

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

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

1. Menura Nanwidu
Rambukkanage, No:27, Nihal
Silva Mawatha, Kirulapone,
Colombo 06.
2. S.T.Kodithuwakku,
No: 27, Nihal Silva Mawatha,
Kirulapone, Colombo 06.

PETITIONERS

Vs.

SC (F/R) Application
No: 62/2018

- (1) B.A. Abeyrathne,

The Principal and the
Chairman of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.
- (2) A. Galahitiyawa
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,

Colombo 07.

- (3) K.D.S. Siyaguna,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.
- (4) Harshana Matharaarachchi,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.
- (5) K.A.H. Karasingha,
Member of the Interview
Board to admit Students to
Grade 1 of Royal College
Of Colombo,
Royal College,
Colombo 07.
- (6) K.G. Wimalasena
The Chairman of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.

- (7) Amith Dharmapala,
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.
- (8) W.N.P. Kumara,
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.
- (9) S.P.M. Gunasekara
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.
- (10) Charana Gunasekara
The Member of the Appeals
and Objections Board to
admit Students to Grade 1 of
Royal College of Colombo,
Royal College,
Colombo 07.
- (11) Director National Schools,
Ministry of Education,

Isurupaya, Pelawatta,
Battaramulla.

(12) Sunil Hettiarachchi,
Secretary,
Ministry of Education,
Isurupaya, Pelawatta,
Battaramulla.

(13) Honorable Attorney General,
Department of Attorney General,
Colombo 12.

RESPONDENTS

Before:

S. Eva Wanasundera, PC. J.,
Nalin Perera, J. and
Murdu N.B. Fernando, PC. J.

Counsel:

Thanuka Nandasiri with Susil Wanigapura for the Petitioners.
Dr. Avanthi Perera SSC, for the Respondents.

Argued on: 28.08.2018

Decided on: 12.12.2018

Murdu N.B. Fernando, PC. J,

The Petitioners have filed this application seeking a declaration that the Petitioner's Fundamental Rights guaranteed by Article 12 (1) of the Constitution have been violated by one or more or all of the 1st to 12th Respondents and / or by the State.

Leave to proceed was granted on 06-06-2018 for the alleged violation of Article 12 (1) of the Constitution against the 1st to 12th Respondents.

The facts of this case, as submitted by the Petitioners are as follows,

The 2nd Petitioner who is the mother of the 1st Petitioner tendered an application to Royal College, Colombo 07 for the admission of the 1st Petitioner to Grade one for the year 2018, under the category “Brothers/Sisters of applicants already studying in the School” based on the relevant Circular dated 30-05-2017 (P3).

The Petitioners were called for an interview (P4) on 23-08-2017 and were required to submit documents listed in P4 at the interview, namely proof of residence and proof of brother studying in School. The Petitioners tendered documents P5a to P5f and P6a to P6c respectively in support of their application.

At the interview before the Interview Board consisting of 1st to 5th Respondents the Petitioners were given “0” Zero marks and were informed that the last will submitted to establish title of the property cannot be accepted. The Petitioners state, even if no marks were given for proof of title of property, the Petitioners were entitled to at least 48 marks, as the older brother of the 1st Petitioner is a student of the School from grade 01 grade 10 and for his achievements in School and also for the parents being registered at the given address in the Electoral Registry during the last 5 years. Petitioners also state that Clause 7.1.3 of the Circular categorically provided that refraining from allocating marks under one heading is not a reason to refrain from allocating marks under the remaining heads.

On 28-09-2017 the 2nd Petitioner lodged a complaint with the Human Rights Commission. The first day of inquiry was postponed as the 1st Respondent (Chairman of the Interview Board and Principal, Royal College) was not present. On the next date of inquiry the 1st Respondent was represented and moved time to consider marks and documents pertaining to brother category but did not tender same to the Human Rights Commission until this application was filed before this Court on 30-01-2018.

Petitioners further state that subsequently they were made aware that Clause 7.1.3 of the Circular (P3) referred to above was repealed on 31-07-2017 (P10A) but by letter dated 19-09-2017 (P10B) the 12th Respondent, Secretary, Ministry of Education had clarified that the repeal

of Clause 7.1.3 does not mean that the applicants should be denied marks under the remaining headings only because a particular applicant is not entitled for marks under one heading.

The 1st Respondent in his affidavit filed before this Court states that an endorsement was made at the very beginning on the marking sheet (P7) referring to the absence of a requisite document and in accordance with the relevant Circular as amended, no marks were given to the 1st Petitioner.

1st Respondent further averred that consequent to the processing of the application of the 1st Petitioner, the 12th Respondent's letter dated 19-09-2017 (P10B) was received clarifying the implication of repealing Clause 7.1.3 of P3 inter-alia, that where an applicant has basic qualifications, the repeal did not necessarily mean that the application should be rejected in toto on the basis that marks cannot be awarded under one part of a particular category. However, since the Respondent School did not process any applications after 19-09-2017 the clarification given by the 12th Respondent was not resorted in respect of any application and hence all application were treated alike without discrimination and therefore the Respondent's have not violated the Fundamental Rights of the Petitioners.

The Respondents also submitted that, the Constitution guarantees equal protection of the law and that the Respondents applied the 'applicable law' at the relevant time and did not act contrary to the applicable law, namely the relevant Circular (P3) as amended (P10 A/ 1R1) and further submitted that acting contrary to the amended Circular and applying the original Circular would have been a violation of the applicable law.

In responding to the position taken up by the Petitioners, that the clarification given by the 12th Respondent, Secretary, Ministry of Education should have been taken cognizance at the time the Petitioners appeal was considered by the Appeal Board, the Respondents submitted that it would have led to an overhaul of the entire evaluation process in respect of all applicants whose applications had been rejected on the same premise in order to prevent discrimination.

Petitioner on the other hand submitted that the Respondents have failed to establish that there were more similarly circumstanced applicants and relied on the maxim *vigilantibus et non dormientibus succurrunt jura*, a maxim of Roman Law subsequently embraced by equity, that

the law comes to the assistance of those who are vigilant with their rights, and not those who sleep on their rights which maxim has now been absorbed in to our legal system.

Having referred to the positions taken-up by the Petitioners and the Respondents respectively in this application, I will now advert to the Circular pertaining to Admission of Children to Grade One in Government Schools for the year 2018.

A paramount wish of a parent is to admit a child to a School of their choice and the issuance of the Circular governing Admission to Schools is eagerly awaited, as it lays down the basic qualifications, categories, procedure and time lines that ought to be followed in order to be eligible for admission to grade one every year. The Circular (P3) pertaining to admission to grade one in 2018 was issued on 30-05-2017 and applications had to be submitted by 30-06-2017 to the respective Schools. The basic qualification for admission as stated in Clause 2, is the age of the child and it is undisputed that the 1st Petitioner passed the 1st hurdle.

The 2nd hurdle to overcome is Clause 4.7 wherein it states that the parents should be resident in the Administrative District of the School applied for also referred to as the feeder area. This hurdle too, the parents passed since Kirulapone, Colombo, where the parents reside comes within the Administrative District of Colombo in which Royal College to which admission was sought by the Petitioners is situated.

The 3rd hurdle is Clause 3, the category under which an application should be made. There are six Categories referred to in the Clause under which an application could be made. They are as follows:-

- Children of residents in close proximity to the School
- Children of parents who are past pupils of the School
- Brothers / Sisters of students already studying in the school
- Children of persons in the staff of institutions directly involved in school education
- Children of officers on transfer
- Children of persons returned to Sri Lanka after living abroad.

Clause 7.1 discusses the mode and manner of selections based upon the six different categories referred to above and the percentages upon which the selections will be made.

In this case the 2nd Petitioner a resident in the Administrative District of Colombo submitted an application in respect of the 1st Petitioner under Clause 7.4 “Brother Category” to the Respondent School, as the older brother of the child was studying in the said School. According to the provisions of Clause 7.1 the percentage allocated for Brother Category is 15% of the total number of vacancies for the given year.

The Provisional List and the Final List (P11A and P11B) produced by the Petitioners before this Court indicate the number of vacancies or the selections made for ‘Brother Category’ for the year 2018, was 40 and the cut-off mark under the Brother Category or the marks obtained by the 40th child selected under the ‘Brother Category’ was 22.5. Admittedly the 1st Petitioner was given “0” zero marks or no marks and thus was not admitted to the Respondent School.

In the absence of the 1st Respondent submitting any documentation pertaining to the number of vacancies and cut-off marks for Brother Category, I rely on the documents submitted by the Petitioners as P11A and P11B as correct.

Let me now advert to the Marks Sheet (P7) issued to the Petitioners by the Respondent School. The description column therein is a reproduction of Clause 7.4 *albeit brief* of Circular P3. The description as referred to in P7 *verbatim* is reproduced as follows;

- 1) Brother in School
- 2) Registration of Electoral
- 3) Other documents
- 4) Proximity
- 5) Achievements and donations

I observe that the Interview Board, in P7 had not given any marks under any of the items above and had made an endorsement, under the notes column “No deed. Only the Last Will”. Further I observe that the Petitioner had tendered documents under items (1), (2) and (5) and for item (1) Brother in School, 1st Petitioner claims the maximum 25 marks under Clause 7.4.1.1 and 7.4.1.2, for item (2) Registration in the Electoral Register, the maximum 20 marks under Clause 7.4.2.1, and for item (5) 3 marks under Clause 7.4.5 for the achievements of the brother, totalling 48 marks, out of 100 marks.

Thus, the primary question this Court has to answer is whether the decision of the Interview Board was correct in giving zero marks or no marks to this applicant.

In view of the position taken up by the Respondents that marks were not given to the applicant based on the ‘relevant law’ or the applicable law as at the given date, firstly let me consider Circular (P3) and the provisions of the said Circular without recourse to the original Clause 7.1.3.

The 2nd Petitioner made an application to the Respondent School under ‘Brother Category’ as the older child of the 2nd Petitioner was already studying in the School. Clause 7.4 has five Sub-Clauses and the said five Sub-Clauses are reflected in the marking sheet (P7) referred to earlier and are now discussed in detail.

i. Brother in School

Under Sub-Clause 7.4.1.1, 20 marks are allocated for the years of study of the older brother in School (2 marks for each grade) and under Sub-Clause 7.4.1.2, an additional 5 marks are given for the older brother if he was admitted to grade one of the School.

Thus, the 1st Petitioner is entitled for the maximum 20 marks (2 marks for each grade to a maximum of 20 marks) as the older brother presently is a student in grade ten, plus another 5 marks as the older brother was admitted to grade one of the School. This would entitle the 1st Petitioner for 25 marks under this description.

(ii) Electoral Register as proof of residency

Sub-Clause 7.4.2 refers to registration in the Electoral Register and the 2nd Petitioner has submitted extracts of the Electoral Register for the last 5 years as proof of being registered at the given address.

Thus, the 1st Petitioner is entitled for 20 marks, the maximum marks under this Sub-Clause.

(iii) Title of property as proof of residency

Sub-Clause 7.4.3 indicates the documents to establish title to the residence. The 2nd Petitioner relied on the last will given by her spouse’s father (Child’s grandfather) to the spouse (Child’s father) to establish the title of the residence. No marks could be given for same as the last will being an entitlement of title to a property is not acceptable as it does not come within the documents indicated in this Sub-Clause.

(iv) Proximity to School

Sub-clause 7.4.4 refers to the Proximity of the School to the place of residence. Marks will only be given under this item, if title of the residence is established and no marks can be given to the 1st Petitioner under this item, as title of the residence was not established.

(v) Achievements and donations.

Sub-Clause 7.4.5 refers to a maximum of 10 marks for achievements and contributions made to the School by the older brother. The certificates tendered (P6A to P6C) by the 2nd Petitioner especially the older brother being a junior prefect, should entitle the 1st Petitioner at least 2-3 marks, under this Sub-Clause.

Thus, I observe that out of the 5 items in Sub-Clause 7.4, excepting 7.4.4 where marks can be given only if 7.4.3 is fulfilled, all the other 4 Sub-Clauses are stand alone Sub-Clauses, independent to each other. One Sub-Clause does not get priority over the other Sub-Clause and there is no justification not to give marks for items (1) and (2) merely because items (3) or (4) are not full filled. On the corollary, in the Brother Category just because an applicant is not entitled to any marks under item (5) achievements and donations, should an applicant not be given marks under item (1) brother in School. I consider such argument to be ludicrous.

The only explanation given by the Respondent School for non-granting of marks under item (1), (2) and (5) of the Brother Category, is that the applicant could not prove to the satisfaction of the Interview Board, the Petitioner's place of residence. The Sub-Clause does not give item (3) priority over item (1) or (2) or (5) i.e. Priority for title of residence over older brother studying in School or Electoral Register or achievements of the brother. All descriptions or items are of equal footing. Thus, Clause 7.1.3 earlier adverted to, is repealed or not is immaterial. The plain reading of Clause 7.4, older brother studying in school is that, if there is an older brother studying in School, a parent can apply under this category and is entitled to the marks reflected therein irrespective of whether he has proved title of residence or not. What is material is to be a resident in the feeder area namely the Administrative District of Colombo which factor was established by the Petitioner by submitting the extracts of the Electoral Register.

The Respondents have tendered the site reports said to have been done after this application was filed in the Supreme Court in the months of April and May 2018, to indicate that the Petitioners are not resident at the given address but only the parents of the 2nd Petitioner are resident at the given address. I place no reliance on these one paragraph site reports, since at the time the decision was made to grant zero marks, these reports were not available with the Respondent School. In any event, the Petitioners have submitted an affidavit of the grand mother of the child to counter the facts stated in the site reports with the counter affidavit and the said reports are disputed.

Thus, on a careful consideration of Clause 7.4 of the Circular, I accept the Petitioners position that a minimum of 45 marks should have been given to the 1st Petitioner under Sub Clause 7.4.1 and 7.4.2 of the Circular which brings him within the cut-off mark of 22.5 for the Brother Category and would place him among the top half or among the 1st twenty places out of the forty places available for Brother Category as evidenced by the Final List (P11B). Petitioners are also entitled for more marks under Sub-Clause 7.4.5 for achievements of the older brother as adverted to earlier.

In **Gayani Geethika Vs Dissanayake SC (FR) 35/2011**- S.C.M. 12.07.2011 a case pertaining to School Admissions under proximity Category, Suresh Chandra J with Marsoof J and Ekanayake J agreeing held that the cumulative effect of all documents submitted along with the grade one school admission application should be considered and assessed carefully in order to establish the genuineness of the residence of an applicant.

Similarly, in another school admission case under proximity category **Pushparajan Rohan Vs Kariyawasam SC (FR) 06/2017** - S.C.M. 03.11.2017 Malalgoda J with Wanasundera J and Perera J agreeing held that it was arbitrary for the School not to grant any marks, merely because one of the documents listed to verify proof of residency had not been submitted.

The Judgements referred to above are in respect of applications under category (1), Children of residents in close proximity, where proximity is the key factor.

In the matter now before this Court, the application was made under category (3) namely, Brother Category, where the older brother studying in school is the key factor. None of the

documents tendered as proof of the older brother studying in school by the Petitioners had been considered by the Interview Board. These include older brothers School Record Book, Junior Prefect Certificate, Boys Scouts Patrol Leader Certificate, Grade V Government Schools Scholarship Exam Merit Certificate and many other Certificates. The failure of the interview board to consider and assess these documents and Certificates and award marks, I consider caused grave injustice to the younger brother, the 1st Petitioner in this application.

At this juncture, I wish to consider Clause 3 of the Circular once again. It refers to six categories, namely;

- Children of residents in close proximity to the School
- Children of parents who are past pupils of the School
- Brothers / Sisters of students already studying in the school
- Children of persons in the staff of institutions directly involved in school education
- Children of officers on transfer
- Children of persons returned to Sri Lanka after living abroad.

When an applicant has fulfilled the basic qualification for admission namely the minimum age and resident in the feeder area or the Administrative District in which the School is situated (excepting for past pupil category) such an applicant can submit an application under any one or more of the above referred categories. The key factor to be established is proximity, sibling studying in School, parents involved in School Education, Public Officers on transfer and Children returned from abroad.

The Admission Circular has been in existence for the last two decades and the 12th Respondent and his predecessors would have had good reasons to categories applications under Clause 3 of the Circular in this manner. The object of separate categorization of applicants would be rendered nugatory, if the key factor is over looked and an additional threshold criteria is applied by schools in admitting children under this Circular creating another hurdle on the parent, not envisaged by the Circular and there by violating the Circular itself.

This Court is very much aware that there is fierce competition within the Categories itself, to be successful to gain a slot for the limited number of vacancies under the particular category. Thus in the absence of an elimination process as envisaged in Sub Clause 7.4.4 (where

it is clearly laid down that no marks will be given, if Sub-Clause 7.4.3 is not fulfilled) marks should be allocated under each and every Sub-Clause of the particular category and selections made based on the total marks to achieve the objects of the Circular. Sub-Clause 7.1.3, heavily relied upon in these proceedings only re-iterates the above proposition. The repeal of the Sub-Clause does not envisage that a threshold criteria should be applied violating the provisions of the Circular.

Let me now advert to the letter of clarification issued by the 12th Respondent, Secretary, Ministry of Education (P10B) dated 19-09-2017. This letter specifically refers to the effect of the repeal of Sub Clause 7.1.3 and clarifies that the basic qualification is residence within the feeder area and proof of residency is only one criteria.

The Respondents submitted to this Court that the application of the interpretation set out in Secretary, Ministry of Education letter did not arise since no grade one applications were processed after receipt of this letter and the School treated all applications alike and did not award marks for the remaining parts of a category when an applicant has not secured marked under one category. In the absence of any documentation to substantiate that no processing of applications took place after 19-09-2017, as averred to by the 1st Respondent and since the Provisional List was published only on 16-11-2017 two months after the issuance of P10B and 3 months after the Petitioners faced the interview and the Appeal Board should have met consequent to the publication of the Provisional List and especially since the Appeal Board proceedings and determinations are not before Court, I cannot accept the reasons given by the Respondents in not re-evaluating the applications in the best interests of the child as contemplated by the letter of the Secretary, Ministry of Education, who is the 12th Respondent before this Court. Furthermore this clarification/interpretation comes from the author of Circular P3 who by virtue of Clause 12.10 is the Authority to monitor and supervise admission of students to grade one of all Government Schools.

I also cannot accept the position taken by the Respondents, that the Respondents in all instances where an applicant to the Respondent School had not secured marks under part of category such applicants were treated alike and marks were not awarded for the remaining parts of that category and therefore all similarly circumstanced persons were treated equally, as no material, documents or statistics are before this Court, to substantiate that position at least in

respect of the Brother Category under which the Petitioners tendered an application to admit the 1st Petitioner to the Respondent School.

I also observe that the Provisional List varies from the Final List (P11A and P11B) and there is no explanation for same before this Court.

The Respondents submission that acting contrary to the amended Circular and applying the original Circular would violate the applicable law too cannot be accepted for the reasons adverted to earlier.

In the above circumstance, I hold that the Petitioners have established that the 1st to 10th Respondents have violated the 1st and 2nd Petitioners Fundamental Rights guaranteed under Article 12(1) of the Constitution by granting zero marks or no marks at the interview to the 1st Petitioner and thus refusing 1st Petitioner admission to Grade One of Royal College, Colombo 07 in the year 2018.

Therefore, the Respondents are directed to take steps forthwith to admit the 1st Petitioner to Grade One or to the appropriate Grade of Royal College, Colombo 07.

Judge of the Supreme Court

Nalin Perera Chief Justice

I agree

Judge of the Supreme Court

S. Eva Wanasundera PC. J

I agree

Judge of the Supreme Court

