

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, Prohibition and Mandamus under and in terms of Article 140 of the Constitution.

Second Lieutenant Hewavitharanage Janaka Saman
Hewavitharana
No. B 115, Panakawa, Kegalle.

Petitioner

Case No. C. A. (Writ) Application 48/2013

Vs.

1. Lieutenant General Jagath Jayasuriya
Commander of the Army,
Sri Lanka Army Headquarters,
P. O. Box 553, Colombo 03.
- 1A. A. W. J. C. D. E. Silva
Commander of the Army,
Sri Lanka Army Headquarters,
P. O. Box 553, Colombo 03.
- 1B. R. M. D. Rathnayake
Commander of the Army,
Sri Lanka Army Headquarters,
P. O. Box 553, Colombo 03.
- 1C. N. U. M. M. W. Senanayake
Commander of the Army,
Sri Lanka Army Headquarters,
P. O. Box 553, Colombo 03.
2. Brigadier R. V. Ravipriya
Director of Personal Administration,
Sri Lanka Army Headquarters,
P. O. Box 553, Colombo 03.
3. Major General E. K. J. K. Wijayasiri
Regimental Commander,
Regimental Headquarters,
Sri Lanka Corps of the Military Police,

- Polhengoda, Colombo 05.
4. Colonel D. K. G. D. Sirisena
Colonel of the Regiment,
Regimental Headquarters,
Sri Lanka Corps of the Military Police,
Polhengoda, Colombo 05.
 5. Colonel G. K. S. Fonseka, LSC
Colonel A. Q.
Security Forces Headquarters,
Mulativu.
 6. Lieutenant Colonel A. C. A. De Soyza
Commanding Officer,
1st Regiment of Sri Lanka Corps of the Military
Police, Polhengoda, Colombo 05.
 7. Major A. M. G. B. Abeysinghe
2nd Regiment of Sri Lanka Corps of the Military
Police, Sudugalakanda, Girithale.
 8. Major N. P. E. M. Nearangama
Special Investigation Unit,
Sri Lanka Corps of the Military Police,
Polhengoda, Colombo 05.
 9. Mr. Gotabaya Rajapaksha
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha, Colombo 02.
 - 9A. Mr. B. M. U. D. Basnayaka
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha, Colombo 02.
 - 9B. Mr. Karunasena Hettiarachchi
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha, Colombo 02.

- 9C. Mr. Kapila Waidyaratne, P. C.
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha, Colombo 02.
10. Mr. Lalith Weerathunga
Secretary to His Excellency the President,
Presidential Secretariat, Colombo 01.
- 10A. Mr. P. B. Abeykoon
Secretary to His Excellency the President,
Presidential Secretariat, Colombo 01.
- 10B. Mr. Austin Fernando
Secretary to His Excellency the President,
Presidential Secretariat, Colombo 01.

Respondents

Before: Janak De Silva J.

Counsel:

Saliya Pieris P.C. with Heshan De Silva for the Petitioner

Manohara Jayasinghe SSC for the Respondents

Written Submissions tendered on:

Petitioner on 02.07.2019

Respondents on 03.04.2019

Argued on: 30.01.2019

Decided on: 30.07.2019

Janak De Silva J.

The Petitioner was at all times material to this application a Platoon Commander of the Sri Lanka Corps of Military Police in the rank of Second Lieutenant. He complains that based on the allegation of a breach of discipline concerning the alleged illicit relationship he had with another woman soldier certain acts were done which culminated in a recommendation been made to the H.E. the President to withdraw the commission of the Petitioner.

The Petitioner claims that only a Court of Inquiry took place in relation to the alleged act and that no recommendation can be made to withdraw the commission without the finding of guilt at a Court Martial. He further contends that even the Court of Inquiry was held violating the principles of natural justice as he did not get a proper opportunity of cross-examining the witnesses testifying before the Court of Inquiry.

Suppression/Misrepresentation of Material Facts

It is established law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi* [77 N.L.R. 131 at 135,6]:

“The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigns*. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination”.

This principle has been consistently applied by courts in writ applications as well. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd. v. Commissioner of Labour* [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jayasinghe v. The National Institute of Fisheries and Nautical Engineering* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene & Others* [(2007) 1 Sri.L.R. 24].

In fact, in *Dahanayake and Others v. Sri Lanka Insurance Corporation Ltd. and Others* [(2005) 1 Sri.L.R. 67] this Court held that if there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination.

In *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held that a petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised and that it is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge. It was further held that if there is anything like deception the Court ought not to go in to the merits, but simply say "we will not listen to your application because of what you have done'.

The Petitioner states that apart from the allegation in issue he holds a clear service record throughout the entire 16 years of his military career and no such incident or wrong doing whatsoever was recorded during his service [paragraph 19 of the petition]. However, the Respondents have produced evidence to establish that the Petitioner was previously punished after a summary trial for being absent without leave where he pleaded guilty and was admonished and severely reprimanded (R8). That is a material misrepresentation/suppression on the facts in this case and the application is liable to be dismissed on that ground alone without going into the merits.

Futility

It is an established principle that since relief by way of judicial review is discretionary in nature relief will be refused if the application is futile [*Air Vice Marshall Elmo Perera v. Liyanage* (2003) 1 Sri.L.R. 331].

In this application it is clear that H.E. the President has approved the withdrawal of commission of the Petitioner with effect from 30.06.2013 (R11). In fact, when this matter was supported for interim relief on 19.03.2013 this Court refused interim relief on the basis that the recommendation of the 1st Respondent had already been dispatched to H.E. the President. The Petitioner himself admits that this application will be rendered nugatory if H.E. the President were to withdraw his commission prior to the determination of this application [paragraph 29 of the petition].

This Court has on previous occasions refused to intervene by way of judicial review where H.E. the President has withdrawn the commission [*Air Vice Marshall Elmo Perera v. Liyanage* (supra), *Captain Sunil Pathirana v. Lieutenant General Jagath Jayasuriya* (C.A. Writ Application No. 614/2011, C.A.M. 06.07.2015), *Lt. Cdr. Pathirage v. Vice admiral Jayantha Perera and Others* (C.A. Writ Application No. 689/2011, C.A.M. 14.02.2019)].

Mr. Manohara Jayasinghe the learned Senior State Counsel for the Respondents, acting in accordance with the highest traditions of the Attorney General's department drew the attention of Court to the decision in *Flying Officer Ratnayake v. Air Marshall Donald Perera and Others* (C.A. Writ Application No. 104/2005, C.A.M. 28.02.2007) where this Court has taken a contrary view. I have considered this decision but am of the view that the better view is reflected in the cases referred to above and that it is indeed a futile exercise to intervene by judicial review where the commission has been withdrawn by H.E. the President particularly where the Petitioner himself admits that it will be futile.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal