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 Republic of Sri Lanka

SC FR 168/2010 with
SC FR 170/2010,
SC FR 189/2010,
SC FR 190/2010 and
SC FR 246/2010

SC FR 168/2010

1. Rajapaksha Senarathge Gamini Jayakodi,
   Pasala Idiripita, Thiladiya,
   Puttalam.

   and 119 others

PETITIONERS

Vs.

1. Inspector General of Police,
   Police Headquarters,
   Colombo 01.

   and 324 others

RESPONDENTS

SC FR 170/2010

1. M.K.M.B. Jayawardena,
   No. 106, "Barathywass",

Koralawella,
Moratuwa.

and 35 others

PETITIONERS

Vs.

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

and 324 others

RESPONDENTS

SC FR 189/2010

1. M.A. Harsha Dammika Perera,
1/2/1, Anderson Flats,
Colombo 05.

and 43 others

PETITIONERS

Vs.

1B. Poojith Jayasundera,
Inspector General of Police,
Police Headquarters,
Colombo 01.

and 564 others

RESPONDENTS

SC FR 190/2010

1. Rannathige Aruna Shantha,
   A-400-1-Pirivena Area,
   Ampara.

2. Kamal Priyantha Kodithuwakku,
   251/11, Samagi Mawatha,
   Kadawatha.

   and 45 others

PETITIONERS

Vs.

1. Mahinda Balasuriya,
   Former Inspector General of Police,
   Police Headquarters,
   Colombo 01.

   and 613 others

RESPONDENTS

SC FR 246/2010

1. Hendawasam Manil Bhathiya,
   Jayasinghe Wenamulla,
   Ambalangoda.

and 50 others

PETITIONERS

Vs.

1. Secretary,
   Ministry of Defense, Public Security,
   Law & Order,
   Colombo 01.

and 20 others

RESPONDENTS

Before: Buwaneka Aluwihare PC. J
Nalin Perera. J
L.T.B. Dehideniya. J

Counsel: Sanjeewa Jayawardena PC with Rajeev Amarasuriya instructed by Ms. Ashoka Niwunhella for the Petitioners in SC FR 168/2010 & SC FR 170/2010

Manohara de Silva PC, for the Petitioners in SC FR 189/2010

Dr. Jayampathi Wickremaratne with Pubuduni Wickramaratne & Chandrika Silva for the Petitioners in SC FR 190/2010

Saliya Pieris PC, with Pasindu Tilakarathne for the Petitioners in SC FR 246/2010

Asthika Devendra for the 1st to 15th for the Intervenient- Petitioners in SC FR 246/2010

Upul Kumarapperuma for the 16th to 21st Intervenient- Petitioners in SC FR 246/2010

Senany Dayarathne with Nisala Seniya Fernando for some of the parties seeking intervention in SC FR 246/2010.

Rajiv Goonetileke SSC for Respondents.

Argued on: 06.02.2018

Decided on: 30. 10. 2018

Aluwihare PC. J.,

At the outset, it should be noted that all the Petitioners in SC FR 168/2010, SC FR 170/2010, SC FR 189/2010, SC FR 190/2010, SC FR 246/2010 and the parties permitted to be heard in SC FR 246/2010 agreed to abide by a single judgment given in respect of all the cases referred to above.

The Petitioners filed the present fundamental rights applications in March 2010 shortly after being promoted to the rank of Inspector of Police with effect from 08th February 2010. The Petitioners were initially enlisted into the Sri Lankan Reserve Police as Reserve Sub-Inspectors between the years 1989 to 1991 and remained in active service in that rank for periods ranging from 13 to 21 years. In February 2006, pursuant to a

Cabinet Memorandum, police officers in all ranks in the Reserve Police who possessed requisite eligibility and had no adverse disciplinary records were absorbed into the Regular police. The scheme of absorption stipulated *inter alia* that officers in the reserve cadre who possessed basic academic qualifications required for the Regular Force or those who had served a minimum of 8 years active service would be eligible to be absorbed. The said scheme further disclosed that those who are absorbed would be placed just below their counter parts in the regular cadre.

Days prior to the Petitioners being absorbed into the regular force, namely on 06th February 2006, a large number of Sub-inspectors who were then in the Regular service or who had already been absorbed into the regular service, were promoted to the rank of Inspector of Police purely based on the length of their service. The Petitioners could not apply for this round of promotions as their absorption took place only on the 24th February 2006.

It was only in September 2007 that the Petitioners were informed that their absorption was in fact backdated to 1st February 2006. Since the relay of this message took place nearly after a year, the Petitioners were prevented from applying for the aforesaid round of promotions.

In the same month, *i.e.* September 2007, the Inspector General of Police called for fresh applications for promotions to the rank of Inspector of Police. In contrast to the previous round of promotions which was based purely on the length of service, the present promotions were to be made on the basis of both 'seniority' and 'merit'. [hereinafter referred to as the "2007 seniority and merit scheme"]

Accordingly, the Petitioners duly submitted their applications, self-calculated the marks and went through the interview process. They were confident that they had obtained the required marks to qualify for the promotions.

In the meantime, several officers belonging to the Petitioners' cadre filed a series of Fundamental Rights cases numbered SC FR 330/2007, 331/2007, 347/2007, 348/2007, 358/2007 and a Writ Application numbered CA Writ 980/2007 seeking to aggregate their service in the Reserve Police and the service in the Regular Police to

fulfil the required years of service to be eligible for promotion to the rank of Inspector of Police under the promotion scheme.

The Court of Appeal in the aforesaid CA Writ 980/2007 issued an interim order staying the grant of promotions under the 2007 Seniority and Merit scheme till the cases were resolved.

An out of court settlement was reached among the several parties, in 2010, to promote the Petitioners in the aforesaid SC FR 330/2007, 331/2007, 347/2007, 348/2007, 358/2007 and CA Writ 980/2007, to the rank of Inspector of Police purely based on the length of their service.

This batch of promotees included those who duly qualified under the 2007 Seniority and Merit scheme and those who got in based on the 'length of service' pursuant to the out of court settlement. Since the out of Court settlement took nearly 3 years, these promotions were backdated to take effect from the 25th of September 2007-the day on which the applications were called.

As a considerable number of vacancies, which were initially reserved for the successful candidates under the promotion scheme, were thus filled by the promotees pursuant to the out of court settlement, the promoting authority had to increase the cut off marks to choose candidates for the remaining vacancies. This unavoidable development resulted in prejudicing the present petitioners as they could not meet the high cut off mark and thereby became ineligible under the promotion scheme.

Naturally, the aforesaid state of affair caused frustration among police officers and His Excellency the President subsequently intervened and directed that all Sub-Inspectors of Police who had completed 8 years of service be promoted to the rank of Inspector of Police with effect from 8th February 2010.

It was pursuant to the said intervention that the present Petitioners received their promotions to the rank of Inspector of Police with effect from 8th February 2010. However, the Petitioner still had an outstanding grievance as they received their promotions with effect from 2010 whereas several officers, who obtained lower marks

than them under the promotion scheme, received their promotions with effect from September 2007 pursuant to the out of court settlement.

When this case was taken for hearing, the Public Service Commission (the appointing authority at that point) indicated that they could arrive at an out of court settlement. Accordingly, by a motion dated **17th March 2014, the PSC filed three documents marked respectively as "A", "B" and "C" whereby the PSC brought to the attention of the Court the basis of the settlement, the conditions and the list of petitioners whose promotions could be backdated to 25th September 2007. The aforesaid list of petitioners whose promotions could be backdated is reflected in the document marked "C" filed by the motion dated 17th March 2014.** The document marked "C" is a composite document that carries the names of those who are eligible to have their promotions backdated (in each of the present cases) and those who are not. Hereinafter, the officers who have been recognized in the said document "C" as being eligible to have their promotions backdated will be referred to as "eligible petitioners". **On 12th November 2014, the Court has agreed to accept the said motion dated 17th March 2014 as the basis of settlement**.

Therefore, the remaining question, *viz a viz*, the settlement is to see whether backdating should be done on a notional basis. In the event this Court were to hold so, it would not allow the Petitioners to count the backdated years for the purposes of future promotions and would leave them with only the actual service to be made eligible for future promotions.

Prior to addressing the above issue, I wish to first address the preliminary objection raised by the learned Senior State Counsel against the following Petitions for intervention in SC FR 246/2010. These Petitions include the Petition dated 12/09/2012 filed by Mr. Asthika Devendra, the petitions dated 02/05/2011, 26/ 08/ 2011 and 28/11/2011 filed by Mr. Upul Kumarapperuma and a motion dated 03/12/2014 filed by Mr. Senany Dayarathne.

The learned Senior State Counsel objected to the said Applications on 12. 05. 2016 stating that they were filed out of time. A perusal of the journal entry on 12.05.2016 in

SC FR 246/2010 indicates that the Court has allowed the aforesaid Counsel to make submissions. No order permitting intervention has been made.

The several intervenient petitioners have come before this Court claiming the same relief *i.e.* to have their promotions backdated to 27th September 2010. The alleged violation, against which they have come before this Court, had taken place in February 2010. However, I observe that they have filed their intervention papers respectively in 2011, 2012 and 2014—several years after the alleged violation. Prima facie, their applications fall outside the time period stipulated under Article 126 (2) of the Constitution.

Nevertheless, it is accepted that a preliminary objection on time bar should be taken at the earliest opportunity. In **Ranaweera v Sub-Inspector Wilson Siriwardena and Others [2008] 1 SLR 260** it was held that;

"*In a fundamental rights application, the first opportunity available to a respondent to put forward any defence available to him including the plea of time bar is the stage at which he has to file his objections after the Court has granted leave to proceed*"

In the present instance, leave to proceed for Application SC FR 246/2010 was granted on 06. 09. 2012. On the said day, Counsel for Intervenient-Petitioners in Petitions dated respectively, 12/09/2012 (Mr. Asthika Devendra) and 02/05/2011 and 28/11/2011 (Mr. Upul Kumarapperuma) had informed the Court that they have filed papers for intervention. The observation made by the Court as shown in the journal entry is as follows;

"*Mr. Kumarapperuma and Mr. Devendra inform Court that they have filed papers to intervene in this application. Mr. Kumarapepruma inform Court that there are two applications for intervention and all together there would be seven Intervenient-Petitioners. Mr. Devendra informs the Court that he has one Petition which consists of 20 petitioners. Mr. Devendra further submits that he will have to amend those papers and after the amendment there would be 15 intervenient petitioners. The said papers to be sent to the Learned counsel for the petitioners and the learned senior state counsel within one week form today. No further interventions would be allowed in this*

application or in any other connected applications since this matter has been pending since 2010 and these matters will have to be concluded"

On 06. 05. 2016, the Court has again fixed these petitions for support for intervention. By this time, the last batch of Petitioners seeking to be heard (the petitioners in the Petition dated 03.12.2014 represented by Mr. Senany Dayarathne) had filed papers for intervention. On 12.05.2016 parties were heard in relation to intervention and I observe that the learned Senior State Counsel on that occasion has raised a preliminary objection on time bar.

According to the above sequence of events, the Court, most likely due to an oversight, has on two occasions proceeded to hear parties on the issue of intervention. It appears to me that the observation made by this Court on 06. 09. 2012 suggests that the Court permitted the Petitioners in petitions dated 12/09/2012 (represented by Mr. Asthika Devendra) 02/05/2011, 26/ 08/ 2011 and 28/ 11/ 2011 (represented by Mr. Upul Kumarapperuma) to intervene in the proceedings, on the same day leave to proceed was granted. The aforesaid Petitioners have appeared before the Court and have time to time appraised the Court on the progress of the settlement process. Accordingly, I do not think the learned Senior State Counsel could take up the position 4 years later that those intervening Petitions are filed out of time. In fact, it would be inequitable to do so.

However, the said objection remains valid in relation to the Petitioners seeking to intervene through the Petition dated 03.12.2014. According to **Ranaweera v Sub-Inspector Wilson Siriwardena and Others (supra)**;

"*A time bar or prescription which affects jurisdiction of Court must be specifically pleaded in the very first opportunity and if it is not so pleaded, the Court is entitled to proceed on the basis that the respondent has waived his right to raise the defence of time bar in defence of the claim raised against him.* "

It was only on 12. 05. 2016 that the Court for the first time heard the Petitioners in the Petition dated 03. 12. 2012 (represented by Mr. Senany Dayarathne) in support of the intervention. As I have already adverted to, the learned Senior State Counsel has raised the objection on the very first opportunity that the papers have been filed out of time.

I further observe that the Petitioners in the said Petition dated 03. 12. 2014 have filed their Petition after the settlement has been arrived between the parties and approved by this Court. (by motions dated 17th March 2014, the PSC brought to the attention of the Court a list of petitioners whose promotions could be backdated to 25th September 2007. On 12th November 2014, the Court ordered that the said motion dated 17th March 2014 be accepted as the basis of settlement). Thus, there can be no question that the motion for intervention dated 03. 12. 2014 has been filed out of time.

It must be stated that the Supreme Court has consistently held in a number of cases involving alleged violation of fundamental rights that the time limit within which an application for relief for any fundamental right or language right violation may be filed is mandatory and must be complied with. (See **Edirisuriya Vs. Navaratnam [1985] 1 SLR 100, Illangaratne Vs. Kandy Municipal Council [1995] BALJ Vol.VI Part 1 p.10**) In a fit case, however, the Court would entertain an application made outside the time limit provided an adequate excuse for the delay could be adduced.

The learned Counsel for the party seeking to be heard has stated in their written submission that the Petitioners have pursued other avenues of redressal such as lodging a complaint in the Human Rights Commission and appealing to the Inspector General of Police. Proof of said complaints are produced marked X4(a) and X4(b) respectively. It must be borne in mind that it is only section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 that has the power to interrupt the passage of time in Article 126 (2) of the Constitution. As Justice Fernando enunciated in **Gamathige v Siriwardena [1998] 1 SLR 384** pursuing other avenues *per se* does not interrupt the time.

"If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point of time, the filing of an appeal or an application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time-limit. […] The Constitution provides for a sure and. expeditious remedy, in the highest Court, to be granted according to law, and not subject to the uncertain discretion of the very Executive of whose act the aggrieved person complains; if he decides to pursue other remedies, particularly administrative remedies, the lapse

of time will (save in very exceptional circumstances) result in the former remedy becoming unavailable to him."

The Petitioners have complained to the Human Rights Commission on or before 5th March 2010. On 5th March 2010 (X4(a)) the Human Rights Commission has informed the Petitioners that the Commission commenced an inquiry into the complaint. However, over and above this document, the Petitioners have not stated what became of the inquiry thereafter. The Petition for intervention is dated 3rd December 2014—4 years after the commencement of the said inquiry—and there is no material to see whether the investigation has been concluded and if so, at which point. I also observe that the Petitioners seeking intervention have already invoked this Court's Jurisdiction in respect of the same matter and have sought the same reliefs in SC FR 193/2012. In paragraph 22 of the Petition in SC FR 193/2012, the Petitioners have stated that the Human Rights Investigation was pending at the time of invoking the Court's Jurisdiction. In contrast, it is stated in paragraph 5(a) of the present Petition for intervention, that "*We, along with several others similarly circumstanced, complained to the Human Rights Commission by complaint dated 5th March 2010, bearing number HRC 898/2010, which was to no avail.*" In the absence of any evidence indicating the continuance of the inquiry, I could only construe that the investigation may have concluded after 2012. Furthermore, as adverted to above, the Petitioners have invoked this Court's jurisdiction in respect of the same matter in SC FR 193/2012. On their own admission leave to proceed has been refused in the first instance. By filing papers for intervention in the present case, they have sought to achieve indirectly what they have been unable to achieve directly.

In these circumstances, I am inclined to believe that the Petition dated 03. 12. 2014 for intervention has in fact been filed out of time. The only instance, if at all, which could compel the Court to allow an Application filed out of time is when the circumstances clearly give rise to a situation of *lex non cogit ad impossibilia.* Even in such circumstances, the Court must look to see that there is no lapse, fault or delay on the part of the petitioner. With regard to the Petition dated 03. 12 2014, I observe no such circumstances that could have prevented the Petitioners seeking to be heard from filing their papers for intervention before 2014.

For the foregoing reasons, I uphold the preliminary objection against the Petitioners in the petition dated 03. 12. 2014. However, I wish to emphasize that this dismissal does not in any manner preclude the Authorities from considering the grievances of the Petitioners in the Petition dated 03. 12. 2014 and providing administrative relief where possible.

With that I proceed to answer the main issue whether the promotions of the "eligible petitioners" named in document marked "C" filed by the motion dated 17th March 2014 should be antedated on a notional basis.

The learned Senior State Counsel placed great reliance on SC FR 94/2002 in which the Supreme Court has ruled that backdating must be done on a notional basis. However, in the said case, the Court arrived at that decision based on the facts peculiar to that case. The opinion of the Court in that case reflected the rationale in the Cabinet Memorandum which clearly stipulated that promotions to Class I of the SLEAS should be made in strict compliance of the applicable service minute. i.e. "*In order to be qualified to hold a permanent post, promotions will have to be obtained in accordance with the relevant schemes of promotions, e.g. passing a competitive examination or on merit*".

In any event, parties to the said case did not dispute the notional date of appointment. The issue was the purported cancellation of all appointments made on that basis as oppose to pronouncing on the acceptability of the notional basis. The Court quashed the decision to cancel the appointments and ordered that all future promotions be given based on the requirements in the promotion scheme. The Court when pronouncing the decision in the above case did not lay down as a principle that backdating must always be notional.

In those circumstances I do not believe that SC FR 94/2002 can be taken as decisive authority for issues involving antedating.

In the present case, it is undisputed that the "eligible petitioners" are equally circumstanced as Petitioners in the previous cases (who received their promotions backdated on account of the out of court settlement). They were absorbed into the

regular force along with the petitioners of the previous cases. The only differentiating factor between the two groups is the date on which they received their respective promotions. The former group received it on 25th September 2007 while the present "eligible petitioners" received it on 02nd February 2010. However, this difference was effectuated not based on any overarching rational policy but due to the interplay of certain circumstances.

I am mindful that at the inception, the Petitioners were blanketly claiming to have their promotions backdated while the previous petitioners who received their promotion in 2007 had to go through a review process by the PSC. However, it has been brought to the attention of the Court that the present settlement was arrived at pursuant to a criterion approved by the Inspector General of Police and the Public Service Commission and later endorsed and adopted by the National Police Commission. Accordingly, 300 individuals who have scored above 28.5 marks at the interview, and those who (i) are confirmed in their rank (ii) possess six years of active service (iii) have an unblemished record of service in the last five years and (iv) have passed the first aid examination, would qualify to have their promotions antedated. **They will not receive back wages and their seniority will be determined according to the marks they received at the interview. This settlement along with the names of the eligible petitioners [document marked "C"], has been produced by the Respondents by a motion dated 17. 03. 2014. The National Police Commission by motion dated 5th October 2016 has endorsed the said settlement.**

Thus, it appears that the antedating of promotions would take place on a rational basis which would favor only the most eligible candidates.

In those circumstances, the only outstanding concern which, if at all, could have had the effect of placing the present petitioners on a different footing has been nullified. In my opinion, the "eligible petitioners" in the list marked "C" in the motion dated 17th March 2014, are equal and perhaps more deserving of the promotions than the Petitioners in the previous cases. There is nothing that militates against giving them the same privileges that the petitioners in the previous cases were entitled to.

On the contrary, if this Court were to artificially deprive the Petitioners from aggregating their services for future promotions, it would create an anomaly for which no reasonable explanation could be given. It would render nugatory a process of negotiations which had run a course of 8 years and more particularly permit a classification which is unsupported by any intelligible differentia.

In this regard it is pertinent to note Justice Amerasinghe's observation in ***Ragunathan V. Jayawardene, Secretary, Ministry of Transport and Highways and Others*** **[1994] 2 SLR 255** that;

"*The public services exist to supply an efficient administration and Article 12 of the Constitution does not preclude the imposition of qualifying examinations, selective tests and other criteria for selecting or promoting public officers to assure efficiency. The distinction between those qualified for promotion and those who were not was therefore founded upon an intelligible differentia. It was rational. The scheme of promotion was not arbitrary or artificial or evasive in its formulation or relation to its purpose or in its application.*"

In matters relating to promotions, as it is the case in all other instances impugned under Article 12 (1) of the Constitution, there ought to be a rational, an intelligible basis which permits differentiation. That is the only form of classification which law recognizes.

In the present instance, the mere fact that the present petitioners chose to follow the 2007 Promotion scheme instead of resorting to litigation does not place them in a category different to the one which the Petitioners in the previous cases belonged. As has been clearly demonstrated in the well known case of **Ram Krishna Dalmia v. Justice Tendolkadz** ***A. I. R. 1958 S.C. 538***, classifications are permitted provided that "*the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group*"

If the "eligible petitioners" in Document "C" in the motion dated 14th March 2014, were less qualified or had no merit, this Court undoubtedly would have come to a different conclusion. However, as demonstrated, these "eligible petitioners" have

obtained marks higher than 28.5 and rightfully earned their promotions under the 2007 promotion scheme; yet due to factors beyond their control, they were deprived of claiming that benefit. They have come before this Court requesting to be instated in the position which they would have otherwise received. In those circumstances, if this Court were to hold that the shortlisted "eligible petitioners" would only be entitled to have their promotions backdated on a notional basis, it would place them in a different category purely because they decided against litigating in 2007. Needless to say, such a classification would not be 'intelligible' within the meaning of Article 12 (1) of the Constitution.

It has also been brought to our attention that section 1:11:2 of Chapter II of the Establishment Code and the PSC Procedural Rules 30 and 31 published in Gazette 20. 02. 2009 prohibit antedating an appointment. In **Abeywikcrema v Pathirana [1986] 1 SLR 120** and **Public Service United Services Union v The Minister of Public Administration [1988] 1 SLR 229**, the Supreme Court has observed that the Establishment Code has statutory force.

While being mindful of these restrictions, I wish to nevertheless emphasize that in terms of rule 140 of the PSC Procedural Rules, the Supreme Court has the overarching power to determine the seniority of Public Officers. In the case at hand, the parties having already arrived at a settlement envisaging antedating, the question is one of determining whether attaching a notional value to the said settlement would discriminate the present Petitioners *viz a viz* their equals.

In the absence of any justification, which is apparent on the facts of this case, I am of the opinion it would be so.

In those circumstances, I declare that the "eligible Petitioners" rights have been violated under Article 12 (1) of the Constitution and make an order that the promotions of the "eligible Petitioners" in the document marked "C" filed by the Respondents by way of motion dated 17. 03. 2014 be antedated to 25th September 2007 and **only** allow such promotees to aggregate the past years to their service.

As already reflected in the said motion, such "eligible petitioners" will not be entitled to back wages and their seniority will be determined according to the marks they received at the interview.

Application allowed.

Judge of the Supreme Court

Justice Nalin Perera.

I agree

Chief Justice

Justice L.T.B. Dehideniya

I agree

Judge of the Supreme Court