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

Herath Mudiyanselage Rukman
Gunathilaka Herath,
No. 229,
Ambagaha Gedara,
Narammala.
Petitioner

CASE NO: CA/WRIT/171/2016

Vs.

Vice Admiral R.C. Wijegunaratne,
Commander,
Sri Lanka Navy,
Naval Head Quarters,
Colombo.
And 5 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Shantha Jayawardena with Chamara Nanayakkarawasam for the Petitioner.
Chaya Sri Nammuni, S.S.C., for the Respondents.

Decided on: 22.03.2019

Samayawardhena, J.

The petitioner is a Lieutenant in the Volunteer Naval Force of the Sri Lanka Navy and was functioning as the Second in Command of the English Learning Teaching School of the Naval and Maritime Academy, Trincomalee when he was informed (in my view indirectly) by P12 and P13 that he was sent on compulsory unpaid leave effective from 23.05.2016. He does not know why he was so sent on compulsory unpaid leave for an unspecified period. By looking at P12 and P13 even the Court cannot get any clue about it—P12 is a Navy General Signal which cannot be understand, and P13 is a letter addressed to the Regional Director of Education of Ibbagamuwa with a copy to the petitioner. There is no direct letter addressed to the petitioner. The petitioner has filed this application seeking to quash P12 and P13 by way of writ of certiorari.

When an officer is sent on compulsory leave, nay compulsory unpaid leave for an unspecified period, he must know why he is sent on compulsory unpaid leave. That is a rudimentary principle of natural justice. The decision maker cannot say that there is no express or implied obligation on his part to give reasons. If he does not give reasons, he "would run the risk of having acted arbitrarily" or "will be found to have acted unlawfully."

In *Srimasiri Hapuarachchi v. Commissioner of Elections [2009] BLR 34 at 39*, Shirani Bandaranayale J. (later C.J.) had this to say on that matter:

> *On a consideration of our case law in the light of the attitude taken by our Courts in other countries, it is quite clear that giving reasons to an administrative decision is an*

important feature in today's context, which cannot be lightly disregarded. Moreover in a situation, where giving reasons have been ignored, such a body would run the risk of having aced arbitrarily, in coming to their conclusion. These aspects have been stated quite succinctly in the following passage, where Prof. Wade had expressed the view that, (Administrative Law, 9th Edition, pg. 522),

"Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reason is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."

And more importantly,

"Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there ae many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully."

By looking at paragraph 2 of P13, it is clear that the petitioner has been sent on compulsory unpaid leave forever. This is made amply clear by 2R1 and 2R2 tendered by the respondents with their statement of objections.

The learned Senior State Counsel appearing for the respondents admits that "*the petitioner was sent on compulsory unpaid leave with effect from 23.05.2016 under the provisions of the Placing on Compulsory Leave Regulations gazette bearing the date 26th July*

1957."[1] The aforementioned part of the Gazette was tendered by the petitioner marked P14.

It reads as follows:

> *Placing on Compulsory Leave Regulations*
>
> *1. (1) Where the Regular Naval Reserve, the Volunteer Naval Force, the Volunteer Naval Reserve, or any part thereof, has been called out on active service under section 16 of the Act, the Commander of the Navy or any other officer authorized by him in writing in that behalf, may, by order published in such manner as the Commander of the Navy may deem adequate, place on compulsory leave for such period as may be specified in that order, and officer or seaman such Naval Reserve, Naval Force or part thereof who has been called out on active service.*
>
> *(2) An officer or a seaman who has been placed on compulsory leave under paragraph (1) of this regulation shall not be entitled during the period of such leave to any pay or allowance or any other emolument which he may be entitled to under any regulation made under the Act and for the time being in force.*
>
> *(c) In this regulation, "Act" means the Navy Act, No.34 of 1950.*

By the above regulation it is clear that the Commander of the Navy cannot send an officer on compulsory unpaid leave indefinitely as was done in this case. According to the above quoted regulation, an officer can be placed on compulsory

[1] Vide paragraph 15 of the written submissions.

unpaid leave "*for such period as may be specified in that order*". The learned Senior State Counsel for the respondents admits that it has not been done.[2] If that has not been done, the decision is procedurally flawed and *ultra vires* and liable to be quashed by way of certiorari.

Why there is a requirement to specify a period when an officer is sent on compulsory unpaid leave? That is mainly, not solely, to induce the administrative authority to conclude the inquiry against the officer as quickly as possible. A person cannot be sent on compulsory unpaid leave forever. It cannot be a substitution for dismissal of service. They are two different things and not the same thing.

The learned Senior State Counsel states that the petitioner was sent on compulsory unpaid leave "until an inquiry is held".[3] What is the inquiry the respondents are going to hold against the petitioner? It is crystal clear by P13, 2R1 and 2R2 that the respondents have already taken the decision to dismiss him from service, but they have given effect to that decision by sending him on compulsory unpaid leave indefinitely.

The respondents have tendered 2R3 to say that a Board of Inquiry has been appointed to look into the alleged misconduct of the petitioner. This has been done about three months after the filing of this application, which is clearly an afterthought, if not a camouflage.

The learned Senior State Counsel states that:

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[2] Vide paragraph 32 of the written submissions.
[3] Vide paragraph 26 of the written submissions.

> *Volunteer Naval Force Regulations (P15) at section 18 states that an officer may be called upon to resign his commission (d) if he is temperamentally unfit for the service of the Navy and (c) if he does not discharge his duties efficiently. The Reports at 2R1 and 2R2 clearly demonstrate that a person can even be removed from the service of the Navy on this ground. The petitioner has merely been placed on compulsory leave until an inquiry is held. It is also clear that "temperamentally unfit" and "not discharging duties efficiently" are not defined and it is up to the authorities to decide. <u>There are no regulations to state that there must be an inquiry before deciding the same</u>.*[4]

I am perturbed by that line of argument. This is not the occasion to deal with how and when an officer can be sacked from service. According to that argument, there is an untrammeled discretion on the authorities, and an officer can be removed from service without an inquiry! I flatly reject that argument.

There is no unfettered discretion. In *Gunathileka v. Weerasena [2000] 2 Sri LR 1 at 6-7*, J.A.N. de Silva J. (later C.J.) stated:

> *It is observed that in Modern Administrative Law the concept of absolute discretion is unacceptable. "Parliament constantly confers upon Public Authorities, powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what Courts refuse to countenance. They have woven a network of restriction principles which require statutory powers to be*

[4] Vide paragraphs 26 and 27 of the written submissions.

exercised reasonably and in good faith for proper purpose only." Administrative Law - 7th Edition - Wade at page 379.

Justice Dougles in his dissenting judgment in U.S. vs. Wundarlich (1951) 342 US 98 observed,

"Law has reached its finest moments when it has freed man from unlimited discretion of some ruler, some civil or military official, some bureaucrats. Where discretion is absolute man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life; absolute discretion is a ruthless master."

These Principles have been explained and elaborated in a series of English decisions over a long period of time. Lord Wrenbury in Roberts vs. Hopwood (1925) AC 578 at 613 stated that,

"A person who is vested with a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes but what he ought. In other words, he must by the use of reason, ascertain and follow the course which reason directs. He must act reasonably."

Removal from service is a serious punishment. Punishment shall commensurate with the offence committed.

The learned Senior State Counsel has cited *Perera v. Attorney General [1985] 1 Sri LR 185* in the written submission. That case has no applicability as it deals with civil liability arising out

of withdrawal of a commission. The instant application is a writ application putting the procedure through which the petitioner was sent on compulsory unpaid leave in issue.

The procedure adopted by the respondents from the beginning is fundamentally flawed. I quash P12 and P13 by way of writ of certiorari.

Application is allowed with costs.

Judge of the Court of appeal