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

In the matter of an application in the nature of writs of Certiorari and Mandamus under article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka.

K.W.P.Fermin A. Fernando of

'Indra's Efforts' No. 11/4, Uyana Lane XI, Uyana, Moratuwa.

Petitioner

CA(writ)120/2009

- Vs –

(1) The Administrative Appeals Tribunal No.5, Dudley Senanayake Mawatha, Colombo 05.

(2) Hon. Justice Nimal Dissanayake Chairman, Administrative Appeals Tribunal, No.5, Dudley Senanayake Mawatha, Colombo 05.

(2) Mr. C. Mannamperuma
Member Administrative Appeals Tribunal, No.5, Dudley Senanayake Mawatha, Colombo 05.

(3) National Police Commission
Level 3, Rotunda Towers, No.109, Galle Road,Colombo 03.

(4) Inspector General of Police
Police Headquarters
Colombo 1.

Respondents

BEFORE : S. HETTIGE, J. P/CA

D. S. C. LECAMWASAM, J.

COUNSEL : Kamran Aziz for the Petitioner

Ruwanthi Herath Gunaratne SC for the Respondents

ARGUED ON : 02/09/10

WRITTEN SUBMISSIONS ON : 12/10/2010

DECIDED ON : 12/ 01/ 11

D. S. C. Lecamwasam. J

The petitioner in this case has sought a writ of Certiorari to quash the decision marked P 13 of the Administrative Appeals Tribunal (hereinafter referred to as AAT) and a writ of Mandamus directing the ADMINISTRATIVE APPEALS TRIBUNAL to re-hear and/or reconsider the appeal of the petitioner. The facts of the case briefly are as follows.

The petitioner having joined the Police Department as a probationary Sub-Inspector on 1st May 1963 gradually rose up the ladder of ranks and on 11th June 1995 was promoted to the rank of SP Grade I (SSP). On completion of 60 years of age, he retired from the service on 17th April 2001. The petitioner whilst he was Superintendent of Police, by letter dated 08th February 1994 sought a 'Temporary Promotion' to the rank of Senior Superintendent of Public which was eventually turned down by the Public Services Commission by p 3 on the premise that it had no reason to intervene. With the change of government in 1994, the petitioner made an appeal to the Political Victimization Committee (hereinafter referred to as the PVC) of the Ministry of Defense seeking an anti-dating of his promotion. The said committee, in its report marked p 4 stated inter alia, that it was satisfied that the complainant was politically victimized and hence the following recommendations were made;

1. His promotion to the rank of Assistant Superintendent of Police (ASP) be back dated from 01st December1985 to 01st May1983 and
2. His promotion to the rank of S.S.P. be back dated to 11th June1993.

However as these recommendations were not implemented by either the Public Services Commission or the Police Commission, petitioner sought redress from the Human Rights Commission (hereinafter referred to as the HRC) by submitting application No.HRC/L/4/503/02 in February 2002. The Human Rights Commission went further than the decision reached by the PVC and recommended that the promotion to the rank of SP be made effective from 01st May 1989, SSP from 10th June 1990 and to the rank of DIG to be made effective from 1996. As the National Police Commission and the Public Services Commission failed to implement the recommendations of the Human Rights Commission, the petitioner preferred an appeal to the Administrative Appeals Tribunal. By order dated 17th December2008 Administrative Appeals Tribunal dismissed the appeal of the petitioner. The present writ application is against the said order of the ADMINISTRATIVE APPEALS TRIBUNAL.

Petitioner in his petition states that the order of the ADMINISTRATIVE APPEALS TRIBUNAL is irrational, unreasonable, arbitrary and an error on the face of the record for the following reasons;

a) The ADMINISTRATIVE APPEALS TRIBUNAL had failed to appreciate that the recommendations of the HRC dated 23rd May 2006 and the communications of the HRC of 31st August 2006 were made by and on behalf of the HRC and therefore the decision of the ADMINISTRATIVE APPEALS TRIBUNAL, holding that the recommendations are illegal (on

the premise that they are not the decisions of the HRC) is unreasonable, irrational, arbitrary and unfair;

b) Although the ADMINISTRATIVE APPEALS TRIBUNAL had correctly adverted to the fact that anti-dating of promotions can only be carried out with the authority of the Director of Establishments, it had failed to appreciate that it was only the Appointing Authority who should make the application for such anti-dating in terms of section 1:10:1 of Chapter II of Volume I of the Establishments Code.

c) The ADMINISTRATIVE APPEALS TRIBUNAL has irrationally and unreasonably failed to differentiate and to distinguish between the petitioners appeal to the PSC with regard to the granting of a 'Temporary Promotion' and the application to the PVC and the HRC, which concerned the anti-dating of the petitioner's promotion which has no relation whatsoever to the former matter

d) Although the ADMINISTRATIVE APPEALS TRIBUNAL has held that the NPC is not mandatorily bound to implement the recommendations of the PVC and the HRC, it has failed to consider the failure on the part of the NPC or the IGP to put forward and urge any grounds as to why such recommendations cannot be implemented.

I cannot agree with the opinion expressed by the ADMINISTRATIVE APPEALS TRIBUNAL as to the inadmissibility of Document marked p 7 on the ground it is not signed by all the commissioners of the HRC. As p 7 is signed by the chairman and the additional secretary, it amply fulfills all the requirements and there's no legal necessity for all the commissioners to sign it.

This assertion is further augmented by section 21 (4) of the National Human Rights Commission Act No.21 of 1996 where it is stipulated that even a certificate

addressed to the Supreme Court has to be signed only by the chairman of the Commission and no other. Therefore all the members of the Commission need not subscribe their signatures to a certificate, for it to be valid. Hence p 7 reflects the decision of the HRC and it is binding.

Though it is binding, when there is a failure on the part of a person or authority to which a recommendation is addressed by the HRC, section 15(8) of the act provides an alternative remedy. The right of resorting to the procedure stipulated in Section 15(8) of the Act lies with the commission. It is the commission who should follow the procedure stipulated in 15(8). Although the ADMINISTRATIVE APPEALS TRIBUNAL has commented on the absence of signatures of the other commissioners, its final decision does not hinge on p 7 i.e. the decision of the HRC, and has based its final decision on the provisions applicable to anti-dating of appointments in the Establishment Code.

According to section 1:10 to 1:11:2 of Chapter II of the Establishments Code, before anti dating an appointment, the following conditions have to be fulfilled.

1) There has to be a substantial vacancy
2) The officer ought to be fully qualified for appointment
3) The officer ought to be performing the duties of the post continuously from the time the post had been vacant, on an acting appointment by a letter of appointment duly issued to such effect

It is provided further that anti-dating of appointment will not be granted;

1) If such anti-dating result in the officer gaining seniority over an officer appointed before him to the same grade or post

2) If the substantive appointment is made on the results of a competitive Examination.

On the facts available before this court it is blatantly apparent that the petitioner has failed to disclose the requirements under Chapter II of the Establishments code in relation to anti-dating of the appointment. For example, he has failed to reveal his position in the seniority list as at the relevant date. In paragraph 7 of P 2 dated 08th February1994 he has stated that he was the 37th according to seniority but failed to state his seniority at the time of retirement in 2001.

This scenario is rife with pitfalls. The petitioner's grievance is not without warrant since four (4) junior officers had been promoted over the head of the petitioner. Conversely the same kind of grievance would befall the 36 officers who are senior to the petitioner if the petitioner was granted the promotion. Therefore the responsibility is on the IGP/Director, Establishments to consider these myriad aspects before a recommendation is forwarded.

In p 4, chairman of Political Victimization Committee had come to the conclusion that the petitioner had been politically victimized on the basis of election related incidents in 1977 and 1982. P 4 speaks of only three isolated incidents that had taken place during the career of the petitioner spanning from 1963-1995 (p 4 is dated 30/11/1995) but the PVC has conveniently forgotten the fact that the petitioner was given the very promotions of ASP and SP in 1985 and 1990 respectively during the same regime under which the petitioner was allegedly victimized. It is ironical that the petitioner who was alleged to have been subjected to political victimization had served either in his home town of Moratuwa or at the neighbouring station of Mt.Lavinia during the said period. In October 1983 he was sent on promotion to an A1 station viz.Kalmunai as Head Quarters Inspector

(HQI). All these occurrences had taken place during the so called politically victimized period. At this late stage I do not wish to comment further on p 4 but I am of the view that the then IGP had made correct observations in paragraph 4 of 2R2.

Although the ADMINISTRATIVE APPEALS TRIBUNAL has in its order merely alluded to an appeal made by the petitioner and rejection of the same by the Public Services Commission. As I have already acknowledged, it has not based its findings on the rejection of appeal by the Public Services Commission.

The ADMINISTRATIVE APPEALS TRIBUNAL in its order has stated that ' There is no material before this tribunal that the appellant had satisfied the PSC/NPC that the aforesaid provisions of the establishment code has been fulfilled, before he sought to ante-date his promotion'. Therefore it is crystal clear that the ADMINISTRATIVE APPEALS TRIBUNAL, though it had referred to various other facts in its order, had made the decision based on the fact that the petitioner had not satisfied the PSC/NPC that the relevant provisions in Chapter II of the Establishments Code had been fulfilled. Hence the ADMINISTRATIVE APPEALS TRIBUNAL had dismissed the appeal of the petitioner on that ground and on that ground alone.

As the respondents pointed out in their written submissions, it was held by His Lordship Justice F.N.D.Jayasuriya in *Best Footwear (Pvt) Ltd and two others Vs. Aboosally* (1997) 2 SLR 137, as follows "The remedy by way of Certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the court is concerned with the merit of the decision under appeal. In judicial review

the court is concerned with the legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful.....".

Hence acting on the above guidelines, I find that the ADMINISTRATIVE APPEALS TRIBUNAL had not erred in coming to its conclusion and it had made a lawful order. Therefore in the instant application this court cannot interfere with a lawful order made by the ADMINISTRATIVE APPEALS TRIBUNAL and hence the application of the petitioner is dismissed without costs.

Judge of the Court of Appeal

Sathya Hettige.P.C.J.P/CA

I Agree

President of the Court of Appeal