

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

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

Dr. Chanaka Harsha Talpahewa

No. 380/56, Bullers Road,

Colombo 07.

Petitioner

SC /FR/ Application No. 378/2017

Vs,

1. Mr. Prasad Kariyawasam
Secretary to the Ministry of Foreign Affairs,
Ministry of Foreign Affairs,
Republic Building, Colombo 01.
- 1A. Mr. Ravinatha Aryasinha
Secretary to the Ministry of Foreign Affairs,
Ministry of Foreign Affairs,
Republic Building, Colombo 01.
2. Mr. Dharmasena Dissanayake
Chairman- Public Service Commission
- 2A. Hon. Justice J. Balapatabendi (retired)
Chairman- Public Service Commission
3. Prof. Hussain Ismail
Member- Public Service Commission
- 3A. Mrs. Indrani Sugathadasa
Member- Public Service Commission
4. Ms. Dhara Wijayatilake
Member- Public Service Commission
- 4A. Mrs. Shivagnanasothy
Member- Public Service Commission
5. Dr. Prathap Ramanujam
Member- Public Service Commission

- 5A. Dr. T.R.C. Ruberu
Member- Public Service Commission
6. Mr. V. Jegarasasingam
Member- Public Service Commission
- 6A. Mr. Ahamod Lebbe Mohamed Saleem
Member- Public Service Commission
7. Mr. Santi Nihal Seneviratne
Member- Public Service Commission
- 7A. Mr. Leelasena Liyanagama
Member- Public Service Commission
8. Mr. S. Ranuuge
Member- Public Service Commission
- 8A. Mr. Dian Gomes
Member- Public Service Commission
9. Mr. D. Laksiri Mendis
Member- Public Service Commission
- 9A. Mr. Dilith Jayaweera
Member- Public Service Commission
10. Mr. Sarath Jayatilaka
Member- Public Service Commission
- 10A. Mr. W.H.Piyadasa
Member- Public Service Commission

3rd to 10th Respondents all of No. 177, Nawala Road, Narahenpita.

11. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: **Justice Vijith K. Malalgoda PC**
 Justice Murdu N. B. Fernando PC
 Justice S. Thurairaja PC

Counsel: Saliya Pieris, PC with Geeth Karunaratne, for Petitioner
 Dr. Avanthi Perera, SSC for Respondents

Argued on: 25.03.2021, 21.10.2021

Written Submission by the Petitioner: 19th March 2021

Further Submission by the Petitioner: 19th November 2021

Written Submission by the Respondents: 22nd March 2021

Further Submission by the Respondents: 11th November 2021

Judgment on: 21.06.2022

Vijith K. Malalgoda PC J

Petitioner to this application Dr. Chanaka Harsha Thalpahewa was an officer belonging to Grade II of Sri Lanka Foreign Service (hereinafter referred to as SLFS) at the time the instant application was filed before the Supreme Court for alleged violation under Article 12 (1) of the Constitution for failure to grant his promotion from Grade II to Grade I of the SLFS.

As revealed before this Court, the Petitioner who was placed first at the open competitive examination conducted to recruit officer to the SLFS, was recruited to Grade III of the SLFS under the Service Minute Published in 1994, with effect from 3rd January 2000.

The said Service Minute had been revised in 2001 by the Minute published in Gazette Extraordinary 1168/17 dated 24.01.2001.

The first promotion to which the Petitioner would be eligible, both under the Service Minute published in 1994 and 2001 was the promotion from Grade III to Grade II and officer should complete 10 years satisfactory service to become entitled to the said promotion. The scheme that was relevant

for the Petitioner's first promotion was the minute that was published in 2001 and Clause 7.2.1. of the said Service Minute refers to the promotion from Grade III to Grade II as follows;

7.2.1. Promotion form Grade III to Grade II - The criteria for promoting a SLFS officer from Grade III to Grade II shall be as follows;

- (i) The officer should have completed 10 years satisfactory service in Grade III
- (ii) The officer should have completed the second Efficiency Bar Examination before reaching the salary step of Rs. 116,400 and the Third Efficiency Bar, and the other official and link language requirements before reaching the step of Rs. 135,300 on the Grade III scale.
- (iii) The officer should have reached the salary step of Rs. 135,300 on the Grade III scale.

Accordingly, the Petitioner was promoted to Grade II of the SLFS with effect from 3rd January 2010, as borne out by the document produced marked P10 before this Court.

As revealed before us, the Petitioner's next promotion under the service minute that was published in 2001 was the promotion from Grade II to Grade I and the requirements for the said promotion were identified under Clause 7.2.2 of the said Service Minute as follows;

7.2.2 Promotion from Grade II to Grade I –

The criteria for promoting a SLFS officer form Grade II to a vacancy in Grade I will be that the officer should have completed 6 years satisfactory service in Grade II.

When an officer belonging to Grade II of SLFS completes 6 years satisfactory service in the said Grade, he or she becomes eligible to be promoted to Grade I of SLFS but the requirement identified under the said Clause, "to a vacancy in Grade I" imposed an additional requirement of having a vacancy to effect such promotion. In other words, an officer belonging to Grade II of the SLFS who completed the requirements under Clause 7.2.2 of SLFS service Minute, had to remain in the same Grade until a position in Grade I falls vacant, and the said vacancy had to be fill in the order of seniority from amongst the eligible Grade II officers.

As a Grade II officer in the SLFS, the Petitioner held several positions locally and abroad including, Acting High Commissioner of Sri Lanka to the United Kingdom (Special Assignment), Acting High Commissioner of Sri Lanka to the Maldives and Director Middle East Africa Division of the Ministry of Foreign Affairs.

Whilst the Petitioner was holding the post of Director Middle East Africa Division in the Foreign Ministry, he was offered an assignment at the United Nations Human Settlement Programme in Colombo on 17th June 2016 as Head of Agency/Programme Management Officer with UN- Habitat Sri Lanka. At the time the said assignment was offered to the Petitioner, the Petitioner had completed sixteen years of satisfactory service in SLFS and also completed six years of satisfactory service in Grade II of SLFS.

In other words, the Petitioner was eligible to be promoted to Grade I of the SLFS under clause 7.2.2 of the Service Minute published in 2001 at the time he was offered the said position in UN- Habitat Sri Lanka.

The events that followed the Petitioner accepting the said offer was explained by the Petitioner as follows;

- a) By letter dated 15th July 2016 the Petitioner made an application for leave under Chapter XII Section 16.1.4 of the Establishment Code to accept the said assignment
- b) By letter dated 22nd July 2016 Secretary to the Ministry of Foreign Affairs recommended to the Public Service Commission that the Petitioner has completed sixteen years satisfactory service and earned all the salary increments without previously obtaining no pay leave, and the request for one year no pay leave be granted to the Petitioner. (P-17)
- c) By letter dated 28th July 2016 the Secretary to the Ministry of Foreign Affairs further recommended that the Petitioner be released without loss of seniority.
- d) Among several correspondents between the Public Service Commission and the Ministry of Foreign Affairs, Public Service Commission by letter dated 9th August 2016 requested information pertaining to;
 - i. Any documents in relation to the release of the Petitioner on the requirements of the Government,

- ii. Whether the Petitioner was appointed to the said position based on a recommendation by the Government or whether it was a personal request by the Petitioner
- e) However, by letter dated 15th August 2016 Public Service Commission had approved the release of the Petitioner for the period commencing from 15th August 2016 to 14th August 2017 whilst postponing the decision, whether the period of release be considered as active service or not to be taken in due course.
- f) The above decision of the Public Service Commission was communicated to the Petitioner by the Ministry of Foreign Affairs by its letter dated 22nd August 2016 (P-28)
- g) Since then, several letters were exchanged between the Ministry of Foreign Affairs and the Public Service Commission in order to resolve the question that was not addressed in the approval granted by the Public Service Commission in its letter dated 15th August 2016 (P-29 to (P-33).
- h) By letter dated 18th May 2017 the Public Service Commission informed its decision to the Ministry of Foreign Affairs to the effect that the period of temporary release wherein the Petitioner was serving as Head of Agency at UN Habitat was not to be considered as part of active service in accordance with the provisions of Establishment Code and regulation of the Public Service Commission.
- i) Even though the Petitioner had appealed against the said decision of the Public Service Commission, the Commission did not change its decision.
- j) Whilst the decision with regard to the Petitioner's active service was pending at the Public Service Commission, the Public Service Commission by order published in Government Gazette 1996/28 dated 6th December 2016 replaced the Service Minute of Sri Lanka Foreign Service.

As observed by this Court one of the major changes introduced to the Service Minute of SLFS by the New Service Minute that was introduced in the year 2016 was the relaxation of the cadre restriction that was applicable to promotions from Grade II of SLFS to Grade I of SLFS.

Provisions with regard to the promotion from Grade II to Grade I of SLFS is identified under Clause 10.2 of the New Service Minute as follows;

10.2 Promotion from Grade II to Grade I

10.2.1. Requirements to be completed;

- i) Should have completed at least seven (07) years active and satisfactory service in Grade II Service category and earned seven (07) salary increments.
- ii) Should have passed the second Efficiency Bar Examination on the due date.
- iii) Should have completed a period of satisfactory service during the preceding five (5) years from the date of gaining eligibility for promotion.
- iv) Should have shown a satisfactory or a higher-level performance during the preceding seven (7) years of gaining eligibility for promotion.
- v) Should have obtained a postgraduate degree in International Relations or an equivalent qualification from a university recognized by the UGC or an institution, a university recognized by the UGC as an institution of degree awarding or a foreign university recognized by the UGC, as per Appendix D.

10.2.2. Scheme of Promotion:

Officers who have fulfilled the required qualifications should make a request to the Appointing Authority. The officers who are eligible will be promoted to Grade I, on verification of the qualifications by the Appointing Authority with effect from the date of fulfillment of all the relevant requirements.

Provisions of Clause 14 and 15 of the New Service Minute are also relevant in granting a promotion to an officer belonging to Grade II of SLFS and the said provision reads as follows;

14. Absorption of SLFS officers to the New system of Grades

14.1 All officers who are in the SLFS on the date of implementation of this Service Minute shall be absorbed into the Grading System as given below. There shall not be any change whatsoever in the salaries or in the date of increment or date of promotion into their respective Grade or the seniority of the officers due to the absorption

- (i)
- (ii) All officers in Grade II of the SLFS on the date of implementation shall be absorbed to Grade II of the Service
- (iii)

15. Transitional Provisions

“The transitional period will be effective for three (03) years from the date of the publication of this Minute.

15.1 During the transitional period, promotions from one Grade to another will be effected as follows;

15.1.1

15.1.2 Promotion from Grade II to Grade I

An officer absorbed to Grade II under the provisions of Section 14 of this Minute will be eligible for promotion to Grade I provided he/she has fulfilled the qualifications under 10.2.1. of the Service Minute. However, the requirement for the fulfillment of qualifications under sub section (v) of 10.2.1. will not apply regarding the promotion of officers recruited before 01.01.2001 from Grade II to Grade I during the transition period

Even though the New Service Minute was published in the Government Gazette on 6th December 2016, under Clause 1 of the said Minute the Effective Date was fixed at 12.10.2015 a date one year one month and 24 days prior to a date it was issued.

When compared the provisions with regard to promotion from Grade II to Grade I under the two Service Minutes referred to above, including the Transitional Provisions, the following major changes, were introduced by the New Service Minute

- a) Six years satisfactory service in Grade II is increased to seven years satisfactory service
- b) A post graduate requirement was introduced but the said requirement is applicable only to those who were recruited after 01.01.2001 (transitional provision)

- c) Cadre requirement which was compulsory under the previous Service Minute had been taken away and the officer who fulfills the necessary requirement should make a request to the appointing authority for the promotion.

Grievance complained by the Petitioner

As submitted by the Petitioner, when the Petitioner made an application for leave in order to accept the offer by U.N. Habitat, Secretary to the Ministry of Foreign Affairs wrote P-17 to the Public Service Commission. In the said letter it was stated that,

“the Petitioner has completed sixteen years of satisfactory service and earned all the salary increments”

In the said circumstances, the Petitioner had taken up the position that, he has fulfilled all the requirements, to be promoted to the next Grade, i.e., Grade I under the Service Minute which was operative at the time he submitted the application for leave under the provisions of the Establishment Code.

However, after his leave was approved, and prior to the decision with regard to the nature of the leave granted to the Petitioner was finalized, a new Service Minute was introduced,

- a) Backdating the effective date to a date prior to the effective date of his leave period
- b) Increased the service requirement from six years to seven years satisfactory service and receipt of seven salary increments for the promotion from Grade II to Grade I of SLFS;

with several others requirements under Clause 10.2.(ii)-(v), the Petitioner had already fulfilled but the Petitioner was no longer eligible to be promoted from Grade II to Grade I as the requirement of “a period of active service” would be deemed not to be satisfied.

As already referred, the Petitioner was eligible to be promoted to Grade I, according to the Service Minute that was operative at the time the leave was granted to him, but in the absence of a position in Grade I, the Petitioner had to remain in Grade II until a position became vacant. At the time the Petitioner was granted leave, more than 21 officers senior to him in Grade II of the SLFS were expecting promotions to the higher Grade and therefore Petitioner obtaining leave subject to any condition would not be an obstacle in getting the promotion, and in the said circumstance it was argued on behalf of the Petitioner that the Petitioner had a legitimate expectation based upon the policy adopted by Sri Lanka Foreign Service and given effect through the published criteria for

promotion through the Foreign Service Minute of 2001 which was in operation at the time the leave was granted to him, that he would be promoted from Grade II to Grade I when a position become vacant in Grade I.

Therefore, it was further argued that the 1st to the 11th Respondents by

- a)** Backdating the effective date of the new Service Minute of SLFS by which the service requirement was extended from six years to seven years to a date prior to granting of leave to the Petitioner
- b)** Failing to introduce a transitional provision addressing the grievance the Petitioner or any other person similarly circumstanced due to backdating of the effective date of the Service Minute, acted against the legitimate expectation of the Petitioner and thereby infringed the Fundamental Rights of the Petitioner guaranteed by Article 12 (1) of the Constitution.

Whilst objecting to any relief being granted to the Petitioner, 2nd to the 10th Respondents took up the position that,

- a)** In January 2006, the Ministry of Public Administration introduced a new salary structure in the Public Service through Public Administrative Circular 06/2006.
- b)** Thereafter, pursuant to a decision of the Cabinet of Ministers in 2011, Service Minute and Scheme of Recruitment that were in existence within the Public Service prior to the said Circular 06/2006 were required to be revised with the approval of the Public Service Commission, in terms of Public Administrative Circular 25/2011 and 25/2011 (i)
- c)** Accordingly, the Ministry of Foreign Affairs took steps to revise the Sri Lanka Foreign Service Minute of 2001 and new Foreign Service Minute was submitted to the Public Service Commission for its approval.
- d)** Under the provisions of the Service Minute of 2001, the criteria for promotion from Grade II to Grade I was contingent upon there being a vacancy in the approved cadre of Grade I and whenever a vacancy arose in Grade I of SLFS, the said vacancy was filled in the order of seniority from amongst the eligible Grade II officers.
- e)** The above issue was addressed in the New Service Minute that was submitted to the Public Service Commission for its approval

- f) The New Service Minute was approved by the Public Service Commission on the 12th October 2015. However, several amendments were proposed to the said Service Minute, which was considered and approved by the Public Service Commission on the 28th November 2016.
- g) The New Service Minute of the Sri Lanka Foreign Service was published in the Gazette on the 6th December 2016 and came into effect on the date it was originally approved by the Public Service Commission i.e., on 12th October 2015
- h) In the meantime, the Petitioner had submitted an application through the Secretary, Ministry of Foreign Affairs for no pay leave to undertake a one-year assignment to serve in the post of Programme Management Officer at the United Nations Human Settlement Programme.
- i) The public Service Commission by its letter dated 15th August 2016 granted approval to the Petitioner to undertake the said assignment
- j) The Public Service Commission thereafter considered the material furnished on behalf of the Petitioner to consider whether there was a possibility that the Petitioner's no pay leave could be considered as "active service," but the Public Service Commission could not give a favorable reply to the Petitioner, since it was revealed that the Petitioner had obtained the assignment through an application made by him directly and not pursuant to a nomination by the Government of Sri Lanka.
- k) Therefore, the Public Service Commission by its letter dated 18th May 2017 informed its decision, to the effect that "there was no basis to consider the period of no pay leave as active service" to the Ministry of Foreign Affairs.

Whilst submitting the above on behalf of the 1st to the 11th Respondents, it was argued that the Petitioner could not have entertained a legitimate expectation of him being promoted to Grade I of SLFS, since there were 21 officers who were senior to him in grade II of SLFS at the time his no pay leave was approved by the Public Service Commission on 15th August 2016.

On behalf of the Respondents, it was further argued that under Clause 14 (II) of the New Service Minute, every member of Grade II of the SLFS shall be absorbed to the Grade II of the same service and all promotions thereafter will only be considered under the provisions of the New Service Minute and therefore the 7 years' service requirement is essential to implement a promotion to an officer belonging to Grade II of the SLFS.

In the said circumstance, it was submitted that the failure by the Petitioner to challenge the New Service Minute and his appeal which is contrary to the provisions of the New Service Minute estops him from claiming legitimate expectation when his appeal was refused by the Public Service Commission.

When considering the arguments placed by the two parties before us, it is clear that, at the time the Petitioner's no pay leave was approved by the Public Service Commission, the Petitioner had completed six years and eight months in Grade II of the SLFS and was eligible to be promoted to Grade I when a position falls vacant, under the Service Minute that was in operation at that time.

Backdating the effective date of the Service Minute

In the New Service Minute that was published in the Government Gazette Extraordinary 1996/20 dated 6th December 2016, the effective date had been identified as 12.10.2015 under Clause I of the said minute. When giving reasons for the decision to back date the effective date, it was submitted on behalf of the 2nd Respondent that, the New Service Minute was approved by the Public Service Commission on the 12th October 2015 but could not give effect to the said service minute due to several discussions had with the relevant authorities with regard to some proposed amendments. The final draft which was agreed upon and approved by the Public Service Commission on 28th November 2016 was published in the Government Gazette on 6th December 2016, but the effective date was fixed at 12th October 2015, the date on which the service minute was originally approved by the Public Service Commission.

However, the Respondents were silent on the proposals that were introduced to the service minute between 12.10.2015 and 28.11.2016 after having discussions with the authorities and the difficulty the Public Service Commission had faced to fix the effective date as 28.11.2016, the date on which the amended service minute was approved.

Even though the Petitioner before this Court had not challenged the legality of the service minute published on 06.12.2016, this Court is mindful of its powers under Article 126 (4) of the Constitution which reads as following;

126 (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any Petition or reference referred to in the paragraphs (2) and (3) of this Article.

The broad powers, given to the Supreme Court by Article 126 (4) was decided in the case of ***Nishantha and Another V. Bandula Gunawardane and Others 2012 BLR 209*** as follows;

“Particularly with regard to violations of Constitutional rights, it is well established that the Courts have broad power to grant an order that is appropriate, just and equitable. The Courts have a power to forge new tools in this regard. Appropriate relief, apart from the declaration which this Court makes must also vindicate the Constitution, and consider the maladministration by the 3rd Respondent.”

In the case of ***Coral Sands Hotel (Pvt) Ltd V. Minister of Finance SC/FR/170/2015 SC Minute 08.12.2015*** this Court held that,

“The Court under Article 126 of the Constitution has the implicit power to issue whatever direction or order necessary in a given case, including all incidental or ancillary powers required to secure enforcement of the citizen’s fundamental right. The Constitution enshrines and guarantees the rule of law and Article 12 (1) is designed to ensure that each and every authority of the State, acts bona fide and within the limits of its power and when the Court is satisfied that there is an abuse or misuse of power and the jurisdiction of the Court is invoked, it is incumbent on the Court to afford justice to the affected citizen.”

The legality of retrospective subsidiary legislation was decided by this Court in more than one occasion and the case of ***Rathnakumara and Others V. The Postgraduate Institute of Medicine SC Appeal 16/2014 SC Minute 30.03.2016*** is one such instance,

In the said case the Petitioners were enrolled at the PGIM for ‘MD Medicine’ under prospectus 2003 commenced and completed stage I and II under the said prospectus. However New Prospectus was issued by PGIM in the year 2005 stipulating that only six attempts are permitted for the successful completion of the final MD and it applied retrospectively. i.e., with effect 01.01.2004. But there was no reference to the number of attempts under prospectus 2003. It was also observed that the prospectus 2005 neither contained any transitional provisions with regard to the candidates who registered and commenced the program under the Prospectus 2003 nor had any reference to such candidate.

The Court having considered whether

- a) The subordinate legislation can be enacted with Retrospective effect and,
- b) Does it violate the Legitimate expectation of the Petitioners?

held that the subordinate legislation having retrospective effect is ultra vires unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation and also it violated the legitimate expectation of the Petitioner.

Legitimate Expectation of the Petitioner

The doctrine of Legitimate Expectation the scope and the extent of its applicability was discussed and considered in several cases decided by this Court.

In the case of ***Ariyaratne and Others V. Illangakoon, Inspector General of Police and Others, SC FR 444/2012***, SC Minute 30.07.2019 this Court had extensively analyzed jurisprudence of various jurisdictions and observed that,

“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.”

In the said decision Jayawardena (J) had also relied on the following paragraphs from ***R. V. North and East Devon Health Authority exparte Coughlan [2000] 3 AER 850***,

“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- i.e. 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 LJ 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].

In the case of *Rathnakumara and Others Vs. The Postgraduate Institute of Medicine* (Supra) the immediate change of a Regulation without giving adequate prior notice was considered by this court as follows;

".....any person who commences an act under a particular "Regulation" has an expectation to finish the same under the same terms and conditions stated in the said Regulations. Thus, it gives rise to a legitimate expectation for such persons to complete their actions under the same terms and conditions.

However, the regulations can be amended or rescinded by giving reasonable prior notice unless the circumstances warrant an immediate change of the regulations. In fact, keeping in line with this principle both the Prospectus contained a Clause which stated that an adequate notice will be given of any changes.

.....

Therefore, imposing a restriction on the number of attempts at the MD (Medicine) without giving adequate prior notice, is a violation of the legitimate expectation of the Appellants.”

The Petitioner’s contention before this Court was that he had fulfilled all the requirements, to be promoted to the next Grade, i.e., Grade I of Sri Lanka Foreign Service under the Service Minute that was in operation at the time he accepted the offer by UN Habitat for the Post of Head of Mission Sri Lanka and submitted his application for leave. There were 21 officer’s seniors to him in the same Grade, were also expecting promotions to Grade I and the established practice under the Service Minute published in year 2001 (which was in operation at that time) was to fill the vacancy by appointing the most senior officer among the officers in Grade II.

In the said circumstances it is clear that the Petitioner when he made the leave application in order to accept the position at UN Habitat,

- a) Had fulfilled all the requirements to be promoted to Grade I of SLFS
- b) By applying No pay leave his next promotion would not be affected, since he had already completed six years’ satisfactory service and earned six increments in Grade II of SLFS. (P-17)
- c) There were only 10 positions in Grade I of SLFS and the promotions were given only when a vacancy had occurred and the appointments were made on the seniority in Grade II
- d) That there were 21 officer’s seniors to him in Grade I of SLFS

The Respondents had failed to submit before court any material to establish that the Petitioner was aware of the changes proposed in the New Service Minute, and even if the Petitioner was aware of the changes that were proposed, including the change proposed to the required period of service in Grade II, he had to remain only four months and that could have easily arranged with UN Habitat to accept the post after January 2017. When all these matters considered together the only conclusion that can be arrived is that the Petitioner had entertained a legitimate expectation when accepting a position in UN Habitat after obtaining no pay leave, that it would not be an obstacle for his next promotion.

As revealed before us, the Petitioner did not challenge the legality of the New Service Minute introduced in 2016 but appealed to the Public Service Commission to consider his period of leave as active service. The Petitioner submitted several appeals both to the 1st Respondent Secretary Foreign Affairs and to the Public Service Commission. The 1st Respondent when forwarding the appeal submitted by the Petitioner to the Public Service Commission, had also answered several queries

made subsequently by the Public Service Commission, strongly recommending to consider the period of leave as active service since the services rendered by the Petitioner in his new capacity as the Head of Agency at UN Habitat is much useful to the Government of Sri Lanka. However, the Public Service Commission by its letter dated 18th May 2017 (P-34) informed the 1st Respondent it's decision, that the Petitioner's period of leave cannot be considered as active service.

During the correspondence between the 1st Respondent Secretary Foreign Affairs and the Public Service Commission it was further revealed that there were instances where temporary release of officers belonging to SLFS without their names being nominated by the Government of Sri Lanka but were also placed on active service after obtaining Cabinet approval.

The learned President's Counsel who represented the Petitioner before us submitted that, the Petitioner did not seek to quash the New SLFS minute issued in 2016, as it would have created grave consequences in SLFS and would have affected several recruitments and promotions. It was the position of the learned President's Counsel that, his client does not want to obstruct the promotions of several officers belonging to SLFS, but was only interested in resolving the grievance he had complained in the instant application.

As already discussed in my judgement, the Public Service Commission when introducing the New Service Minute for the Sri Lanka foreign Service,

- a) Fixed a date retrospectively as the effective date without having any legal basis to do so.
- b) The said date was a date one year one month and 24 days prior to a date it was issued and 10 months and 5 days prior to the date the leave was granted to the Petitioner.
- c) Failed to introduce any transitional provision with regard to the change of the service requirement
- d) Failed to explain the amendments proposed to the service minute in between 12th October 2015 and 28th November 2016

and the above conduct of the Public Service Commission is in clear violation of the equal protection guaranteed to the Petitioner under Article 12 (1) of the Constitution.

However, any decision by this court with regard to the validity of the said service minute, would affect several appointments and promotions made to the SLFS creating a controversy among the said officers in SLFS and in the said circumstance I am not inclined to make any order with regard to the

validity of the said service minute published in the Government Gazette 1996/28 dated 6th December 2016 and/or make any order as per prayer (c) and (d) of the Petition dated 23rd October 2017.

However, this court is mindful of the powers vested with this court to make an appropriate, just and equitable order under Article 126 of the Constitution when an aggrieved party established a violation of his/her Fundamental Rights guaranteed under the Constitution.

In the said circumstances I hold that 2nd to the 10th Respondents have violated the Fundamental Rights of the Petitioner guaranteed under Article 12 (1) of the Constitution.

I further direct the 2nd to 10th Respondents and/or the Public Service Commission and its Secretary to decide the period of leave approval by letter dated 16th August 2016 and 18th May 2017, be treated as active service until 3rd January 2017 and/or until the Petitioner completed 7 years active service and draws 7 salary increments in Grade II of SLFS.

I further hold that the Petitioner is entitled to be promoted to Grade I of SLFS once his leave period applied by the letter dated 15th July 2016 be convert as active service by the Public Service Commission as directed above, if he has fulfilled the other requirements referred to in Clause 10.2.1 of the Service Minute of the SLFS dated 6th December 2016.

The State is directed to pay Rs. 250 000/- as compensation and cost for litigation which is fixed at Rs. 100 000/-

Application Allowed with Cost.

Judge of the Supreme Court

Justice Murdu N. B. Fernando PC

I agree,

Judge of the Supreme Court

Justice S. Thuraiaraja PC

I agree,

Judge of the Supreme Court