constitution ?*".

Consequent to the granting of Leave to Appeal by this Court to the 2nd Defendants as well as to the Plaintiff, against the order of the High Court of Civil Appeal on the said common question of law, Case No. SC/HCCA/LA/144/2022 was re-numbered as SC Appel No. 88 of 2024, whereas Case No. SC/HCCA/LA/165/2022 too was re-numbered as SC Appeal No. 89 of 2024, respectively. Hon. Chief Justice made another nomination on 29.08.2024, constituting the present bench, which proceeded to hear the two appeals on 11.10.2024, after consolidating them with the consent of the parties. They further made the undertaking to Court that they would abide by the determination of this Court on the question of law, common to both appeals.

Since both the Plaintiff as well as the 2nd Defendant are now ought to be considered as appellants before this Court, they shall be continued to be referred to in their respective status before the original Court in this judgment, purely for the purpose of convenience in its presentation.

It is already noted that the Plaintiff was successful in convincing the District Court that it had jurisdiction over the eight Defendants, who functioned as members of the Public Service Commission, on the claim that they allegedly have acted *mala fide* in breach of duty of care owed to her.

Learned President's Counsel for the Plaintiff, during the hearing of the appeals, has presented his primary contention that the Article 61A only confers, what he termed only a "*qualified immunity*" (as opposed to an absolute immunity) on the members of the PSC, who therefore cannot claim any privilege that had been afforded by the Constitution, creating an exception to the fundamental right of equality, guaranteed to her under Article 12(1), if they act *mala fide*.

Learned Additional S.G., who represented the 1st, 3rd, 4th and 8th Defendants, and the other learned President's Counsel, who represented the 2nd and 5th Defendants, in replying to the said contention, have collectively submitted that the Constitutional provisions contained in the Article 61A, in itself is indicative of the intended purpose of Legislature had in its mind, when that Article was enacted, and accordingly it should not be taken as an Article conferring any '*immunity*' on the members of the PSC, but should be taken in as an "*ouster clause*", by which the Parliament had deliberately taken away the jurisdiction of certain Courts of its power to adjudicate upon any "*orders*" and "*decisions*" made by the PSC.

Since there are many different contentions that were advanced before this Court by the learned President's Counsel on behalf of the Plaintiff, in addition to his primary contention referred to in the preceding paragraph, for the purpose of determining the question of law on which these appeals were argued, each of these contentions had to be considered in a more descriptive manner as we

proceed along with this judgment. Therefore, before proceeding any further, it is proposed to make a brief reference at this stage of the judgment to the different and diverse contentions that were advanced on behalf of the Defendants by their Counsel, seeking to counter the contentions that were advanced by the Plaintiff.

Learned Additional SG, who appeared for the 1st ,3rd, 4th and 8th Defendants, during his submissions traced the origins of the Constitutional ouster clauses, which led to the incorporation of Article 61A, when the 17th amendment to the Constitution was brought in, and thereby altering the status *ante* that prevailed under Article 55(5). He also referred to the decision of the Court of Appeal in ***Katugampola v Commissioner General of Excise and Others*** (2003) 3 Sri L.R., where the difference between the ouster clauses of Articles 55(5) and 61A was considered by this Court, which it held to include "*any type of decision so long as it was made pursuant to a power conferred or imposed on such body*" into its jurisdiction. He also invited our attention that the 17th amendment repealed Article 59 and replaced same in the present form after establishing a dedicated body, namely the Administrative Appeals Tribunal, after conferring it with power to alter, vary or rescind any order or decision made by the PSC.

Learned Additional S.G., strongly contended that the Article 61A is not an article that confers an immunity on the members of the PSC, who made orders and decisions on behalf of that Commission, but only an ouster clause, that meant to oust the jurisdiction of the Courts, which they otherwise would possess, to inquire into adjudicate on such orders and decisions.

The submissions of the learned President's Counsel, who represented the 2nd Defendant, is aimed at to counter the contention of the Plaintiff, that she only sought to challenge the decision making of the members on their individual

capacities before the District Court and not to challenge the validity of an order or decision made by the PSC. Learned President's Counsel, in support of her submissions, pointed out the instances where the Plaintiff described the decisions made by the PSC in her Plaint, in setting out her claim against the Defendants. Paragraphs 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 27 and 31 of the Plaint were particularly referred to by the learned President's Counsel as instances where it is clearly stated that the "*decisions*" of the PSC, which the Plaintiff expects the District Court to adjudicate upon, coupled with a "*few vague allegations of mala fide*".

Learned President's Counsel then referred to the decision-making process of the PSC in terms of the relevant Articles and submitted that, in view of the intricacies involved in the said process, there is no question of individual liability that could be imposed on a member of PSC and consequently there is no question of any immunity. She also added that the Plaintiff had already sought intervention of AAT in terms of the Constitutional provisions to challenge the 'decisions' of the PSC and succeeded.

It is the submissions of the learned President's Counsel for the 5th Defendant that the ouster of jurisdiction imposed by Article 61A is far wider than the ouster clause in Section 22 of the Interpretation Ordinance, as it ousts even judicial review under Articles 140, 141, being a remedy available to any affected party under that Section. He further submitted that, in terms of the Constitutional provisions, the fora in which PSC decisions could be challenged are limited to the Administrative Appeals Tribunal and the Supreme Court. Since the Courts and Tribunals that are referred to in Article 61A, includes the District

Court in terms of Article 105(2), the Parliament could abolish its powers by enacting legislation to that effect, which it did in enacting Article 61A.

Learned President's Counsel for the 5th Defendant particularly invited our attention to the decision-making process of the PSC as set out in Article 61, as the learned President's Counsel for the 2nd Defendant did, and stressed upon the point that the decisions of the PSC are taken, only if the members vote either in unanimity, or by majority and, with a casting vote by Chairman of the PSC, in case of equal votes. This was highlighted to impress upon the fact that any individual decision of the membership could not be considered as "*order*" or a "*decision*" of the PSC. He further submitted that the attempt made by the Plaintiff to question the "*orders*" or "*decisions*" of the PSC through the instant action is clearly an instance where she tries to do something which she cannot do directly, but by indirect means.

Having referred to the gist of the contentions in the preceding paragraphs that were presented by Counsel, over the description that ought to be given to Article 61A, it is proposed to commence the examination of these, commencing with a detailed description of the primary contention presented by the learned President's Counsel for the Plaintiff during the hearing of these consolidated appeals.

Learned President's Counsel for the Plaintiff contended that, generally the nature of an immunity conferred by a statue could be divided into two classes. Then he cited the instances of conferring "*absolute immunity*" and instances of conferring "*qualified immunity*" in support of that contention. It was pointed out that certain categories of persons enjoy "*absolute immunity*" for life, in respect of certain categories of acts/omissions. The utterances and the acts of the Members

of Parliament, made within the Parliament, are cited as examples for conferment of absolute immunity. He also referred to the immunity conferred on Judges, when they perform their duties, as instances that protects the person concerned, by conferring an "*absolute immunity*".

Learned President's Counsel further submitted that, on the other hand, a "*qualified immunity*" means that certain persons or institutions would enjoy immunity in a qualified manner and invited attention of Court to following instances, in support of his proposition.

a. A President, whose immunity is restricted to his term of office, and therefore the immunity conferred on him is qualified by time,
b. The immunity conferred on the decisions of some persons is qualified by the fact that they have to act in good faith.

Learned President's Counsel for the Plaintiff thereupon proceeded to build his argument by adding that, in the instances where there is an element of *mala fide,* the privilege of a qualified immunity is not made available to such a person. In order to illustrate the point, it was submitted that, even if a Member of Parliament acts *maliciously* within the Chamber of the Parliament, he is protected by an "*absolute immunity*", whereas a person entitled only to a "*qualified immunity*", is not so protected by such immunity, if he acts *mala fide*.

After inviting attention of Court to the marginal note of Article 61A, where it states, *"Immunity from Legal Proceedings"*, learned President's Counsel proceeded on to submit that although that Articles seems to provide 'immunity' to members of the PSC, as described in the marginal note, it does not however confer any immunity, if the member acts *mala fide.* After a comparison made with

the two groups of immunity clauses contained in the Articles 104A, 111K, and also in the Articles 41, 153E and156B, learned President's Counsel contended that, similar to the situations where no such immunity is conferred on the individual members of different Commissions that are created and established by these Articles, no immunity could be claimed by the individual members of the PSC, for an act done *mala fide* and/or *maliciously,* which is a question of fact, that must be determined by a trial Court, that too after a proper evaluation of the evidence.

Learned President's Counsel, who appeared on behalf of the 5th Defendant, termed the Plaintiff's contention on Article 61A that it confers only a "*qualified immunity*" to the members of the PSC, as a "*devious*" endeavour to characterise that Article to the provisions contained in Articles 35 and 111K. It was contended by the learned President's Counsel for the 5th Defendant, by drawing a parallel to Articles 35 and 111K, which confers immunity to the President of the Republic and to the members of the Judicial Service Commission as a Constitutional provision that only provides limited protection, and adding that Article 61A too provides a similar type of protection to the members of the PSC, is totally a wrong proposition in law. According to the learned President's Counsel for the 5th Defendant, an immunity clause is a provision by which the Parliament exempts certain individuals, entities or certain actions from legal proceedings, under specified circumstances, whereas a jurisdictional ouster clause is a provision of law that specifically limits or removes the authority of a Court or a tribunal to hear or determine a particular class of disputes or issues. Therefore, such clauses operate as effective procedural barrier to the very act of initiation of any adjudication process against such disputes or issues and this is achieved by

declaring certain class of disputes or issues being non-justiciable or by vesting exclusive jurisdiction over such matters in an alternative forum.

In this regard, it was further submitted that, unlike an immunity clause, which pertains to the liability or personal responsibility of a party or an individual, a jurisdictional ouster clause is aimed at restricting judicial oversight and thereby guiding the dispute over to a designated authority, if any, which is conferred with jurisdiction for the purpose of resolving that dispute.

Learned Additional S.G. also presented his contention adopting a similar line of reasoning and submitted that Article 61A could be better characterised as an "*ouster clause*", rather than an "*immunity clause",* particularly in view of the fact that it does not make the members of the PSC, 'immune' from any legal proceedings, but rather seeks to oust the jurisdiction of all Courts or tribunals, preventing initiation of any litigation against them, except to the conferment of jurisdiction on the AAT (under Article 59(2)) and on the apex Court (under Article 126), before which a "*decision"* or an "*order"* of the PSC, could be impugned by an aggrieved party.

Since the core issue revolves around the issue of the nature of the protection afforded by Article 61A to "*decisions"* or "orders" made by PSC made on a public officer, in the exercise of its power of disciplinary control, it is helpful if a brief reference is made with regard to the nature of the evolving relationship between the disciplinary control over public service and the standing of the PSC in that respect.

The origins of present public service could be traced back to the officers, who were appointed by British India Company in 1802, to govern the affairs of

the coastal areas brought under its control in 1796. With the establishment of Civil Service in 1833, the public service continued to function, firstly under the Constitution in 1948 as "*Ceylon Civil Service*", until its transformation to "*Sri Lanka Administrative Service*", which came along with the adoption of the 1st Republican Constitution in 1972.

Section 57 of the Ceylon (Constitution) Order in Council issued on 15.05.1946 states that "*[S]ave as otherwise provided in this Order, every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure.*" The Public Service Commission established under that Constitution, in terms of Section 58(1), was vested with the powers to appoint, transfer, dismissal and disciplinary control of public officers under Section 59(1).

After the adoption of 1st Republican Constitution in 1972, the public officers were referred to as "*State Officers*" and in terms of Section 106(1), the power to make their appointments, transfers, dismissals and disciplinary control was vested in the Cabinet of Ministers. Importantly, Section 106(5) of that Constitution states:

> " *[N]o institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call into question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a State officer regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of State officers.*"

The present Constitution, when it adopted by the Parliament in 1978, and with the creation of the PSC, in terms of Article 56(1), included the following

provisions contained in sub-Article 55(5), where it states that " *[S]ubject 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, or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer.*"

With the 17th amendment made to the Constitution, a new Article 61A, was introduced. The said Article reads:

> "*[S]ubject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or 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 under any other law.*"

This Article was once more amended with the adoption of the 19th Amendment made to the Constitution. The amendment was replacement of the words "*subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126*" contained in that Article, with the words "*subject to the provisions of Article 59 and of Article 126*", as it currently reads.

The issue, whether the Article 61A should be taken as an instance of conferring immunity (either absolute or qualified in its extent) against the decisions or orders made by the PSC or as an instance of a Constitutional ouster

that effectively takes away the jurisdiction of the Courts and tribunals against adjudicating upon decisions or orders made by the PSC, had already been argued and considered by the superior Courts.

One of the earliest of these instances, in which the Courts had to consider the provisions that are similar to that of Article 61A, arose in ***Migultenna v The Attorney General*** (1996) 1 Sri L.R. 408. In that instance, a public officer, who was dismissed from the public service during the operation of the 1972 Constitution, had instituted an action before the District Court, challenging his dismissal on the basis of *mala fide* on the part of the defendants, who functioned as members of the PSC. In appeal, it was contented before this Court on his behalf, that Section 106(5) of the Constitution (1972) and Article 55(5) of the present Constitution should be harmoniously construed, so as to give effect to both, justifying the action instituted before the District Court.

Mark Fernando J, who delivered the judgment was not impressed with that contention and held (at p.419) that " *… the comparison with Article 55(5) is not valid , because that Article expressly preserves a significant area of judicial review through the fundamental rights jurisdiction, from the fact that Article 55(5) permits review, in the exercise of that jurisdiction by the highest Court, it does not follow that Section 106(5) permits review by way of a declaration in the District Court."*

It is of significance to note that the term that his Lordship used in this instance in relation to the provisions contained in Section 106(5) of the 1972 Constitution is "*ouster clause*", which in effect acts as a bar to the institution and continuation of the plaintiff's action before the District Court. In ***Ratnasiri and Others v Ellawala and Others*** (2004) 2 Sri L.R. 186, the petitioner invoked jurisdiction conferred on the Court of Appeal under Article 140, in seeking to

review an order made by the Transfer Appeal Board. The respondents raised a preliminary objection in terms of Article 61A, claiming that the said Article prevented the Court of Appeal from looking into the validity of the impugned order made by that Board, in the exercise of its jurisdiction under Article 140.

After making a detailed analysis on comparative Constitutional provisions and, in view of the evolution of the impact of the 'pleasure principle' on the appointments, transfers, disciplinary control and dismissals of public officers, *Marsoof* J, P/CA concluded that (at p. 189);

> "*[I]n 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.*"

In this instance too, the Court of Appeal used the term "*preclusive clause*" to describe the effect of the provisos contained in Article 61A (Articles 59 and 126), rather than treating same as a Constitutional provision that had conferred a blanket immunity on the PSC. In delivering the judgment of this Court in ***Ratnayake v Administrative Appeals Tribunal and Others*** (2013) 1 Sri L.R. 331, *Marsoof* J used the more elaborate term "*Constitutional ouster of jurisdiction*" in making a reference to Article 61A. His Lordship stated (at p.333) as follows: "*… the above provision of the Constitution, which constitutes a Constitutional ouster of*

jurisdiction, does not apply to the impugned decision of AAT, it being specifically confined in its application to the orders or decisions of the Public Service Commission, …". The description attributed to the provisions of Article 61A as an 'ouster clause' had been the consistently adopted and used in several instances, whenever Judges were called upon to deal with that Article. The judgments of ***Wijayananda v Post Master General and Others*** (2009) 2 Sri L.R. 318, ***Katugampola v Commissioner General of Excise and Others*** (2003) 3 Sri L.R. 207, ***Gunaratne and Others v IGP and Others*** (2012) 1 Sri L.R. 185, ***Weeraratne v Chairman, Public Service Commission and Others*** (CA Writ application No. 410/2009 – decided on 03.05.2019), ***Peiris and Others v Commissioner General of Excise and Others*** (2020) 1 Sri L.R. 135, ***Dharmasiri v Weerasinghe, Commissioner General of Agrarian Development and Others*** (CA Writ application No. 322/2014 – decided on 28.01.2019), ***Lokuge v Dr. Dayasiri Fernando and Others*** (CA Writ application No. 160/2013 – decided on 16.10.2015), ***Ovitigama v Inspector General of Police and Others*** (CA Writ application No. 1009/2008 – decided on 05.03.2019) described Article 61A as a "*ouster clause*" and not a provision that conferred immunity on the PSC.

Similarly, in several instances where the superior Courts had to deal with the statutory provisions that conferred an immunity on someone or on an entity, those instances too were clearly recognised as such, and that too after distinguishing them from ouster clauses.

The conferment of immunity on the President of the Republic by Article 35 of the Constitution which states "*[W]hile any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President,*

either in his official or private capacity." is one such provision that had been considered by this Court in several of its judgments. It is also one of the Articles that the Plaintiff relied on in support of her contention of an instance of a "*qualified immunity*". Hence, it is of relevance to the question of law, we are called upon to determine.

In ***Mallikarachchi v Shiva Pasupati, Attorney General*** (1985) 1 Sri L.R. 74, a divisional bench of this Court stated that, in terms of the Article 35(1) (as it stood at that point in time), it "… *confers on the President during his tenure of office an absolute immunity in legal proceeding in regard to his official acts or omission and also in in respect of his acts or omissions in his private capacity."* The judgment of ***Karunathilaka and Another v Dayananda Dissanayake, Commissioner of Elections and Others*** (1999) 1 Sri L.R. 157, also is an instance where this Court adopted the view (at p. 176) that " *[T]he immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35(1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35(3) excludes immunity in respect of the acts therein described."* In ***Senerath v Chandraratne, Commissioner of Excise and Others*** (1995) 1 Sri L.R. 209, this Court stated (at p. 210): *"[A]rticle 35 of the Constitution provides for the personal immunity of the President during his tenure of office. It bars the institution of proceeding, against him in any Court. The reference is to proceedings in which some relief is claimed, or liability is alleged, by way of an action or a prosecution."*

Not only the President of the Republic is conferred with immunity, of course subject to the certain limitations, there are certain other individuals and public bodies too who were granted such immunities by specific statutory

provisions enacted for the said purpose. Article 111K conferred immunity to the members of the Judicial Service Commission and several others, who are specified in that Article, from any legal proceedings by stating that no suit or proceeding shall lie against them for any lawful act done in good faith in the performance of their duties. Similarly, the judicial acts too are made immune from litigation process, as in the case of ***Divalage Upalika Ranaweera Vs. Sub-Inspector Vinisias and Others*** (SC Application No. 654/2003, decided on 13.05.2008), this Court held:

> *"Under the Roman Dutch Law, which is the Common Law of Sri Lanka, a Judge enjoys complete immunity from civil liability for the acts done in the exercise of his judicial functions. 'No action lies against a judge for acts done or words spoken in honest exercise of his judicial office' - R.W. Lee, An Introduction to Roman Dutch Law 5th Edition page 341. Section 70 of the Penal Code extends the same protection against criminal liability. Since judicial acts do not fall within the ambit of Article 126 of the Constitution, a Judge is not liable for the violation of fundamental rights arising from a judicial act"*

This pronouncement was re-iterated once more in the case of ***Gammanpila v Gunathilake, Inspector of Police and Others*** (2016) 1 Sri L.R. 233. The rationale behind the conferment of such an immunity for judicial acts was clarified by *Colin Thome* J, in ***Leo Fernando v. Attorney General*** (1985) 2 Sri L.R. 341, (at p.357):

> *"Within the framework of our Constitution there is a fundamental reason for excluding judicial action from review under the procedure provided for in Article 126. Articles 138 and 139 invest the Court of Appeal with an*

> *appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution. Under Article 128 an appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal which involves a substantial question of law. In the circumstances there is no basis for a collateral jurisdiction in respect of such action under Article 126."*

Other than the Constitution, there are several other statutes that confer immunity on certain statutory bodies, created and established by such statutes. Those statutes confer such immunity with a specific statutory provision being enacted to that effect and incorporated into the relevant piece of legislation. This is generally achieved with insertion of the words in a Section to read "*[N]o civil or criminal proceedings shall be instituted or maintained or continued, against ….*" such body or individuals. In the judgment of ***Wickremasinghe v The Monetary Board of the Central Bank of Sri Lanka and another*** (1989) 2 Sri L.R. 230, the Court of Appeal observed that *"[T]his is the traditional formula by which immunity from CIVIL AND CRIMINAL LIABILITY has been conferred from time immemorial"* and referred to Section 33 of the Co-operative Employees Commission Act, No. 12 of 1972 and Section 18 of the Criminal Justice Commission Act, No. 14 of 1972 (emphasis original).

The refences made in this judgment to multiple instances, where the ouster clauses and immunity clauses were dealt with by the superior Courts, are meant for the purpose of stressing upon the point that the Courts have already identified the significant differences that exists between these two legal concepts that are enacted by the Legislature to cater for different situations. Of course, in

spite of the fact that several differences that exists between them, these two 'instruments' in law, could not be totally separated from each other by dividing them with a clearly defined and an impermeable boundary, in view of certain other innate characteristics that are identifiable within them.

It is in this backdrop I now turn to consider the wording of the Article 61A in order to assess whether it is a Constitutional ouster of the jurisdiction of the Courts, or an instance of a '*qualified immunity*' conferred on the PSC, as contended by the learned President's Counsel for the Plaintiff. This endeavour is made, despite the fact that it had already been referred to as such in several judgments already pronounced by this Court, that are referred to above. This became a necessary exercise in this instance, primarily due to contention advanced by the Plaintiff that it confers only a 'qualified immunity' on PSC and therefore, proper classification of Article 61A became a central to the question of law that is to be decided and answered by this Court.

I wish to begin that task by first looking at the text of the Article 61A.

Article 61A reads in Sinhala as follows:

> *"**59** වන ව්‍යවස්ථාවේ සහ **126** වන ව්‍යවස්ථාවේ විධිවිධානවලට යටත්ව කමිටුවක් විසින් හෝ යම් රජයේ නිලධරයකු විසින් මේ පරිච්ඡේදය යටතේ හෝ වෙනත් යම් රීතියක් යටතේ ඒ කොමිෂන් සභාව වෙත පැවරී ඇති හෝ පැනවී ඇති, නැතහොත් කමිටුව වෙත හෝ රාජ්‍ය නිලධරයා වෙත පවරා දී ඇති, යම් බලයක් හෝ කාර්යයක් ප්‍රකාර කරන ලද යම් නියමයක් හෝ තීරණයක් විභාග කිරීමට හෝ තීන්දුවක් දීමට හෝ කවර වූ හෝ ආකාරයකින් ඒ පිළිබඳ ප්‍රශ්න කිරීමට කිසිම අධිකරණයකට හෝ විනිශ්චය අධිකාරයකට බලය හෝ අධිකරණ බලය නොමැත්තේය"*

English translation of the said Article reads;

> *"[S]ubject to the provisions of Article 59 and 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 under any other law."*

Plain reading of the said Article in the context of the instant appeal, the phrase *"... කිසිම අධිකරණයකට හෝ විනිශ්චය අධිකාරයකට බලය හෝ අධිකරණ බලය නොමැත්තේය"* immediately caught my attention. The words *"... කිසිම අධිකරණයකට හෝ විනිශ්චය අධිකාරයකට බලය හෝ අධිකරණ බලය නොමැත්තේය"* and the words that appears in the English translation as "*… no Court or tribunal shall have power or jurisdiction"* are clear in what they meant. Upon plain reading of the said Article, it is clear that the jurisdiction of the Courts or tribunals "*… 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 under any other law,"* was effectively and explicitly taken away by this Constitutional provision.

The words "*jurisdiction of Courts or tribunals*" that used in the Article 61A, indicate that what exactly the Parliament intended by the enactment of that Article. The said Article was to intended to prevent the Courts or other institutions established under the Constitution from adjudicating upon any "*orders or decisions*" made by the PSC, after assuming jurisdiction conferred on them under Constitutional provisions and other Statutes. This declared intended purpose was achieved by taking away the jurisdiction already conferred on the

Courts and other such institutions, which otherwise enabled those institutions to inquire into such matters.

The Court, in which the Plaintiff instituted an action against the Defendants, being the District Court, is one of the Courts established under Section 2 of the Judicature Act No. 2 of 1978, as amended. The District Court had its jurisdiction clearly demarcated by provisions contained in Chapter IV of that Act, which in turn referable to the conferment of jurisdiction from Article 105(1)(c). Article 105(1)(c) is an Article by which the Parliament had ordained and established the Courts of First Instance, through Section 2 of the Judicature Act, as institutions created for the administration of justice, which protect, vindicate and enforce the rights of the People. The District Court, is included in that as such an institution.

The relevant part of the Article 105(2) that relates to the instant appeal states that "*[A]ll Courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication and settlement of industrial and other disputes, … shall be deemed to be Courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or amend the powers, duties, jurisdiction and procedure of, such Courts, tribunals and institutions*."

Thus, when the Parliament amended Article 61A, with the adoption of the 19th Amendment made to the Constitution, to read in its current form, it was exercising the power conferred by Article 105(2) as it "… *may replace or abolish, or amend the powers, duties, jurisdiction and procedure of, such Courts, tribunals and institutions*" and thereby effectively taken away the jurisdiction it had originally conferred on that Court, but restricted it only in relation to "*orders and decisions*" made by the PSC.

It is clearly an instance of a Constitutional ouster of the jurisdiction of the Courts from instituting actions before them, seeking to adjudicate upon the "*orders*" and "*decisions"* made by the PSC. Article 61A, not only ousts the jurisdiction of the Courts of First Instance, but also ousts the jurisdiction conferred on the Court of Appeal under Article 140, as that Court, although a superior Court of record, must exercise that jurisdiction subject to the provisions of the Constitution. The case of ***Ratnasiri and Others v Ellawala and Others*** (supra) was decided on this very point.

In contrast to an ouster of jurisdiction, when the Constitution conferred immunity on a person or an institution, different wordings are used in the relevant Article to denote such a conferment. Sinhala text of the Article 35(1) of the Constitution reads:

> *"ජනාධිපතිවරයා ලෙස ධුරය දරනා කවර වූ හෝ තැනැත්තකු විසින් පෞද්ගලික තත්වයෙහි ලා හෝ නිල තත්වයෙහි ලා හෝ කරන ලද හෝ නොකර හරින ලද කිසිවක් සම්බන්ධයෙන් මහුට විරුද්ධව කිසිම අධිකරණයක හෝ විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පැවරීම හෝ පවත්වාගෙන යාම නොකළ යුත්තතේය:"*

When one considered the phrases contained in the Article 61A and 35, *i.e*., *"... කිසිම අධිකරණයකට හෝ විනිශ්චය අධිකාරයකට බලය හෝ අධිකරණ බලය නොමැත්තේය",* after juxtaposing with the phrase "*විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පැවරීම හෝ පවත්වාගෙන යාම නොකළ යුත්තතේය* ", this distinction becomes clearer. The Article 61A undoubtedly takes away the jurisdiction of the Courts to entertain any actions against the orders and decisions made by PSC whereas the Article 35 prevents a person from instituting any proceedings in a Court of law against the President of the Republic, but without restricting the jurisdiction of that Court, which had already been conferred by law to entertain any such action.

In view of the rival contentions presented before this Court over the proper description of Article 61A, I wish to reproduce an observation made by *Menon* CJ in the judgment of ***Nagaenthran v Public Prosecutor and another*** [2019] SGCA 37. Whilst dealing with an issue on the immunity conferred on the decisions made by the public prosecutor, his Lordship notes that (at para 47) *"[I]t is crucial here to differentiate between clauses that oust or exclude the Court's jurisdiction or authority to act in a matter, and clauses that immunise parties from suit or liability"* as *"[L]ike ouster clauses, immunity clauses may be worded differently. Unlike ouster clauses however, they do not exclude the Courts' jurisdiction or authority to act in a matter"*.

Menon CJ, then proceeds to identify three characteristics that distinguishes immunity clauses from ouster clauses (at para 50), which are listed as follows:

> *"… statutory immunity clauses share certain characteristics. First, they are exceptional in that they preclude claims being brought against certain classes of persons under prescribed conditions where ordinarily such persons might otherwise be subject to some liability. Second, statutory immunity clauses commonly seek to protect persons carrying out public functions. It is on account of the responsibilities that burden the exercise of such public functions and the desire not to hinder their discharge that such immunity clauses are commonly justified …Third, and as a corollary to this, such immunity generally would not extend to the misuse or abuse of the public function in question; nor would the immunity typically apply where its beneficiary exceeded the proper ambit of the functions of his office"*.

In ***Karunathilaka and another v Dayananda Dissanayake, Commissioner of Elections and Others*** (1999) 1 Sri L.R. 157 (case No. 1), *Mark Fernando* J, in the context of immunity conferred on the President of the Republic, observed that the (at p. 177) *"[A]rticle 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act"* (emphasis added). This observation was quoted in the judgment of ***Victor Ivan v Hon. Sarath N. Silva and Others*** (2001) 1 Sri L.R. 309, whilst dealing with the very nature of the immunity conferred on the President of the Republic by Article 35(1) once more, (at p. 324).

In view of the reasoning contained in the preceding paragraphs and despite the obvious conclusion that could conveniently be reached thereupon on this issue, I wish to refer to one last factor that should be dealt with in this context, before moving on any further.

In support of his contention that Article 61A is an immunity clause, learned President's Counsel for the Plaintiff also relied on the description provided to that Article in the marginal note, which reads as *"[I]mmunity from Legal Proceedings"*. It is correct that the draftsmen of the Constitution may have opted to use the word "*immunity*" and inserted same in the marginal note to that Article. This Article was introduced to the Constitution for the first time, and that too after the adoption of the 17th amendment to the Constitution. This was done by substituting an entirely a new Chapter IX, after repealing all the provisions contained in that Chapter up to that point in time. The said amendment was made effective from 10.03.2001.

In view of this contention, a question necessarily arises whether the marginal note "*[I]mmunity from Legal Proceedings*" should be taken as the determinant indicator of the legislative intent which is sought to be achieved by the Legislature by enacting that Article.

Ordinarily, the marginal note and title of an Act of Parliament would not be taken into account in the interpretation of provisions contained in a Section contained in that Act. Marginal notes are considered to be editorial inclusions added into the text of the enactment passed by the Parliament. *Maxwell,* in dealing with the topic of marginal notes in his work ***Interpretation of Statutes*** (12th Ed, at p. 10) cited Lord *Reid* from the judgment of House of Lords in ***Chandler v DPP*** (1964) A.C. 763, where it was observed (at p. 789) that " *[I]n my view side notes cannot be used as an aid to construction. … Side notes in the original Bill are inserted by the draftsman … so side notes cannot be said to be enacted in the same sense as the long title or any part of the body of the Act.*" ***Bindra*** in ***Interpretation of Statues*** (9th Ed, at p. 95) offers a slightly different view by stating that "*[T]hey form the basis of any index dealing with the Act. Although, there are decisions of Courts purporting to disregard them, they should not be considered trivial or unimportant, since most people are likely to accept the guidance of a marginal note. Moreover, the marginal note, though it forms no part of the Section, is of some assistance, inasmuch as it shows the drift of the Section.*" These statements are in line with the approach taken by this Court in ***Toyota Lanka (Pvt) Ltd., and another v Jayathilaka and Others*** (2009) 1 Sri L.R. 276, (at p. 288) in observing that "*[O]rdinarily, marginal notes and the title would not be taken into account in interpreting the provisions of a Section since they are considered to be editorial inclusions*".

Even if we are to ignore these rules of interpretation momentarily, a comparison made between the marginal notes of these two Articles, in itself would suffice to provide a definitive answer to the issue currently under consideration. The marginal note of Article 61A, in Sinhala text reads "*නඩු කටයුතු වලින් මුක්තිය*" whereas the marginal note of Article 35 reads "*ජනාධිපතිවරයාට විරුද්ධව නඩු පැවරිය නොහැකි බව*". In addition to these two Articles, there are several other instances where the Constitution, contain ouster clauses and immunity clauses, conferred on certain public institutions it had created. Marginal note of Article 111K reads that the Judicial Services Commission is conferred with and the marginal note in Sinhala also reads "*නඩු කටයුතු වලින් මුක්තිය*", with its English translation "*immunity from legal proceedings*" as did the marginal note of Article 35.

Marginal notes to Articles 153E and 155C indicate that the said Articles confer the Audit Services Commission and National Police Commission of "*නීති කෘත්‍යවලින් මුක්තිය*" (with the English translation "*immunity from legal proceedings*") respectively. Different wordings are used in respect of the Elections Commission, as the marginal note of Article 104A reads "*නිරණවල අවසානාත්මකභාවය සහ නඩු කටයුතු වලින් මුක්තිය*" (translated into English as "*finality of decisions and immunity from suit*").

Learned Additional S.G., strongly contended that the Article 61A is not an article that confer an immunity, whether qualified or otherwise, on members of the PSC.

What was meant by the draftsmen of the Constitution by inserting the marginal notes that reads "*නඩු කටයුතු වලින් මුක්තිය*" or "*immunity from legal proceedings*" could easily be understood, if one makes a comparison of marginal

note of the Article 61A with that of Article 35, which reads in Sinhala "*ජනාධිපතිවරයාට විරුද්ධව නඩු පැවරීය නොහැකි බව*" and in English as "*[I]mmunity of President from suit*". The difference between the marginal notes of Articles 35 and 111K and the others which were referred to above is obvious. The Sinhala text of the phrase contained in Articles 35 that reads "*ඔහුට විරුද්ධව කිසිම අධිකරණයක හෝ විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පැවරීම හෝ පවත්වාගෙන යාම නොකළ යුත්තතේය*" with the English translation "*… no civil or criminal proceedings shall be instituted or continued against the President…*" clearly speaks of an instance of immunity conferred on the President of the Republic. Similarly, Article 111K too carries the almost identical words in the Sinhala text "*... ඔහුට විරුද්ධව කිසිම අධිකරණයක හෝ විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පවරනු නොලැබිය යුත්තතේය*", with the English translation that "*… no civil or criminal proceedings shall be instituted or continued against …*" and thereby conferring the members and certain officials of the Judicial Service Commission referred to therein with an immunity from legal proceedings against them.

However, the common and almost identical phrase that appears in Articles 153E and 155C that "*... කිසිම අධිකරණයකට හෝ විනිශ්චය අධිකාරයකට බලය හෝ අධිකරණ බලය නොමැත්තේය*" is clear in its meaning that it must be taken as an instance of effectively taking away the jurisdiction of Courts, subject to the Constitutional provisions contained therein. Article 104A(a) confers immunity to the members of the Election Commission while imposing a Constitutional ouster of jurisdiction by Article 104A(b).

In view of the above considerations, it is my considered view that the marginal note that reads "*නඩු කටයුතු වලින් මුක්තිය*" or "*immunity from legal proceedings*" does not indicate the position that the Article 61A was intended to

confer any '*immunity*' on the PSC as such, but only imposes a Constitutional ouster of jurisdiction of Courts to adjudicate upon its decisions and orders which was sought to be achieved by taking away the jurisdiction already conferred by law on such Courts. If it was the intention the draftsmen of the Constitution to indicate that Article 61A meant to confer immunity on the PSC, they could have used the marginal note as they used in Article 35, namely, *"[I]mmunity of … from suit"* (**"විරුද්ධව නඩු පැවරීය නොහැකි බව"**) in that Article as well, instead of the marginal note that has commonly been used in respect of other public institutions referred to above conferring with only an ouster of jurisdiction.

If the Legislature intended to protect a person or a public body from any form of litigation, such objective is achieved by conferment of an immunity on that entity by enactment of a positive provision of law to that effect. The words "*… no civil or criminal proceedings shall be instituted or continued …",* that generally found in such provisions that confer immunity, are clear in what they mean. In must also be noted that the Article 61A, however, does not leave the Plaintiff high and dry without providing an alternative and effective legal remedy to the grievance suffered by her, consequent to a decision or order of the PSC.

The orders and decisions made by the PSC are made subject to the appellate powers of the Administrative Appeals Board (hereinafter referred to as the "AAT"). In terms of Article 59(2), the AAT is conferred with powers to " … *alter, vary and rescind any order or decision made by the Commission.*" In addition, Article 61A itself made it open to challenge the legality of the orders and decisions made by the PSC by invoking the fundamental rights jurisdiction of this Court, which has expanded its jurisdiction over the years by judicial activism, even to capture the instances of "*Constitutional Torts*", per the judgment

of ***Janath Vidanage and Others v Pujith Jayasundara and Others*** (SC/FR Application No. 163/2019 – decided on 12.01.2023).

The judgment of ***Ratnayake v Administrative Appeals Tribunal and Others*** (2013) 1 Sri L.R. 331, dealt with a situation where a contention was advanced in support of a preliminary objection taken on behalf of the AAT, against an application that invoked the jurisdiction of the Court of Appeal under Article 140. It was contended that, in view of the establishment of the said tribunal in terms of Article 59(1) and in terms of Section 8(2) of the Administrative Appeals Tribunal Act No. 4 of 2002, which states " *[A] decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a Court of law",* the Constitutional ouster of jurisdiction conferred in terms of Article 61A, made the decision of the AAT not reviewable by the Court of Appeal. On this contention, *Marsoof* J held that "… *the Court of Appeal did possess jurisdiction to hear and determine the application filed before it. AAT is not a body exercising any powers delegated to it by the PSC, and is an appellate tribunal constituted in terms of Article 59(1)"* and therefore ouster of jurisdiction conferred by Article 61A on decisions and orders made by the PSC "… *does not apply to the impugned decision of the AAT, it being specifically confined in its application to the orders and decisions of the Public Service Commission, …*".

Thus, a public officer who is aggrieved by an order or a decision of the PSC has the remedy of challenging same by preferring an appeal to the AAT and if that option too was proved unsuccessful, he could still invoke the jurisdiction conferred on the Court of Appeal under Article 140 against the decision made by the appellate body. Article 61A itself recognised another, perhaps equally effective, if not more, remedy to such a public officer by providing that he could

invoke fundamental rights jurisdiction of this Court under Articles 17 and 126(1), but within the mandatory time period Article 126(2) had stipulated.

In view of the above process of reasoning, I am fortified in my view that Article 61A distinctly bears the characteristics of a Constitutional ouster clause rather than a provision that confers immunity, as the provisions contained in Article 35 has the three characteristics referred to by *Menon* CJ in ***Nagaenthran v Public Prosecutor and another*** (supra) that are found in the case of conferment of an immunity and, accordingly acts as a shield from litigation to the doer, unlike in Article 61A which only takes away the jurisdiction of Courts and tribunals, they otherwise possess, in terms of the statutory law. Thus, whilst respectfully agreeing with the findings already made by this Court through its multiple pronouncements on the scope of Article 61A, I too would proceed to term the effect created by the Article 61A on the general jurisdiction of the District Court, as a Constitutional ouster of the jurisdiction of that Court, over maintaining litigation into any decision or order made by the PSC and not as a clause that confers any immunity over such decisions or orders.

It is already referred to the fact that the Plaintiff invoked the appellate powers conferred on the AAT by preferring an appeal against the decisions of the PSC. The AAT, by its decision dated 14.07.2021 and also with an amended decision dated 22.07.2021 (document marked as "X" in the bundle of documents marked as "P7" in SC Appeal No. 88/24), made following orders:

> *a.* "*Rescinded the PSC order made on 06.04.2021 to continue to keep the appellant under compulsory leave until the Formal Disciplinary Inquiry is completed,*

b. Direct the PSC to revoke the order made on 19.10.2020 sending the appellant on compulsory leave and allow her to resume duties in the post of Solicitor General with immediate effect,

c. Retire the appellant on 30.07.2021 on her reaching compulsory age of retirement …

d. *Take steps to conclude the formal disciplinary inquiry against the appellant in terms of P.A. Circular 30/2019 dated 30.09.2019 expeditiously*."

With the amended order of the AAT, both the decisions made by the PSC, for which the Plaintiff claimed damages as decisions taken *mala fide,* were rescinded by the AAT. In the absence of any challenge to that decision of the AAT on the part of the PSC, the legal validity of those two decisions does not arise for consideration in these proceedings. However, this fact becomes relevant in view of a particular contention advanced by the Plaintiff.

In response to a contention advanced by the Defendants and, perhaps in an attempt to divert the adverse impact that might result from the direct application of the provisions contained in Article 61A on the action instituted by the Plaintiff, learned President's Counsel submitted that, it was not the Plaintiff's intention to challenge any "*decisions*" made by the PSC by her action instituted before the District Court. What she in fact intended to bring before that Court was that the conduct of the individual Defendants in acting *mala fide* which then resulted in the deprivation of her career progression.

In support of his submission, learned President's Counsel presented this Court with an equation, which was formulated by him with a view to set out the causal chain of arriving at decisions made by each of the individual Defendants,

during the process within which they have allegedly acted with "*mala fide, maliciously and illegally*" and thereby committing a "*delictual wrong*".

The formula relied on by the learned Counsel in order to impress upon this Court of the proposition that the individual decision so arrived at by each member "*is only a part of the causal chain*", is as follows:

i. Defendants act maliciously,
ii. Consequent to that malicious action, decisions are made,
iii. Consequent to the decisions, the Plaintiff suffers damages.

Since this equation deals with the important phases of the decision-making process by which each of the Defendants, being members of the PSC, said to have arrived at their respective individual decisions with minds tainted with malice, it is pertinent to examine the nature and scope of the powers conferred on the PSC, in relation to the Plaintiff, as the first step and the manner in which it is expected to exercise such powers as the second step.

But before proceeding to the first step in the said process, it is of great relevance to make at least a passing reference to a factor that the learned President's Counsel for the 2nd Defendant, thought it fit to invite our attention.

Paragraph 31 of the Plaint, in which the Plaintiff sets out her complaint to the original Court, reads as follows:

> "*[T]he Plaintiff states that the Defendants by interdicting the Plaintiff and/or interdicting the Plaintiff without pay and/or paying the Plaintiff half salary and/or placing the Plaintiff on Compulsory Leave, jointly and/or*

severally, negligently and/or wrongfully and/or illegally and/or acting ultra vires and /or mala fide and/or maliciously;

(a) interrupted the Plaintiff's career as a public servant,

(b) deprived the Plaintiff of her legitimate entitlements including her salary."

It is clear from that averment that the action instituted before the District Court by the Plaintiff was founded primarily on two specific events that had already taken place namely, her interdiction from the public service and the subsequent placement of her under compulsory leave. If the causal chain of events, that culminated with the actual carrying out of her interdiction and placing her on compulsory leave, is traced in its reverse sequence, starting from the point of implementation, then they could be lined up as follows.

It was the Attorney General, who in fact carried out the decisions of the PSC to interdict the Plaintiff and placed her on compulsory leave, as the head of that Department, in which she served. In doing so, he was merely carrying out the decisions made by the PSC, which communicated to him, through the Secretary to the Ministry of Justice, to affect its compliance. It is therefore reasonable to conclude that the act of interdiction and the subsequent placement of her on compulsory leave were the direct results of carrying out decisions taken by the PSC to that effect. It is also important to note that the Attorney General has no disciplinary control over the Plaintiff, who functioned as the Solicitor General of the Republic during the relevant time period, and therefore had no statutory power either to place her on interdiction or to place her on compulsory leave.

In this factual scenario and, in view of the formula invented and relied on by the learned President's Counsel for the Plaintiff, it is imperative for this Court to undertake an inquiry into the contribution made by the individual members of the PSC, who voted in favour of or in opposition to the said two decisions, which allegedly disrupted career progression of the Plaintiff. But before venturing into consider those two aspects, it would be pertinent to consider *albeit* briefly the decision-making process of the PSC, as envisaged by the Constitutional provisions.

After the creation of PSC in terms of Article 51(1), the Constitution thereupon confers a statutorily demarcated set of powers and functions on that Commission by Article 55(3). Article 55(3) states that the appointments, promotions, transfers, disciplinary control and dismissals of public officers shall be vested in the PSC. It further states that the PSC is to exercise its functions and powers conferred by that Article, subject to the provisions of the Constitution. Article 55(1) and (2) set out the powers and functions of the Cabinet of Ministers it could exercise over the PSC under Article 55(3).

Admittedly, the involvement of the PSC regarding the Plaintiff, who served as a senior public officer during the relevant period of time, is confined to an instance of exercising of disciplinary control it had over her, a power conferred on that Commission by the Constitution itself. The Plaintiff, either in her pleadings before this Court or in her submissions, did not dispute the power of disciplinary control the PSC had over her. What she claimed before this Court was that the impugned decisions were taken by the members of the Commission *mala fide* and maliciously, whilst participating in the decision-making process of the PSC.

In terms of Articles 55(1) and 55(3), the PSC is required to make its orders and decisions, in line with the policies laid down by the Cabinet of Ministers over the appointment, promotion, dismissal, and disciplinary matters of public officers. The manner of exercising such powers is set out in Article 61. Article 61(3) states that "*[A]ll decisions of the Commission shall be made by a majority of votes of the members present at the meeting. In the event of an equality of votes, the member presiding at the meeting shall have a casting vote*" while Article 61(1) sets out the required quorum for a meeting of the PSC. Moreover, Article 61(2) sets out the manner in which the decisions of the PSC should be reached when it stated that all such "*… decisions shall be made by a majority of votes of the members present at the meeting.*"

The "*Public Service Commission*" is not conferred with a juristic personality by the Constitution and its "*decisions*" are therefore made consequent upon reaching unanimity or obtaining majority of votes of the members of the Commission. The Article also expects the members of the PSC to cast their individual votes on a particular course of action to be taken on a public officer, in terms of its mandate, during a meeting of the Commission and in the presence of each other.

Thus, it could then be reasonably deduced from Article 61(3) that the acts of each individual member in casting his vote, either in agreement or in opposition of a proposed course of action, is a necessary pre-requisite for the validity of the decision or an order of the PSC and, it is upon satisfying that pre-requisite only that such individual decisions, would thereupon transforms itself into a collective decision or an order, in the form of an "*order*" or "*decision*" made by the PSC. Clearly, the decision of each member of the PSC, taken individually,

could not be the accepted as an "*order*" or a "*decision*" of the PSC. Such an individual decision, taken by that particular member, either to vote in favour or in opposition to the suggested course of action, therefore would have no impact on a public officer, in respect of whom that particular course of action was suggested. On the other hand, the Attorney General could not have interdicted the Plaintiff nor could he place her on compulsory leave, on any individual decision made by the membership of the PSC.

It is only after the PSC makes an "*order*" or a "*decision*", either in unanimity or in majority vote of members, who are present at its meeting and subject to the quorum, in terms of Article 61(3), such a "*decision*" would have any impact on the concerned public officer. Therefore, the individual acts of voting by each member of PSC are relevant only, in so far as, to determine the number of votes in favour of the order or the decision for it qualify as an "*order*" or a "*decision*" of that Commission.

It was the position of the learned President's Counsel that the Plaintiff did not challenge the validity of any "*decision*" of the PSC, but she complained only of the *mala fide* acts of each Defendant, in taking their respective individual decisions to arrive at the "*decision*" which had an adverse impact on the career of the Plaintiff. If I understood the learned President's Counsel's submissions correctly, the Plaintiff therefore confines her action only to the stage at which each member had taken his individual decision before voting, and not after the stage at which those individual decisions assume the character and status of a "*decision*" of the PSC, upon being accepted either in unanimity or in the majority of votes.

Thus, the Plaintiff thereby seeks to isolate a single component, that she had picked up from the decision-making process of the PSC and relies on same to claim a breach of duty of care on the basis of *mala fide.*

In view of this reasoning, it appears to me that the Plaintiff, in instituting action before the District Court, was acting under a mistaken perception that it was the individual decisions of the Defendants (which she alleges as taken in *mala fide*) that resulted in her interdiction from the public service and the eventual placement of her on compulsory leave, which, in my opinion, could be not be accepted as a correct proposition both factually and legally.

Thus, I regret for my inability to accept the formula invented by the learned President's Counsel on behalf of the Plaintiff which sets out the causation chain to illustrate the process of decision making by identifying three consequential steps:

i. that the Defendants act maliciously
ii. consequent to malicious action, a decision is made
iii. consequent to the decision, the Plaintiff suffers damage.

The reason being, of these three components of causative equation identified by the Plaintiff, the second component, '*consequent to malicious action, a decision is made*', necessarily speaks of an individual decision-making process that passes through in each member's mind. It is at that stage the Plaintiff claimed that the malice, already harboured in the minds of the members of the PSC, makes a contribution to the decision, tainting that decision, whereas that decision should have been taken by them upon adoption of a process of logical reasoning.

The last component in that causative equation, which is termed as, '*consequent to the decision, the Plaintiff suffers damage*', necessarily pre-supposes the fact that it was due to the individual decision of the member, that made the Plaintiff to suffer damage, whereas it clearly is not the case. There is clearly an intermediate step in between that separates the second component of the said causative equation from the third. It is already noted that the individual member's decision would transform itself into a collective decision by assuming the character of a <u>decision</u> made by the PSC, only upon receiving either unanimity or majority of votes. After that point in time, it is no longer the individual decision of the membership of the Commission but, it is the <u>decision</u> of the PSC in terms of Article 61(2). It is undoubtedly the <u>decision</u> made by the PSC that caused the interruption to the progression of the Plaintiff's career and not the decision of each member that had taken individually to vote in favour to the proposed course of action, in order to reach unanimity or majority.

There is one point, among many others, that were stressed upon by the learned Additional S.G., that needs further consideration in relation to the contention of the Plaintiff that she only challenges the *mala fide* actions of the individual Defendants and not the decision or order of the PSC before the District Court. During his submissions, learned Additional S.G. submitted that the Plaintiff's act of making an appeal to the AAT, consequent to which the tribunal made an order rescinding the impugned decisions of the PSC, is in itself an admission that the decision that interrupted her career was taken not by any individual member of the PSC but by the PSC itself.

In its order, the AAT stated that it was of the view that the grievance presented before that tribunal was in relation to an instance where "… *the exercise*

of discretion of the PSC in the capacity of the disciplinary authority of the appellant was at issue". Placing reliance on this statement made by the AAT, learned Additional S.G. submitted that it also confirms the impugned decisions were in fact had been accepted by the Plaintiff as decisions made by the PSC and no one else, although she made a futile attempt before the District Court to present a case, in total contradiction to her position taken before this Court and to the finding made by AAT.

This particular submission demands a consideration of relevant Constitutional provisions that applies to Administrative Appeals Tribunal, since it was made in the context of the act of the Plaintiff, in submitting herself to the jurisdiction of that tribunal after conceding its jurisdiction, that contradicts her claim taken up before the District Court. The AAT too had its powers and functions spelt out by the Constitution itself. Article 59(1) establishes the Administrative Appeals Tribunal, while Article 59(2) confers that tribunal with powers to "*… alter, vary or rescind any order or decision made by the Commission",* making a direct reference to the "*orders*" or "*decisions*" made by PSC.

Thus, a public officer, who is issued with an order or a decision made by the PSC, if aggrieved with that order or decision, could thereupon prefer an appeal to AAT, seeking its intervention. The Plaintiff too had availed herself of this opportunity when she tendered her Petition of Appeal to the AAT, which she subsequently amended on 07.12.2020 (marked as "X6" in "P7" by the Plaintiff, in her application to this Court seeking leave to appeal in SC/HCCA/LA/165/2022, now SC Appeal No. 89/2024) claiming that she had appealed to that tribunal " … *in relation to an order made by the Public Service Commission … wherein the PSC had authorised the Appellant to be paid only half-salary*

with effect from 12.08.2020." Interestingly, the reference to an "*order*" dated 12.08.2020, made in the Plaintiff's petition of appeal, was in relation to one of the decisions she had attributed to the PSC in that petition, was re-described in her Plaint, as a collective outcome of a *mala fide* acts committed by each of the Defendants.

The other decision, challenged by the Plaintiff before the AAT, was in relation to the decision of the PSC relating to her interdiction dated 25.09.2019, which she herself admitted to being "… *conveyed to the Appellant by the Attorney General by letter dated 25.09.2019"* by the PSC. The said letter is briefed in SC Appeal No. 88/2024 at "P2" of "P7". Perusal of its contents reveals that the Plaintiff was interdicted with immediate effect on the "*orders*" ("*... නියෝග කර ඇත*"), issued by the PSC, by its letter dated 24.09.2019.

Thus, it is clear that the Plaintiff herself had accepted that both her interdiction and the subsequent placement on compulsory leave, were due to specific "*orders*" or "*decisions*" made by the PSC to that effect. She thereby conceded that the two decisions are "*decisions*" made by the PSC, when she invoked the appellate jurisdiction conferred on the AAT by Article 59(2). The stance taken by the Plaintiff before this Court, by claiming that what she complained to the District Court is not the "*decisions*" made by the PSC, but the individual acts of the Defendants who collectively decided to vote in favour for the purpose of arriving at those decisions of the PSC, is consistent with the one she had taken in her Plaint. The Plaintiff accused the Defendants, who functioned as members of the PSC, in doing so, have acted *mala fide* and committed a "delictual *wrong"*. This particular aspect of the Plaintiff's contention,

concerning the 'acts' and 'decisions' has already been dealt with in this judgment.

In view of the Plaintiff's own admission that she was interdicted and placed on compulsory leave by a "*decision*" made by the PSC to that effect, Learned Additional S.G. submitted that the Plaintiff should not be allowed to do what she cannot do directly, by indirectly. He invited attention of this Court to a pronouncement made by this Court in ***Bandaranaike v Weeraratne and Others*** (1981) 1 Sri L.R. 10, and relied on the principle it had re-iterated, in support of the said submission.

This judgment dealt with a situation where the petitioner, by way of a Writ of *Certiorari,* sought to quash an adverse finding made against him by a Special Presidential Commission upon which it made recommendation to take away her civic rights. Subsequent to a resolution effected by the then Prime Minister with the approval of the Cabinet of Ministers, the said recommendation was passed by the Parliament with 2/3rd majority.

The respondents raised a preliminary objection to the maintenance of the application. The petitioner's submission was that if the recommendations of the Commission are *void* for the reasons alleged in her petition, and therefore the resolutions passed by the Parliament too would become invalid. However, in this instance, it must be noted that when the matter was taken up for hearing before this Court, the Speaker of the Parliament, upon the said resolution being approved by the Parliament, already certified that the said resolution was duly passed by the Parliament, in terms of Article 81. Accordingly, the preliminary objection was raised in terms of Article 81(3).

This Court, having considered the relevant Articles, upheld the preliminary objection raised by the respondents. Relevant part of Article 81(3), as it stood at that point in time, reads as follows:

> *"[E]very such certificate shall be conclusive for all purposes and shall not be questioned in any Court, and no Court or tribunal shall inquire into, or pronounce upon or in any manner call in question the validity of such resolution on any ground whatsoever".*

In view of the Constitutional provisions contained in Article 81(3) this Court stated that (at p. 16) *"[T]he issue of a writ quashing the findings and recommendations of the Special Presidential Commission would amount to a decision that one of the necessary conditions for passing a resolution did not in fact exist. If the validity of the resolution was capable of being called in question, one way of doing it is to show that a necessary condition for passing the resolution did not in fact exist. It is true that in this application what the petitioners seek to quash are the findings and recommendations of the Special Presidential Commission but the granting a writ would necessarily imply that the resolution was invalid"*

Dealing further with this situation, the Court held (also at p. 16) that, in view of the *"… general rule in the construction of Statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner."* Then it went on to add that *"[B]ut quite apart from such general rule of construction, there is in this preclusive clause itself express words to indicate this."*

The process of legal reasoning adopted by this Court in ***Bandaranaike v Weeraratne and Others*** (supra) in arriving at the above quoted conclusion on the preliminary objection had consistently been followed by superior Couts in

similar situations, as indicative from the judgments of ***Senerath v Chandraratne, Commissioner of Excise and others*** (1995) 1 Sri L.R. 209, ***Eksath Kamkaru Samitiya v Ceylon Printers Ltd., and Others*** (1996) 2 Sri L.R. 317 and ***Omalpe Sobhita v Dayananda Dissanayake and another*** (2008) 2 Sri L.R. 121. The only two instances that I have come across in which this Court did not act on that principle are the judgments of ***Sirisena Cooray v T.D. Bandaranayake and Others*** (1999) 1 Sri L.R. 1 and ***Wijayapala Mendis v Perera and Others*** (1999) 2 Sri L.R. 110.

In ***Sirisena Cooray v T.D. Bandaranayake and Others*** (*ibid*) is an instance where the petitioner sought to challenge the validity of recommendations made by a Special Presidential Commission, established under the Special Presidential Commissions of Inquiry Law No. 7 of 1978. In delivering the judgment, *Dheeraratne* J declared that the *Writ* jurisdiction conferred under Article 140 on the Superior Courts is "*unfettered*" by any statutory provisions which were enacted by the Parliament to limit or oust that jurisdiction. However, his Lordship stressed the point that (at p.14) *"[W]e are here certainly not inquiring into, pronouncing upon, or in any manner calling in question, the validity of the SPCI Amendment Act No. 4 of 1978 as contemplated by Articles 80 (3)"* and attributed the reason for making that qualification to the principle that "*[T]he Constitutional provision must prevail over normal law."*

In relation to the appellate powers conferred on the AAT over the orders and decisions made by PSC was considered earlier on in this judgment in the context of the Constitutional ouster and the availability of statutorily created legal remedies to a person who is affected by that ouster.

Mark Fernando J, delivering judgment in ***Wijayapala Mendis v Perera and Others*** (*ibid*), in relation to an instance where a similar objection was taken in respect of an application seeking a Writ against a recommendation made by a Special Presidential Commission, held that (at p. 162) that "*[T]he application now before us is a legitimate invocation of the jurisdiction of this Court to review the findings and recommendations of the Commission; it seeks relief only in an area in which Parliament has no jurisdiction, and it seeks no order or relief in respect of what Parliament has done or may do*". His Lordship held that view after distinguishing the matter before that Court, with the facts of the case of ***Bandaranaike v Weeraratne and Others*** (*supra*), as in that instance, by the time the application was taken up for hearing before Court, the Parliament had already passed the resolution based on the recommendations of the Commission, unlike in the situation presented in ***Wijayapala Mendis v Perera and Others*** (*ibid*).

After undertaking a careful consideration of the multiple factors that were referred to in the preceding paragraphs, I have arrived at the firm conclusion that the Plaintiff's claim presented on the basis that the individual acts of each member of the PSC, in arriving at their individual decisions on the Plaintiff, who alleged to have acted with malice and, in that, have acted in breach of the duty of care owed to her, could not be accepted as a legally valid proposition to maintain an action in the District Court, in view of the Constitutional ouster clause contained in Article 61A.

This claim of *mala fide* acts of each member of the PSC, being the fundamental premise on which her action was founded, could be termed as a clever attempt to circumvent the otherwise an insurmountable legal obstacle, namely the Constitutional ouster clause, contained in Article 61A. The Plaintiff,

in taking up such a stance, made an attempt to attribute the detrimental impact caused to her by the decisions of the PSC, by driving a wedge into the decision making process, as envisaged by Article 61, and thereby seeking to separate the individual decisions of each member of the PSC to vote in favour of such decisions and the eventual "decision" reached by the PSC, which in itself consists of the unanimous or majority vote of the individual members.

With this contention, the Plaintiff also seeks to attach undue weightage to the individual acts of the members of the PSC, who voted in favour of those decisions, by alleging that they were motivated by malice, rather than to the actual "*decisions*" of the PSC, that had been carried out by the Attorney General and once again, allegedly caused a detrimental effect on her career.

Learned Additional S.G. has termed the Plaintiff's act of filing action before the District Court, and claiming damages from the members of the PSC, also as an endeavour to find an alternative legal remedy, being motivated by the realisation that her alleged grievance, which she could have been adequately remedied if she petitioned this Court by invoking its jurisdiction under Articles 17 and 126(1), as provided for by the Article 61A itself, was already time barred. It is his submission that the Plaintiff's decision to institute action in the District Court was made only when the Administrative Appeals Tribunal decided to rescind the impugned decisions of the PSC and hence the claim of *mala fide* was invented to facilitate that course of action.

In conclusion, and in view of the fact that where the Parliament had provided several alternatives to a person who may have suffered an injustice but was deprived of a legal remedy due to an ouster clause, an ouster clause of jurisdiction must be given its full effect. In ***Migultenna v The Attorney General***

(*supra) Fernando* J made the following observation in relation to a contention presented that the Constitutional ouster contained in Article 55(5) is inclusive of an implied exception, (at p. 419);

> *" … 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 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 in an implied exception into an ouster clause in the Constitution by reference to general provisions in ordinary laws governing the jurisdiction of the Courts; the maxim, generalia specialibus non derogant, would apply with much greater force when the special provisions are found in the Constitution itself"* (emphasis added).

Having rejected that contention, his Lordship proceeded on to hold (at p. 419) *" … the fact Article 55(5) permits review, in the exercise of that jurisdiction by the highest Court, it does not follow that Section 106(5) permits review by way of declaration in the District Court."* In this instance too, the action instituted by the Plaintiff against the Defendants, who for *"… all times material to the action, … were the members of the Public Service Commission".* They were being sued on the following grounds after alleging they have acted;

a. in breach of their duty of care,
b. negligently,
c. and/or unlawfully,
d. in breach of their duties,

e. *ultra vires,*

f. *mala fide* in law,

g. with malice in law,

h. in failure to duly and properly discharge their duties.

The effect of Article 61A is to restrict the adjudication of the decisions and orders of the PSC only under the jurisdiction conferred on the apex Court by Articles 17 and 126 and the AAT. The apparent conflict between the jurisdiction so conferred on this Court which described as the " *jurisdiction for the protection of fundamental rights"* by Article 118(b) and the Constitutional ouster imposed by Article 61A on the Courts, tribunals and institutions created and established law, in relation to decisions and orders of the PSC, had already been given due recognition by the Constitution and was effectively mitigated by the Parliament by making such decisions and orders, subject to the jurisdiction of this Court in terms of Article 126(1) and also of the AAT.

Having dealt applicable Constitutional provisions and the relevant jurisprudence that had developed around them in relation to the question of law this Court must determine, it is time that a reference is made to the judgments of the Courts below and consider its validity, based on the above determinations.

Upon being served with summons of the instant action, issued by the District Court, the 2nd Defendant filed a Motion in that Court on 22.10.2021, wherein an objection to the invocation of the jurisdiction of Court was raised under Article 61A. The 1st and 3rd to 8th Defendants too have tendered their Statement of Objections dated 16.11.2021. They have specifically pleaded that the impugned decisions were taken as 'decisions' of the PSC and the District Court

has no jurisdiction to inquire into or pronounce upon or in any manner call in question any such order or decision.

The District Court, after an inquiry into the objection raised on its jurisdiction, made an order rejecting the said objection. The rejection of the said objection was primarily made on the footing that no "*immunity*", as conferred on the President of the Republic or on the members of the Judicial Service Commission, was conferred on any of the members of the PSC and, since the "*immunity*" conferred on the members of the Election Commission is limited to the acts done in good faith, in this instance too, an action could be instituted and maintained against the Defendants, when the cause of action against them is founded on breach of duty of care, for acting negligently, wrongly, illegally, in excess of powers, and *mala fide*.

The Defendants have thereupon moved the High Court of Civil Appeal and sought its leave, in order to appeal against the said order. That Court, while granting leave, also permitted the action of the Plaintiff, that was pending before the District Court to proceed with, in terms of Section 757(5) of the Civil Procedure Code.

Since the answer to the question of law, upon which the two appeals were argued, namely "Can the Plaintiff have maintained this action, in view of Article 61A of the Constitution ?" will itself determine the legal validity of these two orders, I shall therefore proceed to determine the said question of law.

It has already been decided that the Article 61A acts as a Constitutional ouster of jurisdiction of the Courts and tribunals, barring the jurisdiction of this Court conferred under Article 126, and that the actions of the individual

members of the PSC have no impact on the career of a public officer since it is the unanimous or majority "*decision*" of the PSC only that would make an impact. This is because only the PSC, being the body that conferred with powers to determine the appointment, transfer, dismissal and disciplinary control over the public service, could make an "*order*" or a "*decision*" on any of these matters on an individual public officer.

Having reached the final section of this judgment, it is necessary to refer to another interesting contention advanced by the learned President's Counsel for the Plaintiff, by which he sought to add another perspective to the already referred legal principle on which the instant action was founded before the District Court, and thereby seeking to justify her action. In addition to the position already taken up that no immunity conferred on the Defendants in terms of Article 61A, learned President's Counsel also contended that the action instituted by his client was also premised on an allegation of violation of her common law rights, which in turn gave rise to imposition of delictual liability on those Defendants for causing a "*delictual wrong*".

Due to this reason, learned President's Counsel contended that the said action should not be ruled as an action being barred by Article 61A. He added that, in this particular instance what the Plaintiff claimed from the District Court is not a declaration from that Court of a violation of her fundamental rights, but a remedy for the injurious conduct on the part of the Defendants. This is a violation of her rights, which she is entitled to enjoy under the common law, and therefore falls outside the scope of the jurisdiction conferred on this Court, under Articles 17 and 126(1). According to learned President's Counsel, only the District Courts are conferred with the jurisdiction to adjudicate such complaints

and to award adequate compensation, if it was found that the allegation is substantiated.

There cannot be any dispute over the contention of the Plaintiff that she is entitled to the full enjoyment of the bundle of rights conferred on her under the common law, in addition to her entitlement to the rights conferred under Chapters III and IV of the Constitution, described therein as fundamental rights and language rights. However, as a consequence of the said contention, the nature of the dispute presented before this Court is slightly modified and therefore should be described as, whether the instant action instituted by the Plaintiff, on the basis of a violation to her common law rights, could be maintained in the District Court, in view of the Constitutional ouster of the jurisdiction of that Court, explicitly made by Article 61A.

In making her complaint to the District Court, the Plaintiff alleged in her Plaint that it was the actions or decisions that are attributed to the Defendants taken *mala fide* to interdict her and to place her on compulsory leave only resulted in a "*delictual wrong",* when it interrupted her career progression. The legal validity of that complaint was examined in the preceding part of this judgment and I have already arrived at the conclusion that it was not due to actions and decisions of the Defendants, but due to the "decisions" or "orders" made by the PSC that resulted in the said interruption to her career progression, if any.

What Article 61A deprives the District Court is, its jurisdiction to " … *inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, …".* It is relevant to note in this context that the Plaintiff did not make any allegation that the PSC has acted *mala fide* in arriving at the

decisions it did, but it was the members of that Commission who did act with malice. The alleged violation of her common law rights was undoubtedly consequent to a "*decision*" made by the PSC. Thus, with the direct application of the Constitutional ouster of jurisdiction of the District Court, it cannot entertain any such action. With regard to the contention of the Plaintiff that the complaint made by her to the District Court was only to seek a remedy in relation to a violation of her common law rights, which could not be adjudicated by this Court since that violation falls outside the jurisdiction conferred on this Court by Articles 17 and 126(1), but is well within the general jurisdiction of that Court, it could well be that the said contention is founded upon the observation made by *Mark Fernando* J ***Saman v Leeladasa and Another*** (1989) 1 Sri L.R. 1, (at p. 23) that "*[U]nder our Constitution, if the infringement is by 'executive or administrative action'. the remedy is by petition under Article 126; if it is not by 'executive or administrative action', the common law or statutory remedies are available.*"

When the Constitution itself affords a remedy to a person who was aggrieved by a decision or order made by the PSC, and explicitly ousts the jurisdiction of other Courts to adjudicate on such matters, it is apposite to quote *Mark Fernando* J once more from the judgement of ***Migultenna v The Attorney General*** (*supra*), where his Lordship stated that (at p. 419) " *[I]t 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 specialius non derogant, would apply with much greater force when the special provisions are found in the Constitution itself.*"

Therefore, in view of the unambiguous Constitutional provision which expressly ousts the jurisdiction of the Courts and tribunals, inclusive that of the

Court of Appeal, in adjudicating upon the orders and decisions made by the PSC, it must therefore be given full effect and thus, the said question of law on which these two consolidated appeals were argued, is answered in the negative and against the Plaintiff.

It is of relevance at this point to quote *Wadugodapitiya* J, in ***Victor Ivan v Hon. Sarath N. Silva and Others*** (*supra*) where his Lordship made a pertinent observation in respect of a matter, somewhat similar to the one presented before this Court, in this instance. His Lordship stated (at p. 327) "*[I] am constrained to say that what the Petitioners are asking this Court to do, is in effect to amend, by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, it is not within the powers of this Court to do. In the guise of judicial decisions and rulings Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned*" (emphasis added).

In terms of Article 61A, the District Court is clearly deprived of its ordinary jurisdiction to maintain the Plaintiff's action against the members of the PSC and the question of the legality of the said action proceeding along notwithstanding the fact that leave was granted on the question of jurisdiction too must be determined against her. If the District Court has no jurisdiction to entertain such an action, there is no question of continuing with the same, even if the High Court of Civil Appeal directed the original Court to do so. In any case, I do not think the High Court of Civil Appeal acted correctly in that instance, when it made the direction under Section 755(5) of the Civil Procedure Code, as that Section caters to a totally different scenario.

Moreover, the District Court, in providing an interpretation to Article 61A that it does not confer the members of the PSC with an *"immunity"* from litigation, when the plain reading provided an obvious answer, it had either wittingly or unwittingly made a transgression on to the exclusive domain of this Court, completely ignoring the provisions contained in Article 125(1).

Therefore, the order of the District Court in overruling the objection to its jurisdiction based on Article 61A and the order of the High Court of Civil Appeal, directing that original Court to proceed with the action of the Plaintiff are hereby set aside. The Plaint of the Plaintiff too is rejected/dismissed owing to the reason that the original Court had no jurisdiction to entertain such a Plaint.

In conclusion, it is apt to re-produce the observation of *Samarawickrame* J in ***Bandaranaike v Weeraratne and Others*** (*supra*) where his Lordship stated (at p. 17) that:

> *"I am conscious of the fact that this decision means that without going into the factual aspects of the petitioners' complaints, because of a preliminary legal objection the petitioners are declared disentitled to a remedy in a matter in which each of them rightly or wrongly feels that he or she has a serious grievance to place before Court. We are faced, however, with a provision of the fundamental law, the Constitution. This Court has been given the sole jurisdiction to interpret the Constitution. This Court is also vested with jurisdiction in respect of fundamental rights granted by the Constitution and certain other matters arising under the Constitution. There is, therefore, a peculiar duty resting on this Court to uphold and give effect to a provision of the Constitution, and we have no alternative but to give proper effect to the preclusive clause in Article 81 (3)."*

Similarly, in this instance too this Court must give proper effect to the ouster clause contained in Article 61A, in fulfilling its Constitutional duty.

Therefore, the appeal of the 2nd Defendant in SC Appeal No. 88/2024, is allowed and consequently the appeal of the Plaintiff in SC Appeal No. 89/2024 stands dismissed.

This Court records its appreciation of the assistance offered by all Counsel, in the determination of the question of law, on which these two consolidated appeals were heard.

Parties will bear their costs of these appeals.

JUDGE OF THE SUPREME COURT

HON.E.A.G.R. AMARASEKARA,J.

I agree.

JUDGE OF THE SUPREME COURT

HON. MAHINDA SAMAYAWARDHENA,J.

I agree.

JUDGE OF THE SUPREME COURT