

**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: 230/2018**

Captain (Temporary) S.A.M.D. Seneviratne  
Parakumgama, Thambala, Polonnaruwa.

**PETITIONER**

Vs.

1. Lt. Gen. N.U.M.M.W. Senanayake,  
Commander of the Sri Lanka Army.
- 1A. Lt. Gen. Shavendra Silva,  
Commander of the Sri Lanka Army,  
Army Headquarters,  
Sri Jayawardenapura, Kotte.
2. Maj. Gen. A.P. De. Z. Wickremarathne,  
Commander,  
Sri Lanka Army Volunteer Force.
- 2A. Maj. Gen. H.J.S. Gunawardena,  
Commander,  
Sri Lanka Army Volunteer Force,  
Volunteer Force Headquarters,  
Salawa, Kosgama.
3. Maj. Gen. Ruwan Kulatunga,  
Colonel of the Regiment.

- 3A. Maj. Gen. H.M.J.K. Gunaratne,  
Colonel of the Regiment,  
Sri Lanka Light Infantry,  
Regiment, Panagoda.
- 4. Major Weerasinghe,  
Commanding Officer – 2<sup>nd</sup> Battalion,  
Sri Lanka Light Infantry Regiment.
- 4A. Major W.M.W.G.C.K.W. Bandara  
Commanding Officer – 2<sup>nd</sup> Battalion,  
Sri Lanka Light Infantry Regiment,  
Army Camp Thalawatta, Ariyali,  
Jaffna.
- 5. Maj. Gen. Ajith Wijesinghe,  
Military Secretary.
- 5A. Maj. Gen. P.J. Gamage,  
Military Secretary.
- 6. Kapila Waidyaratne,P.C.,  
Secretary, Ministry of Defence,
- 6A. Maj. Gen. G.D.H. Kamal Gunaratne,  
Secretary, Ministry of Defence,  
No. 15/5, Baladaksha Mawatha,  
Colombo 3.
- 7. Maj. Gen. W.P.D.P. Fernando.
- 8. Maj. Gen. D.G.I. Karunarathne.
- 9. Brig. M.A.S.K. Muhandiram.
- 10. Brig. K.G.D. Perera.
- 11. Maj. Gen. W.A. Wanniarachchi.

5<sup>th</sup>, 5A, 7<sup>th</sup> – 11<sup>th</sup> Respondents,  
at the Army Headquarters,  
Sri Jayawardenapura, Kotte.

## **RESPONDENTS**

**Before:** Mahinda Samayawardhena, J  
Arjuna Obeyesekere, J

**Counsel:** Pasindu Silva for the Petitioner

Ms. Nayomi Kahawita, Senior State Counsel for the Respondents

**Argued on:** 8<sup>th</sup> June 2020

**Written Submissions:** Tendered on behalf of the Petitioner on 11<sup>th</sup> February 2020 and 15<sup>th</sup> June 2020.

Tendered on behalf of the Respondents on 22<sup>nd</sup> June 2020

**Decided on:** 10<sup>th</sup> July 2020

**Arjuna Obeyesekere, J**

The Petitioner had joined the Volunteer Force of the Sri Lanka Army as an Officer Cadet on 26<sup>th</sup> August 2008. Having completed his initial period of training, the Petitioner had been commissioned as a Second Lieutenant on 2<sup>nd</sup> January 2010. The Petitioner had thereafter been promoted as a Lieutenant on 2<sup>nd</sup> January 2013, and as a Captain (Temporary) on 1<sup>st</sup> June 2016.

The Petitioner states that in terms of Regulation 15(1) and 15(2) of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations, 1985<sup>1</sup> (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:

---

<sup>1</sup> Published in Extraordinary Gazette No. 476/26 dated 20<sup>th</sup> October 1987.

- (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.

The Petitioner has no disciplinary orders made against him, except an incident that had taken place in August 2010 where he had been absent without official leave (AWOL) for a period of five days due to medical reasons. The Petitioner states that a summary trial was held against him, and that he was reprimanded over the incident, in addition to a penalty of six days salary being deducted from his salary.

I must state at the outset that I am in agreement with the submission of the learned Senior State Counsel that discipline is paramount in an institution such as the Sri Lanka Army, and that the Commander, Sri Lanka Army, who has been entrusted with the overall task of maintaining discipline, shall be entitled to consider the disciplinary record of an Officer when deciding on the promotion and retirement of an Officer.

The following passage of Justice Sripavan (as he then was) in **Wikramaratne vs Commander of the Army and Others**<sup>2</sup>, sets out clearly the role of this Court when considering issues such as the non-promotion and retirement of Officers within the Armed Forces:

---

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

*“in service matters, the 1<sup>st</sup> 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.”*

The Petitioner states that while he was expecting to be confirmed in the rank of Captain, he had been served with a letter dated 9<sup>th</sup> February 2018, annexed to the petition marked 'P12' informing him as follows:

*“The Army Board No. 3 assembled on 19<sup>th</sup> December 2017 examined the SLAVF Board proceedings and stipulated criteria with regard to the Confirmation of the rank of T/Captain and determining their career progression. The Board having perused your record on AWOL, recommended you to be retired without further promotions, and be confirmed in the temporary rank one day prior to your retirement based on the directions at paragraph 1 a (1) of Army Head Quarters Policy Letter on AWOL Officers Reference MSB/A/01 (29) dated 31<sup>st</sup> August 2016.”*

Annexed to the petition marked 'P13' is the Policy Letter referred to in 'P12' containing the 'Policy Decision on AWOL Officers' issued by the Military Secretary. The concurrence of the Commander of the Army has been granted to implement the policy contained therein, in respect of Officers who had been AWOL after 20<sup>th</sup> May 2009. I have examined 'P13' and observe that it contains provisions relating to those who have been AWOL for less than 7 days, and those who have been AWOL for a period of 8 – 21 days. Paragraph (1) of the former category, which reads as follows, would apply to the Petitioner:

*(a) “Officers with a service of less than 10 years in the rank of Major or below could be retained in the service until they complete 10 years of reckonable service with due promotion in order to be eligible for the service gratuity. Further, these Officers should not be considered for any foreign courses / foreign visits / official visits and UN deployments. They should not be considered for further command and instructor appointments.”*

Aggrieved by the decision in ‘**P12**’, the Petitioner filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision reflected in ‘**P12**’;<sup>3</sup>
- b) A Writ of Certiorari to quash the decision made against the Petitioner by the Army Selection Board No. 3;<sup>4</sup>
- c) A Writ of Certiorari to quash the application of the Policy decision in ‘**P13**’ in so far as it affects the Petitioner;<sup>5</sup>
- d) A Writ of Mandamus directing the Respondents to confirm the Petitioner in the rank of Captain with effect from 14<sup>th</sup> January 2018;
- e) A Writ of Prohibition prohibiting the Respondents from retiring or discharging the Petitioner from the Sri Lanka Army without confirming him in the rank of Captain with effect from 14<sup>th</sup> January 2018.

I am 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

---

<sup>3</sup> Paragraph (b) of the prayer to the petition.

<sup>4</sup> Paragraph (c) of the prayer to the petition.

<sup>5</sup> Paragraph (d) of the prayer to the petition.

of Captain as of right. The Writ of Prohibition cannot be considered for the same reason – i.e. that the promotion is at the discretion of the Sri Lanka Army. I shall therefore only proceed to consider whether the Petitioner is entitled to one or more of the above Writs of Certiorari.

When this application was taken up for argument, the learned Senior State Counsel informed this Court that 'P13' has been rescinded, and replaced with Army Order No. 11/2019. In paragraph 5 of the written submissions of the Respondents, it has been submitted that *with the repeal and replacement of Policy Decision in P13 with a new Army Order, the Petitioner's confirmation application would have to be reconsidered in terms of the prevailing Army Order, and thus, on that account both P12 and P13 have no force and avail at present*. However, in the absence of a formal withdrawal of 'P12', the learned Counsel for the Petitioner submitted that he has no option, but to proceed with this application.

It is agreed between the parties that confirmation of an Officer in the rank of Captain takes place in the following manner:<sup>6</sup>

- a) At the request of the Military Secretary, the Commanding Officer of the 2<sup>nd</sup> Battalion, Sri Lanka Light Infantry submits 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;

---

<sup>6</sup> Vide paragraph 10 of the petition, and paragraph 3 of the Statement of Objections.

- 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.

The promotion of the Petitioner has been recommended by the Commanding Officer of the 2<sup>nd</sup> Battalion, Sri Lanka Light Infantry, the Colonel of the Regiment, and the Commandant of the Sri Lanka Army Volunteer Force, as borne out by the following documents annexed to the petition:

- a) '**P8a**' – The recommendation of the Commanding Officer of the 2<sup>nd</sup> Battalion, Sri Lanka Light Infantry;
- b) '**P7**' - The recommendation of the Colonel of the Regiment, which reads as follows: “මෙම නිලධාරී දැනට ඒකකයේ විධායක අධිකාරී වශයෙන් රාජකාරී ඉටු කරනු ලබයි. නොවිසඳුන වෝදනාපත් වනය රපෝර්තු සහ වනය කඩ කිරීම කිසිවක් නොමැති මොහු පවරනු ලබන රාජකාරීන් ඉතා වගකීමෙන් යුතුව ඉටු කරනු ලබන නිලධාරියෙකු වන අතර, පුළුතිමස් වෛද්‍ය වාර්ථාවද යහපත් වශයෙන් ඇත. ඒ අනුව තා/කපිතාන් නිලය ස්ථිර කිරීම සඳහා නිර්දේශ කරමි.”
- c) '**P8b**' - The recommendation of the Commandant of the Sri Lanka Army Volunteer Force.

The Petitioner has produced marked '**P9a**' – '**P9f**', the Annual Confidential Reports submitted by his Commanding Officer. I have examined the said documents and in particular '**P9f**' which is the Report for the year 2017, and



observe that the promotion of the Petitioner to the rank of Captain has been recommended by the Initiating Officer as well as the Reviewing Officer.

The primary argument of the learned Counsel for the Petitioner was that the automatic application of the above Policy in 'P13' on a retrospective basis is arbitrary, irrational and unreasonable, and that the Army Selection Board No. 3 must take into consideration the aforementioned recommendations and reports, in arriving at its decision.

Having examined the decision of the Army Selection Board No. 3 conveyed by 'P12', it is clear that the decision to retire the Petitioner has been taken solely in view of the policy decision in 'P13'. There has not been a consideration of the recommendations contained in 'P7', 'P8a' and 'P8b', nor have the Annual Confidential Reports on the Petitioner for the period 2013 – 2016 been considered by the Army Selection Board No.3. This is contrary to the aforementioned provisions of Regulations 15(1) and (2) of the Volunteer Force Regulations.

While the considerations applicable for the promotion of an Officer to the rank of Captain would be different to the criteria applied when considering the promotion of a Second Lieutenant to the rank of Lieutenant, the fact of the matter is that the aforementioned AWOL incident occurred at a time when the Petitioner was a Second Lieutenant but yet, that had not prevented the Petitioner from being promoted on two occasions after the AWOL incident.

In **Colonel J.D.A Gunasekara vs Lt. Gen. N.U.M.M.W Senanayake, Commander of the Sri Lanka Army and Others**,<sup>7</sup> this Court was called upon to consider a Circular similar to 'P13', which was applicable to those holding the rank of

---

<sup>7</sup> CA (Writ) Application No. 126/2018; CA Minutes of 9<sup>th</sup> June 2020.

Colonel and above. Having considered the legality of applying the AWOL policy on an automatic basis with retrospective effect, this Court had held as follows:

*“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 retrospective application of such policy automatically.<sup>8</sup> 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.”*

---

<sup>8</sup> “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 30<sup>th</sup> 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 20<sup>th</sup> May 2009, issued an interim order staying the operation of ‘P16’ in so far as it related to the petitioner in that application.”

The above decision would apply with equal force to the facts of this application.

Taking into consideration all of the above factors, it is my view that the decision to retire the Petitioner **solely** on the basis of '**P13**' is unreasonable and irrational, and that the decision of the Army Selection Board No. 3 as conveyed to the Petitioner by '**P12**' is liable to be quashed by a Writ of Certiorari.

There is one other matter that I wish to advert to. The learned Senior State Counsel drew the attention of this Court to Regulation 10 of the Volunteer Force Regulations which specifies that Regulations relating to Officers of the Regular Force of the Sri Lanka Army for the time being in force shall apply to Officers of the Volunteer Force, except where special provision has been made in the said Regulations. The learned Senior State Counsel stated that Army Order No. 11/2019 titled '*Promotion and Career Progression Criteria of the Sri Lanka Army- Lieutenant, Colonel and below*' has been made applicable to Officers of the Volunteer Force as well, unless the Volunteer Force Regulations contain provisions which are contrary.

Paragraph 54 of the said Army Order specifies that '*Officers who are AWOL for less than 21 days should be considered for promotion.*' Thus, it is clear that the Petitioner shall not be disqualified from being confirmed in the rank of Captain, based solely on the AWOL incident that occurred in 2010.

The learned Counsel for the Petitioner drew the attention of this Court to paragraph 72 of the said Army Order which reads as follows:

*“The Officers, who have been AWOL, shall not be considered for promotion to the rank of Temporary Major. Such officers are to retire upon reaching the maximum permissible period in the substantive rank of Captain. However, in the event an officer requests to continue his/ her service, until completion of 20 years of reckonable service, he/she may be granted to continue the service on extremely compassionate grounds, in order to facilitate them to complete 20 years of service to be eligible for service pension and gratuity under Section 1(8)(1) of the Army Pensions and Gratuities Code, 1981.’*

The learned Counsel for the Petitioner submitted that an Officer in the Regular Force of the Sri Lanka Army must retire from service upon completion of the maximum period in a particular rank, unless promoted to the next rank during that period. He submitted that a Captain in the Volunteer Force is entitled to remain in active service until he reaches 50 years of age and is thereafter eligible to be transferred to the Volunteer Reserve. He therefore submitted that the considerations applicable to the retirement of an Officer in the Regular Force upon reaching the maximum period in a particular rank does not apply to the Petitioner and for that reason, paragraph 72 of the said Army Order would not be applicable to the Petitioner.

The learned Senior State Counsel in response has submitted as follows:

*“It is further submitted that the option given to an officer who had failed to gain a promotion to the next rank to continue in service in a substantive rank, until such officer completes 20 years, is applicable to the officers attached to the Regular Service, in order to give such officers the opportunity to become entitled to service pension and gratuity under the Army Pensions and Gratuity Code of 1981.*

*However, in the case of an officer attached to the Volunteer Force of the Army Service, if any such officer becomes unsuccessful in getting a promotion to the next rank such Volunteer Service Officer by virtue of the provisions in Section 29(1) of the Volunteer Force Regulations can remain in the substantive rank until such officer completes the maximum ages stipulated there in for the respective ranks. Upon such officer completing the maximum ages in such substantive rank, he/she shall be transferred to the Volunteer Reserve and steps taken to retire from the said Reserve..'*

Thus, while paragraph 72 of the said Army Order would not apply to the Petitioner, it is my view that the provisions contained in the Volunteer Force Regulations, together with any other provisions applicable to Officers in the Regular Force which are not contrary to the said Regulations, would have to be followed when considering the retirement of the Petitioner from the Volunteer Force of the Sri Lanka Army.

In the above circumstances, I issue the Writs of Certiorari prayed for in paragraphs (b), (c) and (d) 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**