IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application under
Section 126 of the Constitution.

Ginigathgala Mohandiramlage Nimalsiri,
349/1, Horagala Watta,
Beraketiya,
Kiriwattuduwa.

Petitioner

SC FR Application No. 256/2010

Vs.

1. Colonel P.P.J. Fernando,
   Commanding Officer,
   3/Sri Lanka General Corps,
   Panagoda Army Camp,
   Homagama.

2. Major General H.L. Weeratunge,
   Colonel Commander,
   General Services Corps,
   Panagoda Army Camp,
   Homagama.

3. Brigadier W.R. Palihakkara,
   Director,
   Pay and Records Office,
   Panagoda Army Camp,
   Homagama.

4. Major General H.J.G. Wijeratne,
   Director General (Legal),
   Sri Lanka Army,
   Army Headquarters,
   Colombo 02.

5. Lt. General Jagath Jayasooriya,
   Commander of the Sri Lanka Army,
   Army Headquarters,
   Colombo 02.

6. Mr. Gotabhaya Rajapakse,
   Secretary,
   Ministry of Defence, Public Security,
   Law and Order,
   Colombo 03.

7. Honourable Attorney General,
   Department of the Attorney General,
   Colombo 12.

Respondents

Before : Chandra Ekanayake J.
S.E. Wanasundera, PC, J.
Priyantha Jayawardena, PC, J.

Counsel : Asthika Devendra with Lilan Warusavithana for the Petitioner
Rajiv Goonatillake, SSC for the 1st to 7th Respondents

Argued on : 2nd July, 2015

Decided on : 17th September, 2015

Priyantha Jayawardena, PC. J,

This is an application filed under Article 126(1) of the Constitution in which the Petitioner prays for an order declaring that his fundamental rights to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution have been violated by reason of the Petitioner not being re-enlisted to the Sri Lanka Army for the third time.

The Petitioner has joined the Sri Lanka Army Regular Force on 21.01.1986. After training he entered into the Sri Lanka Army General Services Corps as a Clerk to the Director Board of the Pay and Records office which is part of the headquarters of the Sri Lanka Army.

In terms of the Soldiers Service Regulations No. 01 of 1994 on Enlistment and Re-engagement the original enlistment of a soldier shall be 12 years which consists of two periods of 5 years and 7 years.

The Petitioner was first enlisted for a period of five years from 21.01.1986 to 20.01.1991, and thereafter he was re-enlisted from 21.01.1991 to 20.01.1998 for a period of further seven years.

The Petitioner while serving his second enlistment was arrested on 07.05.1996 by the Padukka Police on the suspicion of the murder of the Akaravitage Airangani, his wife and was produced before the Magistrate's Court of Homagama. The Petitioner was in remand custody from 08.05.1996 to 20.08.1996 for a period of 3 months and thereafter released on bail by the Magistrate's Court on 20.08.1996. The Petitioner was required by the Army to seek re-enlistment for a further period of 10 years if he wishes to re-enlist for the third time on or about June 1997. He has requested that he be re-enlisted during the said period.

The Petitioner was in active service until he was interdicted on 15.09.1997. The Petitioner's second re-enlistment period was ended on 20.01.1998, but he has been paid half pay up to 30.09.1998 which was beyond the period of the second enlistment. Therefore, the Petitioner claimed that his application for the third re-enlistment should be considered as accepted. Further, the Petitioner stated that he entertained a legitimate expectation to obtain the third enlistment.

The Petitioner on numerous occasions had requested from the authorities of the Sri Lanka Army that he be allowed to serve in the active service or to resign from the Army as the case pending against him was getting prolonged. One of the said appeals dated 23.02.1999 was preferred to the Director, Pay and Records requesting that since up to that date no charges had been preferred against him, to take steps to engage him in active service and if the Army was unable to do the same to allow him to resign as a soldier who had completed 12 years of service. In response to the requests for re-enlistment, the Petitioner was informed by the Director Board of Pay and Records of the Sri Lanka Army by their letter dated 05.05.1999 that they had been informed by the Legal Services Directorate that it was not possible to re-engage him in services until such time the case pending against him was concluded.

The Petitioner had been further copied a letter of the Board of Directors of Pay and Records dated 26.07.1999 addressed to the Legal Department of the Army stating that the Director Board of Pay and Records has suspended to re-enlist the Petitioner for a further period of 10 years acting on the instructions of the Legal Services Directorate.

Thereafter, by the letter dated 31.08.1999 the Petitioner was again informed by the Board of Directors of Pay and Records of the Sri Lanka Army that they had been instructed by the Directorate of Legal Services of the Army that the Petitioner could not be taken back to service until the case pending against him was concluded.

On 05.12.2008 the Petitioner was discharged by the Magistrate's Court of Homagama on a decision taken by the Honourable Attorney General in terms of section 396 of the Criminal Procedure Code.

Further, an Attorney-at-Law on the instructions of the Petitioner sent a letter dated 30.07.2009 to the 5th Respondent informing that the Petitioner on several previous occasions had requested from the Army that he be allowed to serve in the Army pending the case or to be discharged from the Army as having served only 12 years.

The Petitioner was requested by letter dated 14.10.2009 sent on behalf of the 1st Respondent to be present on or before 25.10.2009 for clearance in order for the Petitioner to be discharged.

Thereafter, by his letter dated 09.11.2009 the Petitioner had informed the Commanding Officer that since steps are being taken to discharge the Petitioner from the Army having considered his period of service in the Sri Lanka Army to be 12 years, he had requested that a letter be given to him saying that he had been discharged accordingly.

Further, by his letter dated 08.02.2010 addressed to the Commanding Officer the Petitioner has mentioned that he has expressed his desire to work in the Security Division of a State Bank and therefore he required a letter in proof of his service in the Sri Lanka Army to be submitted to the aforesaid bank.

Thereafter, a letter dated 16.03.2010 was issued on behalf of the 1st Respondent, Commanding Officer informing that the Petitioner had been discharged from the Sri Lanka army with effect from 20.01.1998 after serving in the Sri Lanka Army for 12 years.

The Petitioner challenged the refusal to re-enlist him to the Sri Lanka Army for the third time on two grounds. The first ground of challenge was that the refusal to re-enlist the Petitioner to the Sri Lanka Army was illegal, irrational and arbitrary. The second ground of challenge was that he had a legitimate expectation that he would be re-enlisted to the Sri Lanka Army once the pending case against him before the Magistrate's Court was concluded. In the circumstances, he pleaded that his fundamental rights guaranteed under Article 12(1) of the Constitution have been infringed by the Respondents.

The Court having heard the learned Counsel for the Petitioner in support of this application, granted leave to proceed for the alleged infringement of fundamental rights guaranteed by Article 12(1) of the Constitution.

Thereafter, the 5th Respondent filed an Affidavit on behalf of the Respondents and stated that the Petitioner's second period of enlistment came to an end on 20.01.1998. The Soldiers Service Regulations No. 1 of 1994 governs the re-enlistment of soldiers, which does not provide for automatic re-enlistment. He further stated that the re-engagement in service is at the discretion of

the relevant authorities and upon a soldier satisfying the conditions set out in Regulation 4 of the said Regulations.

The Soldiers Service Regulations No. 01 of 1994 on Enlistment and Re-Engagement states as follows;

> 2. Save as hereinafter provided, the period of original enlistment of a soldier is twelve years of which he shall serve the first five years in the Regular Force and the remaining seven years in the Reserve unless otherwise ordered by Commander of the Army.
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> 3. A soldier may, before the expiry of the period of his original enlistment, be re-engaged for a further period of military service in the Regular Force. Such further military service may be in one or more periods, but the aggregate of such service shall not exceed twenty years.
>
> Provided, however, that no soldier shall serve beyond the age of 55 years,
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> 4. (1) An extension of service in the Regular Force beyond the period of five years referred to in Regulation 2 or re-engagement for a further period beyond the period of original enlistment referred to in Regulation 3, may be allowed to a soldier who:-
>
> (a) is efficient, well-behaved and recommended by his Commanding Officer; and
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> (b) has passed a medical test to the satisfaction of the Commander of the Army:
>
> Provided that a soldier who is not recommended by his Commanding Officer for an extension of service or for re-engagement, but in all other respects is eligible therefore may, appeal to the Commander of the Army against the refusal by Commanding Officer to recommend such soldier, and the Commander of the Army may, if he thinks fit, allow an extension of service or re-engagement as the case may be, to such soldier.
>
> (2) The number of soldiers who will be allowed to extend their services in the Regular Force beyond the period of five years or to re-engage for a further period beyond the period of original enlistment shall depend on the number of vacancies as determined by the Minister of Defence.

According to the 5th Respondent's Affidavit the Petitioner was arrested on 07.05.1996 and was produced before the Magistrate's Court of Homagama in case number NS 489/96 on 08.05.1996 in connection with the murder of his wife Akaravitage Irangani and was in remand custody at the Welikada Prison for a period of 3 months from 08.05.1996 to 20.08.1996 and thereafter released on bail by the Magistrate's Court on 20.08.1996.

By the order dated 04.09.1997 of the Army Commander, it was informed to the Petitioner that he was suspended from service with half pay with effect from 01.08.1997 in terms of Regulation 22(4) (a) of the Sri Lanka Army Pay Code, 1982 and Regulation 112 of the Sri Lanka Army Disciplinary Regulations, 1950.

In view of the fact that criminal proceedings were pending against the Petitioner, when his period of second engagement came to an end on 20.01.1998, the Petitioner's service was not extended beyond that date.

Moreover, while the Petitioner was serving his second enlistment the Petitioner had been convicted of three charges levelled against him under Sections 106(b), 116(c) and 106(b) of the Army Act No. 17 of 1949 namely; absence from duty without leave; failure to appear for the weekly Muster Parade and making of false declarations. He had been reprimanded for all three charges.

The 5th Respondent stated that there were no grounds for the Petitioner to have a legitimate expectation of being re-enlisted in the Sri Lanka Army for the third time, and also that the Petitioner was aware that his Commanding Officer had not recommended him for re-enlistment. Further, the Army has acted according to the rules and regulations applicable for re-enlistment.

Further, the Petitioner has requested that steps be taken to discharge the Petitioner from Army with effect from 20.01.1998 on which date his 12 years service period was completed.

The Petitioner's service has been suspended since 15.09.1997. Hence, he was entitled to payment of half salary only for the remainder of his service period i.e. only until 20.01.1998. As stated by the Respondents, the payment of salaries beyond that period i.e. until 30.09.1998 had been due to an oversight.

Moreover, the 5th Respondent stated that the Petitioner had not forwarded any appeal to the Commander of the Army in terms of Regulation 4(1) of the said Regulations. Since the Petitioner had not availed himself of this opportunity, his present application is misconceived in law.

The 5th Respondent stated in his Objections that the Petitioner is not entitled to the benefits sought for the following reasons;

i. his period of engagement came to an end on 20.01.1998 whilst a charge of murder was pending against him in court,

ii. in view of the pending criminal case his service could not have been extended beyond 20.01.1998 in terms of Regulation 4 (1) (a) and Regulation 2 of the said Regulations,

iii. extension of service is not automatic nor is it a legal right of a soldier. Considering the pending murder charge and his convictions under the Army Act the Petitioner could not have been classified as "well behaved",

iv. the Petitioner was discharged from the murder charge against him on 05.12.2008 after his initial period of engagement came to an end on 20.01.1998.

Therefore, it was contended that the Petitioner has failed to establish that his fundamental rights have been violated.

When the matter was taken up for argument the learned Counsel for the Petitioner firstly submitted that the Respondents failed to exercise the discretionary powers in a fair manner. Further, the failure to re-enlist the Petitioner is illegal, irrational and arbitrary and infringed the fundamental rights guaranteed to the Petitioner under Article 12(1) of the Constitution.

Counsel for the Petitioner further submitted that the Petitioner was not responsible for the false allegation made against him of murdering of his wife and he is not responsible for the delay of ten years for him to be discharged by the Magistrate's Court. The Petitioner's position is that the refusal to re-enlist him for the third time was a violation of the principles of the administration law which amounts to a violation of the equal protection guaranteed by the Constitution. Thus, he is entitled to Constitutional remedies.

On the other hand, the learned Senior State Counsel for the Respondents submitted that the actions of the Respondents were neither illegal, irrational nor arbitrary and that there was no violation of the Petitioner's rights.

He submitted that in terms of the Army Regulation No.112 the Petitioner was suspended as he was charged with murder. In fact, the Petitioner was discharged from criminal proceedings after the date of his re-enlistment fell due. Hence, it was submitted by the Respondents that the Sri Lanka Army did not act irrationally or arbitrarily by not re-enlisting the Petitioner in 1998.

Further, it was submitted that the Petitioner was not discharged earlier as grave criminal charges were pending against the Petitioner and it would be irrational to discharge the Petitioner or issue the Petitioner a certificate of discharge prior to conclusion of the criminal proceedings pending in court.

Having considered the material produced in court I am of the opinion that the Petitioner did not establish that he had either a contractual or statutory right to obtain the third re-enlistment.

Further, in *Dissanayake v. Kaleel* (1993) 2 SLR 135 at 184 Mark Fernando J. stated that fairness lies at the root of equality and equal protection. However, the Petitioner neither

established that he was eligible for the third enlistment nor the refusal to enlist him for the third time is unreasonable, discriminatory or arbitrary. The unreasonableness should be judged from an objective basis.

Further, the refusal by the Respondents to enlist the Petitioner for the third time is neither irrational nor arbitrary. On the contrary the said decision was reasonable and based on the facts and circumstances of this case and the regulations that are applicable to the Petitioner.

Thus, the Petitioner failed to prove that the refusal to enlist him for the third time amounted to a violation of his fundamental rights guaranteed by the Constitution.

The second ground of challenge was that the Petitioner had a legitimate expectation that he would be re-enlisted to the Sri Lanka Army once the pending case against him before the Magistrate's Court was concluded.

The Petitioner submitted that he had a legitimate expectation to enlist for the third time after his second enlistment. Thus, the failure to enlist him for the third time violated his fundamental rights guaranteed by the Constitution.

The Petitioner stated that he was in remand custody from 08.05.1996 to 20.08.1996 for a period of 3 months and thereafter released on bail by the Magistrate's Court on 20.08.1996. The Petitioner was required by the Army to seek re-enlistment for a further period of 10 years if he wishes to re-enlist for the third time on or about June 1997. He has requested that he be re-enlisted during the said period.

The Petitioner's second re-enlistment period was ended on 20.01.1998, but he has been paid half pay up to 30.09.1998 which was beyond the period of the second enlistment. Therefore, the Petitioner claimed that his application for the third re-enlistment should be considered as accepted. Further, he also entertained a legitimate expectation to obtain the third enlistment.

In *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 Amarasinghe 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. Thus, it is necessary to consider the applicability of the doctrine of legitimate expectation to the instant application to ascertain whether the Petitioner could have had a legitimate expectation to obtain the third re-enlistment and if so whether it has been breached by the Respondents.

Legitimate expectation is a concept evolved in Europe. Though the doctrine of legitimate expectation commenced as a remedy in public law, later the said doctrine was applied to cases arising from European Convention on Human Rights and Fundamental Freedoms etc. In Sri Lanka the said doctrine of legitimate expectation is applied in the fields of public law,

fundamental rights law and in labour law. In labour law the said doctrine is applicable to the state sector and the private sector in like manner.

The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection.

Procedural expectations are protected by requiring that the promised procedure be followed save in very exceptional circumstances, for instance where national security warrants a departure from the expected procedure. However, in such instances the decision-maker must take into account all relevant considerations.

In *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 Amarasinghe J. held that 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. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against equal treatments arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the Executive.

An expectation is considered to be legitimate where it is founded upon a promise or practice by the authority that is said to be bound to fulfil the expectation. Therefore, an expectation reasonably entertained by a person may not be considered as legitimate because of some countervailing consideration of policy or law. Further, clear statutory words override any expectation howsoever founded. Where an expectation is founded on a policy and later a relevant change of policy is notified, the expectation founded on the previous policy cannot be considered as legitimate.

An expectation the fulfilment of which results in the decision maker making an unlawful decision cannot be treated as a legitimate expectation. Therefore, the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation case. If a person did not expect anything, then there is nothing that the doctrine can protect.

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 said doctrine is based on the facts and circumstances of each case.

In the instant application the Petitioner's second argument was based on the legitimate expectation of substantive protection. In his Petition he states that he was first enlisted from

21.01.1986 to 20.01.1991, for a period of five years and thereafter he was re-enlisted from 21.01.1991 to 20.01.1998 for a period of further seven years. The Petitioner while serving his second enlistment was arrested on 07.05.1996 and was in remand custody from 08.05.1996 till 20.08.1996 and subsequently released on bail on 20.08.1996. Thereafter, he was interdicted on 15.09.1997 and was on half pay up to 30.09.1998.

It was further submitted on behalf of the Respondents that they have not made any express representation at any stage to the Petitioner that he would be re-engaged. And also the Petitioner has failed to demonstrate that the Sri Lanka Army or the Respondents have had a past practice of re-enlisting persons in similar circumstances.

It is apparent from the documents filed by the 5th Respondent that the payment of half the salary beyond the end of the second enlistment was an administrative error, an error cannot be a basis of a legitimate expectation. In order to succeed in an application made on the grounds of legitimate expectation, the expectation must be legitimate. Mistakes, decisions based on erroneous factual data or illegality cannot be the basis for a legitimate expectation. A similar view was expressed in *Vasana v. Incorporated Council of Legal Education and Others* (2004) 1 SLR 154.

As stated above the Petitioner had preferred several appeals to re-enlist him for the third time or to allow him to resign as a soldier who had completed 12 years of service. By appeal dated 23.02.1999 addressed to the Director, Pay and Records the Petitioner had requested to take steps to engage him in active service and if the Army was unable to do the same to allow him to resign as a soldier who had completed 12 years of service.

The Soldiers Service Regulations No. 1 of 1994 which governs the re-enlistment of soldiers does not provide for automatic re-enlistment. Whether a soldier has a right to be re-enlisted depends on whether he had met the criteria set out in the aforesaid Regulation No. 4. Thus, a Commanding Officer may in his discretion recommend an efficient and well behaved soldier for re-engagement. However, such discretion shall be used in line with the principles of natural justice. As such, there was no statutory or legal right which entitled a soldier to be re-engaged in service as of right for a further term, upon the conclusion of an enlistment. Further, the convictions under the Army Act are relevant facts when using the discretion for an enlistment. The Petitioner failed to prove that he has fulfilled the required criteria to enlist for the third time.

The Petitioner's re-enlistment for the third time fell due on 20.01.1998. However, the Petitioner was discharged from criminal proceedings on 05.12.2008 which was long after his re-enlistment fell due. Therefore, the date of re-enlistment has passed by the time the Petitioner was discharged from the criminal proceedings. It was not possible to back-date the third enlistment.

Further, the Petitioner failed to prove that there was an established past practice of re-enlisting persons similarly circumstanced. Moreover, the Petitioner could not have had a legitimate expectation to be re-enlisted upon the conclusion of his second enlistment on 20.01.1998 as the Respondents have not given an undertaking to the Petitioner in regard to his third enlistment nor have the Respondents adopted a past practice in regard to persons similarly circumstanced. Mere expectation of a citizen will not, by itself, give rise to an enforceable right.

Further, the Petitioner has on several occasions requested from the Sri Lanka Army to allow him to resign as a soldier who had completed 12 years of service. Such requests to resign from the Sri Lanka Army estop the Petitioner invoking the doctrine of legitimate expectation and seeking for a further enlistment in the Sri Lanka Army.

Moreover, the Petitioner has not availed himself the opportunity of lodging an appeal to the Commander of the Army in terms of Regulation 4 (1) of the Soldiers Service Regulations No. 1 of 1994, which provides that a soldier who is not recommended by his Commanding Officer for an extension of service or re-engagement may appeal to the Commander of the Army against the refusal by the Commanding Officer. Thus, I am also of the view that the doctrine of legitimate expectation cannot be invoked by a person who has not exhausted his remedies unless he can satisfy court as to why he did not exercise his rights made available to him.

I hold that the Petitioner has failed to establish that he was entitled in law to be enlisted in the Sri Lanka Army for a third time and he had a legitimate expectation to be enlisted for the third time. Further, the Respondents' failure to grant the third enlistment to the Petitioner was neither unreasonable, illegal, irrational nor arbitrary. In the circumstances, I hold that that the Petitioner failed to establish that his fundamental rights guaranteed by the Constitution have been infringed by the refusal to enlist the Petitioner for the third time to the Sri Lanka Army. This application is therefore dismissed.

I order no costs.

Judge of the Supreme Court

Chandra Ekanayake J.

I agree

Judge of the Supreme Court

S. E. Wanasundera, PC, J

I agree

Judge of the Supreme Court