

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

*In the matter of an application in terms of Article
126 read with Article 17 of the Constitution of
the Democratic Socialist Republic of Sri Lanka.*

S C (F R) Application No. 288/ 2014

1. W G Gunarathna,
No. 13,
Randiya Uyana,
Palapathwala.
2. M W M Shanika Karunarathna,
'Sirikatha',
Udagama,
Ulapane.
3. D M Pathma Kumari,
Bamwaththa,
Gokarella.
4. D C Sunethra Ariyasinghe,
No. 145,
Koskotuwa,
Walawela,
Matale.
5. S M I R Samarakoon,
38th Mile Post,

Lenadora.

6. H M S K Herath,
No. 104/B,
Magoda,
Ruwan Eliya,
Nuwara Eliya.

7. S A C S Kumarathna,
302/1,
Aluthwela,
Karalliyadda,
Theldeniya.

8. I G H D Somasinghe,
No. 25,
Palapathwala,
Wahakotte.

PETITIONERS

-Vs-

1. Secretary,
Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 07.
2. Director-General Establishments,

Ministry of Public Administration and
Home Affairs,
Independence Square,
Colombo 07.

3. Retired Justice Hon. Sathya Hettige PC,
Chairman.

4. S C Manapperuma,

5. Ananda Seneviratne,

6. N H Pathirana,

7. S Thillandarajah,

8. A Mohamed Nahiya,

9. Kanthi Wijetunge,

10. Sunil S Sirisena

11. Dr. I M Zoysa Gunasekera,
All members of the Public Service
Commission
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

12. T M L C Senaratna,
Secretary,

Public Service Commission,
No. 177,
Nawala Road,
Narahenpita,
Colombo 05.

13.S Premawansa,
Chief Secretary of the Central Province,
Chief Secretary's Office,
Kandy.

14.K Kekulandara,
Secretary,
Ministry of Health, Indigenous Medicine,
Social Welfare, Probation & Child Care
Services,
Central Province Provincial Council,
Sangaraja Mawatha,
Kandy.

15.Dr. K A Shanthi Samarasinghe,
Provincial Director of Health Services,
Department of Health Services of the
Central Province,
Sangaraja Mawatha,
Kandy.

16.Secretary,
Ministry of Healthcare and Nutrition,
'Suvasiripaya',

No. 385,
Ven. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

17. Director-General of Health Services,
Department of Health,
No. 385,
Ven. Baddegama Wimalawansa Thero
Mawatha,
Colombo 10.

18. Hon. Attorney-General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

Before: **L. T. B. DEHIDENIYA J**

P. PADMAN SURASENA J

S. THURAIRAJA PC J

Counsel: Nishantha Sirimanna with M Dissanayaka for Petitioners.

N Wigneshwaran SSC for the Respondents.

Argued on : 02-03-2020

Decided on : 03-06-2020

P Padman Surasena J

The Petitioners were appointed to the posts of Planning and Programming Officers (Grade II) in the Department of Health of the Central Province during the years 1999-2005. Their appointments were made in such a way that their service would only be within the said department with no transfers being possible to any other Department.

In terms of the salary revisions effected for the entire public service in 2006, the post of the Petitioners was designated under M N - 5 salary code placing them on the initial step of the said M N - 5 salary scale with effect from 01-01-2006. The Petitioners have enjoyed the said status up to date.

In 2014, the Secretary, Ministry of Public Administration and Home Affairs issued the circular No. 22 / 2014, dated 29-08-2014, calling for applications from qualified Sri Lankan citizens for the competitive examination for the recruitment of officers to the Posts of Grade III of Sri Lanka Administrative Service (hereinafter sometimes referred to as SLAS) on the basis of merit.

The Petitioners complain that the Respondents have failed to include in the above circular, the Petitioners, as a category of Public Servants who would be eligible to apply to sit the said examination. The Petitioners have produced the above circular marked **P 6**.

The Petitioners have further stated in their petition that the said ineligibility has caused severe prejudice to them depriving them of the prospects of any such future promotions. The Petitioners have complained that the failure on the part of the 1st to 11th Respondents to include the Planning and Programming Officers as a category of officers eligible to apply to sit the said SLAS merit based competitive examination, to be conducted in December 2014, for recruitment to Grade III of the SLAS as per Public Administration Circular marked **P 6** is illegal, unlawful, ultra vires, arbitrary, unreasonable, unfair, irrational, discriminatory, in breach of the rules of natural justice, without justifiable reasons and has violated the legitimate expectations of the Petitioners. It is the position of the Petitioners that the above failure has amounted to

an infringement of their fundamental rights to equality and/or equal protection of the law as guaranteed by Article 12(1) of the Constitution.

It is in this backdrop that the Petitioners have prayed inter alia for the following relief.

- i. A declaration that their fundamental rights to equality and/or equal protection of law, guaranteed by Article 12(1) of the Constitution, have been infringed by the 1st to 11th and/or 13th to 17th Respondents and/or by any one or more of them;
- ii. A declaration that any decision taken by the 1st to 11th Respondents and/or by any one or more of them to remove and/or exclude the Petitioners and/or Planning and Programming Officers as a category of public officers eligible to apply for and sit the said SLAS merit based competitive written examination, scheduled to be conducted in December 2014, for the recruitment of officers to Grade III of SLAS, from the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) is illegal and null and void;
- iii. A declaration that the non-inclusion/omission of Planning and Programming Officers as a category of public officers, who are eligible to apply for and sit the said SLAS merit based competitive written examination, scheduled to be conducted in December 2014, for the recruitment of officers to Grade III of SLAS, in the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) is illegal and null and void;
- iv. A declaration that the rejection of the 7th Petitioner's application to sit the said SLAS merit based competitive written examination in 2014 for the recruitment of officers to Grade III of SLAS, by the 1st and/or 13th and/or 15th Respondent(s) is illegal and null and void;
- v. A declaration that the said Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**) and/or the examination sought to be held in

terms the said circular, is illegal and null and void in so far as it fails/omits to specifically include, recognize and/or acknowledge Planning and Programming Officers (including the Petitioners) as a category of public officers who are eligible to apply for and face the said SLAS merit based competitive written examination referred to therein;

- vi. A direction on the 1st to 11th and/or 13th to 17th Respondents and/or any one or more of them and their servants and agents to forthwith specifically include and/or recognize and/or acknowledge Planning and Programming Officers as being a category of public officers eligible to apply for and face the said SLAS merit based competitive written examination scheduled to be conducted in December 2014 for the recruitment of officers to Grade III of SLAS in the said Public Administration Circular bearing No. 22/2014, dated 29-08-2014 (marked **P 6**); and/or forthwith amend the said Circular accordingly to reflect the same, call for applications afresh thereafter (as per amended circular) and then conduct the said examination;
- vii. A direction on the 1st to 17th Respondents and/or any one or more of them and their servants and agents to forthwith permit the Petitioners to submit their applications for the said SLAS merit based competitive written examination scheduled to be conducted in December 2014 for the recruitment of officers to Grade III of SLAS, as referred to in the said Public Administration Circular bearing No. 22/2014, dated 29/08/2014 (marked **P 6**); and accept their applications and permit them to sit the said examination.

This Court on 02-12-2014 having heard the submissions of the learned counsel for the Petitioners and the submissions of the learned Deputy Solicitor General for the Respondents, had decided to grant leave to proceed in respect of the alleged violations of Article 12(1) of the Constitution.

It is to be noted at the outset that the Public Administration Circular No. 22 / 2014 (**P 6**) is merely a circular issued for the purpose of inviting applications from the eligible

persons to sit the competitive examination for the recruitment of officers to Grade III of SLAS for the year 2013/2014 through the Merit Stream. The eligibility criteria for the said recruitment stipulated in clause 6 of that circular is nothing more than a mere reproduction of the eligibility criteria for such recruitment under the Merit Stream stipulated in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 produced marked **P 9(a)**. That is the Minute of the Sri Lanka Administrative Service.

Thus, it is clear that the circular **P 6** which is the scheme of recruitment issued by the Secretary, Ministry of Public Administration and Home Affairs is a mere enforcement step taken in accordance with the Minute of the Sri Lanka Administrative Service published in the Government Gazette marked **P 9(a)**.

Moreover, it is important to note that the vacancies of Grade III SLAS posts are to be filled through three streams of recruitment. This is clearly mentioned in the Minute of the Sri Lanka Administrative Service [**P 9(a)**]. The said three streams of recruitment are as follows.

- 1) Recruitment under the Open Stream
- 2) Recruitment under the Limited Stream
- 3) Recruitment under the Merit Stream

It must be further noted that any person who has a degree from a recognized university is eligible to apply to sit the examination under the Open Stream. Admittedly, the Petitioners are graduates.¹ Therefore, it is open for them to sit the examination under the Open Stream.

As per the salary code in which the Petitioners are placed, they also become eligible to sit the examination under the Limited Stream as well.

However, for a person to be eligible to sit the examination under the Merit Stream, such applicant must;

¹ Paragraph 5 of the petition.

- 1) be a supra class officer in a permanent and pensionable post in the Public Management Assistant Service or in a Provincial Public Management Assistant Service ; or
- 2) be an officer with an active and satisfactory period of service not less than 20 years in the Public Management Assistant Service or in a Provincial Public Management Assistant Service with 10 years active and satisfactory service in Class 1 of such service.

Thus, it is clear that the Minute of the Sri Lanka Administrative Service [**P 9(a)**], as a whole, has not sought to exclude the Petitioners as an ineligible category of Public Servants who cannot apply for the recruitment under the Open Stream as well as the Limited Stream.

The above facts show unequivocally that the Petitioners by challenging the eligibility criteria for the recruitment under the Merit Stream set out in clause 6 of the Public Administration Circular bearing No. 22/2014 dated 29/08/2014 (marked **P 6**), is actually challenging, at a belated moment, the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [i.e. the Minute of the Sri Lanka Administrative Service produced marked **P 9(a)**].

It is in that backdrop that the learned Senior State Counsel in addition to his arguments based on the merits of the case, has also raised the issue of the failure of the Petitioners to file this application within the period specified by law.

In contradistinction to the claim of time bar raised by the Respondents, the Petitioners, relying on clause 01 of the Minute of the Sri Lanka Administrative Service [**P 9(a)**], have sought to argue that **P 9(a)** has been made operative without prejudice to the Combined Service circular No. 01 / 2007, dated 05-02-2007 issued by the Secretary, Ministry of Public Administration and Home Affairs (produced marked **P 3**). The Petitioners contended that the said circular (**P 3**) is one of the steps taken or purported to have been taken to amend the provisions of the Minute of the Sri Lanka Administrative Service at one point of time.

Making further submissions on this point, the learned counsel for the Petitioners stated that even if the Petitioners ought to have been aware in view of **P 9(a)** that they would not be qualified to sit the examination under the Merit Stream under clause (10.2.3)(c) of the said Gazette, they still had a legitimate expectation of being allowed to sit the said competitive examination as **P 9(a)** has come into operation without prejudice to the circular **P 3**.

In order to consider this argument it would be prudent to reproduce below, clause 01 of **P 9(a)**, relied upon by the Petitioners. It is as follows.

*"01. **Effective date:** This Minute shall come into operation with effect from 01st July 2012 without prejudice to any step taken or purported to have been taken in terms of provisions as per the amendments made from time to time to the said Minute of the Sri Lanka Administrative Service dated 28th October, 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November, 2005."*

The plain reading of the above clause clearly shows that the purpose of the said clause was to preserve the steps taken in terms of the provisions of the Minute of the Sri Lanka Administrative Service dated 28th October 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 as amended from time to time. This is because it was that Minute which was in force before **P 9(a)**.

This is also evident from the first paragraph of **P 9(a)** which states thus *"The following Minute of the Sri Lanka Administrative Service shall come into operation with effect from 01st July 2012 substituting the Minute of the Sri Lanka Administrative Service dated 28th October, 2005 published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 of the Democratic Socialist Republic of Sri Lanka and the amendments thereto from time to time."*

According to the Public Administration circular No. 16 / 2006, dated 17-08-2006 issued by the Secretary, Ministry of Public Administration and Home Affairs (produced marked **P 4**), the new Minute of the Sri Lanka Administrative Service published in the Gazette Extraordinary No. 1419/3 of 14th November 2005 in substitution to the Minute of the Sri

Lanka Administrative Service dated 28th October 2005, published in the Gazette Extraordinary No. 1419/3 of 27th May 1988 published in the Gazette Extraordinary No. 509/7 dated 07th June 1998 has come in to force with effect from 01-01-2005.²

Closer look at the Combined Service circular No. 01 / 2007, dated 05-02-2007 (**P 3**) clearly shows that the application of the said circular **P 3** has been clearly restricted to the year 2004 only. This is clearly mentioned in the heading of **P 3** as follows.

“කුසලතා උසස් කිරීම මගින් ශ්‍රී ලංකා පරිපාලන සේවයේ (ii) පන්තියේ (ii) ශ්‍රේණියට පත් කිරීම - 2004”

Moreover, when one considers the qualifications specified in **P 3**, it is clear that the main qualification for one to be eligible for appointment to class II grade II of SLAS as per **P 3**, had been the completion of 15 years of service as at 31-12-2004. This clearly indicates that the said qualification was meant to apply only for the said recruitment in that year (2004).

Further, the fact that there is no such date specified in clause 10.2.3 (c) in **P 9(a)** is another factor, which establishes that **P 3** was only meant for such appointments to be made in the year 2004.

For the above reasons, it is clear that the application of the circular **P 3** had ended with the completion of the said recruitment process for the year 2004. Therefore, it is not open for the Petitioners to argue that the Public Service Commission is obliged to stick to circular **P 3** (instead of **P 6** which was issued in 2014) on the basis that clause 1 of **P 9(a)** has exempted the circular **P 3** from the application of **P 9(a)**.

The above positions have clearly established that it is the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [the Minute of the Sri Lanka Administrative Service marked **P 9(a)**] which the Petitioners in the instant case in fact attempt to challenge, in a circuitous way, at this belated moment.

² Vide first paragraph of **P 4**.

This Court has been consistent in holding that the applications of this nature must be filed within the period specified in Article 126 (2) of the Constitution. Although one can lay hands on many such judgments, I would in the circumstances of this case, refer only to Dayaratne and others Vs National Savings Bank and others³.

The ten petitioners who filed the fundamental rights application in that case, were supervisory grade employees of National Savings Bank. They complained against the failure of the respondent bank (National Savings Bank) to promote them to the Executive Grade. It was the scheme of promotion published on 12-02-2001, which directly applied to the said petitioners. The applications were called for by the notice dated 15-02-2001 in which the closing date was set as 08-03-2001. Interview procedures ended on 28-06-2001. It was on 07-08-2001 that the Respondents announced the list of the officers selected for promotions. The fundamental rights application was filed in the Supreme Court on 30-08-2001, which was within one month from 07-08-2001.

The 1st limb of the preliminary objection raised by the Respondents is that the Petitioners were barred from challenging the scheme of promotion in view of the time bar specified in Article 126 (2) of the Constitution. His Lordship Justice Mark Fernando in his judgment upholding the said preliminary objection stated as follows.

" ... 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. They failed to do so. Instead, they acquiesced in those terms and conditions by applying for promotion without any protest. I therefore uphold the objection. ... "

³ 2002 (3) Sri L. R. 116.

In the instant case, the Petitioners were clearly aware of the eligibility criteria for recruitment under the Merit Stream set out in clause 10.2.3 (c) of the Gazette Extraordinary No. 1842/2 dated 23-12-2013 [the Minute of the Sri Lanka Administrative Service marked **P 9(a)**] and the fact that it came in to force with effect from 01-01-2005.⁴

Therefore, the Petitioners have clearly failed to file the instant application within one-month period specified in Article 126 (2) of the Constitution. I therefore dismiss this application with costs.

JUDGE OF THE SUPREME COURT

L. T. B. Dehideniya J

I agree,

JUDGE OF THE SUPREME COURT

S. Thurai Raja PC J

I agree,

JUDGE OF THE SUPREME COURT

⁴ Vide first paragraph of **P 4**.