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

In the matter of an application under and in terms of Article 140 of the Constitution seeking mandates in the nature of Writs of Certiorari, Mandamus and Prohibition.

CA Writ Application No: 393/18

Thulika Nirosheni Wickramasiri Gunasekara
No. 2/B/66/L,
National Housing Scheme,
Raddolugama.

Petitioner

-Vs-

1. D.G.S.C. Niroshini
   Assistant Secretary (pensions) Affairs
   Ministry of Public Administration and Home
   Independence Square,
   Colombo 07.

2. J.J. Rathnasiri
   Secretary
   Ministry of Public Administration and Home Affairs,
   Independence Square,
   Colombo 07.

3. A.J.D. Dias
   Director General of Pensions
   Department of Pensions
   Maligawatta
   Colombo 10.

4. Chandani Denagama
   Director- Widows and Orphans
   Pensions Department of Pensions
   Maligawatta
   Colombo 10.

5. K.G.H.H.R. Kirialla
   Divisional Secretary
   Divisional Secretariat
   Katana.

6. Lieutenant General Mahesh
   Senanayake
   Commander of the Army
   Army Headquarters
   Colombo 03.

7. Hon Attorney General
   Attorney General's Department
   Colombo 12.

Respondents

Before: C.P. Kirtisinghe – J.
Mayadunne Corea – J.

Counsel: Shavindra Fernando, PC with Natasha Wijesekara for the Petitioner.
Y. Fernando, DSG with A. Weerakoon, SC for the Respondents.

Argued on: 07.09.2022

Decided On: 28.11.2022

C. P. Kirtisinghe – J.

The Petitioner is seeking for a mandate in the nature of a Writ of Certiorari to quash the determination made by the 2nd Respondent to reduce her monthly Widows and Orphans Pension by 50%, and to stop totally her monthly dependents' allowance and to recover a sum of Rupees 1,702,842.81 as a purported over payment to the Petitioner, for a mandate in the nature of a Writ of Mandamus directing the 1st – 5th Respondents to restore and pay in full, with back arrears, of her W and OP and dependents' allowance in accordance with the opinion expressed by the Hon. Attorney General and for a mandate in the nature of a Writ of Prohibition prohibiting the 1st – 5th Respondents from recovering a sum of Rupees 1,702,842.81 as purported over payment to the Petitioner.

The facts of the case can be briefly summarized as follows;

The Petitioner was married to one Lt. Colonel Kirimatiyawa of the SL Army who was killed in action on 22.04.2000 at Elephant Pass. After the death of her husband the Petitioner was recognized by the Respondent as his Lawful war widow and she had been receiving her monthly Widows' and Orphans' Pension and the dependents' allowance payable by the 3rd Respondent the Director General of Pensions. Thereafter, her W and OP was reduced by 50% and her dependents' allowance was totally stopped on a determination made by the 2nd Respondent, the Secretary to the Ministry of Public Administration and Home Affairs on the ground that she had given birth to a child consequent to an unlawful marriage. By the letter marked 2R3 the 4th Respondent the Director of Widows' and Orphans' Pension had informed the 2nd Respondent, the Secretary to the Ministry of Public Administration that she could recommend the payment of 50% of the Widows' and Orphans' pension to the Petitioner on the basis that her illegitimate child was born out of a customary marriage. She had asked for the consent of the 2nd Respondent to act accordingly. She had drawn the attention of the 2nd Respondent to the fact that there is a discrepancy in paying 50% of the pension to a widow who had entered into a lawful marriage subsequently and paying the full pension to a widow who has illegitimate children. By the letter marked 2R4 the 3rd Respondent, the Director General of Pensions had made the same request to the 2nd Respondent. By the letter marked 2R5 the 2nd Respondent, the secretary to the Ministry of Public

Administration had given his consent to pay 50% of the W and OP to the Petitioner under section 37 of the Widows' and Orphans' Pension Scheme (Armed Forces) Act No. 18 of 1970. By the letter marked P4 the Director General of Pensions had conveyed the aforesaid decision of the 2nd Respondent to the Petitioner. It is apparent from the letter dated 30th August 2018 marked P6 that the commander of the Sri Lanka Army had referred this matter to the Hon. Attorney General for advise and the Hon. Attorney General had expressed the opinion that the Petitioner is entitled to the full pension.

By the letter marked P7 the Commander of the Army had informed the opinion expressed by the Hon. Attorney General to the Director of Pensions. By the letter marked P22 the Petitioner had made an appeal to the 2nd Respondent, the Secretary to the ministry of Public Administration to reconsider his decision and grant her the full pension and on behalf of the Petitioner her attorney-at-law had made the same request to the 2nd Respondent by the letter marked P26C. By the letter marked P28 the 2nd Respondent had conveyed his decision to the Petitioner and informed that there is no change in his earlier decision. From the letter dated 28.09.2020 marked 2R5A it is apparent that the Hon. Attorney General had conveyed his decision to the 2nd Respondent, the Secretary to Ministry of Public Administration and the 2nd Respondent by that letter had informed the Hon. Attorney General that for the reasons stated there in that letter and in that background he had taken the decision to pay 50% of the W and OP to the Petitioner under section 37 of the Act no 18 of 1970.

Therefore, it is apparent from the letter marked 2R5A that the 2nd Respondent, the Secretary to the Ministry of Public Administration was not willing to accept the opinion expressed by the Hon. Attorney General regarding this matter and he had taken into consideration irrelevant matters before arriving at a decision. He had referred to the fact that, although the Petitioner is in a position to seek legal assistance regarding this matter because of her social and economic background there are many people in this country who are unable to get legal protection in similar matters. He had also referred to the fact that a full pension and allowances are paid to a war widow as a mark of respect to the deceased officer and in a society like ours the war widow herself should behave in a manner that will bring honour and respect to the deceased officer. It is against the expectations of the society to deliver an illegitimate child which will tarnish

the image of the deceased army officer. All those observations are irrelevant considerations in arriving at a final conclusion regarding the issue which was before the 2nd Respondent. The 2nd Respondent had failed to take into consideration the main issue which was before him to be decided namely, the interpretation of section 7 of the Pension Circular 13/2010 and the interpretation of the Regulation 37 made under the Widows' and Orphans' Pension Scheme (Armed Forces) Act No. 18 of 1970.

Section 7 of the Pension Circular 13 of 2010 reads as follows;

In view of that, following entitlements are introduced to the amendment Act,

7. Payment of 50% (exact half) of the Widows'/ Widowers' and Orphans' Pension for the widows and widowers remarried.

Regulation 37 made under the Widows' and Orphans' Pension Scheme (Armed Forces) Act No. 18 of 1970 reads as follows;

37. Should any question arise as to whether any person is a contributor within the meaning of these regulations, or as to whether any person is entitled to any pension as the widow or child of a contributor, or as to the amount of pension to which any widow or child shall be entitled, or as to the meaning or construction to be assigned to any provision of these regulations, the Commander may on his own initiative and shall at the written request of such contributor, widow or child submit through the Director such question or decision to the Permanent Secretary, Ministry of the Public Administration, Local Government and Home Affairs and the decision of such Permanent Secretary thereon shall be final.

According to the plain reading of the section it is the Commander of Army who should refer the matter for a decision to the Secretary of the Ministry of Public Administration. To do so a question should arise regarding the interpretation contained in the regulations as to the amount of Pension to which any widow shall be entitled, etc. If such a question arises the Army Commander may on his own initiative or at the written request of such a widow…… can submit to the Permanent Secretary of the Ministry of Public Administration, through the Director, such a question for determination. If a question has arisen for consideration the Army Commander may on his own initiative can refer the matter to the Secretary and in such a situation the Commander has a

desecration to do so. The Army Commander can refer the matter to the Secretary at the written request of a widow and in such a situation the Commander has no desecration and he shall refer the matter to a decision. In both situations there should be a question for determination before the Army Commander regarding the interpretation of the regulations. In this case no such question has arisen regarding the interpretation of the regulations before the Army Commander as the Director (Legal) of Army and the Commander himself were of the view that the full pension benefits should be paid to the Petitioner. Therefore, under regulation 37 the matter cannot be referred to the Secretary for a decision. If there is a question for determination it should be referred to the Secretary of the Ministry of Public Administration by the Army Commander through the Director of Pensions and the regulation 37 does not empower the Director of Pensions to refer the matter to the Secretary on his own initiative. In this case the Army Commander had not referred this matter for a decision to the Secretary under regulation 37 and therefore, under that regulation the Secretary to the Ministry of Public Administration is not empowered to make such a decision. Therefore, the decision of the Secretary of the Ministry of Public Administration is ultra vires.

According to the literal interpretation that can be given to section 7 of the Pension Circular 13 of 2010, the widows and widowers who are remarried are entitled only to a payment of 50% of the Widows'/ Widowers' and Orphans' Pension. The question that has to be taken into consideration here is whether the Petitioner comes under the definition of a **widow remarried.** In other words, whether the Petitioner has contracted a valid marriage subsequently after the death of her husband.

In the letter marked 2R3 the 4th Respondent refers to a customary marriage. In the letter marked 2R4 the 3rd Respondent refers to an unlawful marriage.

There can be no doubt that the marriage contemplated by section 7 of the Circular no.13 of 2010 is a valid marriage or a lawful marriage.

Under our law a lawful marriage can be contracted by registration of the marriage under General Marriages Ordinance no. 19 of 1907 as amended or to those who are governed by the Kandyan law. A lawful marriage can be contracted by registration under the provisions of Kandyan marriage and Divorce Act no. 44 of 1952. Our law recognizes customary marriages. In the case

of **Sophia Hamine Vs Appuhamy 23 NLR 353** there was evidence of a Poruwa Ceremony in the bride's house and in the presence of the relatives the fingers of the bride and the bride groom were tied together by a thread and water was poured over them and other customary rights were performed. The Supreme Court held on this evidence that a valid customary marriage had been contracted. In the case of **Rathnamma Vs Rasaiya 48 NLR 475** the Hindu Priest who officiated at the ceremony stated that he had performed all the rights of a second-rate Hindu wedding which were the Pillayar pooja, the tying of the *thali* and the presentation of the *koorai.* The Court held that the rituals and ceremonies performed were adequate to constitute a customary marriage.

There is also a presumption of marriage by habit and repute. When a man and a woman are proved to have lived together as husband and wife the law presumes, unless the contrary is proved, that they are living together in consequence of a valid marriage. It is only a rebuttable presumption. The proof of co habitation, habit and repute give rise to a presumption only. It does not prove the fact of marriage (**Tisselhamy Vs. Nonnohamy 2 NLR 352**). As Dr. Shirani Ponnambalam observes in her treatise **Law and The Marriage Relationship in Sri Lanka** (at page 84) an essential prerequisite for the adoption of this presumption is proof of some antecedent ceremony of marriage. Proof of this requisite however is insisted on only if one or both of the parties to the marriage are alive, for then it would be reasonable to expect them to recollect and adduce some evidence of the solemnization of the Marriage followed by evidence of habit and repute. There is no proof to the fact that the Petitioner had contracted a second marriage after her husband's death and registered it under the General Marriage Ordinance or Kandian Marriage and Divorce Act. There is no evidence to show that she had contracted a customary marriage after the death of her husband. The Petitioner states that, for Kandyans the registration of marriage is mandatory and they are not competent to contract a customary marriage. According to sections 3(1)a of the Kandyan Marriage and Divorce Act a marriage between persons subject to Kandyan law shall be solemnized and registered under that Act or under the Marriage Registration Ordinance. According to section 3(1)b of the Act, any such marriage which is not so solemnized and registered shall be invalid. Therefore, a Kandyan marriage must be registered and a Kandyan cannot contract a valid customary marriage. Although the Petitioner says that she was born in Kegalle a Kandyan District she

does not directly say that she is a Kandyan. Therefore, that question will not arise. In any event there is no evidence of a customary marriage. The Divisional Secretary Katana who had inquired into this matter had stated in the document marked P15 that the Petitioner had not contracted a lawful marriage or a customary marriage subsequently. By the word lawful (නීත්‍යානුකූල), what he had meant is a marriage registered under one of the two marriage Ordinances. There is no evidence to show that the Petitioner was living together with the father of her illegitimate son as husband and wife. The extracts of the electoral register marked P21A to P21F shows that the only male who was living in the house where the Petitioner resided was the Petitioner's father. Therefore, the presumption of a marriage by habit and repute will not arise. Therefore, there was no evidence before the 2nd Respondent and the other authorities to come to the conclusion that the Petitioner had 'remarried' within the meaning of section 7 of the Circular No. 13/2010 marked P25. According to the literal interpretation what is meant by the word 'remarried' in that section is a lawful marriage, a marriage recognized by law. A person who had given birth to a child as a result of an association with a man who is not his lawful husband does not come within the definition of a person who had remarried. In the case of the **Writ Application No. 442/2015** decided by this Court on 16.05.2018, in an identical situation Samayawardena J. had observed as follows,

"This decision regarding the question of contracting a valid marriage has been taken not by a Court of Law but by certain individuals sitting alone in their official capacities."

The pension Circular No. 13/2010 is not a mere circular but a direction given to all the secretaries to the ministries, heads of departments, district secretaries, divisional secretaries and the commanders of the three armed forces regarding the implementation of the amendments to the Widows/Widowers' and Orphans' Pension Act. Therefore, what is contained in that document are the amendments made to the Pension Act. Therefore, the section 7 of that circular has the force of a statute. The Respondents have not disputed this position. Therefore the 2nd Respondent is bound by section 7 of that circular which is in fact a regulation made under the Act which has the force of a statute.

For the reasons I have sated before there was no material before the 2nd Respondent to come to a conclusion that the Petitioner had 'remarried' within

the meaning of section 7 of the circular. Therefore, the decision of the 2nd Respondent to reduce the petitioner's pension by 50% is unreasonable, unlawful and *ultra vires.*

In the letter addressed to the Hon. Attorney General marked 2R5A, the 2nd Respondent had stated that he is acting in terms of the powers vested in him under Regulation 37 of the Act No. 18 of 1970. When acting under the regulation the 2nd Respondent must act reasonably and according to law, within the power vested in him.

On the **Principle of Reasonableness**, **Wade and Forsyth** in their treatise **Administrative Law** 9th Edition at page 353 states thus,

"Lord Wrenbury, dealing with the argument that that Act did not say 'such reasonable wage' or 'as they reasonably think fit', said that to his mind there was no difference in meaning, whether those words were in or out. He laid down the law as follows:

A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so-he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

At page 363 Wade and Forsyth observes as follows,

"It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called '*wednesbury* unreasonableness', after the now famous case in which Lord Greene MR expounded it as follows.

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must

exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being in bad faith; and, in fact, all these things run into one another."

As I have observed earlier the 2nd Respondent in arriving at his decision had taken into consideration irrelevant matters such as social and economic background of the Petitioner which enable her to seek legal assistance and the poverty of the ordinary citizens who are unable of getting the protection of the law. Therefore, the 2nd Respondent had not excluded from his mind matters which are irrelevant to what he has to consider and not followed the course which reasons directs. Therefore, the decision of the 2nd Respondent is unreasonable which no reasonable authority could have come. Therefore, the decision becomes unlawful.

De Smith, Woolf and Jowell in their treatise **Judicial Review of Administrative Action** 5th edition at page 229 observes thus, "Acting *ultra vires,* and acting without jurisdiction have essentially the same meaning, although in general the term 'vires' has been employed when considering administrative decisions and subordinate legislative orders, and 'jurisdiction' when considering judicial decisions, or those having judicial flavour"

Dr. Ranjith Ranaraja J. in the case of **Surveyors Institute of Sri Lanka vs. Acting Surveyor General 1998 1 SLR 266** had stated as follows,

"An administrative act or order which is *ultra vires* or outside jurisdiction is void in law, ie., deprived of legal effect. This is because an order to be valid it [sic] needs statutory authorisation, and if it is not within the powers given by the Act, it has no leg to stand on….."

For the aforesaid reasons we are of the view that the decision of the 2nd Respondent is contrary to the provisions of the Pensions Act and against the literal interpretation that can be given to section 7 of the aforementioned

circular. Therefore, the decision becomes unlawful. The 2nd Respondent had not acted within the powers given to him by the Pensions Act and therefore, the decision becomes *ultra vires* which lacks statutory authorisation.

For the aforesaid reasons we issue a mandate in the nature of a Writ of Certiorari quashing the determination made by the 2nd Respondent which is embodied in the documents marked P4 and P28 to reduce the Petitioner's W and OP by 50% and to stop totally her monthly dependent allowance and to recover a sum of rupees 1702842.81 as a purported overpayment to the Petitioner, a mandate in the nature of a Writ of Mandamus directing 1st to 5th Respondents to restore and pay in full, with back areas of the Petitioner's W and OP and the dependents allowance in accordance with the opinion expressed by the Hon. Attorney General and a mandate in the nature of a Writ of Prohibition prohibiting 1st to 5th Respondents from recovering a sum of rupees 1702842.81 as a overpayment to the Petitioner.

The application is allowed without costs.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal