

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

***In the matter of an Application  
under and in terms of Article 17  
and 126 of the Constitution of the  
Democratic Socialist Republic of  
Sri Lanka.***

***SC (F/R) Application No. 276/2016.***

- 1.** Palipana Walawwe Udaya  
Bandara,  
Palipana, 37/34, Eragoda,  
Gampola.
- 2.** Kuruppu Arachchilage Champa  
Nalinie Senevirathne.  
22, Vijirarama Mawatha, Primrose  
Garden, Kandy.
- 3.** Nadeeka Prashanthi Thenna  
Gunawardena,  
348/1, Kumbure Gedara Road,  
Haloluwa.
- 4.** Ahangama Gamage Sunil,  
082 B1,  
Sirimavo Bandaranayake  
Mawatha,  
Peradeniya.
- 5.** Merangnage Gayani Fonseka,  
126B, Yapa Mawatha,  
Gannoruwa,  
Peradeniya.

6. Herath Mudiyanseelage Indrani  
Herath,  
237, Meddegoda,  
Yatiwawala,  
Katugastota.
7. Marappulige Uthpalawanna  
Ranasinghe,  
Ihalagama,  
Tholangamuwa.
8. Anusha Nishanthi Nanayakkara,  
214/8, Colombo Road,  
Gampaha.
9. Rajamuni Devage Donil  
Kularathne,  
Dikwatte Gedara,  
Sevanagama,  
Mahaulpotha,  
Bandarawela.
10. Ekanayake Mudiyanseelage Sumith  
Ekanayake,  
5/12, Gamunu Mawatha,  
Hanthana Pedesa,  
Kandy.
11. Halpawaththage Madhuri  
Padmakumari Pieris.  
"Iresha", Rohal Patumaga,  
Tangalle Road,  
Weeraketiya.
12. Rankette Gedara Sagara Priyantha  
Piyasena.  
108, Doolwala,  
Halloluwa, Kandy.

**Petitioners.**

**Vs.**

1. K.N. Yapa.  
Director General, Department of  
National Botanic Gardens,  
P.O. Box 14,  
Peradeniya.
  
2. R.M.D.B. Meegasmulla,  
Secretary,  
Ministry of Sustainable  
Development and Wildlife,  
9<sup>th</sup> Floor,  
"Sethsiripaya", Stage 1,  
Battaramulla.
  
3. Gamini Jayawickrema Perera,  
Minister,  
Ministry of Sustainable  
Development and Wildlife,  
9<sup>th</sup> Floor,  
"Sethsiripaya", Stage 1,  
Battaramulla.
  
4. R.M.N.E.K. Ranasinghe,  
Director,  
Sri Lanka Scientific Service Board,  
C/O, Ministry of Public  
Administration and Management,  
Independence Square,  
Colombo 07.
  
5. Ms. M.F.R. Safra,  
Assistant Director,  
Sri Lanka Scientific Service Board,  
C/O, Ministry of Public  
Administration and Management,  
Independence Square,  
Colombo 07.

6. Mr. Dharmasena Dissanayake,  
Chairman
7. Justice A. Salam Abdul Waid,  
Member
8. Mr. D.S. Wijayatilaka, Member
9. Dr. Prathap Ramanujan, Member
10. Mrs. V. Jegarasasingam, Member
11. Mr. S.N. Seneviratne, Member
12. Mr. S. Ranugge, Member
13. Mr. D.L. Mendis, Member
14. Mr. Sarath Jayathilaka, Member

The 6<sup>th</sup> to 14<sup>th</sup> Respondents all of,  
Public Service Commission,  
No. 177, Nawala Road,  
Narahenpita,  
Colombo 05.

15. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.
16. E.J.S. De Soysa,  
No. 105/A, Mariyawatta, Gampola.
17. J.K.P.T.P. Jayaweera,  
Anoma, Diviyagahawela,  
Karadeniya.
18. H.K.K.D. Pathirana,  
Weragama,  
Ude Niriella,

Ratnapura.

19. H.S. Wijethunge,  
No.69/C, Giridara,  
Kapugoda.
20. B.H.D.S. Sampath, Sri  
Bodhiramaya, Samanalagama,  
Pathakada,  
Pelmadulla.
21. P.A.A.P.K. Senanayake,  
No. 1/21, Kehelgolla,  
Uduwa,  
Kandy.
22. M.C.L. Aththanayake,  
'Sandun Sewana',  
Ambalakanda Road,  
Pondape,  
Aranayake.
23. H.S. Punchihewa,  
No.144, Stage IV,  
Tissa Mawatha,  
Uyandana,  
Kurunegala.
24. M.M.L.I.W. Bandara,  
Indipitiya Wattha,  
Sumangala Mawatha,  
Wariyapola.
25. K.M.S. Deshaprema,  
No.17, Circular Road,  
Makuluwala,  
Galle.
26. H.M.I.N.K. Haluwana,

No. 15/A/A, Kulugammana,  
Kandy.

**Respondents**

**BEFORE** : **SISIRA J. DE ABREW, J.**  
**VIJITH K. MALALGODA, PC, J.**  
**S. THURAIRAJA, PC, J.**

**COUNSEL** : J.C. Weliamuna, PC with Pulasthi Hewamanna for the Petitioners.  
Yuresha de Silva, SSC for the 1<sup>st</sup>-15<sup>th</sup> Respondents.  
Rajeev Amarasuriya with Chanaka Weerasekera and Anne  
Devananda for the 16<sup>th</sup>- 26<sup>th</sup> Respondents.

**ARGUED ON** : 07<sup>th</sup> February 2019.

**WRITTEN SUBMISSIONS** : Petitioners on 22<sup>nd</sup> February 2019.  
1<sup>st</sup> – 15<sup>th</sup> Respondents on 20<sup>th</sup> February 2019.  
16<sup>th</sup>-26<sup>th</sup> Respondents on 26<sup>th</sup> February 2019.

**DECIDED ON** : 05<sup>th</sup> April 2019.

**S. THURAIRAJA, PC, J.**

The petitioners above named filed a Fundamental Rights Application and leave was granted under Article 12(1) of the Constitution. Thereafter 16<sup>th</sup> to 26<sup>th</sup> Respondents intervened with the permission of the Court, those who are qualified to apply for the post of 'Assistant Director' in the Scientific Service in respect of the Department of National Botanical Gardens in terms of the Scheme of Recruitment (SOR). All parties filed written submissions and made their respective oral submissions.

Petitioners were originally joined as Graduate Development Programme and absorbed into the Department of Agriculture as Agricultural Programme Officers.

Subsequently, they were assigned to Department of National Botanical Gardens. The complaint of the petitioners is that, they were not absorbed in to Grade III-in the Sri Lanka Scientific Service, as per the Scheme of Recruitment marked as P4 dated 11<sup>th</sup> June 2015 by the petitioners.

Senior State Counsel had submitted all relevant documents regarding these positions. She submits that, the government had taken a policy decision in consultation with necessary State agencies to make the Department of National Botanical Gardens efficient, and several positions were categorized under Sri Lanka Scientific Services. Service Minutes of the Sri Lanka Scientific Services was approved and gazetted by the Secretary to the Public Service Commission on 28<sup>th</sup> August 2014 under Reference No.1877/27 (which is marked as 1R4). Accordingly, an internal circular- 1R5 (Scheme of Recruitment- SOR) was issued by the Director General of Department of National Botanical Gardens dated 11<sup>th</sup> June 2015 marked as 1R5.

According to the internal circular marked as 1R5, it clearly described the mode of recruitment. As far as the Department of National Botanical Gardens is concerned, 70% of candidates will be selected under the open category and 30% of the vacancies to be filled from the officers serving in the Department under the closed category. It is observed that, if the officers serving in the Government Department of National Botanical Gardens, possess relevant qualifications, they can compete either under the open category or closed category. However other candidates who are not currently serving in the government departments comes under the Scientific Service, can contest under the closed category.

As was evidenced by the communication between the petitioners and other relevant authorities, it clearly reveals that, they were aware of 1R4 (Service Minute) and 1R5 (SOR) at least by May 2016 (as per the amended petition). As per the letter dated 9<sup>th</sup> of June 2016, sent by the Secretary to Agriculture and Science Graduates Association

of Department of National Botanical Gardens addressed to the Director General of Department of National Botanical Gardens marked as P5 (b), they had made representation to the Director General and complained of the allocation of 30% and they wanted the limit to be increased from 30% to 90% for the closed category.

The complaint before this Court is regarding the Service of Recruitment (SOR). Therefore, it can be comfortably presumed that the Petitioners were well aware of the said SOR at least by May 2016, i.e. well before the Gazette (P6) calling for applications for the Sri Lanka Scientific Service.

The first approval for the said SOR has been received in 2011, and followed by consecutive approval process for the same in 2012, 2013 and 2014. All this time, the Petitioners were employed at the Department of National Botanical Gardens.

In **K.H.G. Kithsiri vs. Hon. Faizer Musthapha and Five Others (SC/FR Application No.362/2017)**, it was held 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 the date on which he should have become aware of the alleged infringement.."*

*"This Court, however in exceptional circumstances 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 if there had been no lapse on the part of the Petitioner, has exercised its discretion in entertaining fundamental rights applications and had not hesitated to apply the maxim *lex non cogit ad impossibilia*."*



The Senior State Counsel who appeared for 1<sup>st</sup>-15<sup>th</sup> Respondents and the Counsel for the 16<sup>th</sup>- 26<sup>th</sup> Respondents takes up a preliminary objection that, the fundamental rights application of the Petitioners is time barred. Hence, the Respondents moved this Court not to entertain this Fundamental Rights Application.

With respect to this, under Article 126 (2) of the Constitution requires any person alleging the violation of any Fundamental Right or Language Right or of the imminent violation of such rights by executive or administrative action, to prefer an application to the Supreme Court within a period of one month thereof.

In **Illangaratne vs. Kandy Municipal Council [1995 BALJ Vol. VI Part1page10]**, Hon. Kulatunge J. explained that,

*“the result of the express stipulation of 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.”*

In this connection, Fernando J. commented in **Gamaethige vs. Siriwardena [1988 1 SLR 384 at page 401]** stated that, *“... there is a heavy burden on a petitioner who seeks that indulgence..”*

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Petitioners filed their respective complaints before the Human Rights Commission on 7<sup>th</sup> July 2016. The petitioners relying on the Section 13 of the Human Rights Commission Act No.31 of 1996 to overcome the time bar of one month.

As per paragraph 13 of the Amended Petition of the Petitioners, they became aware of the SOR in or about May 2016. As per the paragraph 14 of the Amended Petition, Petitioners further contended that immediately thereafter, they had obtained a copy

of the said SOR. Petitioners relied upon to bridge further time gap between their contentions of the knowledge of SOR in May 2016 and Petitioners filed their original Petition on 16<sup>th</sup> August 2016, which is more than one month after by May 2016.

In **Alagaratnam Manorajan vs. Hon. G.A. Chandrasiri, Governer, Northern Provoince [SC Application No. 261/2013 (F/R)]** decided on 11<sup>th</sup> September 2014, Wanasundera J. held as follows,

*"I am of the opinion that, Section 13 of the Human Rights Commission Act No.31 of 1996 should not be interpreted and/or used as a rule to suspend the one month's time limit contemplated by Article 126(2) of the Constitution... The provisions of an ordinary Act of Parliament should not be allowed to be used to circumvent the provisions in the Constitution..."*

Petitioners have not filed any further documents with regard to the applications to Human Rights Commission other than the documents marked as P-7(a) to P-7(m), to establish that the Human Rights Commission were inquired into and/or the inquiry is pending before the Human Rights Commission to overcome the time bar of one month.

As held by this Court, both in the Case of **Subasinghe vs. The Inspector General of Police** [ SC Special 16/99 SC Minutes of 11.09.2000] and the case of **Divalage Upalika Ranaweera and others vs. Sub Inspector Vinisias and others** [SC Application 654/2003 SC Minutes 13.05.2008],

*"A party seeking to utilize Section 13(1) of the Human Rights Commission Act to contend that, 'the period within which the inquiry into such complaint is pending before the Commission shall not be taken into account in computing the period of one month within which an application may be made to the*

*Supreme Court' is obliged to place material before this Court to show that an inquiry into his complaint is pending before the Human Rights Commission."*

This application being a Fundamental Right Application, prior to considering the objections taken by the Counsels for the Respondents, it is appropriate to consider the merits of this application. In the present circumstances, Petitioners were recruited under the Graduate Development Programmes and placed at the Agricultural Department. When, the National Botanical Garden Department was created and these Petitioners were absorbed in to the said Department with additional perks and privileges. Subsequent to consultation with all necessary parties, the government had decided to convert certain positions as scientific services and to attach them to Sri Lanka Scientific Service.

We perused the available documents and find various departments were considered for this conversion and the recruitment ratio was decided after the due process. Under this recruitment to Scientific Services, some departments recruited 100% of their officers from the open category and very few departments called for applications for the recruitment of their officers from closed category. In this respect, following examples of Departments can identified falling within the Sri Lanka Scientific Service, offered lesser percentages for Limited Category.

As per 16R-14(a)- Export Agriculture SOR- Open 75: Limited 25.

As per 16R-14(b)- Metereology SOR- Open 75: Limited 25.

As per 16R- 14(c)- Zoological Gardens SOR- Open 75: Limited 25.

As per 16R-14 (d)- Government Analyst SOR- Open 100%.

As per 16R-14 (e)- Museums SOR- Open 100%.

In the Petitioners' Department, 30% of officers were allocated under the closed category, which is higher than the allocation given to other Departments to recruit to their department from the closed category. Clearly, therefore the Petitioners have been provided with an allocation of 30%, is higher than all of the above.

The Petitioners emphasized the fact that, the open category has a higher requirement and age limit for the selection processes; thereby the Petitioners' complaint is that the Petitioners wanted to be increased to 90% from 30% of their allocation.

Considering the required qualifications for the post advertised and the qualifications of the candidates from open and closed category reveals that, this process bring betterment to the public at large.

However, since this matter is dealing with a government Policy of the State, Courts are reluctant to intervene with the said policy, unless it is seriously warranted.

In **Wasantha Disanayake and others vs. Secretary, Ministry of Public Administration (SC/FR/ 611/2012)** decided on 10<sup>th</sup> September 2015, it was observed that,

*"What is meant here is that equals should be treated equally and similar laws and regulations should be applicable to persons who are similarly circumstanced. In reference to Article 12(1) of the Constitution, it would be necessary to show that there had been unequal treatment and therefore there exist discriminatory action against the Petitioners."*

The other institutions which were considered under this scheme have concluded their recruitment well ahead and those departments are up and running in their work.

Unfortunately, due to the undertaking obtained by the Respondents, recruitment for the positions in their Department is still pending which adversely affects the day-to-day running of the said Department.

Considering the preliminary objections taken by the Respondents, we find that the Petitioners failed to file their petition within the stipulated time period. Hence, we hold with the Respondents and accept the preliminary objections. Accordingly, we find that, the Petitioners are not entitled to maintain this application.

Application Dismissed with cost.

***Application dismissed.***

**JUDGE OF THE SUPREME COURT**

**SISIRA J. DE ABREW, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**VIJITH K. MALALGODA, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**