

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

In the matter of an application for writ in the
nature of Certiorari under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Waruna Russel Subasinghe
F/166, Stage II, Ranpokunagama
Nittambuwa.

PETITIONER

CA Writ Case No. 728/2010

Vs

1. Lt. Gen. Jagath Jayasooriya
Commander of the Sri Lanka Army
Army Head Quarters
Colombo 03.
2. Maj. Gen. D.R.A.B. Jayathilake
The Commandant, Sri Lanka Army
Volunteer Force Head Quarters
Pelawatte, Battaramulla.
3. Lt. Col. S.R.M.B. Weerakoon
Commanding Officer
5th Gajaba Regiment Army Camp
Horewpothana, Anuradhapura.

RESPONDENTS

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: J.C. Waliamuna with Pulasthi

Hewamanna for the Petitioner

Chaya Sri Nammuni SSC for the

Respondents.

ARGUED ON

: 05th September, 2016

DECIDED ON

: 19th July, 2017

Deepali Wijesundera J.

The petitioner has filed this application seeking a mandate in the nature of a writ of certiorari to quash the decisions against the petitioner contained in **P1 and P2**.

The petitioner was a Captain in the Sri Lanka Army Volunteer Force who was on active service attached to the Gajaba Regiment. The petitioner was absent without leave and was subjected to a summary trial and punished after surrendering to the Army during a general amnesty. The petitioner's learned counsel stated that since he surrendered during a period of general amnesty his absence was converted to compulsory leave without pay and the punishment was revoked by **P4, P5 and P6**.

By letter dated 14/08/2010 marked **P1** it has been recommended that the petitioner be prematurely retired and by **P2** dated 01/09/2010 petitioners' commission has been withdrawn.

The learned counsel for the petitioner argued that the decision to prematurely retire the petitioner was on the ground of being absent without leave for more than 21 days, which pursuant to **P4** is no longer considered as being AWOL, as it has been converted to compulsory leave without pay. The petitioner's learned counsel further submitted that **P1 and P2** are issued based on **1R3 and 1R4** which decisions have been made pursuant to *section 33 (2) (a) and (b) of the Sri Lanka Army Voluntary Force Regulations* which only applies to officers seeking to resign or retire. He stated that the petitioner never sought to resign or retire. Citing the judgment in **Re Mark Antony Lyster Bracegirdle (1937) 39 NLR 193** and **Bandaranaike vs Weeraratne (1978-79) 2 SLR 412** the petitioner stated that when a wrong provision of the regulations have been utilized to make a decision such decision is a nullity.

The learned counsel for the petitioner further argued that what is being challenged is not His Excellency the President's approval to demobilize but the recommendations to prematurely retire the petitioner and to withdraw his commission by **P1 and P2**. Citing the

judgment in **Flying Officer R.H.M.A.K.B. Ratnayake vs Air Marshal Donald Perera CA (Writ) 104/2005 CA Minutes 28/02/2007** the petitioner stated that it was held in this case that the decision of the commander was ultra vires and a writ of certiorari was granted quashing the recommendations.

The learned counsel for the respondents submitted that it was the punishment that has been revoked during the amnesty period as stated in **P4** and that the fact, the petitioner has been absent for over 21 days still remained valid. The respondents stated that the revocation of punishment does not prevent them from taking any policy decisions regarding those who have been AWOL for over 21 days, and that the policy decision has been taken in accordance with the Regulation 4 and 5 (2) (b) of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations of 1985. They further referred to section 79 (1) of the Army Act.

The respondents referring to section 10 of the Army Act and stated that the officers such as the petitioner held office at the pleasure of the President and that it was open to the President to terminate the services of the petitioner.

The learned counsel for the respondents referring to regulations 33 (2) (a) and (b) as mentioned by the petitioner stated that these were mentioned only to state that they have been carried out to fulfill requirements and formalities since they refer to payments.

Regulation 4 of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations 1985 states; *"the Commander of the Army shall be responsible to the minister on all matters pertaining to training, discipline and administration of the Volunteer Force"*.

Regulation 5 (2) (b) thereof states that the *"Commandant of the Sri Lanka Army Volunteer Force shall be responsible to the Commander of the Army for the maintenance of discipline and the administration of the Volunteer Force in accordance with the Army Headquarters policy set out in the Army orders and instructions issued from time to time by the Commander of the Army"*.

Section 79 (1) of the Army Act states that *"such of the provisions of Article 140 of the Constitution as relate to the grant and issue of writs of mandamus, certiorari and prohibition shall be deemed to apply in respect*

of any court martial or of any military authority exercising judicial functions”.

It is clear that if any military authority is not exercising judicial functions but only exercising administrative and policy decision, writ jurisdiction will not apply.

Since the petitioner has been sent on retirement by the President it will be futile to issue a writ of certiorari to quash **P1 and P2**.

Section 10 of the Army Act no. 17 of 1948 states thus;

“Every officer shall hold his appointment during the President’s pleasure”.

In the case of **Air Vice Marshall Elmo Perera vs Liyanage 2003 SLR 331** it was held;

“.....it was open to the President to terminate the services of the petitioner on the basis that the petitioner holds office at the pleasure of the President.”

For the afore stated reasons I decide that there is no merit in the petitioner's application. I dismiss the petitioner's application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL