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

In the matter of an Application for mandates in the nature of Writs of Certiorari Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 399/2019

A.W.P.C. De Waas. Gunawardhana,
Ex PC 49956
No. 289/C, Kaluwarippuwa Cross Road,
East Katana.

Petitioner

Vs.

1. National Police Commission.

2. P.H. Manathunga,
   Chairman, National Police Commission.

3. Professor S.T. Hettige
4. Savithri D. Wijesekare
5. Anton Jeyananthan
6. Y.L.M. Zawahir
7. Tilak Collure
8. Dr. Frank de Silva

   (2nd – 8th Respondents are the Members of the National Police Commission)

9. D.M. Samansiri,
   Secretary,
   National Police Commission,

   1st – 9th Respondents at
   Bandaranayake Memorial
   International Conference Hall,
   Bauddhaloka Mawatha, Colombo 07.

10. Hon. Justice N.E. Dissanayake,
    Chairman,
    Administrative Appeals Tribunal.

11. A. Gnanathasan P.C,
    Member.

12. G.P. Abeykeerthi,

    11th and 12th Respondents - Members,
    Administrative Appeals Tribunal,

    10th – 12th Respondents at No. 35, Silva
    Lane, Dharmapala Place, Rajagiriya.

13. C.D. Wickremaratna,
    Acting Inspector General of Police,
    Police Head Quarters,
    Colombo 01.

14. Hon. Attorney General,
    Attorney General's Department,
    Colombo 12.

Respondents

Before:	**Arjuna Obeyesekere, J**
Counsel:	Prince Perera for the Petitioner
Supported on:	20th November 2019
Written Submissions:	Tendered on behalf of the Petitioner on 29th November 2019
Decided on:	13th March 2020

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the disciplinary order made against the Petitioner by the Inspector General of Police, dismissing the Petitioner from service;

b) A Writ of Certiorari to quash the decision of the National Police Commission;

c) A Writ of Certiorari to quash the decision of the Administrative Appeals Tribunal dated 21st March 2019.

The facts of this application very briefly are as follows.

The Petitioner had joined the Police Department on 20th November 1995 as a Reserve Police Constable, and had been absorbed into the Regular Service of the Police Department on 6th February 2006. The Petitioner states that he had

an unblemished record of service for a period of 15 years, until the incident that is the subject matter of this application arose in May 2012.

The Petitioner states that on 24th May 2012, he, together with his wife, had visited the house of his sister-in law (i.e. sister of his wife) at around 3pm to borrow a sum of Rs. 10,000 from his wife's brother-in-law, Jesudasan Gerard. The Petitioner states further that Gerard was carrying on a small shop at his residence and was engaged in the distillation of illicit liquor to supplement his income. The Petitioner claims that once he arrived at the house of his sister-in-law, Gerard had left the said house to go to the bank to get the money leaving the Petitioner and his wife in the house. In the meantime, a group of Police Officers attached to the Negombo Police Station, led by Inspector of Police Wijerama had visited Gerard's house, and having found that the distillation of illicit liquor is being carried out at the said premises, arrested the Petitioner and produced him before the Magistrate's Court. The Petitioner had been granted bail the next day. Although formal criminal proceedings had been instituted against the Petitioner, he had been discharged by the Magistrate's Court of Negombo as the prosecution witnesses had not been present on the trial date.

The Petitioner denies that he was involved in the distillation of illicit liquor, and states that the said illegal operation was carried on by Gerard. He states further that his presence at Gerard's house that day was only to collect the money.

Pursuant to his arrest, the Petitioner had been placed under interdiction. The Police Department had thereafter issued the Petitioner with a charge sheet dated 27th July 2012 under the hand of the Senior Deputy Inspector General of Police, containing the following charge:

> "**<u>අපකීර්තිදායක හැසිරීම</u>**
>
> **එනම්, අනිසි ලෙස හෝ විනය පවත්වා ගැනීමට හානිකර වන අන්දමින් හෝ පොලිස් සේවයේ හොඳ නමට කැළලක් වියහැකි අන්දමින් හෝ හැසිරීම.**
>
> **මිගමුව කොට්ඨාශයේ සිදුව පොලිස් ස්ථානයට අනුයුක්තව රාජකාරී කල පොලිස් කොස්තාපල් 49956 අන්දරවාස් පටබැඳිගේ චන්දන වාස් ගුණවර්ධන වන ඔබ, ස්ථිර පදිංචිව සිටින නැගෙනහිර කලුවාරිප්පුව, කටාන පිහිටි නිවස, 2012.05.24 වන දින සවස් කාලයේ මිගමුව පොලිස් ස්ථානයේ පො.ප. විජේරාම ඇතුළු නිළධාරීන් පිරිසක් විසින් වැටලීමේදී එහි ඔබ විසින් නිති විරෝධී මත්පැන් නිෂ්පාදනය කරමින් සහ ඒ සඳහා යොදා ගන්නා ගෝඩා සහ ඊට අදාල උපකරණ ළඟ තබා ගෙන සිටීමෙන්, ඔබ පොලිස් දෙපාර්තමේන්තු නියෝග ඒ 07 "බ්" පරිශිෂ්ඨයේ විනය සංග්‍රහයේ 01 වන වගන්තිය යටතේ දැක්වෙන වරදක් සිදු කර ඇති බවට ඔබට මෙයින් චෝදනා කරමි.**"

A disciplinary inquiry had thereafter been held against the Petitioner, where the evidence of Inspector of Police, Wijerama as well as several others was led on behalf of the prosecution. The Petitioner had given evidence, and led the evidence of his wife and Gerard. This Court has examined the evidence of Gerard and observes that Gerard has in fact accepted responsibility for the illicit liquor that had been seized by the Police.

The Inquiry Officer, having evaluated the evidence placed before him, had rejected the defense of the Petitioner, and held as follows:

"මේ අනුව වුදිත නිළධාරියාගේ ක්‍රියා කලාපයෙන් සමස්ට පොලිස් දෙපාර්තමේන්තුවම අපකීර්තියට පත් කිරීම සිදු කර ඇත. පොලිස් නිළධාරීන් සිටින්නේ නීති විරෝධී මත් පැන් පෙරීම, විකිනීම, ප්‍රවාහනය, සම්බන්ධ තොරතුරු සොයා බලා පුද්ගලයින් අත්අඩංගුවට ගැනීමටය. නමුත් මෙම වුදිත නිළධාරියා කර ඇත්තේ නීති විරෝධී මත්පැන් නිෂ්පාදනයයි. මෙවැනි අපකීර්තිදායක නිළධාරීන් තවදුරටත් පොලිස් දෙපාර්තමේන්තුවේ තබා ගැනීම කිසිසේත් සුදුසු නොවන බැවින් ඔහුට දඬුවම් පැමිනවීමේදි ආයතන සංග්‍රහයේ II වගන්තියේ 24:3:1 අනුව සේවයෙන් පහකිරීම හැර වෙනත් විකල්පයක් නොමැති බව විනය බලධාරී තුමාගේ ගෞරවනීය අවධානය යොමු කරවම්."

The Inspector General of Police had thereafter issued the following disciplinary order on the Petitioner:

"විධිමත් විනය පරීක්ෂණයෙදි ඉදිරිපත් වූ සාක්ෂිකරුවන්ගේ සාක්ෂි, ලේඛනගත සාක්ෂි, මූලික විමර්ෂන ගොනුව, විධිමත් විනය පරීක්ෂණ ගොනුව, හා පරීක්ෂණ නිළධාරියාගේ අවසන් වාර්තාව මා විසින් අධ්‍යනය කරන ලදි. පරීක්ෂණ නිළධාරියාගේ අවසන් වාර්තාව අනුව, චෝදනා පත්‍රයේ සඳහන් වූ එකම චෝදනාව සාක්ෂි සහිතව සනාථ වී ඇති අතර මාද ඒ හා එකඟ වෙමින් එම චෝදනාව සඳහා ඔබ වැරදිකරු බවට තීරණය කරම්.

පොලිස් නිළධාරියෙකු ලෙස ඔබ කර ඇති විනය කඩකිරීම මුළු පොලිස් දෙපාර්තමේන්තුවම අපකීර්තියට ලක්කරන්නකි. එමෙන්ම ඔබ වැනි අයෙකු තවදුරටත් සේවයේ තබාගැනීම සමස්ට රාජ්‍ය සේවයටම හානිදායක වන අතර එය අනෙකුත් නිළධාරීන්ට වැරදි පූර්වාදර්ශයක්ද සපයනු ලබයි.

දඬුවම:- 2012.05.24 දින සිට ක්‍රියාත්මක වන පරිදි සේවයෙන් පහ කිරීම."

එන්. කේ. ඉලන්ගකෝන්
පොලිස්පති"

The Petitioner's appeal to the National Police Commission had been rejected by letter dated 3rd July 2017. The Petitioner had thereafter appealed to the Administrative Appeals Tribunal (AAT). Having heard the Petitioner as well as having considered the observations of the National Police Commission, the written submissions of the Petitioner and the Inquiry proceedings, the AAT had concluded that the Petitioner had been rightly found guilty of the charge preferred against him, and upheld the dismissal from service.

Aggrieved by the said decision of the AAT, the Petitioner invoked the jurisdiction of this Court conferred under Article 140 of the Constitution, seeking the aforementioned relief. The Petitioner has made available to this Court, a complete copy of the proceedings before the Inquiry Officer, thus affording this Court an opportunity of considering the complaint of the Petitioner.

Prior to considering the complaint of the learned Counsel for the Petitioner, this Court wishes to advert to the averment in the petition to this Court that the Petitioner possesses an unblemished record of service.[1] This Court has examined the written submissions filed on behalf of the Petitioner at the AAT, and observes that on page 6 thereof, there is a reference to the Petitioner having pleaded guilty to a charge of cheating a sum of Rs. 57,795. It has been mentioned further that the Petitioner had been placed under interdiction and had been reinstated only on 9th April 2012 which is 1 ½ months prior to the incident that is the subject matter of this application. Thus by his own

[1] Vide paragraph 3(1) of the petition, and paragraph 4(i) of the affidavit.

admission, the Petitioner does not have an unblemished record of service, and his statement, made under oath to this Court, is untrue.

The Supreme Court in **Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others**[2] citing the case of **Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others**[3] has held as follows:

> "*The conduct of the petitioner in withholding these material facts from Court shows a lack of uberrimae fides on the part of the petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court*."

In **Fernando, Conservator General of Forests and two others vs. Timberlake International Pvt. Ltd. and another**[4], the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court, stated as follows:

> "*It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show uberrimae fides or ultimate good faith, and disclose all material facts to*

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[2] 2013 (1) Sri LR 6 at page 15.

[3] 2002 (1) Sri LR 277.

[4] S.C. Appeal No. 06/2008; SC Minutes of 2nd March 2010.

this Court to enable it to arrive at a correct adjudication on the issues arising upon this application."

This Court is therefore of the view that on this ground alone, this application is liable to be dismissed.

The Petitioner has also referred to an incident where he had been charged with a similar offence of distilling illicit liquor, a few months after the incident that is the subject matter of this application occurred. The Petitioner had however been acquitted by the learned Magistrate of this charge.[5] This incident however is not relevant to a consideration of the issue before this Court.

The following passage of Lord Diplock, in **Council of Civil Service Unions vs Minister for the Civil Service**[6] sets out clearly the grounds on which a decision of an administrative body could be subjected to judicial review:

"*Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'*."

[5] The Order of the learned Magistrate is at page 91.
[6] 1985 AC 374

In considering the complaint of the Petitioner, this Court must be mindful that in this application, this Court is exercising its Writ jurisdiction as opposed to its Appellate jurisdiction. This distinction has been referred to in **Administrative Law** by Wade and Forsyth[7] in the following manner:

> "*The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful'?*"

As Lord Brightman stated in the House of Lords in **Chief Constable of North Wales Police v Evans**[8], applications for judicial review are often misconceived:

> "*Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.*."

The learned Counsel for the Petitioner has no complaint with regard to the procedure that has been followed. His grievance, which has been clearly set out in the written submissions, is that the evidence that was available was

[7] H.W.R. Wade and C.F. Forsyth, Administrative Law (11th Edition), Oxford University at page 26.
[8] [1982] 1 WLR 1155 at 1174.

insufficient to conclude that the Petitioner had been involved in the distillation of illicit liquor. He thus submitted that there was an error on the face of the record, and that the benefit of any doubt must be given to the Petitioner. As the Petitioner's complaint is that there is no material to conclude that the Petitioner was involved in the alleged incident, this Court has examined the evidence in order to ascertain the veracity of the said complaint.

This Court has already narrated the events that transpired on 24th May 2012 when IP Wijerama visited the house of Gerard. The evidence had revealed the following facts:

(a) The Petitioner was aware that Gerard was engaged in the distillation of illicit liquor;

(b) Inspite of that, the Petitioner, being a Police officer, did not think too seriously of being present at such a place;

(c) The Petitioner was present in the said house at the time the Police visited Gerard's house.

The following narration of IP Wijerama as to what transpired once he went inside the house sheds light on the involvement of the Petitioner:

> "මා නැවත වරක් ගේට්ටුව අරින ලෙසට ගේට්ටු හොල්ලා කෑගැහුවා. එවිට සරමක් ඇඳ ගත්තු පුද්ගලයෙක් පැමිණ ගේට්ටුව විවෘත කලා. එම අය මිට ඉස්සෙල්ලා සිදුව පොලිසියේ වැඩ කරනවා යැයි කියූ අය බව හඳුනා ගත්තා. මා නිවස පිටුපසින් ඇතුල් වුනා. නිවසේ මුලුතැන් ගෙය තාවකාලිකව සකස් කරන ලද විශාල ලිපක් මත ඇලුමිනියම් මුට්ට දෙකක් කසිප්පු පෙරන්න සකස් කර තිබුනා. මෙහි දහනයට ගෑස් මගින් ලබාදි

තිබුණා. මා ඉදිරිපිටදි සැකකරු රෙගුයුලේටරයේ සුව්වය වසා ගින්න නිවා දැමුවා. මේ අවස්ථාවේ මා ඔහුගෙන් විමසුවා කවුද මේක කරන්නේ කියා."

The central feature of the defence of the Petitioner is that it is Gerard who carried out the illegal operation and that Gerard had already left the house by the time the Police arrived at the scene. One would therefore have expected this position to have been suggested to IP Wijerama, during cross examination. What had however been suggested, as borne out by the following question, is that Gerard had fled the scene after the Police arrived:

"ප්‍රශ්නය:- මෙම නිවස නියම පදිංචිකරු රාසයියා ජේසුදාසන් නොහෙත් පෙරාඩි නැමැති අය බවත් ඔහු මෙම වරද සිදු කරමින් සිට පොලිස් නිළදාරීන් එනවා දැක ඔහු පැන යාමෙන් පසු එම නිලදරියා එම රුස්ව සිටි පිරිසට පෙනෙන්ට ඔහු අත් අඩංගුවට ගෙන ජීප් රථයට දමා ගත්තාද විත්තිය කියන්නේ පිළිතුර කුමක්ද".

The failure on the part of the defence representative to suggest the central feature of the defence of the Petitioner to this Court, gives rise to a doubt about the credibility of the version of the Petitioner that he was alone at the time the Police visited the scene.

The Petitioner himself admits that the charge leveled against him is a serious charge. A similar conclusion has been reached by the Inspector General of Police, the National Police Commission and the AAT. When this Court considers the decision of the Inquiry Officer in the light of the material that has been placed before the Inquiry Officer, this Court cannot say that the said decision to reject the defence of the Petitioner and to find him guilty of the charge is irrational and unreasonable or that there has been an error on the face of the

record. This Court agrees with the AAT that the Petitioner had been rightly found guilty of the charge, and would in fact take the view that the decision of the AAT is a decision which a *sensible authority acting with due appreciation of its responsibilities would have decided to adopt*.[9]

The Petitioner, being a Police Officer with 15 years of service, and having just been reinstated in service, ought to have known that his presence at premises where illicit liquor is being distilled, can give rise to a charge of being involved in that operation, and that such conduct can bring the entire Police Department to disrepute. This Court therefore agrees with the conclusion of the Inquiry Officer, the Inspector General of Police and the AAT that retaining in service a person such as the Petitioner would bring the entire Public Service to disrepute.

In the above circumstances, this Court does not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

[9]Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014.