

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

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

**SC (FR) Application No: 457/2011**

Priyankara Kamalanath Kodithuwakku,  
'Wanniarachchi Janaudanagama,'  
Borala, Pelmadulla.

**PETITIONER**

vs.

1. B.V. Wijeratne,  
Assistant Superintendent of Police (Retired),  
Isuru Place, Paradise, Kuruwita.
2. E. Dhanapala,  
Assistant Superintendent of Police,  
Office of the Assistant Superintendent of  
Police, Ratnapura.
3. Senior Superintendent of Police,  
Office of the Senior Superintendent of Police,  
Ratnapura.
4. Director (Personnel),  
Police Headquarters, Colombo 1.
5. Director,  
Discipline and Conduct Division,  
Police Headquarters, Colombo 1.
6. Inspector General of Police,  
Police Headquarters, Colombo 1.

7. Secretary,  
Ministry of Defence, Colombo 1.
- 7A. Secretary,  
Ministry of Law and Order,  
Floor – 13, 'Sethsiripaya' (Stage II),  
Battaramulla.
- 7B. Secretary,  
Ministry of Defence,  
15/5, Baladaksha Mawatha, Colombo 3.
- 7C. Secretary,  
Ministry of Law & Order and Southern  
Development, No. 25, Whiteaways Building,  
Sir Baron Jayathilake Mawatha, Colombo 1.
- 7D. Secretary,  
Ministry of Public Security,  
14<sup>th</sup> Floor, 'Suhurupaya,' Battaramulla.
8. Vidyajothi Dr. Dayasiri Fernando,  
Chairman, Public Service Commission.
- 8A. Justice Sathya Hettige, PC,  
Chairman, Public Service Commission.
9. Palitha M. Kumarasinghe, PC
- 9A. S.C. Mannapperuma
- 9B. Indrani Sugathadasa
10. Sirimavo A. Wijeratne
- 10A. Ananda Seneviratne
- 10B. Dr. T R C Ruberu

- 11. S.C. Mannapperuma
  - 11A. N.H. Pathirana
  - 11B. Ahamed Lebbe Mohammed Saleem
- 12. Ananda Seneviratne
  - 12A. S. Thillanadarajah
  - 12B. Leelasena Liyanagama
- 13. N.H. Pathirana
  - 13A. A. Mohamed Nahiya
  - 13B. Dian Gomes
- 14. S. Thillainadarajah
  - 14A. Kanthi Wijetunge
  - 14B. Dilith Jayaweera
- 15. M.D.W.Ariyawansa
  - 15A. Sunil S. Sirisena
  - 15B. W.H. Piyadasa
- 16. A. Mohamed Nahiya
  - 16A. Dr. I.M. Zoysa Gunasekera

9<sup>th</sup>, 9A, 9B, 10<sup>th</sup>, 10A, 10B, 11<sup>th</sup>, 11A, 11B, 12<sup>th</sup>, 12A, 12B, 13<sup>th</sup>, 13A, 13B, 14<sup>th</sup>, 14A, 14B, 15<sup>th</sup>, 15A, 15B, 16<sup>th</sup>, 16A are members of the Public Service Commission.

- 17. Secretary, Public Service Commission.

8<sup>th</sup>, 8A, 9<sup>th</sup>, 9A, 9B, 10<sup>th</sup>, 10A, 10B, 11<sup>th</sup>, 11A, 11B, 12<sup>th</sup>, 12A, 12B, 13<sup>th</sup>, 13A, 13B, 14<sup>th</sup>, 14A, 14B, 15<sup>th</sup>, 15A, 15B, 16<sup>th</sup>, 16A and 17<sup>th</sup> Respondents at No. 177, Nawala Road, Narahenpita, Colombo 5.

18. The Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.
19. Prof. Siri Hettige,  
Chairman, National Police Commission
20. P.H. Manatunga
21. Savithree Wijesekara
22. Y.L.M. Zawahir
23. Anton Jeyanandan
24. Tilak Collure
25. Frank de Silva

20<sup>th</sup> – 25<sup>th</sup> Respondents are members of the National Police Commission.

26. Secretary,  
National Police Commission.

19<sup>th</sup> – 26<sup>th</sup> Respondents are at Block No. 9, B.M.I.C.H. Premises, Buddhaloka Mawatha, Colombo 7.

## **RESPONDENTS**

**Before:** Priyantha Jayawardena, PC, J  
Achala Wengappuli, J  
Arjuna Obeyesekere, J

**Counsel:** Saliya Peiris, PC, with Anjana Ratnasiri for the Petitioner  
Rajiv Goonetilleke, Deputy Solicitor General for the Respondents

**Argued on:** 25<sup>th</sup> October 2021

**Written Submissions:** Tendered on behalf of the Petitioner on 15<sup>th</sup> July 2022  
Tendered on behalf of the Respondents on 15<sup>th</sup> November 2021

**Decided on:** 21<sup>st</sup> February 2024

**Obeyesekere, J**

In this application, the Petitioner is impugning the decision of the Inspector General of Police not to promote him as an Inspector of Police for the reason that he did not possess five years of unblemished service as at 8<sup>th</sup> February 2010. The issue that needs to be determined by this Court is whether the said decision of the Inspector General of Police is justifiable in terms of the criteria for promotion.

**Institution of proceedings against the Petitioner**

The Petitioner joined the **Reserve Force of the Sri Lanka Police Department** as a Sub-Inspector on 30<sup>th</sup> August 1992. In 1998, he was assigned to the Opanayake Police Station, and assumed duties at the Kahawatte Police Station in October 2002. The Petitioner states that while serving at Opanayake, he had apprehended a large number of persons on charges of brewing illicit liquor, and instituted proceedings in the Magistrate's Court against such persons in respect thereof. On 29<sup>th</sup> May 2002, one of the persons so apprehended had lodged a belated complaint with the Superintendent of Police, Ratnapura alleging that on 12<sup>th</sup> May 2001, the Petitioner had solicited and accepted from him a gratification in a sum of Rs. 1000. The said person had also lodged a complaint with

the Commission to Investigate Allegations of Bribery or Corruption [*the Commission*] in respect of the same matter.

Having recorded a statement from the Petitioner, the Commission had initiated proceedings against him in the Magistrate's Court of Colombo under the provisions of the Bribery Act. As a result of the institution of the above action, the Petitioner had been interdicted from service with effect from 20<sup>th</sup> September 2004, as required by Section 31:1:4 of Chapter XLVIII of the Establishments Code [*the Code*].

The trial in the Magistrate's Court had commenced on 26<sup>th</sup> May 2005. While the prosecution had led the evidence of three witnesses, the Petitioner had given evidence on his own behalf. By judgment delivered on 30<sup>th</sup> June 2005, the learned Magistrate had acquitted the Petitioner of all charges levelled against him.

#### Reinstatement in service

Pursuant to his acquittal, the Petitioner had sought to be reinstated in service.

Section 28:6 of Chapter XLVIII of the Code provides that the acquittal of an officer by a Court of Law is not a bar to disciplinary proceedings being taken against such officer under the Code for the same offence, provided there is sufficient material to do so. However, by his letter dated 21<sup>st</sup> December 2005, the Superintendent of Police, Ratnapura had confirmed that further disciplinary proceedings would not be taken against the Petitioner in respect of the above incident. The inference that can be drawn from the said decision of the Superintendent of Police is that the material that was available was insufficient for the Police Department to initiate such disciplinary proceedings against the Petitioner.

While noting that the Petitioner had been acquitted by the Magistrate's Court, the Police message issued by the Inspector General of Police reinstating the Petitioner in service on 7<sup>th</sup> April 2006, contained *inter alia* the following conditions:

“මෙ කේතුව මත පේෂණ්ඩ පොලිස් අධිකාරි රත්නපුර හා පේෂණ්ඩ නියෝජ්‍ය පොලිස්පති සභායක සේවා විසින් මොහුව නැවත සේවයේ පිහිටුවීමට නිර්දේශ කර ඇති බැවින් මෙම නිලධාරියා වහාම නැවත

සේවයේ පිහිටුවා පොලිස් සේනාධිපති ධර්මානුෂාංග ආණ්ඩුකරු කිරීමට නියෝග කර නිලධාරියා දිගු කලක් සේවයේ නොසිටි බැවින් පොලිස් විද්‍යාලයේ පුහුණුව සඳහා යොමු කිරීමටත් පොලිස් විද්‍යාලයේ පුහුණුවෙන් පසුව පොලිස් සේනාධිපති ධර්මානුෂාංග ආණ්ඩුකරු කිරීමටත් නිලධාරියා සේවයේ නොසිටි කාලය වැටුප් රහිත කාලයක් සේ සැලකීමටත් වර්ෂ 02 ක කාලයක් සඳහා වැඩ හා හැසිරීමේ ගොනුවක් පවත්වා ගෙන යාමටත් පොලිස්පති විසින් නියෝග කර ඇත.”

By way of a further message dated 25<sup>th</sup> April 2006, the Senior Superintendent of Police, Ratnapura, had informed the Officer-in-Charge of the Kahawatte Police that the Petitioner has been reinstated in service, subject to the following conditions specified in the above message of the Inspector General of Police:

- (a) The period the Petitioner was not in service to be considered as a period of no-pay leave;
- (b) The Petitioner to undergo training at the Police Training Institute and to be attached to the Police Field Force Headquarters after the said training;
- (c) A file to be maintained relating to the work and conduct of the Petitioner for a period of two years.

Fundamental Rights Application No. 188/2016

The above three conditions had thereafter been entered in the Bad Conduct Register relating to the Petitioner. Aggrieved by the decision to reinstate him without back wages and the decision to make the above endorsements on the Bad Conduct Register, the Petitioner invoked the jurisdiction conferred on this Court by Article 126 of the Constitution by way of a petition dated 26<sup>th</sup> May 2006 in SC (FR) Application No. 188/2006.

The Petitioner had specifically pleaded therein that he possessed an unblemished service record, that no disciplinary proceedings had been initiated against him, and that he had not been punished for any offence during his period of service. The gravamen of the Petitioner’s complaint to this Court was that the insertion of the above conditions in the

Bad Conduct Register amounts to a punishment, which had been imposed without any disciplinary proceedings being held against him.

On 22<sup>nd</sup> June 2006, prior to the said Fundamental Rights application being considered by this Court, the learned Deputy Solicitor General who appeared for the Attorney General had undertaken to obtain instructions on whether the above entries could be removed from the Bad Conduct Register. Having done so, this Court had been informed by the Attorney General on 21<sup>st</sup> August 2006 that, *“he has received instructions from the Respondents that the notation in P32 would be expunged, subject to the condition that the petitioner would not be entitled to back wages for the period under interdiction.”* On this basis, proceedings in the above application had been terminated.

The effect of the above undertaking is that the interdiction of the Petitioner from service did not result in any adverse findings against the Petitioner and the period under interdiction was not considered as a period of no-pay leave, even though the Petitioner was not paid any wages for that period. The distinction between no-pay leave and non-payment of back wages has been considered by this Court in **Tuan Ishan Raban and Others v The Police Commission** [(2007) 2 Sri LR 351], to which I shall advert, later in this judgment.

#### Expunging the entries in the Bad Conduct Register

By the time the above undertaking was given to this Court, the Police Department had already initiated steps to expunge the above entries from the Bad Conduct Register of the Petitioner. The following two paragraphs of the internal communication dated 27<sup>th</sup> June 2006 sent by the Director (Discipline and Enforcement) to the Commandant of the Field Force Headquarters soon after proceedings were terminated, clearly reflects the understanding of the Police Department on the relief that was sought by, and granted to the Petitioner:

“නිලධාරියා විසින් ඔහු සේවයේ නොසිටි කාලයට වැටුප් ලබාදෙන ලෙසත් මෙම සේවයේ පිහිටුවීමේදී ලබාදී ඇති කොන්දේසි ඔහුගේ සේවා ලේඛනයේ අයහපත් හැසිරීම් යටතේ ලේඛන ගත කිරීම ඉවත් කර දෙන ලෙසත් ශ්‍රේණිධායකරණය අංක 188/2006 යටතේ කොළඹ ශ්‍රේණිධායකරණය වෙත



ඉල්ලුම්පතක් ඉදිරිපත් කර ඇත. ශ්‍රේණිධානකරණය මගින් සේවයේ නොසිටි කාලයට වෙනත ගෙවීමට නොහැකි බවත් මෙම කොන්දේසි නිලධාරියාගේ සේවා ලේඛණයේ අයහපත් හැසිරීම් වශයෙන් ඇතුළත් කර තිබීම ඉවත් කරන ලෙසටත් උපදෙස් ලබාදී ඇත.

මේ අනුව නිලධාරියාගේ සේවා ලේඛණයේ පිටු අංක 110 හා 111 හි ඇතුළත් කර ඇති නිලධාරියා නැවත සේවයේ පිහිටුවීමේදී යටත් කරන ලද කොන්දේසි ඉවත් කරන ලෙසට ඔබ වෙත දැන්වන මෙන් පොලිස්පති විසින් මා වෙත උපදෙස් ලබා දී ඇත. ඒ අනුව කටයුතු කර වාර්තා කරන්න.”

The above communication had been acted upon by the deletion of the impugned entries from the Bad Conduct Register on 14<sup>th</sup> July 2006. It should perhaps be reiterated that the deletion of the said entries clearly meant that the institution of proceedings in the Magistrate’s Court and the subsequent interdiction did not result in any adverse findings against the conduct of the Petitioner.

#### Absorption of Officers of the Reserve Force to the Regular Force

In early 2006, during which time the Petitioner was still under interdiction, the Cabinet of Ministers had taken a decision to absorb all those serving in the Reserve Force of the Police Department to the Regular Force, with effect from 24<sup>th</sup> February 2006. Although the Cabinet Memorandum and the decision of the Cabinet of Ministers have not been made available to this Court, the memorandum circulated within the Police Department in this regard stipulated that those in the Reserve Force must have *inter alia* the following qualifications:

- (a) Basic academic qualifications applicable to the Regular Force or eight years of active service;
- (b) **An unblemished period of service for a period of five years preceding 31<sup>st</sup> December 2005;**
- (c) While only the active period of service will be counted, any period under suspension or demobilization will be deducted when calculating the number of years in active service.

The said memorandum also stipulated that:

- (a) An officer who had been ordered by Court to pay compensation in a fundamental rights application or awarded punishment in a disciplinary proceeding during the five-year period preceding 31<sup>st</sup> December 2005 will be treated as having a blemished record;
- (b) Reservists who are suspended from service will be considered for absorption provided *inter alia* their absorption is recommended by the Commandant of the Police Reserve;
- (c) Those who are not eligible due to pending cases in Courts and disciplinary inquiries will be kept in a reserve list until such time the inquiries are completed and will be absorbed depending on the outcome of the inquiry.

It is therefore clear that:

- (a) An unblemished service meant that no punishment had been imposed pursuant to the findings of a disciplinary inquiry or has not been ordered to pay compensation in a fundamental rights application;
- (b) Any period under suspension or de-mobilisation would only affect the period of active service that was required for absorption; and
- (c) Any period under suspension had no nexus to the requirement to have an unblemished record of service.

It is admitted that the Petitioner was absorbed to the Regular Force of the Sri Lanka Police on 13<sup>th</sup> July 2007, which means that the Petitioner possessed the aforementioned qualifications **including an unblemished period of service for a period of five years preceding 31<sup>st</sup> December 2005**. More importantly, his absorption demonstrates that the interdiction of the Petitioner and the fact that he was not in active service as a result thereof during the period of five years immediately preceding the operative date, were not considered a blemish on his service for the purposes of absorption.

Promotion of all Sub-Inspectors of Police

The issue that culminated in this application arose in February 2010, when the President ordered that all Sub-Inspectors of Police who had completed eight years of service as at 8<sup>th</sup> February 2010 in the rank of Sub-Inspector be promoted to the rank of Inspector of Police with effect from the said date. Similar to what was stipulated at the time of the aforementioned absorption, promotion was subject to each officer having eight years of active service and an unblemished record during the five-year period immediately before the date of promotion.

By a message dated 17<sup>th</sup> February 2010, the Senior Superintendent of Police (Operations) had called for a report from the Officer-in-Charge of the Kahawatte Police relating to the disciplinary records of six Officers including the Petitioner. By a further message sent on 18<sup>th</sup> February 2010, which appears to be based on a facsimile message sent the same day by the Inspector General of Police, the following instructions had been issued with regard to the calculation of the period of eight years of service:

**“වසර 08 ක සේවා කාලය ගනන් ගැනීමේදී පහත පරිදි ක්‍රියා කල යුතුය**

01. උප පොලිස් පරීක්ෂක තනතුරට පත් කිරීමෙන් පසු සේවය අතහැර ගොස් ඇත්නම් එම කාලය උප පොලිස් පරීක්ෂක තනතුරේ මුල සේවා කාලයෙන් අඩු කල යුතුයි.
02. උප පොලිස් පරීක්ෂක තනතුරට පත් කිරීමෙන් පසු **වැටුප් රහිත නිවාඩු** ලබා ඇත්නම් එම කාලය උප පොලිස් පරීක්ෂක තනතුරේ මුල සේවා කාලයෙන් අඩු කල යුතුයි.

සේවා කඩවීම ඇත්නම් එම කාල පරිච්ඡේද සදහන් කල යුතු අතර සනාථ කිරීමට අදාල ලේඛන තිබෙනම් එයද ඉදිරිපත් කිරීමට කටයුතු කල යුතුයි”

Thus, it is clear that the Inspector General of Police was of the view that any period of no-pay leave would be relevant only in respect of the calculation of the eight years of active service that was required for promotion.

In response, the Senior Superintendent of Police, Ratnapura, by letter dated 29<sup>th</sup> June 2010 had confirmed that the Petitioner has not had any disciplinary issues during the preceding five-year period and that his promotion was being recommended.

Petitioner is not granted his promotion

On 31<sup>st</sup> December 2010, the Inspector General of Police had issued a list containing the names of those Sub-Inspectors of Police who had been promoted to the rank of Inspector of Police pursuant to the aforementioned order of the President. Aggrieved by the decision not to include his name on the said list of promotees, the Petitioner had lodged a complaint with the Human Rights Commission on 26<sup>th</sup> January 2011.

In his response to the Human Rights Commission, the Director (Legal) of Sri Lanka Police had stated as follows:

“ඉහත කොන්දේසින් අභියෝගයට පත් කරමින් නිලධාරියා විසින් අංක 188/2006 යටතේ ශ්‍රේණිධාරිකරණයේ අභියාචනයක් ගොණුකර ඇත. එම නඩුව අනුව සේවයට පත් කිරීමේදී පැනවූ කොන්දේසි නිලධාරියාගේ සේවා ලේඛනයේ අයහපත් හැසිරීම් යටතේ ඇතුළත් කර තිබීම ඉවත් කරන ලෙසට තීන්දුවක් ලබා දී ඇති අතර සේවයේ නොසිටි කාලයට වැටුප් ගෙවීමට නියෝග කල නොහැකි බවට දැනුම් දී ඇත.

ඒ අනුව නිලධාරියාගේ සේවා ලේඛනයේ අයහපත් හැසිරීම් යටතේ ඇතුළත් කර ඇති ඉහත කොන්දේසින් ඉවත් කිරීමට පියවර ගෙන ඇති අතර සේවයේ නොසිටි කාලය සඳහා වැටුප් ගෙවීමක් සිදුකර නොමැති නිසා එම කාලය සක්‍රීය සේවා කාලයක් සේ ගනනය කල නොහැකි බව සඳහන් කරමි.

පැමිණිලිකාර නිලධාරියා නැවත සේවයට පත්කර ඇත්තේ 2006.04.07 වන දින වන අතර සේවයට පත්කිරීමේදී ලබා දෙන කොන්දේසියක් වන සේවයේ නොසිටි කාලය වැටුප් රහිත කාලයක් සේ සැලකීම මත උසස් වීම ලබාදුන් දින සිට පෙර වසර පහක නොකැපුණු සේවා කාලයක් පැමිණිලිකාරට නොමැති බව සඳහන් කරමි.”

Thus, the contention of the Police Department was that the Petitioner did not possess five years of unblemished service prior to 8<sup>th</sup> February 2010, **for the reason that he was on no-pay leave during the period he was under interdiction** [i.e., 20<sup>th</sup> September 2004 – 7<sup>th</sup> April 2006]. I must state that this position was factually incorrect as the Inspector General of Police represented by the Attorney General had agreed before this Court in the previous Fundamental Rights application not to treat the said period as a period of no-pay leave, despite the Petitioner agreeing that he would not be entitled to the payment of back wages.

### Alleged infringement of Article 12(1)

Pursuant to the above response to the Human Rights Commission, the Petitioner filed this application on 3<sup>rd</sup> October 2011 complaining that the decision not to grant him his promotion is an infringement of his fundamental rights guaranteed by Article 12(1) of the Constitution. On 12<sup>th</sup> January 2012, this Court had granted leave to proceed for the alleged violation of Article 12(1).

In **Karunathilaka and Another v Jayalath de Silva and Others** [(2003) 1 Sri LR 35 at pages 41-42] it was observed as follows:

*“The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby become discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which have a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.”*

The concept of equality therefore forbids action which is arbitrary and capricious. A determination by this Court that the right to equality guaranteed to the Petitioner by Article 12(1) has been violated would therefore have to be preceded by a finding that the aforementioned decision of the Inspector General of Police is unreasonable and unfair and is therefore arbitrary.

### Does the Petitioner have eight years of service?

There were only two requirements that had to be satisfied by a Sub-Inspector of Police who was in service on 8<sup>th</sup> February 2010 to be entitled for promotion to the rank of Inspector of Police. The first was that the Officer should have completed eight years of service in the rank of Sub-Inspector as at that date. It was the position of the Respondents, as borne out by the affidavit filed before this Court by the Inspector General of Police and the written submissions filed on their behalf, that:

- (a) The National Police Commission has decided that the period of service in the Reserve Force could be aggregated with the period of service in the Regular Force after absorption;
- (b) Therefore, the eight years of service need not be after absorption to the Regular Force;
- (c) The requirement of eight years of service need not be eight years of continuous service;
- (d) Even after discounting the break in service due to his interdiction, the Petitioner had almost sixteen years of service and had satisfied the requirement of having eight years of service required for promotion.

Thus, there is no dispute between the parties with regard to the first requirement. The position taken up by the Respondents is consistent with the judgment of this Court in **R.A.S.R Kulatunga v Pujitha Jayasundera, Inspector General of Police and Others** [SC (FR) Application No. 132/2014; SC Minutes of 18<sup>th</sup> March 2021] where it was held that, “*giving due regard to the period of active service in the Reserve Force in the rank of Inspector of Police in deciding whether an applicant had completed eight years of active service in the rank of Inspector of Police is neither arbitrary nor irrational.*”

Does the Petitioner have an unblemished period of service of five years?

The second requirement that must be satisfied in order to be promoted as an Inspector of Police is that the Petitioner should have an unblemished record of service during the five-year period immediately prior to the date of promotion of 8<sup>th</sup> February 2010, with the Inspector General of Police claiming that the Petitioner did not possess the said requirement, and hence is not eligible for promotion.

It was submitted by the learned Deputy Solicitor General that the Code does not contain a definition of *unblemished* service. The plain and simple dictionary meaning of the word *blemish* appropriate to the present circumstances is, to impair morally or to cast a slur on the honour and reputation of an individual. This Court would therefore have to consider

the attendant circumstances in determining whether the Petitioner possessed an *unblemished service*.

The Code contains detailed provisions relating to the taking of disciplinary proceedings against public officers. Section 1:2 of Chapter XLVIII of the Code stipulates that, “*All acts of misconduct or lapse by officers calling for punishment in any form **should be dealt with, under these rules, as soon as possible, by the Disciplinary Authorities, Heads of Departments and other relevant Heads of Institutions...***”. The step-by-step procedure that should be followed in order to impose a punishment provided in the Code is contained in Chapter XLVIII. The major punishments set out in Section 24:3 of Chapter XLVIII could be imposed by the Disciplinary Authority only upon the findings of a formal disciplinary inquiry that has been conducted pursuant to the issuance of a charge sheet. This extends to the decision with regard to the payment of arrears of salary for the period an officer was under interdiction – vide Section 31:14.

I shall now consider the position of the Respondents. In his affidavit to this Court, the Inspector General of Police has stated the following as being the reasons why the Petitioner was not entitled to be promoted in 2010:

- “(a) The period the petitioner was out of service cannot be considered as active service and no salary has been paid to the Petitioner for the said period;*
- (b) It is not possible to deem that the Petitioner’s service was unblemished during the period he was not in service as it is necessary to be in active service in order to determine whether the relevant period was unblemished or not;*
- (c) A period a person is out of service cannot be construed as a period of unblemished service as there had been no opportunity to assess his service;*
- (d) The Petitioner was not entitled to back wages for the period he was out of service and that too is indicative of the fact that the said period is not an unblemished period of service;*

(e) *Therefore, the Petitioner did not possess an unblemished record during the five-year period immediately before the date of promotion.*" [emphasis added]

#### Payment of wages to an Officer of the Reserve Force

As noted earlier, the Petitioner did not receive any wages for the period that he was under interdiction, with the Petitioner conceding in the Fundamental Rights application filed by him that he is not entitled to the payment of back wages. The position of the Respondents, as I understand, is that as the Petitioner did not receive a salary for the period under interdiction, the said period cannot be considered as being a period of active service, and that the period the Petitioner was not in active service cannot be construed as a period of unblemished service as there had been no opportunity to assess his service.

In **Tuan Ishan Raban and Others v The Police Commission** [supra], this Court observed that it is apparent from Section 26B(1) of the Police Ordinance that Officers of the Reserve Force were paid on a daily basis for the reason that such Officers could be mobilised and de-mobilised from time to time, and therefore such Officers were not in continuous service. Although provision was made in 1992 for Officers of the Reserve Force to be paid a monthly salary, this was subject to the period of their mobilised service being not less than 26 days for a calendar month. The fact remained therefore that an officer in the Reserve Force was entitled to wages only if he was in active service, and therefore the question of placing an Officer of the Reserve Force such as the Petitioner in this case on no-pay leave while he was not in active service simply does not arise. The fact that wages were not paid during such period an Officer of the Reserve Force was not mobilised certainly does not mean that the said period is of blemished service.

Thus, the Petitioner being an Officer of the Reserve Force, and not having been on active service during the period of 20<sup>th</sup> September 2004 – 7<sup>th</sup> April 2006, was not entitled to the payment of wages for the said period. This was perhaps the logic behind the Petitioner agreeing before this Court in the previous application that he was not entitled to the payment of back wages. Furthermore, the Petitioner not having been on active service during the above period is not sufficient by itself for the Respondents to claim that the said period is of blemished service.



### Distinction between active service and an unblemished period of service

I must state at this point that an unblemished period of service must not be confused with the first requirement of eight years of active service. The Inspector General of Police appears to have done just that, contrary to the instructions given by his facsimile message of 18<sup>th</sup> February 2010 that the period of no-pay leave would apply only with regard to the calculation of the eight years of active service. Therefore, the period for which the Petitioner did not receive his wages as a result of being under interdiction would only apply with regard to the first requirement of active service and cannot be applied to the second requirement of unblemished service, unless of course the reason for the non-payment of wages arises out of a disciplinary order, which is not the situation in this case.

Under the Code as well as the Procedural Rules of the Public Service Commission, the entitlement to promotion is conditional upon the criteria in the relevant service minute being satisfied and the public officer earning his salary increments. The learned Deputy Solicitor General has drawn the attention of this Court to the requirement in Rule 186 of the Procedural Rules of the Public Service Commission, which reads as follows:

*“A Public Officer must earn his promotion by a satisfactory service and fulfilment of all the required qualifications prescribed in the Service Minute or the Scheme of Recruitment.*

- (i) Satisfactory service means a period of service, during which period an officer had earned all annual salary increments that fall due, by efficient and diligent discharge of duties, by passing over efficiency bars that fall due, by qualifying for confirmation in service that fall and during which period he has not committed a punishable offence.*
  
- (ii) Where an officer has not been granted his due annual salary increments for legitimate reason the period during which the increment had stand suspended, reduced, stopped or deferred and where an officer had committed a punishable offence falling under Schedule I of offences, a period of three years from the*

*date of commission of the offences and where an officer had committed a punishable offence falling under the Schedule II of offences a period of one year from the date of commission of the offence, shall be excluded in computing his period of satisfactory service.”*

The above rule makes it clear that a public officer must earn his promotion *inter alia* by satisfactory service which once again means a period of active service during which all salary increments are earned by the efficient and diligent discharge of his duties. The fact that a public officer fails to earn such increments may be due to a variety of reasons and even though it may affect the period of years in active service, given the circumstances of this case, such failure does not mean that such officer’s service is blemished. Nor can it be applied to a situation where the increments have not been earned for no fault of the public officer concerned, as in this application.

Furthermore, no fault can be attributed to the Petitioner for him not having five years of consecutive service from 8<sup>th</sup> February 2005. Therefore, if as the Inspector General of Police claims, a period of five years’ service had to be assessed in order to determine if the services of the Petitioner were unblemished, the Respondents could very well have considered the five years of active service that the Petitioner possessed immediately prior to 8<sup>th</sup> February 2010, leaving out the period under interdiction. Taking into consideration all of the above circumstances, I am of the view that the explanation offered to this Court by the Inspector General of Police is irrational and the decision of the Inspector General of Police is arbitrary and violative of the fundamental rights of the Petitioner guaranteed by Article (12). I therefore reject the said explanation.

#### No formal disciplinary proceedings

The learned President’s Counsel for the Petitioner submitted that even though the Petitioner was under interdiction as at 8<sup>th</sup> February 2005 – which under normal circumstances should have been the commencement date in calculating the five-year period for the purpose of unblemished service – the Petitioner was subsequently acquitted of all charges levelled against him and the Police Department had taken a conscious decision not to proceed with any disciplinary action, although such a course of

action was available to the Police Department under the provisions of the Code. He therefore submitted that, having decided not to proceed with disciplinary action, the Police Department cannot claim that the service of the Petitioner is nonetheless blemished as a result of the said incident and subsequent interdiction by drawing a nexus to the non-payment of wages for that period. I am in agreement with this submission and take the view that not having pursued disciplinary action as provided for by the Code, the Police Department has no basis to claim that the Petitioner's service is blemished, or in other words, that the said incident has cast a slur on the honour and reputation of the Petitioner.

#### Deletion of entries from the Bad Conduct Register

The second argument of the learned President's Counsel for the Petitioner was that the decision of the Police Department to record the three conditions in the Bad Conduct Register, including the condition that the period under interdiction must be treated as a period of no-pay leave, was challenged by the Petitioner in the aforementioned Fundamental Rights application and that the Police Department had agreed to revoke that decision and remove the said entries from the Bad Conduct Register.

The consequence of this deletion is three-fold. The first is that there are no entries in the Bad Conduct Register and therefore it cannot be said that the Petitioner's service record is blemished. The second is that no adverse conclusion could be drawn by the fact that the Petitioner was under interdiction. The third is that the Police Department has agreed that the period the Petitioner was under interdiction was not a period of no-pay leave, even though the Petitioner had agreed that he will not be entitled for the payment of wages during that period. As I have observed earlier, as an Officer of the Reserve Force, the Petitioner had no entitlement for the payment of wages for the period that he was not in active service. I am of the view that having agreed in this Court to remove the three entries from the Bad Conduct Register of the Petitioner, it smacks of bad faith on the part of the Inspector General of Police to thereafter claim that the Petitioner does not have an unblemished service record.

### Identical requirement for absorption

The third argument of the learned President's Counsel for the Petitioner was that the requirement of five years of unblemished service was applicable even for absorption from the Reserve Force to the Regular Force, and the fact that the Petitioner was absorbed to the Regular Force on 13<sup>th</sup> July 2007, in spite of being under interdiction for a period of little over one and half years preceding the said absorption, demonstrates that the Police Department did not consider the period under interdiction as a blemish on the service record of the Petitioner. The argument simply put is that the Inspector General of Police is *estopped* from claiming that the services of the Petitioner are blemished.

As the Inspector General of Police now claims, if the Petitioner cannot have an unblemished period of service as a result of not being able to assess his performance during the period under interdiction, he owed a duty to this Court to explain the reason for the non-consideration of the period of interdiction when the Petitioner was absorbed to the Regular Force. Neither the Inspector General of Police nor the other Respondents have done that nor have they sought to draw a distinction in the requirement for an unblemished service between the absorption and the promotion. I am therefore in agreement with the said argument of the learned President's Counsel for the Petitioner and take the view that the impugned decision of the Inspector General of Police is irrational and arbitrary and is violative of the fundamental rights of the Petitioner guaranteed by Article 12(1).

### Conclusion

Taking into consideration all of the above circumstances, I hold that the impugned decision of the Inspector General of Police to deny the Petitioner his promotion to Inspector of Police on 8<sup>th</sup> February 2010 is irrational and arbitrary and that the Inspector General of Police has infringed the fundamental rights of the Petitioner guaranteed by Article 12(1).

At the hearing of this application, the learned President's Counsel for the Petitioner informed this Court that, (a) the Petitioner has been promoted as an Inspector of Police on 1<sup>st</sup> July 2019, and (b) if this Court were to hold with the Petitioner, the Petitioner is agreeable to be placed at the end of the list of those promoted to the rank of Inspector of Police on 8<sup>th</sup> February 2010.

I accordingly direct the Respondents [i.e., the Inspector General of Police and the National Police Commission] to back date the promotion of the Petitioner to the rank of Inspector of Police to 8<sup>th</sup> February 2010 and to place the Petitioner at the end of the list of those who were promoted as Inspectors of Police on 8<sup>th</sup> February 2010. The Petitioner shall be entitled to the payment of back wages in the rank of Inspector of Police and to all other entitlements of an Inspector of Police from 8<sup>th</sup> February 2010, in accordance with the law and other applicable Rules and Circulars.

I make no order with regard to costs.

**JUDGE OF THE SUPREME COURT**

**Priyantha Jayawardena, PC, J**

I agree

**JUDGE OF THE SUPREME COURT**

**Achala Wengappuli, J**

I agree

**JUDGE OF THE SUPREME COURT**