

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

**In the matter of an Application for a
mandate in the nature of *Writ of Certiorari*
under article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka**

Dassayanke Mudiyansele Dulip Chameera
Adikari,
412/5/236, Ratmalgama, Galadivulwewa,
Nochchiyagama.

PETITIONER

CA/WRIT/134/2015

Vs,

1. Gagan Bulathsinhala,
(Air Marshal) Commander,
Sri Lanka Air Force,
Air Force Head Quarters,
Colombo 01.
2. Karunasena Hettiarachchi,
Secretary,
Ministry of Defence,
15/5, Baladaksha Mw,
Colombo 03.
And another

RESPONDENTS

**Before: Vijith K. Malalgoda PC J (P/CA) &
S. Thurairaja PC J**

Counsel: Pradeep Fernando for the Petitioner
Chaya Sri Nammuni SC for the Respondents

Argued on: 17.01.2017

Judgment on: 23.02.2017

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Dasanayake Mudiyansele Dulip Chameera Adikari had come before this court seeking inter alia,

3. Grant and issue a mandate in the nature of writ of Certiorari quashing P-3
4. Grant and issue a mandate in the nature of writ of Mandamus compelling the 1st Respondent to make/grant a service extension to the Petitioner in the Sri Lanka Air Force with effect from 2015.02.13 in keeping with his legitimate expectation for the same

The petitioner's main argument before this court was based on two documents produced before this court, namely P-1 and P-2. As revealed before this court the Petitioner was serving in the voluntary wing of the Sri Lanka Air Force (here in after referred to as SLAF) where he could serve up to the maximum of 22 years, on periodic service extensions granted to him. As submitted by the Petitioner he has received service extensions as follows,

1. 2002.01.04 up to 2007.01.04 5 years
2. 2007.01.04 up to 2008.02.13 1 year
3. 2008.02.13 up to 2010.02.12 2 years
4. 2010.02.12 up to 2014.02.13 4 years
5. 2014.02.13 up to 2015.02.13 1 year

In the year 2012 when the Petitioner was undergoing a routine training, he sustained an injury on a knee. As a result of the said injury the Petitioner was categorized “Lowered Employment Standard” and the Petitioner submitted that his service extension was not approved due to the said medical condition. In this regard the Petitioner heavily relied on P-1 and the 1st paragraph of the said P-1 reads thus,

“The above named JNCO is on a Lowered Medical Employment Standard A4G4 (T) w.e.f. 13 October 2014 and his present engagement is due to complete on 13 February 2015. As per above reference, he has not been approved a further extension of service by SLAF due to his Lowered Employment Standard. Hence the authority is hereby granted to convene an assess medical board prior to his discharge.

Subsequent to the said communication the Petitioner was referred to the SLAF Hospital Katunayake and the said Hospital had referred him to Consultant Orthopedic Surgeon Dr. Ananda Perera of Sri Jayewardenepura General Hospital. The Petitioner was seen by the Consultant Orthopedic Surgeon on few occasions and during this period the Petitioner was undergoing treatment both by the said Consultant and by the SLAF Hospital Katunayake. When the Petitioner was finally examined by the said Consultant Orthopedic Surgeon on 05.01.2015 he made the following observation,

“This Pt. I have seen him today he is perfectly OK. Now he is fit for all duties.” (P2-P)
However as submitted by the Petitioner the Petitioner’s service extension was not approved and it was communicated to him through his CO (P-3) and whilst challenging the said decision not to approve his service extension in spite of the said independent observation by the Consultant Orthopedic Surgeon, Petitioner had submitted that the said decision was taken against the legitimate expectations of the Petitioner, that he would be considered for a service extension once he is fit to attend to his duties.

The Petitioner had further argued, that the Respondents are not entitled to take any decision not to extend the service of the Petitioner, once the Respondents have put the Petitioner on notice that his service extension would be decided on the categorization based on “Lowered Employment Standard.”

When going through the submissions made by the Learned Counsel for the Petitioner and the documents submitted on behalf of the Petitioner, it is observed by us that the contention of the Petitioner was to establish that the Petitioner’s service extension due on 13.02.2015 was totally depending on the said categorization of “Lowered Employment Standard”.

However as observed by this court, the service extension of a volunteer noncommissioned officer was considered periodically and as indicated above, the Petitioner too was given service extensions ranging from 01 year to 5 years on different intervals.

As submitted by the Respondents before us, the Petitioner had faced an additional requirement when he met with the said accident and categorized as “Lowered Employment Standard” in addition to the other routine approvals required for consideration of his service extension. In these circumstances the Petitioner had to overcome an additional requirement and if he failed to do so, he would automatically lose his job due to the said categorization. In this regard the Respondents have relied on the Air Force Orders on Air Force Health Policy (1R2) and Sri Lanka Volunteer Air Force Regulations 1978 published in Government Gazette 304 on 10.02.1978 (1R3) and we see no reason to reject the said argument. In the said circumstances, it is clear that the disciplinary issues pertaining to the conduct of the Petitioner played a major role in deciding whether the services are extended or not.

In this regard our attention was drawn to the fact that the Petitioner was tried before the Magistrate’s Court Negombo for Sexual Harassment, which charge was later reduced to section 343 and was compounded and the Petitioner was ordered to pay Rs. 10,000/- to the victim. The proceedings of the said criminal case was submitted along with the statement of objection of the Respondents produced marked 1R9 and as observed by this court, the Petitioner had been apprehended by public on 10th July

2013 and handed over to police when he molested a woman who was returning home from a shop after buying some daily provisions around 8.30 pm at a lonely place in Negombo Road Katunayake, and was prosecuted under section 345 of the Penal Code but settled the matter on a lesser offence after paying compensation. As further observed by this court the said settlement was reached between the parties on 31st January 2014 and the case was concluded after the payment of compensation on 14.03.2014 and the said settlement was reached after the Petitioners last service extension on 13.02.2014.

As observed by this court, the above case too was referred to in the relevant papers submitted for the consideration for his service extension which was due on 13.02.2015 as follows;

“A civil litigation has been filed against him at Magistrate’s Court Negombo for the offence of an assault and use of criminal force to a woman with the intent of outrage her modesty. The Hon. Magistrate has released the suspect upon a payment of Rs. 10,000/- to the above party as compensation.”

The said reference along with the Petitioner’s record of conduct was forwarded for the consideration for his service extension by Petitioner’s Commanding Officer on 17.12.2014 and as observed by this court, following are the observations made by the relevant officers with regard to the Petitioner’s service extension.

- D Leg- Extension of service is not recommended please
- D HS- Recommended only in limited extension considering medical condition (L/ACL tear).
- DGO- One year (01) extension of service is recommended please
- C of S- Considering the nature of the last offence committed by the JNCO, extension of service is not recommended

CMDR- Not approved.

As revealed from the above recommendation submitted, it is clear that the final recommendation by the Chief of Staff to the Commander was based on the conduct of the Petitioner and if not for his conduct, as recommended by DHS he would have got a limited extension until his medical condition was cleared. (as observed by this court the above minute was made on 23.12.2014 and the Medical condition was cleared on 05.01.2015)

In these circumstances, we see no merit in the argument placed by the Learned Counsel who represented the Petitioner to the effect that, the said decision not to approve the service extension to the Petitioner was against the legitimate expectation of the Petitioner, i.e. P-1 refers only to his medical conditions.

M.R. Mallick in his book on Writs Law and Practice had observed that “whether the expectation of the claimant is reasonable whenever such a question arises it is to be determined not according to the claimant’s perception but in larger public interest, where in other more important considerations, may outweigh what otherwise would have been the legitimate expectation of the claimant. A *bona fide* decision of the public authority reached in fair manner would satisfy the requirement of non-arbitrariness and withstand the judicial scrutiny” [Writs Law and Practice M.R. Mallick at page 790]

As observed by this court, the above passage clearly explains the situation under which the Respondents have acted in this case.

With regard to the nature of the expectation, the courts have identified that the said expectation has to be derived either,

a) An express promise or representation-

Attorney General of Hongkong V. Ng Yuen Shiu (1983) 2 AC 629

b) A representation implied from established practice based upon the past action or the settled conduct of the decision maker-

R.N. Secretary of Home Department (1987) 1 WLR 1482

As discussed above in this judgment, the expectation the Petitioner relied before us, which derived from the document produce marked P-1 does not come under any of the categories identified above. As clearly identified by us, the said expectation is against the established practice of the Air Force and the impugned decision was reached after following the correct practice.

In the said circumstance this court is not inclined to grant relief as prayed by the Petitioner. We therefore dismiss this application but refrain from making any order with regard to cost.

Application dismissed.

President of the Court of Appeal

S. Thuraija PC J

I agree,

Judge of the Court of Appeal