

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 Writ of Certiorari and Prohibition under and in terms of the Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Gnendra Shani Abeysekara, No.
L/1/1, Elvitigala Flats,
Colombo 08.

C. A. Writ Application No. 0167-20

PETITIONER

vs.

1. Hon. Upaly Abeyrathne, Chairman
Presidential Commission of
Inquiry,
Room No. 210, Block No. 02,
2nd Floor,
Bandaranayake International
Conference Hall,
Buddhaloka Mawatha,
Colombo 07.
2. Daya Chandrasiri Jayathilaka,
Member
Presidential Commission of
Inquiry,
Room No. 210, Block No. 02,
2nd Floor,
Bandaranayake International
Conference Hall,
Buddhaloka Mawatha,
Colombo 07.

3. Chandra Fernando,
Member,
Presidential Commission of
Inquiry,
Room No. 210, Block No. 02,
2nd Floor, Bandaranayake
International Conference Hall,
Buddhaloka Mawatha, Colombo
07.
4. The Secretary,
Presidential Commission of
Inquiry,
Room No. 210, Block No. 02,
2nd Floor,
Bandaranayake International
Conference Hall,
Buddhaloka Mawatha,
Colombo 07.
5. Janaka Bandara
Senior State Counsel
Attorney General's Department
Colombo 12.
6. Hon Attorney General
Attorney General's Department,
Colombo 12.

7. Nissanka Sanadhipathi,
Avangrade Maritime Services (PVT)
Ltd, No 613, Bangalawa Junction,
Kotte Road, Kotte.
8. Avangrade Maritime Services (PVT)
Ltd, NO 613, Bangalawa
Junction, Kotte Road, Kotte

RESPONDENTS

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

Counsel: Asthika Devendra, AAL with Kaneel Maddumage, AAL, Kavindi Weerasekara, AAL with the instructions of Manjula Balasooriya for the Petitioner.

Parinda Ranasinghe P.C. ASG with Chaya Sri Nammuni, DSG and Shemanthi Dunuwille, SC for the 6th Respondent.

Written Submissions: By the Petitioner – Not filed
By the 6th Respondent – Not filed.

Argued on : 11.10.2023

Decided on : 25.03.2024.

N. Bandula Karunarathna J. P/CA

The Petitioner states that he is a citizen of Sri Lanka, and presently holds the rank of Senior Superintendent of Police of the Sri Lanka Police, and prior to his suspension/ interdiction from service, held the post of Director of the Criminal Investigation Department (CID). The Petitioner is 59 years of age, is married and is a father of two children. He joined the Sri Lanka Police on 10th February 1986, as a Sub Inspector of Police and had his basic training at the Sri Lanka Police College - Kalutara. The Petitioner successfully completed his basic training and passed out from the said College on 30th May 1986.

The Petitioner states that during the course of his exemplary career, he has strived to continuously cultivate not only his academic credentials, but also endeavored to hone his skills in the field. To this end, he has obtained several professional qualifications, and additionally, partaken in numerous training courses, both locally and internationally, with particular emphasis on criminal investigations and public security. A non-exhaustive list, demonstrative of the aforesaid self-ameliorative endeavors of the Petitioner includes, *inter alia*;

- (a) Trainer's training course in Crime Scene Management conducted by the British High Commission;
- (b) Crime Scene Management and Forensic Science course conducted by FBI Trainers at Kathmandu in Nepal;
- (c) Criminal Justice Education Diploma course conducted by the FBI National Academy in Virginia supervised and confirmed by the University of Virginia, USA;
- (d) Obtained Certificate for High level professionalism and excellent support to the INTERPOL incident response team;
- (e) Obtained certificate for Understanding Terrorism: Mindset, Methodologies, and Government's Response course by U.S. Department of Justice Federal Bureau of Investigation (FBI);
- (f) Certificate of Attendance for the Forensic Science for Police Administrators and Managers by the Federal Bureau of Investigation Laboratory Division, Evidence Response Team Unit;
- (g) Certificate in recognition of completion of the 'Gangs Developmental Issues and Criminal Behavior' by the U.S Department of Justice Federal Bureau of Investigation;
- (h) Certificate of Attendance, certifying the successful completion of FBI Statement Analysis Course by the U.S Department of Justice Federal Bureau of Investigation;

- (i) Successful completion of the fit challenge events by the National Academy of Fit Challenge - 228th Session.

The Petitioner states that;

- (a) The 1st Respondent is the present Chairman of the Commission of Inquiry, which Commission has been appointed by his Excellency the President of Sri Lanka, by his proclamation as reflected in Gazette Extraordinary Bearing No. 2157/44 dated 09.01.2020 (hereinafter referred to as the Commission), by virtue of the powers vested in him by the Commissions of Inquiry Act No. 17 of 1948 (as amended), with a view of inquiring into and obtaining information pertaining to alleged incidents of Political Victimization of Public Officers, Employees of State Corporations, members of Armed Forces and the Police Service (i.e. such persons who held posts under such categories of service), between the period commencing 08th January 2015, and culminating on 16th November 2019.
- (b) The 2nd and 3rd Respondents are the other two remaining members of the aforesaid Commission of Inquiry. The Petitioner states that the 1st to 3rd Respondents who collectively comprise of the said Commission of Inquiry, are public servants in terms of Section 9 of the Commissions of Inquiry Act and as such, any order and/or decision and/or act and/or omission of the said Commission would constitute an administrative and executive act, which renders the same amenable to the Writ Jurisdiction of this Court.
- (c) The 4th Respondent is the Secretary to the said Commission of Inquiry.
- (d) The 5th Respondent is Senior State Counsel summoned by the 1st-3rd Respondents to appear before the commission who is currently engaged in certain prosecutions relating to this application and whom I am made aware to have been summoned to appear before the Commission. The said Respondent is made party for notice and no relief is sought against him by this application.
- (e) The 6th Respondent is the Hon. Attorney General. He has been named a party as he has already informed the 1st-3rd respondent members of the commission its total lack of Jurisdiction to inquire in to a matter of a complaint made by a private individual particularly when the Hon. Attorney General has sent indictment to the High Court against the

Complainant Nissanka Senadhipathy (7th Respondent). No relief is sought against the Hon. Attorney General.

- (f) The 7th Respondent is the Chairman of the 8th Respondent and is the virtual complaint which related to this application.
- (g) The 8th Respondent is a company which has been incorporated under the Companies Act No. 07 of 2007 Which can sue and be sued in its corporate name. The 7th Respondent has made the complaint on behalf of the 8th Respondent.

The Petitioner states at the very outset that, as shall be morefully adverted to and demonstrated hereinafter, he has preferred this application before this Court challenging and impugning the most arbitrary, capricious, ad-hoc, most illegal, procedurally flawed inquiry conducted by the 1st to 3rd Respondents based on Complaint No: PCI/PV/01/Com./50/2020, made primarily on the basis that the said Respondents do not have the requisite jurisdiction to conduct such inquiry in terms of the mandate issued to them by Gazette Extraordinary No. 2157/44 dated 09th January 2020 Gazette Extraordinary No. 2159/16 dated 22nd January 2020 and in terms of the Commissions of Inquiry Act No.17 of 1948 (as amended).

The Petitioner states that after he completed his basic training, he served as a Sub Inspector of Police at the Cinnamon Gardens Police Station from 30th May 1986 to 1st July 1986. Thereafter, the Petitioner was absorbed into the Special Task Force of the Sri Lanka Police on 1st July 1986 and underwent Para Military Training at the Katukurunda Training Wing until 5th December 1986.

The Petitioner states that during his service with the Special Task Force, he had served in many parts of the Island including operational areas. The Petitioner was thereafter posted to the Special Task Force camp at Kiran in the Batticaloa District in the Eastern Province of Sri Lanka on 9th December 1986 and served at such post until 29th July 1987. Thereafter, he was posted to the Morakottanchena Special Task Force Camp on 29th July 1987 and served at such post until 10th May 1988. On 10th May 1988, he was called back to serve at the Special Task Force Camp at Kiran and served at such post until 17th December 1989.

He was posted at Yalabowa Special Task Force Camp at Wellawaya in Uva Province from 17th December 1989 to 9th July 1990. Thereafter, the Petitioner was posted to Sangamankanda Special Task Force Camp in the Ampara District until 17th December 1990. On 17th December 1990, the Petitioner was posted to the Special Task Force Camp at

Sastrawela Jungle Training Camp in the Eastern Province of Sri Lanka as an Officer-in-Command.

The Petitioner states that on 1st January 1991, the Petitioner was promoted to the rank of Inspector of Police and was transferred to the VIP Security Division of the Police Special Task Force with effect from 27th January 1992. Subsequently, the Petitioner underwent training on Close Protection of VIPs from 3rd February 1992 to 3rd March 1992 at the Katukurunda Special Task Force Training Wing.

Thereupon, the Petitioner states that he was assigned to provide close protection to His Excellency the President and Cabinet Ministers. From 11th April 1992 to 06th October 1994, the Petitioner performed his duties as a close protector of designated VVIPs, as a member of the Close Protection Team of the Special Task Force. On 6th October 1994, the Petitioner was posted to the Special Task Force Camp at Porathiv in the Eastern Province of Sri Lanka, where he served as the Officer in Command till 20th January 1995.

On or about 20th January 1995, the Petitioner was absorbed into the general duties of the Sri Lanka Police and served as the Deputy Officer-in-Charge of Crimes at the Narahenpita Police Station from on or about 20th January 1995 to 01st January 1996. Subsequently, the Petitioner was transferred to the Grandpass Police Station as Officer-in-Charge of the Crime Branch on 01st January 1996. The Petitioner states that he performed duties as Officer-in-Charge of the Range Criminal Investigation Office at the Maradana Colombo Unit from 27th September 1998 to 10th January 1999.

He was thereafter promoted to the rank of Chief Inspector of Police with effect from 1st January 2003 and the same was subsequently antedated by the National Police Commission to 8th September 1998. This was considered a special promotion on Merit by the Sri Lanka Police. The Petitioner states that on a special request made by the then Deputy Inspector General of Police of the Criminal Investigation Department to the Inspector General of Police, the Petitioner was assigned to the Criminal Investigation Department on 10th January 1999. From 23rd August 2004 to 27th September 2007, the Petitioner served as the Officer-in-Charge of the Criminal Investigation Department.

He was thereafter promoted to the rank of Assistant Superintendent of Police on 27th September 2007, which was considered as a field promotion of the Sri Lanka Police and was posted as the Assistant Superintendent of Police in charge of Jaffna (District I) in the Northern Province of Sri Lanka on 27th September 2007. On 1st January 2008 the Petitioner's field promotion was confirmed and he was gazetted as an Assistant Superintendent of Police. The Petitioner states that on 1st April 2009, he was reposted to

the Criminal Investigation Department, where he served till 20th April 2010. Subsequently, the Petitioner was transferred as the district-in-Charge Officer of Homagama South. Thereafter, on 14th July 2010, the Petitioner was transferred back to the Criminal Investigation Department.

He was given a special promotion to the rank of Superintendent of Police on 25th August 2011, by the National Police Commission, based on a special recommendation made by the then Inspector General of Police, Mr. N. K. Illangakoon. The said special promotion was given to the Petitioner by the National Police Commission, based on a commendation made by Hon. Justice Shiranee Tilakawardane, in consideration of the Petitioner's exceptional work in the Angulana Murder Investigation.

The Petitioner states that he was promoted to the rank of Senior Superintendent of Police by the National Police Commission on 25th August 2016, based on the unblemished record maintained by the Petitioner during 05 years of previous service in the rank of Superintendent of Police. As a senior officer of the Criminal Investigation Department, he supervised the Special Investigation Unit (II), Special Branch, Gang Robbery Branch and Homicide Investigation Unit of the Criminal Investigation Department. On 9th September 2017, he was appointed as the Director of the Criminal Investigation Department - Sri Lanka's premier law enforcement body and the functional division of the police charged with international law enforcement cooperation, investigation of high profile and complex crimes, large scale financial crimes and human smuggling.

The Petitioner states that he has rendered 33 years of highly meritorious service in the Sri Lanka Police, with an unblemished record. The Petitioner states that hitherto, he has never been served with a charge sheet or even suspended. Although he has been named as a Respondent in several fundamental rights applications, the same has not been on account of any act taken by him personally as Director CID, or in his personal capacity, but solely on account of the fact that as Director, he was the head of the Criminal Investigation Department. He also has obtained the "Purnabumi medal" (පුර්ණබුමි පදක්කම) for his services rendered with the Special Task Force (STF) in high combat zones during the height of the civil war in the Northern and Eastern provinces. The Petitioner states that he was awarded the Humanitarian Operation Medal (මානුෂීය මෙහෙයුම් පදක්කම) for his exceptional service rendered to protect the country during the period of war, and he was also awarded the Deergha Sewa medal (දීර්ඝ සේවා පදක්කම), and Vishishta Sewa medal (විශිෂ්ට සේවා පදක්කම), amongst such other awards.

The Petitioner further states that, he received numerous commendations, not only from the Police but also from the Judiciary, the Attorney General's Department, as well as from

numerous ambassadors, in consideration of the highly meritorious and dedicated service rendered by the Petitioner throughout his career, particularly in respect of criminal investigations and the assistance provided by the Petitioner to the State (prosecution) in judicial proceedings.

It is evident that the Petitioner was serving as the Director of the Criminal Investigation Department until he was transferred as the Personal Assistant to the Deputy Inspector General of Police (Galle Range) with effect from 21.11.2019. The Petitioner has received summons and notice dated 16.06.2020 under the hand of the 4th Respondent summoning him to appear before the Commission of Inquiry on 17.06.2020 on the order made by the 1st to 3rd Respondents to inquire into matters pertaining to the purported complaint bearing No. PCI/PV/01/Com./50/2020.

The said Commission has been described as the "Presidential Commission to inquire into and obtain information in relation to alleged Political Victimization of Public Officers, Employees of State Corporations, members of Armed Forces and the Police Service who held posts during the period commencing 08th January 2015 and ending 16th November 2019". Certain parties who had been named as Respondents by the Commission had recorded a preliminary objection with regard to the jurisdiction of the Commission to entertain the complaints. The Petitioner says that even though the Petitioner was not represented when the above preliminary objection was raised by the other parties, when the Petitioner appeared before the Commission on 23.06.2023, he also concurred with the said preliminary objection.

The 1st Respondent refused to make any order regarding the said preliminary objection and stated that the Commission had come to a conclusion regarding the jurisdiction at the time of filing the complaint by the 7th Respondent and there was no necessity to deliver an Order. The Petitioner filed the present Writ Application bearing No. 167/20 on 10.07.2020 *inter alia* impugning the decision of the Commission to name the Petitioner as a Respondent in the inquiry and issuing summons on the Petitioner. Despite the Learned President's Counsel appearing for the 1st to 4th Respondents gave an undertaking on 27.07.2020 to this Court, the 1st to 3rd Respondents have made certain recommendations and decisions against the Petitioner and the instant application was filed impugning the said recommendations and decisions.

The Petitioner states that he believes the complaint by the Nissanka Senadhipathi of the Avant Garde Maritime Services (Pvt) Ltd., the 7th Respondent in this present case has been lodged before the Commission on the basis of unfounded allegations against the

Petitioner. He was the officer of the CID in which the investigation regarding the 7th Respondent was conducted. The 7th Respondent maliciously targeting and intimidating investigations and obstructed the prosecution. The Petitioner and the other officers in the CID who conducted the investigations against the complainant Nissanka Senadhipathi, before the Respondents in the present application are required in terms of the law to diligently assist the prosecution before the Court of Law.

The Petitioner prays *inter alia*;

(a).....

(b).....

(c).....

(d).....

(e) Issue a mandate in the nature of writ of Certiorari quashing the decisions taken by one or more of the 1st to 4th Respondents to accept/entertain/investigate the complaint made by the 7th Respondent to one or more or all of the 1st to 4th Respondents dated 31.01.2020 marked as P15a.

(f) mandate in the nature of a writ of Certiorari quashing the decisions taken by the 1st to 4th Respondents to name the Petitioner a respondent/summon him under section 16 of the Commission of Inquiry Act No. 17 of 1948 (as amended) in the inquiry No. 50/2020 emanating from the complaint made by the 7th Respondent dated 31.01.2020 marked as P15a.

(g) mandate in the nature of writ of Certiorari quashing the decisions to issue summons on the Petitioner under the Commissions of Inquiry Act No. 17 of 1948 (as amended) by the summons dated 16.06.2020 marked as P14.

(h) mandate in the nature of writ of Certiorari quashing the decisions dated 23.06.2020 and 30.06.2020 taken by the 1st to 3rd Respondents not to consider/to overrule the preliminary objections taken by the Petitioners and other respondents to that inquiry regarding the jurisdiction of the Commission to inquire into the complaint dated 31.01.2020 marked as P15a.

(i) Grant and issue a mandate in the nature of a writ of Prohibition, prohibiting the 1st to 4th Respondents from exercising any Act/omission that amounts to a violation of the purpose and the powers under and in terms of Gazette Extra Ordinary No. 2157/44 dated 09th of January 2020 and notification published in

Gazette Extra Ordinary 2159/16 dated 22nd of January marked as P17a and P17b.

(j) Grant and issue a mandate in the nature of writ of Prohibition preventing the 1st to 4th Respondents inquiring into the complaint made by the 7th Respondent marked as P15a dated 31.01.2020.

(k) Grant and issue a mandate in the nature of a Prohibition preventing the 1st to 4th Respondents from naming the Petitioner as a respondent and/or person coming under Section 16 of the Commissions of Inquiry Act No. 17 of 1948 (as amended) in the inquiry which emanates from the complaint preferred by the 7th Respondent dated 31.01.2020 marked as P15a.

(l) award the Petitioner compensation as determine by Your Lordships Court.

(m) award the Petitioner costs.

(n) Grant the petitioner such other and further reliefs as to Your Lordships Court shall seem meet.

It is crystal clear that when we consider the arguments in all the other similar applications before this Court against the respondents that the Commission of Inquiry has shown hostility throughout the proceedings towards the parties that came before the Commission.

The contention of the learned 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 8th February 2023. 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 counsel submits that the findings and the Report is contrary to all principles of natural justice known to law.

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 bidding 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) 1 S.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 intends 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 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 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 Srisankarajah 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 case was taken up together with the other similar matters and argued together by all counsel considering the unreasonableness of the final report of the Commission. Although the petitioner in this case has not prayed in his Petition dated 10.07.2020, to quash the final report of the Commission, I wish to consider granting the relief to the petitioner in this case under Prayer (n) of the Petition.

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 'P13' in respect of the Petitioner on the complaint bearing No. PCI/PV/01/Com./50/2020 (P-6), of the report marked P13 in so far as it relates to the Petitioner, under prayer (b) of the Petition dated 13.01.2022 in CA-WRT-0026-22.

The said Judgment will directly apply in the present case as well.

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