

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

*In the matter of an application for a mandate in
the nature of Writs of Mandamus in terms of
Article 140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

CA Writ Application No: 351/2019

Prof. Deepal Senaka Weerasekara
No. 33/4A, Galpotha 2nd Lane,
Nawala,
Rajagiriya.

Petitioner

Vs.

1. Mr. A. Jagath D. Dias
Director General of Pensions
Department of Pensions
Maligawatte,
Colombo 10.
2. Dr. Anil Jasinghe
Director General of Health Services
Ministry of Health, Nutrition and Indigenous
Medicine
"Suwasiripaya"
No.385, Rev. Baddegama Wimalawansa
Thero Mawatha,
Colombo 10.
3. Dr. D. M. S. Samaraweera
Director
Teaching Hospital – Anuradhapura
Harishchandra Mawatha,
Anuradhapura.
4. Dr. W. M. Palitha Bandara
Provincial Director of Health Services

Provincial Department of Health Services –
North Central Province
Bandaranayake Mawatha,
Anuradhapura.

5. Mrs. Wasantha Perera
Secretary, Ministry of Health, Nutrition and
Indigenous Medicine
Ministry of Health, Nutrition and Indigenous
Medicine
“Suwasiripaya”
385, Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.
6. Hon. Rajitha Senaratne
Minister of Health, Nutrition and Indigenous
Medicine
“Suwasiripaya”
385, Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.
7. Mr. J. J. Rathnasiri
Secretary, Ministry of Public Administration,
Disaster Management and Rural Economic
Affairs
Ministry of Public Administration, Disaster
Management and Rural Economic Affairs
Independence Square,
Colombo 07.
8. Hon. Ranjith Maddumabandara
Minister of Public Administration, Disaster
Management and Rural Economic Affairs
Independence Square,
Colombo 07.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Avindra Rodrigo PC with Ashiq Hassim instructed by
F. J. & G. de Saram for the Petitioner.
Dr. Charuka Ekanayake SC for the Respondents.

Decided on : 2021.11.08

Dhammika Ganepola, J.

The Petitioner is a qualified Consultant Obstetrician and Gynecologic who was attached to the Ministry of Health, Nutrition and Indigenous Medicine and served in various places around the island in several capacities from 16.01.1985 to 15.10.1995. While being attached to the Ministry, the Petitioner was appointed as a Specialist (V.O.G) to the General Hospital, Anuradhapura with effect from 10.12.1991 and served there until he was permanently released to the University of Sri Jayewardenepura on 15.10.1995. The Petitioner has served at the said University until his resignation from his service on 30.10.2004.

After reaching the age of 55 years on 16.03.2015, the Petitioner has made a written request dated 30.03.2015 (P13) to the 2nd Respondent requesting that he be granted his pension entitlement for the period of his public service from 16.01.1985 to 15.10.1995. In response to the said letter P13 the Acting Deputy Director General (Health Services) by his letter dated 20.08.2018 (P14) with copy to the Petitioner has instructed the 3rd Respondent to take all necessary steps to proceed with the Petitioner's request upon the 7th Respondent's determination based on S.48C(1) of the Minutes of Pension which declares that the Petitioner is entitled to a pension. Subsequently, the 3rd Respondent by his letter dated 01.11.2018 (P15) addressed to the Provincial Director of Health Services Anuradhapura has requested the personal file and the salary particulars of the Petitioner to take steps to grant his pension since such documentation were not available at the Teaching Hospital, Anuradhapura. The 3rd Respondent in his letter P15 has indicated that the personal file of the Petitioner should be available at the said Provincial Director's office during the relevant period. In response to said letter P14, the 3rd Respondent by his letter dated 10.11.2018 (P16) has forwarded the salary particulars of the Petitioner to the Deputy Director General of Health, but has informed the Deputy Director General of Health that the Petitioner's

personal file is not available at the Anuradhapura Teaching Hospital. The 3rd Respondent by his letter P16 has further informed that the Petitioner had not obtained any no-pay leave or paid leave during the concerned period. Since the personal file of the Petitioner was not to be found, the 3rd Respondent by his letter dated 19.11.2018 (P17), with copies to the Petitioner and the 4th Respondent, has requested the Deputy Director General of Health to make available the documents referred to therein in order to proceed with the granting of pension entitlement to the Petitioner. Even though the 4th Respondent had not responded to the said request P17, the Petitioner has submitted the certified copies of the required documents that were available in his possession along with his letter dated 05.20.2018 (P18). Thereafter, the Petitioner through his Attorneys-at-Law, has made a request by his letter dated 08.02.2019 (P19) to the 3rd Respondent requesting him to take necessary steps to grant the pension entitlement of the Petitioner. In response to the said request P19, the 3rd Respondent by his letter dated 11.03.2019 (P20) has informed the Petitioner that the 3rd Respondent is unable to proceed with the matter since the 4th Respondent has failed to make available the Petitioner's personal file. In spite of such circumstances, the 1st Respondent by his letter dated 10.05.2019 (P23) has informed the Petitioner his willingness to proceed the Petitioner's request in the event the Petitioner submits a duly filled application. The Petitioner submits that up to date the Respondents have failed to take necessary steps to grant the Petitioner his pension entitlement.

Being aggrieved by the said failure and/or negligence on the part of the Respondents, the Petitioner seeks the intervention of this Court by way of *Writ of Mandamus* directing the 1st and /or any one or more of the Respondents to take all necessary steps according to the law to grant his pension entitlement and a *Writ of Mandamus* directing the 1st Respondent to comply with the determination of the 7th Respondent reflected in the letters P14 and P22.

By a *Writ of Mandamus*, a court commands some officer, authority or inferior court to exercise or appropriately perform some power which it has, either refused to do or invalidly exercised. Accordingly, this Court should consider whether there are sufficient grounds for this Court to issue a Writ of Mandamus. The Respondents have admitted the issuance of the documents marked as P14, P15, P17, P20, P22 and P23 annexed to the Petition. Accordingly, it is apparent that the Respondents admit the stance advanced by the Petitioner that the 7th Respondent has approved the grant of the Petitioner's pension entitlement.

Public Servants have no absolute right to any pension or allowance under the regulations of the Minutes of Pension. However, in the case of **JAYARATHNE vs. WICKREMARATNE AND OTHERS 2003 (2) SLR 276** it was held that,

“Under section 2 (kk) of the Interpretation Ordinance, the Minutes of Pension is, included to be a " written law." Therefore, the decision of the Education Service Committee on the payment of pension is one regulated by 'written law of the country.'”

Similarly in the instant case the 7th Respondent has made a determination that the Petitioner is entitled to a pension in terms of S.48C(1) of the Minutes of Pension. Therefore, it is apparent that the Petitioner has a statutory right for a pension. Since, it has already been decided that the Petitioner has a statutory right for a pension, the Respondents are legally bound to act in accordance with the Minutes of Pension and ensure that the Petitioner is granted his entitlement.

In the instant case, the issue has arisen with the inability on the part the Respondents to locate the personal file of the Petitioner. In terms of the S.4 of the Chapter IV of the Establishment Code, the appointing authority or the employer of the respective public officer is required to maintain the personal file of the respective public officer. In view of letter P3, it is apparent that the Petitioner has been appointed by the Secretary, Health Services. In view of P12, it appears that the Petitioner was attached to the General Hospital of Anuradhapura at the time he was permanently released to the University of Sri Jayawardenapura. Therefore, it is observed that in terms of S.4 of Chapter VI of the Establishment Code, the 4th and the 5th Respondents are responsible for maintaining the personal file of the Petitioner. In the case of ***Pathirana V. Victor Perera (DIG Personal Training Police) (2006) 2 SLR 281*** it was held that the ***Establishment Code is part of the statute law of Sri Lanka***. Therefore, it is evident that the 4th and 5th Respondents had a duty to maintain the personal file of the Petitioner by law.

However, letters marked P15, P16 and P17 to the Petition disclose that the personal file of the Petitioner was not to be found in the custody of the 4th or 5th Respondents. In the above premise, it is apparent that the 4th and the 5th Respondents have failed in duly performing their statutory duty as indicated in S.4 of Chapter VI of the Establishment Code. In the event where the Respondents have been imposed with a statutory duty, the 4th and 5th Respondents cannot simply escape from their responsibility merely indicating that the Petitioner’s personal file is not to be found. In such instances, the Respondents are bound by

law to take remedial steps to prevent any injustice being caused to the Petitioner due to no failure of his, but the 4th and 5th Respondents.

The procedure to be adhered to by the Heads of the Departments in the event where there is a difficulty in locating the documents required to initiate the payment process of pensions, is laid down in the Public Administration Circular No. 07/2018 dated 24.05.2018 (P24). The said Circular issued by the Secretary to the Ministry of Public Administration, Management, Law and Order make necessary provisions to accelerate the payment process of pension. Section 2.III of the said Circular is as follows,

“At special occasions where it is not possible to find the documents and particulars relevant to the service records of the officer, the Head of the Department shall appoint an Investigation Committee consisting of two Staff Officers. If such Staff Officers are not available in the respective institution, the committee shall be appointed obtaining Staff Officers from a public office located in the close proximity. Recommendations shall be made by the report of the committee to make the period of service, of which particulars are not available, applicable for the calculation of pension and the report shall be certified by all the committee members placing the official stamp with their names. The Head of the Department shall recommend the report of the committee and then submit it to the Director General of Pension to accept the recommendation. In the meantime, all the documents which served as the base for the preparation of the committee report and a new history sheet, which has been certified, shall be included in the personal file.”

The guidelines and instructions laid down in the said Circular P24, confer authority upon the Heads of the Departments to take such action to avoid any delay in the pension payment process and to accelerate the payment process of pension. Therefore, there again lies a statutory duty upon the 4th and the 5th Respondents to act accordingly to remedy the failure on their part. However, it appears that the 2nd, 3rd, 4th and/or 5th Respondents have failed to take any positive step in compliance with the provisions of the said Circular P24 and that the said conduct of the Respondents have compelled the Petitioner to file the instant application. It appears that the very conduct of the 2nd, 3rd, 4th and 5th Respondents have prevented the 1st Respondent also from accelerating the payment process of pension in respect of the Petitioner.

Section 1.3 of Chapter XLVII of the Establishment Code specifically indicates the duty of the public officers to familiarize themselves with and to observe the Circular instructions. Section 1:3 of Chapter XLVII of the Establishment Code is as follows;

“ An officer is required to familiarize himself with and to observe the provisions of the Financial Regulations, the Establishment Code, Circular Instructions and other Departmental Manuals and Instructions.”

Therefore, it appears that the Respondents were legally obliged to adhere the procedure laid down in the said Circular in initiating the pension payment process with regard to the Petitioner. Moreover, in the case of **Karavita and Welikanna v. Inspector General of Police (2002)2 SLR 287** it was held that ***where a duty is imposed upon a public officer by statute, such person is required to perform such duty in accordance with the applicable circulars or scheme of recruitment.***

Irrespective of such legal obligation, it is observed that the Respondents have failed to follow the due procedure in granting the Petitioner his pension entitlement. Therefore, in such an instance, a Writ of Mandamus lies against such persons to ensure that they properly perform their statutory duty in accordance with the applicable circulars or scheme of recruitment.

Further, it is observed that the purpose of the letter P17 which has been forwarded to the 4th Respondent by 3rd Respondent with copy to the Petitioner, was to obtain the missing documents contained therein, so that the 3rd Respondent could initiate/proceed with the pension payment process. In response to said letter(P17), the Petitioner has submitted copies of all documents required by way of said letter P17 to the 3rd Respondent except for one. Even so, it appears that the 3rd Respondent or any of the Respondents has failed to take any positive step in order to carry out the needful and has simply passed the ball to each other. The Petitioner completed the age of 55 years on 16th March 2015 and made his application for pension to the 2nd Respondent on the 30th of March of the same year. Since then, more than six years have lapsed without a finality causing grave injustice to the Petitioner. The aforesaid lapses on the part of the Respondents have not been reasonably explained by the Respondents.

In the above premise, the failure on the part of the Respondents to adhere to the guidelines and instructions provided in the said Public Administration Circular and their failure to provide any administrative relief to the Petitioner with regard to his request for pension entitlement throughout long period, would amount to a

refusal to exercise the power on the part of the 2nd, 3rd, 4th, or 5th Respondents. It was held in the case of *Wijeyesekera and Co. Ltd. Vs. The Principal Collector of Customs (1951) 53 NLR329 at 333*, that *it is not indeed necessary that the word 'refuse' or any equivalent to it, should be used; but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required.*

Pension Entitlement of the Petitioner was approved by the 7th Respondent in terms of the S.48C(1) of the Minutes of the Pension. Therefore, it is the duty of the relevant officers to ensure that the Petitioner is granted with his pension without delay. Purported inability on the part of the 2nd-5th Respondents to locate the personal file of the Petitioner and/or to comply with the said Circular has prevented the 1st Respondent from ensuring that Petitioner is granted his pension without undue delay. The Petitioner has been unfairly treated and should not be made to suffer for the lapses on the part of the public officers.

On the forgoing reasons I issue a mandate of *Writ of Mandamus* directing 1st and the 2nd to 5th Respondents to take all the necessary steps in accordance with the law to ensure that the Petitioner is paid his pension in terms of the decision of the 7th Respondent reflected in the letter marked P14. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna, J.

I agree.

Judge of the Court of Appeal