

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

In the matter of an Application under and in terms of Article 17 and Article 126 of the Constitution.

SC. FR. Application No. 492/2011

Ravidu Viduranga Lokuge
appearing by his next friend
Haputhanthrige Geethanjali Prasadhika,

Both of No. 265/N/98, Torrington Flats,
Housing Scheme,
Torrington Avenue,
Colombo 05.

Petitioner

-Vs.-

1. Upali Gunasekera
Principal,
Royal College,
Colombo 07.
2. Wimal Gunaratne,
Former Principal of Thurstan College,
Chairman,
Objections Panel of the Royal College

SC. FR. Application No. 492/2011

Year one admissions for the year 2011,
Royal College,
Colombo 7.

3. H. M. Gunasekara
Secretary,
Ministry of Education,
“Isurupaya”,
Battaramulla.

4. Attorney General
The Attorney General's Department,
Colombo 12.

Respondents

Before : The Honourable P. A. Ratnayake PC, J.
The Honourable S. I. Imam J.
The Honourable P. Dep PC, J.

Counsel : Mr. Manohara De Silva PC with Ms. Darini Daluwatte
for the Petitioners.

Ms. S. Herath SSC., for the AG.

Argued on : 28.06.2012

Written Submissions of the Respondents

Tendered on : 24.07.2012

Written Submissions of the Petitioner

Tendered on : 04.09.2012

Judgment delivered on : 12.10.2012

S.I. Imam, J.

The Petitioner tendered this Application alleging an infringement of his Fundamental Rights as guaranteed in Article 12 (1) of the Constitution. On 15.11.2011 this Court having heard submissions of the learned President's Counsel for the Petitioner and the learned Additional Solicitor General for the Respondents granted Leave to Proceed for the alleged violation of **Article 12 (1) of The Constitution.**

The facts of the case are briefly as follows. The Petitioner through his Next Friend namely his mother applied to Royal College Colombo 7 for admission as a grade one student for the Academic Year commencing 2011 under section 6.1 of The **Circular 2010/21** dated **31.5.2010** annexed marked **A** to the Petition which dealt with Applicants whose **“Residence is in close proximity to the school.”** On being called for an Interview the Petitioner having obtained 54 marks was placed in the 119th position above the Cut off point of 52 in The **Provisional List annexed marked “D”** to the Petition. Subsequently by letter dated **13.11.2010** annexed marked as **'E'** to the Petition the 1st Respondent namely the Principal of the Royal College informed the Next Friend of the Petitioner to

present herself on **28.11.2010** to face a **Protest Inquiry** with regard to an **objection** purported to have been tendered **against** the **Petitioner**. Although the Petitioner's **Next – Friend duly presented herself** at the **aforsaid Inquiry** on 28.11.2010 neither was the Identity of the objector nor the nature of the **objection divulged** to the **Next Friend**. On **24.12.2010** although the **Final List of Students** selected to Royal College was released, the Petitioner learnt that his name had **not been included** in the **Final List**, marked as **'F'** and annexed to the Petition. The Petitioner contended that although he was **placed** in the **119th position** in The **Provisional List**, as **140 students** were **selected** in the **Final List**, that **21 students** who were placed below him in the **Provincial List** were **admitted** to Royal College. The Petitioner hence filed this application to this Court, as he had been treated **Unreasonably** and **Unequally**. He states that although he had **fulfilled** the **Selection Criteria** having obtained **54 marks** in the **Provisional List**, the Petitioner was left **out of** the **Final list of students admitted to Royal College**.

In paragraph 10 of the Affidavit of the 1st Respondent dated **4.1.2012** it was **admitted** that the Petitioner received **54 marks** after the **initial Interview**. The aforesaid Affidavit of the 1st Respondent stated that **consequent** to the **Appeals** and **Protest Board Interview** **12 marks** allocated to The **Petitioner were deducted** and hence it was averred by the 1st Respondent that the marks received by the Petitioner should have been **42 marks** and not **54 marks** as previously obtained by the Petitioner. The main basis for this deduction

amongst others was that **neither** the **name** of the **Petitioner** nor The name of the **Petitioner's Next Friend** appeared in The **Electoral CD** provided by The Elections Commissioner's Office for the year **2006** for which **7 marks** were **deducted** and **Vidyathilaka Vidyalaya** having been considered as an **Intervening School** between the **Petitioner's Residence** and **Royal College** a further **5 marks** were **deducted**, the **total deduction** being **12 marks**, which **reduced** the marks obtained by the **Petitioner** to **42**. At the hearing it was conceded by the learned State Counsel that the **Primary Section of Lumbini Vidyalaya** had been **shifted** to Wellawatte, which according to the Respondents **entitled** the **Petitioner** to another 5 marks which **increased** the marks obtained by the Petitioner to **47**.

A matter for consideration would be the **Legality** and **Propriety** of the **Decision** of The **Appeals** and **Protest Board**. It was contended on behalf of the Petitioner that **Circular 2010/21** in clause **10.0** and **specifically** in **Clause 10.6** stated that only the Documents that were **submitted** should be **Re Examined**. It was urged that **clause 10.6** also stipulated that a **Report** relating to the **Appeals** and **Protest Board Inquiry** should be **submitted**, which had **not been complied** with by the **Respondents**, and it was **contended** on behalf of the **Petitioner** that the original **54 marks** obtained by the **Petitioner** should **not be** altered. It was argued on behalf of the Petitioner that the aforesaid Clause 10.6 specified that it was only the **Documents** that were produced at the

Interview which **The Appeals** and **Protest Board Panel** were permitted to **Re-scrutinize**, and hence a **CD** which the **Next-Friend** of the **Petitioner** could not **Rebut** and could **not** be referred to. Consequently as **admitted** in paragraph 10 of the 1st Respondent's Affidavit the Petitioner was initially granted the maximum of 35 marks for Electoral Register, which was subsequently reduced to **28 marks** by the Appeals and Protest Board Panel with regard to The Electoral Register 2005, 2007, 2008 and 2009 for other **supporting Documents** as they were **not** in the name of the Petitioner. It is my view however, that the CD produced for the year 2006 issued by The Election Commissioner's was **not** available for **Re-Scrutiny** by the Next Friend of The Petitioner, and hence could **not** be referred to. Hence the reduction of marks from 35 to 28 for Electoral Register is **incorrect** and **contrary** to the **provisions** contained in **Clause 10.6**. Thus marks obtained by the **Petitioner** for **Electoral** Register should in my view be **35** as decided at the **Initial Inquiry**. It is also I state necessary for The Appeals and Protest Board to follow the Procedure as set out in **Clause 10.6** in **Circular 2010/21**. The Respondents however **accept** the position that the **Petitioner's name** is in **one** of the **lists** of The **Grama Niladari** for the year 2006.

The Respondents averred that **Circular 2010/21** contains **identical sections** in **respect** of **Section 6.1(ii)** and **6.1(iv)** as in **Circular 2008/21**. It was contended by the Respondents that **challenging the Executive** Act of enumerating the Policy in respect of

admitting students to Government Schools in The **Circular** is **time barred** as it first appeared in **2008/21**. It was pointed out by the Respondents that **prayer (b)** to this **Application** is **against** the **1st Respondent** who had to **act** according to the **Policy Document** namely **2010/21**, and that the **1st Respondent** having acted **in conformity** with **Circular 2010/21** had **not** infringed the **Fundamental Rights** of the **Petitioner** who had **been treated equally** among **all** the **other Applicants**. It was contended by the Petitioner that the Petitioner **can** and is **entitled** to challenge **Circular 2010/21** as **Arbitrary** and **Unreasonable** at the **point** at which he is **affected** by The Circular and **not only** at the **time** when the aforesaid Circular was **published** calling for **Applications**. The Petitioner stressed that it was only at the time when the **Petitioner** was **deprived** of **Admission** to Royal College that the Petitioner **could challenge** The **Circular**, as it was only **then** that his **Fundamental** Rights had been **violated** in **accordance** with the **Provisions** of The **aforesaid Circular**.

Article 126 (2) of The **Constitution** states as follows: "Where any person alleges that any such **Fundamental Right** or **Language Right** relating to such person has been **infringed** or is **about to be infringed** by **Executive** or **Administrative** Action, he may by himself or by an Attorney at Law on his behalf, within **one month** thereof in accordance with such Rules of Court as may be in force, apply to The **Supreme Court** by way of Petition in writing addressed to such Court praying for Relief or Redress in respect of such

Infringement. Such Application may be **proceeded** with **only** with **Leave to Proceed first had** and **obtained** from The **Supreme Court** which **Leave** may be **granted** or **refused** as the case may be by not less than two Judges. "Hence for a Petitioner to seek redress under this Article there must be an **Infringement** or **Imminent Infringement** of a **Fundamental Right** or **Language Right**. It was averred on behalf of the Petitioner that the **Infringement** took place when the **Petitioner's name** was omitted from the **Final List** for **Admission** to **grade 1** of **Royal College**, having taken into consideration the preceding facts of this case. The Respondents contended that the **1st Respondent** had **not** infringed the **Fundamental Rights** of the Petitioner. The Respondents further submitted that the **Placement** of The **Circle** which had the **Radius** between the **Residence** of the Petitioner and The **Primary School** of **Royal College** was to be considered by having **examined** the **Petitioner's** own Document '**H1**'. In H1 the Respondents pointed out that Circle No. 2 marked in Red chalk was marked by the Petitioner to be the correct Circle from which the **Intervenient** Schools should be considered for marks to be **deducted**. The Respondents claimed that as there are **9 schools** within the **Correct Circle** H – 1 the act of **deducting 45 marks** for **Intervenient Schools** in between the **Residence** of the **Petitioner** and The **Primary School** of **Royal College** is in accordance with the **Provisions of The Circular**, and thus the Respondents have **not** violated the **Fundamental Rights** of the **Petitioner** in this regard. However the Respondents **conceded** upon receiving instructions from the **3rd Respondent** that **Lumbini**

Vidyalaya situated at **Skelton Road, Colombo 5** does **not** have its Primary at the **same location**, but at Wellawatta, which is well **outside** the **Proximity Circle** of the Petitioner. The Respondents contended that **Vidyathilaka Vidyalaya** which is situated in the **Centre** of the **Circle** of **Document H1** was by **mistake not taken into account** at the **Initial Interview**. The **existence** of **Vidyathilaka Vidyalaya** was **accepted by** the **Petitioner** in **paragraph 21** of his **Counter Affidavit** dated 13.3.2012, although he has stated that the Advanced Level classes are **not available** at **Vidyathilaka Vidyalaya**. The Petitioner having referred to the Plan 1R1 stated that the number of **Intervenient Schools** could **change** depending on where the **Compass is placed**. In **determining** the Number of **Intervenient Schools** a **Circle** was **drawn**, the **base** of the **Compass** being placed at the Petitioner's **Residence**, the **Radius** of the Circle being the distance between the Residence and the school. The Petitioner averred that as he **resided** at the **Torrington Flats Housing Scheme** which encompassed a large area, schools that are near the edge of the Circle could be deemed **inside** or **outside** the **Circle**, dependant on where the **Compass** is **placed**. It was contended by the Petitioner that the **Plan 1R1** depicted Thurstan College as being near The **Science Faculty** of the **The University of Colombo** which is an **incorrect Assessment**. The Petitioner reiterated that Thurstan College and St. Mary's Mixed School are two schools that could be either **inside** the **Circle** or **outside** the **Circle** dependant on where the **Base** of the Compass is kept. The Petitioner contended that out of the **8** Schools considered as **Intervening Schools**, **3** Schools

namely **Mahamathya Vidyalaya, St. Mary's Mixed School and Vidyathilaka Vidyalaya** do **not** have **provision** for **Advanced Level Education**. From the remaining **5 Schools** **Duddly Senanayake Vidyalaya** provided for **Arts and Commerce subjects** at the Advanced Level and **Parakramabahu Vidyalaya** provided only for **Arts subjects** at The Advanced **Level**. It was submitted by the Petitioner that when parents applied for a **School** they generally **expected** the child to **study up to** the **Advanced level**. Thus it was contended by the Petitioner that in the interpretation of Section **iv** of Clause **6.1** it would be **reasonable** to consider an **interpretation** that is least disruptive of a child's **Education**. Certain schools do not have 'A' level classes but in the event of a student wishing to do the 'A' levels The Government would find a school within close proximity. If such schools are not considered as Intervening schools, The Education Department may be posed with difficulties.

Initially the **9 Schools** referred to as “**Intervening Schools**” were 1. Thurstan College 2. D.S. Senanayake Vidyalaya 3. Sri Parakrama Maha Vidyalaya 4. Vidhyathilake Vidyalaya 5. Dudley Senanayake Vidyalaya 6. Isipathana Maha Vidyalaya 7. Mahamathya Maha Vidyalaya 8. Lumbini Maha Vidyalaya and 9. St. Mary's Mixed School which the Petitioner had obtained **05** marks out of **50** marks for “Proximity from the Residence to the School”, 45 marks having been reduced on the basis that **09 other Schools** were in **closer proximity** to the **Petitioner's Residence**. The Petitioner set out reasons earlier having explained why the deduction of marks for the 7 other schools that

were said to be in closer proximity to the Petitioner's Residence was **unfair**. Although the Petitioner initially obtained 15 marks for **Clause iv** namely "**Proximity from Residence to school**", **10 marks** were further deducted under **Section 6.1 Clause iv**, reducing the **Petitioner's marks** in this category to **05 marks**, thereby reducing the **Aggregate** of the **marks** obtained by the Petitioner to **44**. Having examined Clause iv the **further reduction** of **10 marks** is in my view **unfair**. Hence the allocation of **15 marks** to the **Petitioner** originally for Clause iv, though in my view insufficient, should **not** be **further reduced**. It is my view that in respect of Clause iv, a **reasonable** and fair **interpretation** should be given.

I wish to refer to the following relevant Authorities.

1. In **Haputhanthrige and others Vs. Attorney General 2007(1) SLR p. 101**, His Lordship **Sarath N. Silva CJ** at the **inception stated** as follows:

"The Petitioners in all the Applications have been granted Leave to proceed on the alleged infringement of their Fundamental Rights guaranteed by Article 12(1) of The Constitution. The infringements they allege are in respect of the refusal to admit the several children in the Petitions to Grade 1 of the respective National Schools
"....." **The allegations have related to Unequal, Arbitrary**

and Capricious Application of the relevant Circulars resulting in less suited Children securing Admission to the detriment of the children who have been thereby compelled to invoke the Jurisdiction of Courts.

2. In **Ceylon Paper Sacks Ltd. Vs. Janatha Estate Development Board and others BLR 1993 Vol. V part 1 page 6** His Lordship Kulatunga, J. held that:

“A determination as to whether the decision to reject a Tender is violative of the Tenderer's Rights under Article 12(1) of The Constitution cannot be made by the mere application of the principles of Administrative law relating to the Vires of Administrative action. **The question is whether between persons who are similarly circumstanced there was unlawful discrimination**”

In School admission cases Publication of the Notice calling for Admission does not violate the Petitioner's Fundamental Rights. **It is only after he applies for Admission** and his **Admission is Refused that infringement** takes place. It is only **then** that the **time period** in **Article 126** would apply to the Petitioner. In my view the Respondents have **failed** to apply **Circular No. 2010/21** fairly and reasonably. Due to the negligence and failure of the Respondents to act fairly and reasonably the Petitioner has been deprived of

the equal protection of the law as guaranteed by **Article 12(1)** of the Constitution and was thereby deprived Admission to Royal College, whereby candidates that were marked outside the Marking Scheme were granted Admission to Royal College.

Hence I declare that the **Petitioner's Fundamental Rights guaranteed** under **Article 12(1)** of The Constitution **has been infringed** by the 1st **Respondent** as sought for in prayer (b) of the Petition dated 24.10.2011. Answering prayer (c) of the Petition I Declare that the Petitioner's Fundamental Rights guaranteed under Article 12(1) has been infringed by the Decision to **omit** his name from the final list of students selected to Royal College. In the circumstances I **Direct** the 1st and 3rd **Respondents** to **admit the Petitioner to Royal College.**

I do not order costs.

JUDGE OF THE SUPREME COURT

P. A. Ratnayake PC. J.

I agree.

JUDGE OF THE SUPREME COURT

P. Dep PC. J

I agree.

JUDGE OF THE SUPREME COURT