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

In the matter of an application under Articles 17 and 126 of the Constitution.

1. **M.R.C.C. ARIYARATHNE**
   No. 27/55, 1st Lane, Colombo Road, Ratnapura.
2. **H.K.B. JAYARUWAN**
   'Issuru', Karambaketiya, Beliatta.
3. **N.U.S. ARIYARATHNE**
   Galkadagodawaththa, Horawala, Welipenna.
4. **W.H.M.A.G.S. BANDARA**
   Wijethunga Niwasa, Ihalagama, Millawana, Matale.
5. **J.K.S.F. PERERA**
   No. 25/2, Asoka Mawatha, Dandagamuwa, Kuliyapitiya.
6. **U.P. ABEYWICKRAMA**
   No. 26A, Diyawana, Kirindiwella.
7. **N. WANIGASEKARA**
   No. 512/C, Near the Milk Board, Dikhenapura, Munagama, Horana.
8. **D.M.M.C. DISSANAYAKE,**
   Boraluwa, Kalugalla, Molagoda, Kegalle.
9. **R.W. DAYARATHNE**
   No. 49, Gurudeniya Road, Ampitiya.
10. **B.L.A. HEMANTHA**
    No. 429/2, Walawwa Road, Homagama.
11. **G.L. CHAMINDA**
    No. 156/1, Kirinda, Puhulwella.
12. **C.Y. ABEYWARDENA**
    No. 154/5/C, Uduwana, Homagama.
13. **U.G. WEERASINGHE**Nirigahahena, Galagama-North, Nakulugamuwa.

14. **D.M.C.C.K. DISANAYAKE**
    No. 34/A, Getamanna Road, Beliatta.
15. **K.D.D.T. KARUNARATHTHNE**
    Ranga Nivasa, Terungama, Agunakolapelassa.
16. **P.R. WARNAKULA**
    'Jayamini', Thalapekumbura, Alapaladeniya, Morawaka.
17. **G.G.P.B. GAMAGE**
    No. 339/10, Wakwella Road, Galle.
18. **H.G.N. DHARSHANI**
    No. 34/8, Malgalla, Tangalle.
19. **K.G.B. THUSHANTHI**
    No. 08, Nadun Uyana, Andugoda, Dikkumbura.
20. **W.G. SUNIL**
    No. 82/A, Hakwadunna, Nittambuwa.
21. **J.T.L. FERNANDO**
    No. 37, Yatiyana, Minuwangoda, Gampaha.
22. **I.G. ABHAYATHILAKA**
    No. 319/12, Rajamahavihara Road, Mirihana,Kotte.
23. **A.N. JAYAWEERA**
    No. 77, Rajyasevaka Gammanaya, Devurumpitiya, Getaheththa.
24. **A.I.C. JAYASEKARA**
    No. 416, Uda Ellepola, Balangoda.
25. **K.M.P. BANDUJEEWA**
    'Ashoka Nivasa', Rilpola, Badulla
26. **N.K.L. PRIYANGIKA**
    Mahagangoda, Ambalangoda Road, Aluthwala.
27. **U.G.J.S. KUMARA**
    C/O Namal Stores, Niyampaluwa, Godamuna, Pitigala.
28. **S.A.D.N. MANORI**
    Kendaduwa Waththa, Galthuduwa, Gonagalapura, Bentota.

29. **D.M.G.P.M. SHAMALEE**
    Delgaha Badda Road, Kirimatiya, Batapola.
30. **A.M.S ATHTHANAYAKE**
    No. 27, Sarasavigama, Mahakanda, Hindagala.
31. **J.A. SOMAWEERA**
    No. 55/A, Aluthapola, Wegowwa, Gampaha.
32. **S.D.J. NIROSHANA**
    Haldola Road, Bellana, Agalawatta.
33. **S.P.K. WIJESINGHE**
    No. 244, Sri Sobitha Road, Nagoda, Kalutara.
34. **A.V.P. AJITH SHANTHA**
    No. 100/1, Gamunu Mawatha, Panapitiya, Kalutara.
35. **Y.N. ARIYASIRI**
    Pelawatte, Bombuwala, Kalutara South.
36. **M.A.J. THUSHARA**
    No. 290, Omaththa Road, Agalawatta.
37. **E.L.M.K. ELVITIGALA**
    No. 133, Madulgoda, Pannipitiya.
38. **B.V.J. PRIYANTHA**
    Paniyawala Janapadaya, Pareigama.
39. **C.L.I.M.T.S. CHANDRASEKARA**
    Dostara Watte, Dadagamuwa, Kuliyapitiya.
40. **D.M.H.G.D.P.K. TILAKARATHTHNE**
    No. 22/36, Weerapuran Appu Place, Matale.
41. **M.G.L.S. JAYASINGHE**
    Hakirillagoda, Walagedara, Wattappala, Pilimatalawa.
42. **R.M. RANMULLA**
    No. 30, Ranmulla, Udispattuwa, Kandy.
43. **T.D.G.C.S. JAYAWARDANE**
    'Namal', Madagoda, Galagedhara, Kandy.
44. **R.M.I.K. RATHNAYAKE**
    No. 2/29, Kohombiliwala, Matale.

45. **S.K.W.M.K. SENEVIRATHTHNE**
    No. 30/07, Patum Uyana, Naranwala, Gampaha.
46. **D. CHANDRALATHA**
    No. 264, Quila 04, Kottukachchiya.
47. **R.M. PIYATHISSA**
    No. 533/04/A, Janatha Mawatha, Eldeniya, Kadawata.
48. **A JAYASURIYA**
    No. 116/02, Pahalabiyanwala, Kadawata.
49. **M.A.W. PUSHPAKUMARA**
    No.114/19, Mihindu Mawatha, Wattegedhara Road, Maharagama.
50. **M.S.P.K. FERNANDO**
    No. 28, Nawodayagama, Kirimitithanne, Balangoda.
51. **J.M.R.B. JAYASINGHE**
    No. 119/58, Sooriyapura Watte, Diuldeniya.
52. **R.P.N. PATHIRANA**
    No. 484, Old Rest House Road, Giriulla.
53. **W. RATHNASIRI**
    Gamini Bekariya, Wannithammannawa, Anuradhapura.
54. **U.M.M.B. WIJESOMA**
    Masanwaththa, Wehera, Kurunegala.
55. **V.A. HETTIARACHCHI**
    Kadulawa, Ibbagamuwa.
56. **W.R.D.S.G. WEERAKOON**
    'Kavinda', Pugalla Road, Kalugauwa, Kurunegala.
57. **K.A. RATHNAWEERA**
    No. 194/E3, Thalgahena Road, Kesbawa, Piliyandala.
58. **N.G.M.S. RATHNAYAKE**
    No. 25, Anandarama Road, Moratumulla, Moratuwa.

59. **K.A.D.S.P. WEERASINGHE**
    No. 118/6, Navoda Udyanaya,
    Soysapura, Moratuwa.
60. **W.G. ANURA**
    No. 418/14, Pegathi Mawatha,
    Kahathuduwa, Polgasowita.
61. **P.A. BANDU KUMARA**
    Damayanthi Stores, Akkara 10,
    Bopitiya, Pelmadulla.
62. **A.P.U. NISHANTHA**
    No. 663/A, Mihindugama, Sevanagala.
63. **U.W.A.C. RANATHUNGA**
    'Madura', Balavinna, Pallebadda,
    Ratnapura.
64. **H.P.D.A.L. HADUNPATHIRANA**
    No. 150H, Maththegoda.
65. **K.M. SISIRA**
    No. 722B, Malabe Road, Kottawa,
    Pannipitiya.
66. **W.P.A. DHARMASENA**
    No. 14, Walpola, Rukgahawila,
    Nittambuwa.
67. **K.P.K. GRASHION**
    Mandalapura, Neluwa, Galle.
68. **U.T. SENAVIRATHNE**
    No. 782, Habaraluwawa, Sevanagala.
69. **S.A.B. SUBASINGHE**
    No. 60, Kahadawa, Mirigama.
70. **W.T. WIJEWARDENA**
    'Sirinivas', Hubaswalana, Ruwanwella.
71. **W.P.D. RANASINGHE**
    Pansala Road, Karadeniya, Danowita.
72. **D.R.T. RANASINGHE**
    No. 180, Hokandara South, Hokandara.
73. **M.A.S.W. PERERA**
    'Piyasevana', Paluwaththa, Waralla,
    Thalwita.
74. **D.L.D. PRASANNA**
    No. 623, Egodawaththa, Arrawwala,
    Pannipitiya.

75. **H.M.R. DISSANAYAKE**
No. 112, Sadagala, Uhumiya.
76. **M.P.J.L.A. KARUNARATHNE**
'Asiri', Wataraka, Iguruwaththa, Mawathagama.
77. **R.N.J. RAVINDRA**
No. 451/A/22, Supreme City, Artigala Road, Meegoda.
78. **H.K.U. DEHAPPRIYA**
'Dhammi', Deewala, Pallegama, Kegalle.
79. **K.S.C. GUNATHUNGA**
No. 31, Dharmapala Udyanaya, Dharmapala Mawatha, Tittawela, Kurunegala.
80. **N.D.G.R. WEERASINGHE**
Rusigama, Ehalagama, Pallepola, Matale.
81. **H.P.R.R. PIYATHILAKE**
Jahapagama, Kumbukwewa.
82. **N.N.W.M.R. BANDARA**
No. 109/1A, Rajawella, Matale.
83. **H.B.M.P. KUMARA**
No. 372/10, Wilgoda Road, Yanthampalawa, Kurunegala.
84. **H.A.C.D. PERERA**
No. 148, Eksath Mawatha, Mahara, Kadawatha.
85. **M.M.D.C. REMIGEOUS**
No. 316/7, Neliagama, Ragama.
86. **S.M.U.S. SAMARAKOON**
No. 245A, Gemunu Mawatha, Kotuwegoda, Rajagiriya.
87. **D.G.R.S. RANASINGHE**
Diddeniya, Hawella.
88. **K.G.D. SUBASHINI**
Heritage Park, Gamudawa, Kamburupitiya.
89. **W.A.A. SHANTHA**
No. 254 ½, Batadomba Thuduwa, Road, Alubomulla.

90. R.D.S.R. KUMARA
Hammalawa Waththa, Diyakalamulla, Kuliyapitiya.

91. A.M.S.A. ATHTHANAYAKE
6th Mile Post, Diyakobala, Bibile.

92. K.I.C. KOONGAHAWATHTHA
Doloswala Walawwa, Nivitigala.

93. S.L.P. RAJAPAKSHA
Giraketiya Kumbura, Kuliyapitiya.

PETITIONERS

SC FR Application No. 444/2012

VS.

1. **N.K. ILLANGAKOON**
   Inspector General of Police, Police Headquarters, Colombo 01.
2. **VIDYAJOTHI DR. DAYASIRI FERNANDO**
   Chairman
3. **S.C. MANNAPPERUMA**
   Member
4. **ANANDA SENEVIRATNE**
   Member
5. **N.H. PATHIRANA**
   Member
6. **PALITHA M. KUMARASINGHE**
   Member
7. **SIRIMAVO A. WIJERATNE**
   Member
8. **S. THILLANADARAJAH**
   Member
9. **A. MOHAMED NAHIYA**
   Member
10. **M.D.W. ARIYAWANSA**
    Member
    2nd to 10th, all of the Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.
11. **T.M.L.C. SENARATNE**
    Secretary, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05.

12. **GAMINI NAWARATNE**
    Senior Inspector General of Police (Administration), Police Headquarters, Colombo 01.
13. **P.B. ABEYKOON**
    Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
14. **W.D. SOMADASA**
    Director General of Establishments, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
15. **B.P.P.S. ABEYGUNARATHNA**
    Director General of Combined Services, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 07.
16. **N. GODAKANDA**
    Director General, Ministry of Finance and Planning, The Secretariat, Colombo 01.
17. **HON. ATTORNEY GENERAL**
    Attorney General's Department, Colombo 12.

RESPONDENTS

18. **PROF. SIRI HETTIGE**
    Chairman
19. **P.H. MANATHUNGA**
    Member
20. **SAVITHREE WIJESEKARA**
    Member
21. **Y.L.M. ZAWAHIR**
    Member
22. **ANTON JEYANADAN**
    Member
23. **TILAK COLLURE**
    Member

24. **F. DE SILVA**
    Member
    18th to 24th all of the National Police Commission, Block 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07.
25. **N. ARIYADASA COORAY**
    Secretary, National Police Commission, Block 3, BMICH Premises, Bauddhaloka Mawatha, Colombo 07.

ADDED-RESPONDENTS

26. **H.M.N.I. HERATH**
    Near the Police Station, Lunugala.
27. **C.U. JAYASINGHE**
    Kaudella, Bibila.
28. **D.M.K. BANDARA**
    Alpitiya, Dambagalla, Moneragala.
29. **K.M.S. BANDARA**
    No. 59, Kolladeniya, Mariarawa, Dambagalla.
30. **L.M. THUSHARA**
    No. 16, Ruhunudanauwa, Siyambalanduwa.
31. **G.P.H.S. PUNCHIHEEWA**
    No. 19/1 B, Haltotawatta Lane, Avissawella.
32. **E.W.I.K. WEERASINGHE**
    No. 299, Madarangoda, Kadugannawa.
33. **H.K.A. KUMARA**
    No. 52, Nawa Berillawatta, Halpathota, Baddegama.
34. **E.P.R. RUPASINGHE**
    No. 142/C/1, Morahela, Madulla, Uda Pussellawa.
35. **M.P.S. WEERASINGHE**
    No. 396/01, Elawalu Watta, Kirimetiya.
36. **JAINUDEEN NIJAMDEEN**
    Idiman, Kinniya 05, Trincomalee.

37. **E.W.M.S.P. EKANAYAKE**
    No. 49/B, 02nd Cross Road, New Town, Polonnaruwa.
38. **R.C.S. RAJAPAKSHA**
    Gamameda Road, Elawaka, Nikaweratiya.
39. **A.A.A.S. GUNASEKARA**
    No. 25/A/2, Meepanihena, Thibbatuwawa, Wiyalagoda, Eheliyagoda.
40. **R.A.K.U.K. RAMANAYAKA**
    No. 26, Muwandeniya, Mathale.
41. **T.A.P.K. JAYAWEERA**
    07 Mile Post, Rassagala, Balangoda.
42. **C. M. JAYASENA**
    275/21, Galagawela Road, Pahala Gattuwana, Kurunegala.
43. **M.N.N.C. WIJERATHNE**
    No. 02, Emarled Park, Thorawathura, Kohilegedara.
44. **S.T.J. ABEYRATHNA**
    S 42, Narandeniya, Deewalegama.
45. **B.W.C.P. FERNANDO**
    Koswaththa, Nawalagama, Ballaketuwa, Ella, Bandarawela.
46. **K.A. SAMANMALEE**
    No. 18, Shantha Patrick Road, Molligoda, Wadduwa.
47. **W.G.S. JAYASINGHE**
    No. 34, Welipillewa, Kudauduwa, Horana.
48. **L.H.P. KAMAL**
    58/16A, Araliya Pedesa, Aluthgama Road, Elpitiya.
49. **K.S. L. NISHANTHA**
    132/3, 11th Mile Post, Awiththawa Road, Elpitiya.
50. **R.T.A. JAYAWEERA**
    No. 228/03, Tea Factory Road, Balakaduwa, Alawatugoda.

51. **G.G.I. SIRISENA**
    No. 34/A, Parana Ganthenna,
    Ovilikanda, Matale.
52. **W.A.W.M.S. WICKRAMARACHCHIGE**
    Near the Primary College, Udugama,
    Janapadaya, Kitulwitiya.
53. **D.G.P.K. SENAVIRATHNA**
    No. 81, Cinnamon Park, Mananduwa
    Road, Nugagoda, Kalutara.
54. **A.M.K.R. BANDARA**
    No. 716/C/15, 11th Lane, Romiel Lane,
    Panagoda, Homagama.
55. **S.D. RUPASINGHE**
    No. 160/13, Kanaththa Road,
    Thalapathpitiya, Nugegoda.
56. **G.M.A.P. ABESIRI**
    160/01, Siripela, Karakole,
    Nikaweratiya.
57. **W.M.L.R.K. WEERASURIYA**
    No. 247, 'Suramya Sewana',
    Bakmeegolla, Ibbagamuwa.
58. **K.P.S. SAMARATHUNGA**
    No. 291,Galwalagaraya, Avulegama.
59. **H.B.N.H. KUMARA**
    Kulasendawa, Karabe, Mahawa.
60. **H.M.T. BANDARA**
    Kurunaidawetiya, Avulegama.
61. **D.M.A.A. DISSANAYAKA**
    Mahaindigollagama, Galkiriyagama.
62. **D.M.M.P. DISSANAYAKA**
    U/04, No. 456, Dinadhi Sewana,
    Kandaketiya.
63. **E.M. GHANASIRI**
    'Priyangani', Thennepita, Aluthwela
    North, Diyatalawa.
64. **Y.B.S. BANDARA**
    No. 58, Pallegama, Padiyatalawa.
65. **D.M.R. BANDARA**
    No. 26/01, Senpathigama,
    Nannapurawa, Bibile.

66. **A.M.R.G.J.R.K. ABEYRATHNA**
    No. 03, Dumbaragama, Kalugala.
67. **E.C.K. GAMAGE**
    No. 36/76, Nugelanda, Rajagalathenna, Ampara.
68. **D.T.K.A. DEEPAGODA**
    01 Mile Post, Padaviya.
69. **D.M.T.P. DISSANAYAKA**
    Near the Post Office, Galapara, Olukaranda, Kekirawa.
70. **H.M.C.P. GUNAWARDHANA**
    Meegahawewa, Nochchiyagama.
71. **P.A. KUMARA**
    No. 323, Gangurewa, Seeppukulama.
72. **R.M.J. RAJAGURU**
    Walpola, Medawachchiya.
73. **G.P.J.K. RATHNAYAKE**
    School Lane, Palugaswewa, Eppawala.
74. **R.M.S. RAJAPAKSHA**
    No. 247, Mahagalkadawala, Algamuwa.
75. **D.M.S. DISSANAYAKE**
    No. 183/B, Nochchiya, Wannikudawewa, Galgamuwa.
76. **W.G.S.M. DHARMAKEERTHI**
    Siyambalangamuwa, Mahawa.
77. **T. WIDHANAPATHIRANA**
    No. 195, Kajukoratuwa, Witharandeniya, Tangalle.
78. **K. ARUNSHANTHA**
    75/2 B, Weelamahara, Buthpitiya.
79. **U.G.T.A.N. KULARATHNA**
    No. 2472, Samagipura, Nebada.
80. **R.M.H.R.J.B. RAJAPAKSHA**
    No. 20,Heerassagala, Pilimatalawa.
81. **B.G.S.C.C. DE SILVA**
    No. 418, Bihalpola, Nakkawaththa.
82. **K.K.W.A. KUMARA**
    Galpola, Illukhena, Kuliyapitiya.
83. **T. KANCHANA**
    BCP 27, City Paradise, Walahapitiya Road, Nattandiya.

84. I.D.A.T. GUNARATHNA
Aganaketiya Road, Thalgahawatta,
Karandeniya.

85. H.B.M.K. WEERAKOON
Kadaveediya, Madatugama.

ADDED INTERVENIENT-RESPONDENTS

BEFORE:	Buwaneka Aluwihare, PC, J Prasanna Jayawardena, PC, J L.T.B. Dehideniya, J.
COUNSEL:	Faisz Mustapha, PC, with Pasindu Silva and Keerthi Tillekaratne instructed by Sanjeewa Kaluarachchi for the Petitioners. Pradeep Kumarasinghe with Hemathilaka Madukanda for the 10th and 77th Petitioners. J.C. Weliamuna, PC, with Shantha Jayawardena for the Intervenient Petitioners-Respondents. D. Titus Padmasiri for the Petitioners seeking intervention. Sanjay Rajaratnam, PC, SASG, for the Attorney General.
ARGUED ON:	10th January 2019 and 12th February 2019.
WRITTEN SUBMISSIONS FILED:	By the Petitioners on 26th March 2019. By the 1st to 25th Respondents on 18th February 2019. By the 26th to 85th Added Intervenient Respondents on 21st March 2019.
DECIDED ON:	30th July 2019

Prasanna Jayawardena, PC J.

The 93 petitioners who have filed this application, invoked the fundamental rights jurisdiction of this Court alleging that the respondents have violated their fundamental rights guaranteed by Articles 12 (1) and 14 (1) (g) of the Constitution. The respondents include the Inspector General of Police, the Chairmen and members of the Public Service

Commission and National Police Commission, the Director General of Combined Services and the Director General of Management Services.

The petitioners were appointed to the post of "Development Assistants" [*"සංවර්ධන සහකාර නිලධාරීන්"*] in the Department of Police. They continue to hold that post. They are public officers in the Public Service They are not *"Police Officers"* in the Sri Lanka Police Force, which now consists of the Regular Police Force and five specialised Units [*"ඒකක"*] of the Sri Lanka Police Force - *ie:* (i) Police Medical Service; (ii) Police Engineering Service; (iii) Police Technical Service; (iv) Police Support Service and (v) Police Special Service. [It appears that the aforesaid specialised Units of the Sri Lanka Police Force are sometimes referred to using the term *"පොලිස් සහායක සේවා"* (*"Police Support Services"*) and the petitioners have used that term].

The central plank on which the petitioners have rested this application is their claim they have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units] and that the respondents have arbitrarily and irrationally negated that *"legitimate expectation"*, thereby, violating the petitioners' aforesaid fundamental rights. On that basis they seek a declaration that they are entitled to be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units] and a direction for the implementation of that declaration.

There is a second claim which the petitioners make in support of their application. They allege that a Service Minute issued by the Director General of Combined Services on 14th February 2012 and the two Public Administration Circulars by which this Service Minute was notified to public officers across the Public Service, are arbitrary and irrational and violative of the petitioners' aforesaid fundamental rights. This Service Minute established a new "Programme Officers' Service" and gave the petitioners the entitlement to be absorbed into that newly created Programme Officers Service, if they wished to. However, the Service Minute also provided for the petitioners to remain in their present posts if they did not wish to seek absorption into the Programme Officers Service.

After this application was filed, the parties made efforts to reach a settlement by way of administrative measures. These efforts were unsuccessful. On 31st July 2017, this Court granted the petitioners leave to proceed in respect of an alleged violation of their fundamental rights guaranteed by Article 12 (1) of the Constitution.

The facts

The petitioners are all graduates of recognized universities. By 2004, they had been unemployed for some time after graduation. In that year, the Government implemented a

scheme - known as the “Graduate Scheme” - to recruit a large number of unemployed graduates to the Public Service. The petitioners were among those recruits who entered the Public Service in 2004 under this Graduate Scheme. Recruits under the Graduate Scheme were initially attached, by way of a period of training, to various Divisional Secretariats - as “Graduate Trainees”. After completing that period of initial training, the recruits were attached to various Government Departments for the purpose of serving in specific capacities in those Departments.

In the case of the petitioners, they were attached to the Department of Police on or about 03rd January 2005, as set out in the letter filed with the petitioners’ petition marked “P2”. They were designated “Community Relations Officers”. The petitioners commenced their service in the Department of Police with a period of introductory residential training at the Sri Lanka Police College at Kalutara. After the conclusion of their period of training, the petitioners were attached to the Police Headquarters and to Police Stations throughout the island. The Inspector General of Police [1st respondent] has, in his affidavit, stated that the training given to the petitioners covered the responsibilities and work of Development Assistants and an introduction to Police duties and responsibilities. He says it was not similar to the training given to police officers of the Regular Police Force.

In October 2005, the petitioners were appointed to the aforesaid posts of Development Assistants in the Department of Police. That employment was on a permanent basis but was subject to a period of probation. Upon confirmation in employment at the end of the period of probation, they were to be confirmed in the posts of Development Assistant - *vide:* the letter of appointment marked “P7”. The petitioners successfully passed the period of probation and have been confirmed in the posts of Development Assistant - *vide* the letter dated 21st April 2009 marked “P8”. That was a transferable and pensionable post. The petitioners were placed on Salary Scale MN 4-2006 on 01st June 2007, consequent to the general restructuring of salaries in the Public Service in terms of the well-known Public Administration Circular No. 06/2006. The petitioners have remained on that Salary Scale [which appears to have been subsequently designated as “Salary Scale MN 4-2006(A)” following a revision of Salary Scales], up to the time of filing this application.

At this point, it is relevant to note that the Sri Lanka Police Force [*ie:* the Regular Police Force] was established in 1866 under and in terms of the provisions of section 3 of the Police Ordinance. Section 104 of the Police Ordinance defines a *“police officer”* as a *“member of the regular police force and includes all persons enlisted under this Ordinance.”.* Section 20 read with section 21 (1) of the Police Ordinance makes it clear that *“police officers”* are appointed under the provisions of the Police Ordinance and hold the ranks of: Inspector General of Police, Deputy Inspectors General of Police, Superintendents and Assistant Superintendents of Police, Inspectors, Sergeants and Constables. *“Police officers”* appointed under the provisions of the Police Ordinance are

required to wear designated police uniforms when on duty, unless the specific nature of their duties preclude the wearing of uniform.

Further, a Police Reserve was later established under section 24 of the Police Ordinance for the following purpose: *"to assist the police force in the exercise of its powers and the performance of its duties."*. Section 25 read with section 26 (1) of the Police Ordinance state that the officers in the Police Reserve hold the ranks of Commandant, Deputy Commandant, Reserve Superintendents, Reserve Assistant Superintendents of Police, Reserve Chief Inspectors, Reserve Inspectors, Reserve Sub Inspectors, Reserve Sergeant Majors, Reserve Sergeants and Reserve Constables. Officers in the Police Reserve are also required to wear designated Police Reserve uniforms when on duty, unless the specific nature of their duties preclude the wearing of uniform.

With effect from 01st February 2006, all 27,988 Police Reserve Officers then serving in the Police Reserve were absorbed into the Regular Police Force, as evidenced by the Circular No. 2070/2008 dated 27th June 2008 issued by the Inspector General of Police marked "P16". As set out in "P16", 26,121 of these erstwhile Police Reserve Officers were absorbed into the Regular Police Force and 1527 erstwhile Police Reserve Officers were appointed to the aforesaid five newly created specialised Units of the Sri Lanka Police Force. It is evident from "P16" that these five specialised Units were to be regarded as part of the Sri Lanka Police Force. All the Officers absorbed into these five specialised Units of the Sri Lanka Police Force held the same rank as they did in Police Reserve and were mandatorily required to wear uniforms which were modelled on uniforms worn by police officers in the Regular Police Force. As the petitioners have correctly pleaded in paragraph [23] of their petition, these five specialised Units perform *"supportive services"* to the Regular Police Force.

However, the remaining 340 erstwhile Police Reserve Officers were not absorbed into the Regular Police Force or into the five newly created specialised Units of the Sri Lanka Police Force. Instead, these 340 persons were absorbed into a newly established "Civil Support Services Unit" [*"සිවිල් සහායක සේවා ඒකකය"*] of the Department of Police.

The petitioners have pleaded that they and also the Graduate Employees Union which represents them have addressed letters dated 26th July 2006, 29th November 2006 and 18th January 2012 marked "P17(a)", "P17(b)" and "P17(c)" respectively, to the Defence Secretary, Inspector General of Police and a Senior Deputy Inspector General of Police requesting that the petitioners be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into a specialised Unit of the Sri Lanka Police Force]. However, a perusal of these three letters reveals that the first two [*ie:* "P17(a)" and "P17(b)"] deal only with some complaints the petitioners had about their day to day working conditions. A written request that the petitioners be absorbed into the Sri Lanka Police Force appears to

have first been made on 18th January 2012 by the letter marked "P17(c)", which was written a few months before filing this application. The petitioners also state that they engaged in several discussions with the Inspector General of Police and other senior police officers to press the aforesaid request and that they had been given an assurance that they would be absorbed into the Regular Police Force or into one of its specialised Unit. But, the documents before us do not substantiate the petitioners' claim that such an assurance was given to them.

The petitioners state that a Senior Deputy Inspector General of Police [the 12th respondent] had, by a letter dated 30th September 2010 addressed to the Inspector General of Police marked "P20" and the Annexure thereto marked "P21", recommended that five *new* specialised Units of the Sri Lanka Police Force be established - to be named: (i) Police Educational Service; (ii) Police Analyst Service; (iii) Community Policing Service; (iv) Police Intelligence Service; and (v) Police Prosecution Service - and that the petitioners be absorbed into these proposed five *new* specialised Units of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police and be placed on Salary Scale SL 1-2006.

However, that recommendation was not acted upon by the Department of Police or the Public Service Commission or National Police Commission and the petitioners were not absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units]. The Inspector General of Police has, in his affidavit, stated that the recommendations made in "P20" and "P21" were *"not practical as there are no vacancies available"* and has also stated that the Department of Management Services disapproved of the recommendations. The Inspector General of Police also states that these recommendations could not be accepted for the reason that the petitioners had not passed the Open Competitive Examination which is held to select appointees [from outside the ranks of the Sri Lanka Police Force] to the rank of Assistant Superintendent of Police and because the petitioners would not necessarily meet the physical specifications which have to be met for appointment to that rank. He further states that appointing the petitioners to the rank of Assistant Superintendents of Police will cause injustice to serving officers of the Sri Lanka Police Force.

On 14th February 2012, the Director General of Combined Services issued the aforesaid Service Minute which is titled "Minute of the Programme Officers' Service" and is marked "P23". This Service Minute created a new "Programme Officers' Service" in the Public Service. Clause 14 of "P23" provided that all public officers in the Public Service who were recruited under the aforesaid Graduate Scheme and are on Salary Scale MN 4-2006 (A), are entitled to be absorbed into the newly created Programme Officers' Service. Clause 14 also specified the procedure to be followed by eligible public officers who wish to apply for absorption into the Programme Officers' Service - *ie:* they had to submit an application in

the specified format to the Director General of Combined Services, through their Head of Department.

However, Clause 17.2 of "P23" specified that officers of the Public Service who did not wish to be absorbed into the Programme Officers' Service, are entitled to remain in their present posts.

"P23" was circulated throughout the Public Service by the first of the aforesaid Public Administration Circulars, which bears No. 10/2012 and is dated 08th May 2012. It has been marked "P24". The petitioners, being officers of the Public Service recruited under the Graduate Scheme and placed on Salary Scale MN 4-2006(A) were eligible for absorption into the Programme Officers' Service under and in terms of "P23", were given notice of "P23" and "P24". Clause 2 of "P24" also clearly stated that eligible public officers were entitled to be absorbed into the newly created Programme Officers' Service only if they so wished and specified that public officers who did not wish to be absorbed into the Programme Officers' Service, were entitled to remain in their present posts. Clause 4 of "P24" required that any public officer, who wished to submit an application to be absorbed into the Programme Officers' Service, should do so by 14th July 2014. This time limit was extended up to 14th August 2014 by the second Public Administration Circular referred to earlier. That bore No. 10/2012 (I) and is dated 21st June 2012. It is marked "P26".

However, none of the petitioners wished to be absorbed into Programme Officers' Service under and in terms of "P23". Therefore, they all sent letters to the Inspector General of Police, on the lines of the letter dated 13th July 2012 marked "P25" written by the 4th petitioner, declaring they did not wish to be absorbed in to the Programme Officers' Service as provided for by "P23'. They went on to say in these letters that, instead, they wished to be absorbed into one of the specialised Units of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police in terms of the aforesaid recommendation marked "P20" and its Annexure marked "P21". [It appears that the aforesaid specialised Units of the Sri Lanka Police Force established in terms of the Circular marked "P16" are sometimes referred to using the term *"පොලිස් සහායක සේවා "* [*"Police Support Services"*] and the petitioners have used that term].

The petitioners' aforesaid request to be absorbed into one of the specialised Units of the Sri Lanka Police Force, was not granted. Consequently, as they had rejected the opportunity given by "P23" for them to be absorbed into the newly created Programme Officers' Service, the petitioners continued to remain in their posts of Development Assistants in the Department of Police.

The petitioners were dissatisfied with this outcome and filed the present application. They claimed that they had a *"legitimate expectation"* to be absorbed into the Regular Police

Force or into one of the specialised Units of the Sri Lanka Police Force. They pleaded that the failure to give effect to that expectation violated their fundamental rights guaranteed by Articles 12 (1) and 14 (1) (g) of the Constitution. The petitioners also pleaded that "P23" and the offer made thereunder to absorb the petitioners into the cadre of Programme Officers, was published without giving the petitioners a hearing.

On the aforesaid basis, the petitioners prayed, *inter alia*, for a declaration that they are entitled to be absorbed into the Regular Police Force or into one of its specialised Units and for a direction that the recommendations made in "P20" and "P21" be implemented - *ie:* a direction that the petitioners be absorbed into a specialised Unit of the Sri Lanka Police Force at a rank of Assistant Superintendent of Police and be placed on Salary Scale SL 1-2006, as recommended in "P20" and "P21". They also pleaded that the Service Minute marked "P23" and Circulars marked "P24" and "P26" are arbitrary and irrational and prayed for a declaration that "P23", "P24" and "P26" are null and void *vis-à-vis* the petitioners.

In his affidavit, the Inspector General of Police has stated, *inter alia*, that the petitioners are not entitled to be absorbed into the Sri Lanka Police Force [the Regular Police Force or one of its specialised Units], for the reasons set out in his affidavit. He also pleads that the petitioners' application is time barred. The petitioners filed a counter affidavit.

Subsequently, 60 officers of the Regular Police Force, who are all Graduates of recognised Universities and who have functioned in the posts of "Community Coordinating Officers" since March/April 2017 [although they have not yet been formally appointed as such due to the fact that this application is pending], filed an application for intervention claiming that they are similarly circumstanced to the petitioners. These Intervenient Petitioners prayed that, in the event the petitioners are absorbed into the Sri Lanka Police Force, the intervenient petitioners also be placed in the same rank and be paid the same salary as the petitioners. This application for intervention was permitted and the Intervenient Petitioners have been added as Intervenient-Added Respondents.

As evident from the aforesaid account of the pleadings and the facts before us, there are two issues to be decided in this application. They are:

(i) Firstly, whether the petitioners have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force, which the Court should give effect to, because not doing so will perpetuate a violation of the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution;

(ii) Secondly, whether the Service Minute marked "P23" and Circulars marked "P24" and "P26" are arbitrary and irrational *vis-à-vis* the petitioners and

violate the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

A determination of whether the petitioners are entitled to the first head of relief they claim as set out in (i) above, will require an examination of the scope and ambit of the `doctrine of legitimate expectation', if I may call it that.

I also venture to think that such an examination might be useful at this point since, as far as I am aware, this Court has not had occasion to examine the developments in the law on the subject in some detail since the judgment of Priyantha Jayawardena,PC J in NIMALSIRI vs. FERNANDO [SC FR No. 256/2010 decided on 17th September 2015]. This is especially so because there have been some material developments in the doctrine of legitimate expectation after that judgment was delivered. Another reason why such an examination might be useful at this point is the frequency with which claims of *"legitimate expectation"* are made, sometimes with little justification and it would appear almost by rote, in applications for writs and applications invoking the fundamental rights jurisdiction of this Court. Nearly two decades ago, this led Gunawardana J to observe in the Court of Appeal decision of WICKREMARATNE vs. JAYARATNE [2001 3 SLR 161 at p.177] that *"It is the vogue, nowadays, to invoke the concept of legitimate expectation, without discernment almost blindly and by force of habit - as it were."*. Gunawardana J's observation remains apposite to this day. That was perhaps one reason which led Murdu Fernando,PC J in the recent decision of KALUARACHCHI vs. CEYLON PETROLEUM CORPORATION [SC Appeal No. 43/2013 decided on 19th June 2019 at p.12] to cite Wade and Forsyth [Administrative Law 11th ed at p. 450] and warn that *"legitimate expectation must not be allowed to collapse into an inchoate justification for judicial intervention."*. I am in respectful agreement with Her Ladyship. For these reasons, I consider that carrying out a survey of the parameters of the doctrine of legitimate expectation will be helpful and, I hope, justify the resulting addition to the length of this judgment.

Overview of the doctrine

The doctrine of legitimate expectation, as it is sometimes called, originated in Europe. To put it in the broadest terms, the doctrine envisages that a court may, in appropriate circumstances and where the public interest does not require otherwise, enforce a *"legitimate expectation"* [as distinct from a personal or proprietary *right*] of a person that a public authority will act as it has promised or held out it would. Prof. Endicott of the University of Oxford [Administrative Law 2nd ed. at p. 283] has commented that a legitimate expectation *"might be better called a `legally protected expectation'."*.

It is often said that this doctrine is an application of a court's duty to ensure fairness and certainty on the part of administrative bodies in their dealings with citizens, and also an

affirmation that citizens should be entitled to repose their trust in what administrative bodies tell them and lead them to believe. Thus, Lord Neuberger recently put the doctrine's underlying philosophy in general terms when he said in the Privy Council decision of THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO [2016 1 WLR 3383 at para. 37], *"In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts."*.

As observed by the Israeli legal philosopher Prof. Joseph Raz ['The Authority of Law' (1979) Chapter 11], the concept is rooted in the *grundnorm* [if I may call it that] of the Rule of Law which, *inter alia*, requires fairness, regularity and certainty in a public authority's dealings with the public, and condemns abuse of power by a public authority. Thus, Prof. Schwarze [European Administrative Law (1992) at p. 867] comments *"The principles of legal certainty and the protection of legitimate expectations are fundamental to Community Law. Yet these principles are merely general maxims derived from the notion that the Community is based on the rule of law ….."*. Schwarze observes that the doctrine of legitimate expectation reflects the Germanic concept of *"vertrauensschutz"* which could be translated to mean *"the honouring of a trust"*.

The doctrine has been adopted and adapted by the Courts of England, which have been designated as a *"relative latecomer to the doctrine"* by European writers [*vide:* Schwarze]. Our Courts have consistently looked to the English Law when formulating and applying this doctrine in our jurisdiction. Therefore, it is necessary to look at the manner the doctrine of legitimate expectation developed and now prevails in England.

The doctrine of legitimate expectation in the English Law

In the English Law, the phrase *"legitimate expectation"* had been used in early cases such as IN RE BARKER [1881 LR Ch. D. 241 at p.243] which dealt with the interpretation of a particular statute. The first use of the phrase in the context of public law is said to have been in SCHMIDT vs. SECRETARY OF STATE FOR HOME AFFAIRS [1969 2 Ch.D 149] when Lord Denning, MR recognised that a person who expects a public authority to act as it has assured him it would, should be heard by the public authority if it intends to act differently. The learned Master of the Rolls said *obiter* [at p.170] "*It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say."*. This concept was developed and expanded by the Courts in England in a series of later decisions.

Firstly, with regard to ***locus standi***, the doctrine of legitimate expectation operates where an aggrieved person does not have a proprietary or personal right *stricto sensu* which gives him the *locus standi* to challenge a decision of a public authority under the other

grounds recognised by administrative law. In such situations, the doctrine operates to confer *locus standi* on an aggrieved person to seek judicial review where he only has a *"legitimate expectation"* [and not a "right"] that a public authority will act in a particular way. Thus, in O'REILLY vs. MACKMAN [1983 2 AC 237 at p.275] Lord Diplock said that in public law [as distinguished from private law], a person who held a legitimate expectation had *"sufficient interest"* to challenge the legality of a public authority's decision. On the same lines, Lord Woolf MR said in R. vs. NORTH AND EAST DEVON HEALTH AUTHORITY *ex parte* COUGHLAN [2000 3 AER 850 at para. 56] that when a person claims he had a legitimate expectation which has been negated by a public authority, *"the dispute has to be determined by the court ….."*

To next consider the **scope** of the doctrine of legitimate expectation, it often said to cover two aspects - *ie:* the *procedural* aspect and the *substantive* aspect. As Prof. Craig [Administrative Law 7th ed. at p.677] explains, *"The phrase `**procedural legitimate expectation'** denotes the existence of some **process right** the applicant claims to possess as the result of a promise or behaviour by the public body that generates the expectation ….. The phrase **'substantive legitimate expectation'** captures the situation in which the applicant seeks a **particular benefit or commodity**, such as a welfare benefit or a license, as the result of some promise, behaviour or representation made by the public body."*. [emphasis added]. In R. [BHATT MURPHY AND ORS] vs. INDEPENDENT ASSESSOR [2008 EWCA Civ. 755 at para. 33] Laws LJ succinctly described the two aspects by saying *"In the procedural case we find a promise or practice of notice or consultation in the event of a contemplated change. In the substantive case we have a promise or practice of present and future substantive policy. This difference is at the core of the distinction between procedural and substantive legitimate expectation."*.

It was the doctrine of ***procedural* legitimate expectation** that developed first in England. It applies to ensure natural justice. As Wade and Forsyth explain [at p. 450], *"Where some boon or benefit has been promised by an official (or has been regularly granted by the official in similar circumstances), that boon or benefit may be legitimately expected by those who have placed their trust in the promises of the official. It would be unfair to dash those expectations without at least granting the person affected an opportunity to show the official why his discretion should be exercised in a way that fulfils his expectation. Hence there has developed a doctrine of the protection of legitimate expectations primarily in the context of natural justice ….."*.

There are several well-known decisions on the doctrine of procedural legitimate expectation. While the scope and effect of the doctrine are also well known, it will perhaps not be out of place to briefly refer to three of the leading decisions and then attempt a broad description of the doctrine.

In R. vs. LIVERPOOL CORPORATION *ex parte* LIVERPOOL TAXI FLEET OPERATORS' ASSOCIATION [1972 2QB 299] Lord Denning, MR [at p.306], though he based his decision on estoppel, stated at p.308] *"It is said that a corporation cannot contract itself out of its statutory duties. ….. But that principle does not mean that a corporation can give an undertaking and break it as they please. So long as the performance of the undertaking is compatible with their public duty, they must honour it. ….. At any rate they ought not to depart from it except after the most serious consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it."*.

More than a decade later, the House of Lords decided COUNCIL OF CIVIL SERVICE UNIONS vs. MINISTER FOR THE CIVIL SERVICE [1984 3 AER 935], which is usually referred to as the "CCSU case". Considering the question of whether the petitioners had a procedural legitimate expectation to be consulted before the impugned instruction was issued, Lord Diplock [at p.949] formulated the principle that a decision by a public authority which negates a legitimate expectation of a petitioner would be subject to judicial review *if* the impugned decision affects the petitioner *" ….. (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."*. See also Lord Roskill [at p.954].

In the later case of R. vs. SECRETARY OF STATE FOR TRANSPORT *ex parte* RICHMOND-UPON-THAMES L.B.C [1994 1 WLR 74 at p.92], Laws J [as he then was in the High Court] stated, *"A public authority may, by an express undertaking or past practice or a combination of the two, have represented to those concerned that it will give them a right to be heard before it makes any change to its policy upon a particular issue which affects them. If so, it will have created a legitimate expectation that it will consult before making changes, and the court will enforce this expectation save where other factors, such as considerations of national security, prevail …. This species of legitimate expectation may be termed `procedural', because the content of the promise or past practice consists only in the holding out of a right to be heard: a procedural right."*.

If I am to attempt a description in broad terms and without any pretence of trying to achieve a comprehensive definition, a survey of decisions on issues of procedural legitimate expectation shows that: 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 - *vide:* R. vs. LIVERPOOL CORPORATION, CINNAMOND vs. BRITISH AIRPORTS AUTHORITY [1980 2 AER 368 at p. 374], O'REILLY vs. MACKMAN, AG OF HONG KONG vs. NG YUEN SHIU [1983 2 AC 629], R. vs. HOME SECRETARY *ex parte* KHAN [1984 1 WLR 1337], the CCSU case, FINDLAY vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [1985 AC 318], RE WESTMINSTER CC [1986 AC 688], R. vs. SECRETARY OF STATE FOR HEALTH *ex parte* UNITED STATES TOBACCO INTERNATIONAL INC. [1992 1 AER 212]; and R. vs. SECRETARY OF STATE *ex parte* RICHMOND-UPON-THAMES L.B.C.

To move on to the second aspect, the **doctrine of *substantive* legitimate expectation** emerged more recently in England, albeit hesitantly and with a considerable amount of judicial discussion on the scope and applicability of the doctrine.

Craig [at p. 679] observes that the doctrine of substantive legitimate expectation is based on the *"principle of legal certainty"* which requires that a person should be *"able to plan action"* on the basis of representations made to him by a public authority and which he has *"reasonably relied on".*

The petitioners' claim that they have a legitimate expectation to be absorbed into the Regular Police Force or into one of its specialised Units is *ex facie* an assertion that they have a *substantive* legitimate expectation to that effect. There have been relatively recent developments in the English Law on the doctrine of *substantive* legitimate expectation, which, as far as I am aware, have not yet been considered by our courts. As mentioned earlier, our courts have consistently applied the principles of English Law when considering claims based on alleged legitimate expectation. Therefore, I think it would be appropriate to examine, in some detail, the development of the doctrine of *substantive* legitimate expectation in England leading up to its present state.

The decision of Taylor J In R. vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT *ex parte* RUDDOCK [1987 2 AER 518] is, perhaps, when the doctrine of substantive legitimate expectation set sail on a voyage that, as will be seen later on, met turbulent seas and altered its course more than once. Taylor J [at p. 528-531] considered several previous decisions which had dealt with claims based on alleged legitimate expectations and concluded that the need to ensure `fairness' had resulted in the recognition of a doctrine of substantive legitimate expectation. The learned judge stated [at p. 531], *"On those authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord*

Roskill said, 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 ……". Three year later, in R. vs. INLAND REVENUE COMMISSIONERS *ex parte* MFK UNDERWRITING AGENCIES LTD [1990 1 WLR 1545 at p.1569-1570] , Bingham LJ, then on the High Court, sailed the same course based on `fairness' and described the concept of legitimate expectation saying, *"If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it …. The doctrine of legitimate expectation is rooted in fairness."*.

However, a few years later, in RICHMOND-UPON-THAMES L.B.C., Laws J took a different tack and commented [at p.93-94] that the reach of the doctrine of legitimate expectation only extended to bestow a procedural right to be heard before a change of policy was effected. The learned judge was of the view that a court was not entitled to give effect to a substantive expectation based on a test of `fairness' and that, instead, a decision by a public authority which negated a legitimate expectation of a petitioner citing a change of policy, could be set aside only if it was unreasonable in the WEDNESBURY sense - *ie:* a reference to the well-known power of a court to review a decision of a public authority on the ground that it was `irrational' or `unreasonable' in the sense described by Lord Greene MR in ASSOCIATED PROVINCIAL PICTURE HOUSES LTD vs. WEDNESBURY CORPORATION [1948 1 KB 223]. Perhaps it should be mentioned here that the other two traditional grounds of judicial review of administrative decisions - *ie:* `illegality' and `procedural impropriety' as Lord Diplock identified in the CCSU case [at p.950] - do not usually come into play in cases where a petitioner invokes the doctrine of substantive legitimate expectation since there would be no need to invoke the doctrine if the administrative decision could be successfully impugned on the other two grounds.

A year later, in R. vs. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD *ex parte* HAMBLE (OFFSHORE) FISHERIES LTD [1995 2 All ER 714] Sedley J [as he then was, on the High Court] navigated back to the course chartered by Taylor J in RUDDOCK. Sedley J emphatically affirmed that the doctrine of substantive legitimate expectation enabled a court to uphold and give effect to a substantive legitimate expectation on broader grounds than being confined to determining whether the public authority's change of policy or decision was unreasonable in the WEDNESBURY sense. The learned judge also observed [at p.723] that the aforesaid views of Laws J in RICHMOND-UPON-THAMES L.B.C. had been expressed *obiter*.

Sedley J stated [at p.724] that there was strong authority to hold that a court would, in appropriate cases, consider judicial review on the basis of substantive legitimate

expectation in order to ensure fairness in public administration and observed "….. *the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step."*.

Sedley J held [at p. 731] in his well-known formulation of the law which I will cite *in extenso* since this Court has referred to it with approval in DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE [1999 1 SLR 393 at p.403-404], *"Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment. 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. While 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 (as of course the lawfulness of the policy). To postulate this is not to place the judge in the seat of the Minister* ***... but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it****."* The learned judge went on to explain [at p.735] *"****While 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 (as of course does the lawfulness of the policy).*** *To postulate this is not to place the judge in the seat of the minister. As the foregoing citations explain,* ***it is the court's task to potency and reasonableness of the applicant's expectations****."* [emphasis added].

Thus, Sedley J held that, where a petitioner seeks judicial review of a decision by a public authority which has negated his substantive legitimate expectation and the public authority cites a change of policy as the reason for doing so, a court is not limited to looking at the *"bare rationality"* [in the WEDNESBURY sense] of the decision. Instead, the `test' formulated by Sedley J was that court should make its ruling by: weighing the reasons and necessity for the change of policy, on the one hand; against the significance of realising the expectation to the petitioner and the prejudice that will be caused to him if his expectation is negated, on the other hand; and then, decide whether the petitioner's substantive legitimate expectation carries so much weight that *"fairness"* demands that the expectation must prevail over the alleged public interest, or whether the public interest is so pressing that the expectation must give way to the public interest.

However, two years later, in R. vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT *ex parte* HARGREAVES [1997 1 WLR 906], the Court of Appeal steered back to the views of Laws J in RICHMOND-UPON-THAMES L.B.C. The Court of Appeal

disapproved of and described as *"heresy"* the aforesaid `test' proposed by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD. The Court of Appeal held in HARGREAVES that, where a decision of a public authority negated a legitimate expectation of the petitioner based on a change of policy, that decision could be quashed only if it was unreasonable in the WEDNESBURY sense - *vide:* Hirst LJ [at p.921] and Pill LJ [at p.924]. This approach in HARGREAVES has been criticised as being over-rigid by several writers including Craig [English Public Law and the Common Law of Europe (1998)] and Prof. Allan [1997 CLJ 246].

The wind turned again in R. vs. NORTH AND EAST DEVON HEALTH AUTHORITY *ex parte* COUGHLAN in which the Court of Appeal did not view with favour the aforesaid restrictive approach suggested in HARGREAVES. Referring to the test of `WEDNESBURY unreasonableness' applied in HARGREAVES, Lord Woolf MR, with Mummery LJ and Sedley LJ agreeing, reviewed many of the previous decisions and observed [at para. 74] *"Nowhere in this body of authority ….. is there any suggestion that judicial review of a decision which frustrates a substantive legitimate expectation is confined to the rationality of the decision."* Following that line of thought, the Court of Appeal distinguished the decision in HARGREAVES on the basis that it was specific to the facts of that case.

The Court of Appeal's decision in COUGHLAN was a watershed in the establishment of the doctrine of substantive legitimate expectation and requires some exposition here. In COUGHLAN, the petitioner was a severely disabled lady. In 1993, she and seven other comparably disabled patients were moved to Mardon House, which was a National Health Service facility built to care for such patients. The health authorities had assured the petitioner and the other patients that Mardon House would be their home for life. Despite this assurance, the health authorities sought to close Mardon House in 1998. The petitioner sought judicial review of that decision. The Court of Appeal affirmed the lower court's order quashing the decision to close Mardon House.

The Court of Appeal [at para. 57] identified the following three ways in which a court could examine and decide a claim that a public authority's change of policy or decision had negated a legitimate expectation of the petitioner arising from a previous assurance, policy or practice of the public authority: (a) the court may take the view that the circumstances of the case are such that it should *apply the test of WEDNESBURY unreasonableness* when reviewing the change of policy or decision; or (b) the court may decide that the previous assurance, policy or practice which gave rise to the claimed legitimate expectation *entitles the claimant to a consultation before the decision, policy or practice is changed in a manner which affects him*, unless there is a clear overriding reason to deny that consultation - *ie:* the `classic' instance of a *procedural* legitimate expectation as described earlier; or (c) where the court considers that the public authority has given a promise or followed a practice which has caused the claimant to have a legitimate expectation of a

substantive benefit and the public authority later intends to act in a different manner which will negate that substantive legitimate expectation, the court will *decide whether negating the substantive legitimate expectation is so unfair that it will amount to an abuse of process* and, if so, hold the public authority bound to give effect to the expectation.

Referring to the circumstances described in (c) above Lord Woolf, MR with Mummery and Sedley LJJ agreeing, formulated a `test' to be applied in such cases when the learned Master of the Rolls stated [at para. 57] *"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."***. Lord Woolf, MR went on to say *"….once the legitimacy of the expectation is established,* ***the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*** and *"….. **the court has when necessary to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised."*** [emphasis added].

Thus, in COUGHLAN, the Court of Appeal laid to rest the preceding controversy and emphatically established the principle that a court could exercise its powers of judicial review based on the doctrine of *substantive* legitimate expectation without being restricted to only the test of WEDNESBURY unreasonableness.

Craig comments [at p. 690] that *"the court in Coughlan preferred to use abuse of power as the criterion for testing whether a public body could resile from a prima facie legitimate expectation."* and also observes with regard to instances in which the doctrine of substantive legitimate expectation is applied, *"A power which has been abused has not been lawfully exercised. The court's task was to ensure that the power to alter policy was not abused by unfairly frustrating legitimate expectations."*.

It would appear that the approach set out in COUGHLAN is similar to that propounded by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD other than for the Court of Appeal going on to observe in COUGHLAN that the frustration of the substantive legitimate expectation should be *"so unfair"* that it will *"amount to an abuse of power"* - essentially, a difference of degree from Sedley J's `test' of *"fairness"*.

Following the decision in COUGHLAN, the doctrine of substantive legitimate expectation sailed on calmer waters and was recognised in a flotilla of later cases which adopted both the views in COUGHLAN that the doctrine was rooted in the prevention of abuse of power and the aforesaid `test' formulated by Lord Woolf, MR. Thus, in R. [BEGBIE] vs. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2000 1 WLR 1115 at

p.1124] Peter Gibson LJ cited the decision in COUGHLAN and the aforesaid `test' formulated by Lord Woolf, MR, with approval. Similarly, in R. [WALKER] vs. MINISTRY OF DEFENCE WALKER [2000 1 WLR 806] the House of Lords appears to have applied the `test' formulated in COUGHLAN - *vide:* Lord Hoffman at p. 816 and also Lord Slynn at p. 813. In R. [BIBI] vs. NEWHAM LBC [2002 1 WLR 237] Schiemann LJ [at para. 34] relied on the `test' formulated in COUGHLAN while commenting that this `test' requires *"refinement"*. In the later decision of the House of Lords in R. [REPROTECH (PEBSHAM) LTD] vs. EAST SUSSEX COUNTY COUNCIL [2003 1 WLR 348], Lord Hoffman [at para. 34] stated that the denial of a legitimate expectation could amount to an abuse of power and referred to the `test' formulated in COUGHLAN with apparent approval. Thereafter, in R. [BANCOULT] vs. SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS [2008 3 WLR 955] Lord Carswell stated [at para. 133] *"The principles governing what is now known as substantive legitimate expectation were outlined by the Court of Appeal in R v North and East Devon Health Authority, Ex p Coughlan in a judgment which has now become very familiar. They have not yet been considered in depth by the House, although in R (Reprotech (Pebsham) Ltd) v East Sussex County Council [para 34] Lord Hoffmann accepted Coughlan as correct."*. In PAPONETTE vs. AG OF TRINIDAD AND TOBAGO [2011 3 WLR 219], the Privy Council cited COUGHLAN with approval and Sir John Dyson, SCJ [at paras. 34 and 35] described COUGHLAN as the *"leading case"* on the doctrine of substantive legitimate expectation and applied Lord Woolf MR's `test' in deciding the case before him. Very recently in IN RE FINUCANE [2019 UKSC 7 at para.56] Lord Kerr in the House of Lords with Lady Hale, Lord Carnwath, Lord Hodge and Lady Black agreeing, also described COUGHLAN as *"the leading case"* on the doctrine of substantive legitimate expectation.

However, throughout this chorus of approval of the approach set out in COUGHLAN, the voice of Laws LJ has cautioned that restraint is necessary when applying the doctrine of substantive legitimate expectation since an indiscriminate application of Lord Woolf's `test' in COUGHLAN to every claim of substantive legitimate expectation, may result in unwarranted encroachments upon the ability of public authorities to change policy in the public interest. For that reason, Laws LJ advocated that the doctrine should be applied only in exceptional situations where the facts and circumstances of the case justified doing so - *vide*: Laws LJ's judgments in the Court of Appeal in BEGBIE, R. [NADARAJAH] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005 EWCA Civ. 1363] and R. [BHATT MURPHY AND ORS] vs. INDEPENDENT ASSESSOR.

The value of these cautionary exhortations enunciated by Laws LJ, have been recognised in several subsequent decisions of the courts in England. Therefore, Laws LJ's aforesaid views bear repetition here, as they set out the manner in which the `test' formulated in COUGHLAN has been moulded and are part of the law as it now stands in England. I should also mention here that, in fact, Lord Woolf, MR recognised in COUGHLAN [at

paras. 59-60 and 71] that the doctrine of substantive legitimate expectation was a developing area of the law and foreshadowed the concerns later voiced by Laws LJ.

In BEGBIE [at paras. 80-83] Laws LJ, in a separate judgment, fired the first shot across the bow of proponents of an unqualified acceptance of the doctrine of substantive legitimate expectation and pointed out that when Lord Woolf, MR formulated the aforesaid `test' in COUGHLAN, the learned Master of the Rolls himself referred to the fact that: (i) the promise on which the applicant relied on was one of great importance to her; (ii) was made to only a few individuals; and (iii) the consequences of the court compelling the health authorities to keep to their promise had only financial consequences to the health authorities *"and not of very great financial consequences at that.",* as De Smith observes [at para 12-050]. Drawing on that, Laws LJ expressed his view that judicial review on the basis of a negation of a substantive legitimate expectation would be unlikely to be available in cases where the public authority's change of policy *"….. involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court);"* since in such cases the judges cannot adjudicate [except on the basis of the WEDNESBURY unreasonableness] without the judges *"themselves donning the garb of policy-maker, which they cannot wear."*. Laws LJ observed that, on the other hand, judicial review might be justified in cases such as COUGHLAN where the *"act or omission complained of may take place on a much smaller stage, with far fewer players….. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. ….."*. Laws LJ went on to say that *"The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy. "*. In fact, the view that a claim of legitimate expectation is unlikely to succeed in cases where the alleged promise had been made to the public at large, had been expressed earlier in the House of Lords by Lord Keith in R. [FIRE BRIGADE UNION] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [1995 2 AC 413 at p.545] and was followed by Roch LJ in the Court of Appeal in R. [EMERY] vs. SECRETARY OF STATE FOR WALES *ex parte* EMERY [1998 4 AER 367 at p.374-375].

Five years later in NADARAJAH [at para. 69], Laws LJ reiterated that a case of legitimate expectation will be easier to establish where the promise has been made to *"an individual or specific group"*, and that it is often difficult to establish a case of legitimate expectation where the promise relied on concerns *"wide-ranging or `macro-political' issues of policy"*.

On similar lines, Laws LJ stated in the subsequent decision of BHATT MURPHY AND ORS [at paras.43-46] that, *"Authority shows that where a substantive expectation is to run the promise or practice which is its genesis ….. must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured ….. These cases [KHAN and COUGHLAN] illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class ….. The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of.".*

It may also be mentioned that in NADARAJAH [at paras. 68 and 69] Laws LJ referred to relevance of the test of proportionality in the application of the doctrine of legitimate expectation. The learned judge was of the view that *both* in cases of procedural legitimate expectation and cases of substantive legitimate expectation, the court should judge whether the public authority's decision to negate the legitimate expectation was a proportionate response in the light of the public duty or requirements of public interest claimed by the public authority. Laws LJ stated *"….. the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. ….. The balance ….. is not precisely calculable, its measurement not exact. ….. These cases have to be judged in the round."*

In BHATT MURPHY AND ORS, Laws LJ further stated [at para. 35] that where a petitioner claims that a public authority has negated his legitimate expectation and the public authority contends that public interest requires negating that expectation, a court should apply a *'rigorous standard"* when determining whether the claimed legitimate expectation should override the public interest and decide the issue *"by the court's own view of what fairness requires."*. In this connection, Laws LJ observed [at paras. 41-42] that cases where the doctrine of legitimate expectation is invoked *"….. are concerned with exceptional situations ….. a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. ….. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest …. . They have to decide the content and the pace of change. …. But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise*

be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself …..".

The Court of Appeal of England and Wales has referred to and approved of Laws LJ's aforesaid views in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS, in several subsequent decisions such as R. [MANCHESTER CITY COUNCIL] vs. ST. HELENS' B.C. [2009 EWCA Civ. 1348], R. [MANCHESTER CORPORATION OF HALL OF ARTS AND SCIENCES] vs. WESTMINSTER C.C [2011 EWCA Civ. 430], R. [GODFREY] vs. LONDON BOROUGH OF SOUTHWARK [2012 EWCA Civ. 500], R. [PATEL] vs. GENERAL MEDICAL COUNCIL [2013 EWCA Civ. 327], THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO and THE COMMISSIONERS FOR REVENUE AND CUSTOMS vs. HUTCHINSON [2017 EWCA 1075]. Laws LJ's aforesaid views have been applied by the High Court in England in a host of subsequent decisions of which I will cite only a representative few - *vide:* WHEELER vs. OFFICE OF THE PRIME MINISTER [2008 EWHC 1409 at para. 44], R. [HSMP FORUM UK LTD] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2009 EWHC 711], R. [CHESHIRE EAST BOROUGH COUNCIL, CHESHIRE WEST AND CHESTER BOROUGH COUNCIL] vs. SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS [2011 EWHC 1975], R. [DUDLEY METROPOLITAN BOROUGH COUNCIL] vs. SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2012 EWHC 1729], UNITED KINGDOM ASSOCIATION OF FISH PRODUCERS ORGANISATIONS vs. SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS [2013 EWHC 1959], R. [ALANSI] vs. LONDON BOROUGH OF NEWHAM [2013 EWHC 3722] and SOLAR CENTURY HOLDINGS LIMITED vs. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE [2014 EWHC 3677]**.**

In the Privy Council decision of THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO, Lord Carnwath [at paras. 79 to 121] reviewed the development of the law on substantive legitimate expectation and approved of the views expressed by Laws LJ in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS. The learned judge, citing Wade and Forsyth [at p. 460] stated that the doctrine would usually be *"narrowly construed"* by a Court. Lord Carnwath concluded by stating [at para. 121] *"In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is `clear, unambiguous and devoid of relevant qualification', has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a `macro-economic' or `macro-political' kind."*. It should be mentioned

here that in the later decision of IN RE FINUCANE, Lord Carnwath stated [at para. 158] that his reference to detrimental reliance being essential in the above passage, was limited to the particular facts in THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO and was not meant to be of general application.

In the recent decision of IN RE FINUCANE, the House of Lords referred with approval [at para. 60] to Laws LJ's view in BHATT MURPHY AND ORS that a *"rigorous standard"* should be applied when deciding whether a claim of a substantive legitimate expectation should prevail over a public authority's wish to change its policy in the public interest and also endorsed [at para. 58 and 75-76] Laws LJ's observation that a claim of substantive legitimate expectation is unlikely to succeed in cases involving *"macro-political"* issues.

On a survey of the decisions which have been available to me, it appears that the following principles may be extracted with regard to the doctrine of substantive legitimate expectation, as it now applies in England. I mention these principles only by way of an indication of how the courts have applied the doctrine in England. The statement set out below does not aim at being a complete summation of the doctrine of substantive legitimate expectation as it now stands in England. Indeed, it would be unwise to try to do so, particularly when this doctrine is evolving and since, as Bingham, MR cautioned in R. vs. INLAND REVENUE COMMISSIONERS *ex parte* UNILEVER PLC [1996 STC 681 at p. 690], *"The categories of unfairness are not closed, and precedent should act as a guide and not as a cage."*: Each case has to be decided on its facts and circumstances with the objective of the court being to ensure fairness, proportionality and justice and prevent an abuse of power, while, at the same time, protecting the public interest. These principles which the courts have developed will only serve to guide that endeavor.

(i) Where a public authority: acting *intra vires* [1]; has, by its words or conduct or a combination of both, given a specific, unambiguous and unqualified assurance [2] which is of a defined and limited nature with identifiable consequences [and not a representation of general policy affecting the entire public or dealing with *"macro-political"* matters] [2a]; to an individual or to a specified and identified group of persons [usually, but not necessarily, a small group] [3]; and has, thereby, created a substantive legitimate expectation held by that individual or group of persons that the public authority will act as it has assured [or, in the absence of a specific assurance of the nature described above, the public authority has followed an established and unambiguous practice which has created such an expectation; or the facts and circumstances of the dealings between the public authority and that individual or group of persons have created such an expectation] [4]; and the individual or group of persons have placed reliance on that assurance [usually, but not necessarily, detrimental reliance]; [5]; and the public authority subsequently seeks to negate that substantive legitimate

expectation on the basis that public interest requires it to do so; the court may, where it determines that the nature of the expectation, and the prejudice caused to that individual or group of persons by the public authority negating it, outweighs the public interest to such an extent that the negation of the substantive legitimate expectation would be unfair or unjust or disproportionate and constitute an abuse of power by the public authority; exercise its power of judicial review and hold that the substantive expectation is a legitimate one which the public authority is bound to fulfil [6] - *vide:* [1] R.[MATRIX SECURITIES LTD] vs. INLAND REVENUE COMMISSIONERS [1994 1 WLR 334 at p.357], HAMBLE (OFFSHORE) FISHERIES LTD [at p.731], BIBI [at p.244], FLANAGAN vs. SOUTH BUCKINGHAMSHIRE D.C. [2002 EWCA Civ. 690 at para.18], ROWLAND vs. THE ENVIRONMENT AGENCY [2003 EWCA Civ. 1885 at para.69], RAINBOW INSURANCE COMPANY LTD vs. FINANCIAL SERVICES COMMISSION, MAURITIUS [2015 UKPC 15 at para.52]; [2] R. [MFK UNDERWRITING AGENCIES LTD] vs. INLAND REVENUE COMMISSIONERS [at p.1570], R. [BAKER] vs. DEVON COUNTY COUNCIL [1995 1 AER 73 at p.88]; R. [ZEQIRI] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2002 UKHL 3 at paras. 44 and 64], R. [ASSOCIATION OF BRITISH CIVILAN INTERNEES (FAR EAST REGION)] vs. SECRETATY OF STATE FOR DEFENCE [2003 EWCA Civ. 473 at para. 71], R. [BEGUM] vs. RETURNING OFFICER FOR TOWER HAMLETS LBC [2006 EWCA Civ. 733 at para. 45], BANCOULT [at paras. 60 and 134], PAPONETTE [at paras. 28-30], R. [ELAYATHAMBY] vs. HOME SECRETARY [2011 EWHC 2182 at para.28], R. [ROYAL BROMPTON AND HAREFIELD NHS FOUNDATION TRUST] vs. JOINT COMMITTEE OF PRIMARY CARE TRUSTS [2012 EWCA Civ. 472 at para. 104], THE UNITED POLICYHOLDERS GROUP vs. AG OF TRINIDAD AND TOBAGO [at para.37]; and IN RE FINUCANE [at paras. 62 and 64]; [2a] BEGBIE, NADARAJAH and BHATT MURPHY and ORS; [3] R. [FIRE BRIGADE UNION] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [at p.545], R [EMERY] vs. SECRETARY OF STATE FOR WALES [at p.374-375], BEGBIE [at paras. 81-82], NADARAJAH [at paras. 68-69], BHATT MURPHY AND ORS [at paras. 43-46], WHEELER vs. OFFICE OF THE PRIME MINISTER [at paras. 43-44] and PATEL [at para. 84], [4] CCSU case [at p.401], UNILEVER PLC [at p.690-691], R. [LOADER] vs. POOLE B.C. [2009 EWHC 1288 (Admin) at para. 28] and ROWLAND vs. THE ENVIRONMENT AGENCY [at para. 68]; [5] R. [RAM RACECOURSES LTD] vs. JOCKEY CLUB [1993 2 AER 225 at p. 236-237], BEGBIE [at p. 1124 and p.1133], BIBI [at p.246], BANCOULT [at para. 60], BIBI [at para.29], OXFAM vs. HER MAJESTY'S REVENUE AND CUSTOMS [2009 EWHC 3078 at paras. 48-54], PATEL [at para. 84] and IN RE FINUCANE [at paras. 72 and 157-159]; [6] the aforesaid discussion on the decisions in HAMBLE (OFFSHORE) FISHERIES LTD, COUGHLAN, BEGBIE,

NADARAJAH, BHATT MURPHY and ORS and THE UNITED POLICYHOLDERS GROUP;

(ii) However, a substantive legitimate expectation will not be protected by judicial review, *inter alia*, if fulfilling the expectation will be in breach of the public authority's statutory duty [1] or where the person who claims the right has not dealt fairly with the public authority or where the granting of the expectation would have an unfair or unjust result [2] - *vide:* [1] AG OF HONG KONG vs. NG YUEN SHIU [at p. 638], RUDDOCK [at p. 531], R. [UNITED STATES TOBACCO INTERNATIONAL INC] vs. SECRETARY OF STATE FOR HEALTH [at p. 223], R. [WOOD] vs. SECRETARY OF STATE FOR EDUCATION [2011 EWHC 3256 at para. 76], MFK UNDERWRITING AGENCIES LTD [at p.1568] and SOLAR CENTURY HOLDINGS LTD vs. SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE [2014 EWHC Admin. 377 at para 90]; [2] MFK UNDERWRITING AGENCIES LTD [at p.1569], R. vs. MATRIX SECURITIES LTD [p.344-346 and p. 356] and R. [MULLEN] vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005 1 AC 1 at paras. 60-61].

Illustrative examples of a court upholding and enforcing a substantive legitimate expectation are found in COUGHLAN's case - where the disabled residents of Mardon House had been promised they could reside in that care home during their lifetime, and the court enforced that promise; and in PATEL's case - where a pharmacist who wished to qualify as a doctor had relied on the General Medical Council's representation that it would recognise a specified qualification and expended much money and effort to obtain that qualification, and the court compelled the General Medical Council to honour that representation.

The doctrine of legitimate expectation in India

Before examining the position of the law in our jurisdiction, a passing glance at the position in **India** is warranted as a matter of comparative interest. On an overview, it appears that, while the concept of procedural legitimate expectation has been regularly applied by the courts in India, there has been hesitation in recognising a doctrine of substantive legitimate expectation outside the confines of WEDNESBURY unreasonableness.

Thus, in UNION OF INDIA vs. HINDUSTAN DEVELOPMENT CORPORATION [1993 Indlaw SC 1085 at paras. 66-70] Reddy J in the Supreme Court observed *" …..the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken ….."*. The learned judge went on to say that the scope of a court granting relief on the basis of a substantive legitimate expectation is limited to instances where the decision of the public authority is *"arbitrary, unreasonable and not taken in public interest."* - *ie:* in the

WEDNESBURY sense. Reddy J went further and said *"If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision."* It is evident from his judgment that Reddy J was in agreement with and drew from the oft-quoted views of Mason CJ in his judgment for the majority in the High Court of Australia's decision of AG FOR NEW SOUTH WALES vs. QUIN [1990 HCA 21 at para. 37]. Mason CJ held that the courts could give effect only to procedural legitimate expectations and that the then emerging doctrine of substantive legitimate expectation had no place in the law since its recognition will result in *"curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances.".*

The approach set out by Reddy J in HINDUSTAN DEVELOPMENT CORPORATION has been followed in several subsequent decisions of the Supreme Court of India such as MADRAS WINE MERCHANTS ASSOCIATION vs. STATE OF TAMIL NADU [1994 Indlaw SC 923 at para 60], PTR EXPORTS [MADRAS] PVT LTD vs. UNION OF INDIA [1996 Indlaw SC 2973 at para.1], BAJAJ HINDUSTAN LTD vs. SIR SHADI LAL ENTERPRISES LTD [2011 1 SCC 640 at para. 37], GHAZIABAD DEVELOPMENT AUTHORITY vs. DELHI AUTO AND GENERAL FINANCE (PVT) LTD [1994 4 SCC 42 at para. 7], MP OIL EXTRACTION vs. STATE OF MADHYA PRADESH [1997 Indlaw SC 2198 at para. 6], NATIONAL BUILDING CONSTRUCTION CORPORATION vs. RAGHUNATHAN [1998 Indlaw SC 1178 at para. 18], PUNJAB COMMUNICATION LTD vs. UNION OF INDIA [1999 4 SCC 727 at paras. 43-49], UNION OF INDIA vs. INTERNATIONAL TRADING COMPANY [2003 5 SCC 437 at paras. 21-21], BANNARI AMMAN SUGARS LTD vs. CTO [2005 1 SCC 625 at para. 15] and UNION OF INDIA vs. CHOUDHARY [2016 Indlaw SC 156 at paras. 43-47] - *cf:* Lodha J's somewhat different views in MONNET ISPAT AND ENERGY LTD vs. UNION OF INDIA [2012 Indlaw SC 230].

In this background, Jain [Principles of Administrative Law 7th ed. at p. 1598] comments *"The doctrine [of] legitimate expectation has not yet struck roots in India as there seems to be some confusion in judicial thinking on the scope and range of the concept of legitimate expectation. The approach of the Indian Courts seems lagging behind the approach of the British Courts. ….. the concept is much more substantive and positive in nature than what Supreme Court has characterised it to be."*. Jain pertinently points out that, *"If an administrative action is irrational or unreasonable in the Wednesbury sense, then it is already invalid and there is no need further to invoke the legitimate expectation doctrine to illegitmize such action and the doctrine will then have no purpose or meaning."*.

The doctrine of legitimate expectation in our Law

The doctrine of legitimate expectation has been adopted and applied by our courts in a series of decisions. When doing so, our courts have consistently regarded the English Law on the use of prerogative writs in judicial review as being authoritative and have applied the principles of English Law when deciding the body of case law that has formed in Sri Lanka. Consequently, principles of English Law are a reliable guide, *mutatis mutandis*, when applying our case law and are applicable where there is a lacuna in our case law.

Thus, in WIJESEKERA vs. A.G.A MATARA [44 NLR 533 at p.538] De Kretser J referred to section 42 of the Courts Ordinance which conferred the power on the court to issue writs *"according to law"* and stated with regard to the issue of writs and the English Law that *"we have hitherto gone to that law for direction and guidance ….. writs would issue in the circumstances and under the conditions known to the English law."*. In NAKKUDA ALI vs. DE JAYARATNE [51 NLR 457 at p.460-461] Lord Radcliffe in the Privy Council also referred to section 42 of the Courts Ordinance and held *"….. it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court, may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon."*. In COLOMBO COMMERCIAL COMPANY LTD vs. SHANMUGALINGAM [66 NLR 26 at p.32] Weerasooriya SPJ simply said *"In the issue of these prerogative writs we follow the English law."*. In MENDIS vs. GOONAWARDENA [1978-79 2 SLR 322 at p.356] Vythialingam J, then in the Court of Appeal, observed that from 1873 onwards, the English Law had been applied by our Courts when dealing with writs. Finally, in COORAY vs. DIAS BANDARANAIKE [1999 1 SLR 1 at p.14-15] Dheeraratne J, with Gunawardena J and Weerasekera J agreeing, authoritatively held that Article 140 of the present Constitution [which confers the power to issue writs] uses the phrase *"according to law"* in the same manner as section 42 of the Courts Ordinance and that a long line of authority has held that the English Law is to be applied by the courts when considering the issue of writs. His Lordship emphatically held *"….. that proposition admits of no controversy."*.

It appears that the first reference by our courts to a concept akin to the modern day rule that a legitimate expectation can be legally protected was in KASSIM HAMIDU LEBBE vs. SAMOON [71 NLR 452 at p. 455] where Alles J stated that the defendant, who had developed a Crown land and paid rents to the Crown based on an assurance that a permit would be issued to him, had a *"reasonable expectation"* that the Crown would issue a permit to him. This case was decided within the province of private law.

To first look at the development of the doctrine of **procedural legitimate expectation** in our law, one of the earliest cases to invoke the concept of a procedural legitimate expectation in the firmament of public law was DAYARATNE vs. BANDARA [1983 BALJR

Vol.1 Part 1 p.23 at p.30]. In that case, Vythialingam J, then in the Court of Appeal, held that the petitioner who had possessed a liquor license for several years had *"a very real expectation that the license would be retained"* and should have been given *"an opportunity to be heard"* before the licensing authority decided to revoke his license. Although the court did not refer to the doctrine of procedural legitimate expectation, which [in 1978] was still nascent in the English Law, this was an instance of the court giving effect to what would now be termed a procedural legitimate expectation. More than a decade later, in SUNDARKARAN vs. BHARATHI [1989 1 SLR 46], Amerasinghe J, considering a set of facts which were similar to those in DAYARATNE vs. BANDARA, held [at p.61] that the petitioner was *"….. an existing license holder with legitimate expectations"* of being granted a hearing before any decision was taken not to renew his license. Accordingly, Amerasinghe J quashed a refusal to renew the petitioner's license and directed that an inquiry be held by the licensing authority to consider the petitioner's application for renewal of the license. This too was an instance of the Supreme Court giving effect to what is now termed a procedural legitimate expectation although it appears that the decisions of the English Courts in LIVERPOOL CORPORATION, AG OF HONG KONG, KHAN, FINDLAY and the CCSU case which had previously examined the concept of procedural legitimate expectations, were not brought to the attention of Amerasinghe J. Thereafter, in DISSANAYAKE vs. KALEEL [1993 2 SLR 135] Fernando J [at p. 186-187] cited the decisions in CINNAMOND, O'REILLY vs. MACKMAN, AG OF HONG KONG and the CCSU case which dealt with procedural legitimate expectations. Fernando J observed that *"pronouncements or undertakings of the authority concerned"* can give a person a *"legitimate expectation"* of the protection of the *audi alteram partem* rule even though he does not have *"legal rights"*. In PERERA vs. COMMISSIONER OF NATIONAL HOUSING [1994 3 SLR 316 at p.328-329] Grero J in the Court of Appeal cited the CCSU case and stated *"the right to be heard"* is the principle *"entrenched"* in the doctrine of legitimate expectation. Later, in LAUB vs. AG [1995 2 SLR 88 at p.95-96], Ismail J, then in the Court of Appeal, referred to SCHMIDT and AG OF HONGKONG and citing Lord Bridge in RE WESTMINSTER C.C. said *"The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation."*. In GUNAWARDENE and WIJESOORIYA vs. MINISTER OF LOCAL GOVERNMENT, HOUSING AND CONSTRUCTION [1999 2 SLR 263 at p;273], this Court referred to the petitioners' *"legitimate expectation"* of purchasing the relevant premises and recognized that the petitioners had a procedural legitimate expectation of being heard in an appeal to the Board of Review before the houses they were occupying as tenants were divested by the Commissioner of National Housing.

As far as I am aware, the first reported decision which specifically recognized that a doctrine of procedural legitimate expectation applies in Sri Lanka was the aforementioned decision of DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE. In

this case, the Ministry of Health called for applications from persons who wished to follow a training course leading to a certificate of competency as an Assistant Medical Officer. The petitioners applied and expected to commence the training course. However, the Ministry of Health then advised the petitioners that they should apply for training to follow a different course leading to a different [and lesser] qualification. The Ministry of Health did not give the petitioners a hearing before changing its decision. The petitioners invoked the fundamental rights jurisdiction of this Court claiming that their *"legitimate expectations"* of following the training course had been negated. They prayed for an order directing the Minister of Health to conduct the original training course for them. Amerasinghe J, with Gunasekera J and Weerasekera J agreeing, held [at p.412] *"No opportunity was given to the petitioners to argue why the change of policy should not affect them: …..When a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably ….."*. Thus, in DAYARATHNA, the Supreme Court held that, where a public authority has given a petitioner an assurance that it will follow a specified policy and then seeks to act in disregard of that assurance, a court will protect and enforce that petitioner's procedural legitimate expectation of being heard, before the public authority changes its policy. [However, the question of giving effect to that *procedural* legitimate expectation did not arise because the court went on to order that the training course be held and, thereby, gave effect to the petitioner's *substantive* legitimate expectation].

The first reported decision which specifically applied the doctrine of procedural legitimate expectation to compel a public authority to grant a hearing before it took a decision affecting the petitioner's legitimate expectation, appears to be MULTINATIONAL PROPERTY DEVELOPMENT vs. URBAN DEVELOPMENT AUTHORITY [1996 2 SLR 51]. Here, the respondent authority had assured the petitioner that a land would be leased to the petitioner and accepted payments from the petitioner on that account. The respondent authority subsequently notified the petitioner that there had been a change of policy and that the land would not be leased to the petitioner. The petitioner was not given an opportunity of being heard before that decision was taken. Ranaraja J applied the principles enunciated in the CCSU case and in KHAN and held that the petitioner had a legitimate expectation of being heard before the respondent authority took a decision in that regard, thereby upholding a procedural legitimate expectation. Accordingly, the Court of Appeal quashed the respondent authority decision and directed it to give the petitioner a hearing and, thereafter, make a determination according to law. Ranaraja J [at p.55] held, *"A substantive change in policy resulting from a change in the Executive Presidency cannot be avoided. But where a new policy is to be applied, the individuals who have legitimate expectations based on promises made by public bodies that they will be granted certain benefits, have a right to be heard before those benefits are taken away from them on the ground that there had been a change of policy."*.

Thereafter, in WICKREMARATNE vs. JAYARATNE, Gunawardana J, in the course of an instructive survey of the doctrine of legitimate expectation [both procedural and substantive], held [at p.176] that the petitioner had a procedural legitimate expectation of being heard before the respondents proceeded with the contemplated action. Further, in SAMARAWEERA vs. PEOPLE'S BANK [2007 2 SLR 362] and CHOOLANIE vs. PEOPLE'S BANK [2008 2 SLR 93], Bandaranayake J discussed the doctrine of procedural legitimate expectation and held [at p.388 and at p.112 respectively] that *"…...legitimate expectation must be given a broad interpretation as it could be used in more than one way utilizing the concept as the foundation for procedural fairness."*. See also Bandaranayake J's judgments in LORNA GUNASEKERA vs. PEOPLE'S BANK [SC No. 524/2002 decided on 20th June 2007], PERERA vs. NATIONAL POLICE COMMISSION [2007 BLR 14], PERERA vs. BUILDING MATERIALS CORPORATION [2007 BLR 59] and KARUPPANNAPILLAI vs. VISVANATHAN [2010 1 SLR 240 at. p.252].

To now turn to the decisions of our courts dealing with **substantive legitimate expectations**, in JAYASENA vs. PUNCHIAPPUHAMY [1980 2 SLR 43], Tambiah J, then in the Court of Appeal, citing the English decision of McINNES vs. ONSLOW FANE [1978 3 AER 211 at p.218] in which Megarry VC observed that a person who has applied for a license and has a *"legitimate expectation"* that it will be issued would be entitled to seek judicial review if license was not issued, quashed a cancellation of a license and issued a writ of *mandamus* compelling the validation of the license up to its expected term. Although Tambiah J did not refer to the doctrine of substantive legitimate expectation as we know it today, His Lordship granted reliefs which gave effect to a substantive legitimate expectation. A few years later, in MOWJOOD vs. PUSSADENIYA [1987 2 SLR 287] Sharvananda CJ issued a writ of *certiorari* quashing an eviction notice and restored the tenant to possession of the premises. The Court [at p. 297] proceeded, *inter alia*, on the basis that the tenant had a *"legitimate expectation"* that he would not be evicted from the premises unless the Commissioner of National Housing had previously notified the District Court that comparable alternative accommodation would be provided. The learned Chief Justice observed that this *"right and expectation"* gave the tenant sufficient interest to seek judicial review of the Commissioner's decision. Here too, although Sharvananda CJ did not refer to the doctrine of substantive legitimate expectation as we know it today, the court gave effect to a claimed substantive legitimate expectation. A few years later, in SANNASGALA vs. UNIVERSITY OF KELANIYA [1991 2 SLR 193] the petitioner had sought a writ of *mandamus* directing the University to confer a degree on him. It transpired that the University did not have the statutory power to do so until the required Rules were promulgated. The petitioner relied, *inter alia*, on AG OF HONG KONG and KHAN. Kulatunga J held that these decisions dealt with a breach of a legitimate expectation of a hearing and were inapplicable and observed that, in any event, the Privy Council had held in AG OF HONG KONG that a *"legitimate expectation"* could not be given effect, if doing so required a public authority to violate a statutory provision.

The decision in DAYARATHNA vs. MINISTER OF HEALTH AND INDIGENOUS MEDICINE appears to be the first reported instance of the doctrine of substantive legitimate expectation being expressly recognised and given effect by our courts. The facts were set out above. Amerasinghe J, with Gunasekera J and Weerasekera J agreeing, observed [at p.402] that *"Essentially, this is an appeal that the respondents should be required to act with fairness."* and went on to refer to the concept of substantive legitimate expectation as it had been developed by the courts in England.

Amerasinghe J [at p.403-404] quoted with approval Sedley J's views [cited above] in HAMBLE (OFFSHORE) FISHERIES LTD. Thereafter, Amerasinghe J went on to hold [at p.404] *"In my view, 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, but eventually, it seems to me, 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.****".* [emphasis added]. In this connection, Amerasinghe J added [at p.405], again citing Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD with approval, *"…. It is also well-established that it is a misuse of power for (a public body) to act unfairly or unjustly towards the private citizen when there is no overriding public interest to warrant it."*.

Thus, it is evident that Amerasinghe J's views on the doctrine of substantive legitimate expectation in DAYARATHNA, were similar to those of Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD, and that the aforesaid `test' set out by Amerasinghe J is on much the same lines as the `test' advocated by Sedley J in that case. Accordingly, in DAYARATHNA, Amerasinghe J has: (i) endorsed Sedley J's view that a court is not limited to the test of *"bare rationality"* [in the WEDNESBURY sense] when deciding whether to give effect to a substantive legitimate expectation which is threatened by a public authority's change of policy or change of decision; (ii) further, Amerasinghe J has set out a `test' which, in such situations, calls on the court to weigh the petitioner's legitimate expectation against the public interest which led the public authority's change of policy or change of decision and then decide whether the public authority has acted *"unfairly or unjustly"* because there was no *"overriding public interest"* to warrant the public authority's change of policy or change of decision - *ie:* in much the same manner Sedley J suggested in HAMBLE (OFFSHORE) FISHERIES LTD.

Applying the aforesaid `test', Amerasinghe J held in DAYARATHNA [at p.412-3413] *"….. there is a substantive requirement that there must be an overriding public interest if a change of policy were to set at nought an individual's prior expectation: R. v. Secretary of State for the Home Dept. (ibid); R v. MAFF, ex p. Hamble Fisheries (ibid). There was no such interest claimed in the matters before me…… 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.". On that basis, Amerasinghe J held that the legitimate expectation of the petitioners to follow the promised training would *"survive the policy change that has taken place"* and directed the Ministry of Health to hold the training course for the petitioners.

It should also be mentioned that, in arriving at his aforesaid views, Amerasinghe J considered the aforesaid views expressed in AG OF NEW SOUTH WALES vs. QUIN which had held that recognition of a doctrine of substantive legitimate expectation [as opposed to the ready recognition of the doctrine of procedural legitimate expectation] would constitute an undue fetter on administrative discretion. In this regard, Amerasinghe J stated [at p.404-406] that he was mindful of the *"reluctance of some courts"* to recognise a doctrine of substantive legitimate expectations. However, His Lordship went on to comment that *"the cogency of the 'no fettering' argument …. has been overstated*" and cited, with approval, Craig who has said [Legitimate Expectations: A Conceptual Analysis 1992 Vol. 108 LQR 79 at 90] *"Policies must of course be allowed to develop, and in this sense it is correct to say that they cannot be fettered. One cannot, therefore, ossify administrative policy, which may alter for a variety of reasons …. Nonetheless, the 'no fettering" theme must be kept within bounds. Where a representation has been made to a specific person, or where conditions for the application of policy in a certain area have been published and relied on, then the public body should be under a duty to follow the representation or the published criteria. This does not prevent it from altering its general policy for the future, but it should not be allowed to depart from the representation or pre-existing policy in relation to an individual who has relied, unless the overriding public interest requires it, and then only after a hearing."*.

In the later judgment of MERIL vs. DE SILVA [2001 2 SLR 10] Gunawardena J in the Court of Appeal upheld what was clearly a substantive legitimate expectation of the petitioner to be awarded compensation by the respondent. In the course of doing so, the learned judge stated [at p.30] *"As will now be apparent the decision …….. can be assailed or attacked, under the judicial review procedure, at least, on the two grounds enunciated above: (a) irrationality and (b) legitimate expectation provided the petitioner has the locus standi or sufficient interest to challenge the decision and the issue involved is a public law issue."*. In other words, Gunawardana J held that the respondent's failure to pay compensation could be successfully impugned *both* on the ground that it was irrational and *also* [and separately] on the ground that it negated a legitimate expectation of the employee. Thus, in this decision, the Court of Appeal recognised that a claim based on a substantive legitimate expectation may be judicially reviewed on a standard different to the test of WEDNESBURY unreasonableness. Soon thereafter, in WICKREMARATNE vs. JAYARATNE, Gunawardana J held that a court could grant relief, by way of judicial review, in the case of substantive legitimate expectations and stated [at p.178] *"The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing*

before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances." His Lordship held [at p.174-175] *"The doctrine of inconsistency or of legitimate expectation prohibits decisions being taken which confounds or disappoints an expectation which an official or other authority or person has engendered in some individual except, perhaps, where some countervailing facet of the public interest so requires - this being judged in the light of the harm being done to the applicant.".* Thus, although Gunawardana J did not refer to the previous judgment in DAYARATHNA in either of his aforesaid decisions, it is apparent the learned judge was of much the same view as Amerasinghe J in DAYARATHNA - *ie:* that, when a court has to decide whether to give effect to a petitioner's substantive legitimate expectation which is negated by a public authority's change of policy or decision, the court is not limited to the test of WEDNESBURY unreasonableness, but should, instead, weigh the substantive legitimate expectation against the public interest [as described earlier].

However, a markedly different approach was taken in the later decision of SIRIMAL vs. BOARD OF DIRECTORS OF THE CWE [2003 2 SLR 23]. In this case, Weerasooriya J [at p.28] observed that the aforesaid `test' formulated by Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD had been expressly disapproved of by the Court of Appeal in the later decision of HARGREAVES which held that, in cases of substantive legitimate expectation, a court can review a decision of a public authority only on the ground of WEDNESBURY unreasonableness. On that basis, Weerasooriya J, with Silva CJ and Ismail J agreeing, held [at p.29] *"The Court would only intervene if the decision maker's judgment was perverse or irrational. Thus the present position is that the substantive protection of legitimate expectation has to be sought on the more traditional approaches of the English Law namely (a) procedural protection and (b) protection in terms of 'Wednesbury' unreasonableness."*.

It is evident on reading Weerasooriya J's judgment that His Lordship considered the decision in HARGREAVES as having settled the law in this regard and that this was the reason Weerasooriya J stated in SIRIMAL that the *"present position"* is that judicial review on the ground of substantive legitimate expectation must be decided only *"in terms of 'Wednesbury' unreasonableness."* .

However, it appears that the attention of the court in SIRIMAL was not drawn to the decision of the Court of Appeal in COUGHLAN, which had been delivered *after* HARGREAVES. As mentioned above, in COUGHLAN, the Court of Appeal had distinguished the decision in HARGREAVES as being specific to the facts of that case and had rejected the idea that a claim of substantive legitimate expectation can only be upheld if the public authority's impugned change of policy or decision was unreasonable in the WEDNESBURY sense. Thus, the restrictive approach set out in HARGREAVES was no longer of general application when SIRIMAL was decided. Instead, at the time SIRIMAL

was decided, the decision in COUGHLAN was authority for the proposition that a court which is deciding a claim of substantive legitimate expectation should apply the `test' formulated in COUGHLAN of *"weighing"* the competing interests [as described earlier]. Weerasooriya J's attention was also not drawn to the fact that the decision of the Court of Appeal in COUGHLAN had been approved by the House of Lords in WALKER and in REPROTECH [PEBSHAM] LTD and also applied by the Court of Appeal in BIBI, all of which were decided *before* SIRIMAL.

Further, it appears that the attention of the court in SIRIMAL was not drawn to the previous decision of this Court in DAYARATHNA in which, as mentioned earlier, this Court had (i) taken the view that a court is not confined to the test of WEDNESBURY unreasonableness in cases of claimed substantive legitimate expectations; and (ii) set out a `test' which calls on the court to decide such cases by weighing the legitimate expectation against the public interest which led to the public authority's change of policy or change of decision [in the manner described earlier].

The aforesaid circumstances substantially diminish the weight of the view expressed in SIRIMAL that only the test of WEDNESBURY unreasonableness may be applied when a court is considering an application to review a public authority's change of policy which negates a petitioner's substantive legitimate expectation.

In any event a perusal of the judgment in SIRIMAL reveals that, although Weerasooriya J stated [at p.32] that the grounds relied on by the respondent to justify its change of policy *"have to be assessed in the light of the principle of unreasonableness"* crystallised in the WEDNESBURY description of unreasonableness, His Lordship does not appear to have proceeded to explicitly use that test to decide the case. In fact, a reading of the judgment suggests that, Weerasooriya J decided the case on a process of reasoning which resembles the `tests' formulated in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN. Thus, Weerasooriya J stated [at p.36], *"In view of the foregoing material, the decision of the 1st respondent Board to effect a change of policy in respect of extension of service of over 55 employees* ***is not warranted either upon considerations of public interest or upon known principles of fairness****….* ***The duty of the Court is to safeguard rights, as well as interests deserving protection based on legitimate expectations****."* and, on that basis, gave effect to the petitioner's claimed substantive legitimate expectation by granting the petitioners compensation in lieu of the salary they would have received up to the age of 60 years [emphasis added].

Subsequently, in SAMARAKOON vs U.G.C. [2005 1 SLR 119], Bandaranayake J held that a hand book published by the respondent gave the petitioners a *"legitimate expectation"* of being admitted to a Medical Faculty of a State University and directed that the petitioners be admitted to the relevant Medical Faculties This was another instance of the Court giving

effect to a substantive legitimate expectation. However, Bandaranayake J did not refer to the judgments in DAYARATHNA and in SIRIMAL. In JAYAWARDENA vs. FERNANDO [2008 BLR 255], the petitioner claimed that he had a legitimate expectation to be provided with a security escort. Sri Skandarajah J in the Court of Appeal cited the decisions in DAYARATHNA, WICKREMARATNE vs. JAYARATNE and SIRIMAL and stated [at p.259] *"The duty of the Court is to safeguard rights, as well as interests deserving protection based on legitimate expectations."* His Lordship gave effect to a substantive legitimate expectation by issuing a writ of *mandamus* directing the respondents to provide the petitioner with a security escort.

Three judgments which were delivered after the decision in SIRIMAL require closer consideration. In chronological sequence, the first of those is the judgment of Sisira De Abrew J in THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY [2010 2 SLR 262]. De Abrew J, then in the Court of Appeal, conducted a comprehensive survey of the doctrine of legitimate expectation, referring to several relevant decisions including LIVERPOOL CORPORATION, AG OF HONG KONG, KHAN, the CCSU case, COUGHLAN, BEGBIE, DAYARATHNA, WICKREMARATNE vs. JAYARATNE and SIRIMAL. His Lordship emphatically recognised the validity of the doctrine of substantive legitimate expectation when he stated [at p.296] *"Considering the above judicial decisions, I hold that the public authorities are bound by its undertakings/promises provided (1) that they do not conflict with its statutory duty (2) that there is an (no) overriding public interest justifying the departure from the earlier undertakings or promises."*. De Abrew J proceeded to give effect to the petitioners' substantive legitimate expectation by issuing writs quashing the respondent's decision to transfer the land to a third party and prohibiting the use of the land for any purpose other than as assured to the petitioners . It is evident that, when De Abrew J upheld the petitioner's substantive legitimate expectation, His Lordship did not consider it necessary to apply the test of WEDNESBURY unreasonableness as suggested in SIRIMAL. Instead, De Abrew J applied a `test' of examining whether there was *"an overriding public interest"* which justified the respondent authority negating the petitioner's substantive legitimate expectation. Thus, in THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY, the court adopted an approach similar to that taken in DAYARATHNA and in WICKREMARATNE vs. JAYARATNE.

The second is NIMALSIRI vs. FERNANDO [SC FR 256/2010 decided on 17th September 2015] in which Priyantha Jayawardena,PC J examined several aspects of the doctrine of legitimate expectation and succinctly summarised the doctrine. His Lordship observed [at p.9] that *"Legitimate expectation can be either based on procedural propriety or on substantive protection."* and went on to say *"In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the doctrine is based on the facts and circumstances of each case."*.

The third is the recent decision of GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL [CA PHC No. 155/2010 decided on 01st March 2019] in which Janak De Silva J in the Court of Appeal referred to the development of the two-fold doctrines of procedural legitimate expectation and substantive legitimate expectation in our jurisdiction. With regard to the latter, De Silva J pertinently observed that the decision in COUGHLAN, which set out the applicable law at that time, does not appear to have been considered by the court in SIRIMAL. His Lordship applied the aforesaid approach set out in COUGHLAN [in category (c) of the aforesaid three types of situations described in that decision] when he decided an application for judicial review in which the petitioner claimed that his substantive legitimate expectation had been frustrated by a change of policy of the public authority.

I should also mention SIRIWARDANA vs. SENEVIRATNE [2011 2 SLR 1 at p.8] in which Bandaranayake J, as she then was, observed that *"A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact."*. and [at p.11] *"…..the concept of legitimate expectation would embrace the principle that in the interest of good administration it is necessary for the relevant authority to act fairly."*. See also Bandaranayake J's judgment in WANNIGAMA vs. INCORPORATED COUNCIL OF LEGAL EDUCATION [2007 2 SLR 281] and Bandaranayake CJ's judgments in DE ALWIS vs. EDIRISINGHE [2011 1 SLR 18 at p.27] and KURUKULASOORIYA vs. EDIRISINGHE [2012 BLR 66]. Further, in 609 MANUFACTURERS (PVT) LTD vs. COMMISSIONER GENERAL OF EXCISE [CA Writ 242/2015 decided on 15th December 2016] Thurairaja J, then in the Court of Appeal, commented [at p. 4] that *"Legitimate expectation arises to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. It is based on the principles of natural justice and fairness, and seeks to prevent authorities from abusing power."*.

Very recently in ZAMRATH vs. SRI LANKA MEDICAL COUNCIL [SC FR 119/2019 decided on 23rd July 2019], Dehideniya J examined the rationale underlying the doctrine of legitimate expectation and observed [at p.9] that the doctrine *"….. ensures legal certainty which is imperative as the people ought to plan their lives, secure in the knowledge of the consequences of their actions. The perception of legal certainty deserves protection, as a basic tenet of the rule of law which this court attempts to uphold as the apex court of the country. The perception of legal certainty becomes negative when the authorities by their own undertakings and assurances have generated legitimate expectations of people and subsequently by their own conduct, infringe the so generated expectations."*. His Lordship went on to state [at p.11] that when deciding cases where a petitioner complains of the negation of a substantive legitimate expectation, *"The main function of this court in this type of case is to strike a balance between ensuring an administrative authority's ability to*

change its policies when required, and make sure that in doing so they do not defeat the legitimate expectations of individuals by acting unfairly and arbitrarily.".

Before concluding this survey of the decisions [of which I am aware] on the subject of substantive legitimate expectation in our jurisdiction, I should mention, for the sake of completeness, some other decisions which have referred to various specific *aspects* of the doctrine of legitimate expectation. In GALAPATHTHY vs. SECRETARY TO THE TREASURY [1996 2 SLR 109 at 114] Ranaraja J in the Court of Appeal held that a claim by a petitioner that he has a legitimate expectation of receiving a benefit based on an assurance given to him by a public authority, cannot succeed if he has breached a condition specified in that assurance as one with which he must comply in order to receive the benefit. In VASANA vs. INCORPORATED COUNCIL OF LEGAL EDUCATION [2004 1 SLR 154 at p.163] Amaratunga J, then in the Court of Appeal held that a court will not give effect to a legitimate expectation which is claimed upon the basis of an assurance given due to a mistake of fact and subsequently withdrawn when the mistake became known. In TOKYO CEMENT (COMPANY) LTD vs. DIRECTOR GENERAL OF CUSTOMS [2005 BLR 24 at p.27-28] Silva CJ, citing Lord Greene, MR in MINISTER OF AGRICULTURE AND FISHERIES vs. HULKIN [1950 1 KBD 148 at p.154], held that a representation not permitted by law and made *ultra vires*, cannot found a legitimate expectation. This approach was followed by the Court of Appeal in CEYLON AGRO-INDUSTRIES LTD vs. DIRECTOR GENERAL OF CUSTOMS [CA Writ 622/2009 decided on 14th February 2011 at p.8], 609 MANUFACTURERS (PVT) LTD vs COMMISSIONER GENERAL OF EXCISE [at p.6-7] and, more recently, in PUSHPARAJA vs. UC OF NAWALAPITIYA [CA PHC No. 161/2008 decided on 15th March 2019 at p.6]. In FERNANDO vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD [2006 3 141 at p.147] Amaratunga J observed that a legitimate expectation *"….. could 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 RATHNAKUMARA vs. THE PGIM [SC Appeal No. 16/2014 decided on 30th March 2016] Priyantha Jayawardena,PC J held [at p.13] that a legitimate expectation may arise from the contents of subordinate legislation. In the aforesaid decision of KALUARACHCHI vs. CEYLON PETROLEUM CORPORATION, Murdu Fernando J held [at p. 11-12] that the petitioner could not succeed with the claim that he had an enforceable substantive legitimate expectation because the alleged assurance relied on to create the expectation was *"….ambiguous, vague and not clear and thus will not create a legitimate expectation."*.

Having concluded the aforesaid survey, there is an issue of some importance which needs to be examined. That issue arises from the fact that two decisions of the Supreme Court - in DAYARATHNA and in SIRIMAL - refer to two distinctly different `tests' to be applied by a court when a petitioner claims that his substantive legitimate expectation has been negated by a public authority's change of policy or change of decision - *ie:* Amerasinghe J

in DAYARATHNA was of the view that a court is not confined to the test of WEDNESBURY unreasonableness and held that the court should weigh the competing interests and decide whether the public authority has acted *"unfairly or unjustly"* [in the manner described earlier]. In contrast, Weerasooriya J held in SIRIMAL that a court is confined to applying the test of WEDNESBURY unreasonableness.

Somewhat unusually, it appears that the issue of these two different `tests' has not yet been specifically examined by this Court. Perhaps I should qualify that statement by saying I am not aware of any decision of the Supreme Court which has examined this issue, though the aforesaid decision of the Court of Appeal in GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL touches on the issue. It is clearly time for this Court to examine this ambiguous position and identify which `test' is to be applied.

In order to do so, it will be helpful to first turn to the English Law which, as mentioned earlier, will, *mutatis mutandis*, guide the application of our case law and apply where there is a *lacuna* in our case law. In this regard, as mentioned earlier, the decision of Lord Woolf, MR in the Court of Appeal in COUGHLAN [and, previously, the decision of Sedley J in the High Court in HAMBLE (OFFSHORE) FISHERIES LTD] held that, in such cases, the court is *not* confined to reviewing the public authority's acts on the test of WEDNESBURY unreasonableness and, instead, should weigh the competing interests and then decide by applying a yardstick of what was described as `fairness' by Sedley J and `unfairness which will amount to an abuse of power' by Lord Woolf, MR. As mentioned earlier, during the nearly two decades since COUGHLAN was decided, the aforesaid approach taken in COUGHLAN has been consistently approved by the House of Lords [and Privy Council] and applied by the Court of Appeal and High Court, albeit subject to the aforesaid restrictions identified by Laws LJ in BEGBIE, NADARAJAH and BHATT MURPHY and ORS.

To move on to our law, it should be mentioned here that COUGHLAN had not been decided at the time Amerasinghe J specifically approved of Sedley J's `test' in HAMBLE (OFFSHORE) FISHERIES LTD. However, as observed earlier, Lord Woolf, MR's `test' in COUGHLAN is on much the same lines Sedley J's `test'. Thus, the weight of the English Law stands firmly behind the approach formulated by Amerasinghe J in DAYARATHNA.

Further, Dehideniya J's recent observation in ZAMRATH vs. SRI LANKA MEDICAL COUNCIL [at p.9-10] which I cited earlier, makes it clear that His Lordship was of the view that, in these instances, a court has to *"strike a balance"* between the legitimate expectation of the petitioner, and the public authority's change of policy or change of decision and ensure that the legitimate expectation is not defeated *"unfairly or arbitrarily"*. In taking this view, Dehideniya J cited Sedley J in HAMBLE (OFFSHORE) FISHERIES LTD and Amerasinghe J in DAYARATHNA with apparent approval and had no recourse to

the decision in SIRIMAL. It is evident that the approach taken by this Court in ZAMRATH vs. SRI LANKA MEDICAL COUNCI, is on similar lines to that voiced in DAYARATHNA.

It has to be also kept in mind that several decisions of the Court of Appeal referred to above - *ie:* MERIL vs. DE SILVA, WICKREMARATNE vs. JAYARATNE, THIRIMAWITHANA vs. URBAN DEVELOPMENT AUTHORITY and GALLE FESTIVAL GUARANTEE LTD vs. GALLE MUNCIPAL COUNCIL - have all formulated and applied approaches on broadly similar lines to that set out in DAYARATHNA, when deciding cases of this type.

Turning to the decision in SIRIMAL, I have not been able to find a subsequent reported decision which has followed the view set out therein that, in cases of this type, a court is confined to the test of WEDNESBURY unreasonableness. In any event, for the reasons I set out in some detail earlier on and need not reiterate here, the authority of the decision in SIRIMAL is significantly diminished.

Thus, the weight of authority in our law is clearly in favour of the aforesaid approach formulated by Amerasinghe J in DAYARATHNA.

I should also mention here that, quite apart from the *cursus curiae* in our jurisdiction which broadly follows the approach in DAYARATHNA, there is good reason why it not appropriate, in cases of this type, to confine a court to reviewing the public authority's decision on the traditional test of unreasonableness described in WEDNESBURY.

That is because the test of WEDNESBURY unreasonableness is usually applicable in circumstances where there is a *single* exercise of power by the public authority - *ie:* when it takes a decision affecting a right of the petitioner [or, in some cases, affecting an interest recognised by law such as in the `License cases'] - and the petitioner says that this decision should be set aside. In such cases, the traditional test of WEDNESBURY unreasonableness is usually adequate to ascertain whether this `single' exercise of power by the public authority amounts to an abuse of its power and, therefore, it should be struck down.

However, in cases where the petitioner claims a substantive legitimate expectation, there is typically a *dual* exercise of power by the same public authority. First, an exercise of the public authority's power when it gave the assurance to the petitioner which created his expectation; and, later, another exercise of the same public authority's power when it changed its policy or decision relating to the previous assurance and, thereby, negated the initial expectation which it had created by its previous assurance. A petitioner who claims a substantive legitimate expectation is caught between these two exercises of power by the same public authority. He relies on the first and challenges the second but nevertheless,

his case for judicial review is inextricably linked to both exercises of power. Thus, in COUGHLAN, Lord Woolf, MR commented [at para. 66] that in this type of case the individual is *"trapped"* between "*two lawful exercises of power (the promise and the policy change) by the same public authority"*

In cases of this type, the first exercise of power [*ie:* by which the public authority gave an assurance which created a substantive legitimate expectation] underlies the petitioner's case and the court would typically only be required to look at the legality and procedural propriety of the assurance and not its rationality. Therefore, if a court is confined to applying the traditional test of WEDNESBURY unreasonableness in cases of substantive legitimate expectation, the court will be effectively limited to testing *only* the *latter* exercise of power [*ie:* by which the public authority changed its previous policy or decision] by asking whether it is unreasonable in the WEDNESBURY sense. However, in the majority of cases, that second exercise of power is very likely to satisfy the low bar set to decide what is deemed to be `reasonable' in the traditional WEDNESBURY test which, notwithstanding Lord Cooke's observations in R. vs. CHIEF CONSTABLE OF SUSSEX, *ex parte* INTERNATIONAL TRADER'S FERRY LTD [1999 2 AC 418 at p. 452], permits the court to consider only the *"bare rationality"* of the public authority's second exercise of power. Thus, confining judicial review to the test of WEDNESBURY unreasonableness in cases where a substantive legitimate expectation is claimed, will, in many cases, reduce the doctrine of substantive legitimate expectation to futility. As Lord Woolf, MR observed in COUGHLAN [at para. 66] referring to the aforesaid second exercise of power by the public authority, *"In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process."*

Therefore, it is important that, in cases of this type, a court which is considering judicial review must necessarily consider and evaluate *both* competing interests - *ie:* the assurance [or practice or circumstances] 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. Considering only one of these competing interests would place the court in the abhorrent realm of inequity.

It is for these reasons that, in my view, applying a test of WEDNESBURY unreasonableness is inappropriate in cases which consider a substantive legitimate expectation. Further, as I mentioned, the authority of the decision in SIRIMAL is diminished for the reasons set out earlier. Consequently, it is with the great respect that I am compelled to say that I am unable to agree with the views expressed in SIRIMAL with regard to the `test' to be applied in cases of this type.

Instead, upon a careful consideration of the issues which arise in this type of case, I am in respectful agreement with the general lines of the `test' set out in DAYARATHNA [and the similar `tests' formulated in HAMBLE (OFFSHORE) FISHERIES LTD and COUGHLAN] which have been described earlier.

An aspect of the [similar] `test' set out in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN is that the character of this `test' resonates with the `principle of proportionality' which originated in European jurisdictions and has been often referred to by the English Courts and also, in some instances, by our Courts - *eg:* in the area of fundamental rights by Fernando J in AYOOB vs. IGP [1997 1 SLR 412 at p. 419] and in the area of administrative law by Gunawardana J in the Court of Appeal in PREMARATNE vs. UGC [1998 3 SLR 395 at p.418] and NEIDRA FERNANDO vs. CEYLON TOURIST BOARD [2002 2 SLR 169 at p.187] and by Gooneratne J in GOONERATNE vs. SRI LANKA LAND RECLAMATION AND DEVELOPMENT CORPORATION [CA 412/2007 decided on 24th February 2011 at p. 12]. Thus, in NADARAJAH, Laws LJ [at paras. 68 and 69] referred to the relevance of the principle of proportionality in the application of the doctrine of legitimate expectation and observed that, in cases where a legitimate expectation is claimed, the court should judge whether the public authority's decision to negate the legitimate expectation was a *proportionate response* in the light of the public duty or requirements of public interest claimed by the public authority. As mentioned earlier Laws LJ stated in this connection, *"….. the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case."*

There is another aspect of the character of the `test' set out in HAMBLE (OFFSHORE) FISHERIES LTD, DAYARATHNA and COUGHLAN which must be examined. That is the issue that, when Sedley J, Amerasinghe J and Lord Woolf, MR set out broadly similar `tests' in all three of these cases, they did so in general terms. As a result, these `tests', by their very nature, vest a great deal of discretion in the court, thereby leaving considerable room for the hazards of subjectivity and inconsistency which can accompany an exercise that calls on the court to weigh two very different competing interests - one a private interest and the other the public interest - and then apply the fluidly supple and unstructured standards of *"fairness",* "*injustice"* and *"abuse of power"* to judicially decide which of those competing interests should prevail. *"Fairness"*, as Lord Wilson said in R. [MOSELEY] vs. HARINGEY LONDON BOROUGH COUNCIL [2014 1 WLR 3947 at para. 24], *"is a protean concept.…."* and it can be correctly said that the concepts of "*injustice"* and *"abuse of power"* are equally variable. Needless to say, each individual's perception of these concepts will be different.

In my view, these factors could make the doctrine of substantive legitimate expectation an unruly and 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. The result would be the standards applied to judicial review in cases of this type varying widely from court to court and from case to case. That, in turn, would reduce the doctrine to *"little more than a mechanism to dispense palm-tree justice"* as once observed by a writer [Watson in SLS Journal Vol. 30 Issue 4 at p.633-652]. The author was referring to Deborah, wife of Lapidoth, who is said to have dispensed judgments under a date palm tree in the land of Ephraim [Book of Judges KJV 4:4-5].

It seems to me that it was this danger which led Laws LJ, in BEGBIE, NADARAJAH and BHATT MURPHY AND ORS, to introduce some guideposts which serve to mark a course on which the doctrine of substantive legitimate expectation could run in a more orderly manner. As mentioned earlier, Laws LJ was of the view that the successful invocation of the doctrine of substantive legitimate expectation would usually require that: (i) the assurance [or practice or circumstances] relied on was specific, unambiguous and unqualified [Laws LJ used the words *"pressing and focussed"*]; (ii) the assurance was given to [or the practice or circumstances were applicable to] an individual or to an identified group and not to innominate or undetermined persons or to the *"public at large"*; (iii) the substance of the assurance [or the result expected from the practice or the circumstances] was definable and limited in scope and applicable to the individual or identified group relying on the assurance [or practice or circumstances] and not to the public at large; (iv) the court is able to reliably assess the consequences of giving effect to the claimed expectation; and (v) the questions in issue are not those relating to *"general policy affecting the public at large or a significant section of it"* nor those in the *"macro-political field"* since deciding such issues would require judges *"themselves donning the garb of policy-maker, which they cannot wear."*.

I am in respectful agreement with these guidelines formulated by Laws LJ. It seems to me that they arise from prudent common sense and offer a practical road map which can direct the application of the doctrine of substantive legitimate expectation. It is often the case that common sense is the genesis of the law, particularly when ideals of justice thrust forth the elemental principles, common sense, which is usually drawn from prudence and practicality, must step in to shape and refine these principles and make the law. Further, the rule that the English Law is to apply, *mutatis mutandis*, where there is a *lacuna* in our law, gives authority to the contention that these guidelines can be readily applied by our courts.

On an intrinsically related note, it is necessary to keep in mind the long-recognised principle that the larger public interest requires that public authorities are able to adjust, alter, amend and, if necessary, abandon previous policies and decisions when it is

necessary to do so in the pursuance of their duties and in the public interest. As Sedley J said in HAMBLE (OFFSHORE) FISHERIES LTD [at p. 731], public authorities should be able *"to formulate and to reformulate policy"* when necessary. On the same lines, Lord Diplock observed in HUGHES vs. DEPARTMENT OF HEALTH [1985 AC 776 at p. 875], *"Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."*.

It hardly needs to be said here that an indiscriminate application of the doctrine of substantive legitimate expectation to every change of policy or change of decision which affects a person's expectations, could run counter to that normative value. Accordingly, I am in respectful agreement with the aforesaid views of Laws LJ in BHATT MURPHY AND ORS who held [at para. 35] that a court should apply a *'rigorous standard"* when determining whether the claimed legitimate expectation should override the public interest and observed [at paras. 41-42] that cases where the doctrine of substantive legitimate expectation can be successfully invoked *"….. are concerned with exceptional situations ….."*. In such cases, the duties placed on a court, in the course of judicial review of administrative action, to ensure that public authorities act fairly and to strike down abuse of power, justify the court making the public interest defer to the substantive legitimate expectation. Needless to say, in cases where the court considers the public interest in issue is of high importance, the public interest will usually prevail over the prejudice caused to the individual.

In my view, the resulting position is that the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England. I have earlier made an attempt at setting out the applicable principles when considering the doctrine as it now stands in the English Law. Those principles will also apply in our jurisdiction, and here too, subject to the necessity of deciding each case on its own facts and circumstances keeping in mind the court's objective of ensuring fairness, proportionality and justice and preventing an abuse of power while, at the same time, protecting the public interest. It is inherent in such an exercise, that these principles taken from precedent would be a guide and not hard and fast rules.

To sum up, I am of the view that, in cases where a court is deciding a claim that a petitioner's substantive legitimate expectation has been negated by a public authority's change of policy or change of decision which is said to have been adopted in the public interest, the court should adopt a two-step approach. First, to examine whether the constituent elements of the claimed substantive legitimate expectation are in line with the principles referred to earlier which describe the usual characteristics of a substantive legitimate expectation that a court may be inclined to protect and enforce. If those constituent elements or such of them as are deemed appropriate in the facts and

circumstances of the case are present, the second step would be to apply a `test' on the broad lines of that set out in DAYARATHNA. To be more specific, when doing so: the court should weigh the character and substance of the expectation and the prejudice caused to the petitioner by its frustration, on the one hand; against the importance of the public interest which led to the public authority's change of heart, on the other hand; and then decide whether that exercise of weighing the competing interests leads to the conclusion that the petitioner's expectation is of such weight and the consequences of its frustration are so prejudicial to him when compared to the public interest relied on by the public authority, that the public authority's decision to change its policy and negate the expectation was disproportionate or unfair or unjust and amounted to an abuse of power which should be quashed; **or** whether the decision to change the policy should stand because the public authority has acted proportionately, fairly and justly when it decided that the petitioner's substantive legitimate expectation could not be granted since public interest demanded a change of policy.

In my view, a `test' of this nature satisfies the aforesaid policy requirement that a rigorous standard should be applied in cases where the doctrine of substantive legitimate expectation is invoked so as to avoid unnecessarily fettering administrative discretion to change policies or decisions where the public interest requires doing so.

Before moving on to determining the petitioners' application, there are three other matters relating to the doctrine of legitimate expectation, which I would like to briefly mention.

Firstly, it seems to me that, although procedural legitimate expectations and substantive legitimate expectations have been traditionally viewed as two different categories which have to be decided upon different criteria, they are, in reality, often connected and are two shades in one spectrum. It is often the case that the procedural expectation segues into the substantive one, with no discernible pause or break. To borrow a phrase used by Laws LJ in BEGBIE [at para.80], though in a different context, procedural legitimate expectations and substantive legitimate expectations are not *"hermetically sealed"* categories. Instead, as Lord Woolf, MR observed in COUGHLAN [at para. 59], there is often *"…..the difficulty of segregating the procedural from the substantive….."*. An example is the decision in DAYARATHNA where Amerasinghe J held that the petitioner had a procedural legitimate expectation of being heard but did not give effect to that procedural expectation, and, instead, gave effect to the petitioner's substantive legitimate expectation of following the training course. As seen from the previous discussion, the guidelines that should be applied when deciding either type of legitimate expectation are broadly similar. The significant difference being that, in cases where only a procedural legitimate expectation to be heard is invoked, the court would usually apply a liberal standard and be more ready to grant that expectation so as to ensure fairness, and refrain from doing so only in exceptional circumstances where the public interest requires that the petitioner cannot be

given a hearing. On the other hand, in cases where a substantive legitimate expectation is claimed, the court would apply a more rigorous standard, for the reasons I mentioned earlier. However, it is unwise and unnecessary to make too much of seemingly different standards or rules, as they are all aspects of the same approach which, in all cases where a legitimate expectation is claimed, require the court to balance the expectation and the public interest and decide which should prevail in order to ensure proportionality, fairness and justice and quash an abuse of power. In this connection, it is apt to recall Lord Sumption's recent observation in R. [GALLAHER GROUP LTD] vs. THE COMPETITION AND MARKETS AUTHORITY [2018 UKSC 25/ 2018 2 WLR 1583 at para. 50] that, *"In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories.".*

Next, as mentioned earlier, the law, as it presently stands, is that an assurance given *ultra vire*s by a public authority, cannot found a claim of a legitimate expectation based on that assurance. But, it has to be recognised that there may be many instances where a petitioner who relies on an assurance given by a public authority or one of its officials, reasonably believed that the public authority or official who gave it to him was acting lawfully and within their powers. It is also often the case that an individual who deals with a public authority will find it difficult to ascertain the extent of its powers and those of its officials. In such cases, much hardship will be done to an individual who *bona fide* relies on an assurance given to him by a public authority or one of its officials and is later told the assurance he relied on and acted upon, sometime with much effort and at great cost to him, cannot be given effect to because of a flaw regarding its *vires*. In such instances, the principle of legality comes into conflict with the principle of certainty and, the law as it stands now, is that the illegality of the assurance will defeat the value of certainty which contends that the assurance should be given effect. However, that outcome can cause grave prejudice to an individual, for no conscious fault of his own. There has been much discussion among academic writers on how the law should resolve this dilemma. In ROWLAND vs. THE ENVIRONMENT AGENCY, the Court of Appeal referred to these issues and Mance LJ observed [at para. 152] that, in view of recent decisions of the European Court of Human Rights, a public authority's assurance having being given *ultra vires "can no longer be an automatic answer under English Law to a case of legitimate expectation."*. Peter Gibson LJ [at para. 85] referred to the decision of the European Court of Human Rights in PINE VALLEY DEVELOPMENTS vs. IRELAND [199114 EHRR 319] and commented on the possibility, in cases where the legitimate expectation is based on an assurance which turns out to have been given *ultra vires*, of the court ordering *"other relief which it is within the powers of the public body to afford, e.g. the benevolent exercise of a discretion available to alleviate the injustice or payment of compensation."*. These questions will have to await consideration by our courts on a suitable occasion.

Thirdly, it is well established that this Court will take into account an arbitrary or unjust frustration of a petitioner's legitimate expectation by a public authority when determining whether there has been a violation of that petitioner's fundamental rights guaranteed by Article 12 (1) of the Constitution. As Amaratunga J held in FERNANDO vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD at p.147], *"The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126 (4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to a denial of the right to equal protection of the law guaranteed by the Constitution.".* Similarly, in NIMALSRI vs. FERNANDO Priyantha Jayawardena,PC J stated [at p.8] *"In Dayaratne v. Minister of Health and Indigenous Medicine Amerasinghe J. held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution."*. In FOOD CORPORATION OF INDIA V. M/S KAMDHENU CATTLE FEED INDUSTRIES [1992 Indlaw SC 426] Verma J, speaking for the Supreme Court of India, outlined the rationale for the aforesaid principle when he said, [at paras. 10-12],*"…… the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet ….. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case ….. this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law."*.

Determination

As mentioned at the outset, the first issue before us is to decide whether the petitioners have succeeded in establishing that they have a *"legitimate expectation"* of being absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units]. It is only if the petitioners have succeeded in doing so, that it will become necessary to examine whether such a *"legitimate expectation"* has been arbitrarily or irrationally negated by the respondents, thereby, making it incumbent on this Court to protect and enforce that *"legitimate expectation"* because its negation has violated the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

As evident from the principles I endeavoured to set out earlier, the first characteristic which will sustain a petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner [or, alternatively, that the respondent

public authority has followed an established and unambiguous practice which entitled the petitioner to have a legitimate expectation the public authority will continue to act in that manner or that the facts and circumstances of the dealings between the public authority and the petitioner have created such an expectation].

Turning to the facts before us, the documents establish that the petitioners were appointed to the post of Development Assistants in the Department of Police in an unmistakably `civilian capacity' and that they continued to serve in that `civilian capacity'. Thus, the letter marked "P2" by which the petitioners were attached to the Department of Police with the designation of "Community Relations Officers", makes it clear that this was done as part of the Graduate Scheme and not as a precursor to appointment to the Sri Lanka Police Force as police officers. The subsequent letter marked "P7" by which the petitioners were appointed to the posts of Development Assistants also makes it clear that the appointment was made as part of the Graduate Scheme and that the petitioners would serve as public officers in the Public Service and not as police officers in the Sri Lanka Police Force. Thereafter, the Circulars and letters marked "P9", "P10" and "P11" issued by the Inspector General of Police referring to the duties of Development Assistants in the Department of Police, make it clear that the petitioners' duties were in fields such as community relations, developing a healthy relationship between the Sri Lanka Police Force and the community and the collection of data. Such duties are very different to the ordinary duties of police officers in the Sri Lanka Police Force which, as stated in section 3 and section 56 of the Police Ordinance, are *"the protection of persons and property"*, *"to use his best endeavours and ability to prevent crimes, offences, and public nuisances", "to preserve the peace"*, *"to apprehend disorderly and suspicious characters"* etc. Thus, the Circular marked "P14(f)" issued by the Inspector General of Police clearly differentiates between police officers serving in the Sri Lanka Police Force on the one hand and persons serving as Development Assistants in the Department of Police on the other hand.

The fact that the petitioners were, at all times, regarded as public officers in the Public Service who were serving in a `civilian capacity' in the Department of Police and not as police officers in the Sri Lanka Police Force, is well illustrated by Clause 7 of the document marked "P21" [which is annexed to the recommendation marked "P20" relied on by the petitioners]. Clause 7 of "P21" observes that, in addition to police officers of the Sri Lanka Police Force, there are several public officers who are members of one of the Combined Services of the Public Service presently serving in the Department of Police in civilian capacities, and that the petitioners too are regarded as public officers serving in a civilian capacity in the Department of Police [*"සාමාන්ය සිවිල් නිලධාරීන් ලෙස සලකා..."*]. Further, the letters dated 26th July 2006 and 29th November 2006 marked "P17(a)" and "P17(b)" written by the Graduate Employees Union on behalf of the petitioners, clearly acknowledge that the petitioners were regarded as public officers in the Public Service serving in a civilian capacity in the Department of Police.

The aforesaid document dated 30th September 2010 marked “P20” which the petitioners rely on, was authored by the 12th respondent, who was then serving as a Senior Deputy Inspector General of Police. It is addressed to the Inspector General of Police. Its contents have been described earlier. A perusal of “P20” makes it clear that it is only a recommendation made by the 12th respondent. The Inspector General of Police has stated that this recommendation could not be accepted for several reasons, which were mentioned earlier. These reasons appear to be rational. More importantly, there is no material before us which suggests that the recommendation made by the 12th respondent in “P20”, went any further. Thus, “P20” cannot be regarded as any more than a recommendation made by a senior police officer, which was not accepted by the Department of Police and the respondents.

In these circumstances, any subsequent decision to completely transform the nature of the employment of the petitioners by absorbing the petitioners into the Sri Lanka Police Force, [*ie:* to change the nature of their position from that of public officers in the Public Service serving in a `civilian capacity’ to the very different position of police officers of the Sri Lanka Police Force appointed under the Police Ordinance], would be reached only after careful consideration and, undoubtedly, be accompanied by comprehensive documentation.

However, the petitioners have been unable to produce a single document which indicates that the Department of Police or some other duly authorised officer of the Sri Lanka Police Force or any of the respondents took a decision to absorb the petitioners into the Sri Lanka Police Force. There is also no material before us which suggests any written or verbal assurance to that effect, was given to the petitioners.

In this regard, the petitioners have also claimed that the Department of Police required the petitioners to sign a Bond by which the petitioners undertook to serve at the Department of Police and not to apply for a transfer to any other Government Department, until the petitioners retired from the Public Service. However, the letter marked “P5” states that the petitioners have refused to sign such a Bond. In any event, a request made by the Department of Police that the petitioners sign such a Bond undertaking to serve in the Department of Police in a `civilian capacity’ cannot be said to result in the Department of Police having given an assurance that the petitioners would be subsequently absorbed into the Sri Lanka Police Force as police officers.

Consequently, the only conclusion that can be reached is that the petitioners were not given any written or verbal assurance whatsoever by any of the respondents, that the petitioners would be absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units].

Having ascertained that there was no written or verbal assurance on which the petitioners can found their claim of the aforesaid legitimate expectation, it is necessary to consider whether the Department of Police has followed an established and unambiguous practice which entitled the petitioners to have a legitimate expectation that they would be absorbed into the Sri Lanka Police Force [either into the Regular Police Force or into one of its specialised Units] as police officers or whether the facts and circumstances of the dealings between the Department of Police and the petitioners could be said to have created such an expectation.

In this connection, the petitioners appear to have been the first batch of recruits under the Graduate Scheme to be appointed to the posts of Development Assistants in the Department of Police. There is no suggestion that there were any subsequent batches of similar recruits to the same posts. In these circumstances, the petitioners cannot rely on any past practice or on any comparable practice in the Department of Police.

The petitioners have also attempted to establish a practice of appointing public officers recruited to comparable posts in other Departments, to higher positions within those Departments. The petitioners state that: (i) “Development Officers” performing duties associated with the function of planning in Ministries and Government Departments have been given the opportunity of being appointed to Class II Grade II of the Sri Lanka Planning Service on a supernumerary basis, as set out in the Gazette Notification marked “P18”; and (ii) “Development Assistants” serving in the Department of Immigration and Emigration have been appointed as Authorised Officers in the cadre of that Department, as set out in the letter marked “P19”. However, the petitioners are not helped by the aforesaid instances since: (i) a perusal of “P18” shows that the “Development Officers” referred to therein had held that post in a Ministry or Government Department from at least 01st January 2002 onwards and are not similarly circumstanced with the petitioners who had been appointed “Development Assistants” in 2005. In any event, the selection of “Development Officers” referred to in “P18” to be appointed to Class II Grade II of the Sri Lanka Planning Service, was on the basis of a competitive examination and was not on the basis of an absorption into the Sri Lanka Planning Service; and (ii) “P19” is only a letter appointing the addressee to the post of “Authorised Officer” in the Department of Immigration and Emigration and does not bear out the rest of the claims made by the petitioners.

Next, the mere fact that the petitioners were given introductory training at the Sri Lanka Police College does not help them in their claim. A perusal of the documents marked “P3(a)” to “P3(d)” and “P4” show that, during this training course, the petitioners were exposed to a wide range of subjects, with the bulk of the training covering 120 hours each of classes in the Tamil Language and English Language and 42 hours of classes in Computer Training. The training in regular `police work’ was not more than a perfunctory

introduction. It is relevant to mention that "P3(a)" describes the aforesaid training given to the petitioners as *"ජ්‍රජා සංවර්ධන නිලධාරීන් සඳහා පුහුණු පාඨමාලාව"*. In contrast, as set out in "P16", the training given to Police Officers newly recruited to the Regular Police Force is described as *"සාමාන්‍ය පොලිස් රාජකාරී වලට යොමු කිරීමේ පුහුණු පාඨමාලාව"* [*"Basic Induction Training"*] and covers a considerably longer period than the period of training given to the petitioners. Similarly, the petitioners are not helped in their claim by the fact that, from 2005 onwards, the petitioners have received some sporadic training in a variety of fields such as para-legal work, computer operations, the law, human rights, community policing, criminology, human trafficking, counselling, public relations and research methodologies, as evidenced by the documents marked "P6(a)" to "P6(l)".

In these circumstances, the inevitable conclusion is that the petitioners have also failed to show that the Department of Police has followed an established and unambiguous practice which entitled the petitioners to have a legitimate expectation that they would be absorbed into the Sri Lanka Police Force as police officers or to show that the facts and circumstances of the dealings between the Department of Police and the petitioners have created such an expectation.

In UNION OF INDIA vs. HINDUSTAN DEVELOPMENT COPORATION [1993 INDLAW SC 1085 at para. 57], Reddy J observed that a mere *"wish, a desire or a hope"* cannot found a legitimate expectation which will be protected by a court. It is clear that the petitioners had, at best, a *"wish, a desire or a hope"* that they would be absorbed into the Sri Lanka Police Force as police officers. As Reddy J said, that does not help the petitioners to establish the substantive legitimate expectation they claim in this case.

Since the petitioners have failed to establish that there was an assurance or a practice or circumstances on which their alleged *"legitimate expectation"* can be founded, there is no need to go further with what, in effect, would be a sequential exercise of examining whether the other characteristics of a substantive legitimate expectation which a court will protect, are present.

Accordingly, I conclude that the petitioners have failed to establish the first premise on which they rested their case - *ie:* that they have failed to establish their claim that they have a legitimate expectation of being absorbed into the Sri Lanka Police Force as police officers [either into the Regular Police Force or into one of its specialised Units] .

The other premise which the petitioners' have pleaded in support of their case has now to be examined. That is their claim that the Service Minute marked "P23" is arbitrary, irrational and violative of the petitioners' aforesaid fundamental rights for the reason that "P23" does not take into account the petitioners' *"training, qualifications and experience"*

and also because the scheme set out “P23” is *per se* irrational and unfair, *inter alia*, for the reason that the petitioners would *“stagnate”* in one position.

Determining whether there is merit in these claims requires an examination of the Service Minute marked “23”. As mentioned earlier, “P23” constituted a new Programme Officers’ Service in the Public Service. “P23” has been approved by the Public Service Commission and, thereafter, issued by the Director General of Combined Services since the newly constituted Programme Officers’ Service is a ‘Combined Service’. “P23” specifies that there would be an approved Cadre of 45,000 Programme Officers in this Service. These posts are permanent and pensionable and the appointing authority is the Director General of Combined Services. Programme Officers in the new Service are to be placed in the `Associate Officer’ category of the Public Service. There are three Grades in the Programme Officers’ Service - *ie:* Grade III, Grade II and Grade I and there is provision for promotion from Grade III to Grade II and, thereafter, to Grade I, based on seniority in service and merit. The salary points applicable to each Grade are different within the applicable Salary Scale of MN4-2006(A). Recruitment to Grade III of the Programme Officers’ Service comes from two sources - (i) by *“Recruitment under Open Stream”* which enables unemployed Graduates of recognised universities to apply for appointment with selection being based on the results of structured interviews; and (ii) from the ranks of public officers appointed to the Public Service under the Graduate Scheme, who have completed ten years’ service but are not currently placed on the Salary Scale of MN4-2006(A) or its equivalent and public officers appointed to the Public Service under the Graduate Scheme, who have not completed ten years’ service but are currently placed on the Salary Scale of MN4-2006(A) or its equivalent. Both categories of public officers described in (ii) are entitled to submit applications for absorption into the Programme Officers’ Service in terms of “P23”, and, if they do so, will be absorbed into Grade III of the Service. However, “P23” also makes provision for public officers employed in the Public Service under the Graduate Scheme for longer periods, to be absorbed into Grade II of the Programme Officers’ Service if they satisfy specified criteria.

Clause 8 of the Service Minute states that the duties and functions of Programme Officers serving in the newly constituted Programme Officers’ Service would consist of tasks such as *“Investigation, Collection/analysis of information and data/analysis/function in relation to the tasks of achieving the expected goals in development proposals including report compilation and survey and/or other task entrusted.”*.

It is evident that the aforesaid tasks, duties and functions of Programme Officers in the Programme Officers’ Service are not very different to the duties the petitioners presently perform as Development Assistants in the Department of Police. Thus, it was reasonable to give the petitioners the opportunity to be absorbed into the newly constituted Programme Officers’ Service, if they so wished.

It is important to note that, as mentioned earlier, Clause 17.2 of "P23", specifically provides that public officers who had been recruited under the aforesaid Graduate Scheme [such as the petitioners] were given a choice to decide whether or not they wished to be absorbed into the newly constituted Programme Officers' Service. Those who did not wish to become Programme Officers under and in terms of "P23", are entitled to continue in their present posts under the applicable terms and conditions of service. Thus, the petitioners are not obliged or compelled to accept absorption into the Programme Officers' Services. They are free to remain in their present posts in the Department of Police, if they so wish.

It is also evident that the objective and scheme of the Service Minute marked "P23" is to establish a Combined Service, which will be staffed by public officers who have the ability and capacity to serve in various Government Departments across the board of the entire Public Service. They are to perform the important functions of investigation, collection and analysis of data and the preparation of reliable surveys and reports, which are all necessary to enable the efficient operation of Government Departments and assist the overall development efforts of the Government.

It would seem that, in the light of these objectives of the Programme Officers' Service and the nature of the tasks, duties and functions of Programme Officers, the provision of the aforesaid three Grades within the Service with the opportunity for promotion within those Grades, is reasonable. Further, in view of the type of functions allocated to Programme Officers, it seems appropriate for the Programme Officers to have been placed on Salary - Scale MN 4 - 2006(A), which applies to Associate Officers in the Public Service.

It has to be kept in mind that the reasonableness and rationality of "P23" has to be viewed objectively and from the perspective of the overall purpose sought to be achieved by "P23". As mentioned earlier, the purpose of "P23" is to establish a Combined Service staffed with public officers who can serve in various Government Departments across the Public Service, performing essential functions of a particular type which is required for the efficient operation of all those Government Departments. The scheme set out in 'P23" has been structured with that objective in view and makes provision for promotions within the Programme Officers' Service and for payment based upon an appropriate Salary Scale. Further, there is no unequal treatment which is caused by "P23". All public officers who are eligible to be absorbed into the Programme Officers Service, including the petitioners, are entitled to be absorbed into the service, if they wish. However, if they do not wish to be absorbed into the Service, they are free to remain in their present posts.

In the aforesaid circumstances, I see no merit in the petitioners' contention that the Service Minute marked "P23" marked is arbitrary and irrational. I also see no basis for the petitioners' submission that "P23" has been issued *ultra vires* the powers of the Public Service Commission and Director General of Combined Services. Further, since "P23"

only gives the petitioners an option of being absorbed into the Programme Officers' Service, there is no justification in the petitioners' contention that they should have been consulted before "P23", was published. I should also mention here that in the recently decided case of WIMALACHANDRA vs. MAHINDA YAPA ABEYWARDENA [SC 285/2012 decided on 26th July 2019], Thurairaja J upheld the validity and rationality of the Service Minute marked "P23".

Thus, the petitioners have failed to establish either of the two grounds on which they relied and this application has to be dismissed.

Since the petitioners' application has to be dismissed, the intervenient-added respondents' application does not need to be considered, as it is dependent on the petitioners being granted the reliefs they seek. Therefore, that application also has to be dismissed.

Learned Senior Additional Solicitor General has contended that the petitioners' application is time-barred. I note that the application has been filed before the expiry of the time limit given to the petitioners to decide whether they wish to be absorbed into the Programme Officers' Service or remain in their present posts. In view of the aforesaid conclusion that the petitioners' application has to be dismissed on the merits, there is no reason to examine whether the time limit available to the petitioners in terms of Article 126 (2) ended before they filed this application.

The petitioners' application and the intervenient-added respondents' application are both dismissed. The parties will bear their own costs.

Judge of the Supreme Court

Buwaneka Aluwihare,PC, J.
I agree

Judge of the Supreme Court

L.T.B.Dehidenya, J.
I agree

Judge of the Supreme Court