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

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

Vavuniya Solar Power (Private) Limited
Level 04, Access Towers,
No. 278, Union Place,
Colombo 2.

Petitioner

Vs.

SC FR Application 172/2017

1. **Ceylon Electricity Board**
   No. 50, Sir Chittampalam A.
   Gardiner Mawatha,
   Colombo 02.

2. **Sri Lanka Sustainable Energy Authority**
   Block 05, 1st Floor, 3G-17, BMICH,
   Bauddhaloka Mawatha,
   Colombo 7.

3. **W.B. Ganegala**
   Former Chairman,
   Ceylon Electricity Board

3A. **Rakhitha Jayawardene**
Former Chairman,
Ceylon Electricity Board

3B. **Wijitha Herath**
Chairman,
Ceylon Electricity Board

4. **A.K. Samarasinghe**
Former General Manager
Ceylon Electricity Board

4A. **S.D.W. Gunawardena**
Former General Manager
Ceylon Electricity Board

4B. **Keerthi Karunaratne**
Former General Manager
Ceylon Electricity Board

4C. **N.W.K. Herath**
General Manager
Ceylon Electricity Board

5. **H.A. Vimal Nadeera**
Former Director General
Sri Lanka Sustainable Energy
Authority

5A. **Labuna Hewage Ranjith Sepala**
Former Director General
Sri Lanka Sustainable Energy
Authority

5B. **Asanka Rodrigo**
Director General
Sri Lanka Sustainable Energy
Authority

6. **Dr. B.M.S. Batagoda**
Former Secretary,
Ministry of Power & Renewable
Energy

6A. **Wasantha Perera**
Secretary,
Ministry of Power & Renewable
Energy, No. 72, Ananda
Coomaraswamy Mawatha,
Colombo 07.

7. **Honourable Attorney General**
Attorney General's Department,
Colombo 12.

<u>Respondents & Added Respondents</u>

Before : **E.A.G.R. Amarasekara, J.**
Yasantha Kodagoda, P.C., J.
A.H.M.D. Nawaz, J.

Appearance: Faiz Musthapha, P.C. with Chanaka De Silva, P.C., Ms. Faisza Markar and Ms. T. Machado for the Petitioner.
Sanjay Rajaratnam, P.C., Solicitor General (as he then was, and presently the Honourable Attorney General) with SSC Rajitha Perera for the Respondents.

Argued on: 4th March, 2021

Decided on: 20th September, 2023

Yasantha Kodagoda, P.C., J.

This judgment relates to an Application filed by the Petitioner in terms of Articles 17 read with Article 126 of the Constitution. Following the Application being supported, the Supreme Court granted leave to proceed in terms of Articles 12(1) and 14(1)(g) of the Constitution.

1. Introduction

Through this Application, the Petitioner – Vavuniya Solar Power (Pvt.) Ltd. complained to this Court that its fundamental rights guaranteed under Article 12(1) of the Constitution – *the right to equality and equal protection of the law*, and Article 14(1)(g) of the Constitution – *the freedom to engage in any lawful occupation, profession, trade, business or enterprise*, were infringed by the 1st and 2nd Respondents.

Albeit brief, the complaint of the Petitioner is that in April 2012 it presented to the 2nd Respondent – Sri Lanka Sustainable Energy Authority (hereinafter sometimes referred to as "the SLSEA"), an Application seeking approval to commission and operate a solar power electricity generation plant in Vavuniya. In May 2016, provisional approval for the project was granted by the 2nd Respondent. However, subsequently, as a result of a 'Letter of Intent' not being granted by the 1st Respondent – Ceylon Electricity Board (hereinafter sometimes referred to as "the CEB") indicating its intent to purchase electricity generated from the proposed plant, the Petitioner company did not receive the permit applied for from the 2nd Respondent. The Petitioner's position is that in view of the 'provisional approval' it received from the 2nd Respondent, it entertained a 'legitimate expectation' that it will receive a 'Letter of Intent' from the 1st Respondent (as it had previously obtained 'grid interconnection concurrence' from the 1st Respondent and had complied with all the other conditions laid down in the 'provisional approval') and thereafter, a permit be issued in terms of section 18 of the Sri Lanka Sustainable Energy Authority Act, to enable it to proceed with the project, commission the electricity generation plant in order to provide electricity to the national grid by selling such electricity to the CEB, and thereby secure its commercial objectives.

The position of the 1st Respondent – CEB is that in view of an amendment introduced to the Sri Lanka Electricity Act in 2013, it became no longer possible to issue a 'Letter of Intent' to the Petitioner.

Thus, it is to be noted that this is a matter that relates directly to the 1st Respondent – CEB and the 2nd Respondent – SLSEA. Though not a Respondent, this matter also indirectly relates to the functioning of the Public Utilities Commission of Sri Lanka (hereinafter sometimes referred to as "the PUCSL").

2. Applicable legislative framework and legal principles

Particularly as the area of statutory law relevant to this matter argued before the Supreme Court is not frequently referred to in judgments of this Court, this judgment will commence upon a consideration of the applicable provisions of the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007 (hereinafter sometimes referred to as "the SLSEA Act") and the Sri Lanka Electricity Act, No. 20 of 2009 (hereinafter sometimes referred to as "the SLE Act") as amended by Act No. 31 of 2013.

2.1 Sri Lanka Sustainable Energy Authority Act

The Sri Lanka Sustainable Energy Authority Act No. 35 of 2007, came into operation on 1st October 2007. The SLSEA is a body corporate that has been established under the SLSEA Act, No. 35 of 2007.

The SLSEA has been vested by the Act with the objects of *inter-alia* (i) identifying, assessing and developing renewable energy resources with a view to enhancing energy security and thereby deriving economic and social benefits to the country, and (ii) by promoting security, reliability and cost-effectiveness of energy delivery to the country by development and analysis of policy and related information management.

The SLSEA Act is an important statute aimed at creating necessary legal infrastructure for the purpose of harnessing and regulating the use of the available renewable energy resources in the country, and thereby enhancing and protecting energy security of Sri Lanka. That objective is sought to be achieved by the development and optimal utilization of renewable energy resources in the country, enabling sustainable development of energy generation, which is a much-needed essential resource not only for daily living, but for economic development of the country, as well.

With the view to achieving the objectives of the SLSEA Act, the SLSEA has been vested with certain powers and functions. In terms of section 13, the Authority has been vested with the responsibility of conserving and managing all renewable energy resources in Sri Lanka, and to take all necessary measures to promote and develop renewable energy resources, with the view to obtaining the maximum economic utilization of those resources.

The management and the administration of the SLSEA (2nd Respondent) has been vested by the Act in its Board of Management [vide section 3(1)]. The Board has been vested with the powers, duties and functions of *inter-alia* developing a conducive environment for encouraging and promoting investments in renewable energy development in the country, including the (i) development of guidelines on renewable energy projects and disseminating them among prospective investors, and (ii) development of guidelines in collaboration with relevant state agencies, on evaluation and approval of on-grid and off-grid renewable energy projects [vide section 5(c)]. In pursuance of that duty conferred on the SLSEA in terms of section 5(c) to create awareness and issue guidelines, the Authority has *inter-alia* issued a publication entitled *"A guide to the project approval process for on-grid renewable project development"* with the description *"Policies and procedures to secure approvals to develop a renewable energy project to supply electricity to the national grid"*. A copy of this publication was produced by the Petitioner marked "P2C".

The Board has also been empowered to entertain Applications for carrying on on-grid and off-grid renewable energy projects [vide section 5(c)(iii)]. A template (prescribed form) of the Application Form to be submitted in this regard to the SLSEA has been issued by the Minister in terms of section 67 of the Act, and published in Government *Gazette* No. 1599/6 dated 27th April 2009 (produced by the Petitioner marked "P2A").

This template has been amended by *Gazette* No. 1705/22 dated 10th May 2011 (produced by the Petitioner marked "P2B").

The SLSEA Act stipulates that no person shall engage in or carry on an on-grid renewable energy project or the generation and supply of power within a 'Development Area' (the entire country has been declared a 'Development Area'), except under the authority of a permit issued in that behalf by the SLSEA [vide section 16(1)]. Thus, generation of electricity through an on-grid renewable project such as the project proposed by the Petitioner can be carried out only with the legal entitlement emanating from a permit issued by the 2nd Respondent in terms of section 18(2)(a) of the Act.

A person who is desirous of engaging in and carrying out an on-grid renewable energy project within a 'Development Area', is required to submit an Application to the Director-General of the SLSEA in the prescribed form, together with certain documents specified in the Act [vide section 16(2)]. At the time relevant to this Application, the prescribed form of the Application to be submitted was contained in the *Gazette* notification dated 10th May 2011 issued by the Minister of Power and Energy in terms of section 16(2) ("P2B"), which has amended the previous format of the Application form contained in the *Gazette* notification issued by the Minister, dated 27th April 2009 ("P2A").

Following the receipt of a perfected Application from a project proponent seeking a permit to commission an electricity generation plant using renewable energy, the Act requires the Director-General of the SLSEA to register the Application and issue a registration number [vide section 16(3)]. Further, the SLSEA shall carry out preliminary screening, and in consultation with the CEB, submit the Application to the Project Approving Committee (hereinafter sometimes referred to as 'the PAC').

The practice followed by the SLSEA is that prior to submitting an Application to the PAC, the SLSEA obtains grid concurrence of the CEB. This stage is referred to as the stage where the SLSEA obtains from the CEB, 'grid interconnection concurrence'. This process involves the CEB examining the proposed project and considering whether it would be technically feasible for the CEB to receive into the national electricity grid, electricity generated by the project. It is important to note that the 1st Respondent – CEB is represented at the PAC and hence is in a position to take cognizance of the submission of an Application by a project proponent and also submit its views at a meeting of the PAC towards the decision of the 2nd Respondent – SLSEA on whether or not 'provisional approval' should be granted to a particular applicant.

The PAC is an entity recognized by the Act and in terms of section 10, comprises of a number of *ex-officio* officials, including the General-Manager of the CEB and representatives of several other statutory bodies of the State performing functions relevant to renewable energy projects. It is the PAC that is empowered to, on behalf of the SLSEA grant 'provisional approval' and 'final approval' to an Application seeking authorization (a permit) to commission a renewable energy based on-grid electricity generation plant.

Should the PAC decide to grant 'provisional approval' for a particular project, it may require the applicant to submit within 6 months 'such documents and other information as shall be prescribed for the purpose'. The afore-stated period of 6 months granted to comply with this requirement can upon a request being made by the applicant, be extended by the Director-General of the SLSEA up to a maximum of a further 6 months [vide section 17(3)]. If within the initial period of 6 months or the extended period of 1 year from the original grant of provisional approval, the documents and other information referred to above (referred to above as 'conditions and information' and

contained in the provisional approval) are not submitted, the provisional approval granted shall stand automatically cancelled [vide section 17(4)].

Once such conditions have been fulfilled by a project proponent, the PAC may grant 'provisional approval' to such an Application seeking authorization (a permit) to implement an on-grid renewable energy project, which decision shall be communicated to the applicant by the Director General of the SLSEA [vide section 17(2)(a)]. Once the necessary documents (including the authorizations specified in the provisional approval) referred to above are obtained by the applicant and submitted to the Director-General of the SLSEA, he shall forthwith place such material before the PAC, enabling the committee (PAC) to consider granting final approval for the proposed project [vide section 18]. In terms of section 18(2), the PAC is empowered to either approve or refuse the Application for a permit. It is only if the PAC approves the Application, that the SLSEA shall issue a permit to the applicant. If issued by the SLSEA, a permit will be initially valid for a period of 20 years. This would be, provided the developer commences the project and generates electricity within two years of being issued with the permit [vide section 18(4)].

2.2 Sri Lanka Electricity Act

There is another law, the provisions of which are equally relevant to this matter. That is the Sri Lanka Electricity Act, No. 20 of 2009. This law has been enacted for the regulation of the generation, distribution, transmission and supply of electricity. The provisions of the SLE Act relate to all types of electricity generation plants, including those powered by (i) non-renewable energy sources from which electricity may be generated, such as petroleum, and (ii) renewable energy sources from which electricity may be generated such as water, solar, wind and bio-mass. In terms of section 2(1) of the SLE Act, the administration of the provisions of the Act shall vest in the PUCSL.

An examination of the provisions of the SLE Act reveals that, a permit issued by the SLSEA in terms of section 18 of the SLSEA Act by itself would not confer sufficient legal authorisation for a project proponent to commission an on-grid renewable energy project and commence generating electricity. A project proponent needs to obtain an electricity generation license from the PUCSL (referred to as a 'generation license'), which the PUCSL is entitled to issue in terms of section 7(1) of the SLE Act. However, it is important to note that, in so far as renewable energy-based electricity generation plants are concerned, a condition precedent to applying to the PUCSL seeking an electricity generation license, is the obtaining of a permit from the SLSEA, issued under section 18 of the SLSEA Act. Thus, it would be seen that the law contemplates a two-tiered process for the grant of approval for an on-grid renewable energy-based electricity generation project. First, approval by the SLSEA and a permit. Secondly, approval by the PUCSL and a license. As was shown earlier, the CEB is involved in the grant of 'provisional approval' and 'final approval' and a permit by the SLSEA under section 18 of the SLSEA Act. As would be seen hereinafter, the CEB becomes once again involved in the grant of a generation license by the PUCSL. Thus, approval by the CEB is critical.

According to section 7(1) of the SLE Act, no person shall (a) generate, (b) transmit, (c) supply and or (d) distribute electricity for the purpose of giving a supply to any premises or enabling a supply to be given to any premises, unless he is authorized to do so by virtue of a license granted under the Act or is exempted from obtaining a license under section 10. Section 9 stipulates the category of persons who is entitled to apply for a license. However, in terms of section 9(2) of the Act, only the CEB shall be eligible to apply for and obtain a license for the transmission of electricity. In that regard, the CEB is referred to as the sole 'transmission licensee'. Further, section 9(1) *inter-alia* provides who would be entitled to apply for an electricity generation license. Similarly, in terms

of section 9(3), only the CEB and three other categories are entitled to apply for and obtain a license for the distribution of electricity.

In terms of section 13 of the SLE Act, it is the PUCSL that is empowered to grant electricity generation, distribution and transmission licenses. However, as prescribed by sections 9 (1A) and 10 of the Act, the PUCSL may exempt certain persons or categories of persons from the requirement of obtaining a license to generate or distribute electricity. Upon an Application being made to it, having taken into consideration the manner in which or the quantity of electricity likely to be generated or distributed by such person or category of persons, the PUCSL may grant an exemption to such person or category.

Section 43 of the SLE Act provides a statutory scheme to be adhered to in relation to the procuring or operating a new electricity generation plant or the extension of electricity generation capacity of an existing electricity generation plant.

Section 43 of Act No. 20 of 2009 was amended by section 13 of the Sri Lanka Electricity (Amendment) Act No. 31 of 2013. It repealed the original section and caused the substitution therefor a new section. It is pertinent to note that in terms of section 21 of the SLE (Amendment) Act, No. 31 of 2013, the amendments made to the principal enactment by the amending Act shall be deemed for all purposes to have come into force, on 8th April, 2009. That is the date on which the principal enactment (SLE Act, No. 20 of 2009) had following its enactment been certified by the Speaker and thereby came into operation. Thus, the amendments introduced by provisions of Act No. 31 of 2013 including the amendment to section 43 (which is described in detail below), should be deemed to have been in force right from the beginning of Act No. 20 of 2009 having come into operation.

[I am acutely conscious that by the SLE (Amendment) Act No. 16 of 2022, the once amended section 43 was re-amended. Act No. 16 of 2022 was certified by the Speaker and came into operation on 15th June, 2022. However, as that amendment has no relevance to the manner in which the Application presented by the Petitioner for a solar power electricity generation permit was processed by the 1st and the 2nd Respondents, I do not propose to deal with provisions of Act No. 16 of 2022 for the purpose of determining the lawfulness or otherwise of the impugned conduct of the Respondents. [The said amendment does not have a bearing on the findings reached by this Court or to the reliefs ordered.]

According to the original section 43 of the Sri Lanka Electricity Act, subject to section 8, no person shall procure or operate a new electricity generation plant or extend the electricity generation capacity of any existing plant, except as authorized by the PUCSL [Section 43(1)]. According to section 43(2), with the approval of the PUCSL, a transmission licensee, shall in accordance with its license and guidelines relating to the procurement of electricity as may be prescribed by the PUCSL, call for tenders to provide a new electricity generation plant or to extend the generation capacity of an existing generation plant, as specified in a notice calling for tenders. According to section 43(3), a transmission licensee shall with the consent of the PUCSL, from amongst the persons who have submitted technically acceptable tenders in response to such notice, select a person to provide at least cost, the new generation plant or to extend the generation capacity of an existing generation plant specified in that notice.

As stated above, Act No. 31 of 2013, amongst others repealed section 43 of Act No. 20 of 2009, and substituted therefor a new section. In terms of section 43 (as introduced by Act No. 31 of 2013), no person shall proceed to procure or operate a new electricity generation plant or engage in the expansion of the electricity generation capacity of an existing plant, otherwise than in accordance with provisions of that section. In terms of

section 43(1) read with section 43(2), to proceed with the procuring or operating of any new electricity generation plant or to expand the electricity generation capacity of an existing plant, a transmission licensee shall submit a proposal to that effect to the PUCSL, for its written approval. The proposal should be based on the future demand forecast of electricity as specified in the 'Least Cost Long-term Generation Expansion Plan' (as defined in section 43(2) of the Act) of such transmission licensee. However, in terms of the proviso to section 43(2), acting in terms of the afore-stated requirement contained in section 43(2) shall not be necessary, where on the day prior to the date of the coming into force of Act No. 31 of 2013 (that being 8th April 2009) - (a) the Cabinet of Ministers had granted approval for the development of a new generation plant or to expand the generation capacity of an existing plant, or (b) the SLSEA had issued a permit in terms of section 18 of the SLSEA Act to generate electricity through renewable energy resources, and as a consequence, the development of a new generation plant or expansion of an existing plant has become necessary. In these two situations, the transmission licensee will be entitled to obtain the approval from the PUCSL, without complying with section 43(2) of the SLE Act (as amended).

In terms of section 43(4) (as amended) of the SLE Act, after obtaining the approval of the PUCSL under section 43(2), the transmission licensee (CEB) shall in accordance with the conditions of its license and applicable rules made by the Commission relating to procurement, call for tenders by notice published in the *Gazette* to develop the envisaged new generation plant or for the expansion of the generation capacity of an existing plant. However, in terms of the proviso to section 43(4), subject to section 43(6), this requirement of calling for tenders shall not be applicable in respect of any new generation plant or to the expansion of any existing plant that is proposed to be developed, which falls into one of the following situations:

(a) in accordance with the 'Least Cost Long-Term Generation Expansion Plan' duly approved by the Commission and which has received the approval of

the Cabinet of Ministers on the date preceding the date of the coming into operation of the Act and is required to be operated at least cost, or

(b) on a permit issued by the SLSEA and required to be operated at the standard tariff and is governed by a 'Standardised Power Purchase Agreement' (as defined in section 43(8) of the Act) approved by the Cabinet of Ministers, or

(c) in compliance with the 'Least Cost Long Term Generation Expansion Plan' duly approved by the Commission for which the approval of the Cabinet of Ministers has been received on the basis of - (i) an offer received from a foreign government to the Government of Sri Lanka for which the approval of the Cabinet of Ministers has been received, or (ii) to meet any emergency situation as determined by the Cabinet of Ministers during a national calamity or a long term forced outage of a major electricity generation plant, where a protracted bid inviting process outweigh the potential benefit or procuring emergency capacity required to be provided by any person at least cost.

The procedure to be followed after calling for tenders is provided for in section 43(5). It would be noted that the procedure contained in section 43 of the SLE Act, entails the following of a competitive procedure and the transmission licensee (CEB) recommending to the PUCSL the person best capable of developing the new generation plant or the expansion of the generation capacity of an existing plant, selling electrical energy or electricity generation capacity at least cost, and meeting the requirements of the 'Least Cost Long Term Generation Expansion Plan' of the transmission licensee (CEB). This recommendation should be made along with the draft 'Power Purchase Agreement'.

Section 43(6) provides that, (a) notwithstanding an exemption from the submission of a tender is granted to any person under section 43(4), or (b) a new electricity generation

plant or an extension of an existing plant is being developed in accordance with the 'Least Cost Long Term Generation Expansion Plan' by a person who has obtained the approval of the Cabinet of Ministers (which approval was in force at the time of the coming into force of the Act), the transmission licensee shall engage in negotiations with such person and upon satisfying itself of the competence of such person to develop a generation plant and sell electricity at least cost, forward its recommendations along with the draft power purchase agreement to the PUCSL.

According to section 43(7), upon receipt of a recommendation either in terms of section 43(5) or 43(6) of the Act, the Commission shall grant its approval at its earliest convenience, provided it is satisfied that the recommended price for the purchase of electricity meets the principle of least cost and the requirements of the Least Cost Long Term Generation Expansion Plan and accepted technical and economical parameters of the transmission licensee.

2.3 Legitimate Expectations

In view of the importance placed by learned counsel for the Petitioner on the doctrine of 'legitimate expectations' and the response thereto displayed by the learned Solicitor General for the Respondents, incorporating into this judgement a somewhat detailed description of the doctrine is in my view necessary. The need to do so is augmented by some degree of ambiguity that seem to permeate across certain judgments of our Courts regarding the nature, scope, applicability and limitations of the doctrine of legitimate expectations and more particularly pertaining to the judicial response to a claim for relief based on the sub-doctrine of 'substantive legitimate expectations'. Thus, I propose to devote the following lengthy description of the doctrine, mainly for the purpose of highlighting the importance of the doctrine as a ground on which injustice emanating from unfairness and abuse of power can be remedied and as a legal justification for this

judgment. The expansion of the length of this judgment to what it is, should therefore be justifiably excused.

2.3.1 Introduction to the doctrine of Legitimate Expectations and the underlying policy

The doctrine of legitimate expectations is founded upon the principle that an expectation generated due to representations made by or regular practices (procedures) of a public body, should be respected by such public body, and it should conduct itself in accordance with such representations made by itself and its own practices. Justice demands that a public authority be prevented from frustrating an expectation generated by it occasioned either by sudden changes to its governing policy or due to extraneous or collateral reasons. This concept also relates to the extent to which a public authority's administrative power and discretionary authority may be limited by law for the purpose of ensuring fairness. The imposition of such limitations would be justifiable due to (a) the representations made by a public authority to the public at large and more particularly to the persons who seek to either be regulated by or transact with such public authority, as to how it will act in the future, and or (b) its own previous related practices or procedures. In other words, the doctrine of legitimate expectations is a means of keeping a public body bound by its own representations and practices.

The recognition of this doctrine is founded upon the policy of the law of recognizing and protecting legitimate expectations, arising out of a public authority having undertaken expressly or impliedly, through representations made by itself or by its own practices, to take decisions and or conduct itself in a particular manner in the future. In effect, this doctrine requires public authorities to comply with its own undertakings, the failure of which gives rise to judicial review resulting in judicial pronouncements being made requiring the public authority to conduct itself in the prescribed manner, decide

as directed by court and or sanctions being made for having frustrated legitimate expectations.

In ***R v. Secretary of State for Home Department, ex parte Behluli*** *[(1998) Imm. AR 407, at 415]* Beldam LJ, observed that *"although legitimate expectation may in the past have been categorized as a catchphrase not be elevated into a principle, or as an easy cover for a general complaint about unfairness, it has nevertheless achieved an important place in developing the law of administrative fairness. It is an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way".*

Protecting expectations generated by public authorities through the doctrine of legitimate expectations and judicial insistence that expectations so generated be complied with by the relevant public authority is also fundamental to good governance. In the long-term, it would be dangerous to permit public authorities to freely renege on their undertakings, as it would pave the way to public authorities functioning in an unreasonable or arbitrary manner, or otherwise abusing power conferred on them. The public's trust and confidence in public authorities can be protected by requiring public authorities to comply with their own undertakings.

The doctrine of public trust *inter-alia* requires that public authorities who have been vested with statutorily conferred power to discharge public functions vested in them for the benefit of the sovereign of the Republic – the public at large, and for no other purpose. Public authorities must discharge such functions in accordance with the law and they must abide by the expectations generated by their own representations and practices. In a Republic, the trust conferred by the sovereign public on public authorities must be respected, unless there are justiciable reasons developed objectively, diligently and in good faith for the purpose of giving effect to wider public interests, that

necessitate deviating from the previous policy based upon which the previous representations had been made.

The rationale of the doctrine of legitimate expectations is also that if a public authority has induced a person to rely upon its representations or practices on the premise that such reliance was a real possibility and would bear fruit, it is under a fiduciary duty to act in such a way that the reliance placed by such person will not result in detrimental outcomes to such person, who in good faith had placed reliance on the representations of a public authority and its practices. Public authorities must be required by law to honour expectations created by its own representations and practice. If unable to do so, the public authority concerned should compensate the person affected by having placed reliance on such representations and practices.

From the perspectives of the all-important and fundamental feature of our Republican Constitution – the *rule of law*, for the following reasons, recognition and the enforcement of the doctrine of legitimate expectations make good sense:

(i) Respect for an expectation created by a public authority makes the exercise of discretion by such authority more predictable. The *rule of law* presupposes the enforcement of formal equality. Without formal equality, the enforcement of the law can become arbitrary, unreasonable, unfair and uncertain. Thus, like cases must be decided upon in a like manner, by the correct and consistent application of the law.

(ii) The *rule of law* also presupposes a certain measure of consistency and uniformity in the application and the enforcement of the law. The law should provide for administrative action that is based upon a mix of short-term exigencies and long-term considerations. An individual's planning and preparation becomes difficult, if not impossible, if policy and procedure are changed too often or abruptly, and public authorities conduct themselves in

an inconsistent manner and contrary to their own representations, undertakings and previous conduct.

(iii) The *rule of law* also demands that a person's legitimate expectation should not be frustrated without a justiciable cause generated by the desire to serve wider public interests.

Thus, from the perspective of the *rule of law*, recognition of the doctrine of legitimate expectations gives rise to predictability and certainty through consistency and uniformity, formal equality, reasonableness, fairness, and non-retroactivity, which as I have stated above are features of the *rule of law*. Therefore, this doctrine supports the recognition and enforcement of the *rule of law*.

However, it must also be noted that public authorities must be vested with discretionary authority with regard to the exercise of power vested in them. Without discretion, public authorities would not be able to successfully exercise power for the purpose for which such power has been vested in them. Exercise of discretion may entail changes to the applicable policy and criteria and the procedure to be followed in the exercise of power. In the circumstances, the exercise of discretion which results in certain changes to be made to policy and procedure, can create tension between 'administrative autonomy' and 'legal certainty'. There can be situations where a public authority may have to frustrate an expectation it has generated, due to justiciable reasons which are in the wider public interest. In such situations, it would be the duty of the public institutions to explain reasons for the deviation from the expectation it had generated and proceed to satisfy court regarding the lawfulness of the change and its justiciability. Prior to the change in policy, criteria and procedure, the relevant public authority should have informed those who may have by that time had a legitimate expectation that the previous policy, criteria and procedure would be applied, of the intended change, and afforded them an opportunity of being heard. Public authorities

must bear in mind that, as held by Justice Dr. A.R.B. Amerasinghe in ***Dayarathna and Others v Minister of Health and Indigenous Medicine and Others*** *[(1999) 1 Sri L.R. 393],* although the Executive ought not in the exercise of its discretion be restricted to cause a change of policy, a public authority is not entirely free to overlook the existence of a legitimate expectation it has created.

The importance of legal certainty is for the benefit of not only the individual to whom the representation has been made, but also to the public at large. Further, maintenance of legal certainty is in the interest of public institutions as well, as it would generate public confidence in such institutions.

Representations by public authorities may create expectations regarding the criteria that would be applied and the manner in which it would apply such criteria when exercising discretionary authority. Representations by public authorities may also relate to assurances of specific outcomes. Respect to such expectations makes the exercise of discretion and its outcome predictable, thus, creating a degree of certainty with regard to possible outcomes.

Recognizing the doctrine of legitimate expectations is also a means of ensuring administrative fairness. It curtails the opportunity public authorities would otherwise have, to decide on matters subjectively, or in an arbitrary, capricious or unreasonable manner. Therefore, the exercise of administrative discretion is required by law to be subject to the legal duty cast on public authorities to honour legitimate expectations generated by it through its own representations and practices.

The principle of legitimate expectations is also supportive of administrative efficacy and legitimacy of the exercise of administrative power. The enforcement of statutorily conferred power is likely to be perceived as being legitimate, thus justifiable and in

public interest, if exercised in a way that recognizes legitimate expectations. Thus, the recognition of the principle of legitimate expectations is in the best interests of not only individuals who transact with such public authorities and the general public, but also of the administration, itself.

2.3.2 Evolution of the doctrine of legitimate expectations and its present status

Though the actual origins of the doctrine of legitimate expectations can be traced to the 20th century developments of German administrative law, the formal recognition of this doctrine by English administrative law can be traced back to ***Schmidt and Another v. Secretary for Home Affairs*** *[(1969) 1 All ER 904]*. In that case, Lord Denning MR responding to an allegation that the Home Secretary had, without affording a student a fair hearing, refused an extension of a temporary permit previously granted to him to remain in the United Kingdom, observed that, the question of being entitled in law to a hearing prior to a decision being taken, depends on whether or not the claimant had some right or interest or a 'legitimate expectation' that a fair hearing would be afforded before a decision was taken. He further observed that, it would not be fair to take a decision without affording the person concerned a formal and fair hearing enabling him to make representations on his behalf. However, in his judgment, Lord Denning did not define the scope of the doctrine of legitimate expectations and the basis for it. Lord Denning also did not distinguish the doctrine from the right to a fair hearing (compliance with the rules of natural justice) pertaining to a right or a protectable interest.

In ***Regina v. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators' Association and Another*** *[(1972) 2QB 299],* the Queen's Bench held that it was unfair to increase the number of taxi licenses without consulting the Taxi Fleet Operators' Association, as it was contrary to the earlier practice adopted by the Liverpool Corporation. In ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *[(1983) 2 AC 629],* the

Privy Council quashed a deportation order issued on a purported illegal immigrant on the footing that, taking the impugned decision without affording the immigrant an opportunity to present his case, was not in the 'interests of good administration'. In this matter too, the Court considered the need for the public authority to have afforded a fair hearing, independent of the duty to comply with the rules of natural justice.

In the leading case of ***Council of Civil Service Unions and others v. Minister for the Civil Service,*** *[(1985) AC 374],* famously known as the *'GCHQ Case'*, the issue confronted by the House of Lords, was whether the claimants were entitled to a 'legitimate expectation' of consultation, prior to a decision being taken by the Prime Minister to withdraw the entitlement of GCHQ employees to be members of national trade unions. It was not in dispute that prior to the impugned decision being taken, such a consultation process did not take place, notwithstanding on previous occasions such consultations having taken place.

Lord Fraser observed that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. It is the latter criterion that was held to be applicable to the instant case. In the circumstances, Lord Fraser proceeded to hold that the test to be applied is whether the practice of prior consultation with regard to significant changes to the conditions of service of the employees was so well established by 1983, that it would be unfair or inconsistent with good administration for the government to have departed from that practice in this case. Lord Fraser noted that ever since the establishment of the GCHQ in 1947, prior consultation had been an invariable rule. Thus, if there was no question of national security involved, the appellants would have had a legitimate expectation that the Prime Minister accords them a consultation before changing the conditions of employment.

Lord Diplock observed that to qualify for judicial review, the impugned decision must have consequences which affect some person other than the decision-maker, though it can affect the decision-maker as well. It must affect the other person (claimant), either (a) by altering rights or obligations of that person which are enforceable by or against him in private law, or (b) deprive 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 be expected to be permitted to continue until some rational ground for withdrawing it had been communicated to him, and he had been given an opportunity to comment, or (ii) he has received an assurance from the decision-maker that the benefit or advantage will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. [It is category (b) that can be referred to as giving rise to an 'legitimate expectation'.]

In ***R v Secretary of State for Home Department ex parte Khan*** *[(1985) 1 All ER 40],* the court indirectly recognized the sub-doctrine of substantive legitimate expectations. It held that, the Secretary of State should not be allowed to frustrate the applicant's legitimate expectation that, upon fulfillment of the stipulated conditions discretion would be exercised in his favour, without a hearing being given, unless there is an overriding public interest to have changed the policy.

Therefore, it is observable that it is the sub-doctrine of procedural legitimate expectations that was first recognized and developed in English Law. According to what has been developed by courts under this sub-doctrine, where a public authority has, acting in terms of the law, given an assurance to the claimant that it will afford him a hearing before a policy is changed as regards a matter that affects him, or made known its policy with regard to that matter or has an established practice of affording a hearing before a change of policy is effected, that claimant will entertain a procedural

legitimate expectation that the public authority will give him reasonable and adequate opportunity to make representations and be heard before it changes its policy. A court may, by judicial review, enforce such a legitimate expectation other than in limited circumstances such as in instances where considerations of national security override the expectation of being consulted or heard [such as in the *GCHQ* case].

The sub-doctrine of substantive legitimate expectations on the other hand, emerged and developed more recently in English Law. In ***R v Secretary of State for the Home Department ex parte Ruddock and others*** *[1987) 2 All ER 518],* upon considering a long line of English cases, the court concluded that the need to ensure fairness had resulted in the recognition of a doctrine of substantive legitimate expectations. Justice Taylor's words in this regard were as follows:

> *"…I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. While most of the cases are concerned…with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course, such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power."*

In ***R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*** *[(1995) 2 All ER 714],* the court adopted the approach taken by Justice Taylor in ***ex parte Ruddock***, and held that the sub-doctrine of substantive legitimate expectations enabled a court to uphold a substantive legitimate expectation on broader grounds, than being confined to determining whether a public authority's decision to change its policy was unreasonable in the *Wednesbury* sense. Justice Sedley held as follows:

> *"…The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion. Where the policy is for*

the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern."

However, the case of ***R v Secretary of State for the Home Department and another, ex parte Hargreaves and others*** *[(1997) 1 All ER 397],* is said to have cast the existence of substantive legitimate expectations into doubt. It was held that the discretionary power of the Secretary of State to change his policy decision could not be challenged by judicial review, as it would amount to a fettering of discretion. It was held that it was not for the court determine the fairness of the Secretary of State's actions, as doing so would amount to looking into the merits of his decision. It was further held that the act of weighing and balancing between individual and public interest is for the decision-maker and that the court could only intervene where it could be shown that the Secretary's decision was unreasonable or perverse in the *Wednesbury* sense.

The sub-doctrine of substantive legitimate expectations once again gained momentum following the Court of Appeal decision in ***R v North and East Devon Health Authority ex parte Coughlan*** *[(2000) All ER 850].* In recognizing the sub-doctrine of substantive legitimate expectations, it was held that *"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".*

It was also held that once it is recognized that conduct which is an abuse of power is contrary to law, its existence must be for the court to determine, and that review in such instance is not limited to the test of *Wednesbury* unreasonableness. ***Ex parte Coughlan*** is regarded as a welcome development in settling the controversy over substantive legitimate expectations in English law. The subsequent decisions have followed this case in determining matters pertaining to substantive legitimate expectations.

The developments in English law on the doctrine of legitimate expectations have influenced the Sri Lankan administrative law jurisprudence on legitimate expectations. For instance, the earliest cases on legitimate expectations such as ***Dayaratne v Bandara*** *[(1983) BLR vol. 1, part 1 p.23],* ***Sundarkaran v Bharathi*** *[(1989) 1 Sri.LR 46],* ***Dissanayake v Kaleel*** *[(1993) 2 Sri.LR 135]* and ***Multinational Property Development Ltd v Urban Development Authority*** *[(1996) 2 Sri.LR 51]* have recognized and ensured the protection of procedural legitimate expectations.

With the increased recognition in English Law of the sub-doctrine of substantive legitimate expectations, our courts also have recognized the protection of substantive legitimate expectations. The first direct reference in Sri Lanka to 'legitimate expectations' of a substantive character is seen in the judgment of Sharvananda CJ in ***Mowjood v. Pussadeniya*** *[(1987) 2 Sri LR 287]* where the court held that the Petitioner – Appellants have a legitimate expectation that they would not be evicted from their present houses except after following the procedure stipulated in the Act and the grant of 'proper' alternate accommodation (as opposed to mere alternate accommodation). Court approached judicial review of the notification issued by the Commissioner of National Housing from the perspective of abuse of power. Court recognized that the Petitioner – Appellant had both a legitimate expectation as regards the procedure the Commission would follow as well as the nature of the decision he would take, thus, recognizing both procedural and substantive legitimate expectations.

A more progressive approach towards substantive legitimate expectations was adopted by this Court in the case of ***Dayarathna v Minister of Health and Indigenous Medicine*** *[(1999) 1 Sri.LR 393],* which followed the English case of ***R v Minister of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*** In his judgment, Justice Amerasinghe expressed the view that "*although the executive ought not in the exercise of its discretion to be restricted so as to hamper or prevent change of policy, yet it is not entirely free to*

overlook the existence of a legitimate expectation. Each case must depend on its circumstances". Justice Amerasinghe further observed that "*the Court's delicate and sensitive task is one of weighing genuine public interest against private interests and deciding on the legitimacy of an expectation having regard to the weight it carries in the face of the need for a policy change … The change of policy, in the circumstances, may nevertheless affect the future, having regard to the fact that the legislature and executive are free to formulate and reformulate policy; however, it is the duty of this Court to safeguard the rights and privileges, as well as interests deserving of protection such as those based on legitimate expectations, of individuals."*

In ***Sirimal and others v Board of Directors of the Co-operative Wholesale Establishment and others*** *[(2003) 2 Sri.LR 23],* Justice Weerasuriya, while recognizing the fact that "*the frontiers of legitimate expectations in Administrative law have been greatly expanded in recent years to admit of a substantive content",* followed the narrow approach taken in the English case **of *R v Secretary of State for the Home Department and another, ex parte Hargreaves and others,*** and expressed the view that the protection of a substantive legitimate expectation has to be sought on the more traditional approaches of English Law, i.e. protection in terms of *Wednesbury* Unreasonableness. He further expressed the view that it is for the decision-maker and not for the court to judge whether that expectation should be protected or whether broader public interest is so strong as to override that expectation. It was held in that case that the court would only intervene if the decision-maker's judgment was perverse or irrational. However, it must be noted that Justice Weerasuriya did not consider the more recent developments in the English Law's jurisprudence on legitimate expectations such as the principles contained in ***ex parte Coughlan,*** thus, compelling me to distance myself from the views expressed by Justice Weerasuriya as to the criteria based upon which substantive relief should be granted by court.

In the more recent case of ***M.R.C.C. Ariyarathne and others v N.K. Illangakoon, Inspector General of Police and others*** *[SC FR 444/2012, SC Minutes of 30.07.2019],*

Justice Prasanna Jayawardane adopted the wider approach taken in ***Dayarathna*** case. His Lordship was of the view that a court is not confined in cases of substantive legitimate expectations, to reviewing the public authority's decision on the traditional test of unreasonableness described in the *Wednesbury* case. His Lordship identified that the test of *Wednesbury* unreasonableness is adequate in a case where there is a single exercise of power by a public authority. However, in a case where the petitioner claims a substantive legitimate expectation, there is a dual exercise of power and that his case is linked to both exercises of power. If a court confined itself to the test in *Wednesbury*, Justice Jayawardena expressed the view that the court would only be reviewing the second exercise of power, by asking whether it is unreasonable in the *Wednesbury* sense. He held that a court considering judicial review must consider and evaluate both competing interests, i.e. the assurance which created the expectation, and the reasons for the public authority's change of policy or decision which resulted in the negation of that expectation. His view was that considering only one of the two competing interests, would place the court in *'abhorrent realm of inequity'*.

The decision in ***Ariyarathne*** was followed in the subsequent decisions of this Court on legitimate expectations including in the cases of ***Chanaka Harsha Talpahewa v Prasad Kariyawasam, Secretary to the Minister of Foreign Affairs and others*** *[SC FR 378/2017, SCM 21.06.2022]*, and ***Werage Sunil Jayasekera and others v B.A.P. Ariyaratne, General Manager, Department of Railways*** *[SC FR 64/2014, SCM 05.04.2022].*

Therefore, it is seen that the criteria based upon which substantive relief is granted is no longer limited the instances where the claimant can successfully establish that the change of policy on the part of the concerned public authority is so very unreasonable that it satisfies the degree of unreasonableness contemplated in the *Wednesbury's* case.

2.3.3 Nature of the representation that should have been made or the practice of the public authority that would entitle a person to claim, founded upon the doctrine of legitimate expectations:

In order to obtain relief through judicial review on the footing that a legitimate expectation had arisen, the nature of the representation that should have been made by the public authority should be a promise or an undertaking or its own previous practice, both of which should meet the following principles:

(i) As held in ***The United Policyholders Group and Others v. The Attorney General of Trinidad and Tobago*** *[(2016) UKPC 17],* the representation should be clear, unambiguous and devoid of qualifications.

(ii) As observed by this Court in ***Pavithra Dananjanie De Alwis v. Anura Edirisinghe, Commissioner General of Examinations and 7 Others*** *[(2011) 1 Sri L.R. 18]*, the undertaking given by the public authority need not be in written form, and it would be sufficient if the undertaking could be inferred through the surrounding attendant circumstances.

(iii) As held in the ***GCHQ Case*** the decision-maker must have made a specific announcement, or given an express promise or a specific undertaking, or impliedly generated a promise or undertaking by its unambiguous and consistent past practice.

(iv) If the representation was in the form of an announcement, promise or an undertaking, it should take the form of (a) a general representation made in rem (to the world at large) or to a specific class of persons, or (b) a specific representation addressed to the claimant or to a group of persons including the claimant who fall into the same category.

(v) A general representation can take the form of a formal announcement, a circular letter, or a statement of policy issued by the public authority concerned. It can also take the form of a publication containing the manner in which it proposes to deal with persons in the category of the claimant, or

containing previous decisions or extra-statutory concessions that have been made in the past and will be granted in the future.

(vi) The representation relied upon by the claimant need not have been personally made to him. However, it should relate to the category of persons to whom the claimant belongs. Similarly, the past practice of the public authority need not necessarily be aimed at the claimant. However, the past practice should relate to the category of persons to whom the claimant belongs.

(vii) The claimant should belong to the class of persons to whom the representation made by the decision-maker was reasonably be expected to apply. Whether or not a particular representation by a public authority is to give rise to a legitimate expectation or not, is not to be decided based on the intention of the decision-maker. The question to be determined is whether the representation may reasonably have induced a person within the class of persons to whom it was addressed, to rely on it. It is the context of the representation that is important as opposed to the specific contents thereof.

(viii) The representation should relate to an undertaking or promise of a benefit or an advantage the public authority is expecting to give or a course of action it is expecting to take that would be in the interest of the claimant.

(ix) If the representation was specific to the claimant, it should have been in response to a full and accurate disclosure by the claimant. Thus, the claimant should have received the undertaking or promise after his having made a full and accurate disclosure of all the relevant facts.

(x) As held in ***Vasana v. Incorporated Council of Legal Education*** *[2004 (1 SLR 154)]*, the representation made by the public authority, should not be based on a mistake of facts by itself.

(xi) As held in ***R v. Secretary of State for the Home Department ex parte Ruddock and Others*** *(referred to above)* the representation should have been made by

officials on behalf of the public authority who had actual or ostensible legal or administrative authority to make such representation.

(xii) A public authority is generally not liable to give effect to unauthorized or unlawful representations made by its officials. If the claimant either knew or had reason to believe that the official who had made the representation did not have authority to make such a representation, or in the circumstances he ought to have known so, the public body will not be bound by such representation.

2.3.4 Detrimental reliance

When a public authority makes representations containing its policy or conducts itself in a particular manner, it is natural that persons who engage with such authority or have dealings relevant to such representations or conduct, would fashion their own conduct placing reliance on such representations or conduct, as the case may be. In that backdrop, when the public authority changes its policy, it may result to the detriment of those who placed reliance on the previous representations or conduct of such public authority. This would result in the frustration of the expectations of those who placed reliance. In other words, placing reliance has been to the detriment of the person who placed such reliance. This is referred to as 'detrimental reliance'. In most cases, it is such detrimental reliance which causes grievance to the claimant, resulting in his complaining to court that he had developed a legitimate expectation founded upon representations made or the past practices of a particular public authority, which was later frustrated by it.

However, in the case of ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *(referred to above)*, the Court held that a legitimate expectation may arise even in the absence of a detrimental reliance. Thus, detrimental reliance is not a *sine qua non* for legitimate expectations to be enforced. Actually, a detrimental reliance can arise only if the

claimant knew of representations made or previous practice of the public authority, and if he acted upon the belief that it would continue to be applied. However, if he had no knowledge of previous representations made or past practices of the public authority, the issue of detrimental reliance would not even arise. Nevertheless, it must be borne in mind that by establishing detrimental reliance, the case for 'frustration of a legitimate expectation' can be strengthened and the court will then be more receptive to the claimant. This is seen in ***Wickremaratne v Jayaratne and another*** *[(2001) 3 Sri L.R. 161],* where Justice U. De Z. Gunawardane held as follows:

> *"…In this case the petitioner's interest lay in some ultimate benefit which he hoped to attain or possibly retain… It is felt that acting to one's detriment in reliance upon a promise or undertaking given by a public authority or anyone else can strengthen or add to the weight of the legitimate expectation induced thereby, in such a situation, therefore, the counterbalancing public interest should be weightier than in a case where there had been no such detrimental reliance…"*

Implications of the representation

In order to successfully claim relief on the basis of a legitimate expectation that has been frustrated, the claimant must establish that the representation made by the public authority or its past conduct generated an 'expectation' which is justiciable in the eyes of the law. As recognized in ***Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others*** *[(1994) 3 Sri L.R. 316],* it was observed by the Court of Appeal that establishing that the claimant entertained a 'hope' or 'reasonable hope' was insufficient to successfully claim relief through the doctrine of legitimate expectation. I find myself in agreement with that view. The claimant must establish that he entertained or was entitled to entertain a well-founded expectation justiciable in law.

In ***R. v. Department of Education and Employment, ex parte Begbie*** *[(2000) 1 WLR 1115]*, court observed that as the representations cited by the claimant had been made by certain politicians who were not officials of the relevant public authority, and though such representations would have given rise to an 'expectation' as claimed by the claimant, such expectation cannot be recognized as a 'legitimate expectation' which can be protected by law, and therefore, relief cannot be granted founded on the doctrine of legitimate expectations. Quoting from the *GCHQ* judgment, the court held that *"legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue".*

In ***Siriwardana v Seneviratne and others*** *[(2011) 2 Sri.LR 1],* Chief Justice Shirani Bandaranayake cited the following extract from the Indian case of ***India v Hindustan Development Corporation*** *[(1993) 2 SCC 499]* to hold that a mere expectation does not amount to it being legally protected:

> *"However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertible expectation and a mere disappointment does not attract legal consequences…The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in natural and regular consequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiable, legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense."*

It would thus be seen that, embodied in the doctrine of legitimate expectations, are three key variables. They are -

(i) a public authority having through representations made by it or by its conduct generated an expectation,

(ii) legitimacy of that expectation, and

(iii) the protection conferred by law on the expectation that had been generated.

As to legitimacy of the expectation arising out of a representation made or past practice of a public authority, the law is concerned only of the expectation the person concerned is entitled to develop, as opposed to the subjective expectation actually entertained in the mind of such person. Thus, the question to be asked is, what was the expectation the person concerned was **entitled by law** to develop in his mind by the representation or the conduct of the public authority concerned. Once the court identifies the legitimacy of the expectation generated by the public authority, the court needs to identify how that expectation needs to be protected, having regard to the competing interests of protecting discretionary freedom of the public authority versus maintaining legal certainty of its decisions.

2.3.5 Expectations generated through lawful & unlawful representations and practices of public authorities

Expectations attributed to representations and practices of public authorities can relate to two distinct situations. They are, expectations generated through (i) lawful presentations and practices, and (ii) unlawful representations and practices.

2.3.5.1 Expectations generated through lawful representations and practices

When a public authority has generated expectations through lawful representations or practices (which is a reference to situations where the representations or conduct cited by the claimant are lawful / intra-vires the powers of the relevant public authority), whether or not the claimant is entitled to claim a legitimate expectation will be governed by legal principles discussed in the other parts of this judgment under the title 'doctrine of legitimate expectations'.

2.3.5.2 Expectations generated through representations or practices which are unlawful and / or ultra-vires the powers of the public authority

Such expectations may relate to two situations:

(i) Where officials of the public authority concerned who generated the expectation through representations made by them had acted ultra-vires the authority conferred on them by the public authority, made representations which are unlawful, and the public authority now wishes to act intra-vires its legal authority;

(ii) where the public authority had itself acted ultra-vires its authority and made unlawful representations.

A public authority arguing that it did not have lawful authority to make the representations it did (which has given rise to the expectations of the claimant) is unattractive. Allowing a public body to avoid being bound by its own previous representations on that footing seems to be unfair. However, a court cannot compel a public body to do what it is not legally empowered to do. In ***Rowland v. Environment Agency*** *[2005 Ch 1]* , ***R (Bibi) v. Newnham London Borough Council*** *[(2002) 1 WLR 237]* and ***R (Bloggs 61) v. Secretary of State for the Home Department*** *[(2003) 1 WLR 2724]*, court made it abundantly clear that the doctrine of legitimate expectations cannot operate so as to extend the powers of a public authority, by rendering enforceable, acts or decisions which are ultra vires the authority of the body itself. In ***Rowland v. Environment Agency*** *(referred to above)* it was held that the fundamental principle is that, a legitimate expectation can only arise on the basis of a lawful promise.

Court cannot order public authorities to fulfil promises which are beyond their powers or unlawful. In the event a court recognizes that a public body has made certain representations which are ultra vires its powers, which have given rise to an expectation, it will not recognize the existence of an enforceable substantive legitimate

expectation and therefore will not require the public authority to act contrary to law. Such approach is founded on the following three reasons:

(i) a public body cannot enlarge its powers by making *ultra vires* representations. Thereby, the principle of legality is respected and thereby, the *rule of law*;

(ii) requiring a public body not to be bound by its own unlawful representations would facilitate the public body not acting contrary to law. Also, the public body will thereby not be forced to act contrary to law;

(iii) by not requiring a public body to act contrary to law, wider public interests are protected.

However, some amount of protection to unlawfully generated promises may be possible for *bona-fide* claimants. While a public body cannot be required to do what is legally impossible, it can be required by court to exercise its powers benevolently, so as to respect, as far as legally possible, the expectation generated (engendered) by it. (This is referred to as the 'doctrine of benevolent exercise of power'.) Compensation in lieu of the fulfilment of the unlawfully generated expectation, is one option available. By this approach, on the one hand, public interests in not compelling a public body to do what it is not empowered to do or to act contrary to law, is protected. On the other hand, the private interests of the claimant based on the doctrine of fairness is recognized and protected by ordering the payment of compensation.

2.3.8 Procedural and Substantive Legitimate Expectations

Based on the nature of the representation made or practices and conduct of public authorities and the expectations generated by them, the law recognizes two types of legitimate expectations. They are 'procedural legitimate expectations' and 'substantive legitimate expectations'. If what can be inferred by the representation made or the practices of the public authority is adherence to a particular procedure to be followed when taking a decision, then the court may, through the recognition of the doctrine of

'procedural legitimate expectation', require the public authority concerned to adhere to such procedure that was undertaken to be followed. The expectation generated by a public authority can also take a substantive character, in the nature of the public authority having through its representations or practices, given rise to a legitimate expectation that a particular outcome or benefit would be awarded. That situation is recognized as having given rise to a 'substantive legitimate expectation', and thus, the court can require the relevant public authority to respect the expectation that was generated by it, and grant to the claimant the expected outcome.

2.3.8.1 Procedural Legitimate Expectations

Generally, a court would protect an individual's expectation by requiring a fair procedure to be followed before the public authority makes the relevant decision. If the claimant expected procedural fairness, this approach of court would fulfil the claimant's expectation. Procedural fairness may also be conferred by court in a situation where even though the claimant expected a particular substantive outcome, the court has concluded that, when preserving discretionary freedom of the public authority, the authority should be required to adhere to procedural fairness (only), and that compliance with such procedural fairness would be sufficient. In situations where the court recognizes only procedural fairness, the public authority would be entitled to arrive at a lawful decision (having adhered to procedural fairness), though such decision may be contrary to the expectation of the claimant.

The duty to act fairly and procedural protection arising out of legitimate expectations are similar, yet, not identical. The duty to act fairly is a flexible concept based on the rules of natural justice. Its precise meaning and the manner in which *audi alteram partem* of the rules of natural justice must be given effect to, depend on the context. Thus, different situations will require different levels of fairness and procedure to be adopted. The principle of legitimate expectations can influence the degree of fairness and the

exact nature of the procedure to be adopted. The existence of a legitimate expectation may require the public authority to confer on the claimant a more detailed (generous) and specific form of procedural fairness in line with previous practice of and representations made by the public authority, than what he would be entitled to if there was no legitimate expectation and the claimant sought only compliance with *audi alteram partem*. Therefore, should the claimant insist on the public authority having followed a detailed or specific procedure (in excess of what the rules of natural justice would require), he would need to establish that he had a procedural legitimate expectation in that regard. Such expectation may arise out of representations made or previous practices of the relevant public authority.

A frustration of procedural legitimate expectations can arise in the following situations:

(i) claimant relied on a policy or norm of general application, which had changed, and therefore applied differently;

(ii) the claimant relied on a declared policy or norm, which was not changed, but did not apply to the claimant;

(iii) the claimant received a promise or representation, which was not honoured in respect of the claimant, due to a change in policy or a norm pertaining to procedure;

(iv) the claimant received a promise or representation, which was dishonoured in respect of the claimant, not due to a general change in policy, but because the decision-maker has in the particular instance changed his mind.

In ***Attorney General of Hong Kong v. Ng Yuen Shiu*** *(referred to above)* while recognizing the doctrine of procedural legitimate expectation, the Privy Council held that when a public body has promised to follow a particular procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as the implementation does not interfere with its statutory duties.

In ***Sundarkaran v. Bharathi and Others*** *[(1989) 1 Sri LR 46],* the Petitioner – Appellant had a liquour license for the two preceding years, and applied for a license for the following year (1987). He was required by the relevant authorities to pay the license fee. When he attempted to do so at the office of the Government Agent, he was informed that a license could not be issued to him as he had failed to obtain the consent of all the Members of Parliament of the area, which was a requirement in terms of a circular issued in 1986 (which became applicable for the first time). He moved for a writ of Mandamus from the Court of Appeal, and having failed, appealed to this Court. This Court observed that the Respondents had failed to give the Petitioner a fair hearing of meeting the objections raised by the Members of Parliament. Court also held that, it has been repeatedly recognized that no man is to be deprived of his property without having an opportunity of being heard. The Supreme Court rejected the argument that the Petitioner was merely 'hoping against hope' of being granted a renewal of his license and held that he had a legitimate expectation of success, and therefore a right to a full and fair opportunity of being heard.

In ***M.R.C.C. Ariyarathne and Others v. N.K. Illangakoon, IGP and Others*** *(referred to above),* where a group of Development Assistants attached to the Police Department claimed that they had a legitimate expectation of being absorbed to the Sri Lanka Police Force or to one of its specialized units, Justice Prasanna Jayawardena provided the following general description of procedural legitimate expectations:

> *"Where a public authority, acting intra vires, has given an assurance that it will hear a person before it changes its policy with regard to a matter which affects him or has stated or otherwise made known its policy with regard to that matter or has an established practice of holding a hearing before a change of policy is effected, that person will have a procedural legitimate expectation, that the public authority will give him notice and a reasonable and adequate opportunity to make representations and be heard before it decides whether to change its policy with regard to the matter which will affect him. A*

court will, by way of judicial review, enforce such a procedural legitimate expectation, other than in limited circumstances such as, for example, where considerations of national security override that expectation of being consulted or heard."

2.3.8.2 Substantive Legitimate Expectations

As the Petitioner in this matter is seeking relief on the premise that his substantive legitimate expectation to receive a 'Letter of Intent' from the 1st Respondent – CEB and a permit from the 2nd Respondent – SLSEA had been frustrated, I propose to deal with this area of law in some detail.

Recognition of 'substantive legitimate expectations' is an instance which enables court to review the decision which the public body was required to take (based on the expectations it had generated through its own representations and past practices), as opposed to procedure it should have followed when taking the decision. Thus, it goes beyond the traditional scope of judicial review of examining procedural propriety and enters into the controversial area of reviewing merits of the impugned decision.

After a period of uncertainty regarding the question as to whether the English law recognizes the doctrine of 'substantive legitimate expectations' as opposed to 'procedural legitimate expectations', in ***R. v. North and East Devon Health Authority ex parte Coughlan*** *(referred to above),* the Court of Appeal of England cleared the doubt recognizing the non-justiciable frustration of substantive legitimate expectation as a distinct ground for judicial review, resulting in the grant of relief aimed at quashing the impugned decision of the public authority, as opposed to the procedure adopted by it when arriving at the decision. This would result in the court being able to consider the grant of substantive relief.

Lord Justice Laws in ***R (Niazi) v. Secretary of State for the Home Department*** *[(2008) EWCA Civ. 755],* held that, a substantive legitimate expectation arises only if there has

been a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance had been assured. He held that, a substantial legitimate expectation would arise when an individual or a group who have substantial grounds to expect that the substance of the relevant policy will continue to be in force for their particular benefit: not necessarily forever, but at least for a reasonable period of time, to provide a cushion against the change. In such situation, a change cannot lawfully be made, certainly not made abruptly, unless the authority notifies and consults those who would be adversely affected by such change.

The recognition of a substantive legitimate expectation offers not mere procedural protection. It provides a degree of legal certainty about the nature and the merits of the decision of the public authority which results in a particular outcome. The existence of a procedural legitimate expectation imposes a requirement on the decision-maker to take the decision in a particular manner. It does not impose a limitation on the exercise of discretion on the decision to be taken or on the decision itself. (It is a restriction on how to arrive at a decision and not a restriction on the decision itself.)

It must be noted that the recognition by court of substantive legitimate expectations has an impact on the exercise of discretion by public authorities. It can give rise to the decision-maker having to realize (give effect to) or honour the substantive expectation of the person who entertained such expectation. Thus, the expectation of the claimant would have to be realized. It may limit or completely take away discretion of the decision-maker. Some may even argue that, judicial enforcement of a substantive legitimate expectation of a claimant can result in the judiciary usurping the Executive's role. That is an argument *sans* merit, because when a court recognizes a substantive legitimate expectation, it does not require the public authority to give effect to the court's opinion on the matter. It merely requires the public authority to honour the expectation it generated by its own representations or past practice.

The concept of legal certainty provides a major justification for the recognition and enforcement of substantive legitimate expectations. As stated earlier, legal certainty is a component of the *rule of law*. The legal protection of expectations through the application of principles of administrative law such as the doctrine of legitimate expectations is a way of giving expression to the requirements of predictability, certainty, formal equality, fairness and consistency, which are all facets inherent in the *rule of law*, thus, its importance. However, legal certainty should be balanced with wider public interest. What will ultimately be sanctioned by court is what is in public interest.

The sub-doctrine of substantive legitimate expectations arises in the following two situations:

(i) A person who had been enjoying a benefit or advantage over a period of time, claims that such advantage or benefit had been withdrawn in frustration of his substantive legitimate expectation that the advantage or benefit will continue. In this instance, the recognition of the substantive legitimate expectation will preclude the decision-maker from exercising discretionary authority and changing the outcome legitimately expected by the party which entertained the expectation.

(ii) A person who is not presently enjoying a particular benefit or an advantage, claims that while he rightfully expected such benefit or advantage to be granted, in frustration of his expectation, the benefit or advantage he had applied for has been denied. In this instance too, the recognition of the substantive legitimate expectation will force the decision-maker to grant the particular benefit or advantage that was rightfully expected by such party. [The instant case falls into this category.]

Since the ***Coughlan*** case, the intensity with which courts have considered whether there existed a substantive legitimate expectation, has decreased. There exists only a very small category of cases where the stringent proportionality / balancing test applies. In those cases, the public authority can (is entitled to) frustrate the substantive legitimate expectation it created, only if the court is satisfied that the public interest in doing so (deviating from the undertaking given) outweighs the unfairness that will thereby be occasioned to the individual concerned. In such cases, a decision to frustrate a substantive legitimate expectation will be held to be lawful provided the decision-maker has (i) taken the expectation into account as part of its decision-making process, (ii) reached a reasonable conclusion concerning the balance between the public and private interests at stake, and (iii) respected any relevant conditions precedent, such as having given due notice where it would be unfair not to do so. Unless these grounds are satisfied, the public authority concerned will be required by court to honour its own undertaking / representations and its part practices.

However, in the cases that were decided after the decision in ***Coughlan*** which include the cases of ***R (Nadarajah) v. Secretary of State for the Home Department*** and ***R v Secretary of State for Education and Employment ex parte Begbie*** *(both cited above)*, the court's view was that the test enumerated in ***Coughlan*** should be narrowly construed by court. While accepting the test in ***Coughlan,*** the subsequent cases identified that stringent criteria should be applied for the recognition by court of a substantive legitimate expectation. Courts will look for the existence of an individualized promise or a specific promised given to a small group, rather than a representation containing a general statement of policy. Thus, there should be a specific undertaking or other representation by the public authority to the claimant, such as in the nature of a specific promise or a contractual undertaking.

In ***R (Nadarajah) v. Secretary of State for the Home Department*** *[(2005), EWCA Civil 1363],* it was held that, a public body's promise or past practice as to future conduct may be denied, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

In ***United Policyholders Group v. Attorney General of Trinidad and Tobago*** *(referred to above),* Lord Carnwath while approving the tests in ***Coughlan****,* held that a claim for substantive legitimate expectations should be honoured only where the claimant can establish the following:

(i) That there was a promise or representation which is clear, unambiguous and devoid of relevant qualification;

(ii) The promise was given to an identifiable, defined person or to a group by a public authority;

(iii) The promise was given by the public authority for its own benefit, either in return for action by the relevant person or group or on the basis of which the person or group has acted to its detriment;

(iv) The authority cannot show good reasons, judged by the court to be proportionate, to resile from the promise.

2.3.8.4 Approach to be taken by Court when a claim of substantive legitimate expectation is raised and established

When a claim of the existence of a substantive legitimate expectation is raised, as observed in ***R. v. North and East Devon Health Authority, ex parte Coughlan***, court may arrive at one out of the following three findings:

(i) though it has been submitted that the petitioner was entitled to a substantive legitimate expectation of some benefit being awarded or not withdrawn, what he was in fact entitled to was a procedural legitimate expectation (as opposed to a substantial legitimate expectation) such as the granting of a fair hearing or consultation before the impugned decision was taken. That is on the footing that the criterion of legitimacy requires only procedural protection. In other words, it is that all what the petitioner was legitimately entitled to was procedurally fair treatment [e.g. ***R. v. Secretary of State for the Home Department, ex parte Khan***];

(ii) by holding that while the petitioner was entitled to a substantive legitimate expectation (such as a conferral of a benefit or non-withdrawal of it), that expectation should be protected only by requiring a fair procedure being followed. That amounts to procedural protection of a substantive legitimate expectation. This approach is adopted when there are countervailing factors which necessitate the court to only insist on procedural fairness. This is when the public interest favours the exercise of discretionary freedom;

(iii) situations where the court recognize the existence of an actual substantive legitimate expectation, which is what the petitioner expected, and is entitled to expect – namely a particular substantive and legitimate outcome. This results in the court requiring the decision-maker to confer on the petitioner a particular benefit. In this situation, the discretionary freedom of the decision-maker must give way to the principle of legal certainty. This will result in the

decision-maker's discretion being removed completely. Thus, courts are cautious in applying this approach.

As stated previously, it is important to note that judicial thinking seems to recognize the importance of limiting the circumstances in which substantive legitimate expectations may arise. In the case of ***Ariyarathne***, Justice Prasanna Jayawardane, expressing his agreement with the views taken in ***R. v. Department of Education and Employment, ex parte Begbie*** and ***R (Nadarajah) v. Secretary of State for the Home Department*** (*both referred to above),* held the following view:

"*…In my view, these factors could make the doctrine of substantive legitimate expectation an unruly wayward horse if it is left to be guided only by the distinctly 'general' guidelines set out in* ***Hamble (Offshore) Fisheries Ltd, Dayarathna*** *and* ***Coughlan****."*

In conclusion, it would be pertinent to note that, the essence of jurisprudence on this matter supports the view that, in a case of substantive legitimate expectations, the test of reviewing the decision of a public authority is no longer limited to the criteria of *Wednesbury* unreasonableness. The court's task is to weigh genuine public interest that would be protected by accommodating the personal interest of the claimant, and decide on the legitimacy and the weight of the expectation of the claimant in comparison with the reasons given by the public authority for the change of policy on its part which it would invariably claim to also be in public interest. The court must grant substantive relief, if in the opinion of the court, the public authority having changed its policy is lawful and in wider public interest. That is not a means of directing public institutions on what their policy ought to be. The approach of the court is a means of preventing abuse of power by public authorities, and thereby, protecting public interests, which is the bounden duty of courts.

3.8.5 Does the frustration of a legitimate expectation constitute an infringement of Article 12(1)?

The totality of the judicial precedent cited in this judgment and the available jurisprudence both in this country and found in English Law pertaining to the doctrine of legitimate expectations (both procedural and substantive) points towards one direction. That is the conceptual basis for judicial review of the impugned decision, that being the rationale that permitting the impugned decision to stand would be inconsistent with *rule of law,* overlooking an instance of abuse of power, allowing an unreasonable, arbitrary or capricious decision to stand, and contrary to the very foundation of the law – that being fairness. Time and again, this Court has observed that the recognition of the equal protection of the law – the right to equality would necessitate this Court to rule that such legally flawed decisions which are contrary to the *rule of law*, signify an instance of abuse of power, are irrational, capricious or arbitrary or are so fundamentally unfair that the very foundations of justice and the conscience of the court would be shockingly shaken, would amount to an infringement of that fundamental right recognized by Article 12 of the Constitution. Thus, the frustration of a legitimate expectation does amount to infringement of Article 12 and specifically Article 12(1). This view on the impact of the frustration of a legitimate expectation is recognized amongst others in ***Suranganie Marapana v. The Bank of Ceylon and Others*** *[(1997) 3 Sri L.R. 156],* ***Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others*** *(referred to above),* ***Gunawardena v. Ceylon Petroleum Corporation and Others*** *[(2001) 1 Sri L.R. 231],* ***Weerasekara v. Director-General of Health Services and Others*** *[(2003) 1 Sri L.R. 295],* ***Sirimal and Others v. Board of Directors of the Co-operative Wholesale Establishment and Others*** *(referred to above),* ***Fernando and Others v. Associated Newspapers of Ceylon Ltd and Others*** *[(2006) 3 Sri L.R. 141],* and ***M.R.C.C. Ariyarathne and Others v. N.K. Illangakoon, IGP and Others*** *(referred to above).* Thus, it is now necessary to conclude that the 'frustration of a procedural or substantive legitimate expectation' is a *sui generis* ground to hold that

an infringement of the fundamental right recognized by Article 12(1) of the Constitution has occurred.

3. Position of the Petitioner

Vidullanka PLC is a public company incorporated in Sri Lanka, registered with and approved by the Board of Investment, and is listed in the Colombo Stock Exchange. Vidullanka PLC is engaged in the business of generation of electrical power through renewable energy resources and selling such electricity to the 1st Respondent – CEB. The company has, directly and through subsidiary companies successfully completed implementing several mini-hydropower projects and one project using biomass. It claims without contest from the Respondents that it plays a significant role in the development of the renewable energy generation capacity in Sri Lanka and significantly contributing to the national electricity grid. On 14th May 2012, Vidullanka PLC incorporated the Petitioner company - Vavuniya Solar Power (Private) Limited, as a subsidiary. The purpose of incorporating this company was to carry out a solar energy-based electricity generation project in Vavuniya, in the Northern Province of Sri Lanka.

On 20th April 2012, the Petitioner had submitted an Application to the 2nd Respondent – SLSEA for the purpose of obtaining approval for a solar energy-based electricity generation plant (also referred to as a 'photovoltaic plant') to be commissioned in Vavuniya. The expectation of the Petitioner was to obtain a permit under section 18 of the SLSEA Act, to commission the electricity generation plant, and commence generating electricity to be supplied to the national grid.

The project proposed by the Petitioner was to commission an electricity generation plant (using solar energy) at the cost of the Petitioner, and for the electricity generated by the plant to be supplied to the 1st Respondent – CEB to be distributed via the national grid. The 1st Respondent was to pay an agreed amount for electricity supplied to it by the

Petitioner. For that purpose, the Petitioner was to enter into an agreement with the CEB for the sale / purchase of electricity generated by the plant.

Learned President's Counsel for the Petitioner submitted that prior to the submission of this Application, a pre-feasibility study had been conducted and the Application for a permit was submitted to the SLSEA, as it was deemed to be a viable project. Learned President's Counsel also submitted that the Application ("P3A") had been submitted to the SLSEA in terms of section 16 of the SLSEA Act. The Application had been in conformity with (a) provisions of the SLSEA Act, (b) the 'On-grid Renewable Energy Projects Regulations' of 2009 ("P2A"), (c) the Regulations of 2011 promulgated by the Minister of Power and Energy in terms of section 67 read with 16(2), 17(2)(a) and 17(a)(2) of the SLSEA Act ("P2B"), and (d) the Guidelines issued by the SLSEA titled "*A Guide to the Projects approval process for On-Grid Renewable Energy Project Development*" ("P2C").

Following the registration of the Application in terms of section 16(3) of the SLSEA Act (Registration No. R 125550) and a preliminary screening of it by the SLSEA, by letter dated 18th May 2012 ("P3B") the Director General of SLSEA (5th Respondent) wrote to the General Manager of the CEB (4th Respondent) bringing to his attention information pertaining to 23 Applications received by the SLSEA seeking approval for renewable energy (solar) power projects, which included the project submitted by the Petitioner. While seeking information regarding the availability of 'grid capacity' on the part of the CEB (given the intended locations of the respective proposed electricity generation projects), he sought the concurrence of the CEB to table the Applications pertaining to the proposed projects at the forthcoming meeting of the PAC.

Learned President's Counsel for the Petitioner submitted that the afore-stated letter amounted to the 5th Respondent having sought from the CEB a 'grid interconnection

concurrence' for several proposed projects, including the project for which the Petitioner had sought approval.

Subsequently, the Petitioner had been informed by the SLSEA that the CEB requires the project for which the Petitioner sought approval to contain a 'battery storage system'. Therefore, the Petitioner had made necessary changes to the proposed project, and by letter dated 19th November 2012 ("P3C") informed the Deputy General Manager (Energy Purchases) of the CEB, the Petitioner's willingness to include a '8 megawatts battery backup system' as a solution to the problem highlighted by the CEB. The problem was supposedly the short-term power variation in electricity generated by the proposed project. That problem was sought to be resolved by the addition of a battery system to ensure smooth power output at the grid end, so that sudden power drops could be avoided. Through the said letter, the Petitioner had requested the CEB to provide the 'grid interconnection concurrence' for the project proposed by the Petitioner. Receiving such concurrence would have enabled the SLSEA to consider granting 'provisional approval' for the project. By letter dated 21st November 2012 ("P3D"), without making any adverse comment, the Deputy General Manager (Energy Purchases) of the CEB has brought this matter to the attention of the Deputy General Manager (Transmission & Generation Planning) of the CEB. The Petitioner claims that notwithstanding the Petitioner having in November 2012 undertaken to amend the project specifications as required by the CEB to include a 'battery backup system' and several reminders having been submitted to the CEB, till 2016 the CEB failed to grant the 'grid interconnection concurrence' to the intended amended project of the Petitioner (Reminders sent to the CEB in this regard were produced by the Petitioner marked "P3F", "P3G" and "P3H").

On 15th February 2016, the SLSEA wrote to the CEB seeking 'grid interconnection approval' to the modified project proposed by the Petitioner. The modification (as proposed by the Petitioner) was to transfer a minimum of 25% of energy generated

during the daytime to the night peak period via a battery storage system ("P4A"). By letter dated 9th May 2016, the CEB informed the SLSEA that having taken into consideration the innovative nature of the amended project, it has no objection for the consideration of the project for the issue of a 'provisional approval' by the SLSEA as a 'pilot project' ("P4B"). Learned President's Counsel for the Petitioner submitted that this letter amounted to the CEB having granted 'grid interconnection concurrence' for the Petitioner's project. Learned Solicitor General for the Respondent did not object to that contention.

Sequel thereto, on 19th May 2016, the SLSEA notified the Petitioner that in terms of section 17(2)(a) of the SLSEA Act, No. 35 of 2007, the PAC of the SLSEA had granted 'provisional approval' to the Petitioner to develop a '10 megawatts Solar PV Project with a battery storage system' to be located within the area coming within the Divisional Secretariat of Vavuniya South. The Petitioner was required within 6 months from the date of that notification, to submit the documents and information mentioned under items "A" and "B" of Annexure I to the said notification, which were the conditions of the provisional approval ("P5A"). For the provisional approval to be upgraded to the final or full approval and the grant of a permit under section 18 of the Act, these conditions had to be satisfied by the proponent of the project, (being the Petitioner). The notification contained a caution that provisional approval will stand automatically cancelled if the afore-stated requirements were not complied within 6 months or within a further period of 6 months which could be obtained by presenting a request to the SLSEA. The afore-stated 'conditions' of the provisional approval granted to the amended project proposed by the Petitioner contained *inter alia* a requirement that the Petitioner obtains from the 1st Respondent a "Letter of Intent" which would indicate its willingness to purchase electricity generated by the proposed project. That had been an administrative general and imperative requirement imposed by the SLSEA to all project proponents.

In view of the foregoing, the Petitioner applied for the issue of the several approvals stipulated as conditions of the 'provisional approval' issued by the SLSEA. On 26th July 2016, the Petitioner requested the CEB to issue a "Letter of Intent" ("P7A"). As the 1st Respondent did not respond, two further requests were made on 29th August and 7th November 2016 ("P7B" and "P7C"). As there was no response from the CEB notwithstanding reminders being sent, by letter dated 14th September 2016 ("P8A") the Petitioner requested the Minister of Power and Renewable Energy to intervene in the matter and advice the CEB to expedite the issuing of the 'Letter of Intent'. Since there was no positive outcome even from the Minister, yet another letter dated 10th November 2016 ("P8B") had been sent by the Petitioner. Sequel thereto, the Minister had by letter dated 18th November 2016 ("P8C") advised the CEB to expedite the issuing of the 'Letter of Intent' and the 'Electricity Purchase Agreement'. Nevertheless, there had been no positive response from the CEB notwithstanding the Minister's intervention.

As there was a delay in obtaining necessary approvals, including the 'Letter of Intent' from the CEB, by an Application to the SLSEA, the Petitioner had obtained an extension of the validity period of the provisional approval, up to 18th May 2017 ("P5B").

Learned President's Counsel submitted that the 'provisional approval' granted to the project by the SLSEA was a clear indication that the CEB had granted 'grid interconnection concurrence' and an indication that the CEB being the 'electricity transmission and bulk supply licensee' had been satisfied of its ability to accept electricity generated by the project proposed by the Petitioner. In terms of clause 2.3 of the Guidelines, such a decision would have been taken by the CEB upon a careful evaluation of technical factors such as the systemwide impacts, network typology and system stability, in addition to more commonly understood constraints such as local transmission grid limitations and limitations in capacity at the grid sub-station.

Subsequently, the Petitioner had obtained all the required approvals as contained in Annexure I of "P5A", except the "Letter of Intent" from the CEB. The Petitioner produced marked "P6A" to "P6H" the other approvals obtained by the Petitioner, as per the conditions contained in the 'provisional approval' issued by the SLSEA. Thus, the only requirement that stood in the way towards the Petitioner obtaining the final approval (a permit under section 18 of the SLSEA Act) from the SLSEA, was the "Letter of Intent" to be issued by the CEB.

In the meantime, in November 2016, at a meeting held with the 1st Respondent, it had been intimated to the Petitioner that the project would be accepted if the project is changed to its original form (i.e. solar power electricity generation without a battery storage system). The Petitioner agreed to do so. The CEB has not given any reason for the change in the technical requirement previously sanctioned by it. Consequently, by letter dated 17th November 2016 ("P9"), the Petitioner informed the SLSEA of the change of position by the CEB and requested the SLSEA to grant an 'extension as per the original Solar PV Application made'. The SLSEA refused to change the 'provisional approval' without a direction from the CEB. Therefore, by letter dated 1st December 2016 ("P10A"), the Petitioner requested the CEB to issue a directive to the SLSEA to issue an amended 'provisional approval' from a 'Solar PV with a Battery Storage System' to a 'Solar PV System' (which amounted to the original project proposal submitted by the Petitioner – a system without a battery backup). By letter dated 1st December 2016, the CEB informed the SLSEA that it has no objection to the project type being changed to a 'Solar PV project' ("P10B"). Sequel thereto, by letter dated 20th December 2016 ("P11"), the SLSEA notified the Petitioner the grant of an amended 'provisional approval' from a 'Solar PV with battery storage' to a 'Solar PV (without a battery storage system)' project.

By letter dated 26th December 2016 ("P12"), the Petitioner wrote to the CEB seeking a 'Letter of Intent' for the further revised project (original project proposal – a system

without a battery backup). Since there was no response from the CEB, on 16th February 2017, the Petitioner in partial compliance with the conditions contained in the 'provisional approval', submitted the requisite approvals that were available (other than the 'Letter of Intent' to be issued by the CEB) to the SLSEA. This submission ("P13") contained a request that the 'final approval' for the project be issued along with a 'permit' in terms of section 18 of the SLSEA Act. While the 2nd Respondent did not issue a 'permit' to the Petitioner, by letter dated 1st March 2017 ("P14") addressed to the General Manager of the CEB (at the time the 4th Respondent), the SLSEA requested the CEB to issue a 'Letter of Intent' for the project of the Petitioner. As there was no response from the CEB, on 7th March 2017, the Petitioner once again urged the 4th Respondent to issue a 'Letter of Intent' ("P15"). In the said letter, the Petitioner sought reasons if any, for the delay in issuing the 'Letter of Intent'. In response, the Chairman of the CEB by letter dated 22nd March 2017 ("P16") informed the Petitioner that the Minister of Power and Renewable Energy had appointed a committee headed by the Secretary to the Ministry of Power and Energy to review and report on suitable decisions to be taken with regard to all matters pertaining to Applications for 'provisional approvals' and 'Letters of Intent' that are being processed either at the CEB or at the SLSEA, and that in the circumstances the project of the Petitioner would come within the scope of that committee. The Chairman of the CEB (3rd Respondent) had undertaken to revert to the Petitioner 'as soon as a direction is issued by the Ministry'.

The Petitioner claims that neither the said committee nor the CEB had thereafter informed the Petitioner of any reasons for the non-issuance of the 'Letter of Intent'. It is the Petitioner's position that there is no valid reason for the non-issuance of the said letter.

As opposed to the position taken up by the 1st Respondent (CEB) regarding the reason for the non-issuance of the 'Letter of Intent', the Petitioner has asserted that, in terms of section 6 of the Guidelines ("P2C") issued by the 2nd Respondent (SLSEA) there exists a

'Standardised Power Purchase Agreement (SPPA)' for renewable energy projects of the approved types, with an installed capacity of up to 10 MW. The SPPA is a standardised and non-negotiable Agreement that the CEB enters into with project proponents which stipulates the price at which the CEB will purchase electricity from the project proponent. This tariff has been approved by the PUCSL. The Petitioner's position is that the project proposed by the Petitioner comes within the scope of that Agreement. Therefore, the Petitioner's position is that, as the capacity of the Petitioner's project is 10 MW, there is no requirement to negotiate the terms and tariffs according to which electricity generated from the project is to be purchased by the 1st Respondent (CEB) as they are regulated in terms of the Standardised Power Purchase Agreement. Thus, the Petitioner claims that the 1st Respondent (CEB) does not have any discretion in the matter of granting the 'Letter of Intent' to the Petitioner, who had already obtained 'provisional approval' founded upon the 1st Respondent (CEB) issuing 'grid interconnection concurrence'.

4. Position of the Respondents

2nd Respondent – Sri Lanka Sustainable Energy Authority - According to the 5th Respondent (in his capacity as the Deputy Director General (Operations) of the Sri Lanka Sustainable Energy Authority – 2nd Respondent, in terms of section 13 of the Act, it is the Authority that is responsible for the development of all renewable energy resources in Sri Lanka, with the view to obtaining maximum economic utilization of those resources. With this objective, the Authority has published Regulations ("P2A" and "P2B") and Guidelines ("P2C") to regulate the procedure for application and the granting of approvals for renewable energy projects. In terms of section 16 of the Act, the Director General of the Authority is required to accept Applications for development of renewable energy projects and submit them to the PAC for its consideration. Up until 2018, the Authority had successfully achieved targets pertaining to sustainable energy projects, based on the 'least cost long-term generation expansion plan' of the government, which has been approved by the Cabinet of Ministers. When

developing renewable energy projects, there are special considerations to be given by balancing environmental factors and social benefits. According to the SLSEA, it is awaiting 'grid concurrence' from the CEB for a number of Applications it had received.

The 5th Respondent has presented marked "2R1", minutes of the PAC meetings held on 19th May and 23rd June 2016. According to "2R1", at the meeting of the Committee held on 19th May 2016 (at which M.C. Wickramasekara, the then General Manager, CEB was present), the 'Solar PV Project with Battery Storage System' with a capacity of 10 megawatts submitted by the Petitioner has been approved for the issuance of a 'provisional approval'. At the subsequent meeting of the PAC held on 23rd June 2016, no decision had been taken pertaining to the project proposal submitted by the Petitioner.

According to the 5th Respondent, the 6th Respondent – Secretary to the Ministry has by letters dated 4th May 2016 ("2R2") and 20th July 2017 ("2R3") issued certain directives to the Authority. By "2R2" the Secretary has informed the Authority that the government has given high priority for the development of renewable energy envisaged for the future development of the country. He has highlighted the need to identify suitable methodologies to fast-track the development process. He has asserted the need to streamline the project approval process and immediate intervention of the Authority to speed up implementation of projects. By "2R3", the Secretary has notified the Authority that the Ministry intends to amend the SLE Act to enable the development of renewable energy projects under the SLSEA Act, and pending such action being taken, approval has been granted in terms of section 17(c) of the SLE Act to implement certain electricity generation programmes (specified in that letter).

1st Respondent – Ceylon Electricity Board - According to the 4th Respondent (General Manager, CEB), in terms of the SLE Act, the sole authority to offer the "Standardised

Power Purchase Agreement" is the CEB, and the right to purchase generated electricity also lies solely with the CEB, which is recognized as the sole 'transmission licensee'.

Referring to the Application submitted by the Petitioner on or about the 20th April 2012 under section 16 of the Act, the 4th Respondent has asserted that the Petitioner has not complied with the requirement set-out in section 16 of the Act and in *Gazette* notifications bearing Nos. 1599/6 and 1705/22 (pertaining to 'on-grid Renewable Projects') dated 27th April 2009 and 10th May 2011, respectively. That is on the footing that as at the date of the Application, the Petitioner had not been incorporated as a company and thus was not in existence. Instead, the Application contained a reference to the fact that the company was 'in the process of incorporation'. According to the Certificate of Incorporation, the Petitioner company had been incorporated on 14th May 2012. Thus, the Petitioner had submitted an 'irregular Application'. Further, when the applicant is a company, it is incumbent on the company to tender a 'Resolution' of the company authorizing the applicant to submit an Application. This requirement had also not been complied with.

The 4th Respondent admits that, following the 1st Respondent issuing the 'Grid Interconnection Concurrence' in respect of the Application submitted by the Petitioner, on or about 19th May 2016, the 2nd Respondent issued the 'provisional approval' to the project of the Petitioner. The 4th Respondent agrees with the position taken up by the Petitioner that the grant of 'final approval' was contingent upon the submission of certain documents and information stipulated in Annexure I of the document containing the 'provisional approval'. Of such requirements, one was obtaining the 'Letter of Intent' from the 1st Respondent, and tendering it to the 2nd Respondent within 6 months from the issuance of the 'provisional approval'. If the requirements attached to the 'provisional approval' were not satisfied and submitted to the 2nd Respondent or the requirements contained in the 'provisional approval' were not satisfied at all, in

terms of section 17(c) of the SLSEA Act, the 'provisional approval' will automatically stand cancelled at the end of the 6th months period, or a further 6 months period, which may be obtained upon a request being made in that regard. This position is also contained in page 12 of the *"Guidelines to On-Grid Renewable Energy Development Projects"* ("P2C"). The Petitioner is deemed to have been fully aware that the final approval and the permit will be contingent upon his obtaining *inter-alia* a 'Letter of Intent' from the 1st Respondent, which the Petitioner had failed to obtain.

On application by the Petitioner, the time period originally granted by the 2nd Respondent to comply with the requirements was extended by another 6 months, and the extended period was to expire on 18th May 2017. Three days prior to the expiry of the said period, on 15th May 2017 the Petitioner filed the instant Fundamental Rights Application in the Supreme Court in order to prevent the extended period of the 'provisional approval' granted by the 2nd Respondent from automatically lapsing.

The appropriate cause of action where a party fails to obtain a 'Letter of Intent' is to bring the matter to the attention of the 1st Respondent. The 4th Respondent admits that the Petitioner had done so by way of submitting a letter, to which the 1st Respondent had responded by letter dated 22nd March 2017, stating that the Minister of Power & Renewable Energy had appointed a committee to take a decision on the matter. The matter pertaining to the Petitioner was pending deliberation by the Committee as at the time the instant Application was filed. In terms of section 22(1)(b) of the SLSEA Act, any person aggrieved by a refusal to grant final approval to an Application may within one month of the receipt of such communication, appeal against the refusal to the Board of Management. Furthermore, in terms of section 28 of the Act, the Petitioner could have presented an appeal to the Board. By instituting this action, the Petitioner has circumvented the proper forum to obtain redress and has petitioned the Supreme Court, without seeking administrative relief.

In response to the allegation pertaining to the non-granting of the 'Letter of Intent' to the Petitioner, the 4th Respondent has taken up the following positions:

(i) Due to technical reasons that are common or specific to Solar PV and Wind Power electricity generation plants, the 1st Respondent has stopped issuing 'Letters of Intent'. There are constraints in interconnection of these power plants to the transmission system. Therefore, in 2012, the 1st Respondent did not issue to the 2nd Respondent (SLSEA) concurrence for grid interconnection in respect of the project of the Petitioner. However, with grid and system expansion, these constraints can be relaxed or changed.

(ii) The 1st Respondent (CEB) stopped issuing 'Letters of Intent' to wind and solar projects until the grid connection limitations and effects on the system were studied. A study in this regard was conducted by the 1st Respondent and its report is contained in the "Integration of non-conventional renewable energy-based generation into Sri Lanka Power-Grids". ("4R1") According to this study, only 10 MW solar projects have been considered viable for Vavuniya.

(iii) Following the amendment to the SLE Act by Act No. 31 of 2013, procurement of electricity should be done on a competitive basis. This encourages lower electricity cost, ultimately helping customers and the national economy.

(iv) The Ministry of Power and Renewable Energy has decided on a policy of calling for tenders for wind and solar power projects.

(v) No 'Letter of Intent' has been issued since August 2013, except for one project, that being a joint venture between a private project proponent and the CEB.

According to the 4th Respondent, (a) the 1st Respondent did not initially issue a 'grid connection concurrence' for the project of the Petitioner, since there was an issue of 'technical infeasibility in connecting', (b) the 1st Respondent thereafter issued the 'grid

connection concurrence' as the technology was changed to 'battery storage' and as the 'system had expanded', and (c) the 1st Respondent did not issue the 'Letter of Intent' as (i) there were 'further issues to be reviewed in the technical matters with regard to the grid connections', (ii) due to the 'policy decision to go for tendering in solar power projects' and (iii) due to 'legal issues relating to the SLE Act'.

The 4th Respondent has taken up the position that in terms of the SLE Act, the sole authority for offering a 'Standardised Power Purchase Agreement' is the 1st Respondent (CEB). He further emphasizes that the right to purchase electricity lies solely with the electricity transmission licensee, being the CEB.

5. Submissions made on behalf of the Petitioner

Learned President's Counsel submitted that following certain preliminary work such as conducting a pre-feasibility study, on 20th April 2012 the Petitioner had submitted an Application to the Director General of SLSEA (5th Respondent) seeking approval for an on-grid electricity generation project. This Application had been in conformity with all the stipulations of the applicable provisions of the law and requirements contained in the guidelines.

Following a preliminary screening of the Application, the 2nd Respondent (SLSEA) in consultation with the 1st Respondent (CEB) registered the Application submitted by the Petitioner, and issued a registration number, being R 125550. This was in terms of section 16(3) of the SLSEA Act. He submitted that, this showed clearly that the Application submitted by the Petitioner was prima-facie valid and acceptable to the 2nd Respondent. On or about 18th May 2012, on behalf of the 2nd Respondent, the 5th Respondent (Director General, SLSEA) requested the 1st Respondent to provide 'grid interconnection concurrence' for the project proposed by the Petitioner and for several other projects. To facilitate the consideration of the Application for the issue of 'grid

interconnection concurrence' and 'provisional approval' for the project, the 2nd Respondent had submitted the Application of the Petitioner to the PAC of the SLSEA. Contingent upon the 1st Respondent granting 'grid interconnection concurrence' to the project (which is an indication of the CEB's ability to accept to its grid, the electricity generated by the project), the project was to receive 'provisional approval'. Learned President's Counsel drew the attention of Court to section 2.3 of the afore-mentioned Guidelines ("P2C"), which provides that as the 'transmission and bulk supply licensee', the CEB will have to (based on a careful evaluation of system wide impacts, network topology and system stability, in addition to the more commonly understood constraints such as local transmission grid limitations and grid substation capacity limitations), be satisfied with the ability of the CEB to accept electricity produced by the proposed project.

He further submitted that the PAC comprises of several government officials (as specified in section 10 of the SLSEA Act), and includes the General Manager of the 1st Respondent -CEB.

Learned President's Counsel further submitted that, the original proposal was for the establishments of a *Solar PV Power Generation Project.* Following a response received from the 2nd Respondent, the Petitioner having consulted its technical partner, had converted the proposed project into a *Solar PV Power Generation Project with a Battery Storage System.* The Petitioner had verily believed that if the project was converted in that manner (i.e. the enhancement of the project to contain a battery storage system), approval would be given for the project. That the Petitioner would amend the proposed project to include a battery storage system was conveyed to the 1st Respondent by letter dated 19th November 2012 ("P3C").

Notwithstanding the Petitioner making a number of representations to the 1st Respondent, till 2016, no meaningful action was taken by the 1st Respondent. The post-argument written submissions of the Petitioner contain an allegation that notwithstanding the project proposal submitted by the Petitioner having been the only Solar PV power project proposal received by the 2nd Respondent for the Northern Province and ranked 'number one' in the Northern Province for grid interconnection, instead of granting grid interconnection concurrence for the project of the Petitioner, the 1st Respondent had granted approval for a solar - thermal project of 10 MW capacity for the Vavuniya district submitted by another applicant. After a long delay in processing the Application, and no reasons being given for the delay, on 9th May 2016 ("P4B") the 5th Respondent (on behalf of the CEB - 1st Respondent) informed the Director General of the SLSEA - 4th Respondent that the CEB had no objection for consideration of the project for the issue of 'provisional approval' which was understandably subject to the Petitioner complying with certain conditions. This amounted to the CEB - 1st Respondent granting 'grid interconnection concurrence' to the amended project submitted by the Petitioner. Accordingly, by letter dated 19th May 2016 ("P5A") the SLSEA - 2nd Respondent granted 'provisional approval'. As 'provisional approval' was granted, the Petitioner verily believed that upon satisfaction of the conditions attached to the 'provisional approval' the 1st and 2nd Respondents would give approval for the project. Originally, a period of 6 months was given to the Petitioner to comply with the requirements, and on request by the Petitioner, another period of 6 months was given.

It was contended on behalf of the Petitioner that in terms of section 6 of the Guidelines ("P2C"), a 'Standardised Power Purchase Agreement' (SPPA) is available for the renewable energy generation projects which have received approval, with an installed capacity of up to 10 megawatts. The proposed project of the Petitioner belongs to this category. This SPPA is standardised and non-negotiable, and is valid for 20 years from the date of the commencement of commercial operations. Such projects are also eligible

to be paid under the Small Power Purchase Tariff (SPPT). The SPPT is an approved tariff published by the PUCSL.

Learned President's Counsel for the Petitioner submitted that where the capacity of a proposed electricity generation project (such as the project proposed by the Petitioner) is equal or less than 10 megawatts, there is no requirement to negotiate the terms and tariffs of the Standardised Power Purchase Agreement (SPPA). He further submitted that this position was evident by section 6 of the Guidelines ("P2C") which relates to 'Power Purchase Agreements and Tariffs'. Further, with the approval of the Cabinet of Ministers (approval granted on 7th March 2015) following the enactment of the SLE (Amendment) Act, No. 31 of 2013), a standardised tariff for solar power purchases under a Non-conventional Renewable Energy Tariff has been published by the 1st Respondent – CEB. Since the grid interconnection concurrence was given by the 1st Respondent – CEB to the Petitioner prior to the issuance of the 'provisional approval' by the 2nd Respondent – SLSEA, the 1st Respondent does not have in fact and in law a discretion in providing the 'Letter of Intent'. He further submitted that there is no Standardised Power Purchase Agreement for renewable energy generation projects which generate in excess of 10 megawatts, and thus, for those projects following a competitive bidding process based on the normal procurement policies is necessary.

It was submitted that the conduct of the Respondents coupled with the communications received from the Respondents and the Guidelines ("P2C"), gave rise to a legitimate expectation that the Petitioner would be entitled to receive a 'Letter of Intent' from the CEB – 1st Respondent, upon the Petitioner securing all the other approvals. It was therefore submitted that, even after fulfilling all the requirements contained in the 'provisional approval' ("P5A") (i.e. obtaining all the approvals listed as conditions to be satisfied in "P5A", other than the 'Letter of Intent') and the Petitioner having on 26th July 2016 ("P7A") requested the 1st / 4th Respondents to issue a 'Letter of Intent' (and

thereafter having sent two reminders), the failure on the part of the 1st Respondent to issue the 'Letter of Intent' constitutes a breach of the legitimate expectation of the Petitioner.

He further submitted that under section 43(4) proviso (b) of the SLE Act (as amended by Act No. 31 of 2013), it was not necessary for the 1st Respondent – CEB to call for tenders with regard to projects in respect of which a permit has been issued under section 18 of the SLSEA Act. He also drew the attention of the Court to the contents of section 43(7) and 43(8) of the SLE Act (amended by Act No. 31 of 2013), which recognize a 'Standardised Power Purchase Agreement'.

In view of the foregoing, learned President's Counsel for the Petitioner submitted that, there was 'absolutely no restriction' for the 1st Respondent under the SLE Act (as amended) to purchase electricity from a developer approved under the SLSEA Act, as there is no legal requirement for tenders for such projects.

Learned President's Counsel for the Petitioner summed up his submissions by stating that the non-issuance of the 'Letter of Intent' to the Petitioner was wrongful and without justifiable reason. Learned President's Counsel reiterated that the conduct of the Respondents coupled with the communications received from the Respondents gave rise to a legitimate expectation that the Petitioner would be entitled to receive a 'Letter of Intent' upon the Petitioner securing all the other approvals. Learned President's Counsel submitted that the continuing failure which amounts to a refusal to issue the 'Letter of Intent' to the Petitioner is arbitrary, capricious, unreasonable and discriminatory. In the circumstances, he submitted that the Petitioner has been denied the equal protection of the law as envisaged by Article 12(1) of the Constitution. Thus, he submitted that the fundamental right guaranteed in terms of Article 12(1) had been infringed by the 1st Respondent.

6. Submissions made on behalf of the Respondents

On behalf of the Respondents, it was submitted by the learned Solicitor General that the instant Application alleging an infringement of the Fundamental Rights of the Petitioner, had been filed prematurely. He submitted that, initially a period of six months was given by the SLSEA for the Petitioner to comply with the conditions that were attached to the 'provisional approval' (which was issued on 19th May 2016). Subsequently, on a request made by the Petitioner, this period of time was extended by another six months. Accordingly, the extended period granted to the Petitioner to comply with the requirements was to end on 18th May 2017. Had the Petitioner failed to satisfy the conditions that were attached to the 'provisional approval' at the time of the expiry of this extended period, in terms of section 17(4) of the SLSEA Act, the 'provisional approval' granted to the Petitioner would have lapsed. This Application has been submitted to the Supreme Court on 15th May 2017, three days before the extended period was to have lapsed. Learned Solicitor General submitted that the Petitioner resorted to this move, in order to prevent the 'provisional approval' from lapsing. Therefore, he submitted that the instant Application had been filed to prevent the provisional approval from automatically lapsing and was also premature.

Learned Solicitor General also submitted that as the Petitioner has been unsuccessful in obtaining the 'Letter of Intent' from the CEB, he should have brought that matter to the attention of the CEB. That the Petitioner has done. The CEB responded explaining the reason which prevented the CEB from granting the 'Letter of Intent', i.e. the Minister of Power and Renewable Energy has appointed a committee headed by the Secretary to the Ministry of Power and Energy to determine the said matter. In terms of section 22(1)(b) of the SLSEA Act, any person who is aggrieved by a refusal to grant final approval to an Application may, within one month of the receipt of such communication informing him of such refusal, appeal against such refusal to the Board of Management of the SLSEA. This step has not been taken by the Petitioner. Thus,

learned Solicitor General submitted that due to the afore-stated reasons, the instant Application is premature and should be dismissed.

Learned Solicitor General submitted that in 2012, it was due to 'grid interconnection issues' that concurrence for grid interconnection was not given by the 1st Respondent - CEB to the 2nd Respondent - SLSEA in respect of the Petitioner's project. The CEB stopped giving 'Letters of intent' to wind and solar projects until the grid connection limitations and effects on the system were studied. According to a study conducted by the CEB, only 10 MW solar projects had been considered viable for Vavuniya. He further submitted that with grid expansion and system expansion, these constraints can be relaxed or changed.

Learned counsel for the Respondents also submitted that, following the amendment to the SLE Act introduced by Act No. 31 of 2013, in terms of amended section 43 and in particular sub-sections 43(3) and 43(4), procurement of electricity by the CEB with regard to projects above 5 MW has to be done on a competitive basis by calling for tenders. He explained that the process of competitive bidding encourages lower electricity cost, which ultimately helps consumers and also the national economy. In the circumstances, the Ministry of Power and Renewable Energy had decided on a policy of calling for tenders for wind and solar electricity generation projects. Accordingly, tenders had been called for two 10 megawatts wind projects and contracts had been awarded. Tenders for sixty 10 megawatt solar projects had been called and award of tenders were being considered. Since 2013, no 'Letters of Intent' had been issued except for a single joint venture. It is the position of the Respondents that according to "4R2", with regard to projects which are to generate over 5 megawatts of electricity, project development has to take place through a tender process. Thus, a 'competitive bidding process' must be adhered to. As evident from "4R1", the Honourable Attorney General has expressed the opinion that when new electricity generation plants are required, in

terms of the amended law, the price at which electricity is to be purchased by the CEB (in its capacity as the 'transmission licensee') must be determined by competitive bidding. In terms of section 43(3) of the Act, the selection of a person to provide electricity should be on the basis of least cost.

Learned Solicitor General submitted that the Application of the Petitioner was submitted to the SLSEA on 20th April 2012, well before Act No. 31 of 2013 amended section 43 of the Act. He stressed that though on 19th May 2016, 'provisional approval' was granted for the project proposed by the Petitioner, "*the CEB was well within the scope of the said Amendment and the opinion expressed by the Honourable Attorney General to scrupulously adhere to the provisions of section 43(4) and not issue the letter of intent*". He further submitted that the 'sole reason' for not issuing the 'Letter of Intent' was that amended section 43(4) of the Act required competitive bidding to take place prior to entering into an agreement between the CEB and the project proponent. He concluded his submission by asserting that "*the CEB cannot be faulted or censured for obeying the law, as any contravention of it would entail legal sanctions and implications for the CEB'. There was no malicious intent on the part of the CEB in denying the Petitioner of the letter of intent. It was the supervening event of the law being amended, that prevented the CEB from performing the role envisaged by the Petitioner*".

7. Analysis of the evidence, application of the law and conclusions

7.1 Would the Petitioner be disentitled to any relief on the footing that as at the time the Application for a permit was submitted to the SLSEA by the petitioner, it had not been incorporated as a company?

Section 16 of the SLSEA Act which provides for the submission of an Application to the SLSEA by a person who is desirous of engaging in and carrying on an on-grid renewable energy project, does not specify that such an applicant should be a company incorporated under the Companies Act. Thus, there is no statutory requirement to that

effect, though the 4th Respondent has made such an assertion. However, *Gazette* notifications Nos. 1599/6 ("P2A") and 1705/22 ("P2B") dated 27th April 2009 and 10th May 2011, respectively, titled 'On-grid Renewable Energy Projects Regulations, 2009' issued by the Minister of Power and Energy under section 67 read with sections 16(2), 17(2)(a) and 18(2)(a) of the of the SLSEA Act, are relevant in this regard. Schedules A, B, C, and D of "P2A" issued in April 2009 had been replaced by four schedules contained in "P2B", which had been issued in May 2011. Thus, it would be "P2A" read with "P2B" that would be relevant to the instant matter. Regulation 2 of "P2A" provides that "*an application for engaging in or carrying on of an on-grid renewable energy project within a Development Area, shall be submitted to the Director-General in such form as specified in Schedule "A" to these Regulations …*". Schedule A of the said Regulations contain a template of the Application to be submitted. In item 4(ii) of Schedule A of "P2A", the applicant is required to disclose the "*Company Name (if applicable)*". In item 3 of "P2B" the applicant is required to disclose "*If the applicant is a Company: Name, Registration No., Name of Directors of the Company, Address, Telephone Numbers, Email*". It is thus apparent that the applicant being an incorporated company at the time of the submission of the Application is not an essential requirement imposed by law or through Regulations issued under the Act. Furthermore, Clause 2.1 of the guidelines issued by the SLSEA titled "*A Guide to the Project Approval Process for On-grid Renewable Energy Project Development*" ("P2C") provides that "*Any person (an individual or a company) may apply for a renewable energy project anytime …*". According to section 9(1)(c) of the SLE Act, a generation licensee is required to be an incorporated company, only if the project is to generate more than 25 megawatts of electricity. It is also pertinent to observe that, notwithstanding the alleged disqualification asserted to on behalf of the 1st Respondent – CEB and referred to in the submissions of the learned Solicitor General, the SLSEA had entertained the Application submitted by the Petitioner and processed it. Further, this objection was not raised by the 2nd Respondent – SLSEA, which not only accepted the Application, but processed it as well, and referred it to the PAC. Furthermore, in

any event, even though the Petitioner had not been incorporated as a company as at the date on which the Application was submitted by it to the SLSEA (i.e. 20th April 2012), as apparent by "P1A" (Certificate of Incorporation), by 14th May 2012 it had been incorporated as a company. In fact, the Petitioner has revealed in the said Application ("P3A") that the company was 'in the process of incorporation'.

7.2 Would the Petitioner be disentitled to any relief on the footing that the Application submitted by the Petitioner to the SLSEA was not accompanied by a Resolution adopted by the Board of Directors of the Petitioner authorizing the person who submitted the Application, to submit it on behalf of the company?

Section 16 of the SLSEA Act does not impose a statutory requirement that if the applicant is a company, the Application should be accompanied by a Resolution adopted by the Board of Directors authorizing the person submitting the Application to the SLSEA to submit such an Application on behalf of the company. However, "P2B" contains the following: *"Company resolution authorizing the applicant to submit the application (pls. attach)"*. As stated above, as at the time the Application was submitted, the Petitioner – company had not been incorporated. It was under incorporation. Thus, complying with the afore-stated requirement was not possible. "P2B" has been issued by the Minister under section 67 (power conferred on the Minister to make Regulations), read with section 16(2) (which provides that an Application should be in the prescribed form). While compliance with the requirements contained in these Regulations is necessary, acquiescence with a possible non-compliance will thereby prevent the party which acquiesced from subsequently raising any objection to the alleged non-compliance. As referred to above, it is seen that the 2nd Respondent – SLSEA has accepted the Application presented by the Petitioner ("P3A") and processed it. The 1st Respondent – CEB (which raised the objection referred to in this paragraph) took part in the further processing of the said Application and supported the granting of the 'provisional approval' to the Application. Thus, the 4th Respondent is disentitled

in law to object to the Application submitted to the SLSEA by the Petitioner on the footing that the Application was 'irregular'.

Conclusions with regard to questions "7.1" and "7.2"

It is to be noted that, even according to the 4th Respondent, that the Petitioner was not issued with a permit under section 18 of the SLSEA Act, was not due to the alleged submission of an 'irregular Application'. Furthermore, in none of the correspondence either the 1st Respondent – CEB or the 2nd Respondent – SLSEA has had with the Petitioner, has either of the Respondents referred to the Petitioner having submitted an 'irregular Application'. At no point prior to this Application being filed in the Supreme Court has the 4th Respondent raised the issue that the Application presented to the 2nd Respondent - SLSEA was defective. In fact, it is astonishing that the 4th Respondent who served in the PAC which granted 'provisional approval' to the Petitioner did not raise this issue at that stage. In all these circumstances, it is my view that the afore-stated two objections raised on behalf of the 1st Respondent - CEB by the 4th Respondent are without merit, and must be ruled as futile attempts not made in good faith, to prevent the instant Application presented to this Court being adjudicated upon based on its merits and the applicable substantive law. In the circumstances, I must reject *in-limine* the assertions made by the 4th Respondent and the corresponding submissions made by the learned Solicitor General that the instant Application should be dismissed on the footing that the Application submitted to the SLSEA was an 'irregular Application'.

7.3 Did the Petitioner file the instant Application before the Supreme Court prematurely, without having sought administrative relief prior to filing the Application?

The extended period of the 'provisional approval' granted on 19th May 2016 by the SLSEA to the application for a permit under section 18 of the SLSEA Act, was to have lapsed on 18th May 2017. Prior to the said date, on 15th May 2017 the Petitioner filed the instant Application in this Court. On behalf of the 1st Respondent – CEB the 4th

Respondent alleges that on the one hand the instant Application was filed to prevent the extended period of the 'provisional approval' from lapsing and on the other hand without having recourse to administrative reliefs provided for in sections 22(1)(b) and 28 of the SLSEA Act.

Section 22(1)(b) of the SLSEA Act provides that *"any person who is aggrieved by a refusal to grant final approval to an application … may, within one month of the receipt of the communication informing him of such refusal …, appeal against such refusal … to the Board"*. It is necessary to emphatically observe that, in the instant case, at no time did the SLSEA inform the Petitioner that it had taken a decision to refuse to grant final approval to the Application submitted to it by the Petitioner. Thus, the need to seek administrative relief in terms of section 22(1)(b) did not arise. In fact, the last communication received from the SLSEA ("P14" letter dated 1st March 2017 addressed to the General Manager of the CEB and copied to the Petitioner) gives a positive impression, in that the only requirement to be satisfied by the Petitioner to be issued with the final approval was the 'Letter of Intent' to be issued by the CEB, and requesting the CEB to issue such a letter in favour of the Petitioner. In the circumstances, the Petitioner had no reason to believe that the SLSEA had taken a decision or was going to 'refuse' to grant final approval to the Application submitted by the Petitioner seeking a permit under section 18 of the SLSEA Act. Thus, there is no basis in law to fault the Petitioner for not having sought administrative relief under section 22(1)(b) of the SLSEA Act.

Section 28 of the SLSEA Act provides as follows:

"(1) Any person who is aggrieved by – (a) the refusal of the Committee to grant a permit for an off-grid renewable energy project; or (b) the cancellation under section 27 of a permit issued, may appeal against such decision to the Board.

(2) Any person who is aggrieved by the decision of the Board on any appeal made under subsection (1), may appeal against such decision to the Secretary to the Ministry of the Minister, whose decision thereon shall be final."

It is clearly observable that, the mechanism of addressing an administrative appeal provided for in section 28 pertains and is restricted to the two situations referred to in paragraphs "*(a)*" and "*(b)*" above. The instant Application presented by the Petitioner to the SLSEA pertains to an 'on-grid' renewable energy electricity generation project and not to an 'off-grid' project. Furthermore, the matter complained of to this Court by the Petitioner does not relate to a cancellation of a permit issued under section 27 of the SLSEA Act.

In the circumstances, I conclude that, there is no basis for the 4th Respondent whatsoever to complain that the Petitioner had filed the instant Application without having recourse to the administrative relief mechanisms provided in sections 22(1)(b) and 28 of the Act. I must express concern as to how such an objection entered the affidavit of the 4th Respondent, without legal scrutiny, which if took place, would not have resulted in permitting the 4th Respondent to take up such position.

Indeed, the Petitioner has filed the instant Application 3 days prior to the extended period of the 'provisional approval' from lapsing. That in my opinion is perfectly within the legitimate entitlement of the Petitioner. In a matter that has administratively dragged on since April 2012 up to May 2017, the Petitioner was perfectly within his entitlement to have preferred the instant Application on the date it did. The Petitioner has filed this Application sequel to the last communication received from the 1st Respondent CEB on 22nd March 2017 ("P16"), from which it appears that the Petitioner formed the view that, given the previous developments, no useful purpose would be met by pursuing any further, the administrative route to obtain a permit under section 18 of the SLSEA Act. Thus, there is no basis to allege that the Application has been filed prematurely. Therefore, I see no merit in that objection as well.

7.4 Did the 1st Respondent - CEB encounter technical reasons (technical difficulties) which justified the CEB refusing to grant the 'Letter of Intent'?

The 4th Respondent has on behalf of the 1st Respondent – CEB, cited several purported 'technical reasons' as to why the 1st Respondent – CEB was unable to grant the 'Letter of Intent' to the Petitioner. I have referred to those technical reasons in detail earlier in this judgment. Those reasons may be summarized as follows:

(i) problems arising due to constraints in the interconnection of electricity generated by renewable energy power plants to the transmission system (grid);

(ii) the need to refrain from granting the 'Letter of Intent' pending the study of grid connection limitations and effects on the system;

(iii) according to a study conducted, only 10 MW projects were viable for Vavuniya.

Though the 4th Respondent has on behalf of the 1st Respondent – CEB chosen to raise these technical issues as one justification for the non-issue of the 'Letter of Intent' to the Petitioner, the evidence placed before this Court reveals the following:

(a) the first two out of the three technical reasons were of generic character possibly applicable to all on-grid renewable energy-based electricity generation projects. As at April 2012 when the Application of the Petitioner was being tendered to the SLSEA, the CEB had not made a public announcement of such difficulties. Thus, the Petitioner had no basis to entertain a well-founded belief that the application for a permit under section 18 of the SLSEA Act will not be entertained positively due to such technical reasons. If in fact there were such technical reasons which necessitated the CEB not to grant 'grid interconnection concurrence' and 'Letter of Intent' to project proponents, it was incumbent on the CEB to have made an announcement to that effect;

(b) in this regard, the following paragraph in the Guidelines ("P2C") is of great relevance.

"As the single buyer of electricity produced by the NRE project, CEB Transmission and Bulk Supply Licensee will have to be satisfied with its ability to accept electricity produced by the proposed project. This will be based on careful evaluation of system wide impacts, network typology and system stability, in addition to the more commonly understood constraints such as local transmission grid limitations and grid substation capacity limitations. SEA will consult CEB in this regard upon receiving a complete application, before presenting it to the PAC for Provisional Approval. Hence the absence of the concurrence of CEB to grid connect the proposed project will result in refusal of provisional approval." (Section 2.3, 'Concurrence of the CEB', page 8 of "P2C")

On 18th May 2012 ("P3B") the 5th Respondent acting on behalf of the 2nd Respondent – SLSEA wrote to the 4th Respondent – General Manager of the CEB, providing information pertaining to 23 Applications received by the SLSEA, which included the Application submitted by the Petitioner. He sought information from the CEB regarding the availability of 'grid capacity' pertaining to the proposed projects. He also sought the concurrence of the CEB to table the corresponding Applications before the PAC for the grant of 'provisional approval'. It was the contention of the learned President's Counsel for the Petitioner that this letter amounted to the 2nd Respondent – SLSEA seeking 'grid interconnection concurrence' for the Petitioner's proposed project from the 1st Respondent. Learned Solicitor General for the Respondents did not express disagreement with that contention. In response to "P3B", the 1st Respondent required the Petitioner to change the design of the proposed project to include a 'battery storage system' due to 'short-term power variation in electricity generated by the proposed project'. This shows that at this stage itself, the 1st Respondent – CEB had addressed its mind to 'technical aspects' pertaining to the project proposed by the Petitioner. Furthermore, the Petitioner changed the

design of the proposed project to include a 'battery storage system'. The Petitioner has adverted to the fact that this would ensure smooth power output at the grid end so that sudden power drops could be avoided. The Respondents have not countered this position. The amenability of the Petitioner to change the technical design of the proposed solar energy electricity generation plant to suit the requirement of the CEB was conveyed by the Petitioner to the 2nd Respondent – SLSEA, and the SLSEA informed the CEB in 2012 itself. From 2012 till 2016, the 1st Respondent – CEB remained silent. By "P4A" by letter dated 15th February 2016, the SLSEA wrote to the CEB specifically requesting from the latter, 'grid interconnection approval' for the Petitioner's project. Finally, by letter dated 9th May 2016 ("P4B", which has also been produced marked "P6J"), the CEB wrote to the SLSEA indicating that it had no objection to the SLSEA considering the Petitioner's Application for the grant of 'provisional approval'. Counsel agreed that this letter ("P4B") amounted to the CEB granting 'grid interconnection concurrence' to the Petitioner's project. Therefore, it concludes that certainly by May 2016, the 1st Respondent – CEB had cleared all possible technical concerns it may have entertained as regards the Petitioner's project.

It was in this backdrop that in May 2016, the PAC decided to grant 'provisional approval' to the project proposed by the Petitioner (a 10 megawatts Solar PV Project with a battery storage system). Learned President's Counsel for the Petitioner submitted that a decision to grant 'provisional approval' would have been taken upon a careful evaluation of technical factors such as the systemwide impacts, network typology, system typology, system stability, local transmission grid limitations and limitations in capacity at the grid end sub-station. Learned Solicitor General did not counter this submission. It is noteworthy that the General Manager of the CEB was a constituent member of the PAC, and hence if

there were genuine technical reasons, he could have raised those reasons at the PAC and objected to the grant of 'provisional approval'.

Neither the 4th Respondent nor the learned Solicitor General explained to this Court reasons for that technical turn-around. Nor was this Court informed as to why even in November 2016, the CEB continued to indicate to the Petitioner of the possibility of proceeding with the project, if certain technical modifications were given effect to. If the two technical reasons cited by the 4th Respondent genuinely prevented to 1st Respondent – CEB from issuing the 'Letter of Intent' to the Petitioner, it could have raised such technical difficulties with the SLSEA and with the Petitioner well before such factors were raised in the pleadings filed in this Court.

Thus, the position taken up in the affidavit of the 4th Respondent is totally unacceptable.

(c) Letters issued by the 1st Respondent – CEB with regard to the Application submitted by the Petitioner for a permit, namely "P3D" dated 21st November 2012, "P6J" dated 9th May 2016, "P10B" dated 1st December 2016, and "P16" dated 22nd March 2017 make no reference to any of the purported technical difficulties cited by the 4th Respondent. The 4th Respondent has not taken up the position that Petitioner was not informed of the afore-stated purported technical difficulties, as reasons for the non-issue of the 'Letter of Intent'.

(d) Learned President's Counsel for the Petitioner submitted that the grant of the 'provisional approval' by the 2nd Respondent - SLSEA was a clear indication of the issue of 'grid interconnection concurrence' by the 1st Respondent – CEB. That such concurrence being issued is a clear indication that no technical difficulty

exists with regard to the proposed project of the Petitioner. Learned Solicitor General for the Respondents did not counter this position.

(e) In terms of the findings of the study commissioned by the 1st Respondent – CEB ("4R1"), *"… only 10 MW solar had been considered viable for Vavuniya."* As stated above, the project proposed by the Petitioner was a renewable energy project which had the potential of generating 10 megawatts. Thus, the generation capacity of the proposed project of the Petitioner matched this requirement contained in the findings of the study. The affidavit of the 4th Respondent does not contain any reason why under the afore-stated circumstances the project proposed by the 4th Respondent was technically unsuitable.

In view of the foregoing circumstances, this Court is of the opinion that the 'technical reasons' cited by the 4th Respondent were in fact not the actual reason for the refusal on the part of the 1st Respondent – CEB to issue the 'Letter of Intent' to the Petitioner. The conduct of the CEB in granting 'grid interconnection concurrence' in May 2016 clearly shows that by that time the CEB had cleared whatever technical issues there may have been and the proposed project of the Petitioner was of such nature that electricity generated by it could be supplied to the national grid without encountering any technical glitch. Thus, the said purported 'technical reasons' cannot be accepted as valid grounds to refuse granting any relief to the Petitioner.

7.5 Do the provisions of section 43 of the Sri Lanka Electricity Act as amended by Act No. 31 of 2013 impose a legal compulsion on the CEB to call for tenders prior to issuing a 'Letter of Intent' to a solar powered electricity generation project which would generate up to 10 megawatts of electricity?

Paragraph 23(c) of the affidavit of the 4th Respondent – Aruna Kumara Samarasinghe, the General Manager of the CEB reads as follows:

"*Following the amendment to the Electricity Act (Act No. 31 of 2013) procurement of electricity has to be done on a competitive basis. This process of utilizing competitive bidding encourages lower electricity cost, ultimately helping customer and national economy.*" [Emphasis added.]

Thus, the position of the 1st Respondent – CEB is that following the amendment introduced to the SLE Act by Act No. 31 of 2013, it became imperative for the CEB as a transmission licensee (the sole transmission licensee) to procure electricity from a person entitled to generate electricity and supply it to the national grid, based on the selection of such person on a competitive basis.

The learned Solicitor General submitted that the enactment of Act No. 31 of 2013 was a 'supervening event' which prevented the 1st Respondent – CEB from issuing a 'Letter of Intent' to the Petitioner. Referring to an opinion expressed by the 7th Respondent - Honourable Attorney General (AG) to the 6th Respondent – Secretary to the Ministry of Power and Energy ("4R1"), the learned Solicitor General submitted that the AG had expressed the view that where new electricity generation plants are required, the amended law stipulates that the selection of licensees to operate new electricity generation plants or for the expansion of existing generation plants and the price at which electricity is to be purchased from such electricity generation plants is to be determined by the selection of suitable persons based on competitive tenders to be submitted by them.

In view of the position taken up on behalf of the 1st Respondent – CEB in this regard, it is necessary to examine the law, prior to the enactment of Act No. 31 of 2013, and the changes introduced by the afore-stated amendment.

Section 43 (original section, prior to it being amended by Act No. 31 of 2013) of the SLE Act, No. 20 of 2009 provided as follows:

"43

(1) Subject to section 8, no person shall operate or provide any new generation plant or extend any existing generation plant, except as authorized by the Commission under this section.

(2) Subject to the approval of the Commission, a transmission licensee shall, in accordance with the conditions of the transmission license and such guidelines relating to procurement as may be prescribed by regulation and by notice published in the Gazette, ***call for tenders*** *to provide new generation plant or to extend existing generation plant, as specified in the notice.*

(3) A transmission licensee shall with the consent of the Commission, ***select a person to provide at least cost****, the new generation plant or to extend the existing generation plant specified in the notice published under subsection (2), from amongst the persons who have submitted technically acceptable tenders in response to such notice."*
(Emphasis added).

[Section 8 provides as to who would be entitled to participate in a bidding process for the generation of electricity. Section 9 elaborates that position with regard to those who shall be eligible to apply for issue of a generation license with a generation capacity of 25 megawatts or more.]

Section 43 of the SLE Act (the original section) or any other provision of that Act (prior to the amendment introduced by Act No. 31 of 2013) does not exclude the applicability of section 43 to electricity generation plants which use renewable energy sources. Neither party presented evidence which shows that the PUCSL had exempted electricity generation projects which use renewable energy from provisions of the SLE Act. Nor did learned Counsel who appeared for the Petitioner and the Respondent took up the position that section 43 (in its original form) did not apply to electricity generation plants which use renewable energy. Nor do the provisions of the SLSEA Act exclude the application of the SLE Act to electricity generation plants which use

renewable energy. Therefore, the inference to be drawn is that the provisions of the SLE Act (prior to the amendment) applied equally to electricity generation plants which use both renewable energy and non-renewable energy.

It would thus be seen that well before the enactment of Act No. 31 of 2013 (which amended provisions of the SLE Act, No. 20 of 2009 including section 43 thereof), the original law itself provided for a competitive bidding process to be followed to select project proponents of new electricity generation plants or to extend existing generation plants (generation licenses), enabling the transmission licensee to purchase electricity at the least cost from selected generation licensees. Thus, it would be incorrect to refer to the methodology of 'competitive bidding through the calling of tenders' as a 'supervening event' introduced to the law by Act No. 31 of 2013, as the original law itself provided for that methodology.

Neither the 1st or the 2nd Respondents refer as to why the competitive bidding methodology through the calling of tenders (which obviously is aimed at the CEB – sole transmission licensee purchasing electricity from electricity generation licensees at the least cost) was not embedded in the *'Guide to the project approval process for on-grid renewable energy projects development'* ("P2C") issued by the 2nd Respondent – SLSEA and why such a procedure was not embedded in the procedure to be followed by project proponents who were interested in obtaining a permit under section 18 of the SLSEA Act to operate on-grid renewable energy based electricity generation projects.

From the evidence placed before this Court by the Petitioner and the 4th and 5th Respondents on behalf of the 1st and 2nd Respondents, respectively, the only inference this Court can arrive at, is that the 1st and 2nd Respondents have erroneously proceeded on the footing that section 43 of the SLE Act (prior to being amended in 2013) had no application to on-grid electricity generation plants which would utilize renewable

energy sources. As I propose to explain shortly, it appears that the 1st and 2nd Respondents have proceeded with the same mindset till this Application was filed by the Petitioner, notwithstanding the Honourable Attorney General in November 2013 ("4R1 – Attachment - 2") (which opinion had been issued after Act No. 31 of 2013 came into operation) having expressed his opinion that *"the Sri Lanka Electricity (Amendment) Act No. 31 of 2013 while repealing section 43 of the Principle Enactment, by section 43(4) of the Amending Act, maintains the general principle that the purchase of electricity by the Transmission licensee from new generation plants (and extensions thereto) shall be determined by way of open competitive bidding, by way of tender"* [Emphasis added]. It would be seen that by the use of the terminology *"… maintains the general principle …"* the Attorney General has also noted that even prior to the amendment of section 43 by Act No. 31 of 2013, the principle of *"… open competitive bidding by way of tender …"* had been in existence.

I will now deal with the position advanced on behalf of the Petitioner, that following the amendment to the law introduced by Act No. 31 of 2013, section 43(4) read with section 43(2) does not require the 1st Respondent – CEB to call for tenders and cause competitive bidding for the purpose of purchasing electricity from those to whom an electricity generation license would be issued by the PUCSL and who would generate electricity not exceeding 10 megawatts utilizing renewable energy sources such as solar power. I propose to also deal with the other submission made on behalf of the Petitioner that there was no need for the 1st Respondent – CEB to negotiate the price at which electricity was to be purchased from the Petitioner, as there was a Standardised Power Purchase Agreement (SPPA) and a Small Power Purchase Tariff (SPPT) which had been approved by the PUCSL and which specified the price at which electricity should be purchased by the 1st Respondent – CEB.

In this regard, it would be necessary to consider the provisions of section 43 of the SLE Act, as amended by Act No. 31 of 2013. For ease of reference, the relevant provisions of section 43 are reproduced below:

"(1) Subject to the provisions of section 8 of this Act, no person shall proceed with the procuring or operating of any new generation plant or the expansion of the generation capacity of an existing plant, otherwise than in the manner authorized by the commission under this section.

(2) A transmission licensee shall, based on the future demand forecast as specified in the Lease Cost Long Term Generation Expansion Plan prepared by such licensee and as amended after considering the submissions of the distribution and generation licensees and approved by the Commission, submit proposals to proceed with the procuring of any new generation plant or for the expansion of the generation capacity of an existing plant, to the Commission for its written approval:

Provided however where on the day preceding the date of the coming into force of this Act:-

(a) an approval of the Cabinet of Ministers had been obtained to develop a new generation plant or to expand the generation capacity of an existing generation plant ; or

(b) a permit had been issued to generate electricity through renewable energy resources by the Sri Lanka Sustainable Energy Authority established by the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007 under section 18 of that Act, as a consequence of which the development of a new generation plant or the expansion of the generation capacity of an existing plant, has become necessary,

the approval obtained or the permit issued, as the case may be, shall be referred to the Commission for its approval. The Commission shall, having considered the request made along with any supporting documents annexed thereto and on being satisfied that the necessary Cabinet approval has been obtained or a permit had been issued by the Sustainable Energy Authority, as the case may be, prior to the coming into force of this Act, grant

approval to the transmission licensee to proceed with the procuring of the new generation plant or the expansion of the generation capacity of its existing plant, as the case may be.

(3) Where a person who is issued with a licence under section 13 of this Act to generate electricity of less than 25MW in capacity, proposes to expand its generation capacity of its generation plant as a consequence of which the generation of electricity would exceed 25MW in capacity, the approval of the Commission under subsection (1) for such proposal shall not be granted, unless such person is a person who is qualified under subsection (1) of section 9 of this Act, to be issued with a generation licence.

(4) Upon obtaining the approval of the Commission under subsection (2), the transmission licensee shall in accordance with the conditions of its transmission licencee shall in accordance with the conditions of its transmission licence and in compliance with any rules that may be made by the Commission relating to procurement, call for tenders by notice published in the Gazette, to develop a new generation plant or to expand the generation capacity of an existing generation plant, as the case may be, as shall be specified in the notice:

Provided however, subject to the provisions of subsection (6) of this section, the requirement to submit a tender on the publication of a notice under this subsection shall not be applicable in respect of any new generation plant or to the expansion of any existing generation plant that is being developed –

(a) in accordance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission and which has received the approval of the Cabinet of Ministers on the date preceding the date of the coming into force of this Act and is required to be operated at least cost;

(b) on a permit issued by the Sri Lanka Sustainable Energy Authority, established by the Sri Lanka Sustainable Energy Authority Act No. 35 of 2007 under section 18 of that Act for the generation of electricity through renewable energy sources and required to

be operated at the standardized tariff and is governed by a Standardized Power Purchase Agreement approved by the Cabinet of Ministers; or

(c) *in compliance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission having received the prior approval of the Commission, for which the approval of the Cabinet of Ministers has been received on the basis of : -*

(i) an offer received from a foreign sovereign Government to the Government of Sri Lanka, for which the approval of the Cabinet of Ministers have been obtained ; or

(ii) to meet any emergency situation as determined by the Cabinet of Ministers during a national calamity or a long term forced outage of a major generation plant, where protracted bid inviting process outweigh the potential benefit or procuring emergency capacity required to be provided by any person at least cost.

(5) *Upon the close of the tender, the transmission licensee shall through a properly constituted tender board, recommend to the Commission for its approval, the person who is best capable of –*

(a) Developing the new generation plant or the expansion of the generation capacity of an existing generation plant, as the case may be, as specified in the notice published in the Gazette under subsection (4), in compliance with the technical and economic parameters of the transmission licensee:

(b) Selling electrical energy or electricity generating capacity at least cost; and

(c) Meeting the requirements of the Least Cost Long Term Generation Expansion Plan of the transmission licensee duly approved by the Commission,

along with the draft Power Purchase Agreement, describing the terms and conditions of such purchase.

(6) *Notwithstanding the fact that: -*

(a) An exemption from the submission of a tender is granted to any person under paragraphs (a), (b) or (c) of the proviso to subsection (4); or

(b) A new generation plant or an expansion of the generating capacity of an existing generation plant is being developed in accordance with the Least Cost Long Term Generation Expansion Plan duly approved by the Commission, by a person who had obtained the approval of the Cabinet of Ministers and which approval is in force on the date of the coming into operation of this Act,

the transmission licensee shall be required to negotiate with the person concerned to satisfy itself, that such person is capable of developing the new generation plant or the expansion of the generating capacity of an existing generation plant, as the case may be, in compliance with the technical and economical parameters of the transmission licensee and is capable of selling electrical energy or electricity generating capacity at least cost, and forward its recommendations for approval to the Commission, along with the draft Power Purchase Agreement or the draft Standardized Power Purchase Agreement, as the case may be, describing the terms and conditions of such purchase.

(7) *The Commission shall be required on receipt of any recommendations of the transmission licensee under subsection (5) or subsection (6), as the case may be, to grant its approval at its earliest convenience, where the Commission is satisfied that the recommended price for the purchase of electrical energy or electricity generating capacity meets the principle of least cost and the requirements of the Least Cost Long Term Generation Expansion Plan and that the terms and conditions of such purchase is within the accepted technical and economical parameters of the transmission licensee.*

(8) *For the purpose of this section –*

"Least Cost Long Term Generation Expansion Plan" means a plan prepared by the transmission licensee and amended and approved by the Commission on the basis of the submissions made by the licensees and published by the Commission, indicating the future electricity generation capacity requirements determined on the basis of least economic cost and meeting the technical and reliability requirements of the electricity

network of Sri Lanka which is duly approved by the Commission and published in the Gazette from time to time; and

"Standardized Power Purchase Agreement" means an agreement entered into by the transmission licensee for the purchase of electrical energy or electricity generation capacity, generated using renewable energy resources under a permit issued by the Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007, under section 18 of that Act."

From a plain reading of the section, it is clear that section 43 of the SLE Act *inter-alia* applies to (i) the procuring of a new electricity generating plant or the expansion of an existing plant by the transmission licensee (the CEB), and (ii) the operation of a new electricity generation plant or the expansion of an existing plant by a generation licensee. It is also apparent that, section 43 applies to both electricity generation plants using non-renewable energy sources as well as to those using renewable energy sources. Section 43(2) provides that the process of procurement of electricity by the transmission licensee (the CEB) shall commence with the latter preparing a 'Least Cost Long-Term Generation Expansion Plan' and getting it approved by the Commission. Procurement of electricity by the transmission licensee from a generation licensee shall be in accordance with such plan. Thus, it is evident that the procurement of electricity shall be based on the national need for electricity and the requirement of the transmission licensee to service that demand as provided in the Least Cost Long Term Generation Expansion Plan. Further, this plan should facilitate the purchase of electricity by the transmission licensee at the least cost, enabling the transmission licensee to provide electricity to consumers also at least cost. However, as stipulated in the proviso to subsection 43(2), following the afore-stated methodology shall not be necessary in the following two situations:

(i) instances where on the day preceding the date of coming into operation of the Act, an approval had been obtained from the Cabinet of Ministers to develop either a new electricity generation plant or to expand the generation capacity of an existing plant;

(ii) instances where on a day preceding the date of coming into operation of the Act, a permit had been issued by the SLSEA under section 18 of the SLSEA Act to generate electricity through renewable energy resources.

As stated earlier, in terms of section 21 of Act No. 31 of 2013, the amendments made to the principal enactment (SLE Act, No. 20 of 2009) by provisions of the amending Act shall be deemed for all purposes to have come into force on 8th April 2009. Therefore, the two exemptions stated above contained in the proviso to section 43(2) with regard to the requirement to follow the legislative scheme contained in section 43(2) would not be applicable, only if either the approval by the Cabinet of Ministers or a permit issued under section 18 of the SLSEA Act had been obtained prior to 8th April 2009. In the instant case, as at 8th April 2009, neither the approval of the Cabinet of Ministers nor a permit under section 18 of the SLSEA Act had been obtained for the project proposed by the Petitioner. Therefore, the proviso to subsection 43(2) would have no applicability to the instant case. Thus, it was incumbent on the transmission licensee – CEB to have complied with the procedural requirement contained in subsection 43(2). Neither party has placed before this Court any evidence in that regard. Nor has either party alleged that the 1st Respondent – CEB had failed to comply with subsection 43(2) of the SLE Act.

It would be seen that subsection 43(3) has no applicability to this case, as this instant case does not relate to the expansion of the electricity generation capacity of an existing plant.

In terms of section 43(4), after obtaining the approval from the PUCSL under section 43(2), the transmission licensee (CEB) is required to in accordance with the conditions of the transmission licence call for tenders by notice published in the *Gazette*. However, subject to the provisions of subsection (6), this requirement of calling for tenders shall not be applicable in three instances. One such instance is if the new electricity

generation plant or the expansion of an existing plant is being developed on a permit issued by the SLSEA established under section 18 of the SLSEA Act for the generation of electricity through renewable energy sources and required to be operated at the standardized tariff and is governed by a Standardised Power Purchase Agreement approved by the Cabinet of Ministers. [paragraph (b) of the proviso to subsection 43(4)] However, notwithstanding that exemption, under subsection 43(6)(a), the transmission licensee is required to negotiate with the generation licensee for the purpose of satisfying itself of the capability of such person to develop the new generation plant in compliance with the technical and economical parameters of the transmission licensee and regarding its capability to sell electricity at least cost.

As pointed out by learned President's Counsel for the Petitioner, section 6 of the Guidelines ("P2C") issued by the SLSEA is of significance. Section 6 contains 3 parts. The first and third parts relate to projects which generate up to 10 megawatts of electricity (as in the case of the project proposed by the Petitioner). The second part relates to projects which generate electricity in excess of 10 megawatts, and thus is irrelevant in so far as the Petitioner's project is concerned. The first and third parts of section 6 are reproduced below:

> "***For projects up to 10 MW:*** *SEA and CEB offer a Standardised Power Purchase Agreement (SPPA) for renewable energy projects of the approved types, with an installed capacity up to 10 MW. The SPPA is standardized and non-negotiable, and is valid for twenty years from the commercial operation date. Projects eligible for the SPPA are also eligible to be paid under the Small Power Purchase Tariff (SPPT).*
>
> ***Small Power Purchase Tariff:*** *For renewable energy projects up to 10 MW, the standardized tariffs would apply. The tariff for projects that would enter into an SPPA is published at any given time, typically at the end of each calendar year. There will be a tariff review process conducted by the Public Utilities Commission of Sri Lanka typically once a year, where the following will be considered;*

(a) *Types of projects to be offered the standardized tariffs (whether any new types of projects have matured to an adequate level to be included in the tariff schedule.*

(b) *Tariffs to be offered to Developers entering into an SPPA in the coming year."*

Thus, it would be seen that the Guidelines envisage the CEB entering into an Agreement with a person who generates electricity (mobilizing a renewable energy source) not exceeding 10 megawatts. The Agreement will be founded upon a uniform template which is referred to as the 'Standardised Power Purchase Agreement' (SPPA). The price at which electricity generated by the project will be purchased by the CEB will be governed by the clauses of the 'Small Power Purchase Tariff' (SPPT), which has received the approval of the PUCSL.

Therefore, had the SLSEA issued a permit to the Petitioner under section 18 of the SLSEA Act (following the CEB having issued a 'Letter of Intent' to the Petitioner), the situation of the Petitioner would have come under paragraph (b) of the proviso to section 43(4) of the SLE Act (as amended). In the circumstances, it would not have been necessary for the transmission licensee (the CEB) to have called for tenders for the development of a new electricity generation plant and for the Petitioner to have submitted a tender in response, prior to issuing a 'Letter of Intent' to the Petitioner.

In view of the foregoing, I hold that, in the circumstances of this case, provisions of section 43 of the SLE Act as amended by Act No. 31 of 2013 do not impose a legal compulsion on the CEB to call for tenders prior to issuing a 'Letter of Intent' to a solar powered electricity generation project which would generate up to 10 megawatts of electricity, if such person who proposes to commission a renewable energy-based electricity generation plant has received a permit under section 18 of the SLSEA Act.

Had the 1st Respondent – CEB (transmission licensee) have issued to the Petitioner a 'Letter of Intent' signaling its intention to procure electricity from the Petitioner at the Small Power Purchase Tariff after entering into a Standardised Power Purchase Agreement, that would have enabled the 2nd Respondent – SLSEA to issue a permit under section 18 of the SLSEA Act to the Petitioner, which would have in turn enabled the 1st Respondent to comply with subsections 43(6) and 43(7) of the SLE Act (as amended).

7.6 Is the Petitioner entitled in fact and in law to entertain a legitimate expectation that the CEB would have issued a 'Letter of Intent' and the SLSEA would have issued a permit to the Petitioner in terms of section 18 of the SLSEA Act, and have such legitimate expectations been frustrated by the CEB and the SLSEA?

In this regard, the Petitioner's claim for relief founded upon an alleged frustration of a substantive legitimate expectation is said to have been generated by the 1st Respondent – CEB and the 2nd Respondent – SLSEA. In order to establish that certain representations were made by the two Respondents which were relied upon by the Petitioner, he has based his case founded upon four sets of documents. They are –

(i) A publication containing a set of guidelines issued by the 2nd Respondent - SLSEA entitled *"A Guide to the Project Approval Process for On-grid Renewable Energy Project Development"* (hereinafter referred to as "the Guide") with the sub-title *"Policies and procedures to secure approvals to develop a renewable energy project to supply electricity to the national grid"* of July 2011 – "P2C"

(ii) Regulations dated 22nd April 2009 made by the Minister under and in terms of sections 67 read with sections 16(2), 17(2)(a) and section 18(2)(a) of the SLSEA Act - "P2A"and the amended Regulations dated 6th May 2011 – "P2B"

(iii) Correspondence the Petitioner has had with the 1st and 2nd Respondents, with special attention to letters received by the Petitioner from the 1st and 2nd Respondents. – "P3C", "P3E", "P3F", "P3G", "P3H", "**P4A**", "**P5A**" "**P5B**",

"P7A", "P7B", "P7C", "P9", "P10A", "**P11**", "P12", "P13"and "P15". [Printed in bold are letters received by the Petitioner.]

(iv) Correspondence between the 1st and 2nd Respondents pertaining to the Application presented by the Petitioner seeking a permit under section 18 of the SLSEA Act, to which the Petitioner has been privy to. – "P3B", "P3D", "P4B/P6J", "P10B", and "P14".

An examination of the Guide ("P2C") and its application to this matter reveal the following:

(a) The Guide had been issued by the 2nd Respondent – SLSEA in July 2011. There is no evidence placed before this Court that the Guide was amended after its original publication or that it was amended and re-published following the enactment of the SLE (Amendment) Act No. 31 of 2013.

(b) The Guide is aimed at several distinct groups of persons, which include those intending to develop and invest in projects for the generation of on-grid electricity generation projects using renewable energy. The Petitioner belongs to that category of persons to whom the guidelines issued by the 2nd Respondent – SLSEA relate;

(c) The Guide is also aimed at serving as a reference to institutions that would be reviewing Applications from investors seeking permits and approvals. The 1st Respondent – CEB is one such institution.

(d) The Guide is intended to provide a detailed explanation regarding the process to be followed as prescribed in the 'On-grid Renewable Energy Projects Regulations 2009' ("P2A"). The Petitioner claims to have followed the procedure contained in the Regulations ("P2A" and "P2B") and the Guide ("P2C").

(e) The Guide contains a set of detailed guidelines regarding the manner in which Applications seeking a permit under and in terms of section 18 of the SLSEA Act should be perfected, the method of submitting the Application to the SLSEA, and the manner in which it will be processed. There is a detailed reference in the

guidelines to the two-tiered process of initially processing the Application and granting 'provisional approval', and upon conditions contained in the 'provisional approval' being satisfied by the applicant, the manner in which final approval and the permit will be granted. The scheme contained in the Guide is compatible with provisions of the SLSEA Act. Up to the stage where the 1st Respondent – CEB refrained from issuing a 'Letter of Intent' to the Petitioner, the procedure followed by the 2nd Respondent – SLSEA had been in compliance with the step by step approach contained in the Guide. Furthermore, up to that point of time when the 1st Respondent – CEB by implication refused to issue a 'Letter of Intent' it (the CEB) had also participated in this process in compliance with the provisions contained in the Guide. In this regard, I have given my particular attention to the 1st Respondent – CEB's participation in the grant of 'grid interconnection concurrence' and his having participated in the grant of 'provisional approval' to the Petitioner. Furthermore, under the title "Grant and Refusal of Provisional Approval" is a reference to the fact that all Applications received by the SLSEA will in consultation with the CEB be evaluated to ascertain the possibility of securing grid connection. Documentary evidence placed before this Court clearly reveals that the CEB did even after the enactment of the SLE (Amendment) Act No. 31 of 2013 act in terms of the Guide towards granting 'grid interconnection concurrence' and 'provisional approval' to the Application of the Petitioner. Thus, I conclude that through acquiescence, the 1st Respondent has also endorsed the Guide.

(f) Clause 2.2 of Appendix 4 of the Guide (at page 28) titled 'Letter of Intent' states that it will be issued by the CEB and signifies an assurance that the electricity generated by the project will be procured by the CEB. It further states that an application to the CEB to obtain a 'Letter of Intent' could yield one of the following two standard responses:

   a. that the CEB is willing to purchase electricity from the project as per attached grid connection proposal;

b. that the CEB is willing to purchase electricity from the project, but the grid proposal will be provided within one month.

The Guide does not contain any reference to the project proponent having to engage in a competitive bidding process for the purpose of obtaining the 'Letter of Intent' or the requirement to engage in any negotiation with the CEB pertaining to the tariff at which the electricity generated by the project will be sold to the CEB, provided however the output of electricity generated by the project does not exceed 10MW.

(g) As stated in a previous part of this judgment, under the title "Power Purchase Agreements and Tariffs" (page 16) there is reference to the fact that for projects up to 10 MW, the SLSEA and the CEB offer a 'Standardised Power Purchase Agreement'. This position is reiterated in clause 4.3 of Appendix 4 of the Guide (at page 30). The provisions of the relevant Agreement are standardized and non-negotiable and such projects are entitled to apply for the Small Power Purchase Tariff. Once a year there will be a review process of the applicable tariffs conducted by the PUCSL and published typically at the end of each calendar year. Thus, it is manifestly clear that the 'Letter of Intent' by the CEB to purchase electricity generated by the project' (referred to by the parties as well as in this judgment as a 'Letter of Intent') will for projects aimed at generating up to 10MW and no more (as in the case of the project of the Petitioner) be founded upon the standard power purchase tariff stipulated from time to time by the PUCSL. This scheme is in consonance with not only the status of the law prior to the enactment of the SLE (Amendment) Act No. 31 of 2013, but with the statutory scheme contained therein as well.

(h) Clause 4.1 of Appendix 4 of the Guide (at page 29) clearly states that following the obtaining of a 'provisional approval' by the project proponent and the satisfaction of all the conditions contained therein (which is clearly a reference to obtaining

approvals from relevant external agencies and obtaining a 'Letter of Intent' from the CEB, the permit will be issued under and in terms of section 18 of the SLSEA Act sequel to a decision to be taken by the PAC. [*"Once all other approvals are secured by a project developer, the PAC grants a 20 years permit (extendable by a further 20 years after successful operation of the project during the initial 20 year period) to the developer allowing him to use the resource under several conditions."*] Thus, it is clear that, following the Petitioner having received the 'provisional approval' from the 2nd Respondent – SLSEA, the only condition the petitioner was required to satisfy for the purpose of obtaining a permit under and in terms of section 18 of the SLSEA Act, was a 'Letter of Intent' from the 1st Respondent – CEB.

I have examined the Regulations promulgated by the Minister under the SLSEA Act contained in "P2A" and "P2B", and have found nothing therein contrary to the contents of the Guidelines ("P2C").

I have also considered the contents of the letters sent by the 1st Respondent – CEB and 2nd Respondent (SLSEA) to the Petitioner and the correspondence between the 1st and 2nd Respondent pertaining to the Application of the Petitioner seeking a permit under and in terms of section 18 of the SLSEA Act, to which the Petitioner had been privy. It primarily reveals the following sequence of key events: By Application dated 20th April 2012 submitted by the Petitioner to the SLSEA ("P3A"), he sought a permit under section 18 of the 2nd Respondent - SLSEA to commission an on-grid renewable energy (solar) based electricity generation plant with an output not exceeding 10MW. The Application was in accordance with the provisions of the SLSEA Act, Regulations and the several clauses of the Guide, and was thus accepted by the 2nd Respondent. By letter dated 18th May 2012 ("P3B"), the 2nd Respondent sought the concurrence of the 1st Respondent – CEB to place the afore-stated Application before the PAC. Prior to granting its concurrence, the 1st Respondent – CEB required the project proponent (the

Petitioner) to alter the technical design of the proposed project, which requirement was promptly accepted by the Petitioner ("P3C" dated 19th November 2012, "P3E" dated 24th November 2015 and "P3G" dated 1st December 2015). By letter dated 15th February 2016 ("P4A"), the 2nd Respondent – SLSEA once again sought from the 1st Respondent – CEB 'grid interconnection concurrence' to the Petitioner's project ("P4A"). Finally, by letter dated 9th May 2016 ("P4B"), the 1st Respondent – CEB granted its concurrence to the 1st Respondent – SLSEA to place the Petitioner's Application before the PAC of the SLSEA. By letter dated 19th May 2016 ("P5A"), the PAC of the SLSEA (which comprised of *inter-alia* the Director General of the PUCSL and the Deputy General Manager (Energy Purchase) of the 1st Respondent – CEB) granted 'provisional approval' to the on-grid renewable energy-based electricity generation project proposed by the Petitioner.

Upon a careful consideration of the four categories of material referred to above ["(i)" to "(iv)"] and the applicable law, I have arrived at the following conclusions:

1. The Guide ("P2C") prepared and published by the 2nd Respondent – SLSEA contains lawful and *intra-vires* representations of the SLSEA pertaining to *inter-alia* on-grid renewable energy-based electricity generation projects aimed at generating not more than 10 MW of electricity. The Guide contains unambiguous and specific content amounting to representations aimed at a specific group of persons, i.e. project proponents who propose to obtain a permit under and in terms section 18 of the SLSEA Act for the purpose of commissioning an on-grid renewable energy-based electricity generation project with an electricity output not exceeding 10MW. The 1st Respondent has by acquiescence with provisions of the Guide exhibited its willingness to abide by the provisions of the Guide pertaining to the CEB, and by its letters sent to the Petitioner (referred to above) impliedly represented to the Petitioner that following the Petitioner complying with the provisions of the Guide ("P2C"), it will issue a 'Letter of Intent' to the

Petitioner company enabling it to obtain a permit under and in terms of section 18 of the SLSEA Act.

2. The 2nd Respondent – SLSEA has by the several correspondence sent to the Petitioner and letters exchanged with the 1st Respondent – CEB relating to the Petitioner's Application (to which the Petitioner was privy) has *inter-alia* generated an expectation in the mind of the Petitioner that upon the Petitioner satisfying the conditions contained in the 'provisional approval' issued by the SLSEA to the Petitioner (of which the only outstanding one is the 'Letter of Intent' to have been issued by the CEB), a permit will be issued to the Petitioner under and in terms of section 18 of the SLSEA Act.
3. The 1st Respondent – CEB has through its acquiescence with the provisions of the Guide ("P2C"), correspondence it had with the Petitioner and correspondence with the SLSEA pertaining to the Petitioner's Application (which the Petitioner was privy to) made implied representations to the Petitioner and thereby generated an expectation that following the Petitioner having obtained 'provisional approval' from the SLSEA (which was following the re-design of the project to suit the technical requirements of the 1st Respondent – CEB), it will grant a 'Letter of Intent' to the Petitioner, enabling the Petitioner to obtain a permit under and in terms of section 18 of the SLSEA Act.
4. In view of provisions of the contents of the Guide ("P2C") and the correspondence the 1st Respondent – CEB had with the Petitioner (even up to letter dated 1st December 2016 ("P10B") wherein the Petitioner was asked to revert to the original technical design of the project (to which the Petitioner promptly agreed), it is evident that at no previous time did the 1st Respondent – CEB make any representation to the Petitioner that the Petitioner had to engage in a competitive bidding process (by submitting a tender) for the purpose of obtaining a 'Letter of Intent' from the CEB. Through implication, the 1st Respondent – CEB also intimated to the Petitioner that if he were to comply with

the several applicable clauses of the Guide ("P2C"), he will be entitled to obtain a 'Letter of Intent' from the 1st Respondent – CEB.

As explained by me in Part 7.5 of this judgment, for an on-grid electricity generation project using renewable energy with an electricity output not exceeding 10MW, it is not necessary for the CEB to call for tenders and for project proponents to submit tenders or to negotiate and agree on the price at which electricity generated by the project is to be sold to the CEB. Therefore, the reason cited by the 1st Respondent – CEB for having refused to issue a 'Letter of Intent' to the Petitioner is not justiciable, as the position taken up by the 1st Respondent – CEB is not in accordance with the law. Thus, the expectation entertained by the Petitioner to follow the path contained in the Guide ("P2C") and obtain a 'provisional approval', 'Letter of Intent' and a 'permit under and in terms of section 18' in that sequence, is legitimate, as it is in accordance with the law.

Due to the foregoing reasons, I hold that the expectation entertained by the Petitioner that it will be issued with a 'Letter of Intent' by the 1st Respondent – CEB and thereafter a permit under and in terms of section 18 of the SLSEA Act by the SLSEA are expectations the Petitioner was entitled in law and through the representations and conduct of the 1st and 2nd Respondents to entertain. By their very nature, the said expectations are not mere procedural expectations, but substantive expectations. The evidence placed before this Court clearly reveals that the afore-stated legitimate expectations of the Petitioner have been frustrated by the 1st Respondent – CEB initially by its inordinate delay and thereafter its refusal to issue the 'Letter of Intent', and by the 2nd Respondent – SLSEA by its inability to obtain the 'Letter of Intent' for the Petitioner on behalf of the Petitioner and by the non-issuance of the permit. In the circumstances of this case, the substantive legitimate expectations of the Petitioner should in my view be protected through relief granted by this Court.

7.7 Is the Petitioner entitled to any relief and if so, what reliefs should the Petitioner be entitled to?

Where a substantive legitimate expectation of a claimant has been frustrated by a decision-maker for a reason that is not in wider public interest justiciable, and the impugned decision is either perverse or irrational, the Court will and should not refrain from intervening in granting substantive protection to the claimant. Relief of substantive character should be granted in instances where the impugned decision has been taken contrary to expectations the public authority has generated and is therefore unlawful, and thus amounts to an abuse of power. It would also be available in instances where the change in policy, applicable criteria and procedure is not objectively and rationally aimed at serving wider public interests and is not proportionate to the intended goal of serving public interests.

Substantive relief will be granted by court for the purpose of protecting the substantive legitimate expectation of the claimant, as it is necessary to do so not only because doing so is in the interest of the claimant, but in public interests as well. As held by Justice Amerasinghe in ***Dayarathna and Others v. Minister of Indigenous Medicine and Others*** *(referred to above),* when taking a decision on whether or not substantive relief as opposed to procedural relief should be granted, the court should weigh genuine public interest against private interests, and decide on the legitimacy of the expectation of the claimant, having regard to the weight it carries in the face of the need for a change of policy which may also be in public interest.

It is in this regard necessary for me to observe that the belated position taken up by the 1st Respondent – CEB is contrary to law. The Respondents have not shown this Court any basis to conclude that the non-grant of either the 'Letter of Intent' or the permit to the Petitioner is in the wider interests of the public. In what is undoubtedly in public interest was for the 1st and 2nd Respondents to have expeditiously processed the

Application of the Petitioner and grant the permit sought by the Petitioner. Both Respondents have unlawfully and miserably failed in the performance of their duty towards the public in encouraging project proponents to harvest green energy sources such as solar energy for the purpose of generating electricity which would be environmentally friendly. This case is a case study in itself exemplifying how two State agencies have floundered in the performance of their public duties.

The repercussions of the 1st Respondent - CEB and the 2nd Respondent - SLSEA in not having encouraged and facilitated entrepreneurs to, through private enterprise, generate electricity by tapping renewable energy sources and feed such electricity to the national grid, was only too evident in the year 2022, when the country and her people had to suffer severely due to the insufficiency of electricity generation and the over-dependency on petroleum as a means of generating electricity. This situation resulted in power outages of long duration, which affected the daily lives of the public at large and resulted in serious consequences to trade, industry and commerce. At the time of writing this judgment, the critical importance of generating electrical energy using sustainable and renewable energy resources available in abundance in Sri Lanka, and the devastating consequences that have arisen out of the failure on the part of agencies of the State to voluminously and efficiently mobilize new renewable energy generation projects for the generation of electricity using solar and wind power, and other renewable energy resources is felt unlike ever before. The incident referred to in this judgment is an unfortunate testament to the root causes of the prevailing situation to which I find the 1st and 2nd Respondents having to bear responsibility.

8. **Orders of Court**

For the reasons enumerated above, I hold that the Petitioner is entitled to the following reliefs:

(i) Due to the reasons set out in this judgment, I hold that in processing the Application submitted by the Petitioner for a permit under section 18 of the SLSEA Act, the 1st and 2nd Respondents have not acted in terms of the law. I note that the culpability of the 1st Respondent – CEB far exceeds the culpability of the 2nd Respondent - SLSEA. In the circumstances, I declare that the 1st and 2nd Respondents acting jointly have infringed the fundamental right of the Petitioner to the equal protection of the law guaranteed by Article 12(1) of the Constitution.

(ii) In view of the detailed analysis of the facts and the law contained in this judgment, it would not be necessary for me to delve in detail into the consequences arising out of the conduct of the 1st and 2nd Respondents to the fundamental right of the Petitioner to engage *inter-alia* in the lawful business which he had chosen, planned and applied for, namely the generation of solar powered electricity, providing such electricity to the national grid, and thereby generating income which would include profit. In the circumstances, I hold that the 1st and 2nd Respondents have jointly infringed the fundamental right of the Petitioner guaranteed by Article 14(1)(g) of the Constitution, which infringement had financial implications to the Petitioner.

(iii) The 1st Respondent – CEB shall forthwith issue a 'Letter of Intent' to the Petitioner in accordance with the law and the provisions of the Guide ("P2C").

(iv) Upon the Petitioner submitting to the 2nd Respondent – SLSEA proof of the satisfaction of the conditions contained in the 'provisional approval' including the afore-stated 'Letter of Intent', the 2nd Respondent shall within one month of the submission of such material, process the Application of the Petitioner in accordance with the law and the relevant provisions of the Guide ("P2C"), and issue a permit to the Petitioner under and in terms of section 18 of the SLSEA Act.

(v) I am acutely conscious that this infringement would have resulted in considerable financial loss to the Petitioner, which this Court is regrettably though, compelled not to fully compensate. Providing reparation for loss of profit suffered by the Petitioner arising out of the infringement of fundamental rights would be quite justified in the circumstances of this case. However, I am sensitive to the fact that making such an order for full reparation will only result in the Consolidated Fund having to bear such burden, which would eventually result in the tax paying public having to suffer further hardships.

However, the attendant circumstances of this case require this Court to make an order for the payment of a significant amount of damages. Such an order should have a deterrent effect on not only the 1st and the 2nd Respondents, the state as well. Therefore, I direct that the 1st Respondent who has been primarily responsible for the infringement of the fundamental rights of the Petitioner, shall pay the Petitioner a sum of Rs. 1,000,000.00 as damages.

(vi) Since the 1st Respondent through its officials has been primarily responsible for the infringement of the fundamental rights of the Petitioner, it would be the responsibility of the state to identify such individual officials of the 1st Respondent – CEB, and take appropriate action against them. This is a matter

in respect of which I would have ordinarily ordered the payment of punitive damages by the individual officers who had been instrumental in the infringement of the fundamental rights of the Petitioner guaranteed by Articles 12(1) and 14(1)(g) of the Constitution, provided their identities transpired through the evidence placed before Court.

Accordingly, the Secretary to the Ministry of Power and Energy is hereby directed to cause the conduct of an investigation into this matter and take action according to law against those identified for having infringed the fundamental rights of the Petitioner. The findings and the action taken should be reported to this Court.

The Registrar of this Court is directed to forward copies of this Judgement to the Honourable Attorney General and to the Secretary to the Ministry of Power and Energy.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

I agree.

Judge of the Supreme Court