

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

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

W.P.S. Wijerathna
No. 02, Kaluwalgoda,
Markawita.

Petitioner

SC. FR. Application No. 256/17

Vs.

1. **Sri Lanka Ports Authority**
No. 19, Chaithya Road,
Colombo 1.
2. **Chief Human Resources Manager**
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.
3. **S.H.S. Padmini**
Deputy Chief Human Resources
Manager,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.

4. **A. Hewawitharana**
Harbour Master,
Sri Lanka Ports Authority
No. 19, Chaithya Road,
Colombo 1.

5. **S.A.R. Jayathilaka**
Chief Fire Officer,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.

6. **Nelum Anawarathna**
Acting Chief Human Resources
Manager,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.

7. **Nirmal De Fonseka**
Manager,
Mahapola Training Centre,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.

8. **B.M. Anulawathie**
Deputy Chief Manager of
Administrative and Engineering,
Sri Lanka Ports Authority,
No. 19, Chaithya Road,
Colombo 1.

9. R.G. Hettiarachchi

Superintendent of Audit,
Auditor General's Department,
No. 306/72, Polduwa Road,
Battaramulla.

10. Auditor General

Auditor General's Department,
No. 306/72, Polduwa Road,
Battaramulla.

11. Honourable Attorney General

Attorney General's Department,
Colombo 12.

Respondents

Before: Hon. Murdu N.B. Fernando, PC, J.
Hon. S. Thurairaja, PC, J.
Hon. Yasantha Kodagoda, PC, J.

Counsel: Niranjan de Silva with Kalhara Gunawardana for the Petitioner.
Sureka Ahmed, State Counsel for the Respondents.

Argued on: 9th July 2020

Decided on: 11th December, 2020

JUDGMENT

YASANTHA KODAGODA, PC, J.

This Judgment relates to an Application filed in terms of Article 126 of the Constitution by one W.P.S. Wijerathna (hereinafter referred to as “the Petitioner”) alleging the infringement of his Fundamental Rights guaranteed by the Constitution, and seeking *inter-alia* a declaration that his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution have been violated by one or more of the Respondents to this Application.

Position of the Petitioner

By his Petition to this Court dated 17th July 2017, the Petitioner stated that, on 5th January 1987, he joined the Sri Lanka Ports Authority (hereinafter sometimes referred to as “the 1st Respondent Authority”) as a ‘Fireman’. Consequently, he had been attached to the ‘Fire Brigade’ of the Sri Lanka Ports Authority (1st Respondent Authority). Following confirmation in service, he served the 1st Respondent as a Fireman for a continuous period of 15 years. In March 1998, the Petitioner has passed the preliminary examination of the Institution of Fire Engineers, which according to the Petitioner amounts to a ‘Diploma’. On 15th October 2001, the Petitioner was appointed as a ‘Landing and Delivery Clerk’ of the 1st Respondent Authority. Though the Petitioner has not specifically stated in his affidavit, it became apparent at the argument stage of this Application, that this appointment was sequel to the Petitioner having applied for that post, and being selected. In view of that appointment, the Petitioner left the Fire Brigade and became attached to the Supply & Services Division of the 1st Respondent Authority. The Petitioner continues to-date to function as a ‘Landing and Delivery Clerk’ of the 1st Respondent Authority.

In 2006, the Chief Human Resources Manager (hereinafter referred to as ‘the 2nd Respondent’) of the 1st Respondent Authority called for applications for the post of ‘Station Officer’ of the Fire Brigade of the 1st Respondent Authority. Since he had the requisite minimum qualifications to be eligible for appointment as ‘Station Officer’, he preferred an application for the post. However, he had not been recruited on the premise that, the Petitioner had not completed the required period of ‘continuous service’ at the

Fire Brigade of the 1st Respondent Authority. In his Petition to this Court, the Petitioner has not impugned the decision of the 2nd Respondent acting on behalf of the 1st Respondent Authority in not having appointed him to the post of ‘Station Officer’ of the Fire Brigade, on that occasion.

By a Notice dated 28th March 2012, the 2nd Respondent once again called for applications to fill the post of ‘Station Officer’ of the Fire Brigade of the 1st Respondent Authority. According to the said Notice calling for applications (a copy of which was produced attached to the Petition marked “P4”), to be eligible for appointment for the post of ‘Station Officer’, an applicant had to possess the following three qualifications (‘minimum / threshold qualifications’):

- (1) Be a permanent employee of the 1st Respondent Authority.
- (2) Satisfy one out of the three following eligibility criteria referred to in the said Notice:
 - (i) Passed three subjects at the GCE (A/L) examination at the same sitting, possess a level five certificate of National Vocational Qualification certified by the Institute of Fire Engineers and 3 years experience in the ‘T/NT wage scale’.
 - (ii) Passed six subjects including Language and Mathematics at the GCE (O/L) examination in not more than two sittings, possess a level five certificate of National Vocational Qualification certified by the Institute of Fire Engineers and 5 years experience in the T/NT wage scale.
 - (iii) Performed minimum of 20 years service at the 1st Respondent Authority, and out of that, eight years in the ‘T/NT wage scale’ and possess a level four certificate of National Vocational Qualification.
- (3) Possess a ‘satisfactory’ level of performance.

The Notice further stated that, applicants would be required to (a) sit and pass written and practical tests pertaining to professional experience, (b) pass the interview or if relevant to the post, pass the medical test. Though not of particular significance, it may be noted that, as per the Notice “P4”, criteria “(b)” that is passing the interview and passing the medical test were *ex-facie* alternate requirements, as opposed to two distinct criteria to be accomplished to be successful. As the Petitioner possessed the eligibility

criteria referred to in the Notice, he preferred an application for the post of 'Station Officer'.

Subsequently, the Petitioner had got to know that, by letter dated 23rd April 2013, the 3rd Respondent - Deputy Chief Human Resources Manager of the Sri Lanka Ports Authority (hereinafter sometimes referred to as "the 3rd Respondent") had notified the 4th Respondent - Harbour Master of the 1st Respondent Authority (hereinafter sometimes referred to as "the 4th Respondent") that though six applications had been received for the vacancy of 'Station Officer', the Petitioner was the only qualified applicant, and in the circumstances had sought the 'consent' of the 4th Respondent to hold an interview and a practical examination as components of the selection process. In response, by letter dated 11th May 2013, the 4th Respondent had taken up the position that he was 'not agreeable' to the holding of the interview and the practical examination, on the premise that, the Petitioner had not completed the required period of 'continuous service' at the Fire Brigade of the 1st Respondent Authority. In the circumstances, notwithstanding the fact that the Petitioner was the only eligible applicant, he was not called for an interview and was not required to face a practical examination. Accordingly, the Petitioner was not appointed to the post of 'Station Officer'.

The Petitioner claims that, (a) he was the only applicant who had successfully met the required minimum / threshold qualifications, (b) at the time he preferred the afore-stated Application, he had served the Fire Brigade of the 1st Respondent Authority for 15 years (though at the time he preferred the application he was not attached to the Fire Brigade and was attached to another Division of the 1st Respondent Authority), (c) there was no rule at the Sri Lanka Ports Authority that only persons employed at a particular Division were entitled to an appointment to a higher position within that same Division, and (d) 65 Firemen of the Fire Brigade of the 1st Respondent Authority had signed a letter dated 20th June 2013 which was addressed to the Director of Human Resources of the 1st Respondent Authority by the Petitioner, requesting that he be called for an interview for the position of 'Station Officer'. A copy of the said letter was submitted attached to the Petition marked "P6". This letter according to the Petitioner indicated that, none of those employed at the Fire Brigade had any objection to the Petitioner being called for an interview and for a practical examination being held to consider him being appointed to

the post of 'Station Officer'. It appears that, there was no favourable response to the Petitioner's letter dated 20th June 2013.

Being aggrieved by his not being called for an interview, the Petitioner had by letters dated 21st and 28th December 2012 appealed to the Chairman of the 1st Respondent Authority to issue a direction to the Human Resources and Development Division to call him for an interview for the post 'Station Officer'. Consequently, by letter dated 23rd September 2013, the Petitioner was called for an interview and a practical test, to be held on 26th September 2013. Though the Petitioner does not specifically disclose so, according to material placed before this Court and the submissions made by learned Counsel, it is evident that the Petitioner had presented himself for both the interview and the practical test. The Petitioner claims that, he was not notified of the outcome of the interview and the practical test.

In 2014, an audit had been conducted by the Auditor General's Department regarding the vacancy of the post 'Station Officer' not having been filled. The circumstances under which this audit was commissioned and held, have not been placed before this Court by either party. However, a copy of the corresponding Report dated 13th November 2014 authored by Superintendent of Audit R.G. Hettiarachchi of the Auditor General's Department (hereinafter referred to as 'the 9th Respondent') and addressed to the Chairman of the Sri Lanka Ports Authority was presented to this Court attached to the Petition marked "P8". According to "P8", the 9th Respondent had formed the opinion that, notwithstanding the Petitioner having fulfilled the eligibility criteria, the reason as to why the Petitioner was not called for an interview and for a practical test in response to his application tendered in 2012, was because the divisional head, namely, the Harbour Master (4th Respondent) having refused to give his 'consent', and due to the Human Resources Division of the 1st Respondent Authority seeking to delay the selection process until a workman of the Fire Brigade became eligible for the post of 'Station Officer'. The 9th Respondent in his Report further observes that, (a) the 1st Respondent Authority does not have a policy of making appointments to higher positions, only from among eligible employees of the same Division, and (b) the relevant 'scheme of recruitment' does not contain a condition which requires the position in issue to be filled from among only serving employees of the relevant Division, in this instance the 'Fire Brigade'. As regards the interview held in 2013, the Report comments adversely regarding (a) the composition

of the interview panel which interviewed the Petitioner (in that it comprised of a nominee of the 4th Respondent, which was contrary to precedent), and (b) the nature of the sole question asked from the Petitioner at the interview and the corresponding comment entered in the mark sheet. Further, regarding the practical test, the Report comments adversely on (a) the short notice given to the Petitioner to get ready for the practical test (eighteen hours), and (b) the marks assigned to the Petitioner by the nominee of the 4th Respondent, notwithstanding his having asked only a single question regarding a particular chemical substance. The Report reveals that the Petitioner had scored 30 out of 45 marks at the interview and 59 out of 100 marks at the practical test. In view of the foregoing reasons, having concluded that the entire process had resulted in an ‘injustice’ being caused to the Petitioner, the 8th Respondent has sought observations from the Chairman of the 1st Respondent Authority regarding the contents of the Report, and information on what steps he proposes to take with regard to the filling of the relevant vacancy.

Following the release of the Audit Report (“P8”), an inquiry had been held at the 1st Respondent Authority, and consequently, a decision had been taken to hold a fresh interview. The Petitioner had protested at the holding of the interview for the second time without releasing the results of the initial interview. However, a fresh interview had been held on 11th March 2016. It is evident that only the Petitioner had been called for that interview too. On that occasion, the interview panel assigned to the Petitioner 28 out of 40 marks for his performance at the interview, and 40 marks for the ‘trade test’, seemingly out of 60 marks. Thus, the Petitioner had scored a total of 68 marks. According to the Petitioner, the interview panel had ‘recommended’ the appointment of the Petitioner to the post of ‘Station Officer’. The Petitioner alleges that, notwithstanding the recommendation of the interview panel, the Acting Chief Human Resources Manager (presently functioning as the Manager of the Mahapola Training Centre of the 1st Respondent Authority and cited as the 7th Respondent) had recommended that the interview findings be ‘cancelled’ and fresh applications be called for the post of ‘Station Officer’. Accordingly, a fresh Notice calling for applications had been published. A copy of the said Notice dated 19th June 2017 was produced before this Court attached to the Petition marked “P13”. The Petitioner alleges that, without selecting him based on the results of the interview held on 11th March 2016, the process of selection was delayed till another person became eligible to apply for the post of ‘Station Officer’.

In the foregoing circumstances, the Petitioner alleged that, not having appointed him to the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority based on the interview for that post held on 11th March 2016 and calling for fresh applications as reflected in Notice dated 19th June 2017 (produced marked “P13”) was arbitrary, capricious and unreasonable and was an infringement of his Fundamental Rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution.

Leave to proceed and grant of interim relief

Following the issue of Notice of this Application to the Respondents, the Petitioner’s Application was sought to be Supported on 10th August 2017. On that occasion, the Honourable Attorney General (cited as the 11th Respondent) who was represented by learned State Counsel, sought time to obtain instructions from the other Respondents. Learned State Counsel submitted that, the Respondents will not take steps to hold interviews sequel to the issue of the Notice calling for application (“P13”) until this Application was Supported. On that occasion, this Court directed the Respondents to submit to Court the marks sheets of the previous interviews held by the 1st Respondent Authority in respect of the post of ‘Station Officer’. The Respondents complied with the said order of Court, by producing the marks sheets pertaining to the interviews held on 26th September 2013 (“X3A”), 10th February 2016 (“X2”) and 11th March 2016 (“X1”).

On 27th October 2017, having heard submissions of both the learned counsel for the Petitioner and the learned State Counsel for the Attorney General, this Court decided to grant leave to proceed to the Petitioner in respect of the alleged infringement of his Fundamental Rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution. The Court also granted a Stay Order as prayed in paragraph “e” of the prayer to the Petition, staying further processing of applications received in response to Notice dated 19th June 2017 (“P13”) and staying until the final determination of this Application the holding of interviews, and practical examinations, and making an appointment to the post of ‘Station Officer’ of the Fire Brigade of the 1st Respondent Authority. The Respondents were given time to file Objections to the Application, and the matter was fixed for Argument. Accordingly, Statement of Objections of the 1st Respondent Authority was filed on 1st June 2018 and Counter Affidavit of the Petitioner was filed on 25th November 2019.

On 28th November 2019, learned State Counsel made an application to this Court on behalf of the 1st Respondent Authority. She submitted that, in addition to the vacancy of the post 'Station Officer' to which the Petitioner had applied, due to the retirement of an employee, another vacancy of the same post had arisen. In the circumstances, she sought permission of this Court to call for applications to fill such second vacancy. Having heard Counsel, this Court allowed the said application, since the 1st Respondent Authority undertook to retain the previous vacancy to be filled by the Petitioner, in the event this Court holding in favour of the Petitioner.

Position of the Respondents

The position of the Respondents is reflected in the affidavit filed on behalf of the 1st Respondent Authority by its Managing Director H.D.A. Sarath Kumara Premachandra. In his affidavit, referring to the first occasion when applications for the post of 'Station Officer' were called in 2006, he has submitted that, there were two vacancies for the post of 'Station Officer', and seven candidates including the Petitioner had applied. Interviews had been held on 10th April 2007. Following the adoption of the selection procedure, based on merit, three of the applicants had been selected. Of them, the interview panel had recommended the appointment of the first two applicants. The third had been placed on a waiting list. The Petitioner had received 52½ marks and had been placed 5th. Accordingly, the Petitioner had not been selected. As noted above, the Petitioner is not impugning his non-selection for the post of 'Station Officer' on that occasion.

Referring to the applications that were received in 2012 in response to Notice dated 28th March 2013 ("P4"), the Managing Director admits that the Petitioner preferred an application for the post of 'Station Officer'. He asserts that, after the Petitioner submitted his application, there was an exchange of letters between the Chief Human Resources Manager and the Harbour Master, but does not venture to explain the purpose for which such an exchange of letters took place. Nor does he reveal the contents thereof. He has also refrained from stating the outcome of the exchange of these letters. He has further submitted in his affidavit that, pursuant to the Notice calling for applications dated 28th March 2013, interviews were held on 26th September 2013. The Petitioner was the sole candidate. Two out of the three interviewers had not recommended the appointment of the Petitioner. The relevant mark sheets were produced marked "R2(a)", "R2(b)" and

“R2(c)”. In the circumstances, the Petitioner had not been selected. Along with the mark sheets, a letter dated 27th September 2013 marked “R2(d)” was produced, addressed to the Chief Human Resources Manager by the Senior Harbour Safety Officer W.A.M.J Perera, who served as a member of the interview panel. The Managing Director of the 1st Respondent Authority offers no explanation as to why this particular member of the interview panel wrote that letter to the Chief Human Resources Manager and what the latter’s response was.

The Managing Director of the 1st Respondent Authority has not contested the fact that an Audit was conducted by the 9th Respondent, and that “P8” is a copy of the Audit Report. He has not commented on or disagreed with the findings contained therein. According to the Managing Director, after the audit query raised by the 9th Respondent, a domestic inquiry had been conducted into this matter, and it was decided to hold fresh interviews. Hence, by letter dated 8th February 2016, the Petitioner was called to face another interview to be held on 10th February 2016. The Petitioner did not present himself for that interview. However, another interview was held on 11th March 2016, and the Petitioner participated at that interview. He scored 68 marks, and members of the interview panel had recommended that the Petitioner be appointed to the post ‘Station Officer’. However, according to the Managing Director, the selection process had ‘not been concluded’. Thereafter, the Acting Chief Human Resources Manager had recommended the ‘cancellation’ of the interview held on 11th March 2016. The Managing Director has not given any reason for the said recommendation to cancel the interview held on 11th March 2016. Though not specifically stated, the Managing Director seems to imply that someone in authority had agreed with the said recommendation of the Acting Chief Human Resources Manager that the interview held on 11th March 2016 be cancelled, since he has in his affidavit acknowledged that once again a Notice dated 19th June 2017 was published calling for applications all over again. Finally, the Managing Director of the 1st Respondent Authority has stated that, “the Petitioner does not possess requisite ‘experience’ to fulfill the duties of the post of Station Officer”. However, he has not ventured to explain reasons for his view on the matter.

Rebuttal of the Petitioner

By his affidavit dated 25th November 2019, the Petitioner has stated that, the mark sheets tendered on behalf of the Respondents marked “R2(a)”, “R2(b)” and “R2(c)” which

reflect the marks assigned by three members of the interview panel who conducted the interview on 26th September 2016, do not support the position taken up by the 1st Respondent Authority that two out of the three interviewers had not recommended the appointment of the Petitioner. The Petitioner asserts that the letter dated 27th September 2013 written by interview panel member W.A.M.J. Perera was a malicious act with the intention of preventing the Petitioner being appointed to the post of ‘Station Officer’.

The Petitioner has asserted that, since the members of the interview panel that interviewed him on 11th May 2016 had recommended that he be appointed to the post of ‘Station Officer’, he became entitled to be appointed to that post.

Denying the position of the 1st Respondent Authority that the Petitioner does not have the requisite experience, the Petitioner has submitted that having served the Fire Brigade of the Sri Lanka Ports Authority for 15 years, he has acquired sufficient experience to fulfill the duties of the post of ‘Station Officer’ of that Fire Brigade.

Submissions made on behalf of the Petitioner

Learned Counsel for the Petitioner having explained to Court the factual narrative referred to in the initial and counter Affidavits of the Petitioner and associated documents, submitted that, it is of particular importance to note that based on the performance of the Petitioner at the interview held on 11th May 2016, the panel of interviewers had recommended the appointment of the Petitioner to the post of ‘Station Officer’. In the circumstances, learned Counsel submitted that there was no reason whatsoever for the Petitioner to have been denied the appointment. He lay special emphasis on the findings contained in the Audit Report (“P8”) prepared on behalf of the Auditor General by the 9th Respondent, and drew the attention of the Court to the finding that an ‘injustice had been caused to the Petitioner’ by not appointing him to the post of ‘Station Officer’. Learned Counsel further submitted that, the refusal on the part of the Respondents to appoint the Petitioner to the post of ‘Station Officer’ was arbitrary, capricious, unreasonable and was an infringement of the Fundamental Rights of the Petitioner guaranteed under Articles 12(1) and 14(1)(g) of the Constitution. Learned Counsel for the Petitioner drew the attention of Court to his Written Submission, which the Court found to be useful.

Submissions made on behalf of the Respondents

Learned State Counsel who appeared on behalf of the Respondents defended the decision of the Respondents in not appointing the Petitioner to the post of 'Station Officer'. Her submission was that, as the Petitioner did not continuously serve at the Fire Brigade of the 1st Respondent, and as at the time he applied for the post he was working as a 'Landing and Delivery Clerk' in a different Division of the 1st Respondent Authority, he did not possess the required experience to function as a 'Station Officer'. She also drew the attention of the Court to letter dated 27th September 2013 sent to the Chief Human Resources Manager of the 1st Respondent Authority by member of the interview panel W.A.M.J. Perera, stating that at the interview held on 26th September 2013, the Petitioner failed to answer most of the questions which had been posed by him relating to 'general safety' and 'dangerous cargo', and hence the Petitioner was not up to the required standard. Learned State Counsel submitted that member of the interview panel W.A.M.J. Perera had not recommended the Petitioner to be appointed as 'Station Officer'.

Learned State Counsel also drew the attention of the Court to an endorsement made seemingly by the same interviewer on the 'marks sheet', which states that the Petitioner had 'nil knowledge' regarding 'dangerous cargo', 'chemicals' and 'port safety'. She further submitted that, under such circumstances, the Respondents were justified in not appointing the Petitioner to the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority. In the circumstances, learned State Counsel submitted that the treatment of the Petitioner by the administration of the Sri Lanka Ports Authority did not amount to discrimination and hence the Fundamental Rights of the Petitioner guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution had not been infringed by the Respondents. Accordingly, learned State Counsel pleaded that the Application of the Petitioner be dismissed.

Though it is a requirement under the Rules of the Supreme Court, no Written Submissions were tendered on behalf of the Respondents, before the date fixed for argument. It is unfortunate that, even after this Court having drawn the attention of learned State Counsel to the fact that Written Submissions had not been filed on behalf of the Respondents, no attempt was made to seek and obtain the permission of the Court to file Written Submissions even after the conclusion of argument.

Time and again this Court has emphasized the need and usefulness of Written Submissions being filed, in addition of course to the mandatory duty cast by the Rules of the Supreme Court on all Counsel cum instructing attorneys to file Written Submissions. Particularly, at the argument stage, most counsel generally crystalize their submissions and press only certain matters, while not strenuously arguing some other matters. Particularly due to brevity of time that can be allocated for a matter, they support their key arguments, leaving out certain other matters. Particularly in such circumstances, it is extremely helpful to Court if ‘post argument written submissions’ are tendered with the leave of Court.

Analysis by Court and findings

In this matter, the core issues to be determined by this Court is (i) whether the non-appointment of the Petitioner to the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority following the interview for that post held on 11th March 2016, and / or (ii) in the backdrop of all the circumstances of this matter including the outcome of the interview held on 11th March 2016, whether the publication of a Notice dated 19th June 2017 (“P13”) calling for applications for the post of ‘Station Officer’ by one or more of the Respondents to this Application, amount to an infringement of the Petitioner’s Fundamental Rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution.

Article 12(1) of the Constitution

I will initially deal with the first declaration sought by the Petitioner, namely that the Fundamental Right guaranteed by Article 12(1) of the Constitution has been infringed by one or more of the Respondents.

Article 12(1) of the Constitution provides as follows:

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

It is well settled law that, at the core of Article 12 of the Constitution is a key concept, namely the concept of ‘equality’. The concept of equality is founded upon the premise that, all human beings are born as equals and are free. Equality confers equal value, equal

treatment, equal protection and equitable opportunities to all persons, independent of or notwithstanding various demographic, geographic, social, linguistic, religious and political classifications based on human groupings prevalent in contemporary society, some of which are immutable or *born to* and others acquired. The concept of ‘equality’ was originally aimed at preventing discrimination based on or due to such immutable and acquired characteristics, which do not on their own make human being unequal. It is now well accepted that, the ‘*right to equality*’ covers a much wider area, aimed at preventing other ‘injustices’ too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a ‘Fundamental Right’, conferred on the people by the Constitution, for the purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law. While all Fundamental Rights are of equal importance and value, the ‘*right to equality*’ reigns supreme, as it can be said that, all the other Fundamental Rights stem from the ‘*right to equality*’. The ability of human beings to live in contemporary society (as opposed to merely existing), and develop and reap the fruits of social, scientific, economic and political developments, is based on their ability to exercise fully the ‘*right to equality*’. Similarly, for human civilizations may they be national or international, to reap the full benefits of knowledge, skills, experience, talents and wisdom that people possess, people of such societies must enjoy the ‘*right to equality*’.

A pre-condition for the maintenance of peaceful co-existence of any plural society, sustainable peace, cohesiveness between different communities, and achieving prosperity, is the conferment of the right to equality to all persons of such society. The right to equality is a fundamental feature of the Rule of Law, which is a cornerstone of the Constitution of Sri Lanka, and hence the bounded duty of the judiciary to uphold. In fact, representative democracy, which the Constitution of Sri Lanka recognizes to be the form of governance of the country, is also founded upon equality.

It is necessary to highlight that, as the Preamble to the Constitution of the Democratic Socialist Republic of Sri Lanka provides, the Constitution has been adopted with the objectives of *inter-alia* assuring to all Peoples of Sri Lanka freedom, equality, justice, fundamental human rights and the independence of the judiciary, as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka and of all the People of the World, who come to share with those

generations the effort of working for the creation and preservation of a just and free society.

During the very early stages of the evolution of the legal concept of equality in Sri Lanka, Chief Justice Sharvananda in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others*¹ explaining the nature of Article 12, held that it forbids the State from denying to any person equality before the law and equal protection of the law. It means that all persons are equally subject to the law and have a right to equal protection of the law, in similar circumstances, both as regards privileges and liabilities imposed by the law. It ensures that, laws have to be applied equally to all persons, and that there must be no discrimination between one person and another, when their position is substantially the same. The principle which underlines Article 12 is that, equals must be treated equally, operate equally on all persons, under like circumstances. Article 12 guarantees equality among equals. It is violated both by unequal treatment of equals and equal treatment of the unequal. Indeed, the concept of equality does not involve the idea of absolute equality among human beings. Thus, equality before the law does not mean that persons who are different shall be treated as if they were the same. Article 12 does not absolutely preclude the State from differentiating between persons and things. The State has the power of what is known as 'classification' on a basis of rational distinction relevant to the particular subject dealt with. So long as all persons falling into the same class are treated alike, there is no question of discrimination and there is no question of violating the equality clause. The discrimination that is prohibited, is treatment in a manner prejudicial as compared to another person in similar circumstances. So long as classification is based on a reasonable and a justifiable basis, there is no violation of the constitutional right to equality. What is forbidden is invidious (unfair / offensive / undesirable) discrimination. The guarantee of equal protection is aimed at preventing undue favour to individuals or class privilege, on the one hand, and at hostile discrimination or the oppression of equality on the other. Since the essence of the right guaranteed by Article 12 and the evils which it seeks to guard against are the avoidance of designed and intentional hostile treatment, or discrimination on the part of those entrusted with the administering of the same, a person setting up grievances of denial of equal treatment must establish that between persons

¹ [1985] 1 Sri L.R. 285

similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relevance to the object sought to be achieved. He must show that, the other person was similarly situated or equally circumstanced. He must make out that not only had he been treated differently from others, but had been so treated from persons similarly placed without any reasonable basis, and such differential treatment is unjustifiable. Chief Justice Sharvananda continued to explain that, the expression 'discrimination' indicates an unjust, unfair or unreasonable bias in favour of one person or a class, as well as bias against any person or class. Discrimination can exist only where two persons or two subjects are treated in different ways. It arises only from two dissimilar treatments and from similar treatment. There is no discrimination when two equals are treated alike. Discrimination can exist only where two persons or two subjects are treated in different ways. Chief Justice Sharvananda finally held that, what Article 12 strikes at is not unjust treatment or wrongful treatment, but unequal treatment or unjust discrimination.

It would thus be seen that, former Chief Justice S. Sharvananda's views of the concept of equality is akin to the '*reasonable classification doctrine*' which is consonant with the conventional description of discrimination founded upon the concept of '*equality between similarly placed persons*'. Of course, since the pronouncement of the majority judgment in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others*, the Supreme Court of Sri Lanka has somewhat distanced itself from the interpretations provided by Chief Justice S. Sharvananda to the concepts of 'equality' and 'discrimination', and provided an expansive and more progressive definition of the concept of equality, founded upon the concept of '*substantive equality*', aimed at protecting persons from arbitrary, unreasonable, malicious and capricious executive and administrative action. After careful examination and consideration of the law and the need for such law, respectfully, I am also inclined to distance myself from the conservative interpretation given by Chief Justice Sharvananda to the concept of equality, while expressing my agreement with the subsequent views expressed by their Lordships enumerated in the judgments referred to below, which encompass the broad concept of '*substantive equality*'. It is necessary to place on record that the '*reasonable classification doctrine*' continues to play an important role in certain factual situations, in determining whether the *right to equality* has been infringed.

However, prior to doing so, I need to refer to a monumental exploration of the concept of equality contained in Indian jurisprudence. Former Chief Justice of India, Justice Bhagwati has somewhat poetically held in *E.P. Royappa v. State of Tamil Nadu*² the following:

“Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose J, ‘a way of life’, and it must not to be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional doctrinal limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14.”

Article 14 of the Constitution of India is significantly similar to Article 12 of the Constitution of Sri Lanka. However, *ex-facie* it is apparent that, Article 12 of the Constitution of Sri Lanka is wider in scope than Article 14 of the Constitution of India. On the other hand, the jurisdiction of the Supreme Court of India relating to petitions and appeals alleging violation of rights is wider than the jurisdiction of the Supreme Court of Sri Lanka conferred by Article 126 of the Constitution. However, those differences in nature and scope, in my view, should not debar Sri Lankan justices from where appropriate, taking persuasive cognizance of Indian jurisprudence relating to the interpretation of the substantive legal concepts embodied in the ‘right to equality’.

It would thus be seen that, both ‘*equality between similarly placed persons*’ and ‘*substantive equality*’ come within the scope of Article 12(1) of the Constitution.

² AIR 1974 SC 555

As former Chief Justice Parinda Ranasinghe has pointed out in *Ramuppillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others*³, Article 12 requires that, (i) among equals, the law should be equal and it should be equally administered, (ii) like should be treated alike, (iii) all persons are equal before the law and are entitled to the equal protection of the law, (iv) no citizen shall be discriminated against on grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds, (v) equality of opportunity is an instance of the application of the general rule underlying Article 12, (vi) whilst Article 12 does not confer a right to obtain State employment, it guarantees a right to equality of opportunity for being considered for such employment, (vii) what is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of difference as may be found amongst people in general, (viii) it prohibits class legislation, but that reasonable classification is not forbidden, and (ix) in instances where a classification exists, it must appear that not only that a classification has been made, but also that the classification is one based on some reasonable ground or some difference which bears a just and proper relation to the purpose of the classification.

Justice Dr. Shirani Bandaranayake (as she then was) has pointed out in *Kanapathipilli v. Sri Lanka Broadcasting Corporation and Others*⁴, that the concept of equality, is a “dynamic concept”. It is based on the principle that the status and dignity of all persons should be protected whilst preventing inequalities, unfairness and arbitrariness.

It is also necessary to point out that in *Wickremasinghe v. Ceylon Petroleum Corporation and others*⁵ Chief Justice Sarath Silva has pointed out that, although the objective of the right to equality is to ensure that all persons, similarly circumstanced are treated alike, it is seen that the essence of this basic standard is to ensure ‘reasonableness’ being a positive connotation, as opposed to ‘arbitrariness’ being the related negative connotation. If legislation or the executive or administrative action in question is ‘reasonable’ and ‘not arbitrary’, it necessarily follows that all persons similarly circumstanced will be treated alike, being the end result of applying the guarantee of equality.

³ [1991] 1 Sr. L.R. 11

⁴ [2009] 1 SLR 406

⁵ [2001] 2 Sri L.R. 409

In *Weligodapola v. Secretary, Ministry of Women's Affairs*⁶, Justice Dr. A.R.B. Amerasinghe has held that, though Article 12 of the Constitution does not especially mention the right to equality of opportunity for all citizens in matters relating to employment under the State, it is 'a necessary incident of application of the concept of equality' enshrined in Article 12.

It is possible that, Justice Dr. A.R.B. Amerasinghe made specific reference to this fact, since unlike Article 16 of the Constitution of India which makes specific reference to public officers' right to equal opportunity, the 1978 Constitution of Sri Lanka contains no specific Fundamental Right to that effect. It is noteworthy to mention that, the 1972 Constitution (referred to as the 'first republican Constitution of Sri Lanka') contained such a Fundamental Right in Article 18(1)(h).

As Justice Mark Fernando has pointed out in *Ramuppillai v. Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others*, the term 'the law' contained in Article 12(1) relates not only to the 'law' as it is conventionally understood and interpreted, it would include both subordinate legislation and executive action. Thus, for the purpose of Article 12, schemes of recruitment, promotion and appointment would come within the scope of the term 'the law'. Thus, both the very nature of schemes of recruitment, promotion and appointment of public institutions such as the 1st Respondent Authority, and, should there be an infringement of the application of such a scheme, such infringement too would come within the scope of Article 126 of the Constitution, and thereby the Supreme Court would have jurisdiction to inquire into such complaint alleging an infringement of Article 12(1). This enables employees of public institutions to secure justice from the Supreme Court pertaining to their grievances relating to executive and administrative action in their employment setting. Furthermore, not only in instances where an employer - employee relationship exists or is sought to be entered into, in instances where a contractual relationship existed, exists or is sought to be entered into, the right to equality may be invoked as regards executive or administrative treatment of such contracting party or potential contracting party which is

⁶ 1989 (2) SLR 63 at 85

a public institution. This is evident upon a consideration of the judgment of Justice Mark Fernando in *Gunaratne v. Ceylon Petroleum Corporation*⁷.

With the afore-stated judicial pronouncements in mind, the primary focus of this judgment is to consider the application of the fundamental '*right to equality*' in relation to the non-appointment of the Petitioner to the post of 'Station Officer' at a public statutory authority, namely the Sri Lanka Ports Authority.

The 1st Respondent - Sri Lanka Ports Authority has been established in terms of the Sri Lanka Ports Authority Act, No. 51 of 1979, as amended from time to time. Section 7(1)(b) empowers the Sri Lanka Ports Authority to employ such officers and servants as may be necessary for carrying out the work of the Authority. Section 7(1)(e) of the Act empowers the Authority to make rules in relation to the officers and servants of the Authority, including their appointment, promotion, remuneration, discipline, conduct, leave, working times, holidays and the grant of loans and advances of salary to them. Therefore, it is apparent that the 1st Respondent Authority has the power to make in the form of rules and enforce *inter-alia* schemes for the selection and appointment of persons to various positions at the Sri Lanka Ports Authority, which would include the Ports of Colombo, which is a *specified port* in terms of the Act. In any event, the promulgation of such schemes is part of the inherent administrative power of any organization, including statutory authorities such as the Sri Lanka Ports Authority. Such schemes for the selection, appointment and promotion of persons particularly for positions in the public sector, should (a) be founded upon the recognition and compliance with the concept of equality, (b) contain a rational basis, (c) be capable of objective application, (d) be compatible with the organization's objectives, and (e) be aimed at ensuring that the most suitable are selected for the relevant positions. Particularly in the public sector, it would be necessary to develop, have in place, and enforce schemes of appointment and promotion which are compatible with the concepts of equality, for the purpose of (a) providing an environment in which the objectives of the organization are given effect in an efficient manner, (b) ensuring meritocracy, (c) preventing arbitrary and unreasonable decision making and nepotism, (d) preserving effective administration, (e) preventing abuse, (f) preventing corruption, (g) ensuring transparency, (h) maintaining the morale of

⁷ [1996] 1 Sri L.R. 315

the workforce, and (i) ensuring that the public has confidence in such public institutions. Once such schemes are promulgated, it is equally important and necessary to ensure that, they are enforced correctly, comprehensively, uniformly, consistently and objectively. Recruitment and appointment of persons to positions in the public sector cannot be left to be decided according to the whims and fancies of persons in authority. As pointed out by learned counsel for the Petitioner, it has been held by Justice Mark Fernando in *Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others*⁸, that, powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice.

It would thus be seen that arbitrariness and unreasonableness in decision-making in selections, appointments and promotions particularly in public sector institutions is inconsistent with the concept of equality. In fact, as pointed out repeatedly by numerous erudite judges, *'arbitrariness is the anathema of equality'*. In India's former Chief Justice Bhagwati's words, *'equality and arbitrariness are sworn enemies'*.

In my view, principally, schemes for the selection, appointment and promotion of persons for employment positions should contain mechanisms enabling the selection of the most suitable person for the relevant position, whilst embodying the principle of equality. The objective sought to be achieved by doing so, is the imposition of compulsion on persons in authority who are empowered to take decisions relating to selections, appointments, recruitment and promotions, to arrive at objective and reasonable decisions, and thereby securing protection against arbitrary decision-making. While conferring discretionary authority on elected and appointed higher officials is necessary, it is equally necessary to ensure that, such discretion is exercised for the purpose for which discretionary authority has been conferred, and not for the purpose of giving effect to personal objectives which are inconsistent with equality and influenced by irrational and subjective criteria. In all probability, the conferment of unregulated discretionary power would result in violations of the rule of law, and arbitrary, unreasonable and capricious decision-making, and should therefore be avoided at all cost. Particularly in

⁸ [2001] 1 Sri L.R. 132

and with regard to governance of nation States and management and administration of public institutions, it is of critical importance that, discretionary authority is exercised by Executive and by administrative authorities in *public trust*, only for the purpose of securing the purpose for which such power had been conferred, for the best interests of the organization concerned, for the best interests of the State, and in overall public interest. Not adhering to these vital norms, can certainly result in an infringement of Article 12 of the Constitution, in injustice, and in the long-term, in calamity.

Whether the 1st to the 8th Respondents have acted in conformity with these legal principles, or contrary to the right to equality conferred on the Petitioner by the Constitution, is the purpose of the following analysis of the evidence.

It would be seen that, in this matter, it was of fundamental importance that the Respondents placed the relevant ‘scheme of selection and appointment’ pertaining to the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority (1st Respondent) before this Court. In its absence, this Court can only proceed on the footing that the ‘Notice’ calling for applications (“P4” and “P13”) reflect the relevant scheme of appointment.

Now, I wish to consider whether (i) the non-appointment of the Petitioner to the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority following the interview for that post held on 11th March 2016, and / or (ii) in the backdrop of all the circumstances of this matter including the outcome of the interview held on 11th March 2016, the publication of a Notice dated 19th June 2017 (“P13”) calling for applications for the post of ‘Station Officer’ breached the principles of equality and non-discrimination.

During the argument stage of this Application, this Court specifically inquired from the learned State Counsel as to whether the appointment of a person as a ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority was governed by a formal ‘Scheme of Recruitment / Appointment’. She specifically answered that enquiry in the affirmative. Though unsupported by an affidavit, I am ready to accept that answer, since it was made by a Counsel from the Bar table in response to a question posed by Court. Court thereafter inquired from learned State Counsel as to why she did not plead the relevant scheme as an attachment to the affidavit of the Managing Director of the Sri Lanka Ports

Authority, which was the only evidence placed before this Court on behalf of all the Respondents. Learned State Counsel did not respond to that enquiry and remained silent. She offered no explanation either for her persistent silence.

In this regard, it is necessary to point out that, the primary duty of Attorneys-at-Law is to assist Court in the due administration of justice. Their duties and obligations towards their respective clients are subordinate to the duty they have towards Court. This is more so with regard to officers of the Attorney General's Department, who are quite rightly deemed to be *ministers of justice*, due to some of the quasi-judicial functions conferred on the office of the Attorney-General by law. Therefore, officers of the Attorney General's Department are required to actively aid Court in the discovery of the truth and administer justice according to law. It is of critical importance to bear in mind that, officers of the Attorney General's Department are duty bound to act in the best interests of the State, as doing so would be in public interest. Thus, the overall objective of legal professionals serving the State, should be the protection and fostering of public interest. Protecting and acting in the best interests of the State and public officials, is circumscribed by the overarching professional duty legal officers of the State have towards Courts to assist in the administration of justice. Legal Officers of the State are certainly not required and should not protect or defend public officials who have committed any illegality or otherwise acted contrary to law.

I wish to reproduce a passage from Justice Dr. A.R.B. Amerasinghe's treatise on *"Professional Ethics and Responsibilities of Lawyers"*, which provides as follows:

"An attorney has a duty to act in the best interests, of his client. However, in undertaking the conduct of a case in court he takes on himself an office in the performance of which he has other duties. Justice will be done, and then to the imperfect level which human nature allows, if the courts and those assisting them act with integrity and fairness. An attorney's duty to court, to the standards of his profession and to the public which may, and often does, lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

Where there is any doubt, an attorney must put the public interest before the apparent interests of his client. Otherwise, there would not be that implicit trust

between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice.”

I must emphasize that, for a moment I have not in this instance inferred that the learned State Counsel refrained from responding to the question posed by Court, occasioned by any improper motive. She may have erroneously though or sincerely assumed that, she owed a duty towards her clients to remain silent not answering the question put to her by Court.

Therefore, when questions are posed by Court, State Counsel as well as members of the unofficial Bar must, necessarily answer, and answer truthfully. Remaining silent is no answer at all. If providing an answer is not possible, Counsel must seek the indulgence of Court to remain silent, by explaining why it is not possible to provide an answer.

Be that as it may, in the circumstances, this Court is compelled to recognize the ‘Notice’ dated 28th March 2012 (which was produced by the Petitioner marked “P4”) calling for applications to fill the vacancy of ‘Station Officer’ and which led the Petitioner to submit an application and subsequently being interviewed initially on 23rd September 2013 and subsequently on 11th March 2016, as substantially reflecting the relevant ‘scheme of recruitment / appointment’. I have to also infer that the formal ‘scheme of recruitment / appointment’ was not presented to this Court by the Respondents, as the production of that document would have either supported the case of the Petitioner, or run contrary to the position taken up by the 1st Respondent Authority, or have contributed towards both.

I propose to commence the analysis of the factual matrix relating to this application by a consideration of the eligibility criteria or as learned Counsel for the Petitioner put it ‘the threshold requirement’ contained in the Notice dated 28th March 2012 (“P4”) calling for applications for the post ‘Station Officer’. It contains three alternate eligibility criteria or certain ‘minimum qualifications’, which have been referred to above under the narrative of the Petitioner’s position. The position of the Petitioner is that, at the time he preferred the application for the post of ‘Station Officer’ he possessed both the first and second eligibility criterion, though he was required to fulfill only one. In addition to such minimum qualifications, the Notice also states that, applicants should possess a ‘satisfactory performance’ level. The Petitioner’s position is that he possessed that level

of performance too. The 1st Respondent Authority has not challenged either of these factual positions taken up by the Petitioner. In the circumstances, I conclude that the Petitioner had satisfied the eligibility criteria contained in “P4”.

Under ‘Notes’, “P4” states that, (i) all applicants should pass a written / practical examination aimed at assessing the professional experience applicable for the applied post, and (ii) the applicant should pass the ‘interview’ or if applicable to the post, pass the ‘medical test’. In recognition of its normal usage, I infer that the symbol “/” in Note “(i)” above, denotes alternatives. Thus, what was contemplated was to conduct either a written or a practical examination. It seems that the term ‘or’ in Note “(ii)” above is a typographical error or a mistake in the ‘Notice’ calling for applications. Thus, I conclude that what is actually meant is that applicants will be interviewed, and where relevant to the post applied for, be required to subject themselves to a medical examination. The Managing Director of the 1st Respondent Authority has not stated in his affidavit that the post of ‘Station Officer’ required applicants to pass a ‘medical examination’. Nor does the Petitioner state that he was required to subject himself to a medical examination. Therefore, it must be concluded that, according to the ‘scheme of recruitment / appointment’, applicants who possess the minimum or threshold qualifications referred to above, would be required to face an interview and sit for a written or a practical test. Marks would be given based on their performance, and if only one vacancy existed, the applicant who earned the highest marks would be selected and appointed to the post. There appears to be no other requirement to be satisfied for the purpose of being selected. It is pertinent to bear in mind that, according to this scheme, following the conduct of the interview, if the applicant is recommended for appointment by the panel of interviewers, there is no further step to be taken, than to offer the appointment to the selected candidate.

In this backdrop, I will now examine what actually happened. Sequel to the publication of “P4” the Petitioner and five others have presented applications. Only the Petitioner possessed the minimum qualifications / eligibility criteria. Thus, according to the scheme referred to above, the 2nd and 3rd Respondents, namely the Chief Human Resources Manager and the Deputy Chief Human Resources Manager, respectively, were required to constitute an interview panel, set or cause the setting of a written or practical examination for the purpose of assessing whether the Petitioner had the necessary

practical experience for the post 'Station Officer', and thereafter call the Petitioner to face the interview and sit for the examination. Instead of doing so, the 3rd Respondent had written a letter dated 23rd April 2013 to the 4th Respondent seeking his consent to hold the interview and the examination. This step which the 3rd Respondent has taken is not a procedural requirement contained in the 'scheme of appointment'. The flaw in the procedure followed, commences at that stage.

The Managing Director of the 1st Respondent Authority in his affidavit offers no explanation as to why it was necessary to seek the consent of the 4th Respondent. By letter dated 11th May 2013, the 4th Respondent declined to give his consent. The Petitioner claims that the reason for the 4th Respondent refusing to give his 'consent' was because the Petitioner had not completed the required period of 'continuous service' at the Fire Brigade of the Sri Lanka Ports Authority. The Petitioner's position in this regard seems to be founded upon the contents of the Audit Report marked "P8". The Managing Director of the 1st Respondent has neither admitted nor denied this position. In the circumstances, it is necessary to examine whether the relevant 'scheme of recruitment / appointment' contains such a requirement that applicants should possess 'continuous' service at the Fire Brigade. This is pertinent, as admittedly, the Petitioner had not been attached to the Fire Brigade continuously. Furthermore, learned State Counsel too in her submissions relied on the fact that the Petitioner had applied for and obtained another appointment at a different division, and hence at the time he presented the application was not attached to the Fire Brigade. She submitted that, this was a factor that justified the Petitioner not being selected for the post 'Station Officer'. An examination of the "P4" reveals that there exists no requirement that applicants should have continuously been attached to the Fire Brigade or that only serving employees of the Fire Brigade were entitled to apply for the post 'Station Officer'. Further, the Respondents have not taken up the position that, there exists an overarching policy at the 1st Respondent Authority, that a person may apply and thereby be selected for a post at a particular Division of the 1st Respondent Authority, only if he had previously continuously served in the same division. In the circumstances, I conclude that, consequent to the Petitioner having applied for the post, the 3rd Respondent need not have sought the 'consent' of the 4th Respondent, and the 4th Respondent having refused to give his 'consent' was not founded upon a provision in the applicable 'scheme of recruitment / appointment' or a policy of the 1st Respondent Authority. Furthermore, the material placed before this Court by the

Respondents, does not justify the position that, only a serving officer of the Fire Brigade was competent to be appointed and serve as a 'Station Officer'. In the circumstances, I conclude that, this ground urged on behalf of the Respondents seeking to justify the Petitioner not being called for an interview sequel to the original publication of "P4" is both unreasonable and arbitrary.

As the 2nd and 3rd Respondents failed to conduct the interview and the examination, the Petitioner had to appeal to the Chairman of the 1st Respondent Authority. This resulted in the Petitioner being called for an interview, which had been held on 26th September 2013. The Petitioner was the only applicant who was called for the interview, seemingly because he was the only eligible applicant. It seems from the relevant 'marks sheet' (produced by the Respondents marked "X3A") the interview and the written / practical examination had been combined by holding a composite 'interview'. This by itself is a violation of the 'scheme of recruitment / appointment'. According to the affidavit of the Managing Director, two out of the three interviewers of the interview panel had not recommended the selection of the Petitioner for the post 'Station Officer'. Thus, according to the Managing Director, it was decided not to appoint the Petitioner. In support of that position, the Managing Director produced marked "R2(a)", "R2(b)" and "R2(c)" being the 'marks sheets' perfected by the interviewers. It was on this occasion that the nominee of the 4th Respondent who served on the interview panel, namely, W.A.M.J. Perera, wrote a letter marked "R2(d)" to the 2nd Respondent, stating his reasons for not recommending the Petitioner for appointment.

With regard to the 'marks sheets', I wish to make the following observations. The 'marks sheets' indicate by designation and name, the composition of the four-member interview panel. However, the affidavit of the Managing Director reveals that only a three-member interview panel conducted the interview. Further, only three 'marks sheets' were presented to court. No explanation has been given as to why only three officials conducted the interview, instead of the designated four interviewers who were supposed to interview the Petitioner. Further, the three 'mark sheets' submitted do not reveal which of the interview panel member perfected which 'mark sheet'. Further, they have not been signed and dated by the respective members of the interview panel, except for an illegible initial possibly placed by of one possible member. Thus, the integrity of those 'mark sheets' is in serious doubt. As stated above, the affidavit of the Managing Director does

not reveal any reason as to whether in fact a written / practical examination was conducted. The Petitioner claims that he presented himself to ‘an interview and a practical test’. However, the Respondents have not presented to this Court the examination paper that was administered or a document indicating the performance of the Petitioner at the ‘practical test’. Marks sheets “R2(a)”, “R2(b)” and “R2(c)” do not contain columns in which marks can be assigned for performance at such a ‘practical test’. However, “R2(a)” contains an unsigned endorsement that states “*Dangerous Cargo (chemical knowledge) - Nil*”. “R2(b)” also contains an unsigned endorsement that states “*Dangerous Cargo, Chemical knowledge, Port safety - Nil knowledge*”. Further, “R2(c)” contains an endorsement stating that the Petitioner’s answers to questions on ‘fire extinguishing’ were ‘good’. Thus, it seems that, without conducting an examination as contained in the ‘scheme of recruitment / appointment’, the three interviewers have asked a few questions and assessed the Petitioner. In all the circumstances referred to above, it is difficult to place any reliance on the outcome of this interview cum selection process.

It must be observed that, the afore-stated selection process lacked transparency and compliance with the ‘scheme of recruitment / appointment’. In the circumstances, it is quite understandable that the Audit Superintendent (8th Respondent) who conducted the Audit of which the Report was produced marked “P8” had multiple criticisms regarding the selection process and the outcome of it, and concluded that ‘injustice’ had been caused to the Petitioner. Therefore, it is quite understandable as to why the Managing Director of the 1st Respondent did not venture to critique the said Audit Report. From the mere fact that upon the release of the Audit Report (“P8”) the management having decided to conduct an ‘inquiry’ into the matter and having subsequently decided to conduct a fresh interview, reveals clearly that the interview held on 22nd September 2013 and its outcome were flawed in many respects.

On 11th March 2016, the Petitioner was required to present himself for a fresh interview. At that interview, instead of strict compliance with the ‘scheme of appointment’, a composite interview had been conducted, which seems to have included testing the knowledge and experience of the Petitioner as well. He was interviewed by four interviewers and he received a total of 68 marks. The interviewers ‘recommended’ his appointment as ‘Station Officer’. The relevant marks sheet was produced marked “R4”.

Unlike the previous marks sheets produced marked “R2(a)”, “R2(b)” and “R2(c)”, the authenticities of which are in serious doubt, this marks sheet was signed by the relevant interviewers. *Ex-facie*, there is no doubt regarding the authenticity of this marks sheet relating to the interview held on 11th March 2016.

Notwithstanding the recommendation by the interview panel, the Managing Director in paragraph 21 of his affidavit states that, *“the process such as Interview Panel Report signed by the interview panel members seeking approval of the Chairman for the respective appointment has not been concluded consequent to the interview held on 11.03.2016”*. This sentence does not enable the Court to understand which step in the selection process was not fulfilled. Once, the interview panel had ‘recommended’ the appointment of the Petitioner to the post ‘Station Officer’, what was the remaining step in the ‘scheme of selection and recruitment / appointment’ to be taken? In the absence of such a step that is evident, I am compelled to conclude that, the Managing Director had included that sentence in his affidavit, merely for the purpose of attempting to justify what the Acting Human Resources Manager of the time, who has been cited as the 7th Respondent, had done. Namely, make a recommendation to ‘cancel’ the interview held on 11th March 2016, and hold a fresh interview. Affidavits of the 2nd, 3rd and 7th Respondents have not been filed. Thus, there is no explanation whatsoever, as to the possible justification for the 7th Respondent to have taken this step, which in the absence of an explanation can be labeled only as an unreasonable and arbitrary act. It is apparent that, it was that arbitrary decision which resulted in a further decision being taken to publish a fresh Notice dated 19th June 2017 (“P13”) calling for applications for the post of ‘Station Officer’ all over again.

It is therefore my conclusion that, the entire process of calling for applications by Notices dated 28th March 2012 (“P4”) and 19th June 2017 (“P14”), processing of the corresponding applications, conduct of the selection processes, and the non-selection and non-appointment of the Petitioner for the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority were seriously flawed, and contrary to the relevant ‘scheme of recruitment / appointment’. In the circumstances enumerated above and the reasoning contained in this judgment, I hold that the non-appointment of the Petitioner for the post of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority following the holding of an interview on 11th March 2016 and the ensuing calling for fresh

applications by Notice dated 19th June 2017 was neither reasonable nor justifiable, and was arbitrary, unreasonable and capricious.

There is every reason to believe that, one or more of the 2nd, 3rd, 4th, 6th and 7th Respondents had acted maliciously and connived with each other to prevent the Petitioner from receiving the appointment of ‘Station Officer’ of the Fire Brigade of the Sri Lanka Ports Authority, which he was legitimately entitled to receive in response to his application submitted in 2012. Had the relevant authorities applied the relevant ‘scheme of recruitment / appointment’ pertaining to that post in *good faith* and with due diligence, while the Petitioner would have become entitled to hold the post ‘Station Officer’ in 2012 itself, the Sri Lanka Ports Authority would have had the services of a ‘Station Officer’ to its Fire Brigade. Particularly for an establishment such as the Colombo Port, I have to take judicial notice of the fact that, the services of a ‘Station Officer’ of its Fire Brigade would be extremely important.

Article 14(1)(g) of the Constitution

I shall now deal with the second declaration sought by the Petitioner, namely a declaration that the Fundamental Right guaranteed by Article 14(1)(g) of the Constitution has been infringed by one or more of the Respondents.

Article 14(1)(g) of the Constitution states as follows:

“Every citizen is entitled to - the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.”

It would thus be seen that, Article 14(1)(g) of the Constitution confers on citizens of Sri Lanka the Fundamental Right to be entitled to the freedom to engage by himself or in association with others, in any lawful occupation, profession, trade, business or enterprise.

Article 15(5) of the Constitution, which provides possible restrictions to the Fundamental Right guaranteed by Article 14(1)(g), states as follows:

“The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to -

- (a) *the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and*
- (b) *the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.”*

Further restrictions that may be imposed are found in Article 15(7) of the Constitution. They relate to restrictions that may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or for meeting the just requirements of the general welfare of a democratic society.

Article 15(5)(a) recognizes the fact that, the Fundamental Right contained in Article 14(1)(g) does not confer an absolute right or a right that cannot be restricted or conditioned to engage in any lawful occupation, profession, trade, business or enterprise. In order to effectively engage in certain occupations, professions, trades, businesses and certain enterprises, it would be necessary for the State to ensure that, persons who wish to engage in such activities possess certain educational, academic, professional, technical qualifications, training, experience, and skills. It would also be in the interests of the public to ensure that, persons who wish to be engaged in certain occupations, professions, trades, businesses and other enterprises possess legal authority granted by competent authorities such as licenses and permits to engage in such activities. Furthermore, it would be necessary to ensure that, certain occupations, professions, trades, businesses and enterprises are conducted in terms of an appropriate legal and regulatory framework, and where required, subject persons engaged in such activities to regulatory and disciplinary control. Thus, Article 15(5)(a) enables the legislature to enact laws that prescribe or provide for such measures in the form of restrictions to be imposed.

It must be noted that, certain occupations, professions and trades are employment related. Only those holding particular employment positions are entitled to engage in the related occupation, profession or trade. Thus, a prerequisite to engage in the relevant

occupation, profession or trade, is the requirement to hold the relevant employment position. It should be appreciated that, what Article 14(1)(g) confers is a general right to engage in an occupation, profession, trade, business or enterprise of one's choice. It does not guarantee a Fundamental Right to hold a particular employment related position.

It was held by Chief Justice Sharvananda in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries* that, Article 14(1)(g) only recognizes a general right conferred on every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice. A similar view was expressed by Justice A.R.B. Amerasinghe in *W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation*⁹, wherein he held that, Article 14(1)(g) ensures that freedom to engage in any lawful occupation of one's choice, but that does not extend to a right to be employed by a particular master or in a particular place of work.

In this matter, while the Petitioner has been successful in establishing that he has been unreasonably and arbitrarily denied being appointed 'Station Officer' of the Fire Brigade of the 1st Respondent Authority, at a time when he on his own calling was not even employed at the Fire Brigade and was performing job functions unrelated to fire-fighting, he has not established that, non-appointment to the post of 'Station Officer' of the Fire Brigade amounted to an infringement of his Fundamental Right to engage in a lawful occupation or profession of his choice. It appears from the circumstances of this case that, the Petitioner's desire was to be appointed as 'Station Officer' of the Fire Brigade, and not to engage in any particular occupation or profession of his choice. Correspondingly, his grievance was that he was not appointed to the post of 'Station Officer' and not that, he was deprived of his right to engage in a profession or occupation of his choice. In the circumstances, I am of the view that, the Respondents have not infringed the Petitioner's Fundamental Right guaranteed in terms of Article 14(1)(g) of the Constitution.

⁹ [1989] 2 Sri L.R. 393

Grant of relief and directives of Court

In view of the foregoing circumstances and reasons, I hold that, the 1st, 2nd, 3rd, 4th, 6th, and 7th Respondents have by the afore-stated impugned decisions and conduct, jointly infringed the Fundamental Rights of the Petitioner guaranteed by Article 12(1) of the Constitution, by depriving him of the right to equality.

Therefore, I hereby issue a Declaration that the Petitioner's Fundamental Rights guaranteed by Article 12(1) of the Constitution have been infringed by the 1st, 2nd, 3rd, 4th, 6th, and 7th Respondents.

I further direct that, based on the findings of the panel of interviewers who conducted the interview on 11th March 2016, the Petitioner be forthwith appointed to the post of 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority. However, taking into consideration the fact that, had the 2nd, 3rd, 4th, 6th and 7th Respondents correctly and in good-faith applied the 'scheme of recruitment / appointment' of the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority, the Petitioner would have received the appointment in 2012, I direct that the said appointment be backdated to 1st July 2012.

The Petitioner will not be entitled to receive any back wages.

In the circumstances enumerated above, I make order quashing the Notice dated 19th June 2017 ("P13") calling for fresh applications for the post 'Station Officer' of the Fire Brigade of the Sri Lanka Ports Authority, as prayed for in paragraph (g) of the prayer of the Petition.

On a consideration of the totality of the circumstances of this case, I direct the 1st Respondent - Sri Lanka Ports Authority to pay the Petitioner compensation to the value of Rs. 300,000/=, and the 2nd, 3rd, 4th, 6th and the 7th Respondents to jointly pay the Petitioner further compensation to the value of Rs. 100,000/=.

In the afore-stated circumstances, I allow this Application.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC,J.

I agree.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC,J.

I agree.

JUDGE OF THE SUPREME COURT