

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

In the matter of an application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 55/2017

K. M. R. Perera,
51/1, Northpole Residencies,
Apartment 5/1, Peter's Lane,
Dehiwala.

PETITIONER

vs.

- 1) Dharmadasa Dissanayake,
Chairman.
- 1A) Justice Jagath Balapatabendi,
Chairman.
- 2) A.W.A. Salam.
- 2A) Hussain Ismail.
- 2B) Indrani Sugathadasa.
- 3) D. Shirantha Wijayatilake.
- 3A) Prathap Ramanujam.
- 3B) Dr. T.R.C. Ruberu.
- 4) V. Jegarajasingam.
- 4A) Ahamed Mohammed Saleem.
- 5) Santi Nihal Seneviratne.

5A) Sudarma Karunaratne.

5B) Leelasena Liyanagama.

6) S. Rannuge.

6A) Dian Gomes.

7) D.L. Mendis.

7A) Dilith Jayaweera.

8) Sarath Jayatilake.

8A) G.S.A. De Silva.

2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th & 8A Respondents are members of the Public Service Commission.

9) H.M.G. Seneviratne.

9A) M.A.B. Senaratne.

9B) Daya Senarath,
Secretary.

1st, 1A, 2nd, 2A, 2B, 3rd, 3A, 3B, 4th, 4A, 5th, 5A, 5B, 6th, 6A, 7th, 7A, 8th, 8A, 9th, 9A & 9B Respondents are at Public Service Commission, No. 1200/9, Rajamalwatte Road, Battaramulla.

10) K.S.C. Dissanayake,
Director General,
Overseas Administration Division.

10A) M.K. Pathmanathan,
Additional Director General.

10B) Sumith Dissanayake,
Director General,
Human Resources and Mission Management,
Ministry of Foreign Affairs.

11) Esala Weerakoon.

11A) Ravinatha Ariyasinghe.

11B) Admiral Jayanath Colombage,
Secretary.

10th, 10A, 10B, 11th, 11A & 11B Respondents
are at Ministry of Foreign Affairs,
The Republic Building, Colombo 1.

12) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: E.A.G.R. Amarasekara, J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Uditha Egalahewa, P.C., with Ranga Dayananda for the Petitioner
Nirmalan Wigneswaran, Deputy Solicitor General for the Respondents

Argued on: 26th July 2021

Written Submissions: Tendered on behalf of the Petitioner on 16th August 2021

Tendered on behalf of the Respondents on 19th August 2021

Decided on: 21st January 2022

Arjuna Obeyesekere, J

The Petitioner, who is an Officer of the Sri Lanka Foreign Service [the Foreign Service], filed Fundamental Rights Application No. 4/2017 in January 2017 alleging *inter alia* that the Respondents have violated the Petitioner's fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution and the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g) of the Constitution.

Soon after the said application was filed, but prior to the said application being supported, the Public Service Commission had taken a further decision with regard to the Petitioner which prompted the Petitioner to file this application in February 2017, complaining of the said decision as well, and alleging *inter alia* that the Respondents have violated the Petitioner's fundamental rights enshrined in Articles 12(1) and Article 14(1)(g) of the Constitution.

On 6th November 2019, this Court granted the Petitioner leave to proceed in both applications in relation to the infringement of the aforementioned Articles of the Constitution. However, as the complaint of the Petitioner set out in SC (FR) Application No. 4/2017 is subsumed in this application, the Petitioner pursued this application, while the first application was mentioned together with this application. When this matter was taken up for argument on 26th July 2021, the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General for the Respondents informed this Court that the parties in SC (FR) Application No. 4/2017 would abide by this judgment.

The facts of this application very briefly are as follows.

Having successfully completed the Open Competitive Examination held to recruit persons to the Foreign Service, the Petitioner was appointed to Grade III of the Foreign Service on 10th July 1998 by letter dated 30th June 1998 marked '**P5**'. The said appointment was permanent and the Petitioner was required to undergo a probationary period of three years.

The Service Minute that was applicable to the Petitioner at the time he joined the Foreign Service was the '*Sri Lanka Foreign Service Minute of 1994*', marked '**P3**'. This Service Minute was replaced by the '*Sri Lanka Foreign Service Minute of 2001*' marked '**P4**'. It is admitted by the Petitioner that in terms of Paragraph 4 of Section 3 of '**P3**', the Petitioner was required to undergo a probationary period of three years, which requirement had been reiterated in his letter of appointment '**P5**'. It is also admitted that in terms of '**P3**', the Petitioner's confirmation in service at the end of the probationary period was subject to the Petitioner achieving the following:

- a) Successfully completing the First Efficiency Bar Examination;
- b) Obtaining the required level of proficiency in a foreign language assigned to the Petitioner by the Secretary, Ministry of Foreign Affairs;
- c) Obtaining the required level of proficiency in the Tamil language.

The issues that arise for the determination of this Court relate to the First Efficiency Bar Examination. While it is common ground that the Petitioner successfully completed the First Efficiency Bar Examination and that the Petitioner has been confirmed in service, the parties are at variance with regard to the following matters:

- a) The number of opportunities (attempts) that are available to the Petitioner to complete the First Efficiency Bar Examination;
- b) Whether the Petitioner completed the First Efficiency Bar Examination within the time period specified in the Service Minutes '**P3**' and/or '**P4**'.

As noted earlier, the Petitioner had joined the Foreign Service on 10th July 1998. In terms of '**P3**', the Petitioner was required to successfully complete the First Efficiency Bar Examination during his three-year period of probation, which is by 10th July 2001. Although '**P3**' does not specify the frequency with which the said examination must be conducted – i.e., annually, bi-annually etc. – it is the position of the Respondents that the

said examination was held once a year, thus affording an Officer in the Foreign Service three opportunities during his/her probationary period to complete the said examination.

The Petitioner states that even though the first examination that was held after he joined the Foreign Service was in October 1998, the closing date for the submission of applications to sit for the said examination had lapsed by the time the Petitioner joined the Foreign Service, and hence, the said examination cannot be considered as an opportunity that was available to the Petitioner. This position has been accepted by the Respondents.

The Petitioner states that he applied and sat for the examination held in July 1999, where he passed five of the six subjects. It is common ground that this was the first attempt of the Petitioner at the First Efficiency Bar Examination.

Even though the next examination was held in July – August 2000, the Petitioner states that he did not apply for the said examination due to pressure of work. The learned President's Counsel for the Petitioner submitted that as the Petitioner did not even apply to sit for the said examination, the examination held in 2000 cannot be counted as his second opportunity. This position, which I will advert to later in this judgment, has been challenged by the learned Deputy Solicitor General for the Respondents on the basis that even though the Petitioner may not have applied for the examination, that should still be counted as his second opportunity to sit for the First Efficiency Bar Examination.

As already noted, 'P3' was replaced by 'P4' and was effective from 1st January 2001. Paragraph 2.1 of Part I of 'P4' specified that 'P4' shall apply to all members of the Foreign Service. Paragraph 3.6 of Part II of 'P4' specifically provided that the First Efficiency Bar Examination shall be held twice in each calendar year, as opposed to once each year, as submitted by the Respondents, when the previous Service Minute 'P3' was in operation. Although in terms of 'P4' the period of probation continued to be three years, the First Efficiency Bar Examination was to be completed in two years. Accordingly, an Officer who had joined the Foreign Service after 1st January 2001 had four examination opportunities

to complete the First Efficiency Bar, but was required to do so within two years of joining the Foreign Service.

The Petitioner admits that he sat for the First Efficiency Bar Examinations that were held in August 2001 as well as in July 2002, but that he was unsuccessful on both occasions. It is the position of the Respondents that, for reasons that I shall advert to later, the Petitioner had time until July 2002, which translates into four examination opportunities, to complete the said Examination. The Petitioner had successfully completed the First Efficiency Bar Examination at his next sitting of the examination held in December 2003, which, according to the Respondents, was the fifth opportunity that was available to the Petitioner to complete the said Examination. Thus, it was the position of the Respondents that the Petitioner did not complete the First Efficiency Bar Examination, either (a) within the period of probation of three years, as extended, or (b) within the four opportunities that the Respondents claim were available to the Petitioner, with the introduction of 'P4'.

It would perhaps be pertinent to address at this stage the consequences that flow from the failure by a Public Officer to complete an Efficiency Bar Examination within the time period stipulated in the relevant service minute.

Section 11:9 of Chapter II of the Establishments Code reads as follows:

*“When an Officer fails to qualify for confirmation at the proper time, that is, within the initial period of probation, **for reasons beyond his control**, his period of probation may be extended by a reasonable period to enable him to qualify. If the officer qualifies within that extended period, he will be confirmed as from that the date of his appointment on probation. **He will not lose in salary or seniority.**”*

Section 11:10:1 of Chapter II of the Establishments Code, however, provides as follows:

*“If an Officer fails to qualify for confirmation at the proper time, that is within the initial period of probation, **for reasons within his control**, but qualifies for confirmation during an extension of the period of probation granted to him in terms of sub-section 11:7 then –*

the increment falling due after the expiry of the initial period of probation will be deferred by the length of time taken in excess of the initial period allowed to him to qualify.”

Thus, a distinction has been drawn between the failure to qualify for confirmation for reasons beyond the control of an officer, and reasons within the control of an officer.

Section 15:4:1 of Chapter II provides further as follows:

“If for any special reason an officer is granted, with the approval of the Director of Establishments, an extension of time in which to pass an Efficiency Bar examination, he may be allowed to draw increments (above the Efficiency Bar) during such extension of time allowed. If he does not pass the Efficiency Bar examination during the extension allowed, the increment that falls due after the expiry of that extension will be deferred by a period of time equal to the time in excess of the extension allowed to pass the Efficiency Bar Examination.”

Upon the Petitioner successfully completing the First Efficiency Bar Examination in December 2003, the Secretary, Ministry of Foreign Affairs, by a letter dated 2nd November 2004 marked '**P7b**', had informed the Public Service Commission that the Petitioner had completed the First Efficiency Bar Examination on 12th December 2003, and taking into consideration the fact that the time period to complete the said examination lapsed on 10th July 2002, had sought the approval of the Public Service Commission to extend the probationary period of the Petitioner from 10th July 2002 to 12th December 2003 under **Section 11:10** of Chapter II of the Establishments Code and to confirm the Petitioner in service with effect from 10th July 1998.

By its reply dated 30th November 2004, the Public Service Commission, while drawing attention to its previous letter dated 16th June 2004, had stated as follows:

“නිලධාරීන්ට පත්වීම් දින සිට පවත්වන අනුගාමී විභාග හතරක් මගින් කාර්යක්ෂමතා කඩඉම සමත්වීමට අවසර ලබා දීමට හා එම කාලය තුළදී පරිවාස කාලය ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේ දීර්ග කිරීමටත් අනුගාමී විභාග හතරෙන් එක 11:10 වගන්තිය යටතේ දීර්ග කිරීමටත්ය. ඉන් අදහස් කරන්නේ පත්වීම් දින සිට අනුගාමී වසර හතරක් තුළ කාර්යක්ෂමතා කඩඉම සමත්වීම නොවෙන බව අවධාරනය කරමි.”

Thus, the Public Service Commission made its position clear that the Petitioner had four consecutive examination opportunities to complete the First Efficiency Bar Examination but that it does not mean the Petitioner had a period of four years to complete the said examination. The Public Service Commission specified further that the completion of the First Efficiency Bar Examination within four consecutive opportunities was within Section 11:9 and that any further attempts at the examination would attract the provisions of Section 11:10.

By letter dated 6th December 2004, the Secretary, Ministry of Foreign Affairs had informed the Public Service Commission as follows:

“1998 වර්ෂයේ පැවැත්වූ විභාගය සඳහා අයදුම් පත් කැඳවීමේ අවසාන දිනය 1998 මැයි මාසයේ වූ බැවින් ඒ වනවිට සේවයට බැඳී නොසිටි පෙරේරා මහතාට එම විභාගයට ඉල්ලුම් කිරීමට නොහැකි විය. එහිසා ඔහුගේ පත්වීම් දිනයට පසු පැවති අනුගාමී විභාග හතර ලෙස සැලකිය හැක්කේ 1999, 2000, 2001 හා 2002 යන වර්ෂයන්හි පැවැත්වූ විභාග වේ. පෙරේරා මහතා 2002 වර්ෂයේ ජූලි මස පැවැත්වූ විභාගයෙන්ද සමත් නොවූ බැවින් ඔහුගේ පරිවාස කාලය 2001.07.10 දින සිට 2002.07.28 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේද 2002.07.29 දින සිට 2003.12.12 දින දක්වා 11:10 වගන්තිය යටතේද දීර්ග කොට ඔහු 1998.07.10 දින සිට තනතුරේ ස්ථිර කිරීම මින් නිර්දේශ කරමි.”

Thus, the recommendation of the Ministry of Foreign Affairs was as follows:

- (a) The period until July 2002 be treated under Section 11:9 as the Petitioner’s fourth attempt at the examination was in July 2002;
- (b) The period from July 2002 to December 2003 be treated under Section 11:10.

The consequence of the above recommendation, as provided by Section 11:10, was that the increment falling due after July 2002 was deferred until December 2003, or in other words, the Petitioner would not be entitled to any salary increments for the period of July 2002 – December 2003.

Accordingly, the Public Service Commission, by letter dated 7th April 2005, had informed the Secretary, Ministry of Foreign Affairs that the probationary period of the Petitioner has been extended as follows:

- (a) Period between 10th July 2001 and 7th June 2002 – under Section 11:9;
- (b) Period between 8th June 2002 and 12th December 2003 – under Section 11:10.

By letter dated 15th April 2005 marked 'P7c', the Secretary, Ministry of Foreign Affairs has informed the Petitioner of the above position. 'P7c' reads as follows:

“රාජ්‍ය සේවා කොමිෂන් සභාවේ ලේකම්ගේ අංක ඒ/6/14/93(1) – 2004 හා 2005 අපේල් 07 දිනැති ලිපිය අනුව ඔබගේ පරිවාස කාලය 2001.07.10 දින සිට 2002.06.07 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:9 වගන්තිය යටතේද 2002.06.08 දින සිට 2003.12.12 දින දක්වා ආයතන සංග්‍රහයේ II පරිච්ඡේදයේ 11:10 වගන්තිය යටතේද දීර්ඝ කර ඔබ 1998.07.10 දින සිට ශ්‍රී ලංකා විදේශ සේවයේ III ශ්‍රේණියේ තනතුරෙහි ස්ථිර කර ඇති බව දන්වනු කැමැත්තෙමි.

ඒ අනුව 2002.07.10 දිනට නියමිත ඔබගේ වැටුප් වර්ධකය 2003.12.12 දින දක්වා විලම්බනය වන බවද ඔබගේ අනාගත වැටුප් වැඩිවීමේ දිනය දෙසැම්බර 12 දින වන බවද වැඩිදුරටත් දන්වමි.”

In their Statement of Objections, the Respondents have stated to this Court that the reference to 7th June 2002 (07.06.2002) should be amended to read as 6th July 2002 (06.07.2002), with the latter date being the commencement date of the examination held in July 2002. Similarly, it has been pointed out that the examination held in December 2003 had commenced on 2nd December 2003 and hence, the relevant date should be 2nd December and not 12th December 2003. I must observe that the above change in the dates reflects the provisions of Section 1:14 of Chapter II of the Establishments Code, in terms of which, *“the effective date of passing an examination for purposes of confirmation, promotion and/or on an Efficiency Bar will be the commencing date of that*

examination at which the officer completes the examination.” The above amendments to the letter dated 7th April 2005 have been conveyed by the Public Service Commission to the Secretary, Ministry of Foreign Affairs by its letter dated 22nd May 2020 marked ‘**R4**’.

The Petitioner was therefore aware as far back as April 2005, that the Public Service Commission had decided to treat the period between 8th June 2002 and 12th December 2003 as a period for which the Petitioner would not be entitled to any salary increments and the reasons for such decision. The Petitioner does not appear to have had any issue with the reasons adduced in ‘**P7c**’ or the previous correspondence that I have referred to, and had not challenged the aforementioned decision of the Public Service Commission, thereby bringing the issue to a closure.

The process that culminated with ‘**P21**’ which contains the decision that has given rise to this application, commenced with the following letter dated 4th May 2016 marked ‘**P12**’ sent by the Public Service Commission to the Ministry of Foreign Affairs:

“කාර්යක්ෂමතා කඩඉම් සහන ලබා දීම - ධම්මිකා සේමසංභ මෙනවිය

02. කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය නියමිත පරිදි නොපැවැත්වීම නිසා ඇතිවන පරිපාලනමය ගැටලු සම්බන්ධයෙන් පහත සඳහන් සහන ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණ ගෙන ඇති බව එහි නියමය පරිදි කාරුණිකව දැන්වා සිටීම:

- (I) අංක 1168/17 හා 2001.01.24 දිනැතිව ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රවාදී ජනරජයේ අතිවිශේෂ ගැසට් පත්‍රයේ පළ කරන ලද ශ්‍රී ලංකා විදේශ සේවා ව්‍යවස්ථාව යටතේ ශ්‍රී ලංකා විදේශ සේවයේ III ශ්‍රේණියට බඳවා ගන්නා ලද නිලධාරීන් සඳහා පළමු කාර්යක්ෂමතා කඩඉම සම්පූර්ණ කිරීම සඳහා අනුයාත විභාග අවස්ථා හයක් ලබා දීමටත්
- (II) අංක 1168/17 හා 2001.01.24 දිනැතිව ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රවාදී ජනරජයේ අතිවිශේෂ ගැසට් පත්‍රයේ පළ කරන ලද ශ්‍රී ලංකා විදේශ සේවා ව්‍යවස්ථාව යටතේ ශ්‍රී ලංකා විදේශ සේවයට බඳවා ගන්නා ලද නිලධාරීන් සඳහා දෙවන කාර්යක්ෂමතා කඩඉම සම්පූර්ණ කිරීමට අනුයාත විභාග අවස්ථා 12ක් දක්වා සහන කාලයක් ලබා දීමටත්
- (III) ඉහත 02(I) හා 02(II) යටතේ සහන ලබා දිය හැකි නමුත් පෙර අවස්ථාවන් වලදී රාජ්‍ය සේවා කොමිෂන් සභාව විසින් එලෙස සහන කාල ලබා නොදුන් ශ්‍රී ලංකා විදේශ සේවයේ නිලධාරීන් සිටි නම් එම නිලධාරීන් පිලිබඳ තොරතුරු රාජ්‍ය සේවා කොමිෂන් සභාව වෙත ඉදිරිපත් කරන ලෙස ඔබට දැන්වීමටත්”

It is important that 'P12' is read and understood in its proper context, as it forms the basis of this application.

It is clear from 'P12' that even though its caption refers to Ms. Dhammika Semasinghe who had joined the Foreign Service when 'P3' was in operation, that 'P12' is applicable only to those who joined the Foreign Service after the introduction of the 2001 Service Minute 'P4'. It is equally clear from Paragraph 2(III) of 'P12' that the Public Service Commission called for details of only those who joined under 'P4' and where relief had been previously refused.

As I have already observed, under the Service Minute of 2001 'P4', there was a specific requirement that the First Efficiency Bar Examination must be held twice a year and that an Officer must complete the First Efficiency Bar Examination in two years, thus affording an Officer four attempts at the examination.

As submitted by the Respondents, the First Efficiency Bar Examination was held only once a year in 2001, 2002, 2003 and 2005, while no examination was held in 2004 and 2006. Thus, even though those who had joined the Foreign Service after January 2001 under the 2001 Service Minute had four attempts in two years, in actual fact, the fourth examination had been held only in February 2005, as opposed to it being held by end 2002, as required by 'P4'.

The requirement to complete the First Efficiency Bar in two years was extended to three years in 2007, thus affording an Officer who had joined the Foreign Service after the introduction of 'P4' six opportunities to complete the First Efficiency Bar Examination. Hence, the reference to six examination opportunities in Paragraph 2(I) of 'P12'.

In view of the fact that the requirement to complete the First Efficiency Bar Examination had been extended to three years, and since the failure to hold the examination bi-annually was an event beyond the control of the Officer concerned and therefore came

within Section 11:9 of the Establishments Code, the Public Service Commission had decided by 'P12' to afford the Officers referred to therein – i.e., those who joined the Foreign Service after January 2001 – six attempts at the First Efficiency Bar Examination, prior to applying the provisions of Section 11:10 to such an Officer.

Even though the Petitioner had joined the Foreign Service prior to January 2001, he sought the concessions offered in 'P12' – i.e., that he too be permitted six attempts to complete the First Efficiency Bar Examination. If the request of the Petitioner was acceded to, Section 11:9 would apply to the entire period from 6th July 2002 to 2nd December 2003, and the Petitioner would have been entitled for his salary increments without a break.

The Ministry of Foreign Affairs did a 180° turn and, contrary to the recommendation that it had made in 2005 that I have discussed earlier, recommended to the Public Service Commission by its letter dated 20th May 2016 marked 'P14' the above request of the Petitioner. After a series of correspondence with the Ministry of Foreign Affairs, the Public Service Commission, by its letter dated 5th December 2016 marked 'P21' had informed the Petitioner as follows:

“ශ්‍රී ලංකා විදේශ සේවයේ පළමු කාර්යක්ෂමතා කඩඉම සම්පූර්ණ කිරීම සඳහා 2001.07.10 දින සිට 2002.07.06 දින දක්වා සහන කාලයක් ඔබට ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණය කර ඇති බව රාජ්‍ය සේවා කොමිෂන් සභාවේ අංක PSC/APP/4/70/2015 හා 2016.11.22 දිනැති ලිපිය මගින් දන්වා ඇති බව කාරුණිකව දැනුම් දෙමි.”

Thus, the Public Service Commission had reiterated its decision taken in 2005 to grant the Petitioner a concession until 6th July 2002 to complete the First Efficiency Bar Examination. It was the contention of the learned Deputy Solicitor General that in arriving at the above decision, the Public Service Commission has proceeded on the basis that the Petitioner had four opportunities to complete the First Efficiency Bar Examination and that the failure on the part of the Petitioner to complete the First Efficiency Bar Examination before 10th July 2001 (i.e. three years from the date of joining the Foreign Service) was due to two examinations not being held in 2001, an event which the Public Service Commission has recognized as being beyond the control of the Petitioner. For that

reason, the Public Service Commission had decided that the Petitioner was entitled to an extension of time until 6th July 2002, which was:

- (a) The commencement date of the second examination that should have been held in 2001; and
- (b) The fourth attempt by the Petitioner at the First Efficiency Bar Examination.

The Public Service Commission had however rejected the request of the Petitioner for an extension of time until 2nd December 2003. The consequence of the rejection of the Petitioner's request is that the Petitioner is not entitled to any salary increments for the period 6th July 2002 to 2nd December 2003.

'P21' was therefore a confirmation of the aforementioned recommendation made by the Ministry of Foreign Affairs by its letter dated 6th December 2004 and a reiteration of the decision of the Public Service Commission dated 7th April 2005, which had been conveyed to the Petitioner by 'P7c' dated 15th April 2005.

Dissatisfied by 'P21', the Petitioner filed this application seeking *inter alia* the following relief:

- a) A declaration that the fundamental rights of the Petitioner guaranteed under Articles 12(1) and 14(1)(g) of the Constitution have been infringed by the Respondents;
- b) A declaration that the decision of the Public Service Commission contained in 'P21' by which the Public Service Commission agreed to grant the Petitioner a concessionary period only until 6th July 2002, is null and void;
- c) A direction that the Petitioner be paid his salary increments from 10th July 2001.

The Petitioner had also sought a declaration that the decision of the Public Service Commission contained in '**P24**' by which the Public Service Commission agreed to grant the Petitioner a concessionary period until April 2007 to complete the Second Efficiency Bar Examination and the Foreign Language requirement is null and void. However, at the hearing of this application, the learned President's Counsel for the Petitioner submitted that pursuant to the filing of this application, the Petitioner has been granted relief in respect of the aforementioned language requirements referred to in '**P24**' and that the only outstanding issue pertains to the decision of the Public Service Commission in '**P21**' with regard to the date on which the Petitioner is deemed to have completed the First Efficiency Bar Examination.

Article 12(1) of the Constitution guarantees that "*All persons are equal before the law and are entitled to the equal protection of the law.*" In terms of Article 14(1)(g), "*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.*"

In **Karunathilaka and Another vs Jayalath de Silva and Others** [2003 (1) Sri LR 35] Shirani Bandaranayake, J (as she then was) observed as follows:

"The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions."

In **Wickremasinghe vs Ceylon Petroleum Corporation and Others** [2001 (2) Sri LR 409], Chief Justice Sarath Silva, having considered whether the decision of the Ceylon Petroleum Corporation to terminate the lease agreement that it had with the Petitioner was arbitrary in the context of the said decision being unreasonable, stated as follows:

“The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.

The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. But, the test once again is one of being reasonable and not arbitrary. Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis.

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power

that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority.”

Thus, a determination by this Court that the right to equality guaranteed to the Petitioner by Article 12(1) has been violated would have to be preceded by a finding that the aforementioned decision of the Public Service Commission is unreasonable and unfair and is therefore arbitrary.

The learned President’s Counsel for the Petitioner presented three arguments before this Court, in support of his submission that the Petitioner completed the First Efficiency Bar within the time period specified in the Service Minutes. He submitted that in such circumstances, the aforementioned decision of the Public Service Commission to withhold the salary increments of the Petitioner from 6th July 2002 to 2nd December 2003 is arbitrary, irrational and unreasonable and is therefore a violation of the fundamental rights of the Petitioner guaranteed by Articles 12(1) and 14(1)(g).

Each of the said arguments are referable to the criteria set out in the Service Minutes ‘**P3**’ and ‘**P4**’ relating to the confirmation of a public servant. In **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC Minutes 11th December 2020], Yasantha Kodagoda, P.C., J, having considered the application of the

principle of equality enshrined in Article 12(1) in the context of appointments and promotions in the Public Service, held as follows:

“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 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. . .

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.”

The first argument of the learned President's Counsel for the Petitioner is that in terms of 'P4', the Petitioner had six opportunities to complete the First Efficiency Bar Examination, and that the Petitioner did so on his fifth opportunity. The basis of this argument is that what should be applied to the Petitioner is the Service Minute 'P4', which provides that examinations shall be held twice a year, and which, when read together with (a) the amendment introduced in 2007 that a period of three years is available to complete the First Efficiency Bar Examination and (b) 'P12', means that the Petitioner had six opportunities at the said Examination.

The position of the Public Service Commission is that:

- (a) What applies to the Petitioner is a combination of the provisions of 'P3' and 'P4'; and
- (b) The Petitioner had only four opportunities to complete the First Efficiency Bar Examination, if he was to avoid the consequence set out in Section 11:10.

It was submitted by the learned Deputy Solicitor General that the Petitioner joined the Foreign Service in 1998 at a time when 'P3' was in operation and that on the basis that the First Efficiency Bar Examination had to be completed within the three-year probationary period, he had three opportunities to complete the First Efficiency Bar Examination. He submitted further that the examinations held in July 1999, which the Petitioner passed partially, and the Examination held in July - August 2000, for which the Petitioner did not apply, must be counted as two opportunities. The examination that was scheduled to be held in 2001 therefore was the last opportunity that the Petitioner had of completing the First Efficiency Bar Examination under 'P3'. Thus, as at 31st December 2000, the Petitioner had one more opportunity left to complete the First Efficiency Bar.

The requirement introduced by 'P4' on 1st January 2001 that the examination shall be held twice a year accrued to the advantage of the Petitioner. Having one more year remaining as at 1st January 2001 to complete the First Efficiency Bar Examination translated into two examination opportunities with the introduction of 'P4'. The Petitioner now had two examination opportunities in terms of 'P4' to complete the First

Efficiency Bar, as opposed to one opportunity under 'P3'. It is on this basis that the Public Service Commission had decided that the Petitioner had four opportunities to complete the First Efficiency Bar Examination. It must be noted that the requirement in 'P4' that the First Efficiency Bar Examination must be completed in two years had not been applied to the Petitioner and that this period remained as three years, as stipulated by 'P3'.

It is agreed between the parties that the First Efficiency Bar Examination was held only once in 2001. Thus, the Examination held in July 2002 has been considered as the second examination that should have been held in 2001. It was the submission of the learned Deputy Solicitor General that the Petitioner utilised the two opportunities that were available with the introduction of 'P4', when he sat for the examination in August 2001 and July 2002. As the Petitioner was unsuccessful at both examinations, it was submitted that the Petitioner had failed to complete the First Efficiency Bar Examination within the four opportunities that were available to him – i.e., at the examinations held in 1999, 2000, 2001 and 2002.

It is admitted that the Petitioner successfully completed the First Efficiency Bar Examination held in December 2003. However, according to the Respondents, this is outside the period and the examination opportunities permitted in terms of 'P3' and 'P4', with the result that the period of service between 6th July 2002 and 2nd December 2003 has not been taken into consideration in the calculation of the service period of the Petitioner for purposes of salary increments. This was the basis on which the Public Service Commission limited the concession in terms of Section 11:9 of Chapter II of the Establishments Code until 6th July 2002.

The issue that arises for the determination of this Court from the first argument advanced on behalf of the Petitioner is whether the Petitioner had six examination opportunities in terms of 'P4' or whether the decision of the Public Service Commission to combine the period under 'P3' with a pro-rated adjustment of the examination opportunities available under 'P4' is irrational, unreasonable and arbitrary.

In my view, the Petitioner does not have six attempts at the First Efficiency Bar Examination on the basis of two examinations per year for each year of probation, for the reason that, that privilege was only afforded to those who joined the Foreign Service under the 2001 Service Minute 'P4'. The Petitioner, having joined the Foreign Service when 'P3' was in operation, cannot seek benefits that were afforded to those who joined subsequently under 'P4'. This would amount to the Petitioner having the best of both worlds in that while retaining the benefit of having passed a majority of subjects at an examination conducted when 'P3' was in operation, the Petitioner would also have the benefit of having six additional examination opportunities that were available to those who joined after 'P4' came into operation. To grant the Petitioner six additional examination opportunities under 'P4' would have resulted in the Public Service Commission acting contrary to the objectives set out in the said Service Minute and applying the provisions of 'P3' indiscriminately. Furthermore, this would be unfair by those who joined when 'P3' was in operation and who completed their examinations as required by 'P3'. The Petitioner cannot claim parity of status with those who joined the Foreign Service with him but who passed their examinations in terms of 'P3'.

The Respondents have afforded the Petitioner the benefit of two examination opportunities in terms of 'P4' for the remaining period of his period of probation – i.e., for the year 2001. As I have observed, the Petitioner was required to successfully complete the examination at least by the second examination held for 2001. The fact of the matter is that only one examination was held in 2001, thus affording the Petitioner an opportunity of sitting for the examination in July 2002, without facing the consequence of Section 11:10. Had the Petitioner passed the examination held in July 2002, the provisions of Section 11:9 would have applied to the Petitioner and he would have been entitled to his salary increments from that date. The fact remains that the Petitioner failed the exam held in July 2002. He finally passed the examination held in December 2003, which was his fifth opportunity at the said examination. The Petitioner must therefore face the consequence set out in Section 11:10 and the Petitioner would therefore not be entitled to any salary increments for the period between 6th July 2002 – 2nd December 2003.

In these circumstances, I am of the view that the decision of the Public Service Commission that the Petitioner was required to complete the First Efficiency Bar Examination in four attempts – i.e., two opportunities under 'P3' and two opportunities under 'P4' – if he was to avoid the provisions of Section 11:10 being applied to him, or in other words, the decision of the Public Service Commission to aggregate the number of examination opportunities available under 'P4' with the examination opportunities that were available when 'P3' was applicable, on a *pro rata* basis, is a fair and reasonable decision and is not arbitrary.

This brings me to the second argument of the learned President's Counsel for the Petitioner, which is that even if the position of the Public Service Commission that the Petitioner had only four opportunities to complete the examination is accepted, the Petitioner completed the First Efficiency Bar Examination on his fourth attempt. This argument is premised on the basis that (a) the Petitioner only sat for the examination held in July 1999, August 2001, July 2002 and December 2003, and (b) the failure to apply for the examination held in July 2000 cannot be counted as an attempt.

The issue that arises for the determination of this Court from this argument is whether the decision of the Public Service Commission to treat the examination held in July 2000 as one opportunity, even though the Petitioner did not apply to sit for the said examination, is arbitrary and unreasonable. Before I proceed to consider the said argument, it would be useful to consider the rationale for requiring a Public Officer to complete the Efficiency Bar examinations in order to be confirmed in service as well as to obtain consequential promotions.

In terms of Section 11:1 of Chapter II of the Establishments Code, "*every appointment to a Permanent post will be on probation for a period of three years*", thus providing an appointee the opportunity of *learning work and being tested for his suitability for permanent retention*. Section 11:2 goes on to state that, "*Appointment on probation implies that the officer may, before confirmation, count on being admitted to the permanent establishment if he carries out the obligations imposed by his letter of*

appointment and proves by conduct and efficient service, his suitability for permanent retention in the Public Service.” While Section 11:2:3 provides that, “A Head of Department should ensure that an officer on probation is confirmed on completion of the period of probation or his period of probation is extended or the probationary appointment is terminated,” in terms of Section 11:7, “If the Officer is not judged as fit and qualified for confirmation in all respects, either his appointment should be terminated or the period of probation ... should be further extended by the appointing authority subject to Section 11:9 or 11:10...”. Section 15:1 of Chapter II provides that, “Promotion over an Efficiency Bar will be governed by the Scheme of Recruitment for the post, grade or service.”

An objective mode of judging the competency of an Officer during probation is through the Efficiency Bar Examinations that are conducted periodically. Where there is a requirement in the Service Minute that an Officer must pass the First Efficiency Bar Examination within the probationary period, it is the responsibility of such Officer to act diligently and apply for and sit the said examination. Not applying for an examination, or having applied but not sitting for an examination citing pressure of work, is not acceptable and only goes to demonstrate a lack of diligence on the part of that Officer in complying with the requirements and achieving the objectives of the relevant Service.

While a Public Servant who cannot pass the Efficiency Bar examinations cannot demand that he/she be confirmed in service and/or be promoted, an Officer cannot circumvent the requirement to pass an Efficiency Bar within the period specified in the Service Minute by refraining from applying to sit for the examination. In fact, Section 11:10 is a merciful alternative to termination of service arising from the failure to pass the Efficiency Bar Examination within the time periods specified in the Service Minute.

It must be remembered that it is the task of the Foreign Ministry to coordinate and carry out the foreign policy of the Government of Sri Lanka. It is the members of the Foreign Service who are attached to the Ministry in Colombo and the missions abroad who are entrusted with the task of promoting, projecting and protecting Sri Lanka’s national interests internationally. It is in order to achieve this objective and thereby discharge their

professional duties efficiently and effectively that an Officer of the Foreign Service is required to pass the subjects of Elementary Constitutional Law and International Law, Diplomatic Practice, International Affairs, Foreign Ministry Regulations, Sri Lankan History and Geography and Finance, as part of the First Efficiency Bar Examination.

I can at this stage only reiterate what was held by this Court in **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [supra] that schemes of recruitment, confirmation, promotion etc. set out in Service Minutes reflect the objectives that are sought to be achieved from a particular Service and that “*Once such schemes are promulgated, it is equally important and necessary to ensure that, they are enforced correctly, comprehensively, uniformly, consistently and objectively*”.

In **Damayanthi Namalee Haupe Liyanage Madawalagama vs H.P.S. Somasiri, Director General of Irrigation and Others** [SC (FR) Application No. 317/2010; SC Minutes 26th March 2012], Chief Justice Shirani Bandaranayake has observed as follows:

“Therefore it is clearly evident that when an officer does not complete the relevant Efficiency Bar Examination within the given time frame, the next increment would be deferred by the period of time corresponding to the period of delay. This action cannot be regarded as a violation of petitioner’s fundamental right guaranteed in terms of Article 12(1) of the Constitution.”

In the above circumstances, I am of the view that an Officer cannot refrain from applying to sit for the examination citing pressure of work and thereby extend the period that is available to complete the First Efficiency Bar. If an officer does so, he or she must face the consequences set out in Section 11:10. Thus, I am of the view that the decision of the Ministry of Foreign Affairs in 2004, as well as the decision of the Public Service Commission, both in 2005 as well as in 2016 that the failure to apply and/or sit the examination in 2000 should be counted as one opportunity is fair and reasonable and is in accordance with the objective that is sought to be achieved through the said requirement stipulated in the Service Minutes ‘**P3**’ and ‘**P4**’.

I shall now consider the final argument of the learned President's Counsel for the Petitioner. He submitted that 'P12' was issued by the Public Service Commission pursuant to a decision taken with regard to Ms. Dhammika Semasinghe, another Officer of the Foreign Service who had joined when 'P3' was in operation. He submitted further that the Public Service Commission had decided otherwise with regard to the Second Efficiency Bar Examination of Ms. Semasinghe and that the Public Service Commission had treated the Petitioner differently, thereby violating the equality provisions contained in Article 12(1). While it may be true that 'P12' was issued pursuant to a decision taken with regard to Ms. Semasinghe, it must be stressed that the contents of 'P12' clearly provide that it applies in respect of those who had joined the Foreign Service under 'P4'.

In order to address this argument, it would be necessary to briefly refer to the factual circumstances relating to Ms. Semasinghe. It is admitted by the parties that Ms. Semasinghe joined the Foreign Service on 18th April 1996 and that in terms of the Service Minute 'P3' that prevailed during that time, she was required to complete the Second Efficiency Bar examination within seven years of her first appointment – i.e., by 18th April 2003.

Ms. Semasinghe had passed the First Efficiency Bar Examination by October 1998. She had also passed two subjects of the Second Efficiency Bar Examination held in August 1997 and a further three subjects at the examination held in October 1998. Ms. Semasinghe had not applied to sit for the examinations held in 1999 and 2000. As at 31st December 2000, a period of four and half years had lapsed out of the seven years available under 'P3' to complete the Second Efficiency Bar Examination, leaving Ms. Semasinghe with a period of two and half years and three examination opportunities to complete the Second Efficiency Bar. With the introduction of 'P4' on 1st January 2001, examinations were required to be held bi-annually. Ms. Semasinghe therefore had a further five opportunities to pass the said examination, as opposed to three opportunities that she would have had, if a new service minute had not been introduced.

According to the Respondents, details relating to the Second Efficiency Bar Examination relating to Ms. Semasinghe after the introduction of 'P4' are as follows:

2001	Has not applied for the examination.
2002	Failed the examination.
2003	Has not applied for the examination.
2004	Examination has not been held.
2005	Has not applied for the examination.
2006	Examination has not been held.
2007	Although applied, the examination paper had not reached Washington, DC on time.
2008	Examination has not been held.
2009	Passed the examination held in May 2009.

It is clear from the above table that as only one examination had been held in 2001, the examination held in 2002 has been considered as the second examination that should have been held in 2001. Similarly, the examinations held in 2003 and 2005 have been considered as the two examinations that should have been held in 2002. The Public Service Commission had treated her attempt at the examination held in 2009 as having been completed in April 2007, when she failed to sit for the examination for a reason beyond her control – i.e., due to the examination papers not reaching Washington, DC on time. Thus, Ms. Semasinghe had completed the Second Efficiency Bar Examination on her fifth attempt, and therefore within the seven-year period, as permitted by 'P4'. On the basis that the fifth examination after 'P4' was introduced should be the examination held in December 2003, the Public Service Commission had accordingly granted her a concession from 2nd December 2003 to 27th April 2007 in terms of Section 11:9 of the Establishments Code.

It is thus clear that the Public Service Commission had treated the Petitioner and Ms. Semasinghe in the same manner – i.e., the period under the Service Minute 'P3' had been taken into account in the calculation of the total opportunities available to complete the Efficiency Bar examination. In other words, there has been a pro-rated adjustment of the

period available to sit for the relevant examination under 'P4' in respect of the Petitioner as well as in respect of Ms. Semasinghe, as they already had a period of service at the time 'P4' was introduced. Furthermore, the Public Service Commission had treated the failure of Ms. Semasinghe to apply for the examinations held in 2001, 2003 and 2005 as opportunities that were available to her, similar to that of the Petitioner. Thus, I cannot agree with the final argument of the learned President's Counsel for the Petitioner.

There is one other matter that I must advert to. In 2014, the Public Service Commission issued Circular No. 1/2014 marked 'P10' setting out the concessions that were being granted in respect of Efficiency Bar examinations. The relevant portions of 'P10' are reproduced below:

“කාර්යක්ෂමතා කඩඉම් විභාග සම්බන්ධයෙන් සහන ලබාදීම

රාජ්‍ය සේවයේ තනතුරකට සේවයකට පත් කරනු ලබන යම් නිලධාරියෙකු පත්වීම් දින සිට වසර 03ක් ඇතුළත පලමු කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය සමත් විය යුතු අතර

එසේ වුවද කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය නියමිත පරිදි නොපැවැත්වීම නිසා ඇතිවන පරිපාලනමය ගැටලු සම්බන්ධයෙන් පහත සඳහන් සහනය ලබා දීමට රාජ්‍ය සේවා කොමිෂන් සභාව තීරණය කර ඇත.

‘නියමිත පරිදි විභාග නොපැවැත්වීම මත කාර්යක්ෂමතා කඩඉම් විභාග සම්පූර්ණ කිරීමට නොහැකි වූ නිලධාරීන්ගේ ජ්‍යෙෂ්ඨත්වයට හානි නොවන පරිදි ස්වකීය පත්වීම් උසස්වීම් දිනයේ සිට පවත්වනු ලබන අනුගාමී විභාග හතරක් මගින් පලමු දෙවන කාර්යක්ෂමතා කඩඉම් පරීක්ෂණය සමත්වීමට නිලධාරියෙකුට පුලුවන.’”

Although the Petitioner has complained that the benefit of 'P10' was not afforded to him, it is clear from the aforementioned facts that the Petitioner has been afforded four opportunities to pass the First Efficiency Bar Examination, prior to applying the provisions of Section 11:10 to the Petitioner.

In the aforesaid circumstances, I hold that the Petitioner's fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution, and the Petitioner's fundamental right to engage in a lawful occupation

guaranteed by Article 14(1)(g), have not been infringed by the Respondents. The application of the Petitioner is therefore dismissed. I make no order with regard to costs.

As agreed by the learned President's Counsel for the Petitioner and the learned Deputy Solicitor General for the Respondents, the parties in SC (FR) Application No. 4/2017 will be bound by this judgment. The said application shall accordingly stand dismissed, without costs.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.

I agree.

JUDGE OF THE SUPREME COURT