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

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

Field Marshal Sarath Fonseka

No. 167/713, Heenela Road,

Kirimandala Mawatha, Colombo 05.

PETITIONER

CA (Writ) Application No. 135/2021

vs.

1. Hon. Upaly Abeyratne,
   Retired Judge of the Supreme Court,
   No. 42/10 Beddagana North,
   Pitakotte.

2. Hon. Daya Chandrasiri Jayatilaka,
   Retired Judge of the Court of Appeal, No.24,
   Diyawanna Gardens, Pelawatta,
   Battaramulla.

3. Chandra Fernando,
   Retired Inspector General of Police,
   No. 1 Shrubbery Gardens,
   Colombo 04.

4. Pearl Weerasinghe,

Room No. 210 ofB10ck 2, BMICH,
Bauddhaloka Mawatha, Colombo
07.

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

RESPONDENTS

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

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D. N. Samarakoon, J.

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M. T. Mohammed Laffar, J

Counsel: Farman Cassim PC with Thavishi Wanaguru AAL, Nimali Abeyratne AAL, Vimasha Premasiri instructed by Mallawarachchi Associates for the Petitioner.

M. Gunatilleke ASG, PC with S. Wimalasena DSG for the Respondents.

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Written Submissions: By the Petitioner – 01.11.2023.

By the 5th A Respondent – 26.06.2023.

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 3' in respect of the petitioner. The 1st 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.

The Petitioner says that he is a citizen of Sri Lanka and was the 18th Commander of the Sri Lankan Army and under his command the Sri Lanka Army ended the 26-year Civil War defeating the LTTE. The Petitioner retired from the Sri Lanka Army in the rank of General and in 2015 became the 1st Sri Lankan Army Officer to be promoted to the rank of Field Marshall. He was the common opposition candidate in the 2010 Presidential Election and has been in active politics up to date. The Petitioner has served as a Cabinet Minister from 2016 until October 2018.

A Presidential Commission of Inquiry was established by His Excellency the Former President of Sri Lanka Mr. Gotabhaya Rajapaksha by the warrant issued on 9th of January 2020 under the seal of the Democratic Socialist Republic of Sri Lanka in terms of Section 2 of the Commission of Inquiry Act by way of the Gazette. The said Commission was established by way of Gazettes marked as 'P2a', 'P2b', 'P2c' and 'P2d' to the Petition to inquire and make investigations in relation to any form of political Victimization that may have occurred between the period of 8th January 2015 to 16th November 2019, to Government Officers and employees of State Corporations, Members of Armed Forces and the Police Service who held posts prior to the Presidential Election and/or the General Election held in January and August 2015.

Subsequently a Commission Report was formulated under the name 'Report of the Commission of Inquiry appointed to inquire into Political Victimization'.

The Petitioner says that an official and Final copy of the said Report of the Commission of Inquiry had not been published nor made available to the Petitioner, despite the continuous requests that had been made to the Presidential Secretariat by the General Secretary of the 'Samagi Jana Balawegaya' marked as 'P4' to the Petition and by Mr. Nimesh Kumaratunga Attorney-at-Law to obtain a certified copy of the same marked as 'P5' to the Petition. As such requests had been made to no avail the Petitioner had thereafter obtained a copy of the said Report marked as 'P3' to the Petition, which had been widely circulated, and the Petitioner verily apprehends that it is in fact an accurate Report of the 1st to 3rd Respondents. The Petitioner states that upon perusal of the said Report of the Commission the Petitioner has been named as a responsible person (වගකිව යුතු පුද්ගලයන්) in Volume I part VII of the said Report marked as 'X6' hereto.

The Petitioner has also been named as a Respondent in complaint Number 205/2020 in Volume I Part 9 (IX), complaint Numbers 289/2020 and 290/2020 in Volume I Part 9 (XI), complaint Number 316/2020 in Volume 1 Part 9 (XI), complaint Number 816/2020 in Volume 1 Part 9 (XIV), complaint Numbers 432/2020 and 433/2020 in Volume 1 Part 9 (XVIII), complaint Number 8807/2020 in Volume 2 9 (XXXII), complaint Number 1842/2020 in Volume 2 Part 9 (XL), complaint Number 1941/2020 in Volume I Part 9 (XLVI), complaint Number 414/2020 in Volume 3 Part 9 (LV),complaint Number 416/2020 in Volume 3 Part 9 (LVI), and complaint Number 352/2020 in Volume 3 Part 9 (LIX).

The Petitioner says that he was at no point informed that there were proceedings that had been held against him at the Commission, and the Petitioner verily believes that evidence had been led against the Petitioner without him being present and/or even informing him of such a proceeding being held which is a grave infringement and/or violation of the Petitioners Civic Rights and Fundamental Rights guaranteed under the Constitution of Sri Lanka. The Petitioner had not been served with summons and/or received notice from the 1st to 4th Respondents and/or their agents and or the Commission in any manner or form whatsoever under and in terms of the Commission of Inquiry Act No. 17 of 1948 (as amended).

The Provisions of Section 7 of the Commission of Inquiry Act No. 17 of 1948 (as amended) contains the Powers of the Commission, thereby the attention of Your Lordships Court is drawn to Section 7(c) of the said Act which states as follows,

> '(c) to summon any person residing in Sri Lanka to attend any meeting of the commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession

The attention of this Court is drawn to Section 11 of the Commission of Inquiry Act No. 17 of 1948 (as amended) which provides as follows,

> (1) Every summons shall, in any case where a commission consists of one member only, be under the hand of that member, and in any case where a commission consists of more than one member, be under the hand of the chairman of the commission
>
> Provided that where a person has been appointed under section 19 to act as secretary, any such summons may, with the authority of the commission, be issued under the hand of the secretary
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> (2) Any summons may be served by delivering it to the person named therein, or if that is not practicable, by leaving ill at the last known place of abode of that person.

(3) Every person on whom a summons is served shall attend before the commission at the time and place mentioned therein, and shall give evidence or produce such documents or other things as are required of him and are in his possession or power, according to the tenor of the summons.

The Petitioner was not informed that he had been named as a person of interest and/or that his conduct was the subject matter of investigations and/or inquiries by the Commission. He was not informed or made aware in manner whatsoever of the nature of the complaint that had been made against him and/or any allegation that had been made against him. As described hereinabove the Petitioner has been wholly deprived the Right to Natural Justice and the Audi Alteram Partem rule has been breached at the said Commission.

In the case of The University of Ceylon v E W F Fernando NLR, Volume 61, page No 505 the Supreme Court held;

> In quasi-judicial inquiries, the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. Apart from special circumstances, there is a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice, In general, the requirements of natural justice are, first, that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith.

In the case of Ridge v. Baldwin [(1963) 2A.E.R. 661 Lord Hodson referred (at page 114) to the three features of natural justice which stand out are; 1) the right to be heard by an unbiased, 2) the right to have notice of charges of misconduct, 3) the right to be heard in answer to those charges, all of which have been denied to the Petitioner at this inquiry.

In Dharmaratne v Samaraweera and others the Supreme Court held that,

> The basic standard of fairness implicit in the rules of natural justice required the 1st respondent himself, at some stage of his inquiry, to identify the allegation against the appellant, to inform him thereof, and to give him the opportunity of meeting those allegations, by cross-examining witnesses or otherwise. The 1st respondent failed to do so and what he did instead was to cast this burden on the appellant - namely to attend the Commission or obtain copies of the proceedings, to analyze the entire evidence to ascertain whether there were allegations against him, to assume that the commission wished to pursue those allegations, and on that basis to request the Commission to allow him to defend

himself. Section 16 of the Act does not impose any such burden. The adverse findings against the appellant were therefore reached in flagrant violation of the *Audi alteram Partem* rule, and must be quashed on that ground. The appellant also complains that the 1st respondent has acted ultra vires in terms of reference set out in the warrant and/or the provisions of the Commissions of Inquiry Act and therefore the findings and the recommendations of the Commissioner are void.

It was for those reasons that at the conclusion of the hearing I allowed the appeals, set aside the judgement of the Court of Appeal, and issued mandates in the nature of writs of certiorari to quash the 1st respondent's findings (contained in his Report marked A3) of involvement/guilt as against the two appellants, and his recommendations therein that the two appellants be deprived of their civic rights for seven years and that criminal proceedings be instituted against them, Each of the appellant will be entitled to costs in a sum of Rs 5000 payable by the State.

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 attention of this Court is drawn to complaint No. 205/2020 on volume I page 354 of the said Report to which the Petitioner has been named as the 4th Respondent, which *inter alia* provides;

'එසේම, එකී වැරදි සිදු කිරීම සඳහා අනුබල දීමෙන් දණ්ඩ නීති සංග්‍රහයේ 100 වගන්තිය යටතේ දඩුවම් ලැබිය යුතු අනුබල දීමේ වරද සිදුකර ඇති බැවින්ද, නිසි කරණ බලය ඇති අධිකරණයේ ඉහත නම් සඳහන් වගඋත්තරකරුවන්ට එරෙහිව නඩු පැවරීම'

The Petitioner further draws the attention of this Court to complaint No. 289/2020 on volume I page 416 and 418 of the said Report to which the Petitioner has been named as the 4th Respondent, which inter alia provides;

> '..... මහේස්ත්‍රාත් අධිකරණයෙහි ගොනු කර ඇති අංක බී 9556/15, බී 9557/15, බී 9579/15 සහ බී 44/15 දරණ බී වාර්තාවන්හි සහ එම බී වාර්තා වලට ගොනු කරන ලද වැඩිදුර වාර්තාවන්හි දැක්වෙන **සියලුම චෝදනා වලින් සියලුම චුදිතයන් නිදොස් කොට නිදහස් කල යුතු බවට කොමිෂන් සභාව ඒකමතිකව තීරණය කර ඇත**
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> එසේම කොළඹ මහා අධිකරණයේ පවරා ඇති HC 8570/16, HC 8546/16, HC 8222/16 දරණ අධි චෝදනා පත්‍ර ඉල්ලා අස්කර ගැනීම මහින් නිෂ්ප්‍රභා කළ යුතු බවටත් **එම අධිචෝදනපත්‍ර වලින් චෝදනා කර ඇති සියලුම චිත්තිකරුවන් නිදොස් කොට නිදහස් කළ යුතු බවටත් කොමිෂන් සභාව තීරණය කර ඇත'**
>
> 'පැමිණිලිකරුවන් නිවැරදි අධිකරණ වන මාළිගාකන්ද අධිකරණයට ඉදිරිපත් නොකර ඔවුන් රක්ෂිත බන්ධනාගාර ගත කිරීමේ කුමන්ත්‍රණය දියත් කිරීම සඳහා ඔවුන් කඩුවෙල මහේස්ත්‍රාත් අධිකරණයට ඉදිරිපත් කිරීමට ක්‍රියාකළ **පොලිස් නිලධාරීන්ට එරෙහිව දණ්ඩ නීති සංග්‍රහය පනත යටතේ සහ අල්ලස් පනතේ 70 වගන්තිය යටතේ නඩු පැවරීම'**

In all 13 complaints in which the Petitioner has been named as a Respondent the said Commission has determined the course of action that is to be taken against the Petitioner and the other Respondents so named in the said complaint which is a clear indication that the 1st to 3rd Respondents have exceeded their jurisdiction. The attention of this Court is drawn to Section 7(2) of the Commission of Inquiry Act No. 17 of 1948 (as amended), which is the only power that has been vested upon the Commission is under and in terms of the said Act which states as follows,

> "where any report is rendered in terms of any warrant issued to a Commission appointed under this Act, such Commission mat/ make recommendations to the relevant disciplinary authority with regard to the action that it considers necessary to be taken in respect of any person whose conduct is subject of the inquiry or investigation or who is in any way implicated or concerned in the matter which such Commission -was warranted to investigate or inquire into

The Petitioner states that under and in terms of Section 7(2) only recommendations can be made to the relevant Disciplinary Authority and in this instant application the Commission has exceeded their Authority, by deciding the course of action that is to be taken against the Petitioner and the persons named as Respondents in the Report marked as 'P3' to the Petition. Under Section 24 of the Commission of Inquiry Act No. 17 of 1948 it clearly states that it shall be lawful for the Honorable Attorney General to institute Criminal Proceedings in any Court of law in respect of any offence, based on the material collected in the course of an investigation or inquiry or both.

Therefore, it is indisputable that in any event it is the Hon. Attorney General who has the power to institute Criminal Proceedings and the Commission has usurped the power of the

Attorney-General when deciding the course of action that should be taken against the Petitioner and the other persons named as Respondents in the Report marked as 'P3' to the Petition.

The Petitioner further 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 summons or 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 the 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 sad 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 la 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 *praprio 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 5th 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 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, 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 5th 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 5th 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 fee 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 as substantially met ....Where 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 defense 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 P3 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. Fowzieand 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 `P3' in respect of the Petitioner, contained in the report marked P3 in so far as it relates to the Petitioner, under prayers (c), (d), (e), (f) of the Petition dated 08.03.2021.

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