

**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 and prohibition under Article 140 of the Constitution of Sri Lanka

KAPS Angulugaha, Group Captain
(Temporary Air Commodore), Sri Lanka Air
Force.

Petitioner

- Vs -

C.A. (Writ) Application

No: 439/ 2011

1. Air Marshal HD Abeywickrama,
Commander of Sri Lanka Air Force,
Headquarters, Colombo 2.
2. Gotabhaya Rajapaksha,
Secretary Ministry of Defence.
3. Air Vice Marshall
PB Premachandra, (Former Chief of Staff)
4. Air Vice Marshall, KRA Ranasinghe,
Director Administration Sri Lanka Air Force
5. Air Vice Marshall Kolitha Gunathilake
Chief of Staff, Sri Lanka Air Force.
6. Group Captain Roshan Biyanwila,
Secretary to the Commander of
Sri Lanka Air Force.
7. Hon. Attorney General

Respondents.

Before : Sisira de Abrew J &
Sunil Rajapakshe J

Counsel : JC Waliyamuna with M Ratnayake for the Petitioner.
Vickum De Abrew SSC for the Respondents.

Argued on : 10. 10. 2012, 17.10.2012

Decided on : 24. 01. 2013.

Sisira de Abrew J.

This is a petition to set aside the decision of the 1st respondent not to recommend the petitioner's promotion to the substantive rank of Air Commodore and his decision to forward retirement papers in respect of the petitioner to His Excellency the President for approval. Although there are several prayers in the petition learned counsel for the petitioner at the hearing before us submitted that he would restrict his relief only to paragraphs (b) and (d) of the prayer to the petition.

The petitioner was a Group Captain in Sri Lanka Air Force (SLAF). He was, with effect from 1.1.2010, promoted to the rank of Temporary Acting Air Commodore and was interviewed by the Annual Promotion Board (APB) for confirmation in the rank of Air Commodore. The petitioner states that the recommendation of the APB to confirm him in the substantive rank of Air Commodore had been approved and signed by the then Commander of SLAF and was due to be forwarded to His Excellency the President for his approval. However the petitioner has later learnt that the 1st respondent who is the present commander of SLAF had decided not to recommend his promotion to the substantive rank of Air

Commodore to His Excellency the President but to forward his retirement papers to His Excellency the President for approval. These are the two decisions of the 1st respondent that the petitioner challenges in this case. The petitioner challenges that the said decisions of the 1st respondent are unreasonable, unfair, arbitrary, irrational, in violation of his legitimate expectation and against the principles of natural justice. The petitioner by way of writ of certiorari seeks to quash the said two decisions of the 1st respondent. What does the 1st respondent say on this matter? He in paragraph 15(e) and (f) of his affidavit states as follows:

15(e) "The petitioner's promotion was not forwarded to His Excellency the President having considered the facts of merit, age and seniority of other officers in the best interest of the Air Force."

15(f) "Since the petitioner reached the maximum period in the rank of Group Captain, the approval of His Excellency was sought to send the petitioner on retirement under para 3(2) of the Air Force Pension and Gratuity Code. (The Respondents reserved the right to produce relevant documentation to Your Lordships' Court at the stage of arguments)." Thus the 1st respondent admits that the petitioner's promotion was not forwarded to His Excellency the President and that the petitioner's retirement papers were forwarded to His Excellency the President. Learned SSC contended that when 1st respondent did not forward the documents relating to the petitioner's promotion to HE the President there was no decision by the 1st respondent. But it is very clear from the 1st respondent's statement of objection and his affidavit that he had decided not to forward the petitioners papers relating to the promotion to HE the President. For these reasons I am unable to agree with the contention of the learned SSC on this Point. Learned SSC further contended when the 1st respondent forwarded the

petitioner's retirement papers to HE the President it was only a recommendation and not a decision and that therefore it could not be quashed by way of certiorari. I now advert to this contention. When the 1st respondent decided not to forward the petitioner's papers relating to the promotion of Air Commodore, he knew that the petitioner after reaching the maximum period, had to retire. Thus how can it be said that the 1st respondent had not decided to forward retirement papers to HE the President? From the statement of objection and the affidavit of the 1st respondent, it is very clear that the 1st respondent had decided to forward the retirement papers of the petitioner to HE the President. I am therefore unable to agree with the above contention of the learned SSC.

Learned SSC next contended that the petitioner had not submitted these two decisions in court and that therefore they could not be quashed by a writ of certiorari. Although learned SSC contended so, he himself, in the course of his submission, submitted that these documents were confidential documents. If that is so how can the petitioner obtain copies of these documents? Even the 1st respondent with his statement of objection has not submitted these documents. For the above reasons I am unable to agree with the submission of learned SSC.

Learned SSC next contended that in any event granting relief claimed by the petitioner is now futile as HE the President has now signed the retirement papers and that the decision of HE the President could not be challenged. Learned counsel for the petitioner replying this submission contended that if the said decision of the 1st respondent are quashed it would not be futile as he could appeal to HE the President to reconsider his case. Learned SSC cited *Siddeek Vs Jacolyn Seneviratne* [1984] 1SLR 83 wherein the Supreme Court at page 90 held thus: "The writ of certiorari clearly will

not issue where the end result will be futility, frustration, injustice and illegality.” In the case of Air Vice Marshall Elmo Perera Vs Liyanage [2003] 1SLR 331 Court of Appeal held thus: “Writ will not lie if the final relief sought is a futile remedy.” I must consider whether quashing of two decisions of the 1st respondent would be futile. The 1st respondent in his statement of objection admits that he sought approval of HE the President to send the petitioner on retirement. Thus it appears that the petitioner was sent on retirement on the decision of the 1st respondent. If this decision of the 1st respondent is quashed, it is possible for He the President to reconsider his decision on an appeal submitted by the petitioner. Therefore one cannot say that quashing of two decisions of the 1st respondent would be futile. For these reasons I am unable to agree with the submission of the learned SSC.

Learned SSC next contended that it will not be possible for the petitioner to appeal to HE the President as he had already submitted an appeal to HE the President by document marked P7c and that HE the President had taken the decision to send him on retirement after considering his grievances. Learned SSC contended that the 1st respondent had submitted the document marked P7c to HE the President. Has the 1st respondent in fact sent this document to HE the President? If he has sent it there should be a covering letter addressed to HE the President or his secretary. No such letter has been produced by the 1st respondent. In these circumstances it is not possible to decide that the 1st respondent had sent the document marked P7c to HE the President. For these reasons I am unable to agree with the submission of learned SSC.

Learned SSC next contended that the petitioner is not entitled to the relief claimed as there is a delay in coming to court. I now advert to this contention. According to the petitioner he first came to know the decision of

the 1st respondent not to recommend him to his promotion only on 28.4.2011 (vide paragraph 18 of the petition). He filed this case on 29.6.2011. Therefore it is clear that within two months he has come to this court. Thus can it be said that there was a delay in coming to this court. I think not. For these reasons, I am unable to agree with the submission of learned SSC.

The petitioner, in paragraph 18 of his petition says that the APB and the former Commander of the SLAF had recommended the petitioner's promotion to the substantive rank of Air Commodore. The 1st respondent has not denied this paragraph. The 1st respondent, in his statement of objection, admits that he did not forward the papers relating to the petitioner's promotion to HE the President on the ground of merit, age and seniority of other officers. According to him this was done in the best interest of the Air force. On what basis did he come to this conclusion especially when the APB of which the 1st respondent himself was a member and the former Commander of the SLAF had recommended the petitioner's promotion? The 1st respondent has not explained these matters. Has he forwarded his reasons for his decision? The answer is no. Has he given any hearing to the petitioner before he took his decision? The answer is no. Therefore I hold that his decision not to forward the petitioner's promotion to HE the President is unreasonable, arbitrary, irrational and against the principles of natural justice. I further hold that his decision is wrong. Since his above decision is wrong, his subsequent decision to forward petitioner's retirement papers to HE the President is also wrong.

For the above reasons, I hold that the said two decisions of the 1st respondent should be quashed by issuing a writ of certiorari. I therefore issuing a writ of certiorari quash the decision of the 1st respondent not to recommend the petitioner's promotion to the substantive rank of Air

Commodore and his decision to forward the retirement papers of the petitioner to His Excellency the President for approval. I grant the relief claimed in paragraphs (b) and (d) of the prayer to the petition.

Judge of the Court of Appeal.

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal.