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

In the matter of an application under Article 140 of the Constitution for mandates in the nature of writs of certiorari and prohibition

1. Dr. D.P. Sriyani Nanayakkara,
   Oval View Residencies,
   223A24, Serpentine Road,
   Colombo 08

CA Writ Application: 473/2022

2. Dr. Kamani Dammika Jayalath,
   Base Hospital,
   Kiribathgoda.

3. Dr. Mallika Arachchi Chandradasa,
   No. 47/D, Horahena,
   Hokandara.

4. Dr. Peduru Arachchige Siripala,
   282/7, Sriyakantha Waththa,
   Kelaniya.

5. Dr. Wathu Dura Asoka Kanthi Ganewatta,
   No. 572/E/1, Piliyandala Road,
   Errawwala,
   Pannipitiya.

6. Dr. D.M.S Samarakoon,
   16, Mount Pleasant, Baseline Road,
   Colombo 9.

PETITIONERS

Vs

1. Hon. Dinesh Gunawardena,
   Prime Minister and Minister of Public Administration, Home Affairs, Provincial Councils and Local Government
   Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government,
   Independence Square, Colombo 07.

2. Secretary,
   Ministry of Public Administration, Home Affairs, Provincial Councils and Local Government,
   Independence Square,
   Colombo 07.

3. Secretary,
   Minister of Health, SUWASIRIPAYA No. 385,
   Rev. Baddegama Wimalawansa Thero Mawatha,
   Colombo 10.

4. Keheliya Rambukwella,
   Minister of Health, SUWASIRIPAYA No. 385,
   Rev. Baddegama Wimalawansa Thero Mawatha,
   Colombo 10.

5. Hon. Nimal Siripala De Silva,
   Minister of Ports, Shipping and Aviation,
   No. 19, 1 Chaithya Road,
   Colombo 01.

6. Hon. Douglas Devananda,
   Minister of Fisheries,
   New Secretariat, Maligawatta,
   Colombo 10.

7. Hon. Achchige Don Susil Premajayantha,
   Minister of Education
   Ministry of Education, Isurupaya,
   Battaramulla.

8. Hon. Bandula Gunawardena,
   Minister of Transport and Highways, Minister of Mass Media, 7th Floor,
   Sethsiripaya Stage II,
   Battaramulla.

9. Hon. Amaraweera Mahinda,
   Minister of Agriculture
   Minister of Wildlife and Forest Resources Conservation,
   No. 1090, Sri Jayawardenapura Mawatha,
   Rajagiriya.

10. Hon. Wijayadasa Rajapaksha,
    Minister of Justice,
    Prison Affairs and Constitutional Reforms,
    Superior Courts Complex,
    Colombo 12.

11. Hon. Nalaka Jude Hareen Fernando,
    Minister of Tourism and Lands, 7th Floor,
    Sri Lanka Institute of Tourism and Hotel Management, Galle Road,
    Colombo 03.

12. Hon. Ramesh Pathirana,
    Minister of Plantation Industries
    Minister of Industries, 11th Floor,
    Sethsiripaya 2nd Stage, Battaramulla.

13. Hon. Prasanna Ranatunga,
    Minister of Urban Development and Housing,
    17th and 18th Floors, "SUHURUPAYA"
    Subhuthipura Road, Battaramulla.

14. Hon. M.U.M. Ali Sabry,
    Minister of Foreign Affairs, Sri Baron Jayathilake Mawatha, Colombo 01.

15. Hon. Vidura Wikramanayaka,
    Minister of Buddhasasana, Religious and Cultural Affairs, 135 Srimath Anagarika Dharmapala Mawatha, Colombo 07.

16. Hon. Kanchana Wijesekera,
    Minister of Power and Energy, No. 437, Galle Road, Colombo 03.

17. Hon. Ahamed Zenulabdeen Naseer,
    Minister of Environment, Sobadam Piyasa,
    416/C/1, Robert Gunawardana Mawatha,
    Battaramulla.

18. Hon. Anuruddha Ranasinghe Arachchige Roshan,
    Minister of Sports and Youth Affairs
    Minister of Irrigation, No.500, T. B. Jaya Mawatha,
    Colombo 10.

19. Hon. Maligaspe Koralege Nalin Manusha Nanayakkara, Minister of Labour and Foreign Employment, 6th Floor, Mehewara Piyasa, Narahenpita, Colombo 05.

20. Hon. Tiran Ailes,
    Minister of Public Security, 14th Floor,
    Suhurupaya, Battaramulla.

21. Hon. Kachchakaduge Nalin Ruwanjiwa Fernando,

Minister of Trade, Commerce and Food Security
No 27, CWE Secretariat Building, Vauxhall Street, Colombo 02.

22. E. M. S. B Ekanayake,
Secretary to the President, Presidential Secretariat, Galle Face,
Colombo 01.

23. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

24. Dr. Darshana Sirisena,
President, Government Medical Officers' Association, 275, Organisation of Professional Associations of Sri Lanka (OPASL, 75 Prof Stanley Wijesundera Mawatha,
Colombo 7.

RESPONDENTS

Before: **N. Bandula Karunarathna J. (P/CA)**

&

M. Ahsan R. Marikar J.

Counsel: Romesh de Silva, PC with Niran Anketell instructed by Sanath Wijewardena for the Petitioner.

Nerin Pulle, ASG, PC with Shiloma David, SC for the 1st – 23rd Respondents.

Ravindranath Dabare, AAL with S. Ponnamperuma AAL for the Added Respondent.

Written Submissions: By the Petitioners – 13.11.2023.

By the Respondents – 08.11.2023 and 10.112023.

Argument on : 20.10.2023.

Judgement on : **15.12.2023.**

N. Bandula Karunarathna J. P/CA

The Petitioners who are Medical Specialists, Medical and Dental Officers including Medical Officers and Registered Medical Officers, instituted this application seeking *inter alia*, a Writs of Certiorari, to quash the Gazette bearing No 2309/04 dated 05th December 2022 (marked P36 in CA (Writ) 420/2022, 421/2022, 422/2022, marked P9 in CA (Writ) 473/2022, and marked P10 in CA (Writ) 54/2023) which sets out the compulsory age of retirement of Public Officers, including medical officers to which class the Petitioners' belong, at 60 years. The Petitioners have also sought to impugn Public Administration Circular No. 19/2022 titled "Reducing the Age of Compulsory Retirement of Public Officers up to 60 years" dated 14th September 2022, (P17), the Cabinet Decision dated 17.10.2022 (P21) and Gazette No. 2310/08 dated 12.12.2022 (A4) on the same grounds that they challenge the Gazette No. 2309/04 dated 05.12.2022.

The crux of the applications filed by the petitioners are that Gazette No. 2309/04 dated 05.12.2022 (P36), which set the compulsory age of retirement for the services to which the petitioners belong to at 60 years must be quashed, so that they may revert to the compulsory age of retirement of 63 based on their legitimate expectations and the effect to such retirement will have on the healthcare system of the country. When this matter came up for argument before this court on 20.10.2023, all parties agreed to dispose the matter by way of Written Submissions. Accordingly, this court directed the parties to file Written Submissions on 10th November 2023, and fixed this matter for Judgment.

In August 2022, the Government reversed a previous decision to extend the compulsory age of retirement to 65 years and reinstated the compulsory age of retirement of all public officers to 60 years.

His Excellency, the President in his capacity as Minister of Finance when presenting the Interim Budget in August 2022, to the Parliament explained the Government's policy rationale as follows:

> "It has been observed that there has been increasing unrest among unemployed youth as the Government had decided to raise the mandatory retirement age of public sector employees to 65 years and that of semi-governmental employees to 62 years. Besides, it has also been reported that the increase in the retirement age has restricted the promotional opportunities available for many public sector and semi-governmental employees.
>
> Accordingly, it is proposed to reduce the retirement age of public sector and semi-governmental employees to 60 years. Those who have been employed beyond 60 years of age at present in the Government and semi-Government sectors will be retired as of 31.12.2022."

Public Administration Circular No.19/2022 titled "Reducing the Age of Compulsory Retirement of Public Officers up to 60 years" dated 14.09.2022 was issued by the Secretary to the Ministry of Public Administration, Home Affairs, Provincial Councils and Local Governments, notifying

all public servants that the compulsory age of retirement was 60 years. A Cabinet sub-committee had also been appointed to make recommendations with regard to implementing the aforesaid policy decision to avoid any adverse impact that may occur in the health care sector. The Cabinet Sub-Committee initially proposed;

a. To retire doctors who have already completed the age of 63 years, by December 31st 2022;

b. To retire the doctors who have completed the age of 62 years at the time they reach the age of 63 years,

c. To retire the doctors who have completed the age of 61 years at the time they reach the age of 62 years,

d. To retire the doctors who have completed the age of 60 years at the time they reach the age of 61 years,

e. To retire all the doctors who have completed 59 years of age by now upon completion of 60 years of age similar to the other government officials.

The Cabinet of Ministers by its decision dated 17.10.2022 approved the report of the said sub-committee subject to the following changes;

a. Doctors who have reached the age of 60 years and above and who have their birthdays between 01st of January and 30th of June, to retire on 30th of June 2023;

b. Doctors who have reached the age of 60 years and above and who have their birthdays between 1st of July and 31st of December, to retire on 31st of December 2023.

The Petitioners, who are Senior Medical Consultants and who have reached the age of 60 years have invoked the writ jurisdiction of this court by the original Petition dated, 09.11.2022 and along with two other similar writ applications bearing numbers, CA WRIT 421/2022 and CA WRIT 422/2022. The Petitioners are claiming that notwithstanding the compulsory age of retirement for the entire public service being 60 years, the Petitioners have a legitimate expectation to continue in service until they reach the age of 63 years and therefore, they should be given preferential treatment over and above all other public servants. On 21.11.2022 the said Writ Applications had been supported by the petitioner's *ex-parte* before this court and a limited interim order had been granted by this court, preventing the implementation of the aforesaid decision to retire the petitioners.

By the Gazette Extraordinary bearing No. 2304/04 dated 05.12.2022 issued by the Prime Minister and the Minister of Public Administration, Home Affairs, Provincial Councils and Local Government, section 17 of the Minutes on Pension has been amended making the compulsory age of retirement of the public officers to be 60 years of age. Subsequent to the said amendment to the section 17 of the Minutes of Pension, the petitioners filed an amended petition dated 10.12.2022 *inter alia* impugning the said Gazette Extraordinary amending the Minutes of Pension, in addition to the decisions already impugned by the original petition

dated 09.11.2022. The amended Petitions were also filed in the said Writ Applications bearing Numbers, CA WRIT 421/2022 and CA WRIT 422 /2022 which are identical to the amended Petition of the present Writ Application.

The Minutes on Pensions was further amended taking into consideration the special phased out manner of retiring Medical Officers by Gazette Extraordinary bearing No.2310/07 dated 12.12.2022. When the present matter was fixed for argument before this court, the Ministry of Health explored to settle the present Writ Application and the said connected matters and consequently a circular was issued by the 2nd respondent which was also filed in the present Writ applications. The effect of the said circular is to extend the compulsory age of retirement of Specialist Doctors to 63 years, however, as per the sad circular the said extension is valid only till 31.12.2024. Being dissatisfied by the said circular which was intended to be a settlement to the present Writ Application, the petitioner by the amended petition dated 27.09.2023 (hereinafter sometimes referred to as the final amended Petition).

The 40th to 51st Added Respondents to this application (hereinafter sometimes referred to as the 'Added Respondents') are Consultant Specialists in the Specialist Medical Officer Grade, who made an application to intervene in these cases as they represent all other similarly circumstanced Consultant Specialists who have been directly affected due to the non-implementation of the Policy to compulsorily retire all public servants at the age of 60 years. It was argued on behalf of the Added Respondents that they are necessary parties to this application for the reason that any order issued by this court granting interim and final reliefs as prayed for in the final amended petition would prejudicially affect their rights. Therefore, the final reliefs [B], [E], [F], [G], [H], [I], [J], [K], [M], [N], [0], [P], [Q], [AA] and [BB] and interim reliefs [DD], [EE], [HH], [II], [JJ], [KK], [MM], [NN], [00], [PP], [QQ], [RR], [SS], [TT], [UU], [VV], [XX], [YY] prayed for in the petition relate to the retirement of all Consultant Specialists/ Medical Specialists including the Added Respondents.

It was submitted by the learned Counsel who appeared on behalf of the Added Respondents that the final reliefs [T], [X], [Y] and interim reliefs [YY], [ZZ], [CCC] and [DDD] if granted would *inter alia*;

a. precludes the respondents from deeming the stations/positions held by the petitioners as being vacant for the purposes of transfers in the annual transfer list;

b. precludes the respondents from making any replacements or appointments to the posts/ stations held by the petitioners;

c. requires the respondents to restore and reappoint the petitioners in the respective posts/stations held prior to retirement, if the petitioners are made to retire before the age of 63;

d. requires the respondents to suspend any replacement appointments.

It was further argued on behalf of the Added Respondents that the aforesaid reliefs, if granted would prejudicially impact upon the career advancement and promotional prospects of the Added Respondents and that of similarly circumstanced junior specialist doctors, many of

whom are serving in peripheral hospitals and who are unable to secure stations/posts in Tertiary Healthcare Hospitals and other Specialist Hospitals since such stations/posts are presently held by the petitioners and other Consultant Specialists over the age of 60 years, many of whom hold "End Posts".

Most Junior Specialist Doctors are thus confined to serve in peripheral hospitals for several years and are therefore denied the requisite exposure and experience in handling complex and difficult medical cases, which are mainly handled by Tertiary and Specialist hospitals. They say that whilst serving in peripheral hospitals, these Medical Specialists do not get adequate opportunity to contribute their specialised knowledge, skill and expertise to patients in their chosen specialities given that many of the Peripheral hospitals do not provide for wards or treatment units commensurate with their specialisation or lack necessary resources. The denial of such exposure and experience is detrimental to the healthcare system of the country in as much as it has caused stagnation and frustration within the ranks of the Junior Medical Specialists and has prompted many specialist doctors to migrate to foreign countries which offer better career advancement opportunities. Therefore, Added Respondents submit in the aforesaid circumstances, any order made by this court granting final reliefs as prayed for in the main application would cause grave prejudice to the Added Respondents and other Consultant/ Medical Specialists similarly circumstanced.

It was argued on behalf of the Added Respondents that the petitioners are barred from seeking mandates in the Writ Jurisdiction in the Petition by Article 61A of the Constitution of the Democratic Socialist Republic of Sri Lanka. The 25th respondent named in the present Writ Application is the Chairman of the Public Service Commission and the 26th to 33rd respondents are members of the Public Service Commission. The 34th respondent in the present Writ Application is the Chairman of the Health Service Committee of the Public Service Commission and the 35th and 36th respondents are members of the said Committee. The 37th respondent is the Secretary to the said committee.

The Petitioners have sought both final and interim reliefs against all respondents including the Public Service Commission and the Health Service Committee of the Public Service Commission;

a. Final reliefs prayed for; [C], [D], [K], [L], [N], [0], [P], [Q], [R], [S], [T], [V], and [X];

b. Interim reliefs prayed for; [FF], [GG], [QQ], [RR], [SS], [TT], [UU], [VV], [WW], [XX], [YY], [AAA], [CCC] and [DDD];

The following prayers in the amended petition specifically seek reliefs against the Public Service Commission and the Health Service Committee of the Public Service Commission. The said prayers are reproduced as follows;

"(V) Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining the Public Service Commission (5th to 13th Respondents) and/or its Health Service Committee (14th to the 17th Respondents) and/or their successors in office, from engaging in any act of commission, in the form of granting any

approvals permitting any acting appointments being made, thereby permitting Senior Registrars to act as "Consultant Specialists";

(AAA) Grant and issue an interim order restraining the Public Service Commission (5th to the 13th Respondents) and/or its Health Service Committee (14th to the 17th Respondents) and/or their successors in office, from engaging in any act of commission, in the form of granting any approvals permitting any acting appointments being made, thereby permitting Senior Registrars to act as "Consultant Specialists", until the final hearing and determination of this application" [Emphasis added]

The reliefs prayed for by the petitioners against the Public Service Commission and the Health Services Committee of the Public Service Commission are thus substantive reliefs sought in this application. The learned Counsel for the Added Respondents argued that the Article 61A of the Constitution of the Democratic Socialist Republic of Sri Lanka, ousts the Writ Jurisdiction of this Court under Article 140 of the Constitution in connection with any order or decision made by the Public Service Commission or the Health Service Committee of the Public Service Commission.

Article 61A of the Constitution states as follows;

> "61A. Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any Public Officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this chapter or under any other law" [Emphasis added]

It was contended by learned President's Counsel for the Petitioners that Article 61A of the Constitution only ousted judicial review by this court in connection with "any order or decision" of the Public Service Commission and the Health Service Committee of the Public Service Commission. The petitioners contend that they were not challenging any order or decision by the Public Service Commission or the Health Service Committee in this application but instead were seeking orders in the nature of Writs of Prohibition to prevent the Public Service Commission and the Health Service Committee from taking any decision to give effect to the decision to compulsorily retire all public servants at the age of 60 years. Therefore, Added Respondents argued that Article 61A of the Constitution has completely ousted the Writ Jurisdiction of the Court of Appeal under Article 140 of the Constitution. Therefore, no Writ, be it Writs of Certiorari, Mandamus, Prohibition, Quo Warranto or Procedendo can be issued against the Public Service Commission or the Health Service Committee. The only remedy provided for under Article 61A of the Constitution is the Fundamental Rights jurisdiction of the Supreme Court under Article 126 of the Constitution.

Learned President's Counsel for the Petitioners drew the attention of this Court to Article 104 H (1) of the Constitution and alleged that the ouster clause in that Article was much wider than Article 61A of the Constitution, which should be interpreted narrowly.

Article 104 H (1) of the Constitution is reproduced below;

> "104 H (1)- The jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution shall, in relation to any matter that may arise in the exercise by the Commission of the powers conferred on it by the Constitution or by any other law, be exercised by the Supreme Court"

The Learned President's Counsel for the petitioners submitted that in Article 104 H (1) of the Constitution, which is applicable for the Election Commission, the Article does not refer to "any order or decision made by the Commission ", as contained in Article 61 A of the Constitution and thus Article 104 H (1) had a broader application. Whereas, it was argued that Article 61A of the Constitution has a narrow application since it ousted the jurisdiction of the Court of Appeal only against any order or decision made by the Commission. Accordingly, he submitted that the Petitioners were not prevented from seeking mandates in the nature of writs of prohibition and writs of mandamus from this Court against the Public Service Commission and the Health Service Commission of the Public Service Commission.

On behalf of the Added Respondents, it was argued that the Article 104 H (1) of the Constitution permits the exercise of the writ jurisdiction against the Elections Commissions, but the jurisdiction of the Court of Appeal to issue writs under Article 140 of the Constitution has been given to the Supreme Court. In essence, Article 104 H (1) is not an ouster clause but a forum jurisdiction clause. Article 61A of the Constitution completely ousts the writ jurisdiction against the Public Service Commission. The writ jurisdiction under Article 140 cannot be exercised by the Court of Appeal or the Supreme Court against the Public Service Commission. Therefore, the Article 61A completely ousts the writ jurisdiction, providing the invocation of the Fundamental Rights jurisdiction of the Supreme Court as the only means of challenging an order or a decision made by the Public Service Commission, in a Court of law. Whereas, Article 104 H (1) of the Constitution only specifies the forum at which the writ jurisdiction must be invoked against the Elections Commission.

Thus, it is further argued by the learned Counsel for the Added Respondents that the Article 61A and the Article 104 H (1) of the Constitution are two incomparable Constitutional provisions and the argument of the learned President's Counsel for the petitioners is completely misconceived in law.

It is true that the Courts are prevented from doing something indirectly which the Court cannot do directly. Thus, the Petitioners cannot seek from this Court to invoke the writ jurisdiction indirectly against the Public Service Commission and the Health Service Committee of the Public Service Commission by seeking Writs of Prohibition to prevent the Public Service Commission from making a decision.

In the case of Ratnasiri and Others vs. Ellawala and Others, His Lordship the President of the Court of Appeal (as His Lordship was then) Saleem Marsoof, PC. J, referring to the Article 61A of the Constitution held as follows;

> "In view of the elaborate scheme put in place by the Seventeenth Amendment, to the Constitution to resolve all matters relating to the public service, this Court would be

> extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

In Hewa Pedige Ranasingha and Others vs. Secretary Ministry of Agricultural Development and Others, the Petitioners had challenged the manner in which a competitive examination to select Agricultural Instructors had been conducted by the Secretary, Ministry of Agricultural Development in terms of the powers delegated by the Public Service Commission.

Sisira De Abrew, J upheld the argument, of the respondents that in view of the provisions of Article 61A of the Constitution, the Court of Appeal has no jurisdiction to inquire into the conducting of the examination, and that the petitioners could not have invoked the writ jurisdiction of the Court of Appeal to quash the results of the said examination.

In a more recent Judgement of this court in the case of K. V. Gamini Dayaratne vs. P. S. Wickremarathna, Senior DIG (Administration) and Others, His Lordship the President of the Court of Appeal (as His Lordship was then) Arjuna Obeysekere PC. J., relying on the aforesaid Judgements in the Ratnasiri and Others case and the Hewa Pedige Ranasingha and Others case has also held that the Court of Appeal cannot exercise the writ jurisdiction in matters against the Public Service Commission. Therefore, its trite law that the writ jurisdiction vested in this court is ousted by Article 61A of the Constitution to grant any mandate in the nature of writs against the Public Service Commission, a committee or a public officer of the Commission.

The retirement of public officers including the Petitioners are governed by the provisions of the Public and Judicial Officers (Retirement) Ordinance No.11 of 1910, as amended (hereinafter sometimes referred to as the 'Ordinance'), and the rules formulated thereunder. In terms of section 1 (1) of the Ordinance, the retirement age of every public officer, including the Petitioners to the present Writ Application, is 60 years of age. It was further argued by the learned Counsel for the Added Respondents that by the present Writ Application the petitioners are seeking an Order from this Court to extend the age of their retirement from 60 years to 63 years of age in direct violation of existing law.

When the law states that the compulsory age of retirement of all public officers including the Petitioners is 60 years of age, the Petitioners cannot entertain any expectation which contravenes the law and seek to be retired at the age of 63 years. On behalf of the Added Respondents, it was submitted that, it is trite law that there can be no legitimate expectation if such expectation is contrary to law.

In M.R.C.C. Ariyarathne and others v. N.K. Illangakoon, Inspector General of Police and others, SC/FR 444/2012 Decided on 30.07.2019 at page 55 it was held;

> "Next, as mentioned earlier, the law, as it presently stands, is that an assurance given ultra vires by a public authority, cannot found a claim of a legitimate expectation based on that assurance. But it has to be recognised that there may be many instances where

a petitioner who relies on an assurance given by a public authority or one of its officials, reasonably believed that the public authority or official who gave it to him was acting lawfully and within their powers. It is also often the case that an individual who deals with a public authority will find it difficult to ascertain the extent of its powers and those of its officials. In such cases, much hardship will be done to an individual who *bona fide* relies on an assurance given to him by a public authority or one of its officials and is later told the assurance he relied on and acted upon, sometime with much effort and at great cost to him, cannot be given effect to because of a flaw regarding its vires. In such instances, the principle of legality comes into conflict with the principle of certainty and, the law as it stands now, is that the illegality of the assurance will defeat the value of certainty which contends that the assurance should be given effect."

At this stage it is important to note that in Jathika Sevaka Sangamaya vs. Sri Lanka Hadabima Authority, the Supreme Court held;

> "Now I will consider the effect of the said decision of the Cabinet of Ministers with regard to the inquiry before the Labour Tribunal. As pointed out earlier under Article 42 and 55 of the Constitution, the Cabinet of Ministers are performing executive functions under the Constitution and their decisions can be either policy decisions or administrative decisions or both. Accordingly, the decisions of the Cabinet of Ministers other than the policy decisions are amenable to judicial review."

Prior to the impugned changes in policy, the age of retirement of the said Petitioners was sought to be placed at 65 years in January 2022 by the Public Administration Circular No. 02/2022 marked P14 to the Petition in CA/Writ/420/2022. The Cabinet of Ministers have granted its approval to the Cabinet Memorandum dated 9th September 2022 (vide, A2 in 420-422/2022 and A3 in 473/2022 annexed to the Statement of Objections), by Cabinet Decision dated 23rd September 2022 (vide, A3 in 420-422/2022 and A4 in 473/2022 annexed to the Statement of Objections), to restrict the age of retirement of Public Officers to 60 years. However, upon concerns being raised regarding the revision of the age of retirement, a Cabinet Sub-Committee was appointed to reconsider the revision of the compulsory age of retirement. Accordingly, said Sub-Committee submitted to the Cabinet of Ministers a Report dated 10th October 2022, which is marked P20 annexed to the Petition in CA/Writ/420/2022.

In view thereof the Cabinet of Ministers by Cabinet Decision dated 17th October 2022, marked P21 to the Petition in CA/Writ/420/2022, granted approval to implement the recommendations from (a) to (e) of the Cabinet Sub-Committee Report.

It was namely;

> (a) To retire doctors who have already completed the age of 63 years before 31st December, 2022;
>
> (b) To retire doctors who have completed the age of 62 years, upon attaining the age of 63 years;

(c) To retire doctors who have completed the age of 61 years, upon attaining the age of 62 years;

(d) To retire doctors who have completed the age of 60 years, upon attaining the age of 61 years; and

(e) To retire doctors who have completed the age of 59 years, upon attaining the age of 60 years.

Thereafter, the Minutes on Pension were amended by Gazette Extraordinary bearing No 2309/04 dated 5th December 2022, marked P36 in CA (Writ) 420/2022, 421/2022, 422/2022, marked P9 in CA (Writ) 473/2022, and marked P10 in CA (Writ) 54/2023) to the Amended Petitions and Petition, respectively. Thus, in terms of the Gazette Extraordinary bearing No 2309/04 dated 5th December 2022, marked P36, P9 and P10, the Minutes on Pension are amended as follows:

The Minutes on Pensions, which is amended from time to time is further amended by removing Section 17 entirely and substituting the following new section.

"Any Government employee may be directed to retire from Government Service on or after attaining the age of fifty-five years. All civil officers must retire compulsorily on attaining the age of sixty, except those officers those age of compulsory retirement is fixed by the Constitution or by any other law, unless otherwise decided by a competent authority.".

This Order shall come into effect from January 01st, 2023.

The Cabinet policy decision pertaining to the implementation of the compulsory age of retirement (P21) was sought to be amended by Cabinet Decision dated 6th December 2022 marked as P35 to the Amended Petition in CA/Writ/420/2022.

In view of P35;

(a) Medical officers whose date of birth falls during the period from 1st January to 30th June, are permitted to serve up to 30th June of the relevant year in which they are to retire; and

(b) Medical officers whose date of birth falls during the period from 1st July to 31st December, are permitted to serve up to 30th December of the relevant year in which they are to retire. The Minutes on Pension were further amended by Gazette Extraordinary No. 2310/07 of 12th December 2022 (A4) whereby the following new paragraph was added immediately after section 17 above:

The age limit of compulsory retirement of the posts of Medical Consultants/Government Medical Officers/Dental Surgeons/Registered Medical Officers of the Government shall be revised in the following manner;

(a) Sending the Medical Officers on retirement, who have already completed the age of 63 years, before 31st December 2022.

(b) Sending Medical Officers on retirement, who have already completed the age of 62 years, on completion of 63 years of age.

(c) Sending Medical Officers on retirement, who have already completed the age of 61 years, on completion of 62 years of age.

(d) Sending Medical Officers on retirement, who have already completed the age of 60 years, on completion of 61 years of age.

(e) Sending Medical Officers on retirement, who have already completed the age of 59 years, on completion of 60 years of age.

The Medical Consultants, Government Medical Officers, Dental Surgeons and the registered Medical Officers of the Government whose birthday falls within the period from 1st of January to 30th June should be given the opportunity to serve up to 30th June of the relevant year and sent on retirement and the Medical Consultants, Government Medical Officers, Dental Surgeons and the registered Medical Officers of the Government whose virtually falls within the period from 1st of July to 31st of December should be given the opportunity to serve up to 31st December of the relevant year and sent on retirement. These interim provisions expire on 31st of December, 2023. The above amendments to the Minutes on Pension reflect the amendments approved by the Cabinet Decision dated 17.10.2022 (P21) and 06th December 2022 (P35).

After the amendments brought by the Gazette notifications the Minutes on Pension pertaining to the compulsory age of retirement would read as follows:

Any Government employee may be directed to retire from Government Service on or after attaining the age of fifty-five years. All civil officers must retire compulsorily on attaining the age of sixty, except those officers those age of compulsory retirement is fixed by the Constitution or by any other law, unless otherwise decided by a competent authority. The age limit of compulsory retirement of the posts of Medical Consultants/Government Medical Officers/Dental Surgeons/Registered Medical Officers of the Government shall be revised in the following manner;

(a) Sending the Medical Officers on retirement, who have already completed the age of 63 years, before 31st December 2022.

(b) Sending Medical Officers on retirement, who have already completed the age of 62 years, on completion of 63 years of age.

(c) Sending Medical Officers on retirement, who have already completed the age of 61 years, on completion of 62 years of age.

(d) Sending Medical Officers on retirement, who have already completed the age of 60 years, on completion of 61 years of age.

(e) Sending Medical Officers on retirement, who have already completed the age of 59 years, on completion of 60 years of age.

The Medical Consultants, Government Medical Officers, Dental Surgeons and the registered Medical Officers of the Government whose birthday falls within the period from 1st of January to 30th June should be given the opportunity to serve up to 30th June of the relevant year and sent on retirement and the Medical Consultants, Government Medical Officers, Dental Surgeons and the registered Medical Officers of the Government whose birthday falls within the period from 01st of July to 31st of December should be given the opportunity to serve up to 31st December of the relevant year and sent on retirement.

We should not forget that the Petitioners are 'Medical Specialists' in the specialist medical officer Grade who have served as Medical Specialists for a period of 20 to 30 years. They are highly experienced consultant specialists who have obtained qualifications in varying spheres such as Cardiology, Neurology, Paediatrics, and other fields. Due to the extensive clinical training a medical specialist is required to undergo, the said consultant specialists were vested with special rights, benefits and privileges as opposed to other medical offices and public officers due to the *sui generis* nature of the function that they perform. In line with the aforesaid decision, in 2018, the age of compulsory retirement of the consultant specialists were validly extended to the age of 63.

The palpable rationale for the said decision was due to *inter alia*,

i) unique skills and expertise the said category of consultant specialists provided to the patient-care system of Sri Lanka which cannot be substituted by any other medical practitioner.
ii) traceable shortage of medical specialists in the cadre.

The consultant specialists were statutorily carved out from the rest of the public officers by extending their age of retirement to 63 years as averred in the Petition. Attention of this court is drawn to the fact that the said decision was taken at a time where the age of other public officers was set to 60 years. This amounts to a clear recognition of *sui generis* nature of the consultant specialists and this distinct status became an entrenched and normative position. The aforesaid decision was subsequently amended in 2022 by Public Administrative Circular No. 02/2022 dated 06-01-2022 which extended the compulsory age of retirement of all public officers to 65 pursuant to the Cabinet decision dated 03-01-2022.

In 2022, following the interim budget speech delivered in Parliament by the Minister of Finance, the Government took a policy decision to reduce the age of compulsory retirement of all public officers to 60 years. It was argued by the learned President's Counsel that the said decision was taken without any intelligible data or criteria and nor was the said decision supported by any data and statistics. Subsequent to the aforesaid decision, the government proceeded to impose a blanket age of compulsory retirement of 60 years to all public officers including the consultant specialists who were classified as a special category of officers for the purpose of retirement. The petitioners were thereafter clubbed with the general category of public officers who were to retire from service upon the age of 60 years.

As a result, the Petitioners invoked the writ jurisdiction of this Court seeking relief (a) to (cc), in effect, challenging *inter alia*;

a. The purported cabinet decision dated 17th October 2022 marked as P21 which reduces the compulsory age of retirement of Consultant Specialists to 60 years;

b. The purported Public Administration Circular No 19/2022 titled "Reducing the Age of Compulsory Retirement of Public Officers up to 60 years" dated 14th September 2020 marked as P17 issued by the 7th Respondent, in so far as it applies to Consultant Specialists;

c. The purported Cabinet decision dated 12th September 2022, reducing the compulsory age of retirement of public officers to 60 years, in so far as it applies to Consultant Specialists;

d. The purported cabinet decision dated 6th December 2022 marked as P35 which reduces the compulsory age of retirement of Consultant Specialists to 60 years;

e. The purported Gazette (Extraordinary) No. 2309/04 dated 5th December 2022 marked as P36 issued by the 7th respondent;

The purported Gazette (Extraordinary) No. 2310/07, dated 12th December 2022, issued by the 7th respondent, to introduce the phased scheme of retirement for Medical Consultants, Government Medical Officers, Dental Surgeons, and Registered Medical Officers, which was recommended by the Cabinet Sub-Committee, subject to the amendment by the Minister of Health, as evinced by the Cabinet Decision of 17-10-2022 (P-21). The said Gazette Notification has been produced marked as "A4", the approvals being issued by anyone or more of the Respondents to this Application, permitting Senior Registrars to act as Consultant Specialists.

The Hon. Attorney General took two preliminary objections in respect to the maintainability of the application on the grounds that;

(i) The Public Service Commission has the authority to determine whether the Specialist Doctors are permitted to serve beyond the age of compulsory retirement,

(ii) This Court has no jurisdiction to review a policy decision taken by the Cabinet of Ministers in terms of Article 55 (1) of the Constitution.

Subsequent to both oral and written submissions of all Counsels, this Court overruled the said preliminary objections.

The impugned decisions of the Respondents created *inter alia*;

i) the compulsory retirement of more than 300 medical specialists in one day,
ii) created a lacuna due to the insufficient number of specialist consultants to fill the posts that would fall vacant upon the retirement of such a large number of specialist consultants,
iii) newly qualified medical doctors are preparing for foreign licensing examinations instead of local postgraduate examinations which indicates that many of them are likely to migrate to a foreign country which would further enhance the lacuna present,

iv) a serious impediment to the training of future consultants which was conducted so far by senior consultant specialists who are now forced to retire at an early age,

v) violated the legitimate expectation of the consultant specialists who hoped to provide their services to the health sector for a longer period of time, and are now forced to retire suddenly without prior notice,

vi) would create a debilitating health crisis dismantling the entire patient care system of Sri Lanka.

It is the position of the Petitioners that the said impugned decisions are arbitrary, illegal, irrational, unlawful, illogical, and unjustifiable. The Respondents submit that the requirement that facilitated the special rights to consultant specialists in 2018 is not applicable to the present context of the health sector. The Respondents have failed to substantiate the said claim and as to how the health sector had overcome the requirement of consultant specialists. The Respondents submit that they attempt to fill the vacant posts which arise as a result of a large number of consultant specialists retiring by assigning duties to Senior Registrars or junior doctors. On behalf of the Petitioners, it was argued that the said decision is arbitrary, unlawful, illegal and *ultra vires* as the Medical Ordinance provides a detailed scheme pertaining the registration of the medical and dental specialists in the country.

Section 39 C in particular of the said ordinance imposes a prohibition on acting and tending to believe that any person possesses the qualification to act as a medical and dental specialist. Despite the said provision the Respondents have taken steps to temporarily attach Senior Registrars and junior officers to act as consultants to cover up the duties of a consultant, (Vide P40 (a), P40 (b) and P40 (c)).

It was argued that such a decision reflects *ex facie* illegal, ultra vires, unreasonable and irrational nature of the decisions of the Respondents. As per the Cabinet Memorandum marked P 8, P 9 and the Cabinet Decision P 10, the decision to extend the age of compulsory age of retirement of consultant specialists was due to *inter alia;*

i) the requirement to strengthen the patient care system of Sri Lanka owing to the increasing health risks and illnesses faced by patients due to unhealthy lifestyle patterns,

ii) the lack of sufficient number of consultant specialists in the health sector to attend to the needs of the patients,

iii) the requirement of the expertise and skills of the senior consultant specialists to strengthen the health sector.

The government policy to separate the consultant specialists from the other public officers in terms of the compulsory age of retirement was justified in view of the impeding need of the health sector.

It is important to refer to the case of Ramupillai vs Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others, 1991 (1) S.L.R. 11 held that;

> "The state is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Service are to be made. For such

purpose the state could take into consideration the over-all needs and matters of national interest and policy. Once such selections are made those taken in from such sources are integrated into one common class. Thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion by referring to the consideration that they were recruited from different sources. Their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals, unequal once again. There should be no further classification among them, except upon certain acceptable criteria such as educational qualifications. "

"Any differentiations made on ethnic grounds per se would be considered abhorrent. Even so under certain circumstances even such distinctions, drawn upon racial grounds, could be considered permissible. "

"Although the internal notice of March 1990 envisages the issuance of a fresh letter of appointment as Assistant Director to the successful applicants, the applications are confined to officers in a lower grade, viz: Superintendent of Customs. The said appointments, therefore, do in fact operate as promotions to a higher grade for the 22 officers who, like the petitioner, are now serving in a lower grade as Superintendents of Customs. "

"It seems to me that these Customs Officer were, upon their initial appointment, integrated into one common class and that thereafter there should not ordinarily be any further classification, as amongst them, for promotion from their present grade to the higher grades. The only consideration that should thereafter prevail, in regard to promoting them to a higher grade, is merit, or merit and seniority, which alone would enhance and ensure the efficiency of the service rendered by the department to the public in general. "

"Any promotions made, based upon ethnic quotas would be violative of the right of equality assured by the provisions of article 12 of the Constitution. "

The Cabinet has by virtue of the provisions of article 55 (4) the power to make rules for appointment and promotion subject however to the power vested in the Supreme Court by the provisions of article 55 (5) of the Constitution. The complaint of imminent infringement is directed against acts of the respondents, more particularly the 2nd and 3rd Respondents who seek to do such acts on the authority of cabinet decisions. Such acts fall within the category of 'executive and administrative' acts as contemplated in sub-articles 1 and 2 of article 126 of the Constitution.

The subsequent cabinet memorandum and cabinet decision in 2022, marked P 20 and P 21, does not establish any justifiable reasons and proof, data or statistics to state that the aforesaid reasons which led to conferment of the age of compulsory retirement of consultant specialists to 63 years have now changed. Thereby the aforesaid decisions to reduce the age of compulsory retirement of consultant specialists to 60 years is arbitrary and thereby is *ultra vires*, illegal and unreasonable.

The Public Services United Nurses Union v Montague Jayewickrema, Minister of Public Administration and others 1988, 1 S.L.R. 229 where it was held that;

> "1) Although the origin of government service is contractual, once the appointment is made, the legal position of a government servant is one of status and his powers and duties are exclusively determined by law and not by agreement. Under Article 55 of the Constitution, the government can make unilateral alterations that may affect the contractual relationship of a public officer with the Government, yet there must be observance of form and procedure.
>
> (2) The Establishment Code has been issued by Government in the exercise of the legislative power vested in the Cabinet of Ministers under Article 55 (4) and has statutory force. Though *ad hoc* determinations may be made by the Cabinet in a few matters it is essential that provisions relating to salary increments, leave, gratuity, pension, super annuity, promotion and every termination of employment and removal from service should be in the form of rules which are general in operation though they may be applied to a particular class of public officers. Further when existing general rules are sought to be altered this too must be done in the same manner and following the identical procedure for their formulation, namely, by enacting an amending rule. "

A classification to pass muster must be based both on intelligible differentia and such differentia must have a rational relation to the object sought to be achieved.

In the case of Aruna Roy vs. Union of India (2002) 7 SCC 368 it was held that it is for Parliament to take a decision on a national education policy one way or the other and that Court can intervene in the implementation of policy if it is against any statute.

In such circumstances, the aforesaid policy decision is a blatant violation of the statutorily provisions as morefully set out in these submissions and the petition and that the said policy decisions were evidently not taken to the benefit of any patients. If the impugned decisions are not quashed, the crisis would be worsened, and the citizen would be denied timely-needed treatment, and the state health system would be collapsed. Therefore, it is my view that the impugned decision is *ex facie* arbitrary, illegal, ultra vires, unreasonable and irrational.

In view of the above facts, it was argued that the arbitrary change of government policy further violates the right to equal treatment of the petitioners as per Article 12 (1) of the Constitution. This Court's attention is drawn to the case of Dayaratne vs. Minister of Health and Indigenous Medicine 1999 (1) SLR 393 where Amarasinghe J. held that; "when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important hearing on the protection afforded by Article 12 of the Constitution against equal treatment arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the Executive. An expectation is considered to be legitimate where it is founded upon a promise or practice by the authority that is said to be bound to fulfil the expectation. "

The aforesaid arbitrary, unlawful, irrational, and ultra vires decision of the Respondents have violated the right to equality afforded by Article 12 of the Constitution of Sri Lanka in as much as the Petitioner states that this court can exercise the writ jurisdiction when Article 12 (1) is violated as per W. K. C. Perera v Prof. Daya Edirisinghe and Others 1995 1 S.L.R 148 which is a decision of the Court of Appeal with regard to a Writ Application states that,

> "Article 12 of the Constitution ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4 (d). Thus, whether the Rules and Examination Criteria have statutory force or not, the Rules and Examination criteria read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such degree without discrimination and even where the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretions."

Arbitrary Decision of the Respondent to extend the Age of Retirement of Consultant Specialists to 63 Years subject to a Terminal Date.

The Respondent submitted a Cabinet Memorandum seeking the approval of the Cabinet to extend the age of retirement of the Consultant Specialists to the compulsory age of retirement of 63. Accordingly, the respondent submitted an undertaking to this court to permit the Petitioners to continue their service in the Health Sector until the compulsory age of retirement of 63 years. The said Cabinet Memorandum was referred to a Cabinet Sub-committee which recommended the approval of the age of compulsory retirement of the Petitioners to 63 years which, however, was subjected to a terminal date without providing any justification or reasons for the said decision.

Even if the merits of a policy decision are not subject to judicial review, the process by which the decision was made may be. If there are allegations of procedural impropriety, such as bias, unfairness, or a failure to follow proper procedures, the court may intervene to ensure that the decision-making process was lawful.

State Of Madhya Pradesh & Ors vs Nandlal Jaiswal & Ors on 24 October, 1986: 1987 AIR 251, 1987 SCR (1) 1;

"The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. "

Kuldeep Singh vs Govt. of Nct of Delhi on 6 July, 2006 (2006) 5 SCC 702, Para-25] Patna High Court CWJC No.762 of 2022 dt. 25 -03-2022;

"The doctrine of 'legitimate expectation' is attracted in the instant case. Indisputably, the said doctrine is a source of procedural or substantive right. [See R. v. North and East Devon Health Authority, *ex parte* Coughlan 2001 Q.B. 213] But, however, the relevance of application of the said doctrine is as to whether the expectation was legitimate. Such

legitimate expectation was also required to be determined keeping in view the larger public interest. Claimants' perceptions would not be relevant therefor. The State actions indisputably must be fair and reasonable. Non - arbitrariness on its part is a significant facet in the field of good governance. The discretion conferred upon the State yet again cannot be exercised whimsically or capriciously. But where a change in the policy decision is valid in law, any action taken pursuant thereto or in furtherance thereof, cannot be invalidated."

Ramchandra Murarilal Bhattad & vs State of Maharashtra & Ors on 5 December, 2006

Appeal (civil) 5610 of 2006;

" Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. (supra), each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible."

Noticing some of the areas where judicial review would be permissible, this Court opined that ordinarily, this Court would not enforce specific performance of contract where damages would be adequate remedy. It was also held that conduct of the parties would also play an important role. The expansive role of Courts in exercising its power of judicial review is not in dispute. But as indicated hereinbefore, each case must be decided on its own facts.

Certainly, the consideration of public interest is a significant aspect in the exercise of judicial review. Judicial review is the process by which courts examine the actions of the executive or legislative branches of government to ensure they are consistent with the constitution and legal principles. Public interest serves as a guiding principle in this process, and courts often take it into account for several reasons:

1. protection of rights and liberties: Judicial review aims to safeguard individual rights and liberties. Considering public interest ensures that the court's decisions have broader implications for society, promoting the protection of fundamental rights that are essential for the public welfare.

2. Democratic values: In a democratic society, public interest is closely tied to the idea of representative governance. Judicial review helps maintain a balance between the powers of different branches of government, and taking public interest into account ensures that the government acts in the best interests of the people.

3. Policy implication; Judicial decisions can have wide-ranging effects on public policy. Considering public interest allows the court to assess the potential impact of its decisions on the well-being of the community, ensuring that legal interpretations align with societal values and needs.

4. Legitimacy of the judiciary; Taking public interest into consideration enhances the legitimacy of the judiciary. It demonstrates that the court is not detached from the concerns and values of the society it serves, reinforcing the idea that judicial decisions are not arbitrary but are made with a broader understanding of the public good.

5. Social stability: Judicial review aims to maintain stability and order in society. By considering public interest, the court contributes to social cohesion and stability by addressing issues that may have a significant impact on the general welfare.

However, it's essential to note that the concept of public interest can be subjective and may vary based on societal norms, cultural values, and the prevailing political climate. Balancing the diverse interests within society is a complex task for the judiciary, and the interpretation of public interest may evolve over time as societal values and norms change. Overall, recognizing public interest in judicial review ensures that the judiciary plays a crucial role in promoting a just and equitable society.

It is evident that by Gazette Extraordinary bearing number 2235/60 dated 08.07.2021 marked P 3 the compulsory age or retirement of doctors was increased to 63 years which was made effective from 14.06.2021. This was preceded by the Cabinet decision dated 14.06.2021 marked P2(b) which conferred the sanction of the Cabinet of Ministers to the recommendations set out in the Cabinet Memorandum dated 17.05.2021 marked P2(a). Accordingly, Gazette Notification marked P3 was published. Thereafter, a Public Administration Circular was published on 06.01.2022 by the Secretary to the Minister of Public Services, Provincial Councils and Local Government giving effect to a decision to extend the age of compulsory retirement up to 65 years.

However, His Excellency the President in the Interim Budget Speech-2022 dated 30.08.2022 proposed certain reforms to the Public Sector, which included a revision to the compulsory age of retirement of public officers being placed at 60 years. Pursuant to the above Budget proposal, by Circular dated 14.09.2022 (marked P 7) the compulsory age of retirement of all public officers were revised to 60 years. The Cabinet of Ministers by their decision dated 23.09.2022 (marked A 4) has granted its approval to the recommendations contained in the Cabinet Memorandum dated 09.09.2022 to restrict the age of retirement of Public Officers to 60 years. The said decision of the Cabinet of Ministers was followed by the Gazette Extraordinary bearing number 2309/04 dated 05.12.2022 (marked P9) the Minutes of Pensions pertaining to the compulsory age of retirement of all public officers was made 60 years with effect from 01.01.2023 inclusive of the Doctors.

The Petitioners aver inter alia that the document under challenge marked P 21 and P 35 is contrary to various representations made by the Respondents and responsible officers of the State, the said document marked P9 reflecting the Minutes of Pensions is harmful to the health sector of the country and is contrary to the legitimate expectation of the Doctors to serve until the age of 63 years.

The learned Counsel for the respondent argued that the petitioners' entire case appears to be premised on a purported legitimate expectation and the alleged frustration thereof. The Public and Judicial Officers (Retirement) Ordinance, No. 11 of 1910 (as amended) and Rules made thereunder govern the age of retirement and the procedure to be adopted in the event a revision is made effective. Pursuant to Rule 1(2) of the said Rules, the compulsory age of retirement for judicial and public officers has been determined to be 60 (sixty) years and may be extended by the Competent Authority in the interest of service. In terms of Rule 5 of the said Ordinance, the approval of the Competent Authority, which is the Public Service

Commission in the instant application is a mandatory requisite for the revision of the age of retirement to be effective.

The learned President's Counsel for the petitioners argued that the revision of the age of retirement to 63 years was subject to the approval of the Public Service Commission as the appointing authority. The age of retirement of the public sector is a matter of policy and the Cabinet of Ministers is vested with the power in terms of Article 55 of the Constitution. The justifications for the revision is entailed in the Cabinet Memorandum dated 17.05.2021, the most compelling reason which precipitated the same was the onset of Covid-19 which demanded an immediate cadre expansion in order to counter the effects of the global pandemic.

Learned Additional Solicitor General argued on behalf of the Hon. Attorney General that at the time the instant Application was filed the Petitioners did not have a subsisting legal right to compel the Respondents to set the age of retirement at 63 years. No legitimate expectation can arise in view of the many revisions to the compulsory age of retirement and a change of national policy. He further says that the Petitioners cannot compel the Respondents to contravene the law and the Petitioners have not established that a public duty is cast upon the Respondents to revise the age of retirement to 63 years.

It is important to note that Section 2 (1) of the Public and Judicial Officers (Retirement) Ordinance No. 21 of 1917 confers powers on the Governor-General to make rules for compulsory retirement of public or judicial officers.

Section 2(1) reads as follows;

"The Governor-General may make, and when made may revoke, vary or amend, rules regulating the age at which, the reasons for which, and the conditions subject to which, public or judicial officers shall be required to retire from the public or judicial service."

In terms of the Rules promulgated thereunder, the age of compulsory retirement of every public or judicial officer shall be sixty years.

Rule 1 stipulates as follows;

"1. (I) The age of compulsory retirement of every public or judicial officer shall be sixty years:

a. Provided, however, that the age of compulsory retirement shall-in the case of Presidents of Rural Courts who are not lawyers, be fifty-five years; in the case of matrons, nursing sisters, nurses and midwives in the Department of Health Services, be fifty years."

Rule 1 sub-rule (2) stipulates a proviso which reads as follows;

"(2) Notwithstanding anything in paragraphs (1) of this rule, the competent authority may, if the authority considers it expedient, extend the employment of any public officer beyond the age of compulsory retirement if,

(a) the Head of the Department in which he is employed considers that his services should be retained in the interests of the service; or

(b) where that officer is Head of a Department, the Permanent Secretary to the Ministry to which that Department is attached considers that his services should be retained in the interest of the service.

Rule 5 defines the "competent authority" to mean "the authority competent to make appointments to the office held by that officer."

In terms of the above provisions, the power of the extension of employment of any public officer beyond the age of compulsory retirement is entirely vested in the competent authority, which is the Public Service Commission in terms of Article 55(3) and Article 55(5) read with the above provisions. The learned Counsel for the respondents submits that the Petitioners cannot rely on an invalid and no longer legally valid Minutes on Pensions, marked P3 and elevate it to the level of a statutory underpinning when the rules promulgated under the Public and Judicial Officers (Retirement) Ordinance No. 21 of 1917, set the law on age of retirement for all public officers. It is only the Parliament that can increase such this age.

The respondents state that the contention of the Petitioners that doctors are a special class of people in view of the compulsory age of retirement being placed at 63 years is erroneous and misplaced. The decision to retire Doctors at 63 years was a policy decision taken by the Cabinet of Ministers as evident by the Cabinet Memorandum dated 17.05.2021 marked P 2(a) and the Cabinet Decision dated 14.06.2021 marked P2(b) to the Petition, owing to a shortage of doctors prevailing at the time. The Respondents further state that the circumstances that warranted an extension of the age of retirement of doctors was time centric as there were 2500 odd vacancies at the time.

Learned Additional Solicitor General argued on behalf of the Hon. Attorney General that in contrast, as evinced at present there are enough doctors, hence, the requirement that existed in 2021, no longer exists at present and therefore the revision of the compulsory age of retirement in issue has no impact on the health sector.

The learned President's Counsel for the petitioners always says that all doctors are treated in one category as the Doctors, Specialists and Dental Surgeons. The petitioners have a legitimate expectation of being treated in the same category of Doctors, Specialists and Dental Surgeons. The doctors and medical specialists instituted proceedings, obtained interim orders, and finally appear to have obtained an undertaking that they will not retire until the age of 63, in the case of CA WRIT 420/2022, CA WRIT 421/2022, CA WRIT 422/2022, CA WRIT 473/2022 and CA WRIT 54/2023. The petitioners argued that the same rule shall apply to all doctors.

It is important to note that;

i. By Gazette 2235/60 dated 8.7.2021 [P3], the retirement age of Medical Officers, Dental Surgeons, and Nurses were made 63.

ii. By Circular dated 6.1.2022 [P6], the retirement age of Doctors, Dental Surgeons and Nurses were proposed to be at 65.

iii. By circular 14.9.2022 [P7], Doctors, Specialists and Medical Officers, including Nurses' retirement age was proposed to be reduced to 60.

It is evident that according to P8[1], all Nurses, all Medical Officers and all Dental Surgeons' retirement age was reported to be at 63. In the aforesaid circumstances it is clear that nurses, medical officers and specialists were treated in the same way. Thereafter by Gazette 2309/04 dated 05.12.2022 the retirement age of all government officers was reduced to 60. The doctors and medical specialists filed several writ applications in this Court bearing No. CA

WRIT 420/2022, CA WRIT 421/2022, CA WRIT 422/2022, CA Writ 473/22 and CA WRIT 54/2023. Interim orders in the above matters were granted by this Court. The State gave an undertaking that the retirement age of medical specialists and doctors would be 63.

In the circumstances the petitioners argued that the retirement age of all doctors should be same as retirement age of consultant doctors and medical specialists. In these circumstances the petitioners request that this Court should quash the gazette which sets the retirement age at 60.

Attention of Court is drawn to the following documents by the petitioners, which are uncontroverted:

(a) Document marked P13 annexed to the Counter Affidavit of the Petitioners.

(b) Document marked P14, as at 31.03.2023 total number of vacancies has increased from 2307 to as at 31.12.2022 to 2835.

(c) Document marked P14 - several letters confirming the existing vacancies as at year 2023.

In those circumstances it is our view that there is a grave shortage of doctors in the government sector. In that event the impugned age of retirement is imposed, this problem will be severely exacerbated.

In any event new entrance to the doctor's service will not resolve the shortages of doctors caused by the compulsory retirement. In view of the compulsory retirement, most if not all doctors are Grade 1 and Supra Grade doctors. Training new doctors cannot fill the void of sudden exclusion of the Grade 1 and Supra Grade medical doctors. The arguments raised by the respondents are illogical, irrational and stands no logic. Therefore, it is important to note that with the compulsory age of retirement at age 60 is implemented in respect of doctor's service, there will be severe shortage of skilled and senior most doctors in the country. The Respondents have not proposed a solution for the aforesaid.

According to the Respondents, the age of retirement is set by Rules made under the Public and Judicial Officers (Retirement) Ordinance. However, this Court observe that the age of retirement of public servants is in fact set by the pensions minute and amendments made thereto.

It was argued by the learned counsel for the petitioners that in law, the Pension Minute is the instrument that fixes and changes the age of retirement. The Respondents now belatedly in these proceedings take the view that the age of retirement is set by A1- a Rule made in accordance with a 1910 Ordinance called the Public and Judicial Officers (Retirement) Ordinance.

The Pension Minute has been specifically mentioned in the Interpretation Ordinance No 2 of 1947 as amended, which states in Section 2 that;

"written law" shall mean and include all Ordinances, and Acts of the Parliament, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants and process of every kind made or issued by anybody or person having authority under any statutory or other enactment to make or issue the same in and for Ceylon or Ceylon or any part thereof, and the Minutes on Pensions, but shall include any statute of the United Kingdom extending expressly

or by necessary implication to Ceylon, nor any order of the Queen in Council, Royal charter, or Royal letters patent (Parliamentary Elections) Order-in-Council 1946;

Thus, by an Act of Parliament in 1947, the Minutes on Pensions (Pension Minute) became written law.

Article 168 (1) of the Constitution provides that "unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, mutatis mutandis and except as otherwise expressly provided in the Constitution, continue in force".

Thus, the Pension Minute has been specifically preserved and is binding law. In the circumstances, by virtue of the Interpretation Ordinance No. 2 of 1947 (read with the Constitution), the Pension Minute has superseded document marked A 1 and the 1910 Ordinance. The document marked A 1 is not a statute but is a rule made under the 1910 Ordinance. Thus, it is subordinate legislation. In the same manner, it is my view that the documents marked as P3, P6, P7 and P9 are also subordinate legislation. Consequently, the later in time prevails and clearly, it is the Pension Minute which sets the age of retirement.

The Respondents' own limited objections admits this, inasmuch as paragraph 21 references P3, P6, P7 and P9 and states "I state that the compulsory age of retirement has constantly been subject to revision as demonstrated by"...

In the circumstances, the Respondents are estopped from denying that it is the Pension Minute which sets and revises the age of retirement.

It is interesting to note that similarly, the limited objections states; "whilst the compulsory age of retirement of doctors was placed at 63 years in 2021 by P3, the same was extended to 65 years in January 2022 by P6...."

This Court can also observe that the document A6 provides no purported approval to P 3. On the contrary it only provides recommendations and observations. In the circumstances, it is crystal clear that in law, it is the Pension Minute which sets the age of retirement.

Another argument raised by the learned Additional Solicitor General (ASG) on behalf of the respondents focus in terms of Article 55 (3) and Article 55 (5) of the constitution. It says that the appointment, promotion, transfer, disciplinary control, and dismissal of public officers shall be vested in the Public Service Commission (PSC) subject to the provisions of the Constitution. The PSC shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions. As such the PSC is the appointing authority of the Petitioners.

In terms of the aforesaid powers and in terms of the previously mentioned the PSC has granted its approval to fill the vacancies of categories on doctors as it is evinced in documents A 6 (a), A 6 (b), A 6 (c), A 6 (d) and A 6 (e) attached to the Statement of Objections. Therefore, this Court does not have jurisdiction to hear and determine this application to quash the decision made by the PSC to fill these vacancies either with or without the PSC being made a party to this instant application.

The said jurisdiction objection is based on the provisions of Article 61 A of the Constitution, which reads as follows;

"61 A. Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law".

The learned ASG argued that this Application is an indirect challenge to the said approval granted by the PSC. It is trite law that, one cannot do something indirectly, which he cannot do directly. The Doctrine of Colourability forbids the Petitioners from doing indirectly, what they cannot do directly. This has been recognized in several cases including the case of Bandaranayake vs. Weeraratne 1981 (1) SLR 10 where Samarawickrema J stated as follows;

"There is a general rule in the construction of Statutes that what a court or person is prohibited from doing directly, it may not be done indirectly or in circuitous manner."

The learned counsel for the respondents submits that the Petitioners' appointment and retirement are elements that establish that the Petitioner is seeking to affect a performance which plainly and squarely falls within the purview of the PSC. Therefore, this Application and the reliefs prayed for by the Petitioners will be resulted in challenging the said approval of the PSC, for which the Court of Appeal does not have jurisdiction. The Petitioners cannot invoke the writ jurisdiction of this Court in an indirect manner to overcome the constitutional ouster. If the Petitioners have any grievance, that ought to have been submitted to the Supreme Court. The Respondents say that in these circumstances, the instant Application ought to be dismissed *in limine*.

The provisions of Article 140 of the Constitution is very clear that the Court of Appeal is vested with the power to hear Writ Applications subject to the provisions of the Constitution, which reads as follows;

"140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person".

The Article 61A is a Constitutional ouster and only the Supreme Court has the jurisdiction to hear and determine the applications which involves any order or decision made by the PSC, a committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission.

In the case of CA Writ Application 1009/2008, CA Minutes 10.05.2019, it was decided by the Court of Appeal as follows;

"In Atapattu vs. People's Bank 1997 (1) SLR 2001 the Supreme Court held that the jurisdiction of the Court of Appeal set out in Article 140 of the Constitution can only be ousted by a constitutional provision. Article 61A of the Constitution is an example of such an ouster."

The approach this Court should take to the constitutional ouster in Article 61A of the Constitution was dealt with great detail by Marsoof J. in Ratnasiri and others vs. Ellawala and others 2004 (2) SLR 180 at 190 where he held as follows;

"In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service ...I have no difficulty in agreeing ... that this Court must apply the preclusive clause contained in Article 61A of the Constitution in such a manner as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

"Furthermore, the ouster clause in Article 61A of the Constitution does not insulate the PSC from all forms of judicial supervision as the fundamental rights jurisdiction vested in the Supreme Court by Article 126 of the Constitution is preserved in all its vigour and any party whose fundamental rights are infringed or is in imminent danger of infringement has recourse to that jurisdiction".

"The learned President's Counsel further submits that the scope of the ouster clause is limited to the preclusion of an evaluation of merits of the decision and not to the preclusion of the jurisdiction of this Court to review whether the decision is arbitrary, violates natural justice and violates constitutional principles. I am unable to accept this position as doing so would be a frontal attack on a clear and precise constitutional ouster of the jurisdiction of this Court. A court cannot do indirectly what it is prohibited from doing directly".

Supreme Court decided clearly in the case of, Bandaranaike vs. Weeraratne and Others, 1981 (1) SLR 10 at 16, the effect of an ouster clause as follows;

"But quite apart from such general rule of construction, there is in this preclusive clause itself express words to indicate this. It states, inter-alia;

"No Court or tribunal shall... in any manner call in question the validity of such resolution on any ground whatsoever."

"It is the position of the petitioners themselves that they are seeking to show that the resolutions passed by Parliament are not valid and that they expect that Parliament will in due course rescind the resolutions. Having regard to the necessary effect of granting a writ and the expressed purpose of the petitioners in seeking it, cannot resist the conclusion that if this Court were to entertain the Application and go into it, it would be acting in violation of the second part of the preclusive clause. The effect of the issue of a writ quashing the recommendations and findings of the Special Presidential Commission would be in some manner to call in question the validity of the resolutions. "

The same legal issue of applicability of the ouster clause of the Article 61A of the Constitution was raised in the case of Rathnasiri and Others vs. Ellaw-ala and Others, 2004 (2) SLR 180 at page 196. After the careful consideration of long line of authorities, the Court of Appeal held that;

"This Court is clearly bound by the decision of the Bench of seven Judges of the Supreme Court in Ramuppillai vs. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others 1991 (1) SLR 11 and is inclined to the view adopted by the Supreme Court in Migultenne vs. Attorney-General 1996 (1) SLR

> 408 that rules and regulations such as those found in the Establishment Code, which are formulated by the Cabinet of Ministers under the above mentioned Constitutional provisions are subordinate rather than primary legislation. Such subordinate legislation, even where authorized by the Constitution, cannot prevail over the Constitution, unless the Constitution clearly authorizes such a result. Accordingly, I hold those provisions of the Establishment Code such as Chapter 111:5.1 upon which the petitioners have placed so much reliance, being subordinate legislation, cannot prevail over, or inhibit the application of Article 61A of the Constitution in terms of which the decision of the Public Service Commission embodied in I R18, which has been made in pursuance of power vested in the Commission by Article 55 of the Constitution, is precluded from judicial review. The preliminary objection based on Article 61A against the judicial review of the validity of the order of the Public Service Commission communicated by 1R 18 is therefore upheld".

Further the court in the same case held that;

> "As noted earlier, subordinate legislation including rules and regulations made by the Cabinet of Ministers prior to the Seventeenth Amendment such as the provisions of the Establishments Code, cannot inhibit the application of Article 61A of the Constitution, in terms of which the decision of the 4th respondent taken in pursuance of power vested in him by reason of a delegation of authority law fully made by the Public Service Commission under Article 57 of the Constitution, is precluded from judicial review. The first preliminary objection taken up by learned State Counsel has therefore to be upheld".

Accordingly, the learned Additional Solicitor General on behalf of the Respondents submits that it is apparent from the decided cases that Appellate Courts have considered the Constitutional ouster clause in its full scope and has decided that the said ouster clause removes the judicial review of the Court of Appeal. Hence, he says that this instant Application should be dismissed.

It is Crystal clear that Article 61A removes from the jurisdiction of the Court of Appeal a matter in which orders or decisions made by the Commission or any Committee or officer who exercises delegated power of the Commission. In the present case, ex facie, there is no attempt to impugn any order or decision of the Public Service Commission. It is important to focus only on that point. Thus, the preliminary objection raised by the respondents entirely misconceived.

Attention of this court is drawn by the learned President's Counsel who appears for the petitioners that according to the caption the only parties are the Minister and Secretaries of the Health and Public Administration, the other Members of Cabinet, Cabinet Secretary, the Secretary to the President and the Attorney General. The Public Service Commission is not made a party to this case and no reliefs are sought against them. Thus, it is baffling as to how the purported preliminary objection could be taken in this case. Therefore, we decide that the preliminary objections raised by the respondents are misconceived.

The Writ of Certiorari sought is to quash P 21 and P 35 the underlying decision made therein. P 9 is a decision made to compulsorily retire all government officers at 60 years of age. Thus, the preliminary objection is entirely inappropriate to this case and it must fail.

It is the contention of the respondents that the Public Service Commission being the appointing authority of the Petitioners and the nursing service has consequentially granted the approval to fill the vacancies of the Petitioners to this application. If the Petitioners intend to maintain this application, it is paramount to cite the PSC a party to the application.

I do not agree with the said argument as the petitioners never sought any relief against the PSC. The Public Service Commission and its members are not necessary parties. Accordingly, necessary parties are before this Court, which is not fatal to the maintainability of this application.

Article 55(1) of the Constitution stipulates that the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control, and dismissal. In terms of Article 55(3) and Article 55(5), the appointment, promotion, transfer, disciplinary control, and dismissal of public officers shall be vested in the Public Service Commission (PSC) subject to the provisions of the Constitution. Learned ASG argued that the PSC shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions.

The petitioners state that "in the said circumstances the policy decision of the Cabinet of Ministers to reduce the compulsory retirement age to 60 (regarding doctors services) followed by document marked P9 is.....". Hence they admit that what is sought to be quashed is a policy decision.

This is a policy decision outlined by His Excellency the President of the Democratic Socialistic Republic of Sri Lanka in the Interim Budget Speech marked as A 2 annexed to the Statement of Objections. Accordingly, it was proposed to reduce the retirement age of public sector and semi-governmental employees to 60 years. Those who have been employed beyond 60 years of age at present in the government and semi government sectors will be retired as of 31.12.2022.

In the case of Herath Mudiyansela Dingiri Banda v Land Commissioner General CA (WRT) 293/2007 decided on 28th November 2012, Justice Gooneratne quoted the De Smith's 'Judicial Review' (6th edition), it was held, inter alia, (at pages 423 to 426):

"It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. It will not suffice to merely recite a general formula or restate a statutorily prescribed conclusion. It is also preferable if reasons demonstrate a systematic analysis has been undertaken by the decision maker".

The petitioners were granted a special privilege owing to the sui generis nature of the technical skills and expertise possessed by the Petitioners. Thus, the arbitrary decrease of the compulsory age of retirement which had been entrenched for a period of time violates the legitimate expectations of the Petitioners.

The strongest argument raised by the petitioners were the Doctrine of legitimate expectation. It is basically aimed at admirative authorities abusing their discretion contrary to the expectation of individuals. It ensures legal certainty as people ought to have planned their life secure in knowledge of the consequences of their action. Perception of legal certainty deserves protection. Public perception of legal certainty becomes negative when the

authorities on their own have given assurances which give rise to their expectations and later arbitrarily infringe the same.

In the case of S. M. Samrath vs Sri Lanka Medical Council SC FR 119/ 2019 it was held as follows;

> "all the more so when the promise is not a bear promise but is made with the intention that other party should act upon it" the principal of legitimate expectation is connected with an administrative authority and an individual. It emerges in an instance where an administrative authority affects a person by depriving him of some benefit or an advantage which is had in the past being permitted by the decision maker to enjoy which he can legitimately expect to be permitted to continue"

In the said circumstances there is no real reason submitted by the Respondents before this Court for the reasons to treat the doctors, surgeons, and medical officers differently. The respondents have not indicated a word that the arbitrary imposition of compulsory retirement is 60 has not violated their legitimate expectation.

De Smith elaborated in 'Judicial Review of Administrative Action' 5th Edition as follows;

> "The protection of legitimate expectations is at the root of the constitutional principle of rule of the law, which requires regularity, predictability, and certainty in government's dealing with the public"
>
> "The legitimate or reasonable expectation arises from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. This court decides that, the expectation which is defined in the domain of this doctrine is not merely an anticipation. It is not just a wish, desire, hope, a claim, or any kind of a demand. The legitimacy of an expectation can be inferred, if it is founded on the sanction of a law or custom or assurance or an established procedure by a public authority."

It was stated in Union of India v. Hindustan Development Corporation (1993) SCC 499 at 540, that;

> "Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

When I consider all the above circumstances it is my view that the Petitioners' legitimate expectation has been violated by the Respondents. Therefore, this Court has all the rights and reasons to interfere to remedy the affectation caused by violation of their expectation.

The doctrine of Legitimate Expectation was discussed in the case of S. M. Samrath vs Sri Lanka Medical Council SC FR 119/ 2019 where it was held that;

> "all the more so when the promise is not a bear promise but is made with the intention that other party should act upon it. The principal of legitimate expectation is connected with an administrative authority and an individual. It emerges in an instance where an administrative authority affects a person by depriving him of some benefit or an advantage which is had in the past being permitted by the decision maker to enjoy which he can legitimately expect to be permitted to continue".

As per De Smith in 'Judicial Review of Administrative Action' 5th Edition;

> "The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealing with the public. The legitimate or reasonable expectation arises from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. This court decides that, the expectation which is defined in the domain of this doctrine is not merely an anticipation. It is not just a wish, desire, hope, a claim or any kind of a demand. The legitimacy of an expectation can be inferred, if it is founded on the sanction of a law or custom or assurance or an established procedure by a public authority."

This Court's attention is further drawn to the case of Geethani Hemamala Kotikawatte and others vs Hon. Dinesh Gunawardane, Prime Minister and Minister of Public Administration, Home Affairs, Provincial Councils and Local Government Ministry of Public Administration, Home Affairs, Provincial Councils and Local CA (WRIT) 508/2022 C.A. Minutes dated 24.10.2023 held;

> "The facts and circumstances of the said authority is identical to the issue of the present application submitted by the Petitioners. This Court granted relief to the Petitioners by inter alia quashing the decision to send the public officers (nurses) on compulsory retirement by the age of 60. "
>
> "In general terms, a legitimate expectation arises when a public authority makes a promise, representation, or commitment to an individual or a group of individuals, and these individuals rely on that promise to their detriment. In my view if the public authority subsequently acts in a way that goes against the legitimate expectation, it may be subject to judicial review. The cases in which it can be said that an established practice or policy gives rise to an expectation of consistent or equal treatment. Even if the terms of the policy do not amount to a promise aimed at any person in particular, the routine application of the policy to persons in the same category can give rise to an 'expectation' of similar treatment. Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority. "
>
> "According to this doctrine, a public authority can be made accountable in lieu of a legitimate expectation. Thus, the doctrine of Legitimate Expectation pertains to the relationship between an individual and a public authority. Legitimate expectation is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. "
>
> "The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of

administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. Therefore, it can be said that this doctrine is a firm of a check on the administrative authority. When a representation has been made, the doctrine of legitimate expectation imposes, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectation. It also adds a duty on the public authority not to act in a way to defeat the legitimate expectation without having some reason of public policy to justify, it doing so. "

"In any event new entrance to the nursing service will not resolve the shortages of nurses caused by the compulsory retirement. In view of the compulsory retirement, most if not all nurses are Grade 1 and Supra Grade nurses. Training nurses cannot fill the void of sudden exclusion of the Grade 1 and Supra Grade nurses. The arguments raised by the respondents are illogical, irrational and stands no logic. Therefore, it is important to note that with the compulsory age of retirement at 60 is implemented in respect of nursing service, there will be severe shortage of skilled, senior and most experienced nurses in the country. The Respondents have not proposed a solution for the aforesaid."

Hence, the case of the Petitioners is based on mere legitimate expectations. The nature of such expectations was fully explained by His Lordship justice Priyantha Jayawardena PC in Ginkrathgala Mohandiramlage Nimaisiri vs. Colonol P. P. J Fernando SCFR 256/2010 decided on 17.09.2015;

"The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection. Procedural expectations are protected by requiring that the promised procedure be followed save in very exceptional circumstances, for instance where national security warrants a departure from the expected procedure. However, in such instances the decision-maker must take into account all relevant considerations."

In Dayaratne vs. Minister of Health and Indigenous Medicine 1999 (1) SLR 393 Amarasinghe J. held that;

"when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against equal treatment arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the

Executive. An expectation is considered to be legitimate where it is founded upon a promise or practice by the authority that is said to be bound to fulfil the expectation.

In general terms, a legitimate expectation arises when a public authority makes a promise, representation, or commitment to an individual or a group of individuals, and these individuals rely on that promise to their detriment. In my view if the public authority subsequently acts in a way that goes against the legitimate expectation, it may be subject to judicial review. The cases in which it can be said that an established practice or policy gives rise to an expectation of consistent or equal treatment. Even if the terms of the policy do not amount to a promise aimed at any person in particular, the routine application of the policy to persons in the same category can give rise to an 'expectation' of similar treatment.

Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some consistent practice in the past or an express promise made by the concerned authority. According to this doctrine, a public authority can be made accountable in lieu of a legitimate expectation. Thus, the doctrine of Legitimate Expectation pertains to the relationship between an individual and a public authority.

Legitimate expectation is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process, or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical, and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical, or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course.

Therefore, it can be said that this doctrine is a form of a check on the administrative authority. When a representation has been made, the doctrine of legitimate expectation imposes, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectation. It also adds a duty on the public authority not to act in a way to defeat the legitimate expectation without having some reason of public policy to justify it doing so.

Applying the same principle in Aruna Roy vs. Union of India (2002) 7 SCC 368 it was held that it is for Parliament to take a decision on a national education policy one way or the other, court cannot take a decision on the good or bad points of an educational policy. Court can intervene in the implementation of policy only if it is against any statute.

Wade and Forsyth Administrative Law 10th Edition deals with the power of issuing Writs of Certiorari and Prohibition when the lower Tribunal has acted in excess of Jurisdiction is as follows;

On pages 214 and 215, it says;

“where there is a breach of natural justice”

On pages 372 to 379, it says;

“where there is a lack of fair hearing”

On pages 405 to 408 it says;

“if the decision is bias.”

Article 140 of the Constitution prescribes the Law under which this Court can issue Writs in the nature of Certiorari and Prohibition.

The respondents argued that the contention of the Petitioners that Doctors is a special class of people in view of the compulsory age of retirement being placed at 63 years is erroneous and misplaced. The decision to retire Doctors at 63 years was a policy decision taken by the Cabinet of Ministers as evident by the Cabinet Memorandum dated 17.05.2021 marked P 2(a) and the Cabinet Decision dated 14.06.2021 marked P2(b) to the Petition, owing to a shortage of doctors prevailing at the time. The Respondents further state that the circumstances that warranted an extension of the age of retirement of doctors was time centric as there were so many vacancies at this time, and only limited number of doctors are serving this time.

The learned President’s Counsel for the petitioners always says that all doctors are treated in one category as the doctors, specialists, and dental surgeons. The Petitioners have a legitimate expectation of being treated in the same category of doctors, specialists, and dental surgeons. The doctors and medical specialists instituted proceedings, obtained interim orders, and finally appear to have obtained an undertaking that they will not retire until the age of 63, in all Writ matters. The petitioners argued that the same rule shall apply to all the Doctors as there is a severe shortage of experienced Doctors.

It is important to note that;

-By Gazette 2235/60 dated 8.7.2021 [P3], the retirement age of medical officers, dental surgeons, and nurses were made 63.

-By Circular dated 6.1.2022 [P6], the retirement age of doctors, dental surgeons and nurses were proposed to be at 65.

-By circular 14.9.2022 [P7], Doctors, specialists and medical officers, including nurses’ retirement age was proposed to be reduced to 60.

It is evident that according to P8[1], Nurses, medical officers and dental surgeons’ retirement age was reported to be at 63. In the aforesaid circumstances nurses, medical officers and specialists were treated in the same way. Thereafter by Gazette 2309/04 dated 05.12.2022 the retirement age of all government officers was reduced to 60. The doctors and medical specialists filed several writ applications in this Court bearing No. CA WRIT 420/2022, CA WRIT 421/2022, CA WRIT 422/2022, CA Writ 473/22 and CA WRIT 54/2023. Interim orders in the above matters were granted by this Court. The State gave an undertaking that the retirement age of medical specialists and doctors would be 63 years. They will be permitted to serve until 31.12.2024. But it was revealed that, the doctors and medical specialists are not happy about the dead line introduced by the Government. It is our view that the said deadline should not be applied for all the doctors.

In the circumstances the petitioners argued that the retirement age of all doctors should be the same as retirement age of other medical officers. dental surgeons, medical consultants and all medical specialists. In these circumstances the petitioners request that this Court should quash the gazette which sets the retirement age at 60 for all doctors.

In considering the above circumstances it is our view that there is a grave shortage of doctors in the government sector. We take judicial notice that since 31.03.2023 for the past 8 months nearly 1000 vacancies for doctors were created in the hospitals, due to various reasons. Some of them have retired and many experienced doctors have gone abroad. In that event the impugned age of retirement is imposed, this problem will be severely exacerbated in the government hospitals. This will have a severe impact on the healthcare sector and it will surely cause the collapse of the entire government hospital system very soon. End of the day, poor patients will be suffered immensely.

In any event new entrance to the doctors' service will not resolve the shortages of doctors caused by the compulsory retirement. The arguments raised by the respondents are illogical, irrational and stands no logic. Therefore, it is important to note that with the compulsory age of retirement at 60 is implemented in respect of doctors' service, there will be severe shortage of skilled, senior, and most experienced doctors in the country. The Respondents have not proposed a solution for the aforesaid.

Considering all the submissions and documents filed by all parties this Court decides as follows;

1. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the Public Administration Circular No. 19/2022, produced marked P-17, dated 14-09-2022, in so far as it pertains to the retirement of Consultant Specialists, including the Petitioners;

2. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all or any one or more of the Respondents and/or their successors in office, from applying the Public Administration Circular No. 19/2022, produced marked P-17, dated 14-09-2022, to the Petitioners, to retire them prior to them reaching the age of 63 years;

3. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all or any one or more of these Respondents from retiring and/or causing and/or deeming to retire, the Petitioners, prior to them reaching the age of 63 years;

4. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the decision of the Cabinet of Ministers, as comprised by the 1st, the 18th to the 35th Respondents and the 39th Respondent (in a representative capacity), dated 17/10/2022, and/or any one or more of the said members of the cabinet, produced marked P-21, in so far as it pertains to the retirement of Consultant Specialists, including the Petitioners, on a purported phased basis, at ages below the age of 63 years;

5. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the decision of the Cabinet of Ministers, as comprised by the 1st, the 18th to the 35th Respondents and the 39th respondent (in a representative capacity), dated 05/12/2022, and/or any one or more of the said members of the Cabinet, produced marked P-35, in so far as it pertains to the retirement of Consultant Specialists, including the Petitioners, and/or that portion of the said decision, which purports to reduce the age of retirement of

medical specialists, including the petitioners and/or the petitioners, from 63 years of age, to 60 years of age and/or to any other reduced age below 63 and which makes the said impugned phased scheme, effective from 17.10.2022;

6. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the decision of the Cabinet of Ministers, as constituted by the 1st, the 18th to the 35th Respondents and the 39th Respondent (in a representative capacity), dated 17/07/2023, produced marked P-41, in so far as it pertains to the retirement of Consultant Specialists, including the Petitioners, prior to attaining 63 years of age;

7. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the Circular dated 21/07/2023 and bearing No. TCS/B/SP/01/2023, issued by the 2nd Respondent, produced marked P-40, so far as it requires all Consultant Specialists, to compulsorily retire upon reaching 60 years of age, after 31-12-2024;

8. Call for and grant and issue a Mandate in the nature of a Writ of Certiorari to quash any and every further Cabinet decision, and/or Order, and/or decision and/or Regulation, and/or Rule, and/or amendment to the Minutes on Pensions, affecting the subject matter of this Application before Your Lordships' Court, inter alia that may require the Petitioners to compulsorily retire upon reaching 60 years of age;

9. Call for and grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the decision of the Cabinet of Ministers, as comprised by the 1st, the 18th to the 35th respondents and the 39th respondent (in a representative capacity), dated 12/09/2022, and/or any one or more of the said members of the cabinet, in so far as it pertains and/or applies to the retirement of Medical Specialists, including the Petitioners and/or the petitioners and/or that portion of the said decision which purports to reduce the age of retirement of medical specialists including the petitioners and/or the petitioners, from 63 years of age to 60 years and/or to any other reduced age;

10. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the purported decisions of the Cabinet of Ministers, i.e., comprising of the 1st, the 18th to 35th respondents and the 39th respondent (in a representative capacity), dated 17/10/2022 and 05/12/2022, produced marked P-21 and P-35, in so far as it pertains to curtailing the compulsory age of retirement of Specialist Medical Officers/Medical Specialists, including the Petitioners, to ages below 63 years, through a purported phased scheme and/or that portion of the said cabinet decision, which purports to reduce the age of retirement of Specialist Medical Officers/Medical Specialists including the petitioners and/or the petitioners, from 63 years of age, to any other reduced age ;

11. Call for and grant and issue a Mandate in the nature of a Writ of Certiorari, quashing any decisions, if any, having being made in pursuance of the aforesaid impugned decision of the Cabinet of Ministers, i.e., 1st , 18th to 35th respondents and the 39th respondent (in a representative capacity), dated 17/10/2022, produced marked P-21 and/or the Decision of the Cabinet of Ministers dated 12/09/2022, and/or the decision dated 05/12/2022, produced marked P-35, in so far as it pertains to curtailing the compulsory age of retirement of Specialist Medical Officers/Medical Specialists, including the Petitioners, to ages below 63 years;

12. Grant and issue a Mandate in the nature of a Writ of Certiorari, quashing the Gazette (Extraordinary) bearing No. 2304/04 dated 05-12-2022, repealing and substituting in its entirety, section 17 of the Minutes on Pensions, produced marked P-36, in so far as it pertains to curtailing/reducing the compulsory age of retirement of Specialist Medical Officers/Medical Specialists, including the Petitioners, to 60 years of age;

13. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all the respondents and/or any one or more of them and/or their successors in office, from taking any further steps, in terms of the decision of aforesaid Cabinet Decisions dated 12.09.2022, 17.10.2022, 05/12/2022 produced marked P-21 and P-35, in so far as they pertain to curtailing the compulsory age of retirement of Specialist Medical Officers/Medical Specialists, including the Petitioners, to ages below 63 years, through a purported phased scheme and/or that portion of the said cabinet decisions, which purports to reduce the age of retirement of Specialist Medical Officers/Medical Specialists including the petitioners and/or the petitioners, from 63 years of age, to any other reduced age;

14. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all the respondents and/or any one or more of them and/or their successors in office, from taking any steps, in terms of the decision of Cabinet Decisions dated 17/07/2023, produced marked P-41, in so far as it pertains to curtailing the compulsory age of retirement of Specialist Medical Officers/Medical Specialists, including the Petitioners, to any other ages below 63 years;

15. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all the respondents and/or any one or more of them and/or their successors in office, from taking any steps, in terms of the Circular dated 21/07/2023 and bearing No. TCS/B/SP/01/2023, issued by the 2nd Respondent, produced marked P-40, so far as it requires all Consultant Specialists to compulsorily retire upon reaching 60 years of age after 31-12-2024;

16. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all or any one or more of the respondents and their servants and agents and successors in office, from reducing the retiring age of Specialist Medical Officers and/or the petitioners, to any age, below 63 years;

17. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all or any one or more of the respondents and their servants and agents and successors in office, from retiring or causing to retire the Petitioners, prior to reaching 63 years, in any manner or form or under any circumstances whatsoever;

18. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining all the respondents and/or any one or more of them and/or their successors in office, from taking any steps that depart from the amendment to the Minute on Pension, as published in the Gazette Extraordinary bearing No.2086/1, dated 27.8.2018, which made the retirement age of Specialist Medical Officers, 63 years;

19. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining these respondents and/or any one or more of them and/or their successors in office, from deeming the stations and/or positions presently held by the Petitioners and/or anyone or more of them, as being vacant, for the purposes of transfers in the annual transfer list, prior to them completing 63 years of age;

20. In the event of any such transfer list being published including the stations and/or posts held by anyone or more of the Petitioners, on the basis of the age of retirement being now reduced to 60 years and/or in terms of the retirement mechanism introduced by the Cabinet Decisions dated 17/10/2022 and/or 05/12/2022 grant and issue a Mandate in the nature of Writ of Prohibition, restraining anyone or more respondents to this Application, from implementing the same, to the extent it relates to the posts/stations held by the Petitioners;

21. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining the Public Service Commission (5th to the 13th Respondents) and/or its Health Service Committee (14th to the 17th Respondents) and/or their successors in office, from engaging in any act of commission, in the form of granting any approvals permitting any acting appointments being made, thereby permitting Senior Registrars to act as "Consultant Specialists";

22. In the event of any acting appointments having being made, and/or any purported approvals being issued by anyone or more of the Respondents to this Application, permitting Senior Registrars to act as Consultant Specialists, call for and grant and issue a Mandate in the nature of a Writ of Certiorari, quashing any such appointments;

23. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining anyone or of the respondents to this Application and/or their successors in office, from making any replacements to the posts and/or stations held by any one or more of the Petitioners, on the basis of the Petitioners having retired from service;

24. In the event of any replacement appointments having being made, on the basis of the petitioners have retired from service, call for grant and issue a Mandate in the nature of a Writ of Certiorari, quashing any such appointments;

25. In the event of any one or more of the Petitioners being made to retire from service, Grant and issue a Writ of Mandamus, restoring the status quo ante and reappointing the Petitioner/Petitioners, in the respective posts/stations he/they held, prior to such purported retirement;

26. Grant and issue a Mandate in the nature of a Writ of Prohibition, restraining the Secretary, Ministry of Health, i.e., the 2nd respondent and/or the Director General of Health Services, i.e., the 3rd Respondent and/or their successors in office, from issuing any Circular and/or directive, retiring and/or causing and/or deeming to retire all Consultant Specialists, including the Petitioners, to retire, prior to attaining 63 years of age;

27. Grant and issue a mandate in nature of a Writ of Prohibition, restraining anyone or more Respondents to this Application and/or their successors in office, and/or any one or more Respondents to this Application, from obstructing or interfering with the duties, functions, and responsibilities of the Petitioners, as "Consultant Specialists" and/or "Medical Specialists" until the petitioners reach the age of 63 years;

Petitioners' application is allowed. No order for cost.

President of the Court of Appeal

M. Ahsan R. Marikar J

I agree.

Judge of the Court of Appeal