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

In the matter of an application in the nature of a Writ of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (WRIT 289/2020)

1. Rathnappulige Sandun Chinthaka,
   No.05/2, Alen Egoda,
   Danketiya,
   Tangalle.

2. Koththigoda Kankanamge Wimala Chandani,
   No.12,
   Dolahena Watta,
   Galagama/W,
   Nakulugamuwa.

3. Thanuja Chatumali Ranasinghe,
   No. 1544/1/10. Prime Beyond,
   Amuatamula Road, Kottawa.

4. Akbar Akbar Atheek,
   Jayanagar, Muthur 04.

5. Indika Priyadarshani Wewalagamage,
   D.P. Roahan Wijebandara Bare,
   Ambagolla, Udapola,
   Polgahawela.

6. Mohamed Mahroof Mohamed Ifham,
   No. 119.46, Nathwa Street,
   Muthur 05.

7. Ranpatiyalage Niranjala Dilrukshi Wickramasinghe,
   No. 24,
   Saranasirigama,
   Girithale.

8. Ekanayaka Mudiyanselage Eranda Thushara Ekanayaka,
   No.60/D, Sithumina Uyana,
   Bogahapitiya,
   Kengalla.

9. Amirthalingam Sivaruban,
   No. 501,
   New Street, Uppukulam, Mannar.

10. Tharindu Asanka Jayasinghe,
    No. 223,
    Digana Village,
    Digana.

11. Mahabalage Don Gayani Upeshika Swarnamali,
    No.44/22,
    Bodhiraja Mawatha,
    Buwelikada, Mahanuwara.

12. Ilandari Pedige Champika Jayathilaka,
    No.63,
    Samangi Mawatha,
    Ihala Walaku,bura
    Alawwa.

13. Yatiyalagala Udahalinde Gedara Shiromi Wijethunga,
    No.16A,Madagammadda,
    Walala,Menikhena.

14. Kirinde Liyanage Keshani Kokila,
    No.923/19, Gatambe,
    Kandy.

15. Rathnayaka Mudiyanselage Chamara Prasad Rathnayaka,
    No. 20/1,Post 13,
    Bakinigahawela,
    Madagama.

16. Dilani Saranga Samaraweera,
    No. 24/79/03, Udayagiriya,
    Uhana,
    Ampara.

17. Doolwalage Vimali Harshani Premathilake,
    No. 260/A, Gannoruwa,
    Peradeniya.

18. Rathnayaka Mudiyanselage Champika Siriwardhane,
    No. 26/2 A,
    Pahala Raja Street, Badulla.

19. Thennakoon Mudiyanselage Gayani Koshila,
    No/207/C, Usawiya Road,
    Galagedara.

20. Rajapaksha Mudiyanselage Thilanka Ashan Bandara Adikaram
    No. 131/1B, Thawalankoya,
    Ukuwela, Matale.

21. Dissanayake Mudiyanselage Sachini Pavithra Dissanayake,
    Disa Sewana, Nikathanna Road,
    Mailagasthanna, Badulla.

22. Dhanasekara Mudiyanselage Nirasha Dhanasekara,
    No.145/2,
    Doluwa Road,
    Hindagala.

23. Gajan Gedara Waruni Sewwandi,
    No. 95/1,
    Bowatta, Ukuwela.

24. Lidamulla Jayasinghalage Madushan Pramitha Jayasinghe,
    No. 23/7, Udakale Road,
    Bowala, Kandy.

25. Wijethunga Mudiyanselage Ulpathayaye Gedara Janaka thushara Bandara Wijethunga,
    No. 17/3, Galwadukumbura, Kawudupalalla,
    Matale.

26. Meragal Pathiranalage Sujith Krishantha,
    No. D4, Second Bridge,
    Dhamana, Ampara.

27. Thanama Gedara Rathnayaka Mudiyanselage
Vijaya Siriwardhane,
No.120,
Second Bridge,
Diwiyagala, Damana.

28. Vihare Gedara Krishani DIssanayake,
No.54, Halangoda,
Aluthgama, Jambugaspitiya.

29. Nalin Chandana Punchibandara,
No. D-06,
Medagama,
Kekirawa.

Petitioners

Vs.

1. National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

2. Nishantha Ranathunga,
Chairman,
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

3. K.A. Ansar,
No.22,
Hena Road,
Mount Lavinia.

Formerly

Chairman,
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

4. R.W.R. Pramasiri
   No.216, Denzil Kobbekaduwa Mawatha,
   Koswatta,
   Battaramulla.

   Formerly

   Chairman,
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

5. W.P. Sandamali de Silva,
   Secretary,
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

6. R.H. Ruvinis,
   General Manager,
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

7. B.W.R. Balasuriya,
   No.66, 2nd Lane,
   North Lake Road,
   Kurunegala.

   Formerly
   General Manager,
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

8. N.Priyantha Thibbutumunuwa,
   No.310/18, 1st Lane,
   Kalapaluwewa,
   Rajagiriya.

   Formerly
   Acting Working Director,
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

9. G.K. Iddamalgoda,
   Additional General Manager
   (Human Resources Management),
   National Water Supply and Drainage Board,
   Galle Road,
   Ratmalana.

10. T.W.S. Perera,
    Additional General Manager,
    (Water Supply Projects)

National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

11. K.R.Devasurendra,
No. 88/22,
Samindu Lane,
Mawiththara, Piliyandala.

Formerly
Additional General Manager,
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

12. N.H.R. Kulanatha,
Additional General Manager (Sewerage),
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

13. D.M.Malkanthi Gunasekara,
Assisting General Manager (Human Resources Management),
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

14. W.A.S. Sumanasuriya,
Deputy General manager,

(Human Resources Management),
National Water Supply and Drainage Board,
Galle Road, Ratmalana.

15. Hon. Mahinda Rajapaksa,
The Prime Minister of Sri
Lanka & Minister of Finance,
Buddhasasana, Religious and Cultural Affairs and Urban Development and Housing Facilities.

Formerly
The Minister of Urban Development, Water Supply and Housing Facilities.

16. Priyath Bandu Wickrama,
The Secretary,
The Ministry of Water Supply,
"Lakdiya Madura, No.35, New Parliament Road,
Pelawatta, Battaramulla.

17. Nihal Somaweera,
No. B. 10-3-3,
Edmonton Housing Scheme,
Edmonton Road, Kirulapana
Colombo 06.

Formerly
Secretary,
Ministry of Water Supply and Drainage Board,
"Lakdiya Madura, No.35, New Parliament Road,

Pelawatta, Battaramulla.

18. Hon. Vasudewa Nanayakkara,
    The Ministry of Water Supply,
    "Lakdiya Madura, No.35, New Parliament Road,
    Pelawatta, Battaramulla.

    Formerly
    State Minister of Urban Development, Water Supply and Housing Facilities.

19. M.M.P.K.Mayadunne,
    Secretary,
    Ministry of Justice,
    Superior Court Complex,
    Adhikarana Mawatha,
    Colombo 10.

    Formerly
    Secretary,
    Ministry of Urban Development, Water Supply and Housing Facilities.

20. Karunasena Hettiarachchi,
    Chinthana Mawatha,
    Thalangama,
    Koswatta.

    Formerly,
    Secretary,
    Ministry of Urban Development, Water Supply and Drainage and Higher Education.

21. *Sarath Chandrasiri Withana,*
No.1127/13,
Dammodaya Mawatha, Minindupura,
Battaramulla.

Formerly
Additional Secretary
(Administration and Finance)
Ministry of Urban Development, Water Supply and Drainage and Higher Education.

22. P.I.T. Mahilala Silva,
No.324/3, Madupitiya,
Panadura.

Formerly
Working Director,
National Water Supply and Drainage Board,
Galle Road,
Ratmalana.

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

RESPONDENTS

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel: Reshaal Seresinghe instructed by Lasodha Siriwardena for the 1st to 29th Petitioners.
Chaya Sri Nammuni, DSG for the 1st,2nd, 5th,6th,9th,10th,12th, 13th, 14th, 16th and 18th Respondents

Argued On : 19.10.2022

Written Submissions: On 17.11.2022 (by the Petitioners)
03.03.2023 (by the Respondents)

Decided On: 13.03.2023

B. Sasi Mahendran, J.

The Petitioners are contract-based employees of the National Water Supply and Drainage Board (1st Respondent) who are seeking this Court's intervention to grant and issue a Writ of Mandamus to compel the 1st, 2nd, 5th, 6th, 9th, 10th,12th,13th and 14th Respondents to confirm their services in accordance with Public Administration Circulars Nos. 25/2014 ("**P3**"), 25/2014(I) ("**P4**") and 29/2019 ("**P17**") dated 12th November 2014, 29th December 2014 and 18th September 2019, respectively.

The sole grievance of the Petitioners is that their legitimate expectation of being absorbed into the permanent cadre of the Respondent Board, in terms of the aforesaid Public Administration Circulars, has been frustrated. As a result, it is averred that the failure or refusal of the Respondent authorities to do so is unlawful.

A brief exposition of the doctrine of legitimate expectations, the key ground on which this Court is invited to review this apparent unlawful decision must be set out prior to delving into the merits.

The doctrine of legitimate expectations is relatively a newcomer in the "armoury" of judicial review. In English administrative law, this doctrine was first enunciated by Lord Denning in the year 1969, in the case of Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 thus:

"The speeches in Ridge v Baldwin show that an administrative body, may in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether the person has some right or interest, or, I would add, **some legitimate expectation** of which it would not be fair to deprive him without hearing what he has to say." [emphasis added]

The doctrine of legitimate expectations, to use the words of Professor Paul Craig in his treatise, 'Administrative Law' (9th Edition at p. 728), is "predicated on a range of values", such as equitable notions of fairness; rule of law principles such as the need to protect against the abuse of power; legal certainty; and protection of the citizens' trust in the administrative system. In their monumental tome, 'Administrative Law' (11th Edition at p. 450) Sir H.W.R. Wade & Professor C.F. Forsyth observe:

"Where some boon or benefit has been promised by an official that boon or benefit may be legitimately expected by those who have placed their trust in the promises of the official. It would be unfair to dash those expectations without at least granting the person affected an opportunity to show the official why his discretion should be exercised in a way that fulfils his expectation."

Lord Diplock in the landmark judgment of Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (the "GCHQ" Case) noted that it is preferable to refer to such expectations as "legitimate" instead of "reasonable" so as to indicate that the former has consequences to which effect will be given in public law. His Lordship observed legitimate expectations arise when decisions affect a person:

"by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii)he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

The doctrine of legitimate expectations, in its formative years, was given protection only if the expectation was categorised as a procedural legitimate expectation. That is an expectation that "denotes the existence of some process right the applicant claims to

possess as a result of a promise or behaviour by the public body that generates the expectation" (Craig, supra at p. 727). In contrast, Substantive legitimate expectations or expectations that a particular or favourable decision by the authority would occur were considered "beyond the bounds of judicial competence and authority" (Wade & Forsyth, supra at p. 460) and thus not protected for reasons such as the fettering of a public authority's statutorily conferred discretion and autonomy. Unwilling to be tied down by tradition and a refusal to discriminate between procedural and substantive legitimate expectations, the landmark judgment of the Court of Appeal in R v. North & East Devon Health Authority ex p. Coughlan [2000] 3 AER 850, settled beyond doubt that substantive legitimate expectations are now equally protected. We are reminded of the words of an eminent judge and jurist Justice C.G. Weeramantry, as his Lordship wrote in 'An invitation to the Law' (at p. 218), "if judges are dominated by the common law attitude of conformity rather than by attitude of innovation which characterised equity in its great formative stage, judicial decision making can lose some of its thrust."

Having analysed the English law position, his Lordship Prasanna Jayawardena J. in Ariyarathne & Others v. Illangakoon & Others (SC FR Application No. 444/2012 SC Minutes 30.07.2019) provided a comprehensive exposition of the doctrine of legitimate expectations in our legal system. As amply demonstrated in our extensive writ and fundamental rights jurisprudence, the doctrine of legitimate expectations is much in vogue.

In order to protect or enforce this "legally protected expectation" (Professor Timothy Endicott, 'Administrative Law' 5th Edition at p. 313), which the law gives some form of protection in judicial review, a Court must first be satisfied as to the "legitimacy" of the expectation, and second, it must be satisfied that there is no overriding or countervailing consideration that will frustrate the expectation. The "legitimacy" of an expectation largely depends upon the nature of the representation on which the claimant relies. A legitimate expectation, set out in case law, stems from a clear, unequivocal, and unambiguous representation by the relevant authority in the nature of either a promise, practice, or policy. In addition, such representation must not be *ultra vires*; it must not conflict with statutes, and the claimant should not have foreseen that the expectation was likely to be frustrated. If there was sufficient and adequate notice of the change in the status quo it would not amount to a "legitimate expectation".

Secondly, if an expectation is deemed to be legitimate there are three approaches, as set out in Coughlan (supra) which a Court is faced with. The first is to determine whether the expectation was only a mandatory relevant consideration. If the expectation is categorised as such, the Court may either judge whether the expectation has been considered at all as a relevant consideration, and if it has not been so considered at all, quash the decision to resile from the expectation for want of taking into account a relevant consideration. If the expectation has been considered, but if it appears to Court that the failure to enforce the expectation, in the circumstances of the case, was so unreasonable (in the Wednesbury unreasonable sense) the decision to resile from the expectation can be quashed. The second, exclusively dealing with procedural legitimate expectations, the Court would require that represented process be carried out, provided the expectation is not outweighed by an overriding reason. Third, dealing exclusively with substantive legitimate expectations, the Court must determine whether the frustration of the expectation was so unfair that it was tantamount to an abuse of power. Inherent in this approach as well is the task of weighing the claimant's expectation against the overriding reason submitted by the authority for its change in direction. These three approaches as described in the case of Coughlan (supra) are thus:

"(a) The court may decide that the public authority is **only required to bear in mind its previous policy or other representation, giving it the weight, it thinks right, but no more**, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds.

(b) the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that **the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it**. In which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide **whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.** Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy." [emphasis added]

The Coughlan standards of review have been adopted in our jurisprudence. For instance, his Lordship Arjuna Obeyesekere J. in Captain (Temporary) H.D.C. Perera v. Lt. Gen N.U.M.M.W. Senanayake & Ors (CA Wrt 408/2018 CA Minutes 31.08.2020) studied the application of these standards. Similarly, his Lordship Janak De Silva J. in Galle Municipal Council v. Galle Festival (Guarantee) Limited (CA (PHC) No. 155/2010 CA Minutes 01.03.2019) discussed the applicability of Coughlan's third standard of review in our law.

Bearing this in mind, we must now determine whether the Petitioners in the instant application will overcome these obstacles.

In the instant case, some Petitioners have completed more than 3 years of service at the National Water Supply and Drainage Board, whilst others have completed more than 23 years of service.

As alluded to above, the representation that the Petitioners are relying on is the circulars; Public Administration Circulars Nos. 25/2014 ("**P3**"), 25/2014(I) ("**P4**") and 29/2019 ("**P17**") dated 12th November 2014, 29th December 2014 and 18th September 2019, respectively, issued to all Secretaries of Ministries, Heads of Departments and Heads of all State Corporations and Statutory Boards. As stated in the body of the circulars, the same has been issued with the concurrence of the Treasury. This was pointed out by the Petitioners to dispel the notion that their absorption into the permanent cadre would not burden the country's finances. Further, the first two circulars state that contract, substitute, daily, and temporary employees can be made permanent provided they have satisfied certain conditions such as the completion to the satisfaction of the employer continuous 180 days of service, and minimum educational qualifications depending on the grade/post of the relevant employees. **P4** (at para. 5) includes temporary, contract employees who are serving in foreign-funded projects as well.

However, Public Administration Circulars Nos. 25/2014 ("**P3**"), 25/2014(I) ("**P4**") were revoked by Public Administration Circular No. 25/2014(II) dated 4th April 2016 ("**P16**"). The said Circular communicated the decision of the Cabinet dated 23rd February 2016 to revoke the previous two Circulars in a manner that would not cause any prejudice to those employees who would have been made permanent under those Circulars. The relevant paragraph reads:

"එකී චක්‍රලේඛ අනුව ස්ථිර පත්වීම් ලබා දීම පිළිබඳව මෙතෙක් ගෙන ඇති මොනයම් හෝ අකාරයේ ක්‍රියාමාර්ගයකට අගතියක් නොවන ආකාරයෙන් ඉහත පළමුවන ඡේදයේ සඳහන් රාජ්‍ය පරිපාලන චක්‍රලේඛ අවලංගු කිරීමට 2016.02.23 දින පැවති අමාත්‍ය මණ්ඩල රැස්වීමේදී තීරණය කර ඇති බව මෙයින් දන්වා සිටිමි."

On the 18th of September 2019, Circular "**P16**" was rescinded by Circular 29/2019 ("**P17**"), which reinstated Circulars "**P3"** and "**P4**". The circular too depicts that it was issued with the concurrence of the Treasury. The relevant portion reads:

"02. ඉහත 25/2014 හා 25/2014 (i) දරන රාජ්‍ය පරිපාලන චක්‍රලේඛයන්හි සඳහන් සුදුසුකම් සම්පූර්ණ කල යුතු දිනය 2019.09.01 ලෙස සලකා එදිනට සුදුසුකම් සම්පූර්ණ කර ඇති නිලධරයන් එදින සිට මෙහි පහත සඳහන් i හා ii කොන්දේසිවලට යටත්ව ස්ථිර කිරීමට හැකිවන පරිදි රාජ්‍ය පරිපාලන චක්‍රලේඛ 25/2014 හා 25/2014 (i) යලි බලාත්මක කිරීමට 2019.09.17 දින පැවති අමාත්‍ය මණ්ඩල රැස්වීමේදී තීරණය කර ඇත.

i. ඉහත පරිදි ස්ථිර පත්වීම් ලබා දීමෙන් අනතුරුව විශ්‍රාම වැටුප් ව්‍යවස්ථා සංග්‍රහය යටතේ විශ්‍රාම වැටුපක් සඳහා සම්පූර්ණ කල යුතු අවශ්‍යතා සම්පූර්ණ කල හැකි නිලධරයන් සඳහා ස්ථිර විශ්‍රාම වැටුප් සහිත පත්වීම් ලබා දීම.

ii. ඉහත i හි සඳහන් අවශ්‍යතා සම්පූර්ණ කල නොහැකි නිලධරයන් සඳහා රාජ්‍ය සේවක අථර්සාධක අරමුදල යටතේ ස්ථිර පත්වීම් ලබාදීම."

Ex facie, these circulars would give any reasonable person a legitimate expectation to be made permanent. If these Circulars are in fact applicable to the employees of the 1st Respondent, it is rather unequivocal that those employees satisfying the minimum criteria therein might expect to be absorbed as permanent cadre.

Notwithstanding the issue of whether the circular has 'statutory force' (for instance, see Basnayake v. Secretary of the Treasury [2006] 2 SLR 9), as Dr. Sunil Coorey in his influential, 'Principles of Administrative Law in Sri Lanka' (4th Edition - Volume 1 at p. 458) notes:

"Circulars, instructions and rules, issued by State officials for the guidance of themselves or their subordinates, not under any empowering statutory provisions and therefore not enforceable as "law", but laying down criteria on which they would act in different types of cases, will create the legitimate expectation in the minds of the general public that those circulars would be adhered to in individual cases."

Despite the finding of a legitimate expectation, that expectation in order to be legally enforceable must withstand any countervailing consideration that is thrown at it.

It must also be noted that subsequent to these Circulars, recruitment and filling vacancies was regulated by Circulars of the Ministry of Finance such as DMS/Cir/2020 dated 21st February 2020 ("**1R4**"), which is alluded to in DMS/Cir/2020 dated 26th October 2020 ("**1R5**").

Nonetheless, we are of the view that the standard of protection this expectation would garner is that of the first standard set out in the aforesaid Coughlan test. That is, these expectations would only amount to a mandatory relevant consideration on the part of the authorities. There is evidence to suggest that the authorities had considered it, as set out in paragraph 16 of their statement of objections. Although, the circulars were issued in 2014 and 2019, and with the concurrence of the Treasury, given the present economic predicament of the country we cannot, regrettably, in the absence of any material demonstrating the continuity of the Treasury's concurrence, insist the implementation of the circulars. This is also due to the subsequent circulars that have suspended and/or regulated recruitment to the public service.

We are of the view that it is a vital consideration that we cannot ignore and that it deals with a polycentric question involving finite resources. It is with situations such as the present in mind that Lord Laws observed in R v. Department of Education and Employment, ex p Begbie [2000] 1 WLR 1115, that the first and third categories are not "hermetically sealed". We cannot, as the learned Judge said, don the garb of a policy maker. His Lordship Arjuna Obeyesekere J. in Captain (Temporary) H.D.C. Perera v. Lt. Gen N.U.M.M.W. Senanayake & Ors (supra) observed:

> "This is especially so in relation to the first and third categories, where a policy decision, as stated in the first category may have the effect of depriving a previously promised substantial benefit, as envisaged by the third category."

In addition, the Petitioners contend that by the conduct of the Respondent authorities, such as by treating them as similar to permanent employees, whenever a project came to an end, assigning them to a new project would give rise to a legitimate expectation that they would be made permanent. However, we are unable to agree with this contention since in these circumstances we are not satisfied that a legitimate expectation can be generated. As noted above, there must be a clear, unequivocal, and unambiguous representation from the relevant authority, in this case, the relevant

Respondent authorities which gives rise to such an expectation. In the instant case, factors such as them being paid the same as permanent employees or assigned duties in the Water Board as done for permanent employees have not crystallised into the standard expected by law for the expectation to be legally protected, in the absence of a clear promise or practice. Their contracts of employment made it clear that they were hired on a temporary basis for the duration of their contract.

Further, the Respondent Board notes that the Petitioners have been recruited after the completion of a project to other projects for the duration of those projects. However, it maintains the position that the Petitioners were always employed on a contract basis. This is not uncommon or a strange occurrence. Firstly, the term "project" itself denotes a collaborative enterprise that is carefully planned to achieve a particular aim. This means one cannot expect a project to continue in perpetuity. (In terms of the Management Services Circular No 01/2019 ("**1R8**"), issued by the Ministry of Finance, a project was defined as "a planned set of interrelated tasks to be executed **over a fixed period of time** and within certain costs and other limitations to achieve a particular objective/s". Secondly, hiring employees on a contractual basis for various projects is well within reason. If a person is hired for a particular project, and such person's performance is satisfactory to the employer, the employer would prefer to keep such person until the life of that project terminates, and if there are opportunities where such employee's services can be made use of in another project, any prudent employer would prefer that employee for the job. In a scenario where the employee, such as in the present case, has served the relevant authority during the life of a project and seen it to completion, we do not think it is reasonable for the employee to compel the employer to hire the employee for some other project if there are no projects or if there are no vacancies in ongoing projects. Perhaps, there may be a moral obligation that a generous employer may render in the form of an ex gratia payment or finding employment for the hard-working employee elsewhere, but that would be at the discretion of each employer, and that remains purely a moral consideration; that is a matter of conscience rather than a legal obligation.

In the latter circumstance in which the Petitioners claim a legitimate expectation has arisen (i.e. their apparent treatment as permanent employees), if what had been sought was fulfilment of an expectation of being considered in the pool of candidates for the new recruitment or merely to be interviewed, instead of the expectation of being recruited itself, the unenviable judicial task of balancing competing interests would have been easier to perform and the scales may have tilted in favour of the Petitioners.

Related to this application, especially in the light of the sole prayer for a writ of mandamus, is another question that arises for consideration.

The issuance of a writ of mandamus is based upon the satisfaction of certain criteria that have been laid out in our case law. The clearest of such an enumeration of criteria is found in Credit Information Bureau of Sri Lanka v. Messrs Jafferjee and Jafferjee (Pvt) Ltd [2005] 1 SLR 89. His Lordship J.A.N. De Silva, J. (as he then was), with their Lordships S.N. Silva C.J. and Weerasuriya J. agreeing, set out some of the prerequisites for issuing a Writ of Mandamus:

"There is rich and profuse case law on Mandamus on the conditions to be satisfied by the Applicant. Some of the conditions precedent the issue of Mandamus appear to be:

(a) The Applicant must have a legal right to the performance of a legal duty by the parties against whom the Mandamus is sought (R v Barnstaple Justices). The foundation of Mandamus is the existence of a legal right (Napier Ex Parte)

(b) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature.

(c) The legal right to compel must reside in the Applicant himself (R v Lewisham Union)

(d) The application must be made in good faith and not for an indirect purpose

(e) The application must be preceded by a distinct demand for the performance of the duty

(f) The person or body to whom the writ is directed must be subject to the jurisdiction of the court issuing the writ

(g) The Court will as a general rule and in the exercise of its discretion refuse writ of Mandamus when there is another special remedy available which is not less convenient, beneficial and effective.

(h) The conduct of the Applicant may disentitle him to the remedy.

(i) It would not be issued if the writ would be futile in its result.

(j) Writ will not be issued where the Respondent has no power to perform the act sought to be mandated.

The above principles governing the issue of a writ of Mandamus were also discussed at length in P.K. Benarji v H.J. Simonds. Whether the facts show the existence of any or all pre-requisites to the granting of the writ is a question of law in each case to be decided not in any rigid or technical view of the question, but according to a sound and reasonable interpretation. The court will not

grant a Mandamus to enforce a right not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put."

A key criterion is the existence of a legal right, and correspondingly a legal duty, similar to a Hohfeldian analysis of rights.

This has been the requirement in many cases. His Lordship Sharvananda J. (as he then was) in Weligama Multi-Purpose Co-Operative Society v. Chandradasa Daluwatta [1984] 1 SLR 195 held that Clause 7(1) of a particular circular issued by the Secretary of the Co-operative Employees Commission which stated that an interdicted employee was entitled to such payment pending the conclusion of his inquiry did not impose an obligation to do so, and that such a direction could not be elevated to a regulation having statutory efficacy. His Lordship held (at p. 199):

"Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by Mandamus the duty to be performed must be of a public nature and not of merely private character.. A public duty may be imposed "by either statute, charter or the common law or custom.-Short on Mandamus at page 228.

It is settled that where an entirely new right is given by statute. Mandamus is the remedy, though it is otherwise where an old right only is enforced -Per Wood V.C. in Simpson v. Scottish Union Insurance Company.

Today the chief function of the Writ is to compel the performance of a public duty prescribed by statute, though it lies as well for the enforcement of common law public duty. Vide Ratnayake v. Perera.

The Writ will not issue for private purpose, that is to say for the enforcement of a mere private duty stemming from a contract or otherwise. Contractual duties are enforceable by the ordinary contractual remedies such as damages, specific performance or injunction. They are not enforceable by Mandamus which is confined to public duties and is not granted where there are other adequate remedies."

This was cited with approval in the case of Hakmana Multi Purpose Co-operative Society Ltd. v. Ferdinando [1985] 2 SLR 272 SC. The requisite of public or statutory duty was discussed in the cases such as Piyasiri v. People's Bank [1989] 2 SLR 47; Sannasgala v. University of Kelaniya [1991] 2 SLR 193 and Samaraweera v. Minister of Public Administration [2003] 3 SLR 64.

His Lordship Amaratunga J. in Vasana v. Incorporated Council of Legal Education [2004] 1 SLR 154 at p. 163 observed:

"A writ of mandamus is available against a public or a statutory body performing statutory duties of a public character. In order to succeed in an application for a writ of mandamus the petitioner has to show that he or she has legal right and the respondent corporate, statutory or public body has a legal duty to recognize and give effect to the petitioner's legal right. In the instant case the Council of Legal Education has decided to admit to the Law College in 2002 all those candidates who have scored 70 marks and above at the Entrance Examination held in September 2001. The petitioner who has obtained only 56 marks at the said Examination has no legal right to be admitted to the Law College on the results of the said Examination. Accordingly, there is no corresponding legal duty on the Council of Legal Education to admit the petitioner to the Law College."

A pertinent observation of his Lordship that is worth re-iterating is thus:

"The most important principle to be observed in the exercise of jurisdiction by Mandamus which lies at the very foundation of rules and principles regulating the use of this extra ordinary remedy is based on the distinction between duties of mandatory nature and those which are discretionary in character. The respondents having acted fairly, reasonably, and in accordance with the principles of natural justice in affording an opportunity to the petitioner to examine her answer script will not be compelled to admit the petitioner to Law College by this Court in the exercise of its discretionary jurisdiction. In the result the petitioner's application for a writ of mandamus also fails."

Therefore, it appears trite that there must be a public/ statutory duty or legal duty (not merely equitable duty/obligation), or evidence of the same, in order for a writ of mandamus to be issued. The issue then is whether the doctrine of legitimate expectations which is based on equity can generate a legal or statutory duty to compel the relevant authority to keep to its representation and enforce the expectation.

It must be noted that the doctrine of legitimate expectations has been invoked in the fundamental rights jurisdiction as well. This is what Dr. Jayampathy Wickremaratne P.C. in his tome, 'Fundamental Rights in Sri Lanka' (3rd edition at p. 565) refers to as the "constitutionalisation of administrative law". The learned author explains that administrative law principles such as legitimate expectations, natural justice have been relied on when determining violations of the equal protection clause and thus given rise to constitutional remedies in addition to remedies in administrative law. He cites the cases of Dayarathna v. Minister of Health [1999] 1 SLR 393, Chathurika Silva v. Sunil

Hettiarachchi and Chanima Wijebandara v. Sunil Hettiarachchi SC FR 228/2018 and SC FR 229/2018 SCM 18.06.2020 as examples. In this regard, the fundamental rights jurisdiction is not trammelled by the criteria for the issuance of mandamus; there is no necessity therefore to demonstrate a right and a corresponding duty, unlike the writ jurisdiction conferred on this Court by Article 140 of the Constitution, when granting a writ of mandamus. It is then a distinction that must be borne in mind when analysing the legitimate expectations jurisprudence since it is a distinction that is capable of being overlooked.

Most recently, her Ladyship Murdu Fernando P.C. J. recognised this subtle distinction in Dayanthi Dias Kaluarachchi v. Ceylon Petroleum Corporation SC Appeal 43/2013 SCM 19.06.2019 :

"I re-iterate the observations of JAN de Silva J., quoted above that the foundation of mandamus is the existence of a legal right. A court should not grant a writ of mandamus to enforce a right which is not legal and not based upon a public duty. Judicial intervention based upon legitimate expectation should not be used as a tool for enforcing a right purely of an equitable nature."

The question we are grappling with is whether the criterion of mandamus should be sacrificed on the altar of legitimate expectations. Whether a legitimate expectation, such as in the present case, can be enforced through a writ of mandamus is doubtful. This is an issue that merits further consideration.

For the foregoing reasons, we dismiss the petition, without costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL