

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

LANKA

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

CA (Writ) Application No: 126/2018

Colonel J.D.A.Gunasekara,
352/A, Halgasthota, Katunayake.

PETITIONER

Vs.

1. Lt. Gen. N.U.M.M.W.Senanayake,
Commander of the Sri Lanka Army,
Army Headquarters, Colombo 1.
- 1A. Lt. General L.H.S.C.Silva,
Commander of the Sri Lanka Army,
Army Headquarters, Colombo 1.
2. Major General Piyal Wickremaratne,
Colonel of the Regiment,
Sinha Regiment, Ambepussa.
3. Major General Sudath Perera,
General Officer Commanding,
58th Division, Boossa.
4. Major General P.W.B.Jayasundera,
Military Secretary,
Army Headquarters, Colombo 3.

5. Kapila Waidyaratne,
Secretary, Ministry of Defence,
Baladaksha Mawatha, Colombo 1.
6. Major General Amal Karunasekara.
7. Major General Dampath Fernando.
8. Major General Dananjith Karunaratne.
9. Major General Dushan Rajaguru.
10. Brigadier Easwaran.
11. Major General Amal Karunasekara.
12. Major General Dampath Fernando.
13. Major General Priyantha Jayasundera.
14. Major General Piyal Wickremaratne.
15. Major General Rukmal Dias.
16. Major General Sathyapriya Liyanage.
17. Major General Shavindra Silva.
18. Major General Dharshana Hettiarachchi.
19. Major General Bimal Vithanage.
20. Major General W.R.Palihakkara.
21. Brigadier Shantha Easwaran.

11th – 21st Respondents of Sri Lanka Army,
Army Headquarters, Colombo 3.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Pasindu Silva with Ms. Kaushali Jayaweera for the
Petitioner

Susantha Balapatabendi, P.C., Additional Solicitor
General with Ms. Indumini Randeny, State Counsel for
the Respondents

Written Submissions: Tendered on behalf of the Petitioner on 31st January
2019, 4th June 2019 and 28th January 2020

Tendered on behalf of the Respondents on 4th June
2019 and 25th February 2020

Decided on: 9th June 2020

Arjuna Obeyesekere, J

When this matter was mentioned on 31st May 2019, the learned Counsel appearing for the parties informed this Court that they are in agreement to this Court delivering its judgment on the written submissions of the parties. Having considered the written submissions, this Court invited the learned Counsel to provide this Court with their written response to seven questions posed by this Court, which was duly complied with, by way of further written submissions.

The primary issue that arises in this application is whether the decision of the Respondents that the Petitioner does not meet the stipulated criteria for appointment to the rank of Brigadier, is illegal, irrational and/or arbitrary.

The Petitioner had joined the Sri Lanka Army as an Officer Cadet in 1986, and had been commissioned as a Second Lieutenant in 1989. The Petitioner states

that he received his promotions in the regular course, and was promoted to the rank of Colonel on 23rd December 2013. Upon completion of three years in the rank of Colonel – i.e. on 23rd December 2016 - the Petitioner was eligible to be considered for promotion to the rank of Brigadier. It is admitted between the parties that the maximum period that the Petitioner could serve in the rank of Colonel is five years.¹ Thus, if the Petitioner is not promoted to the rank of Brigadier during that five year period, and unless the Petitioner is given an extension of service in the rank of Colonel, the Petitioner was required to retire from the Sri Lanka Army on 23rd December 2018.

The Petitioner has produced with the petition marked 'P17', Army Routine Order No. 32/2013 issued by the 1st Respondent, Commander, Sri Lanka Army. 'P17' provides for the appointment of an Advisory Board, comprising of the Chief of Staff as its Chairman and seven or more Senior Officers of the Sri Lanka Army. The function of the Advisory Board is to advice and make recommendations to the Commander of the Army in respect of any matter that the Commander may direct. 'P17' also provides for: (a) the appointment of the Army Selection Board No. 1 to advise and make recommendations to the Commander in respect of the selection and promotion of Officers to the rank of Major General; and (b) the Army Selection Board No. 2 to advise and make recommendations to the Commander in respect of the selection and promotion of Officers to the rank of Lieutenant Colonel, Colonel and Brigadier.

According to the Petitioner, the procedure followed when considering the promotion of an Officer to the rank of Brigadier is as set out below:

¹ Vide Regulation 3(1)(b) of the Army Pensions and Gratuities Code 1981, published in Extraordinary Gazette No. 562/11 dated 15th June 1989, marked 'R6'.

- a) The Military Secretary shall call for the recommendation of the Colonel of the Regiment to which the Officer belongs;
- b) The Military Secretary shall call for the recommendation of the General Officer Commanding, of the Division to which the Officer is attached;
- c) The Military Secretary shall call from the Director of Training, the Physical Efficiency Test of the Officer;
- d) The Army Selection Board No.2 shall consider the above recommendations and submit its decision to the Commander, Sri Lanka Army;
- e) The Commander, Sri Lanka Army shall submit his recommendation to HE the President, through the Secretary, Ministry of Defence.

The Respondents, while not disputing the above procedure, has drawn the attention of this Court to two matters. The first is to Regulation 12 of the Army Officers Service Regulations (Regular Force) 1992, published in Gazette Extraordinary No. 780/7 dated 17th August 1993, produced by the Respondents marked 'R1', which contain provisions *inter alia* with regard to the promotion of Officers to the rank of Colonel and above.

Regulation 12 reads as follows:

*“(1) Promotion to the rank of Colonel and above shall be by selection. In the case of promotion to the rank of Colonel, such promotion shall be given only to such substantive Lieutenant Colonel **as is considered best***

qualified for such rank and appointment. In the case of promotion to the rank of Brigadier, such promotion shall be given only to such substantive Colonel as is considered best qualified for such rank and appointment.

*(2) In the case of **every** such selection –*

(a) The Officer's past record of service; and

(b) The question whether his promotion is clearly in the best interest of the Army

shall be considered."

The second matter on which the attention of this Court has been drawn to is the fact that the Army Selection Board No. 2 is not bound by the aforementioned recommendations, and arrives at its decision having taken into consideration all relevant matters relating to the Officer concerned.

The decision to promote an Officer to the rank of Brigadier must therefore be taken by the Commander of the Sri Lanka Army, on the recommendation of the Army Selection Board No. 2, who shall take into consideration *inter alia* the aforementioned recommendations. This Court is therefore in agreement with the learned Additional Solicitor General that appointment to the rank of Colonel or Brigadier is not as of right, but is at the discretion of the Army Selection Board No. 2 and the Commander of the Sri Lanka Army. The discretion vested in the Army Selection Board No. 2 and the Commander, needless to state, shall be exercised reasonably, taking into consideration the aforementioned recommendations, and the criteria set out in Regulation 12 of 'R1', which criteria can be summarised as follows.

- a) The Officer must be considered the best qualified for such rank and appointment;
- b) The Officer must have a good past record of service; and
- c) An Officer's promotion must clearly be in the best interest of the Army.

This Court must state that it will not interfere with the finding of the Army Selection Board No.2 and the Commander, Sri Lanka Army that an Officer is not qualified for promotion to the rank of Brigadier or that his promotion is not in the best interest of the Army, except where this Court is satisfied that:

- (a) The discretion vested in the Army Selection Board No.2 and/or the Commander, Sri Lanka Army has been exercised unreasonably or wrongfully;
- (b) The decision to deny an Officer his promotion is illegal, arbitrary, irrational or unreasonable;
- (c) There has not been a proper consideration of the material pertaining to the Officer, or irrelevant matters have been taken into consideration.

In other words, as long as due process has been followed, the Officer has been afforded a fair hearing, the decision of the Army Selection Board No. 2 and/or the Commander is legal, rationale and reasonable, and, importantly, material to substantiate the said decision has been presented to this Court, this Court shall not interfere with the decision of the Army Selection Board No.2 and/or the Commander, Sri Lanka Army.

The following passage of Justice Sripavan (as he then was) in **Wikramaratne vs Commander of the Army and others**², sets out clearly the role of this Court when considering issues relating to the non-promotion of Officers within the Armed Forces:

“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.”

This Court shall now consider the facts of this application very briefly.

It is not disputed that the Petitioner was confirmed in the rank of Colonel on 23rd December 2013. With the criteria to be promoted to the rank of Colonel being identical to the criteria applicable when considering promotion to the rank of Brigadier, it can safely be concluded that as at 23rd December 2013, the Commander, Sri Lanka Army was satisfied of the following:

- a) The Petitioner was considered the best qualified for the rank and appointment of Colonel;
- b) The Petitioner had a good past record of service;

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

- c) The Petitioner's promotion to the rank of Colonel was in the best interest of the Army.

As noted earlier, the Petitioner was eligible to be considered for promotion to the rank of Brigadier after 23rd December 2016. The Petitioner states that the Army Selection Board No.2 that met on 30th May 2017 had considered him for promotion to the rank of Brigadier, but had not recommended him for promotion as there was an inquiry pending against the Petitioner.³ The Respondents have not provided this Court with the decision of the Army Selection Board No. 2 that met on 30th May 2017 but has agreed with the Petitioner that the Petitioner was not promoted to the rank of Brigadier due to the pending inquiry.⁴ The inquiry that was referred to by the Army Selection Board No. 2 is where on 7th June 2016, some fallen trees had been cut by soldiers working under the Petitioner and the timber had been used to repair the official chalet of the Petitioner, who at that time was the Brigade Commander in Oddusudan. Pursuant to a Court of Inquiry, the Commander, Sri Lanka Army had arrived at the following conclusion on 26th October 2017:

“5. මෙකී සම්පූර්ණ සිදුවීම 643 බසේමු බලසේනාධිපති වන කර්නල් ජේඩ්ග් ගුණසේකර (ති/61147) යන පෙරෙස්ඩ් නිලධාරියේ උපදෙස් හා අනුදැනුම මත සිදුවී ඇති බව නිරීක්ෂණය වන අතර, බලසේනාධිපතියේ නිල නිවාසය කඩිනමින් සැදීමේ අවශ්‍යතාවය මත සිදුවූවක් බව මුපල සාකඡි අනුව සනාථ වේ.

7. මුපල වෙත ඉදිරිපත් සමස්ත සාකඡි විශේලේපණය කිරීමේදී මෙකී කටයුත්ත ලාභ ප්‍රයෝජන හෝ වංචනික චේතනාවෙන් සිදුකල ක්‍රියාවක් නොවුනද රටේ සාමාන්‍ය නීතියට හා යුධ පිලිවෙතින් බැහැරව සිදුකරන ලද ක්‍රියාවක් බවට නිගමනය කරමි.

³ Vide letter dated 31st July 2017, annexed to the petition marked 'P15b'.

⁴ Vide paragraph 18 of the Statement of Objections of the Respondents.

8. ඒ අනුව මන් ඉදිරියේදී මෙවැනි කටයුතු සිදුකිරීමේදී යුද්ධ හමුදාවේ ඉහල මූලස්ථානවල උපදෙස් හා අනුමැතිය මත යුධ පිලිවෙතට අනුව කටයුතු කළයුතු බවට 643 බස්මු බළකේතාධිපති වන කර්නල් ජේඩ්පී ගුණසේකර (ති/61147) යන පෙන්නුම් නිලධාරී රෙජිමේන්තු අධිපති ශ්‍රීලංකිමේ ඉදිරියට පමුණුවා අවවාද කළයුතු බවට විධානය කරමි.”

It is therefore clear that the Petitioner has been issued with only a warning because the Commander, Sri Lanka Army was satisfied that the Petitioner had not acted dishonestly or for his personal benefit, as the repairs had been carried out on the official chalet of the Brigade Commander.

The Petitioner states that responding to a request by the Military Secretary dated 31st October 2017, the GOC 58th Division had submitted a report dated 10th November 2017, annexed to the petition marked 'P5' recommending the Petitioner's promotion to the rank of Brigadier. This Court has examined 'P5' and observes that the Petitioner has been awarded full marks for integrity, which is a mandatory requirement if an Officer is to be recommended for promotion. By his letter dated 24th November 2017, marked 'R2', the Colonel of the Sinha Regiment, while recording the disciplinary record of the Petitioner, had awarded the Petitioner 78 marks out of a maximum 90 including maximum marks for integrity and recommended the promotion of the Petitioner. The Petitioner has also annexed to the petition, marked 'P6h', the Annual Confidentiality Report for the period 1st August 2016 to 31st July 2017, where the Petitioner's promotion to the next rank had been recommended by the Initiating Officer, Major General Ranaweera. Thus, at least during the time period covered by the said reports, namely 2016/2017, the Petitioner had been of good conduct and behavior.

It is in the above background that the Petitioner was once again considered for promotion to the rank of Brigadier by the Army Selection Board No. 2 on 28th November 2017, as well as on 19th December 2017. This Court must note that the Respondents have not provided this Court with the decisions of the Army Selection Board No.2 that assembled on the said dates, except to state in their Statement of Objections that the decision not to promote the Petitioner was taken in line with the Army Policy for the time being.⁵ The Policy that is referred to is the Policy Decision dated 29th June 2016 of the Sri Lanka Army on Officers who have been Absent Without Official Leave (AWOL), a copy of which has been annexed to the petition marked 'P16'. In terms of 'P16', the fact that an Officer has been AWOL in the past would prevent such Officer from receiving his next promotion or would prevent such Officer from being eligible for Command positions. While this Court would discuss the *vires* of 'P16' later on in this judgment, it appears from the averments in the Statement of Objections that by November 2017, 'P16' was the sole impediment preventing the Petitioner's promotion.

The Petitioner states that he submitted a Redress of Grievance (ROG) dated 7th December 2017⁶, and that in response, he was summoned before an Army Advisory Board comprising of the 6th – 11th Respondents, on 15th February 2018. In their Statement of Objections, the Respondents have stated that, *'having considered the service of the Petitioner, the Army Advisory Board assembled on 16.02.2018 decided that the Petitioner **could be promoted to the Temporary rank of Brigadier (when) his turn arrives, to retire upon reaching***

⁵ Vide paragraphs 19 and 20 of the Limited Statement of Objections of the Respondents. By a motion filed on 1st February 2019, the Attorney-at-Law for the Respondents have informed this Court that no further objections would be filed and that the Respondents would rely on the said limited Statement of Objections.

⁶ Annexed to the petition marked 'P19'.

maximum permissible period in the substantive rank of Brigadier.' (emphasis added).⁷

In support of the above averment, the Respondents have annexed the letter dated 19th March 2018 issued by the 4th Respondent who is the Military Secretary, marked '**R8**' which reads as follows:

"The Advisory Board assembled on 15th February 2018.

1. *An abstract of the minutes of the ref Advisory Board relevant to the subject is as follows:*
 - (a) *A ROG forwarded by the Senior Officer requesting to consider his promotion and career progression was referred to the Advisory Board by the Commander of the Army to forward recommendations.*
 - (b) *The Senior Officer was given the opportunity to explain the reasons for submitting the ROG and defend his case. Having listened to the Senior Officer and scrutinizing the related documents, the Board observed that the Senior Officer did not possess substantial evidence to prove the facts in his defence. Subsequent to deliberation, the Board was of the opinion not to recommend his request favourably; **but having examined the Senior Officer's contributions and considering his present appointment (Serving Brigade Commander), the Board recommended that he could be promoted to the rank of Temporary Brigadier in his turn and to retire from the Army on reaching maximum possible period in the rank of Brigadier.***

⁷ Vide paragraph 25 of the Statement of Objections of the Respondents.

2. ***The Commander of the Army has approved the recommendation of the Advisory Board.***” (emphasis added)

The Respondents have stated that the above decision was communicated to the Petitioner on 26th March 2018.⁸

It would perhaps not be unreasonable for this Court to assume that the Commander of the Sri Lanka Army would not have approved the said decision in ‘**R8**’ unless he was of the view that the promotion of the Petitioner to the rank of Brigadier was in the best interest of the Army. It is in this context that the absence of an averment in the Statement of Objections that the *Petitioner’s promotion is not in the best interest of the Army*, becomes significant.

If the above decision of the Advisory Board was implemented, the Petitioner was entitled to be promoted as Brigadier, on the date that the first Army Selection Board No. 2 met – i.e. 30th May 2017. The Petitioner could have thereafter served in that rank for a period of four years, which is until 29th May 2021. This would be approximately seven months prior to the Petitioner completing 55 years of age, which is the mandatory age of retirement of an Officer.

However, on 21st February 2018, which is prior to the aforementioned decision of the Army Advisory Board being communicated, the Petitioner had been

⁸ Vide letter dated 26th March 2018 marked ‘R9’.

summoned by the 2nd Respondent, the Colonel of the Sinha Regiment, where the Petitioner states that the following matters transpired:

- a) The Petitioner was shown a letter dated 16th February 2018 bearing reference No. MSB/4/06/b (Brig) issued by the 4th Respondent;
- b) The said letter referred to the poor disciplinary record of the Petitioner and to the fact that he had been absent without leave for three days in 1995, and for that reason that the Petitioner will not be considered for future promotions.
- c) Upon inquiry as to what is his poor disciplinary record, the 2nd Respondent had referred to an incident that had taken place at an event organised by the Old Boys Union of the Petitioner, held at the BMICH in November 2016;
- d) The Petitioner was told that he would have to retire on 23rd December 2018 upon reaching the maximum period in the rank of Colonel.⁹

The Respondents have not denied the aforementioned version of the Petitioner as to what transpired between the Petitioner and the 2nd Respondent on 21st February 2018.

The Petitioner states that he was not given a copy of the said letter dated 16th February 2018, although he had requested for a copy thereof by his letter dated 8th March 2018.¹⁰ Even though the Respondents undertook to produce

⁹ Vide paragraph 31 of the petition.

¹⁰ Vide letter marked 'P22' annexed to the petition.

the said letter,¹¹ and even though the Petitioner is seeking a Writ of Certiorari to quash the decision contained in this letter, the Respondents have not produced this letter to this Court.

Dissatisfied by the decision in the said letter, the Petitioner filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision made against the Petitioner in the letter dated 16th February 2018, bearing reference No. MSB/4/06/b;¹²
- b) A Writ of Certiorari to quash the Policy decision marked 'P16' in so far as it applies to the Petitioner;¹³
- c) A Writ of Certiorari to quash the decisions and/or determinations made against the Petitioner by the Army Selection Board No. 2;¹⁴
- d) A Writ of Mandamus compelling the Respondents to confirm the Petitioner in the rank of Brigadier (Temporary) with effect from 30th May 2017.
- e) A Writ of Prohibition prohibiting the Respondents from retiring, discharging or removing the Petitioner from Sri Lanka Army without confirming him in the rank of Brigadier (Temporary) with effect from 30th May 2017.

¹¹ Vide journal entry of 15th November 2018.

¹² Paragraph (b) of the prayer to the petition.

¹³ Paragraph (g) of the prayer to the petition.

¹⁴ Paragraph (e) of the prayer to the petition.

This Court is of the view that the prayer for the Writ of Mandamus is misconceived in view of the fact that the Petitioner is not entitled to be promoted to the rank of Brigadier as of right, and that such promotion is at the discretion of the Commander, Sri Lanka Army. This Court cannot consider the Writ of Prohibition for the same reason that the promotion is at the discretion of the Sri Lanka Army. This Court shall therefore only proceed to consider whether the Petitioner is entitled to one or more of the above Writs of Certiorari.

In view of the two contradictory decisions of the Sri Lanka Army – i.e. the decision conveyed to the Petitioner by the 2nd Respondent that he must retire on 23rd December 2018 in his present rank which prompted the filing of this application, and the subsequent decision of the Army Advisory Board that the Petitioner can be promoted to the rank of Temporary Brigadier and serve until he reaches the maximum possible period in that rank – this Court inquired from the learned Additional Solicitor General whether the latter decision could be implemented. Although the Respondents answered in the affirmative, the Petitioner was not agreeable as that would mean the Petitioner retiring prior to reaching the mandatory age of retirement.¹⁵

This Court will now proceed to consider the grievance of the Petitioner that the decision of the Army Selection Board No. 2 held on 28th November 2017, as well as the decision of the 4th Respondent communicated to the Petitioner by the 2nd Respondent on 21st February 2018, is irrational and unreasonable, and therefore are liable to be quashed by Writs of Certiorari.

¹⁵ Vide the response of both parties to Question No. 6 posed by this Court.

The Respondents, having confirmed in their written submissions filed on 25th February 2020 that the decisions of the Army Selection Board No. 2 that met on 28th November 2018 and 19th December 2017 are not before this Court, have re-produced what is said to be the purported decision, the relevant portion of which reads as follows:

“The Board observes that the Officer possesses poor disciplinary records including offences of being AWOL for 3 days. Hence, the Board was of the considered opinion that the Officer does not merit to be promoted to the rank of Temporary Brigadier. Further considering the existing Army Headquarters policy decision on AWOL officers, the Board recommends that the senior officer be retired on completion of maximum permissible period in the rank of Colonel on 23.12.2018.”

However, in paragraph 7 of the written submissions filed on 25th February 2020, the Respondents have answered in the negative the specific question posed by this Court whether the Petitioner’s promotion had been rejected due to the AWOL policy contained in ‘P16’. Thus, even though there appears to be some confusion on the part of the Respondents as to the precise reason for the rejection of the Petitioner’s promotion, the extract of the decision of the Army Selection Board No. 2 makes it clear that the Board was clearly influenced by the fact that the Petitioner had been absent without leave for three days in 1995, thus attracting the mandatory provisions of ‘P16’.

The first submission of the learned Counsel for the Petitioner was that the Army Selection Board acted illegally and unreasonably when it applied ‘P16’ to the Petitioner. The explanation of the Petitioner with regard to the AWOL

incident that occurred in 1995 is that while he was serving in Jaffna, he obtained five days leave from 27th July 1995 to visit his sick mother at the General Hospital, Colombo. As there was a shortage of flights to Jaffna, the Petitioner was able to get a seat only on 3rd August 1995 although he had been at the Ratmalana Airport waiting for his turn to get a flight from the day his leave had expired. On his return to the camp, the Petitioner had been informed that he would be tried for being absent without leave for two days and fourteen hours. The Petitioner had pleaded guilty to the charge and had been severely reprimanded.¹⁶ It is admitted that the Petitioner was promoted thereafter, not only to the rank of Major and Lieutenant Colonel, but even to the rank of Colonel, where the criteria for promotion is identical to that of promotion to the rank of Brigadier, without the above incident of being absent without leave being held against him.

The said incident of being absent without leave came to be considered in view of '**P16**' issued by the then Military Secretary under the heading, 'Policy decision on AWOL Officers' in June 2016. The concurrence of the Commander of the Sri Lanka Army had been granted to implement the policy contained therein, with effect from 1st July 2016, on all Officers of the Sri Lanka Army who had been absent without leave prior to 20th May 2009.

This Court has examined '**P16**' and observes that it does not contain the rationale for applying on **a retrospective basis** a Policy of automatically depriving Officers of their promotion on the basis that they have been absent without leave. Nor has this Court been presented with any material or explanation in the Statement of Objections as to the rationale behind the

¹⁶ Vide document annexed to the petition marked 'P9'.

retrospective application of such policy automatically.¹⁷ What is of significance is that after pleading guilty to the charge of being absent without leave in August 1995, the Petitioner has been promoted on three occasions, and has served in operational areas for a significant period. This demonstrates that the presence of the Petitioner who has been absent without leave for three days has not been considered as being detrimental to the objects of the Sri Lanka Army. While there could have been a perfectly justified reason as to how such an incident can impact the Sri Lanka Army when considering an Officer to the rank of Brigadier, the fact of the matter is that no explanation has been offered in this regard. Thus, while the fact that an Officer has been AWOL in the past can be one of the factors that could be considered when considering an Officer for promotion, it is the view of this Court that the automatic application of such a policy on a retrospective basis, as contained in 'P16' is unreasonable.

Assuming that 'P16' is legal and reasonable, there are two paragraphs in 'P16' that may be applicable to the Petitioner. They are as follows.

Paragraph 1(a)(4)

“Officers who have already been promoted to the rank of Colonel or above should retire on completion of maximum permissible period in the present rank. Further, such Officers will not be considered for any command or instructor appointments in the future and will not be granted

¹⁷ The policy in 'P16' was challenged in Major General Nirmal Ajith Dharmaratne vs Lieutenant General N.U.M. Mahesh W. Senanayake and Others [CA (Writ) Application No. 375/2018; CA Minutes of 30th April 2019], on the basis that it was illegal and irrational. The petitioner in that case had sought an interim order preventing the said Policy being applied to him. This Court, having considered the fact that the respondents had not provided any rationale for the introduction of the said policy and that too only in respect of those who had been absent without leave prior to 20th May 2009, issued an interim order staying the operation of 'P16' in so far as it related to the petitioner in that application.

career courses. However, Officers in this category may be considered for non career courses which will not exceed 90 days and official visits applicable to the appointments held."

Paragraph 1(a)(7)

*"Officers in the rank of Colonel and have already completed a tenure as a Brigade Commander **should be promoted to the rank of Brigadier as per the order of seniority**, subject to fulfillment of all other pre-requisites. Such Officers will not be considered for further command or instructor appointments and should retire on completion of maximum permissible period in the rank of Brigadier. May be considered for non career courses not exceeding 90 days and official visits applicable to the appointments being held. However, they will not be considered for career courses / foreign visits and UN deployment."*

The Petitioner, while holding the rank of Temporary Colonel, had been appointed as Commander, 643 Brigade, Oddusuddan on 19th August 2013. Having held the said appointment for almost three years, the Petitioner had been appointed as Commander, 581 Brigade on 13th August 2016, until he was removed without any reason, by letter dated 21st February 2018.¹⁸ As the Petitioner had completed his tenure as Brigade Commander, the provision in '**P16**' that was applicable to the Petitioner was Paragraph 1(a)(7), in terms of which the Petitioner was entitled to be *promoted to the rank of Brigadier as per the order of seniority, subject to fulfillment of all other pre-requisites*.

¹⁸ Vide letter annexed to the petition marked 'P21'.

Hence, the provisions of 'P16' cannot serve as an automatic impediment to the Petitioner's promotion to the rank of Brigadier. In the said circumstances, it is the view of this Court that the Army Selection Board No.2 acted unreasonably when it applied 'P16' to the Petitioner. Similarly, the 4th Respondent, the Military Secretary erred when he took the Petitioner's absence without leave into consideration, in his letter dated 16th February 2018, the contents of which were communicated to the Petitioner by the 2nd Respondent.

There is one other matter that this Court wishes to advert to, with regard to 'P16'. The Petitioner has filed with his Counter Affidavit marked 'X2', a letter dated 19th October 2017 issued by the 4th Respondent, where Officers currently holding ranks ranging from Captain to Major General and who had been absent without leave for periods ranging from a few hours to 14 days had been exonerated of any wrongdoing by the Commander on the basis that disciplinary action had not been taken against them and that the incident had occurred long time ago. The unreasonableness of the application of 'P16' to the Petitioner and to others who are similarly placed is demonstrated by the fact that an Officer who had been punished for being absent without leave is not entitled to any further promotions or to hold command positions and are liable to be retired prematurely, whereas Officers who have not been punished at all although they had been absent without leave, are exonerated and are entitled for promotion. Furthermore, the Sri Lanka Army has not given the Petitioner the same concession as it did to those referred to in 'X2', even though the period that the Petitioner was absent without leave was less than 3 days. This Court is of the view that it would be irrational and unreasonable to apply the provisions of 'P16' to the Petitioner, for the aforementioned reason, as well.

Taking into consideration all of the above factors, it is the view of this Court that denying the Petitioner his promotion on the basis of 'P16' is unreasonable and that the decision of the Army Selection Board No. 2 is liable to be quashed by a Writ of Certiorari.

The second factor that has influenced the decision of the Sri Lanka Army that the Petitioner is not eligible to be promoted as a Brigadier is the disciplinary record of the Petitioner, with the Respondents taking up the position that the incident that occurred at the BMICH, where the Petitioner, while being under the influence of alcohol, had attacked the catering staff, justified the decision of the Army Selection Board No. 2.¹⁹ The Petitioner, whilst admitting that such an incident took place, has however submitted that in considering the disciplinary record of the Petitioner, the Army Selection Board No.2 ought to have taken into consideration the following reports which had recommended his promotion:

- (a) The report of the GOC 58th Division marked 'P5' dated 10th November 2017;
- (b) The report of the Colonel of the Sinha Regiment marked 'R2';
- (c) The Annual Confidentiality Report for the period 1st August 2016 to 31st July 2017 marked 'P6h'.

It was therefore the position of the learned Counsel for the Petitioner that the Army Selection Board No. 2 failed to consider relevant facts and for that

¹⁹ The Petitioner has admitted this incident in his letter marked 'P14'.

reason, their decision is unreasonable and irrational. It is the view of this Court that the necessity to consider the above submission of the learned Counsel for the Petitioner does not arise in view of the finding of this Court that the decision of the Army Selection Board No. 2 is liable to be quashed in view of the first submission of the learned Counsel for the Petitioner.

There are two other matters that this Court must advert to. The first is the submission of the learned Additional Solicitor General that the Army Selection Board No. 2 has only made a recommendation and that a recommendation cannot be quashed. While this Court is not in agreement with the said submission, it is of the view that the recommendation of the Army Selection Board No. 2 affects the rights of the Petitioner and is therefore a decision which is subject to judicial review. This specific issue has now been laid to rest by the Supreme Court in the case of **Sri Lanka Telecom vs. The Human Rights Commission**²⁰ where his Lordship Justice Sisira de Abrew, after an extensive discussion on several authorities on the said question of law, held as follows:

“Considering the above legal literature, I hold that if a recommendation of a Public Body affects the right of an individual, Superior Courts, in the exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of certiorari.”

The second matter that this Court wishes to advert to, are two judgments that have been referred to by the learned Additional Solicitor General. The first is the judgment of this Court in **Lt. Col. Kottearachchi vs Lt. Gen Senanayake, Commander, Sri Lanka Army and Others**²¹, where the petitioner challenged

²⁰SC Appeal 215/12; SC Minutes of 1st March 2017.

²¹CA (Writ) Application No. 208/2018; CA Minutes of 1st November 2018.

the decision by which he was informed to tender retirement papers. The Respondents had tendered to this Court the relevant material to substantiate the said decision, and as to why the Sri Lanka Army had decided not to promote the Petitioner to the next rank. This Court refused to issue formal notice of the said application on the Respondents only after it considered the said material and was satisfied that it had no reason to doubt the appropriateness of the said decision. The position in this application is different, as the Respondents have failed to substantiate the reasoning of the Army Selection Board No. 2.

Similarly, in CA(Writ) Application No. 186/2016,²² this Court refused to interfere with the decision that the Petitioner must retire on 1st July 2016 as he had reached the maximum period in the rank of Captain, for the reason that the said decision had been taken due to the failure on the part of the petitioner to complete the examinations which were essential to secure his promotion. The situation in this application however is different.

In the above circumstances, this Court issues Writs of Certiorari in terms of paragraphs (b), (e) and (g) of the prayer to the petition.

By way of a motion dated 29th May 2020, which has been supported by an affidavit of Major General H.J.Seneviratne filed on 3rd June 2020, the learned Additional Solicitor General has brought to the attention of this Court that while judgment was pending in this matter, the Petitioner had been produced before the Magistrate's Court of Negombo on an allegation that he has committed offences punishable under Sections 314 and 486 of the Penal Code.

²² CA Minutes of 24th June 2016.

It is the view of this Court that this judgment shall not be an impediment to the Sri Lanka Army taking steps in respect of the said incident against the Petitioner.

This Court makes no order with regard to costs.

Judge of the Court of Appeal