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

In the matter of an appeal under the provisions of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: 52/2020
SC Special LA No: 263/19
CA Writ Application No: 157/2016

1. Weragoda Kapuge Priyantha,
"Agra", Pahala Karannagoda,
Warakagoda.

2. Hewage Don Ananda,
Sri Sarananda Road,
Pahala Naragala, Gowinna.

3. Lalith Samantha Wijesinghe,
179/01, Pannil Kandha,
Kananwila, Horana.

4. Kurukulasooriya Oswal Chanditha
Mario Fernando,
No. 77, Kirigala Road, Handapangoda.

PETITIONERS

vs

1. Secretary,
Ministry of Education,
"Isurupaya",
Sri Jayawardenapura, Battaramulla, Kotte.

2. Upali Marasinghe,
Former Secretary,
Ministry of Education, "Isurupaya",

Sri Jayawardenapura, Battaramulla, Kotte.

3. P.D. Jayarathne,
   Principal,
   Ashoka College, Horana.

4. Ven. Opalle Gnanasiri Nayaka Thero,
   Rajamaha Viharaya, Horana.

5. Vidyarathna (incorporated) Society,
   Rajamaha Viharaya, Horana.

6. P.D. Jayarathne,
   Principal,
   Ashoka College, Horana.

7. Commissioner General of Examinations,
   Ministry of Education,
   Pelawatta, Battaramulla.

RESPONDENTS

And now between

1. Secretary,
   Ministry of Education,
   "Isurupaya",
   Sri Jayawardenapura, Battaramulla, Kotte.

7. Commissioner General of Examinations,
   Ministry of Education,
   Pelawatta, Battaramulla.

1ST & 7TH RESPONDENTS – APPELLANTS

vs

1. Weragoda Kapuge Priyantha,
   "Agra", Pahala Karannagoda,
   Warakagoda.

2. Hewage Don Ananda,
Sri Sarananda Road,
Pahala Naragala, Gowinna.

3. Lalith Samantha Wijesinghe,
179/01, Pannil Kandha,
Kananwila, Horana.

4. Kurukulasooriya Oswal Chanditha
Mario Fernando
No. 77, Kirigala Road, Handapangoda.

PETITIONERS – RESPONDENTS

2. Upali Marasinghe,
Former Secretary,
Ministry of Education, "Isurupaya",
Sri Jayawardenapura, Battaramulla, Kotte.

3. P.D. Jayarathne,
Principal,
Ashoka College, Horana.

4. Ven. Opalle Gnanasiri Nayaka Thero,
Rajamaha Viharaya, Horana.

4A. Ven. Dr. Labugama Naradha Thero,
Rajamaha Viharaya, Horana.

5. Vidyarathna (incorporated) Society,
Rajamaha Viharaya, Horana.

6. P.D. Jayarathne,
Principal,
Ashoka College, Horana.

2ND – 4TH, 4A, 5TH & 6TH RESPONDENTS – RESPONDENTS

Before: **L.T.B. Dehideniya, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Sureka Ahmed, Senior State Counsel for the 1st and 7th Respondents – Appellants

Dr. Sunil Coorey with Sudharshani Coorey for the 1st – 4th Petitioners – Respondents

J.A.J. Udawatte with Anuradha Ponnamperuma for the 4A and 5th Respondents – Respondents

Argued on: 5th November 2021

Written Submissions: Tendered on behalf of the 1st and 7th Respondents – Appellants on 27th August 2020

Tendered on behalf of the 1st – 4th Petitioners – Respondents on 20th October 2020

Tendered on behalf of the 4A and 5th Respondents – Respondents on 7th August 2020

Decided on: 13th January 2023

Obeyesekere, J

This appeal has been preferred against the judgment of the Court of Appeal which quashed the direction given by the Ministry of Education to the Horana Asoka College [*the School*] to refrain from conducting classes solely in the English language and to adopt the bilingual policy of the Government.

Background facts

By letter dated 2nd September 2015 [P12], the Secretary, Ministry of Education who is the 1st Respondent – Appellant [*the 1st Appellant*], informed the 4th Respondent – Respondent [*the 4th Respondent*] who at that time was the Manager of the said School that:

(a) Section 6 of the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 [*the 1960 Act*] requires all 'Government approved unaided private Schools' to comply with the general education policy of the Government; and

(b) the said School, by conducting classes solely in the English medium from Grades 1 to 11 is acting contrary to the education policy of the Government on the medium of instruction that should be adopted by schools.

Furthermore, by P12, the 1st Appellant directed the 4th Respondent to adopt the bilingual policy of the Government of teaching part of the subjects in English and the balance subjects in Sinhalese or else, to adopt Sinhalese solely as the medium of instruction and thereby comply with the Government policy with regard to the medium of instruction.

The 1st – 4th Petitioners – Respondents [*the Respondents*] whose children are students of the said School and who were concerned that compliance with P12 would result in the medium of instruction being changed from English to bilingual [i.e., Sinhalese and English] or Sinhala, invoked the Writ jurisdiction of the Court of Appeal and sought a Writ of Certiorari to quash P12 and a Writ of Prohibition prohibiting the implementation of the decision contained therein. By its judgment delivered on 10th June 2019, the Court of Appeal issued a Writ of Certiorari quashing P12, the Writ of Prohibition as prayed for, and imposed costs in a sum of Rs. 400,000 payable by the 1st Appellant to the 1st – 4th Respondents.

Dissatisfied with the said judgment, the 1st Appellant and the 7th Respondent – Appellant, the Commissioner General of Examinations [*the 7th Appellant*] [*collectively the Appellants*] sought and obtained leave to appeal on 2nd July 2020 on four questions of law, which I shall refer to later in this judgment. It would suffice to state at this stage that the critical issue that needs to be determined in this appeal is whether the School is required to comply with the general education policy of the Government, and more particularly with the policy of the Government with regard to the medium of instruction, if any such policy exists.

Legislation relating to education

In order to place the above issue in perspective, it would be important to consider very briefly the development of the legislation relating to education since the turn of the Twentieth Century, the manner in which State responsibility for education and the medium of instruction has evolved during that period.

The starting point would be the Town Schools Ordinance No. 5 of 1906, which was an Ordinance to provide for compulsory vernacular education in Municipal and Local Board Towns, and the Rural Schools Ordinance No. 8 of 1907, which was an Ordinance to provide for the education in the vernacular languages of children in rural and planting districts for whose education other adequate provision has not been made. In terms of the latter Ordinance, vernacular schools include schools in which instruction is given in English, in addition to the vernacular, provided that English does not form one of the subjects in which it is compulsory to receive instruction.

The above Ordinances were repealed and replaced by the Education Ordinance No. 1 of 1920, which sought to revise and consolidate the law relating to education. This Ordinance refers to two types of schools, namely (a) Government Schools, which meant schools, whether secondary or elementary, established by or transferred to the Government and maintained entirely from the public funds of the State, and (b) Assisted Schools, which meant schools, whether secondary or elementary, to which aid is contributed from the public funds of the State. Although not referred to in any of the above Ordinances, there also existed in the country schools which had been commenced by the missionaries commonly referred to as *denominational schools* where the medium of instruction was generally in English, and where fees were levied from its students, even though such schools may have received financial assistance from the State.

State responsibility for Education

In the chapter titled, 'Full State Responsibility for Education', in the book 'Education in Ceylon – A Centenary Volume' [(1969) Ministry of Education and Cultural Affairs], it has been stated as follows:

"*Since the establishment of the Department of Public Instruction, the State, whilst continuing to assist denominational schools, started schools of its own. Christians, Buddhists, Hindus and Muslims vied with one another in establishing schools, towards the end of the nineteenth century, thus adding to the number of denominational schools. These two types, called Assisted Schools and Government Schools respectively, existed side-by-side till 1960 in which year the State assumed full responsibility for almost all schools in the Island .*

During the Donoughmore period the government in its endeavour to build a welfare state began to assume greater responsibility for education. The Executive Committee for Education, with its Chairman designated the Minister of Education, had control of general policy, finance and administration of education. The task of executing the education programme to build a welfare state fell on this Executive Committee of Education, which, during the period 1931 – 1947 under the distinguished Minister of Education Dr. C.W.W. Kannangara made significant changes in the Island's school system, through a series of measures that widened the responsibility of the State for education.

After tiding over the epidemic of malaria in 1935, the Ministry of Education continued its policy of expansion opening up more and more schools in still unserved areas. Dr. C.W.W. Kannangara whilst pursuing this policy was quite determined on widening State control of the Island's school system. He remarked thus in 1938: "In all justice to the country and the State Council, if the State Council pays the money for educating the youth of this country, it should be able to control education; he who pays the piper, should be able to call the tune."

The gradual control that the State began to exercise over education through the Education Ordinance of 1920 has been discussed in a Chapter titled, 'Unaided Schools' in the aforementioned book 'Education in Ceylon – A Centenary Volume' [supra], where the author states as follows:

"*State Control began to be deemed necessary for the effective planning of education and for the provision of educational opportunity for all. In 1931, the Minister of Education took upon himself the responsibility of planning education on a national scale. Denominational activity was as a result curtailed and some of the missionary schools were taken over when their managers willingly handed them over to the State. In 1934, restrictions were placed on the opening of new schools by private and denominational bodies and there were signs of increasing State control of denominational schools.*

Education Ordinance No. 31 of 1939 and Unaided Schools

The Ordinance of 1920 was replaced by the Education Ordinance No. 31 of 1939, which Ordinance, subject to several amendments, exists to this date [*the Ordinance*]. Among the many provisions of the new Ordinance was Section 32(1) which enabled the Minister to make regulations for the purpose of giving effect to the principles and provisions of the Ordinance.

The first amendment to this Ordinance came by way of the Education (Amendment) Act, No. 26 of 1947, and contained three significant amendments to the principal enactment. The first was the power to make regulations in respect of the language through the medium of which instruction shall be given in any class in any Government School or Assisted School – vide Section 32(2)(ca). The second was Section 41A(1), which stipulated that no fees shall be charged in respect of admission to, or for the education provided in a Government School or an Assisted School. The third was Section 43A, which perhaps for the first time, contained provisions with regard to a third category of schools referred to as Unaided Schools, which were those schools that did not receive any financial assistance from the State. This section empowered the Director of Education to examine such Unaided Schools upon complaints on certain specified matters and give directions on the remedial measures that were to be taken, or where such school failed to remedy the situation, to discontinue such schools.

In the above mentioned chapter titled 'Unaided Schools', the author states as follows:

"*Ordinance No. 26 of 1947 abolished fees in government and assisted schools and ushered in the Free Education scheme recommended by the Special Committee on Education in 1943.* ***Assisted schools which did not join the Free Education Scheme were allowed to become private schools unaided by Government****. Out of 3079 assisted schools in 1945, the majority of which were denominationally managed, only 115 assisted schools remained outside the Free education scheme. The schools that remained outside the Free Education Scheme became "fee levying private schools" and the others became "non-fee levying private schools under denominational management".*

Compliance with the free education scheme on the part of assisted schools was purely voluntary according to the new educational policy formulated in 1946, but the decision had to be made by the schools before 30th April 1948. ***Schools which did not join the free education scheme ceased to receive aid of any kind after first October 1948.***

Schools outside the Free Education Scheme were allowed to levy fees and run as unaided fee-levying private schools*.* ***But they had to conform to set standards and follow State policy regarding education****. Thus, the hand of the State was felt to touch the private schools in more than one way.*" [emphasis added]

Thus began legislation empowering the Director of Education to exercise control over Unaided Schools. While previous legislation sought to regulate schools that received in some measure State assistance, the 1947 Amendment sought to establish the State's control over all schools. What is important is that at the time of Independence, there existed in Ceylon three categories of schools, namely Government Schools, Assisted Schools and Unaided Schools.

<u>The Education (Amendment) Act No. 5 of 1951 and the Education Regulations, 1951</u>

It is acknowledged by the author of the aforementioned chapter titled 'Unaided Schools' that, "*The White Paper (Government Proposals for Education Reform in Ceylon) of 1950 brought all unaided schools, assisted schools and government schools under one system*

in the greater interests of the nation. The Education (Amendment) Act No. 5 of 1951 provided the necessary legislation to give effect to some of the changes envisaged in the White Paper."

The Education (Amendment) Act No. 5 of 1951 contained two important provisions with regard to Unaided Schools. The first was Section 42A(1), which stipulated that "*No person shall, on or after the 1st day of June, 1951, maintain any unaided school unless the principal or other person for the time being in control of the school has notified to the Director in writing all such particulars relating to the school as the Director may, by notice published in the Gazette, require to be furnished to him in respect of unaided schools*."

The second was Section 43A(1), which was amended by the inclusion of a new paragraph (e) that enabled the Director to issue an Order where, "*the education and training at the school does not accord effectively with the national interest or* ***with the general educational policy of the Government, including the policy regarding the medium of instruction in schools***." These two amendments further strengthened State control over Unaided Schools.

Regulation 2 of the Education Regulations, 1951 required the proprietor of any school who required assistance from the State to make an election in that regard, thus making such school an Assisted School.

Regulations 4 and 5(1) of the said Regulations contained provisions relating to the medium of instruction, which may be summarised as follows:

(a) Where there are not less than 15 Sinhalese or Tamil pupils in all the classes of any primary school, instruction shall be given to all such Sinhalese pupils or Tamil pupils, as the case may be, through the medium of the Sinhalese or Tamil language;

(b) Where the parents of at least 15 Muslim pupils in any primary school who are neither Sinhalese nor Tamil requests that instruction shall be given to each of those pupils in Sinhalese, English or Tamil, instruction shall be so given to all these pupils through the medium of the specified language;

(c) In the case of every pupil in any primary school to whom instruction is given in Sinhalese or Tamil, English shall be taught to such pupil as a compulsory second language from Standard Three upwards;

(d) Where a student receives his instruction in English, Sinhalese or Tamil shall be a compulsory second language from Standard Three upwards;

(e) Every pupil in a secondary school, which, on 31st March 1951 was registered for the purposes of the said Regulations as a Sinhalese School shall be given instruction through the medium of the Sinhala language. There was similar provision with regard to Tamil Schools;

(f) The Minister however had the power to authorise or direct that instruction in any subject specified by him be given in any specified class of any such school through the medium of the English language, if the Minister was satisfied having regard to all the circumstances, that the use of the appropriate national language is not practicable;

(g) There shall be provided in every secondary school, a compulsory course in English complying with such minimum requirements as may be prescribed by the Director.

While the said Regulations therefore provided for all three languages to be the medium of instruction in the circumstances set out in the said Regulations, I shall refer to in detail later in this judgment to the provisions of Regulation 5(2) and (3) of the said Regulations where the Minister could change the medium of instruction in schools registered as English schools to one of the national languages, and the direction made by the Minister in that regard in 1963 [R2].

The Respondents have annexed to the petition a document marked X2 said to be based on a book titled, '*History of Education in Ceylon*' by K.H.M. Sumathipala, which briefly sets out the evolution of English as a medium of instruction. It is claimed in X2 that when Sinhala was declared as the Official language by the Official Languages Act, No. 33 of 1956, the medium of instruction in education, even in schools where English was the medium

of instruction was changed and all subjects were taught in Sinhala. The said Act however does not contain any provision with regard to a change in the medium of instruction in schools and the Respondents have not submitted any material to explain the manner in which the change in the medium of instruction was implemented.

Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960

The next significant milestone in the education sector of this Country took place in 1960, when the Government of that time introduced the Assisted Schools and Training Colleges (Special Provisions) Act, No. 5 of 1960 [*1960 Act*]. The developments that led to the introduction of the 1960 Act are explained in the aforementioned chapter titled, 'Full State Responsibility for Education' in the following manner:

> "*In the 1950s, the education policy of the State came to be criticised for making financial provision for a system of denominational schools which was controlled by non-government, sectarian agencies. The demand for full State control of education had gathered the force of a widespread social movement. To bring about a just distribution of educational opportunities it was demanded that all denominational schools be taken under direct State control. Whilst this controversy raged on, public opinion in favour of the State assuming full responsibility for education gathered greater and greater momentum. Responding to this widespread public agitation, the State passed legislation to take over all Assisted Schools and Training Colleges. The State in agreeing to take over active administration of all Assisted schools brought to a close a trend towards full State control of education which had been latently developing within its own policy, simultaneous with the increase in the State's financial obligation for education*."

While the said Act defined 'Assisted School' to mean, "*any school or training college to which* ***aid is contributed from State funds*** *or was contributed from such State funds on July 21, 1960*", Section 3(1) of the 1960 Act provided that, "*The Minister may, by Order published in the Gazette, declare that, with effect from such dates as shall be specified in the Order*, *the Director shall be the Manager of every Assisted School to which this Act applies*."

In terms of Section 5(1), "*The proprietor of any Assisted school (not being an Assisted training college) which is a Grade I or Grade II school may, at any time before the date specified in the Order made and published under section 3,* ***elect to administer such school as an unaided school*** *and if, before that date, he serves a written notice on the Director to the effect that he has made such an election and specifying the date of such election (such date being a date earlier than the date specified in the Order) the provisions of the proviso to the said section 3 shall apply in the case of such school with effect from the date of such election*." [emphasis added]

The proviso to Section 3(1) reads as follows:

> "*… where the proprietor of any Assisted school to which this Act applies (not being an Assisted training college) has, at any time before the date specified in such Order, served under Section 5, a written notice on the Director under this Act to the effect that he has from the date specified in the notice elected to carry on the administration of such school as an unaided school, such Order shall, with effect from the date so specified in the notice, cease to apply to such school*."

Section 6 of the Act provided as follows:

> "*The proprietor of any school which,* ***by virtue of an election made under Section 5, is an unaided school*** –
>
> *(a) shall* ***educate and train the pupils in such school in accordance with the general educational policy of the Government****; …*
>
> *(g) shall comply with the provisions of any written law applicable to such school and matters relating to education*;" [emphasis added]

With the introduction of the 1960 Act, the number of Unaided Schools that existed at that time came down as a result of several Unaided Schools opting to become and thereafter be classified as Assisted Schools. What continued thereafter as Unaided Schools were

those schools that levied fees from their students and therefore had the financial capacity to continue without funding of any form from the State.

The following excerpts from the aforementioned Chapter titled 'Unaided Schools' places in perspective the position of Unaided Schools:

> "*The story of Unaided Schools in Ceylon is the story of a 'rise and decline,' the decline having accompanied a rise in the State control of schools in the face of a growing demand for a comprehensive national system of education. Today the Unaided Schools number a mere 92, and have a pupil enrolment of less than one per cent of the school-going population. In their heyday, they … numbered over 3000.*
>
> *The majority of today's Unaided Schools have had a long and illustrious history going back to early British times when the Missionary school system emerged as a distinctive feature of education in Ceylon, especially at a time when direct governmental activity in the sphere of education was meagre or non-existent… Most of the schools which remain today as Unaided Schools were associated with one religious denomination or another and bore a resemblance to the public schools of England*."

Establishment of the National Education Commission

I must at this stage refer to the National Education Commission, which was established in terms of the National Education Commission Act, No. 19 of 1991, to make recommendations on education policy in all its aspects to the President.

Section 2(1) of the Act provides that the President, subject to the provisions of the Constitution, may, declare from time to time the National Education Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. As provided in Section 2(2), the National Education Policy includes the **medium of instruction**. Although the National Education Policy is yet to be declared, the Commission has made certain recommendations with regard to bilingual education in its National Education Policy Framework (2020 – 2030) [2022], to which I shall refer to later in this judgment.

The gradual decline in the use of English as a medium of instruction and its reintroduction

It is common knowledge that the waves of nationalism, cultural revivalism and nationalisation that swept across newly independent Asian and African countries in the 1950's and 1960's including Sri Lanka contributed to English as a medium of instruction being gradually done away with in our Country in favour of instruction in Sinhalese and Tamil. Although the 1960 Act did not contain any provisions relating to the medium of instruction, it is widely acknowledged that the said Act contributed to the above change.

The use of English as a medium of instruction in our education system and its gradual decline have been summarised in the following paragraph from the National Education Policy Framework (2020-2030) prepared by the National Education Commission [page 139]:

> *"Since the inception of the island-wide school system in Sri Lanka, which evolved under British colonial rule, the medium of instruction has been Sinhala or Tamil in most schools except in the urban elite schools. The first effort to formulate a policy on medium of instruction was attempted in 1943, and the report of the committee, which is widely known as "Kannangara Report" declared that the "mother tongue is the natural medium of education and the genius of a national finds full expression only through its own language and literature". There were two other historical events in the mid-twentieth century that influenced the policy on the medium of instruction in schools. Firstly, the Free Education Act of 1947 and secondly bringing the whole education system under government control in the 1960s. Concurrently, with the increase in demand to switch the medium of instruction to the national languages, Sinhala or Tamil, the government in the 1970s decided to change the medium of instruction gradually by stopping the English medium in the Grade I class from 1971 and eliminating it class by class in succession. By 1983, there were no English medium classes in government or private schools."*

Even though English was taught as a second language in urban and suburban schools, the National Education Commission, referring to the removal of English as a medium of

instruction has acknowledged that *"this policy proved to be a setback for the individuals concerned and society. The government, educators, and the public began to notice the vacuum created by the neglect of teaching in the English medium, and the promotion of the English medium in the last decade is a consequence of this change of perception."*

To cater to this need of having English as a medium of instruction, we saw the emergence of international schools in the early 1980's, with the National Education Commission identifying the following as the categories of international schools that exist today*:*

(i) schools following an international curriculum;
(ii) schools offering both international and local curricula; and
(iii) schools offering local curriculum only.

In its judgment, the Court of Appeal has referred to a speech made in 2011 by Professor Rajiva Wijesinha, one time Member of Parliament and Senior Professor of English at the University of Sabaragamuwa, where he has stated as follows:

> "*English is no longer just the language of the British, a legacy we could do without. Rather it is the principal international language, one of increasing opportunities all over the world. The comparative advantage we had with regard to English has been sacrificed at the altar of a divisive linguistic nationalism, which I fear has contributed to our nation being deprived of a tool that could have helped us immeasurable. While the privileged continued to benefit from their possession of this tool, the vast majority of our people, of all communities, had no access to it. We owe it to them and to the nation as a whole to take all possible steps, in the interests of equity as well as national prosperity, to set right this sad situation.*"

The Court of Appeal has also made the following extremely important observation with which I wholeheartedly agree, on the importance of English for every student of this Country:

> "*Competence in English is essential for personal success in today's globalized world. English should not be the language of the urban elite to downgrade otherwise*

talented rural youth. In my view, it is hypocrisy to make it compulsory to the children of under-privileged to study in Sinhala or Tamil Medium, while making it possible for the children of the elite and affluent to study in English Medium at International Schools or overseas, may be, to keep the distance."

Circulars relating to English as a medium of instruction and bilingual education

Circular No. 5 of 2001 dated 22nd February 2001 issued by the Ministry of Education [P7A] saw the re-introduction of English as a medium of instruction in Government schools, although limited to the Advanced Level Science Stream. The said Circular clearly highlights that globalisation and rapid changes in the field of Information Technology have led to much significance being placed on English, and that it is timely that those entering universities acquire expertise in English.

According to P7A, a survey carried out by the Ministry of Education had revealed that 26% of those students intending to follow Science subjects at the Advanced Level examination were keen to pursue the said subjects in English and that 50% of the graduates were keen to teach in English. Thus, the Government had decided to implement as a pilot project, the teaching of five subjects [Bio-science, Physics, Chemistry, Applied Maths and Zoology] in the English medium for Advanced Level Students.

In May 2002, the Ministry of Education issued a further Circular [P7B] by which it introduced bilingual education. P7B accordingly permitted the teaching of three subjects at Grade 6 [Maths, Social Studies and Health & Physical studies] and four subjects from Grades 7 – 11 [Maths, Social Studies & History, Health & Physical Studies and Science] in the English medium, subject to the availability of teachers in the English medium.

Although approval had been granted for bilingual education from Grades 6 - 11, the Ministry of Education had noticed that some schools had commenced teaching in the English medium even for lower grades, which prompted the Ministry of Education to inform all schools, by its letter dated 5th May 2003 [P7C] that, "නමුත් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීම **ප්‍රතිපත්තියක් වශයෙන් පිලිගෙන නැත. එබැවින් ප්‍රාථමික පන්තිවල** ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීම නොකළ යුතුය."

By Circular No. 2008/12 dated 21st April 2008 [P7], the Ministry of Education issued the following directions to all schools relating to bilingual education.

"4.2 ඉංග්‍රීසි භාෂාවේ අවශ්‍යතාවය හා වැදගත්කම සැලකිල්ලට ගෙන 2002 වර්ෂයේ සිට 6 – 11 ශ්‍රේණි සඳහා සමහර විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්වීමට ඒ සඳහා අවශ්‍ය පහසුකම් පවතින පාසල්වලට අවසර දෙන ලදි.

2007 වර්ෂයේ සිට ද්විතියික ශ්‍රේණිවල (6-11) ක්‍රියාත්මක වන නව විෂයමාලාව යටතේ මෙම ද්විමාධ්‍ය පංතිවල උගන්වනු ලබන විෂයයන් සඳහා මින් ඉදිරියට පහත සඳහන් විධිවිධාන බලපැවැත්වේ.

4.3 පාසල්වල ද්විමාධ්‍යයයන් ඉගෙනුම ලබන සිසුන් සඳහා වෙනම පංතියක් ආරම්භ නොකල යුතුය. සිංහල හෝ දෙමළ මාධ්‍ය හෝ සිසුන් සමග ඉහත සිසුන් ද එකම පංතියේ සිටිය යුතු අතර අදාල විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගෙනගන්නා අවස්ථාවන්හි දී පමණක් වෙන්වී යා යුතුය. මේ ආකාරයට ක්‍රියාත්මක විය හැකි පරිදි පාසල් කාල සටහන සකස් කර ගැනීම විදුහල්පතිගේ වගකීම වේ. තෝරාගත් විෂයයන් ඉංග්‍රීසි මාධ්‍යයෙන් ඉගෙනීම සඳහා තෝරාගත යුත්තේ පාසලේ 6 ශ්‍රේණියේ සිසුන් අතරිනි. පාසළට ඇතුළත්වීම සඳහා ද්විමාධ්‍ය පංතිය උපයෝගි කර ගැනීමට ඉඩකඩ නොදිය යුතය.

4.4 **කණිෂ්ඨ ද්විතියික ශ්‍රේණි (6 - 9) ශ්‍රේණි සඳහා ඉංග්‍රීසි මාධ්‍යයෙන් ඉගැන්විය හැකි විෂයයන්**

i. ගණිතය
ii. විද්‍යාව
iii. සෞඛ්‍ය හා ශාරීරික අධ්‍යාපනය
iv. සෞන්දර්යය විෂයය යටතේ සංගීතය (අපරදිග)
v. භූගෝල විද්‍යාව
vi. පිවිත නිපුණතා හා පුරවැසි අධ්‍යාපනය

ඉහත සඳහන් විෂයයන් අතුරින් උපරිම වශයෙන් ඕනෑම විෂයයන් 05 ක් ඉංග්‍රීසි මාධ්‍යයෙන් හැදෑරීම සඳහා තෝරාගත හැකි ය.

4.5 ජ්‍යෙෂ්ට ද්විතියික ශ්‍රේණි (10 - 11) සඳහා ඉංග්‍රීසි මාධ්‍යයෙන් හැදෑරිය හැකි විෂයයන්

<u>හැර විෂයයන් යටතේ</u>

i. ගණිතය
ii. විද්‍යාව

<u>කාණ්ඩ විෂයයන් යටතේ</u>

i භූගෝල විද්‍යාව

ii පුරවැසි අධ්‍යාපනය හා ප්‍රජා පාලනය

iii. ව්‍යවසායකත්ව අධ්‍යාපනය

iv. සංගීතය (අපරදිග)

v. තොරතුරු සන්නිවේදන තාක්ෂණය

vi. සෞඛ්‍ය හා ශාරීරික අධ්‍යාපනය

හර විෂයයන් අතරින් ඉහත සඳහන් විෂයයන් 02 ද කාණ්ඩ විෂයයන් යටතේ සඳහන් විෂයයන් අතරින් ඕනෑම කාණ්ඩයකින් එක් විෂයයක් බැගින් විෂයයන් 03 ක් ද වශයෙන් විෂයයන් 05 ක් ඉංග්‍රිසි මාධ්‍යයෙන් හැදෑරීම සඳහා තෝරාගත හැකි ය.

4.6 **අංක 4.4 හා 4.5 හි සඳහන් සීමාවන් අ.පො.ස (සමාන්‍ය පෙළ) විභාගයට පෙනී සිටින පෞද්ගලික අයදුම්කරුවන්ට බල නොපැවැත් වේ.**

4.7 6 - 11 දක්වා ශ්‍රේණි වලට ඉංග්‍රිසි මාධ්‍යයෙන් ඉගැන්විය යුතු විෂයයන් සංඛ්‍යාව පාසලේ පවතින භෞතික හා මානව සම්පත් අනුව පාසල විසින් තීරණය කළ යුතුය. මෙය ඉංග්‍රිසි විෂය හැර අවම වශයෙන් එක් විෂයයක් හෝ උපරිම වශයෙන් විෂයයන් 05 ක් හෝ විය හැකිය. ඉංග්‍රිසි මාධ්‍යයෙන් ඉගැන්වීමට හැකි ඉහත සඳහන් විෂයයන් අතුරින් ඉගැන්වීමට තීරණය කරනු ලබන විෂය හෝ විෂයයන් හෝ පිළිබඳව විදුහල්පති විසින් අධ්‍යාපන අමාත්‍යාංශයේ ද්විභාෂා අධ්‍යාපන ඒකකය දැනුවත් කළ යුතුය.

4.8 **ශිෂ්‍යයා ඉංග්‍රිසි මාධ්‍යයෙන් විෂයයන් කිපයක් ඉගෙනගනු ලැබුව ද පාසල් අයදුම්කරුවන් වශයෙන් අ.පො.ස. (සා.පෙ) විභාගය සඳහා අයදුම්පත්‍ර ඉදිරිපත් කිරීමේ දී ශිෂ්‍යයාගේ අභිමතය පරිදි විෂයයක් හෝ විෂයයන් කිහිපයක් හෝ සඳහා ඉංග්‍රිසි මාධ්‍යයෙන් ඉල්ලුම් කළ හැකිය.** එහෙත් ඉන්පසු කිසිදු හේතුවක් නිසා හෝ ඉල්ලුම් කරන ලද මාධ්‍ය වෙනස් කිරීමට ඉඩදෙනු නොලැබේ.

4.9 **2009 වසර 6 වන ශ්‍රේණියේ සිට ක්‍රියාත්මක වන පරිදි ඉතිහාසය විෂය ඉංග්‍රිසි මාධ්‍යයෙන් ඉගැනීම්ය නොහැකිය.** එහෙත් දැනටමත් ඉතිහාසය විෂයය ඉංග්‍රිසි මාධ්‍යයෙන් ඉගෙන ගැනීම ආරම්භ කර ඇති සිසුන්ට 11 ශ්‍රේණිය දක්වා ඉතිහාසය විෂයය ඉංග්‍රිසි මාධ්‍යයෙන් අඛණ්ඩව හැදෑරිය හැකි ය.”

The Appellants have not explained the rationale for paragraphs 4.6 and 4.8, which in effect encourages English as the medium of instruction for all subjects that a student must sit for at the Ordinary Level examination.

Further instructions with regard to bilingual education in Grades 6-11 had been issued by Circular No. 27/2010, where it has been reiterated that bilingual education should only be implemented from Grade 6 upwards. Thus, the position of the Ministry of Education with regard to students from Grades 6 – 11 was that while such students can be taught in

Sinhala/Tamil and English [*bilingual*], at least Religion and History must be taught in Sinhala/Tamil.

Horana Asoka College

It is in the above background that I shall now consider the establishment of the Horana Asoka College [*the School*]. According to the 1st – 4th Respondents, in 1990, Ven. Kahatapitiye Rahula Nayake Thero had commenced a private school by the name of Asoka College, and located the said School within the premises of the Horana Raja Maha Viharaya. It is admitted by the Respondents that from its inception, other than the subject of Sinhala, all other subjects including Buddhism, Art and History have been taught in the said School in the English medium from Grade 1 upwards.

The Respondents have not produced any documents to establish that the said Ven. Thero had obtained the prior approval of the Ministry of Education, as required by Section 49(1) of the Education Ordinance, for the establishment and/or operation of the said School. It is in fact conceded by the Respondents that by 1990, the Government was no longer granting approval for the registration of a school as a private school. Thus, the establishment of the said school in 1990 was not in terms of the law. In spite of not being registered, the Respondents state that not only were the students of the said school permitted to sit for the examinations conducted by the Department of Examinations, including the Grade V scholarship examination, and to take part in several Zonal and District competitions conducted by the Department of Education, but they were also recipients of free school books, uniforms etc.

By letter dated 6th December 2007 [P2], the Zonal Director of Education had informed the Principal of the said School that as the said school was not a private school approved by the Government, its students would not be permitted to sit the Grade V scholarship examination, nor would they be entitled to free text books and uniforms. To overcome the aforementioned situation, the 5th Respondent – Respondent who by then was the Ven. Nayake Thero of the Raja Maha Viharaya had purchased a school situated in Dehiwela by the name of Marshall Preparatory School. While it is not in dispute, (a) that Marshall Preparatory School had been registered in the latter part of the Nineteenth

century, (b) that it had been an English medium private school at some point of its existence, and (c) was a 'Government Approved Unaided Private School', it is admitted by the Respondents that by 2007, Marshall Preparatory School was no longer functioning as a school, although its registration had not been cancelled by the Ministry of Education.

The 5th Respondent had thereafter sought the approval of the Ministry of Education to locate the said Marshall Preparatory School in the premises of the Horana Raja Maha Viharaya. In response to the said request, the Ministry of Education, by letter dated 12th February 2008 [P4] had informed the 5th Respondent that the re-location of Marshall Preparatory School could be allowed subject *inter alia* to the condition that "**අධ්‍යාපන අමාත්‍යාංශයේ ප්‍රතිපත්ති වලට අනුකූලව අනුමත විෂය මාලාව මෙම පාසලේ ක්‍රියාත්මක කිරීම කළ යුතු අතර එම ප්‍රතිපත්තින් සම්බන්ධව අධ්‍යාපන අමාත්‍යාංශය විසින් නිකුත් කරනු ලබන චක්‍රලේඛ/උපදෙස් පිළිපැදීමට ඔබ බැඳි සිටිනු ඇත.**"

The very next day, a further request had been made to change the name of Marshall Preparatory School to Horana Asoka College. By letter dated 26th February 2008 [P5], the approval of the Ministry of Education had accordingly been granted to the said request. It is through the aforementioned mechanism of purchasing Marshall Preparatory School and thereafter changing its name to Horana Asoka College that the said School was able to function in terms of the law. It is perhaps important to reiterate that pursuant to the approval that has been granted by P4 and P5, the school that is now being carried out at the said Raja Maha Viharaya is Marshall Preparatory School with its name having been changed to Horana Asoka College.

<u>Directions issued to Horana Asoka College – 2015</u>

Having carried out an inspection and an on-site examination of the said School, the Ministry of Education, by its letter dated 11th August 2015 [P10] had informed the Manager of the said School *inter alia* of the following:

> "**ප්‍රාථමික අධ්‍යාපනය ඉංග්‍රීසි මාධ්‍යයෙන් ලබා දීම රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට පටහැනි බැවින්**, වහාම ක්‍රියාත්මක වන පරිදි 1 ශ්‍රේණියේ සිට 5 ශ්‍රේණිය දක්වා ඉගෙනුම - ඉගැන්වීම් කටයුතු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව දරුවන්ගේ මව් භාෂාවෙන් (සිංහල/දෙමළ) සිදු කිරීම, 6 ශ්‍රේණියේ සිට 11 ශ්‍රේණිය දක්වා ද ඉගෙනුම් - ඉගැන්වීම් කටයුතු දරුවන්ගේ මව් භාෂාවෙන් (සිංහල/දෙමළ)

හෝ ද්වි මාධ්‍යයෙන් සිදු කිරීම සහ 5 ශ්‍රේණියේ ශිෂ්‍යත්ව විභාගයට ඉදිරිපත් වීමට සිසුන්ට අවශ්‍ය පහසුකම් සැපයීම කළ යුතු වේ.”

By his reply to P10 dated 23rd September 2015 [P13], the Principal of the School, while admitting that History, Buddhism and Art are being taught in English, agreed to comply with the circulars of the Ministry of Education, and sought permission to continue to teach the said subjects in English to those students who had already enrolled at Grade 6 or above.

P10 had been followed with the following letter dated 21st August 2015 [P11] sent by the Ministry of Education to the Commissioner General of Examinations, with copy to the Principal of Horana Asoka College, in respect of students who were scheduled to sit for the Ordinary Level examinations in 2015:

“එම ලිපියට අනුව එම විද්‍යාලයේ 11 ශ්‍රේණියේ සිසුන්හට 2015 වර්ෂයේ අ.පො.ස. (සා/පෙළ) විභාගයේ දී ඉතිහාසය හා බුද්ධ ධර්මය සහ චිත්‍ර යන විෂයයන් සඳහා ඉංග්‍රිසි මාධ්‍යයෙන් පෙනීසිටීම සම්බන්ධයෙන් අධ්‍යාපන අමාත්‍යාංශය වෙත ඉල්ලීමක් ඉදිරිපත්කර ඇත. (ඉල්ලීම කරන ලද ලිපියේ පිටපතක් අමුණා ඇත).

මේ සම්බන්ධයෙන් 2015.08.21 දින අධ්‍යාපන ලේකම්තුමා සමග පැවති සාකච්ඡාවේ දී චක්‍රලේඛ විධිවිධාන තරයේ පිළිපදින ලෙස දැඩිසේ අවවාද කරන ලද අතර පාසලේ ක්‍රියාකලාපය නිසා සිසුන් පත්වී ඇති තත්ත්වය සැලකිල්ලටගෙන 2015 වර්ෂයට පමණක් මෙම අවසරය ලබා දෙන බව පාසල වෙත දන්වන ලදී. අදාළ පාසල 2008/12 චක්‍රලේඛ විධිවිධාන නොසලකා කටයුතු කිරීම නිසා සිසුන් පත්වී ඇති අපහසුතාවය සලකා බලා මානුශික හේතූන් මත 2015 වර්ෂයේ අ.පො.ස. (සාමාන්‍ය පෙළ) විභාගය සඳහා පමණක් වලංගුවන පරිදි එම සිසුන්ට අදාළ පරිදි ඉතිහාසය හා බුද්ධ ධර්මය සහ චිත්‍ර යන විෂයයන් ඉංග්‍රිසි මාධ්‍යයෙන් පෙනී සිටීමට අවශ්‍ය කටයුතු සලසා දෙනමෙන් කාරුණිකව දන්වමි.”

Having granted the aforementioned permission, the Ministry of Education had written the impugned letter dated 2nd September 2015 [P12] to the Manager of the said School:

“2015.07.17 දින අධ්‍යාපන අමාත්‍යාංශයේ නිලධාරීන් විසින් ඔබ පාසල අධීක්ෂණය කර, මා වෙත ලබා දී ඇති වාර්තාවට අනුව මෙම පාසල ඉංග්‍රිසි මාධ්‍ය පාසලක් ලෙස පවත්වා ගෙන යන බව සඳහන් කර ඇත. 1960 අංක 5 දරණ උපකෘත පාඨශාලා හා අභ්‍යාස විද්‍යාල විශේෂ විධිවිධාන පනතේ 6 වන වගන්තියට අනුව රජයේ අනුමත පෞද්ගලික පාසලක හිමිකරුවකු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව සිසුන්ට සාමාන්‍ය අධ්‍යාපනය ලබාදීමට බැඳී සිටී.

නමුත් **ඔබ පාසලේ සිසුන්ට ඉංග්‍රීසි මාධ්‍යයෙන් අධ්‍යාපනය ලබා දීම, රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට පටහැනි වේ.** එබැවින් වහාම ක්‍රියාත්මක වන පරිදි ඉගෙනුම - ඉගැන්වීම් කටයුතු රජයේ අධ්‍යාපන ප්‍රතිපත්තිවලට අනුකූලව දරුවන්ගේ මව් භාෂාවෙන් සිංහල/දෙමළ) හෝ ද්වි මාධ්‍යයෙන් සිදු කිරීම කළ යුතුවේ.

තවද ඉංග්‍රීසි මාධ්‍යයෙන් අ.පො.ස. (සාමාන්‍ය පෙළ) විභාගයට සිසුන් ඉදිරිපත් නොකරන ලෙස මීට පෙර වසර දෙකක දී අධ්‍යාපන ලේකම් විසින් දැනුම් දී ඇති නමුත් එම නියෝගයට පටහැනිව මෙම වර්ෂයේත් ඉල්ලුම් පත්‍ර භාර ගන්නා අවසාන දිනයන්හි දී අදාළ ඉල්ලුම්පත්‍ර ඉදිරිපත් කර ඇත. එම අයදුම් පත්‍ර ප්‍රතික්ෂේප කිරීම මගින් සිසුන්ට සිදු වන අසාධාරණය වැලැක්වීම සඳහා මෙම වර්ෂයේ පමණක් අවසරය ලබා දීමට තීරණය කෙරිණ.

එමෙන්ම, මා පෞද්ගලිකව ඔබ වහන්සේ කැඳවා ලබා දුන් උපදෙස් මෙන්ම අධීක්ෂණ නිලධාරීන් විසින් ද ලබාදුන් උපදෙස්වලට පටහැනිව ක්‍රියා කරන්නේ නම් හා අධ්‍යාපන ලේකම් විසින් 2005.10.31 දිනැතිව නිකුත් කර ඇති අංක 2005/31 දරණ චක්‍රලේඛයට අනුව මූලික අධ්‍යාපනය (1-13 ශ්‍රේණි) සම්බන්ධව රජයේ ප්‍රතිපත්තිවලට අනුකූලව පාසල පවත්නා ගෙන යාමට අපොහොසත් වෙතොත් මා වෙත පැවරී ඇති බලතල අනුව ඔබ පාසලට දෙනු ලබන ආධාර/පහසුකම් නැවැත්වීම හෝ පාසල පවත්වාගෙන යාම තහනම් කිරීමට සිදු වන වන බව දන්වමි.”

Challenge to P12

In November 2015, the parents of three children studying in Grade 10 of the said School and who were due to sit for the General Certificate of Education (Ordinary Level) examination in December 2016 had filed Fundamental Rights Application No. 442/2015 alleging that the decision contained in P12 would not only interrupt the education of their children but that it would cause great inconvenience to their children as they would have to sit the subjects of Buddhism, History and Art in Sinhala and is therefore violative of their fundamental rights guaranteed by Article 12(1). The said case had however been settled with the 1st Appellant agreeing to permit the children of the said petitioners to offer the said subjects at the 2016 examination in the English medium. This would appear to indicate that permitting students to sit for the said subjects in the English medium was a matter of discretion and not mandated by any Government policy.

On 13th May 2016, the Respondents whose children were studying in various grades at the said School filed the aforementioned Writ application seeking a Writ of Certiorari to quash P12, and a Writ of Prohibition preventing the 1st Appellant from taking any steps pursuant to P12.

The arguments of the Respondents before the Court of Appeal were twofold.

The first was that the Government Policy with regard to the medium of instruction is embodied in the Education Ordinance and in the Regulations made thereunder in terms of which English medium education is permissible. The second was that there is no national education policy in terms of Section 2(1) and 2(3) of the National Education Commission Act No. 19 of 1991 which makes bilingual education or education in the mother tongue compulsory, or precludes English as a medium of instruction.

As the Court of Appeal did not address the first of the above arguments of the Respondents, I shall address this at the outset.

Does the Ordinance provide for English as the medium of instruction?

The Respondents are correct when they state that English as the medium of instruction is permissible under the Ordinance. This is reflected in Regulation 5(2) of the Education Regulations, 1951, which reads as follows:

> "***Subject to the provisions of paragraph (3)*** *of this Regulation, every pupil in a secondary school, which, on March 31, 1951,* ***was registered for the purposes of the Code as an English school*** *shall for the time being be given instruction through the medium of the English language."* [emphasis added]

Regulation 5(3) reads as follows:

> *"The Minister may from time to time, if satisfied having regard to all the circumstances that the use of the appropriate national language is practicable, direct that in any specified class in a secondary school referred to in paragraph (2) of this Regulation, instruction in any specified subject shall be given through the appropriate national language to Sinhalese or Tamil pupils. The Minister shall in every such direction specify the date, not being earlier than twelve months after the date on which the direction is given from and after which the direction shall be operative.*"

The cumulative effect of the above two Regulations is that while English can be the medium of instruction in schools registered as English schools, the Minister may instruct that any specified subject be taught through the appropriate national language to Sinhalese or Tamil students.

The 1st Appellant has produced marked R2 the Direction made under Regulation 5(3) by the then Minister of Education and Cultural Affairs on 5th November 1963, published in the Ceylon Government Gazette No. 13,818 of 14th November, 1963 which reads as follows:

> *"In the exercise of the powers vested in me by Regulation 5(3) of the Education Regulations, 1951, I, Idampitiya Rallage Punchi Banda Gunatilleke Kalugalla, Minister of Education and Cultural Affairs, being satisfied having regard to all the circumstances that the use of the Sinhala or Tamil Language as a medium of instruction is practicable in the General Certificate of Education (Ordinary Level) Classes and the General Certificate of Education (Advanced Level) Classes of any school referred to in paragraph 2 of that Regulation (where instruction has hitherto been given through the medium of the English language) do hereby –*
>
> *(1) direct that the medium of instruction in all subjects, other than the subjects specified in the Schedule hereto, in the General Certificate of Education (Ordinary Level) Classes and in the General Certificate of Education (Advanced Level) Classes in any such school shall be Sinhala for Sinhalese and Tamil or Sinhala for Tamil pupils; and further,*
>
> *(2) specify that this direction shall be operative –*
>
> *(a) from and after 1.1.1965 in all the General Certificate of Education (Ordinary Level) Classes in any such school;*
>
> *(b) from and after 1.1.1966 in the first year of the General Certificate of Education (Advanced Level) Classes in any such school;*

(c) *from and after 1.1.1967 in all the General Certificate of Education (Advanced Level) Classes in any such school.*

SCHEDULE

Latin
Greek
English
French
Logic
Western Music
Shorthand and Typewriting (English) "

Thus, even assuming that Marshall Preparatory School had been registered as an English School, the argument of the Respondents that English medium education is permissible under the Ordinance is subject to an important limitation embodied in Regulation 5(3), which permits the Minister to specify that even in English schools, one or more subjects be taught in Sinhalese or Tamil. The Minister has made such a directive [R2] and in the absence of any other material placed by either of the parties, it appears to me that it is pursuant to this directive that English ceased to be the medium of instruction and was replaced by either Sinhalese or Tamil in all schools, whether they be Government, Assisted or Unaided. Thus, to my mind, the first argument of the Respondents cannot be sustained, even though the scope of R2 has been diminished by the aforementioned Circulars issued in 2001, and thereafter.

The reasoning of the Court of Appeal

The Court of Appeal took the view that although Section 6 of the 1960 Act requires an Unaided School to educate pupils in accordance with the general educational policy of the Government, and comply with the provisions of any written law applicable to such school and matters relating to education, Section 6 of the 1960 Act which forms the basis for P12:

(a) has no application to **all** Unaided Schools;

(b) applies only to former Assisted Schools but which later became an Unaided School by virtue of an election made under Section 5 of the 1960 Act;

(c) has no application to Asoka College as its predecessor [Marshall Preparatory School] did not become an Unaided School by virtue of an election made under Section 5 of the 1960 Act.

In other words, the position of the Court of Appeal was that Marshall Preparatory School was an Unaided School prior to the 1960 Act, and hence did not have to make an election under Section 5, with the consequence that the said School was not required to comply with a direction given under Section 6 to educate its pupils in accordance with the general educational policy of the Government. It is on this basis that the Court of Appeal concluded that the *decision contained in P12 is based on a wrong premise and is therefore bad in law*, and proceeded to issue the Writ of Certiorari quashing P12, and the Writ of Prohibition.

The Court of Appeal thereafter went on to consider the second argument of the Respondents that there is no Government policy,

(a) with regard to the medium of instruction, or

(b) that prohibits English as a medium of instruction.

Having done so, the Court of Appeal stated that the Government had failed to declare its National Educational Policy including its policy with regard to the medium of instruction in spite of legislation enacted in 1991 requiring it to do so and that the Circulars issued by the Ministry of Education from time to time displays a clear lack of vision on the part of the Government in that regard. The Court of Appeal in fact went on to state that while the Ministry of Education was attempting to impose restrictions on schools registered with it, entities registered under the Companies Act or as Board of Investment projects as international schools have been operating in a vacuum with no regulation, management or control by the Ministry of Education.

Questions of law

It is against this judgment of the Court of Appeal that special leave to appeal was granted on the following questions of law:

(1) Did the Court of Appeal err in law, by failing to appreciate that it is upon election within the limited time period given under Section 5 of the Assisted Schools and Training Colleges Act that a school would be categorised and operate as a 'Government Approved Unaided Private School'?

(2) In view of the predecessor to the subject school, Marshall Preparatory School admittedly operating as a 'Government Approved Unaided Private School' under the above Assisted Schools and Training Colleges Act, did the Court of Appeal err in law by failing to appreciate that the predecessor school [Marshall Preparatory School] had already elected under Section 5 of the Assisted Schools and Training Colleges Act to be categorised as a 'Government Approved Unaided Private School'?

(3) Despite the Court of Appeal acknowledging in the judgment dated 10th June 2019 that the subject school is a 'Government Approved Unaided Private School', did it err in law by failing to appreciate that therefore, the said school is bound to comply with the general education policy of the Government, and are thereby bound to educate and train students accordingly?

(4) Does the conclusion of the Court of Appeal that there was an error on the face of the record in the impugned order marked P12 constitute and/or amount to an error of law?

Should Asoka College comply with the education policy of the Government?

I have already stated that the critical issue that needs to be determined in this appeal is whether the said School is required to comply with the general education policy of the Government, and more particularly with the policy of the Government with regard to the medium of instruction. This issue is reflected in the third question of law raised by the

Appellants. In my view, the other three questions of law are not directly relevant to a proper determination of this appeal, and shall not be considered.

While it is admitted by both parties that Marshall Preparatory School functioned as a Government approved unaided private School from the time of the 1960 Act, there is no material to demonstrate the status of Marshall Preparatory School as at the time the 1960 Act was introduced – i.e., was it already an Unaided School or was it an Assisted School to which the 1960 Act applied and where an election had been made in terms of Section 5 of the 1960 Act? The Court of Appeal proceeded on the basis that Marshall Preparatory School was a Government approved unaided private School prior to 1960, and for that reason the 1960 Act did not apply to it. Regretfully, none of the parties have submitted any material to support or contradict such a finding.

If Marshall Preparatory School became a Government Approved Unaided Private School under the 1960 Act, then in terms of Section 6 of that Act, it was under a statutory duty to educate and train its pupils in accordance with the general educational policy of the Government. If, on the other hand, Marshall Preparatory School was a Government approved unaided private School prior to 1960 and the 1960 Act had no application, the provisions of the Education Ordinance would still be applicable to Marshall Preparatory School, and thereby to Asoka College.

Accordingly, in terms of Section 43A(1) of the Ordinance,

(a) the Ministry of Education has the power to issue directions to a school that does not accord effectively with the general educational policy of the Government, including the policy regarding the medium of instruction;

(b) Asoka College would have to comply with an Order that it acts in accordance with the general educational policy of the Government, including the policy regarding the medium of instruction in schools.

Thus, the issue is not whether Marshall Preparatory School had made an election as provided by Section 5(1) of the 1960 Act, or whether it was an Unaided School at the time the said Act was introduced, as either way, Marshall Preparatory School, and now Horana Asoka College, is required to comply with the general educational policy of the Government.

The fact that in issuing P12, the wrong statutory provision has been invoked does not make such a decision illegal or invalid, as long as the decision maker has the power to do what he is seeking to do. This position was emphasised in **L.C.H Peiris v Commissioner of Inland Revenue** [65 NLR 457] where it was held by Sansoni, J (as he then was) that:

> "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power*."

In **Kumaranatunga v Samarasinghe and Others** [(1983) 2 Sri LR 63 at 73], having cited **Peiris** with approval, Soza, J went onto state as follows:

> "*Bindra in his work on the **Interpretation of Statutes** states the principle as follows at p. 153:*
>
> *"It is a well-settled principle of interpretation that as long as an authority has power to do a thing, it does not matter if it purports to do it by reference to a wrong provision of law."*
>
> *Bindra is here stating the principle as it was enunciated by Nain J. in the case of Deviprasad Khandelwas & Sons v. Union of India.*
>
> *"It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong Provision of law. The order made can always be justified by reference to*

the correct provision of law empowering the authority making the order to make such order."

Peiris has also been followed in **K.P.K.L.P. Maduwanthi v S.M.G.K. Perera, District Secretary, Matale and Others** [SC (FR) Application No. 23/2021; SC Minutes of 18th November 2022] where Janak De Silva, J has cited the above passage with approval.

I am therefore of the view that it was competent for the Ministry of Education to issue directions to the said School to comply with Government Policy and therefore, P12 is not illegal, even if the 1960 Act does not apply to the said School.

Is the decision in P12 nonetheless illegal?

However, the question of the illegality of P12 is also contingent upon whether it was issued in pursuance of express Government Policy. If an administrative authority is empowered to act only upon the existence of certain conditions, but proceeds to exercise its power despite such conditions being absent, it would be acting ultra vires. Consequently, its actions would be illegal.

The Court of Appeal has noted that *the National Education Policy of the Government is to be understood on assumptions in bits and pieces* of circulars and directions issued by the Ministry of Education. Indeed, the material placed before us needs to be pieced together like a jigsaw, in order to determine the precise policy position of the Government with regard to bilingual education in Government, Assisted and Unaided Schools. Even then, there are several gaping holes, including the disparity in the manner in which English as a medium of instruction is being implemented, as noted by the Court of Appeal. This is amply demonstrated by the fact that a Sri Lankan student who is admitted to an international school could study all subjects in the English medium whereas a Sri Lankan student studying in a Government, Assisted or Unaided School can only take five of the eight subjects in the English medium, although both categories of students may sit for the same examination conducted by the Department of Examinations.

Indeed, no material has been placed before us to indicate as to why students are permitted to sit for examinations in English even though the purported Government Policy was that those subjects must be taught in the vernacular. The necessary implication of permitting some students to sit for those specified subjects in English is that the Government Policy does not prohibit it.

The fact that there is no clear Government policy on bilingual education is clearly borne out by three Reports that have been published since 2014.

In 2014, the National Education Commission had commissioned ten research studies in order to identify the important policy issues in the General Education System in Sri Lanka. In its report titled "Study on Medium of Instruction, National and International Languages in General Education in Sri Lanka", the Committee,

(a) having referred to the aforementioned Circulars by which the medium of instruction either as bilingual or in English have been implemented, have opined that, "*there is no clear policy regarding bilingual education in the Sri Lankan school system at present, irrespective of the practices of bilingual education itself under the common term, 'English medium education'*",

(b) have made many recommendations that should be considered in formulating the policy regarding bilingual education.

In 2016, the then Minister of Education had appointed a National Committee to formulate a new Education Act for general education, under the chairmanship of Dr. G.B. Gunewardena. The following two important observations that have been made by the said Committee in its Final Report reflects the concerns that the Court of Appeal had with regard to the lack of a coherent policy with regard to the medium of instruction.

The first is that "*Education in Sri Lanka appears to have moved on without the guidance of a holistic and coherently enunciated long term educational policy for the last few decades and the resultant lack of direction has brought on uncertainty in the minds of people*." The second is that "*the Education Ordinance of 1939 which is 69 years old is*

outdated and obsolete. The other Acts passed by Parliament need revision and amendment to meet the demands of effective implementation of reforms and changes introduced to the system ….".

In the National Education Policy Framework (2020 - 2030) published by the National Education Commission, under the title "*Absence of a sound bilingual education policy and discrepancies in implementing the MoE directives on bilingual education in schools",* the National Education Commission has stated as follows [page 141]:

> *"State and State-assisted schools have no uniformity in the selection of students and practice of bilingual education. Many schools have overlooked the directives of the MoE and followed their own implementation procedures. Although the MoE has recommended teaching only a few selected subjects in English from Grade six after the student has completed the primary education in the first language, some schools have introduced bimedium education from the primary school and some schools have adopted an all-English approach contravening the MoE guidelines.* ***It appears that this situation has arisen mainly due to the absence of a policy that states clear instructions to all the schools on bilingual education."*** [emphasis added]

The National Education Commission has thereafter made the following recommendations [Page 151]:

> *"The NEC in liaison with relevant stakeholders shall undertake a comprehensive review of current practices of implementation of bilingual education and* ***formulate a comprehensive policy and strategic framework on bilingual education and teaching of English as the second language****.*
>
> *The MoE by taking into consideration of the policy and strategic framework that would be recommended by the NEC based on the proposed review, shall take steps to issue comprehensive circular instructions to promote bilingual education while taking steps to improve English language standards of school children in an equitable manner across all schools in all regions. The MoE should promote bilingualism throughout the country by using English as the medium of instruction in selected*

subjects such as mathematics, science, information technology in the secondary grades, year by year from Grade 6.

The MoE should continue the current practice of students of secondary grades having the option to; (a) study any subject in the English medium in the G.C.E. (O/L) and G.C.E. (A/L) grades *subject to the availability of teachers, and (b) sit the G.C.E. (O/L) and G.C.E. (A/L) examinations in the medium of their choice."* [emphasis added]

The position therefore is that Asoka College must comply with the general education policy of the Government and the Government policy on the medium of instruction. However, compliance with the Government policy on the medium of instruction is contingent upon the existence of such a Policy, which is sadly not in place, although a period of twenty years have lapsed since the issuance of the first Circular relating to bilingual education.

Conclusion

In the above circumstances:

(a) I am in agreement with the Court of Appeal that the decision contained in P12 cannot be enforced against the said School in the absence of a clear policy decision by the Government with regard to bilingual education that prohibits such teaching;

(b) I would therefore answer the third question of law as follows – Horana Asoka College must comply with the general education policy of the Government and the Government policy on the medium of instruction, and educate and train its students in accordance with such policy. However, in the absence of a Government policy specifically precluding English as a medium of instruction, the Ministry of Education is not empowered to implement the decision in P12.

The National Education Commission must fulfil its statutory responsibility and submit its recommendations on the policy that should be adopted by the Government with regard to the medium of instruction that should be followed from Grades 1 – 11 of all Government, Assisted and Unaided Schools. The 1st Appellant is therefore directed to communicate this decision to the National Education Commission.

Subject to the above finding that the Court of Appeal erred when it held that *P12 is issued on a wrong premise and therefore bad in law*, and the setting aside of the Order for costs, the judgment of the Court of Appeal is affirmed. I make no order with regard to the costs of this appeal.

JUDGE OF THE SUPREME COURT

L.T.B. Dehideniya, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT