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

In the matter of an Application under Article 126 of the Constitution of Sri Lanka.

S.C F.R. 206/2008

1. **DEMUNI SRIYANI DE SOYZA**
   No.8, 6th Lane,
   Jambugasmulla Mawatha,
   Nugegoda.
2. **S.M.SRIYALATHA**
   No. 515, Kuruppu Junction,
   Polonnaruwa.
3. **Y.H. SANATILAKE**
   No. 309/1/A, BOP 316,
   Thalpothe, Polonnaruwa.
4. **C.A.P. DE SILVA**
   No.7, Ela Hingurakgoda,
   Minneriya.
5. **K.K.U.J.N. PERERA**
   Merlin Mawatha,
   Horagolla, Maravila.
6. **P.A.J.S. SAMARAKOON**
   No. 40, Dewala Mawatha,
   Nattandiya.
7. **D.M. GUNATHILAKE**
   Baddegama, Kosdeniya.
8. **J.A.G.S. BANDARA**
   No.554 3/4, 6th Lane,
   Bandaranayake Mawatha,
   Gonahena, Kadawatha.
9. **P.G. DIAS**
   No. 12, Sadananda
   Mawatha, Panadura.
10. **H.D. WIMALASENA**
    Kudirippuwa, Galmuruwa.
11. **W.A. ARIYARATNE**
    Kalawana, Metikumbura.
12. **W.D. PERERA**
    No. 125, Temple Road,
    Maharagama.
13. **J.M. PEMADASA**
    Ihalagama, Gampaha.

14. I.M.M. KUMARIHAMI
Dela Walauwa,
Pussella, Parakaduwa.

15. H.M.L.S.B. HERATH
No. 46 E, Hendeniya,
Peradeniya.

16.M.A.MANURATHNA
No.11, Ganga Mawatha,
Panadura.

17. M.K.G.MUDIYANSE
No. 451, Zone 4,
Nawanagaraya, Medirigiriya.

18. A.M.P.I.M.K. HERATH
No.77/7,
Ihalakaragahamuna,
Kadawatha.

19. H.N. CHANDRALATHA
No. 955/5, 1st Lane,
Gothatuwa, Angoda.

20. W.M. CHANDRALATHA
No.8, Irrigation Quarters,
Kundasale.

21. J.WICKRAMASINGHE
Palapathwala,
Totagamuwa, Weliwatte.

22. C. RUPASINGHE,
"Shanthi",Talatuoya,
Mudunkada.

23. H.C.S. WATHULANDA
No.7 F/1,Hendeniya,
Peradeniya.

24. H.B.DENIYAWATTE
No. 16, Dharmashoka
Mawatha, Aruppola,
Kandy.

25. D.M.D. KODIPPILI
No. 24, Uyankele Road,
Panadura.

26. C.WITHANAWASAM
No. 49/3, Wekanda Road,
Homagama.

27. M.P.L.DE SILVA,
No. 145/3, Old Nawala
Road,Nawala, Rajagiriya.

PETITIONERS

VS.

1(b). DHARMASENA DISSANAYAKE
Chairman.

2(b). A.SALAM ABDUL WAID
Member.

3(b). DR.PRATHAP RAMANUJAM
Member.

4(b). MS.D.SHIRANTHA WIJAYATILAKA
Member.

5(b). MRS.V. JEGARASINGHAM
Member.

6(b).SANTI NIHAL SENEVIRATHNE
Member.

7(b). S.RANNUGGE
Member.

8(b). D.L.MENDIS
Member.

9.(b).SARATH JAYATHILAKE
Member.
All of the Public
Service Commission,
No.177, Nawala Road,
Narahenpita, Colombo 5.

10(b).H.M.G. SENEVIRATHNE
Secretary,
Public Service
Commission,
No.177,NawalaRoad,
Narahenpita.

11. D.DISSANAYAKE
Secretary,
Ministry of Public
Administration and Home
Affairs.

12. HON.ATTORNEY GENERAL
Attorney-General's
Department, Colombo 12.

RESPONDENTS

BEFORE: Eva Wanasundera, PC, J
Anil Gooneratne J
Prasanna Jayawardena, PC, J

COUNSEL: J.C. Weliamuna for the Petitioners.
Indika Demuni de Silva PC, ASG for the 1B, 2B, 3B, 4B, 5B, 6B, 7B, 8B, 9B, 10B and 11th Respondents.

ARGUED ON: 29th July 2016.

WRITTEN SUBMISSIONS FILED ON: By the Petitioners on 15th September 2016
Not filed by the Respondents.

DECIDED ON: 09th December 2016

Prasanna Jayawardena, PC, J.

The 25 Petitioners are public servants who joined the General Clerical Service ["the GCS"] of the State in the latter half of the 1970s and early 1980s. In the year 1995, the Petitioners were appointed to the `Supra Class' of the GCS *on a* ***Supernumerary*** *basis* with effect from 01st July 1989. This was done following a settlement entered in Fundamental Rights Application Nos. 197/93 and 198/93.

The Petitioners claim that, by a letter dated 17th January 1995 , the Director - Establishments confirmed that, although the Petitioners were serving on a Supernumerary basis consequent to the settlement entered in the aforesaid Fundamental Rights applications, the Petitioners were entitled to all the general rights [පොදු අයිතිවාසිකම්] of public servants who serve in the `Supra Class' of the GCS.

When the Public Management Assistants' Service ["the PMAS"] was established in 2004, the Petitioners were absorbed into it from 01st January 2004. It is relevant to note that, during their period of service in the PMAS too, the Petitioners continued to be in service on a Supernumerary basis.

On 05th February 2007, the Secretary of the Ministry of Public Administration and Home Affairs issued the Combined Services Circular No. 01/2007 inviting applications for appointment to Class II Grade II of the Sri Lanka Administrative Service ["the SLAS"]. The Circular stated that, officers who had completed 15 years service by 31st December 2004 and had been absorbed into Class I of the PMAS from 01st January 2004 onwards or who had completed 10 years service by 31st December 2004 and had been absorbed into the Supra Class of the PMAS from 01st January 2004 onwards, were eligible to apply.

The aforesaid Combined Services Circular No. 01/2007 stated that, the selection of applicants for appointment to Class II Grade II of the SLAS would be made based on: (i) the marks obtained at a written examination; and (ii) marks for seniority.

It should be mentioned here that, Clause (3) under the Heading *"Marking Scheme for Seniority"* in Section 5 of the aforesaid Combined Services Circular No. 01/2007 dated 05th February 2007 stated, *"Appointment to any post on **Supernumerary** basis or antedating of any appointment will **not** be considered for computing marks for seniority……"* [emphasis added].

The Petitioners applied for appointment to Class II Grade II of the SLAS and sat for the written examination which was held on 26th August 2007. The Petitioners' position is that, it was only in April 2008 that they learnt the results of the written examination when the Merit List was released and marks allotted for seniority became known. The Petitioners had *not* been selected. The Petitioners' position is that, *none* of the applicants who had been serving on a Supernumerary basis at the time they applied, had been selected for appointment to Class II Grade II of the SLAS.

On 05th June 2008, the Petitioners made this application alleging that, the Respondents' failure to allocate marks for the period of the Petitioners' service on a Supernumerary basis in the `Supra Class' of the GCS and later in the PMAS, violated the Petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

The Respondents to the Petition dated 05th June 2008 filed by the Petitioners were the Chairman and Members of the Public Service Commission, the Secretary of the Ministry of Public Administration and Home Affairs and the Hon. Attorney-General.

In their Petition, the Petitioners averred that, the non-allocation of marks for the period of their service on a Supernumerary basis, was the reason for their not being selected for appointment to the SLAS. They stated that, when promotions or appointments had been made in other Services in the public service, the period of service on a Supernumerary basis was taken into account.

The aforesaid letter dated 17th January 1995 issued by the Director-Establishments was annexed to the Petition marked **"P7"** and, the Combined Services Circular No. 01/2007 dated 05th February 2007 was annexed to the Petition marked **"P9"**.

The Petitioners pleaded that, the aforesaid Clause (3) in Section 5 of the Circular marked **"P9"** was discriminatory and unfair. The Petitioners also pleaded that, the failure to allocate marks for the period of their service on a Supernumerary basis, denied them of their legitimate expectations.

The Petitioners stated that, some of them had made the appeals dated 08th July 2005, 07th October 2005,16th June 2007, and 17th October 2007 marked **"P12(a)"**, **"P12(b)"**, **"P12(c)"** and **"P12(d)"**, to the Secretary of the Ministry of Public Administration and Home Affairs and to the Public Service Commission, urging that, marks be allocated for periods of service on a Supernumerary basis.

This Court granted the Petitioners, leave to proceed under Article 12 (1) of the Constitution.

The 1st Respondent – who is the Chairman of the Public Service Commission - has filed an Affidavit stating, *inter alia,* that: the Petitioners are not entitled to be allocated marks for the period of service on a Supernumerary basis; there had been 88 vacancies in Class II Grade II of the SLAS and the marks which the Petitioners obtained upon their results at the written examination and on account of their seniority, did not entitle them to selection to fill these 88 vacancies; the rule that, when computing seniority, marks are not allocated for periods of service on a Supernumerary basis, had also been applied to appointments to Class II Grade II of the SLAS made in pursuance of the schemes of recruitment which commenced in 1998 and 2001, as set out in the Combined Services Circular No. 02/2001 and the Combined Services Circular No. 03/2005 filed with the 1st Respondent's affidavit marked **"1R3A"** and **"1R3B"**; and denying that, the Petitioners' fundamental rights had been infringed.

The 1st Respondent pleaded that, the Petitioners had been well aware that, in terms of the applicable Marking Scheme (which is set out in **"P9"** dated 05th February 2007), they would not be allocated marks for the period of service on a Supernumerary basis but that they did not challenge this rule earlier. The 1st Respondent further pleaded that, the Petitioners had acquiesced to this Marking Scheme when they applied for appointment to Class II Grade II of the SLAS. In this connection, copies of the applications submitted by the Petitioners were filed with the 1st Respondent's affidavit marked **"1R4A"** to **"1R4V"**.

On the aforesaid basis, the 1st Respondent took up the position that, the Petitioners' application is time barred.

The 10th Respondent - who is the Secretary of the Ministry of Public Administration and Home Affairs - has filed an Affidavit stating, *inter alia,* that: the Petitioners are not entitled to be allocated marks for the period of service on a Supernumerary basis. The 10th Respondent too has pleaded that the Petitioners' application is time barred.

The Petitioners filed a Counter Affidavit.

This Application raises the question whether the Respondents' aforesaid rule stated in the Combined Services Circular No. 01/2007 dated 05th February 2007 marked **"P9"** that, when computing seniority for the purpose of making selections for promotion to Class II Grade II of the SLAS, marks will not be allocated for the period of an applicant's service on a Supernumerary basis; is reasonable and justified *or* unreasonable and arbitrary.

The Shorter Oxford English Dictionary [5th ed.] defines the word "Supernumerary" as *"in excess of the usual, proper or prescribed number; additional, extra;"* and also as *"Beyond the necessary number"*. Thus, when it said that an employee is serving `on a Supernumerary basis', it is usually understood that, he is a person who has been employed to serve in a particular post or grade at a time when the permitted number

of the substantive cadre of employees for that post or grade, was filled. The connotation is that, he is an *`extra'* employee serving in that post or grade.

Neither party to the application before us have cited any previous decisions of a Court which examines the question of the eligibility of persons who are serving on a Supernumerary basis for promotion to a higher post in the substantative cadre. My search for previous decisions of this Court on the issue, was not successful either. One can take the view that, where cadres in a particular grade or post are limited, it is only service in a substantive post which counts when computing seniority and that a period of service on a Supernumerary basis will not be taken into account unless the Supernumerary post has been absorbed into the substantive cadre at some point in time prior to making the promotions. However, in circumstances where the material before the Court establishes that, the service though nominally classified as being on a Supernumerary basis, was *de facto* service in a substantive post, there could be instances where a Court may be inclined to cast aside artificiality of nomenclature and take the period of that service into account when computing seniority.

In the present case, the Petitioners contend that, though they were classified as serving on a Supernumerary basis, they performed the duties of a public officer in the substantive cadre and that too, for many years. Thus, a question will arise in this case as to whether the facts and circumstances before this Court justify taking into account the period of the Petitioners' service on a Supernumerary basis, when computing seniority for promotion to Class II Grade II of the SLAS.

Further, the documents before us make it is clear that, the placing of the Petitioners on a Supernumerary basis was a decision taken by the Respondents, in 1995, to remedy the injustice caused to the Petitioners as a result of some administrative anomalies, which were highlighted in the aforesaid Fundamental Rights Application No.s 197/93 and 198/93. It seems to me that, the Petitioners were placed on a Supernumerary basis due to the administrative needs and constraints of the Executive and not due to any fault or weakness on the part of the Petitioners or due to an indulgence granted to the Petitioners. But, those administrative measures taken in 1995 have resulted in the Petitioners not being allowed to take into account their many years of service on a Supernumerary basis, when computing seniority for the purposes of seeking promotion to Class II Grade II of the SLAS. If that is so, the Petitioners may be able to justifiably complain that they have been unfairly treated due to no fault of their own.

On the other hand, the cadre in the public service is limited and it should be ensured that, the public service is managed in a manner which promotes efficiency and economy. The State cannot allow the bloating of numbers in the public service so as to accommodate everyone who is qualified for appointment or promotion. In doing all this, the interests of all public servants have to have be balanced and fair treatment across the board, has to be ensured. Therefore, there may have been good reasons for the decision taken by the Respondents, in 1995, to place the Petitioners on a

Supernumerary basis and for the adoption of the rule that, marks will not be allocated for the period of service on a Supernumerary basis when computing seniority for purposes of making promotions. Further, this rule may have been applied equally to all public officers for several years and been accepted as a fair and reasonable measure and, thereby, become immune from challenge now.

Thus, the questions that arise in this application are intriguing and they engage attention. At the same time, this Court is aware that, the aforesaid rule adopted by the Respondents has, *ex facie*, deprived the Petitioners and other public servants of a possible opportunity for promotion.

But, however captivating the issues that would arise in a determination of this application upon its merits may be, I have to first consider the objection taken by the Respondents that, the Petitioners' application is time barred.

Article 126 (2) of the Constitution stipulates that, a person who alleges that any of his fundamental rights have been infringed or are about to be infringed by executive or administrative action may *"….. within one month thereof ….. "* apply to this Court by way of a Petition praying for relief or redress in respect of such infringement. The consequence of this stipulation in Article 126 (2) is that, a Petition which is filed after the expiry of a period of one month from the time the alleged infringement occurred, will be time barred and unmaintainable. This rule is so well known that it hardly needs to be stated here.

The rule that, an application under Article 126 which has *not* been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution. Thus, in EDIRISURIYA vs. NAVARATNAM [1985 1 SLR 100 at p.105-106], Ranasinghe J, as he then was, stated *"This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution is mandatory."*.

In ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL [1995 BALJ Vol.VI Part 1 p.10] Kulatunga J explained that, the result of the express stipulation of a one month time limit in Article 126 (2) is that, this Court has no jurisdiction to entertain an application which is filed out of time – *ie:* after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of. Thus, Kulatunga J stated [at p.10] *"….. if it is clear than an application is out of time, the Court has* ***no jurisdiction*** *to entertain such application."*. [emphasis added].

Accordingly, if it turns out that the Respondents' objection that the Petitioners' application is time barred is well founded, the result would be that, this Court does not have the jurisdiction to award the Reliefs prayed for by the Petitioners and the application would have to be dismissed.

In this connection, in Paragraph [15] of their Petition, the Petitioners state that, *"….. in or about April 2008, they learnt that the final results of the said Examination (with marks for seniority) had been released. Upon inquiry they were able to obtain a copy*

of the Merit List and they found that they had not been selected. They further observed that none of the supernumerary appointees have been selected. A copy of the Merit List is annexed hereto marked ***P11***.".

The Merit List marked **"P11"** has been signed by the Deputy Commissioner of Examinations on 03rd March 2008. Therefore, it is reasonable to conclude that, in the month of March 2008 itself, the Petitioners became aware that marks had not been allocated for their period of service on a Supernumerary basis and they had not been selected. However, as set out above, in Paragraph [15] of the Petition, the Petitioners state that they learnt of this only in April 2008.

Even if the Petitioners are accorded the benefit of reading the somewhat less than specific averment *"….. in or about April 2008….."* in the manner most favourable to the Petitioners, this Court has to conclude, upon the Petitioners' own pleadings, that, by 30th April 2008, the Petitioners were aware of the alleged infringement of which they complain of in this application.

A period of one month from 30th April 2008 will end on 31st May 2008. However, this application has been filed on 05th June 2008 and, therefore, appears, *prima facie*, to be time barred.

However, I do not think it is fitting to refuse this application by simply applying the aforesaid formula of dates and looking no further, since, as I mentioned earlier, there are several substantial issues which would arise for determination in this application *if* this Court has jurisdiction to do so under and in terms of the applicable Law which has developed with regard to the time limit of one month stipulated in Article 126 (1).

Therefore, it is necessary to look at some of the principles that have developed over the nearly four decades during which this Court has interpreted and applied Article 126 (2) of the Constitution; apply those principles to this application; and then ascertain whether the time bar is insurmountable.

In this regard, as stated earlier, the general rule is clearly that, this Court will regard compliance with the 'one month limit' stipulated by Article 126 (2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126 (1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement.

However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires Article 126 (2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier.

Thus, Sharvananda CJ observed in MUTUWEERAN vs. THE STATE [5 Sri Skantha's Law Reports 126 at p. 130] that, *"Because the remedy under Article 126*

is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. ***Hence Article 126 (2) should be given a generous and purposive construction****."* [emphasis added]. In the same vein, Ranasinghe J stated in EDIRISURIYA vs. NAVARATNAM [at p. 106] that, *"A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations."*.

Several decisions of this Court have discussed the circumstances which would justify permitting an `extension' of the time limit of one month stipulated in Article 126 (2) of the Constitution.

In RAMANATHAN vs. TENNEKOON [1988 2 CALR 187 at p.190], De Alwis J observing that, the time limit of one month would usually be applied, stated *"I must however not be understood to say that this Court cannot exercise its discretion in entertaining an application which is ex facie out of time in appropriate circumstances where the principle lex non cogit ad impossibilia is applicable"*.

The *"appropriate circumstances"* which His Lordship, Justice De Alwis was referring to were:

(i) Instances where the Petitioner becomes aware of the alleged infringement more than a month after it occurred - in this connection, De Alwis J cited the decision in SIRIWARDENE vs. RODRIGO [1986 1 SLR 384]; and:

(ii) Instances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and the maxim *lex non cogit ad impossibilia* applied – in this connection, De Alwis J cited the decision in EDIRISURIYA vs. NAVARATNAM [1985 1 SLR 100].

With regard to (i) above – *ie:* where the time period of one month is to be computed not from the date of the occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement - in the decision cited by De Alwis J, namely, SIRIWARDENE vs. RODRIGO, Ranasinghe J, as he then was, held [at p.387] *"Where however, a petitioner establishes that he became aware of such infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such a case, the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.".* This principle has been reiterated time and again.

It should be added here that, if the facts and circumstances of an application make it clear that, a Petitioner, by the standards of a reasonable man, *should have become* aware of the alleged infringement by a particular date, the time limit of one month will

commence from that date on which he *should have* become aware of the alleged infringement. Thus, in ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL, Kulatunga J held [at p.11], *"…..it would not suffice for the petitioner to merely assert that he personally had no knowledge of the discriminatory act, if on an objective assessment of the evidence he ought to have had such knowledge."*.

The criteria that are to be applied when determining when a Petitioner became aware of the alleged infringement or should have become aware of it, are objective – *vide:* ILLANGARATNE vs. KANDY MUNICIPAL COUNCIL.

With regard to (ii) above - *ie:* where, due to circumstances, beyond his control, the Petitioner has been prevented from invoking the jurisdiction of this Court under Article 126 (1) for more than one month after the occurrence of the alleged infringement - in the decision cited by De Alwis J, namely, EDIRISURIYA vs. NAVARATNAM, Ranasinghe J, as he then was, referred to a period where a Petitioner is held in custody and *incommunicado* without a reasonable opportunity to take meaningful steps to invoke the jurisdiction of this Court and observed [at p. 106] that, such a period *"should not and would not be counted in computing the period of one month referred to in sub-article (2) of Article 126 of the Constitution and that the maxim lex non cogit ad impossibilia would, in such a situation, apply".* This principle has also been reiterated time and again.

The abovementioned decision and, in fact, most of the decisions on this issue deal with situations where the Petitioner was held in detention or was hospitalized after torture or assault while in custody and, therefore, could not take steps to invoke the jurisdiction of this Court under Article 126 (1) and, for that reason, there was no fault, lapse or delay which, could be reasonably attributed to the Petitioner, in invoking the jurisdiction of this Court – *vide:* NAMASIVAYAM vs. GUNEWARDENE [1989 1 SLR 394], SAMAN vs. LEELADASA [1989 1 SLR 1] and several other decisions on the same lines including, more recently, Ekanayake J in UKWATTA vs. MARASINGHE [SC F.R. 252/2006 decided on 15.12.2010].

However, there are circumstances, other than those in which a person is *incommunicado* as a result of being in custody or in hospital, where a Petitioner who complains of an alleged infringement of his Fundamental Rights is, nevertheless, unable to invoke the jurisdiction of this Court due to circumstances which are beyond his control. In such circumstances, there could be cogent reasons to apply the maxim *maxim lex non cogit ad impossibilia* and allow the Petitioner to maintain an application filed under Article 126 despite the one month period stipulated in Article 126 (2) having ended *provided* there has been no lapse, fault or delay on the part of Petitioner and, further, he has filed the Petition within one month of the date on which his disability could be reasonably held to have ceased.

Thus, in GAMAETHIGE vs. SIRIWARDENA [1988 1 SLR 384], which was an application relating to the Petitioner's complaint that he had been unfairly discriminated against in the allocation of residential quarters, Fernando J set out the general principle that, *" While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an*

application made out of time.". More recently, in GOONETILLEKE vs. PIYADIGAMA [SC F.R. 308/2009 decided on 30.01.2014], where the Court was considering an application for intervention in proceedings regarding promotions in the Police Force, His Lordship, the Chief Justice stated [at p.13] *"While the time limit is mandatory in ordinary circumstances, in exceptional circumstances, this Court has a discretion to entertain an application if there is no lapse, fault or delay on the part of the parties seeking to intervene"*. In ALAWALA vs. THE INSPECTION GENERAL OF POLICE [SC F.R. 219/2015 decided on 15.02.2016], which was also an application relating to alleged unfair discrimination in the making of promotions, Aluwihare, PC, J stated [at p.10], *"Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application were the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner."*

The nature of circumstances (other than being in custody or being hospitalized following assault or torture while in detention) do not seem to have been identified or listed in the decisions of this Court, and quite rightly so, since this would always be a question of fact to be determined by the Court considering the facts and circumstances of the particular case before it and applying an objective test. In this regard, it is apt to cite Fernando J's observation in GAMAETHIGE vs. SIRIWARDENA [at p. 401] that, *"The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man–made disaster, would have to be considered in an appropriate case when it arises."*.

Needless to say, a Petitioner who seeks an exemption from the time limit of one month stipulated in Article 126 (2) of the Constitution by claiming unavoidable circumstances which prevented him from invoking the jurisdiction of this Court earlier, will have to satisfy the Court that, he should be granted that exemption. In this connection, Fernando J commented, in GAMAETHIGE vs. SIRIWARDENA [at p. 401], *"….. there is a heavy burden on a petitioner who seeks that indulgence"*.

However, while there is no doubt that, a Petitioner who seeks an extension of the time limit must satisfy the Court that such unavoidable circumstances did exist and prevented him from coming to Court earlier, a Court would, no doubt, find it salutary to keep in mind Sharvananda CJ's counsel that, *"…. Article 126 (2) should be given a generous and purposive construction."* and ensure that, an unrealistic or impractical burden is not cast on a Petitioner. A Court would, in appropriate circumstances, be alive to any real obstacles, be they tangible or intangible, that were insurmountable and lay in the path of a Petitioner who later seeks to exercise his constitutional right to invoke the jurisdiction of this Court under Article 126 of the Constitution, which is a `just and equitable jurisdiction', as stated in Article 126 (4).

At this point, since it is relevant to this application, another principle that has emerged from the decisions of this Court should be mentioned. That is the principle that, other than in limited circumstances, time spent by a Petitioner in making appeals or seeking other administrative or judicial relief would not, normally, be excluded when calculating the period of one month stipulated by Article 126 (2) of

the Constitution. Therefore, if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126 (1) of the Constitution but, instead, choses to pursue other avenues of seeking relief, the time he spends perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126 (1).

Thus, Fernando J held in GAMAETHIGE vs. SIRIWARDENA [at p.396], *"If a person is entitled to institute proceedings under Article 126 (2) in respect of an infringement at as certain point in time, the filing of an appeal or application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time limit."*. Similar views were expressed by this Court in JAYAWEERA vs. NATIONAL FILM CORPORATION [1995 2 SLR 120] and RAMANATHAN vs. TENNAKOON.

For the sake of completeness, it should be mentioned that, a statutorily created interruption in the passage of the one month stipulated in Article 126 (2) is set out in Section 13 (1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996.

In GAMAETHIGE vs. SIRIWARDENA, Fernando J listed the aforesaid principles [at p. 402] stating *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126 (2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both the infringement and knowledge exist (Siriwardena vs. Rodrigo). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*.

There is another development in the interpretation and application of Article 126 (2) which should be mentioned here. That is, the principle that, in appropriate circumstances, this Court may be inclined to consider whether it should extend the time limit of one month beyond the date on which an infringement of Fundamental Rights commenced, if that infringement is of a *continuing* nature.

In SASANASIRITISSA THERO vs. DE SILVA [1989 2 SLR 356], Kulatunga J identified the unlawful detention of a person as being a continuing infringement. In JAYASINGHE vs. THE ATTORNEY- GENERAL [1994 2 SLR 74], Fernando J referred to the likelihood that, a long delay to issue a Charge Sheet and commence disciplinary proceedings against an employee who had been interdicted, will amount to a continuing infringement. In WIJESEKERA vs. THE ATTORNEY GENERAL [2007 1 SLR 38], Silva CJ identified the denial of the right of the people of a Province to have a Provincial Council constituted by the election of members to it, as a continuing infringement. In DE SILVA vs. MATHEW [S.C. F.R. 64/2009 decided on 27.03.2014], Ekanayake J considered the categorization of the Petitioners in a particular Grade, as being a continuing infringement. In WIJESEKERA vs. LOKUGE [S.C. F.R.342/2009 decided on 10.06.2011] Tilakawardane J referred to the

suspension of the Petitioners from a Rugby team as being in the nature of a continuing infringement. However, none of these decisions further discussed the concept or nature of a continuing infringement.

In the recent decision of LAKE HOUSE EMPLOYEES UNION vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD [SC FR 637/2009 decided on 17.12.2014], where the Petitioners complained that their Fundamental Rights had been violated by the Respondents removing Notices which the Petitioner had put up on a Notice Board provided for their use and that this had happened over a long period of time, learned Counsel for the Petitioners contended that, there had been a continuing violation of the Petitioners' Fundamental Rights.

Marsoof J held [at p.7], *"In the absence of any decision of this Court on this point, I wish to adopt the distinction recognised by the courts in the United States between discreet acts of discrimination and continuing violations through a series of such acts.* His Lordship cited NATIONAL RAILROAD PASSENGER CORP. vs. MORGAN, which was a decision of the US Supreme Court and observed *"In analyzing the statute of limitations issue, the Court differentiated between discrete acts and continuing violations, noting that some discrete acts, `such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify'. The Court held that such incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable `unlawful employment practice', and that accordingly, for limitations purposes, a discrete retaliatory or discriminatory act occurs on the day that it happens. In contrast, Court described a continuing violation as `a series of separate acts that collectively constitute one unlawful employment practice' and went on to hold that `such cause of action accrues on the day on which the last component act occurred'."*.

His Lordship held that, *"Adopting the reasoning of the United States Supreme Court in Morgan's case discussed above, I am inclined to the view that, any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party affected invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of."*.

Before turning to the present case, I should also refer to NANYAKKARA vs. CHOKSY [2009 BLR 1 at p.28-29] where, Amaratunga J overruled an objection that the application was time barred for the reason that, the impugned transaction was an ongoing one and also since, *in applications which have been filed in the public interest*, the Court can take cognizance of the time required to obtain relevant documents, study the subject matter of the impugned transaction and formulate the application to be submitted to this Court. His Lordship appears to have taken the view that, the time period of one month should be deemed to commence only after the Petitioners had a reasonable opportunity to complete the preparatory work which was essential to formulate and file their application.

It remains for me to apply the aforesaid principles to the present application and consider whether the Respondents' objection that this application is time barred, should be sustained.

When doing so, it is convenient to apply the aforesaid principles sequentially, by asking the following questions:

(i) (a) When did the alleged infringement occur ?; or, if Petitioners claim they became aware of the alleged infringement only sometime after it occurred, when did they become aware of it or when should they have become aware of it ?

(b) If the alleged infringement is in the nature of a continuing one which the Petitioners were aware of, till when did it continue ?;

(ii) If the application has been filed more than one month after the latest date determined when considering (a) and (b) above, have the Petitioners established that, they were unable to invoke the jurisdiction of this Court due to circumstances which were beyond their control and that, there has been no lapse, fault or delay on their part ?

(iii) If so, have the Petitioners filed this application within one month of any such disability ending ?

The date determined in answer to the first subset of questions will determine the date on which the one month period stipulated in Article 126 (1) *commences* to run. Quite obviously, if the Petition has been filed within one month of that date, it is within time.

However, if the Petitioners have filed this application more than one month after that date, the Petition will be time barred *unless* the answers to the second and third question are in the affirmative.

Accordingly, it is necessary to first identify *when* the alleged infringement occurred.

As stated earlier, the Petitioners' complaint is that, the Respondents' failure to allocate marks for the period of the Petitioners' service on a Supernumerary basis in the `Supra Class' of the GCS and later in the PMAS, violated the Petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution. In this connection, the Petitioners have pleaded that, Clause (3) under the Heading *"Marking Scheme for Seniority"* in Section 5 of the Combined Services Circular marked **"P9"** was *"discriminatory and unfair"*.

"P9" is dated 05th February 2007 and Clause (3) of **"P9"** clearly states that, when computing seniority for the purpose of making selections for promotion to Class II Grade II of the SLAS, marks will *not* be allocated for the period of an applicant's service on a Supernumerary basis. There is no ambiguity or room for any misunderstanding of the effect of that statement that – *ie:* that, marks will not be allocated for the period of the Petitioners' service on a Supernumerary basis.

Further, **"P9"** was *directly and immediately applicable* to the Petitioners since they claim eligibility for promotion and, in fact, applied for promotion in pursuance of **"P9"**.

This is *not* a case where **"P9"** introduced a Scheme of Promotion in terms of which the Petitioners may apply for promotion at some point in the future. Further, it is also clear that, the Petitioners applied for promotion in pursuance of **"P9"** and that it must be deemed that they did so with full knowledge of Clause (3) and its aforesaid effect.

Therefore, it is clear that, the alleged infringement occurred on or soon after 05th February 2007 when the Circular marked **"P9"** was issued and made known to the Petitioners.

Similar circumstances were before Court in GUNARATNE vs. SRI LANKA TELECOM [1993 1 SLR 109] at p.115] where Kulatunga J held *"….. if a scheme, such as the one before us, affecting promotions in an existing service is inherently discriminatory, the right to relief accrues immediately upon the adoption of such scheme and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1)."*. On the same lines, in DAYARATNE vs. NATIONAL SAVINGS BANK [2002 3 SLR 116 at p.124], Fernando J stated *"*The *first limb of the Respondents' preliminary objection is that after the lapse of one month the Petitioners were not entitled to challenge the scheme of promotion. The 1st Respondent was entitled, from time to time, and in the interests of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12. 02. 2001 was directly and immediately applicable to the petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should have complained to this Court within one month."*.

Next, the question that arises for consideration is whether the Petitioners were aware of (or, should have been aware of) the alleged infringement on or about 05th February 2007 itself *or* whether it was only on some later date that they became aware of the alleged infringement (or should have become aware) of it.

In this regard, the Petitioners' position is that, they relied on the Letter marked **"P7"** issued by the Director-Establishments and the terms of settlement entered in the aforesaid two Fundamental Rights Applications and believed that they would be treated in the same manner as officers in the substantive cadre in all matters including promotions. It is on this basis that, they state in Paragraph [15] of the Petition that it was only in April 2008 that they learnt marks had not been allocated for their period of service on a Supernumerary basis and they had not been selected and, thereby, seek to maintain their claim that they became aware of the alleged infringement only in April 2008.

However, a perusal of the appeal dated 08th July 2005 marked **"P12(a)"** evidences that, even in 2005, the Petitioners were aware that they were not entitled to claim marks for their period of service on a Supernumerary basis [*vide:* the statement "ජ්‍යේෂ්ඨත්වය සඳහා ලකුණු අහිමිය." in Item 5 of **"P12(a)"**. This complaint is reiterated and expanded upon in the appeal dated 16th July 2007 marked **"P12(c)"**

which states “අධි පන්තියට උසස් කිරීමේදී සඳහන් කොන්දේසි අනුව අධි පන්තිය වෙනුවෙන් ජේෂ්ඨත්වය සඳහා මොවුන්ට ලැබෙන්නේ ලකුණු 0 කි.”.

Thus, there is no merit in the Petitioners' claim that they became aware of the alleged infringement only in April 2008. In any event, as observed, earlier, this Petition has been filed after the expiry of one month from 30th April 2008.

Next, I should consider whether the infringement complained of by the Petitioners is a continuing one. In this regard, it should be mentioned that, in Paragraphs [18] and [20] of the Petition, the Petitioners have pleaded that, they have been *“continuously discriminated and treated unfairly”* and that they have been subject to a *“continuing infringement”*.

No doubt, the Respondents' decision not to allocate marks for the periods of the Petitioners' service on a Supernumerary basis has an *effect* which continues to cause prejudice to the Petitioners since the Petitioners have been and continue to be deprived of the ability to count that period when computing seniority for the purpose of promotion to Class II Grade II of the SLAS.

But, it has to be kept in mind that, many, if not most, executive or administrative decisions and acts which are challenged under Article 126, are, usually, single and distinct acts or decisions done or taken on a particular day which immediately affect a person or decide his alleged rights, but which have a continuing *effect* on the persons who are subject to such acts and decisions. However, all such executive or administrative decisions cannot be challenged after the expiry of one month simply because they have a continuing *effect*.

Instead, what is relevant when determining the start date of the one month period specified in Article 126 (2), is the **occurrence** of the infringement and *not* its *effect*.

An infringement can be constituted by a single, distinct and `one-off' act, decision, refusal or omission. However, some other infringements can be constituted by a series of acts, decisions, refusals or omissions which continue over a period of time. It is only the second type of infringement which can be correctly identified as a `continuing infringement'.

It seems to me that, the essential characteristic of a `continuing infringement' which is constituted by an **act or decision** is that, such act or decision or similar acts or decisions are committed or are taken several times throughout the period the infringement continues. There is a series of acts or decisions, each of which infringe the Petitioner's Fundamental Rights, which occur throughout the period of the infringement. The result is a 'continuing infringement' in relation to which the time period of one month starts on the day the last such act is done or decision is taken. It should be understood that, the type of decision contemplated here is, usually, a decision taken for the first time on a particular set of facts and not a decision affirming a previous decision.

The position is less easily deciphered in cases where the infringement is a **refusal or omission** to perform an act which should be done. In such instances, much would depend on the facts and circumstances of each case. It seems to me that,

where the infringement consists of the refusal or omission to perform an act that should be done, the infringement will be a continuing one as long as the refusal remains in force or the omission persists and the time period of one month specified in Article 126 (2) will start on the day on which the such refusal is made and becomes known to the Petitioner or omission to perform the act becomes known to the Petitioner.

This line of reasoning is in line with the views expressed in NATIONAL RAILROAD PASSENGER CORP. vs. MORGAN which was cited by Marsoof J in LAKE HOUSE EMPLOYEES UNION vs. ASSOCIATED NEWSPAPERS OF CEYLON LTD and His Lordship's aforesaid observations in that case, with which I am in respectful agreement.

With regard to the present case, it is evident that, the alleged infringement was constituted by the decision set out in the impugned Clause (3) of the Circular marked **"P9"**. This is a distinct and `one-off' decision. The effect of Clause (3) has been implemented from the time **"P9"** was issued. There has been no subsequent decision on a different set of facts. There was no ambiguity or lack of understanding. Thus, on an application of the aforesaid tests, I hold that, the alleged infringement which the Petitioners complain of, was not a `continuing infringement'.

Even if the Petitioners' contention that, the infringement occurred in April 2008 when the results of the selection were issued and became known is assumed to be correct, the alleged infringement will still be a distinct and `one-off' infringement constituted by the non-allocation of marks for the period of service on a Supernumerary basis and the non-selection. Thus, even if this approach is taken, the alleged infringement which the Petitioners complain of, is not a continuing one.

For the aforesaid reasons, I hold that, the alleged infringement which the Petitioners complain of, occurred when the Circular dated 05th February 2007 marked **"P9"** was issued. I further hold that, the Petitioners were aware of the alleged infringement from or about 05th February 2007 when **"P9"** was issued. In fact, they were aware even much earlier that, they would not be allocated marks for the period of service on a Supernumerary basis, as demonstrated by their appeal dated 08th July 2005 marked **"P12(a)"**.As set out above, it has also been determined that, the alleged infringement is not a continuing one.

The Petition has been filed on 05th June 2008 which is more than 16 months after the day the Petitioners themselves state the alleged infringement occurred. Therefore, the Petition is time barred and liable to be dismissed unless the Petitioners can seek an extension of the time limit on grounds that, they were prevented from filing the Petition earlier.

Thus, it only remains for me to consider whether the Petitioners have established that, they were unable to invoke the jurisdiction of this Court due to circumstances which were beyond their control and that there has been no lapse, fault or delay on their part. However, the Petitioners have not made any such claim and this question does not arise for consideration.

At this point, it is apt to cite the recent decision of this Court in KUMARASIRI vs. BANDARA [S.C. F.R. 277/2009 decided on 28.03.2014] which has several parallels with the application now before us. In that case, the Petitioners were seeking promotion and submitted themselves for interviews, in September 2008, at which they were made aware that, an amended Marking Scheme would be applied. The Petitioners did not challenge the amended Marking Scheme then. Seven months later, they filed a Petition alleging that, the amended Marking Scheme violated their Fundamental Rights. Sripavan J [as His Lordship, the Chief Justice then was] held [at p.08],*"It is necessary to state at the outset that I am not inclined to favour the conduct of the Petitioners who participated in the interview without any protest, fully availed themselves to the interview process and then when they observed that selection has gone against them came forward to challenge the addendum* ***P6*** *[*nb: this was the amended Marking Scheme*] on the ground of unknown disability on their part. The participation, without challenging the addendum* ***P6*** *with full knowledge of all the circumstances, preclude the Petitioners from objecting to the selection process embodied by* ***P1*** *and* ***P6*** *by an application filed seven months thereafter, namely, on 07.04.2009. The conferment of exclusive jurisdiction in terms of Article 126 (1) and the imposition of a time-limit in Article 126 (2) demonstrate with certainty the need for the prompt invocation of the jurisdiction of this Court. The addendum embodied in* ***P6*** *therefore cannot be challenged in these proceedings."*. The same reasoning will apply to the present application which is before us and result in the same conclusion.

For the aforesaid reasons, I uphold the Respondents' objection that, the application is time barred. The application is dismissed. In the circumstances of the case, I make no order with regard to costs.

Judge of the Supreme Court

Eva Wanasundera J.,PC
I agree

Judge of the Supreme Court

Anil Gooneratne J.
I agree

Judge of the Supreme Court