

**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* and/or *Mandamus* and/or Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal Case No:**  
**CA/WRT/0003/2019**

**Captain Palawa Gedara Kosala  
Pelawage**  
10(V) Gamunu Watch Army Camp,  
Sirinathakulum,  
Mannar.

**Petitioner**

**Vs**

1. **Lt. General H.I.V.M. Liyanage.**  
The Commander of the Army of Sri Lanka  
Sri Lanka Army Head Quarters,  
Colombo 03.
  
2. **Major General E.A.D.P. Edirisinghe**  
Colonel Commandant of the Gamunu Watch  
Gamunu Watch,  
Kuruwita,  
Ratnapura.

3. **Major General W.A.S.S. Wanasinghe**  
The Commandant Sri Lanka Army  
Voluntary  
Force  
Voluntary Force Head Quarters.  
Kosgama.
4. **Major General M. Fernando**  
Military Secretary of the Sri Lanka  
Army  
Sri Lanka Army Head Quarters,  
Colombo.
5. **General G.D.H.K. Gunarathna (Retd)**  
Secretary to the Ministry of Defense  
Ministry of Defense  
15/5, Baladaksha Mawatha  
Colombo 03.
6. **Major General D. Fernando**
7. **Major General R. W.P Jayasundara**
8. **Major General G.P.I Karunarathna**
9. **Major General W.A Wanniarachchi**
10. **Brigadier K.G.P Perera**
11. **Brigadier M.A.S.K Mohandiram**
12. **Brigadier L.F Kasthuriarachchi**
13. **Colonel B.N.S Bothota**

**6th to the 13th Respondents All  
Members of the Army  
Selection Board No.3**

**14. Brigadier W.B.J.K. Wimalarathna**

Centre Commandant Gemunu Watch  
Kuruwita,  
Ratnapura.

**15 Lt. Col G.P.G.P. Premadasa**

Liaison Officer of Regimental  
Headquarters of G

**Respondents**

Before: **M. T. MOHAMMED LAFFAR, J.**  
**S. U. B. KARALLIYADDE, J.**

Counsel: Roshan Hettiarachi with Ms. Thavishi Wanaguru, instructed  
by Mallawarachchi Associates for the Petitioner.

Ms. Amasara Gajadeera, SC for the Respondents.

Argued on: 25.05.2023

Written Submissions on: 01.09.2023 by the Petitioner

11.09.2023 by the Respondents

Decided on: 02.10.2023

**MOHAMMED LAFFAR, J.**

The main reliefs sought by the Petitioner in this Application, *inter alia*, are as follows:

1. A Writ of Certiorari quashing the determinations contained in the communications marked P5 and P7 retiring the Petitioner with effect from 19-02-2019.
2. A Writ of Certiorari quashing the decisions made against the Petitioner by the Army Selection Board No. 3, which is reflected in P5 and P7.
3. A Writ of Mandamus compelling the Respondents to confirm the Petitioner in the Rank of Major (Temporary) with effect from 17-02-2019 together with his consequential entitlements thereto.
4. A Writ of Prohibition on the Respondents prohibiting the Respondents from taking any steps based on the determinations contained in P5 and P7 from retiring the Petitioner with effect from 19-02-2019.

**FACTUAL MATRIX:**

The Petitioner joined the Sri Lanka Army Volunteer Force as a Cadet Officer in 2004 and was thereafter promoted to the Rank of 2<sup>nd</sup> Lieutenant, to the Rank of Lieutenant, and the Rank of Captain (Confirmed) on 18-12-2010, of which Rank the Petitioner currently holds. The Petitioner was not promoted to the Rank of Major (Temporary) on 18-12-2014 along with his batch owing to him being served with charge sheets dated 06-06-2014 and 14-10-2014. The charges are as follows;

1. Absence without leave for 22 hours from 02-08-2005 to 03-08-2005.
2. Married without permission.
3. Absence without leave for 243 days from 21-06-2013 to 18-02-2014.

The Petitioner had pleaded guilty to those charges before the Court Marshall and accordingly, he was punished in terms of Section 133 of the Army Act. In those circumstances, the Army Selection Board decided that the Petitioner was not eligible to be recommended for promotion to the Rank of Major (Temporary) because of his past disciplinary record. Accordingly, the Major General for Commandant

SLAVF, L.K. Kasthuriarachchi, by letter dated 08-08-2018 marked as **P5** informed the Petitioner that he was to be retired with effect from 19-02-2019, which reads thus;

*“The Army Bd No.3 assembled on 19-02-2018 examined the SLAVF Bd proceedings and stipulated criteria with regard to the promotion to the rank of T/Major and determining their career progression. The Bd having perused your adverse disciplinary record, recommended you to be retired from the SLAVF without further promotion after a period of one year with effect from the date the AHQ board proceedings are approved. It is brought to your information that the Commander of the Army has approved the above recommendation made by the Army Bd No.3.”*

Thereupon, the Petitioner submitted a Redress of Grievance letter dated 03-09-2018 to the 1<sup>st</sup> Respondent, marked as **P6** and by letter dated 23-11-2018, the 14<sup>th</sup> Respondent informed the Petitioner that the said Redress of Grievance letter could not be accepted, which is marked as **P7**.

In those circumstances, the Petitioner states *inter-alia* that the recommendation of the Board for the compulsory retirement of the Petitioner is unlawful and *ultra-vires* and the Petitioner has legitimate expectations for the promotion of the Rank of Major (Temporary).

### **Promotion:**

The decision of the Army Promotion Board No.3, not recommending the Petitioner for the Rank of Major (Temporary) is based on the past disciplinary track record of the Petitioner which should not be regarded as a punishment. The Army Officers are not entitled to be promoted to the next rank as a matter of right, and any promotion to the next rank by an Armed Officer must be earned through good conduct, performance and discipline. In terms of Section 8 of the Army Act, No. 17 of 1949 (as amended) read with Regulation 2 of the Army Disciplinary Regulation of 1950, the general Responsibility for maintenance of the discipline of the Army is vested with the Commander of the Army. Regulation 15 (1) sets out the requirements a candidate should have to fulfill to gain a promotion *inter-alia*, to the rank of Major (Temporary) as follows;

- (a) Passed such examination for that rank as may from time to time be specified in Army Orders by the Commander of the Army.
- (b) Regularly attended training camps parade mobilization and participated in other regimental activities to the satisfaction of the Commandant of his Regiment or Unit.
- (c) Been Recommended by his Commanding Officer and Commandant, Volunteer Force as being suitable for promotion.

Having taken into consideration the facts that the Petitioner had not been recommended by the Regimental and Battalion Heads for the next promotion and the Petitioner had pleaded guilty to the charges, namely absence without leave for 22 hours from 02-08-2005 to 03-08-2005, married without permission and absence without leave for 243 days from 21-06-2013 to 18-02-2014, the Army Selection Board No. 3 had recommended not to promote the Petitioner to the rank of Major (Temporary), P5. In these circumstances, it is the considered view of this Court that the recommendation not to grant promotion to the Petitioner is reasonable and lawful. Since the Petitioner was well aware of the fact that his past disciplinary record is not satisfactory, he is not entitled to form a legitimate expectation for the next promotion.

The contention of the learned Counsel for the Petitioner is that the Petitioner had already been punished for the aforesaid charges, and therefore, he cannot be punished once again by not recommending the next promotion. I observe that not being recommended for promotion to the rank of Major (Temporary) is not the second punishment. The Army Promotion Board No.3 is bound to consider the past disciplinary record and the conduct of the Petitioner before recommending him for the next promotion. Admittedly, as the Petitioner's past disciplinary record and conduct is not satisfactory, the Board is obliged not to recommend him for the promotion.

**Compulsory retirement:**

As per the impugned document marked P5, the Commandant SLAVF informed the Petitioner that the Board has recommended the Petitioner to be retired from the SLAVF due to his adverse disciplinary record. It is pertinent to be noted that the Petitioner was docked seniority by 100 ranks and deducted all pay and allowances for the charge of absence without leave for 243 days from 21-06-2013 to 18-02-2014, admonished and deducted pay and allowance for one day for the charge of absence without leave for 22 hours from 02-08-2005 to 03-08-2005

and severely reprimanded for the charge of married without permission. It appears to this Court that, as the Petitioner had already been punished for the offences committed by him, after four years recommending him to be retired on the same offences is not reasonable. The Board is entitled not to recommend the Petitioner for the promotion as his past record is not satisfactory, but it is not reasonable to recommend that he be retired. Since the Petitioner had already been punished for the said offences, he can have a legitimate expectation to be in service until his age of retirement.

Admittedly, the recommendation marked P5 is to have the Petitioner retired from service against his will, which could be performed in accordance with Regulation 32 of the Sri Lanka Army (Volunteer Force and Volunteer Reserve) Regulations R7. It appears to this Court that the Respondents have not adduced any material before this Court to substantiate the fact that the procedure set out in Regulation 32 is adhered to. In this regard, the attention of this Court is drawn to the observation made by Justice Surasena in **Weerakoon Vs. Lt. Gen. A.W.J.C.De Silva and others**<sup>1</sup> . As such, recommending the Petitioner to retire from services against his will is *ultra-vires*.

The right to be heard is a vital basic principle in administrative law. This is an aspect of participatory democracy. Before a person is deprived of certain privileges, liberties, property, livelihood etc., he must be allowed to present his position.

In the case of **Pure Beverages Company Executive Officers Association Vs. Commissioner of Labour**<sup>2</sup> , it was observed that *“Principles of natural justice not only demands that the affected party should be heard but that they should be given a reasonable opportunity to present their case. Further, the facility of presenting the case of an affected party to be effective and meaningful such an inquiry should be proceeded by sufficient notice.”*

In the instant Application, the Army Disciplinary Board, before recommending that the Petitioner be retired from service, had not given an opportunity to the Petitioner to present his case. In short, the Petitioner was not heard before making such recommendation of Petitioner’s compulsory retirement which amounts to a gross violation

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<sup>1</sup> CA Writ-No. 382/2015. CA. Minute of 23-05-2016.

<sup>2</sup> 2001-2SLR-258.

of the principles of natural justice (*audi-alteram-partem*), and therefore, such recommendation is liable to be quashed in *limine*.

Based on the aforementioned considerations, it is essential to address the recommendations put forth by the Army Disciplinary Board (No. 03) as reflected in P5 and P7. The Board's recommendation for the Petitioner to enter retirement is bad in law and therefore is liable to be quashed. However, the Board's recommendation to withhold the Petitioner's promotion to the rank of Major Temporary is deemed fair, given due consideration to the Petitioner's historical disciplinary record. Thus, the recommendation that the Petitioner should retire from services in the military is quashed.

*No costs.*

JUDGE OF THE COURT OF APPEAL

**S. U. B. KARALLIYADDE, J.**

I agree.

JUDGE OF THE COURT OF APPEAL