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 of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 155/2018

1. Atantikitha Pathiranage Samantha,
   559/4E, Arauwala, Pannipitiya.

   And 310 others

PETITIONERS

Vs.

1. Air Marshal Kapila V. B. Jayampthi.
   Commander, Sri Lanka Air Force.

1A. Air D.L.S. Dias,
   Commander, Sri Lanka Air Force.

1B. Air Marshal Sudarshana K. Pathirana,
   Commander, Sri Lanka Air Force.

2. Air Vice Marshal D.L.S. Dias.

2A. Air Vice Marshal S.K.Pathirana,
   Chief of Staff, Sri Lanka Air Force.

3. Air Vice Marshal A.M. De Zoysa,
   Deputy Chief of Staff Sri Lanka Air Force.

4. Air Vice Marshal S.K. Pathirana,

4A. Air Vice Marshal P.D.K.T. Jayasinghe,
   Director, Air Operations, Sri Lanka Air Force.

5. Air Commodore M.D. Rathnayake.
Director Aeronautical Engineering,
Sri Lanka Air Force.

6. Air Vice Marshal A. W.E. Wijesuriya,
Director General Engineering,
Sri Lanka Air Force, Sri Lanka.

7. Air Vice Marshal A.W.E. Wijesuriya.

7A. Air Commodore H.M.D. Herath,
Director-Electronics& Telecommunication
Engineering, Sri Lanka Air Force.

8. Air Vice Marshal H.M.S.K.B. Kotakadeniya.

8A. Air Comodore W.M.K.S.P.Weerasinghe,
Director- Logistics, Sri Lanka Air Force

9. Air Vice Marshal C.P. Welikala.

9A. Air Vice Marshal P.D.K.T.Jayasinghe,
Director- Administration, Sri Lanka Air Force.

10. Air Vice Marshal K.F.R. Fernando,
Director-Ground Operations,
Sri Lanka Air Force.

11. Air Commodore M.R.K.Samarasinghe,
Director- Civil Engineering Sri Lanka Air Force.

12. Air Commodore L.R. Jayaweera,
Director- Health Services Sri Lanka Air Force.

13. Air Vice Marshal P.D.K.T.Jayasinghe.

13A. Air Vice Marshal M.D.A.P.Payoe,
Director- Training, Sri Lanka Air Force.

14. Air Commodore P.D.A. Mariestella,
Director Welfare (Acting) Sri Lanka Air Force.

15. E. S. Ponnamperuma, Group Captain,
Treasurer, Command Benevolent Fund,
Sri Lanka Air Force.

1st – 15th Respondents are at
Sri Lanka Air Force Headquarters,
No. 594, Sir Chittampalam A.Gardinar
Mawatha, Colombo 02.

16. KapilaWaidyarathne P.C.

16A. Hemasiri Fernando.

16B. Mr. Shantha Kottegoda.

16C Mr. Major General Kamal Gunarathne,
Secretary, Ministry of Defence.

16th, 16A-16C Respondents at
No:5/15, Baladaksha Mawatha, Colombo 03.

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**

Counsel: Sanjeeva Jayawardena,P.C., with Ms. Lakmini Warusevitane and Ms. Saranee Gunathilaka for the Petitioners

Ms. Kanishka De Silva Balapatabendi, Senior State Counsel for the Respondents

Argued on: 9th July 2020

Written Submissions: Tendered on behalf of the Petitioners on 21st August 2019 and 21st April 2021

Tendered on behalf of the Respondents on 22nd June 2020 and 4th September 2020

Decided on: 7th June 2021

Arjuna Obeyesekere, J., P/CA

The issue that arises for the determination of this Court is whether the decision of the Respondents to withhold the payment of the retirement benefit that was promised to the Petitioners under the Command Benevolent Fund of the Sri Lanka Air Force (**the SLAF**) is unreasonable and if so, whether the Petitioners are entitled to a Writ of Mandamus directing the Respondents to pay the Petitioners the said retirement benefit.

The facts of this matter very briefly are as follows.

The 311 Petitioners are non-commissioned Officers of the SLAF. Of them, 306 are Airmen while the balance 5 are Air Women. During their career at the SLAF, the Petitioners have held the ranks of Master Warrant Officer, Warrant Officer, Flight Sergeants, Sergeants, Corporals and Leading Air Craftsmen and have served in various Units of the SLAF, in all parts of the Island. The Petitioners state that they have worked with dedication, commitment, diligence and loyalty right throughout their career at the SLAF.

The Petitioners state that by Air Force Order 850 marked '**P2**', the SLAF established 'The Command Benevolent Fund' (**the Fund**) for the purpose of providing welfare benefits to all ranks of the Regular Force of the SLAF. Paragraph 2 of '**P2**' has recognized the fact that the families of Regular Force Service Personnel who die suddenly or early in life, find it difficult under their changed circumstances to adjust their financial affairs and that in such a situation, the Fund shall provide immediate financial assistance to such families. In order to provide these benefits, the Fund depends essentially on the membership fee that would be paid by its members, who are all serving Officers of the SLAF, both Commissioned as well as Non- Commissioned.

While paragraph 5 of '**P2**' sets out the benefits that the Fund aims to provide, paragraph 10 thereof recognises that servicemen find it difficult upon retirement to adjust themselves to the income standards that they were used to as serving Officers and provides for the members to contribute a sum Rs. 100 per month and to receive the said sum as a retirement benefit, upon their retirement from the SLAF. It is admitted that the

monthly membership fee has been revised over the years and that by 2014, members were paying a sum of Rs. 1000 per month towards the retirement benefit.

The Petitioners state that by letter dated 3rd September 2014 marked '**P4**', the 9th Respondent, Air Vice Marshall C.P. Welikala, the Director of Administration of the SLAF had informed all members that the Fund has introduced a new retirement benefit scheme that would be applicable to all Officers of the Regular Force as well as the Voluntary Force of the SLAF. According to the Petitioners, the Retirement Benefit Fund that was referred to earlier was limited to those in the Regular Force. Those in the Volunteer Force of the SLAF had a separate Fund (**the VAF**). Thus, '**P4**' was the first time that Officers in the Volunteer Force of the SLAF were permitted benefits under the Fund.

In terms of the scheme set out in '**P4**', all Officers were scheduled to receive the following payments upon their retirement:

Category	Number of completed Years at retirement	Benefit
Commissioned Officers	20 years	1,500,000
Commissioned Lady Officers	15 years	1,000,000
Non-commissioned Officers	22 years	1,000,000
Non-commissioned Lady Officers	15 years	750,000
Officers retiring on medical grounds	12 years	500,000

The monthly contribution that each member of the Fund was required to make in order to receive the above benefit is set out below:

Category	Present contribution	Proposed Contribution
Regular Force – Commissioned Officers	1000	2250
Volunteer Force – Commissioned Officers	500	1750
Regular Force – Non-commissioned Officers	1000	1750
Volunteer Force – Non- commissioned Officers	50	1250

The final paragraph of '**P4**' stipulated that any Officer who was not agreeable to the enhanced deduction should convey their objection on or before 16th September 2014.

'**P4**' also specified that until the Fund has sufficient funds to meet the above payments, those who retire at any given point in the first 36 months – i.e. on or before 3rd September 2017, would only receive the following sums of money:

Category	Number of completed Years at retirement	Benefit
Commissioned Officers	20 years	1,000,000
Commissioned Lady Officers	15 years	750,000
Non-commissioned Officers	22 years	750,000
Non-commissioned Lady Officers	15 years	500,000
Officers retiring on medical grounds	12 years	500,000

Thus, even an Officer who had contributed the enhanced sum of money for one month and retired thereafter was eligible to receive and did in fact receive the said sum of money.

The Petitioners state that they bona fide believed in the Scheme introduced by '**P4**' and the representations made therein and did not object to an enhanced deduction from their salary. It is admitted that a sum of Rs. 1750 was deducted from the salaries of the Petitioners from October 2014 until their retirement. '**P4**' did not set out that the success of the scheme will be examined periodically or that the retirement benefit that was promised would be adjusted under any circumstances or more particularly due to the Fund not having sufficient funds to meet the above obligation.

It is admitted that of the 311 Petitioners, the 1st – 225th Petitioners retired from service after the completion of the 36 month period specified in '**P4**' while the 226th – 311th Petitioners retired in 2017 but prior to the completion of the 36 month period. The

Petitioners claim that they are entitled to the payment of the sums of money set out in '**P4**' upon their retirement.

The Petitioners state that by his letter dated 6th December 2017 marked '**P7**', the 9th Respondent, writing in his capacity as Director (Administration) and on behalf of the 1st Respondent, the Commander of the SLAF had informed the Petitioners of the following:

> "**ශ්‍රී ලංකා ගුවන් හමුදා විධායක සුභසාධක අරමුදල මගින් ක්‍රියාත්මක කරනු ලබන විශ්‍රාම ප්‍රතිලාභ යෝජනා ක්‍රමය සම්බන්ධවයි**
>
> 1. **ඔබ ගුවන් හමුදා සේවයෙන් විශ්‍රාම ගැනීමේදී හිමිවන ඉහත විශ්‍රාම පාරිතෝෂික දීමනාව ලැබීමට සුදුසුකම් සපුරා ඇත.**
>
> 2. **දැනට පවතින මෙම යෝජනා ක්‍රමය පිළිබඳව අධ්‍යයනය කිරීමේදී මෙම අරමුදල දීර්ඝ කාලීනව පවත්වා ගනිමින් සියලු ප්‍රතිලාභීන්ට නිසි පාරිතෝෂිකයන් ලබාදීම පිළිබඳව මතුවූ පරිපාලනමය කරුණු කිහිපයක් හේතුවෙන් ඔබගේ විශ්‍රාම පාරිතෝෂික දීමානාව තාවකාලිකව අත්හිටුවූ අතර නිසි අධ්‍යයනයකින් පසුව ඔබ සැමට පූර්ණ ප්‍රතිලාභ වූ ක්‍රියාවලියක් සථාපිත කිරීම පිළිබඳව ගුවන් හමුදා මූලස්ථානයේ අවධානය යොමුවී ඇත.**
>
> 3. **කරුණු එසේ හෙයින්, ඔබට අදාළ එම ප්‍රතිලාභය ඉදිරි කාලයේදී නිසියාකාරව ලබා දීමට ගුවන් හමුදා මූලස්ථානය කටයුතු සලස්වනු ඇති බවට මෙයින් කාරුණිකව දන්වා සිටිමි.**"

Thus, '**P7**' recognized the entitlement of the Petitioners to the retirement benefit promised by '**P4**' and held out further that the said benefit would be paid to the Petitioners in due course.

By letter dated 4th January 2018 marked '**P8**', the 15th Respondent had informed the 1st Petitioner that a sum of Rs. 276,912, has been remitted to the bank account of the 1st Petitioner as the entitlement of the 1st Petitioner under '**P4**'. It is admitted that similar letters have been sent to all Petitioners, except the 107th Petitioner who was paid subsequently. The payments that were made to all Petitioners are set out in the table marked '**P9**'. Thus, all Petitioners have received less than Rs. 300,000 although '**P4**' held out that they would be entitled to a sum of Rs. 1m if they retired after 36 months or Rs. 750,000 if they retired in less than 36 months from September 2014.

By a further letter dated 26th January 2018 marked '**P12**', the 9th Respondent, once again writing on behalf of the 1st Respondent, had informed the 1st Petitioner as follows:

> "3.නමුත් වසර තුනක් පමණ මෙම යෝජනා ක්‍රමය යටතේ විශ්‍රාම ප්‍රතිලාභ ලබාදීමෙන් අනතුරුව යෝජනා ක්‍රමයේ සාර්ථකත්වය පිළිබඳ පසු විපරමක් ලෙස 2017 වසරේදී විශේෂ අධ්‍යක්ෂණයක් සිදු කරන ලද අතර එමගින්, යෝජනා ක්‍රමය සඳහා ලැබෙන අරමුදල් ප්‍රමාණයට සාපේක්ෂව වැඩි ප්‍රමාණයක් ප්‍රතිලාභ ලෙස ලබා දෙනු ලබන බව සහ ඉදිරියට මේ ආකාරයෙන් ප්‍රතිලාභ ලබාදීම සිදු කරනු ලැබුවහොත් වසර 2022 පමණ වන විට අරමුදල බරපතල ලෙස කඩා වැටීමකට ලක් වීම තුළින් අරමුදල ඉදිරියට පවත්වා ගෙනයාම සම්බන්ධව අර්බුධකාරී තත්වයක් උද්ගත විය හැකි බව අනාවරණය කරගන්නා ලදි.
>
> 4.මේ හේතුව නිසා ශ්‍රී ලංකා ගුවන් හමුදා කළමනාකරණ මණ්ඩලය විසින් සිදුකරන ලද වැඩි දුර අධ්‍යයනයකට අනුව ඉදිරිපත් කරන ලද යෝජනා සැලකිල්ලට ගනිමින් විශ්‍රාම ප්‍රතිලාභ යෝජනා ක්‍රමය සංශෝධනය කොට ඉදිරිපත් කිරීමට තීරණය කරන ලදි. ඒ අනුව මෙම යෝජනා ක්‍රමයේ ප්‍රතිලාභ 2017 වසරේ ජූලි මස සිට ක්‍රියාත්මක වන පරිදි සංශෝධනය කොට සාමාජිකයෙකු විසින් සේවයෙන් විශ්‍රාමයන අවස්ථාව වනවිට අරමුදල සඳහා දායක වී ඇති මුලු මුදල් ප්‍රමාණය මත පදනම් ව ප්‍රතිලාභ ලබාදීමට තීරණය කරන ලදි. සංශෝධිත ඉතුරුම් පදනම් කරගෙන ප්‍රතිලාභ ලබා දීමේ දර්ශකය ඇමුණුම "අ" ලෙස මේ සමග ඉදිරිපත් කෙරේ."

Aggrieved by the above decision to withhold the payment that had been promised, the Petitioners filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decision contained in '**P12**';

b) A Writ of Mandamus directing the Respondents to pay the Petitioners the sums of money as held out to them by '**P4**'.

Before I consider the submissions of the learned President's Counsel for the Petitioners, I would like to consider an objection that was raised by the learned Senior State Counsel for the Respondents in the written submissions tendered on behalf of the Respondents that the scheme contained in '**P4**' does not have any statutory underpinning and that this Court does not have the jurisdiction to hear and determine this matter.

The scope of judicial review has seen many developments since the often quoted words of Lord Atkin, J in **Rex v. Electricity Commissioners ex parte London Electricity Joint Committee Co**[1] where it was held that the controls of judicial review may be used "*wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority*."

The subsequent disuse and exclusion of *the duty to act judicially*[2] was followed by the expansion of the scope of judicial review to the actions of non-statutory bodies in the celebrated case of **R v. Panel on Take-Overs and Mergers, Ex parte Datafin plc. and another**[3] where Sir John Donaldson MR adopted the following formula which drastically expanded the scope of judicial review:

> "*Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.*"[4]

The defining feature in the above formula is the reference to a 'public element' which has been analysed in **Judicial Remedies in Public Law**,[5] as follows:

> "*Two approaches to the definition of "public" can be discerned in the Datafin case. First, there is the extent to which the body operates under the authority of the government or was established by the government or, presumably, by some other recognized public authority. Secondly, there is the extent to which a particular function is performed against a background of statutory powers even though there is no specific statutory or prerogative authority for the power which it is sought to review. Both these approaches involve some link between the*

[1] [1924] 1 KB 171.
[2] O'Reilly v Mackman [1983] 2 AC 237 at 279.
[3] [1987] QB 815.
[4] Ibid.at page 838.
[5] Clive Lewis, Judicial Remedies in Public Law (5th Edition, 2017), Sweet & Maxwell, at page 49. This is cited with authority in the case of Lanka Securities (Private) Limited v. Colombo Stock Exchange and Others [CA (Writ) Application No. 326/2019; CA Minutes of 29th May 2020 – per Janak De Silva, J].

government, or the legislature, and the body in question...The current approach of the courts is to consider ***whether the body is woven into the fabric of public regulation or governmental control of an activity or is integrated into a system of statutory regulation or, but for its existence, a governmental body would have assumed control over the activity regulated by the body under challenge*****.**"

It is interesting to note that Sir John Donaldson MR was influenced by the decision in the case of **Regina v. Criminal Injuries Compensation Board, Ex parte Lain**[6], where Lord Parker C.J. stated that the exact limits of the ancient remedy of certiorari had never been and ought not to be specifically defined, and went on to hold as follows:

"*They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word but where immediate or subsequent rights of a citizen were affected.* ***The only constant limits throughout were that it was performing a public duty.*** *Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned...* ***We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects*** *provided always that it has a duty to act judicially. Looked at in this way the board in my judgment comes fairly and squarely within the jurisdiction of this court. It is, as Mr. Bridge said, 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.' It is clearly, therefore, performing public duties*."[Emphasis added]

The words of Lord Parker CJ remain true to date, with the exception of *the duty to act judicially*.

[6] [1967] 2 Q.B. 864 at 882.

This position is aptly summarised in **De Smith's Judicial Review**[7], as follows:

> *"As in other contexts, in working out whether a decision is susceptible to judicial review the court considers two main factors. It will have regard to the source of the power under which the impugned decision is made. If this is "purely" contractual, judicial review is unlikely to be appropriate; some close statutory (or prerogative) underpinning of the contract will normally be needed. Alternatively, the court may consider whether the function being carried out by the defendant is a public function."*

The judicial developments discussed above are reflected in **Harjani and another v Indian Overseas Bank and others**[8], and several other decisions of this Court and the Supreme Court.

In this background, let me now consider whether the scheme contained in '**P4**' and the subsequent decision contained in '**P12**' have the requisite statutory flavour which invites the exercise of jurisdiction of this Court.

It is admitted that all Petitioners have served the SLAF and have retired from service. It is also admitted that the Fund has been established by an Air Force Order. The Respondents have admitted further that the *Fund was established under powers vested in the Commander of the Air Force under Section 156 of (the) Air Force Act No. 41 of 1959, as amended.*[9] Section 156 reads as follows:

> '*All property belonging to the Air Force or to any part of the Air Force, other than the property of individual members of the Air Force, and the exclusive right to sue for and recover moneys and other property due to the Air Force or to any part of the Air Force, shall vest in the Commander of the Air Force for the time being, with*

[7] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell, page 148-149. See Kumuduni Madugalle v. National Housing Development Authority and others [CA(Writ) Application No. 540/2019; CA Minutes of 16th June 2020 – per Samayawardhena, J].
[8] [2005] 1 Sri LR 167.
[9] Vide paragraph 7(ii) of the Statement of Objections.

power for him to sue, to make contracts and conveyances, and to do all other lawful things relating to such property; .....'

I cannot see any other relevance to the above admission by the Respondents except an admission that the moneys lying to the credit of the Fund is the property of the SLAF and can be dealt with by the Commander in terms of the powers vested in him in terms of the Air Force Act.

In their Statement of Objections, the Respondents have stated as follows:[10]

a) In terms of Air Force Order 850, the Commander of the Air Force is the administrator of the Fund;

b) As the administrator of the Fund, the Commander has the authority to make decisions pertaining to the Fund;[11]

c) The Commander has at various times, in the administration of the Fund, issued Orders as empowered by Section 159 of the Air Force Act;

d) The Commander of the Air Force has the power to alter the Rules of the Fund as and when necessary;

e) The Commander of the Air Force, being the administrator of the Fund has the authority to make decisions pertaining to the Fund;

f) Such decisions have been taken in the regular procedure by the Board of Management of the SLAF.

The essence of the above statements of the Respondents is that the power of the Commander to take decisions relating to the Fund emanate from the powers that are vested in the Commander in terms of the SLAF Act. A different position was later sought to be taken where it was argued that the Fund is akin to a welfare society comprising of

[10] Vide paragraphs 7(ii)-(iv) and 8 of the Statement of Objections.
[11] Vide paragraph 7 of 'P2'.

members whose relationship to the Fund is contractual and that whatever decisions that are taken are contractual in nature and devoid of any statutory underpinning.

The Fund has been established by an Air Force Order and in terms of the powers vested in the Commander under the Act. Unlike a welfare society, the Fund does not have a constitution of its own, or even if it does, none has been produced. The Respondents have not placed any material before this Court to establish that the Fund has a group of office bearers who, even though they are serving officers of the SLAF, perform their functions independent of their official titles and functions. On the contrary, the position of the Respondents has been that the Fund is being administered by the Commander, and that decisions have been taken by the Board of Management of the SLAF.

The Respondents have also not placed any material before this Court to establish that the moneys lying to the credit of the Fund is kept in a special bank account without it being mixed with State funds. While one would imagine that the monies belonging to the Fund are held by the Commander in trust for the members, the Respondents have admitted that the moneys lying to the credit of the Fund is the property of the SLAF and can be dealt with by the Commander in terms of the powers vested in him in terms of the Air Force Act – vide Section 156 of the Act. In light of these representations made by the Respondents themselves, this Court cannot deny the existence of a statutory nexus to the impugned decisions.

Furthermore, even the documents that have been sent by the Respondents to the Petitioners – i.e. '**P4**', '**P7**', '**P8**' and '**P12**' - have been written in the official capacities of the relevant officer, with '**P7**' and '**P12**' having been sent on behalf of the Commander of the SLAF. It is also clear from '**R2**' and the annexures thereto that the decision (a) to commence the scheme, and (b) to re-visit the scheme in 2017, have been taken by the SLAF and not by a set of office bearers of a welfare society.

When I take into consideration the totality of the above material, it is clear that the Fund has been established by the Commander of the SLAF in terms of the Air Force Act, and that the decisions that are being impugned in this application have been taken on

behalf of the Commander, by the Board of Management of the SLAF. Therefore, I am of the view that the Fund has the public element or the statutory underpinning that is required for this Court to exercise the Writ jurisdiction conferred on this Court and hear and determine this matter.

This takes me to the principal argument presented to this Court by the learned President's Counsel for the Petitioners that the decision conveyed to the Petitioners was arbitrary, unreasonable and irrational.

In **Council of Civil Service Unions v. Minister for the Civil Service**,[12] Lord Diplock having introduced 'irrationality' as one of the three grounds upon which administrative action is subject to judicial review, stated that:

> "*By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness.' It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*. "

Lord Diplock's definition of irrationality is intrinsically linked to the test adopted by Lord Greene in **Associated Provincial Picture Houses Limited v. Wednesbury Corporation**[13] where unreasonableness was explained as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority*.' The famous example of the red-haired teacher who was dismissed due to the colour of her hair, illustrates the high threshold for "unreasonableness" that was expected to justify judicial intervention on this ground.

Recent developments in English law however illustrate that Courts are keen to reduce the rigour of "wednesbury unreasonableness"[14] in order to better fulfill their function of

[12] [1985] 1 AC 374 (the GCHQ Case).
[13] [1948] 1 K.B. 223 at pages 229 - 230.
[14] See R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433; Regina (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence [2003] QB 1397 at page 1413; Kennedy v Charity Commission (Secretary of State for Justice and others intervening) [2015]1 AC 455.

probing the quality of decisions and ensuring that assertions made by public authorities are properly substantiated, justified, and strike a fair balance between parties.
The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,[15] decided prior to the **GCHQ case** provides in the following passage, what can be considered a *more balanced test*: [16]

> "*In public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt*."

It is clear that by '**P4**', the SLAF had represented to the Petitioners that they would be paid a sum of Rs. 1 million (*or Rs. 750,000 if the period was less than 36 months and depending on whether the recipient was an Airman or Air Woman*) when they retire upon completing 22 years of service. It was argued that '**P4**' created in the minds of the Petitioners a legitimate expectation that they would receive the said sum of money on their retirement. I must admit that on the face of it, what was promised by '**P4**' does not appear to be a realistic scheme, where after three years of contributing Rs. 1750 per month, an officer would receive what would appear to be an unrealistic sum of Rs. 1 million. What is worse is that even an Officer who retired after contributing for just a month received Rs. 750,000. Hardly the circumstances that should prevail for a Court to recognize a legitimate expectation, even though 1821 Officers were paid the sums of money promised – vide '**R1**' - leaving *Ripley* in disbelief.

However, what is important to note is that the SLAF did not venture out into the unknown and hence, what was being introduced was not an unrealistic scheme. The Scheme which was initially proposed was in line with the schemes operated by Sri Lanka Army and Sri Lanka Navy. Furthermore, prior to venturing into this new initiative, the

[15] [1977] AC 1014.
[16] See Colonel U.R. Abeyratne v. Lt. Gen. N.U.M.M.W. Senanayake and Others, CA (Writ) Application No. 239/2017; CA Minutes of 7th February 2020; Also see KIA Motors (Lanka) Limited v. Consumer Affairs Authority, CA (Writ) Application No. 72/2013; CA Minutes of 26th May 2020; U.A.A.J Ukwatte and another v. Minister of Education and others, CA (Writ) Application No. 403/2019; CA Minutes of 12th June 2020.

SLAF has conducted what the SLAF itself calls a *comprehensive study* – vide Exhibit 'A' to the analysis carried out in June 2017 relating to the future sustainability of the Fund, marked '**R2**'.

The scheme contemplated that all Officers serving in the SLAF will join the scheme and contribute towards the Fund. However, it is not all those who joined the scheme that would receive the ultimate benefit of Rs. 1m for the reason that some officers may leave the service prior to the completion of the mandatory period that they need to serve in order to receive the benefit. Such officers would only receive their contribution with interest at 5% per annum. While the membership fee that was to be charged was to bring in Rs. 704m per annum, the number of retirees in the first three years was an average of 675, with over 90% of the retirees being non commissioned Officers. Thus, the moneys that were to be generated through the membership fee were sufficient to pay those retiring in the first three years, at the marked down rate.

The Report '**R2**' has identified that the study in 2014 proposed a monthly contribution from Volunteers which was Rs. 500 less than Officers of the Regular Force whilst offering the same retirement benefits to the Officers of the Volunteer Force under the Scheme. The reason for doing so is that the study had assumed that the Volunteer Force Fund (**the VAF**) would merge with the Fund from the beginning of the scheme, bringing in the capital of the VAF to the Fund. The merger, which should have brought in approximately Rs. 382m, however had not taken place.

The study in 2014 had also estimated an annual income of Rs. 704m. However, what was received was Rs. 80m less due to the distribution of a portion of the savings from the Fund to the VAF, at the rate of Rs. 500 per officer of the Volunteer Force every month. The primary cause in the drop of revenue was the failure to have the Regular Force and the Volunteer Force make the same monthly contribution and the failure to merge with the VAF. The drop in the total income had therefore been Rs. 165m.[17]

[17] Vide Exhibit 'B' of 'R2'.

'**R2**' had therefore proposed the following two options so that the scheme would continue to be feasible:

(a) Increase the monthly contribution of Regular as well as Volunteer Force personnel by Rs. 500, which would bring in an additional Rs. 215m per year;

(b) Merge the Fund with the VAF and have all members contribute the same monthly amount, irrespective of whether they belong to the Regular Force or the Volunteer Force, thus bringing in an additional sum of Rs. 144m.

Although '**R2**' has recognised that the existing scheme would suffer losses beyond 2022, '**R2**' has further recognised that with either of the above options being implemented, the scheme could continue till 2029 with a slight deficit. Annexed to '**R2**'are the figures for each of the above options which shows clearly that with either of the above options, the scheme is feasible until 2029.[18] Thus, '**R2**' contained remedial measures that would ensure the scheme could continue until 2029 and beyond.

The recommendations in '**R2**' had been considered by the 9th Respondent, who has recommended that the following be implemented:[19]

a) To increase the monthly contribution of each member by Rs. 500;

b) To merge the VAF with the Fund;

c) To equal the contributions made by Regular and Volunteer Force officers;

d) To increase the loan interest rate from 4.2% to 5% in order to equalize it with the cost of capital;

e) Increase the monthly membership fee of Rs. 5 to Rs. 20.

[18] Vide Exhibit 'E' of 'R2'.
[19] Vide Annexes 'A' and 'B' of 'R2'.

The above proposals of the 9th Respondent have been recommended by the 2nd Respondent, who was the Chief of Staff at that time and later became the Commander of the SLAF, subject to one further amendment – i.e. to increase the monthly membership fee from Rs. 5 to Rs. 25.[20]

The Respondents have not explained why the above proposals were not implemented. Had it been done, the Fund would have had sufficient monies to honour its obligations. Instead, the Respondents claim that a decision was taken by the Board of Management of the SLAF that the Petitioners cannot be paid the sums of money that was promised by '**P4**' and arbitrarily reduced the sum to Rs. 276,912. It is clear that the Respondents have represented to the Petitioners that they would be paid Rs. 1m on retirement, provided they have completed contributions for 36 months. If the said representation was to be retracted by the Respondents, that must be on reasonable grounds. In this instance, the Respondents own documents reveal that they had two options open to them, which would have ensured that the scheme could proceed upto 2029. Therefore, the decision in '**P12**' is a decision taken without due appreciation of the relevant facts and circumstances.

In any event, the adjustment to '**P4**' contained in '**P12**' is admittedly after the Petitioners retired from service and has been on 26th January 2018 with retrospective effect from June 2017. It is clear that the powers vested in the Commander of the Air Force under Section 156 of (the) Air Force Act do not specifically confer on the Commander of the Air Force, the power to make decisions which affect rights retrospectively.

Together with their written submissions, the Respondents have tendered several documents which reveal the following:

a) The contributions of the Volunteer Force Airmen / Airwomen have been increased in February 2018 by Rs.500 to Rs. 1750;

[20] Vide document dated 18th July 217 annexed to 'R2'.

b) The contributions of the Airmen / Airwomen have been increased in September 2019 from Rs. 1750 to sums ranging from Rs. 2750 to Rs. 3250, depending on the number of years in service;

c) The payments due to the Petitioners who have completed 36 months prior to retirement have been increased upto Rs. 700,000 while those with less than 36 months are to be paid Rs. 600,000;

d) Airmen retiring after September 2019 are entitled to a sum of Rs. 700,000.

In the above circumstances, I am of the view that the decision in '**P12**' in so far as it relates to the Petitioners is arbitrary and unreasonable and is liable to be quashed by a Writ of Certiorari. I accordingly issue a Writ of Certiorari quashing the letter dated '**P12**'. I also issue a Writ of Mandamus directing the Respondents or those holding Office in the Command Benevolent Fund to pay the Petitioners the Retirement Benefit in terms of '**P4**'. I make no order with regard to costs.

President of the Court of Appeal