

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. 14/2017

1. N.C. Gajaweera,
No. 366/15A, 3rd Lane,
Dharmapala Road, Pamburana, Matara.
2. D.C. Wewitawidhane,
No. 118, School Road, Gurulana,
Bope, Padukka.
3. S.D. Bandusiri,
'Manel,' Elaihala, Kolonne.
4. S.A.C. Ashoka,
M2, STF Quarters, Gonahena, Kadawatha.
5. D.M.U.K. Abeyratne,
No. 38/2, Medagoda, Pujapitiya.
6. W.R.V.M. Abeysekera,
'Sekkuwatte,' Pannala, Kurunegala.
7. H.K.R.A. Henepola,
A/3/1, STF Quarters,
Biyawila, Kadawatha.
8. W.G.A. Premasiri,
No. 137/9, Old School Road, Aluwihare,
Matale.
9. S.A.S.L. Bandara,
No. 36, Diddeniya Watte,
Dambokke, Kurunegala.

PETITIONERS

Vs.

1. Prof. Siri Hettige
- 1A. P.H. Manatunga
- 1B. K.W.E. Karaliyadda
- 1st, 1A & 1B Respondents –
Chairman, National Police Commission
2. P.H. Manatunga,
- 2A. Prof. Siri Hettige
- 2B. Gamini Nawaratne
3. Savitree Wijesekara
4. Y.L.M. Zawahir
5. Anton Jeyanadan
- 5A. Asoka Wijetilleke
6. Tilak Collure
7. F. de Silva
- 7A. G. Jeyakumar
- 2nd, 2A – 7A Respondents are members of
the National Police Commission
8. N. Ariyadasa Cooray,
Secretary, National Police Commission
- 8A. Nishantha A Weerasinghe
Secretary, National Police Commission
- 1st to 8A Respondents at the
National Police Commission, BMICH,
Buddhaloka Mawatha, Colombo 7.
9. Pujith Jayasundara,
Inspector General of Police.
- 9A. C.D Wickremaratne,
Inspector General of Police.

9th and 9A Respondents at
Police Headquarters, Colombo 1.

10. Jagath Wijeweera,
Secretary, Ministry of Law and Order and
Southern Development,
Sethsiripaya Stage II, Battaramulla.
- 10A. Major General Kamal Guneratne,
Secretary, Ministry of Internal Security,
Elvitigala Mawatha, Colombo 5.
- 10B. Major General Jagath De Alwis,
Secretary, Ministry of Public Security,
Battaramulla.
11. R.M. Wimalaratne,
No. 592/1, Moragathalanda Road,
Arawwala, Pannipitiya.
12. A.P.M. Pigera,
No. 309, Abaya Mawatha, Nagoda, Kalutara.
13. Y.P.P.K. Wijayasundara,
No. 425/5B, Makola South, Makola.
14. H.D. Wattegedera,
No. 29/C1, Centre Road, Ratmalana.
15. W.R.A.D.A.K. Ranasinghe,
'Shanthi,' Battuwatta, Ragama.
16. R.M.S. Jayatissa,
N1, STF Quarters, Gonahena, Kadawatha.
17. Hon. Attorney General,
Attorney General's Department, Colombo 12.
18. Hon. Justice Jagath Balapatabendi,
Chairman
19. Indrani Sugathadasa
20. V. Shivagnanasothy
21. T.R.C. Ruberu

22. Ahamed Lebbe Mohamed Saleem
23. Leelasena Liyanagama
24. Dian Gomes
25. Dilith Jayaweera
26. W.H. Piyadasa

19th – 26th Added Respondents are members of the Public Service Commission

18th to 26th Added Respondents all of the Public Service Commission, No. 1200/9, Rajamalwatta Road, Battaramulla.

RESPONDENTS

Before: Vijith K. Malalgoda, PC, J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Viran Corea, PC with Thilini Vidanagamage for the Petitioners

Rajiv Goonetilleke, Deputy Solicitor General for the 1st – 10th and 17th Respondents

Rasika Dissanayake with Chandrasiri Wanigapura for the 11th, 14th and 16th Respondents

J.M. Wijebandara with Chamodi Dayananda for the 15th Respondent

Argued on: 17th November 2022

Written Submissions: Tendered on behalf of the Petitioners on 16th October 2020 and 21st December 2022

Tendered on behalf of the 1st – 10th and 17th Respondents on 15th November 2021 and 27th December 2022

Decided on: 20th March 2024

Obeyesekere, J

The issue that needs to be determined in this application is whether the decision of the National Police Commission reflected in its letter dated 29th November 2016 [R2B] to appoint the 11th – 16th Respondents to the rank of Assistant Superintendent of Police [ASP] without following the procedure laid down in the Procedural Rules of the Public Service Commission is arbitrary and violative of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

At the time of the filing of this application, the Petitioners were Chief Inspectors of Police attached to the Special Task Force of the Police Department. The 11th – 16th Respondents too were attached to the Special Task Force and held the rank of Chief Inspector of Police until their impugned promotion to the rank of ASP in December 2016. The Petitioners have subsequently been promoted to the rank of ASP based on the results of an interview held in 2019, and their appointments have been backdated to 10th July 2018. The learned President's Counsel for the Petitioners however submitted that the Petitioners are desirous of pursuing this application for a declaration that their fundamental rights guaranteed by Article 12(1) have been infringed by the National Police Commission [the 1st – 8th Respondents], the Inspector General of Police [the 9th Respondent] and the Secretary, Ministry of Law and Order [the 10th Respondent] and an order that their promotion to the rank of ASP be backdated to the same date as that of the 11th – 16th Respondents.

Calling for applications

By a notice issued in August 2014 [P3], the Commandant of the Special Task Force had called for applications for promotion to the rank of ASP from Chief Inspectors of Police attached to the Special Task Force to fill the cadre vacancies that existed in that rank within the Special Task Force. The said notice stipulated further that in order to be eligible to apply, an applicant had to be a Chief Inspector of Police confirmed in the rank and possess an unblemished record of service during the period of five years immediately prior to 13th January 2014, **which was the date on which the vacancies that were to be filled had arisen**. Whilst reiterating the above criteria, the marking scheme attached to the said notice provided that a total mark of 100 would be allotted on the following basis:

- (a) 50 marks for the period of service in the rank of Chief Inspector of Police, with 5 marks being allotted for each year completed in such rank.
- (b) A maximum 20 marks for outstanding performance and service in Functional Divisions / serving as an Officer Commanding in STF, while being in the rank of Chief Inspector of Police. This was split into four sub-components, with a maximum of 10 marks being allotted for having been an Officer-in-Charge of a Functional Division, a maximum of 10 marks for serving as an Officer Commanding, a maximum of 6 marks for commendations received while serving as a Chief Inspector of Police, and a maximum of 4 marks for special rewards received while being in the rank of Chief Inspector of Police.
- (c) 5 marks for medals.
- (d) 4 marks for achievements in sports while in the rank of Chief Inspector of Police.
- (e) 8 marks for academic and professional qualifications acquired while serving as an Inspector of Police or Chief Inspector of Police.
- (f) 3 marks for language skills.
- (g) 10 marks for performance at the interview.

Categories (b), (d) and (e) related to the period that an applicant had served as a Chief Inspector of Police, thus stressing the importance of having acquired such qualifications while serving in that rank.

Interviews and initial appointment of 15 ASP's

A total of 39 applications, including those of the Petitioners and the 11th – 16th Respondents had been received in response to the notice P3. All applicants had been called for the interview that was conducted by the Promotion Board on 14th and 29th May 2015. By RTM 158 dated 3rd March 2016 [P4], the appointment of fifteen applicants to the rank of ASP **with effect from 13th January 2014** was announced by the Acting Inspector General of Police. It is perhaps important to reiterate that the appointments were made with effect from 13th January 2014 since that was the date on which the vacancies for which P3 had been issued had arisen.

The Petitioners claim that even though the Promotion Board had considered extraneous matters and awarded marks outside the marking scheme, the Petitioners did not challenge the said appointments except for an appeal made by the 1st Petitioner to the National Police Commission against his non-selection, which appeal admittedly had not been considered by the National Police Commission even at the time of the filing of this application in January 2017. Be that as it may, the process that commenced in August 2014 to fill the vacancies that existed on 13th January 2014 ought to have come to an end with the aforementioned promotions made in March 2016.

Promotion of the 11th – 16th Respondents

It is an admitted fact that the Department of Management Services created **six cadre vacancies** in the rank of ASP by its letter dated 24th March 2016 and a further twelve cadre vacancies in the rank of Superintendent of Police, again with effect from the same date. The Petitioners state that as at 1st December 2016, there were nineteen vacancies in the ASP cadre within the Special Task Force, a claim which has not been contradicted by the 1st – 10th Respondents, even though there is some ambiguity whether the number of vacancies ought to have been eighteen.

The Petitioners state that they were expecting the National Police Commission to call for applications to fill the said nineteen vacancies, in accordance with the procedure set out in the Procedural Rules of the Public Service Commission to which I shall advert later. However, instead of calling for fresh applications as required by the Procedural Rules, by an internal circular dated 3rd December 2016 [P6] the Commandant of the Special Task Force notified that the 11th – 16th Respondents had been appointed to the rank of ASP with effect from 24th March 2016.

It is common ground that these appointments were based on the results of the aforementioned interview held in May 2015. I must state that according to the marks sheet of the said interview tendered to this Court by the learned Deputy Solicitor General together with a motion dated 5th October 2021, the 11th – 16th Respondents were placed just below the fifteen candidates who received appointments in March 2016. Thus, the said fifteen successful candidates and the 11th – 16th Respondents had

secured more marks than the Petitioners, irrespective of whether it is the aggregate mark or the aggregate mark less the mark given for the interview that is considered.

According to the National Police Commission, the vacancies which were filled with the said appointments of the 11th – 16th Respondents had arisen as a result of the aforementioned increase in the cadre positions in the rank of ASP within the Special Task Force. It must however be noted that although the name of the 15th Respondent appears on the list of officers promoted with effect from 24th March 2016, the 15th Respondent had received his promotion as an ASP with effect from 1st January 2008 pursuant to a settlement entered into by the National Police Commission in SC (FR) Application No. 453/2010 on 21st October 2016, which means that the appointment of the 15th Respondent is outside the appointments made pursuant to the said cadre increase.

Infringement of Article 12(1) of the Constitution

Aggrieved by the said decision of the National Police Commission to appoint the 11th – 16th Respondents on the results of the interviews held in May 2015 without calling for fresh applications to fill vacancies that had arisen after 13th January 2014, the Petitioners invoked the jurisdiction of this Court in terms of Article 126(1) claiming that their fundamental right to the equal protection of the law guaranteed by Article 12(1) has been infringed by the 1st – 10th Respondents. The Petitioners had sought *inter alia* a declaration that the decision of the 1st – 10th Respondents to promote the 11th – 16th Respondents is violative of Article 12(1), and in the alternative, that the Petitioners be promoted to the rank of ASP with effect from 24th March 2016. It must perhaps be noted that the Petitioners have not prayed for a specific order to quash the appointments of the 11th – 16th Respondents, even though such a result is a possible consequence were this Court to grant the above declaration.

Article 12(1) of the Constitution provides that, “*All persons are equal before the law and are entitled to the equal protection of the law*”. Reviewed in the backdrop of this case, Article 12(1) in its own right, or together with Article 12(2) brings within its reach equal opportunity for employment and such guarantee of equality applies not only in the matter of selection for employment, but also at the stage of selection for promotion.

In **W.P.S. Wijeratne v Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC minutes 11th December 2020], Kodagoda, PC, J stated that, *“It is well settled law that, at the core of Article 12 of the Constitution is a key concept, namely the concept of ‘equality’. The concept of equality is founded upon the premise that, all human beings are born as equals and are free. ... The right to equality is a fundamental feature of the Rule of Law, which is a cornerstone of the Constitution of Sri Lanka, and hence the bounded duty of the judiciary to uphold.”* [emphasis added]

Shirani Bandaranayake, J (as she then was) held in **Karunathilaka and Another v Jayalath de Silva and Others** [2003 (1) Sri LR 35; at pages 41 - 42] that:

“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 v Ceylon Petroleum Corporation and Others** [(2001) 2 Sri LR 409; at pages 416 – 417], 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.

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.*** [emphasis added]

It is in the above background that the learned President's Counsel for the Petitioners submitted that:

- (a) Failure to follow the Procedural Rules in promoting the 11th – 16th Respondents is arbitrary and is an infringement of the Petitioners right to equality guaranteed by Article 12(1);
- (b) Calling for applications would have afforded the Petitioners with an equal opportunity of competing with the 11th – 16th Respondents for the vacancies that had arisen in March 2016 pursuant to the increase in cadre positions;
- (c) The Petitioners would have performed better than at the previous interview held in May 2015 as they had acquired more qualifications since 13th January 2014 under the categories listed at (b), (d) and (e) above;
- (d) It is illegal and arbitrary to act on the results of an interview to fill vacancies that had arisen after such interview has been concluded and that too, after the initial vacancies had been filled.

The above submissions require me to consider three matters. The first is to consider whether it is mandatory to follow the Procedural Rules, and whether there has been a failure to do so. If answered in the affirmative, the second matter that I must consider is whether the Petitioners have satisfied this Court that the aforementioned decision of the National Police Commission has deprived the Petitioners of an equal opportunity for promotion to the rank of ASP. If this too is answered in the affirmative, I shall finally consider the reasons for the deviation and whether such reasons are unreasonable and unfair and is therefore arbitrary.

The Procedural Rules and Article 12(1)

It is admitted that the Procedural Rules on appointment, promotion and transfer of public officers [the Procedural Rules] prepared by the Public Service Commission by virtue of the powers vested in it in terms of Articles 61B and 58(1) of the Constitution have been adopted by the National Police Commission and are applicable to the impugned promotions.

Prior to the promulgation of the Procedural Rules, the procedure that was required to be followed with regard to appointments, promotion, transfer etc., were set out in the

Establishments Code [the Code]. The need to strictly adhere to and follow the provisions of the Code has been repeatedly emphasised by this Court over the years.

In **Elmore Perera v Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and Others** [(1985) 1 Sri LR 285], it was held by Wanasundera, J that:

“It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. These procedures are therefore mandatory and cannot be superseded or disregarded without due legal authority.” [page 335]

“This Code constitutes the norm and embodies the necessary safeguards to protect the rights of public officers. It constitutes the state of the law on this matter and is and should be applicable, without exception, to all public officers of the class or category to which the petitioner belongs. Any departure in a particular case from this basic norm, which is of general application, would be a deprivation of the protection given by the law and must be regarded as unequal treatment and a violation of Article 12(1) of the Constitution.” [page 338][emphasis added]

Kulatunga, J observed in **Perera v Ranatunga** [(1993) 1 Sri LR 39] that the Establishments Code had been formulated in pursuance of the duty cast on the Cabinet to provide for and determine all matters of policy relating to the appointment, transfer, dismissal and disciplinary control of public officers and that, accordingly, the Code is in the nature of ‘..... a constitutional recognition of the concept of the Rule of law, in particular, that government should be conducted within the framework of recognised rules and principles and that, in general, decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The relevant provisions of the Establishments Code are in conformity with this concept and through Article 55 (4) are made complementary to Article 12.”

Even though the Procedural Rules may not stand on the same legal pedestal as the Code, the principle sought to be established by this Court by drawing a nexus between

the provisions of the Code and Article 12(1) would apply with equal force to the Procedural Rules.

The importance of having a well-defined set of rules and adhering thereto was emphasised in **K.W.S.P Jayawardhana v Gotabhaya Jayaratne** (SC (FR) Application No. 338/2012; SC Minutes of 07th September 2018), where Prasanna Jayawardena, PC, J observed that, “... *it is hardly necessary to emphasize that, the efficiency and integrity of the public administration system of a country is dependent on the quality of the officers who serve that system. Therefore, it is important to ensure that the recruitment of such officers is made in the best possible manner. **A key to achieving that objective is to ensure that recruitment to the Public Service of a country is effected according to published procedures which incorporate proper selection criteria and due and fair process.***” [emphasis added]

Similar sentiments were expressed in **W.P.S. Wijeratne v Sri Lanka Ports Authority and Others** [supra] where it was held that:

*“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.**”* [emphasis added]

There are three Rules in Chapter III of the Procedural Rules which capture the need to have a well-defined and well demarcated set of criteria for appointment together with the resultant requirement for strict adherence with such Rules.

The first is Rule 34 which provides that, *“For each approved service in the public service, there shall be a Service Minute and for each post falling outside those services, there shall be a Scheme of Recruitment. Such Service Minute or Scheme of Recruitment shall contain qualifications for recruitment, method of recruitment, salary scales, service conditions, methods of promotion and all other relevant information.”*

The second is Rule 29 in terms of which, *“All appointments in the public service, other than casual and substitute appointments shall be made in accordance with the Service Minute or the Scheme of Recruitment of the respective post.”*

The third, and the Rule which is most critical to this application is Rule 25, which reads as follows:

*“To fill vacancies in the public service **the appointing authority shall call for applications by advertisement** in accordance with the service minute or scheme of recruitment approved by the Commission except where the appointment is on acting basis or to attend to the duties.”* [emphasis added]

Calling for applications to fill vacancies that arise, giving due notice of such vacancies and thereby creating a level playing field for all those eligible to apply is the best way of eliminating opaqueness in the selection process. Rule 25 reflects the policy reasoning of affording everyone eligible in applying for a particular post fair notice of such vacancy, and therefore a fair and equal opportunity of being selected, thereby encapsulating the essence of Article 12(1). Such provisions must be followed, and to do otherwise would be unreasonable and arbitrary.

The need to maintain transparency at all times

A fundamental requirement inherent in a fair selection process is the need to maintain transparency throughout all stages of recruitment and promotion. The fact that transparency is cardinal in the filling of vacancies and that transparency must be maintained at all times is reflected in Rule 189 of the Procedural Rules, in terms of which, *“The process of promotion shall be conducted in a transparent manner so that it will generate confidence among the Public Officers that **promotions are done solely as provided for in the Service Minute or the Scheme of Recruitment** and not in any other manner or due to extraneous influences.”* [emphasis added]

The key emphasis in Rule 189 is that the process must be carried out in a manner that generates confidence among Public Officers that the Service Minute and the Scheme of Recruitment will always be followed and adhered to. The emphasis on ensuring transparency and for that purpose, creating a Service Minute and a Scheme of Recruitment and adhering thereto is explicitly recognised by the Public Service Commission in the introduction to its 'Guideline for Preparing Schemes of Recruitment' where it is stated that, "*Streamlined Schemes of Recruitment should be prepared in order to recruit persons replete with most appropriate knowledge, skills and attitudes to the respective positions in a transparent manner with a view to efficiently maintaining the public service with high productivity **providing equal opportunities to all those who fulfill required qualifications.***" [emphasis added]

Mark Fernando, J in **Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others** [(2001) 1 Sri LR 132; at page 143] stated that:

*"Respect for the Rule of Law requires the observance of minimum standards of openness, fairness, and accountability in administration; and this means – in relation to appointments to, and removal from, offices involving powers, functions and duties which are public in nature – that **the process of making a decision should not be shrouded in secrecy, and that there should be no obscurity as to what the decision is and who is responsible for making it.**"* [emphasis added]

In **Perera and Nine Others v Monetary Board of the Central Bank of Sri Lanka and Twenty-Two Others** [(1994) 1 Sri LR 152; at page 166] Amerasinghe, J expressed similar views when he held that:

"Transparency in recruitment proceedings would go a long way in achieving public expectations of equal treatment. The selection of a person must be viewed as a serious matter requiring a thoroughgoing consideration of the need for the services of an officer, and a clear formulation of both the basic qualities and qualifications necessary to perform the services, and the way in which such qualities and qualifications are to be established. In order to ensure that justice is done and seen to be done, it is at least desirable that cadres, the criteria for

selection, the method of selection and the eventual basis for selection – for instance by the publication of marks obtained – be made known to those concerned. Ideally, the whole process from the determination of the cadre to selection must be easily recognized and seen through, if not obvious. A selection process veiled in secrecy and not openly avowed and expressed is at least open to the suspicion of the existence of something evil or wrong. It is of a questionable character.” [emphasis added]

Thus, the stated intention of the Public Service Commission in formulating the Procedural Rules which have been adopted by the National Police Commission is to create a level playing field thus affording an equal opportunity to those who are eligible for any appointment or promotion, as the case maybe, and to ensure the selection of the most suitable person through a transparent recruitment/promotion process. While the path to ensuring such transparency is laid down *inter alia* in Rules 25, 29 and 34 to which I have already referred to, in reality, this would generally be achieved if applications are called for once the vacancies arise and the due process laid down in the Procedural Rules are followed, and not where scores and ranks from old interviews are dug up in an arbitrary manner to fill vacancies that arose years after the date on which the initial vacancies had arisen, and well after the interviews and the selection procedure had been completed.

Absolute or unfettered discretion

While the adoption of scores from previous interviews would, on the face of it, be contrary to the Procedural Rules, I must observe that deviation from the Procedural Rules is permissible in terms of Rule 3 which provides that, “**Subject to Article 12(1) of the Constitution the Commission reserves to itself the right to deviate from rules, regulations and procedure laid down by the Commission under exceptional circumstances.**” [emphasis added].

Although deviation from the Rules is permissible, it is duly recognised that such deviation cannot be violative of Article 12(1). Furthermore, deviation must not only be the exception but should only be done in exceptional circumstances. The reasons for such deviation demonstrating the existence of reasonable grounds for such deviation and the reasons for such deviation shall accordingly be recorded.

Even though the National Police Commission has a discretion in deciding to deviate from the procedure laid down in the Procedural Rules, such discretion must be exercised reasonably. As held in the Order of this Court read out by Chief Justice G.P.S. De Silva in **Premachandra v Jayawickreme and Another** [(1994) 2 Sri LR 90], *“There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.”*

Mark Fernando, J in **Jayawardena v. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others** [supra; at page 159], stated that, *“It is accepted today that powers of appointment and dismissal are conferred on various authorities in the public interest, and not for private benefit, that they are held in trust for the public and that the exercise of these powers must be governed by reason and not caprice.”*

In **“The Modern Benchmarks of Sri Lankan Public Law”** [Dr Mario Gomez; (2001) 118(3) South African Law Journal 581] the author, referring to several judgments of this Court, has stated that:

“It [the Court] has conceptualised the holders of public power as trustees: public institutions and personalities hold power in trust to be used solely for public benefit. That power is never unfettered or absolute. That power must be exercised fairly. This means that, at least, public decision-making should be transparent, reasonable and fair. It cannot be exercised in an arbitrary or capricious manner. It has also come to mean that government should be conducted within a framework of recognized rules and principles.” [at page 586]

“Discretionary powers given to public institutions are never untrammelled. They are to be used to achieve the purpose for which they were conferred. Arbitrary and unreasonable decisions are the antithesis of fair play and equal treatment. They violate the 'trust' placed in public officials.” [at page 592]

In the Determination of this Court in The Special Goods and Services Tax Bill [SC/SD/1-9/2022, page 36], it was observed that, “... *absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision making, (ii) abuse of power, (iii) corruption, and (iv) the roadway to depredation of the Rule of Law. On all such accounts, it results in an infringement of Article 12(1) of the Constitution which guarantees equal protection of the law.*”

It is therefore clear that arbitrariness and unreasonableness in decision-making in selections, appointments and promotions deprives a citizen of the equal opportunities that he is entitled to, are inconsistent with the concept of equality and attracts Article 12(1) of the Constitution.

Any deviation by the National Police Commission from the procedure laid down in the Procedural Rules would be arbitrary in the absence of proper justification for such deviation. An arbitrary exercise of discretion is *per se* violative of Article 12(1) and particularly in the context of the facts of this case such arbitrary exercise of discretion has also resulted in depriving the Petitioners of an equal opportunity of being considered for promotion and unequivocally paved the way to a violation of Article 12(1).

Chapter VII of the Procedural Rules

The procedure that should be followed by the Public Service Commission in making appointments is set out in Chapter VII of the Procedural Rules. Rules 62 – 65 in particular highlight the strict procedure that has been put in place to ensure that due process is followed.

The first step as set out in Rule 62 reads as follows:

*“Where the Head of Department recommends the filling of the vacant post he shall forward to the Administrative Authority a certified copy of (the) Service Minute or Scheme of Recruitment in force, **a draft advertisement calling for applications** prepared in accordance with the approved Service Minute or Scheme of Recruitment, where the selection is to be based on a structured*

interview its marking scheme, and the persons recommended for inclusion in the interview board in terms of Section 69 & 70.” [emphasis added]

The second step is contained in Rule 63 and provides as follows:

*“The Administrative Authority of the respective service or post shall forward to the Commission without delay the documents mentioned in Rule 62 above for approval together with his recommendations. On receipt of the approval from the Commission, the Administrative Authority **shall make arrangements to call for applications as per the approved advertisement** internally or externally, as the case may be, by advertisement in the Government Gazette and/or national newspapers.” [emphasis added]*

Rule 64 sets out the third step that should be followed, upon the receipt of applications and requires the Administrative Authority to *“take action to **duly hold the competitive examinations and/or interviews** as the case may be in accordance with the service minute or scheme of recruitment, marking scheme and forward to the Commission the list of applicants prepared in order of merit together with examination results, interview Schedules, the number of posts for which appointment should be made and the recommendation of the Board of Interview.” [emphasis added]*

The role of the Public Service Commission and in this case, the National Police Commission is laid down in Rule 65, which reads as follows:

*“On receipt of document in terms of Section 64, **the Commission having satisfied itself that examinations and/or interviews have been held in accordance with the Service Minute or the scheme of recruitment**, where relevant in accordance with the approved marking scheme and having considered the recommendations of the interview board, if there are any, **shall select a person** on the order of merit of marks obtained at the examination and/or interview. The Administrative Authority shall be informed of the selections and a formal letter of appointment shall be issued by the Commission as per Appendix 01 or 02 with changes where necessary.” [emphasis added]*

While in terms of Rule 191, *“The provisions in Chapter VII on ‘General Conditions relating to Appointments’ in these procedural rules shall apply, mutatis mutandis, with regard to promotions.”*, Rules 62 – 65 emphasise the necessity to call for applications once vacancies arise, and demonstrates in no uncertain terms that the results of today’s interviews cannot be re-purposed and re-calibrated to fill tomorrow’s vacancies, as today’s interviews are to fill a specific number of vacancies that exist today. Rules 62 – 65 set out in unequivocal terms the onerous responsibility cast on the National Police Commission, and the trust that has been placed in the members of such Commission in order to ensure that all appointments and promotions in the Police Department shall be in accordance with the law.

Chapter XVII of the Procedural Rules and the need to make timely promotions

The frustration experienced by the Petitioners as a result of long delays in making promotions reverberates right throughout the petition, and therefore is a matter that I must address, as such delays appears to have become the norm in our Public Service today.

Chapter XVII of the Rules contain specific provisions relating to promotions. Rules 184 and 187 are important in ensuring that the Appointing Authority **takes steps as expeditiously as possible to ensure that promotions are carried out as soon as vacancies arise**, and are re-produced below:

Rule 184

*“Every promotion in the Public service shall be made only in accordance with the approved Service Minute or scheme of recruitment. **It shall be the responsibility of the Appointing Authority to promote officers on due time as provided for in the Service Minutes or Schemes of Recruitment approved by the Commission.**”*
[emphasis added]

Rule 187

*“It shall be the duty of Appointing Authorities or Administrative Authorities to conduct the required examination, trade test, interview etc. **on the due dates** in*

order to provide Public Officers with an opportunity to acquire the qualification for promotion.” [emphasis added]

The above Rules demonstrate the duty cast on the Appointing Authority to make timely appointments and promotions. The public servants of this Country render yeoman service to the Public notwithstanding the fact that their remuneration may not be commensurate with the services they perform. What motivates them to continue to work for the State is the great pride one derives in being a public servant and the rewards for such service by way of periodic promotions that they are entitled to in terms of the relevant service minute. It would not be an exaggeration to say that all public servants look forward to receiving promotions that they are entitled to in a timely manner. It is therefore the paramount duty of the Inspector General of Police, with a view to keeping his staff motivated, to ensure that steps are taken to fill the vacancies that arise in accordance with the duly established Rules.

I say this for the reason that in this case:

- a) Applications were called only in August 2014 for vacancies that had arisen in January 2014;
- b) The closing date for applications being 15th September 2014, it took the Police Department a further eight months to conduct the interviews of 39 applicants;
- c) The National Police Commission took a further six months to submit its approval to the 15 candidates recommended by the Promotion Board;
- d) The appointments were made in March 2016, which is 26 months after the vacancies had arisen.

I simply cannot understand why it took 26 months to complete the process, especially when there were only 39 applicants. With a further nineteen vacancies available in the rank of ASP as at 1st December 2016, the National Police Commission failed to initiate the procedure laid down in the Procedural Rules to call for applications and fill such vacancies. Instead, it took an unexplainable but easy route of resorting to the results of an interview conducted over 1 ½ years ago to fill six vacancies, and then went into deep slumber until July 2018, when applications were called to fill the consequential

vacancies in the rank of ASP, which is 28 months after the Department of Management Services had increased the cadre in the ranks of ASP and SP. **The inequality created by the delay is obvious.** While both the 11th – 16th Respondents and the Petitioners are beneficiaries of the vacancies created as a consequence of the increase in cadre, the former received their promotions with effect from 24th March 2016, while the latter received their promotions only in July 2018.

Be it due to the lethargy or the inefficiency on the part of the Inspector General of Police, the relevant officers in the Police Department or the National Police Commission, the damage caused to those who are entitled to promotions including the Petitioners is immeasurable. What aggravates this lethargy and inefficiency is the thinking that all such sins could be laundered by backdating the date of promotion to the date on which the vacancy arose.

Whether undue delay in granting promotions could amount to a violation of Article 12(1) was answered in the affirmative in **W. A. J. H. Fonseka and Others v Piyadigama, Chairman, National Police Commission and Others** [SC (FR) Application No. 73/2009; SC minutes of 8th September 2020] where Priyantha Jayawardena, PC, J held as follows:

“I am of the view that the administrative authorities who hold power in trust to perform the functions of the State shall not delay and/or neglect to fill the vacancies when and where such vacancies arise. Hence, promotions in the public sector should be filled in time without undue delays.

Referring to the need to act without delay to achieve efficiency, Leonardo da Vinci stated that: ‘Iron rusts from disuse, stagnant water loses its purity, and in cold weather becomes frozen; even so does inaction sap the vigours of the mind’.

It is important to keep in mind that when an individual joins the public service, he or she entirely bases his/her life-long expectation in the public service for the betterment of his/her life. Further, given the nature of the public service, it is common for an individual serving in the public sector to expect certain benefits such as security in tenure, advancement in their career and retirement benefits...

Further, given the limited opportunities to obtain promotions in the public sector, the delay in giving promotions in due time will demoralize public servants in performing their duties.

Thus, the stipulated procedure must be complied with and unwanted delay must be avoided at all times to have an efficient public service. I am of the view that unreasonable and undue delay in promoting employees is a violation of Article 12(1) of the Constitution.”

The position of the National Police Commission and the Inspector General of Police

The provisions of the Procedural Rules that I have referred to makes it clear that, (a) it is mandatory for the National Police Commission and the Inspector General of Police to follow the Procedural Rules in making appointments and promotions; (b) the National Police Commission have deviated from the said procedure laid down in the Procedural Rules; and (c) the course of action adopted by the National Police Commission has deprived the Petitioners of the equal opportunity that they were entitled to in terms of the law of competing with others who were similarly placed.

I shall now consider the position of the National Police Commission and the Inspector General of Police in order to decide if such deviation is fair and reasonable. However, prior to doing so, I must state that I am mindful that when it comes to selection of persons for initial appointment to the Public Service as opposed to promotion, there may be situations where some of those selected may opt not to accept the appointment. In those situations, it may be in order to select those who had faced the interview and obtained the next highest mark/s. Such a situation is different to what has arisen in this application.

The learned Deputy Solicitor General, referring to the letter dated 30th October 2016 sent by the Inspector General of Police to the National Police Commission [R2A], submitted that the Department of Management Services had created six cadre positions in the ASP cadre with effect from 24th March 2016, and that the Inspector General of Police had recommended that the **six new cadre positions** be filled with the 11th – 16th Respondents, who, as I have already stated, had obtained the next highest marks after those appointed in March 2016. The said letter does not provide

any reasons for the said recommendation nor has the Inspector General of Police thought it fit to offer an explanation to this Court. Such an explanation was necessary not only in view of the admitted failure to follow the Procedural Rules but also since the Department of Management Services had also created twelve vacancies in the rank of Superintendent of Police, with the consequence that the number of vacancies in the rank of ASP amounted to eighteen.

In an extremely brief and vague affidavit filed before this Court, the Chairman of the National Police Commission has stated that shortly after promotions were made on 3rd March 2016, a further six vacancies arose on 24th March 2016 and that steps were taken to promote the next six persons in order of merit. While no further explanation has been offered for not following the provisions of the Procedural Rules and calling for fresh applications, the Chairman has the audacity to state that the members of the National Police Commission and he have *“acted in terms of the law, within the powers, acted in good faith, reasonably, rationally, and neither discriminatory, arbitrarily nor capriciously and that the fundamental rights enshrined in Article 12(1) have not been breached.”*

Attached to the said affidavit are two documents, namely letter dated 30th October 2016 sent by the Inspector General of Police to the National Police Commission [R2A] in response to the letter dated 18th October 2016 of the National Police Commission [which letter has not been tendered to this Court] and letter dated 29th November 2016 sent by the National Police Commission to the Inspector General of Police [R2B] in response to R2A.

In the absence of an explanation from the National Police Commission and the Inspector General of Police for not following the Procedural Rules and why it effected appointments on the strength of stale interview results, I have sought to piece together the following sequence of events from R2A and R2B:

- (a) It is the National Police Commission that initiated the correspondence with the Inspector General of Police by its letter dated 18th October 2016 under the heading “විශේෂ කාර්ය බලකායේ ප්‍රධාන පොලිස් පරීක්ෂක තනතුරේ සිට සහකාර පොලිස් අධිකාරී තනතුරට උසස්වීම ලබාදීමේදී සිදුවී ඇති අසාධාරණය සම්බන්ධ අභියාචනය – ආර්.එම්. එම්ලරන්ත මහතා” and invited the Inspector General of Police to provide his

recommendations with regard to the promotion of the 11th – 16th Respondents to the rank of ASP. Thus, the National Police Commission had identified well in advance the need to promote the 11th – 16th Respondents even though the caption referred to an appeal only from the 11th Respondent.

(b) In response to the said letter, the Inspector General of Police has informed the National Police Commission by R2A that the Department of Management Services has created six vacancies, that reports have been called from various divisions within the Police Department relating to the 11th – 16th Respondents and that there are no adverse reports relating to them. While the Inspector General of Police should have mentioned the creation of twelve vacancies in the cadre of Superintendent of Police, in fairness to the Inspector General of Police, I must state that he has also mentioned that **there are twenty four Chief Inspectors of Police who have not received promotions**, which is a reference to the twenty four candidates who were not successful at the interview, and thus alerting the National Police Commission that their decision will have an impact on those twenty four Chief Inspectors of Police, including the Petitioners.

(c) In paragraph 7 of R2A, the Inspector General of Police has stated as follows:

“2014.01.13 දින සහකාර පොලිස් අධිකාරී තනතුරට උසස්වීම් ලැබූ නිලධාරීන් 15 දෙනාට පහලින් (කුසලතා අනුපිළිවෙලට අනුව පහලින්) සිටින ඉහත ජේද 01 හි නම් සඳහන් ප්‍රධාන පොලිස් පරීක්ෂක වරුන් 06 දෙනා හට සම්මුඛ පරීක්ෂණ මණ්ඩලය විසින් ලකුණු ලබාදීමේදී යම් අසාධාරණයක් සිදුවී ඇති බවට නිරීක්ෂණය වේ. එබැවින් 2016.03.24 දිනට සහකාර පොලිස් අධිකාරී තනතුරේ ඇති වී ඇති පුරප්පාඩු 06 පිරවීමේ බලතල පාත්‍රික පොලිස් කොමිෂන් සභාව වෙත පැවරී ඇති බැවින් ඒ සම්බන්ධයෙන් කටයුතු කිරීම සඳහා ඔබ වෙත යොමු කරමි.”

(d) At its meeting held on 3rd November 2016, the National Police Commission had considered R2A, and decided to grant approval to promote the 11th – 16th Respondents to the rank of ASP. This is reflected in the letter R2B.

There are several infirmities that arise from R2A and R2B. The first is that R2A does not contain any further details of the alleged “යම් අසාධාරණයක්” that the 11th – 16th Respondents had been subjected to, nor has the Inspector General of Police offered any explanation to this Court in this regard. The second is that a copy of the decision said to have been taken by the National Police Commission at its meeting held on 3rd November 2016 has not been briefed to this Court. The third is that in any event, R2B

too does not contain the reasons that led the National Police Commission to arrive at its decision disregarding the procedure laid down. The National Police Commission has not been forthright to this Court, and their actions lack transparency.

I must reiterate that the Department of Management Services not only created six vacancies in the post of ASP but a further twelve vacancies in the post of Superintendent of Police. Thus, with at least eighteen vacancies being available [as opposed to the nineteen claimed by the Petitioners] by the time the National Police Commission met on 3rd November 2016 and with the Inspector General of Police informing the National Police Commission that there were twenty-four other candidates who had faced the interview, the question that arises in my mind is what led the National Police Commission to limit the appointments to only the 11th – 16th Respondents, as opposed to considering all those who faced interviews in May 2015. While such a course of action would still have begged the question as to why the procedure of calling for applications to fill those vacancies was not followed, it would have at least shed some light as to why the decision was limited to six candidates.

In these circumstances, I am of the view that:

- (a) The National Police Commission has failed to satisfy this Court that there existed exceptional circumstances that warranted a deviation from the Rules;
- (b) The National Police Commission has deprived the Petitioners of the equal opportunity that should have been afforded to them to seek promotion to the rank of ASP;
- (c) The National Police Commission has breached the trust placed in them;
- (d) The decision of the National Police Commission to promote the 11th – 16th Respondents is unreasonable, arbitrary and irrational;
- (e) The National Police Commission has infringed the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution.

I am however not inclined to quash the appointments of the 11th – 16th Respondents as the material before me does not indicate that the 11th – 16th Respondents have

manipulated the National Police Commission to have their promotions granted in an arbitrary manner. Furthermore, at least one more round of promotions have taken place after December 2016 which culminated in the appointment of the Petitioners to the rank of ASP, and the consequence of quashing the appointments of the 11th – 16th Respondents would gravely prejudice the 11th – 16th Respondents in that they would revert to their previous rank and cause administrative chaos within the Police Department.

Relief sought by the Petitioners

This brings me to the submission of the learned President's Counsel for the Petitioners that the Petitioners appointment to the rank of ASP be backdated to 24th March 2016. The basis for this argument is that the Petitioners have acquired additional qualifications during the period January 2014 and March 2016 and that, had applications been called afresh, the Petitioners would have scored more marks than what they did in May 2015, and possibly more marks than the 11th – 16th Respondents and that the failure to follow due procedure has deprived them of competing with the 11th – 16th Respondents on a level playing field.

While the Petitioners have certainly been deprived of the equal protection of the law, I am not inclined to backdate their promotions to 24th March 2016 for the following reasons:

- (a) The Petitioners as well as the 11th – 16th Respondents barring the 15th Respondent have all been promoted to the rank of Chief Inspector of Police on the same date, thus entitling them to equal marks for period of service. Therefore, the Petitioners would not have scored more marks than the 11th – 16th Respondents for the period of service for which 50% of the marks are allotted;
- (b) Although details of such additional qualifications the Petitioners claim they have acquired since January 2014 have not been disclosed in the petition, the Petitioners have annexed to the counter affidavit, a list of qualifications that the Petitioners claim they acquired during the aforementioned period. Even if that is correct, the Petitioners have failed to demonstrate the manner in which the said additional qualifications would improve their overall mark;

- (c) The 11th – 16th Respondents too may have acquired additional qualifications during such period, and therefore, it is not possible for this Court to conclude that the Petitioners would have scored more marks than the 11th – 16th Respondents had fresh applications been called;
- (d) Although it is only the Petitioners who have challenged the appointment of the 11th – 16th Respondents by way of this application, there may have been others holding the rank of Chief Inspector of Police who would have become eligible to apply had applications been called in 2016, and who may have scored more marks than the Petitioners had the proper procedure been followed.

Conclusion

Whilst acknowledging that the Petitioners have been unfairly treated as a result of the arbitrary action of the National Police Commission and that such injustice must be corrected, I am mindful that any decision of this Court must not adversely affect others holding the same rank as that of the Petitioners.

There are three matters that I have considered in deciding on the manner in which the injustice to the Petitioners could be corrected. The first is that no material has been placed before this Court to indicate that there were others who fared better than the Petitioners at the interviews that culminated in the promotion of the Petitioners in July 2018 and as a result have been placed above the Petitioners. The second is that of the other candidates who faced the interview in May 2015, there were several candidates who had obtained marks higher than some of the Petitioners – e.g. Chief Inspector of Police Deshapriya had marks higher than all Petitioners except the 2nd and 9th Petitioners. However, these candidates including Chief Inspector of Police Deshapriya had retired while holding the post of Chief Inspector of Police either prior to P6 or a few months after P6. Thus, the question of those who faced the interview in May 2015 but did not receive their promotions being prejudiced does not arise. The third is that according to the learned Deputy Solicitor General, even though the 11th – 16th Respondents have completed the required number of years required in the rank of ASP to be considered for promotion, they have not been promoted to the next rank due to the non-availability of vacancies.

In these circumstances, I am of the view that it would only be just and equitable for the Petitioners to be placed on par with the 11th – 16th Respondents in calculating the period of service required for promotion to the rank of Superintendent of Police. Thus, provided the Petitioners have fulfilled all other criteria required to apply for promotion to the rank of Superintendent of Police, the Petitioners shall be deemed to have become eligible to apply or be considered for promotion to the rank of Superintendent of Police on the same date that the 11th – 16th Respondents became eligible, with the period of service of the Petitioners in the rank of ASP deemed to have commenced on 24th March 2016, only for that purpose. This would afford the Petitioners an opportunity of competing with the 11th – 16th Respondents and equalise the level playing field that was distorted by the decision of the National Police Commission.

The National Police Commission shall pay a sum of Rs. 10,000 as costs to each Petitioner.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT