

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

In the matter of an Application under Article 126
read with Article 17 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 41/2017

1. H. Sarath Wickramasinghe,
Dangahawila, Karandeniya.
2. T.D.K. Ariyawansa,
No. 60/7, Sri Rathanapala Mawatha,
Matara.
3. A.A. Chandrasiri
No. 1/1, Medagama, Netolpitiya.
4. Ariyasena Narasinghe,
'Sampath,' Palolpitiya, Thihagoda.
5. K.H. Piyasena,
No. 21/5, Sri Sugathapala Mawatha,
Karapitiya.
6. A.M.A. Chandra,
'Rasangi,' Ganegama South, Baddegama.
7. H.P. Premadasa,
Sathsara, Kongala, Hakmana.

PETITIONERS

vs.

1. The Governor
Southern Province,
Governor's Secretariat,
Lower Dickson Road,
Galle.

2. The Chairman,
Provincial Public Service Commission,
Sothern Province, 6th floor,
District Secretariat Building Complex,
Kaluwella, Galle.
3. K.K.G.J.K. Siriwardena
4. K.L.S. Marathons
5. Srimal Wijesekera
6. Samarapala Vithanage

2nd to 6th Respondents are members of
the Provincial Public Service Commission,
Southern Province, 6th Floor,
District Secretariat Building,
Kaluwella, Galle.

7. The Secretary,
Provincial Public Service Commission,
Southern Province, 6th floor,
District Secretariat Building,
Kaluwella, Galle.
8. Commissioner of Cooperative
Development,
Cooperative Development Department of
the Southern Provincial Council,
No. 147/3, Pettigalawatta, Galle.
9. Secretary,
Provincial Ministry of Food, Cooperative,
Roads, Electricity, Alternative Energy and
Trade, Galle.
10. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: P. Padman Surasena, J
Kumudini Wickremasinghe, J
Arjuna Obeyesekere, J

Counsel: Pasindu Silva for the Petitioners

Rajitha Perera, Deputy Solicitor General for the Respondents

Argued on: 18th October 2021

Written Submissions: Tendered on behalf of the Petitioners on 23rd February 2021

Tendered on behalf of the Respondents on 4th September 2020

Decided on: 2nd August 2023

Obeyesekere, J

The issue that arises for the determination of this Court is whether the decision of the Provincial Public Service Commission of the Southern Province [the Provincial Public Service Commission] to cancel the promotions granted by it to each of the Petitioners to the posts of District Officer for Co-operative Development or Assistant Commissioner of Co-operative Development, is arbitrary and whether it amounts to an infringement of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

Provisions of the Provincial Councils Act

In terms of Section 32(3) of the Provincial Councils Act, No. 42 of 1987, as amended, ***“The Governor shall provide for and determine all matters relating to officers of the provincial public service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principle to be followed in, making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of such officers. In formulating such schemes of recruitment and codes of conduct the Governor shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service and the codes of conduct prescribed for officers holding corresponding offices in the public service.”*** [emphasis added]

While Section 32(1) provided that, *“Subject to the provisions of any other law, the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service of such Province is hereby vested in the Governor of that Province,”* this power may be delegated to the Provincial Public Service Commission in terms of Section 32(2) of the Act, which reads thus:

“The Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service to the Provincial Public Service Commission of that Province.”

The above provisions can thus be summarised as follows:

- (a) The Governor of a Province shall provide for and determine all matters relating to officers of the Provincial Public Service;
- (b) The Governor of a Province has been vested with the power of appointment and the transfer, dismissal and disciplinary control of officers in the Provincial Public Service;
- (c) The Provincial Public Service Commission can exercise such powers of appointment, transfer, dismissal and disciplinary control only upon its delegation by the Governor and to the extent to which such power has been delegated.

It is admitted that the 1st Respondent had delegated the powers of appointment, transfer, dismissal and disciplinary control to the Provincial Public Service Commission.

The Co-operative Service and Schemes of Recruitment

The Petitioners had been appointed as Co-operative Inspectors in the Department of Co-operative Development during the period 1983 to 1988. With the subject of co-operative development being devolved to the Provincial Councils pursuant to the 13th Amendment to the Constitution, the Petitioners had been appointed as Co-operative Inspectors by the Provincial Public Service Commission. The post of Co-operative Inspector had been re-designated as Co-operative Development Officer [CDO] in 2015, and as at the time of the filing of this application, the Petitioners were serving as CDOs.

The Scheme of Recruitment that prevailed at the time the Petitioners joined the service, as well as the Scheme of Recruitment that replaced the said Scheme in 1996, contained provisions relating to the promotion of Co-operative Inspectors to the posts of District Officer for Co-operative Development [DOCD] and Assistant Commissioner of Co-operative Development [ACCD], based on seniority and satisfactory service, with satisfactory service being determined on confidential assessment reports. In January 2015, with the concurrence of the Provincial Public Service Commission, the 1st Respondent. i.e., the Governor of the Southern Province, had introduced three separate Schemes of Recruitment for CDOs, DOCDs and ACCDs. As provided for therein, all Petitioners were absorbed into Grade I of the CDO service with effect from 19th January 2015.

Appointment of the Petitioners

The Provincial Public Service Commission had decided that vacancies that existed at the time the new Schemes of Recruitment were introduced in January 2015 should be filled under the 1996 Scheme of Recruitment, while vacancies that arose after January 2015 were to be filled in terms of the criteria specified in the newly introduced 2015 Schemes of Recruitment.

Accordingly, by letter dated 3rd March 2016, the Provincial Public Service Commission had directed the Commissioner of Co-operative Development to call for applications in terms of the 1996 Scheme of Recruitment to fill three vacancies in the post of DOCD that had arisen prior to 19th January 2015. Although the 1st, 2nd, 5th and 6th Petitioners had applied and thereafter been called for the interview, they were not successful, as selection under the 1996 Scheme of Recruitment was based on seniority and satisfactory service.

On the same date, i.e., 3rd March 2016, the Provincial Public Service Commission had also called for applications to fill a further five vacancies that had arisen in the post of DOCD after the introduction of the 2015 Scheme of Recruitment, for the filling of which vacancies the Scheme of Recruitment introduced in 2015 was to apply. The notice issued by the Provincial Public Service Commission contained the criteria that had to be fulfilled by all candidates, and specifically provided that all candidates must have successfully completed all three Efficiency Bar Examinations in the CDO service.

Further to the interviews that were held on 31st May 2016 and 7th June 2016, and based on the results thereof, the 1st, 3rd, 4th, 6th and 7th Petitioners were appointed to the post of DOCD by the Provincial Public Service Commission, soon thereafter.

In addition to the above, applications had also been called on 23rd February 2016 from those in the Supra Grade of the CDO service and those who had completed five years in Grade I in the CDO service to fill three vacancies in the post of ACCD that had arisen after the introduction of the 2015 Scheme of Recruitment. This notice too specified that CDOs in Grade I must have passed all three Efficiency Bar Examinations for CDOs. Pursuant to the conducting of interviews in June 2016, the 1st, 2nd, 5th and 6th Petitioners were appointed by the Provincial Public Service Commission to the post of ACCD.

Challenging the appointments

On 21st June 2016, eighteen persons holding the posts of either CDO or DOCD and who had also faced the above interviews to fill the vacancies in the posts of DOCD or ACCD that had arisen after January 2015 but were unsuccessful, challenged the said appointments of the Petitioners by invoking the jurisdiction of this Court in SC (FR) Application No. 211/2016. While the Petitioners in this application had been named as respondents in that application, the primary complaint of the petitioners in that application was that the marking scheme attached to the 2015 Schemes of Recruitment was arbitrary and contrary to their legitimate expectations in that it departed from the existing scheme of selection based on seniority and satisfactory service, and instead sought for the first time to confer thirty of the one hundred marks to candidates possessing additional educational qualifications (Bachelors Degrees or equivalent), and professional qualifications (local or foreign training). On 23rd September 2016, this Court had granted leave to proceed in SC (FR) Application No. 211/2016 in relation to the alleged infringement of the fundamental rights of those petitioners guaranteed under Articles 12(1) and 14(1)(g) of the Constitution.

Cancellation of the appointments

The issue that culminated in this application arose when the Secretary to the Provincial Public Service Commission informed the Petitioners by his letter dated 19th December 2016 that the aforementioned promotion of the Petitioners had been cancelled

pursuant to a directive dated 2nd December 2016 issued by the 1st Respondent. Aggrieved by the said decision, the Petitioners filed this application on 27th January 2017 complaining that neither the 1st Respondent nor the Provincial Public Service Commission had any legal authority to cancel the said appointments and hence the said decision was arbitrary and illegal as well as contrary to the rules of natural justice and hence was in violation of their fundamental right to equality before the law and the equal protection of the law, as guaranteed by Article 12(1) of the Constitution. Leave to proceed in relation to the alleged infringement of Article 12(1) had been granted by this Court on 2nd August 2017. With the consent of all parties, both applications were taken up for argument together.

I shall now consider the reasons adduced by the Provincial Public Service Commission for the above decision to cancel the promotions granted to the Petitioners.

Requirement to complete the Efficiency Bar Examinations

The learned Deputy Solicitor General appearing for the Respondents submitted that Clause 8 of the 2015 Scheme of Recruitment for CDOs makes it mandatory for each CDO to complete three Efficiency Bar Examinations at the times specified therein, with the 3rd Efficiency Bar Examination having to be completed within five years of being promoted to Grade I of the CDO service. Clause 7.4.2.5 of the 2015 Schemes of Recruitment for DOCDs and ACCDs stipulated further that an applicant must have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion to the post of DOCD or ACCD. It must be noted that paragraph 4 of the letter informing the Petitioners of their absorption to Grade I of the CDO service specifically provided that the Petitioners must pass all three Efficiency Bar Examinations in the CDO service to be eligible for promotion, thus placing the Petitioners on notice of that fact.

The learned Deputy Solicitor General submitted further that none of the Petitioners had passed the 3rd Efficiency Bar Examination for CDOs and therefore were not eligible to be considered for promotion to the post of either DOCD or ACCD. Of course, one must bear in mind that this requirement to pass the 3rd Efficiency Bar Examination was only introduced in the Scheme of Recruitment issued in January 2015 and that the said examination had not been held since the introduction of the 2015 Schemes of Recruitment, with the result that it was impossible for any of the CDOs in service at that time to be eligible for promotion to the posts of DOCD and ACCD.

Exemption from the requirement to pass the Efficiency Bar Examinations

The learned Deputy Solicitor General, while submitting that none of the three Schemes of Recruitment introduced in 2015 contained any transitional provisions addressing this issue, drew the attention of this Court to Paragraph 15 in each of the three Schemes of Recruitment of 2015 which reads as follows: “මෙම බඳවා ගැනීමේ පටිපාටියේ විධිවිධාන සලසා නොමැති යම් කරුණක් වෙතොත් ඒ සම්බන්ධයෙන් දකුණු පළාත් රාජ්‍ය සේවා කොමිෂන් සභාව විමසා ආණ්ඩුකාරතුමා විසින් තීරණය කරනු ලැබේ.”

It was therefore the position of the learned Deputy Solicitor General that in the absence of any of the applicants having passed the 3rd Efficiency Bar Examination, it was imperative upon the Provincial Public Service Commission to have sought a decision from the 1st Respondent whether an exemption could be granted from the said requirement and/or whether appointments could be made in the aforementioned circumstances, taking into consideration that the said requirement had only been introduced in 2015 and that no examinations had yet been conducted.

Notwithstanding the fact that none of the CDOs had passed the 3rd Efficiency Bar Examination, and without having obtained a decision of the 1st Respondent, the Provincial Public Service Commission had proceeded to call for applications to fill the vacancies, conducted the interviews and proceeded to appoint the Petitioners to the applicable posts in June/July 2016. The learned Deputy Solicitor General submitted that in the absence of any approval from the 1st Respondent, the Provincial Public Service Commission had no mandate to appoint the Petitioners to the posts of DOCD and ACCD, and hence, the actions of the Provincial Public Service Commission are *ultra vires* the powers delegated to it in terms of Section 32(2) of the Provincial Councils Act.

Reason for the cancellation of the promotions

This issue of the Petitioners not having passed the 3rd Efficiency Bar Examination came to the forefront only after the filing of the aforementioned SC (FR) Application No. 211/2016, with the petitioners in that application claiming that the appointments of the Petitioners in this application were bad in law. By his letter dated 14th July 2016, the Commissioner of Co-operative Development (Southern Province) had sought the advice of the Secretary, Ministry of Co-operative Development (Southern Province) in this regard. The Secretary in turn had sought the advice of the Provincial Public Service

Commission, which had confirmed by its letter dated 8th August 2016 that an exemption from the above requirement was granted by the Provincial Public Service Commission, taking into consideration the fact the Petitioners had already completed five years of service in Grade I of CDO and had duly earned all salary increments.

The aforementioned letter of the Provincial Public Service Commission does not disclose whether the said decision had been taken prior to the making of the appointments of the Petitioners to the posts of DOCD or ACCD. However, pursuant to further discussions between the Provincial Public Service Commission and the 1st Respondent, the Provincial Public Service Commission had decided to cancel the aforementioned promotions and to call for fresh applications to fill the vacancies that existed in the posts of DOCD and ACCD, as the 1st Respondent had not approved the granting of an exemption. This decision had been communicated to the 1st Respondent by letter dated 8th November 2016, and the approval of the 1st Respondent for such decision of the Provincial Public Service Commission had been granted by letter dated 2nd December 2016. It is only thereafter that the decision to cancel the promotions was duly communicated to the Petitioners by letter dated 19th December 2016.

Is the cancellation of the promotions arbitrary?

The learned Counsel for the Petitioners submitted that the power of promotion delegated to the Provincial Public Service Commission included the power to grant an exemption from the aforementioned requirement with regard to the 3rd Efficiency Bar Examination and that the Provincial Public Service Commission has been pressurised into withdrawing the promotions granted to the Petitioners by those persons who filed SC (FR) Application No. 211/2016.

It was the position of the learned Deputy Solicitor General that even though the power of appointment of public officers and their promotion had been delegated to the Provincial Public Service Commission, the Commission did not have the power either in terms of the said delegation or in terms of the said Scheme of Recruitment to grant an exemption from the requirement to have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion. He submitted that this power had been conferred exclusively on the 1st Respondent by Section 32(3) of the Provincial Councils Act and that paragraph 15 in the 2015 Schemes of Recruitment stipulating that anything not

provided for in the Scheme of Recruitment shall be decided by the 1st Respondent in consultation with the Provincial Public Service Commission, is a reflection of that power.

Having carefully considered the submissions of the learned Counsel for the Petitioners and the learned Deputy Solicitor General, I am of the view that the provisions of the 2015 Scheme of Recruitment must be strictly followed in making appointments to, and promotions within, the Provincial Public Service. This includes ensuring compliance with the requirement set out in Clause 7.4.2.5 of the said Schemes of Recruitment for both DOCDs and ACCDs stipulating that in order to be eligible for promotion to either of the posts of DOCD or ACCD, the candidate must have passed the 3rd Efficiency Bar Examination stipulated for CDOs. Although the power of the 1st Respondent that is delegated to the Provincial Public Service Commission in terms of Section 32(2) includes the power to appoint or promote officers, I am in agreement with the learned Deputy Solicitor General that in the absence of any provision in the Scheme of Recruitment that enables the Provincial Public Service Commission to grant exemptions from the requirements specified in the said Schemes, and in view of the fact that decisions in respect of matters not provided for in the Schemes of Recruitment have been reserved for the 1st Respondent, the Provincial Public Service Commission did not have the power to deviate from the Schemes of Recruitment in granting the promotions.

The Provincial Public Service Commission must take full responsibility for the plight of the Petitioners, for the reason that, having introduced the new Schemes of Recruitment which contained the above requirement to successfully complete all three Efficiency Bar Examinations in order to be eligible for promotion to the post of DOCD and ACCD in January 2015, and in spite of the Schemes of Recruitment clearly specifying that the examinations must be held at least once a year, the Provincial Public Service Commission has failed to conduct the said examinations prior to calling for applications. In fact, a time period of over one year had lapsed between the introduction of the 2015 Schemes of Recruitment and the calling of applications to fill the vacancies that had arisen. In the alternative, prior to making appointments, the Provincial Public Service Commission should have consulted the 1st Respondent, and sought the approval of the 1st Respondent to exempt those candidates from the said requirement, which the Provincial Public Service Commission had failed to do.

Conclusion

In the above circumstances, I am of the view that:

- (a) the decision of the Provincial Public Service Commission to cancel the promotions granted to the Petitioners, and the subsequent approval granted by the 1st Respondent for the cancellation of the said promotions, are not arbitrary;
- (b) the decision of the Provincial Public Service Commission and the 1st Respondent is reasonable and based on discernible grounds, and is consistent with the object of ensuring that those who are promoted have acquired the necessary qualifications stipulated in the Schemes of Recruitment, unless an exemption had been granted from the said requirement, taking into consideration the peculiar circumstances that had arisen;
- (c) the fundamental rights of the Petitioners enshrined in Article 12(1) of the Constitution have not been violated by the 1st Respondent.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT