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

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

CA (Writ) Application No: 408/2018

Captain (Temporary) H.D.C. Perera,
No. 198/2, Weerasekara Mawatha,
Divulpitiya, Boralesgamuwa.

PETITIONER

Vs.

1. Lt. Gen N.U.M.M.W. Senanayake,
Commander of the Sri Lanka Army,
Army Headquarters, Colombo 3.

1A. Lt. Gen Shavendra Silva,
Commander of the Sri Lanka Army,
Army Headquarters,
Sri Jayawardenapura, Kotte.

2. Maj. Gen. E.R.H. Dias,
Commander, Sri Lanka Volunteer Force.

2A. Maj. Gen. H.J.S. Gunawardena,
Commander, Sri Lanka Volunteer Force,
Volunteer Force Headquarters,
Salawa, Kosgama.

3. Maj. Gen Ruwan Kulatunga,
Colonel of the Regiment,
Sri Lanka National Guard,
Wehara, Kurunegala.

4. Maj. Ganearachchi,
Commanding Officer-

Regimental Headquarters
Battalion, Sri Lanka National Guard,
Heraliyawatta, Kurunegala.

5. Maj. Lal Kumarasiri,
Commanding Officer, 10
Sri Lanka National Guard,
Paanaluwa, Watareka.

6. Maj. Gen. Ajith Wijesinghe,
Military Secretary,
Army Headquarters, Colombo 3.

6A. Maj. Gen. P.J. Gamage,
Military Secretary, Army Headquarters,
Sri Jayawardenapura, Kotte.

7. Hemasiri Fernando,
Secretary, Ministry of Defence.

7A. Gen. S.H.S. Kottegoda,
Secretary, Ministry of Defence.

7B. Maj. Gen. G.D.H. Kamal Gunaratne,
Secretary, Ministry of Defence,
No. 15/5, Baladaksha Mawatha,
Colombo 3.

8. Maj. Gen. W.P.D.P. Fernando
9. Maj. Gen. D.G.I. Karunarathne
10. Brig. M.A.S.K. Muhandiram
11. Brig. K.G.D. Perera
12. Maj. Gen W.A. Wanniarachchi.

The 8th to 12th Respondents-
All at the Army Headquarters,
Sri Jayawardenapura, Kotte.

RESPONDENTS

Before:	**Mahinda Samayawardhena, J** **Arjuna Obeyesekere, J**
Counsel:	Pasindu Silva for the Petitioner
	Ms. Yuresha Fernando, Senior State Counsel for the 1st – 6th and 8th – 12th Respondents
Argued on:	6th July 2020
Written Submissions:	Tendered on behalf of the Petitioner on 25th February 2020
	Tendered on behalf of the 1st – 6th and 8th – 12th Respondents on 29th July 2020
Decided on:	31st August 2020

Arjuna Obeyesekere, J

The Petitioner, who holds the rank of Captain (Temporary) in the Volunteer Force of the Sri Lanka Army, has filed this application seeking *inter alia* a Writ of Certiorari to quash the decision reflected in the letter marked '**P18**' to retire the Petitioner from the Sri Lanka Army with effect from 18th January 2019[1].

The Petitioner has also sought a Writ of Mandamus compelling the Respondents to confirm the Petitioner in the rank of Captain, and a Writ of Prohibition preventing the Respondents from retiring or discharging the Petitioner from the Sri Lanka Army without confirming him in the rank of Captain with effect from 1st December 2011.

I must state at the outset that the decision to promote the Petitioner to the rank of Captain or confirm him in that rank, must be taken by the Commander of the Sri Lanka Army, and/or by the Commander, on the recommendation of the Army Selection Board, taking into consideration the provisions relating to such promotion. As long as due process has been followed and the decision to deny the Petitioner his promotion and/or retire the Petitioner is not arbitrary, irrational or unreasonable,

[1] Vide paragraphs (b) and (c) of the prayer to the petition.

this Court shall not interfere with the decision of the Commander of the Sri Lanka Army in relation to such promotion.

As pointed out by Justice Sripavan (as he then was) in **Wikramaratne vs Commander of the Army and others**[2]:

> "*in service matters, the 1st Respondent should be left with a free hand to make decisions with regard to the internal administration of the Army in the interest of efficiency, discipline, exigencies of service etc. The Court cannot interfere with the appointment or promotion unless the first respondent has acted unlawfully, arbitrarily, or guided by ulterior considerations which are discriminatory or unfair*."

Therefore, I am of the view that the prayer for the Writ of Mandamus is misconceived in view of the fact that (a) the Petitioner is not entitled to be promoted to the rank of Captain as of right, and (b) the promotion is at the discretion of the Commander, Sri Lanka Army. I cannot consider the Writ of Prohibition for the same reason. Hence, I shall only consider whether '**P18**' is liable to be quashed by a Writ of Certiorari.

The facts of this matter very briefly are as follows.

The Petitioner had joined the Volunteer Force of the Sri Lanka Army on 9th January 2002 as a Cadet Officer. Having undergone training, the Petitioner had been commissioned as a Second Lieutenant on 6th January 2003. He had thereafter served in various parts of the Country, including operational areas, and had been awarded several medals for his service. The Petitioner had been promoted to the rank of Lieutenant in June 2008, and had been promoted as Captain (Temporary) on 1st December 2011.

The Petitioner states that he received the following letter dated 9th February 2018, marked '**P18**' from the Commandant of the Volunteer Force:

[2] CA (Writ) Application No. 800/2006 CA Minutes of 07th January 2008.

"*The Army Board No. 03 assembled on 19th December 2017 examined the SLAVF Board proceedings and stipulated criteria with regard to the confirmation of the rank of Temporary Captain and determining their career progression. The Board having perused your* ***adverse disciplinary records****, recommended you to be retired from the SLAVF after a period of 1 year with effect from 18th January 2018 ...*

It is brought to your information that the Commander of the Army has approved the above recommendation made by the Army Board No. 3."

The Petitioner states that although he sought an audience with the 1st Respondent, the Commander of the Sri Lanka Army, the said request was not granted. The Petitioner had thereafter submitted a Redress of Grievance, which too had not been considered favourably by the 1st Respondent.[3]

In terms of Regulations 15(1) and 15(2) of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations, 1985[4] (the Volunteer Force Regulations), an Officer may be promoted to the substantive rank of Captain on completion of three years efficient service in the rank of Lieutenant on the active strength of the Volunteer Force, and provided that:

(a) The Officer has passed the examination for that rank;

(b) The Officer has regularly attended training camps, parades, mobilizations and participated in other regimental activities to the satisfaction of the Commanding Officer of his Regiment; and

(c) The Officer has been recommended by his Commanding Officer and Commandant, Volunteer Force, as being suitable for promotion.

It is agreed between the parties that the procedure that is followed in the confirmation of an Officer in the rank of Captain in the Volunteer Force is as follows:[5]

[3] Vide letter dated 26th November 2018, marked 'P22'.
[4] Published in Extraordinary Gazette No. 476/26 dated 20th October 1987.
[5] Vide paragraph 21 of the petition, and paragraph 10 of the Statement of Objections.

a) At the request of the Military Secretary, the Commanding Officer of the Unit to which the Petitioner is attached is required to submit his recommendation on the suitability of the promotion of the Petitioner, to the Colonel of the Petitioner's Regiment;

b) The Colonel of the Regiment is required to submit the above recommendation, together with his recommendation, to the Sri Lanka Army Volunteer Force Headquarters;

c) The Commandant of the Sri Lanka Army Volunteer Force is required to submit the above recommendations, together with his recommendation, to the Military Secretary;

d) The Directorate of Training is required to send the results of the Petitioner's Physical Efficiency Test to the Military Secretary;

e) The Army Selection Board No. 3 shall consider the aforesaid recommendations and submit its decision to the Commander, Sri Lanka Army;

f) The promotion is effected by the Commander, Sri Lanka Army.

The Respondents have not apprised this Court whether the Petitioner has satisfied the provisions of Regulations 15(1) and 15(2), nor have the Respondents apprised this Court whether the promotion and/or confirmation of the Petitioner has not been recommended by the Commanding Officer of the Unit to which the Petitioner is attached to, the Colonel of the Petitioner's Regiment, and the Commandant of the Sri Lanka Army Volunteer Force.

The starting point of the Petitioner's case is the letter dated 28th November 2012, marked '**P15**' by which the Commandant of the Volunteer Force had informed the Petitioner as follows:

> "*The Army Board No. 3 which assembled on 5th September 2012, examined the SLAVF Board proceedings and the stipulated criteria with regard to the Promotion of Officers in the rank of Temporary Captain.* ***The Board considered***

the period of AWOL[6]*, contribution in humanitarian operations and the accumulated service of Officers who have been AWOL over 21 days. Accordingly, you* ***have been AWOL for over 21 days from 24th July 2006 to 1st December 2006 (130 days)****.* ***The Board has recommended to retain in service until completion of 20 years of service with due promotion****.*

It is brought to your information that ***the Commander of the Army has approved the above recommendation*** *made by the Army Board No. 3.*"

The Petitioner states that '**P15**' was a clear representation made to him that the Sri Lanka Army, having taken into consideration his past record of service had decided to retain his services until he completes twenty years of service, with due promotions during that period, and more importantly that the said decision had been approved by the 1st Respondent. The Petitioner has therefore submitted that '**P15**' gave rise to a legitimate expectation that he would not only be promoted but that he would be retained in service until he completed 20 years of service.

As noted earlier, an Officer only requires three years in the rank of Lieutenant, prior to being promoted to the rank of Captain. Even though the Petitioner had been promoted as Captain (Temporary) in 2011, and the above recommendation was conveyed to the Petitioner in November 2012, the Respondents have not explained why the Petitioner has not been promoted to the rank of Captain after '**P15**' was issued in November 2012.

Two and a half years later, by a letter dated 6th March 2015 marked '**P16**', the Commandant of the Volunteer Force had informed the Petitioner as follows:

"*The Army Board No. 3 which assembled on 3rd December 2014, examined the SLAVF Board proceedings and the stipulated criteria with regard to the Confirmation of Officers in the rank of Captain. The Board considered the period of AWOL, contribution in humanitarian operations and the accumulated service of Officers who have been AWOL over 21 days.*

[6] AWOL is the acronym for 'Absent without leave'.

It had been observed that you had been AWOL for over 21 days from 24th July 2006 to 1st December 2006 (130 days). Hence, the Board had recommended you be retained in service for another one year from the date the Board assembled and thereafter retire from the SLAVF without future promotions and selections.

Further, it is brought to your information that the Commander of the Army has approved the above recommendation made by the Army Board No. 3."

It would thus be seen that the decision in '**P16**' is a 180° turn from the decision in '**P15**', even though the factors that have been considered by both Army Selection Boards are identical. Furthermore, the reason for the change appears to be the fact that the Petitioner was AWOL for 130 days in 2006, a factor which ought to have been considered by the Sri Lanka Army when it promoted the Petitioner to the rank of Lieutenant in 2008, and Temporary Captain in 2011, and more importantly, a factor **which was considered** when the decision '**P15**' was taken in 2012 to promote the Petitioner.

I would now consider the explanation offered by the Respondents for the *change in mind* reflected in '**P16**'. The Respondents have stated that in addition to the criteria referred to in Regulation 15(1) and (2), the promotion or confirmation in the rank of Lieutenant as well as Captain in the Volunteer Force is carried out in accordance with the criteria stipulated in the letter dated 10th July 2006, marked '**R3**'. Paragraph 10 of the criteria applicable for promotion to the rank of Captain reads as follows:

"*An Officer who has been low medically categorized due to non battle casualty, will be considered for confirmation on completion of one year mobilised service after being categorized as 'FE'.*"

It is admitted that in June 2008, while returning after duty, the Petitioner had accidently fallen near the entrance to the Army Hospital, and had suffered injury. The Petitioner had thereafter presented himself before a Medical Board of the Sri Lanka Army, which had arrived at the opinion that the Petitioner sustained the said injury *whilst on duty resulting in distal radial fracture on left side* and that his injury can be categorized as a permanent partial disablement.[7]

[7] Vide Proceedings of the Medical Board marked 'P13b'.

In their Statement of Objections, the Respondents have stated that the Petitioner had failed to qualify in the Annual Physical Examination Test (APET) as shown in the Annual Confidential Reports for the years 2013 and 2014, which reflected that the Petitioner was of a **low medical category for a long period of time** due to non-battle reasons, and that in view of paragraph 10 of '**R3**', the Army Board decided to retire the Petitioner after one year from the decision of the Board without promotions.[8] What is important in this explanation is the fact that the Respondents are not claiming that there has been a change of circumstances during the period of November 2012 when the decision in '**P15**' was taken, and March 2015, when the decision at '**P16**' was reached.

In any event, although the Respondents have taken up the above position in their Statement of Objections, the decision of the Army Selection Board No. 3, as conveyed by '**P16**' does not refer to the medical condition of the Petitioner at all, but instead refers to the Petitioner being AWOL as the reason for its decision. Furthermore, while in terms of '**R3**', the medical condition of the Petitioner can be a ground on which his confirmation can be deferred, it does not appear that the medical condition of the Petitioner is a ground on which his promotion could be denied or, a ground on which the Petitioner could be retired from service.

The contradictory positions between '**P15**' and '**P16**' had been considered by the Commander of the Sri Lanka Army, and by letter dated 30th October 2015, marked '**P17**', the Commandant of the Volunteer Force had informed the Petitioner as follows:

> "*Therefore, seeking of above contradictory decisions during the promotion and confirmation Boards on two occasions, the Commander of the Army has directed to implement the first Board decision which was given by the Army Board No. 3.*
>
> *Hence, it is brought to your information that the Commander of the Army has approved to implement the Board decision given to retire you at the completion of 20 years of reckonable service with due promotion.*"

[8] Vide paragraph 21 of the Statement of Objections.

Thus, '**P17**' has made it clear that, irrespective of the medical condition of the Petitioner and the AWOL incident, the Commander of the Sri Lanka Army is of the opinion that the Petitioner can continue in the Sri Lanka Army until he completes twenty years of service, and that he would be entitled to his promotions. Even though '**P17**' had been issued in October 2015, the Respondents have once again failed to explain the reasons that prevented the Petitioner from being confirmed in the rank of Captain after '**P17**'.

The confirmation of the Petitioner in the rank of Captain appears to have been considered once again by the Sri Lanka Army in December 2017, as borne out by the letter dated 9th February 2018, marked '**P18**':

> "*The Army Board No. 3 assembled on 19th December 2017, examined the SLAVF Board proceedings and the stipulated criteria with regard to the Confirmation of the rank of Temporary Captain and determining their career progression. The Board having perused your* ***adverse disciplinary records****, recommended you to be retired from the SLAVF after a period of one year with effect from 18th January 2018, the AHQ Board proceedings are approved.*
>
> *It is brought to your information that the Commander of the Army has approved the above recommendation made by the Army Board No. 3*"

As the basis for the above decision is the *adverse disciplinary record* of the Petitioner, it would be appropriate to refer to at this stage, the disciplinary record of the Petitioner. The Petitioner admits that he was absent without leave (AWOL) from 24th July 2006 to 30th November 2006, and that following a summary trial, his seniority was reduced by 100 places, in addition to a penal deduction of salary for 130 days. The Petitioner had also been severely warned over an incident where he is said to have failed to participate at a social event of the Sri Lanka Army in 2006. Finally in 2014, the Petitioner had been kept under observation for six months over an incident where the Petitioner had submitted an application seeking admission of his son to the Defence College through the Ministry of Defence, instead of forwarding the application through the Regimental Head.

The contradictory positions in '**P17**' and '**P18**' had been brought to the attention of the Military Secretary by the Commandant of the Volunteer Force, by his letter dated 16th February 2018 marked '**R4**', which reads as follows:

> "*The AHQ Board No. 3 assembled on 19th December 2017, has given a Board decision against the undermentioned Officer to be retired from the SLAVF after a period of one year with effect from the date the AHQ Board proceedings are approved, based on* ***adverse disciplinary records****, at vide ref 'B':*
>
> 1. *T/Captain H.D.C.Perera – AWOL 130 days (calculable service 15 years 08 months and 22 days)*
>
> 2. *.....*
>
> *However, the Military Secretary .... has informed this HQ to retain the Officers in service until they complete 20 years of service with due promotion. It is observed that the aforementioned Officers have completed over 15 years of calculable service as on 12th February 2018, and hence the directions of AHQ Board No. 3 at Ref 'B' with Ref 'C' and 'D' are inconsistent.*
>
> *In the light of the above, request for further instructions on implementation of the Board decision or making appropriate changes to the Board decision, please.* "

While the Respondents have not given any details of the *adverse disciplinary record* of the Petitioner that prompted the Army Selection Board No. 3 that met on 19th December 2017 to arrive at the above conclusion, it appears from '**R4**' that the Board was referring to the incident where the Petitioner was AWOL in 2006. Thus, the incident that appears to have influenced the decision in '**P18**' is the AWOL incident.

The response of the Military Secretary to '**R4**' has been marked as '**R5**',[9] and reads as follows:

> "*Ref.B. AHQ Board proceedings dated 19th December 2011*
> *Ref. C. AHQ Board proceedings dated 5th September 2012*

[9] Letter dated 22nd February 2018.

Ref. D. AHQ Board proceedings dated 19th December 2017

In response to letter at Ref 'A', it is hereby intimated that the Board decisions given by Ref 'B' and 'C' are superseded by the decisions given by the Board proceedings at Ref. 'D'.

Accordingly, the Officers concerned to be retired from the Army after elapsing a period of one year with effect from the date the AHQ Board proceedings at Ref. 'D' are approved."

Even though '**P18**' refers to the *adverse disciplinary record* of the Petitioner as being the reason for the decision contained therein, in their Statement of Objections, the Respondents have stated that the Petitioner failed to qualify in the Annual Physical Efficiency Test during the years 2013 – 2016, and that he has been categorized as 'below average' due to non-battle reasons, and that it is for this reason that the Army Selection Board did not recommend the Petitioner to be confirmed in the rank of Captain.

The uncertainty and the indecisiveness did not stop here. The Petitioner has produced marked '**P21**' the following letter dated 10th October 2018 sent by the Sri Lanka Army to the Secretary, Ministry of Defence:

"20 ශ්‍රීලංජාආබමු ඒකකයට අයත් නි/6229 කපිතන් එච්.ඩී.සී පෙරේරා යන නිලධාරි විශේෂ ආරක්ෂක ඒකකයට අනුයුක්තව රාජකාරියේ යෙදී සිටියදී යුද්ධ හමුදා රෝහල කොළඹ වාට්ටු අංක: 09 වෙත ගොස් ආපසු පැමිණෙමින් සිටියදී රෝහලේ ප්‍රධාන දොරටුව අසල ලිස්සා වැටීම හේතුවෙන් 2008.06.09 වන දින තුවාල සිදුවී ඇත.

1. ඒ සබැඳිව පවත්වන ලද මූලික පරීක්ෂණ උසාවි වාර්තාවේ යුද්ධ හමුදාධිපති නිගමනය හා වෛද්‍ය මණ්ඩලය මගින් පහත සඳහන් නිර්දේශ සහ නිගමනයන් ඉදිරිපත් කර ඇත.

   අ. මෙම තුවාල සිදුවීම යුද්ධ හමුදා සේවයට අදාල බවට යුද්ධ හමුදාධිපති නිගමනය කර ඇත.

   ආ. රා: ප: ව 22/93 හි ජේද අංක 03 හි (අ) (III) යටතේ දුබලතාවයේ ප්‍රතිශතය 20% ක් බව යුද්ධ හමුදා වෛද්‍ය මණ්ඩලය මගින් නිර්දේශ කර ඇත.

2. අදාල නිලධාරිගේ වෛද්‍ය මණ්ඩල වාර්තාවේ පිටපතක්, යුද්ධ හමුදාධිපති නිගමනයේ පිටපතක් සහ මූලික පරීක්ෂණ උසාවි වාර්තාවේ පිටපතක් මේ සමග ඉදිරිපත් කර ඇත.

3. ඒ අනුව ඔබ අමාත්‍යාංශ අංක MOD/CP/DEF/67/2017 හා 2017.09.04 දිනැතිව ඉදිරිපත් කරන ලද අමාත්‍ය මණ්ඩල සංදේශයට අනුව 2017.11.08 දිනැතිව ලැබී ඇති අංක අමප/17/2010/703/082 දරණ අමාත්‍ය මණ්ඩල තීරණයට හා ඊට අදාලව ඉදිරිපත් කරන ලද 2018.01.03 දිනැති අංක MOD/CP/DEF/105/2017 දරණ අමාත්‍ය මණ්ඩල සසටහන අනුව 2018.03.20 දිනැතිව ලබාදී ඇති අංක 18/0111/007 දරණ අමාත්‍ය මණ්ඩල තීරණය ප්‍රකාරව ඉහත නම සඳහන් නිලධාරීගේ හට වයස අවුරුදු 55 දක්වා මාසික වැටුප් හා දීමනා ගෙවීමට නිර්දේශ කරන අතර, ඒ සඳහා ඔබ අමාත්‍යාංශ අනුමැතිය කාරුණිකව අපේක්ෂා කරමි."

The Respondents have not explained in their Statement of Objections whether '**P21**' replaces '**P18**', and the effect of '**P21**' on the decision in '**P18**' to retire the Petitioner with effect from 18th January 2019.

It is therefore clear from '**P15**', '**P16**', '**P17**' and '**P18**' that the Respondents have re-evaluated the same set of facts on four different occasions, and had arrived at inconsistent decisions.

It is in the above circumstances that this Court must consider the two arguments of the learned Counsel for the Petitioner, that the decision contained in '**P18**' (a) is a violation of his legitimate expectations, and (b) is arbitrary and irrational.

The principal argument of the learned Counsel for the Petitioner is that '**P15**' gave rise to a legitimate expectation that he would not only be promoted, but that he would be retained in service until he completed 20 years of service.

In considering this submission of the Petitioner, I have to consider three matters. The first is whether the representation made to the Petitioner through '**P15**', that '*the Board has recommended to retain (him) in service until completion of 20 years of service with due promotion',* can in fact give rise to a legitimate expectation. The second is whether there has been a departure from the representation that gave rise to the said legitimate expectation of the Petitioner. The third is whether the said departure is fair and justifiable.

The rationale for holding public authorities accountable to representations made to individuals is founded on rules of natural justice, administrative fairness, and legal certainty. As stated in **De Smith's Judicial Review**:[10]

> "*It is a basic principle of fairness that legitimate expectations ought not to be thwarted.*[11] *The protection of legitimate expectations is at the root of the constitutional principle of the Rule of Law, which requires regularity, predictability, and certainty in Government's dealings with the public*."

In **S.F. Zamrath v. Sri Lanka Medical Council and others**[12] Dehideniya, J, observed that:

> "*The legitimate expectation of a person ensures that, the administrative authorities are bound by their undertakings and assurances unless there are compelling reasons to change the policy subsequently. It further* ***ensures legal certainty which is imperative as the people ought to plan their lives, secure in the knowledge of the consequences of their actions. The perception of legal certainty deserves protection, as a basic tenet of the rule of law*** *which this court attempts to uphold as the apex court of the country. The public perception of legal certainty becomes negative when the authorities by their own undertakings and assurances have generated legitimate expectations of people and subsequently by their own conduct, infringe the so generated expectations. Lord Denning has stated that, (in "Recent Developments in the Doctrine of Consideration"*[13]*) 'A man should keep his word. All the more so when the promise is not a bare promise, but is made with the intention that the other party should act upon it'. The principle of legitimate expectation is connected with an administrative authority and an individual.*" (emphasis added)

Simon Brown LJ in the case of **R v. Devon County Council, Ex parte Baker and Another**[14] suggested that a representation made in respect of a substantive right or benefit, attracts a standard of protection akin to estoppel:

---

[10] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell, page 673.
[11] J. Rawls, A Theory of Justice (1972), pp 235-243 (as referred to in De Smith's Judicial Review (Supra)).
[12] SCFR 119/2019; SC Minutes of 23rd July 2019.
[13] The Modern Law Review, Volume 15 [1952] at page 5.
[14] [1995] 1 All ER 73 at page 88.

> *"…the claimant's right* ***will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely****. Then the administrator or other public body will be held bound in fairness by the representation made* ***unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it****.* ***The doctrine employed in this sense is akin to an estoppel****."* (emphasis added)

The above passage identifies two key features that Courts consider essential in order to qualify a representation as legitimate, or in other words, in determining the legitimacy of an expectation. One is that the representation made must be clear and unambiguous.[15] The other is that the decision is consistent with the statutory duties conferred on the authority, and not made in excess of power, i.e. the representation must be made by a person with actual or ostensible authority to make the representation.[16]

The onus of proving that a clear, unambiguous representation devoid of qualifications was made is on the party who wishes to rely on it. In **Paponette and Others v Attorney General of Trinidad and Tobago**[17], Lord Dyson held as follows:

> "*The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too.* "

Having carefully examined '**P15**', I am satisfied that the representation made by the Commandant of the Volunteer Force satisfies the abovementioned criteria. In my view, the said representation is clear, unambiguous, is not subject to any qualifications, and has received the approval of the Commander of the Army, as expressly contained in '**P15**'. Therefore, I am of the view that '**P15**' gave rise to a

[15] '*the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.*'R v. IRC Ex p. MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 at 1569, followed in several subsequent cases; R (Patel) v General Medical Council [2013] EWCA Civ 327.
[16] South Buckinghamshire DC v. Flanagan [2002] EWCA Civ 690.
[17] [2012] 1 AC 1, para 37, at page 14.

legitimate expectation that the Petitioner will be retained in service until the completion of 20 years of service with due promotion.

The next question that I must consider is whether there has been a departure from the said representation made by '**P15**'. The answer to this question is fairly simple, in that it is clear from '**P18**' that the Respondents have done a 180° turn from '**P15**', and '**P17**'.

Once an applicant succeeds in proving the legitimacy of his expectation, the burden of proof shifts to the authority to justify the frustration of the expectation so created. In **Paponette v Attorney General of Trinidad and Tobago**[18], Lord Dyson went on to state that:

> *"Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation.* ***It will then be a matter for the court to weigh the requirements of fairness against that interest***." (emphasis added)

Therefore, once the existence of a legitimate expectation is apparent, Courts must decide by what standard the decision to disappoint a legitimate expectation can be scrutinised in order to determine if any relief should be granted. The question here is whether a breach of a legitimate expectation should be reviewed under the traditional grounds for judicial review, i.e. *Wednesbury* unreasonableness or irrationality (in the absence of illegality or procedural impropriety), or, by a more intrusive standard.

The case of **R v North and East Devon Health Authority, Ex p Coughlan**[19], which is still considered the leading authority on the doctrine of legitimate expectation,[20] concerned a decision of a public authority to disappoint a promise made to the appellant in that case, who was a severely disabled lady, of a "home for life" by closing down Mardon House, which was a residential care home providing specialist

[18] Ibid.
[19] [2001] QB 213.
[20] See In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7.

care. In this case, Lord Woolf MR described the following three ways in which a legitimate expectation may arise, and the role of the Courts in respect of each category of cases:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds.

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it.

(c) *Where the court considers that a* ***lawful promise or practice has induced a legitimate expectation of a benefit which is substantive****, not simply procedural, authority now establishes that here too the court will in a proper case decide* ***whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power****. Here, once the legitimacy of the expectation is established, the court will have the task of* ***weighing the requirements of fairness against any overriding interest relied upon for the change of policy.***

In theory, the first category of cases would involve matters of public policy, represented to the world at large[21], as opposed to a distinct group of individuals. In such cases, the Court's role is limited to reviewing such policy decisions '*at most on a bare Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear.*'[22] The second and third categories stated in **Ex parte Coughlan** reflect procedural and substantive legitimate expectation.

[21] Where a representation is made generally, directed to the world at large, this usually means that the public authority has adopted a *policy*– De Smith's Judicial review (supra), page 685.
[22] Supra.

The primary distinction between procedural and substantive legitimate expectation has been stated in **R. (Bhatt Murphy (a firm)) v. The Independent Assessor**[23] as follows:

> *"In the procedural case we find a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case we have a promise or practice of present and future substantive policy. This difference is at the core of the distinction between procedural and substantive legitimate expectation*."

However, in practice, the task of assigning facts of each case to the said categories is not clear-cut, and therefore, later cases have pointed out that the categories explained in **Ex parte Coughlan** are "*not hermetically sealed".*[24] This is especially so in relation to the first and third categories, where a policy decision, as stated in the first category may have the effect of depriving a previously promised substantial benefit, as envisaged by the third category.

As Laws LJ, in **Regina v. Secretary of State of Education and Employment, Ex parte Begbie**[25]opined:

> *"Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice.* ***But each is a spectrum, not a single point, and they shade into one another. It is now well established that the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake."***

At one end of the spectrum are those which Laws LJ termed as decisions which lie in the '*macro political field*'[26], where the Court's supervision would be less intrusive, whereas at the other end of the spectrum lie decisions which *may take place on a*

[23] [2008] EWCA Civ 755.
[24] Regina v. The Department of Education and Employment, Ex parte Begbie[2000] 1 WLR 1115, Laws LJ.
[25][2000] 1 WLR 1115.
[26] Ibid. Laws LJ: "*The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fueled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy*."

much smaller stage, with far fewer players[27], where a Court's condemnation of what is done as an abuse of power is justifiable because '*the court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes.'*[28]

As Justice Priyantha Jayawardena, P.C., observed in **Ginigathgala Mohandiramlage Nimalsiri v. Colonel P.P.J. Fernando**:[29]

> "*In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the said doctrine is based on the facts and circumstances of each case*."

Therefore, it is clear that there cannot exist a blanket standard of review applicable to all cases of legitimate expectation, and "*the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review*,"[30] bearing in mind the fundamental principle that "*the doctrine of legitimate expectation is rooted in fairness."*[31]

As observed in **De Smith's Judicial Review**[32]:

> "*On the whole, however, where a legitimate expectation has been disappointed the onus should be on the authority to justify its frustration. No magic formula can reach the right answer as to whether the expectation should be honored, but in considering whether the disappointment of an expectation is deserving of protection, the following factors may be relevant:*
>
> *a) The subject matter of the representation;*
>
> *b) Whether the decision is particular or general;*
>
> *c) Degree of reassurance;*

[27] Ibid. page 1131.
[28] ibid.
[29] SCFR 256/2010; SC Minutes of 17th September 2015.
[30] Regina v. The Department of Education and Employment, Ex parte Begbie (Supra).
[31] R v. Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd.[1990] 1 WLR 1545 at 1569-1570.
[32] Supra. pages 699- 701.

d) Nature of the decision;

e) *Detrimental reliance;*

f) Mitigation of the effects of a disappointed expectation.'

A key factor that influenced the decision in **Ex parte Coughlan**[33] was the fact that the promise was limited to a few individuals. It was observed that:

> "*most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the* ***character of a contract***." (emphasis added)

Having carefully considered '**P18**' in light of the above authorities, I am of the view that the decision contained in '**P18**' to deprive the Petitioner of the substantive legitimate expectation contained in '**P15**' is a classic case which falls within the latter end of the spectrum, inviting a higher degree of scrutiny by Courts on the grounds of fairness and abuse of power.

The test of balancing fairness as noted in the following passage of Sedley J in **R. v. Ministry of Agriculture Fisheries and Food, Ex parte Hamble (Offshore) Fisheries Ltd.**[34] was cited with approval by Justice A.R.B. Amerasinghe in **Dayaratne and Others v. Minister of Health and Indigenous Medicine and Others**[35] and supports the present position in Sri Lankan law on the subject of legitimate expectation:[36]

> "*Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfillment. The balance must, in the first instance, be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not*

[33] [2001] QB 213, para 59, at page 242.
[34] [1995] 2 All ER 714 at 731.
[35] [1999] 1 Sri LR 393.
[36] M.R.C.C. Ariyarathne and Others v. Inspector General of Police, Police and others [SCFR 444/2010; SC Minutes of 30th July 2019], Justice Prasanna Jayewardena, P.C. - 'it should be mentioned here that Coughlan had not been decided at the time Amerasinghe, J, specifically approved of Sedley J's "test" in Hamble (Offshore) Fisheries Limited. However, as observed earlier, Lord Woolf, MR's "test" in Coughlan is on much the same lines as Sedley J's "test". Thus, the weight of the English Law stands firmly behind the approach formulated by Amerasinghe J in Dayarathna."

*consider that the court's criterion is the bare rationality of the policy-maker's conclusion. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the Court's concern (as of course does the lawfulness of the policy). To postulate this is not to place the judge in the seat of the Minister**...** it is the court's task to recognise the constitutional importance of ministerial freedom to formulate and to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it*."

In **Nadarajah Abdi v. The Secretary of State for the Home Department**[37] Laws LJ expressed caution in relying on the broad concept of "abuse of power" in reviewing decisions concerning breach of legitimate expectation, and attempted to provide a degree of certainty to the general use of the principle of fairness by suggesting a test akin to proportionality:

*"Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. It may be, as I ventured to put it in **Begbie**, "the root concept which governs and conditions our general principles of public law". But it goes no distance to tell you, case by case, what is lawful and what is not. I accept, of course, that there is no formula which tells you that; if there were, the law would be nothing but a checklist. Legal principle lies between the overarching rubric of abuse of power and the concrete imperatives of a rule-book."*

"The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought

[37] [2005] EWCA Civ 1363.

to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, ***a proportionate response*** *(of which the Court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."*

In, **In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)**,[38] the UK Supreme Court, after considering the aforementioned authorities held as follows:

"*Where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so.* ***The court is the arbiter of fairness in this context.*** *And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment*."

Having traced the evolution of the doctrine of legitimate expectation in Sri Lanka, India, and in England, Justice Prasanna Jayewardena, P.C., in **M.R.C.C. Ariyarathne**

[38]Supra.

and Others v. Inspector General of Police, Police and others,[39] stated the present position on legitimate expectation in Sri Lanka as follows:

> "*Court should weigh the character and substance of the expectation and the prejudice caused to the petitioner by its frustration, on the one hand; against the importance of the public interest which led to the public authority's change of heart, on the other hand; and then decide whether that exercise of weighing the competing interests leads to the conclusion that the petitioner's expectation is of such weight and the consequences of its frustration are so prejudicial to him when compared to the public interest relied on by the public authority, that the public authority's decision to change its policy and negate the expectation was disproportionate or unfair or unjust and amounted to an abuse of power which should be quashed; or whether the decision to change the policy should stand because the public authority has acted proportionately, fairly and justly when it decided that the petitioner's substantive legitimate expectation could not be granted since public interest demanded a change of policy."*

Let me now consider whether the decision in '**P18**' is a fair decision. The Respondents have sought to justify '**P18**' on the basis that it is an independent decision, which reflects the facts and circumstances that prevailed at the time the decision in '**P18**' was taken. Once a legitimate expectation is established, and is found to be frustrated by a subsequent decision by the same authority, the subsequent decision must be viewed in light of the first decision which gave rise to the legitimate expectation. Therefore, the review involves two exercises of power by the same authority, i.e. the promise, and the breach of promise, '*with consequences for individuals trapped between the two.*'[40] I am therefore of the view that the decision in '**P18**' cannot be viewed independent of the legitimate expectation created by '**P15**'.

As observed above, the reason contained in '**P18**' for the frustration of the Petitioner's legitimate expectation created by '**P15**', is the Petitioner's '*adverse disciplinary record'* which is the AWOL incident in 2006. Subsequently, in their

[39] SCFR 444/2012; SC Minutes of 30th July 2019.
[40] Ex parte Coughlan (supra) at page 244; See M.R.C.C. Ariyarathne and Others v. Inspector General of Police, Police and others (supra) for a detailed discussion on this issue.

Statement of Objections, the Respondents attempted to justify '**P18**' on the basis of the Petitioner's medical condition.

It is not in dispute that the Petitioner had been AWOL for 130 days in 2006. It is also not in dispute that the Petitioner has a partial permanent disability. What is critical is that these two factors were present (a) in 2011 when the Petitioner was promoted as Captain (Temporary); and (b) in 2012 when '**P15**' was issued. The Respondents have not taken up the position that there was a change of circumstances between '**P15**' and '**P18**' which necessitated and justified the departure contained in the decision in '**P18**'.

I would not have had an issue with the said explanation if the Respondents had stated any events that transpired after '**P15**' that would have resulted in the change referred to in '**P16**', or had the Respondents at least explained the change of circumstances after '**P17**' that prompted the Army Selection Board No. 3 to do a 180^{o} degree turn for a second time in December 2017 – vide '**P18**'. Much water has flowed under the bridge since the AWOL incident in 2006, but what is important is that the Respondents have not demonstrated that there was an incident involving discipline or efficiency between **P17**' and '**P18**' that resulted in '**P18**'. The Petitioner has not had any disciplinary action taken against him since then, except the incident in 2014 involving the admission of his child to the Defence College, which does not appear to have influenced the decision, either in '**P16**' or '**P18**'.

The position is no different with the medical condition of the Petitioner. It is not in dispute that the Petitioner has suffered from the said medical condition since 2008, and the Respondents have not demonstrated that the medical condition has worsened since 2016 when '**P17**' was issued, or that the medical condition prevents the Petitioner from carrying out the duties entrusted to him. If the medical condition of the Petitioner was an issue, one would expect the Petitioner to be presented before an Army Medical Board, prior to taking any decision adverse to the Petitioner.

I have no hesitation in saying that the Sri Lanka Army has every right to reconsider '**P15**', where there is a change of circumstances which may warrant a re-evaluation of the facts, or where the interests of the Sri Lanka Army demands so. However, as I have discussed earlier, the Respondents have failed to demonstrate either of the

above. What is apparent here is that the Respondents have made *four separate decisions* on the *same facts and circumstances*, with no explanation as to why the necessity to reconsider the decision contained in '**P15**' arose, and why the same facts resulted in a completely contradictory decision upon reconsideration in '**P18**'. Furthermore, when the same facts were considered for the third time, in '**P17**', the Commander of the Sri Lanka Army had before him, the two contradictory decisions in '**P15**' and '**P16**', with reasons that influenced each of them. Thus, the decision contained in '**P17**' to retire the Petitioner at the completion of 20 years of reckonable service was arrived at after giving due consideration to any factors which may have influenced the departure from the decision in '**P15**' contained in '**P16**.'

Thus, even *if* I were to take the case of the Respondents at its highest, and determine that '**P18**', *as an independent decision*, passes the test of rationality, I am of the view that it is liable to be quashed in light of the representation made in '**P15**', in the absence of a change of circumstances which could warrant and/or justify the change in course. Once a decision has been taken after deliberating on the same facts on a previous occasion (or in this case, on multiple occasions), and represented to the Petitioner creating a substantial legitimate expectation ('**P15**'), it would not be fair, and would in fact be an abuse of power, if such a decision was not allowed to stand.

In the above circumstances, I am of the view that the decision contained in '**P18**' is in violation of the Petitioner's legitimate expectation that he would be retained in service until the completion of 20 years of service with due promotion, and is therefore liable to be quashed by a Writ of Certiorari.

For purposes of completeness, I shall also consider, very briefly, whether the decision in '**P18**', *even if* considered as an independent decision as claimed by the Respondents, can be struck down for being irrational and unreasonable. The test routinely applied to determine the reasonableness of a decision of a public authority is set out in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation**,[41] where Lord Greene defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'*

[41] [1948] 1 K.B. 223 at pages 229 - 230.

There is however growing precedence to show that English Courts have attempted to reduce the rigour of "*Wednesbury unreasonableness*" over the years. The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,[42] decided prior to the GCHQ case[43] provides for what can be considered a more balanced test:

> *"In public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which* ***no sensible authority acting with due appreciation of its responsibilities would have decided to adopt****."*[44]

As observed above, the basis for the decision contained in '**P18**' is the *adverse disciplinary record* of the Petitioner. Although no details have been given of the said *adverse disciplinary record* of the Petitioner, as noted earlier, it appears from '**R4**' that the Board was referring to the incident where the Petitioner was AWOL in 2006. I am not for a moment subscribing to the view that the Commander, Sri Lanka Army is not entitled to consider the AWOL incident, even though it occurred in 2006, when considering the confirmation of the Petitioner as Captain, but in such an event, it would be necessary to justify the necessity to do, especially since the Petitioner had been promoted as Lieutenant and Captain (Temporary) after the said AWOL incident. The Respondents are required to demonstrate why more weight is now placed on the AWOL incident to justify the retirement of the Petitioner, as opposed to when it was considered prior to '**P18**', or if there were any contributory factors which were not considered by the Respondents when '**P15**' was arrived at, that may have added more weight to the said AWOL incident when arriving at the decision in '**P18**'.

Furthermore, in terms of Clause 3 of the 'Criteria for promotion/confirmation to the rank of Lieutenant', '*An officer being AWOL over 21 days will not be considered for*

[42] Supra; page 1064.

[43] Council of Civil Service Unions vs Minister for the Civil Service [1985 AC 374], where Lord Diplock defined irrationality as follows: "*By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."

[44] The test used in Tameside was cited with approval in the case of R v Chief Constable of Sussex (Ex parte International Trader's Ferry Ltd) [[1999] 1 All ER 129 at page 157].

promotion, ***unless he is pardoned by the Commander of the Army***.' One can only assume that the fact that the Petitioner was considered and promoted initially as Lieutenant, and then as Captain (Temporary), is proof that the Petitioner was pardoned for the said AWOL incident by the Commander of the Army.

Be that as it may, in their Statement of Objections, the Respondents have provided a completely different reason for the decision contained in '**P18**', i.e. that the Petitioner failed to qualify in the Annual Physical Efficiency Test during the years 2013 – 2016, and that he has been categorized as 'below average' due to non-battle reasons. Therefore, even if '**P18**' is viewed completely independent of '**P15**', it is clear that the Respondents themselves were not certain as to why they were making the decision contained in '**P18**' to not promote the Petitioner.

In such circumstances, I am of the view that the decision in '**P18**', *even if* viewed as an independent decision as claimed by the Respondents, is not a decision that could have been arrived at after applying one's mind to the question to be decided, and is therefore liable to be quashed by a Writ of Certiorari, for being irrational and unreasonable.

In the above circumstances, I issue the Writs of Certiorari prayed for in paragraphs (b) and (c) of the prayer to the petition. I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal