

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

*In the matter of an application in terms of  
Article 126 read with Article 17 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka in respect of violation  
of Article 12(1) of the Constitution.*

S C (F R) 350/2016

1. Saman Ratnayake,  
11/4, Jeswel Place,  
Mirihana,  
Nugegoda.
2. Suresh Prasanna Kumara Warnasooriya,  
17, Tourbo Housing Scheme,  
Pitawella Road,  
Boralesgamuwa.
3. Janaka Indrajit de Alwis Goontileke,  
35, Nanda Mawatha,  
Nugegoda.
4. Liyanage Samansiri Sigera,  
No. 232/01/A, Makola South,  
Makola.
5. Kariyawasam Don Anandasiri Weerasinghe,  
17/2, Railway Station Lane,  
Udahamulla,  
Nugegoda.

**PETITIONERS**

**Vs.**

1. National Police Commission
2. Siri Hettige, (Chairman)
3. P. H. Manatunga, (Member)
4. Savithree Wijesekara, (Member)
5. Y. L. M. Zawahir, (Member)
6. Anton Jayanadan, (Member)
7. Tilak Collure, (Member)
8. Frank de Silva, (Member)
9. N. Ariyadasa Cooray, (Secretary)

*1<sup>st</sup> to 9<sup>th</sup> are of*

*National Police Commission, Block No. 9*

*BMICH Premises,*

*Baudhaloka Mawatha,*

*Colombo 07.*

10. Pujith Jayasundara,  
Inspector General of Police,  
Police Headquarters,  
Colombo 01.
11. B. M. Basnayaka,  
Chairman,  
Committee to inquire into Political  
Victimization,  
Ministry of Law and Order and Southern  
Development,  
Floor No. 13, Stage II,  
Sethsiripaya,  
Battaramulla.
12. Neil Hapuhinne,  
Secretary,  
Committee to inquire into Political  
Victimization,

Ministry of Law and order and Southern  
Development, Floor No. 13, Stage II,  
Sethsiripaya,  
Battaramulla.

13. Ravi Wijegunawardana,  
Member,  
Committee to inquire into Political  
Victimization,  
Ministry of Law and order and Southern  
Development, Floor No. 13, Stage II,  
Sethsiripaya,  
Battaramulla.
14. J. Sumith Abeysinghe,  
Secretary to the Cabinet,  
Republic Square,  
Sir Baron Jayathilaka Mawatha,  
Colombo 01.
15. P. Wijeweera,  
Secretary,  
Ministry of Law and order and Southern  
Development, Floor No. 13, Stage II,  
Sethsiripaya,  
Battaramulla.
16. J. J. Rathnasiri,  
Secretary – Ministry of Public  
Administration and Management,  
Independent Square,  
Colombo 07.
17. S. A. D. M. P. Gunasekara,  
43/44, Field Garden, Navinna,  
Maharagama.
18. Sagala Rathnayaka,

Minister of Law and order and Southern  
Development,  
Ministry of Law and order and Southern  
Development, Floor No. 13, Stage II,  
Sethsiripaya,  
Battaramulla.

19. Hon. Attorney General,  
Department of Attorney General,  
Colombo.

### **RESPONDENTS**

Before: **P PADMAN SURASENA J**

**E. A. G. R. AMARASEKARA J**

**A. H. M. D. NAWAZ J**

Counsel: Philip Chandraratne for the 2<sup>nd</sup> Petitioner.

Rajiv Goonetilleke, SSC for the Hon. Attorney General.

Argued on: 22-03-2021.

Decided on: 16-12-2021

### **P Padman Surasena J**

Petitioners are police officers and retired police officers claiming to have been politically victimized during the period 1994 to 31-07-2014.

In 2015, the then Cabinet of Ministers, having considered the Memorandum dated 09-03-2015<sup>1</sup> under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, decided on 08-04-2015, to issue a Public Administration Circular to provide a reasonable period of time for those officers, if any, who have been subjected to political victimization and who wish to seek relief, but not yet submitted their appeals, to submit their appeals. The Cabinet of Ministers also decided to authorize the Secretary Ministry of Public Administration to appoint an

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<sup>1</sup> Produced marked **P 3**.

official committee comprising of three retired public officers who had served in the capacity of Additional Secretary or any other similar or higher post to examine the said appeals and make recommendations. The Petitioners have produced the said cabinet decision made on 08-04-2015, marked **P 4**.

As authorized by the said cabinet decision, the Secretary Ministry of Public Administration had issued the Public Administration circular No. 09/2015 dated 17-04-2015, calling for appeals to be submitted to the Ministry of Public Administration by 05-05-2015. The Petitioners have produced the said Public Administration circular No. 09/2015 marked **P 5**.

The Petitioners have stated in their petition<sup>2</sup> that the Minister of Public Order and Christian Affairs thereafter sought approval for the implementation of the recommendations of the Committee referred to in the said Public Administration circular No. 09/2015 (**P 5**), from the Cabinet of Ministers, by the Cabinet Memorandum dated 17<sup>th</sup> June 2015. The Petitioners have produced the said Cabinet Memorandum dated 17<sup>th</sup> June 2015 marked **P 6**. The 9<sup>th</sup> Respondent (Secretary, National Police Commission) has also produced the same marked **9 R1**.

The Cabinet of Ministers had thereafter decided inter alia on 17<sup>th</sup> June 2015, to obtain the observations of the 19<sup>th</sup> Respondent (Hon. Attorney General) on the implementation of the recommendations of the above Committee. The 9<sup>th</sup> Respondent has produced the said decision made by the Cabinet of Ministers on 17<sup>th</sup> June 2015 marked **9 R2**.

The Petitioners have also stated in their petition that the approval of the Cabinet of Ministers was conveyed by **P 7** by the 14<sup>th</sup> Respondent (Secretary to the Cabinet of Ministers) to the Secretary Ministry of Law and Order. The Petitioners have produced the said decision made by the Cabinet of Ministers on 21<sup>st</sup> October 2015 marked **P 7**. The 9<sup>th</sup> Respondent has produced the said decision made by the Cabinet of Ministers on 21<sup>st</sup> October 2015 marked **9 R4**.

The Petitioners have stated that subsequently another committee (hereinafter sometimes referred to as the "Basnayake Committee") comprising of Ms. B. M. M.

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<sup>2</sup> Paragraph 3 (c) of the petition dated 04-10-2016.

Basnayake (11<sup>th</sup> Respondent), Neil Hapuhinna (12<sup>th</sup> Respondent) and Ravi Wijegunawardene (13<sup>th</sup> Respondent) was appointed to reconsider and make recommendations as there were anomalies in the recommendations made by two previous committees. This Committee (Basnayake Committee) recommended granting relief to 129 police officers. The Petitioners have produced the Basnayake Committee report marked **P 8 A**.

The Minister of Law and Order and Southern Development thereafter sought approval for the implementation of the recommendations of the Basnayake Committee from the Cabinet of Ministers, by the Cabinet Memorandum dated 10<sup>th</sup> June 2016. The Petitioners have produced the said Cabinet Memorandum dated 10<sup>th</sup> June 2016 marked **P 8**. The 9<sup>th</sup> Respondent has produced the said Cabinet Memorandum dated 10<sup>th</sup> June 2016 marked **9 R7**.

The Cabinet of Ministers having considered the Note to the Cabinet dated 26-07-2016 (**9 R8**) forwarded by the Prime Minister, Cabinet Decision dated 19<sup>th</sup> April 2016, the observations of the President (**9 R9**) and the observations of the Minister of Finance (**9 R10**), had decided on 9<sup>th</sup> August 2016 to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended. The Cabinet of Ministers also decided to treat the above Decision as a matter of Policy. The Petitioners have produced the copy of the said Cabinet Decision dated 9<sup>th</sup> August 2016 marked (**P 9**). The 9<sup>th</sup> Respondent has also produced the copy of the said Cabinet Decision dated 9<sup>th</sup> August 2016 marked (**9R 11**). For clarity I would reproduce below the said Cabinet decision **P 9 (9R 11)**.

*(B) Agenda Items:*

*(I) Cabinet Papers - General*

*08. Cabinet Paper No. 16/1473/702/053, a Note to the Cabinet dated 2016-07-26 by the Prime Minister on "**Providing relief to those who faced difficulties due to political reasons**"- (Cabinet decisions dated 2016-04-19 on CP No. 16/0654/748/010 and 2016-06-28 on CP No. 16/1134/748/010-I refers) the above Note was considered along with the observations of H.E the President and the Minister of Finance. After discussion, it was decided-*

a) to grant approval treating this as matter of policy, to the proposals (I) and (II) in paragraph 03 of the Note;

b) to direct the Secretary, Ministry of Law & Order and Southern Development-

(i) to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and

(ii) to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.

It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly.

Action by: **Secretary to the Prime Minister** - above observations annexed.

**My/Law & Order and Southern Development** - copy of Note and above observations annexed.

Copied to: **Secretary to the President** - observations of the Minister of Finance annexed.

**My/Finance** - observations of H.E the President annexed.

**My/Public Administration and Management** - copy of Note and above observations annexed.

**Secretary, National Police Commission** - copy of Note and above observations annexed.

The Petitioners state that thereafter, replying to a letter by the National Police Commission (1<sup>st</sup> Respondent), the Inspector General of Police (10<sup>th</sup> Respondent) submitted his report by his letter bearing reference DP/OW/813/2016 dated 15/09/2016, to the National Police Commission giving clearance for 17 officers mentioned in the Basnayake Committee report (**P 8 A**). The Petitioners have produced the copy of the said letter marked **P 10** and the report of the Inspector General of Police marked **P 10 A**.

The Petitioners state that thereafter, S A D M P Gunasekara, the 17<sup>th</sup> Respondent, who was the OIC Division, Nugegoda was promoted with effect from 10-06-2016,<sup>3</sup> from the rank of Senior Superintendent of Police to the rank of Deputy Inspector General of Police on the approval of National Police Commission on the grounds of political victimization discriminating others who were in similar circumstances. The Petitioners allege that the promotion of the 17<sup>th</sup> Respondent is violative; as his name is not in the list cleared by the Inspector General of Police **P 10** and **P 10 A**; there were others having similar qualifications left out. It is in that backdrop that the Petitioners in this application have prayed inter alia, for the following relief in their petition.

- i. Declare that the Petitioners' fundamental rights enshrined in Article 12 (1), have been violated and/or are subject to continuing infringement by the Respondents and State;*
- ii. Declare that the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Petitioners are eligible to be promoted to the rank of Deputy Inspector General of Police with effect from 10-06-2016, in view of **P 8**, **P 8A**, **P 9** and **P 10**;*
- iii. Declare that the 2<sup>nd</sup> Petitioner is eligible to be promoted to the rank of Superintendent of Police with effect from 01-01-2016 in view of **P 8**, **P 8A**, **P 9**, **P 1**, **P 2**, and **P 10**;*
- iv. Declare that the 4<sup>th</sup> Petitioner is eligible to be promoted to the rank of Superintendent of Police with effect from 01-01-2016 in view of **P 8**, **P 8A**, **P 9** and **P 10**;*
- v. Issue direction to 1<sup>st</sup> to 8<sup>th</sup> and 10<sup>th</sup> Respondents to appoint the Petitioners according to above declarations;*
- vi. Issue directions to 10<sup>th</sup> Respondent Inspector General of Police to provide all privileges entitled to their ranks, to the Petitioners, once they are promoted;*
- vii. Grant each petitioner a compensation of Rs. 1 million.*

In the instant case, the Court has granted leave to proceed under Article 12(1) of the Constitution. Thus, the task of this Court must be to ascertain whether anyone or

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<sup>3</sup> Telephone message produced marked **P 11**.

more of the Respondents have infringed the fundamental rights of the petitioners guaranteed under Article 12(1) of the Constitution. In that regard I would examine whether the promotion of the 17<sup>th</sup> Respondent has been made discriminating the Petitioners thereby infringing their fundamental rights guaranteed under Article 12(1) of the Constitution.

At the outset, one must bear in mind that according to the case advanced by the Petitioners, the promotions of the Petitioners or the 17<sup>th</sup> Respondent or any other officer in the given instance is possible only under the terms of the relevant Cabinet decision. As can be clearly seen from the said Cabinet decision dated 09<sup>th</sup> August 2016 (**P 9**), the implementation of the proposals recommended in the Note to the Cabinet forwarded by the Prime Minister has been approved subject to the following conditions (reproduced in verbatim):

- (i) to take note of the matters highlighted in the observations of H.E the President and pursue action accordingly, and*
- (ii) to obtain the concurrence/approval of the relevant authorities prior to implementation of the proposals referred to at (a) above, as indicated in the observations of the Minister of Finance.*

Thus, the implementation of the relevant Cabinet decision must necessarily be done subject to the aforesaid conditions. The 9<sup>th</sup> Respondent has produced the observations of the President referred to in the relevant Cabinet decision marked **9 R 9** which clearly shows that the said Cabinet decision must be implemented in such a way that the implementing of the relief recommended by the committee should not affect the seniority of other serving police officers.

The Affidavit of the 9<sup>th</sup> Respondent, Nawalage Ariyadasa Cooray - Secretary, National Police Commission sheds light as to why the Petitioners could not be promoted in terms of the relevant Cabinet decision. He has explained that the relief recommended to the Petitioners could not be implemented due to the following reasons and the said reasons are set out in the observations received from the 10<sup>th</sup> Respondent. Indeed, it is the Petitioners themselves who have produced the relevant observations of the

Inspector General of Police marked **P 10** and **P 10 A**. The said reasons are as follows (reproduced in verbatim):

- *1<sup>st</sup> Petitioner – The seniority of 93 other police officers of similar rank to him (SSP) will be adversely affected if his promotion is backdated to 10.06.2011.*
- *2<sup>nd</sup> Petitioner – Although there is a recommendation to promote him to the rank of DIG with effect from 01.01.2016, there is no recommendation on his promotion within the ranks of IP to SSP.*
- *3<sup>rd</sup> Petitioner – The seniority of other police officers of similar rank (SSP), but more senior to him, will be adversely affected if his promotion is backdated to 10.06.2011.*
- *4<sup>th</sup> Petitioner – The seniority of police officers of similar rank (SSP), but more senior to him, will be adversely affected if his promotion is backdated to 10.06.2011.*
- *5<sup>th</sup> Petitioner – The seniority of 1124 other police officers of similar rank to him (SSP) will be adversely affected if his promotion is backdated to 10.06.2011.*

Let me now examine whether the 17<sup>th</sup> Respondent could have been promoted in terms of the relevant Cabinet decision. The 9<sup>th</sup> Respondent, (Secretary, National Police Commission) has also explained as to how the promotion of the 17<sup>th</sup> Respondent was possible in terms of the said Cabinet Decision.

The 17<sup>th</sup> Respondent is one of those 129 police officers whose names were submitted to the Cabinet, by the Cabinet Memorandum dated 10.06.2016. His name appears as No. 08 in the schedule (**P 8A**). He was to retire on 19.09.2016. Thus, his promotion on the grounds of political victimization could not have materially affected the seniority of any other serving police officer holding a similar rank held by the 17<sup>th</sup> Respondent at the time (SSP) or an officer holding a rank similar to which the 17<sup>th</sup> Respondent was promoted (DIG). The 9<sup>th</sup> Respondent has produced a copy of the letter dated 19.08.2016 sent to him by the 10<sup>th</sup> Respondent marked **9 R13**. This letter has indicated the 17<sup>th</sup> Respondent's date of retirement and the fact that the backdating of his promotion would not affect the seniority of the other serving police officers.

Therefore, the implementation of the relief recommended in respect of the 17<sup>th</sup> Respondent did not adversely affect the seniority of any other serving officer holding similar rank and therefore, was in compliance with the Cabinet Decision (**P 9**).

Thus, the Petitioners have been unable to prove that the Respondents have infringed the fundamental rights of any of the Petitioners by promoting the 17<sup>th</sup> Respondent, from the rank of Senior Superintendent of Police to the rank of Deputy Inspector General of Police with effect from 10-06-2016.<sup>4</sup>

Despite the above conclusion, looking at this case from somewhat different perspective, I am prompted to add the following comments also in relation to the promotions of public officers in this country. This is because the Police officers were also basically public officers coming under the purview of the Public Service Commission until the 17<sup>th</sup> Amendment to the Constitution established the National Police Commission and vested the powers of carrying out functions relating to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, in that Commission. Later, the 20<sup>th</sup> Amendment to the Constitution repealed Article 155 G which entrusted the aforesaid powers to the National Police Commission bringing back the Police officers again under the purview of the Public Service Commission.

The Public Service Commission was initially established in Sri Lanka by Article 58 of the then existing Constitution of Ceylon. [Ceylon (Constitution) Order in Council 1946 (Chapter 379)]. That Constitution was promulgated as a result of the endeavors of the Soulbury Commission appointed in the years 1944 and 1945 by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the then Island of Ceylon in order to examine and discuss proposals for constitutional reforms. Thus, it became commonly known as the Soulbury Constitution. The country known as Ceylon then, was a member of the British Commonwealth of Nations which had an autonomous state within the British Empire. Having a common allegiance to the British Crown then was a prominent feature in that Constitution and was compatible with then Dominion Status of Ceylon.

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<sup>4</sup> Telephone message produced marked **P 11**.

Thus, Article 57 of the Soulbury Constitution had expressly provided for the tenure of office of state officers in the following manner.

*57. Save as otherwise provided in this order, every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure.*

However, Article 58(1) of the Ceylon (Constitution) Order in Council 1946, established a Public Service Commission and the said Article read as follows;

*58. (1) There shall be a Public Service Commission which shall consist of three persons, appointed by the Governor-General, one at least of whom shall be a person who has not, at any time during the period of five years immediately preceding, held any public office or judicial office. The Governor-General shall nominate one of the members of the Commission to be the Chairman. ....*

Article 60 of that Constitution vested the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission. Provisions such as disqualifying the Senators or the Members of Parliament from becoming members of the Public Service Commission,<sup>5</sup> restraining the members of the Public Service Commission from holding any paid office as a servant of the Crown and making them ineligible for subsequent appointment as Public Officers,<sup>6</sup> entitlement of members of the Public Service Commission to hold office for a period of five years from the date of their appointment,<sup>7</sup> the mandatory requirement for the Governor-General to assign a cause when removing any member of the Public Service Commission from his office,<sup>8</sup> the requirement to determine the salary payable to the members of the Public Service Commission by Parliament and the inability to reduce their salaries during their terms of office,<sup>9</sup> were salient features of the Public Service Commission under the Soulbury Constitution. Those provisions aimed at maintaining the independence of the Public Service Commission. Thus, right from the inception,

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<sup>5</sup> Article 58 (2) of the Ceylon (Constitution) Order in Council of 1946.

<sup>6</sup> Article 58 (3) of the Ceylon (Constitution) Order in Council of 1946.

<sup>7</sup> Article 58 (4) of the Ceylon (Constitution) Order in Council of 1946.

<sup>8</sup> Article 58 (5) of the Ceylon (Constitution) Order in Council of 1946.

<sup>9</sup> Article 58 (7) of the Ceylon (Constitution) Order in Council of 1946.

the Public Service Commission was an institution meant to be an independent body charged with the powers of appointment, transfer, dismissal and disciplinary control of public officers.

However, the first Republican Constitution (1972) did away with the Public Service Commission and vested the powers of the appointment, transfer, dismissal and disciplinary control of state officers in the Cabinet of Ministers.

Article 106 of the 1972 Constitution read as follows;

*106. (1) The Cabinet of Ministers shall be responsible for the appointment, transfer, dismissal and disciplinary control of state officers and shall be answerable therefor to the National State Assembly.*

*(2) Subject to the provisions of the Constitution, the Cabinet of Ministers shall have the power of appointment, transfer, dismissal and disciplinary control of all state officers.*

*(3) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to state officers including the constitution of state services, the formulation of schemes of recruitment and codes of conduct for state officers, the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of state officers.*

*(4) The Cabinet of Ministers may notwithstanding any delegation of powers as is referred to in this Chapter exercise its powers of appointment, transfer, dismissal and disciplinary control of state officers.*

*(5) No institution administering justice shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any recommendation, order or decision of the Cabinet of Ministers, a Minister, the State Services Advisory Board, the State Services Disciplinary Board, or a state officer, regarding any matter concerning appointments, transfers, dismissals or disciplinary matters of state officers.*

Article 107(1) of the 1972 Constitution expressly provided for the tenure of office of state officers and related powers vested in the National State Assembly in that regard in the following manner;

107. (1) Save as otherwise expressly provided by the Constitution, every state officer shall hold office during the pleasure of the President. The National State Assembly may however in respect of a state officer holding office during the pleasure of the President provide otherwise by a law passed by a majority of those present and voting.

Thereafter, the second Republican Constitution (1978) continued to vest the powers of appointment, transfer, dismissal and disciplinary control of public officers in the Cabinet of Ministers. However, there was provision for the Cabinet of Ministers to delegate from time to time, its powers of appointment, transfer, dismissal and disciplinary control of public officers other than Heads of Departments, to the Public Service Commission. Thus, the 1978 Constitution at its inception, re-established the Public Service Commission as a body exercising authority delegated to it by the Cabinet of Ministers.

Article 55 of the 1978 Constitution in its original form was as follows;

*"55 (1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure.*

*(2) The Cabinet of Ministers shall not delegate its powers of appointment, transfer, dismissal and disciplinary control in respect of Heads of Departments.*

*(3) The Cabinet of Ministers may from time to time, delegate its powers of appointment, transfer, dismissal and disciplinary control of other public officers to the Public Service Commission.*

*Provided that .....*"

Although the original Article 55 of 1978 Constitution chose to continue with the principle that all public officers shall hold office at pleasure,<sup>10</sup> it however made the decisions made by those exercised power under Article 55 amenable to the fundamental rights jurisdiction of the Supreme Court<sup>11</sup> removing hitherto existed bar for any court or institution administering justice to inquire into, pronounce upon or in any manner call in question any such decision. This was a yet another step taken to ensure the correctness of such decisions.

Thereafter, the 17<sup>th</sup> Amendment to the Constitution which was certified on 03<sup>rd</sup> October 2001, brought about fundamental changes to the afore-stated original position in the 1978 Constitution. The 17<sup>th</sup> Amendment to the Constitution repealed the whole of original Chapter IX and substituted it with a new Chapter IX. The changes included the structure of the powers vested in the Cabinet of Ministers in relation to appointment, transfer, dismissal and disciplinary control of public officers. Most importantly, the 17<sup>th</sup> Amendment to the Constitution transferred the powers of appointment, promotion, transfer, disciplinary control and dismissal of public officers other than the Heads of Department back to the Public Service Commission and abolished the principle that 'all public officers shall hold office at pleasure' which continued to be in the Constitutions of this country from the time of British Colonization period up until the implementation of the 17<sup>th</sup> Amendment to the Constitution. The Cabinet of Ministers continued to retain the power in relation to appointment, transfer, dismissal and disciplinary control of the Heads of Departments and also retained the power to provide for and determine all matters of policy relating to public officers. The relevant Articles 55 (1), 55(3) and 55(4) introduced by the 17<sup>th</sup> Amendment to the Constitution read as follows,

*55 (1) The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission.*

*55 (3) Notwithstanding the provisions of paragraph (1) of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads*

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<sup>10</sup> As Article 55(1) of 1978 Constitution stood before the 17<sup>th</sup> Amendment to the Constitution.

<sup>11</sup> As Article 55(5) of 1978 Constitution stood before the 17<sup>th</sup> Amendment to the Constitution.

*of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.*

*55 (4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers.*

Article 55 (5) introduced by the 17<sup>th</sup> Amendment to the Constitution states that the Public Service Commission will carry out its affairs according to the policies laid down by the Cabinet of Ministers and the Public Service Commission is answerable to the parliament in regard to carrying out its functions.

Article 59 brought in by the 17<sup>th</sup> Amendment to the Constitution also introduced a procedure to enable any aggrieved party to challenge the decisions made by the Public Service Commission by way of preferring an appeal to the Administrative Appeals Tribunal appointed by the Judicial Service Commission which was given an appellate power to alter, vary or rescind any order or decision made by the Public Service Commission.

The 17<sup>th</sup> Amendment to the Constitution continued to preserve the fundamental rights jurisdiction of the Supreme Court over the decisions made by the relevant bodies in the following manner;

Article 61A.

*Subject to the provisions of paragraphs (1), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.*

Another important change that was introduced by the 17<sup>th</sup> Amendment to the Constitution is the insertion of a new Chapter XVIII A immediately after Article 155 of the Constitution establishing the National Police Commission by Article 155A thereof and vesting it with powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police. Article 155G which vested those powers in the National Police Commission was as follows,

*155G. (1) (a) The appointment, promotion, transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the Inspector-General of Police.*

*(b) The Commission shall not in the exercise of its powers under this Article, derogate from the powers and functions assigned to the Provincial Police Service Commissions as and when such Commissions are established under Chapter XVIIIA of the Constitution.*

*(2) The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose.*

*(3) The Commission shall provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and training and the improvement of the efficiency and independence of the police service, the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions, codes of conduct, and the standards to be followed in making promotions and transfers, as the Commission may from time to time consider necessary or fit.*

*(4) The Commission shall exercise all such powers and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule of the Constitution.*

However, the 18<sup>th</sup> Amendment to the Constitution which was certified on 09<sup>th</sup> September 2010, repealed Article 155G; it also repealed hitherto existed Article 55 and replaced it with new Article 55 which is as follows;

*55. (1) The Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers, including policy relating to appointments, promotions, transfers, disciplinary control and dismissal.*

*(2) The appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Department shall, vest in the Cabinet of Ministers.*

*(3) Subject to the provisions of the Constitution, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission.*

*(4) The Commission shall not derogate from the powers and functions of the Provincial Public Service Commissions as are established by law.*

*(5) The Commission shall be responsible and answerable to Parliament in accordance with the provisions of the Standing Orders of Parliament for the exercise and discharge of its powers and functions. The Commission shall also forward to Parliament in each calendar year, a report of its activities in respect of such year.*

That resulted in re-transferring the National Police Commission's powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the Public Service Commission. This brought the police officers back under the category of public officers coming under the purview of the Public Service Commission. All matters pertaining to the appointment, promotion, transfer, disciplinary control and dismissal of police officers pending before the National Police Commission stood transferred to the Public Service Commission by virtue of section 36(5) of the 18<sup>th</sup> Amendment to the Constitution.

This also brought the power to provide for and determine all matters of policy relating to police officers back under the Cabinet of Ministers by virtue of Article 55 (1) introduced by the 18<sup>th</sup> Amendment to the Constitution.

In the instant case, it was in the year 2015 that the then Cabinet of Ministers having considered the Memorandum dated 09-03-2015<sup>12</sup> under the title "To provide relief to those who were victimized for political reasons" submitted by the then Prime Minister, had decided on 08-04-2015, to issue a Public Administration Circular calling for the officers subjected to political victimization who wish to seek relief, to submit their appeals to be considered by a committee comprising of three retired public officers appointed by the Secretary Ministry of Public Administration. As the 18<sup>th</sup> Amendment to the Constitution came into force with effect from 09<sup>th</sup> September 2010, the powers

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<sup>12</sup> Produced marked **P 3**.

in relation to the appointment, promotion, transfer, disciplinary control and dismissal of public officers including the police officers was with the Public Service Commission and the power to provide for and determine all matters regarding public officers including the police officers, was with the Cabinet of Ministers.

It was in the year 2016 that the Cabinet of Ministers had decided (**P 9**) to direct the Secretary Ministry of Law and Order and Southern Development to implement the proposals recommended by the Basnayake Committee treating that decision as a matter of Policy. The law had changed by that time as the 19<sup>th</sup> Amendment to the Constitution came into force with effect from 15<sup>th</sup> May 2015.

The 19<sup>th</sup> Amendment to the Constitution re-transferred the powers in relation to the appointment, promotion, transfer, disciplinary control and dismissal of police officers back to the National Police Commission from the hands of the Public Service Commission. It re-introduced an article numbered 155G in the following form;

*155G. (1) (a) The appointment, promotion transfer, disciplinary control and dismissal of police officers other than the Inspector-General of Police, shall be vested in the Commission. The Commission shall exercise its powers of promotion, transfer, disciplinary control and dismissal in consultation with the InspectorGeneral of Police.*

*(3) The Commission shall, in consultation with the Inspector-General of Police, provide for and determine all matters regarding police officers, including:-*

*(a) the formulation of schemes of recruitment, promotion and transfers, subject to any policy determined by the Cabinet of Ministers pertaining to the same;*

*(b) training and the improvement of the efficiency and independence of the police service;*

*(c) the nature and type of the arms, ammunition and other equipment necessary for the use of the National Division and the Provincial Divisions; and*

*(d) codes of conduct and disciplinary procedures.*

*(4) The Commission shall exercise all such powers and discharge and perform all such functions and duties as are vested in it under Appendix I of List I contained in the Ninth Schedule to the Constitution.*

Thus, after the 19<sup>th</sup> Amendment to the Constitution it was the National Police Commission which was charged with the power to provide for and determine all matters regarding police officers, including the formulation of schemes of recruitment and promotion in consultation with the Inspector-General of Police, subject to any policy determined by the Cabinet of Ministers pertaining to the same. This was the legal position existed when the Cabinet of Ministers made the decision contained in **p 9** on 09-08-2016.

Let me now examine the scope of power that should have been exercised by the Cabinet of Ministers at the relevant time. It is important to bear in mind that the policies the Cabinet of Ministers are empowered to make must be only to lay down mere schemes of promotions in the nature of general rules and regulations and not decisions to promote any individual public or Police officer. On the other hand, any recommendation made by the Cabinet of Ministers to promote individuals cannot be categorized as policy decisions falling under Article 55(1) or 155G 3(a) of the Constitution. This is reflected in the following judicial precedence which interpreted Article 55 as it had stood at the times of those relevant judgments.

The case of Abeywickrema Vs. Pathirana,<sup>13</sup> is an election petition where the petitioner in that case challenged the validity of the election of the 1<sup>st</sup> respondent in that case as a Member of Parliament for Akmeemana electorate. The said petitioner sought a declaration that the election of the said respondent is void in law on the ground that he was a public officer and was therefore disqualified under Article 91 (1) (d) (vii) of the Constitution for election as a Member of Parliament. The said respondent was a principal of a school coming under the Department of Education which meant that he was a public officer. The petitioner in that case argued that although the 1<sup>st</sup> respondent in that case (school principal) had submitted a letter of resignation from

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<sup>13</sup> 1986 (1) Sri L. R. 120.

the said public service position, that letter of resignation was neither submitted nor accepted by the due authority. This was because the 1<sup>st</sup> respondent in that case (school principal) had tendered his resignation to the Regional Director of Education of the area where he was serving and getting that resignation accepted by the Regional Director who relieved him from his duties; according to the petitioner in that case, the said process did not effectively terminate the services of the said 1<sup>st</sup> respondent (school principal) as a public officer, to qualify him as a candidate at a parliamentary election. It was on that basis that the said petitioner sought to argue that there had been no valid resignation in fact or in law by the said 1<sup>st</sup> respondent school principal who was therefore disqualified under the aforementioned provision to be a Member of Parliament as he had continued to hold a public office. Delivering the majority judgment of Court in 1986, Chief Justice Sharvananda interpreting Article 55(4) of 1978 Constitution as it stood before the 17<sup>th</sup> Amendment to the Constitution, held that the Constitution of 1978 has given a statutory dimension to the Establishments Code and the said 1<sup>st</sup> respondent (school principal) was bound by section 4 of the Establishments Code to obtain proper acceptance of his resignation. The Chief Justice further holding, that the said letter of resignation did not bring about a valid termination of the said school principal's contract of service because it was neither addressed nor accepted by the Appointing Authority i.e., the Educational Services Committee; and that the Regional Director, Galle is not the proper authority to accept the resignation; went on to state in his judgment the following;

*"Article 55(4) empowers the Cabinet of Ministers to make rules for all matters relating to public officers, without impinging upon the overriding powers of pleasure recognised under Article 55(1). Matters relating to 'public officer' comprehends all matters relating to employment, which are incidental to employment and form part of the terms and conditions of such employment, such as provisions as to salary, increments, leave, gratuity, pension, and of superannuity, promotion and every termination of employment and removal from service. The power conferred on the Cabinet of Ministers is a power to make rules which are general in their operation though they may be applied to a particular class of public officers. This power is a legislative power and*

*this rule making function is for the purpose identified in Article 55(4) of the Constitution as legislative not executive or judicial in character.”*

His Lordship Justice Wanasundara who was one of the members of the five-judge bench which heard the above case, did not agree with the majority judgment in that case and delivered a dissenting judgment. However, His Lordship Wanasundara J cited the above passage in his judgment in the case of The Public Service United Nurses Union Vs. Montague Jayawickrama, Minister of Public Administration and others.<sup>14</sup> This was because the majority judgment in Abeywickrema 's case which existed at the time was binding on Court.

In that case, the Public Services United Nurses Union (Petitioner) to which the majority of the Government nurses at that time had belonged, struck work demanding an increase in their salaries. The strike was considered illegal because the relevant service was declared an essential service by His Excellency the President under the Emergency (Miscellaneous Provisions and Powers) Regulation No. 3 of 1986. The Government then decided to treat those who struck work as having vacated their posts and took steps to evict those who occupied Government quarters. However, the strike was eventually settled, the notices of vacation of post were withdrawn and those nurses were allowed to resume work without loss of back pay. Subsequently, the Cabinet of Ministers decided to award a special ad hoc benefit of two increments to the nurses who were members of a rival trade union i.e., the Public Services United Nurses Union, who had worked during the entirety of the strike period and one increment to the nurses who reported for duty at various later stages. The petitioner union challenged the said Cabinet decision on the basis that it was a serious infringement of its members' fundamental right of equality guaranteed under Article 12 of the Constitution. His Lordship Justice Wanasundara having noted that an increment in the public service according to the existing rules and regulations has to be earned by a public officer by satisfactory work and conduct during a specified period of time, namely, one year; and any stoppage, postponement or deprivation of an increment has to be in the nature of a penalty consequent to disciplinary action against a public officer; and held that instantly rewarding particular public officers with one or

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<sup>14</sup> 1988 1 Sri L. R. 229.

two increments and placing the others at a disadvantage in relation to them, goes against the grain of the existing administrative provisions and the legitimate expectations which public servants entertain based on the principles and policies existing in the Establishments Code and the Administrative Regulations. Justice Wanasundara went on to state in the judgment, the following as well;

*"When Article 55 of the Constitution vests authority over public affairs in the Cabinet and make it mandatory for the Cabinet to formulate schemes of recruitment, and codes of conduct for public officers, the principles to be followed in making promotions and transfers etc., the Constitution contemplated fair, and uniform provisions in the nature of general rules and regulations and not action that is arbitrary or ad hoc or savouring of bias or discrimination".<sup>15</sup>*

Time and again, this Court has held that the promotions of public servants must be carried out according to the schemes specified by the Government. The seniority of a public servant has always been an important component which is required to be given due weight in such schemes. In the case of A. H. Wickramatunga and three others Vs. H. R. de Silva and fourteen others,<sup>16</sup> the Supreme Court referred to the principles in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and stated as follows;

*"....[I]n a scheme of promotion based on 'Seniority' and 'Merit', sufficient weightage must always be given to 'Merit' based upon a proper assessment of actual past performance: efficiency, productivity, timeliness, accuracy, initiative, creativity, ability to work with others, co-operation etc. Article 7 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to an "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, **subject to no considerations other than those of seniority and competence.**"*  
[Emphasis Added]

<sup>15</sup> Supra, at page 237; this case also interpreted Article 55 as it stood before the 17<sup>th</sup> Amendment to the Constitution.

<sup>16</sup> SC (FR) 551/98; decided on 31-08-2001.

His Lordship Justice Fernando may have thought it fit to refer to ICESCR in the above case because the Democratic Socialist Republic of Sri Lanka has become a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1980 by way of accession.

In the instant case, the observations of the president (**9R9**), referred to in the relevant cabinet decision to preserve the seniority of the serving police officers is in conformity with the above principle. In terms of Article 155 G of the Constitution, the National Police Commission which was vested with the powers relating to promotions of Police officers at the relevant time, was required to act in consultation with the Inspector General of Police. Thus, it was in order for the National Police Commission, to take into consideration, the relevant observations of the Inspector General of Police (10<sup>th</sup> Respondent) marked **P 10** and **P 10 A**. This Court cannot ignore the seniority of the serving police officers and give directions to promote officers who are less senior merely because the political victimization committee had recommended to do so. The Supreme Court cannot be, and should not become, a mere rubber stamp to endorse any such recommendation of a political victimization committee.

The Case of Poojya Mawanane Sominda Thero and thirteen others Vs. V. K. Nanayakkara and eleven others,<sup>17</sup> also stands as a good example to understand the scope of power vested in the Cabinet of Ministers to provide for matters of policy. That case was in relation to an implementation of a Cabinet decision concerning Pirivena Education. The Petitioners in that case were Lecturers attached to the Seethawakapura Pirivena Teacher Training Institute at Avissawella and Coordinators attached to the Provincial Education Offices. They claimed that according to Pirivena Education Act, No. 64 of 1979, the Government assumed the responsibility of assisting Pirivena education to function parallel to education offered by State. In order to recommend inter alia, changes that should be effected to the above Act, the Government appointed a committee in 1994 to submit its recommendations to the Ministry of Education. The said petitioners sought the implementation of the Cabinet decision based on the afore-stated recommendations. The petitioners in that case complained to Court, that the relevant Committee of the Public Service Commission

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<sup>17</sup> SC (FR) 146/2003; decided on 15-07-2004.

should have implemented the said policy decisions and the non-implementation of those recommendations had caused a serious violation of their fundamental rights. Her Ladyship Justice Shirani A Bandaranayake,<sup>18</sup> having considered whether the relevant decision taken by the Cabinet of Ministers pertains to a matter of policy coming under the purview of Article 55(4) introduced by the 17<sup>th</sup> Amendment to the Constitution, stated in her judgment as follows.

*The Concise Oxford Dictionary refers to a matter of policy as the 'course or general plan of action to be adopted by government, party or a person'. Professor Galligan, on the other hand, defines a decision of policy in the following words (Due Process and Fair Procedures, Clarendon Press, Oxford, 1996, pg. 454),*

*"A decision of policy is one where the authority has to draw on general considerations of a social, economic or ethical kind in deciding an issue, where the decision is likely to affect a range of groups and interests."*

*Accordingly, the general norm in the definition of 'a policy matter' would be for the action taken to be for the common good. As pointed out by Professor Galligan (supra) while interests and claims of individuals and groups are ingredients to be added to the cauldron of policy- making the final decision should reach beyond particular concerns to a broader sense of the interests of all". The necessity for the generalization therefore would be the essential ingredient in defining 'policy' and this is clear as one examines the meaning given to the said word in the Oxford Companion to Law, where it reads thus:*

*"The general consideration which a governing body has in mind in legislating, deciding on a course of action or otherwise acting (David Walker; Clarendon Press Oxford, 1980. pg.965)."*

*Therefore, a policy decision necessarily will have to be applicable in general and cannot be interpreted to include specified persons.*

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<sup>18</sup> (Later became Chief Justice).

*The Cabinet Memorandum dated 03.09.2001 (1 R3) basically deals with 3 main items. The first item is with regard to the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education. The second item refers to the absorption of 8 priests who were holding the positions as Pirivena Coordinators in different provinces. The third item is the upgrading of the ten Lecturers presently attached to the Sudharmarama Pirivena at Avissawella. An examination of the said items would clearly indicate that item 1.1 of the Memorandum clearly deals with a policy matter as it relates in general to the creation of a specific post. The second limb of this item, viz., item 1.2 however refers to the appointment of 8 selected persons and thereby is not in a category which deals with policy matters. This could have been avoided, if there was no special reference to the appointment of 8 persons who were holding positions as Pirivena Co-ordinators. The next item in the Memorandum is not dealing with a policy matter as it clearly refers to the absorption of 10 lecturers who had been serving for a period of over 10 years at the Sudharmarama Pirivena at Avissawella.*

*In the circumstances, it is apparent that the first item which deals with the creation of a post designated as Assistant/Deputy Director (Pirivena) for each Provincial Department of Education deals with a policy matter and the other two items do not come within the category of policy.*

Furthermore, in Black's Law Dictionary a policy is defined: in its 5<sup>th</sup> edition, as '*The general principles by which a government is guided in its management of public affairs, or the legislature in its measures*'; and in its 11<sup>th</sup> edition, as '*A standard course of action that has been officially established by an organization, business, political party, etc.*' Thus, all the above material clearly indicate that a policy decision must be applicable in general as opposed to specific individuals. If a particular policy decision focuses on specific individuals and fails to be applicable in a general context, it will not fall within the ambit of a policy decision.

Therefore, it is apparent that in the instant case, the petitioners cannot rely on the relevant Cabinet Decision to get relief on the basis that their names are included in a

report of a political victimization committee as such a decision cannot be considered as a decision pertaining to a matter of policy for the aforementioned reasons.

I need to mention here a yet another relevant matter. We have a legal system which reasonably protects the citizens' rights including fundamental rights. In such a situation the Petitioners who complain about infringement of their fundamental rights must first show as to why they did not seek an appropriate relief from Court at the time they were politically victimized, if in fact such a victimization had occurred as alleged. On the other hand, if the Petitioners had indeed sought relief from a Court, they should have revealed the details and outcome of such action. The absence of the above explanations, would further vitiate the Petitioners' claim that they were indeed politically victimized. Thus, the Petitioners cannot now complain that their fundamental rights have been violated by the Cabinet of Ministers which anyway did not have power to deal with individual promotions as shown above. This Court cannot directly or indirectly enforce recommendations made solely on political reasons, by implementing recommendations made by a Political Victimization Committee. Such actions would indeed negate the advancement of equal protection of law principle enshrined in Article 12 (1) of the Constitution.

Let me conclude this judgment citing the following passage from the judgment of Her Ladyship Justice Shirani Bandaranayake (as she then was) in the case of Farook Vs Dharmaratne, Chairman, Provincial Public Service Commission, Uva and others.<sup>19</sup>

*The petitioner's relief sought from this Court is to declare that his transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6<sup>th</sup> respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the forgoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his*

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<sup>19</sup> 2005 (1) Sri L. R. 133 at page 140.

*fundamental rights on the basis of unequal treatment ? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines. Article 12(1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12(1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material before this Court that there has been unequal treatment within the framework of a lawful act.*

In these circumstances and for the foregoing reasons, The Petitioners are not entitled to succeed with the prayers in this application. I dismiss this application but without costs.

**JUDGE OF THE SUPREME COURT**

**E. A. G. R. AMARASEKARA J**

I agree,

**JUDGE OF THE SUPREME COURT**

**A. H. M. D. NAWAZ J**

I agree,

**JUDGE OF THE SUPREME COURT**