

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

*In the matter of an Application under and in
terms of Article 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka*

S.C. (F.R.) Application No. 240/2020
and 215/2020 with 97/2016

S.C. (F.R.) Application No. 240/2020

Y.G. Gnanathilaka,
No. 17/1B,
2nd Lane,
Gurudeniya Road,
Ampitiya,
Kandy.
Minuwangoda.

PETITIONER

Vs.

1. D. Dissanayake,
Chairman,
1A. Retired Justice
Jagath Balapatabendi,
Chairman,
1B. Sanath J. Ediriweera,
Chariman,
2. Prof. Hussain Ismail,

2A. Indrani Sugathadasa,
2B. S.M. Mohamed,
3. V. Jegarajasingham,
3A. V. Shivagnanasothy,
3B. N.H.M. Chithrananda,
4. G.S.A. de Silva,
4A. Dr. T.R.C. Ruberu,
4B. G.S.A. de Silva.
5. Dr. Prathap Ramanujan,
5A. Ahamed Lebber Mohamed Saleem,
5B. Prof. N. Selvakkumaran,
6. S. Ranugge,
6A. Leelasena Liyanagama,
6B. M.B.R. Pushpakumara,
7. D.L. Mendis,
7A. Dian Gomes,
7B. Dr. A.D.N. de Zoysa,
8. Sarath Jayathilaka,
8A. Dilith Jayaweera,
8B. R. Nadarajapillai,
9. Sudharma Karunaratna,
9A. W.H. Piyadasa,
9B. C. Pallegama,
All members of the Public
Service Commission of
No. 1200/9,
Rajamalwatta Road,
Battaramulla.
10. M.A.B. Daya Senarath,
Secretary,

Public Service Commission,

No. 1200/9,

Rajamalwatta Road,

Battaramulla.

11. A.L.S.C. Perera,

Surveyor-General,

Surveyor-Generals Department,

No. 150,

Kirula Road,

Colombo 05.

12. Secretary,

Ministry of Lands and Land Development,

‘Mihikatha Medura’,

Land Secretariat,

No. 1200/9,

Rajamalwatta Road,

Battaramulla.

13. Director General of Establishments,

Ministry of Public Administration and

Management,

Independence Square,

Colombo 7.

14. Secretary,

Administrative Appeals Tribunal,

No. 35, Silva Lane,

Rajagiriya.

15. A.D.N.K. de Silva,

Senior Superintendent of Survey,

District Survey Officer,

Kalutara.

16. K.R. Sarath,
Senior Superintendent of Survey,
Surveyor-Generals Department,
No. 150, Kirula Road,
Colombo 05.

17. N.K.U. Rohana,
Senior Superintendent of Survey,
Institute of Survey and Mapping,
Diyatalawa.

18. P.K.L.S. Panduwawala,
Senior Superintendent of Survey,
District Survey Office,
Anuradhapura.

19. N. Gunawardane,
Senior Superintendent of Survey,
District Survey Office,
Hambantota.

20. F.L. Karunaratne,
Senior Superintendent of Survey,
District Survey Office,
Monaragala.

21. G.N.P. Seneviratne,
Senior Superintendent of Survey,
Surveyor-Generals Department,
No. 150, Kirula Road,
Colombo 05.

22. G.D.S.L. Kulathunga,
Senior Superintendent of Survey,
Surveyor-Generals Department,
No. 150, Kirula Road,

Colombo 05.

23. O.T.M.I. Thilakaratne,
Senior Superintendent of Survey,
District Survey Office,
Badulla.
24. K.K.B.N. Fernando,
Senior Superintendent of Survey,
District Survey Office,
Gampaha.
25. Hon. Attorney-General,
Attorney-General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

S.C. (F.R.) Application No. 215/2020

G.D.P. Ariyathilaka,
No. 279/A/1,
Dippitigoda,
Kelaniya.

PETITIONER

Vs.

1. Dharmasena Dissanayaka,
1A. Retired Justice
Jagath Balapatabendi,
1AA. Sanath J. Ediriweera,
Chariman,
Public Service Commission,
No. 1200/9,
Rajamalwatta Road,

Battaramulla.

2. Prof. Hussain Ismail,

2A. Indrani Sugathadasa,

2AA. S.M. Mohomed,

Member,

Public Service Commission,

No. 1200/9,

Rajamalwatta Road,

Battaramulla.

3. Dr. Prathap Ramanujan,

3A. Ahamed Lebbe Mohamed

Saleem

3AA. N.H.M. Chithrananda,

Member,

Public Service Commission,

No. !200/9,

Rajamalwatta Road,

Battaramulla.

4. V. Jegarasasingam,

4A. V. Shivagnanasothy,

4AA. N. Selvakumaran,

Member,

Public Service Commission,

No. 1200/9,

Rajamalwatta Road,

Battaramulla.

5. S. Ranugge,

5A. Leelasena Liyanagama,

5AA. M.B.R. Pushpakumara,

Member,

Public Service Commission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.

6. D. Laksiri Mendis,
6A. Dian Gomes,
6AA. A.D.N. de Zoysa,
Member,
Public Service Commission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.
7. Sarath Jayathilaka,
7A. Dilith Jayaweera,
7AA. R. Nadarajapillai,
Member,
Public Service Commission, No.
1200/9,
Rajamalwatta Road,
Battaramulla.
8. Sudharma Karunaratna,
8A. W.H. Piyadasa,
8AA. C. Pallegama,
Member,
Public Service Commission,
No 1200/9,
Rajamalwatta Road,
Barraramulla.
9. G.S.A. De Silva (P.C.),

9A. Dr. T.R.C. Ruberu,
9AA. G.S.A. de Silva PC,
Member,
Public Service Commission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.

10. M.A.B. Daya Senerath,
10A. Thanuja Murugeson,
Secretary,
Public Service Comission,
No. 1200/9,
Rajamalwatta Road,
Battaramulla.

11. MS. A.L.S.C. Perera,
Surveyor General,
Surveyor General's Department,
No. 150,
Kirula Road,
Narahenpita,
Colombo 05.

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

RESPONDENTS

S.C. (F.R.) Application No. 97/2016

1. S.D. Wimalarathna Perera,
No. 96A,
Nagahawatte Road,
Maharagama.

2. Anura Perera,
No. 378/B,
Katuwana Road,
Homagama.
3. Thirukketheesparan,
No.57/28,
Athivinayagar Lane,
Vyrawapuliyamkulam,
Vavuniya.
4. D. Dunstan Perera,
No. 74/5,
Katuwawala Road,
Maharagama.
5. T.D. Rathnasiri,
No. 597/27,
Gabadawatta 1,
Pitipana North,
Homagama.
6. M.A. Sumanadasa,
No. 21/5, Sinhapura,
Talangama South,
Battaramulla.
7. S.K. Mallawa,
No. 137/1,
Wewelduwa,
Kelaniya.
8. W.T. Perera,
No. 40/2,
Yatiyanawatte,
Hedigama,

Piliyandala.

9. Ranjith Premalal Fernando,

No.41,

Kadalana Road,

Metikanda,

Moratuwa.

10. S. Thanaraja,

No. 22/1 A, Opposite the Technical

College,

Browne Road,

Jaffna.

11. Kanagalingam,

Raja Veediya,

Thoppu,

Achchuweli.

12. K. Kethishwaram,

Sumudine,

Iddikikadu,

Achchuweli.

13. H.D.H. De Alwis,

No. 391, Pinthaliya Road,

Kadawatha.

14. B.G. Karunarathna,

No. 25,

5th Lane,

Kandawatte,

Battaramulla.

15. K.D. Ariyaratna,

No. 130A,

Palliyapitiya,

Dunagaha.

16. H.G.H. Munasingha,

No. 741,

Romiel Mawatha,

Panagoda,

Homagama.

17. S. Sellakumaran,

No. 36, 4/5,

Sinsabha Road,

Colombo 06.

18. R.V.P.L. Gunathillaka,

No. 27/1,

Waragodawatte,

Kelaniya.

19. M.D. Fernando,

No. 46, 'Samadhi', Sri Sobitha Mawatha,

Wadduwa.

20. J.P.H.C. Jayasinghe,

No. 152A,

Ihalagama,

Gampaha.

21. Anil Ruhunuge,

No. 241,

Waragoda Road,

Kelaniya.

22. G.D. Harischandra,

No. 286,

Kandy Road,

Pahala Biyanwila,

Kadawatha.

23. P.A. Leelarathna,

No. 367/2,

2nd Lane,

Shanhi Mawatha,

Makumbura,

Pannipitiya.

24. J.S.J Balasuriya,

No. 1324/1 B,

1st Lane,

Bogahawatte Road,

Pannipitiya.

25. K. Wickramasinghe,

No. 63/5,

Old Kesbewa Road,

Gangodawila,

Nugegoda.

PETITIONERS

Vs.

1. B.G.S. Gunatilleke,

Additional Secretary,

Ministry of Housing and Construction,

2nd Floor,

"Sethsiripaya",

Sri Jayawardanepura Kotte,

Battaramulla.

2. Dharmasena Dissanayake,

Chairman,

Public Service Commission of Sri Lanka,

No. 177,

Nawala Road,

Narahenpita,

Colombo 05.

2A. Hon. Justice Jagath

Balapatabendi,

Chairman,

Public Service Commission of Sri Lanka,

No. 177,

Nawala Road,

Narahenpita,

Colombo 05.

3. A. Salam Abdul Waid,
Member.

3A. Indrani Sugathadasa,
Member.

4. D. Shirantha Wijetilake,
Member.

4A. T.R.C. Ruberu,
Member.

5. Dr. Prathap Ramanujam,
Member.

5A. Ahamod Lebber Mohamed
Saleem,
Member.

6. V. Jegarasasingam,
Member.

6A. Leelasena Liyanagama,
Member.

7. Santi Nihal Seneviratne,
Member.

7A. Dian Gomes,
Member.

8. S. Ranugge,
Member.

8A. Dilith Jayaweera,
Member.

9. D.L. Mendis,
Member.

9A. W.H. Piyadasa,
Member.

10. Sarath Jayathilaka,
Member.

3rd to 10th Respondents and 3A to 9A all of:
Public Service Commission of Sri Lanka,
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

11. H.M.G. Seneviratne,
Secretary,
Public Service Commission of Sri Lanka,
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

11A. Mr. M.A.B. Daya Senarath,
Secretary,
Public Service Commission of Sri
Lanka,
No. 177, Nawala Road,

Narahenpita,
Colombo 05.

12. Secretary,
Ministry of Housing Construction,
2nd Floor,
"Sethsiripaya",
Sri Jayawardanepura Kotte,
Battaramulla.

12A. Eng. Keerthi Ranjith
Abeywardhana,
Secretary of State Minister of
Rural Housing and Construction
and Building Materials
Industries Promotion,
2nd Floor, "Sethsiripaya",
Sri Jayawardanepura Kotte,
Battaramulla.

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

RESPONDENTS

BEFORE : Jayantha Jayasuriya, PC. CJ
E.A.G.R. Amarasekara, J
A.H.M.D. Nawaz, J

COUNSEL : Amaranath Fernando for the Petitioner in
SC. FR. 215/20.

Manohara De Silva, PC with Shantha Jayawardane, Thilini Vidanagamage and Harithriya Kumarage for the Petitioners in SC. PR. 97/16.

Nilshantha Sirimanne with Deshani Goonetileke for the Petitioner in SC. FR. 240/20.

Viveka Siriwardene, PC, ASG for the 1A- 9A, 10th – 12th Respondents in SC. FR. 215/20.

Parinda Ranasinghe, PC, ASG for the Hon. Attorney General in SC. FR. 97/16.

M. Gopallawa, SDSG for the 1st -13th and 1A- 9A Respondents in SC. FR. 240/20.

ARGUED ON : **13.09.2023**

DECIDED ON : **29.11.2024**

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

1. During the arguments in applications SC/FR 97/2016, SC/FR 215/2020, and SC/FR 240/2020, the parties mutually agreed that the judgment in one case would resolve the core issues common to all three cases. Accordingly, this Court will treat the facts in SC/FR 240/2020 as the benchmark for addressing these issues uniformly.

Factual Matrix:

2. Before addressing the Petitioner's case, it is important to provide an overview of the factual background.
3. The Petitioner, a Senior Superintendent of Survey in Class I of the Sri Lanka Survey Service (SLSS), who was serving in the Survey Department Office of the Central Province at the time of the application began his career on January 1, 1986, with his initial appointment as a Surveyor in Class III-Grade III. Over the years, he advanced within the SLSS, being promoted to Class II-Grade II as an Assistant Superintendent of Survey, effective January 20, 1997.
4. This application before the Court arises from the grievances of the Petitioner, a Senior Superintendent of Survey in Class I of the Sri Lanka Surveyors' Service. The Petitioner asserts that the Public Service Commission ("PSC") unjustly applied amended promotion criteria retroactively, adversely affecting his seniority and promotion eligibility. Specifically, he contends that a period of duly authorized no-pay leave was improperly deducted, thereby undermining his rightful promotion.
5. The Petitioner further states that he appealed this decision to the Administrative Appeals Tribunal ("AAT"), which ultimately allowed his appeal, overturning the PSC's decision. However, the gravamen of his complaint lies in the PSC's refusal to abide by the AAT's ruling, despite the AAT being the appellate body for its decisions. The Petitioner argues that this intransigence amounts to a violation of his fundamental rights.
6. In fact, the central issue in the related applications, SC/FR 97/2016 and SC/FR 215/2020, mirrors this concern—whether the PSC can so blatantly

repudiate the decision of its appellate body, and, if not, whether such refusal constitutes an infringement of fundamental rights.

7. The jurisdiction of this Court has been invoked to seek a declaration that the actions and inactions of the PSC, specifically its refusal to implement the AAT's decision, have violated the Petitioner's fundamental rights as guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.
8. Let me now outline the origins of the grievance as articulated by the Petitioner in his petition and submissions before this Court.
9. In February 1998, the Surveyor-General's Department issued Circular No. 01/98, stipulating that periods of overseas no-pay leave taken by an officer would be deducted when calculating the officer's seniority in a particular grade for the purposes of promotions or appointments. This position was subsequently revised with the issuance of Circular No. 01/2001 (2001 Circular) on June 4, 2001, which clarified that only no-pay leave affecting mandatory minimum service periods would impact seniority.
10. In other words, the 2001 Circular established that periods of no-pay leave would be deducted for seniority calculations solely when such promotions or appointments required a minimum mandatory service period. This Circular thus superseded the previous policy, providing the governing framework for seniority calculations applicable to the Petitioner and other officers in similar circumstances. I must interpose to observe that it was this Circular that was *in esse* when the Petitioner commenced his no-pay overseas leave on August 1, 2001.
11. The Petitioner in SC/FR/240/2020 applied for no-pay leave from August 1, 2001, to June 16, 2003, to pursue a short-term overseas employment

opportunity. This application was duly approved by the Surveyor-General's Department, allowing the Petitioner an uninterrupted leave of 1 year, 10 months, and 16 days. Upon his return to Sri Lanka, he resumed his substantive duties on June 17, 2003. At the relevant times—both when he left the country on August 1, 2001, and when he resumed duties on June 17, 2003—the sole requirements for promotion were being in Class II-Grade II and having passed the Departmental Senior Professional Examination or an equivalent qualification. Notably, there was no requirement for a minimum mandatory service period.

2004 Circular requiring 10 years' satisfactory service made applicable retrospectively

12. On April 23, 2004, the SLSS Service Minute was amended to introduce new prerequisites for promotion to Class II-Grade I. The amendment required officers to complete ten years of satisfactory service in Class II-Grade II and to pass the Efficiency Bar Examination. In other words, a prospective promotee needed both ten years of satisfactory service and success in the Efficiency Bar Examination.
13. According to the Petitioner, these amended requirements were promulgated to take effect retrospectively from January 1, 2001, predating his period of overseas leave, which commenced in August 2001, and fundamentally altering the criteria governing his seniority and promotion eligibility. The 2004 Service Minute was subsequently amended in January 2006 and again in October 2009, with the promotion criteria becoming progressively more stringent over time.
14. Under these later amendments, promotion to Class II-Grade I required completion of ten years of satisfactory service in Class II-Grade II, permanent status, and certain additional criteria. These criteria included

passing both the first and second Efficiency Bar Examinations within specified timeframes, demonstrating consistent eligibility for salary increments over the previous five years, and maintaining a disciplinary record free from infractions during the same period.

Petitioner's Case:

15. The Petitioner asserts in his petition that he fulfilled all requisite conditions for promotion to Class II-Grade I, having completed the requisite ten years of satisfactory service in Class II-Grade II as of January 20, 2007. In fact, his 10 years' service in Class II-Grade II, according to him, commenced in 1997 and ended on January 20, 2007. It must be noted that the Petitioner factored his no-pay leave into this period of 10 years. His position seems to be based on the 2001 Circular.

PSC decision of November 20, 2009

16. However, he contends that a letter dated November 20, 2009 informed him that his promotion to Class II-Grade I would be effective only from December 5, 2008—a delay of 01 year, 10 months, and 16 days from the date he asserts his eligibility, January 20, 2007. Upon inquiry, the Petitioner learned that the PSC had retroactively deducted his overseas no-pay leave period, spanning from August 1, 2001, to June 16, 2003, from his seniority when calculating his promotion date. The position of the PSC was based on the 2004 Circular.
17. Feeling aggrieved and dissatisfied with this decision, the Petitioner appealed to the PSC, seeking reconsideration of his seniority and alleging that the delayed promotion was unjust. During this appeal process, he received a promotion to Class I of the SLSS on July 23, 2010. However, he claims that this promotion, too was delayed due to the PSC's continued application of his no-pay leave deduction to his seniority calculations.

AAT Order dated October 21, 2019

18. The then Surveyor-General, in recommendations dated December 19, 2011, and July 23, 2012, acknowledged the Petitioner's grievances and supported his case. Nevertheless, the PSC rejected the appeal, maintaining in a letter dated December 11, 2012, that the promotion date was correctly computed. Consequently, the Petitioner preferred an appeal to the Administrative Appeals Tribunal ("AAT"), arguing that the PSC's decision was erroneous. Following deliberations, the AAT delivered its order on October 21, 2019, directing the PSC to grant the Petitioner promotion to Class II-Grade I with effect from January 20, 2007.

Non-implementation of AAT Order dated October 21, 2019

19. However, the Petitioner contends in the main that the PSC has refused to implement the AAT's order dated October 21, 2019. Seeking clarification, the Petitioner exercised his rights under the Right to Information Act, to inquire about into the delay in the implementation of the AAT order.
20. In June 2020, the PSC responded, claiming that the AAT's order was inconsistent with Clause 16:10 of Chapter XII of the Establishments Code. However, the AAT clarified in a letter dated March 11, 2020, that its directive complied fully with the Code. Despite this clarification, the PSC allegedly continued to refuse implementation of the AAT's order. The foregoing constitutes the facts and circumstances surrounding the case.

Application before this Court

21. It is in these circumstances that the Petitioner invoked the jurisdiction of this Court, contending that the PSC's refusal to implement the AAT's directive infringes upon his constitutionally protected rights under Articles 12 (Equality before the law) and 14(1)(g) (Freedom to engage in any lawful

occupation, profession...) of the Constitution. The Petitioner asserts the following specific grounds:

1. Non-implementation of the AAT's order dated October 21, 2019;
2. Failure to promote him to Class II-Grade I of the SLSS effective from January 20, 2007;
3. Failure to promote him to Class I of the SLSS effective from January 20, 2007;
4. Failure to adjust or reinstate his seniority in both Class II-Grade I and Class I of the SLSS;
5. Non-payment of the alleged arrears and salary differentials allegedly due from January 20, 2007, to July 23, 2010, which he claims are owed to him as a Class I officer; and
6. Non-payment of salary arrears from January 20, 2007, to December 5, 2008, at the rate applicable to a Class II-Grade I officer during that period.

Essence of the Petitioner's Relief

22. The Petitioner seeks relief from this Court, contending that the PSC's extended refusal to adhere to a legally binding directive of the AAT has resulted in significant detriment to his career advancement, seniority, and remuneration, infringing upon his constitutionally safeguarded rights.
23. It should be noted that the Petitioner in SC/FR/215/2020 advanced identical arguments, although the material dates of the promotion allegedly due to him differed in his case.

Respondents' Demur of Time Bar

24. The Respondents raised the argument of time-bar at the very outset, asserting that it bolts the gateway to the Petitioner's case being

entertained. They contended that the Circulars of 2004, 2006, and 2009, which constitute the foundation of the PSC's decision to deduct the no-pay overseas leave period from the petitioner's seniority calculation, were never challenged. Furthermore, they argued that although the Petitioner submitted the petition on August 4, 2020, the PSC's final communication rejecting adherence to the AAT decision occurred in June 2020. Thus, under the one-month limitation rule, the petition ought to have been filed no later than July 2020. This, they maintain, renders the petition non-compliant with procedural timeline under Article 126 of the Constitution.

25. Since October 2019, when the AAT issued its order, there has been ongoing correspondence, with clarifications sought regarding the non-implementation of the order. Despite this, the PSC has remained steadfast in its refusal, even going so far as to justify its decision, which had already been repudiated by the appellate body, the AAT.
26. The case of *Lake House Employees Union v Associated Newspapers of Ceylon*,¹ concerned the application of a circular requiring prior approval of the chairman of the first respondent company (ANCL) for all notices of trade unions before being put up on the respective notice boards. The circular was issued in January 2006. The petitioners alleged that hostility between the management of ANCL and certain trade unions led to the transfer of union activists to branch offices in or outside Colombo. Transfer letters dated 29 January 2009 and 24 July 2009 that were posted on the notice board of the first petitioner-union were forcibly removed by the management. Correspondence exchanged between the first petitioner-union and various authorities including the President of Sri Lanka and the Minister for Information and Media during the period 16 December 2008 to

¹ SC/ FR/ 637/2009, SCM 17 December 2014.

16 July 2009 too were forcibly removed from the notice boards. The application was filed on 25 August 2009.

27. Demurring to an objection that the application was out of time, Counsel for petitioners submitted that the forced removal of communications was not confined to the communications referred to in the affidavit of the 3rd petitioner. They were only a few of the several communications which had been removed. It was submitted before the Supreme Court that since the complaint of the petitioners was, in essence, one of continuous violation of their fundamental rights, no time limitation can be reasonably be drawn based on the few communications expressly referred to in the affidavit. The Counsel further submitted that the gravamen of the application was that the notice dated 06 January 2006 is arbitrary and sought to confer and unfettered discretion of the Chairman of the ANCL.
28. It was also submitted that the continuing conduct on the part of the management of forcibly removing notifications and other documents placed in the notice boards amounted to a continuing violation of the fundamental rights of the petitioners. In any event, the notice dated 06 January 2006 amounted to an unlawful pre-censorship of the publications of the first petitioner in the exercise of its trade union rights in violation of Article 14(1)(a) of the Constitution. Accordingly, since the said continuing conduct of ANCL amounted to a continuing violation of the petitioners' fundamental rights, and as such, it did not attract any time limitation. ANCL argued that as it was common ground that all the communications were placed on the notice boards on the dates specified in them and that they were forcibly removed on the same day. Since the latest document in chronological order was a letter dated 16 July 2009, the application filed on 25 August 2009 was clearly out of time.

29. The case of *Samarasinghe v. The Associated Newspapers of Ceylon Ltd.*,² which also involved a circular, was also drawn to the attention of the Supreme Court. The petitioner in that case was a journalist attached to ANCL and the branch secretary of the Jathika Sevaka Sangamaya. He challenged his transfer to ANCL's outstation office in Anuradhapura, alleging that it was based on a violation of the circular dated 6 January 2006. The alleged violation stemmed from his posting of notices and other material on the union's notice board without prior approval from the ANCL chairman. The transfer order was issued on 17 March 2008, but the fundamental rights application was only filed on 6 May 2009.
30. Justice Sripavan held that if the petitioner's fundamental rights had been violated by the direction issued on 17 March 2008, he should have filed his application within one month from that date.
31. Justice Marsoof, with Justices Eva Wanasundera and Aluwihare concurring, brought to the fore the concept of a continuing violation in the case of *Samarasinghe v. The Associated Newspapers of Ceylon Ltd* (supra). Observing the absence of any Supreme Court decision on the matter, the learned judge adopted the distinction recognized in U.S. jurisprudence between '*discrete acts of discrimination and continuing violations through a series of such acts.*' The judgment in *National Railroad Passenger Corp. v. Morgan*,³ was relied upon for this distinction. If there are discrete acts and, by their very nature, they involve the repeated conduct of an infraction of rights or intransigence to implement a decision of an appellate party such as we come across in this case, the constitutional bar cannot be held against a petitioner as Marsoof

² (2011) BLR 46.

³ 536 US 101 (2001).

J stated in *Lake House Employees Union v Associated Newspapers of Ceylon Ltd* (supra).

32. Having regard to the facts in the case, though the AAT made its order in October, 2019, there had since been a concatenation of continuing events substantiating the allegation of a continuing violation and thus, the petition would not attract any time limitation.
33. Whilst the AAT order of October 2019 conferred rights and liabilities on the parties, the PSC's continued rejection of the decision of its appellate body should be treated as a continuing violation and in such circumstances, we proceed to reject the objections on time-bar.
34. Having thus disposed of the time bar objections raised by the Respondents, there remains the remaining issue which centers on the justification or otherwise preferred by the Respondents for the persistent failure to implement the AAT decision. As has been emphasized by this Court, the AAT is constitutionally and statutorily created as an appellate body of the PSC but the PSC continued to dissent from the binding views of its appellate body. The Respondents pivoted their case to the 2004 circular to deduct the no-pay overseas leave in the fixation of seniority of the Petitioner and there were arguments made to vindicate the retrospective application of the circular in regard to the promotion of the Petitioner. Whilst the AAT rejected such a course of action, it is undisputed that the Respondents have maintained their consistent position that the 2004 Circular must be applied to the case of the Petitioner.
35. The case of the Petitioner is that the AAT order has to be given recognition and enforcement. However, the Respondents defended the PSC decision for

deducting the Petitioner's period of no-pay leave and proffered the tenability and validity of the 2004 Circular. In response, the Respondents sought to demonstrate the inapplicability or invalidity of the 2004 Circular to the case of the Petitioner. It has to be remembered that though the AAT order was not challenged by the PSC in judicial review proceedings such as a Writ Application, the nub of the argument of the learned Additional Solicitor General and Senior Deputy Solicitor General focussed on the validity of the 2004 Circular to justify the PSC decision.

36. When one party holds out the validity of a circular, it is not impermissible for the opposing party to show its invalidity. This is commonly known as collateral attack by the Respondents and oftentimes it so happens that when a party does not mount a direct attack against an adverse order, he is afforded an opportunity to attack it collaterally in the event the order or rule is put forward as valid against him.
37. The attempt on the part of the Respondents could be characterized as a justificatory measure of the 2004 Circular which the Petitioner is at liberty now to impugn by way of a collateral attack in these proceedings.
38. Paul Craig in his Administrative Law states:

The general principle is that any defect that would be treated as jurisdictional in direct proceedings is equally available in a collateral challenge.⁴
39. Wade & Forsyth discusses collateral challenges under the rubric Collateral Proceedings:

⁴ 7th Edition at page 745.

The validity of the act or order may be challenged directly, as in proceedings for certiorari to quash it or for a declaration that it is unlawful. But it may also be challenged collaterally, as for example by way of defence to a criminal charge, or by way of defence to a demand for some payment.⁵

40. It is in that background that the Petitioner has also sought to contend that the 2004 Circular would not apply to them. There was also the argument made on behalf of the Petitioner that there cannot be a retrospective application of a circular. While a retrospective application of a law would hold, it was argued that such a retrospective exercise cannot be made by an executive in the case of a subordinate legislation or circular.
41. In such circumstances this court proceeds to go into the pros and cons of these arguments.
42. The Respondents have presented a detailed justification for deducting the Petitioner's period of no-pay leave when determining his eligibility for promotion to Class II-Grade I of the SLSS. This position rests on two primary issues for the Court's determination.

1. Lawful Deduction of No-pay leave as argued by the Respondents

43. The Respondents contend that the deduction of the Petitioner's no-pay leave, taken for overseas employment, was both lawful and valid. They base this assertion on the terms outlined in the Petitioner's letter of appointment and subsequent promotions, which require compliance with the Service Minute, the Establishment Code, and other pertinent regulations.

⁵ in Chapter 9 entitled *Problems of Invalidity* at page 235; See Rubinstein, *Jurisdiction, and Illegality*, ch.3. Also see *De-ella Arachchige Don Hilda Mayadunne v R.R.P.W.Chandrasekera* CA Case No. 296/2000 (F) D.C. Polonnaruwa No. 5465/L decided on 10.12.2018.

44. The Respondents drew the Court's attention to Section 16:10 of Chapter XII of the Establishments Code, which stipulates that when a scheme of recruitment specifies a minimum service period for promotion eligibility, periods of no-pay leave cannot be included in calculating that duration. They emphasize that this principle ensures fairness by preventing officers who have taken no-pay leave, rendering no active service to the State, from gaining an advantage over those who have maintained continuous service. This rationale is reinforced by the ruling in *Eliyathamby Nadesamoorthy v. T. Asoka Peiris et al.*,⁶ which highlighted the same principle. Moreover, they contend that the Establishment Code consistently excludes no-pay leave periods when reckoning entitlements and advancements, as outlined in Sections 16:8, 16:9, and 16:11. Consequently, the Respondents maintain that the deduction of the Petitioner's no-pay leave aligns with the established legal principles and is therefore lawful.

45. The Respondents further argue that by the time the amendments to the Service minute of 1991 were established, the Petitioner had returned to the country but he did not object to the introduction of a minimum satisfactory service period, brought about in 2004. This, they assert, signifies the Petitioner's implied acceptance of the regulation that no-pay leave would not contribute to the service period required for promotion.

2. Non-compliance with the AAT's order as argued by the Respondents

46. The Respondents assert that the PSC is under no legal obligation to implement the AAT's order dated October 21, 2019. They argue that the AAT, misapplied relevant provisions within the Service Minute and the Establishment Code, when issuing its directive, rendering the order

⁶ SC Appeal 174/2013.

incompatible with the governing legal framework. They further argue that implementing an erroneous AAT's decision would conflict with statutory requirements governing public service promotions.

47. They further refer to the judgement in *C.W. Mackie v Hugh Molagoda, Commissioner General of Inland Revenue and others*,⁷ to assert that any invocation of Article 12(1) must be grounded in lawful grounds. Enforcing an incorrect AAT order, they contend, would contravene principles of equality under Article 12 (1) and set a precedent for invalid claims of fundamental rights. Additionally, the Respondents argue that forcing compliance with an incorrect AAT decision may inadvertently create a parallel fundamental rights jurisdiction within the AAT, which would undermine this Court's jurisdiction and authority.
48. After anxious consideration of the arguments and the time line of events, this Court finds the Respondents' contentions unconvincing. The amendment in question was enacted nearly 10 months after the Petitioner resumed his substantive duties within the Surveyor-General's Department. While the amendment was made retroactively effective from January 1, 2001, the Petitioner's decision not to immediately challenge it is explicable, given the reasonable and legitimate expectation- rooted in the then prevailing policies - that it would not retroactively alter his promotion rights.
49. The Petitioner could be said to have been under a legitimate expectation that any changing policy would not retroactively alter his promotional eligibility. Specifically, Circular No. 01/2001, in effect at the time did not

⁷ (1986) 1 Sri LR 300.

stipulate a 10-year minimum service period for promotion to Class II-Grade I, nor did it suggest that such a requirement would be applied retroactively.

50. The dominant line of authority allows a body to apply its rule provided only that the individual is granted the opportunity to contest its application to the particular case. Thus, in *ex p. Kynoch*, Bankes L.J⁸ contrasted two situations, the former being permissible, the latter not. It was lawful for an authority to adopt a policy, to intimate to the applicant what that policy was, and to tell that person that it would apply the policy after a hearing, unless there was something exceptional in the case. It was, however, not permissible for the authority to make a determination not to hear any application of a particular character.

51. A similar approach was adopted in *British Oxygen Co. Ltd. v. Board of Trade*,⁹ where it was held that while an administrative authority might, in certain cases, be obliged to consider arguments for changing its rules, it is nonetheless entitled to establish and adhere to a policy. This policy, developed over the course of addressing numerous similar cases, may evolve into a precise framework akin to a rule. Such a policy is deemed acceptable, provided that the authority remains open to considering new and relevant arguments presented by individuals who bring forward fresh perspectives or compelling reasons for deviation. The upshot of the reasoning in the case is that before a policy is changed, individuals who lie exposed to the deleterious consequences of a change of policy must be noticed and consulted. This court does not find such a course of action having been adopted in this case.

52. Furthermore, the language of the amendment was, as this Court finds, ambiguous in its scope, failing to clearly indicate whether it was intended

⁸⁸ (1919) 1 K.B. 176 at 184.

⁹ (1971) A.C 610.

to apply prospectively or retroactively. The Petitioner's reliance on the established presumption against retrospective application of rules was therefore both reasonable and in accordance with law.

53. It was only upon the receipt of an official letter dated November 20, 2009—advising the Petitioner that his promotion would be delayed by one year, ten months, and sixteen days—that the Petitioner first became aware that the amendment was, in fact, being applied retroactively to his detriment.
54. Upon learning of this adverse application, the Petitioner promptly sought recourse, first by appealing to the PSC to reconsider the retroactive delay in his promotion. Following the PSC's refusal to amend its decision, the Petitioner pursued further redress by appealing to the AAT. In its decision issued on October 21, 2019, the AAT unequivocally rescinded the PSC's decision and directed that the Petitioner be promoted to Class II-Grade I of the SLSS with effect from January 20, 2007, as personal to him.
55. Despite this unequivocal ruling, the PSC's refusal to implement the AAT's decision or seek its reversal before a competent court has resulted in a continuing infringement upon the Petitioner's fundamental rights. This Court notes that the Petitioner subsequently submitted an application under the Right to Information Act to ascertain the reasons for the PSC's inaction, to which the PSC responded on June 8, 2020 that it would not implement the AAT's order on the purported basis of a conflict with Section 16:10 of Chapter XXII of the Establishments Code. This reply confirmed that the PSC was unwilling to either comply with or contest the AAT's decision, leaving the Petitioner's promotional rights in a state of unresolved uncertainty.

56. With these findings in place, the court now moves to a comprehensive examination of the relevant policy instruments—beginning with Circular No. 01/98 and culminating in the Service Minute amendments of 2004 and 2009—which reveals a progressive refinement in the SLSS's regulatory framework concerning the treatment of no-pay leave vis-à-vis seniority and promotional eligibility. Notably, the 2004 amendment to the Service Minute, enforced retroactively from January 1, 2001, introduced for the first time a ten-year service criterion for promotion to Class II-Grade I, thereby altering the Petitioner's anticipated career progression.
57. The record discloses that, at the time the Petitioner availed himself of no-pay leave, no stipulation existed in the prevailing Service Minute necessitating a minimum tenure in Class II-Grade II. The Petitioner, acting in good faith, thus availed himself of no-pay leave with full departmental authorization, returning to Sri Lanka and resuming service upon its conclusion. In light of the foregoing, prior to, during, and even after returning from overseas no-pay leave, the Petitioner had no reason whatsoever to believe that his said period of overseas no-pay leave would affect or impact his seniority and career progression within the Surveyor-General's Department, in any manner whatsoever. Circular bearing No. 01/2001, dated June 4, 2001 would have manifestly provided the Petitioner a clear basis to entertain a legitimate expectation that his overseas no-pay leave period will not have any impact whatsoever on his next promotion.
58. This Court finds that the AAT, in its ruling, acted with appropriate discernment in recognizing and upholding the legitimate expectations entertained by the Petitioner, expectations that were firmly rooted in the prevailing policies and the Service Minute of the SLSS in force at the relevant time. Specifically, it is held that the Petitioner had a legitimate expectation, grounded in the operative policy framework, that his period of

leave without pay would not adversely impinge upon his eligibility for promotion to Class II-Grade I. The retroactive alteration of promotion prerequisites, therefore, constitutes a substantial infringement of the Petitioner's established expectations—a breach which, in the view of this Court, offends both equity and reason.

59. The doctrine of legitimate expectation, an entrenched principle within the ambit of Sri Lankan public law, first found acknowledgment in the Court of Appeal's decision in *Multinational Property Development Limited v. Urban Development Authority*.¹⁰ Therein, the Court expounded that public authorities bear a duty to honour promises or representations made to individuals, particularly where reliance upon such assurances has occurred to the individual's potential detriment. This doctrine further mandates that judicial review be invoked where decisions unjustly undermine vested expectations.
60. Within the jurisdiction of Sri Lanka, judicial exegesis has fortified the principle that an expectation, to be regarded as legitimate, must be anchored in an unequivocal promise or an established practice. In *Ginigathgala Muhandiramilage Nimalsiri v. Colonel P.P.J. Fernando*,¹¹ this Court elucidated this principle, underscoring that for an expectation to be deemed legitimate, it must be born of a lawful undertaking by the public body in question. The legal foundations underlying this doctrine thereby require that: (i) a promise or practice, lawfully established, engenders an expectation upon which an individual has reasonably relied; and (ii) any deviation from such promises or practices would be unjust and disproportionate in its effect.

¹⁰ [1996] 2 Sri LR 51.

¹¹ S.C.F.R. Application No. 256/2010.

61. However, it is not to be taken as the law that deviation from an established rule is not permissible. Such a deviation is permitted when the party against whom the change of rules is going to be used is heard and notified of such a change. If such a cause of action is adopted affording no opportunity to state its objections to a change of policy it would disappoint procedural legitimate expectation that would amount to a violation of Article 12 (1) of the Constitution.
62. In applying this doctrine to the facts at hand, the Court observes that at the material time when the Petitioner availed himself of no-pay leave, SLSS policies imposed no minimum mandatory service period within Class II-Grade II as a prerequisite for promotion to Class II-Grade I. Indeed, for a period exceeding a decade prior to the Petitioner's leave, it was an accepted practice within the service that officers taking no-pay leave would not suffer detriment to their seniority. This consistent practice should have instilled in the Petitioner a legitimate expectation that taking no-pay leave would not adversely affect his promotion prospects—an expectation upon which the Petitioner clearly relied when organizing his affairs and securing overseas no-pay leave.
63. Furthermore, the Court finds that this legitimate expectation was egregiously undermined by the retroactive imposition of an amendment to the SLSS Service Minute by the PSC in 2004, introducing a new minimum service requirement for promotion to Class II-Grade I. This amendment, imposed retroactively upon the Petitioner, was not merely arbitrary but manifestly injurious to his established expectation.
64. On a similar vein, this court emphasizes the fact that the amendments to the SLSS, as enacted in April 2004, should not be applied retrospectively,

as such an imposition gives rise to the presumption against retroactivity, a principle firmly entrenched in statutory and constitutional interpretation. The presumption dictates that no rule or requirement shall be applied retrospectively unless explicitly stated, especially where such application would prejudice those affected. The principle, as enunciated in *The Attorney-General of Ceylon v. W.M. Fernando*,¹² and reaffirmed by this Court in subsequent judgments, maintains that subordinate legislation with retrospective effect is *ultra vires* unless the enabling Act expressly or by necessary implication authorises such application.

65. The retrospective application of a "mandatory minimum service period" imposes an unforeseen burden on officers who relied in good faith on Circular No. 01/2001. This amendment introduces an unanticipated qualification for those serving in Class II-Grade II at the time of its enactment, creating significant hardship for officers who, based on prior expectations, availed themselves of no-pay leave.
66. The Constitution of the Democratic Socialist Republic of Sri Lanka encapsulates a stringent approach towards retrospective legislation. Articles 13(6), 75, and 170 confer upon Parliament the exclusive power to enact laws with retrospective effect, provided such intent is unequivocally conveyed within the legislative framework. This authority is limited to parliamentary enactments and does not extend to subordinate legislation unless expressly provided for within the enabling statute. Consequently, this Court is persuaded that the retrospective application of the SLSS Service Minute amendment is legally flawed, as it lacks the requisite legislative mandate to retroactively affect rights and expectations.

¹² (1977) 79(1) N.L.R. 39

67. The AAT's conclusion, granting the Petitioner a right based on his reliance on Circular No. 01/2001, is both legally sound and equitable. The AAT's decision appropriately upholds the principles of fairness and non-retroactivity, ensuring that the amendment does not unduly prejudice the Petitioner.
68. This Court concurs with the AAT's finding that, had the amendment been applied prospectively, the Petitioner would have had the necessary foresight to make an informed decision regarding his no-pay leave. The AAT noted that the amendment unjustly delayed the Petitioner's seniority, forcing him to remain in a subordinate grade for a decade longer than reasonably expected, while his juniors advanced.
69. For example, the Petitioner highlighted that he lost seniority by 16 positions in Class II-Grade I of the SLSS and 11 positions in Class I of the SLSS. Additionally, 10 officers who were junior to him before January 2007 now rank above him in seniority as a result.
70. This Court agrees with the AAT's conclusion that the Petitioner's reliance on prior policies was reasonable, and that the retroactive application of new service requirements has caused undue and inequitable harm to his professional standing.
71. In view of the foregoing considerations, this Court concludes that the AAT's decision to uphold the Petitioner's legitimate expectations was both lawful and equitable. The AAT has correctly applied the principles governing the presumption against retrospective rule application as well as the doctrine of legitimate expectations. This decision may reflect a commitment to uphold both the letter and spirit of law against retroactivity in subordinate legislation in the absence of such clear, unequivocal legislative intent. This

Court, therefore, holds the decision of the AAT as legally sound, binding, and definitive.

72. It is pertinent to address that the PSC's failure to implement the determination of the AAT, rendered on October 21, 2019, affirming the Petitioner's entitlement to seniority from January 20, 2007, raises significant concerns. Upon a careful examination of the matter, it is evident that the PSC has neglected to pursue the legal remedies available to challenge the AAT's order, despite the passage of nearly two years.
73. The PSC's omission to file a Writ Application before the Court of Appeal clearly demonstrates an absence of genuine intent to contest the Tribunal's decision through lawful means. This inaction underscores a disregard for the avenues of redress explicitly provided under the law.
74. The AAT, constituted under the Administrative Appeals Tribunal Act No. 4 of 2002 and vested with jurisdiction by virtue of Articles 59(2) and 59(3) of the Constitution, is unequivocally empowered to alter, vary, or rescind decisions rendered by the PSC. Its jurisdiction is both constitutional and statutory, and Section 8(2) of the AAT Act further emphasizes that a determination made by the Tribunal shall be "final and conclusive," thus precluding an appeal but not judicial review. When the Petitioner was bestowed with rights by an appellate tribunal and that right concerns a right to promotion, it cannot be argued that such an infringement of a right cannot amount to an infringement of fundamental rights inasmuch as the rights bestowed amounts to a fundamental right to equality and can extend to a right to practice a profession.
75. It is the settled jurisprudence of this Court that the principle of finality in administrative determinations is foundational to the proper functioning of

public administration. In this regard, it is instructive to note the precedent established in *W.J. Fernando and Others v. Chairman, Public Services Commission*,¹³ wherein this Court affirmed that orders of the AAT, once unchallenged, acquire a binding character and are to be executed by the PSC without reservation. Any wilful disregard by the PSC of such unchallenged orders constitutes an affront to the hierarchical appellate structure intended by the Legislature and, by extension, undermines the rule of law itself.

76. Hence, in view of the fact that the PSC did not challenge or seek review of the aforementioned Order of the AAT in any competent Court of Law, no substantive or procedural grounds existed, either in fact or in law, upon which the PSC could justifiably refuse to give effect to the said Order. The absence of a legal contestation implies a tacit acquiescence by the PSC in the binding nature of the AAT's directive, thereby imposing upon it an unequivocal duty to implement the Order in full.
77. Upon the lapse of over nine months from the issuance of the Order by the AAT, this court observes that the PSC had demonstrably failed to effectuate the Order, thereby manifesting either an outright refusal or unwarranted delay in fulfilling its administrative obligations. This prolonged inaction on the part of the PSC, despite the absence of any judicial intervention suspending or invalidating the AAT's directive, further underscores a disregard for procedural propriety and for the fundamental rights of the Petitioner enshrined in Article 12(1) of the Constitution.

¹³ S.C. (F.R.) Application No. 383/2008, S.C. Minutes of 28/02/2017.

78. Furthermore, in the case of *Dr. S.Y.L.S. Wickramasinghe v. Dr. V. Jeganathan, Director-General of Health Services and Others*,¹⁴ the Supreme Court was faced with similar circumstances to those presently before this Court. The primary issue in *Wickramasinghe* case was whether, after a lapse of more than ten years, the PSC could justifiably apply Chapter XII Section 16:10 of the Establishments Code to calculate the minimum service period for the petitioner's promotion.

79. As in the instant case, the petitioner in *Wickramasinghe* had availed himself of no-pay leave before the 1985 amendment to the Establishments Code introduced Section 16:10, which excluded no-pay leave from being counted towards the minimum period required for promotion. At the time the petitioner took no-pay leave, this restriction did not exist within the Establishments Code. Consequently, the Court in *Wickramasinghe* ruled in favour of the Petitioner, awarding him relief, including the restoration of seniority and compensation. This judgment was based on a finding that the Petitioner's Fundamental Right to equality under Article 12(1) of the Constitution had been infringed.

80. In the present case, the Petitioner similarly contends that:

- The PSC's refusal to adhere to and implement the AAT's order is arbitrary, illegal, and contrary to law.
- The PSC is estopped from refusing to implement the AAT's order, which has reached finality under the applicable law.
- The AAT's order was correctly based on the relevant facts and applicable law, particularly concerning the principles of legitimate expectation and the prohibition against retrospective application of administrative rules.

¹⁴ S.C. Application No. 62/98, S.C. Minutes of 12.11.1999.

81. This Court finds the reasoning in *Wickramasinghe* compelling and applicable to the present case. The PSC's actions in disregarding the AAT's directive, despite the absence of any legal challenge, exhibit a disregard for the established principles of administrative consistency and fairness. Furthermore, as the judgment in *Wickramasinghe* affirms, the retroactive imposition of amended service requirements that were not *in esse* when the Petitioner initially availed himself of leave undermines the principles of legitimate expectation and fairness.
82. Accordingly, this Court acknowledges the merit of the Petitioner's claim and determines that the PSC's refusal to comply with the AAT's order not only violates the principles established in the *Wickramasinghe* case but also constitutes an infringement of the Petitioner's Fundamental Rights under Article 12(1) of the Constitution. In view of the above, this Court is compelled to rule in favour of the Petitioner, affirming his entitlement to the full benefits of the unchallenged AAT order. Furthermore, this Court deems it just and equitable to grant appropriate relief to rectify the continued denial of the Petitioner's rights.
83. In the circumstances, this Court holds that there is a clear infringement of the fundamental rights of the Petitioner in respect of his right to equality and freedom to engage in lawful occupation, as guaranteed by Articles 12 (1) and 14 (1) (g) of the Constitution. Accordingly, the Court makes order directing the Public Service Commission and/or the 1st to 12th Respondents to restore the Petitioner to his seniority in Class II-Grade I of the SLSS with effect from January 20, 2007. His appointment to Class I must be rectified in harmony with this finding. The State is ordered to pay a sum of Rs 50,000 as compensation.

84. This judgment will bind the PSC and the Respondents in regard to the infringements of the rights of the Petitioners in SC/FR 97/ 2016 and SCFR/215/2020. The AAT decisions made in those cases are ordered to be implemented in favour of the Petitioners in those cases.

Judge of the Supreme Court

Jayantha Jayasuriya, PC. CJ

I agree,

Chief Justice

E.A.G.R. Amarasekara, J

I agree,

Judge of the Supreme Court