

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

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

Commodore (Marines) P.A. Sanath K. Pitigala,
109/1/2, Dhammadassi Mawatha,
Kandy.

PETITIONER

Vs.

Court of Appeal Case No:
CA/WRIT/13/24

1. Vice Admiral Priyantha Perera,
Commander of the Sri Lankan Navy
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.
2. Temporary Rear Admiral H.S.K.
Dissanayake,
Commandant of the Navy Infantry
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.
3. Rear Admiral K.J. Kularathna,
President of the Promotion Board,
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.

4. Rear Admiral P.A.J.N. Ponnampetuma,
Member of the Promotion Board,
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.
5. Commodore (INF) P.H.N. Peiris,
Member of the Promotion Board,
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.
6. Commodore (S) R.R. Kalubowila,
Member and Secretary of the Promotion
Board,
Naval Headquarters,
SLNS Parakrama, Flagstaff Street,
Colombo 01.
7. General G.D.H. Kamal Guneratne (Retd),
WWV RWP RSP USP ndc psc Mphil
Secretary, Ministry of Defence,
Ministry of Defence,
Defence Headquarters Complex,
Sri Jayawardenapura, Kotte.
- 7A. Air Vice Marshal Sampath Thuyacontha
(Retd).
Secretary, Ministry of Defence,
Ministry of Defence, Defence
Headquarters Complex,
Sri Jayawardenepura, Kotte.
8. Hon. Attorney General,
Attorney General's Department,
Hulftsdrop,
Colombo 12.

RESPONDENTS

Before: S.U.B.Karalliyadde, J
Mayadunne Corea, J

Counsel: Jagath Wickramanayake, P.C with Thilini Vidanagamage instructed by
Chamali Ranathunga for the Petitioner.
Nayomi Kahawita S.S.C. for the Respondents.

Argued on: 11.12.2024

Written Submissions: For the Petitioner on 20.12.2024
For the Respondents on 16.01.2025

Decided on: 21.03.2025

Mayadunne Corea J

The Petitioner in this Application has among other prayers sought the following reliefs;

- “(c) Grant and issue an order in the nature of **Writ of Certiorari** quashing the adverse decision(s) in relation to the Petitioner in the letter(s) of recommendation of the Promotion Board assembled on 31st October 2023 comprising the 3rd to 6th Respondents appointed on or about 26th October 2023 and/or contained in P11 made in considering the promotion from Commodore to Rear Admiral in the Navy Infantry Branch, which is/are contrary to the Navy Act (as Amended) and/or Regulations made thereunder and /or Sri Lanka Navy Order 0642-P9;
- (d) Grant and issue an order in the nature of **Writ of Certiorari** quashing the adverse decision(s) in relation to the Petitioner in the letter of recommendation of the 1st Respondent in considering the promotion from Commodore to Rear Admiral in the Navy Infantry Branch and/or contained in P15, which is/are contrary to the Navy Act (as amended) and/or Regulations made thereunder and/or Sri Lanka Navy order 0642 – P9;

- (e) Grant and issue an order in the nature of **Writ of Certiorari** quashing Observations and/or Recommendations of the 3rd to 6th Respondents as the Board of Selection (also referred to as the Promotional Board) submitted to the 1st Respondent regarding the Petitioner's Promotion to rank Rear Admiral in the view of the AWOL Charge of the Petitioner contained/or contained in P11, which is/are contrary to the Navy Act (as amended) and/or Regulations made thereunder and/or Sri Lanka Navy Order 0642-P9;
- (f) Grant and issue order in the nature of **Writ of Certiorari** quashing the decision to disqualify the Petitioner for the promotion to the rank of Rear Admiral based on the AWOL charge in 1996;
- (g) Grant and issue an order in the nature of **Writ of Certiorari** quashing Observations and/or Recommendations of the 1st Respondent regarding the Petitioner's promotion to rank of Rear Admiral which was submitted in effecting the promotion of the 2nd Respondent in view of the AWOL Charge of the Petitioner and/or contained in P15, which is/are contrary to the Navy Act (as amended) and/or Regulations made thereunder and/or Sri Lanka Navy Order 0642-P9;
- (h) Grant and issue an order in the nature of **Writ of Certiorari** quashing any regulation and/or a policy decision that would preclude the officers who have been found guilty for AWOL and punished already from being promoted subsequently, in consideration of the promotion(s) of the Petitioner and/or contained in P12, which is/are contrary to the Navy Act (as amended) and/or Regulations made thereunder and/or Sri Lanka Navy Order 0642 – P9;
- (i) Grant and issue a **Writ of Mandamus** directing the 1st, and/or 2nd or any other Respondent to nominate and recommend to promote the Petitioner to the Rank of Rear Admiral;
- (j) Grant and issue, in the alternative to (i) above, an order in the nature of **Writ of Mandamus** directing the 1st and/or 2nd Respondents to recommend the Petitioner to rank of Rear Admiral following the retirement of the 2nd Respondent in accordance with due process;

- (k) *Grant and issue an order in the nature of a **Writ of Prohibition** preventing the 1st, 2nd and/or any other Respondents and their successors/ servants or agents thereof, and/or any Added or Substituted Respondents thereof from further denying the career progression of the Petitioner based on the Award of Punishment in the Charge Sheet – P5 or P5(a) or P5(b);*
- (l) *Grant and issue an order in the nature of a **Writ of Prohibition** preventing the 1st, 2nd and/or any other Respondents and their successors/ servants or agents thereof, and or any Added or Substituted Respondents thereof from appointing or nominating any other officers other than the Petitioner to the vacant position of Rear Admiral after the retirement of the 2nd Respondent, subject to the Navy Act (as amended) and the Regulations made thereunder;*
- (m) *Grant and issue an order in the nature of a **Writ of Prohibition** preventing the 1st, 2nd and/or any other Respondents and their successors/ servants or agents thereof, and or any Added or Substituted Respondents thereof from acting on a regulation and/or a policy decision that would preclude the officers who have been found guilty of AWOL and punished already from being promoted subsequently and/or P12, in consideration of the promotion(s) of the Petitioner which is not duly made under the Navy Act (as amended).”*

The facts of the Petitioner’s Application briefly are as follows. On 20.11.1996, the Petitioner was serving as a Sub Lieutenant in the Navy when a summary trial was conducted against him for the charge of being absent without leave (hereinafter referred to as “AWOL”) from 2200 hrs on 26.05.1996 to 0800hrs on 28.05.1996. The offence is punishable in terms of Section 60(2) of the Navy Act as amended by Act, No. 11 of 1993. The Petitioner pleaded guilty to the charge, and in his statement in mitigation he explained that his fiancée at the time was suffering from severe pain due to an unknown cause. Hence, the Petitioner alleges that he was not emotionally and circumstantially in a state to leave his fiancée. Thereafter, the Petitioner reported to work.

Upon reporting to work the Petitioner faced a summery trial on the charge of being AWOL (P5a). At the said trial, the Petitioner pleaded guilty and pleaded in mitigation. He was given a punishment. He was punished by forfeiture of his seniority for 7 days and forfeiture of his pay and allowances for 3 days.

The Petitioner submitted that subsequent to the AWOL charge the Petitioner was promoted several times and tendered the table below with the Petition.

Signal Reference Date	Promotion to the Rank	Effective date of Promotion
16 th October 2000	Temporary Lieutenant Commander	01 st August 2000
01 st August 2002	Lieutenant Commander	01 st August 2002
11 th September	Temporary Commander	01 st January 2009
22 nd May 2010	Commander	01 st January 2010
12 th May 2015	Temporary Captain	01 st January 2015
01 st November 2018 and 12 th January 2016	Captain	01 st January 2015
22 nd April 2021	Temporary Commadore	31 st January 2016
20 th January	Commadore	31 st December 2020

It is contended that the Petitioner is currently serving as a Commadore (Marines) of Sri Lanka Navy attached to the Navy Infantry. In 2023 a vacancy arose in the Rank of Rear Admiral and the 1st Respondent appointed a Promotion Board consisting of the 3rd to 6th Respondents. The said Respondents were entrusted to make recommendations on the suitability of the officers eligible (P23). It is contended that the Petitioner and another officer who was junior to the Petitioner (2nd Respondent) were eligible to go before the Promotion Board and though the Petitioner had higher marks than the other officer, the Petitioner was not promoted on the basis of him being convicted for an offence of AWOL. It is his contention that the said Promotion Board had considered a National Security Council (hereinafter referred to as “NSC”) decision pertaining to the promotions of officers subject to AWOL, and incorporated the same in the recommendations, thereby depriving him of the promotion. Hence, this Writ Application.

The Petitioner’s case

The Petitioner’s argument is mainly two-fold. The Petitioner contends that the Navy promotions are based solely on the Navy Order 0642 and the Navy Act. He contends that the failure of the 3rd to the 6th Respondents to recommend him to the rank of Rear Admiral, through the application of arbitrary and irregular adverse decisions by the Respondents

denying him of his lawful entitlement is contrary to law, the Navy Act and the Regulations. Further depriving him of his promotion is unreasonable, irrational, unproportionate, unlawful and illegal. It is his contention that as per the Navy Order 0642 there is no provision that prevents an absentee from being appointed to the post of Rear Admiral.

Secondly, he argues that if the promotion is not given to him based on an offence to which he was punished, it amounts to him being penalised twice for the same offence.

The Respondent's case

The Respondents while denying any illegality in the decision contended that the Petitioner had failed to establish a *prima facie* case and further contended that the Petitioner's Application is misconceived in law. It was also their contention that the Petitioner has failed to come with clean hands and moved to dismiss the Writ Application for want of any merit.

This Court will now consider the Petitioner's case along with the Respondent's objections.

It is not disputed that the Petitioner had been absent without leave on one occasion in the early days of his career. The parties are not at variance that the Petitioner had faced a summary trial whereby he was convicted on his own admission and considering the mitigatory factors pleaded he has been subjected to a punishment.

The parties are also not at variance that the Petitioner and the 2nd Respondent faced the Promotion Board for the promotion to the Rank of Temporary Rear Admiral. The learned President's Counsel appearing for the Petitioner at the commencement of his submissions submitted that he is not challenging the appointment of the 2nd Respondent to the post of Rear Admiral above the Petitioner.

It is the contention of the Petitioner that the reason as to why he was not appointed to the rank of Rear Admiral was due to the consideration of a decision by the NSC whereby it had decided not to promote absentees to two star ranks. It is further contended that the NSC decisions are not relevant to the Navy promotions. The Petitioner strongly contended that

the Navy promotions should only be in accordance with the Navy Order 0642 and the Navy Act. It is his contention that consideration of any extraneous matters makes the decision bad in law. Though the Petitioner as well as the Respondents argued on the applicability of the NSC decision, at this stage, the Court observes that neither party has tendered any decision taken by the NSC pertaining to the Petitioner. The decision that is before this Court marked as P12 is regarding another officer and is dated 09.07.2021. Hence, it is not clear whether the circumstances pertaining to the taking of the said decision are similar to the circumstances of the Petitioner's case.

Recommendation of the Promotion Board in 2023

In the above-mentioned circumstances, this Court will now consider the document marked as P11, the recommendation of the Promotion Board pertaining to the Petitioner. The said document clearly demonstrates that the Petitioner has been awarded more marks at the interview held on 01.11.2023, and had been placed on a higher merit position. The Promotion Board has also mentioned that they have learnt about the non-promotion of officers found guilty of AWOL to the post of Rear Admiral. In its final recommendation the Promotion Board has still recommended the Petitioner to the Rank of a Rear Admiral as per the order of merit but has also stated subject to instruction's /directives of the Ministry of Defence pertaining to the issue of officers found guilty of AWOL to the Rank of Rear Admiral. The said recommendation is addressed to the Commander of the Navy. It is observed that P11 and 1R10 is the same document.

The Regulations pertaining to promotions

This Court will now advert to the Petitioner's argument pertaining to the provisions governing the promotions. It is the contention of the Petitioner that the applicable criteria for promotions are governed by the Navy Act and the Regulations made thereunder. The Petitioner relied on Regulation 8 and Regulation 10. This would be an appropriate moment to consider the said Regulations.

Regulation 8

“8. The promotion to the rank of Commander, Captain or Rear-Admiral shall be by selection. Such promotion shall, having regard to the special circumstances of the case, be given to such officer as may be qualified by virtue of his seniority and record of service:

Provided that no officer shall be selected for promotion unless he holds the substantive rank next below that for which he is being selected.”

The Court observes that as per Regulation 8, each case has to be considered as follows. It states, *“having regard to the special circumstances of the case, be given to such officer as maybe qualified by virtue of his seniority and **record of service**.”* As per this Regulation it is clear that the “record of service” is considered.

Regulation 10 states as follows:

Regulation 10

“10. When selections for promotions are made, the following matters shall be carefully considered in each case: -

*(a) **Whether the officers past record justifies favourable considerations** of his case and, particularly, whether his promotion has been recommended with confidence by the officer under whom he has served.*

*(b) **Whether he is suitable in every respect to fill, with competence, all or any of the appointments likely to be available to him in the higher rank for which he is being considered.***

*(c) **Whether taking into consideration the service, age and seniority of other officers, his promotion is clearly in the best interest of the Navy.**” (emphasis added)*

As per Regulation 10, for an officer to be eligible for the promotion, the past record should justify a *“favourable consideration of his case”*. Under Regulation 10(b) consideration should be given as to whether he is suitable to fill the position *“in every respect all with competence, all or any of the appointments likely to be available to him in the higher rank for which he is being considered”* and under Regulation 10(c) after taking into consideration the service among other things, consideration should be given to see whether the *“promotion is in the best interest of the Navy”*. In the view of the Court, this gives the Promotion Board a wide discretion to consider the Petitioner’s past record, whether it makes him suitable in every respect to fill with competence the rank available and also whether the said promotion is in the best interest of the Navy. Accordingly, the Promotion Board by document marked as P11 has considered the Petitioner’s past record and also decided that it was prudent to mention the fact that he had been guilty of AWOL and the fact that on previous occasions officers who were found guilty of AWOL were not promoted to the rank of Rear Admiral. It is the view of this Court, that in the best interest

of the Navy, the Promotion Board though recommending him has thought it prudent to mention facts pertaining to the AWOL charge and about the previous promotions. When considering the substance of the said recommendation read with Regulations 8 and 10, this Court cannot agree with the Petitioner's contention that the AWOL charge the Petitioner faced and was found guilty of, should not be considered.

The Petitioner in his submissions strenuously argued that under Navy Order 0642, and the Regulations the Respondents cannot consider or should not consider the AWOL charge against him made in 1996 or the punishment given to him as he had already been punished. In view of Regulation 8 and Regulation 10, it is our view that the Petitioner's contention is not tenable.

It is also pertinent to note as per document marked as 1R12 pertaining to the Redress of Grievance (hereinafter referred to as "ROG") the Petitioner submitted that, a report has been tendered where it had been stated that said ROG cannot give any redress, in keeping with the decision of not promoting officers who have been found guilty of AWOL to the position of Rear Admiral. It appears that this practice has been prevalent in the Navy as 1R12 stipulates three officers who have not been promoted to the rank of Rear Admiral from the rank of Commadore due to being guilty of AWOL.

The Petitioner contends that the application of the decision of the NSC reflected in document marked as P12 being applied to him is arbitrary, capricious unreasonable, irrational, procedurally improper, illegal, and *ultra vires* of the Navy Act. It is contended that merely following a decision of the NSC to deny him of a promotion is bad in law. This Court observes that there is no provision in the Navy Act nor any other provisions that were brought to the attention of this Court to demonstrate the nexus between the NSC decisions and the promotions of the officers in the Sri Lanka Navy. However, it is also pertinent to note that the Petitioner has failed to submit any decision by the NSC which has refused to appoint him to the rank of Rear Admiral.

Has the Petitioner been punished twice for the same offence?

The Petitioner argues that once in 1996 he was punished for an AWOL charge. It is his contention that if he is not given his promotion as Rear Admiral for the same reason, it amounts to him being punished for the second time. Hence, it violates the principal of

double jeopardy. To substantiate his contention the Petitioner relies on the judgement of *Air Marshal D. G. Perera v K. H. M. S. Bandara, SC Appeal 104/2008, minutes of 29.09.2014*. In this instance, the Court after considering the said judgement finds, the facts of the above case are different to the case before us.

In the case before us, the Sri Lankan Navy has considered the past record pertaining to AWOL charge and has recommended him to the rank of Rear Admiral subject to the instructions/derivatives received from the Ministry of Defence regarding consideration of officers who have been found guilty of AWOL to the rank of Rear Admiral. In considering Regulations 8 and 10 of Regulations and the Navy Order 0642, this Court is of the view that the Promotion Board was acting within the parameters of the said Regulation in the best interest of the Navy in recommending the Petitioner subject to the comment on the AWOL charge. . It is also pertinent to note that even the document marked as 1R15, a confidential report to the Secretary, Ministry of Defence pertaining to the ROG of the Petitioner refers to an NSC decision about not promoting absentees to two star ranks. The said decision per say has not been submitted to this Court. Further, the Court observes that though the report is submitted to the Secretary, Ministry of Defence, it does not contain a clear decision pertaining to the Petitioner's request as the last paragraph of the said confidential report states that they are submitting the ROG submitted by the officer with recommendations for necessary action. Thereby allowing the decision to be taken by the relevant authority. Hence, the decision to promote the Petitioner or not to promote the Petitioner is not taken in 1R15. The said document is only a recommendation. By the said document the author in a confidential note has given reasons and cited precedents in arriving at the conclusion for not recommending the Petitioner. However, still the Commander of the Navy has submitted redress of grievance to the relevant authority for the said authority to take necessary action. In view of the above, this Court finds the decision not to promote the Petitioner to the rank of Rear admiral is not by the Navy Commander. Further, the said decision nor the decision-maker is before this Court.

Commencement of the Petitioner's grievance

At this stage, we will consider the objections of the Respondents. This Court observes that in actual circumstances the Petitioner's alleged grievances commenced when he was not given the promotion after facing the interview in 2023. Subsequent to the recommendations of the Promotion Board, an officer junior to him (2nd Respondent) was appointed as Temporary Rear Admiral. The Petitioner has failed to challenge the said decision. On the

contrary, the Petitioner states that he is not challenging the said appointment. Hence as the Respondents submits that the Petitioner by his conduct has waived off his right.

Further, the Petitioner has waited until the 2nd Respondent reached his retirement to canvas this issue. Hence in our view the argument that the Petitioner has waited till 2024 to canvass the decision of not promoting him and thereby, the Petitioner becoming guilty of laches and his Application becoming a belated Application has to succeed.

The Respondents justifies their decision of not recommending the Petitioner on the basis of the “*need to have strict discipline in the Tri Forces based on the policy directive that there should be zero tolerance accorded to absentees who are guilty of AWOL*”¹. The Respondents also submitted that the 1st Respondent only makes a recommendation and has no power to appoint or promote the Petitioner as the said decision of appointment is made by His Excellency the President. It is strenuously argued by the Respondents that irrespective of any recommendations it is the prerogative of the His Excellency the President to take a decision on the appointment of the Rear Admirals. Hence, the contention that the Petitioner’s Petition and the prayers are misconceived in law and that necessary parties are not before Court too succeeds.

It is further contended by the Respondents that, in making the recommendations the Promotion Board has acted within the Navy Order 0642 marked as P9 and the Regulations marked as P10. At this stage, this Court will consider the reliefs prayed for by the Petitioner which are opposed to by the Respondents.

The Respondents contended that in keeping with the policy of zero tolerance for absentees from the service and to maintain strict discipline a policy decision has been taken to refrain from promoting absentees to a higher rank. It is their contention that this is not only applicable to the Navy but applicable to the Tri Forces. In this instance it is pertinent to consider the judgement of Sripavan J. in ***Wikramaratne v. Commander of the Army and others CA (Writ) Application No. 800/2006 CA Minutes of 07.01.2008***, which sets out the role of the Courts in issues relating to the non-promotions of officers of the armed forces. It is stated as follows,

“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

¹ Written submission of the Respondents, page 2 paragraph 2

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.”

In considering all the material before this Court, it is our view that the Petitioner has failed to establish that the Respondents have acted unlawfully, arbitrarily or guided by ulterior considerations which are discriminatory or unfair.

In this instance, it was argued that when the promotion was due upon a vacancy arisen, the Respondents had appointed the Promotion Board and the Promotion Board after scrutinising the applicants had nevertheless recommended the Petitioner. It is also argued that as per the normal procedure, the recommendation had been tendered through the Ministry of Defence to His Excellency the President. The Petitioner did not contest the said procedure nor is he complaining of not sending his name to the President.

In answering the question of double jeopardy, the Court agrees with the Respondents that the Petitioner has not been punished twice. The Petitioner has been recommended by the Promotion Board to the post of Temporary Rear Admiral, but the Promotion Board had thought it prudent to draw the attention to the guilty plea of the AWOL charge and to the zero tolerance policy towards officers with AWOL charges. In any event the appointment is made by the His Excellency the President and in these circumstances, we cannot agree with the contention of the Petitioner that there is double jeopardy and that the Petitioner has been punished twice for the same offence.

Further, this Court would like to make the observation that as per the submissions of the Respondents it appears that the decision not to promote the Petitioner to the rank of Rear Admiral was an administrative decision taken by the appointing authority. Although administrative decisions are subjected to Writ applications, this Court finds no grounds established by the Petitioner to invoke the discretionary remedy of this Court and also when the appointing authority is not made a party.

The Petitioner's relief

The Petitioner is seeking a Writ of Certiorari to quash the adverse decisions in relation to the Petitioner in document marked as P11. However, as stated above in this judgement, P11 is the document that recommends the Petitioner for his promotion. The document marked as P11 does not contain any adverse decisions pertaining to the Petitioner and recommends the Petitioner to the rank of Rear Admiral. Even the said document does not contain any adverse decisions against the Petitioner. In the said document, paragraph 5 gives the history of the Petitioner's AWOL charge and in paragraph 6 the Promotion Board has commented that they have learnt that the officers found guilty of AWOL previously have not been considered for promotions. Yet in their recommendations the Promotion Board has recommended the Petitioner but subject to the instructions or directives of the Ministry of Defence pertaining to the promotions of officers found guilty of AWOL. In view of Regulations 8 and 10 this Court does not find any procedural irregularity to quash the said letter. Thus, the Court is not inclined to grant the relief prayed in the prayer (c) of the Petition.

The Court comes to this conclusion especially by considering Regulations 8 and 10. Though the learned President's Counsel appearing for the Petitioner submitted that in considering the promotions, the Promotion Board should only consider three grounds as stated in Regulation 10. This Court observes that Regulation 10 gives the Promotion Board a wider discretion in making recommendations. It is observed that pursuant to Regulation 10(a), (b) and (c) the Promotion Board is to "*consider the past record and justify whether there are favourable conditions for his promotion and his suitability in every respect to fill, with competence, all or any of the appointments likely to be available to him in the higher rank for which he is being considered*". Further, it requires the Promotion Board to take into consideration the service among other things and whether it is clearly in the best interest of the Navy. Hence, this Court is not inclined to accept the Petitioner's argument that the failure to recommend his name was not in compliance of Navy Order 0642 or the Regulations. In our view as stated above the Promotion Board's comment reflected in 1R10 falls within the parameters of Regulations 8 and 10. Thus, we do not find the recommendation *ultra vires*.

Hence, the Court is not inclined to grant the reliefs in prayer (c) and (e).

The Petitioner has sought a Writ of *Certiorari* to quash the recommendation of the 1st Respondent contained in P15 which the Petitioner argues is unreasonable. However, this Court finds that there is no document marked as P15 in the docket. In prayer (d), (f) and (g) the Petitioner is seeking a Writ of *Certiorari* to quash the decision to disqualify the Petitioner for the promotion to the rank of Rear Admiral based on the AWOL charge and the recommendation of the 1st Respondent regarding the Petitioner's promotion contained in document marked as P15 respectively. As stated above in the absence of a document marked as P15 whereby it is alleged that the Petitioner has been informed that he is disqualified for the promotion due to the AWOL charge the prayer has to fail.

The Petitioner has cited the cases of *Colonel U.R. Abeyratne v. Commander of the Sri Lanka Army, CA Writ 329/2017 decided on 07.02.2020* in support of his argument. However, the Court cannot consider the said case because the purported impugned decision (P15) is not before this Court. Therefore, the Court cannot ascertain whether a decision is unreasonable when the decision is not before Court.

In prayer (h) the Petitioner has pleaded for a Writ of *Certiorari* to quash any regulation and/or policy decision that would preclude officers who have been found guilty of AWOL and punished, from being promoted subsequently. This prayer has to fail as it is vague in nature and also, we find that the said decision in the document marked as P12 is not regarding the Petitioner but another officer. Hence, the Court observes that there is no material to demonstrate the said decision has been challenged when made or by the officer pertaining to whom the decision had been made. It is also pertinent to note document marked as P12 is dated 09.07.2021 and the Petitioner who is not referred to in the document marked as P12 is seeking a Writ of *Certiorari* to quash a decision taken against another officer after 3 long years. Hence, the said prayer has to fail.

The Petitioner in his written submissions has cited the case of *Vidanage v. Jayasundara Inspector General of Police and others, SCFR 163/2019 several other connected matters, decided on 12.01.2023* related to the functioning of the NSC. However, this Court has considered the above judgement and finds that it has no relevance to the issue before us.

This Court will now consider prayers (i), (j) and (l). The Petitioner has sought a Writ of *Mandamus* through prayer (i) to direct the 1st and 2nd Respondents to nominate and promote the Petitioner to the rank of Rear Admiral. The Petitioner himself drew the attention of this Court to the document marked as P10 and submitted that the promotions should be granted

based on Regulation 8 and Regulation 10. As for the promotion to the rank of Rear Admiral, it is done by selection. It was not disputed that the recommendation of the promotion is done by a Board appointed for the said purpose. In this instance, the Court observes that the said Promotion Board had recommended the Petitioner for the rank of Rear Admiral which has to be recommended subjected to Regulations 8 and 10 as discussed above. The said recommendation of the Promotion Board is conveyed through the Minister of Defence to His Excellency the President.

There is no material to substantiate that the 2nd Respondent is a member of the Promotion Board. Further the Petitioner has failed to demonstrate with any material that a new Promotion Board has been appointed subsequent to the retirement of the 2nd Respondent. Hence, the Court issuing a Writ of Mandamus against the Promotional Board to appoint the Petitioner is futile as the Petitioner has failed to demonstrate that 1st, 2nd and/or any other Respondents are members of the newly appointed Promotion Board.

The Courts have time and time again held that a Writ of Mandamus would not lie were it appears futile. Writ of Mandamus have been refused by the Courts on the ground of futility in *Tissa Abeywickrema v. Mayor, Badulla Municipal Council, CA (PHC) 111/2011 decided on 22.02.2019*, *Dr. M.D. W. Lokuge v. Vidyajothi Dr. Dayasiri Fernando, C.A. (Writ) Application No. 160/2013 decided on 16.10.2015* and *Samarasinghe v. De Mel and another (1982) 1 Sri. L. R. 123, 128*.

In *Samastha Lanka Nidahas Grama Niladhari Sangamaya v. Dissanayake [2013] BLR 68*, Marsoof J. held that,

“It is trite law that no court will issue a mandate in the nature of writ of certiorari or mandamus where to do so would be vexatious or futile.”

Furthermore, in *Selvamani v. Dr. Kumaravelupillai and Others (2005) 1 SLR 99*, de Abrew J. remarked that,

“Therefore, issuing a writ of mandamus in this case would be futile. In the case of Sethu Ramasamy Vs. Moregodd Gunasekara J. Observed that “A mandamus will not be granted when it appears that it would be futile”. In the case of Samsudeen Vs Minister of Defence and External Affairs L. B. de Silva J too remarked that “A writ of mandamus will not be issued if it will be futile to do so and no purpose will be served”. In the case of Gunasinghe Vs. Mayor of Colombo De Kretser J. stated

that “A mandamus will not be issued when it appears that it would be futile in its result”.

This Court also finds that what the Petitioner is seeking by prayers (i) and (j) is for the Court to step into the shoes of the Promotion Board directing the 1st and 2nd Respondents to recommend the Petitioner to the rank of Rear Admiral which the Court is not inclined to do.

Additionally, prayer (j) has to fail as by that prayer the Petitioner is seeking a Writ of Mandamus against the 1st, 2nd and/or any other Respondents to recommend him for the rank of Rear Admiral following the retirement of the 2nd Respondent.

Upon a plain reading of prayer (j) the Petitioner is inviting Court to step into the shoes of the promoting Board to direct the 1st, 2nd and/or any other Respondents to recommend the Petitioner to the rank of Rear Admiral. When statutorily, a Board is appointed to ascertain and recommend, a Court is not inclined to step into the shoes of the said Promotion Board. Hence, the Court is not inclined to grant the relief prayed for in prayer (j). Further, it is also observed that subsequent to the retirement of the 2nd Respondent whether a new Promotional Board was appointed is not clear and the Petitioner has failed to establish the same.

In specially answering prayer (l) this Court further observes that the Petitioner has not established whether a Promotional Board has been appointed to consider the promotion to the rank of Rear Admiral pursuant to the retirement of the 2nd Respondent. If a Board has been appointed then the said members are not before this Court. The said parties become necessary parties. In the absence of necessary parties this prayer has to fail. The Petitioner has only made the previous board members a party to this Application. However, despite the said Board recommending the Petitioner but with a reference to officers who have been found guilty of AWOL he has not been appointed by the appointing authority. The said appointing authority is not before the Court.

It is a well-established principle that failing to name the necessary parties in a Writ Application is fatal. In ***Rawaya Publishers and another v. Wijeyadasa Rajapaksa 2001 (3) SLR 213*** it was held,

“In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of Udit Narayan Singh v. Board of Revenue AIR 1963 – SC 768 it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party also the parties in whose favor the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed in limine. It has also been held that person vitality affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative ‘capacity (vide Prabodh Derma v. State of Uttara Pradesh AIR 1985 – SC 167 also see Encyclopaedia of Writ By P.M. Bakshi) ’”.

Further, it was submitted that following the recommendation, the Promotion Board ceases to exist. The outcome of the said interview conducted by said Promotion Board was the appointment of the 2nd Respondent, which the Petitioner is not challenging. Hence making the said members of the board to this Application and seeking any relief against them becomes futile.

Legitimate expectation

The Court has considered the Petitioner’s argument that the Petitioner had a legitimate expectation which had been violated when the Petitioner was not appointed to the post of Rear Admiral as it was to be the final promotion in his career. The cases of ***Wickremasinghe and Another v. The Urban Development Authority (2002) 3SLR 253, Dayarathne and others v. Minister of Health and Indigenous Medicine and others (1999) 1 SLR 393, Mawjood v. Pussadeniya (1987) SLR 287 and N.C. Gajaweera and others v. Chairman of the National Police Commission and others, SCFR 14/2017, S.C. Minutes 20th March 2024*** were cited by the Petitioner in support of his contention. The Court finds that the facts of the said cases differ from this case.

The Petitioner submits that he had a legitimate expectation to be nominated and be recommended to the rank of Rear Admiral. At this stage, it should be considered whether the Petitioner’s expectation is legitimate. As submitted by the Counsel for the Respondent

the Petitioner being a senior officer was aware of the seriousness of being absent without leave and the discipline that is expected of the officers of the forces. Accordingly, this Court finds that for that expectation to be legitimate there should be strict compliance with discipline and the Petitioner should have demonstrated that he falls within Regulations 8 and 10 which the Petitioner himself has placed reliance. Specially, in view of the fact that there is a wide discretion to the appointing authority to take a decision that is in the best interest of the Navy, and also due consideration should be given to the Petitioner's past record. Considering all the facts submitted this court cannot agree with the contention that the Petitioner's expectation is legitimate.

The Petitioner also contended that he has a legitimate expectation to work until 17.05.2025, whereby he will reach his retirement age of 55 years. It is contended that the failure to receive the promotion would shorten the said period as without the promotion the Petitioner can only serve four years in the rank of Commadore. Therefore, the Petitioner would reach the maximum period he can serve in the present rank by 31.12.2024.

However, the learned President's Counsel appearing for the Petitioner in his submissions conceded that the Petitioner has received an extension to work until 17.05.2025. Hence, the contention that if not for the Petitioner being denied of the promotion, he could have worked till 17.05.2025 has to fail.

By prayer (k) the Petitioner is seeking a Writ of Prohibition preventing the 1st, 2nd and/or any other Respondents and their successors from further denying the career progression of the Petitioner based on the charge sheets marked as P5(a) and P5(b). It is his contention that without the promotion, he will have to retire prematurely, hence, his career progression is affected. This Court has already answered the issue on career progression above.

Further, the Court observes that P5 is not a charge sheet. The said document which is dated 14.11.1996, is a letter sent to the Commander of the Navy consisting of the charges reflected in P5(a) and the proceedings of the summary trial. The prayer as it is, is misconceived in law as by the said prayer the Petitioner is seeking to prevent the 1st and 2nd Respondents from denying the career progression of the Petitioner through the charge sheet.

The Petitioner has reached the post of Commadore and the final post he has to reach is the

post of Rear Admiral. However, in the first interview, though he was recommended to the post of Temporary Rear Admiral, he was not appointed by the appointing authority and the Petitioner has not challenged the appointment made. The Petitioner conceded that he had been given an extension and therefore, he will be retiring at his correct retirement age. Hence, there is no deprivation of the Petitioner serving until he reaches his retirement age.

In his submissions, the Petitioner contends that the Petitioner should not be deprived of a promotion based on a decision arrived by the NSC. As stated above, the said decision pertaining to the Petitioner is not before Court.

The Respondent's vehemently contended that as stated earlier the Promotion Board had recommended the Petitioner to the post of Rear Admiral in order of merit. However, it is also contended that in order to maintain strict discipline among the forces especially among the officers of senior rank. In keeping with the provisions in Regulations 8 and 10 and in maintaining zero tolerance pertaining to absentee, His Excellency the President had not appointed the Petitioner to the post of Rear Admiral.

This Court agrees with the submissions of the learned Senior State Counsel for the Respondents that there must be strict discipline among the forces especially amongst the senior ranked officers. It is pertinent to note that if an absentee is to hold a very senior position and he is appointed to a Promotion Board and faced with recommending an absentee, how such an officer is to make a recommendation or not make a recommendation when the officer himself had been found guilty of committing a similar offence? Further in the said circumstances what will happen to the strict discipline that should be adhered to among the Tri Forces.

Samayawardhena J. in ***J. H. M. L. S. Jayaweera v Air Marshall Gagana Bulathsinhala and others, CA WRIT 88/2015 decided on 07.10.2020*** discussed the importance of strict discipline in the armed forces.

“Unlike in most other institutions, if there is no discipline among the members of the Armed Forces and also the Police Force, those institutions cannot function effectively and responsibly. The fundamental responsibility of the Armed Forces and the Police is to protect the nation from internal and external enemies, and actively participate in maintaining law and order. If there is no discipline, there is no military.”

The importance of strict discipline was discussed by Lord Bingham of Cornhill in the House of Lords case **R v. Boyd Etc. [2002] UKHL 31**. Lord Bingham states;

“3. The effectiveness of such forces has been recognised to depend on their being disciplined forces: that is, forces in which lawful orders will be obeyed, the law will be observed, and appropriate standards of self-control and conduct will be shown.

4. While disciplinary rules and procedures will inevitably vary from state to state, three principles would now, I think, command acceptance in any liberal democracy governed by the rule of law.... Secondly, the maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peacetime as in wartime: a force which cannot display the qualities mentioned above in time of peace cannot hope to withstand the much more testing strains and temptations of war.”

In the above circumstances, this Court is not inclined to issue its discretionary powers and grant a Writ of Prohibition.

The Petitioner by prayer (m) sought a Writ or Prohibition against the Respondents from acting on any policy decision that would preclude officers who have been guilty of AWOL and punished being promoted subsequently and/or P12 in consideration of the Petitioner's promotion.

Even if there was a recommendation, the appointment is not made by the 1st and 2nd Respondents, but the promotion is made by the His Excellency the President, who is the Commander-in-Chief of the Armed Forces. Hence, it is observed that issuing a Writ of Prohibition to the 1st and 2nd Respondents from nominating/appointing any other officer other than the Petitioner to the post of Rear Admiral becomes misconceived. Further, the Petitioner's prayer (m) has to fail as the said prayer is vague.

It is also observed that such a prayer becomes premature as for the promotion board to make recommendations there should be vacancies arisen. The 2nd Respondent retired on 05.05.2024 but no interviews were called. As stated above no material has been placed before Court on the appointment of a new Promotional Board. A Writ of Prohibition cannot be issued against parties who are not before Court. Thus, the relief prayed has to fail. Further as quite correctly pointed out by the learned Senior State Counsel appearing for the Respondent's granting such relief would affect the strict discipline of the Navy and also it will hinder the zero tolerances to absentees in keeping discipline in the Navy.

The Petitioner in his written submission argued that the document marked as P12 cannot be applied retrospectively to penalise or deny the Petitioner of his promotion. The Petitioner cited the cases of *Dr. K.M.L. Rathnakumara and 13 others v. The Postgraduate institute of Medicine and 52 others, SC Appeal 16/2014 decided on 30.03.2016* which was followed by this Court in *T/Captain B.L.T. Gayan v. Commander of the Sri Lankan Army, CA Writ 108/2023 decided on 10.03.2024* in support of his argument. In response it is contended the document marked P12 is dated 09.07.2021 and the Petitioner's Promotion Board was appointed on subsequent to P12 hence there is no retrospective application. However, the Petitioner never challenged his non appointment at the time the 2nd Respondent was appointed which was in 2023. In any event he cannot challenge the same now as it becomes a belated challenge after sleeping over his rights.

The learned Senior State Counsel appearing for the Respondents submitted that in keeping with the policy of zero tolerance for absentees to maintain discipline the Respondents are compelled to take decisions. While agreeing with the said submission however, this Court also observes that the said decisions should be reasonable. In this instance, the Petitioner has failed to challenge and demonstrate that there was or would be an unreasonableness that maybe taken towards the Petitioner in recommending for future promotions as it is observed that the Sri Lanka Navy has been consistent with its policy on zero tolerance for absentees when it comes to promotion of senior ranks.

Considering all the above facts and circumstances of this case and the judicial dicta that has been submitted, this Court is not inclined to grant the reliefs prayed for by the Petitioner. Therefore, this Court dismisses the Writ Application without cost.

Judge of the Court of Appeal

S.U.B. Karalliyadde, J

I agree

Judge of the Court of Appeal