

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

LANKA

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

CA (Writ) Application No: 239/2017

Colonel U.R.Abeyratne,
‘Madhu Wasa’ 92/B/1, Pamunugama,
Alubomulla.

PETITIONER

Vs.

1. Lt. Gen. N.U.M.M.W.Senanayake,
Commander of the Sri Lanka Army,
Army Headquarters, Colombo 1.
2. Major General K.A.D.A.Karunasena,
Colonel of the Regiment,
Sri Lanka Light Infantry Regiment,
Panagoda, Homagama.
3. Major General P.W.B.Jayasundera,
Military Secretary,
Army Headquarters, Colombo 3.
4. Kapila Waidyaratne,
Secretary, Ministry of Defence,

Baladaksha Mawatha, Colombo 1.

5. Major General R.V.Udawatte
6. Major General A.P.De Z. Wickremaratne
7. Major General M.H.P.Mihindukulasuriya
8. Major General L.H.S.C.Silva
9. Major General B.H.M.C.Wijesinghe

5th – 9th Respondents of
Sri Lanka Army,
Army Headquarters, Colombo 3.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: J.C.Weliamuna, P.C., with Pasindu Silva for the Petitioner

Ms. Nayomi Kahawita, State Counsel for the Respondents

Written Submissions: Tendered on behalf of the Petitioner on 9th November 2018 and 18th March 2019

Tendered on behalf of the Respondents on 20th February 2019, 19th July 2019 and 27th January 2020

Decided on: 7th February 2020

Arjuna Obeyesekere, J

When this application was taken up for argument on 17th June 2019, the learned President's Counsel for the Petitioner and the learned State Counsel for the Respondents moved that this Court pronounce its judgment on the written submissions that have already been filed of record. Thereafter, on 13th January 2020, this Court invited the learned State Counsel to clarify certain matters arising from the written submissions filed on behalf of the Respondents on 20th February 2019.

The issue that arises for the determination of this Court is whether the decision of the Sri Lanka Army not to promote the Petitioner to the rank of Brigadier, and to retire him in his present rank of Colonel, is illegal and/or unreasonable.

The facts of this application very briefly are as follows.

The Petitioner had been enlisted to the Regular Force of the Sri Lanka Army as an Officer Cadet on 27th October 1986. Subsequent to the initial training, the Petitioner had been appointed as a Second Lieutenant on 23rd July 1987, and had thereafter been promoted as a Lieutenant, Captain, Major, Lieutenant Colonel and a Temporary Colonel.

Having been appointed as a Temporary Colonel, the Petitioner was confirmed in the rank of Colonel with effect from 27th October 2011, as evidenced by the letter dated 28th March 2014 issued by the Military Secretary, which has been annexed to the petition marked 'P1'.

Upon completion of three years in the rank of Colonel – i.e. on 27th October 2014 - the Petitioner was eligible to be considered for promotion to the rank of Brigadier. It is admitted between the parties that the maximum period that the Petitioner could serve in the rank of Colonel was five years. Thus, if the Petitioner was not promoted to the rank of Brigadier during that five year period, and unless the Petitioner was given an extension of service in the rank of Colonel, the Petitioner was required to retire from the Sri Lanka Army on 26th October 2016.

The Petitioner states that promotion to the rank of Brigadier is carried out by an Army Selection Board, pursuant to recommendations made to the Military Secretary by the (a) Regimental Headquarters, (b) the Serving Duty Station, and (c) the Director of Training. It is noted that the Respondents have not disputed the fact that the above procedure outlined by the Petitioner is in fact the procedure that is followed when promotion of Colonel to the rank of Brigadier are carried out.

The Petitioner states that in spite of being recommended for promotion by the Head of the Serving Duty Station,¹ and in spite of the Annual Confidential Reports being in his favour,² he was not promoted to the rank of Temporary Brigadier in 2014³ or in 2015, prompting the Petitioner to address to the 1st Respondent, a Redress for Grievance dated 9th June 2015, annexed to the petition marked 'P9(a)'. The Petitioner claims that pursuant to 'P9(a)', he met the then Commander of the Sri Lanka Army on 13th August 2015, as evidenced by an internal message marked 'P9(b)', *who had assured him* that he would be

¹ Vide documents annexed to the petition marked 'P5(b)', 'P6(b)', 'P7(b)' and 'P8(b)'.

² Vide documents annexed to the petition marked 'P4(a)' – 'P4(i)'.

³ The Petitioner was considered for promotion twice in 2014 – vide Reports of the Army Selection Boards marked 'R22' and 'R23'.

granted an extension in service and promoted to the rank of Brigadier. The Respondents have however denied that such an assurance was extended to the Petitioner.

The Petitioner states that he received letter dated 15th February 2016 annexed to the petition marked 'P10' from the Ministry of Defence informing him as follows:

"According to the report of the Commander of the Army you have been degraded due to your unlawful actions. Most importantly, during the humanitarian operation you were detected by Military Police, transporting a large quantity of betel and arecanuts unlawfully removed from private lands located in Wanni. In addition your poor disciplinary record in your service became another reason for the degradation of the officer.

However, it was decided after scrutinizing all the details that your retirement, reaching the maximum in the rank of Colonel, is acceptable. Moreover, hereby inform that there is no merit in the appeal made by you as the decision was taken in the best interest of the Army."

Several issues arise from the letter marked 'P10'. The first is that even though the Secretary, Ministry of Defence has been named as a Respondent to this application, and 'P10' is a document that is sought to be quashed, a copy of the report of the Commander of the Sri Lanka Army referred to therein has not been filed of record, nor has any material been adduced to explain and/or support the matters set out therein. The second issue is that the Respondents have not placed before this Court, any material relating to an incident involving the transport of betel and arecanuts. If this incident is the same incident that is

referred to in 'P12' (which incident would be discussed later), then, this Court must observe that the Petitioner was exonerated from such allegation. Be that as it may, this Court must observe that the Petitioner does not appear to have disputed 'P10', until this application was filed.

The Petitioner was due to reach the maximum period in the rank of Colonel on 26th October 2016. However, as he had not been promoted to the rank of Brigadier by then, and therefore would have to retire on 26th October 2016, the Petitioner had sought an extension of service of one year by his letter dated 19th April 2016, marked 'R7'.

Regulation 3(2)(b) of the Army Pensions and Gratuities Code, 1981, marked 'R3' provides as follows: "*The Secretary in consultation with the Commander of the Army, may retain the services of an officer, other than a Short Service Filed Commissioned Officer, in any rank beyond the period specified in that rank in paragraph (1)(b)⁴ or beyond the age specified in paragraph (1)(c), if in the opinion of the President, it is essential in the interest of the Army to do so*".

The request 'R7' had been **recommended** by the then Commander of the Sri Lanka Army,⁵ and had been approved by H.E the President, as conveyed by the Secretary, Ministry of Defence, by his letter dated 4th August 2016, marked 'R7A'. It is safe for this Court to assume that when recommending the extension of service, the Commander did take into consideration the fact that granting an extension of service to the Petitioner was in the interest of the Army, and that H.E. the President has acted on the said recommendation of

⁴ The category of Officers includes Colonel and Brigadier.

⁵ Vide page 38 of the set of documents annexed to the Statement of Objections.

the Commander, in forming the opinion that it is essential in the interest of the Army to grant the said extension to the Petitioner.⁶

The effect of 'R7A' was that the Petitioner was permitted to serve the Sri Lanka Army until 26th October 2017 in the rank of Colonel. As noted earlier, unless the Petitioner was promoted to the rank of Temporary Brigadier or granted a further extension, the Petitioner would have automatically retired with effect from 27th October 2017, while holding the rank of Colonel.

The Petitioner had been considered for promotion to the rank of Brigadier by an Army Selection Board that assembled on 30th May 2017. Their recommendation, marked 'R19', reads as follows:

*"This Senior Infantry Officer is currently performing duties as Colonei (GS), OCDS. The Board observed that the Officer possesses a **poor disciplinary record** and that his **past performances have been mediocre**. Therefore, the Board does not recommend the Officer to be promoted to the rank of Temporary Brigadier. The Senior Officer has completed maximum permissible period in the rank of Colonel on 25 Sep 2016 and his present service extension will complete on 26th Sep 2017. The Board was of the considered opinion that the Senior Officer to be retired with effect from 26 Sept 2017 on completion of maximum permissible period in the rank of Colonel with extensions. Further having considered that the Senior Officer has commanded an Infantry Brigade during the Wanni Humanitarian Operations and an Infantry Brigade for a short period, the Board*

⁶ This Court must observe that by the time an extension of service was recommended, the Petitioner had been considered for promotion to the rank of Brigadier on three occasions – vide 'R21', 'R22' and 'R23'.

recommends the Senior Officer to be promoted to the rank of Brigadier one day prior to his retirement.”

Pursuant to 'R19' the Petitioner was informed by letter dated 6th July 2017, marked 'P11' that he would be retired from the Sri Lanka Army with effect from 27th October 2017, and to submit his documents by 31st July 2017 to process his retirement.

Aggrieved by 'P11', the Petitioner filed this application, seeking the following relief:

- a) A Writ of Certiorari to quash the decision contained in the letter dated 6th July 2017, annexed to the petition marked 'P11', to retire the Petitioner from the Sri Lanka Army with effect from 27th October 2017;
- b) A Writ of Certiorari to quash the decision contained in the letter dated 15th February 2016, annexed to the petition marked 'P10' by which the Petitioner's appeal seeking to be promoted to the rank of Brigadier was rejected by the Secretary, Ministry of Defence;
- c) A Writ of Certiorari to quash the decision of the Sri Lanka Army, if any, not to promote the Petitioner to the rank of Brigadier;⁷
- d) A Writ of Mandamus directing the Respondents to confirm the Petitioner in the rank of Brigadier with effect from 27th October 2014;

⁷ 'R19' is the decision of the Army Selection Board that the Petitioner is not suitable to be promoted to the rank of Temporary Brigadier.

- e) A Writ of Prohibition preventing the Respondents from retiring the Petitioner without granting the Petitioner his promotion to the rank of Brigadier with effect from 27th October 2014, and serving his full term.

The complaint of the Petitioner to this Court is that the decision to refuse his promotion to the rank of Brigadier and therefore the decision to retire him from 27th October 2017 is arbitrary and unreasonable. The basis for this complaint is three fold. The first is that the Petitioner has not been afforded a fair hearing in that there has not been a proper consideration of all material pertaining to his disciplinary record. The second is that the discretion vested in the 1st Respondent by 'R25' has not been exercised reasonably, for the reason, once again, that there has not been a proper consideration of the relevant material. The third is that there is no legal basis to deprive him of his promotion to the rank of Brigadier, especially as he had been promoted to the rank of Colonel based on identical criteria, in March 2014. The common thread running through all three complaints is that the Army Selection Board failed to properly consider the disciplinary record of the Petitioner.

In considering the above complaints of the Petitioner, the starting point would be Regulation 12 of the Army Officers Service Regulations (Regular Force) 1992, published in Gazette Extraordinary No. 780/7 dated 17th August 1993, produced by the Respondents marked 'R25', which contain provisions *inter alia* with regard to the promotion of Officers to the rank of Colonel and above.

Regulation 12 reads as follows:

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

(2) In the case of every such selection –

- (a) The Officers past record of service; and*
- (b) The question whether his promotion is clearly in the best interest of the Army
shall be considered."*

Thus, it is clear to this Court that appointment to the rank of Colonel or Brigadier is not as of right, but is at the discretion of the 1st Respondent, the Commander of the Sri Lanka Army. The discretion vested in the 1st Respondent, needless to state, shall be exercised reasonably, taking into consideration the matters set out in Regulation 12 of 'R25', which can be summarised as follows.

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

This Court must state at the outset, that the decision to promote the Petitioner to the rank of Brigadier must be taken by the Commander of the Sri Lanka Army, and/or by the Commander, on the recommendation of the Board that is appointed to consider the promotion of the Petitioner, taking into consideration the above three matters set out in Regulation 12 of 'R25'. This Court will not interfere with the finding of the Commander that the Petitioner is not qualified for promotion to the rank of Brigadier or that his promotion is not in the best interest of the Army, except where this Court is satisfied (a) that the discretion vested in the 1st Respondent has been exercised unreasonably or wrongfully; and/or (b) the decision to deny the Petitioner his promotion is arbitrary, irrational or unreasonable; and/or (c) that there has not been a proper consideration of the material pertaining to the Petitioner. In other words, as long as due process has been followed, the Petitioner has been afforded a fair hearing, the decision of the 1st Respondent is reasonable, and, importantly, material to substantiate the said decision has been presented to this Court, this Court shall not interfere with the decision of the 1st Respondent.

In this regard, it would be well to remember the following passage of Justice Sripavan (as he then was) in Wikramaratne vs Commander of the Army and others⁸, where he stated as follows:

"in service matters, the 1st Respondent should be left with a free hand to make decisions with regard to the internal administration of the Army in the interest of efficiency, discipline, exigencies of service etc. The Court cannot interfere with the appointment or promotion unless the first

⁸ CA (Writ) Application No. 800/2006 CA Minutes of 07th January 2008.

respondent has acted unlawfully, arbitrarily, or guided by ulterior considerations which are discriminatory or unfair."

It was the position of the learned President's Counsel for the Petitioner that even though the Petitioner had been subjected to several warnings, the Petitioner overall had a good disciplinary record, and therefore the finding that the Petitioner had a poor disciplinary record is factually incorrect. The above submission was supported on three grounds.

The first is that the Confidential Reports on the Petitioner which are required, by Regulation 34 of 'R25', to be furnished annually to the Secretary, Ministry of Defence, are in his favour. The Petitioner has annexed to the petition marked 'P4(a)' – 'P4(i)', the Annual Confidential Reports relating to him for the period 1st April 2006 to 31st July 2016. This Court has examined the Annual Confidential Reports on the Petitioner after he was confirmed in the rank of Colonel in March 2014 and observes that in the Annual Confidential Report for the period 1st August 2014 – 31st July 2015 – marked 'P4(h)', the Initiating Officer, who was a Brigadier by rank, had recommended as follows:

"Colonel Abeyratne is a physically fit and mentally robust officer who has been actively and devotedly performing his duties as the Colonel GS – Security Forces Headquarters during the period under review. Further, he has been a well disciplined and hardworking officer who could be entrusted with any given responsibility and work with a sense of dedication. He will be a successful officer in future beyond doubt."

The reviewing Officer, a Major General by rank, had agreed with the above. While the Petitioner has received an overall grading of 8, he had been recommended both by the Initiating Officer as well as by the Reviewing Officer for promotion. A similar recommendation has been made in the Annual Confidential Report for the period 1st August 2015 – 31st July 2016, marked 'P4(i)', where the Petitioner has received an overall grading of 8.6.

The second ground urged by the learned President's Counsel for the Petitioner was that the Head of the duty station that the Petitioner was attached to, in response to requests made by the Military Secretary calling for recommendations to appoint the Petitioner to the rank of Temporary Brigadier, had recommended the promotion of the Petitioner to the rank of Temporary Brigadier on four occasions. Details of such recommendations are set out below.

Document	Date	Officer making the recommendation	Marks (out of 90)	Recommended for promotion
P5(b)	2 nd May 2014	Brigadier A.A.Kodippily	89	Yes
P6(b)	18 th January 2016	Major General A.K.S.Perera	77	Yes
P7(b) ⁹	August 2016	Major General L.N.Wickremasuriya	76	Yes
P8(b)	8 th May 2017	Major General M.K.D.Perera	83	Yes

⁹ The Respondents have denied the authenticity of 'P7(b)' as it is not dated nor signed by the Officer issuing it. However, the Respondents have not attached any document issued by the Officer who is said to have issued 'P7(b)' explaining his position on 'P7(b)'.

The third ground was that the criteria to be promoted to Colonel as well as Brigadier are identical, and that as at 28th March 2014, which is the date on which the Sri Lanka Army decided to confirm the Petitioner in the rank of Colonel, the Sri Lanka Army was satisfied that the Petitioner:

- (a) had satisfied the criteria laid down in Regulation 12 of 'R25';
- (b) was qualified to be confirmed in the rank of Colonel; and
- (c) that his confirmation was in the best interest of the Sri Lanka Army.

In addition to the above, this Court must observe two other matters. The first is that the Petitioner has been awarded medals such as *Rana Wickrama Padakkama*¹⁰ and the *Rana Sura Padakkama*¹¹ for gallantry and bravery, during the period 2013 - 2016. While the basis of making such an award has not been explained, this Court can only conclude that such an award will not be issued to an Officer whose services are *mediocre*. The second is that the Commander, Sri Lanka Army recommended that an extension of service be granted to the Petitioner only because he was satisfied that such an extension was in the interest of the Army.

The principle submission of the learned State Counsel was that the Petitioner's adverse disciplinary record far outweighs the positive recommendations received by the Petitioner and that in these circumstances, it was impossible for the Petitioner to be promoted to the rank of Brigadier.

¹⁰ Vide document marked 'P3(d)'.

¹¹ Vide document marked 'P3(e)'.

It would thus be appropriate for this Court to consider the *adverse disciplinary record* of the Petitioner, as pleaded by the Respondents, keeping in mind the fact that the Petitioner was in fact confirmed in the rank of Colonel in March 2014, based on the same criteria that are applicable when considering the promotion to the rank of Brigadier.

The first incident referred to by the Respondents is where the Petitioner had delayed handing over monies and valuables collected from injured soldiers. Although no warning had been issued, this incident, which had occurred in August 1991, had been placed 'on record for any further action'.¹²

The second incident is a complaint that the Petitioner has taken 100 days of medical leave during a period of 220 days, for an injury which did not require hospitalisation.¹³ The Respondents have not disclosed the steps that were taken pursuant to the said complaint, which had occurred in 1991.

The third incident is where the Petitioner had failed to report for a meeting scheduled for 19th September 1996 with the Commander of the Sri Lanka Army. The Petitioner had pleaded guilty to the said charge and he had been issued a severe warning.¹⁴

The fourth incident is where a Court of Inquiry had been convened against the Petitioner in January 2002 for issuing a temporary driving license to a soldier

¹² Vide document marked 'R14'.

¹³ Vide document marked 'R15'.

¹⁴ Vide documents marked 'R16' and 'R17'.

who did not possess a valid driving license to drive an Army vehicle which resulted in a fatal accident. The Petitioner had been issued a warning.¹⁵

The fifth incident, which this Court has previously assumed is the same incident referred to in 'P10', is where the Petitioner, while functioning as the Brigade Commander of the 652 Brigade, had been detected by the Military Police on 5th May 2009 while transporting items said to have belonged to internally displaced persons. Pursuant to the submission of the report of the Military Police,¹⁶ the Security Forces Commander, Kilinochchi, by letter dated 25th August 2009, had informed the Commander, Sri Lanka Army as follows:¹⁷

"in view of the observations at Ref: 'A' (i.e. Report of the Military Police dated 23rd May 2009), I am of the opinion that Lt Col UR Abeyratne SLLI is a bad example to his subordinates. He has conducted himself unbecoming (of) an officer and a gentleman. His honesty and integrity is in question. He is unable to continue his command under these circumstances.

In order to maintain high standard of military discipline, I recommend that this brigade commander be relieved of his duties, pending further investigations for disciplinary action."

Pursuant to the above recommendation, the Petitioner had been *removed* from his appointment of Officer Commanding 652 Brigade, as opposed to being *relieved of such appointment*.¹⁸ According to the opinion of the Commander, Sri Lanka Army marked 'P12', it had transpired at the Court of

¹⁵ Vide documents marked 'R18' and 'R18(a)'.

¹⁶ Vide document marked 'R11'.

¹⁷ Vide document marked 'R12'.

¹⁸ Vide document marked 'R12(a)'.

Inquiry that was held thereafter to inquire into the said incident, that the Petitioner had not taken any items belonging to internally displaced persons, but that he should be issued with a warning¹⁹ as he had in his possession a quantity of fruits over and above what is required for personal consumption. Thus, the Petitioner was in fact *exonerated* from the incident that resulted in the removal of the Petitioner from his position as Officer Commanding 652 Brigade, but had been issued a warning, for the reasons set out in 'P12'.

The sixth incident referred to by the Respondents is a letter dated 5th November 2010 by the Security Forces Commander (East) that it had been reported that the Petitioner is not cooperating with the Brigade Commanders, and therefore objecting to the appointment of the Petitioner as 'Officiating Colonel General Staff of HQ 23 Division'.²⁰ However, according to the Annual Confidential Report for this period marked 'P4(d)', the Initiating Officer had noted that the Petitioner was '*a disciplined officer who strived hard to achieve good results. He coordinated rehabilitation of over 3000 ex-combatants in difficult conditions. He was successful in obtaining results.*' The Respondents have not disclosed the steps that were taken pursuant to the said complaint, and hence, this Court is of the view that it would not be reasonable to consider the contents of the said letter against the Petitioner.

This Court will now consider the incidents that have been referred to by the Respondents which have occurred after the Petitioner was promoted as a Temporary Colonel.

¹⁹ පේන්ත්ති ගුද හමුදා තිලකරියකු ආදර්ශනත් හැසිරීමක් පවත්වාගෙන යාමේ වැදගත්කම පහදු දෙමින් අවවාද කළ යුතු බව

²⁰ Vide document marked 'R13'.

The first such incident arose pursuant to an undated petition sent by soldiers attached to the 23rd Brigade at Punany against the Petitioner.²¹ The said complaint had been investigated by the Military Police who had not found any material to substantiate the complaints made against the Petitioner, except an incident where the Petitioner is said to have slapped a soldier by the name of Hettiarachchi.²² A Court of Inquiry had subsequently been conducted to inquire into the incident of assault. According to the Opinion of the Commander, Sri Lanka Army dated 12th June 2013, annexed to the petition marked 'P14', the Petitioner had been exonerated of the charge of assault by the Court of Inquiry and hence, it would not be reasonable to hold this incident against the Petitioner.

The second incident relates to a complaint made in February 2015 after the Petitioner had been confirmed in the rank of Colonel. The complaint was that the Petitioner had obtained the services of a cook to which he was not entitled to, and that food rations have been removed by the said cook, apparently for the Petitioner. The investigation conducted by the Military Police had confirmed that the Petitioner had in fact made use of the services of a cook but no evidence had been uncovered relating to the latter charge.²³ The Petitioner had subsequently been issued a warning in this regard.²⁴

The Respondents have also produced marked 'R2' a report dated 30th April 2014 issued by the 2nd Respondent, who was the head of the Petitioner's regiment, three years prior to 'R19'. In 'R2' the Petitioner's promotion to the

²¹ Vide document marked 'R8'.

²² Vide documents marked 'R9'.

²³ Vide document marked 'R10'.

²⁴ Vide document marked 'P15(b)' - පේන්සි නිලධාරී සම්බන්ධයෙන් තුළ ඇති යුතු හමුවා පොලියි විමර්ශන රැපෑර්තුලති දක්වා ඇති කරණු සම්බන්ධයෙන් තත් පේන්සි නිලධාරී මා හමුවට පැමෙන පසු අවවාද කළ බව

rank of Brigadier had not been recommended '*due to poor past disciplinary records*'. It is significant to note that 'R2' does not disclose the past disciplinary record of the Petitioner that prompted the 2nd Respondent to refrain from recommending the promotion of the Petitioner, nor has an affidavit of the 2nd Respondent been produced to this Court explaining the basis for 'R2'. Such an explanation from the 2nd Respondent would have assisted this Court, for two reasons. The first is that after 'R2' was issued, the 2nd Respondent had sat as a member of three Army Selection Boards that rejected the promotion of the Petitioner to the rank of Brigadier.²⁵ The second reason is that the 2nd Respondent had been a member of the Army Selection Board that recommended the confirmation of the Petitioner in the rank of Colonel, less than three months prior to issuing 'R2' – vide report of the Army Selection Board marked 'R24'. It is pertinent to note that in 'R24', the Board had specifically discussed the incident that led to the Petitioner being removed from Officer Commanding 652 Brigade, and made the following observations:

"The Board observed that officer has been performing well as Colonel (GS) of a Division HQ since 3 November 2010. The Officer has been recommended by his superiors for confirmation in the rank of Colonel. However his disciplinary records depicts that the officer was removed from the command appointment due to disciplinary reasons on 5 Sep 2009. Thereafter officer had been employed on staff appointments at fmns HQs. The Board having reviewed the conduct and behaviour of the officer did not observe any negative remarks after that incident. Therefore the Board recommended the officer to be confirmed in the rank of Colonel. However the Board is of the opinion that officer's past disciplinary

²⁵ Vide Army Selection Boards that assembled on 25th June 2014 ('R23'), 12th November 2014 ('R22') and 6th September 2016 ('R20').

records should be critically analysed when considering for promotion and higher appointments in the future.”

Two important matters arise from 'R24'. The first is that the Board had not been aware that the Petitioner had in fact been exonerated of the initial complaint that led to his removal as Officer Commanding 652 Brigade, with only a warning being issued. The second is that the Army Selection Board of which the 2nd Respondent was also a member found that after September 2009, and as at 19th February 2014 which is the date of 'R24', there have not been any negative remarks on the Petitioner's conduct and behavior.

It is in these circumstances that this Court must consider the above submissions of the learned President's Counsel for the Petitioner. The thrust of the Petitioner's argument is that there has not been a proper consideration of all relevant material pertaining to his disciplinary record. The failure to consider relevant material spreads its tentacles across all grounds of judicial review. Where statutes or subsidiary legislation contain, in clear and unambiguous terms, what should be considered relevant, a decision which falls outside those "four corners of the law" may be caught under the more straightforward grounds of illegality or procedural impropriety. However, statutes do not really have "corners" in the neat way postulated by theory²⁶ and the decision maker would be required to take into account a range of relevant material which is not expressly specified.

In such instances, Courts may be more inclined to assess such decisions on the grounds of irrationality or proportionality, whereby Courts can still intervene

²⁶P.P. Craig, *Administrative Law* [5th Edition, 2003] Sweet and Maxwell, page 633.

even where the decision is within the purported “four corners of the law” but do not satisfy the threshold of reasonableness due to a failure to consider relevant material.

If a decision has been influenced by considerations which either expressly or implicitly cannot lawfully be taken into account, a Court may hold that such discretionary power has not been exercised validly. In doing so, Courts can consider to what degree the decision maker has been influenced by such considerations and, in order to determine the degree of influence, Courts may be guided by the reasons provided by the decision maker. The reasons provided for a decision would therefore allow Courts to effectively scrutinize the decision and detect what factors have influenced the decision maker. The absence of reasons would also support an argument that the decision maker has not afforded a fair hearing, which requires all relevant material to be taken into consideration prior to arriving at a decision. In De Smith's Judicial Review²⁷ it is observed that '*Irrationality may also sometimes be inferred from the absence of reasons.*'²⁸ When reasons are required, either by statute or by the growing common law requirements, or where they are provided, even though not strictly required, those reasons must be both "adequate and intelligible". They must therefore both rationally relate to the evidence in the case²⁹, and be comprehensible in themselves.'

Thus, it is evident that the principle that a decision maker must take into consideration all relevant material and should not take into consideration

²⁷Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell, page 605.

²⁸Padfield v. Minister of Agriculture Fisheries and Food [1968] AC 997 at 1032.

²⁹ Re Poyser and Mills' Arbitration [1964] 2 QB 467 at 478.

irrelevant material, runs across all grounds of judicial review in varying degrees.

This Court shall now consider whether the failure of the Army Selection Board to consider all relevant material resulted in a decision which is unreasonable. In doing so, this Court shall bear in mind the following two passages from Administrative Law by Wade and Forsyth:³⁰

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority.....

Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the courts function to look further into its merits."

As Lord Hailsham L.C. has observed, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.³¹ Similarly Lord Diplock has observed that, '*the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred*'.³² As such, the test to be applied is not what a court of law thinks or considers is reasonable nor what the proverbial Man on the Clapham Omnibus would consider reasonable.

³⁰ H.W.R. Wade, C.F. Forsyth, *Administrative Law* [11th Edition, 2014] Oxford University Press, page 302.

³¹ *Re W (an infant)* [1971] AC 682 at 700.

³² *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* [1977] AC 1014 at 1064.

Instead, it is settled law that in considering the validity of the exercise of discretionary power, the Court will consider whether the power has been properly used, or abused. In other words, the question for the Court is whether an authority has abused its discretion. The test routinely applied for this purpose is the test set out in Associated Provincial Picture Houses, Limited v. Wednesbury Corporation.³³ Accordingly, the criteria for review to be applied would be whether the person vested with the discretion:

- a. Misdirected himself;
- b. Failed to take relevant considerations into account;
- c. Failed to exclude irrelevant considerations.

Subsequently, in Council of Civil Service Unions v Minister for the Civil Service³⁴ [the GCHQ Case], Lord Diplock classified the grounds on which administrative action is subject to judicial control under three heads, namely, 'illegality', 'irrationality', and 'procedural impropriety'.³⁵

"Unreasonableness" in the *Wednesbury* sense³⁶, or "irrationality" as Lord Diplock redefined in the GCHQ case³⁷, were traditionally presented as unusual grounds of judicial review which recognised that a decision may be within the so called 'four corners of the law', but may still be unacceptable due to the existence of something overwhelmingly "unreasonable".

³³ [1948] 1 KB 223 at 229.

³⁴ [1985] AC 374 at 410-411.

³⁵ The test laid down by Diplock, J has been applied in Sri Lanka – see Sudhakaran v. Bharathi and Others [1987] 2 Sri LR 243.

³⁶ Supra.

³⁷ Supra.

Lord Greene in *Wednesbury*³⁸ defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*' The famous example of the red-haired teacher who was dismissed due to the colour of her hair, illustrates the high threshold for "unreasonableness" that was expected to justify judicial intervention on this ground. Subsequently, in the GCHQ Case³⁹, Lord Diplock 'redefined' *Wednesbury* unreasonableness as "irrationality" and confirmed that irrationality '*by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review*', whereby the need to justify judicial review on an inferred though unidentifiable mistake of law by the decision-maker, as required by the traditional *ultra vires* doctrine, was no longer necessary. However, even the ground of irrationality, being intrinsically linked to *Wednesbury unreasonableness*, only applied '*to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*', thus keeping the threshold for judicial intervention still very high. Similar sentiments have been expressed by Lord Scarman who referred to a need to demonstrate that the guidance of the Secretary of State in that case '*were so absurd that he must have taken leave of his senses*'⁴⁰ in order to justify judicial intervention.

A common feature in the abovementioned cases is that for Courts to intervene, the decision of the public authority in question must not just be unreasonable, but manifestly unreasonable. Lord Bingham has noted that this threshold for irrationality is "notoriously high" and that a claimant making a

³⁸ Supra

³⁹ Supra; at page 410-411.

⁴⁰ *Nottinghamshire County Council v. Secretary of State for the Environment* [1986] AC 240 at 247.

claim under that head has a “mountain to climb”.⁴¹ This reaffirms the limited role that Courts can play in exercising judicial review where Courts must be mindful not to substitute its own decision for that of the public authority who had been conferred with the power of making that decision, because judges have no expertise in the subject matter of the decision they are reviewing. In the words of Lord Bingham, ‘*they (judges) are auditors of legality; no more, but no less.*’⁴²

There is however, growing precedence to show that English Courts have attempted to broaden the scope of “*Wednesbury unreasonableness*” over the years, particularly in light of the Human Rights Act 1998 which incorporated Convention⁴³ rights into English domestic law. For instance, Lord Cooke in the case of R v Secretary of State for the Home Department, ex parte Daly⁴⁴ opined that:

“And I think that the day will come when it will more widely be recognised that the Wednesbury case, was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very few extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in

⁴¹ R v. Lord Chancellor Ex parte Maxwell [1997] 1 WLR 104 at 109; referred to in De Smith’s Judicial Review, supra, page 599.

⁴² Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.

⁴³ European Convention on Human Rights.

⁴⁴ [2001] 3 All ER 433 at page 447.

any administrative field merely by a finding that the decision under review is not capricious or absurd.”

In Regina (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence⁴⁵ it was suggested by Dyson LJ that there was difficulty in seeing what justification there is now for retaining the *Wednesbury* test. He however acknowledged that he could not perform its “burial rites” without the sanction of the House of Lords which had acknowledged its continuing existence in prior decisions.

The default position, as noted in De Smith’s Judicial Review,⁴⁶ “is still, at the time of writing, that of the *Wednesbury* formulation, although it has been reformulated to a standard that requires the decision maker to act within the range of reasonable responses.”⁴⁷

The test for “*Wednesbury unreasonableness*” or “irrationality” contains controls of purpose and relevancy which are used to decide what end the decision maker should ultimately seek to achieve and what considerations must be taken into account in reaching the decision.⁴⁸ In determining relevancy, Courts would need to take cognizance of the context in which such decisions are taken. When a decision maker is placed in a position to make a decision, that decision maker himself would place varying degrees of scrutiny on depending on the context. And when such a decision is brought under review, Courts should adopt similar standards of scrutiny to such decisions.

⁴⁵ [2003] QB 1397 at page 1413.

⁴⁶ Supra, page 648.

⁴⁷ In *Boddington v. British Transport Police* [[1998] UKHL 13] it was held that it is sufficient for a decision to be ‘within the range of reasonable decisions open to a decision-maker.’

⁴⁸ P.P.Craig, supra; page 633.

Therefore, while being mindful not to overstep their legitimate bounds, Courts can ensure that decisions are viewed in a holistic manner rather than adopting a general approach.

The varying application of the “*Wednesbury principles*” or “irrationality” demonstrates that the Courts are more concerned with ensuring that a correct decision is taken with due regard to the context. The *Wednesbury* standard is thus not ‘monolithic’⁴⁹. Lord Mance JSC in the case of Kennedy v Charity Commission (Secretary of State for Justice and others intervening)⁵⁰ stated that:

“The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends on the context.”

The case of Secretary of State for Education and Science v Metropolitan Borough Council of Tameside⁵¹ decided prior to the GCHQ case provides for what can be considered a more balanced test:

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

⁴⁹ Wade and Forsyth, *supra*; page 304.

⁵⁰ [2015] 1 AC 455 at page 506.

⁵¹ [1977] AC 1014.

The test used in Tameside was cited with approval in the case of R v Chief Constable of Sussex (Ex parte International Trader's Ferry Ltd)⁵² (ITF Case) where it was held:

"Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene M.R. twice uses (at 230 and 234) the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it.' Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council the precise meaning of 'unreasonably' in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock⁵³ as "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt." These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers."

⁵² [1999] 1 All ER 129 at page 157..

⁵³ Supra; at page 1064

The above reasoning can thus be summarized as follows:

- a) The threshold for judicial intervention set by *Wednesbury* is extremely high. The threshold in GCHQ, being intrinsically linked to *Wednesbury* has a similarly high threshold;
- b) The test laid down in *Tameside* appears to be more realistic, and balanced, as it acknowledges conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, as being unreasonable;
- c) It is the duty of Courts to consider whether a decision is reasonable in the light of the facts and circumstances of each case.

This Court is of the view that Courts must take a more realistic approach in fulfilling its function of probing the quality of decisions and ensuring that assertions made by public authorities are properly substantiated and justified.

This Court shall now consider the decision of the Army Selection Board marked 'R19' in the light of the above judicial reasoning in order to determine if the said decision had been arrived at, after a consideration of all relevant material.

Even though the Army Selection Board had arrived at the conclusion that the Petitioner had a poor disciplinary record and that his past performances have been mediocre, 'R19' does not contain reasons that prompted the Board to arrive at the said conclusion. In the absence of any further elaboration in the Statement of Objections filed before this Court, it is clear that the Board has not considered each of the incidents referred to earlier, nor have they

considered the outcome of each incident. In this regard, this Court must state that had the Board considered each incident carefully, the following would have been evident:

- (a) The six incidents referred to above have taken place prior to the Petitioner being appointed as a Temporary Colonel in 2011;
- (b) None of the said incidents led to the Petitioner being summoned before a Summary Trial or a Court Martial, and the Petitioner has not been subjected to any punishment as provided for in Section 133 of the Army Act;⁵⁴
- (c) The maximum sanction imposed on the Petitioner has only been a severe warning.

The Board has not considered the fact that the Petitioner had been appointed as a Temporary Colonel in 2011, in spite of the warnings issued to the Petitioner, and that three years after being appointed as a Temporary Colonel, in March 2014, the Petitioner had been confirmed in the rank of Colonel. As noted earlier, what is important here is that the criteria that should be followed when appointing an Officer to the rank of Colonel is identical to the criteria that should be followed when an appointment is made to the rank of Brigadier. While this Court will not subscribe to the view that a fresh appraisal of all previous incidents should not be carried out when considering the promotion of the Petitioner to the rank of Brigadier, given the fact that the criteria is identical, this Court is of the view that the Board ought to have carried out a critical appraisal of the Petitioner's disciplinary record, prior to

⁵⁴ This Court must note that the Petitioner did plead guilty to the charge of failing to meet the Commander, thus negating the need to hold a Summary Trial or a Court Martial.

arriving at any conclusion. Unfortunately, the Respondents have not placed any material before this Court to demonstrate that the Board engaged in such an exercise.

In the above background, this Court is of the view that the Respondents were required to explain to this Court:

- (a) Why the Petitioner was confirmed in the rank of Colonel, in spite of the above incidents, if the Sri Lanka Army is now of the view that the said incidents are a reflection of a poor disciplinary record;
- (b) How the said incidents would affect the Petitioner when he is being considered for promotion to the rank of Brigadier.

Regretfully, no such explanation has been given to this Court, either in the Statement of Objections or in the affidavit of the 1st Respondent. The failure to provide such an explanation, at least to this Court, gives credence to the allegation of the Petitioner that there has not been a proper consideration of the material pertaining to the Petitioner.

As observed earlier, it is mandatory that Annual Confidential Reports be submitted on each Officer. The fact that each of the said Reports were in favour of the Petitioner does not seem to have been considered by the Board. What is more is the fact that the Petitioner's conduct has been considered to be mediocre, whereas such an allegation runs contrary to the contents of the

said Confidential Reports, as well as the awarding of several medals such as the *Rana Wickrama Padakkama* in 2016⁵⁵ and the *Rana Sura Padakkama* in 2013.⁵⁶

Furthermore, none of the reports submitted by the head of each Station that the Petitioner was attached to – namely documents marked 'P5(b)', 'P6(b)', 'P7(b)' and 'P8(b)' – appear to have been considered by the Board. If such reports were considered, such fact would have been reflected in the decision 'R19'. Therefore, the fact that 'R19' is silent in this regard, and the fact that an affidavit of an officer who served as a member of the Board has not been submitted, even though several members of the Board have been cited as Respondents, can only lead this Court to arrive at the conclusion that there has not been a proper consideration of the material pertaining to the Petitioner.

Last but not least, a Board that considered the Petitioner as having a poor disciplinary record and mediocre, nonetheless took the view that the Petitioner can be promoted to the rank of Brigadier, one day prior to his retirement.

When this Court considers all of the above facts in the light of the decision in 'R19', it is clear to this Court that there has not been a proper consideration of all relevant material. It is therefore the view of this Court that a decision reached in such circumstances is not only a decision which *no sensible authority acting with due appreciation of its responsibilities would have decided to adopt* but is also a decision which is *so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at*. This Court is

⁵⁵ Supra.

⁵⁶ Supra. The Petitioner in fact states that he was awarded the *Rana Sura Padakkama* on three occasions.

therefore of the view that 'P11' which is founded upon the decision of the Army Selection Board, and the decision of the Board 'R19' are liable to be quashed by Writs of Certiorari. This Court is also of the view that 'P10', even though it pre-dates 'P11' and 'R19', cannot be allowed to stand.

In the above circumstances, this Court issues Writs of Certiorari to quash the decisions contained in 'P10', 'P11' and 'R19'. The 1st Respondent shall, within two weeks from the date of this judgment, direct the relevant Army Selection Board to consider the promotion of the Petitioner to the rank of Brigadier in accordance with the criteria set out in Regulation 12 of 'R25', and arrive at a decision taking into consideration all relevant material relating to the Petitioner. This Court makes no order with regard to costs.

Judge of the Court of Appeal