

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

In the matter of an application for a Writ of Certiorari and a Writ of Mandamus made under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Indika Sampath Imadoowage  
215/7, Lihiniya Garden  
Puwakwatta Road  
Meegoda.

**Petitioner**

**Application No: CA (WRIT) 81/2023**

**Vs.**

1. Justice Anil Gooneratne PC  
Chairman
2. Mr. A. Gnanathan PC  
Member
3. Mr. J.P. Abeykeerthi  
Member  
All of  
The Administrative Appeals Tribunal  
Silva Lane Off Dharmapala Place  
Rajagiriya.
4. Justice Jagath Balapatabendi  
Chairman
- 4A.Mr. Sarath J. Ediriweera  
Chairman
5. Mrs. Indrani Sugathadasa  
Member
- 5A.Mrs. S.M. Mohamed  
Member.

- 6. Dr. T.R.C. Ruberu  
Member
- 6A. Mr. N.H.M. Chithananda  
Member
- 7. Mr.Ahmed Lebbe Mohamed  
Saleem  
Member
- 7A. Prof. N. Selvakumaran  
Member
- 8. Mr. Leelasena Liyananagama  
Member
- 8A. Mr. M.B.R. Pushpakumara  
Member
- 9. Mr. Dilan Gomes  
Member
- 9A. A.D.N. De Zoysa  
Member
- 10. Mr. Dilith Jayaweera  
Member
- 10A. Mrs. R. Nadarajapillai  
Member
- 11. Mr. W.H. Piayadasa  
Member
- 11A. Mr. C. Pallegama  
Member
- 12. Mr. Suntharam  
Member
- 12A. Mr. G.S.A. De Silva PC  
Member

All of the  
Public Service Commission  
No.1200/9, Rajamalwatta Road  
Battaramulla.

13. H.M.T.N. Upuldeniya  
Commissioner General of Prisons  
Department of Prisons  
Prisons Headquarters  
No.150 Baseline Road  
Colombo 9.
14. Hon. Wijedasa Rajapaksa  
Minister of Justice, Prisons Affairs  
and Constitutional Reforms  
Ministry of Justice, Prisons Affairs  
and Constitutional Reforms  
No.19, Sri Sanagaraja Mawatha  
Colombo 10.
15. Mrs. Wasantha Perera  
Secretary Ministry of Justice, Prisons  
Affairs and Constitutional Reforms  
Ministry of Justice, Prisons Affairs  
and Constitutional Reforms  
No.19, Sri Sanagaraja Mawatha  
Colombo 10.
- Respondents**

**Before:** **N. Bandula Karunarathna J. P/CA**  
**&**  
**B. Sasi Mahendran J.**

**Counsel:** Hijaz Hizbullah with Piyumi Senevirathne instructed by D. Kuruppuarachchi for the petitioner  
Mihiri de Alwis, SCC for the respondents.

**Written submissions:** By the Petitioner – 15<sup>th</sup> May 2024  
By the Respondents – 24<sup>th</sup> June 2024.

**Argument:** 27<sup>th</sup> March 2024.

**Judgment Delivered on:** 2<sup>nd</sup> July 2024.

**N. Bandula Karunarathna J. P/CA**

This is an application for writs of certiorari and mandamus by the petitioner to quash the decision of the Administrative Appeals Tribunal (AAT) dated 29<sup>th</sup> November 2022 in appeal bearing no: AAT/ 74/2021(PSC) marked as P 35 and to compel the AAT to exercise its powers and determine the petitioner's appeal in accordance with the law.

Facts of the petitioner's case is as follows.

The petitioner having joined the Prisons Department as a temporary class II jailer in 1998 rose to become an assistant superintendent of prisons. He functioned as the first Chief Jailer of the Intelligence and Security Unit within the Prisons Department which was established in order to have an internal intelligence unit that would combat criminal activities such as drug trafficking, extortion, robbery and murder that was being committed and coordinated through the prisons and within the prisons. It was also established to counter smuggling of narcotics, mobile phones and other prohibited substances and items into the prisons and thereby significantly reduce the capacity of organized criminal gangs to operate from behind prison walls.

The petitioner was very successful in this task and functioned as the Chief Jailer from 2009 to 2016. However, as a result of him successfully curtailing those activities of organized criminal gangs from operating within the prison walls, the petitioner began receiving death threats which compelled the petitioner to send his wife and children to the United Kingdom. While his family was in the UK, the petitioner remained in Sri Lanka and continued to serve in the Prisons Department. The petitioner states that the 13<sup>th</sup> respondent is fully aware of these facts as he was the Commissioner Intelligence at the relevant time.

The petitioner's work also made him very unpopular within the department itself as it is common knowledge that these gangs use jailors and prison staff to smuggle in items and carry out messages. The petitioner states that naturally the petitioner became a target for both prisoners and jailors who are unhappy with the performance of his duties.

On 9<sup>th</sup> November 2012, a riot broke out at the Welikada Prison which eventually led to 27 inmates being killed. These inmates were mostly leaders of gangs. One among the 27 inmates who were killed was one 'Chinnamani Mohottige Thushara Chandana also known as 'Kalli Thushara'. The riots shook the nation. Initially, investigations were commenced by the Borella Police but given the complexity of the case, the CID took over investigations. The Colombo Magistrate also conducted an inquiry and supervised the investigation. The Prisons Department conducted an inquiry known as the 'Andrahennadi Committee' and the line Ministry conducted a ministry level inquiry known as the 'Nambuwasam Committee'.

None of these investigations or inquiries made any findings against the petitioner. However, despite the petitioner being cleared surprisingly by letter dated 3<sup>rd</sup> March 2016, the petitioner was transferred from the Intelligence and Security Unit to Mahara Prison to perform normal duties. Whilst he was serving at Mahara Prison in 2017, the CID re-commenced an investigation into the Welikada Prison riots.

The petitioner states that he was due to travel to Singapore as a member of the prison's football team for a tournament in November 2017. It was then that Mr. Uduwara, who was the Superintendent of Mahara Prison informed the petitioner that the CID was contemplating on arresting the petitioner and therefore the line Ministry was unwilling to approve his application for leave.

However, he was granted leave to attend the football tournament in Singapore on a written undertaking that he would return to Sri Lanka. The petitioner honored his promise and undertaking and returned to Sri Lanka on 29<sup>th</sup> November 2017. This solitary fact that he returned to Sri Lanka whilst being aware of an impending arrest gives assurance for the type of person he is and his loyalty to his department. He could have absconded and jumped ship then, instead he chose to return and honor his promise made to his department.

Having returned to Sri Lanka in 2017, the petitioner began inquiring into the reasons and motives behind him being targeted for an arrest for an offence he did not commit. It was during this process of inquiring into the same that in early 2018 the petitioner received credible information that he was to be arrested and remanded for being involved in the Welikada riots. He also received information that whilst in remand custody he would be killed.

The petitioner being killed whilst in remand custody was not surprising. As the Chief Jailor in the Intelligence Unit he had made enough enemies within the prison inmates and jailors for the petitioner to be killed with relative ease. There were jailors still in service, who faced reprimands, disciplinary actions, demotions and punishments due to raids conducted by the petitioner.

The petitioner was also disturbed by the fact that IP Moses Rangajeewa Neomal of the Police Narcotics Bureau was subjected to an assassination attempt during this period, around 16<sup>th</sup> May 2017. IP Moses Rangajeewa Neomal escaped with gunshot injuries whilst the police driver who was driving the vehicle at the time died in the attack. The assassination attempt was suspected to have been done at the behest of the underworld leader Makandura Madush who was seeking to avenge the death of Kalu Thushara who was killed in the Welikada riots.

Despite his innocence, the petitioner was being framed by interested parties in retaliation for his work in the Intelligence and Security Unit and the attempt on the life of IP Rangajeewa gave cause for serious concern for the petitioner's life and liberty. The petitioner states that as aforementioned, there was a risk of, an illegal and unfair arrest, a long remand period and there was a threat to his life.

The petitioner states that any arrest for being involved with the Welikada prison riots would have substantially increased the security threat towards him as 8 of the most notorious underworld leaders died in the said arrest and those in the network both within and outside prison would seek to avenge their deaths and the petitioner would naturally become a target.

Furthermore, after being transferred to Mahara Prison, the petitioner did not have the same level of protection he had when he was at the Intelligence and Security Unit. When he was in the Intelligence and Security Unit, he had a driver and two armed guards, protecting him. However, after he was transferred to Mahara Prison, he was deprived of armed protection.

Under these circumstances, the petitioner had to leave Sri Lanka on 22<sup>nd</sup> January 2018 with no other choice and seek asylum in the United States of America as an extreme measure of having to save his life.

The petitioner argues before this Court that the AAT erred in the manner in which it decided the petitioner's appeal as explained below and such errors are material and amount to a failure in exercising its jurisdiction.

Firstly, the AAT accepted the position of the Public Services Commission (PSC) that this was a case of a Vacation of Post (VOP) when in fact the evidence that was available showed that there was no intention on the part of the petitioner to abandon his employment in the Prisons Department and that he only acted under extreme urgency, duress and under very extraordinary circumstances to safeguard his life and liberty which he is entitled to do. This is an error with regard to a jurisdictional fact and law that was caused by a failure to exercise their discretion and power to decide the question of whether there was a valid VOP issued on the petitioner. This acceptance by the AAT that there was a valid VOP when there wasn't one, made the decision *ultra vires*.

Secondly, the AAT failed to decide whether the reason attributed by the PSC to reject the petitioner's appeal, which was that the appeal was filed out of time, was valid and reasonable and the AAT failed to consider whether the circumstances invited the exercise of discretion by the PSC to accept the appeal despite it being purportedly out of time given the extraordinary circumstances of the case. Thus the AAT failed to decide a material question of law and failed to exercise its power and discretion.

Thirdly, the AAT accepted as valid the reasons of the PSC that the petitioner had not complained to the police or to the Head of the Department with regard to the threats to his life without any analysis or scrutiny as to whether such considerations were valid, true or correct or reasonable and thereby surrendered its power and discretion to determine the issue to the PSC and even in this instance failed to exercise its power and discretion.

The petitioner submits that for the above three critical errors, the order by the AAT is ultra vires, illegal and irrational and therefore it is liable to be quashed by a writ of certiorari. Further, the petitioner states the AAT ought to be compelled to decide this matter in accordance with the law, by a writ of mandamus.

The position of the respondents is briefly as follows.

The respondents state that the PSC rejected the appeal made by the petitioner requesting to be reinstated into the Public Service and state that the PSC observed the following matters whilst considering the appeal submitted by the petitioner.

- I. The petitioner has failed to take any precautionary measures against the alleged life threats referred to in the petition.
- II. The petitioner has left the country whilst the relevant authorities were taking steps to initiate legal action against him with regard to the killing of 27 inmates in the Welikada Prison during the riots which took place on 9<sup>th</sup> November 2012.
- III. There is a possibility that the petitioner left the country to avoid facing court proceedings.
- IV. The petitioner has failed to provide sufficient and valid reasons to support his appeal.
- V. The aforesaid appeal of the petitioner is belated. It has been observed that the petitioner had been served with the Notice of Vacation of Post on 29<sup>th</sup> January 2018, however the appeal had been made to the PSC on 2<sup>nd</sup> February 2021, i.e. after the expiration of 3 years from the date of the Notice of VOP.
- VI. The petitioner has preferred an appeal on 09.08.2021 against the said decision of the PSC and the AAT has decided to retire the petitioner from service with effect from 29.01.2018 (the date of the Notice of VOP) as a merciful alternative.
- VII. The petitioner has also preferred a re-appeal to the PSC on the same day and made a request to consider the Cabinet's Decision dated 18<sup>th</sup> January 2021 on implementing the recommendations of Presidential Commission of Inquiry to Investigate Incidents of Political Revenge.
- VIII. However, the implementation of the aforesaid Cabinet's Decision had been temporarily suspended and the same has been communicated to the Secretary to the Ministry of National Security by the Secretary to the Cabinet of Ministers by the letter dated 10<sup>th</sup> November 2021 and as such there was no basis to consider the re-appeal made by the petitioner.
- IX. The Secretary to the Public Service Commission had informed the Secretary to the Ministry of Justice in writing by the letter dated 1<sup>st</sup> February 2022, copied to the petitioner, that the re-appeal of the petitioner cannot be considered in view of the aforesaid communication, as the said re-appeal is based on the Cabinet's Decision, operation of which had been temporarily suspended.
- X. Subsequent to the above, the PSC has informed the Secretary to the Ministry of Justice, Prison Affairs and Constitutional Reforms by their letter dated 9<sup>th</sup> February 2023 that steps should be taken to implement the order of AAT by which a decision

has been made to retire the petitioner from service with effect from the 29.01.2018.

The respondents further state the following:

- I. The petitioner has misrepresented and/or suppressed material facts.
- II. The instant application does not disclose any legal and/or material grounds on which the reliefs prayed for therein can be granted.
- III. The instant application is not supported by evidence sufficient to grant the reliefs prayed for therein.
- IV. The petitioner does not display *uberima fides* required in coming before this Court.
- V. The petitioner's application is misconceived in law.

It is the view of the respondents that the decision given by the AAT is in favour of the petitioner as the said tribunal had decided to retire the petitioner overturning the decision that had been taken previously to serve notice of VOP on the petitioner. As such there is no ground that supports the issuance of a writ of certiorari in this regard.

Citing Jayaweera Vs. Assistant Commissioner of Agrarian Services Ratnapura and Another, 1(1996) 2 SLR 701 and Mendis Vs. Land Reform Commission and Others, [S.C. Appeal No. 90/2009, S.C Minutes dated 1202.2016], the respondents contended that a petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief.

Moreover, the respondents state that even if such grounds to issue a writ of certiorari and mandamus could be established, court has also to consider whether the petitioner is disentitled to the relief prayed for even if the grounds of issuing a writ are satisfied, due to the discretionary nature of the remedy.

As regards the issuance of a mandamus the respondents are of the view that the petitioner is not entitled to such relief as he does not seek to enforce a legal right stemming from a public duty and has not taken any immediate steps with regard to any decision made by the relevant authorities that had affected him; vide Jayawardena vs. People's Bank 2002 3SLR 17 and Credit Information Bureau of Sri Lanka vs M/S Jafferjee and Jafferjee (Pvt) Limited 2005 ISLR Pg 89.

The fact whether the petitioner's failure to report to duty can be treated as vacation of post, hinges on the completion of all elements of the act and in the instant matter ideally whether the petitioner operated with the corresponding mental element, is in issue.

In Nelson De Silva v State Engineering Corporation Limited [1996 2 SLR 342 at page 343] the Court held as follows.

'The concept of vacation of post involves two aspects. One is the mental element, that is the intention to desert and abandon the employment and second is the failure to report at the



work place of the employee. To constitute the first element, it must be established that the applicant is not reporting at the work place, was actuated by an intention to voluntarily vacate his employment. The physical absence and the mental element should co-exist for there to be a vacation of post in law. A temporary absence from a place does not mean that the place is abandoned; there must be shown also an intention not to return. So to the physical failure to perform a contractual duty there must be added the intention to abandon future performance. A reasonable explanation may negative the intention to abandon. A *bona fide* challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging the order, the complainant was affirming the contract not abandoning it.'

The judgement in Nelson De Silva (supra) has been followed consistently by courts in cases such as Jathika Sevaka Sangamaya v Sri Lanka Transport Board SC Appeal 133/2016 SCM July 9th 2021 and in Agricultural and Agrarian Insurance Board v Ilyas SC Appeal 164/2013 SCM March 28<sup>th</sup> 2016.

In the instant matter there is no evidence that the petitioner intended to abandon his employment never to return and as held in Nelson De Silva (supra), a reasonable explanation may negative the intention of to abandon. In fact, the evidence shows clearly that he was acting under extreme circumstances of duress where he acted to save his liberty and life. Neither the AAT nor the PSC considered this aspect of the case. In fact, in the PSC's own observations they have stated that the petitioner left the country to escape from the criminal proceedings. The aforesaid statement is in itself an admission that the petitioner did not leave to abandon his employment but due to the criminal proceedings brought against him. Therefore, on the admission of the PSC itself there was no intention to abandon the post.

The petitioner states that on 26<sup>th</sup> February 2018 the Criminal Investigation Department filed a report to the Colombo Chief Magistrate naming Moses Neomal Rangajeewa, Lama Hewage Emil Ranjan and the petitioner as suspects and thereafter the Attorney - General preferred an indictment against the petitioner naming the petitioner as the 3<sup>rd</sup> accused before the High Court of Colombo in HC/TAB/493/19 in respect of deaths of 8 persons during the Welikada prison riot.

The trial against the petitioner was heard in absentia and thereafter on 15th July 2020 the Learned High Court Judge acquitted the third accused person, (the petitioner) as there was no evidence to proceed against him. This further confirms that the case against the petitioner was a set up and there was an attempt to frame him in order to take revenge for his work in the Intelligence and Security Unit of the Prisons Department.

As soon as the petitioner heard of his acquittal from the High Court, he had taken steps to return to Sri Lanka which was delayed by 6 months due to Covid-19 travel restrictions and he arrived in Sri Lanka on 17th January 2021.

The petitioner had submitted an appeal to the PSC on 2<sup>nd</sup> February 2021 bearing no: 244733. In the said appeal he has stated as follows and further establishes the fact that he had no intention to vacate his post but had taken a temporary measure to protect his life and liberty.

කරුණු මෙසේ තිබිය දී මට ලැබුණු ඔත්තුව සනාථ කරමින් අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව මගින් කරගෙන ගිය විමර්ෂණයේදී මාව 3 වන සැකකරු ලෙසට නම් කර ඇතැයි මට නැවත වරක් දැනගන්නට ලැබුණ නිසා ජීවිතාරක්ෂාව සඳහා 2018.01.22 දින දේශපාලන රැකවරණය පතා ශ්‍රී ලංකාවෙන් රහස්‍යව මා පිටව යන ලදී. එසේ නොවීමේ අද වන විට මේ අභියාචනය සිදු කිරීමට පවා මා ජීවතුව අතර නොසිටිනු ඇත යන කරුණ සහතික වශයෙන්ම මා හට කිව හැකිය.

It is Important to note that the Secretary to the State Ministry of Prison Reforms and Prison Rehabilitation by letter dated 11<sup>th</sup> June 2021 and the State Minister of Justice, Prison Affairs and Constitutional Reforms by letter dated 22<sup>nd</sup> February 2022 to the Secretary to the Public Service Commission recommended that the petitioner be reinstated back in service in the Prisons Department.

Despite the recommendations for the petitioner to be reinstated back into the public service, the PSC rejected the petitioner's appeal as it had been tendered out of time. The PSC with neither hearing nor determining the appeal had rejected the same due to it being outside the time limit for submitting appeals. However, the PSC has the discretion to hear an appeal even if it is filed out of time, given the circumstances of the case. Therefore, the sole basis on which the PSC had chosen to reject the appeal of the petitioner was on the basis that the appeal had been tendered outside the time limit for submitting appeals. Quite apart from the question as to whether a right of appeal should be restricted by the PSC by enforcing a time limit, the rules of the PSC allow that the Commission is able to consider an appeal even though it has been tendered outside the time limits since it is quite evident that the circumstances in which the petitioner had to flee the country are exceptional. There was a real threat to his liberty and to his life. The letter of vacation of post itself was sent to his address in Sri Lanka when he was in the United States. Owing to this, calculation of the time period and rigidly applying that three months' rule is unreasonable and unfair.

Subsequently, the petitioner preferred an appeal to the AAT.

The PSC in its observations sent to AAT has admitted that the reason that the petitioner left his service was not because of a mental intention to abandon his post never to return but because of the unlawful legal action that was imminent. Furthermore, baselessly, the PSC continued to harp on and make reference to criminal proceedings against the petitioner even after the petitioner was acquitted of all charges. It is neither the jurisdiction nor the concern of the PSC to ensure that suspects appear in Court. That is the function of the Court itself and the police.

The AAT by its order dated 29<sup>th</sup> November 2022 refused to recommend that the petitioner be reinstated back in his service and ordered that he be retired from service stating that the PSC does not support his reinstatement in service and further stating that the petitioner did not make a police complaint nor did he inform the Head of the Department of Prisons as regards the threat to his life and that of his family.

A portion of the said order is as follows:

‘It appears to this tribunal that his service record had been very good, which indicates that he has had about 23 commendation reports. When he vacated post he held the post of Additional Superintendent of Prisons...it is evident that up to a point the appellant would be considered as suitable material for the Department of Prisons. Unfortunately, the VOP came in between and the starting point according to the appellant may have been on prison riot. The PSC does not support his reinstatement in services as stated above, which also cannot be disputed so easily.’

The said order is bad in law for the reason that the AAT has a duty to consider every aspect of the case and decide for itself. It’s clear that AAT has lamentably failed in doing so and had surrendered its discretion to the PSC, stating that the position of the PSC cannot be disputed so easily. The function of the AAT is to examine issues independently.

In R v Home Secretary ex parte Walsh [1992] COD 240, the decision of the Home Secretary was quashed as he failed to decide and act upon the issue by himself but adopted the advice of a judge or parole board with regard to prisoners and thus acted as a rubber stamp.

The AAT has failed to consider that requiring a person who is about to be arrested by the police, that he must make a complaint to the police appears to be unfair and even absurd. The police would be the last place he would want to go in such circumstances. Moreover, the AAT has failed to appreciate the fact that the petitioner left the country in order to safeguard himself from an illegal, arbitrary, unjust and unfair arrest, they simply accepted the position of the PSC that there was a valid VOP. The AAT has failed to appreciate that in fact his superiors were aware of the threat to his life. Under these circumstances the order of the AAT appears to be irrational and unreasonable.

The respondents have disregarded the key issues aforementioned that have been raised in this application by the petitioner. Furthermore, the fact that the petitioner had been acquitted from the criminal proceedings against him for murder during Welikada Prison riots which appears that the petitioner has been falsely accused of and the fact that two recommendations were sent by the Secretary to the State Minister of Prison Reforms and Prison Rehabilitation letter dated 11<sup>th</sup> June 2021, and the State Minister of Justice, Prison Affairs and Constitutional Reforms to the PSC recommending the reinstatement of the petitioner back in public service have not been taken into consideration.

Upon considering all issues raised by both parties in this case, this Court is of the view that the petitioner’s failure to report to duty cannot be treated as VOP and in light of the extraordinary circumstances of this case, the PSC ought to have considered the petitioner’s appeal and determined it in favour of the petitioner. This Court has further observed that the AAT has merely sailed along with the stance of the PSC by completely failing to exercise its discretion. Thus, by surrendering its power and jurisdiction to the PSC this way the AAT has erred both in fact and in law.

In all of the above circumstances, it is our stance that this is a fit and proper case for granting of the relief prayed for by the petitioner.

On that account, we decide the petitioner to be reinstated back in service in the Prisons Department with all outstanding salary payments. In addition, we decide that the petitioner be granted all promotions and corresponding salary increments due, from 29<sup>th</sup> January 2018 until the date of his reinstatement back into service.

Further, we quash the decision of the Public Service Commission and quash the “Notice of Vacation of Post” served on the petitioner, by the Prison Authorities.

Accordingly, this Court issues a writ of certiorari quashing the decision of the Administrative Appeals Tribunal dated 29<sup>th</sup> November 2022, in appeal bearing no: AAT/ 74/2021(PSC) and a writ of mandamus compelling the Public Services Commission and the Administrative Appeals Tribunal to reinstate the Petitioner with effect from 29<sup>th</sup> January 2018, with all his salary increments, promotions arrears of payments which he is entitled for.

Considering the circumstances, we make no order for costs.

**President of the Court of Appeal**

**B. Sasi Mahendran J.**

**I agree.**

**Judge of the Court of Appeal**