

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Writs of Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Colonel P.K.D.C. Alwis
No. 709, Pokuna Mawatha,
Ambalanwatta, Galle.
2. Lieutenant Colonel S.G. Hewawitharana
No. 11/3/C, Kandaoluwawa, Bemmulla,
Gampaha.
3. Lieutenant Colonel E.M.U.W.L.Boyagoda,
No. 119, Amunugama,
Gunnapanna

CA (Writ) Application No:

Writ-0346-19

PETITIONERS

Vs.

1. Lieutenant General N.U.M.M.W.
Senanayake
Commander of Army,
Army Headquarters,
Colombo 03.
- 1(a). Lieutenant General L.H.S.C. Silva
Commander of Army,
Army Headquarters,
Colombo 03.
2. Major General S.W.L. Daulagala
Commandant,
Sri Lanka Army Volunteer force,
Army Camp,
Salawa,
Kosgama.

3. Brigadier Chanaka Weragoda
Director,
Sri Lanka Army Directorate of Pay and
Record,
Army Cantonment,
Panagoda.
- 3(a). Brigadier W.A.A.C.P. Weragoda
Director,
Sri Lanka Army Directorate of Pay and
Record,
Army Cantonment,
Panagoda.
4. Major General M.M.S. Perera,
Director,
National Cadet Corps,
No. 15, Dutugemumu Steet,
Pamankada,
Dehiwala.
5. A. Jagath D. Dias
Director General of Pensions,
Department of Pensions,
Maligawatta,
Colombo 10.
6. J.J. Rathnasiri
Secretary,
Ministry of Public Administration and
Disaster Management,
Independence Square,
Colombo 07.
7. Lieutenant General S.H.S. Kottegoda
Secretary,
Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 03.

8. H.A. Chandana Kumarasinghe
Director General of Establishment (Act.)
Ministry of Public Administration,
Disaster Management and Rural
Economic Affairs.
9. P.B.S.C. Nonis
Director General of Budgets,
2nd Floor,
Ministry of Finance,
The Secretariat,
Colombo 01.
10. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Sanjeewa Jayawardena, PC with Ms. Ranmali Meepagala instructed by Ms.
Lanka R. Dharmasiri for the Petitioners.

Z. Zain D.S.G. with Ms. Medaka Fernando, S.C. for the Respondents

Written submissions tendered on:

18.08.2022 by the Petitioners

19.08.2022 by the 1st - 3rd and 5th - 10th Respondents

Argued on: 20.06.2022

Decided on: 29.09.2022

S.U.B. Karalliyadde, J.

Since the material facts and the reliefs sought by the Petitioners in the Writ Applications bearing numbers Writ-0346-19, Writ-0389-19 and Writ-384-19 are almost same and identical, the parties agreed to abide by the judgement delivered in this Application in respect of the other two Writ Applications as well. The Petitioners to this Writ Application were serving in the Civil Government Service and thereafter joined the Sri Lanka Army Volunteer Force. By virtue of Presidential Proclamations published in the Government Gazettes dated 10.08.1990 marked as P3A, 08.12.1989 marked as P3AB and 08.02.1991 marked as P4 they were commissioned and posted as Officers of the Sri Lanka Army Volunteer Force. By the Government Gazette dated 08.02.1991 marked as P4, the Petitioners were declared to be the Officers of the National Cadet Corps (hereinafter referred to as the NCC). Thereafter, during the period of 1991 to 1993, the Petitioners were mobilized for active service in terms of section 44 of the Mobilization and the Supplementary Forces Act, No. 40 of 1985 read with the NCC Regulations published in the Government Gazette dated 29.04.1988 marked as P14 and they were directed to report for work at the Headquarters of the NCC. Once the Petitioners were reported at the Headquarters, they were Commissioned for mobilized service as NCC Officers. Subsequently, the 1st, 2nd and 3rd Petitioners in the instant Application were demobilized from the NCC. Even though, they were demobilized from the NCC their services were required by the Army and therefore, they had reported for duty at the Army Headquarters and went on retirement upon reaching 60 years. At the time of the retirement, the 1st Petitioner was in the rank of Colonel and 2nd and 3rd Petitioners were in the rank of Lieutenant Colonel. Upon their retirement, they were awarded Civil pensions (as per as per the documents marked as P16(a), P16(b)).

It is the contention of the learned Counsel appearing for the Petitioners that the Petitioners are entitled to Army pension and non-granting of Army pension is unjust, unreasonable, irrational and against the law. The learned Counsel for the Petitioner submitted to the Court that in terms of the Sri Lanka Army Volunteer Force Regulations, Army Pensions and Gratuities Code of 1981 (as amended in 1991 and 2007) (hereinafter referred to as the Army P & G Code) and the Mobilization and the Supplementary Forces Act, No. 40 of 1985 read with the NCC Regulations, the Petitioners are duly entitled to an Army pension which is higher than the pension they could have entitled had they in the Civil Service. By these Writ Applications, the Petitioners are seeking reliefs, *inter alia*, mandates in the nature of Writs of Mandamus directing the Respondents to duly compute and award the due Army pension to them, to forward the Pay and Records pertaining to them to the 3rd Respondent in order to calculate the reckonable service of them, directing the 3rd Respondent to calculate the reckonable service of them in term of the Army P & G Code and forward the same to the 5th Respondent in order to grant an Army pension, directing the 3rd Respondent to calculate the loss incurred by them in depriving them from obtaining an Army pension *ab initio* and inform the 5th Respondent regarding said loss suffered by them and directing the 5th Respondent to indemnify them with regard to the said loss incurred as calculated by the 3rd Respondent and to make good the shortfall in the payment pension.

The learned State Counsel for the Respondents argued that the Petitioners are not entitled for Writs of Mandamus as prayed for in the Petition due to two reasons. The learned State Counsel for the Respondents submitted that the nature of the service of members of the NCC is inherently different to the nature of the service of Officers in the Sri Lanka Army Volunteer Force and therefore, the Petitioners in the instant Application cannot be regarded as Officers of the Sri Lanka Army Volunteer Force.

Hence, the learned State Counsel appearing for the Respondents argued that the Petitioners are not entitled to an Army pension in terms of the Army P&G Code.

The organization of the Sri Lanka Army is set out in section 2 of the Army Act, No. 46 of 1950 as follows;

“2. (1) There shall be raised and maintained, in accordance with the provisions of this Act and of the regulations made there under, an army not exceeding such strength as may, from time to time, be determined by Parliament.

(2) The Army shall consist of -

(a) a regular force,

(b) a regular reserve, and

(c) such Volunteer force and Volunteer reserve.”

Furthermore, the organization of the Sri Lanka Army Volunteer Force is stipulated in section 5 of the Act as follows;

“5 (1) There may be raised and maintained, in accordance with the provisions of this Act and of the regulations made thereunder, a force of volunteers for the purpose of rendering service under this Act.

(2) The Force of volunteers raised and maintained under this Act shall be called the Volunteer Force.

(3) The Volunteer Force shall be organized into such corps as may, from time to time, be determined by the President.”

The Petitioners to the instant Application have been Commissioned as Officers of the Sri Lanka Army Volunteer Force by the Presidential Proclamation dated 08.12.1989 marked as P3B.

The said Presidential Proclamation states thus;

*“His excellency the President has been pleased to approve the Commissioning of the undermentioned gentlemen **in the Volunteer Force of the Sri Lanka Army** and their Postings to the National Cadet Corps in the ranks and with effect from the dates shown against their names.”*

Thereafter, by the Presidential Proclamation dated 08.02.1991 marked as P4, the Petitioners were considered to be the Commissioned Officers of the NCC. P4 reads follows;

“ශ්‍රී ලංකා යුද හමුදා ස්වේච්ඡා බලසේනාවේ අධිකාරීන් උසුලන පහත නම් සඳහන් නිලධාරීන් මෙම ගැසට් නිවේදනය පළකරන ලද දින සිට පහත දක්වා ඇති ජ්‍යෙෂ්ඨත්වය අනුව ජාතික ශිෂ්‍යභට බලකායේ අධිකාරීන් උසුලන නිලධාරීන් සේ සැලකේ...”

As per the legal provisions hereinbefore mentioned in the Army Act and the Gazette notifications, marked as P3(A), P3(B) and P4 it is evident that the Petitioners have been Commissioned as Officers in the Sri Lanka Army Volunteer Force and then posted to the NCC as Officers by the President. Therefore, it is established that the Petitioners are the Officers of the Sri Lanka Army Volunteer Force.

In terms of the Regulations 70(1) of the Sri Lanka Army Volunteer Force Regulations published in the Extraordinary Gazette Notification No. 476/26 dated 20.10.1987, the pension rights of the Officers of the Sri Lanka Army Volunteer Force are governed by the Army P&G Code.

Regulations 70(1) stipulates as follows;

“70. (1) An officer who performs an aggregate of active military service for a period not less than twenty years or is seconded for Regular Service for twenty years shall be entitled to a pension as in the case of a Regular Officer in accordance with the provisions of the Army Pensions and Gratuities Code...”

The learned State Counsel for the Respondents argued that the Petitioners have not completed a period of 20 years in continuous active service in the Sri Lanka Army in order to be eligible for an Army pension under the Army P&G Code and the central issue which the Court has to address in this Writ Application is whether the Petitioners have required aggregate 20 years of service to be eligible for an Army pension. According to the facts of the instant Application, before Commissioning in the Sri Lanka Army Volunteer Force, the Petitioners were serving in the Civil Government Service and they do not have 20 years of active service in the Sri Lanka Army Volunteer Force. Therefore, the Court should decide as to whether their period of service other than in the Sri Lanka Army Volunteer Force could be reckoned for them to be eligible for an Army pension.

The Army P&G Code as amended by the Gazette bearing No. 679/10 dated 11.09.1991 marked as P-25 has facilitated the Volunteer Officers of the Sri Lanka Army to be eligible for Army pension. Regulation 29 (c) mentioned in P25 provides thus;

*“(c) An officer of the Volunteer Force inclusive of a Quarter Master who has an **aggregate of not less than twenty years mobilized service** on the date of his retirement, transfer to the reserve, or on the date a decision is taken to the effect that further employment is not available to him, such date being a date not earlier than September 1, 1981 shall be entitled to a pension in the case of a regular officer.”*

Regulation 29 (i) provides that;

“(i) Reckonable Service for the purpose of a Volunteer Officer or soldier shall be as set out in Regulation 18 and 27 of this Code.”

The provisions of Regulation 29(i) reiterated in the Gazette Notification No. 1512 dated 31.08.2007 marked as P-27.

The services which could be reckoned to be eligible for an Army pension is stated in the Regulations 18 (1) of the Army P&G Code 18 (1)(d) and 18(1)(e) reads as follows;

“18(1) The following service shall be reckonable service for a pension or gratuity of an officer, including Quartermaster.

d. Pensionable Service of a Public servant in a permanent office, which has been declared to be pensionable by notification published in the gazette

e. Service as a teacher that is reckoned as 'Recorded Service' under regulation 2 (ix) of the School Teacher's Pension Regulations...”

Under the above stated circumstances, it is clear that the Officers who do not have 20 years' active service in the Sri Lanka Army Volunteer Force are entitled to aggregate their reckonable service to the Army service in terms of Regulations 29 (c), 29 (i) and 18 of the Army P&G Code to become eligible for an Army pension. Since it is established that the Petitioners to this Writ Application are Officers of the Sri Lanka Army Volunteer Force, the relevant legal provisions pertaining to their pension rights are governed by the Regulations 70(1) and 70 (2) of the Sri Lanka Army Volunteer Force Regulations read together with Regulations 18, 29 (c) and (i) of the P & G Code (as amended in 1991 and 2007). Therefore, subject to these Regulations the previous service of the Petitioners in the Government Civil Service should be considered as reckonable service for the purpose of calculating their Army pension. When

considering the aggregated period of services of the Petitioners in the Government Civil Service, and in the mobilized and demobilized services in the Sri Lanka Army Volunteer Force (as depicted at pages 15-17 of the Petition dated 13.08.2019) the Court is satisfied that such period exceeds 20 years and therefore, the Petitioners have fulfilled the requirements to be entitled for an Army pension in terms of the Army P&G Code.

Be that as it may, the entitlement of the Petitioners for Army pension has been recognized by the Sri Lanka Army, the Hon. Attorney General (the 10th Respondent) and the Ministry of Defense in many occasions.

In the letter marked as P27A, the Director General of Legal of the Sri Lanka Army has referred the Regulations 70(1) and 70(2) of the Sri Lanka Army Volunteer Force Regulations and the Regulations 18, 27 and 29 of the Army P & G Code and stated as follows;

*“... Therefore, where officers and soldiers of the SLAVF are concerned, the relevant legal provisions applicable in relation to pension rights are **Reg 70(1) and 70 (2) of the SLAVF Reg read together with Reg 29 (c) to (i) of the P & G Code as amended by Gazette Notification No 679/10 and provided for under Reg 18(d) to (j) of the P & G Code, where SLAVF officers are concerned, and 27(d) to (k) of the P & G Code where SLAVF soldiers are concerned. Therefore, subject to the specifications/restrictions in the aforesaid Reg 18 and Reg 27 the previous service of the such personnel in the Govt/Public sector shall be deemed to be considered as reckonable service for purposes of pension...***”

In the letter dated 13.09.2016 marked as P26 the 10th Respondent upon referring the provisions of the Army P&G Code and the Sri Lanka Army Volunteer Force Regulations opined that;

*“... I am of the opinion that the amendment of the Army Pensions and Gratuities Code by the above-mentioned Gazette No. 679/10 dated September 10, 1991; by providing in regulation 29(i) that reckonable service for Volunteer Officers shall be as set out regulations 18 and 27 of the said code, **would permit a volunteer officer or soldier to aggregate previous service as set out in regulation 18 or 27 of the Pensions and Gratuities Code as the case may be, for the purpose of pension entitlement.**”*

By the letter dated 11.11.2016 marked as P28, the Commander of the Army (the 1st Respondent) after obtaining the advice of the 10th Respondent on the matter has concluded that the Petitioners are entitled to an Army pension and the Director Pay and Records of the Army (the 3rd Respondent) has directed to proceed with the formalities to pay them the Army pension.

In the letter marked as P30, the Legal Adviser to the Ministry of Defence has observed as follows;

“...ඒ අනුව මෙම නිලධාරීට යුධ හමුදාවට අනුයුක්ත වීමට පෙර පූර්ව සේවා කාලය එකතු කොට යුද්ධ හමුදා විශ්‍රාම වැටුපට නිමිකම් ඇති බවත්, අනුව යුද්ධ හමුදා වැටුප් හා ලේඛන අධ්‍යක්ෂ හට අදාළ නිලධාරීට විශ්‍රාම වැටුප් ගෙවීමට ඇවැසි පියවර ගන්නා ලෙසත් උපදෙස් දී ඇත.” (at page 2)

Under the above stated circumstances, it is clear that even though, the Petitioners are entitled legally for Army pension the Respondents had denied that entitlement and decided to pay them the pension of the Government Civil Service. Therefore, the considered view of this Court is that by failing to take necessary steps to pay the Army pension to the Petitioners the Respondents have failed to perform a public duty. A Writ of Mandamus lies when the rights of an individual have been infringed by the failure of a public officer to perform their duties.

In their work *Administrative Law*¹, H. W. R. Wade and C. F. Forsyth have stated as follows;

“The prerogative remedy of a mandatory order has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of a mandatory order is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. The quashing order and a prohibiting order deal with wrongful action, a mandatory order deals with wrongful inaction. The prerogative remedies thus together cover the field of governmental powers and duties.”

In *Credit Information Bureau of Sri Lanka Vs Messers Jafferjee and Jafferjee (Pvt) Ltd*² the Supreme Court referred to the conditions that should be fulfilled prior to issuance of a Writ of Mandamus.

“There is rich and profuse case law on mandamus, on the conditions to be satisfied by the applicant. Some of the conditions precedent to the issue of mandamus appear to be:

a) The applicant must have a legal right to the performance of a legal duty by the parties against whom the mandamus is sought..... The foundation of mandamus is the existence of a legal right.

b) The right to be enforced must be a “public right” and the duty sought to be enforced must be of a public nature....”

¹ H. W. R. Wade and C. F. Forsyth, *Administrative Law* (11th edn, Oxford 2014) 520.

² 2005 (1) SLR page 89.

Furthermore, in the case of *Kaluarachchi vs Ceylon Petroleum Corporation and Others*³ Fernando J, stated that,

“The foundation of mandamus is the existence of a legal right. A court should not grant a Writ of Mandamus to enforce a right which is not legal and not based upon a public duty.”

Considering all the above stated facts and circumstances, the Court holds that the Petitioners have a legal right to an Army pension and the Respondents have a public duty to pay the Petitioners an Army pension. Under the above stated circumstances, the Court decided to issue Writs of Mandamus as prayed for in the prayers (b), (c) and (d) in the Petition. No costs ordered.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL

³ SC Appeal No. 43/2013; SC Minutes of 19th June 2019.