

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

**S.C. (FR) Application
No. 589/2009**

Harshani S. Siriwardana,
“Shanthi”, Kudagammana,
Divulapitiya.

Petitioner

Vs.

1. Malsiri J. Seneviratne,
Secretary,
Ministry of Health, Indigenous Medicine,
Social Welfare and Women’s Affairs,
Probation and Child Care and Council Affairs,
Western Province,
Independence Square,
Colombo 07.
2. The Provincial Public Service Commission,
Western Province,
Independence Square,
Colombo 07.
3. V. Rajapakse,
Secretary,
The Provincial Public Service Commission,
Western Province,
Independence Square,
Colombo 07.
4. Dr. G. Kariyawasam,
Provincial Director,
Western Province,
Department of Social Welfare Services,

No. 5/2, Madiwela Road,
Embuldeniya,
Nugegoda.

5. Hon. The Attorney-General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
K. Sripavan, J. &
R.K.S. Suresh Chandra, J.

COUNSEL : A.H.H. Perera for Petitioner

N. Pulle, SSC, for 1st to 3rd and 5th Respondents

ARGUED ON: 22.07.2010 and 26.08.2010

WRITTEN SUBMISSIONS

TENDERED ON: Petitioner : 18.10.2010
1st to 3rd and 5th Respondents : 11.10.2010

DECIDED ON: 10.03.2011

Dr. Shirani A. Bandaranayake, J.

The petitioner was a Matron at the Seth Sevana State Elders Home at Mirigama and had commenced her duties on 15.10.1996. Consequent to a notice published in the Government Gazette of 08.12.2006 by the Secretary to the Provincial Public Service Commission of the

Western Province (A), the petitioner had sat for the examination pertaining to the recruitment of Social Welfare Superintendent of the Department of Social Services of the Western Province. According to the petitioner she was placed 3rd in order of merit at that examination. However as there had been only two vacancies to be filled on the basis of the said examination, viz., at the Bellantara Specialized Children's Home and the Gangodawila House of Detention, she could not be appointed as a Social Welfare Superintendent. Nevertheless, the petitioner had a legitimate expectation founded on the basis of paragraph 3 of the Gazette Notification dated 08.12.2006 (A), that she would be appointed to the next available vacancy.

On 12.12.2008, the Social Welfare Superintendent of the Department of Social Services of the Western Province, who was the Administrator and the Supervisor of the State Elders Home at Mirigama had retired and a vacancy of the said position had arisen since that date. The petitioner submitted that the officer, who retired had availed himself of his leave prior to retirement in September 2008 and acting arrangements were made to attend to the duties of that officer. Accordingly the petitioner stated that she was requested to attend to the relevant duties for two (2) days each week.

The petitioner also submitted that she was directed to appear before the 3rd respondent on 22.06.2009 with documents inclusive of a certificate from the Head of the Department. Accordingly, the petitioner had appeared before a Committee, where the 3rd respondent was the Chairman and later the 4th respondent had told her that the said Committee had summoned her to scrutinize her qualifications to recommend her for an appointment as a Social Welfare Superintendent.

The petitioner also submitted that she verily believed that the said appointment was not filled due to the representations that were made by the Registered Trade Union of the Social Services Officers of the Western Province, to the 1st respondent. She had alleged that the 1st respondent is of the view that there is merit in the representations made by the Trade Union against her.

Accordingly, the petitioner complained that the 1st and 2nd respondents had delayed her appointment and thereby had violated her fundamental rights guaranteed in terms of Article 12(1) of the Constitution for which this Court had granted leave to proceed.

The petitioner's complaint is based on paragraph 3 of the Gazette Notification dated 08.12.2006 (A). The said paragraph 3 is as follows:

“03. Number of vacancies existing –

- (1) Bellantara Specialized Children's Home - 01
- (2) Gangodawila House of Detention - 01

Although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on exigencies of the service at the time of recruitment. The decision of the Western Provincial Public Service Commission with regard to the number of vacancies that would be filled will be final and conclusive.”

Learned Counsel for the petitioner contended that he relies on the phrase that ‘although the number of vacancies calculated at present is as indicated above, the said number of vacancies is likely to be more or less depending on the exigencies of the service at the time of recruitment’ and therefore that the petitioner had a legitimate expectation that she would be recruited for the next vacancy in December 2008 based on the results of the examination held on 23.06.2007.

It is to be noted that in paragraph 3 of the said Gazette Notification of 08.12.2006 (A), reference was made only for two vacancies that existed at the time of the said Notification. It

has further stated that the number of vacancies could be more or less depending on exigencies of the service, however at the time of recruitment.

It is not disputed that the closing date for applications was 26.01.2007 and the recruitments were made on the basis of the examination held on 23.06.2007 to fill up the two vacancies that had existed. It is also not disputed that at the time of the publication of the Gazette Notification in December 2006 and at the time of the examination, there had been only two vacancies to be filled in the positions of Social Welfare Superintendents of the Western Provincial Department of Social Services.

As stated earlier, paragraph 3 of the Gazette Notification of 08.12.2006 clearly had stated that the number of vacancies would be more or less depending on exigencies of the service '**at the time of recruitment**'. A plain reading of the said paragraph 3 therefore clearly indicates that the number of vacancies should be advertised or finally decided at least by the date of recruitment. On the date of recruitment, the respondents had filled only two (2) vacancies that had been advertised and there is no material to indicate as to whether there had been any other vacancies at that time. In the circumstances, along with the filling of the said two (2) vacancies, the purpose of the holding of the relevant examination on 23.06.2007 became fulfilled and the results of that examination thereafter cannot be used for filling any other vacancies of the post of Social Welfare Superintendents.

The contention of the learned Counsel for the petitioner was that in view of paragraph 3 of the Gazette Notification of 08.12.2006 (A), the petitioner had a legitimate expectation that she would be appointed as a Social Welfare Superintendent and therefore the petitioner should be appointed to the existing vacancy at the Seth Sevana State Elders Home at Mirigama.

The term, now known as legitimate expectation, was first used by Lord Denning, in **Schmidt v Secretary of State for Home Affairs** ([1969] 1 All E.R. 904). The Court, referring to a decision of the government to reduce the period already allowed to an alien to enter and stay in England,

had held that the person had a legitimate expectation to stay in England that cannot be violated without following a reasonable procedure. This was immediately followed in **Breen V Amalgamated Engineering Union** ([1971] 1 All E.R. 1148).

Discussing the concept of legitimate expectation, David Foulkes (Administrative Law, 7th Edition, Butterworths, 1990, pg. 272) had expressed the view that a promise or an undertaking could give rise to a legitimate expectation. Explaining his view, Foulkes had stated thus:

“The right to a hearing, or to be consulted, or generally to put one’s case, may also arise out of the action of the authority itself. This action may take one of two, or both forms; a *promise* (or a statement or undertaking) or a regular *procedure*. **Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the Courts will enforce**” (emphasis added).

The concept of legitimate expectation was considered and discussed in **Re Westminster City Council** ([1986] A.C. 668), where Lord Bridge had introduced the concept in the following words:

“The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.”

The observations of David Foulkes (*supra*) in the applicability of the concept of legitimate expectation was clearly illustrated by the decision in **Attorney General of Hong Kong v Ng Tuen Shiu** ([1983] 2 All E.R. 346) and **Council of Civil Service Unions v Minister for the Civil Service** ([1984] 3 All E.R. 935).

In **Ng Tuen Shiu** (supra), the decision that he had a legitimate expectation was based on a promise given by the Government, whereas in **Council of Civil Service Unions** (supra), the decision was based on the legitimate expectation that arose out of a regular practice. In the circumstances, a mere hope or an expectation cannot be treated as having a legitimate expectation.

The meaning and scope of the doctrine of legitimate expectation was considered at length in **Union of India v Hindustan Development Corporation** ((1993) 3 S.C.C. 499), where it was clearly stated that,

“Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purpose, 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 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 a natural and regular sequence. Again it is distinguishable from a mere 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 a conventional sense.”

A careful consideration of the doctrine of legitimate expectation, clearly shows that, whether an expectation is legitimate or not is a question of fact. This has to be decided not only on the basis of the application made by the aggrieved party before Court, but also taking into consideration whether there had been any arbitrary exercise of power by the administrative authority in question.

Accordingly, the question that would have to be looked into would be as to whether there was a promise given to the petitioner or a regular procedure that future vacancies would be filled on the basis of a previously held examination on which there had been selections made on the results of the said examination.

As stated earlier, a plain reading of the words in paragraph 3 of the Gazette Notification clearly shows that the number of vacancies would depend on the exigencies of the service at the time of recruitment. When the examination was held on 23.06.2007, in terms of the Gazette Notification, there had been only two (2) vacancies. The petitioner had not disputed this position. Admittedly, those two (2) vacancies had been filled in terms of the Gazette Notification of 08.12.2006 (A) and the subsequent examination held on 23.06.2007. The impugned vacancy had arisen in December 2008 and as has been shown, by that time, the vacancies which had arisen in December 2006 had been filled by the respondents. It is not disputed that at the time the vacancies were advertised by way of the Gazette Notification dated 08.12.2006 (A), and thereafter when the examination was held on 23.06.2007, there was no vacancy for the post of Social Welfare Superintendent at the State Elders Home at Mirigama. By the Gazette Notification (A), steps were taken to fill up the two (2) existing vacancies, which were clearly stipulated in the said Gazette Notification. In the event, if there were to be other vacancies that should have been taken into consideration in filling up on the basis of the examination that was held on 23.06.2007, they should have been vacancies that would have arisen '**on exigencies of the service at the time of recruitment**'. Accordingly, beyond the point of recruitment, the results of that examination cannot be considered for any other appointment. The interpretation suggested by the learned Counsel for the petitioner, that the

petitioner had a legitimate expectation that she would be appointed for the next available vacancy, since she was placed 3rd in the order of merit at the examination cannot be accepted, as such an interpretation to paragraph 3 of the Gazette Notification of 08.12.2006 (A) would give rise to uncertainty in filling future vacancies. Moreover, that would create an unreasonable and irrational procedure in filling up future vacancies as that would prevent persons, who would be eligible to apply for the said positions.

The applicability of the doctrine of legitimate expectation, which imposes in essence a duty to act fairly, was described vividly by Brennan, J., in **Attorney General for New South Wales v Quinn** ((1990) 64 Australian L.J.R. 327) in the following terms:

“The Court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. **It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the Court out of review on the merits**” (emphasis added).

The reasons stated above, clearly indicate that the petitioner’s claim that since she was placed 3rd in order of merit at the examination, that she had a legitimate expectation that she would be appointed at the next vacancy for Social Welfare Superintendent cannot be accepted. The petitioner’s allegation that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated was on the basis of the aforesaid legitimate expectation. Article 12(1) of the Constitution, which refers to the right to equality reads as follows:

“All persons are equal before the law and are entitled to the equal protection of the law.”

The concept of equal protection referred to in Article 12(1) of the Constitution embodies a guarantee against arbitrariness and unreasonableness. The doctrine of legitimate expectation had developed in the context of reasonableness and in the light of the decision in **Attorney General of Hong Kong v Ng Tuen Shiu** (supra) the concept of legitimate expectation would embrace the principle that in the interest of good administration it is necessary for the relevant authority to act fairly.

Considering all the aforementioned facts and circumstances, it is clear that the decision of the respondents cannot be categorised as arbitrary and unlawful which had violated the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid, I hold that the petitioner has not been successful in establishing that her fundamental right guaranteed in terms of Article 12(1) of the Constitution had been infringed by the respondents. This application is accordingly dismissed. I make no order as to costs.

Judge of the Supreme Court

K. Sripavan, J.

I agree.

Judge of the Supreme Court

R.K.S. Suresh Chandra, J.

I agree.

Judge of the Supreme Court