

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

In the matter of an application under and  
in terms of Article 126 read with Article 17  
of the Constitution of The Democratic  
Socialist Republic of Sri Lanka

Peduru Arachchige Tiuska Pushpa  
Weerasinghe,  
No. 107/A, Kanatta Road,  
Mirihana,  
Nugegoda.

SC/FR Application No. 120/2019

**PETITIONER**

**-Vs-**

1. Sirimewan Dias,  
Chairman,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
- 1a. Nilantha Wijesinghe,  
Chairman,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
2. K.AK. Ranjith Dharmapala,  
Acting Chairman,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

3. P.B. Ruwan Pathirana,  
Executive Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
- 3a. Pathmika Mahanama Thilakarathne,  
Executive Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
4. R.M.C.M Herath,  
Director General,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
- 4a. W.M.W Weerakoon,  
Director General,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
5. K.D.R Olga,  
Director General,  
Finance Department,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
6. U.G Rathnasiri,  
Additional Secretary,  
Ministry of National Policies and  
Economic Affairs,  
1<sup>st</sup> Floor,  
“Miloda”

Bristol Street, Colombo 01.

7. W.M.W Weerakoon,  
Director General-Agriculture,  
Department of Agriculture,  
P.O. Box 1,  
Peradeniya.
  
- 7a. Dr. S.H.S.A De Silva,  
Director General-Agriculture,  
Department of Agriculture,  
P.O. Box 1,  
Peradeniya.
  
8. W.M.M.B Weerasekara,  
Commissioner General-Agrarian  
Development,  
No. 42,  
Sir Marcus Fernando Mawatha,  
P.O. Box 537,  
Colombo 07.
  
9. B.L.A.J Dharmakeerthi,  
Additional Secretary (Development),  
Ministry of Plantation Industries,  
11<sup>th</sup> Floor,  
Sethsiripaya 2<sup>nd</sup> Stage,  
Battaramulla.
  
10. R.W Nalaka Rajasekera,  
Commission Member,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
  
- 10a. R.M.U.K Wijeratna,  
Commission Member,

Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

11. D.P Karunarathna,  
Assistant Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

12. A. A Ishara Abeysinghe,  
Secretary/Director – Control  
(Covering),  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

13. G.H.N Shyamali Rathnayake,  
Assistant Director,  
Income Department,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

14. P.B.M Thisera,  
Assistant Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

15. E.A Pradeep Kumara,  
Assistant Director,  
Project Division,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.

16. T.S Wadduwage,  
Project Division,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
17. A.H Kumudu Dharmapriya,  
Assistant Director,  
Land Ceiling Section,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
18. W.M Sunil Bandara,  
Assistant Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
19. Nandasena Wanniarachchi,  
Assistant Director,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
20. T. Narendranadan,  
Internal Auditor,  
Land Reform Commission,  
No. 475, Kaduwela Road,  
Battaramulla.
21. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**BEFORE:** Buwaneka Aluwihare, PC, J.  
Kumudini Wickremasinghe, J.  
Achala Wengappuli, J.

**COUNSEL:** Niranjan de Silva for the Petitioner.  
Gihan Liyanage instructed by Mallawaarachchi Associates for the 1A, 11<sup>th</sup>,  
12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> & 17<sup>th</sup> Respondents.  
Rajitha Perera SSC for the Hon. Attorney General.

**ARGUED ON:** 23.11.2022.

**WRITTEN SUBMISSIONS:** 09<sup>th</sup> December 2022 for the Petitioner.  
16<sup>th</sup> December 2022 for the 1A, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> &  
17<sup>th</sup> Respondents.

**DECIDED ON:** 24.10.2023.

### Judgement

#### Aluwihare, PC, J,

This is a Fundamental Rights Application concerning the alleged non-promotion of an employee attached to the Land Reform Commission. In the Petition of the Petitioner has alleged that her Fundamental Rights guaranteed by Article 12(1) and Article 14(1)(g) of the Constitution had been violated by the 1<sup>st</sup> to 10<sup>th</sup> Respondents or any one or more of them. The Petitioner asserts that the 1<sup>st</sup> to 10<sup>th</sup> Respondents had consistently denied her a promotion by failing to appoint her to the post of ‘Deputy Director - Legal’ of the Land Reform Commission (hereinafter referred to as the ‘LRC’), and they had, by this omission violated her fundamental rights. This Court granted leave to proceed on the alleged infringement under Article 12(1) of the Constitution. Only the 1A, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondents have made representations before this Court, and they will hereinafter be referred to as ‘the Respondents’.

I wish to succinctly state the facts of this case before delving into the relevant legal considerations.

### The Facts

The Petitioner is an Attorney-at-Law who holds a Bachelor of Laws Degree. She was initially employed as a 'Legal Assistant – Grade V' on a contractual basis at the LRC from 23<sup>rd</sup> July 2007, subject to a six-month probation period (vide 'P3', the letter of appointment dated 16.11.2017). The Petitioner's service contract was renewed for further year on 24.01.2008 till 23.01.2009. The Petitioner was also confirmed in employment with effect from 01.02.2008 by letter dated 29.01.2008.

The Petitioner claims to have been promised recruitment as a 'Legal Officer – Grade III' in accordance with the Scheme of Recruitment of 1979, prior to her recruitment as a 'Legal Assistant – Grade V'. The Petitioner also claims to have been continuously harassed at the LRC while not receiving due promotions. The Respondents made no specific averments in this regard besides noting that the Petitioner was not promoted to due to her 'poor performance' (vide Written Submission of the Respondents dated 16<sup>th</sup> December 2022).

Pursuant to repeated appeals and letters of complaint to the 1<sup>st</sup> Respondent's predecessor as the Chairman of the LRC ('P7', 'P7(b)', 'P7(c)') as well as a complaint to the Labour Commissioner (Colombo General), the Petitioner had been promoted to the managerial level as the 'Assistant Director – Grade II' of the LRC with effect from 03.10.2012 by letter dated 29.01.2014 ('P9').

Per the minutes of the LRC dated 26.02.2019, 10 Assistant Directors (11<sup>th</sup> to 20<sup>th</sup> Respondents) who were appointed alongside the Petitioner on 03.10.2012, had been promoted as Deputy Directors of the LRC.

### Submissions

The Petitioner alleges that her omission from the promotion to the post of 'Deputy Director' is particularly concerning as the Petitioner is an Attorney-at-law with 18 years of experience and she possesses educational qualifications above and beyond any qualifications possessed by those who were promoted.

Furthermore, the Petitioner noted that the operational scheme of recruitment of the LRC dated 03.10.2012, in Section 6.1.2 sets out that for promotion to the position of Deputy Director of the LRC requires 6 years of continuous service in Grade II and all due annual salary increments. The Petitioner claims to have fulfilled the elements so required.

The Respondents are in agreement with the Petitioner as to the applicability of the scheme of

recruitment of the LRC dated 03.10.2012 ('P10'). However, they argue that the Petitioner was not eligible for the said promotion as she had not completed the necessary requirements per the scheme.

Section 6.1.2 of the Scheme of Recruitment is reproduced below for convenience.

6.1.2 සුවිශේෂී කාර්ය සාධනය පෙන්නුම් කරන්නන්

(අ) පූර්ව අවශ්‍යතා

- i) පත්වීම ස්ථිර කර තිබීම
- ii) සේවා ගණයේ II ශ්‍රේණියේ අවම වශයෙන් වසර (06) ක අඛණ්ඩ සේවා කාලයක් සම්පූර්ණ කර තිබීම සහ අදාළ කාලයට නියමිත වැටුප් වර්ධක සියල්ල උපය ගෙන තිබීම.
- iii) අනුමත කාර්ය සාධන ඇගයීමේ පටිපාටිය අනුව පූර්වසන්නතම වසර (06) තුළම සුවිශේෂී කාර්යසාධනයක් පෙන්නුම් කර තිබීම.
- iv) උසස් වීම දිනට පූර්වාසන්නතම වසර (05) තුළ සතුටුදායක සේවා කාලයක් සම්පූර්ණ කර තිබීම.
- v) අදාළ කාර්යක්ෂමතා කඩඉම් පරීක්ෂණ නියමිත දිනයේදී සමත් වී තිබීම.
- vi) අදාළ මට්ටමේ දෙවන රාජ්‍ය භාෂා ප්‍රවීණතාවය ලබා ගෙන තිබීම

Of the aforementioned requirements of the scheme, the Respondents claim that the Petitioner has failed to fulfil requirements no. ii) and vi). Specifically, they argue that the Petitioner has not received her salary increments per requirement no. ii) and that she is not proficient, neither has she adduced proof of proficiency of a 2<sup>nd</sup> National Language per requirement no. vi). The Respondents also added that the Petitioner has failed to indicate that she has performed 'exceptionally well' ("සුවිශේෂී කාර්යසාධනයක්") in service during the immediate 6 years prior to the year of application for promotion as per requirement no. iii).

The Petitioner makes no averment regarding requirements iii) and vi) besides noting that she is an Attorney-at-Law and that she has, in the course of her work, executed a considerable number of Deeds and instruments. Regarding requirement no. ii), the Petitioner has



produced a letter from the Secretary, Director (Administration) of the LRC ('Z) and dated 08.12.2022 (subsequent to the filing of the Petition) which affirms that she has, in fact, in received all her due salary increments. The letter also states that it is issued at the Petitioner's request.

Were the Petitioner's Fundamental Rights violated?

It appears to me that the Court has been placed in a peculiar setting for the adjudication of this matter. On the one hand, the Petitioner argues that she has been consistently and deliberately denied promotion within the LRC, which she argues violated her Fundamental Right to equal protection of the Law and equality before the Law under Article 12(1) of the Constitution. On the other hand, the LRC argues that the Petitioner was denied the promotion of concern due to her consistent failure to perform at the required standards in the execution of her duties, as well as her failure to fulfil the requirements which would make her eligible for the promotion.

The issue of ineligibility can be dealt with directly by the application of the scheme of recruitment (P10). The Respondents submitted that the Petitioner has not received her salary increments per requirement no. ii) and that she is not proficient, neither has she adduced proof of proficiency of a 2<sup>nd</sup> National Language per requirement no. vi), and that the Petitioner has failed to indicate that she has performed 'exceptionally well' ("සුවිශේෂී කාර්යාධනයක්") in service during the immediate 6 years prior to the year of application for promotion as per requirement no. iii) of Clause 6.1.2 of the Scheme. The Petitioner's response was that she is an Attorney-at-Law who has, in the course of her work, executed many Deeds and instruments. The Petitioner also produced a letter from the Secretary, Director (Administration) of the LRC ('Z) and dated 08.12.2022 which affirms that she received all her due salary increments.

Notably, the Petitioner has failed to adduce any evidence (such as certificate to her character or performance) to controvert the Respondents claim that she has performed her duties exceptionally well. The petitioner also failed to produce any material which indicates that she is proficient in a 2<sup>nd</sup> National Language.

I do not think it necessary to engage in an etymological pursuit to understand what is meant by the words "exceptionally well' in Clause 6.1.2 iii) of the scheme of recruitment (P10). Such a project would only delay the inevitable conclusion that per the scheme of recruitment, in order to be considered eligible for promotion to the post of Deputy Director, the applicant

must have performed exceptionally well in the execution of their duties. It logically follows that such an exceptional performance may be evidenced by a certificate or reference from a superior affirming such notion.

I wish to further state that most schemes of promotion and recruitment for officers require a degree of merit in the performance of duties. In most cases, considerable weightage is given to this requirement as it is perhaps the most potent evidence of the history of a person's performance.

I find it prudent at this stage to make reference to the sage words of Justice Fernando in *Perera v. Cyril Ranatunga, Secretary Defence and others* [1993] 1 SLR 39 (at page 43).

*“The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to earn, or to deserve. In my opinion, 'merit' must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks promotion. In relation to the individual officer, there is a negative and a positive aspect: whether there is demerit, e.g. incompetence and poor performance in his present post, and whether there is "positive" merit, such as a high degree of competence and excellent performance. It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skills required for the efficient discharge of the functions of that post, and the service to be rendered.”*

It is evident that in the present case, having considered the application of the Petitioner, the Respondents were of the opinion that the Petitioner did not merit a promotion due to her poor performance. Not only is that [performance] a consideration an employer is generally entitled to consider in the context of advancement of their employees, in the present case, the Respondents were *required* to consider the Petitioner's performance per the scheme of recruitment. Therefore, it appears to me that the Respondents had not acted arbitrarily, unreasonably, or unlawfully by denying the Petitioner the promotion to the post of Deputy Director. The Respondents had relied on the applicable scheme of promotion and the assessment of the Petitioner's superiors to determine that she was not eligible for promotion. Even after the filing of this application and being confronted with the submission of the Respondents regarding her failure to fulfil the aforesaid requirements, the Petitioner did not produce any material to her benefit in that regard. This court cannot brush aside lightly the assertions made by the Respondents which indicates that the Petitioner had had a history of underperforming.

In my view, the material before this court falls short of the required threshold of proof to conclude that the Respondents had violated the Petitioner's fundamental rights guaranteed under Article 12(1). The position in our jurisprudence regarding the violation of a person's fundamental right to equal protection of the law and equality before the law has evolved through the decades. Presently, the success of an application alleging a violation of Article 12(1) rests on the ability of a Petitioner to establish any unlawfulness, arbitrary action/inaction, unreasonable conduct or manifest unfairness (*vide Rajavarithiam Sampanthan & Others v. The Attorney General & Others*, SC FR 351-361/2018, S.C Minutes of 13.12.2018; *W.P.S. Wijerathna v. SLPA & Others*, S.C F.R Application No. 256/2017, S.C Minutes of 11.12.2020). The Petitioner has failed to establish any of the aforementioned elements in this application.

I find it prudent at this stage to recall observations made by me in a prior judgement where uncertainty and a lacuna in factual narratives submitted by parties compelled the Court to determine the standard of proof required to establish a fundamental rights violation.

*“In proceedings of this nature, the court has very limited avenues to test the veracity of these assertions and necessarily have to depend on the affidavits and other documents filed. In the circumstances, in arriving at a just and equitable decision in the realm of the fundamental rights jurisdiction, the court necessarily has to apply the test of probability to the factual matters placed before us.”* [ in *Arangallage Samantha v. OIC, Police Station, Biyagama & Others*, S.C. F.R Application No. 458/2012, S.C Minutes of 28. 01. 2020, at page 8]

My observations forecited were formed in light of the astute observations of Wanasundera J in the case of *Velmurugu v The Attorney General and Others* 1981 1 SLR 406 and Soza J. in *Vivienne Goonewardene v Hector Perera* 1983 SLR 1 V 305. In *Velmurugu*, his Lordship Justice Wanasundera stated that the test applicable for the standard of proof required to establish a violation of fundamental rights is a “preponderance of probability”, as adopted in civil cases. His Lordship further stated that although the standard is not as high as that which is required in criminal cases, there can be different standards of probability within that standard and the degree applicable would depend on the subject-matter of the case concerned. In *Vivienne Goonewardene's* case, Soza J held that “*The degree of probability required should be commensurate with the gravity of the allegation sought to be proved...The conscience of the court must be satisfied that there has been an infringement.*”

In my view, the aforementioned *dicta* succinctly capture the standard of proof for an alleged infringement of fundamental rights in an application under Article 126. Accordingly,

although the Petitioner was not required to expel all doubt in the Court's mind that the Respondents had unlawfully, arbitrarily, unreasonably, or unjustly denied her the promotion concerned, the Petitioner was required to produce compelling material which would satisfy the court's conscience on a preponderance of probabilities that the Respondents had engaged in such conduct. In this most essential requirement, the Petitioner has failed.

For the aforementioned reasons, I hold that Petitioner has failed to establish to the satisfaction of this court that the Petitioner's Fundamental Rights guaranteed in terms of Article 12(1) of the Constitution had been violated, and in the circumstances, we hold that the Petitioner is not entitled to the relief prayed.

*Application Dismissed.*

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE SUPREME COURT