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

In the matter of an application under and in terms of Article 126 of the Constitution.

Peduru Arachchige Janaka Pushpakumara
(LL 27759),
No.29, Sisil Uyana,
Panamura Road,
Thelbaduara,
Embilipitiya.

Petitioner

S.C.(F.R.) Application No: 452/2011

Vs.

1. Director General,
   (Electric and Electronic Division)
   Sri Lanka Navy Headquarters,
   Colombo 01.

2. Director General,
   (Personnel and Training)
   Sri Lanka Navy Headquarters,
   Colombo 01.

3. Commander of the Navy,
   Sri Lanka Navy Headquarters,
   Colombo 01.

4. Lieutenant Commander T.R.
   Dahanayake,
   Sri Lanka Navy Headquarters,
   Colombo 01.

5. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12

Respondents

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: Saliya Pieris PC with Susil Wanigapura for the Petitioner.
Anusha Jayatilleke SSC for the Respondents.

Argued On: 02.03.2021

Decided On: 06.07.2021

Janak De Silva J.

The Petitioner was a Leading Electrical Mate in the Sri Lanka Navy. He was enlisted on 27th May 1998.

According to Regulation 7 of the Seaman's Enlistment and Service Regulations 1950 promulgated by the Minister of Defence in terms of section 161 of the Navy Act No. 34 of 1950 as amended, the period of original enlistment of a seaman is twelve years.

In terms of Regulation 8, a seaman, may, before the expiry of the period of his original enlistment, be re-engaged for service in the Regular Naval Force for a further period of not exceeding twenty years.

The Sri Lanka Navy issued a message dated 24th September 2009 (P5) ordering all the seamen who were enlisted as 82nd and 83rd intakes to apply for the re—engagement to the Regular Naval Force before the expiry of their initial service period of twelve years.

The Petitioner belonged to the 83rd intake and hence applied for re-engagement by application dated 26th December 2009 (P6). Although he did not receive any reply to the application, he continued to serve in the Regular Naval Force for another one year and four months after his initial service period was completed on 27th May 2010. However, he was not given any promotions and salary increments during this period.

Since there was no response to his application to be re-engaged, the Petitioner preferred an appeal to the 3rd Respondent by letter dated 25th April 2011 (P7) to allow him to participate in the medical tests to re-engage in the services.

On 29th August 2011, the Petitioner received a letter sent by the Navy Head Quarters (P8) by which he was informed that he has been discharged with effect from 1st September 2011 in terms of Regulation 15(1)(v) of the Seaman's Enlistment and Service Regulations 1950 which reads:

> "15(1) The Commander of the Navy may discharge a seaman –
>
> (v) who has completed his engagement, that is to say, the period of original enlistment or the period of re-engagement; …"

The Petitioner contends that the discharge from the Sri Lanka Navy and the refusal to re-engage him is arbitrary, unreasonable and discriminatory and violates the fundamental rights of the Petitioner enshrined in Article 12(1) of the Constitution.

Regulation 15(1) of the Seaman's Enlistment and Service Regulations 1950 specifies several instances where a seaman may be discharged by the Commander of the Navy. This appears to give a discretion to the Commander of the Navy. Regulation 15(1)(v) applies in the event of a seaman who has completed his engagement.

However, when it comes to the decision of re-engagement, Regulation 10 of the Seaman's Enlistment and Service Regulations 1950 provides the criteria to be considered. It reads:

> "10. (1) An extension of service in the Regular Naval force beyond the period of original enlistment referred to in Regulation 7, may be allowed to a seaman who –
>
> (a) Is efficient, well-behaved and recommended by his Commanding Officer, and

(b) Who has passed a medical test to the satisfaction of the Commander of the Navy"

The Respondents have not taken up the position that the Petitioner has failed to meet these criteria. They simply contend that the decision to re-engage a seaman after he has completed his original enlistment period is purely discretionary and not as of right and that no reasons have to be adduced where a seaman is discharged after completing such period of service. No reasons have been tendered to Court by the Respondents as to why the application of the Petitioner to be re-engaged was refused.

It appears that in terms of Regulation 10, there is discretion vested in the Commander of the Sri Lanka Navy to re-engage a seaman even though he fulfills the criteria set out therein.

However, every discretionary power has limits. There is no such thing as unfettered discretion. Unfettered discretion is anathema to the rule of law on which our Constitution is founded [*Visuvalingam and Others v. Liyanage and Others* (1983) 1 Sri.L.R. 203 at 236; *Premachandra v. Major Montague Jayawikrema and Another* (1994) 2 Sri.L.R. 90 at 102].

In deciding whether the Commander of the Navy has acted within the limits of the law in exercising his discretion, it is important to ascertain the reasons for his decision. While I reserve my position on whether there is a general duty on an administrative body to provide reasons for its decision, I have no hesitation in holding that once the fundamental rights jurisdiction of this Court is invoked, the decision-maker owes a duty to the Court to disclose the reasons for his decision. Even where no reasons have been given to the affected party, the departmental

file must contain the reasons for the impugned decision. Where no such reasons have been recorded, the only conclusion the Court can draw is that the decision was taken devoid of any reasons and is hence arbitrary.

No doubt every breach of the law does not amount to a denial of the protection of the law. As Fernando J. held in *Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others* [(2001) 1 Sri.L.R. 132 at 158]:

> "In my view, while each and every breach of the law does not amount to a denial of the protection of the law, yet some fundamental breaches of the law will result in denying the protection of the law."

Nevertheless, where an administrative body fails to disclose to Court the reasons for the exercise of discretionary power, that is a violation of the rule of law. It results in a fundamental breach of the law and a denial of the equal protection of the law. There may be narrow exceptions to the above principle on grounds such as national security. I reserve my position on the existence of any exceptions to this rule.

For the foregoing reasons, I declare that the decision contained in P8 is arbitrary and unreasonable and that the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution has been infringed by the 3rd Respondent by discharging him with effect from 1st September 2011 in terms of Regulation 15(1)(v) of the Seaman's Enlistment and Service Regulations 1950.

I further declare that the decision to discharge the Petitioner from the Sri Lanka Navy as reflected in P8 is of no force or avail in law.

I direct the State to pay a sum of Rs. 50,000/= as compensation to the Petitioner for the violation of his fundamental right guaranteed by Article 12(1) of the Constitution.

I further direct the 3rd Respondent to consider the application made by the Petitioner for re-engagement by application dated 26th December 2009 (P6) in terms of Regulation 10 of the Seaman's Enlistment and Service Regulations 1950 and take a decision according to law.

Judge of the Supreme Court

Mahinda Samayawardhena J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.

I have had the benefit of reading in draft form, the judgment of His Lordship Justice Janak De Silva who has set out the necessary facts pertaining to this case in his judgment.

As has been mentioned, it is the position of the respondents that the decision to re-engage a seaman at the end of the first enlistment period, is purely discretionary. It is because of the said 'pure discretion' that the respondents have taken up the position that no reasons need to be given when the Commander of

Sri Lanka Navy, decides in his discretion not to re-engage the petitioner for a second period.

If the above position is correct, no reasons need be given when the Commander of Sri Lanka Navy, decides in his discretion to re-engage any other seaman for a second period. The question then arises as to whether the Petitioner has been afforded an equal protection of law guaranteed under Article 12 (1) as against those who were allowed by the Commander of Sri Lanka Navy to re-engage for a second period. This can only be ascertained by comparing/considering, the reasons for such permission to re-engage some seamen as against the reasons for refusal to re-engage some other seamen. Therefore, in this instance the Commander of Sri Lanka Navy ought to have given reasons for his decision not to re-engage the petitioner for a second period.

Thus, the respondents have failed to satisfy the Court that the Petitioner has been afforded the equal protection of law guaranteed under Article 12 (1) of the Constitution. In the above circumstances, I conclude that the respondents, have infringed the fundamental rights of the Petitioner guaranteed under Article 12 (1). For those reasons, I agree with the relief set out in the judgment of His Lordship Justice Janak De Silva.

Judge of the Supreme Court