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

In the matter of an application under Article126 of the Constitution

Mrs. R.M. Dayawathi of 20/2, 14th Milepost, Walawatte, Udawala, Teldeniya.

Petitioner

Vs.

SC Application No. 459/2017 (FR)

1. The Principal,
   Girls' High School, Kandy.

2. The Director, National Schools,
   Ministry of Education,
   "Isurupaya", Battaramulla.

3. The Secretary, Ministry of Education,
   "Isurupaya", Battaramulla.

4. The Honourable Attorney General,
   Hulftsdorp, Colombo 12.

Respondents

BEFORE:	B. P. Aluwihare PC, J. Prasanna Jayawardena PC, J. Vijith K. Malalgoda PC, J.
COUNSEL:	Elmore Perera for the Petitioner Rajiv Goonetilake, SSC for the Attorney General
ARGUED ON:	06. 04. 2018
DECIDED ON:	05. 11. 2018

Aluwihare PC. J.,

The Petitioner has complained to this court that her fundamental right to equality guaranteed by Article 12 (1) of the Constitution of Sri Lanka has been infringed by the 1st Respondent by refusing admission of her daughter Aksha Arundathi to Grade 01 of Girls' High School, Kandy.

The Petitioner in her application has averred that she was born on 30. 01. 1979 and baptized as a Christian on 31. 10. 1993 in Badulla and her daughter, born on 10. 02. 2012 was baptized on 08. 07. 2012. Copies of the daughter's birth certificate and Certificate of Baptism are marked P3 and P4 respectively.

In June 2017, the Petitioner submitted a school admission application dated 10. 06. 2017 for the admission of her daughter to Grade I in Girls' High School, Kandy for the year 2018 under the quota allocated to Christian students. The Petitioner has attached along with the application, *inter alia*, a letter from Rev. M.G. Edmund J.P., Superintendent Minister, Methodist Church, Kandy and a Grama Niladhari certificate confirming the Residence and character. These documents are attached P7 and P8 respectively.

Thereafter, by letter dated 24.07. 2017, the 1st Respondent informed the Petitioner to be present for an interview on 07. 09. 2017 at 2 pm and to bring the originals and photocopies of all documents submitted.

When they duly presented themselves for the interview, the 1st Respondent has asked the Petitioner for the Deed of her residence. Upon informing that the Petitioner does not have the deed as they are not the owners of the property, the 1st Respondent has promptly asked them to leave.

Thereafter, the Petitioner together with aforesaid Rev. M.G. Edumund have appealed to the 1st Respondent drawing her attention to clause 3.2 of the **Instructions** issued by the Ministry of Education **regarding the admission of Children to Grade one in Government Schools for the year 2018**' (marked P5). Clause 3.2 of the said document specifies that "*in filling vacancies in schools vested to the government under Assisted Schools and Training schools (special provisions) Act No. 05 of 1960 and Assisted Schools and Training schools (Supplementary provisions) Act No. 08 of 1961, the proportion of children belonging to different religions at the time of vesting the school to the government will be taken into consideration and the number of vacancies in the said school shall be accordingly divided among different religions and the categories.*"

Pursuant to the said appeal, the 1st Respondent informed the Petitioner to be present before the Appeals Board on 14. 11. 2017. At the Appeal hearing too, the Petitioner was asked to produce the deed to their residence and the Petitioner informed the Board that they do not have a deed as their place of residence is owned by the husband's unmarried brother. In its place, they produced additional documents confirming their residence namely the Grama Niladhari Certificate and provided proof that their names have been registered in the Electoral register. The Appeal Board at the end of the hearing awarded them a total of 20 marks (marked P13) and informed that the final list will be posted on 10. 12. 2017. However, the Petitioners state that their daughter's name was not included in the list.

The Petitioner claims that the non-admission of her daughter to Grade 01 of High School Kandy is violative of Article 12 as the 1st Respondent failed to give regard to clause 3.2 of the P5 which states that due consideration should be given to *the proportion of children belonging to different religions at the time of vesting the school to the government.* She further states that, at the time of vesting to the Government, Girls' High School Kandy had 968 students from which 373 students were Christians. Accordingly, the admission

for Year 2018 has to maintain a proportion of 38.53% of Christian students which would amount to 75 students. She alleges that since the required quota has not been achieved for the Year 2018, her daughter should be admitted to the school as of right on the basis of her religion.

The 1st Respondent in her objections has expressed doubts about the religion of the Applicant on the premise that the Grama Niladhari certificate bears an alteration in relation to the Petitioner's religion and that the Certificate of Baptism bears 2017 as the year of issuance. She further claims that in terms of the **Circular no. 22/2017** (marked R1), applicants who apply under the proximity/vicinity category must establish their residence by resorting to the specific documents specified therein and that anyone who is unable to support the claim of residence in this manner is liable to have the application rejected. She also states that, in any event, the School has met the respective quota for the year 2018 and that the Petitioner's daughter, notwithstanding the failure to prove the residence, cannot be admitted.

For the present purposes, it is important to first determine the percentage which the school must maintain under clause 4.2 of the **Circular No. 22/2017** and clause 3.2 of the **Instructions regarding the admission of Children to Grade one in Government Schools for the year 2018** [hereinafter "Instructions"]—which is the identical English reproduction of the aforesaid clause 4.2. In order to ascertain the proportions of students, I refer to the document marked P14 –submitted by the Petitioner, and relied on by the Respondent—which is a report of the proceedings of the Methodist Church Synod held in 1961. According to this report, in 1961, there had been 968 students learning at Girls' High School of which 373 students belonged to the Christian faith. These 373 students were further sub-categorized into Methodists and students belonging to other denominations. Thus, at the point of vesting, Girls' High School, Kandy housed 81 Methodist students from a total of 968. This reflects an approximate percentage of 8.36 which the school has maintained under clause 4.2 of the Circular No. 22/2017 over the years.

The 1st Respondent has brought to the attention of this Court the numbers relevant for the year 2018. The total number of vacancies for Grade I, 2018 were 190 out of which

25 seats had to be reserved for children of those in the armed forced who served in operational areas. This left 165 seats to be allocated among the different categories of admission. According to the 1st Respondent, 50% of the said 165 was allocated to the proximity category, which amounts to 83 seats. It is from the said 50% that a further 8.36% had to be reserved for Methodist children—which constituted 7 seats. The 1st Respondent has informed this Court that already 12 Methodist students have been admitted.

The Petitioner argues that clause 3.2 of the Instructions, which is identical to clause 4.2 of the Circular no. 22/2017, permits "*when there are no applicants from a religion or when the number of applications from a religion is less than the number of vacancies set apart for that religion,* ***such applicants will all be admitted and the remaining vacancies shall then (and only then) be proportionately divided among other religions***" [emphasis added by the Petitioner]

However contrary to what is claimed by the Petitioner, clause 3.2 imposes no such mandatory requirement on the school administrators to admit all applicants based on their religion to fill the vacancies. It only stipulates that;

> "*In filling vacancies in schools vested to the government under Assisted Schools and Training schools (special provisions) Act No. 05 of 1960 and Assisted Schools and Training schools (Supplementary provisions) Act No. 08 of 1961, the proportion of children belonging to different religions at the time of vesting the school to the government will be taken into consideration and the number of vacancies in the said school shall be accordingly divided among different religions and the categories. When the number of applications is less than the number of vacancies set apart for a given category of a religion, remaining vacancies shall be proportionately divided among other categories of the same religion. When there are no applicants from a religion or when the number of applications from a religion is less than the number of vacancies set apart for that religion, such applicants will all be admitted and the remaining vacancies shall then (and only then) be proportionately divided among other religions*"

The Petitioner's argument proceeds on the basic premise that for the purposes of clause 3.2, the School must allocate the vacancies taking *Christianity* as the only basis and not its different denominations. However, as stated, the School has allocated seats giving due recognition to this distinction. This distinction is also reflected in P14—the document relied on by the Petitioner. For the year 2018, the 1st Respondent has already admitted 12 students although the allocated number of seats were only 7. As to how the 1st Respondent admitted 5 students in excess of the quota reserved for the proximity category has not been explained by the 1st Respondent. Nevertheless, that alone cannot compel this Court to make a finding that the school has proceeded on the basis of Christianity and not on the denominations. The excess of 5 seats could also have been the result of residual seats being proportionately divided among the categories due to lack of applicants in some other category. Since there is no evidence nor any allegation disputing that the 1st Respondent has adopted an inaccurate classification, I am of the view that the School' allocation of seats to Methodist students for 2018 is correct. Consequently, this means that the Girls' High School, Kandy, by admitting 12 Methodist students under the proximity category (for reasons undisclosed and unchallenged) has already exceeded the quota for that category for the relevant year.

Also implicit in the Petitioner's argument is the contention that, even if a Methodist applicant (or an applicant belonging to other faith) fails to meet the criteria for admission, they must be admitted solely on the basis of their religion if there are vacancies remaining in a particular quota. The learned Counsel for the Petitioner has cited **SC FR 335/2016** where it was held that "*Anyhow when a Christian child has applied to be admitted to Kingswood College, Kandy under any category, if the documents show that he is a Christian and if the number of Christian children already admitted are not above the allowed percentage of 20% intake under the religion category, then that child has a right to be admitted under clause 3.2 of the circular*".

However, it is important to note that in the said case, the issue pertaining to proof of residence was resolved in favor of the Petitioner. Furthermore, the Respondent in that case had admitted only 1 child under the proximity category. In view of the said factual matrix, it cannot be said that the said judgment confers on an applicant the right to gain admission to a school solely based on the religion, irrespective of their ineligibility. That

would amount to a surreptitious by-passing of the procedure. At the very least, there must be evidence on the record to show that the applicant fulfills the bare minimum qualifications for the admission.

The Circular no. 22/2017 proceeds taking certain predetermined categories of applicants as its basis. These categories are clearly spelled out in the circular along with the respective qualifications. A candidate must prefer his or her application under one of these categories to gain admission. If religion was to be the sole criteria for eligibility, the circular could have made it a separate category. The fact that it isn't, means that religion must be viewed within the framework of the overarching eligibility criteria. The religious quota is a special factor for consideration—and not a separate tier of admission. It does not make eligible an otherwise ineligible applicant. This is the reason for proportionately dividing remaining slots apportioned to a religion among other categories—to facilitate the intake of eligible candidates in other categories.

Thus, the issue we must in fact determine is whether the Petitioner in the present instance has established their proof of residence and the fact of Baptism.

Although the 1st Respondent disputes the certificate of Baptism, I am not inclined to believe that the certificate is not genuine and by extension that the Petitioner's daughter is not a Christian. The Respondent has not disputed the fact that it was issued in 2017, and for the particular purpose of preferring the School admission application. The Petitioner has also produced letters and interventions made by Rev. M.G. Edmund J.P., Superintendent Minister, Methodist Church, Kandy on behalf of the Petitioners in relation to the school admission. In those circumstances, I see no reason to disbelieve that the Petitioner's daughter was baptized as a Christian.

However, by their own admission, the Petitioners are not the owners of the residence. In terms of the circular therefore, they would be not be entitled to receive most amount of marks given to different types of documents through which an applicant is called to prove residence. These marks are given based on the strength of proof—the highest being given to a title deed and the lowest being given to other documents such as the National Identity Card, Water Bills, Birth certificates etc. This last category is not exhaustive and I would

state that, where the circumstances so warrant, they could include a Grama Niladhari certificate.

As correctly contended by the counsel for Petitioner, the lack of a title deed does not empower the 1st Respondent to outright reject the Petitioner's application at the interview. A rejection could only take place if the applicant has not produced an iota of evidence supporting their claim. In the present case, the Petitioner has presented a Grama Niladhari certificate to support their claim for residence. Albeit very low, that document was entitled to receive a set mark on par with Telephone bills and other similar documents. In those circumstances, the 1st Respondent was wrong to reject their application simply because the Petitioner did not have a title deed.

Nevertheless, I observe that due consideration was given to these factors at the appeal stage. The Appeal Board has awarded the Petitioner 02 marks under the heading "පදිංචිය තහවුරු කරන අතිරේක ලේඛන", indicating that the Grama Niladhari certificate was admitted as a valid document supporting the claim of residence. This establishes that the Petitioner resides within the Administrative district of Kandy.

Thus, there is evidence to support that the Petitioner's daughter fulfils the bare minimum qualifications for admission. The next question is therefore to see whether there is room to accommodate the Petitioner's daughter's application. As admitted by both parties, the Petitioner's application has only succeeded in obtaining 20 marks. No doubt, this would place their application at a clear disadvantage. However, by virtue of clause 4.2 of Circular No. 22/2017, this disadvantage could be overcome if there are seats remaining in the Methodist quota. Even if there are seats remaining, preference must undoubtedly be given to those who have obtained higher marks in the same proximate *cum* religious category. It is subject to these considerations, could the 1st Respondent consider the admission of the Petitioner's daughter.

However, we are informed that the School has already exceeded the relevant quota for Methodist students under the proximate category. Therefore, the Petitioner's daughter could only be admitted, subject to the above specified conditions, if there are residual seats in the other 4 categories which, in terms of the Circular, ought to be proportionately divided among the remaining categories. There is no material before us to determine

whether any such seats were left vacant in other categories. However, the 1st Respondent has informed this Court that 13 Methodist students in total have been admitted to Grade I for the year 2018. This corresponds to the aforesaid 8.36% percentage which the School has maintained under clause 4.2 of the Circular No. 22/2017. It appears therefore that there is no room to accommodate the Petitioner's daughter's application, in the facts and circumstances of the Petitioner's case.

Where an equal protection claim is advanced, an intentional and purposeful discrimination must be shown by any person protesting discrimination in the administration of the law. In **Wijesinghe v Attorney General [1978-79-80] 1 SLR 102** His Lordship Justice Wanasundera with whom Justice Sharvananda and Justice Ismail agreed, quoting Stone CJ.'s dictum in ***Snowden v Hughes***, held that:

> "*The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.*"

In the present case, the School has conducted their admission process based on the proportion of children belonging to different denominations that existed at the time of vesting the school to the government, as reflected in "P14." The Court cannot necessarily fault them for adopting the said criterion since it is not repugnant to the statutory requirements. The Respondent has also drawn attention to the fact that they have been unable to admit two other candidates, despite them securing 45 marks and 74 marks, as the relevant quota for that year has been filled. Where this is the case, I cannot conclude that the Respondents acted with an insidious discriminatory purpose when they refused to admit the Petitioner's daughter. Every similarly circumstanced candidate in the non-Roman Catholic category has been treated in the similar manner.

Therefore, having considered the facts and circumstances in this case, I hold that the Petitioner has failed to establish that 1st Respondent has violated her right guaranteed under Article 12 (1) of the Constitution.

Accordingly, this Application is dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC.
I agree

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH. K. MALALGODA PC.
I agree

JUDGE OF THE SUPREME COURT