

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

In the matter of an application for the grant of Writs of Certiorari, under and in terms of Article 140 of the Constitution.

J. C. Weliamuna,
205, Middleborough Road,
Boxhill Vic 3128 Australia.

PETITIONER

CA (Writ) Application No: 297 /2021

-Vs-

1. Hon. Upaly Abeyrathne,
Chairman
Retired Hon. Judge of the Supreme
Court, No. 42/10, Beddagana North,
Pita Kotte.
2. Chandrasiri Jayathilaka, Member
Retired Hon. Judge of the Court of
Appeal, No. 24, Diyawanna Gardens ,
Pelawatta, Battaramulla.
3. Chandra Fernando, Member
No. 1, Shubbery Gardens Colombo 04.

The 1st to 3rd Respondents of The
Presidential Commission of Inquiry
appointed to inquire into and obtain
information in relation to alleged
political victimization during the period
from 8th January 2015 to 16th November
2019

C/O Presidential Secretariat, Colombo -1

4. The Secretary

The Presidential Commission of Inquiry appointed to inquire into and obtain information in relation to alleged political victimization during the period from 8th January 2015 to 16th November 2019.

C/O Presidential Secretariat,

Colombo -1

5. The Hon. Attorney-General, Attorney-General's Department,
Colombo — 12.

RESPONDENTS

Before: **N. Bandula Karunarathna J. P/CA**
&
D. N. Samarakoon, J.
&
M. T. Mohammed Laffar

Counsel: Faisz Musthapha P.C. with Eraj De Silva instructed by
Vidanapathirana Associates for the Petitioner.

Milinda Gunatilleke, ASG P.C. with Chaya Sri Nammuni, DSG for
the 05th Respondent.

Written Submissions: By the Petitioner – 06.11.2023

By the Respondent – 22.06.2023

Argued on : 11.10.2023

Decided on : 25.03.2024

N. Bandula Karunarathna J. P/CA

This is an application for a Writ of Certiorari to quash the findings, decisions and recommendations of the 1st to 3rd respondents in the report marked 'P 6' in respect of the petitioner. The First to 3rd Respondents are the Chairman and members of a Presidential Commission of Inquiry appointed by H.E. the President under Section 2 of the Commissions of Inquiry Act no. 17 of 1948.

The Petitioner seeks relief preventing the Respondents from taking any steps to implement or give effect to the recommendations of the impugned report in any way in so far as they relate to the Petitioner.

It was argued on behalf of the Petitioner;

- a. That the findings in report marked P6 are against the Petitioner and a group of persons collectively;
- b. The findings are of a very serious nature, including that there has been a violation of the constitution; and
- c. These findings have been collectively made against a group in toto.
- d. The findings and the report should be quashed, is in relation to acts of the Anti-Corruption Committee established by approval of the Cabinet;
- e. Several selected complaints have been entertained (of which the Petitioner has had no notice) and, the 1st to the 3rd Respondents appear to have arrived at findings, and recommendations, in relation each of such complaints (from page 52 onwards in P-6);

However, as against this Petitioner, the basis is the conduct in relation to the Anti-Corruption Committee and findings have been made ex facie, inter alia, that:

- i. The Anti-Corruption Committee and the Secretariat was established consequent to approval by the Cabinet of Ministers at the time;
- ii. That the Cabinet of Ministers are collectively accountable to parliament;
- iii. Prosecutions and actions have been initiated by the relevant law enforcement authorities, including, the Attorney General, the Police and the Commission to Investigate Allegations of Bribery;
- iv. Thereafter, respective Courts have taken cognizance of the matters and proceedings have been initiated in terms of the law.

The Petitioner submits that P6 Report taken as a whole, undermines the judicial process and the law enforcement process, and it is, at times, the report of this commission impugns the actions of the court of law, and the decision-making of the law enforcement authorities. The Anti-Corruption Committee, which was established consequent to a Cabinet Decision, took

no part in the decision to prosecute and in respect of continuing proceedings, which were before Courts. The Court issued notice to all the Respondents on or about 9th May 2022. There have been no objections filed on behalf of any of the Respondents, therefore, the Petitioner seeks permission from this Court to grant the reliefs on such ground alone.

The contention of the learned President's Counsel who appeared on behalf of the Petitioner was that there has been no compliance with the rules of natural justice, in so far this Petitioner is concerned, the findings are ex-facie ultra vires and have no basis. It was further argued that the findings are unreasonable in the Wednesbury sense. In the circumstances, the learned Counsel for the Petitioner says that the findings and the report is ex-facie, ultra vires, void and has no force or effect in law. It is important to note that, an examination of the position of the 5A Respondent, supports the position of the Petitioner, and fortifies the view that the findings and the report ought to be quashed.

This Court heard the Petitioner in support, and was inclined to issue Notices on or about 9th May 2022. Notices were issued and served on the Respondents, who chose not to file any objections, having received the complaint of the Petitioner. The Secretary to the President sought to be added as the 5A Respondent.

However, no objections had been filed thus far by any of the Respondents for over a year, and on this ground alone it must deem that the Respondents have no objection to the grant of the reliefs. It was argued that on this ground alone, the reliefs sought, ought to be granted. In any event, the learned President's counsel submits that the findings and the Report is contrary to all principles of natural justice known to law.

The Petitioner has pleaded, that:

- a. the Petitioner received certain summons; and,
- b. on or about the 4th September 2020, the Petitioner attended the said Commission and was informed by the Commission that the Petitioner was not being treated as a Respondent, but only as a witness.

In these circumstances, the Petitioner argued that he was led to believe and had a legitimate expectation that no findings and recommendations would be made against the Petitioner and there would be no material collected against the Petitioner to the detriment of the Petitioner. In these circumstances, the Petitioner gave evidence, as was asked.

However, the Petitioner says that;

- a. No proper charges were served;
- b. No complaints have been served on the Petitioner; and
- c. The nature of the charges against the Petitioner were not disclosed to the Petitioner.

The petitioner finds that the report contains, damaging findings against the Petitioner, are grave and very serious. In these circumstances, he argued that there is a grave violation of

the rules of natural justice, and on this ground alone, the report and the findings should be quashed.

In my considered view that former President Gotabhaya Rajapaksha had appointed a Special Presidential Commission by Gazette Notification 2212/53 dated 29.01.2021 appointing a Special Commission of Inquiry to look into whether the observations and recommendations contained in the report P6 of the 1st to 3rd Respondents were legally binding and had merit. The words used in the mandate at paragraph 1, inter alia, are as follows;

"... to further investigate and report whether the above malpractices have done and what extent are the respondents so responsible, and to recommend whether a person should be subjected to a community disability according to the provisions of Article 81 of the Constitution and Section 9 of the Special Presidential Commission of Inquiry Act (Special Provisions) Act No 4 of 1978."

Therefore, it is clear that the recommendations of the 1st to 3rd Respondents could not be given effect to until the Special Presidential Commission appointed by the President had gone into the contents of the said report and made their own recommendations as to the validity and legality of giving effect to the Report of the 1st to 3rd Respondents and after further investigation making their independent recommendation of the course of action that needs to be adopted in this regard.

Whether or not the rights of the Petitioner may or may not be affected would therefore, depend on the recommendations of the Special Presidential Commission. The mandate of the said Special Presidential Commission of Inquiry was further amended by Gazette Number 2221/54 dated 01 April 2021. By the said Gazette, His Excellency the President has stated inter alia as follows;

"And whereas, now, I am of the considered view that in consideration of the specific, findings, decisions and recommendations made against and/or against the specific persons identified in the said report submitted to me by the Presidential Commission of inquiry constituted by me, by the warrant issued on 09 January 2020,"

"that such specific, findings, decisions and recommendations contained in the said Report in respect of all such identified persons should inter alia in the public interest, and for purposes of greater scrutiny be further inquired into by you, and to report to me on the suitability and justification if any for the implementation and enforcement of the said findings, decisions and recommendations contained in the said Report of the Presidential Commission of Inquiry as well as for the adoption of any action in respect thereof."

It is clear that His Excellency the President had, at the time of the promulgation of the aforesaid Gazette not yet decided whether there was any justification for the implementation and enforcement of the recommendations of the 1st to 3rd Respondents. In the said Gazette

Number 2221/54 dated 01 April 2021 the Terms of Reference of the Special Presidential Commission was expanded by paragraph 02 of the said Gazette and the Special Presidential Commission was mandated to also inquire into and report whether all or any of the findings, decisions and recommendations contained in the aforesaid Report of the Presidential Commission of Inquiry, made in respect of all the persons identified therein and whether any or all of the same should be implemented or cause to be implemented....."

The expansion of the mandate of the Special Presidential Commission made it clear as a matter of law that in the view of the appointing authority H.E the President, the recommendations of the 1st to 3rd Respondents were unfit for implementation pending a decision of the Special Presidential Commission as to whether any of such recommendations should be implemented or not.

The Special Presidential Commission could not finalize this report and was given an extension of time until 28.04.2022 by Gazette Notification 2251/37 dated 28.10.2021.

However, the Special Presidential Commission could not carry out their mandate and finalize any report and did not submit any recommendation before the expiry of the mandate of the commission on 28.04.2021. The mandate of this Special Presidential Commission was not extended by His Excellency the President. When this Special Presidential Commission appointed for that very purpose became *functus* without submitting any recommendations, what remains is the last Presidential directive not to implement the Report of the 1st to 3rd Respondents without fully looking into and reviewing the recommendations to ascertain whether such recommendations were justified.

The fact that the term of the Special Commission expired without extension and without resulting in a final report does not in any way, take away the fact that the first impugned Report was viewed by His Excellency the President and the Cabinet of Ministers as lacking and requiring further investigation and inquiry. The appointment of another Special Presidential Commission of Inquiry by His Excellency the President, the recommendation of the Commission comprising 1st to 3rd Respondents has become redundant.

By the said appointment of the Special Presidential Commission, the recommendations of 1st to 3rd Respondents have become inoperative and it is evident that His Excellency the President does not wish to proceed with the said recommendations. Even though the position of the 5th Respondent was that, the recommendations of the Special Presidential Commission has now become redundant, the question that has to be considered is whether, the recommendations of the Commission of Inquiry are legally binding.

In the case of Silva and Others v. Sadique and Other; (1978) 1 SLR 166, it was examined whether the commissions formed under Commission of Inquiry Act 1948 able to review by of

Writ of Certiorari under Article 140 of the 1978 Constitution and held that recommendation made by a Commission of Inquiry are not subject to review as the decisions are not binding in nature and lacks legal authority.

In the case of Kehar Singh v Delhi Administration, AIR [1988] SC 1883: [1988] 3 SCC 609, it was held that,

"The report of a Commission is a recommendation of the Commission for the consideration of the Government. It is the opinion of the Commission based on the statements of witnesses and other material. It has no evidentiary value in the trial of a criminal case... "

In the case of Kabugo v The Commission of Inquiry (effectiveness of law, policies and processes of land acquisition, land administration, land management and land registration in Uganda) & Anor, (Miscellaneous Cause 108 of 2019) [2020] UGHCCD 62 [23 April 2020] it was held that;

"Basically, an inquiry under the Commissions of Inquiry Act is usually mounted by the government for the information of its own mind.....",

"The Commissions of Inquiry Act makes no provision for giving effect to the commission's findings. The commission is merely a fact-finding body having no power to pronounce a binding or definitive judgment or orders. It collects facts through the evidence laid before it, and after considering the same, it submits its report which the appointing authority may or may not accept....."

"The Commission is required to collect fact fairly to all concerned and in the best manner possible and advise the government with its findings. It will be ultimately for the appointing authority (President or government) to accept the commission's findings and take appropriate measures as advised or even otherwise....."

In the abovementioned case of, Silva and Others v. Sadique and Other, [1978] 1 SLR 166 the court held that;

"It appears to be clear that certiorari will also lie where there is some decision, as opposed to a recommendation, which is a prescribed step in a statutory process and leads to an ultimate decision affecting rights even though that decision itself does not immediately affect rights. From the citations which I have set out, it would appear that a Writ of Certiorari would lie in respect of an order or decision where such order or decision is binding on a person and it either imposes an obligation or involves civil consequences to him or in some way alters his legal position to his disadvantage or where such order or decision is a step in a statutory process which would have such effect."

Further in the case of Silva and Others vs Director of Health Services and Others [2010] 1 SLR 285 it has been held that;

"The recommendation of the Human Rights Commission contained in PI Ia and P12 does not take effect *proprio vigore*. There is no provision in the said Act to enforce the recommendation of the said Commission. If the Commission's recommendations are not complied with, the Commission can only report to the President and in turn it can be placed in Parliament. In view of this the recommendation of the Human Rights Commission cannot be quashed by a writ of Certiorari."

In the case of S.S.A.U.S.A Udayar and another vs M.S.M.K. Marikkar and Others C. A. (Writ) 106/2012, (C.A Minutes; 22.06.2020) it was held that;

"There is a long line of judicial authority which unequivocally states that a writ of certiorari will issue only where the decision-maker has determined questions affecting the rights of the subject and will not issue against recommendations that do not have any force *proprio vigore*. "

[De Mel v. De Silva (51 N.L.R. 105), Dias v. Abeywardena (68 N.L.R. 409), Fernando v. Jayaratne (78 N.L.R. 123)11, G.P.A. Silva and Others v. Sadique and Others [(1978-79) I Sri.L.R. 166].....

In the case of, Ratnasiri and others v. Ellawala and others, (2004) SLR 180 12, it was held that;

"This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ... will not issue where it would be vexatious or futile. "

See, P.S. Bus Co. Ltd. v Members and Secretary of the Ceylon Transport Board

In Siddeek v Jacolyn Seneviratne and Others 1984 (1) SLR 83 Soza, J. delivering the judgment of the Supreme Court observed that;

"The Court will have regard to the special circumstances of the case before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality."

The learned Additional Solicitor General who appeared on behalf of the 5A Respondent submitted that the recommendations sought to be quashed by the Petitioner has not been acted upon by His Excellency the President and there are no legally binding and operative recommendations to be quashed. Therefore, the issuance of Writ of Certiorari as prayed for by the Petitioner in this application is futile. The learned Additional Solicitor General suggests to terminate the proceedings with liberty for the Petitioner to re agitate this matter if the need arises.

It is my view that the impugned recommendations and decisions of the 1st to 3rd Respondents are not final and conclusive. Therefore, this matter is now futile and academic in view of the fact that the decisions of the 1st to 3rd Respondents are not final and conclusive.

When this matter was taken up on 14.03.2022, it was submitted on behalf of the Attorney General that the Secretary to His Excellency the President Gotabhaya Rajapaksha, has instructed the Attorney General that he does not intend to refer the report of the 1st to 3rd Respondents to Bribery Commission or Public Service Commission but to await the full recommendation of the Special Presidential Commission that His Excellency the President Gotabhaya Rajapaksha has appointed, in terms of the SPCOI Act No 7 of 1978. Thereafter this matter was supported for Notice and Interim Relief. This Court issued the order Notice on the Respondents but not interim relief, holding that the opportunity to make decisions which were prejudicial to the Petitioner no longer existed (Order dated 9.5.2022).

As borne out by the proceedings dated 08.02.2023, the position with regard to the Report of the 1st to 3rd Respondents was submitted by the Hon. Attorney General to this Court as follows;

I quote;

"All these applications invoke the jurisdiction of Your Lordships' Court to quash the recommendation of the Commission of Inquiry. If I may briefly call that Upali Abeyrathne commission Report, now My Lord they all came before Your Lordships Court and there were proceedings which were held before Your Lordships' Court on 30th of March 2021. I would like to advert to the proceedings of 30th March 2021."

"May I read page 02 of the proceedings, the learned President's Counsel appearing for the 6th Respondent somewhere in the middle of that proceedings in CA Writ 174/21 states as follows;"

"I have specific instructions from the President that His Excellency whilst being acutely conscious of there being very serious grievances of those who made genuine complaints of discrimination and victimization to the Presidential Commission of Inquiry that nevertheless in accordance with the rule of law that His Excellency is of the considered view, that prior to causing any of the recommendations or decisions contained in the report of the Justice Abeyrathne Commission, that His Excellency wishes to in the first instant, bring an objective mind to bear on the contents of the said report and the recommendations as well as, the final report of the Special Presidential Commission of Inquiry consisting of 02 sitting Judges of the Supreme Court and a Judge of the Court of Appeal, that has now been constituted by His Excellency the President Gotabhaya Rajapaksha for the purpose of furnishing final recommendations to His Excellency."

"The Hon. Attorney General has received oral instructions from the Secretary to His Excellency the President Gotabhaya Rajapaksha. He has not acted in the findings of

the 1st to the 3rd Respondents that are the Abeyrathne Commission report and has appointed another Special Presidential Commission in terms of Government Gazette. My submission here is the authority when he got the recommendations and findings of the Commission of Inquiry of Abeyrathne Commission for good reason he didn't act on it and instead forwarded those recommendations to be considered by a Special Presidential Commission consisting of two Judges of the Supreme Court and 01 Judge of Court of Appeal."

"Now Your Lordship may ask me what happened to the Special Presidential Commission of inquiry. Up to now from April last year, it came to a premature closure. It did not make any recommendation; it did not make any finding. It was an abrupt end to the Special Presidential Commission and His Excellency in his wisdom thought it fit that not to grant any further extension to the Special Presidential Commission of Inquiry. While that process came to an end, in that case this Court delivered a judgment in CA-WRT-0173-22 in September 2022, popularly known as Janaka Bandara's Case. After Your Lordship delivered the judgment, it was brought to my attention as the Attorney General I wrote to the Cabinet of Ministers and wanted a policy decision taken across the board in respect for all these recommendations given by Upali Abeyrathne Commission and also made my suggestion that this matter should come to an end. The Cabinet of Ministers wanted to clarify before they took a final decision in four matters,

1. Whether the police;
2. The Commission to investigate Bribery and Corruption;
3. Whether the Attorney General;
4. Whether the Public Service Commission;

had taken any step with regard to the finding or recommendation made by Upali Abeyrathna Commission. The reports were forwarded to the Cabinet and all institutions took up uniform position that no action was taken to implement any of the recommendations of the Upali Abeyrathna Commission. Having been briefed with that My Lord, the Cabinet has taken a decision which was taken about a week ago with regard to that matter with the Special Presidential Commission of Inquiry coming to a standstill, premature closure there is no validity in going any further ahead with the Upali Abeyrathna Commission report. They stopped short of making any pronouncement on the Upali Abeyrathna Commission report but of course said that they will not interfere in the Court proceedings before Your Lordships' Court. Those are the very words which they said. It will not interfere in the proceedings initiated before Your Lordships Court. "

"Now having briefed Your Lordships Court based on what I just mentioned, my submission before Your Lordships Court is that the Upali Abeyrathna Commission

Report, the appointing Authority in its wisdom thought it fit, it should not be acted on its own. It should go passed the shifting process of a Special Presidential Commission of inquiry. That Commission of inquiry it should be recorded that nothing flows from the Upali Abeyrathna Commission report. And it is a matter of futility with all due respect whether these cases should proceed I am not for a moment trying to debunk the position taken up by the Petitioner, but I am saying that nothing flows from it because it had a two-tier stage, one tier which had made the recommendation, the 2nd tier came to an abrupt end. So, what is left now, nothing flows from it. "

"In view of my submission which could be recorded, that is proceedings would be terminated and deserving the rights for the Petitioner to file a motion and reagitate those matters whenever they are advised to do so, otherwise with all due respect there is no live issue to be canvassed, except the recommendations of the Upali Abeyrathna Commission. If the Government says they don't want to implement with the presidential Commission inquiry, didn't even make any order on that therefore, what is left. I would suggest may be to look after their interest for the future before they may be worried that there might be peril in the future if somebody wants to take it up. So, terminate the proceedings but reserving their rights for the parties to reagitate this matter whenever they are advised to do so. These are my submissions and I thought it is fit that I should come and make these submissions before your lordships court so that appropriate order and also considered wisdom will be taken by my learned friend who is appearing for the Petitioner. "

Hon. Attorney general himself makes submissions and informs this Court that Cabinet has decided not to take any action regarding the Upali Abeyrathna Presidential Commission Report. Therefore, he is requesting this Court to terminate the proceeding.

The learned President's Counsel argued on behalf of the Petitioner that is it clear that the 1st to the 3rd Respondents have lent themselves party to a political witch-hunt, and the there is no legal basis whatsoever for the findings and the report. An examination of the mandate of the 1st to the 3rd Respondents, it is crystal clear that there is no mandate for the recommendations made and the findings arrived at.

The said findings and recommendations and material collected is ex- facie and otherwise ultra-vires the powers of the Commission and the power given to it in terms of the mandate marked P2a, P2b, P3a and P3b. The Gazette marked P2(a), which set out the original mandate of the 1st to the 3rd Respondents, as amended by P2(b). The findings far exceed the mandate set out in P2(a) as amended by P2(b). In the circumstances, ex-facie, the findings are ultra-vires the mandate of the 1st to the 3rd Respondents.

It was the contention of the learned President's counsel for the Petitioner that in any event the findings and recommendations and material collected are grossly unreasonable. The

findings and recommendations and material collected are nowhere in the vicinity of such that could be arrived at by a reasonably prudent person. On behalf of the Petitioner, he further submits that to put it in the famous words of Lord Diplock, the findings and recommendations so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

The evidence of this Petitioner, before the Commission has been clear in that, inter alia;

- a. The Anti-Corruption Committee and the Secretariat were established consequent to approval by the Cabinet of Ministers;
- b. The Cabinet of Ministers at the time, having deliberated decided to establish the committee;
- c. Prosecutions and actions have been initiated by the relevant law enforcement authorities, including, the Attorney General, the Police and the Commission to Investigate Allegations of Bribery; and
- d. Thereafter, respective Courts have taken cognizance of the matters and proceedings have been initiated in terms of the law.

The unequivocal position of the Petitioner is as follows;

1. at all material times it was the relevant authorities, including the Police, the Attorney General's Department and the Judiciary that investigated the complaints, took decisions to prosecute and carry out prosecutions in all cases; and
2. at no point did the Petitioner interfere with such investigations and with such authorities.

It is crystal clear that there appears to be no finding that the Petitioner interfered and meddled with any proceedings and that the Petitioner manipulated and engineered any proceedings in a particular desired fashion. However, the recommendations, that have been arrived at (from page 17 onwards in P6), are gross unreasonable and far exceeds what a reasonably prudent person would arrive at, given the positions and the evidence before them. In the circumstances, the findings are unreasonable in the Wednesbury sense and ought to be quashed, on this ground alone.

According to the learned Additional Solicitor General, the 5A Respondent's position appears to be as follows;

- a. the findings and recommendations and material collected in the report are not final and conclusive;
- b. that the findings and recommendations and material collected have been the subject matter of further Presidential Commission of inquiry;
- c. the term of the said presidential commission of inquiry has expired without extension and no outcome has been achieved;

- d. the Cabinet of Ministers and the relevant authorities including the Attorney General, the Bribery Commission and the Police have indicated that no actions have been and will be taken in terms of the findings and recommendations and material collected; and
- e. in the circumstances, this application would be futile.

On this position alone it is clear that the findings and recommendations and material collected are;

- i. baseless; and
- ii. in any event, completely ultra vires.

As set out earlier, in view of that, particularly the reputation of this Petitioner, these baseless findings cannot be allowed to stand. In view of the position of the 5A Respondent alone, there could not be any questions for this Petitioner's relief being granted. In these circumstances, there is no objection from the Respondents to the reliefs being granted.

In the case of Shell Gas Lanka Ltd. v. Consumer Affairs Authority and others [2008] 1 Sri LR 128 which was a matter regarding an inquiry under Section 13 of the Consumer Affairs Authority Act, it was held by Justice Sriskandarajah that;

"The duty of the court is to see that power shall not be exercised in unlawful and arbitrary manner, when exercise of such powers affects the basic rights of individuals. The courts should be alert to see that such powers conferred by the statute are not exceeded or abused. "

Dealing with an inquiry held under Section 18(3) of the Consumer Affairs Authority act, Justice Sripavan (as he then was) held in the case of Nestle Lanka Ltd. v. Consumer Affairs Authority and another [2005] 2 Sri LR 138, 141 that;

"Though the aforesaid section gives certain amount of discretion to the Authority in order to decide on the increase of a reasonable price, the exercise of such discretion necessarily implies good faith in discharging public duty. The abuse of power or discretion constitutes a ground of invalidity independent of excess of power. It is to be borne in mind that when a power granted for one purpose is exercised for a different purpose or a collateral object or in bad faith, the court will necessarily intervene and declare such act as illegal or invalid. Statutory powers conferred for public purposes are conferred upon trust and not absolutely. That is to say, that they can be validly used only in the right and proper manner."

"The lawful exercise of a statutory power presupposes not only compliance with the substantive and procedural conditions laid down for its performance but

also with the implied requirements governing the exercise of the discretion. Thus, all statutory powers must be exercised fairly and reasonably, in good faith, for the purposes for which they are given with due regard to relevant considerations without being influenced by irrelevant considerations."

In the case of G.P.A De Silva and others v Sadique and Others (1978-79-80) SLR 166, 171, a divisional bench of 5 judges of the Supreme Court held that;

"The classic statement in regard to when a Writ of Certiorari will issue is however found in the judgment of Lord Atkin in R v Electricity Commissioners, in which he held that writs of certiorari and prohibition may "wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority"

In the case of Gregory Fernando and Others v. Stanley Perera, Acting Principal, Christ the King National School and Other [2004] 1 SLR 346, 349 Justice Sripavan (as he then was) stated that;

"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The law is concerned with public confidence in the administration of justice; hence it is of paramount importance to ensure that individuals feel that they have been given a fair hearing before a decision is taken. "

In the case of Mahindapala and Others v. Minister of Lands and Land Development and Others [2009] 2 SLR 324, 327-328 it was held by Justice Lecamwasam that;

"...Had they followed the proper procedure petitioners would have got an opportunity to air their grievances. Failure on the part of the authorities to follow the procedure deprived the petitioners of that opportunity. One pillar of the doctrine of Natural Justice is the right to a fair hearing before an administrative authority acts or makes decisions affecting the rights of subjects..."

Addressing the general procedure required for a fair hearing, Wade (8th Edition) at pages 511-512 states as follows;

"A 'hearing' will normally be an oral hearing. But in some cases, it may suffice to give an opportunity to make representations in writing, provided that any adverse material is disclosed and provided, as always, that the demands of fairness are substantially metWhere an oral hearing is given, it has been laid down that a tribunal must

(a) consider all relevant evidence which a party wishes to submit;

- (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently
- (c) allow witnesses to be questioned;
- (d) allow comment on the evidence and argument on the whole case."

In Gunadasa v. Attorney-General and Others [1989] 2 SLR 130, 133-134 it was held by Justice Gunawardana that;

"...It has been said by Lord Denning in the case of Kanda vs. Government of Malaya that, "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."

"Hence the failure to give to the petitioner a fair opportunity to "correct or contradict" the said witnesses when they gave evidence, in my view has occasioned a violation of the principle of natural justice, that a man's defence must always be fairly heard. The non observation of the said principle of natural justice would consequently amount to an error on the face of the record, which would attract the remedy of Writ of Certiorari"

Wade and Forsyth, Administrative Law (11th Edition; page 428) quote Lord Denning to state;

"if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them"

"The fundamental rule is that, if a person may be subject to pains or penalties, or be exposed to prosecution or proceedings, or be deprived of remedies or redress, or is in some such way adversely affected by the investigations and report, then he should be told the matter against him and afforded a fair opportunity of answering it."

R vs. Race Relations Board, ex parte, Selvarajan, cited with approval in G.P.A De Silva and others v Sadique and Others (1978-79-80 1SLR 166, 171)

"if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have

been made affecting him and then he must be given a fair opportunity to correct or contradict them "

The unreasonableness should be considered as an important element when it comes to issuing of writs. The classic test of "unreasonableness" was set out in the landmark case of the Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223, where it was held that the if a decision is "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it", same is liable to be quashed by way of a writ of certiorari.

In Dona Marian Sandya Kumari Kodduruarachchi vs Additional Secretary, Education quality Development [CA WRIT 343/2009] Decided 30.05.2013 Anil Gooneratne J observed that:

“The hallmark of the Wednesbury connotation of unreasonableness is that the repository of discretion, although acting within the four corners of the legislative grant of discretion, has arrived at a decision which is repugnant to all reason.” -Recent Developments in Administrative Law- G.L. Pieris pg. 189.

In those circumstances, it is clear that in the event the court finds a decision to be unreasonable in the Wednesbury sense, the Courts have had no hesitation in quashing such a decision, on such ground alone.

The writ sought in the prayer to the Petitioner is granted. The findings and the report P6 are quashed as sought.

Wade and Forsyth Administrative Law 10th Edition deals with the power of issuing Writs of Certiorari and Prohibition when the lower Tribunal has acted in excess of Jurisdiction on pages 214 and 215, where there is a breach of natural justice on pages 372 to 379, where there is a lack of fair hearing at pages 405 to 408 and bias at pages 389 to 392.

Wade and Forsyth administrative Law in 12th Edition at page 398 under the sub heading “Acting Fairly”, refers to the case of Furnell vs. Whangarei High School Board [1973] A. C. 660 at 679 where Lord Morris said, that,

“Natural justice is but fairness writ large and judicially.”

At the same page the learned writers have also referred to the dicta of Lord Diplock in Regina vs. Commission for Racial Equality ex parte Hillingdon LBC [1982] A. C. 779 where Lord Diplock said,

“Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decision”.

Hence it appears to this Court, that, as the obligation to exercise powers and discretion fairly extends to administrative bodies too, there is no question about its application to judicial and quasi-judicial bodies.

It is also submitted, that, it was said in Roberts vs. Hopewood, 1925, Appeal Cases 578, that;

“I rest my opinion on higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.” (Lord Wrenbury, page 613).

It is important to note that there are a few cases in which the matters of Writs concerning the Presidential Commission of Inquiry were decided.

- (a) Dharmaratne vs Samaraweera and Others 2004 1 SLR 57
- (b) Mendis. Fowzie and others vs. Goonewardena (1979) 2 SLR 322
- (c) Seneviratne vs. Tissa Dias Bandaranayake and Another (1999) 2 SLR 341
- (d) B. Sirisena Cooray vs. Tissa Dias Bandaranayake and two Others (1999) 1 SLR 1

Article 140 of the Constitution prescribes the Law under which this Court can issue Writs in the nature of Certiorari, Mandamus and Prohibition.

This Court issue a Writ of Certiorari quashing the findings, decisions, material and recommendations of the 1st to 3rd Respondents in the report marked as 'P6' in respect of the Petitioner, contained in pages 17-51 of the report marked P6 in so far as it relates to the Petitioner, under prayer (c) of the Petition dated 30.07.2021.

Considering the circumstances, we make no order for cost.

President of the Court of Appeal

D.N. Samarakoon J.

I agree.

Judge of the Court of Appeal

M.T. Mohammed Laffar J.

I agree

Judge of the Court of Appeal