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

In the matter of an Application under and in terms of Articles 12(1) and 14(1)(g) read with Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (FR) Application No: 211/2016

1) Weerathunga Arachchige Michael Padmasiri,
'Weerawansa',
Bolana, Ruhunu Ridiyagama.

2) Bala Manage Dayawathi,
'Sirimuthu', Mahawela Road, Dickwella.

3) Nanayakkara Wasam Goda Liyanage
Sumiththa Dias,
'Senehasa', Mountain Hall Watta,
Ambalanwatta, Galle.

4) Modara Gamage Dona Greta Maria Mallika,
No. 105, Kaduru Pokuna East, Tangalle.

5) Ambagaha Duwage Pearly,
Kadegederawatta, Ukwatta, Gintota.

6) Hewa Alankarage Misilin,
No. 289, Mayurupura, Hambanthota.

7) Anurasiri Muthumala,
'Baghya', Aluthgoda, Dikwella.

8) Manik Purage Ariyadasa,
'Asiri', Gangoda, Kolawenigama.

9) Swarna Jayanthi Wedaarachchi,
4th Milepost, Hapugala, Wakwella.

10) Basnayaka Jagath Perera

11) Kimbeeyage Neelamani De Silva,

Both of No. 19/1, Railway Station Road,
Unawatuna.

12) Asmulla Kankanamge Kalyani Kusumlatha,
'Senehasa', Mountant Hall Watta,
Ambalanwatta, Galle.

13) Wahideen Mohamed Razik,
No. 306, Malay Kolaniya, Ambalanthota.

14) Preethi Wimalasuriya,
No. 204, Tissa Road, Tangalle.

15) Pol Dhanaraja Pathirathna De Silva,
No. 331, Galle Raod, Wellawatta, Balapitiya.

16) Sanath Dayakantha Vidyalankara,
"Mekala", Waulagoda, Hikkaduwa.

17) Nadugala Vidanapathiranage Upali,
No. 111/A, Hiththatiya Meda, Matara.

18) Mewala Arachchilage Padma Priyadharshani
Perera,
Kosmulla, Galle, Neluwa.

19) Singan Kutti Arachchila Athukoralage Bhadra
Malani Athukorale,
Wadigala, Ranna.

PETITIONERS

vs.

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

2. The Chairman,
   Provincial Public Services Commission-
   Southern Province, 6th Floor,
   District Secretariat Building Complex,
   Kaluwella, Galle.

3. K.K.G.J.K. Siriwardena

4. K.L. Marathons

5. Srimal Wijesekara

6. D.K.S. Amarasuriya

7. Samarapala Vithanage.

   Members of the Provincial Public Service
   Commission – Southern Province, 6th Floor,
   District Secretariat Building Complex,
   Kaluwella, Galle.

8. The Secretary,
   Provincial Public Service Commission –
   Southern Province, 6th Floor, District
   Secretariat Building Complex,
   Kaluwella, Galle.

9. The Secretary,
   Ministry of Agriculture, Agrarian
   Development, Irrigation, Water Supply and
   Drainage, Food Supply and Distribution Trade
   and Co-operative Development of the

Southern Provincial Council, 4th Floor,
Dhakshinapaya, Labuduwa, Galle.

10. Commissioner of Cooperative Development,
Cooperative Development Department of the
Southern Provincial Council,
No. 147/3, Pettigalawatta, Galle.

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

12. H. Sarath Wickramasinghe,
Dangahawila, Karandeniya.

13. T.D.K. Ariyawansa,
No. 60/7, Sri Rathnapala Mawatha, Matara.

14. A.A. Chandrasiri,
No. 1/1, Medagama Netolpitiya.

15. Ariyasena Narasinghe,
'Sampath', Palollpitiya, Thihagoda.

16. K.H. Piyasena,
No. 21/5, Sri Sugathapala Mawatha,
Karapitiya.

17. A.M.A. Chandra,
'Rasangi', Ganegama South, Baddegama.

18. H.P. Premadasa,
Sathsara, Kongala, Hakmana.

19. Chief Secretary,
Southern Provincial Council,
Chief Secretary's Office,
S.H. Dahanayake Mawatha, Galle.

RESPONDENTS

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

Counsel: Harsha Fernando with Chamith Senanayake for the Petitioners

Rajitha Perera, Deputy Solicitor General for the 1st – 10th Respondents

Pasindu Silva for the 12th – 18th Respondents

Argued on: 18th October 2021

Written Submissions: Tendered on behalf of the Petitioners on 18th September 2020 and 29th November 2021

Tendered on behalf of the 1st – 10th Respondents on 7th September 2020 and 29th October 2021

Tendered on behalf of the 12th – 18th Respondents on 25th February 2021 and 22nd November 2021

Decided on: 2nd August 2023

Obeyesekere, J

The Petitioners are officers of the Co-operative Development Department of the Southern Province. In January 2015, the 1st Respondent – i.e., the Governor of the Southern Province – acting in terms of the powers vested in him by Section 32(3) of the Provincial Councils Act, No. 42 of 1987 as amended, introduced new Schemes of Recruitment and Promotion for the following posts in the Co-operative Service of the Southern Province:

(a) Co-operative Development Officer [CDO];

(b) District Officer for Co-operative Development [DOCD]; and

(c) Assistant Commissioner for Co-operative Development [ACCD].

The marking schemes attached to the said Schemes of Recruitment for the posts of DOCD and ACCD sought to confer *inter alia*:

a) 15 marks and 10 marks respectively, for educational qualifications – i.e., a Bachelor's degree from a university recognized by the Government or an equivalent qualification;

b) 10 marks for professional qualifications and training – i.e., a higher diploma of a duration of one year or more in the fields of Management, Social Sciences, Auditing etc;

c) 5 marks and 10 marks respectively, for foreign training.

The 1st – 4th Petitioners who were serving as DOCDs and the 5th – 19th Petitioners who were serving as CDO's at the time of the filing of this application, did not possess any of the above qualifications, with the result that the said marking schemes severely affected their promotional prospects. Having made representations to the 1st Respondent and the Provincial Public Service Commission of the Southern Province [the Provincial Public Service Commission] and having faced the selection interview unsuccessfully, the Petitioners filed this application on 21st June 2016 complaining that the allotment of marks for additional educational and professional qualifications is arbitrary, irrational and violative of their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. Leave to proceed for the alleged infringement of the said Articles had been granted on 23rd September 2016.

Background facts

The Petitioners had been appointed as Co-operative Inspectors in the Department of Co-operative Development during the period 1981 – 1988. With the subject of Co-operative Development being devolved to the Provincial Councils pursuant to the enactment of the 13th Amendment to the Constitution, the Petitioners had been appointed, with their consent, as Co-operative Inspectors by the Provincial Public Service Commission. The post

of Co-operative Inspector has subsequently been re-designated as Co-operative Development Officer.

The entry point to the Co-operative Service was as Co-operative Inspector/CDO, with the basic educational qualification required for entry being four passes at the General Certificate of Education (Advanced Level) Examination. There were two promotional grades within the CDO service, with further promotion to the aforementioned post of DOCD and thereafter to the post of ACCD.

The Schemes of Recruitment that prevailed at the time the Petitioners joined the Service in the 1980's as well as the Schemes of Recruitment for the posts of DOCD and ACCD introduced in 1996 provided that promotion from CDO to DOCD and from DOCD to ACCD shall be on seniority and satisfactory service, with satisfactory service being determined on confidential assessment reports. The said Schemes did not require a CDO or a DOCD to obtain any further educational qualifications over and above the aforementioned qualifications at the General Certificate of Education (Advanced Level) Examination in order to be eligible for promotion to the next grade in the CDO service or as DOCD's or ACCD's.

<u>The proposed Schemes of Recruitment</u>

The Respondents state that as a result of the new salary grades introduced by the Public Administration Circular No. 6 of 2006, the necessity had arisen to introduce a new Scheme of Recruitment for each of the above three posts of CDO, DOCD and ACCD and match each of the said posts with the relevant salary grades stipulated in the said Circular. In 2014, the Provincial Public Service Commission had circulated the proposed schemes, with Clause 7.4.4 in each of the Schemes reading as follows:

> "ව්‍යුහගත සම්මුඛ පරීක්ෂණයක ප්‍රතිඵල මත එහිදි ලබාගන්නා ලකුණු වල කුසලතා පිළිවෙල අනුව සුදුසුකම් ලත් අපෙක්ෂකයින් අතුරෙන් බඳවා ගැනීමට අපේක්ෂිත නිලධාරීන් සංඛ්‍යාව බඳවා ගනු ලැබේ"

The marking schemes to which I have already referred to provided *inter alia* that 30 marks shall be allocated for the additional professional and educational qualifications while 60 marks were allocated for seniority, 5 marks for language proficiency and the balance 5 marks for performance at the interview. The Petitioners did not possess any educational qualifications over and above the four passes obtained at the General Certificate of Education (Advanced Level) Examination nor had the Petitioners received any training opportunities, either local or foreign. The proposed marking schemes were therefore clearly to the detriment of the Petitioners.

The Petitioners and the Union to which they belonged to had made representations with regard to the proposed allocation of marks for educational and professional qualifications, and discussions had taken place in that regard with the 1st – 10th Respondents in 2014. The Petitioners claim that at these discussions, they received an assurance that their grievances would be considered. Notwithstanding such assurances, the proposed Schemes of Recruitment had been adopted and thereafter published by the Southern Provincial Council, with the 1st Respondent granting his approval on 19th January 2015. It must be noted at this stage that the Petitioners did not seek to challenge in a Court of law, the said Schemes of Recruitment including the marking schemes attached thereto, soon after its approval by the 1st Respondent, and that this application, filed in June 2016, is the first occasion that the said Schemes of Recruitment have been challenged in Court. Instead, the Petitioners and their Unions had continued to make representations to the 1st Respondent and the Provincial Public Service Commission to exempt the Petitioners from the requirement to possess the aforementioned additional qualifications.

Applications to fill vacancies in the posts of DOCD and ACCD

By letter dated 3rd March 2016, the Provincial Public Service Commission had directed the Commissioner of Co-operative Development to call for applications in terms of the Schemes of Recruitment approved in January 2015, from those who possessed the qualifications set out in the said Schemes, to fill the vacancies that had arisen in the posts of DOCD and ACCD after the introduction of the said Schemes. Applications had

accordingly been called on 15th March 2016 with the closing date for applications being 28th March 2016.

Having submitted their applications, the Petitioners had presented themselves for an interview on 31st May 2016 and 7th June 2016, together with the 12th – 18th Respondents, who, although said to be junior to the Petitioners in service, possessed the additional qualifications stipulated in the impugned marking schemes. While the Petitioners were unsuccessful at the interview, the 12th – 18th Respondents had received appointments as DOCD/ACCD based on their performance at the interview. I must note at this stage that the Respondents have not placed before this Court the results of the interviews or details of the educational and professional qualifications that the 12th – 18th Respondents are said to have possessed which accrued to their advantage and ensured their selection over the Petitioners.

Application to this Court

It is only after participating at the above interviews that the Petitioners invoked the jurisdiction conferred on this Court by Article 126(1) of the Constitution, alleging *inter alia* that the allocation of marks for the aforementioned additional educational and professional qualifications, and that too without any prior intimation is an infringement of the Petitioners' fundamental right to equality before the law and the equal protection of the law enshrined in Article 12(1) of the Constitution, and the freedom to engage in a lawful occupation guaranteed by Article 14(1)(g) of the Constitution.

In addition to the above relief, the Petitioners have also sought the following:

a) Quash the results of the interviews held on 31st May 2016 and 7th June 2016 under the 2015 Schemes of Recruitment and any appointments made consequent to such interviews;

b) Quash the 2015 Schemes of Recruitment for DOCD and ACCD and direct the Provincial Public Service Commission to reformulate new schemes of recruitment without allocating any marks for additional educational and professional qualifications;

c) In the alternative, to direct that the implementation of the marking scheme attached to the said schemes be deferred for a period of five years, thereby affording the Petitioners a reasonable opportunity of acquiring the necessary qualifications.

The basis of the Petitioners case

The basis of the Petitioners case, as presented by the learned Counsel for the Petitioners at the hearing of this application, is three-fold. The first is that the Petitioners had a legitimate expectation at the time they joined the Service way back in the 1980's that no further educational qualifications would be required for their promotions as DOCD/ACCD. The second is that the marking scheme is illogical and arbitrary, in that there is no rational nexus between the scope of work/duties of a DOCD and ACCD and the need to obtain or possess additional educational and professional qualifications. The third is that in any event, the Provincial Public Service Commission ought to have given prior intimation of the proposed amendment, as well as granted a realistic period of time after the introduction of the Schemes of Recruitment to enable the Petitioners the opportunity to acquire the additional qualifications.

I must state at the outset that an employee cannot expect the criteria applicable for promotion that prevailed when he or she joined a particular Service to remain static right throughout his or her career in the Public Service. An employer certainly has a right to introduce new and innovative criteria with a view to improving the quality of the service that it provides to the public and in keeping with the rapid changes taking place in this technological era. However, it is critical to ensure *inter alia* that such changes (a) bear a rational nexus to the object that is sought to be achieved, (b) are implemented with adequate notice to those who would be affected, (c) do not discriminate between persons who are similarly circumstanced, and (d) do not violate the equal protection of the law guaranteed by Article 12(1).

It would perhaps be appropriate to refer to the judgment of this Court in **Guneratne and Others v Sri Lanka Telecom and Others** [(1993) 1 Sri LR 109], where, as in this application, the petitioners complained that the stipulated revised schemes for recruitment afford

more favoured treatment to graduates and that the preferential treatment sought to be given to graduates has no rational basis and hence amounted to discrimination violative of Article 12 (1) . Kulatunga J, having considered the said argument, summarised the applicable position in the following manner:

> "*In the result, I am satisfied that the classification of graduate clerks for preferential treatment under the impugned schemes is unreasonable because it is not based on criteria having a rational relation to the object sought to be achieved namely, the efficient functioning of the Telecommunications Service. If it is desired to give preferential treatment to them in the interest of the service and for utilising their skills, the Corporation may do so on the basis of relevant qualifications,* ***with reasonable notice to those affected*** *and* ***without prejudicing the legitimate expectations of clerks who are on the verge of promotion under the previous schemes****. The identification of relevent qualifications, the preparation of fresh schemes of recruitment and the period of notice to be given are matters for the Corporation to determine, after considering the total effect of such schemes on the officers who are presently in service and the needs of the Corporation*." [emphasis added]

The learned Counsel for the Respondents, while explaining the rationale for the allocation of marks for additional educational and professional qualifications, raised two preliminary objections at the hearing of this application. Although the three arguments presented by the learned Counsel for the Petitioners raise several issues that arise in the preparation of schemes of recruitment and deserve a closer examination upon its merits, I am inclined to first consider the said preliminary objections.

<u>Proceeding with the application is futile</u>

The first objection is that this application is futile, as the impugned appointments of the 12th – 18th Respondents have been cancelled.

The learned Deputy Solicitor General appearing for the 1st – 10th Respondents submitted that Clause 8 of the 2015 Scheme of Recruitment for CDOs makes it mandatory for each

CDO to complete three Efficiency Bar Examinations at the times specified therein, with the 3rd Efficiency Bar Examination having to be completed within five years of being promoted to Grade I of the CDO service. Such a requirement did not exist under the previous schemes. Clause 7.4.2.5 of the 2015 Schemes of Recruitment for DOCDs and ACCDs stipulates that an applicant must have passed the 3rd Efficiency Bar Examination in order to be eligible for promotion to the post of DOCD or ACCD. It must be noted that with the introduction of the new Schemes of Recruitment in 2015, the Petitioners were absorbed to Grade I of the CDO service and that paragraph 4 of the letter informing them of such absorption specifically referred to the fact that the Petitioners must pass all Efficiency Bar Examinations in the CDO service to be eligible for promotion, thus placing the Petitioners on notice of that fact.

It is admitted that the 3rd Efficiency Bar Examination had not been conducted until the interviews were held in June 2016, although the said Schemes required that such examinations be conducted at least once every year. Therefore, neither the 12th – 18th Respondents nor the Petitioners were afforded any opportunity to comply with this requirement, with the result that it was impossible for any of the CDOs in service at that time to be eligible for promotion to the post of DOCD or ACCD.

The learned Deputy Solicitor General, while submitting that none of the three Schemes of Recruitment introduced in 2015 contained any transitional provisions addressing this issue, drew the attention of this Court to Paragraph 15 of the said Schemes which reads as follows:

> "මෙම බඳවා ගැනීමේ පටිපාටියේ විධිවිධාන සලසා නොමැති යම් කරුනක් වෙතොත් ඒ සම්බන්ධයෙන් දකුණු පළාත් රාජ්‍ය සේවා කොමිෂන් සභාව විමසා ආණ්ඩුකාරතුමා විසින් තීරනය කරනු ලැබේ."

It was therefore the position of the learned Deputy Solicitor General that in the absence of any of the applicants having passed the 3rd Efficiency Bar Examination, it was imperative upon the Provincial Public Service Commission to have sought a decision from the 1st Respondent whether an exemption could be granted from the said requirement and/or whether appointments could be made in the aforementioned circumstances,

taking into consideration that the said requirement had only been introduced in 2015 and that no examinations had yet been conducted.

Notwithstanding the fact that none of the CDOs had passed the 3rd Efficiency Bar Examination, and without having obtained a decision of the 1st Respondent, the Provincial Public Service Commission had proceeded to call for applications to fill the vacancies, conducted the interviews and proceeded to appoint the 12th – 18th Respondents to the applicable posts in June/July 2016. After it transpired that none of the applicants had passed the 3rd Efficiency Bar Examination and therefore were not eligible for promotion either as DOCD or ACCD, the promotions of the 12th – 18th Respondents to the posts of DOCD/ACCD based on the results of the aforementioned interviews held in May and June 2016 had been cancelled in December 2016 by the Provincial Public Service Commission with the approval of the 1st Respondent. Fresh applications had been called to fill the vacancies, only after the 3rd Efficiency Bar Examination had been conducted. It must be stated that the 12th – 18th Respondents have challenged the cancellation of their appointments in SC (FR) Application No. 41/2017. That application was taken up for argument together with this application.

It is in the above factual circumstances that the learned Counsel for the Respondents submitted that as the said promotions granted pursuant to the said interviews have been cancelled, the necessity for this Court to make an order quashing the results of the interviews and directing that the Petitioners be appointed to the said posts does not arise. In a separate judgment delivered in SC (FR) Application No. 41/2017, I have held that the cancellation of the promotions granted to the 12th – 18th Respondents is not arbitrary. I am therefore in agreement with the learned Counsel for the Respondents that the Petitioners are not entitled to the relief claimed by them with regard to the cancellation of the interviews and the subsequent appointments. However, the matter does not end there as the Petitioners are also challenging the said Schemes and in particular the marking scheme attached thereto. Hence, I am of the view that the cancellation of the results of the interviews and the appointments does not render futile the entire application nor does it prevent this Court from considering whether the marking scheme

attached to the said Schemes of Recruitment infringes the fundamental rights of the Petitioners.

Application is time barred

The second preliminary objection that was raised is that this application has been filed outside the one-month time period stipulated in Article 126(2) of the Constitution and is liable to be rejected *in limine* as this Court lacks the jurisdiction to hear and determine this matter.

Article 126(2) of the Constitution stipulates that, "*Where any person alleges that any such fundamental right or language right relating to such person* ***has been infringed*** *or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof****, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court* …" [emphasis added].

In **Gamaethige v Siriwardena** [(1988) 1 Sri LR 384] Mark Fernando, J stated that:

> "*[T]he remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed time, and if not so availed of, the remedy ceases to be available.*"
>
> *[…]*
>
> *"Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2):* ***Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required*** *(e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory),* ***time begins to run only when both infringement and knowledge exist****. (Siriwardena v. Rodrigo (1986) 1 Sri LR 384).* ***The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit****. While the time limit is mandatory, in exceptional cases, on the application of the principle*

lex non cogit ad impossibilia, if there is no lapse, fault or, delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time." [emphasis added]

[…]

"*The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man–made disaster, would have to be considered in an appropriate case when it arises*.".

The imposition of a time limit in Article 126(2) demonstrates with certainty the need for the prompt invocation of the jurisdiction of this Court – *vide* **Kumarasiri and Others v Bandara and Others** [SC (FR) Application No. 277/2009; SC minutes of 28th March 2014]. The consequence of not complying with this requirement is that a petition which is filed after the expiry of the period of one month from the time when the alleged infringement occurred, would be time-barred, thus depriving this Court of jurisdiction to entertain and/or of proceeding further with the application.

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [SC (FR) Application No. 206/2008; SC minutes of 9th December 2016] Prasanna Jayawardena, PC, J considered a long line of jurisprudence on this matter, including **Edirisuriya v Navaratnam and Others** [1985 (1) Sri LR 100] and held as follows:

"The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution."

[…]

"[T]he general rule is clearly that, this Court will regard compliance with the 'one month limit' stipulated by Article 126(2) of the Constitution as being mandatory and

refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed ***after the expiry of one month from the occurrence of the alleged infringement*** *or imminent infringement"* [emphasis added].

While the infringement complained of in this application revolves around the marking scheme and arose upon the publication of the Schemes of Recruitment on 19th January 2015, the objection that this application is time-barred revolves around two principal events. The first is of course the publication of the 2015 Schemes of Recruitment, and the events that preceded and followed its approval and publication. The second is the notices dated 15th March 2016 and 1st March 2016 calling for applications to fill the vacancies that existed in the posts of DOCD and ACCD, respectively and which referred to the fact that applications will be assessed in accordance with the 2015 Schemes of Recruitment.

<u>One month from the date of publication of the SOR</u>

The need to introduce new Schemes of Recruitment can be traced back to the introduction of Public Administration Circular No. 6/2006 in terms of which the salaries of public servants were re-structured based on the Budget proposals of 2006. In 2010, those in the CDO, DOCD and ACCD services were categorised as Management Assistants (Supervisory), Management Assistants (Supra Grade) and Executive Grade, respectively, and placed on the corresponding salary scales of MN3-2006A, MN7-2006A and SL1-2006. It is the position of the Respondents that (a) the Petitioners were placed in the said salary scales in 2010 and were thereafter paid according to the new salary structure set out in the said Circular; (b) the categorization of DOCDs and ACCDs in terms of the said Circular required those being appointed to possess the qualifications referred to in the marking scheme in order to be promoted; and (c) the necessity had therefore arisen to prepare new schemes of recruitment to address the above. I must however state that the Respondents have not referred to any specific provisions of the said Circular in support of the matters set out in (b) above.

Discussions to amend the schemes of recruitment had been initiated in 2012, with the relevant Union of which the Petitioners were members being apprised of the amendments that were to be effected. The fact that the Petitioners were gravely concerned that the proposed introduction of the requirement to possess additional educational and professional qualifications would affect their promotional prospects is evident from the representations made on their behalf to the 1st Respondent and the Provincial Public Service Commission by letters dated 21st July 2014 and 28th November 2014. I have examined these letters and it is clear that while the Petitioners had no objection to the schemes of recruitment being amended, they had sought an interim period prior to the implementation of the proposed schemes to enable them to obtain the required qualifications. In spite of these representations, the 1st Respondent had proceeded to approve the new Schemes of Recruitment on 19th January 2015.

Kulatunga, J in **Guneratne and Others v Sri Lanka Telecom and Others** [supra; at page 115] explains the criteria for deciding the stage at which a scheme of recruitment must be challenged as follows:

> "… *If a scheme is prima facie non- discriminatory, it cannot be challenged in limine on the ground of possible discrimination in its application. In such a case, relief may be sought only upon the occurrence of discrimination. However, if a scheme, such as the one before us, affecting promotions in an existing service is inherently discriminatory,* ***the right to relief accrues immediately upon the adoption of such scheme*** *and prospective candidates for promotion under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an infringement or an imminent infringement of their rights under Article 12 (1).*" [emphasis added]

The Petitioners come within the latter category and were therefore required to challenge the Schemes of Recruitment within one month of 19th January 2015, which admittedly the Petitioners did not do. However, being disturbed by the fact that the Schemes had been approved in spite of their objections, by letter dated 13th February 2015 the Petitioners and their Union had sought an audience with the 1st Respondent to discuss

this issue. The fact that the 1st Respondent undertook to consider the grievances of the Petitioners and until then to place on hold the implementation of the said Schemes, is borne out by the minutes of the meeting that was held between the 1st Respondent and the 9th and 15th Petitioners on 26th February 2015, and the letters dated 4th June 2015 and 2nd July 2015 that followed the said meeting.

It is in this background that the Petitioners claim that (a) they were assured that the said Schemes would not be made applicable in a manner that would affect their career prospects, and (b) the necessity for them to mount a legal challenge at that stage did not therefore arise. The 1st Respondent has not filed an affidavit before this Court explaining the steps that he took in this regard pursuant to the said meeting and whether the Petitioners were informed at any stage that their representations have been rejected. I have already referred to **Gamaethige v Siriwardena** [supra] where Mark Fernando, J stated that the pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While I am in full agreement with that view, I am also of the view that the question of time bar must not be applied mechanically and is an issue that would depend on the circumstances of each case. What has taken place in this application can be distinguished on the basis that the Petitioners received an assurance that their grievances would be considered, and until then, the scheme would not be implemented. The failure on the part of the Petitioner to come to Court within one month of the publication of the said schemes was therefore not due to any lapse on their part.

In **Alawala v The Inspector General of Police** [SC (FR) 219/2015; SC minutes of 15th February 2016], Aluwihare, PC, J stated that, "*Even though the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances, the Court has discretion to entertain a fundamental rights application where the delay in invoking the jurisdiction of the Court under Article 126 is not due to a lapse on the part of the Petitioner*."

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [supra], Jayawardena, PC, J went on to state as follows:

> *"However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires* ***Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances*** *which found the application. This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the* ***Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier"*** [emphasis added].

In these circumstances, the explanation of the Petitioners as to why they did not challenge the said Schemes of Recruitment as soon as they were published or as soon as the alleged infringement took place is accepted, with the result that this application cannot be rejected due to the failure to file action within one month of the approval and publication of the 2015 Schemes of Recruitment on 19th January 2015.

One month from the date of applications being called

The second event that relates to the objection that this application is time barred revolves around the letters dated 15th March 2016 and 1st March 2016, by which the Department of Co-operative Development called for applications to fill the vacancies in the post of DOCD and ACCD, respectively. While the first paragraph of the letter dated 15th March 2016 states that applications are being called in terms of the Scheme of Recruitment dated 19th January 2015, the second paragraph of both letters specifically state that educational and professional qualifications will be considered as special qualifications. This notice thus serves as the intimation by the Respondents that the representations made on behalf of the Petitioners have been disregarded and that the Provincial Public Service Commission would proceed to apply the 2015 Schemes of Recruitment when promoting officers to the post of DOCD/ACCD. This application should therefore have been filed within one month of 15th March 2016 and 1st March 2016, which is the date on

which the Petitioners had full knowledge that the 2015 Schemes of Recruitment would apply in the promotion of officers to the posts of DOCDs and ACCDs. Instead of invoking the jurisdiction of this Court within one month of the said letters, the Petitioners submitted their applications and faced the interviews on 31st May 2016 and 7th June 2016. Probably having become aware of their non-selection, the Petitioners invoked the jurisdiction of this Court on 21st June 2016.

A similar situation arose in **Kumarasiri and Others v Bandara and Others** [supra] where Sripavan, J (as he then was) observed as follows:

> "*It is necessary to state at the outset that I am not inclined to favour the conduct of the Petitioners who participated at the interview without any protest, fully availed themselves to the interview process and then when they observed that selection had gone against them, came forward to challenge the addendum P6 [N.B. this was the amended marking scheme] on the ground of unknown disability on their part. The participation, without challenging the addendum P6 with full knowledge of all the circumstances, preclude the Petitioners from objecting to the selection process embodied in P1 and P6 by an application filed seven months thereafter, namely, on 07.04.2009. The conferment of exclusive jurisdiction in terms of Article 126(1) and the imposition of a time-limit in Article 126(2) demonstrate with certainty the need for the prompt invocation of the jurisdiction of this Court. The addendum embodied in P6 therefore cannot be challenged in the proceedings.*"

The explanation offered by the Petitioners is that even at the time of calling for interviews, the 2015 Schemes of Recruitment were under consideration and therefore the Petitioners faced the interview on 31st May 2016 and 7th June 2016 on the understanding that the said Schemes would not be applied to them, and that it was only at the interview that they got to know that the said Schemes would be applied. This explanation cannot however be accepted as the notice calling for applications specifically provided that selections would be made in terms of the 2015 Schemes of Recruitment in respect of vacancies that had arisen after the introduction of the said Scheme. I am therefore of the

view that this application has been made outside the time period stipulated in Article 126(2) of the Constitution, thus depriving this Court of the jurisdiction to hear this matter.

This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT