

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

S.C. F.R. No. 469/08

In the matter of an Application under

Article 126 of the Constitution of Sri Lanka.

1. Dr. C.L. Illesinghe, Asiri, Kanadarawa,
Medawachchiya.
2. Dr. W.M. Yamuna Malkanthi, 94,
Manampitiya-East, Manampitiya.
3. Dr. T.J.B. Senadheera,
New Puttlam Road, Anuradhapura.
4. Dr. K.S.N.S. Senanayake,
5th Mile Post, Zone 11, Rajanganaya.
5. Dr. K.R.W. Senaratne, Tirrappane,
Anuradhapura.
6. Dr. W.G.R. Padmalatha,
145, UC Quarters, New Town,
Anuradhapura.

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7. Dr. L.P. Magamma,
90th Mile Post, Ibbamkatuwa, Dambulla.
8. Dr. K.K. Yapa Bandara, 115/25-C,
Hewaheta Road, Kandy.
9. Dr. W.K. Jayakody, Siriniwasa,
Budhanapitiya, Wellawa.
10. Dr. R.A.S.P. Wijesundera, Ganegoda,
Narammala.
11. Dr. W.M. Mallika Wijeratne, Hemasiriya,
Kanugala, Muruthenge.
12. Dr. K.M.M.P. Kumarasekera, 26, Saliya
Mawatha, Anuradhapura.
13. Dr. H.M. Bisomenike Herath, Waramada,
Thammita, Kumbukwewa.
14. Dr. Priyanthi Dissanayake, Chaminda
Sevana, Anuradhapura Road, Rambewa.

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15. Dr. H.M. Wijesuriya, Yauwanagama,
Malagane.
16. Dr. S.P.W. Atapattu, Hokandara North,
Hokandara.

PETITIONERS

Vs.

1. Justice P.R.P. Perera, Chairman.
2. Prof. Dayasiri Fernando, Member.
3. W.P.S. Jayawardane, Member.
4. Palitha M. Kumarasinghe, Member.
5. Prof. M.S. Mookia, Member.
6. Prof. M. Rohanadheera, Member.
7. Gunapala Wickramaratne, Member.
8. S.A. Wijeratne, Member.

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9. Dr. Bernard Soyza, Member.
all of Public Service Commission,
No. 356/B,
Galle Road, (Carlville Place), Colombo 3.

10. R.P.W. Gunawardene, Commissioner of
Ayurveda Department,
Old Kottawa Road, Navinna,
Maharagama.

11. Asoka Malimage, Secretary, Ministry of
Indigenous Medicine,
Old Kottawa Road, Navinna,
Maharagama.

12. Tissa Karaliyadda,
Hon. Minister of Indigenous Medicine,
Ministry of Indigenous Medicine,
Old Kottawa Road, Navinna,
Maharagama.

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

RESPONDENTS

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Before : **Hon. Dr. Shirani Bandaranayake, CJ**
Hon. C. Ekanayake, J
Hon. S.I. Imam, J

Counsel : J.C. Weliamuna with Pasindu Silva For
Petitioners.
Senior State Counsel Rajiv Goonetilleke for the
11th, 12th and 13th Respondents.

Argued on : 29.07.2010

Written Submissions
of the Petitioners

tendered on : 09.09.2010

Written submissions of the
11th, 12th, & 13th

Respondents Tendered on : 06.08.2010

Decided on : 29.09.2011

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S.I. IMAM, J

The Petitioners have tendered this application seeking a Declaration inter alia that they be declared eligible and entitled to be appointed as Ayurveda Medical Officers under the Sri Lanka Ayurveda Service Minute, and consequently direct the Respondents to appoint the Petitioners as Ayurvedic Medical Officers (Preliminary Grade) attached to the Department of Ayurveda. The 1st to 15th Petitioners contend that they have obtained a DIPLOMA in Ayurveda from the Gampaha Wickramarachchi Institute affiliated to the University of Kelaniya while the 16th Petitioner is a Diploma Holder from the Institute of Indigenous Medicine affiliated to the University of Colombo and having Registered with the Ayurvedic Medical Council established under section II of the Ayurveda Act No. 31 of 1961 (as amended) are Ayurvedic Doctors. The Petitioners aver that Ayurvedic Doctors come under the purview of the Sri Lanka Ayurveda Service (hence forth sometimes referred to as SLAS) and are subject to the Sri Lanka Ayurveda Service Minute (SLASM). The Petitioners further claim inter alia that their Fundamental Rights guaranteed under Article 12(1) of the Constitution of Sri Lanka have been violated by the Respondents as a result of the termination of their Contracts of Employment and hence that they are unemployed. The Petitioners also seek a Declaration inter alia that the failure of the Public Service Commission (hence forth

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sometimes referred to as the PSC) to recruit the Petitioners as Ayurveda Medical Officers (Preliminary Grade) under the Sri Lanka Ayurveda Medical Service Minute should be taken into consideration. On 20.11.2008 on hearing Counsel for the Petitioners in support of this application this Court granted Leave to Proceed for the alleged infringement of Article 12(1) of the Constitution of Sri Lanka.

The Petitioners claim that in accordance with clause 10.1.1. read with clause 11.1.1. of the SLAS minute 75% of the vacancies are filled by Graduates (Degree Holders) while the balance 25% are comprised of Diploma Holders who have Registered themselves with the Ayurvedic Medical Council as Physicians. The Petitioners contend that Clause 10.1.1. further states that Diploma Holders would be recruited only until the year in which the first Batch of Graduates (Degree Holders) pass out from the Gampaha Wickramarachchi Ayurveda Institute. It is contended by the Petitioners that in accordance with clause 10.1.11 of the SLASM Diploma Holders are recruited as Ayurveda Medical Officers from their date of Registration. The Petitioners aver that Diploma Holders are persons who have followed a 5 year course at an Ayurveda College in Ayurveda, Siddha or Unani and have Registered themselves with the Ayurveda Medical Council as Physicians. They aver that Section 10.1.11. further

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provides that selection from the Diploma Holders would be on the basis of Priority in the Register for Registration as an Ayurvedic Medical Officer. The Petitioners complain that they were not recruited to the Department of Ayurveda as they did not come within the said Quota of 25% which is an opportunity extended to Diploma Holders annually.

The Petitioners contend that by News-paper Advertisement dated 2.4.2001 issued by the Secretary to the Ministry of Indigenous Medicine Applications were called for the Posts of,

- 1) Community Health Medical Officer of Ayurveda and,
- 2) Assistant Community Health Medical Officer of Ayurveda.

The Petitioners state that the aforesaid Advertisement was captioned “Recruitment on Contract Basis for Posts in the Ayurveda Community Health Pilot Project.” The aforesaid Pilot Project was to be implemented in the Anuradhapura District and the Applicants were chosen from the Anuradhapura, Polonnaruwa and Kurunegala Districts. The Petitioners having applied to the said posts were consequent to the Interview appointed as “Community Health Medical Officers of Ayurveda” with effect from 3.9.2001 in 21 selected Divisional Secretary Divisions in the Anuradhapura District for one year. The Petitioners claim that at the ceremony in which Appointment

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Letters were handed to the Appointees including the Petitioners, the 12th Respondent promised that the aforesaid Appointments were given on a Contract basis, as the Project was a Pilot Project, and in the event of the Pilot Project being successful that Ayurveda Community Health Service would be introduced island wide under the SLAS, with the Appointees being recruited to the SLAS as Permanent Medical Officers. At the end of the one year Contract period as the Pilot Project showed considerable progress the Petitioners' contracts were extended up to 3.9.2003 on which date the Petitioners state that the Pilot Project came to an end. Consequently based on a Cabinet Decision preceded by a Report that Community Health Promotion Service should be made an aspect of the Ayurveda Service on the Petitioners' Applications, they were appointed as "Community Health Medical Officers" in their respective Divisional Secretary Divisions in the Anuradhapura District for a period of 6 months from 1.10.2004. The Department of Management Services by letter dated 09.12.2004 approved the Cadre for the aforesaid Community Health Promotion Service. The Petitioners contend that their Contracts were extended on the understanding that Extensions would be granted until permanent Appointments were given to them. However Consequent to the PSC intimating to the 10th Respondent Commissioner, the 10th Respondent Commissioner by letter dated 24.5.2007 called the Petitioners for an Interview, at which the Petitioners participated, only to be informed by the PSC that 5

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Candidates had been selected. The Petitioners aver that as the letter dated 2.1.2008 indicated that the Petitioners Contracts would cease upon the Appointment of 323 All-Island Ayurveda Community Health Medical Officers Appointments, the Petitioners made a complaint to the Human Rights Commission of Sri Lanka (henceforth sometimes referred to as HRC). The Petitioners also filed a Writ Application bearing No. CA Writ 392/2008 in the Court of Appeal, seeking inter alia a Writ of Mandamus urging The Minister of Indigenous Medicine (12th Respondent) to submit a Cabinet Memorandum in relation to the Petitioners concerns and grant possible relief. The aforesaid Writ Application was withdrawn as an undertaking was given by 12th Respondent to submit a relevant Cabinet paper which the Petitioners' complain has still not been tendered. The HRC held in favour of the petitioners by order dated 28.07.2008. However to the surprise and frustration of the petitioners , on or about 19.09.2008 all the petitioners except the 16th petitioner received letters dated 12.09.2008 issued by the Secretary, Ministry of Indigenous Medicine (11th Respondent),whereby the petitioners' contracts were respectively terminated, thus rendering them unemployed, which the petitioners' claim compelled them to file this application. The petitioners complain that 323 community health medical officers were recruited, which to their dismay excluded the Petitioners.

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The 11th, 12th and 13th Respondents in their submissions took the position that the Contracts of Employment of the Respondents have been terminated. These Respondents aver that the Public Service Commission did not recruit the Petitioners to the SLAS, as on a strict application of the SLASM the Petitioners are not entitled to such Appointment. These Respondents contend that the Establishments Code specifies that the Appointing Authority should ensure that the approved Scheme of Recruitment is followed. These Respondents aver that Section 6 of Chapter II of the Establishments Code stipulates that before an Appointment is made that the Appointing Authority should be satisfied that the Post is approved by the Director Budget after ensuring that a vacancy actually exists in a Cadre, that Financial Provisions has been made for it, and that the Appointment conforms to The Scheme of Recruitment. It was urged on behalf of these Respondents that the SLAS is a Cadre based service, and that at any point of time all Graduates and Diploma Holders cannot be recruited to the SLAS due to the limitation in the approved Cadre. These Respondents contend that the selections of Ayurvedic Doctors to the SLAS is performed on the basis of Merit as and when Vacancies exist as set out in Section 10.1.1. and 10.1.2 of the SLASM. These Respondents aver that the Petitioners after registering themselves as Ayurvedic Medical Officers were not recruited to the SLAS as they did not come within the

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available vacancies in terms of the said Quota of 25% allocated for Diploma Holders as set out in the SLASM, but instead 21 persons inclusive of the Petitioners were appointed as Community Health Medical Officers of Ayurveda for a Contract period of one year.

I have examined the Application of the Petitioners, the Position taken up by the Respondents, scrutinized the Documents tendered to Court and considered the Oral and Written Submissions submitted by both sides. The basis for the Petitioners' Application is that the Petitioners' Fundamental Rights guaranteed under the Constitution have been violated as a result of the Termination of their Contracts of Employment. As a consequence of the termination of their contracts, as they have not been recruited as Medical Officers of the SLAS, they are presently unemployed. Section 10.1.11 stipulates that selection from among the Diploma Holders will be on the basis of Priority in the Register for Registration as an Ayurvedic Medical Officer.

A matter for determination by this Court is as to whether there has been an Infringement of Article 12(1) of the Constitution by an Infringement of the Human Rights of the Petitioners by the decision of the Respondents to terminate their Contract

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of Employment. The question as to whether the aforesaid decision is unreasonable, Arbitrary and Irrational has been considered by me. The fact that the Petitioners are qualified Ayurvedic Medical Officers who could have been recruited to the SLAS, the service they have imparted to the Community from the time they qualified, and the fact that their Contracts were renewed for 7 years has been taken into consideration by me. The Legitimate Expectation claimed by the Petitioners to be recruited to the SLAS has also been considered by me.

The Provisions contained in Section 6, Chapter II of the Establishments Code is in my view relevant to the matter in consideration. It states that the Appointing Authority should before making an Appointment be satisfied that the post is approved by the Director-Budget, that Financial Provision has been made for it, that a vacancy actually exists in a Cadre, that the need for the post actually exists and that the Appointment is in accordance with the Approved Scheme of Recruitment is necessary. An adherence to the procedure specified in the existing SLASM when granting Appointment, is in my view mandatory. In accordance with section 10.1.11 of the SLASM, the selection of Diploma Holders would be on the basis of PRIORITY in the Register for Registration as Ayurvedic Medical Officers. As the last batch of Diploma Holders

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from the Wickramarachchi Institute passed out on 1.4.2006, from that date onwards legitimately the 25% allocation for the filling of the Cadre with Diploma Holders would be limited. Ayurvedic Diploma Holders are recruited subject to a 3 year Probation period in terms of section 10.1.7 of the SLASM, consequent to which they could be absorbed to the Preliminary Grade as Medical Officers in the SLAS. The Petitioners have not produced any material to indicate that they successfully completed the 3 year Probation Period.

In my opinion as the SLAS is a Cadre based service, all Graduates and Diploma Holders cannot be recruited to the SLAS at any given point of time due to the limitations in the approved Cadre. New Appointees are recruited only when Vacancies arise as set out in Section 10.1.1. and 10.1.2. of the SLASM. It is also necessary that an Applicant should have the necessary SENIORITY in the Register in the respective Merit Order of Ayurveda, Siddha, Unani or Diploma category as and when a Vacancy arises in the approved Cadre. The Petitioners have failed to produce any material that they possessed the relevant Seniority in the Register for due Appointment to the SLAS or that they were prejudiced by some one with a Junior Registration being appointed above them. The Cabinet Decision dated 29.9.2005 in which the Cabinet had

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recommended to the PSC to grant 21 Ayurvedic Community Health Officers permanency in Service was conveyed to the PSC. The PSC having considered the opinion of the Director General of Management Service who ordered the absorption of these Contract Employees into the SLAS was observed by the PSC who subsequently appointed an Interview Panel to determine whether the afore- mentioned 21 persons were qualified for appointment to the SLAS in terms of the SLASM. It transpired that 2 of the 21 Contract Appointees were above the age of 45 years at the time of Recruitment in 2001, and hence could not be appointed to the SLAS. The Minute on Pensions Section 2(1) states as follows:

“Notwithstanding any thing to the Contrary in these Minutes, but subject as there in after provided, any person who shall have served for 120 months or more may receive a pension.”

Hence it is apparent that persons above the age of 45 years cannot be recruited for service in the Government as the optional age of Retirement is 55 years by which time such persons would not have acquired the 10 years of service to be eligible for a pension. It also transpired that 14 of the 21 Appointees were Junior to the Diploma

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Holders appointed in 2007, and hence could not be appointed to the SLAS without prejudice to the 282 Officers appointed in 2007. It was revealed that the Petitioners' contract Appointments were NOT granted by the PSC, which is the Appointing Authority of the SLAS. The PSC was of the view that the Secretary, Ministry of Indigenous Medicine had no Authority to make these Appointments initially. On an examination of the Petitioners' Appointment letters it was specifically stated that they were recruited on a Contract basis, which is not a permanent Appointment. Hence in my view there is no plausible reason for the aforesaid contracts of Employment to create a legitimate Expectation in the minds of the Petitioners. It is evident from the Petitioners' Appointment letters that the Petitioners' were recruited on a Contract basis, and thus were not entitled to Permanent Appointments. It is my view that the decision of the PSC not to appoint the Petitioners' to the SLAS was not unreasonable, Arbitrary, nor irrational. It appears to me that the SLAS strictly followed the SLASM and the Establishments Code. Section 1:6 of chapter II of the Establishments Code states that "Every appointment must be made in accordance with the Scheme of Recruitment". Section 1:11:1 of the Establishments Code states that antedating results in the Officer concerned gaining Seniority over an Officer appointed before him to the same grade or Post or in disturbing the seniority made at the selection for such Appointment.

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In considering prayer (b) of the Petition dated 31/10/2008 for which leave was granted there is in my view no Infringement of Article 12(1) of the Constitution, as the Petitioners have not been discriminated against in any manner. The SLASM was merely being adhered to and hence the Petitioners cannot be granted any relief as sought for in this paragraph.

The reliefs sought for in prayer (C) of the Petition cannot be granted as the decisions contained in P20 (a) to P20 (O) are Contracts which have come to an end. The relief sought for in prayer (d) cannot be given as The Public Service Commission acted in terms of the criteria set out in the SLASM and the Establishments Code.

The relief claimed in prayer (e) which is a Declaration that the Petitioners be eligible to be appointed to the SLAS cannot be granted for the aforesaid reasons. I am thus disinclined to grant the Petitioners any other reliefs sought for, for the reasons referred to by me.

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Hence for the aforesaid reasons I am Compelled to Dismiss the Petition of the
Petitioners without Costs.

JUDGE OF THE SUPREME COURT

Hon. Dr. Shirani Bandaranayake,

I agree

CHIEF JUSTICE

Hon. C. Ekanayake, J

I agree

JUDGE OF THE SUPRME COURT