

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

In the matter of an Application for Orders in the nature of writs of Certiorari, Mandamus and Prohibition under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**WRIT-108/2023**

T/ Captain Borala Liyanage Tharindu Gayan  
No.A33/2, “Indunil”, Pothukoladeniya,  
Kegalle.

**Petitioner**

**v.**

1. Lieutenant General Vikum Liyanage  
RWP  
RSP ndu  
Commander of the Sri Lanka Army  
Army Headquarters  
Sri Jayawardhenapura  
Colombo.
2. Maj Gen CD Weerasuriya RPW RSP  
ndu  
Chief of Staff and Colonel of the  
Regiment Sri Lanka  
Regimental Center Sri Lanka Light  
Infantry Army Cantonment  
Panagoda  
Homagama.

3. Maj Gen W S S Wanasinghe RSP VSV  
USP ndu  
  
Commandant of the Sri Lanka Army  
Volunteer Force,  
  
Headquarters Sri Lanka Army  
Volunteer Force, Salawa Kosgama.
4. Col MPSK Kulasekara WWV RWP RSP  
Centre Commandant of the Regimental  
Center- Sri Lanka Light Infantry  
Regimental Center Sri Lanka Light  
Infantry Army Cantonment  
Panagoda, Homagama.
5. Major HMJ Pramathilaka RSP SLLI  
Commanding Officer 17<sup>th</sup> Battalion Sri  
Lanka Light Infantry,  
Army Camp, Alankulam, Thunukkai.
6. General G.D.H. Kamal Gunaratne  
(Read)  
WWV RWP RSP USP ndc psc MPhil  
Secretary, Ministry of Defence,  
Ministry of Defence, Defence  
Headquarters Complex, Sri  
Jayewardenepura, Kotte.

**Respondents**

**Before :** N. Bandula Karunarathna P/CA, J  
B. Sasi Mahendran, J

**Counsel :** Shantha Jayawardena with Thilini Vidanagamage for the Petitioner  
Dilan Ratnayake, PC, SDSG for the 1<sup>st</sup> to 6<sup>th</sup> Respondents

**Written**

**Submissions:** 01.03.2024 (by the Petitioner)  
**on:**

**Supported on:** 02.02.2024

**Judgment On :** 10.05.2024

**B. Sasi Mahendran, J**

The Petitioner by Petition dated 16.02.2023 has invoked this Court's Writ Jurisdiction by praying for the following reliefs,

- a) Issue notice on the Respondents in the first instance;
- b) Call for and examine the record pertaining to the subject matter of this application, including the said decision contained in the letter bearing reference No. VF/O/ROG/SNR OFFRS/178/8524/2023(23) dated 15<sup>th</sup> February 2023;
- c) Grant and issue an order in the nature of Writ of Certiorari quashing the adverse decision(s) contained in the letter 07<sup>th</sup> July 2020 – PI7;
- d) (d) Grant and issue an order in the nature of Writ of Certiorari quashing the adverse decision(s) contained in the letter 30th July 2021 - P23;
- e) Grant and issue an order in the nature of Writ of Certiorari quashing the adverse decision(s) contained in the letter bearing reference No. VF/O/ROG/SNR OFFRS/178/8524/2023(23) dated 15th February 2023- P33;
- f) Grant and issue an order in the nature of Writ of Certiorari quashing any adverse decision(s) on account of and in consequent to the contained in the letter bearing

reference No. VF/O/ROG/SNR OFFRS/178/8524/2023(23) dated 15th February 2023- P33;

- g)** Grant and issue an order in the nature of a Writ of Prohibition preventing any one or more Respondents and their successors/ servants or agents thereof, and or any Added or Substituted Respondents thereof from further denying the career progression of the Petitioner based on the Award of Punishment in the Charge Sheet - P6;
- h)** Grant and issue an order in the nature of a Writ of Prohibition preventing any one or more Respondents and their successors/ servants or agents thereof, and or any Added or Substituted Respondents thereof from acting on decision contained in the letter dated 07th July 2020 or P17;
- i)** Grant and issue an order in the nature of a Writ of Prohibition preventing any one or more Respondents and their successors/ servants or agents thereof, and or any Added or Substituted Respondents thereof from acting on the decision contained in the letter bearing reference No. VF/O/ROG/SNR OFFS/178/8524/2023(23) dated 15th February 2023 or P33;
- j)** Grant and issue an order in the nature of Writ of Mandamus directing the 1<sup>st</sup> Respondent to confirm the Petitioner in the Rank of Captain;
- k)** Grant and issue an order in the nature of Writ of Mandamus directing the 1<sup>st</sup> Respondent to confirm the Petitioner in the Rank of Captain with effect from 20<sup>th</sup> December 2014;
- l)** Grant and issue an order in the nature of Writ of Mandamus directing the 1<sup>st</sup> Respondent to promote the Petitioner to the Rank of Temporary Major;
- m)** Grant and issue an order in the nature of Writ of Mandamus directing the 18 Respondent to promote the Petitioner to the Rank of Temporary Major with effect from 20<sup>th</sup> December 2018;
- n)** Grant and issue an order in lie nature of Writ of Mandamus directing the 18 Respondent to promote the Petitioner to the Rank of Major,
- o)** In the alternative to the prayer (j). grant and issue an order in the nature of Writ of Mandamus directing the 1st and/or 2nd Respondents) to recommend the Petitioner for confirmation in the Rank of Captain;
- p)** In the alternative to the prayer (k), grant and issue an order in the nature of Writ of Mandamus directing the 1st and/or 2nd Respondents) to recommend the Petitioner for confirmation in the Rank of Captain with effect from 20th December 2014;

- q) In the alternative to the prayer (1), grant and issue an order in the nature of Writ of Mandamus directing the 1st and/or 2nd Respondents) to recommend the Petitioner for promotion to the Rank of Temporary Major;
- r) In the alternative to the prayer (m), grant and issue an order in the nature of Writ of Mandamus directing the 1st and/or 2nd Respondent(s) to recommend the Petitioner for promotion to the Rank of Temporary Major with effect from 20th December 2018;
- s) In the alternative to the prayer (n), grant and issue an order in the nature of Writ of Mandamus directing the 1st and/or 2nd Respondents) to recommend the Petitioner for promotion to the Rank of Major;
- t) Grant costs; and/or
- u) Grant such further and other reliefs) as Your Lordships' Court shall deem meet.

#### Facts relevant to this case

According to the Petitioner following facts are revealed in the Petition.

Petitioner is attached to the Sri Lankan Volunteer Force of the Sri Lankan Army, who was attached as a Volunteer Cadet on 06.07.2007 and promoted to 2<sup>nd</sup> Lieutenant on 10.04.2012.

After completing 3 years in the rank of Lieutenant and after completing the exam in 2012 he was promoted to the rank of Temporary Captain with effect from 20.12.2014. On 31.10.2015 the villages has complained to the police that, he has come out from the camp under the influence of liquor and had a quarrel with the civilians. Court of Inquiry was held on 01.11.2015 and a charge sheet was served on him containing 3 charges. After he pleaded guilty on 20.09.2016, he was awarded severe reprimand as the punishment for all the charges.

By the document marked P7, the 1<sup>st</sup> Respondent has taken a decision that it is not necessary to take further action against the Petitioner in respect of the same incident. According to the Petitioner, he has completed the Captain to Major Exam in 2016. Due to the punishment he was not promoted in 2017. According to the Petitioner he has to wait for 1 year to get the promotion. From the year 2017 to 2019 though he has received confirmation for the promotion he was not promoted. In the year of 2020 he was recommended for promotion but his promotion was denied. In 01.08.2020 the Petitioner

was informed by the letter P17 that the 1<sup>st</sup> Respondent declined the Petitioners request on the basis that, the Petitioner has committed an offence that amounts to more on moral turpitude. According to him, this was the first time he was informed by the Authority concerned.

Against that Order, he has made several appeals to the 1<sup>st</sup> Respondent by way of redress of grievance. In the meantime, in 2021 and 2022 his Commanding Officer recommended for his promotion. Thereafter, he has requested the right of the audience with the 4<sup>th</sup> Respondent and no action has been taken. By the document marked P33 he was informed by the 1<sup>st</sup> Respondent that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have considered the gravity of the offence committed by the Petitioner on 31.10.2015 and have declined his promotion.

According to the Petitioner, he has satisfied all the criteria for the confirmation in the rank of captain with effect from 20.12.2014. But the Respondent has taken the position that the petitioner is not eligible under circular No. AO/11/2019 which was tendered by the 1<sup>st</sup> Respondent in their objection. The Respondent in their Objection has taken the position that, according to the army order No. AO/11/2019 dated 27.06.2019 it sets out the promotion and career progression criteria of the Sri Lankan Army Lieutenant Colonel and below which was marked as R1. According to the paragraph 53 of the said order, it stipulates that “The Officers who have punished for civil-military offences, which amount to Moral Turpitude are not to be considered”.

The question before us is whether the Respondent’s decision not to promote the Petitioner considering the circular AO/11/2019?

According to the Petition, is to be promoted to the rank of temporary major and to promote to the rank of major, as he has completed the major exam in 2016 in terms of regulation 15/01 of the regulation which was marked as P9. Also, the officers who have sat for the exam with the Petitioner they have been placed in temporary major effect from 30.12.2018.

In the objections the Respondent has taken the position that due to the Army Order which was marked by the Respondent as R1, where the Officer who has been punished for civil offences which amounted to moral turpitude to be considered for the promotion. But when we peruse the charge sheet which was marked as P6 where the offence was committed on 31.10.2015, the offence was never indicated in the said charge sheet. When the Respondents framed the charges against him, the particular offence was not there at the

time the incident took place. They have described 3 charges in the particular charge sheet and described the offences as follows;

1. Neglect to obey garrison or other orders
2. Prejudicial to military discipline
3. Conduct prejudicial to military discipline

Those three charges are based on, whilst the Petitioner was performing duties as an officer commanding of A coy of 5<sup>th</sup> volunteer battalion of Sri Lanka Light infantry, consumed liquor in the living room and left the camp through the security fence without obtaining the permission from the superior and entered into a civil house. By doing that, he committed an offence punishable under sections 102(1) and 129 (1) of the Army Act No 17 of 1949 which was in force at that time. But the Respondent has deprived his promotion by stating that the petitioner who has been punish for civil/ military offences which amount to moral turpitude, which disqualifies his promotion. The Petitioner right to be promoted as a Major, was deprived by imposing a condition that was circulated by AO/11/2019 that was not an offence at that time. Whether the particular offence will have the retrospective effect when the incident occurred. We hold that P17 and P33 where Respondents consider the incident comes under Moral turpitude which was not an offence at that time of the offence committed is irrational. There is no evidence to show that, the Respondent has the power to make regulations under and in terms of the Army Act with retrospective effect where decision contained in P33 is based on the said circular.

This concept was discussed in Dr. K.M.L.Rathnakumara and 13 Others v. The Postgraduate Institute of Medicine and Others , SC Appeal NO: 16/2014, decided on 30.03.2016, (2016 BLR Vol.XXII page 92 at page 98; Priyantha Jayawardhena, PC.,J., held;

“Section 17 of the Interpretation Ordinance stipulates the General provisions with respect to power given to any authority to make rules, regulations, and by-laws.

Thornton’s Legislative Drafting at page 424 says “ Delegated legislation may have retrospective effect only if the primary legislation containing the delegation either has that effect or authorities the delegated legislation to have that effect.’... no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act.” This principle

was adapted by Sharvananda J. in the case of the **Attorney General of Ceylon and W.M. Fernando, Honorary Secretary, Galle Gymkhana Club 79 (1) NLR 39.**

Constitutional and Administrative Law of Sri Lanka by Joseph A.L. Cooray at page 329 says “ The doctrine that subordinate legislation is invalid if it is ultra vires is based on the principle that subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivative nature and must be exercised within the periphery of the power conferred by the enabling Act. For example, subordinate legislation having retrospective effect is ultra vires unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation.”

At page 323 of the said book states “ Unless Parliament has in the enabling or parent Act expressly or impliedly authorized the sub-delegation, the maxim delegatus non potest delegare applies to make the sub delegation unlawful.”

There is no provision available in the said act to delegate power to the 1<sup>st</sup> Respondent to make regulations with retrospective effect. When there is no power to the 1<sup>st</sup> Respondent to make regulation with retrospective effect, the decisions containing in P17 and P33 are ultra vires.

Be that as it may, the Petitioner was continuously applying for the rank of major from 2016. We are mindful that in 2018, 2020, 2021 and 2022 after satisfying all the necessary and requisite criteria for the rank of captain and also in 2016 after completing the captain to major exam where the Petitioner's batch was confirmed in the rank of captain on or about 09.02.2017 in the view of the disciplinary circular he was lawfully eligible for the promotion on 20.09.2017. According to the Petitioner, as per the annual confidential report marked as P 11-C he was duly recommended to be promoted. Some Officers of the Petitioner's batch confirmed the substantive rank of captain. According to the P 13A, P 13B he was duly recommended by the commanding officer. He has made an appeal for not being promoted.

Under the terms of the said regulation of the Sri Lankan Army ( Volunteer Force and Volunteer Reserve) Regulation 1985, he was expecting that, he will be eligible to be promoted to the rank of temporary major by 20.12.2018 and by 20.12.2022 he will be able to be promoted to the rank of major by 20.12.2022. Whereas the Officers from his intake



who have sat for the said exam have now confirmed the rank of captain and placed in the rank of temporary major in 2018.

Failure to promote him and failure to consider his appeal violates his rights and due entitlement. The only defence taken by the Respondent was that according to P17 and P33 that the Petitioner has committed an offence of moral turpitude. Where we have already held that the particular offence was not indicated in the charge sheet. If the 1<sup>st</sup> Respondent considered his promotion in the due process he would have been appointed as temporary major in 2018. He had a legitimate expectation that he would be promoted after completing 3 years as a captain.

**Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 61, Page 694.**

#### **Legitimate expectations.**

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of the decision-makers, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision-maker.

In appropriate circumstances the existence of a legitimate expectation may require a public body to confer a substantive, as opposed to a procedural, benefit. In such cases the courts will not permit the public body to resile from the representation if to do so would amount to an abuse of power. “

I like to refer the observation made in Perera v. National Police Commission and 24 Others, SC (FR) Application No. 290/2006, Decided on 03.07.2007, 2007 BLR 14 at page 17 Shirani A. Bandaranayake,J held as she was then:

Examining the decisions in Schmidt (supra) and Attorney- General for New South Wales v. Quin [(1990) 170 C.L.R 1], P. P. Craig (Legitimate Expectations, A Conceptual Analysis, L.Q.R. [(1992) 108 pg. 79] had observed the applicability of the concept of legitimate expectation in administrative decisions and had stated that,

"The foundation of the applicant's procedural rights is not simply that he has some legitimate expectation of natural justice or fairness. The basis of the applicant's claim to protection is that he has a legitimate expectation of an ultimate benefit which is in all the circumstances felt to warrant the protection of that procedure, in his instance his continued presence in the country."

Thus it is apparent that, as observed by David Foulkes (supra), a promise or a regular procedure could give rise to a legitimate expectation that could be enforced by court. This position is clearly illustrated by the decisions in Attorney General of Hong Kong vs. Ng Tuen Shiu [(1983) 2 AU.E.R. 346] and Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 All E.R. 935}.

According to the Petitioner, he was eligible for promotion after 20.09.2017. He was duly recommended to be promoted as Captain. But the decision of the 1st Respondent stating that he is not eligible to be promoted for the position of captain as he has committed an offence namely moral turpitude which was ultra vires.

Considering the above facts we hold that the decision taken by the 1<sup>st</sup> Respondent in P17 and P33 are ultra vires. Therefore we quash both the decisions according to the prayer (c) and (e) of the petition. Although in his prayer he has asked for a writ of mandamus directing the 1<sup>st</sup> respondent to confirm the Petitioner in the rank of captain with effect from 20.12.2014. But in his petition, he admits in paragraphs 17 and 18 that due to the punishment, he lost the opportunity of being considered for promotion for one year from effect till 20.09.2017. Therefore there is confusion with regards to his promotion date. Therefore we direct the 1<sup>st</sup> Respondent to consider his promotion to the rank of Captain with effect from 20.12.2017. Thereafter if he is eligible for the rank of Temporary Major under the said circular recommend him to that post.

Application allowed without costs.

**JUDGE OF THE COURT OF APPEAL**

**N. Bandula Karunaratna (P/CA), J.**

**I AGREE**

**PRESIDENT OF THE COURT OF APPEAL**