

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**  
**REPUBLIC OF SRI LANKA**

In the matter of an Application under  
and in terms of Article 17 and 126 of  
the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

Lt. Col. Samitha Manojith Hewa  
Imaduwege,  
46/4, Senanayake Avenue,  
Nawala, Rajagiriya.

S.C. (F/R) Application No. 291/2016

**Petitioner**

Vs

1. Lieutenant General A. W. J. C. De Silva,  
Commander of the Army,  
Army Headquarters,  
Colombo 03.

1A. Lieutenant General Mahesh Senanayake,  
Commander of the Army,  
Army Headquarters,  
Colombo 03.

2. Major General N. J. Walgama,  
Military Secretary,  
Army Headquarters,  
Colombo 03.

2A. Major General C. W. B. Wijesundera,

Military Secretary,  
Army Headquarters,  
Colombo 03.

3. Brigadier K. B. R. De Abrew,

Assistant Military Secretary,  
Army Headquarters,  
Colombo 03.

3A. Brigadier S. K. Eshwaran,

Assistant Military Secretary,  
Army Headquarters,  
Colombo 03.

4. Brigadier A. L. S. K. Perera,

Director Personal Administration,  
Premier Pacific Building,  
No. 28, R. A. De Mel Mawatha,  
Colombo 04.

5. Major General K. R. P. Rowel,

Colonel Commandant,  
Sri Lanka Signal Corps,  
Regiment Centre,  
Army Cantonment,  
Panagoda.

5A. Major General B. H. M. A. Wijesinghe,

Colonel Commandant,  
Sri Lanka Signal Corps,  
Regiment Centre,  
Army Cantonment,  
Panagoda.

6. Brigadier K. A. D. S. L. Perera,  
Director Pay and Records,  
Army Cantonment,  
Panagoda.

6A. Colonel L. Wijesundara,  
Director Pay and Records,  
Army Cantonment,  
Panagoda.

7. Lieutenant Colonel B. D. Fernando,  
5<sup>th</sup> Commanding Officer,  
Sri Lanka Signal Corps,  
Regiment Centre, Army Cantonment,  
Panagoda.

8. Jagath Dias,  
Director General of Pensions,  
Department of Pensions,  
Colombo 10.

9. Karunasena Hettiarachchi,  
Secretary to the Ministry of Defence,  
Ministry of Defence,  
15/5, Baladaksha Mawatha,

Colombo 03.

9A. Kapila Waidyaratne PC,

Secretary to the Ministry of Defence,  
Ministry of Defence,  
15/5, Baladaksha Mawatha,  
Colombo 03.

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

**Respondents**

Before:

Buwaneka Aluwihare PC J.

Priyantha Jayawardena PC J.

L. T. B. Dehideniya J.

Counsel:

Asthika Devendra with Upeksha Devinuwara for the  
Petitioner.

Dr. Avanti Perera, SSC for the Attorney General

Argued On:

24. 07. 2018

Decided On:

20. 02. 2020

## JUDGEMENT

Aluwihare PC J.,

1. The Petitioner, an Officer of the Sri Lanka Army, complained of the infringement of his rights under Article 12(1) of the Constitution, for not being granted the promotion to the rank of Lieutenant Colonel *with his contemporary intake* and not being granted the promotion to the rank of Colonel. The Petitioner claims that although he is entitled to be granted the said promotions, he has been retired as a Lieutenant Colonel.

### Facts

2. The Petitioner had joined the Sri Lanka Army in 1990 with Intake 33A as a Second Lieutenant. During his tenure in the Army he had served in the conflict areas and claims that he sustained injuries in the course of an attack by the terrorists in the year 2000, while engaged in duty in the Forward Defense Lines in Chavakachcheri. In recognition of his acts of gallantry in the theatre of war, he had been awarded the '*Rana Sura Padakkama*' (RSP) in 2002 and '*Desha Putra Sammanaya*' in 2004. The Petitioner is also a recipient of the 'United Nations Medal' for the service rendered as a member of the military of the United Nations Stabilization Mission in Haiti.
3. After sustaining injuries in the battleground in the year 2000, the Petitioner had been categorized as a 'battle casualty' by a medical board. Although he had the option of retiring from service after being categorized as a battle casualty the Petitioner had opted to continue in service. In January 2016 the Petitioner had been promoted to the rank of Lieutenant Colonel on a temporary basis with effect from 10<sup>th</sup> November 2009.

4. Consequent to a decision taken by the Cabinet of Ministers on 21<sup>st</sup> July 1982 ('P2'), members of the Armed Forces or Police Officers who are compelled to retire due to medical reasons attributable to injuries received while in action or due to terrorist attacks or while enforcing the law, became entitled to be paid their salary and other allowances they were being paid at the time of sustaining injuries, until the age of 55. Further, such persons were to be granted all salary increments they would have been entitled to, had they been in active service. The Petitioner states that the 'Public Administration Circular No. 22/93 (iv)' ('P3') confirms the abovementioned decision and that it provides *inter alia* for the computation of pensions according to the salary which the Officer would be entitled to at the age of 55. Subsequently, 'Army Routine Order No. 90/2009' ('P4') had been implemented in respect of the promotions of Officers injured due to terrorist attacks. According to the said Routine Order ('P4') all battle casualties of the Sri Lanka Army were divided into 4 categories which are as follows;

**Category No. 1**

Officers capable of further serving their mother regiment and attending to their normal duties were placed in Category 1 and promotions were to be given under the normal procedure based on the vacancies available.

**Category No. 2**

Officers not capable of attending to their normal duties but capable of attending to other duties in their mother regiment or another regiment are placed in Category 2 with promotions to be awarded under the normal procedure based on the vacancies available.

**Category No. 3**

Officers who cannot be placed in Categories 1 and 2 due to their disability but are not willing to retire are placed in Category 3. Officers in Category 3 are to be placed in a *super numeric* cadre and promoted according to the Army Routine

Order without prejudice to the seniority of the immediate senior Officers serving in the normal cadre.

#### **Category No. 4**

Officers who cannot be placed in Categories 1 and 2 but are not opting to remain in service further under Category 3 are placed in Category 4. Officers who choose to retire under this Category will not be entitled to promotions after retirement but are entitled to be placed in the relevant salary steps of the promotions which they should be given from time to time provided in the said Army Routine Order.

5. Following the end of the war, by letter dated 13<sup>th</sup> March 2013 ('P5') issued by the Adjutant General, officers who were serving regardless of their disabilities have been allowed to retire from active service on medical grounds upon their requests. If a Board of medical officers does not recommend the relevant officer for further service in the Sri Lanka Army such officer should be retired and provided with the benefits/ entitlements set out in 'P2'.
6. The Petitioner states that after he was injured in 2000 he was considered a battle casualty and that after 'P4' came into operation in 2009 he was placed in the Category 1 aforesaid of 'P4' and that, he could have continued in service, until a request is made by him, to retire from active service.
7. In 2014 the Petitioner had been appointed the Military Coordinator of the Disaster Management Centre. The Petitioner states that during his tenure at the Centre, he brought irregularities that had taken place in the 'Disaster Management Communication and Response Capacity Building Project' to the attention of the authorities. The Petitioner alleges that after he revealed these irregularities the Officers of the Ministry of Disaster Management and the Respondents began to ill-treat him. The 2<sup>nd</sup> Respondent, by communication dated 30<sup>th</sup> October 2015 ('P7H') had appointed another Officer, in place of the

Petitioner, to the Disaster Management Centre with effect from 2<sup>nd</sup> November 2015, without discharging the Petitioner from the duties. The Petitioner had been discharged from the Disaster Management Centre later by communication dated 14<sup>th</sup> January 2016 ('P7I') and attached to the Regiment Centre with effect from 3<sup>rd</sup> November 2015.

8. The Petitioner contends that there was no rational basis to have him discharged from the post of Military Coordinator with effect from 3<sup>rd</sup> November 2015 when in fact he served in the said post until 14<sup>th</sup> January 2016, other than as an encouragement to cause him to retire. On the other hand, the Respondents, however, maintain that the Petitioner was removed from the appointment to the Disaster Management Centre due to a report made by the Director of the Centre complaining of misconduct and behavior on the part of the Petitioner that is unbecoming of an Officer. The said report dated 23<sup>rd</sup> October 2015 had been produced marked '1R7'. It states that the Petitioner's "conduct, behavior and actions during working environment tend to create divisions in the organization, hence deem to destroy the peace and tranquility within the staff members of the DMC".
9. It appears that there had been another development concerning the Petitioner. In 2013, a Court of Inquiry had been held in respect of the Petitioner, regarding an incident where the Petitioner was alleged to have employed soldiers to work at the construction site of the house the Petitioner was building. In fact the Petitioner has admitted having employed military personnel to assist in the construction of his house. The Petitioner's explanation is that, having commenced the construction of the house in 2008, he had hired a contractor in 2013 to complete the construction as he had not been able to complete it due to his professional commitments. The Petitioner states that he had been compelled to find another contractor, upon the contractor defrauding the Petitioner. Therefore, he had requested a Signalmán, who was a skilled mason, to direct him to another contractor. The Signalmán, however, had proposed to complete the

construction himself together with his colleagues who were on leave, to which the Petitioner had agreed. On 13<sup>th</sup> March 2013 officers of the Military Police had come to the site of construction of the Petitioner's house and had arrested the soldiers who were working there.

10. The Petitioner's contention is that no adverse findings were made at this Court of Inquiry and that he was not informed of any further steps regarding the same, leading him to believe that he had been exonerated. However, the Respondents have produced documents to the contrary and shown that the Court of Inquiry in question had been conducted according to the Army Courts of Inquiry Regulations, 1952. An extract from the Court of Inquiry ('1R9') reveals that several adverse observations had been made against the Petitioner and based on the proceedings of the Court of Inquiry, the Army Commander's decision ('1R10') had been that disciplinary action should be taken against the Petitioner as he has also been found guilty of acquiring a vehicle belonging to his wife in contravention of the relevant guidelines as Unit Commanding Officer of the Sri Lanka Signal Corps and using the said vehicle for the purposes of the construction of his private house while utilizing Sri Lanka Army's fuel and drivers, in addition to employing soldiers of the Sri Lanka Army in the construction of his house and approving leave for the soldiers for the days that they were deployed in the construction. It has been further recommended that, the fact that he had committed these offences while he was being considered for confirmations or promotions should be taken into account. The Respondents state that accordingly, the Petitioner had been warned and subjected to a probationary period of one year as evidenced by the letter '1R11' dated 07<sup>th</sup> May 2014.

11. While the inquiry was pending, in February 2014 the Petitioner's confirmation in the rank of Lieutenant Colonel also had come up for consideration by Army Board No. 2 ('1R3'). The Regimental Council of the Sri Lanka Signal Corps **had not recommended** the Petitioner for rank confirmation due to pending

Investigations against the Petitioner and therefore the Board had decided to temporarily supersede him, concluding that his career is to be determined based on the findings of the investigations.

12. While the probation period per '1R11' was running, on 09<sup>th</sup> January 2015 the Petitioner had completed the maximum permissible period in the substantive rank of Major. Despite this, the Petitioner had been granted an extension of service until 09<sup>th</sup> January 2016 upon an application to that effect by the Petitioner. Even so, the Petitioner's substantive rank had remained as that of Major.

13. During the probation period itself the Petitioner's confirmation in the rank of Lieutenant Colonel was considered for the second time on 05<sup>th</sup> February 2015 by Army Board No. 2 ('1R4'). The Petitioner again had not been recommended for rank confirmation by the Regimental Council, Sri Lanka Signal Corps on this occasion as well, since the Petitioner was under observation until 07<sup>th</sup> May 2015 due to the pending Court of Inquiry against him. Considering these facts, the Board **had not recommended** the Petitioner for rank confirmation and decided that he should be retired from the Army with pension and gratuity at the end of the service extension. On 26<sup>th</sup> May 2015 the Petitioner had been informed of this decision, a fact which is admitted by the Petitioner.

14. The Petitioner's position however is that he had been summoned by the 5<sup>th</sup> Respondent on 26<sup>th</sup> May 2015 and been informed that he had been kept under observation for a period of one year from 06<sup>th</sup> May 2014 to 07<sup>th</sup> May 2015. The Petitioner states that in order to keep an officer in the rank of Lieutenant Colonel under observation such officer should be tried in a Court Martial on the recommendation of the report of a Court of Inquiry or, such officer should be summoned before the Colonel Commandant (the 5<sup>th</sup> Respondent in respect of the Petitioner) and informed of the same. The Petitioner asserts that neither of these steps had been resorted to against the Petitioner. The Petitioner, however, has not

substantiated the procedural position referred to, by reference to any legal provision. The Petitioner had been further informed that the Petitioner's service in the Sri Lanka Army would end on 09<sup>th</sup> January 2016 since the maximum permissible period in the rank of Major would expire on that date. The Petitioner contends that this statement has no merit and that his service was not superseded (brought to an end) on that date despite being informed thus, and that he was allowed to continue serving in the Sri Lanka Army. Presumably, this may have been the reason for placing the Petitioner in the rank of Temporary Lieutenant Colonel in January 2016.

15. The Petitioner had argued that the period of probation that was imposed ended before his effective retirement date in April 2016 and that therefore the decision to supersede him should have been revised and the Petitioner should have been promoted.

16. It has been submitted on behalf of the Petitioner that he ought to have been promoted to the rank of Lieutenant Colonel while he was in service on three alternative grounds;

- The Petitioner should have been promoted to the rank of Lieutenant Colonel with his contemporary intake in 2008.
- The Petitioner is entitled to be promoted to the rank of Lieutenant Colonel as he has exceeded the maximum years permissible in the rank of Major at the time of retirement **or** had he been promoted to the rank of Lieutenant Colonel with his peers, he would have had exceeded the maximum years in the rank of Lieutenant Colonel by the time he ended his service in August 2016 and ought to have been promoted to the rank of Colonel.
- The Petitioner is entitled to be promoted to the rank under the circular 'P4' as he is a battle casualty.

## The issue of time bar

17. The Respondents on the other hand assert that the Petitioner had not at any time challenged the decision taken by the 2<sup>nd</sup> Army Board on 5<sup>th</sup> February 2015, to supersede him ('1R4') despite being aware of the decision at least by 26<sup>th</sup> May 2015. However, this contention does not appear to be correct as the Petitioner, in exercise of his right of appeal to the Commander of the Army as provided for by Section 32 of the Army Act No. 14 of 1949, has appealed against the decision by the Redress of Grievance (ROG) to the 1<sup>st</sup> Respondent ('P8'). The 1<sup>st</sup> Respondent has admitted the receipt of the ROG in paragraph 28 of his Affidavit filed on 5<sup>th</sup> June 2017.

18. Thereafter, upon being informed on 12<sup>th</sup> May 2016 that his appeal was not favourably considered by the Commander of the Army, the Petitioner had preferred an appeal to the President on 2<sup>nd</sup> July 2016 ('P15'), as further provided for by Section 32 of the Army Act. The Petitioner has asserted that even at the time of filing written submissions on his behalf in the instant application on 12<sup>th</sup> September 2018; the Petitioner had received no response to his appeal to the President. Further, it has been brought to the notice of the court that although the maximum period of service in the rank of Major had come to an end and that by then a decision had been taken to permanently supersede the Petitioner, he was granted a final service extension of 3 months in the substantive rank of Major with effect from 11<sup>th</sup> January 2016 on "extreme compassionate grounds" ('1R14').

19. In *Gamaethige v Siriwardena and Others* 1988 1 SLR 384 it has been held that "While the time limit is mandatory, in exceptional cases on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time." Therefore, due to the above reasons I am of the opinion that

the preliminary objection of the application being time barred can be overruled, as there is no apparent lapse, fault or delay on the part of the Petitioner in failing to invoke the jurisdiction of this Court in time, as he was awaiting a response to the appeal that he had forwarded to the President.

### **Petitioner's entitlement to be promoted**

20. The Petitioner had not satisfied the criteria for a promotion to the rank of Colonel in terms of Regulation 12 of '1R1'. Regulation 12(1) of the 'Army Officers Service Regulations (Regular Force) 1992' states that promotion to the rank of Colonel and above shall be by selection and that promotions to the rank of Colonel shall be awarded only to such **substantive** Lieutenant Colonel as is considered best qualified for such rank and appointment. Regulation 12(2) states that the Officer's past record of service and whether the promotion is clearly in the best interests of the Army shall be considered. As per Regulation 17(5) of '1R1' an officer of the substantive rank of Major may be promoted to the temporary rank of Lieutenant Colonel, if selected for an extra regimental employment carrying such rank. As brought to the notice of the court by the Learned Senior State Counsel on behalf of the Respondents, when an officer in the Army retires, the practice is to grant the promotion to the next rank, at the point of retirement. If the said practice of the Army, with regard to granting of promotions is to be considered, an officer who is in the rank of Lieutenant Colonel while in service is eligible to be promoted to the rank of Colonel at the point of retirement. As pointed out by the Respondents, the past disciplinary record affects the promotional prospects of even those officers who are deemed unfit for service on grounds of disability.

21. For the purposes of this judgment it would be useful to reproduce in full, Regulation 19(1) of '1R1'.

*“19. (1) An officer who is overlooked for promotion may be superseded temporarily or permanently. If permanently superseded he shall be so informed.*

*(2) An officer shall be permanently superseded if he does not qualify for promotion before the expiry of the appropriate period referred to in Regulations 11 and 15: Provided that he shall not be permanently superseded where his failure to pass the appropriate examination is due to causes beyond his control, as determined by the Commander of the Army.”*

22. In the case of the present Petitioner he had been temporarily and then permanently superseded as he was overlooked for promotion. It is in accordance with Regulation 19(1), since it was due to the Petitioner's failure to obtain confirmation in the rank of Lieutenant Colonel in the normal course of promotions that he lost the opportunity of being promoted to the rank of Colonel prior to retirement.

23. Following the meeting with the 5<sup>th</sup> Respondent on 26<sup>th</sup> May 2015 the Petitioner had directed a ROG dated 04<sup>th</sup> June 2015 ('P8') to the 1<sup>st</sup> Respondent seeking redress against the decisions informed by the 5<sup>th</sup> Respondent. In 'P8' the Petitioner had maintained that he was not confirmed in the present rank with contemporary intakes due to being placed under observation for a period of one year ending on 7<sup>th</sup> May 2015 by the Colonel Commandant. Since the Petitioner as a battle casualty was in any event entitled to retire from service if found permissible by a Medical Board, the Petitioner had thereafter decided to retire from the Sri Lanka Army. By the ROG dated 27<sup>th</sup> January 2016 ('P9') forwarded to the 1<sup>st</sup> Respondent, the Petitioner had sought to retire from active service.

24. Thereafter, by message dated 14<sup>th</sup> March 2016 ('P10') the Petitioner had been summoned before a Board of Medical Officers who recommended that the Petitioner can be retired on medical grounds on the conclusion that he was unfit for active service. The Petitioner has brought to the notice of this court by

Seniority List of the Sri Lanka Army as at 12<sup>th</sup> February 2016 ('P11') that officers who belonged to Intake 33 have, on 10<sup>th</sup> April 2014, been confirmed in the rank of Lieutenant Colonel with effect from 9<sup>th</sup> January 2008 and that officers who belonged to Intake 33A have, on 27<sup>th</sup> January 2016, been confirmed in the rank of Lieutenant Colonel with effect from 1<sup>st</sup> July 2008. The Petitioner asserts that from the 4 officers who joined with Intake 33A, only the Petitioner and Lieutenant Colonel J. S. Weerakoon were in active service at that time.

25. Although officers in the contemporary intakes of 33 and 33A have been promoted to the rank of Lieutenant Colonel with effect from 2008 the Petitioner had not been confirmed in the rank of Lieutenant Colonel with his contemporary intake. The Petitioner therefore states that he is entitled to be confirmed in the rank with effect from 1<sup>st</sup> July 2008, the same date that the officer of the 33A intake Colonel J. S. Weerakoon was confirmed in the rank of Lieutenant Colonel. The Petitioner has pointed out that the said Officer Weerakoon had been temporarily superseded by the first Army Board No. 2 marked 'IR3' (at page 15) due to not being qualified at the Annual Physical Fitness Test. As the said Officer had again failed to qualify at the Physical Fitness Test the second Army Board No. 2 marked 'IR4' (at page 11) had temporarily superseded him and recommended that if the Officer fails to become medically fit before the end of his 1<sup>st</sup> service extension until 09<sup>th</sup> January 2016, he should be retired at the end of the said period. The Petitioner complains that although he too was on his 1<sup>st</sup> service extension running up to the same date i.e. 09<sup>th</sup> January 2016, he had been permanently superseded thereby unequally treating two equals. The Petitioner and the said Officer Weerakoon cannot be considered equals merely because they were both in their 1<sup>st</sup> service extension of the same duration. In the case of the Petitioner there were ongoing disciplinary proceedings against him at the time, whereas Officer Weerakoon had been overlooked due to his failure to pass the Annual Physical Fitness Test. Being subjected to disciplinary proceedings and failure to attain the required physical fitness cannot certainly be considered as identical or equal situations.

26. The Petitioner has further referred to the promotion of one Lieutenant Colonel Kithsiri Munasinghe. The said Officer had been confirmed in the rank of Lieutenant Colonel and retired by Extraordinary Gazette No. 1991 dated 28<sup>th</sup> October 2016 (marked 'X1' and submitted with the Written Submissions on behalf of the Petitioner) the same Gazette by which the Petitioner had been retired. Thereafter, by Extraordinary Gazette dated 13<sup>th</sup> January 2017 (marked 'X2' and submitted with the Written Submissions on behalf of the Petitioner) the said Officer's confirmation in the rank of Temporary Lieutenant Colonel and retirement had been revoked and he had been then promoted to the rank of Lieutenant Colonel and retired. In the absence of any information as to whether any one or more of the officers referred to above by the Petitioner were subjected to disciplinary proceedings, this court is not in a position to conclude that the Petitioner falls into the same class as them.

27. The Petitioner states that when an officer serving in a temporary rank is concluded to be unfit for active service, the normal practice followed by the Sri Lanka Army is to confirm the Officer in the rank with his contemporary intake and to grant the next promotion prior to the retirement. The Petitioner refers to the promotion of one Lieutenant Colonel Nilupul Wedaarachchi who had been serving in the rank of temporary Major and had opted to retire on medical grounds. He had been confirmed in the rank of Major with his contemporary intake and promoted to the rank of Lieutenant Colonel with effect from 06<sup>th</sup> July 2015 and retired from active service with effect from 07<sup>th</sup> July 2015.

28. The Petitioner's contention is that upon being considered unfit for active service by the medical board in March 2016 the Petitioner should be automatically placed in Category 3 set out in 'P4' and should have been promoted to the rank of Colonel after a 5-year period in the rank of Lieutenant Colonel. The Petitioner contends that since the Petitioner ought to have been confirmed in the rank of Lieutenant Colonel with effect from 01<sup>st</sup> July 2008 with his contemporary intake,

he should have been promoted to the rank of Colonel with effect from 01<sup>st</sup> July 2013 according to the provisions of 'P4'.

29. The Petitioner refers to one Colonel S. S. K. Jayawickrama, a Temporary Lieutenant Colonel who had been placed in Category 3 of 'P4' in 2008. He had been confirmed in the rank of Lieutenant Colonel along with his contemporary intake with effect from 16<sup>th</sup> June 2006 and then promoted to the rank of Colonel with effect from 2013 along with his contemporary intake. The Petitioner states that he had been reliably informed that Colonel S. S. K. Jayawickrama is to be promoted to the rank of Brigadier prior to his retirement, for which he had had forwarded the request at the time of filing the application.

30. By a ROG dated 04<sup>th</sup> April 2016 ('P12') the Petitioner had requested the 1<sup>st</sup> Respondent to confirm the Petitioner in the rank of the Lieutenant Colonel with his contemporary intake and further to promote him to the next rank of Colonel. By message dated 11<sup>th</sup> May 2016 ('P13B') the 4<sup>th</sup> Respondent had informed the Petitioner that the Ministry of Defence had approved his retirement on medical grounds with monthly salary and other benefits upto the age of 55. Although the Petitioner had been permitted to be retired on medical grounds by message dated 12<sup>th</sup> May 2016 ('P14') the Petitioner's requests for the promotions by 'P12' had not been granted. It was then that the Petitioner had, exercising the statutory right granted under Section 32 of the Army Act, appealed to the President of his predicament by 'P15' and requested that he be confirmed in the rank of Lieutenant Colonel with his contemporary intakes and that he be promoted to the next rank of Colonel.

31. Subsequently, by message dated 29<sup>th</sup> July 2016 ('P16') the Petitioner had been informed that the President had approved his confirmation in the rank of Lieutenant Colonel **with effect from 01<sup>st</sup> April 2016** (not with his contemporary intake which had been confirmed in 2008) **and to retire the Petitioner with effect from 02<sup>nd</sup> April 2016.**

32.Extraordinary Gazette No. 562/11 of 15<sup>th</sup> June 1989 ('P18') sets out the maximum permissible periods of time an officer can hold in each respective rank from the rank of Lieutenant. The Petitioner contends that according to 'P18' he is entitled to be promoted to the rank of Colonel on 1<sup>st</sup> July 2016 on which date he completed the maximum permissible period of 8 years in the rank of Lieutenant Colonel. Such a simplistic view cannot be adhered to as the Gazette does not state that promotions should be awarded mandatorily to every officer who completes the maximum permissible period in a particular rank. 3(1)(b) in 'P18' reads to the effect that;

3(1)(ආ) උපකරණ පාලක නිලධරයකු හෝ කෙටිකාලීන කාරක අධිකාරී ලත් නිලධරයකු හෝ නොවන්නාවූ නිලධරයකු ස්වකීය ස්ථිර නිලයෙහි රැඳී සිටින කාලසීමාව තුළ ඊළඟ ඉහල නිලයට උසස් කරනු නොලැබුවහොත් පහත නියම කර ඇති පරිදි උසුලන ස්ථිර නිලයේ කාලසීමාව අවසානයේදී විශ්‍රාම ගත යුතුය.

<u>ස්ථිර නිලය -</u>	<u>කාලය අවුරුදු</u>
ලුතිනන්-	06
කපිතන්-	11
මේජර්-	10
ලුතිනන් කර්නල්-	08
කර්නල්-	05
බ්‍රිගේඩියර්-	04

33.At the time, the Petitioner was in the rank of Temporary Lieutenant Colonel having been promoted to the temporary rank in 2009. According to 'P18', on the completion of the maximum permissible period in any of the specified ranks an Officer can be promoted only to the rank immediately above the **substantive**

**rank** held by such officer and **not** the rank immediately above the **temporary rank** held by an officer. Accordingly, the substantive rank of the Petitioner at the time being ‘Major’ the Petitioner can be promoted to the rank of Lieutenant Colonel and not to the rank of Colonel.

34. Until the service of ‘P16’ the Petitioner had been engaged in active service up to the 5<sup>th</sup> of August 2016. In addition to carrying out his ordinary responsibilities the Petitioner has served as an invigilator in the ‘Captain to Major promotion (Regular) 2016 Examinations’ held on 22<sup>nd</sup> June 2016 and 08<sup>th</sup> July 2016 respectively. The Petitioner argues that if the Petitioner is to be retired with effect from April 2016 his role in the Examinations could be brought into question. The allowances that were granted to the Petitioner during the 4 months from April too would be in question. The Petitioner states that even in the service report dated 28<sup>th</sup> July 2016 carrying the names of the officers in active service at the time includes his name.

35. The Respondents contend that although the Petitioner’s retirement was to take effect from 02<sup>nd</sup> April 2016 he had been allowed to report to work until August even past the lapse of his last extension of service on 09<sup>th</sup> April 2016 purely due to routine administrative delays that take place in the processing of retirement papers of all officers of the Army and also because several appeals had been made to backdate his rank confirmation by the Petitioner. The Respondents further submit that the Petitioner has been paid all his employment dues covering the period that he reported to work beyond the effective date of retirement.

36. The Petitioner contends that the decision to retire the Petitioner with effect from 02<sup>nd</sup> April 2016 has been taken maliciously to deprive the Petitioner from being promoted to the rank of Colonel, as there is no other logical explanation to retire the Petitioner on 02<sup>nd</sup> January 2016 when he served in uniform until 2<sup>nd</sup> August 2016. Due to the decision to confirm the Petitioner in the rank of Lieutenant

Colonel with effect from 01<sup>st</sup> April 2016 the Petitioner had been prevented from obtaining the concessionary vehicle permit which is available to officers who have minimum service of six years (confirmed in the said rank) in the rank of Lieutenant Colonel or above.

37.The Petitioner challenges the decisions in ‘P14’ and ‘P16’ as actions and/or inactions of an administrative and executive nature in the circumstances referred to and alleges the infringement of his fundamental rights under Article 12(1) of the Constitution. The Petitioner prays for the Court to direct that the Petitioner be confirmed in the rank of Lieutenant Colonel with effect from 01<sup>st</sup> July 2008 and be promoted to the rank of Colonel with effect from 01<sup>st</sup> July 2016.

### **Conclusions**

38.The Petitioner is not similarly situate as his peers because the Petitioner’s promotion/rank confirmation was rejected on both occasions it came up for consideration. At the time of the decision to retire the Petitioner, he was holding the substantive rank of Major. Therefore, if he was granted promotion to the rank of Colonel, as well as promotion to/rank confirmation as Lieutenant Colonel it would have resulted in two promotions being awarded to an officer whose promotion had been rejected twice.

39.Promotion to rank of Colonel on the other hand, is not awarded merely due to serving in the Army for a set period of time, but upon meeting the criteria set out in Regulation 12, which the Petitioner has failed to meet due to issues in his past disciplinary conduct.

40.I wish to cite with approval the pronouncement made in the case of *Wijesinghe v Attorney General* 1978-1979-1980 1 SLR 102, where the court held;

*“This Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and our powers are given in very wide terms; but our authority is not absolute for these powers are subject to certain well defined principles and we have to concede that there are limits which we cannot transgress, however hard and unfortunate a case may be. We have to take cognizance of the distinction between ordinary rights and fundamental rights, and it is only a breach of a fundamental right that calls for our intervention.” (at page 105)*

*“The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination. (see per Stone, C.J. in Snowden v: Hughes, (supra))” (at page 106).*

Even in the instant case the Petitioner has failed to establish that there had been purposeful discrimination against the Petitioner by the Respondents; and the Petitioner had not been granted the promotions that he had sought due to the shortcomings in the manner he had discharged his duties as a officer of the Armed Forces.

41. For the reasons set out above I am of the view that the Petitioner had failed to establish that his fundamental right enshrined in Article 12(1) had been violated by any of the Respondents and as such the Petitioner cannot succeed in this application. Accordingly, this Application is dismissed.

*Application Dismissed*

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree.

JUDGE OF THE SUPREME COURT