

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

In the matter of an application under Article 126 of
the Constitution of Sri Lanka.

1. W, K. B. Seneviratne,
376/ A2, Shanthi Mawatha,
Kirillawala.

And 5 Others

PETITIONERS

S.C. (F.R.) APPLICATION NO. 105/08

VS.

1. Justice P. R. P. Perera,
Chairman,
Public Service Commission,
No. 46, Vauxhall Street,
Colombo 02.

And 23 Others

RESPONDENTS

BEFORE : Saleem Marsoof, P.C., J.,
P. A. Ratnayake, P. C., J., &
Chandra Ekanayake, J.

COUNSEL : J. C. Weliamuna with N. S. Ranaweera for Petitioners

M. K. B. A. Jayasinghe, D.S.G., for 1st-4th, 6th-10th, 11th,
12th-14th and 24th Respondents.

ARGUED ON : 25-11-2009

DECIDED ON : 1.04.2010

MARSOOF, J.

The Petitioners are Class II-Jailors of the Department of Prisons, falling within the purview of the Ministry of Justice and Law Reforms, and have in this application under Article 17 read with Article 126 of the Constitution, sought to challenge the promotions of the 16th to 23rd Respondents to the post of Class I-Jailor in the said Department and the failure to promote the Petitioners to the said post. The Petitioners, who are all

senior jailors in Class II of the service, claim that their fundamental right to equality enshrined in Article 12(1) of the Constitution has been violated by the actions of the 1st to 15th Respondents or any one or more of them, which have resulted in the 16th to 23rd Respondents who are more junior in the service being promoted over the Petitioners, who even otherwise are more qualified than the said Respondents. By way of relief, the Petitioners have prayed for a declaration that their fundamental right to equality has been violated by executive and administrative action and the purported promotions of the 16th to 23rd Respondents to posts of Jailor-Class I is null and void, and additionally, they have prayed that the marking scheme marked P9 and the communication setting out the purported appointments of the 16th to 23rd Respondents marked P8 be quashed. The Petitioners have also sought a declaration that they are entitled to be appointed to the post of Jailor-Class I with effect from 7th June 2007.

In the petition and affidavit filed in this Court, the Petitioners state that by a communication dated 23rd February 2007 (P3), the Secretary to the Ministry of Justice and Law Reforms (10th Respondent) called for applications from the senior-most officers currently holding office as Class II-Jailors having the specified qualifications to fill 4 vacancies in the cadre of Class I-Jailors. The said communication expressly referred to the Public Administration Circular No. 30/91 dated 20th July 1991 (P4) which required that promotions should be made on the basis of merit and seniority (I=i,;djh iy fCHlaG;ajh). It was stated in P3 that the basic qualifications required to be satisfied for the said promotions were completion of 5 years satisfactory service in the post of Class II-Jailor and passing, or being exempted from, the Efficiency Bar Examinations for that post. It is common ground that at the time application were called for the said promotions, there were only 4 vacancies, but by the impugned communication dated 26th February 2008 (P8) issued by the Commissioner General of Prisons, 8 persons were purported to be promoted to the post of Class I-Jailor.

According to the Petitioners, the marking scheme that was applicable to the promotions in question as on the date of the communication calling for applications (P3) was the scheme that was approved by the Public Service Commission (hereinafter referred to as "PSC") by its letter dated 8th July 2002 (P5) under which a maximum of 75 marks had to be allocated for seniority and a maximum of 25 marks for merit. It is stated in P5 that the maximum of 25 marks available under the category of merit, should be allocated under 5 headings for each of which a maximum of 5 marks were available namely, (a) commendations; (b) sports; (c) welfare and religious activities; (d) positions held and responsibilities undertaken; and (e) employment related training courses. The Petitioners stated that although they duly attended the interview held on 27th June 2007 and submitted all relevant documents in support of their candidature, to their surprise and dismay, they learnt that by P8 the 16th to 23rd Respondents have been appointed to the post of Jailor-Class I, although the Petitioners were on account of their seniority and merit more qualified than the said Respondents.

The gravamen of the complaint of the Petitioners, as contended by learned Senior Counsel for the Petitioners, was that at the said interview the marking scheme used was radically different from that contained in P5, and had been used without the approval of the PSC and without prior notice to the Petitioners and the other officers who applied to fill the vacancies. Learned Counsel for the Petitioners submitted that his clients were able to obtain a copy of the marking scheme in fact used at the

interview which they have produced marked P9, and it appears from this that only 50 marks would be allocated for seniority, the remaining 50 marks being apportioned in the following manner :-

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|-------|---|-----------------|
| (i) | Merit: | 20 marks |
| | ➤ Commendations: | 04 marks |
| | ➤ Sports: | 04 marks |
| | ➤ Welfare & religious activities: | 04 marks |
| | ➤ Promotions & responsibilities: | 04 marks |
| | ➤ Training programmes : | 04 marks |
| (ii) | Performance appraisals : | 20 marks |
| | ➤ Excellent : | 04 marks |
| | ➤ Above Average : | 03 marks |
| | ➤ Satisfactory : | 02 marks |
| | <i>(for each year of the past 05 years)</i> | |
| (iii) | Presentation at the interview : | 10 marks |

Learned Counsel for the Petitioners submitted that the 1st Petitioner was at the time of the interview ranked first in the Seniority List marked P10, and the 2nd Petitioner ranked second in the said List. He also submitted that the 3rd, 4th, 5th and 6th Petitioners ranked respectively 6th, 7th, 9th and 17th in the said Seniority List, and that the 16th to 23rd Respondents who were successful at the interview, were all junior in Class II to the 1st and 2nd Petitioners, and the 3rd to 6th Petitioners were also senior in Class II to the 16th, 19th, 21st and 22nd Respondents. He emphasized that by adopting the marking scheme P9, instead of the scheme contained in P5, which was the only scheme approved by the PSC, the comparative seniority of the Petitioners as against the 16th to 23rd Respondents has been unduly overlooked. Learned Counsel for the Petitioners contended that P9 was only a proposed marking scheme, which not only did not have the approval of the PSC, but was also irrational and arbitrary; the allocation of the marks for performance appraisals was unfair as no specific guidelines have been introduced in respect of evaluating the performance of the relevant officer; and the allocation of 10 marks for “presentation at the interview” gave the interview panel an unfettered discretion which was capable of being abused.

The learned Counsel for the Petitioners emphasized that by the promotion of the 16th to 23rd Respondents over the Petitioners, the fundamental rights of the Petitioners to equability before the law enshrined in Article 12(1) of the Constitution has been violated. Learned Counsel for the Petitioners submitted that in the absence of any other material to justify the appointment of the 16th to 23rd Respondents to fill the 8 vacancies in question, the Petitioners are entitled to all the relief prayed for by them in the petition.

In several fundamental rights cases involving promotions in the public service, this Court has looked into the legitimacy and rationality of the marking scheme adopted at interviews. *See, Perera and Another v. Cyril Ranatunga, Secretary Defence and Others* [1993]

1 Sri LR 39; *Perera and Nine Others v. Monetary Board of the Central Bank of Sri Lanka & Twenty-two Others* [1994] 1 Sri LR 152; *Wijesuriya v. National Savings Bank* [1997] 1 Sri LR 185; *Piyasena and Another v. The People's Bank and Others* [1994] 2 Sri LR 65; *Abeyasinghe and 3 Others v. Central Engineering Consultancy Bureau and 6 Others* [1996] 2 Sri LR 36; *Narangoda and Others v. Kodituwakku, Inspector-General of Police and Others* [2002] 1 Sri LR 247. This is because, as explained by Amerasinghe, J. in *Perera and Nine Others v. Monetary Board of the Central Bank of Sri Lanka & Twenty-two Others* (*supra*) at page 162-

“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.”

Bearing these words in mind, it is necessary to look at the question whether the marking scheme in P9 was a transparent and clear formulation of both basic qualities and qualifications necessary to perform the services relating to the post of Class I-Jailor and has received the approval of the Public Service Commission (PSC), the authority constitutionally vested with the function of formulating the same. It is noteworthy that the scheme of recruitment applicable to the post of Jailor-Grade I (1R3) in paragraph 11.1(ii) does not lay down any specific guidelines as regards the percentage of marks to be allocated for seniority as opposed to merit, but expressly provides that the PSC should approve the marking scheme to be followed at the interview. Both the 1st Respondent, Justice P. R. P. Perera, former Judge of the Supreme Court, who was at the relevant time the Chairman of the Public Service Commission, and the 10th Respondent, Suhada Gamlath, Secretary to the Ministry of Justice and Law Reforms, have filed affidavits with the objections on behalf of the 1st - 4th, 6th - 14th and 24th Respondents. In their affidavits, they have clarified that the marking scheme marked P9 used at the interview had in fact been approved by the Public Service Commission by its letter dated 9th February 2007, a copy of which was produced as 1R1. It is clear from the said letter that not only did the Public Service Commission approved the marking scheme, it also approved the proposal to fill the 4 additional vacancies that had arisen after the date of the communication dated 23rd February 2007 (P3) by which initially applications had been called only to fill 4 vacancies, that brought the total number of vacancies to be filled to 8. In these circumstances, learned Counsel for the Petitioners concedes that the said marking scheme has been duly approved by the Public Service Commission, and also concedes that the filling of the 4 additional vacancies that had arisen subsequently is not improper.

Accordingly, the question that has to be decided by this Court in the context that the Petitioners' are alleging violation of their fundamental rights enshrined in Article 12(1) of the Constitution, is whether the use of the said marking scheme marked P9, as opposed to the marking scheme marked P5, offend the basic right to equality. The main difference between the two marking schemes is that whereas P5 allocates only 25 per centum of the marks for merit, P9 assigns a maximum of 50 per centum of the marks for merit. In this context, it is necessary to emphasise that the marking scheme marked P9 gives equal weightage to seniority and merit and is in conformity with the requirements in the Public Administration Circular No. 30/91 dated 20th July 1991 (P4),

which embodies the decision made by the Cabinet of Ministers that all promotions to the Public Service should be based on “merit and seniority” (l=i; djh iy fcHlaG; ajh). It is also important in this context that the communication by which applications were called to fill vacancies in the cadre of Class I-Jailors specifically refers to the said circular.

No doubt, in apportioning the marks into the compartments of merit and seniority, the position of the post or posts to be filled in the hierarchical structure of the relevant establishment and the nature of the work that the person or persons to be promoted have to discharge will be important considerations. One cannot lose sight of the fact that the impugned promotions were to posts of Class I-Jailor which is the highest class in the post of jailor within the hierarchy of the Department of Prisons.

The submission that was made by learned Senior Counsel for the Petitioners that seniority should be given more weight than merit may be of some relevance in the lower grade or class of a particular post, but the higher the position in the hierarchy and the more complex the functions involved, merit has to inevitably increase in its importance in any rational scheme of promotion. As M.D.H. Fernando, J. observed in the course of his judgment in *Perera and Another v. Cyril Ranatunga, Secretary Defence and Others* [1993] 1 Sri LR 39 at page 43-

“To ignore the requirements of the post and the needs of the public would be to permit the unrestricted application of the “Peter principle” - that in a hierarchy a person will continue to be promoted until he reaches a level at which he is quite incompetent. “Merit” thus has many facets, and the relative importance or weight to be attached to each of these facets, and to merit in relation to seniority, would vary with the post and its functions, duties and responsibilities.”

The so called “Peter principle” was enunciated by Dr. Laurence J. Peter and Raymond Hull in their book *The Peter Principle*, a humorous treatise which introduced the salutary science of “Hierarchiology”. The gist of the principle is that in a hierarchy, members are promoted so long as they work competently. Sooner or later they are promoted by virtue of their seniority to a position at which they are no longer competent (their “level of incompetence”), and in time, every position in the hierarchy will be occupied by an employee who is incompetent to carry out his duties and the work involved is accomplished by those employees who have not yet reached their level of incompetence. The practical utility of the theory is that in making promotions for even higher positions, the system should be able to filter such employees who have reached their level of incompetence, or else an incompetent person at the top might cause the entire establishment to collapse. It is therefore clear that the allegation that Respondents were obliged to allocate 75 per cent of the marks for seniority and only 25 per cent of the marks for merit in terms of the letter of the Public Service Commission dated 8th July 2002 (P5) is altogether baseless. I also do not consider it unreasonable to award 20 marks under the category “performance appraisals” for the reason that the performance in the previous grade or class is extremely relevant in making promotions to the next grade or class in any service, and no specific allegations have been made in regard to the criteria adopted for such appraisal. The allocation of 10 marks for “presentation at the interview” no doubt bring in a certain degree of subjectivity, but considering that this constitutes only 10 per cent of the marks that can be allocated

under the marking scheme, and the versatility and integrity of the interview panel, I am of the view that no questions of inequality would arise from this position.

Apart from the issue of comparative seniority, the only other basis on which the impugned promotions are sought to be challenged by the Petitioners is that there is an inquiry pending against the 17th Respondent before the Human Rights Commission of Sri Lanka. Although a bold statement to this effect is found in paragraph 18(f) of the Petition and the corresponding paragraph of the affidavit filed in this Court by the Petitioners, no particulars of the case have been provided, and in the absence of material to sustain the allegation, this Court cannot make any finding or pronouncement in this regard.

For the reasons outlined above, I hold that the Petitioners have not succeeded in proving any violation of their fundamental rights enshrined in Article 12(1) of the Constitution. Accordingly I make order dismissing the application, but make no order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT