

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

In the matter of an application for Mandates in the nature of Writs of Certiorari, Mandamus & Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 375/2018

Major General Nirmal Ajith Dharmaratne,
No. 52/11, Nagahamulla Road,
Pelawatte, Battaramulla.

PETITIONER

Vs.

1. Lieutenant General N.U.M.Mahesh W. Senanayake,
Commander of the Sri Lanka Army,
Sri Lanka Army Headquarters, Colombo 3.
2. Major General Ajith Wijesinghe,
Military Secretary,
Sri Lanka Army,
Sri Lanka Army Headquarters, Colombo 3.
3. Hemasiri Fernando,
Secretary,
Ministry of Defence,
15/5, Baladaksha Mawatha, Colombo 3.
4. Major General Piyal Wickremaratne,
Army Board Member.
5. Major General Priyantha Jayasundera,
Army Board Member.

6. Major General Sathyapriya Liyanage,
Army Board Member.

7. Major General Sunil Wanniarachchi,
Army Board Member.

(the 4th – 7th Respondents along with
the 1st Respondent, collectively
constitute the Army Board,
All C/O the Sri Lanka Army,
Sri Lanka Army Headquarters,
Colombo 3.

8. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

Before: Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Sanjeeva Jayawardena, P.C with Nilshantha Sirimanne and Uween
Jayasinha for the Petitioner

Ms. Kanishka De Silva Balapatabendi, Senior State Counsel for the
Respondents

**Application for interim
relief supported on:** 25th March 2019

Written Submissions: Tendered on behalf of the Respondents on 1st April
2019

Tendered on behalf of the Petitioner on 9th April 2019

Decided on: 30th April 2019

Arjuna Obeyesekere, J

The Petitioner who had joined the Sri Lanka Army in January 1985 is currently serving as a Major General. In March 1995, while serving as a Major, the Petitioner had been charged with being absent without leave from the Special Forces Training School at Maduru Oya for a period of 5 days. Upon the Petitioner pleading guilty to the said charge, he had been severely reprimanded and his salary and allowances for 5 days had been forfeited.

According to the *Curriculum Vitae* of the Petitioner annexed to the petition marked 'P1a', the Petitioner had received his regular promotions thereafter and had been promoted to the rank of Temporary Major General in January 2016.¹ During the period 1995 - 2017, the Petitioner had held several Command

On 29th June 2016, Major General N.J.Walgama, Military Secretary attached to the Army Headquarters had issued the document annexed to the petition marked 'P18' under the heading, 'Policy decision on AWOL² Officers'. According to 'P18', the concurrence of the Commander of the Sri Lanka Army had been granted to implement the policy contained therein, with effect from 1st July 2016, on all Officers of the Sri Lanka Army who had been absent without leave before 20th May 2009.

¹ Letter dated 12th February 2016 issued by the Military Secretary confirming the appointment has been annexed to the petition marked 'P14'.

² AWOL is the acronym for 'Absent without leave'.

In terms of paragraph 14 of 'P18', Officers in the rank of Temporary Major General, who are holding the appointment of a General Officer Commanding and who has been absent without leave for a period under 14 days, such as the Petitioner, "should not be considered for further command or instructor appointments. Such Officers should retire on completion of maximum permissible period in the rank of Major General."

Dissatisfied with 'P18', the Petitioner had submitted a Redress of Grievance (ROG) to the 1st Respondent Commander of the Sri Lanka Army on 15th September 2016, through the Colonel of the Gajaba Regiment³, who, in forwarding the said ROG to the 1st Respondent, had stated as follows:

"Further, I have no doubt that his reputation as a capable officer with a professional outlook is known to all his superior officers in the Army, therefore, such an officer is an asset to the Army.

In light of the above, it is presumed that you would certainly realise that his residual service is beneficial to the organisation and the country. Hence, I earnestly request that his appeal be favourably considered please."

It is the position of the Petitioner that inspite of reminders sent to the Military Secretary in July 2017⁴, to HE the President in August 2017⁵ and to the

³ The ROG has been annexed to the petition marked 'P19'.

⁴ Letter dated 3rd July 2017 annexed to the petition marked 'P20'.

⁵ Letter dated 10th August 2017 annexed to the petition marked 'P21'.

Secretary, Ministry of Defence in November 2017⁶, the Petitioner is yet to receive a reply to his ROG. This Court observes that the Petitioner has submitted two further appeals to HE the President in February 2018⁷ and September 2018⁸ but that, apart from referring the said letters to the 3rd Respondent, Secretary, Ministry of Defence, no action has been taken on the purported grievance of the Petitioner. The effect of the long delay in addressing the ROG of the Petitioner is that in terms of 'P18', the Petitioner has not been given any Command positions after April 2017.

It is in these circumstances that the Petitioner filed this application in November 2018, seeking *inter alia* a Writ of Certiorari to quash the aforementioned paragraph of 'P18', in so far as it relates to the Petitioner. The Petitioner's complaint to this Court was that 'P18' was not only illegal in that matters purportedly relating to discipline and promotions were sought to be effected by means other than by way of regulations under the Army Act but also that the policy was irrational and unreasonable and sought to be implemented with retrospective effect.

This application was supported for notices on 7th February 2019. This Court, being of the view that the Petitioner has established a *prima facie* case and also having observed that although 'P18' was issued in July 2016, it was to apply only to those Officers who had been absent without leave prior to 20th May 2009, issued notices on the Respondents.

⁶ Letter dated 7th November 2017 annexed to the petition marked 'P23'.

⁷ Letter sent in February 2018, annexed to the petition marked 'P28'.

⁸ Letter dated 11th September 2018, annexed to the petition marked 'P29'.

By way of a motion filed on 22nd February 2019, the Attorney-at-Law for the Petitioner brought to the attention of this Court that four Officers who are senior to the Petitioner are due to retire by end April 2019 and that the application of 'P18' to the Petitioner will deprive the Petitioner from holding any command positions. Accordingly, the Attorney-at-Law for the Petitioner moved that the learned President's Counsel appearing for the Petitioner be permitted to support for the interim relief prayed for in the petition. This Court, having afforded the Respondents an opportunity of filing Limited Statement of Objections, considered the application for interim relief on 25th March 2019.

In the Limited Statement of Objections as well as during the course of the oral submissions and in the written submissions, the learned Senior State Counsel appearing for the Respondents has taken up the following preliminary objections and moved that this application be dismissed in limine in view of the said objections:

- 1) That Article 35 of the Constitution acts as a bar to the Petitioner maintaining this application as the relief sought by the Petitioner has a direct bearing on a decision which is to be taken by HE the President.
- 2) The Petitioner has failed to pursue administrative relief, as provided for in Section 32 of the Army Act;
- 3) The Petitioner is guilty of laches and delay;

- 4) The Petitioner has suppressed material facts, especially the fact that the Petitioner had been absent without leave in 2002.

What constitutes a preliminary objection has been considered by this Court in Jathika Sevaka Sangamaya vs Sri Lanka Ports Authority and another⁹ and has subsequently been expanded by this Court in Sarath Andarahennadi vs OIC Police Station, Sigiriya¹⁰. Accordingly, an objection must have the following attributes if it is to constitute a preliminary objection:

- "(I) A preliminary objection is a matter that can be decided without going into the merits.
- (II) A preliminary objection can be on a pure question of law such as a patent lack of jurisdiction. It can also be a mixed question of fact and law as well as a question of fact alone but, only in situations where there is *ex facie* either no dispute or a frivolous dispute on the fundamental facts that are being urged before the Court and contained in the pleadings that have been filed.
- (III) A preliminary objection must be distinguished from an objection on any point of law, which can be raised at any part of the trial unlike the preliminary objections, which by its nature is expected to be raised at the beginning of the proceedings prior to the beginning of the arguments in the case."

⁹ 2003 (3) Sri LR 146.

¹⁰ CA (PHC) APN: No. 117/2017; CA Minutes of 27th March 2019.

This Court is of the view that the matters at 1, 2 and 3 above involve an examination of the facts of this case, which can only be done at a full hearing and after having afforded the Respondents an opportunity of filing comprehensive Statement of Objections. They cannot be classified as preliminary objections in accordance with the criteria laid down in the above case. Furthermore, any determination of the said issues at this stage would not only be premature but can be to the detriment of the Respondents, especially since the Respondents have only filed a brief limited Statement of Objections.

However, given the fact that this Court is exercising its discretionary powers, this Court is of the view that in considering this application, this Court is entitled to consider at this stage the conduct of the Petitioner, which is the fourth objection raised by the learned Senior State Counsel. In this regard, the Respondents have submitted that the Petitioner does not have an unblemished and exemplary record of service, as claimed by the Petitioner. In support of this statement, the Respondents have submitted that the Petitioner, while following an Infantry Captain's Career Course in the USA in 2001, had been arrested by the Parker County Sheriff's Office of Texas on charges of aggravated assault with a deadly weapon and had been absent without leave for 118 days from the said Course. The Petitioner had been warned over this incident and asked to pay the course fee of Rs. 65,000 in addition to not being considered for overseas courses for three years. The Petitioner has however annexed to his Counter affidavit marked 'A', the proceedings of the Army Advisory Board, which he claims had been communicated to him in 2002, which reads as follows:

"The Board discussed in detail the events leading for Lt Col M N A Dharmaratne RWP RSP psc GR to be AWOL while following the Infantry Captains Career Course in USA. Instructions were sought from the D legal and it was observed that the Officer was acquitted as he was not found guilty of any charges. Further the Officer was unable to report for duty as he was held by the US Immigration Authorities on expiry of his visa, once being acquitted and released from the Police custody. The Board also decided that as the Officer was acquitted, he should be granted leave for the period held in custody.

The Board decided that the Officer should not be penalised in his future military career for the above and to be considered for promotion and higher appointments in due course."

The Respondents in their limited Statement of Objections as well as the learned Senior State Counsel in the written submissions have confirmed that the 'AWOL was cancelled as per the Advisory Board decision dated 14.12.2002.' In these circumstances, this Court is unable to hold that the statement in the petition that the Petitioner had an unblemished and exemplary record of service is false or that the failure to disclose an incident from which he had been exonerated by the Sri Lanka Army itself is a suppression or misrepresentation of a material fact. It is rather disturbing that the Respondents have raised this issue in view of the final paragraph of the said decision that "the Officer should not be penalised in his future military career for the above..."

Being of the view that the scope of this inquiry should be limited to the interim relief prayed for by the Petitioner, this Court will now consider whether the interim relief should be issued. In doing so, this Court would bear in mind the following observation by Chief Justice Neville Samarakoon in Billimoria v. Minister of Lands and Land Development & Mahaweli Development and two others¹¹:

“It would not be correct to judge such orders in the same strict manner as a final order. Interim orders by their very nature must depend a great deal on a Judge's opinion as to the necessity for interim action.”

In Duwearachchi and another vs Vincent Perera and others¹² this Court considered the application for an interim order in the light of three essential considerations:

- a) Will the final order be rendered nugatory if the petitioner is successful?
- b) Where does the balance of convenience lie?
- c) Will irreparable and irremediable mischief or injury be caused to either party?

The decision in Duwearachchi has been consistently followed by this Court in several cases including in Ceylon Tobacco Company PLC vs Hon. Maithripala Sirisena, Minister of Health and others¹³, Tokyo Super Cement Company

¹¹ 1978-79-80 (1) Sri LR (SC) 10 at page 15.

¹² 1984 (2) Sri LR 94.

¹³ CA (Writ) Application No. 336/2012; CA Minutes of 22nd February 2013.

Lanka (Private) Limited vs Sri Lanka Ports Authority and others,¹⁴ NatWealth Securities Lanka (Private) Limited vs The Monetary Board of the Central Bank and others¹⁵, F Hoffmann La-Roche Ltd and another vs National Medicines Regulatory Authority and others¹⁶ and Wadugodage Wijeratne vs Faiszer Mustapha, Minister of Provincial Councils and Local Government and another.¹⁷

The Petitioner is 54 years of age and is due to retire in April 2020. After the incident in 1995, the Petitioner has been granted his promotions and has been able to reach the highest rank that an officer other than a person who becomes the Commander of the Sri Lanka Army can aspire to. The Petitioner has also held command positions from 1996 until he was declared ineligible by 'P18' in 2017. This fact alone demonstrates that the Petitioner had the maturity, character, integrity and loyalty required to hold such positions, which are the criteria the Army Board of Officers have identified an officer should possess in order to be selected as the Colonel of the Regiment or the Colonel Commandants.¹⁸ The Petitioner has annexed several documents to demonstrate that the Petitioner was entrusted positions of responsibility during the last stages of the military operations and that he carried out his duties as Special Forces Brigade Commander in a satisfactory manner. Thus, in the ordinary course of events, it is not unreasonable to conclude that the Petitioner would have been granted further command responsibilities until his retirement. It is therefore clear to this Court that the reason why the Petitioner is being deprived of such responsibilities is the policy in 'P18'.

¹⁴ CA (Writ) Application No. 258/2013; CA Minutes of 30th August 2013.

¹⁵ CA (Writ) Application No. 335/2015; CA Minutes of 29th March 2016.

¹⁶ CA (Writ) Application No. 98/2016; CA Minutes of 22nd June 2016.

¹⁷ CA (Writ Application) No. 373/2017; CA Minutes of 22nd November 2017.

¹⁸ The decision of the Army Board of Officers dated 4th December 2017 has been produced by the Respondents marked 'R8'.

As observed earlier, the Petitioner has challenged the said policy in 'P18' on the basis of *inter alia* illegality and irrationality. So far, this Court has not been presented any material, either in 'P18' itself or in the Limited Statement of Objections of the Respondents that would rebut the arguments of the Petitioner. This Court has also not been provided with any explanation so far as to why 'P18' is to apply only to those who were absent without leave prior to 20th May 2009 but not thereafter. Thus, in the event this Court finally holds with the Petitioner but, if by that time the Petitioner has retired, the final order that would be delivered by this Court would be rendered nugatory. As Chief Justice Samarakoon said in the case of Billimoria¹⁹ the Petitioner "will be left holding an empty decree worthless of all purposes."

Would the Respondents, the Sri Lanka Army or the country at large suffer by having a person such as the Petitioner holding command positions? It is observed that the Respondents have not taken up the position in their limited Statement of Objections that the Petitioner is not worthy of holding any command positions. Other than the issue relating to the Petitioner being absent without leave in 1995, the Respondents have not cited any other incident which would demonstrate that the Petitioner does not have the maturity, character, integrity and loyalty to hold command positions. On the contrary, the Petitioner has been awarded the Rana Wikrama Padakkama in 1991, the Weera Wikrema Vibushanaya in 2016 and has been recognised by the then Commander of the Sri Lanka Army for his contribution to end terrorism as evidenced by 'P7'.²⁰ It is infact appropriate to quote the citation in 'P7' at this stage:

¹⁹ Ibid. vide Bertram CJ in Weerasuriya vs Sidambaram Chetty [8 Ceylon Weekly Reports 238].

²⁰ Certificate dated 28th May 2009 signed by the then Commander of the Sri Lanka Army annexed to the petition marked 'P7'.

“මූල්‍ය ලංකාදුව්පය දෙකීඩි කරලුමේ පවතු වෙතනාටත් අභ්‍යන්තරව යුද වැදගත් සියලු තුශ්‍රත්වයින් සමුල හානිය කොට රට, දැය, සාමය ආරණ්‍ය කරමින් නිතිය හා සාමය ස්ථාපිත කර ලක් දෙරණෙහි සියලු පෙදෙස් සහ පන කොටස් එකම ධ්‍යායක් යටතට ගෙනැවීන් සමස්ත දේශයට තිරසාර සාමය උදාකරලුමේ පරමාධ්‍යය මුළු කොට ගෙන මූල්‍ය යුද්ධ හමුදාව විසින් අයිතිව කැප කිරීම කොට ඉටුකරන ලද වගකීමේදී 553 බලයෙනාටි සහ විශේෂ බලකායේ බල සේනාධිපති වශයෙන් අනිතව සටත් පෙරමුණ ගත් බුශේරියර් එත් ජේ බරමරත්න ආර් ඩබ පි ආර් එස් පි පි එස් සි ජ්‍යේෂ්ඨ යුද කෙනවියකුගේ සෑපු වූ විකුමාන්වතනාවය, අවංකනාවය, තිරණිතනාවය හා අයිතිව කැපවීම ද පුදුරෝගනය කරමින් රුදුරු තුශ්‍රත්වයි මූල්‍ය යුද්ධය මුදවා ගැනීම සඳහා දියත් කරන ලද මානුෂීය මෙහෙයුමේ නිරත වූ හටපිටිය වෙත අත් දීමෙන් මූල්‍ය ලංකාදුව්පය තුශ්‍රත්වයින් මුදවා ගැනීමට සක්‍රිය දායකත්වය ලබා දීමෙන් දැක්වා ආදර්යමන් තායකත්වය මූල්‍ය ලංකාදුව්පය පනර්පයේ යුද්ධ හමුදාධිපති වශයෙන් මා ගොරට පුරුෂිකව මහත්වා ප්‍රත්‍යාමයෙන් අයය කරනු ලබන බව මෙයින් සැල කර සිටම්.”

As recently as September 2016, the Colonel of the Gajaba Regiment to which the Petitioner belonged had stated that the Petitioner is an asset to the Army.²¹ In this background, the only conclusion that this Court can reach is that there is certainly no damage that would accrue to the Respondents or to the Sri Lanka Army by the Petitioner being entrusted with command responsibilities.

On the other hand, the effect of this Court refusing to issue the interim relief but the Petitioner eventually turning out to be the victor would be that in the interim, the Petitioner not only has been denied the opportunity of holding command responsibilities but would be subject to ridicule in a hierarchical system that exists in the Sri Lanka Army where despite being the 11th most senior Officer, the Petitioner is deemed not suitable to hold a command

²¹ Vide ‘P20’; supra.

position. In these circumstances, it is clear that not only does the balance of convenience lie in favour of the Petitioner, he would also suffer irreparable or irremediable mischief and injury, if this Court does not issue an interim order staying the operation of 'P18'.

In the above circumstances, it is the view of this Court that the interests of justice would be best served by issuing an interim order as prayed for in paragraph (j) of the prayer to the petition, until the final determination of this application, staying the operation of 'P18' in so far as it relates to the Petitioner.

Given the urgency on the part of all parties to conclude this application as expeditiously as possible, this Court, while directing the parties to file their pleadings as early as possible, would endeavour to give priority to conclude this case at its earliest.

Judge of the Court of Appeal

Kumudini Wickremasinghe, J

I agree

Judge of the Court of Appeal