

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

*An application made under and in terms of
Articles 12(1) and 14(1)(g) of the Constitution
read with Article 126 of the Constitution.*

K. L. A. R. Krishantha Kulasinghe
772/12, Indrajothi Mawatha,
Battaramulla.

PETITIONER

SC/FR Application No. 308/2021

Vs.

1. Dr. P.B. Jayasundara,
Secretary to the President,
Presidential Secretariat,
Colombo 01.
2. Vice Admiral D. N. S. Ulugetenne,
Commander of the Navy,
Navy Headquarters,
PO Box 593, Chatham Street,
Colombo 01.
3. Gen. (Rtd) Kamal Gunaratne,
Secretary,
Ministry of Defense,
Defense Headquarters Complex,
Sri Jayawardenapura Kotte.
4. Rear Admiral Y.N. Jayarathne,
Chief of Staff Sri Lanka Navy,
PO Box 593, Chatham Street,
Colombo 01.

5. Rear Admiral A.P.N. De Silva,
Director General Logistics,
PO Box 593, Chatham Street,
Colombo 01.
6. Rear Admiral Tilak Segera,
Director General Finance and Budget,
PO Box 593, Chatham Street,
Colombo 01.
7. Commodore T.M.A.A. Tennakoon,
Acting Director General Personal,
Naval Headquarters,
PO Box 593,
Colombo.
8. Commodore M.S.K. Mahawatte,
Director Naval Training,
Naval Headquarters,
PO Box 593,
Colombo.
9. Commodore P.S. De Silva,
Command Headquarters,
SLNS Rangala,
Port of Colombo, Colombo.
10. Commodore T.S.K. Perera,
Command Headquarters,
SLNS Uththara,
Port of KKS, Jaffna.
11. Commodore N.A. Ubayasiri,
Director Logistic Management Cell,
Naval Headquarters,
PO Box 593,

Colombo.

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

RESPONDENTS

BEFORE : P. PADMAN SURASENA, C.J.
JANAK DE SILVA, J.
K. M. G. H. KULATUNGA, J.

COUNSEL : Saliya Pieris, P.C., with Ashan Stanislos, instructed by Thushari Jayawardhana, for the Petitioner.

Nayomi Kahawita, SSC, for the Respondents.

WRITTEN SUBMISSIONS ON : 05.12.2025

ARGUED ON : 19.01.2026

DECIDED ON : 17.06.2026

JUDGMENT

K. M. G. H. KULATUNGA, J.

1. The petitioner, K. L. A. R. Krishantha Kulasinghe, is now a retired officer of the Sri Lanka Navy (SLN) from the rank of Commodore. At the time of filing this application, he was in active service. By this application, the petitioner is seeking a declaration that his fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution have been violated due to the non-promotion to the rank of Rear Admiral. Firstly, it is alleged that he was unreasonably denied the opportunity of being promoted due to the changes made to the Scheme of Promotion of the Sri Lanka Navy Order (SLNO) No. 0642. The specific change alleged is

the change to the criteria of apportioning marks between merit and seniority, from 60:40 to 50:50 of the total of 100 marks. It is also alleged that the petitioner was not recommended for promotions, at least in view of his retirement.

2. The petitioner had completed 34 years of service in the Sri Lanka Navy. He had joined as a Cadet Officer on 21.07.1987 and had risen to the rank of Commodore at the point of his retirement in January 2022. The Scheme of Promotion in the Sri Lanka Navy in respect of officers to the rank of Commodore and above is provided for by the SLN Regulation for Officers 1950 ("P2B") and the Sri Lanka Navy Order No. 0642 ("P2A"), which is generally referred to as SLNO 0642. In the said order, as it prevailed in 2000, the seniority to merit proportion was 80:20. However, this proportion was amended to 40:60. This prevailed so and then was subsequently revisited and amended to 50:50 with effect from 30.06.2021, on a recommendation made by a Board of Study on 03.12.2020. Whilst amending the relevant proportion, it also did make certain amendments to the formula in tabulating marks for seniority.
3. The petitioner has, during the relevant period, gone before the Promotion Board on five occasions: 02.12.2020 (2R11), 01.01.2021 (2R12), 18.05.2021 (2R13), 31.08.2021 (2R14), and 28.09.2021 (2R15). Of these occasions, the first three were held under the 40:60 proportion and the last two upon the amended 50:50 proportion. According to the relevant promotion board minutes 2R11 - 2R15, the placement of the petitioner had respectively been 6th, 5th, 4th, 3rd, and 2nd. The respective promotion board minutes also include the detailed marks and mark sheets, giving the breakdown of marks awarded. However, during the period of his active service, the petitioner had not been successful in securing the promotion to the next rank of Rear Admiral.
4. The petitioner's principal complaints and grievances are:

- i. that the said change of the Scheme of Promotion by amending the seniority to merit ratio to 50:50 and implementing the same without sufficient time frustrated his legitimate expectation;
- ii. calling unsuitable persons for the interviews and awarding marks, especially for 'suitability' to such persons with adverse findings at courts martial and with LODs, deprived the petitioner of the opportunity of qualifying for the *viva voce* interviews and being promoted; and
- iii. not being recommended for the promotion pending his retirement.

The Scheme of Promotion.

5. The selection procedure for promotions is provided for by SLNO 0642, dated 01.10.2022 (annexed as "2R1D"). Paragraph 9, under the subhead of "Seniority" provides that seniority is allocated a maximum of 50 marks. Paragraph 3 of the said Order provides that the eligible officers will be evaluated out of 100 marks, and 50 marks will be allocated for record of service (merit) and 50 marks will be allocated for seniority. Paragraph 3 reads as follows:

"3. Accordingly, eligible officers will be evaluated out of 100 marks where 50 marks will be allocated for record of service (merit) and 50 marks will be allocated for seniority (50:50, seniority : merit). Further, the merit list to call for the Viva Voce, is to be prepared as per the order of command (seniority). Also the minimum number of officers to be considered when preparing the merit list should be at least three (03) times of the number of vacancies. In the meantime, when there is only one (01) vacancy available, minimum five (05) officers should be considered when preparing the merit list. Further, same ratio should be taken in to consideration when officers are called for the Viva Voce. Subsequently, the most suitable officer/officers will be selected for the respective promotion in respect to their order of command (seniority) and merit in accordance with paragraph '2' above."

6. The 50 marks in the Scheme of Evaluation reserved for the relevant officer's "Record of Merit and Demerit" are divided into the following

subheads and allocated marks: (1) Merit; (2) Demerit; (3) Achievements; and (4) General suitability. Under 'Merit', marks are allocated under each subhead of NAV 206, Staff Course, Gallantry Medals, Sea Command, Sports, and LOCs; and for 'Demerit', under subheads Court Martial, Summary Trials, and LODs. Up until the amendment of the said Order 0642, on the recommendation made by a Board of Study on 03.12.2020 (2R2), the allocation of marks between seniority and merit was 40:60. This was provided for by the previous Orders under the same number, dated 24.06.2019 ("2R1C"); 15.02.2014 ("2R1B"); and the initial memorandum containing the procedure dated 09.08.2004 ("2R1A"). The amended SLN Order 0642 dated 01.10.2022 is produced also by the petitioner as P-10.

7. The complaint is that the change was made without sufficient advance notice, and there was a frustration of the legitimate expectation of the petitioner. It is common ground that the said scheme was amended and the seniority to merit proportion was changed from 40:60 to 50:50. The effect of this change is that seniority and merit are now considered on equal proportion in the selection procedure for promotions. This change would ensure that an officer who is senior would now have an advantage when compared with the previous scheme.
8. This is a change of policy. This change was not *ad hoc*. It was made upon the consideration and the recommendation of a Board of Study appointed for the specific purpose of limiting and reducing the seniority gap of late promotions and superseded promotions. The said recommendation is produced by the Respondents marked "2R2". The Board of Study, consisting of 11 members, upon deliberating, made the following observations:

"2. The present mechanism of calculating marks for the promotion to the ranks of Commander and above is governed by the provisions stipulated in SLNO 0642. Further, 60% of the marks are allocated for the merits and 40% of the marks are allocated for the seniority. Awarding a higher percentage of marks for merit and a

lower percentage of marks for the seniority has led to a situation where the junior officers get promoted to their next higher ranks over the senior officers purely based on the merit leading to several administrative impediments and exercising command and control within the Navy. In addition, when generating vacancies in other branches, opportunity is created for the junior officer to get their promotion and to become senior over the others.”

9. Having so observed, it was then found that there is no comparable or similar ratio of seniority and merit followed in the Sri Lanka Army and the Sri Lanka Air Force. It is observed that, *“in those services, they go purely by the seniority unless a senior officer has committed an offence, which deprives him of being promoted to the next higher rank with his batchmates.”* The Board also observed that the evaluation criteria of 40:60 (seniority to merit) has resulted in junior officers superseding senior officers. This has also led to officers junior by several batches obtaining promotions with seniors on the same dates. Upon considering in detail, the said Board of Study recommended that the evaluation criteria of 40:60 (seniority to merit) be amended to 50:50 and also recommended that the formula for calculating marks for seniority be amended accordingly.
10. Is this change rational and reasonable? As evident from P2C, the Sri Lanka Navy Order 0639, the shift from seniority to merit had taken place between 1994 and 1996. To start with, the seniority to merit proportion was 80:20 in 1994, 60:40 in 1995, and has been 40:60 since 1996. This shift to give weightage to merit had now been reversed. In my thinking, the military is an organisation with a structured hierarchy strictly based on seniority. In the military subculture, seniority is the basis and the mode of maintaining discipline, command and control in its operations and interrelations of officers and soldiers alike. Therefore, in the military subculture, giving greater weightage to seniority is desirable and required. That is what has been brought about by the change of criteria, by 2R14.

11. Schemes of Recruitment and Promotion cannot remain static; with the passage of time and the change of circumstances and considerations, such Schemes of Recruitment and Promotion require to be periodically realigned and reconsidered to meet the demands of such services. As I see, the consideration of seniority and giving greater weightage to seniority in the context of the military subculture is desirable. In the military subculture, maintaining discipline as well as command and control is certainly of primary importance. As opposed to any other service, the military consists of trained and armed personnel. In this subculture, seniority is of critical importance to ensure the effective control of the chain of command and the command structure. To that extent, seniority is of importance in considering promotions, as opposed to merit. It is just that the amendment to the Scheme of Promotion endeavoured to achieve.
12. In any event, considering the dynamics of the military structure, a balance between seniority and merit should be maintained in formulating Schemes of Promotion. Seniority, which is usually pegged to a fixed and determinate date or placement or promotion, is predictable. Thus, the shift to seniority would make a prospect more predictable and tangible, so to say. Thus, the shift from a 60:40 to a 50:50 merit-to-seniority ratio is not unreasonable and, in the context of the military, is desirable and necessary. In context, it strikes the right balance between seniority and merit, so to say.
13. In ***Balachandra Arachchige Don Nuwan Chathuranga Padmasiri and others v. C. D. Wickramaratne, Inspector General of Police and others*** (SC/FR/46/2021, decided on 23.11.2022), Mahinda Samayawardhena, J., considering the above issue of seniority and merit, opined as follows:

“Promotion is an important part of any institution. No institution can run effectively and efficiently if seniority is the sole criterion for promotion, disregarding merit. This is not undervaluing seniority. Seniority should be given due recognition but it should not be the

only criterion because seniority and competency do not always go hand in hand. If the principles of meritocracy are given due place, there will be a sense of accomplishment and fulfilment. It will encourage innovations and increase productivity, which will in turn positively affect the steady growth of the institution. But favouritism should not play a role in promotion. There shall be a promotion policy. The weightage given to seniority vis-à-vis merit may vary. A right balance should be struck when considering merit and seniority.”

14. The complaint of the petitioner is that a person who happens to be senior will, on this new formula and weightage, gain an advantage which would not be easily abridged by merit of a junior officer. On a careful consideration and perusal of 2R1D, the Navy Order 0642, I see that there is a specific provision for the retention of seniority and suppression by clause 08 of the said Scheme which is as follows:

“Retention of Seniority and Supersession

8. Once an officer is promoted to the rank of Commander, unless superseded, officers will not change their order of seniority by virtue of marks obtained as per the promotion procedure. i.e. Two officers, A and B if promoted to the rank of Commander where A is senior to B, at the time of evaluation for promotion to Captain, B will not become senior to A unless there is only one vacancy available and B has obtained higher marks than A. If there are two vacancies and B has better marks than A, both A and B will be promoted, but A will retain his/ her senior position despite his/ her marks being lower than that of B. In an organization like the Navy, it is not possible to permit flip-flopping of seniority at different periods, unless superseded by another.

a. All officers who are superseded should be permitted to retire if they so desire. Vacancies created due to such retirement should be filled at the first opportunity.

b. Superseded officers are given the option of appearing for subsequent promotion boards, until they are promoted or until they complete the stipulated time in their rank.”

This clearly recognises the importance of seniority when two officers are competing with each other. This provision was there in all previous Schemes of Promotion. Therefore, it is apparent that successive Schemes of Promotion have always recognised seniority in some form,

whatever the proportion may have been. Thus, seniority in rank and position amongst recruits of the same intake was a relevant and important consideration. The petitioner cannot claim a legitimate expectation of having merit being afforded greater weightage over seniority. As said before, it is especially so in the military hierarchy and subculture, where seniority is an overriding consideration. It is a fact that every military officer ought to know, anticipate, and expect. That being so, when seniority is given greater or equal weightage, the petitioner being a member of the military, cannot complain of the frustration of his/her legitimate expectation.

15. The petitioner bases his expectation on merit being afforded greater weightage over seniority in the previous Scheme of Promotion. In administrative law, the doctrine of legitimate expectation will only arise where there exists of a clear, settled and regular practice upon which an individual could reasonably form an expectation. In **Council of Civil Service Unions v. Minister for the Civil Service** (1984) UKHL 9 (“the GCHQ case”), Lord Fraser, considering the then-emerging doctrine of legitimate expectation, observed as follows:

*“This subject has been fully explained by my noble and learned friend, Lord Diplock, in **O’Reilly v. Mackman** [1983] 2 A.C. 237, and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”*

16. In **Union of India and others v. Hindustan Development Corporation and others** (1994 AIR 988, decided on 15.04.1993), K. Jayachandra Reddy, J., observed as follows:

“For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be, and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a

mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation.

The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.”

17. The petitioner’s alleged expectation is founded not upon any express representation or established assurance but on the hope that the existing Scheme of Promotion and criteria would remain unchanged, affording greater weightage to merit over seniority. Such an expectation cannot be regarded as “legitimate” in law, as an organisation or authority is not precluded from revising policy where such revision is rational, necessary, and reasonable. In **Dayarathna and Others v. Minister of Health and Indigenous Medicine and Others** (1999) 1 SLR 393, Amerasinghe, J., observed as follows:

*“In general, a Government has a right to change its policies. As Lord Diplock observed in **Hughes v. Dept of Health and Social Security**:*

‘Administrative policies may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such changes is something that is inherent in our form of constitutional Government. When a change in administrative policy takes place and is communicated in a departmental circular...any reasonable expectations that may have been aroused...by any previous circular are destroyed.’”

*This passage might be thought to suggest that no expectation can survive a change in policy. That is not so. As Sedley, J. observed in **R v. MAFF**, (supra), at 730: ‘But it is also well-established that it is a misuse of power for (a public body) to act unfairly or unjustly towards the private citizen when there is no overriding public interest to warrant it’. (see **HTV Ltd v. Price Commission** at 185*

*per Lord Denning MR, cited with approval by Lord Templeman in **Preston v. IRC** at 340.” (at pages 404 and 405)*

18. Then at page 406, Amerasinghe, J., cites the following paragraph from Craig’s ‘Administrative Law’ (at page 90):

“Policies must of course be allowed to develop, and in this sense it is correct to say that they cannot be fettered. One cannot, therefore, ossify administrative policy, which may alter for a variety of reasons, including experience gleaned from the operation of the previous policy, change of political outlook, or new technological developments. Nonetheless, the “no fettering” theme must be kept within bounds. Where a representation has been made to a specific person, or where conditions for the application of policy in a certain area have been published and relied on, then the public body should be under a duty to follow the representation or the published criteria. This does not prevent it from altering its general policy for the future, but it should not be allowed to depart from the representation or pre-existing policy in relation to an individual who has relied, unless the overriding public interest requires it, and then only after a hearing.”

19. Though the petitioner alleges that the change from 40:60 to 50:50 was implemented without due notice and was rushed through, I find that the said change had been well-considered with due notice. The starting point is that the Sri Lanka Navy has convened a Board of Study to consider the change, and the said Board has provided a detailed report dated 03.12.2020 (*vide* 2R2). This Board had been specifically convened for the purpose of considering the limiting/reducing of the seniority gap of late promotions and superseding promotions and consisted of 12 senior officers of the Sri Lanka Navy. Upon considering various aspects and effects, the said Board of Study has recommended the change of the proportion to 50:50 (seniority to merit). The Sri Lanka Navy has presented and placed the recommendations of the Board of Study before the Board of Management and Area Authorities Meeting held at the Naval Headquarters on 19.03.2021. A portion of the minutes, including pages 1–6, is produced as 2R3. Item No. 6 in the said minutes is the

consideration of this recommendation on this issue in respect of which a presentation and a briefing had been made to those who were present. This consisted of 56 officers of the ranks of Vice Admiral to Captain, including the Commander of the Sri Lanka Navy. I observe that the petitioner, K. L. A. R. K. Kulasinghe, who was a Commodore, was also present at the said meeting.

20. Upon considering the recommendations, all have agreed with the proposal to change the proportion between merit and seniority to 50:50 and has unanimously approved and directed that the existing SLNO 0642 be amended and the new SLNO 0642 be promulgated accordingly, considering the effective date to be the date of the new SLNO. Therefore, a fair and transparent procedure has been followed upon a study, and it is only thereafter that the change to the proportion has been incorporated and given effect to. Accordingly, the assertion that it was arbitrary and without notice cannot stand.

21. What is significant and critical is that the petitioner himself had been a member of and a participant at the said meeting of the Board of Management and Area Authorities, who adopted and recommended the said amendments. The petitioner, being a party and an active member who scrutinised and approved the same and also made a collective directive to give effect and implement, cannot now claim a legitimate expectation to be considered for promotions on the previous scheme. To my mind, the conduct of the petitioner is not rational or in consonance with any reason. The petitioner, having also participated in the process of amending the scheme, cannot now be heard to claim a legitimate expectation or, to that matter, complain of the frustration of such expectation.

Calling Unsuitable Officers.

22. The petitioner's next complaint is that by repeatedly calling Commodore Pathberiya and Commodore D. W. M. Perera before the interview board,

against whom certain disciplinary inquiries were pending, the petitioner was denied the opportunity of being selected for the *viva voce*. Mr. Saliya Pieris, P.C., submitted that the said two officers were not suitable to be called for the interviews for promotions in view of certain pending inquiries within the Navy and LODs. The adverse finding against Commodore D. W. M. Perera is in P-15. However, in 2021, Commodore Pathberiya, upon obtaining the highest marks before the promotion board, was not selected, in view of a pending inquiry.

23. The Scheme of Promotion does not disqualify persons with adverse findings but only prescribes demerit points. It was also submitted that giving high marks for “suitability” to the said two officers is contrary to the Scheme of Promotion, in view of the pending inquiry and the adverse recommendation made by P-15. Commodore D. W. M. Perera had been awarded 8.6 marks for suitability in 2021. Mr. Pieris, P.C., argued that a person with an adverse finding such as P-15 is not entitled to be considered ‘suitable’ and to receive such high marks.

24. What is ‘suitability’? Sri Lanka Navy Order 0642 (“P2A”) describes ‘General Suitability’ as follows:

“b. General Suitability. *Trend, attitude and commitment (positive continuous progress or otherwise) and leadership traits such as personality, bearing, confidence, composure and ability of decision-making and knowledge of the board members on each candidate will be considered as contributory factors under General Suitability.*”

Paragraph 10 of the Sri Lanka Navy Regulations 2000 (“P2B”) states as follows:

“10. *When selections for promotions are made, the following matters shall be carefully considered in each case: -*

a) Whether the officer’s past record justifies favourable consideration of his case and, particularly, whether his promotion has been recommended with confidence by the other officer under whom he has served.

- b) Whether he is **suitable** in every respect to fill, with competence, all or any of the appointments likely to be available to him in the higher rank for which he is being considered.
- c) Whether taking into consideration the service, age and seniority of other officers, his promotion is clearly in the best interest of the Navy.”

25. Thus, “suitability” is considered vital; however, “suitability” in the context of the Scheme of Promotion in the Navy is different and distinct. The same concept of “suitability” was expounded in the case of **Union of India vs Maj. Gen. Manomoy Ganguly** (Civil Appeal No. 5800 of 2018, decided on 01.08.2018), where the Supreme Court of India observed the following:

“42) In English parlance, the word ‘suitable’ is assigned the meaning as ‘appropriate, fitted for the purpose or acceptable’. The concise Oxford Dictionary defines the word suitable as ‘well fitted for the purpose; appropriate’. This ordinary meaning is to be given effect to as a general guide, unless this expression is given special meaning in a statute or rule in administrative instructions. In **R (Quintavalle) v. Human Fertilisation Authority** [2005] UKHL 28, the House of Lords remarked that “the word ‘suitability’ is an empty vessel which is filled with meaning by context and background”.

43) **In service jurisprudence, where the word ‘suitable’ is normally examined from the point of view as to whether a particular person is suitable to hold a particular post, it is construed as ‘fit’ to hold that post.** It would mean that the job profile and job requirement of a particular post would be seen and then, going by the calibre, competence, attributes, skill and experience of the candidate, it would be ascertained as to whether such a person would be able to discharge the duties of the post i.e. whether he is suited to carry out the functions of the post, to the satisfaction of his employer.” (emphasis added)

Then, I observe that in **R (Quintavalle) v. Human Fertilisation Authority** (supra), the House of Lords observed as follows:

“‘Suitable’ is one of those adjectives which leaves its content to be determined entirely by context. As my noble and learned friend Lord Scott of Foscote put it in argument, a suitable hat for Royal Ascot is very different from a suitable hat for the Banbury cattle

market... the breadth of the concept of suitability is what determines the breadth of the authority's discretion."

26. The above description of 'General Suitability' in SLNO 0642 does not contemplate or include an adverse finding at a court martial, a court of inquiry or an LOD. Therefore, it is apparent that LODs or any other adverse court martial or court of inquiry finding cannot be considered in evaluating suitability. This is further buttressed by the fact of the marking scheme specifically and distinctly providing for fixed demerit points in respect of such adverse findings. If there be an adverse finding by a court martial, a court of inquiry, or an LOD, the marking scheme prescribes the deduction of 10, 5, or 1 mark, respectively. Therefore, the deductions (demerits) for such adverse findings are different and distinct and not relevant to assessing "suitability".

27. If marks are deducted under a separate subhead for such adverse findings or LODs, is it reasonable and lawful to also reduce the marks that may be awarded for suitability? I think not. It would then amount to double-counting, so to say. As I see, if such demerit is specifically considered under a separate head, then it should not be considered again under another head. This is particularly so in the current context of the description provided for 'General Suitability'. Then also, the Scheme of Promotion is formulated on the premise that officers subject to adverse findings of courts-martial, courts of inquiry or LODs, are not *per se* disqualified, but eligible to be considered for promotions, subject to fixed deductions as aforesaid. Thus, the said argument advanced on behalf of the petitioner is misconceived.

28. Mr. Saliya Pieris, P.C., also submitted that apart from the adjustment of the proportion to 50:50, the formula of calculating marks for seniority was also changed. He submitted that the period of service of the senior-most applicant becomes a relevant factor in view of the said formula contained in 2R14. Thus, even a few years' difference may have a significant impact and give a significant advantage to a senior officer. It

is also argued that the effect of this equated merit and seniority proportion, when considered with the new formula, which gives a greater advantage to a senior officer, makes it virtually impossible for a junior officer to catch up on marks earned on merit. It is inherent in this scheme that for a junior officer to successfully obtain an overall score above a senior officer, he/she would have to be exceptional in merit.

29. This, as I see, stands to reason and falls in line with the significance of seniority in the military. Thus, for a junior officer in the military to qualify for a promotion over a senior officer, he/she should excel and be exceptional in merit. In the Scheme of Promotion, deductions are contemplated for adverse findings of a court martial, a summary trial, or an LOD. The scheme clearly provides a check and balance by penalising such persons with adverse records. Therefore, this scheme, which is sensitive to such adverse records, ensures that senior officers with unmeritorious and adverse records may not succeed in securing a promotion and a junior officer who would be exceptional in merit may qualify for a promotion over such a senior. In these circumstances, there is no merit in the said argument advanced on behalf of the petitioner.

30. The petitioner alleges that calling the following officers from the Logistics branch for the *viva voce* interviews on 01.01.2021 has prejudiced the petitioner:

- i. Commodore (S) D. W. M. Perera,
- ii. Commodore (S) A. P. N. De Silva,
- iii. Commodore (S) S. N. K. Pathberiya, and
- iv. Commodore (S) M. T. Sigera.

The prejudice alleged is that of the said officers; D. W. M. Perera was under investigation for an alleged fraud, and S. N. K. Pathberiya was under investigation by the Ministry of Defence. Thus, it is submitted that the said two officers are not eligible to be selected but were called for the *viva voce* interviews. By calling these two officers, the petitioner claims that he was effectively prevented from being called for the *viva voce*

interview. However it is conceded that though Commodore Pathberiya was recommended by the Board for promotion, it was not accepted by the Ministry of Defence.

31. However, the 2nd respondent Commander of the Navy, in his Statement of Objections, states that, at the Promotion Board held on 01.12.2020 for promotion to the rank of Temporary Rear Admiral of the Logistic Branch, seven Commodores, including the petitioner, were eligible for consideration. The officers were evaluated in accordance with the criteria set out in SLNO 0639 and 0642, and the 2nd respondent in the objections states that, pursuant to paragraph 12 of SLNO 0642, the Promotion Board determines the number of officers to be called for *viva voce* by taking into account the number of vacancies, seniority, merit, and demerit, excluding board assessment, and that the minimum number of officers called for *viva voce* should be at least three times the number of vacancies. It is stated that the petitioner was placed sixth prior to the board assessment/*viva voce* and was therefore not called for *viva voce*. The 2nd respondent further states that Commodore (S) D. Wijethunga secured second place in the order of merit and was accordingly promoted to the rank of Rear Admiral in view of the observations made by the Promotion Board.

32. The 2nd respondent further states that, in relation to the Promotion Board held on 01.01.2021 for promotion to the rank of Rear Admiral, six officers were eligible for consideration, and the petitioner was ranked fifth in the order of merit. It is stated that four out of the six officers were called for *viva voce*. The 2nd respondent also states that there are no provisions in SLNO 0642 preventing officers who are subject to pending inquiries or investigations from being evaluated for promotion, giving precedence to the legal presumption of innocence. Thus, it is the submission of the 2nd respondent that the petitioner was not eligible to be called for *viva voce*.

Non-Promotion Pending Retirement.

33. The petitioner alleges that it is a practice in the Sri Lanka Navy that senior officers, in view of reaching retirement, are recommended for promotions. The claim of the petitioner is that he had a legitimate expectation to be recommended for the promotion to the next rank of Rear Admiral, at least at the point of retirement. This expectation is on the alleged practice that has prevailed in recommending persons on the eve of their retirement for the next senior rank. According to the written submissions, it is alleged that Commanders of the Navy have, at various times, in the exercise of their discretion, recommended officers who have completed 20 years to be promoted to the next rank just prior to retirement. This discretion, according to the petitioner, is referable to the Board of Study recommendation 2R2.
34. Consideration of the said recommendation and the other promotions so granted on the eve of the retirement of such officers appear that they were in the circumstances of such officers reaching the maximum in the rank or, at the point of retirement, there being a vacancy though such officer was not the senior most eligible for the promotion. There are just only isolated instances of such promotion being made and referred to in the petition. This cannot create a rule or practice sufficient to establish an expectation which is legitimate.
35. There is thus no right, entitlement or expectation to demand the recommendation to the next rank on the eve of retirement. If at all, it is in the circumstances of an officer reaching the maximum in the rank or reaching retirement and there being a vacancy in the higher rank that such recommendations may have been so made in exceptional circumstances though such officer is not the senior-most eligible person. The petitioner had not established any such circumstance.
36. Be that as it may, if the argument of the petitioner is accepted in its totality, it will create an absurd circumstance where every officer retiring

will expect a promotion on the eve of retirement, be there a vacancy or otherwise. In these circumstances, I find that there is no legal basis for the petitioner to claim a legitimate expectation to be recommended for a promotion on the eve of his retirement.

37. In the above circumstances I am left with no option but to find that the petitioner has failed to establish any violation as alleged. Accordingly, this application is dismissed. However, we make no order as to costs.

JUDGE OF THE SUPREME COURT

P. PADMAN SURASENA, C.J.

I agree.

CHIEF JUSTICE

JANAK DE SILVA, J.

I agree.

JUDGE OF THE SUPREME COURT