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 writ of *certiorari* and *mandamus* under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CASE NO: CA/WRIT/262/14

S. Victor Wijerathne,
No. 355, Moderwatte,
Kurunegala.

PETITIONER

VS.

1. Hon. Tissa R. Balalle,
Governor of the North Western Province,
Governor's Office, Maligawa,
Kurunegala.

1A. Hon. Amara Piyaseeli Ratnayake,
Governor of the North Western Province,
Governor's Office, Maligawa,
Kurunegala.

1B. Hon. K.C. Logeswaran,
Governor of the North Western Province,
Governor's Office, Maligawa,
Kurunegala.

2. Secretary to the Governor of the North Western Province,
Governor's Office, Maligawa,
Kurunegala

3. Mr. G.S. Waththegedara,
   The Chairman,
   Provincial Public Service Commission
   of the North Western Province.

4. Ms. Kanthi Wehalla,
   Secretary,
   Provincial Public Service Commission
   of the North Western Province.

5. Mr. H.M. Meththananda Nilame,
   Member,
   Provincial Public Service Commission
   of the North Western Province.

5A. Mr. E.M.P. Ekanayake,
   Member,
   Provincial Public Service
   Commission of the North Western
   Province.

6. Mr. D.S. Jothirathne,
   Member,
   Provincial Public Service Commission
   of the North Western Province.

6A. Mr. Nihal Sumanadeera,
   Member,
   Provincial Public Service
   Commission of the North Western
   Province.

7. Mr. M.M. Iqbal,
   Member,
   Provincial Public Service
   Commission of the North Western
   Province.

8. Mr. W.A.D.T. Sarath Stanley,
   Member,
   Provincial Public Service
   Commission of the North Western
   Province.

9. Chief Secretary,
   Chief Secretary's Office,
   North Western Province.

10. Mr. S.L. Gunasekara,
    Administrative Officer,
    Livestock and Health Department of
    North Western Province,
    Kurunegala.

11. W.W. Fernando,
    Inquiry Officer,
    No. 370, Vajira Mawatha,
    Vilgoda Road,
    Kurunegala.

12. A.P. Gunathilake,
    Administrative Officer,
    Chief Secretary's Office,
    Noth Western Province,
    Kurunegala.

13. Director General of Pensions,
    Department of Pensions,
    Maligawatte,
    Colombo 10.

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. and**
K. K. A. V. SWARNADHIPATHI, J.

Counsel: Saliya Peiris PC, instructed by Manjula Balasooriya for the Petitioner.

Manohara Jayasinghe SSC for the Respondents.

Written Submissions on: 20.02.2019 & 22.11.2019 (by the Petitioner).

24.12.2018 (by the Respondents).

Decided on: 05.08.2021.

MOHAMMED LAFFAR, J.

The Petitioner in this application has invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking, *inter alia*, for the following relief:

b) a mandate in the nature of a writ of *certiorari* quashing the Disciplinary Orders at P-15 and P-16;
c) a mandate in the nature of a writ of *certiorari* quashing the decision reflected by P-18;
d) a mandate in the nature of a writ of *mandamus* directing one or more or all of the Respondents,
    i. to take steps according to law to pay the Petitioner his due emoluments including back wages from the date of interdiction to the date of his retirement and
    ii. to take steps according to law to pay the Petitioner his pension from the date of retirement.

When this matter was taken up for argument, both parties had consented to dispose the matter by way of written submissions that have already been tendered.

Admittedly, the Petitioner had joined the public service on 02.06.1977 as a clerk and had been worked several government institutions of North Western Province after being absorbed to the Provincial Public Service until his impugned interdiction was done on or about 15.10.2008.

The Petitioner, by the letter dated 12.09.2008 was informed by the 10th Respondent, Administrative Officer of Livestock and Health that he had been ordered to hold a preliminary investigation against the Petitioner in respect of misappropriation of money of the office of the Deputy Commissioner of Co-operative Development of North Western Province at the time he served.

Accordingly, on 17.09.2008, a statement was recorded from the Petitioner on the said allegation and thereafter, he was interdicted by letter dated 15.10.2008 of the Chief Secretary of the North Western Province and subjected to a formal Disciplinary Inquiry which was commenced on 19.02.2010 based on 36 charges [vide P-11b].

After the inquiry, by letter marked P-15 and P-16 the Petitioner was informed by the Secretary of the Provincial Public Service Commission through the 9th Respondent that the Petitioner had been found guilty of 28 charges in the charge sheet at the inquiry. Further it was informed that after considering the outcome of the inquiry, the commission had ordered to dismiss the Petitioner from the service from the date of interdiction.

The Petitioner further submits that having dissatisfied by the disciplinary order, he appealed to the Governor of the North Western Province and to the Secretary of Public Service Commission on 04.05.2013. However, this appeal was refused by the Governor [by the letter dated 20.07.2013 marked P-18] without a hearing and proper reasons.

According to the Petitioner, the main ground for premising this application is that the disciplinary inquiry is unfair, *ultra vires* and contrary to the rules of natural justice.

The Petitioner states that as the allegations related to his conduct in his previous assignment in the Provincial Public Service namely, the Kurunegala Co-operative Development Assistant Commissioner's Office, the Provincial Public Service Commission could not have lawfully held an inquiry against him. In contrast, the Respondents correctly submitted that Petitioner's this position is flatly contradicted by clause 6.1 of the Disciplinary Procedure Code of the Provincial Public Service of the North Western Province [vide P6/1R8] which clearly provides that the current Head of Department can inquire into misconduct alleged to have taken in the previous place of employment in the Provincial Public Service.

It was further complained by the Petitioner that the purported disciplinary inquiry was instituted under the influence of one A.P. Gunathilake [i.e., Prosecuting Officer] who was the Administrative Officer in the Chief Secretary's office who has developed an animosity with the Petitioner while he was serving in the same office[1]. Therefore, the Petitioner submits that he was deprived an opportunity of fair trial as preparing charge sheet as well as conducting the prosecution by an officer who has an animosity with the Petitioner.

It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that adjudicators should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could *reasonably apprehend* that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that *"justice must not only be done but must also appear to be done"* [vide *R v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256].

As correctly observed by Ratnayake J in *Captain Nawarathna v. Major General Sarath Fonseka and 6 Others* [(2009) 1 Sri LR 190], where the petitioner denies that rules of natural justice have not been complied with and the respondents assert the contrary, a petitioner can do no more than deny the compliance with the rules of natural justice and the burden is on the respondents to establish that rules of natural justice have been complied *by producing an acceptable record of proceedings*. In the absence of production of such a record of proceedings the Court would not have any option other than to accept the petitioner's version that there has been procedural impropriety leading to a denial of the rules of natural justice.

[1] Vide para 5 of the Petition dated 06.08.2014.

The principle which emerges from bias is not concerned with the fact that the decision maker was biased, but with the possibility that he or she might have been biased i.e., a real likelihood of bias [see, *Simon v. Commissioner of National Housing* (1972) 75 NLR 471].

It is necessary to point out, however, that courts will not merely uphold a plea of bias simply because a party has raised it. It should be made clear that a party wishing to raise a complaint of bias has to do so with the disciplinary authority. The disciplinary authority is enjoined to consider such objection and make a decision. Where the objection of bias has not been raised before the disciplinary authority, the complainant has to demonstrate actual bias in the proceedings on appeal or judicial review.

Question of likelihood of bias can only, logically, be raised before or perhaps during the proceedings in question. It can never be based on conjecture or on flimsy insubstantial grounds and there must be material which shows a tendency to favour one side unfairly at the expense of the other [vide *Dr. Karunaratne v. Attorney General and Another* (1995) 2 Sri LR 298 – *per* Gunersekera J in page 302]. In such cases, an affected party would normally be expected to request that the person suspected of such bias recuse himself from participation in the proceedings in question. Parties may be held to have waived the right to invoke the bias rule if they were fully informed of the facts that could support a claim of bias but failed to raise the issue in a timely manner. Vide *Canada (H.R.C.) v. Taylor*, [(1990) 3 SCR 892] and *In re Human Rights Tribunal and Atomic Energy of Canada Ltd.* [(1986) 1 FC 103 (CA)]. Accordingly, in my view, where a party does not raise any objections then such party cannot rely on the ground of likelihood of bias on appeal or judicial review**.** This ensures that the tribunals' decisions are not set aside based on a point that had not been brought to their attention.

In the instant case, the Respondents have submitted the inquiry proceedings in its entirety [vide 1R9]. A careful perusal to the document 1R9 is suggested that the Petitioner afforded the opportunity to lead his

defence with testimony of witnesses and documents. The Petitioner has not placed any materials to show that he had objected the said inquiry as to the alleged animosity of the inquiring officer or any irregularity of procedure. Therefore, this Court is of the view that there is no basis for the Petitioner to complain now of an irregularity of procedure based on bias.

The Petitioner further contended that as per the clause 19.1.1 of the Disciplinary Procedure Code, the Inquiring Officer should take necessary steps to issue a disciplinary order within one year after issuing the charge sheet against a Respondent or Charged Officer. However, the Petitioner submitted that the charge sheet dated 26.05.2009 was served on the Petitioner on 05.05.2009 and after concluding the inquiry the disciplinary order was communicated to the Petitioner on 22.04.2013 where it took approximately four years delay for the completion of the inquiry. Therefore, the Petitioner submits that this prolonged delay for completion of the inquiry against the Petitioner which has not been explained is unreasonable and unfair.

The Respondents, while admitting the fact that the inquiry took longer than intended, submit that there was good reason for this and there was certainly no intention to protract the process with a view to vexing and harassing the Petitioner. They further submit that the Secretary of the Provincial Public Service Commission wrote repeatedly to the inquiry officer urging an expeditious inquiry [vide 1R1]. However, the ill-health of the inquiring officer Mr. Ariyaratne and the difficulty in calling a crucial witness [vide 1R4 and 1R5] caused an unavoidable delay to conclude the inquiry. They further submit that the Respondents made every endeavour in good faith to conclude the inquiry early and therefore, the delay which they have duly explained cannot be the basis for invalidation of the Provincial Service Commission's order. Therefore, the delay which the Respondents have duly explained cannot be the basis for an invalidation of the findings of the inquiry commission.

It was also submitted by the Petitioner that even though the Petitioner was communicated with the disciplinary order [vide P-15 and P-16], the Respondents have not specified the findings and reasons on each individual charges in the charge sheet. It was further contended that the Petitioner was unaware on which charges he had been found guilty and from which charges he had not been found guilty until the Inquiry Report 1R9 was submitted along with objections of the Respondents.

It is not only appropriate but is a solemn duty of every decision-maker, to state the reasons in support of their decisions. Reasoning is the soul of a judgment and embodies one of the three pillars on which the very foundation of natural justice. Every decision-maker shall give reasons at the time of making the decision, unless there is an agreement to the contrary. Failure to give reasons cannot be remedied by giving reasons later. However, if reasons have been given but *not communicated* to the party concerned, the situation is different. In such a situation, once the appeal or judicial review is put in motion, the decision-maker can tender the reasons to Court, as suggested by S.N. Silva J (later CJ) in *Kusumawathie v. Aitken Spence Co. Ltd.* [(1996) 2 Sri LR 18] and Mark Fernando J in *Karunadasa v. Unique Gems Stones Ltd.* [(1997) 1 Sri LR 264]. However, if reasons are suggested for the first time in Court, the tendency is to reject them as afterthoughts [vide *Abeysinghage Chandana Kumara v. Kolitha Gunathilaka and 10 Others*, CA Minutes dated 01.06.2020].

In any event, in the case in hand, this Court observed that the findings of the disciplinary inquiry on all the charges contained in the charge sheet has been clearly set out in the order. The Petitioner has been found guilty on charges 1 to 27 and charge 36 and cleared of charges 28 to 35. While the reasons for each offence are clearly stated in the order, the Petitioner was briefly informed the final decision reached by the inquiring officers. The Petitioner would have always been able to obtain or peruse the order or relevant proceedings of the inquiry at any time. No complaint was made to this Court to the contrary.

In these respects, I am of the considered view that the Petitioner's arguments on the ambiguity in the disciplinary order and breach of natural justice are devoid of merits.

The Petitioner's next compliant is that although he appealed to the 1st Respondent - Governor against the disciplinary order on 04.05.2013, by the letter marked P-18 dated 29.07.2013 sent by the Secretary to the 1st Respondent stating that the appeal of the Petitioner has been refused after being considered by the Governor under the powers conferred on him in the section 33(8) of the Provincial Council Act, No. 42 of 1987 without a hearing and proper reasons.

This Court carefully perused the letter P-18 in its entirety. In this letter the Governor has correctly stated that *after perusing the entire inquiry proceedings* and the alleged order, he was of the opinion that the *Inquiring Officers correctly found the Petitioner guilty of the charges i.e., Misappropriation of State funds*. Accordingly, he had refused to interfere with the findings of the Inquiry Commission and accordingly, he dismissed the Petitioner's appeal.

Therefore, I am unable to agree with the contention of the Petitioner that the Governor had refused the appeal without stating reasons.

In the circumstances aforesaid, I see no merit in this application.

I dismiss the application without cost.

Application dismissed.

Judge of the Court of Appeal.

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal.