

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.

Colombage Dona Bandulani
Basnayake,
No. 128, Helweesiyawatte,
Narammala.

Petitioner

S.C.(F.R.) Application No: 311/2016

Vs.

1. Sunil Hettiarachchi,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.
- 1A. Prof. K. Kapila C. K. Perera,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.
- 1B. Nihal Ranasinghe,
Secretary,
Ministry of Education,
"Isurupaya",
Pannipitiya Road,
Battaramulla.
2. Dharmasena Dissanayake,
Chairman,
Public Service Commission of Sri
Lanka,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

- 2A. Jagath Balapatabendi,
Chairman,
Public Service Commission of Sri
Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.
3. A. Salam Abdul Waid,
Member.
- 3A. Indrani Sugathadasa,
Member.
4. D. Shirantha Wijetilake,
Member.
- 4A. V. Shivagnanasothy,
Member.
- 4B. Suntharam Arumainayaham,
Member.
5. Dr. Prathap Ramanujam,
Member.
- 5A. T. R. C. Ruberu,
Member.
6. V. Jegarasasingam,
Member.
- 6A. Ahamed Lebbe Mohamed Saleem,
Member.
7. Santi Nihal Seneviratne,
Member.
- 7A. Leelasena Liyanagama,
Member.

8. S. Ranugge,
Member.
- 8A. Dian Gomes,
Member.
9. D. L. Mendis,
Member.
- 9A. Dilith Jayaweera,
Member.
10. Sarath Jayathilaka,
Member.
- 10A. W. H. Piyadasa,
Member.

3rd to 10th Respondents all of;

Public Service Commission of Sri Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.

11. H. M. G. Seneviratne,
Secretary,
Public Service Commission of Sri Lanka,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.
- 11A. M. A. B. Daya Senarath,
Secretary,
Public Service Commission of Sri Lanka,
No. 1200/9, Rajamalwatta Road,
Battaramulla.
12. J. H. Rohana Karunaratne,
Nakkawatte National School,
Nakkawatte.

13. Akila Viraj Kariyawasam,
Minister of Education,
Ministry of Education,
“Isurupaya”,
Pannipitiya Road,
Battaramulla.

13A. Prof. G. L. Peiris,
Minister of Education,
Ministry of Education,
“Isurupaya”,
Pannipitiya Road,
Battaramulla.

13B. Hon. Susil Premajayantha,
Minister of Education,
Ministry of Education,
“Isurupaya”,
Pannipitiya Road,
Battaramulla.

14. Hon. Attorney General,
Attorney General’s Department.
Colombo 12.

Respondents

Before: Hon. Buwaneka Aluwihare, P.C., J.

Hon. Janak De Silva, J.

Hon. Achala Wengappuli, J.

Counsel:

Shantha Jayawardena with Chamara Nanayakkara, Hafeel Faris, Hirannya Damunupola and Azra Basheera for the Petitioner

Nirmalan Wigneswaran D.S.G. for the 1B, 2A to 11A, 13B and 14 Respondents

Written Submissions:

27.07.2020 and 05.02.2021 by the Petitioner

03.02.2022 and 08.02.2023 by the Respondents

Argued on: 18.01.2023

Decided on: 16.10.2023

Janak De Silva, J.

The Petitioner is a Grade III officer of the Sri Lanka Education Administrative Service (SLEAS). She was appointed as the Principal of Nakkawatta National School by letter dated 10.12.2013 (P14a) with effect from 01.01.2014.

According to the Petitioner, the school was in a state of neglect when she took on her duties. The Petitioner's efforts resulted in a significant improvement in the quality of education. The school's best result in the past was a student who received 6 'A' grade passes in the General Certificate of Education (Ordinary Level) Examination. After the Petitioner assumed duties, a student obtained 9 'A' grade passes for the first time in the history of the school while four other students obtained 8 'A' grade passes and two students obtained 7 'A' grade passes.

During the August school vacation in 2016, the Petitioner received a letter dated 10.08.2016 (P21) from the Secretary, Ministry of Education informing that, subject to the covering approval of the Public Service Commission (PSC), she has been temporarily 'attached' to the Provincial Education Department of the North Western Province with immediate effect due to exigencies of service.

The Petitioner appealed to the Secretary of the Ministry of Education and requested that her temporary attachment be rescinded with immediate effect. She also made an appeal to the PSC. According to the Petitioner, the usual course of action adopted by the Ministry of Education in such circumstances is to allow the incumbent to continue

in the post till a decision is taken on the appeal. Nevertheless, the Secretary of the Ministry of Education temporarily attached the 12th Respondent with immediate effect to cover duties as the Principal of Nakkawatta National School by letter dated 30.08.2016 (P24). At that time, the 12th Respondent was the Deputy Principal of Kuliypitiya Central College. The 12th Respondent is a Class III officer of the SLEAS but is junior to the Petitioner by 6 years.

The Petitioner claims that she was removed from her post as Principal of Nakkawatta National School for the purpose of giving the 12th Respondent a promotion in effect and in fact. It is alleged that her attachment to the Provincial Education Department of the North Western Province is arbitrary, unreasonable, irrational, tainted with malice, and made for an ulterior and collateral purpose.

The Petitioner seeks *inter alia* the following relief:

- (a) Declare that the Petitioner's fundamental rights guaranteed to her under Article 12 (1) and/or 14 (1) (g) of the Constitution have been infringed by the 1st to 11th Respondents or one or more of them;
- (b) Declare that the 'attachment' (evidenced by P21) of the Petitioner to the Provincial Education Department of the North Western Province is null and void;
- (c) Direct the 1st to 11th Respondents or one or more of them to forthwith appoint the Petitioner to a suitable substantive post commensurate with her qualifications, experience and seniority in the SLEAS.

Leave to proceed has been granted only under Article 12 (1) of the Constitution.

On 12th December 2018, the Petitioner informed that she may consider returning if offered a suitable school in the Central Government. On 2nd September 2020, the Respondents filed a motion along with a letter dated 24th February 2020, by which the Petitioner was appointed as the Principal of Mayurupada Vidyalaya in Kurunegala. The Petitioner appears to be with this appointment.

Nevertheless, she is desirous of proceeding with this application. Therefore, we must proceed to investigate the allegations of infringement of her fundamental rights under Article 12 (1).

The Respondents claim that the Petitioner's temporary attachment to the Provincial Education Department of the North Western Province by P21 was based on exigencies of service and was not disciplinary in nature.

According to the Respondents, an internal audit was conducted on 28th March 2016 on the orders of the Secretary of the Ministry of Education as part of the internal audit programme 2016/2017. It revealed several lapses in the administration and discipline of Nakkawatta National School, as well as several irregularities regarding the finances and assets of the school. In light of the findings of the internal audit report (1R1) following the aforementioned internal audit, the predecessor of the 1st Respondent was of the opinion that due to the administrative reasons borne out in the said audit report (1R1) the retention of the Petitioner as the Principal of the Nakkawatta National School, was not suitable. Accordingly, the predecessor of the 1st Respondent, by P21, took steps to temporarily attach the Petitioner to the Provincial Education Department of the North Western Province.

A preliminary investigation was conducted following the audit report on the PSC's direction. A preliminary investigation report was issued on 7th February 2018 after the preliminary investigation was completed. Pursuant to the said report, the 1st Respondent requested the PSC to grant covering approval for the attachment of the Petitioner to the Wayamba Provincial Department of Education and for approval to implement the recommendation of transferring the Petitioner in the preliminary investigation report. The PSC approved the transfer of the Petitioner after taking into account the preliminary investigation report.

Nevertheless, whether the fundamental rights of the Petitioner guaranteed under Article 12 (1) has been violated or not must be decided on the material available with the predecessor of the 1st Respondent at the time P21 was issued. The temporary attachment made by P21 cannot be justified based on subsequent events. In fact, the Respondents have, at paragraph 4 of the written submissions filed with motion dated 3rd February 2022, emphasised that the decision made in 2016 was reasonable based on the material available to the Secretary, Ministry of Education at the time the decision was made. According to the Respondents as well, the focus should be on the material available at the time P21 was issued.

This position appears to have been in the minds of the drafters of the Procedural Rules on Appointment, Promotion and Transfer of Public Officers and to provide for matters connected therewith and incidental thereto published in Gazette No. 1589/30 dated February 20, 2009 (PSC Rules 2009). Rule 221 reads:

“221. The Appointing Authority shall record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. The Appointing Authority shall convey the reasons to the officer concerned.”
(emphasis added)

The Appointing Authority cannot use other materials that were not available at the time of the decision to justify the transfer because of this obligation.

I am conscious that the Respondents do not assert that the Petitioner was transferred. They claim that it was only a ‘temporary attachment’ based on service exigencies. Nevertheless, there is no reference to ‘temporary attachment’ in the PSC Rules.

Moreover, the Respondents have in the written submissions filed with motion dated 3rd February 2022, sought to rely on Rule 218 (iii) of the PSC Rules to justify the contents of P21. Rule 218 (iii) empowers a transfer on the basis of exigencies of service *“where it is found, due to administrative reasons, that the retention of an officer in his*

present station is not suitable". As a result, the Respondents acknowledge that P21 is in fact a transfer.

The Respondents deny that the transfer was due to disciplinary reasons. It is claimed to have been due to exigencies of service. Such a transfer can indeed be made in accordance with Rule 243 (XXVI) of the PSC Rules, which reads:

*"'Transfer' means the **moving of a public officer from one station or institution to another station or institution** by the Commission or an authority with delegated power at their discretion or on disciplinary grounds or on the proposal of an Annual Transfer Committee and/or on the recommendation of an Annual Transfer Proposals Review Committee or on the request of the officer or **on exigencies of service** or on the appointment of the officer to another post as a result of promotion."* (emphasis added)

The 1st Respondent in his affidavit states that in the light of the findings of the internal audit report (1R1), his predecessor was of the opinion that due to administrative reasons borne out in the said report, the retention of the Petitioner as Principal of Nakkawatta School was not suitable.

However, P21 does not refer to the transfer made for the reasons outlined in the affidavit of the 1st Respondent. It merely states that the transfer is made due to exigencies of service.

PSC Rule 218 identifies three situations where a transfer can be made on the exigencies of service. They are:

- (i) Where the services of an officer is no longer needed at his present station;*
- (ii) Where an officer is needed for service in another station or that particular officer himself is needed;*

(iii) Where it is found, due to administrative reasons, that the retention of an officer in his present station is not suitable.

Hence, it was imperative for the Secretary of the Ministry of Education to specify in P21 which of the above is the reason for the transfer of the Petitioner. This enables the Petitioner to become aware of the reasons for her transfer and take any necessary steps to defend her rights.

In ***Dayasena v. Bindusara, Director, National Blood Transfusion Service and Others [(2003) 1 Sri.L.R. 222]*** court was called upon to examine the legality of a transfer order. Fernando J. held (at page 227):

“While the 2nd Respondent had authority to transfer the Petitioner on one or more of the grounds stated above, there is no proof that he did actually make a transfer order. Even assuming that he did make a transfer order, there is no evidence as to the basis on which he acted, and it cannot be assumed that it was on one of the four permitted grounds. But even if I were to assume that he did act on one of those grounds, yet that ground and the supporting reasons were not disclosed to the Petitioner when the transfer order was made, and even when his appeals were refused and that was a fatal flaw...In the present case, not only the reasons but even the ground had not been disclosed. I therefore hold that the Petitioner's transfer was wrongful and arbitrary.”

Moreover, a public officer cannot be transferred due to service exigencies at the whims and fancies of a superior. PSC Rule 219 requires that before a public officer is transferred on exigencies of service, the Authority with Delegated Power shall personally satisfy himself that need has actually arisen as specified in Rule 218 and that the transfer cannot be deferred till the next annual transfers. Accountability and transparency are established by this.

PSC Rule 221 seeks to crystallise this situation by requiring the Appointing Authority to record in the relevant file clearly all the factors that caused the transfer of an officer on exigencies of service. The Appointing Authority shall convey the reasons to the officer concerned. These are mandatory requirements.

In ***Premachandra v. Bandara, Secretary Ministry of Lands, Irrigation and Mahaweli Development and Others [(1994) 1 Sri.L.R. 301 at 318]***, Fernando J. held, in reference to the scheme stipulated in the Establishment Code, that:

“[...] when the law requires disclosure of such reason, it will have to be disclosed – and, if not disclosed, legal presumptions will be drawn.” (emphasis added)

The note or minute the Secretary, Ministry of Education should have recorded in the relevant file in terms of PSC Rule 221 would have established if the transfer of the Petitioner was made for the reasons outlined in the affidavit of the 1st Respondent. However, the Respondents have not produced the said note or minute.

In the absence of such note or minute, the best evidence to prove that the Petitioner's transfer was actually based on the internal audit report (1R1) is not available. Furthermore, the internal audit report (1R1) does not recommend the Petitioner's transfer.

In the aforementioned circumstances, we are entitled to draw an adverse inference in terms of section 114 (f) of the Evidence Ordinance that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

Moreover, in response to the appeal made by Petitioner to the PSC, the PSC referred the letter dated 05.10.2016 (P37) stating that:

“සී.ඩී.බී. බස්නායක මහත්මිය විසින් 2016.08.30 දිනැතිව උක්ත කරුණ සම්බන්ධයෙන් ඔබ මගින් මා වෙත යොමු කර ඇති අභියාචනයක ප්‍රගමන පිටපතක් මෙම කාර්යාලය වෙත ලැබී ඇත.

02. එහි පිටපතක් මේ සමඟ අමුණා එවන අතර, අභියාචනයෙහි සඳහන් කරුණු සම්බන්ධයෙන් ඔබගේ නිරීක්ෂණ හා නිර්දේශ රාජ්‍ය සේවා කොමිෂන් සභාව වෙත ඉදිරිපත් කිරීමට හැකිවනු පිණිස දන්වා එවන ලෙස කාරුණිකව දැනුම්දෙමි.”

The final sentence of the passage confirms that the internal audit report (1R1) did not reach the PSC by the date mentioned earlier. It should be noted that there is a nearly two-month difference between the letter dated 10.08.2016 (P21) and the letter dated 05.10.2016 (P37).

In the circumstances, I am inclined to draw the inference that the transfer was not based on the internal audit report (1R1).

Nevertheless, the Respondents submit that the internal audit report (1R1) is dated 4th August 2016 and P21 is dated 10th August 2016. As a result, the Petitioner has been transferred within a week of the internal audit report (1R1). The Respondents argue that the close proximity of the two events indicates a causal nexus between the audit report and the action taken.

Assuming that the transfer of the Petitioner was actually based on the internal audit report (1R1), it is nonetheless troubling for various reasons.

According to the Petitioner, the audit officers who conducted the audit failed to record her statement, nor did they make any inquiries from her regarding matters stated in the internal audit report (1R1). According to the Petitioner, she became aware of the report when it was filed with the objections in this application.

It was admitted that the audit was finished within a day. The report does not refer to any statements recorded from the Petitioner or at a minimum, any inquiries made from her regarding the matters dealt with therein. The decision to transfer the Petitioner had allegedly been taken based on such a report.

Public officers play a crucial role in providing public services to the public. They do so at great sacrifice, disregarding more lucrative opportunities in the private sector, and for a meager salary.

It is important to point out that the SLEAS is perhaps one of the most significant sectors in the public sector of the country. The concept of 'free education' makes it even more special. The public officers' role in the context of free education does not merely suggest that education is provided free of charge by the State, but it is offered to the highest standard within the limitations of the resources available. Furthermore, Article 27 (2) (h) of the Constitution states that:

"27. (2) The State is pledged to establish in Sri Lanka a Democratic Socialist Society, the objectives of which include – [...]

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

The concept of free education is still maintained by Sri Lanka, which is a welfare State, through tax payer money. Due to this, administrators have a higher responsibility in ensuring that education is provided smoothly, effectively, and efficiently. The process of developing a robust system begins within the system itself. Free education can only produce the desired results if the administration maintains the highest standards in its functions. Actions with negative outcomes, whether deliberate or inadvertent, will result in demoralising the teachers, which in turn negatively impacts their productivity. The lower officials cannot be expected to adhere to the laws and norms of the public sector if the higher officials fail to do so. Moreover, the failure to uphold the highest standard would ultimately affect the student.

In ***Premachandra v. Bandara, Secretary Ministry of Lands, Irrigation and Mahaweli Development and Others*** [(1994) 1 Sri. L. R. 301 at 318], Fernando J. held that:

“The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is reali[s]ed.”
(emphasis added)

An individual's dignity and freedom are guaranteed by the Preamble to the Constitution. In the case of teachers, it requires that they be assured of good working environment where they are able to render their services with dignity befitting of the sacred role, they play in molding future generations. Any action taken in relation to a public officer must conform to the rules that the State has adopted.

In ***Abeywickrema v. Pathirana and Others*** [(1986) 1 Sri. L. R. 120 at 138] Sharvananda C.J. held:

“Article 55 (4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers [...] The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation, though they may be applied to a particular class of public officers. This power is a legislative power and this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative, not executive or judicial in character. A rule made in exercise of this power by the Cabinet has all the binding force of a statute, or regulation.”

The same rationale applies to the PSC Rules which have constitutional underpinning and were issued by the PSC in accordance with Article 61B and 58 (1) of the Constitution. It is important to follow them in all matters pertaining to public officers. Failure to do so will result in a violation of Article 12 (1) of the Constitution.

The decision to transfer the Petitioner by P21 was made based on an internal audit report that was prepared without recording a statement from the Petitioner. Moreover, the Secretary of the Ministry of Education has failed to comply with PSC Rule 221. The Petitioner was not made aware of the reasons for her transfer. The PSC Rules recognise three different categories of exigencies of service, so merely stating that it was on exigencies of service is not sufficient.

Based on the foregoing reasons, I hold that the Secretary, Ministry of Education has violated the Petitioner's fundamental right under Article 12 (1) by issuing P21. I award her a sum of Rs. 1,00,000/= as compensation payable by the State, and a sum of Rs. 50,000 as costs also payable by the State.

Both of these sums should be paid to the Petitioner within one month of the judgment.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.

I agree.

JUDGE OF THE SUPREME COURT