

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

CA Writ Application No: 357/21

G. M. Ramesh Chandima Aponsu,
No. 17/6,
Sri Dharmapala Road, Mt. Lavinia.

PETITIONER

Vs.

(1) General Shavendra Silva,
Former Commander of the Sri Lanka
Army,
C/o Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayewardenepura,
Kotte.

(1A) Lieutenant General H. L. V. M.
Liyanage,
Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayewardenepura,
Kotte.

- (2) Lieutenant General N. U. M. M. W.
Senanayake (Rtd),
Former Commander of the Sri Lanka
Army,
C/o Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayewardenepura,
Kotte.
- (3) Major General N. A. Dharmaratne (Rtd).
Former Deputy Chief of Staff,
Chairman / Board President,
Army Selection Board No. 2.
C/o Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayewardenepura,
Kotte,
- (4) Major General H. M. T. B. Hangilipola
(Rtd),
Member,
Army Selection Board No. 2,
C/o Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayewardenepura,
Kotte.
- (5) Brigadier R. M. J. B. Ratnayake,
Member,
Army Selection Board No. 2,
Centre Commandant, Sri Lanka Army
Women's Corps,
Regimental Centre,
Kinsey Road,
Colombo 08.

- (6) Major General S. P. K. A. Pilapitiya,
Colonel of the Regiment,
Vilavabahu Infantry Regiment,
Army Camp,
Boyagane,
Kurunegala.
- (7) Brigadier W. S. M. Hemarathna,
Former Centre Commandant of the
Vijayabahu Infantry Regiment,
C/o Centre Commandant,
Vijayabahu Infantry Regiment,
Army Camp,
Boyagane,
Kurunegala.
- (7A) Brigadier G. P. Kodithuwakku,
Centre Commandant,
Vijayabahu Infantry Regiment,
Army Camp,
Boyagane,
Kurunegala.
- (8) Lieutenant Colonel E. M. M. S. K.
Ekanayake,
Former Commanding Officer of the
14th Battalion of the Vijayabahu
Infantry Regiment,
C/o Commanding Officer,
14th Battalion,
Vijayabahu Infantry Regiment,
Army Camp,
Tripoli, Maradana,
Colombo 10.

(8A) Major P. A. T. Niroshan, Commanding
Officer,
144 Battalion, Vijayabahu Infantry
Regiment,
Army Camp,
Tripoli, Maradana,
Colombo 10.

(9) General G. D. H. Kamal Gunaratne (Rtd),
Secretary,
Ministry of Defence,
Defence Headquarter Complex,
Sri Jayewardenepura,
Kotte.

(10) Hon. Attorney-General,
Attorney-General's Department,
Colombo 12.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Shyamal A. Collure with Prabath S. Amarasinhe and A.P. Jayaweera for the
Petitioner.

M. Jayasinghe, DSG with A. Weerakoon, SC for the Respondents.

Written submissions tendered on:

03.11.2023 by the Petitioner

Argued on: 14.07.2023

Decided on: 07.03.2024

S.U.B. Karalliyadde, J.

The Petitioner to this Writ Application was commissioned in the Sri Lanka Army as a Second Lieutenant and posted to the Vijayabahu Infantry Regiment. On 24.07.2019 he and other two Army men were arrested by the Military Police while smoking a cigar consisting of cannabis. Consequent to that incident, they were charge-sheeted for committing two offences under the Army Act, No. 17 of 1949 (the Act) by the commandant of the relevant Regimental Centre in which the Petitioner served. The alleged two charges against the Petitioner were briefly as follows;

1. By using Cannabis, the Petitioner had committed an offence punishable under Section 102(1) of the Act
2. By using Cannabis, he had behaved in an unsuitable way as a commissioned officer and thereby committed an offence punishable under Section 129(1) of the Act.

At the summary trial held, the Petitioner pleaded guilty to both charges consequently, he was reprimanded and severely reprimanded for two charges respectively. After continuing the service in the Army, the Petitioner applied for the promotion to the rank of Lieutenant and, prior to applying for the said promotion in or about July 2020, he was informed verbally by the then Center Commandant of the Vijayabahu Infantry Regiment that the 2nd Respondent had made a decision to withdraw his commission, to which the Petitioner forwarded a Redress of Grievance (RoG) (marked as P4) to the

Commander of Army, the 1st Respondent. In regards to the RoG of the Petitioner, he was summoned before a Board consisting of seven high-ranking Officers referred to as the Army Selection Board No. 2 in September 2020 where he was questioned about the aforesaid incident. The position of the Petitioner is that the decision of the Board was never communicated to him. Thereafter, the Regiment that he was attached to was instructed by the letter dated 18.05.2021 marked as P6 by the Centre Commandant of the Vijayabahu Infantry Regiment to take action to withdraw the commission of the Petitioner with effect from 31.07.2021 after recovering from him a sum of Rs. 1,000,000/- being the bond value entered by the Petitioner when he joined the Army. The Petitioner states that the decision to withdraw the commission and dismiss him from the Army was officially informed to him by a letter dated 19.05.2021, signed by the 8th Respondent marked as P11. Consequent to the said decision, his salary for July 2021 was withheld/suspended.

The learned Counsel for the Petitioner argues that in terms of Regulation 37 of the Army Officers Service Regulations (Regular Force) 1992 (marked as P12), other than His Excellency the President, no authority could persuade, require or induce an Officer to retire or resign his commission, further that and under Section 39 of the said Regulation an Officer may be called upon to retire or resign his commission for misconduct or in any circumstances which in the opinion of H. E. the President, require such action, such Officer may request an interview with the Secretary of Defence for an opportunity to state his case. He further argues that the power to

cashier/dismiss/discharge an Officer is exclusively vested with a Court Martial under Section 47 read with Section 133 of the Act and the decision to discharge the commission of the Petitioner by P6 and P11 is an absolute nullity.

In that scenario, the Petitioner in this Writ application seeks the following substantive reliefs, *inter alia*,

(g) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the decision and/ or determination of the 1st and 2nd Respondents or any one of them to withdraw the commission of the Petitioner referred to in the letters marked "P6" and "P 11" and/or the letters therein referred to;

(h) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the decision and/or determination of the 1st and 2nd Respondents or any one of them to cashier/dismiss / discharge / remove the Petitioner from the Sri Lanka Army reflected and/or disclosed in the letters marked "P6" and "P11" and/or the letters therein referred to;

(i) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the decision and/or determination and/or recommendation to withdraw the commission of the Petitioner or to implement the decision of the 2nd Respondent, made by the Army Selection Board No. 2 comprised of the 3rd to 5th Respondents and the parties to be added as the 5A, 5B, 5C and 5D Respondents;

(j) Grant and issue a mandate in the nature of a Writ of Prohibition on the Respondents or any one or more of them prohibiting such Respondent / Respondents from cashiering or dismissing or discharging or removing the Petitioner from the Sri Lanka Army for the offences enumerated in the Charge-Sheet marked "P2" for which the Petitioner has already been punished at a Summary Trial.

The position of the Respondents is that the Army Board No.3 convened on 06.05.2020 regarding the “Promotion to the rank of Lieutenant and career progression”, did not recommend the Petitioner for the promotion to the rank of Lieutenant but recommended to withdraw his commission, considering the earlier conviction for smoking a cigar which contained cannabis. This decision was conveyed to the Center Commandant of the Vijayabahu Infantry Regiment by letter dated 03.07.2020 (marked as R1) which requested that the Petitioner be informed about the said Board decision. The Respondents state that consequent to the RoG forwarded by the Petitioner, he was granted an opportunity to present his grievances before the Army Review Board in respect of “Officers recommended to be retired from the Army due to AWOL and Disciplinary Reasons”, where the said Board decided to uphold the decision of the Army Board No.3. The said decision was informed to the Center Commandant of the Vijayabahu Infantry Regiment by letter dated 02.03.2021 (marked as R2) requesting to inform the same to the Petitioner. However, the Petitioner argues that he was neither summoned before the Army Board No.3 nor informed about the said recommendation and the said Board had no authority whatsoever to recommend his commission to be

withdrawn. The Respondents deny the allegation of the Petitioner that he was not officially informed of the decision to withdraw his commission and state that once an administrative decision is taken with regards to an Officer, it is the standard procedure to inform the said decision to his/her respective Regiment to take necessary action and convey the decision to the Officer concerned.

The learned Counsel appearing for the Petitioner argues that neither the Commander of the Army nor any Board appointed by him has authority whatsoever to withdraw the Petitioner's commission and the power to withdraw the commission of the Petitioner is vested with the President under Regulation 37 and therefore the decision to discharge the commission of the Petitioner as mentioned in P6 and P11 is unlawful, illegal, arbitrary, unreasonable, unfair, irrational and *ultra vires* the statutory powers. The learned Counsel appearing for the Petitioner further argues that even a Court Martial cannot award punishments to an Officer mentioned in Section 133 (1) of the Act including cashiering and dismissal from the Army for the reason that Section 58(c) of the Act stipulates that a Court Martial shall not try a person who has been dealt with summarily for an offence by his Commanding Officer or the Commander of the Army or by any Officer of a rank not below that of Colonel, authorized in that behalf by the Commander of the Army. Unless an Officer is discharged by a Court Martial, it is apparent from Regulation 37 that only His Excellency the President has the power to induce an Officer to retire or resign from his Commission. Regulation 37 reads as follows;

37. No authority other than the President shall require, persuade, or induce an officer to retire or resign his commission.

When considering the document marked R1, it is apparent that the Petitioner has been summoned before the Army Board No. 3 and the Board has recommended to discharge of the commission of the Petitioner and the Army Commander has approved the same. However, no document has been placed before this Court to show that the approval of the President has been granted in respect of the withdrawal of Petitioner's commission. The position of the learned DSG appearing for the Respondent is that before taking further steps to obtain the approval of the President to withdraw the Commission of the Petitioner he has filed this Writ Application and therefore the 1st Respondent was prevented from getting approval of the President even though it has already been sent to the Secretary of the Ministry of Defence.

P6 states thus,

1. ඔබ ඒකකයට අයත් පහත නම සඳහන් නිලධාරී වහා ක්‍රියාත්මක වන පරිදි අධිකාරියෙන් ඉවත් කල යුතු බව යොමුගත (මෙයට ඇමුණුම වශයෙන් ඉදිරිපත් කර ඇති) ලිපිය මගින් දන්වා ඇති බැවින් ඒ සඳහා ඉදිරි කටයුතු සිදු කරන ලෙස දන්වා සිටිමි.

2/ලුතිනන් ජිම්මි ආර්ඪි අපොන්සු (නි/71112)

2. ඒ අනුව තත් නිලධාරී 2021.07.31 දින සිට අධිකාරියෙන් ඉවත් කිරීම සඳහා ඇප බැඳුම්කර ගාස්තු ලෙස රු 1.000.000.00 ක මුදලක් අයකර ගත යුතු බවත් එම මුදල් නිරවුල් කිරීමෙන් පසු මුදල් භාරදීම තුවිතාන්සිපන මෙම රෙම වෙත 2021.05.21 දිනට පෙර ඉදිරිපත් කරන ලෙස දන්වා සිටිමි.

The letter marked P11 written to the Petitioner titled “withdrawal of commission and payment of the bond” reads thus;

“As instructed by the vide ref ltr, hereby instructed you to pay the bond amount of 1,000,000 Rupees and hand over the deposit slip to this HQ before 21 May 2021 **prior to the withdrawal of your commission on 31 July 2021.**”

It is apparent from the documents marked as P6 and P11 that, the Respondents had decided to withdraw the commission of the Petitioner even before obtaining the approval of the President. Lord Diplock in *Council of Civil Service Unions Vs. Minister for the Civil Service*¹ defines illegality as follows,

By “illegality” as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

¹ (1985) AC 374(HL).

In *Francis Vs. Municipal Council of Kuala Lumpur*² where the plaintiff in that case was employed by the Defendant Municipal Council as a clerk. The Council purported to dismiss him. This dismissal was held to be *ultra vires* because in terms of the Ordinance in which the Council is established the power to dismiss the plaintiff is not vested with the Council but with its President.

In *Kotakadeniya Vs. Kodithuwakku and Others*³ where the Inspector General of Police transferred the Petitioner who is a Senior Deputy Inspector-General of Police when the power to transfer him is vested with the Public Service Commission, this Court held that the Inspector General has no power or authority to transfer a S/DIG and the decision is *ultra vires*.

In *Gunaratne Vs. Chandrananda de Silva*⁴ where a Senior Deputy Inspector-General of Police had been placed on compulsory leave by the Secretary to the Ministry of Defence when the authority to do so was vested in the Public Service Commission (PSC), held that the powers given to the PSC regarding disciplinary control had not been delegated and therefore, the decision to place the Petitioner on compulsory leave has to be considered as a personal decision of the PSC. Gunawardena, J. held that,

“In these circumstances, therefore, the decision taken in this case, to place the petitioner on compulsory leave, is a nullity or ultra vires and has no legal effect.

² [1962] 3 All ER 633.

³ (2000) 2 SLR 175.

⁴ [1998] 3 Sri LR 265.

It is appropriate here to refer to the passage that was cited by learned President's counsel for the petitioner from Wade and Forsyth Administrative Law, 7th edition, page 43 Any administrative act or order which is ultra vires or outside jurisdiction is void in law, ie deprived of legal effect. This is because in order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has no legal leg to stand on. The court will then quash it or declare it to be unlawful or prohibit any action to enforce it."

Further, in that case, Gunawardena, J. observed that,

"it is an inflexible and deep rooted principle of law that no act or decision which is void at its inception can ever be ratified ... statutory power must be exercised only by the body or officer in whom it has been reposed or confided unless sub delegation of the power is authorized by express words or Necessary Implication ... one cannot act or decide on his own account... when in fact one is devoid of power to so act or decide and seek to validate that act or decision thereafter under the colour of the concept of ratification."

When considering the above-stated facts and circumstances of the case at hand in the light of the authorities mentioned, it is evident that the Respondents have decided to withdraw the commission of the Petitioner as reflected in the documents marked as P6 and P11 without having the decision-making power taking into hand the powers of the H. E. the President, who have the exclusive power to retire or resign the commission of

an Officer. The view of this Court is therefore that the decision to withdraw the commission of the Petitioner reflected in P6 and P11 is illegal, arbitrary and *ultra vires* the Regulation 37 of the Army Officers Service Regulations (Regular Force) 1992.

Considering all the above-stated facts this Court is of the view that the Petitioner is entitled to the reliefs sought in the prayers (g) to (j) in the Petition. Therefore, the reliefs sought in those prayers are granted. No costs ordered.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL