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 Mandamus in terms of Article 140 of the Constitution of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A (Writ) Application No. 173/2013

H.G.P.D. Kumara,
No. 239, Pethiyagoda Watte,
Naula.

Petitioner

Vs.

1. K.V.B. Jayampathy,
   Air Marshal,
   Commander of the Sri Lanka Air Force.

2. D.L.S. Dias,
   Air Vice Marshall,
   Chief of Staff of the Sri Lanka Air Force.

   All of Air Force Headquarters,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 2.

3. Karunasena Hettiarachchci,
   Secretary,
   Ministry of Defence,
   No. 15/5, Baladaksha Mawatha,
   Colombo 3.

4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Harishke Samaranayake for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for the Respondents

Written Submissions of the Petitioner tendered on: 17th July 2018

Written Submissions of the Respondents tendered on: 09th July 2018

Decided on: 05th October 2018

Arjuna Obeyesekere, J

When this matter was taken up for argument on 30th July 2018, learned Counsel for all parties informed Court that written submissions have already been tendered by the parties and moved that this Court pronounce judgment on the said written submissions.

The Petitioner has filed this application seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the decision of the Respondents to discharge the Petitioner from the Sri Lanka Air Force with effect from 5th December 2012, reflected in the documents annexed to the petition, marked **'P4'** and **'P6'**;

(b) A Writ of Mandamus to compel the Respondents to reinstate the Petitioner in service and to pay all back wages, allowances and other emoluments that the Petitioner is entitled to, with effect from 5th December 2012.

The facts of this application very briefly are as follows.

The Petitioner was enlisted as an airman in the Sri Lanka Air Force in November 1995. Having received his preliminary training, the Petitioner was assigned to the Vavuniya Air Force Camp in July 1997. While serving at Vavuniya, the Petitioner had proceeded on approved leave on 10th May 1998. Although the Petitioner was required to report for duty on 18th May 1998, he had failed to do so. Pursuant to a general amnesty granted to those who were absent without leave, the Petitioner too reported for duty on 24th May 1998 and was permitted to resume duties subject to the forfeiture of pay and allowances for the period of absence.

The Petitioner states that in June 2012, while serving at the Sigiriya Air Force Camp as the Senior Non-Commissioned Officer, there had been a shortage of 1kg of gelatine for which he took responsibility as it was misplaced while it was

in his custody. The Petitioner states that he had been charged for disgraceful conduct in relation to this incident and was served with a severe reprimand as a punishment, in addition to being asked to reimburse the cost of the gelatine.

The Petitioner states that to his utmost surprise, he was served with the letter dated 5th November 2012, annexed to the petition marked '**P4**' wherein he was informed that he is being discharged from the Sri Lanka Air Force with effect from 5th December 2012 upon the termination of his engagement with the Sri Lanka Air Force.[1] The Petitioner had appealed against the said decision but his appeal had been rejected by letter dated 19th December 2012, annexed to the petition marked '**P6**', whereby the Petitioner was informed that the 1st Respondent, Commander of the Sri Lanka Air Force, had taken a decision not to extend the period of engagement of the Petitioner from 5th December 2012, for the following reasons:

> "ඔබ 1995.11.30 වන දින අවිකරු වෘත්තිකයෙකු ලෙස ශ්‍රී ලංකා නිතය ගුවන් හමුදා සේවයට බැඳි වසර 17 ක අඛණ්ඩ ස්ථිර ගුවන් හමුදා සේවයක් සඳහා ගිවිස සිට ඇත. ඔබ 1998.05.18 වන දින සිට අනුමත නිවාඩු නොගෙන සේවය සඳහා වාර්තා නොකර සිට 1998.05.24 වන දින පොදු සමාව යටතේ හාර වී ඇත. ඒ සම්බන්ධයෙන් ගුවන් හමුදා නිති ප්‍රකාරව කටයුතු කිරීමෙන් අනතුරුව 2000.06.26 වන දින ඔබහට අවසන් අවවාදාත්මක ලිපියක් නිකුත් කර ඇත. එසේ තිබියදීත් නැවත වරක් ඔබ විසින් ගුවන් හමුදා නිති රෙගුලාසින් උල්ලංඝනය කරමින් 2012.06.12 වන දින විනය විරෝධී ක්‍රියාවක් සිදු කර ඔබ වෙත ලබාදෙන ලද අවසාන අවවාදයට පටහැනිව ක්‍රියාකොට ඇත. ඒ සම්බන්ධයෙන් ගුවන් හමුදා නිති ප්‍රකාරව කරන ලද විනය පරීක්ෂණයෙන් පසු ඔබ ගිවිස ගත් කාල සීමාව අවසානයේ සේවයෙන් ඉවත් විය යුතු අතර ඔබගේ සේවය තවදුරටත්

[1] Regulation 126(1) specifies that 'the various causes of discharge from the Regular Air Force and competent officers to authorise, carry out and confirm such discharge, and the special instructions regarding the cause of the discharge in each case, shall be as specified in Table B of the Fifth Schedule hereto. The Petitioner was discharged under the category of "Termination of Engagement", contained in item XV (b) of Table B.

දිරඟ නොකිරීමට තීරණය කර ඇත. ඒ අනුව ඔබ ගිවිසගත් සේවා කාලය 2012.12.05 වන දිනෙන් අවසන් වේ."

Thus, according to '**P6**', as a result of the incident that took place in June 2012 with regard to the shortage of gelatine, the Petitioner had violated the final warning issued in June 2000 for being absent without leave in May 1998. The 1st Respondent had accordingly taken into consideration the conduct of the Petitioner and decided not to extend the period of engagement of the Petitioner, which resulted in the discharge of the Petitioner from the Sri Lanka Air Force on 5th December 2012.

Being dissatisfied with the said decision, the Petitioner has filed this application, seeking the aforementioned relief. The Petitioner's complaints to this Court are three fold.

The first complaint of the Petitioner is that he had a legitimate expectation to serve the Sri Lanka Air Force for a period of 22 years, until 2017. The Respondents have submitted that in terms of Regulation 39 of the Ceylon Air Force (Regular and Regular Reserve) Regulations, 1951[2], the period of original enlistment of an airman is **twelve years.** In terms of Regulation 40(1) thereof, the period of engagement of an airman who is (a) medically fit for service, and (b) **efficient and well-behaved** can be extended for a further period not exceeding 12 years. Regulation 40(2) of the said Regulations provides further that, "selection for extension of service shall be made after the whole of an airman's service has been taken into account" and taking into consideration *inter alia* the Service entries on his general conduct sheet.

[2] The Regulations have been made by the Minister of Defence and External Affairs under Section 155 of the Air Force Act No. 41 of 1949.

Regulation 40(1) demonstrates that re-engagement ***may*** be allowed to an airman who is efficient and ***well behaved*** and against whom there are no allegations of bad conduct. Thus, it is clear to this Court that the extension of the term of engagement, referred to as re-engagement in the said Regulations, does not take place as of right but is at the discretion of the Commander of the Sri Lanka Air Force.

Hence, the Petitioner cannot claim to have a legitimate expectation to serve the Sri Lanka Air Force for a period of 22 years from the date of his original enlistment. In these circumstances, this Court does not see any merit in the first complaint of the Petitioner.

The second complaint of the Petitioner is that the Sri Lanka Air Force never informed him about a final warning letter and that in any event, the Sri Lanka Air Force cannot take into consideration the said final warning as details of that had not been entered in the general conduct sheet of the Petitioner.

It is admitted between the parties that the Petitioner did not report for duty on 18th May 1998 and that he was absent without leave. Being absent without leave is an offence in terms of Section 106 of the Air Force Act No. 41 of 1949 as amended, which reads as follows:

> "Every person subject to this Act who absents himself without leave shall be guilty of an air-force offence and shall, on conviction by a court martial, be liable, if he is an officer, to be cashiered or to suffer any less severe punishment in the scale set out in section 133, and, if he is an

airman, to suffer simple or rigorous imprisonment for a term not exceeding three years or any less severe punishment in the scale set out in section 133."

It is important to note the submission of the Respondents that at the time the Petitioner was absent without leave, he was serving in the Sri Lanka Air Force Special Operations Group, Mankulam, northward of Vavuniya Town in the Northern Province, at a time when the area was on red alert due to LTTE threats.

The Respondents have submitted that the Petitioner being absent without leave, especially at a time when the enemy threat was as its highest, was a serious offence for which the Petitioner could have been imposed the above punishments specified in Section 106. Thus, although the Petitioner was guilty of an offence which warranted severe penal punishment, a trial had been dispended with and the Petitioner had only been subjected to a forfeiture of pay and allowances for the period of absence and an adjustment of his period of service. This is borne out by the Petitioner's general conduct sheet, annexed to the petition marked **'P1'**.

The Respondents state that the Petitioner was given a lenient punishment as he surrendered himself during the period of General Amnesty declared by the Government. It is the position of the Respondents that in addition to the aforementioned punishment, the Petitioner had been issued with a final warning through letter dated 26th June 2000, annexed to the petition marked **'P2'**, notifying him *inter alia* that if he acts in contravention of the Air Force

rules in the future, he would be discharged from the Sri Lanka Air Force. The relevant portions of the letter '**P2**' are re-produced below:

"ගුවන් හමුදා නිතිරීතීන්ට අනුකූල නොවන ගුවන් භටයකුට ගුවන් හමුදාපතිතුමාගේ නියෝගය පරිදි කඳවුරු අණදෙන නිලධාරිතුමා විසින් දෙනු ලබන අවසාන අවවාදයයි

01 වන කොටස

කඳවුරු අණදෙන නිලධාරිතුමා විසින් දෙනු ලබන අවවාදයයි

අ. පහත දැක්වෙන පරිදි ඔබ විසින් ගුවන් හමුදා නිති රීති කඩ කර එම වැරදිවලට වරදකරු වී ඇත.

1. 1998.05.18 දින සිට 1998.05.24 දින දක්වා දින 06ක් අවසර නිවාඩු නොලබා සේවයට වාර්තා නොකර සිට 1998.05.24 දින පොදු සමාව යටතේ හාර වී ඇත.

ආ. ඉහත දැක්වෙන පරිදි ඔබගේ චිනය ගුවන් භටයකු වශයෙන් නොමනා පරිදි පහත මට්ටමකින් ඔබ විසින් පවත්වාගෙන ගොස් ඇත.

ඇ. ගුවන් හමුදා නිතිරීති වලට අනුකූලව පමණක් මින් ඉදිරියට ඔබ විසින් ක්‍රියාකල යුතු අතර, කිසියම් අවස්ථාවකදි ගුවන් හමුදා නිතිරීති කඩ නොකරන ලෙසට මෙයින් තරයේ අවවාද කර සිටිමි.

ඉ. තවද, මෙම අවවාදයේ කරුණු නොසලකා මෙම අවවාදයට පටහැනිව නැවත වරක් ක්‍රියා කලහොත් ඔබ නියත වශයෙන්ම ගුවන් හමුදා සේවයෙන් නෙරපා හරින බව ගුවන් හමුදා මූලස්ථානය විසින් දන්වා ඇත."

The Petitioner has completely denied any knowledge of the final warning letter '**P2**'. He states that he was never informed that he was being issued with such a letter and that a copy thereof was given to him only on 16th October 2012.

It is the position of the Respondents that prior to the issuance of the final warning letter '**P2**', the Petitioner was summoned before the Base Commander of the Sri Lanka Air Force camp at China Bay, Trincomalee. It is significant to note that the Petitioner has admitted this fact as well as that the fact that he went before the Commanding Officer at China Bay. The Respondents state that the reasons and gravity of the offence which led to the issuance of the final warning were explained to the Petitioner along with the repercussions he is likely to face in the event of any misbehaviour in the future and that the Petitioners signature was only obtained thereafter.

It is clear from '**P2**' that the Petitioner has placed his signature thereon confirming that the contents of the said letter were read out to him and that he understood the contents thereof and the consequences of violating the said final warning. The Petitioner, whilst admitting that he signed a document before the Base Commander, has taken up the position that he was not aware of the contents of the document that he was asked to sign. However, this Court observes that '**P2**' is in Sinhalese and it is difficult to accept the position of the Petitioner that he did not read its contents, prior to placing his signature on '**P2**'.

This Court has carefully considered the material presented by the parties and is of the view that the Petitioner being summoned before the Base Commander of China Bay for the purpose of issuing the final warning letter is a clear indication that the authorities did in fact inform the Petitioner of the contents of the said final warning letter. '**P2**' on the face of it is self explanatory and therefore, the Petitioner cannot be heard to say that he did not read it before signing or that the contents thereof were not made known to him or that he

signed it without knowing what it was. Therefore, the argument of the Petitioner that '**P2**' was not read out to him or that he was unaware of the contents thereof cannot be accepted and must be rejected by this Court.

This Court has examined the General Conduct Sheet of the Petitioner marked '**P1**' and note that it only requires the "punishments" to be recorded. The learned Deputy Solicitor General for the Respondents has submitted that a final warning is an administrative practice adopted by the armed forces to prevent the occurrence of offences in the future. It is not a form of punishment, but is a notice to place service personnel on notice not to commit any offence in future. This Court is in agreement with the submission of the Deputy Solicitor General that a warning letter is not a form of punishment and that the necessity to include same in the general conduct sheet does not arise. Even if there was such a requirement, this Court is of the view that it has no relevance to the decision taken by the 1st Respondent not to reengage the Petitioner.

In these circumstances, this Court is of the view that it was within the powers of the Sri Lanka Air Force to issue the Petitioner with the final warning letter '**P2**' and to act upon it, in the event of it being violated by the Petitioner. Accordingly, this Court finds no merit in the second complaint of the Petitioner.

The third and final complaint of the Petitioner is that he had been severely reprimanded for the incident that took place in June 2012 and therefore, to punish him again by terminating his services amounts to punishing him twice for the same offence.

The Petitioner had been attached to the Sri Lanka Air Force base at Sigiriya in 2002 and had been the Senior Non-Commissioned Officer in charge of the yoghurt manufacturing project. The Petitioner claims that he took responsibility for a shortage of 1kg of gelatine, for which he had been severely reprimanded and that the matter ought to have ended there.

The Respondents have produced, marked '**R1**', the charge sheet and other documents relating to this incident. This Court has examined the charge sheet and observes that the Petitioner has been charged with the following offence:

> "At Sri Lanka Air Force Station Sigiriya on the 12th of June 2012, whilst performing secondary duty as Senior Non-Commissioned Officer in charge of the Yoghurt Project did fraudulently misappropriate Rs. 1400 from the Yoghurt fund by submitting a forged bill to the value of Rs. 35,000 obtained from M/s New Lanka Ayurvedic Shop at Matale, to purchase Gelatin for the yoghurt project, thereby committing an offence punishable under Section 109(e) of the Air Force Act."

Section 109(e) of the Air Force Act reads as follows:

> "Every person who commits any other fraudulent act hereinbefore not particularly specified, or any act of cruel, indecent or unnatural kind, shall be guilty of an air-force offence and shall, on conviction by a court martial, be liable to suffer simple or rigorous imprisonment for a term not exceeding three years or any less severe punishment in the scale set out in section 133."

The Petitioner had admitted at the inquiry that he had obtained a sum of Rs. 37000 on 12th June 2012 to purchase raw materials for the yoghurt project and that having spent a sum of Rs. 33,600 to purchase 24 kg's of gelatine at the rate of Rs. 1400 per kg, he had submitted a false bill for 25 kg for a total sum of Rs. 35,000, to the main guard room. When the Officer on duty at the guard room had weighed the parcel, the total weight was only 24 kg. Thus, it was clear that the Petitioner had misappropriated a sum of Rs.1400. The Petitioner had pleaded guilty to the said charge and he had been severely reprimanded. In fact, the Commanding Officer had observed that the conduct of the Petitioner is not acceptable and cannot be tolerated, as he was the Senior Non-Commissioned Officer in charge of the project.

The incident of 12th June 2012 came to an end with the Petitioner being severely reprimanded. Quite coincidentally, the Petitioner's term of engagement was coming to an end on 5th December 2012 and a decision had to be taken by the Commander of the Sri Lanka Air Force with regard to the re-engagement of the Petitioner. As submitted earlier, when considering re-engagement, the Commander of the Air Force was required to take into consideration *inter alia* the conduct of the Petitioner. This Court has already concluded that the re-engagement of a serviceman is at the discretion of the Commander of the Sri Lanka Air Force and that the Commander is entitled to take into consideration any form of misconduct after the final warning, when considering the service extension.

It is important to note that the refusal to re-engage the Petitioner was not a disciplinary action taken for the abovementioned incident that took place on 12th June 2012, but rather a discretionary disengagement of service due to the

failure on the part of the Petitioner to maintain the requisite level of conduct in his employment after being issued a final warning. Thus, the Petitioner's argument that his discharge from the Sri Lanka Air Force was a punishment for the incident of 12th June 2012 is without any legal basis.

The Respondents have submitted that it is in these circumstances that '**P4**' had been issued in terms of Regulation 126(1) of the Ceylon Air Force (Regular and Regular Reserve) Regulations, 1951 as amended, informing of the decision not to re-engage the Petitioner in service. Document **'P6'** confirms the decision in **'P4'**.

In the above circumstances, this Court is of the view that the documents marked **'P4'** and **'P6'** containing the decision to discharge the Petitioner and the dismissal of his appeal to re-engage him respectively are well within the powers of the 1st Respondent, conferred on him by the aforementioned provisions of the Air Force Act and the Regulations made thereunder. The said decision is based on cogent material and is not arbitrary or irrational and therefore is not liable to be quashed by a Writ of Certiorari.

This Court observes that it is paramount that the highest standards of discipline are maintained by the Petitioner at all times. The evidence presented to this Court by the Respondents is to the contrary. In terms of Regulation 6 of the Ceylon Air Force (Discipline) Regulations, 1954, every officer shall at all times be responsible for the maintenance of good order and discipline in the corps or unit to which he belongs. This Court shall not interfere with any action taken by the 1st Respondent to maintain discipline, unless the said decision is

arbitrary or circumstances warrant such interference, which is not the case in this application.

In this regard, it would be well to remember the following passage of Justice Sripavan (as he then was) in **Wikramaratne vs Commander of the Army and others**[3], where he stated as follows:

> "in service matters, the 1st Respondent should be left with a free hand to make decisions with regard to the internal administration of the Army in the interest of efficiency, discipline, exigencies of service etc. The Court cannot interfere with the appointment or promotion unless the first respondent has acted unlawfully, arbitrarily, or guided by ulterior considerations which are discriminatory or unfair."

In the totality of the facts and circumstances of this case, this Court is of the view that the decisions of the 1st Respondent set out in '**P4**' and '**P6**' are in terms of the law and is not liable to be quashed by a Writ of Certiorari. In view of this finding, the necessity to consider the Writ of Mandamus prayed for does not arise.

The application of the Petitioner for Writs of Certiorari and Mandamus are therefore refused and this application is accordingly dismissed, without costs.

Judge of the Court of Appeal

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[3] CA (Writ) Application No. 800/2006 CA Minutes of 07th January 2008. Although the said observations were made in the context of a promotion, this Court is of the view that it would be equally applicable when decisions are taken by the Commander of the Sri Lanka Air Force with regard to re-engagement.