

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

In the matter of an Application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**SC (FR) Application No: 363/2008**

1. W.S. Nissanka,  
Chief Inspector of Police,  
OIC Police Station, Valvettithurai.
2. K.K.D.W.P. Kumarasinghe,  
Chief Inspector of Police,  
Police in Service Training Centre,  
North Western Range, Kurunegala.
3. M.G. Podinilame,  
Chief Inspector of Police,  
Special Investigations Unit, Kegalle.
4. E.A.S. Kumarasinghe,  
Chief Inspector of Police,  
State Intelligence Service,  
Cambridge Place, Colombo 7.
5. A.M.K. Seneviratne,  
Chief Inspector of Police,  
Sabaragamuwa Range, Ratnapura.
6. K.H.A. Wimal Shantha,  
Personal Assistant, Officer of the Senior  
Superintendent, Mount Lavinia.
7. K.K. Karunasinhge,  
Chief Inspector of Police,  
Range Intelligence Unit, Kurunegala.

**PETITIONERS**

vs.

1. Inspector General of Police,  
Police Headquarters, Colombo 1.
2. Secretary,  
Ministry of Defence,  
15/5, Baladaksha Mawatha, Colombo 3.
- 2A. Nandana Mallawarachchi,  
Secretary,  
Ministry of Law and Order,  
13<sup>th</sup> Floor, Sethsiripaya,  
II Stage, Battaramulla.
3. Neville Piyadigama,  
Chairman,  
National Police Commission.
4. Ven. Elle Gunwansa Thero
5. Justice Chandradasa Nanayakkara
6. Nihal Jayamanne, PC
7. R. Sivaram
8. Charmaine Madurasinghe
9. M. Mowjood

4<sup>th</sup> – 9<sup>th</sup> Respondents are members of the  
National Police Commission.

10. Secretary,  
National Police Commission.

3<sup>rd</sup> – 10<sup>th</sup> Respondents are at

Rotunda Tower, Level 3,  
No. 109, Galle Road, Colombo 3.

11. Commissioner General of Examinations,  
Pelawatte, Battaramulla.

12. G.M. Somaratne,  
Assistant Superintendent of Police,  
Presently at UNPOL 2210,  
Gonaives Region, Minustah, Haiti.

Power of Attorney Holder,  
Hennedige Kumudinie Kanthi Soysa of  
260/1, Andaragaha Road,  
Kaludewala, Panadura.

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

14. Justice Priyantha Perera,  
Chairman, Public Service Commission.

15. Gunapala Wickramaratne

16. M.L. Mookiah

17. Srma Wijeratne

18. W.P.S. Wijewardena

19. Mendis Rohanadheera

20. Bernard Soysa

21. Palitha Kumarasinghe, PC

22. Professor Dayasiri Fernando,

Chairman, Public Service Commission.

23. S.C. Manapperuma
24. Ananda Seneviratne
25. N.H. Pathirana
26. S. Thillanadarajah
27. M.D.W. Ariyawansa
28. A. Mohamed Nahiya

15<sup>th</sup> – 21<sup>st</sup> and 23<sup>rd</sup> – 28<sup>th</sup> Respondents are members of the Public Service Commission.

14<sup>th</sup> – 28<sup>th</sup> Respondents are at  
No. 177, Nawala Road, Narahenpita,  
Colombo 5.

29. Professor Siri Hettige,  
Chairman, National Police Commission.
30. P.H. Manatunga
31. Savithri Wijesekera
32. Y.L.M. Zawahir
33. Anton Jeyanandan
34. Thilak Collure
35. Frank de Silva

30<sup>th</sup> – 35<sup>th</sup> Respondents are members of the National Police Commission.

36. N. Ariyadasa Cooray,  
Secretary, National Police Commission.

29<sup>th</sup> – 36<sup>th</sup> Respondents are at Block No. 9,  
B.M.I.C.H. Premises,  
Buddhaloka Mawatha, Colombo 7.

37. Justice Jagath Balapatabendi,  
Chairman, Public Service Commission.

38. Indrani Sugathadasa

39. T.R.C. Ruberu

40. Ahamod Lebbe Mohamed Saleem

41. Leelasena Liyanagama

42. Dian Gomes

43. Dilith Jayaweera

44. W.H. Piyadasa

38<sup>th</sup> – 44<sup>th</sup> Respondents are members of  
the Public Service Commission.

45. Secretary,  
Public Service Commission.

37<sup>th</sup> – 45<sup>th</sup> Respondents are at  
No. 1200/9, Rajamalwatta Road,  
Battaramulla.

## **RESPONDENTS**

**Before:** P. Padman Surasena, J  
Mahinda Samayawardhena, J  
Arjuna Obeyesekere, J

**Counsel:** Manohara De Silva, PC with Kaveesha Gamage for the Petitioners  
Nirmalan Wigneswaran, Deputy Solicitor General for the Respondents

**Argued on:** 11<sup>th</sup> February 2022

**Written Submissions:** Tendered on behalf of the Petitioners on 2<sup>nd</sup> September 2013 and 30<sup>th</sup> May 2022

Tendered on behalf of the Respondents on 8<sup>th</sup> February 2022 and 26<sup>th</sup> April 2022

**Decided on:** 15<sup>th</sup> May 2023

**Obeyesekere, J**

The Petitioners filed this application on 8<sup>th</sup> September 2008, alleging that their fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by the 1<sup>st</sup> – 9<sup>th</sup> and 11<sup>th</sup> Respondents as a result of the 12<sup>th</sup> Respondent, G.M. Somaratne, being promoted to the rank of Assistant Superintendent of Police [ASP] with effect from 29<sup>th</sup> March, 2007 and seeking a direction that the National Police Commission promote the Petitioners to the said rank of ASP with effect from 1<sup>st</sup> July 1999. On 18<sup>th</sup> November 2008, this Court granted the Petitioners leave to proceed in respect of the alleged infringement of Article 12(1). Although the Petitioners have thereafter filed an amended petition on 1<sup>st</sup> December 2008, the relief claimed from this Court has remained the same.

The events that culminated in this application go back to August 1998, and pervades across several fundamental rights and writ applications, to which I shall refer to in detail in order to place the issue that needs to be decided in this application in its proper perspective.

## Scheme of Recruitment and Promotion as an Assistant Superintendent of Police

Pursuant to the approval granted by the Cabinet of Ministers on 5<sup>th</sup> August 1998, the Ministry of Defence submitted to the 1<sup>st</sup> Respondent, the Inspector General of Police, the schemes of recruitment and promotion of the Senior Gazetted Officers of the Police Department. Schedule 1 of the said scheme [P2] provided for the recruitment and/or promotion to the rank of ASP under three categories. The first category was recruitment through an open competitive examination where graduates of recognised universities who possessed the qualifications set out therein were eligible to apply for selection as ASPs. 25% of the vacancies in the ASP cadre were to be filled under this category. The second category was by way of merit promotion where 50% of the vacancies were to be filled from among Chief Inspectors of Police who had been confirmed in that rank. The third and final category by which selection to the rank of ASP was to be done was through the results of a limited competitive examination. The balance 25% of the vacancies were to be filled under this final category, and it is this category that is the subject matter of this application.

In order to be eligible to apply under the limited competitive category, a candidate was required to either be a Chief Inspector of Police, or an Inspector of Police with 10 years in service, and possess an unblemished record of service during the five-year period immediately before the closing date of applications. The selection procedure stipulated in Schedule 1 of the Scheme of Promotion required each candidate to sit for a written examination conducted by the Commissioner General of Examinations, for which 75% of the marks were allotted, and to face a *viva voce* interview before a Board of Interview appointed by the Public Service Commission, for which the balance 25% of the marks were allotted. Thus, the ratio between the marks for the written examination and the interview was 3:1.

Under this selection procedure, it had been noted that, "*The number of candidates summoned for the viva voce test will be equal to five times the number of vacancies to be filled, but the candidates to be so summoned will be limited to those who have obtained a minimum of 40% marks at the written examination.*" The requirement to call 5 times the number of qualified candidates was applicable to all three categories referred to

above. Under the third category, a candidate had to satisfy two criteria in order to be eligible to be called for the interview. The first was to obtain a minimum of 40% marks at the written examination and the second was to be within 5 times the number of vacancies.

### Calling for applications

By an internal Circular dated 3<sup>rd</sup> September 1998 [P3], the then Inspector General of Police called for applications to fill the vacancies that existed in the rank of ASP under the aforementioned third category.

The Petitioners, who at that time were either holding the rank of Chief Inspector of Police, or Inspector of Police with ten years in service, had applied and sat for the limited competitive examination held in November 1998. It is admitted that each candidate was required to sit for the following subjects, with the total number of marks for the examination being 600, and the marks being apportioned in the following manner:

Subject	Mark
Language Ability (essay and precis)	150
General Knowledge and Intelligence	150
Social, Political and Economic Development	100
Practical Police Methods	100
Police Administration	100

As the number of vacancies that existed at that time was 14, 70 candidates were entitled to be called for the interview. Accordingly, the then Secretary, Ministry of Defence, by a letter dated 26<sup>th</sup> February 1999 [P4a], had requested the Commissioner General of Examinations to submit a list containing the names of the 70 candidates who had obtained the highest marks at the examination, provided they had obtained the minimum 40% mark, but without specifying the marks obtained by each of the said candidates at the written examination. It is admitted that those placed at the 71<sup>st</sup> and 72<sup>nd</sup> positions at the said examination had obtained the same mark as the candidate placed at the 70<sup>th</sup>



position, and that the Commissioner General of Examinations had sent a list containing the names of 72 candidates, including the Petitioners – *vide* P4b – in the ascending order of the index numbers of the 72 candidates. It is also admitted that the Petitioners were thereafter called for the *viva voce* interview held in March 1999. Upon the conclusion of the interview, the marks allotted to each of the candidates at the interview had been sent to the Department of Examinations for the purpose of aggregating with the marks at the written examination, in order to determine the candidates who are eligible to fill the 14 vacancies that existed at that time.

### Conversion of the marks

It must be noted that when submitting the marks, the Department of Examinations was required to submit the marks that each candidate had obtained out of (a) 600 at the written examination, and (b) 200 at the *viva voce* interview. However, in the final mark sheet [P5] submitted by the Department of Examinations, which I shall refer to as the '*converted mark sheet*,' it had converted the 150 marks allocated for the Language and General Knowledge question papers to 100 through a process of pro-rating the marks obtained for the said subjects, and marked each candidate by a total of 500 marks for the written examination. In other words, the Department of Examinations had allotted 100 marks for each of the five examination papers, contrary to the Circular issued by the Inspector General of Police which stipulated that the written examination will attract 600 marks. Consequently, it was contrary to the stipulation that the ratio between the written examination component and the *viva voce* interview shall be 3:1, since the ratio effectively was now 5:2.

### The first application challenging the results

The above conversion of the marks does not appear to have drawn the attention of either the Inspector General of Police or the Public Service Commission, and the first 14 candidates in the converted mark sheet P5 were appointed to the post of ASP by the Public Service Commission with effect from 7<sup>th</sup> June 1999. It must be observed that while the candidate placed 1<sup>st</sup> had an aggregate of 375.4 marks, the candidate placed 14<sup>th</sup> had an aggregate of 329 marks.

Several unsuccessful candidates who were dissatisfied with the said appointments filed Fundamental Rights Application Nos. 607/1999, 609/1999, 641/1999, 646/1999 and 647/1999, alleging that their fundamental rights guaranteed by Article 12(1) have been infringed as a result of the said appointments. Unaware of the fact that the Department of Examinations had converted the marks in two subjects and that the total marks at the written examination had been calculated out of a mark of 500 as opposed to 600, these petitioners complained that some of the candidates appointed had not crossed the 40% threshold required in the written examination in order to be eligible to be called for the interview. It is at this point that the Department of Examinations disclosed that the raw marks out of 150 in respect of each of the two subjects (Language and General Knowledge) had been converted to a percentage of 100 in respect of all candidates, with the Department of Examinations claiming that this was in accordance with the practice prevailing at that time at the said Department.

By its judgment dated 12<sup>th</sup> January 2000, this Court dismissed the said applications while holding that, *“this practice adopted by the Commissioner of Examinations to convert the marks obtained by the candidates out of 150 for the first two subjects to a percentage to ensure uniformity has not caused any prejudice to any of the candidates as that was the practice that had prevailed in the Department of Examinations.”* Thus, for all intents and purposes, this Court had sanctioned the converted mark sheet, and the appointments made pursuant thereto.

#### The raw mark sheet

The mark sheet prior to the aforementioned conversion, where the marks given out of 600 are reflected, was produced together with the petition marked as P7. The said mark sheet which I shall refer to as the ‘*raw mark sheet*’ is dated 16<sup>th</sup> February 2000 and has been prepared subsequent in time to the judgment of this Court in SC (FR) Application No. 609/1999. Although the circumstances under which P7 was prepared have not been explained to this Court either by the Petitioners or by the Respondents, it appears that P7 was prepared in order to arrive at a settlement in CA (Writ) Application No. 1164/1999 filed by an unsuccessful candidate, to which application I shall advert to, later.

According to P7, 13 of the 14 candidates who were promoted under the converted mark sheet were identical to the first 13 candidates in the raw mark sheet. Therefore, irrespective of whether the appointments had been done on the basis of the converted mark sheet or the raw mark sheet, the appointment of 13 of the 14 candidates was beyond challenge.

The issue arose, however, with the appointment of L.H.E. Cooray, who was placed 13<sup>th</sup> on the converted mark sheet, but only placed 17<sup>th</sup> on the raw mark sheet. Thus, had the raw mark sheet been adopted for the purpose of making the promotions instead of the converted mark sheet, someone other than Cooray would have been eligible for appointment.

#### Court of Appeal (Writ) Application No. 1164/1999

H.K.D.W.M.G.D. Ratnatilleke, who had been placed 14<sup>th</sup> in the raw mark sheet (but 20<sup>th</sup> on the converted mark sheet) and who therefore had obtained higher marks than L.H.E. Cooray under the raw mark sheet, complained to the Court of Appeal in CA (Writ) Application No. 1164/1999 that the practice of pro-rating of marks was arbitrary and in excess of the powers of the Commissioner General of Examinations. Even though this Court in SC (FR) Application No. 607/1999 did not find the preparation of the converted mark sheet obnoxious, the Public Service Commission, who by then had obtained the raw mark sheet dated 16<sup>th</sup> February 2000 [P7], had appointed Ratnatilleke, as well as M. Moses and V.D. Chandrasiri, who were placed 15<sup>th</sup> and 16<sup>th</sup> on the raw mark sheet, to the post of ASP with effect from 7<sup>th</sup> June 1999.

There are four observations that I must make at this stage. The first is that with the said appointments, the Public Service Commission opened the doors to cross-refer or zigzag between the two mark sheets. The second is that the Public Service Commission formally recognised the raw mark sheet and commenced making appointments based on the raw mark sheet, thus recognising the existence of two mark sheets and in the process creating two parallel streams of candidates, even though the source of both streams was the results of one examination. The third is that the appointment of Ratnatilleke, Moses and Chandrasiri were over and above the 14 vacancies that existed under the aforementioned

third category and were therefore outside the approved cadre of ASPs prevailing at that time for the said category. The fourth is that even though Ratnatilleke, Moses and Chandrasiri were placed 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> on the raw mark sheet, they were placed 20<sup>th</sup>, 39<sup>th</sup> and 29<sup>th</sup> respectively, in the converted mark sheet, which meant that more litigation was bound to follow from those who had scored more marks than Ratnatilleke, Moses and Chandrasiri on the converted mark sheet, demanding that the cross-referencing between the two mark sheets continue.

#### Further litigation before the Court of Appeal

As ought to have been expected, the said appointments of Ratnatilleke, Moses and Chandrasiri as ASPs spurred further litigation. The first was CA (Writ) Application No. 736/2000, filed by those candidates placed 15<sup>th</sup> – 19<sup>th</sup>, 22<sup>nd</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 31<sup>st</sup>, 34<sup>th</sup>, 36<sup>th</sup> and 37<sup>th</sup> on the converted mark sheet. The second was CA (Writ) Application No. 907/2000, filed by W.M.R.M. Welikanna who was placed 24<sup>th</sup> on the converted mark sheet. The complaint of the petitioners in the above two applications (which were taken up together) was that as all of them were placed higher on the converted mark sheet than Moses and some of them higher than Ratnatilleke and Chandrasiri as well, the appointment of Moses was, and where applicable, that of Ratnatilleke and Chandrasiri were, arbitrary and illegal.

The fact that the Court of Appeal was puzzled by the necessity for the Public Service Commission to prepare and act on the raw mark sheet when this Court had accepted the converted mark sheet as not being violative of Article 12(1), is evident from the following passage of the judgment of Amaratunga, J in **Karavita and Others and Welikanna v Inspector General of Police and Others** [(2002) 2 Sri LR 287 at 294]:

*“Several questions arise in view of the aforesaid averment. What was the necessity to amend the marks sheet tendered to the Supreme Court? Were there mistakes in P5 [converted mark sheet] and if so what were those mistakes and how did such mistakes occur? Who detected those mistakes and who requested or authorized the preparation of an amended marks sheet? I cannot find answers to any of the above questions in the affidavit of the 4<sup>th</sup> respondent. The Commissioner General of Examinations is a respondent to these applications but he has not filed an affidavit*

*setting out the reasons for and the basis on which he prepared the amended mark sheet 4R1. In the absence of any explanation from the Commissioner General of Examinations, Chairman of the Public Service Commission or from the Inspector General of Police the reason for the preparation of the amended mark sheet remains a mystery as far as this Court and these applications are concerned.”*

The Court of Appeal issued a Writ of Mandamus to appoint all the petitioners in CA (Writ) Application Nos. 736/2000 and 907/2000 as ASPs with effect from 7<sup>th</sup> June 1999 as, ***“The respondents have failed to establish the validity of the amended mark sheet 4R1 as against the original mark sheet accepted by the Supreme Court as the correct mark sheet (and also by the PSC by appointing 14 ASPP on the basis of P5) and as such the respondent members of the PSC are under a duty to order promotions on the basis of the results reflected in P5. By promoting a person who has obtained less marks than all petitioners in these two applications they have failed to perform their duty according to law and have failed to adhere to the results reflected in P5.”*** [emphasis added].

A few weeks after the delivery of the above judgment, CA (Writ) Application No. 1016/2002 had been filed by those candidates who had been placed 21<sup>st</sup>, 23<sup>rd</sup>, 27<sup>th</sup>, 30<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup> and 38<sup>th</sup> on the converted mark sheet. Udalagama, J, P/CA (as he then was), referring to the judgment of this Court in SC (FR) Application No. 607/1999 and the related cases held that while he is *“inclined to the view that the aforesaid Supreme Court decision ... conferred legal sanctity to the results released by the Commissioner of Examinations and that the respondents to those applications were legally bound to give effect to same,”* the Public Service Commission had *“flagrantly ignored the legal sanctity conferred on the results sheet.”* It is in this background that the Court of Appeal held in Application No. 1016/2002 that the petitioners in that application, by virtue of the fact that they were placed higher on the converted mark sheet than Moses and some of them over Chandrasiri, are entitled to be promoted to the rank of ASP, with effect from 1<sup>st</sup> July 1999. With this judgment, the first 39 candidates on the converted mark sheet, except the 28<sup>th</sup> Respondent, had been promoted to the rank of ASP, even though the number of vacancies was only 14 at the time applications were called.

It will thus be seen that even after this Court found that the converted mark sheet was not illegal, the Public Service Commission acted on the raw mark sheet and made appointments in terms of the raw mark sheet, with the result that there was litigation whenever those on the converted mark sheet, who had more marks than those on the raw mark sheet, were appointed, or *vice versa*.

Litigation continued when another set of officers who were placed higher in the order of merit in the raw mark sheet than many others appointed on the basis of the converted mark sheet filed Writ Application No. 1484/2002 in the Court of Appeal. Although the said application had been dismissed, upon special leave to appeal being sought [SC Spl L/A Application Nos. 13/2005 and 14/2005], this Court had directed that administrative relief be sought from the National Police Commission. The National Police Commission had accordingly appointed the petitioners in those cases, namely K. Wedasinghe, K.K.A.P. Mapalagama, H.H. Chulasiri, C.A. Premashantha and G.W.W.B.R.M. Dambagalla, who were placed 44<sup>th</sup>, 47<sup>th</sup>, 48<sup>th</sup>, 49<sup>th</sup> and 54<sup>th</sup> respectively on the converted mark sheet, and 46<sup>th</sup>, 43<sup>rd</sup>, 44<sup>th</sup>, 38<sup>th</sup> and 33<sup>rd</sup> respectively on the raw mark sheet, as ASPs. These appointments, which had been conveyed to this Court on 9<sup>th</sup> November 2007, were with effect from 29<sup>th</sup> March 2007, and thus brought the number of appointments made outside the approved cadre to 30.

#### Appointment of the 12<sup>th</sup> Respondent as an ASP

The above five appointments saw five other candidates, namely L.A. Guneratne, M.A.D. Dhanasekara E.M.U.V. Guneratne, S.D.S.P. Sandanayake and the 12<sup>th</sup> Respondent, G.M. Somaratne, who were placed 40<sup>th</sup>, 42<sup>nd</sup>, 45<sup>th</sup>, 50<sup>th</sup> and 52<sup>nd</sup> respectively in the converted mark sheet, file Fundamental Rights Application No. 6/2008, claiming that under the converted mark sheet, some or all of the aforementioned five appointees had less marks than them, and that the appointments of the said five candidates were violative of their fundamental right to the equal protection of the law.

This application too had been settled by the National Police Commission. According to its decision dated 8<sup>th</sup> May 2008, the National Police Commission, having observed that all five petitioners had secured more marks than Dambagalla (i.e., more than 300 marks) in

the converted mark sheet, had appointed the aforementioned petitioners including the 12<sup>th</sup> Respondent to the rank of ASP with effect from 29<sup>th</sup> March 2007.

### The complaint of the Petitioners

The 12<sup>th</sup> Respondent's promotion to the rank of ASP was based on his ranking in the converted mark sheet. However, **in terms of the raw mark sheet**, the 12<sup>th</sup> Respondent had identical marks as that of the 7<sup>th</sup> Petitioner in this application, but was otherwise placed below the other six Petitioners. This prompted the filing of this application, with the Petitioners alleging that their fundamental right to equality guaranteed by Article 12(1) of the Constitution had been infringed by the Respondents as a result of the 12<sup>th</sup> Respondent being promoted over and above them to the rank of ASP with effect from 29<sup>th</sup> March, 2007. It is on this basis that the Petitioners, who claim that they became aware of these appointments when it was communicated within the Police Department on 14<sup>th</sup> August 2008, filed this application soon thereafter, seeking a declaration that their fundamental right to the equal protection of the law guaranteed by Article 12(1) had been infringed and a direction that the National Police Commission promote the Petitioners to the rank of ASP with effect from 1<sup>st</sup> July 1999.

The learned President's Counsel for the Petitioners presented two arguments before us.

### The conversion of the marks distort the promotion scheme

The first argument was that even though the Circular issued by the Inspector General of Police required 600 marks to be given for the written examination and 200 marks for the *viva voce* interview, and thereby maintain a ratio of 75% to 25% (i.e., 3:1) between the two, by adjusting the marks at the written examination to a total of 500, the percentage for the written examination had been brought down from 75% to 71.4%, thereby distorting the intended ratio as well as the scheme contemplated by the said Circular, and resulting in a deviation from the marking scheme set out therein. It is on this basis that the learned President's Counsel submitted that the converted mark sheet is contrary to the scheme embodied in P2, and that this Court must uphold the raw mark sheet as the only correct mark sheet.

Article 126(2) of the Constitution requires an infringement of a fundamental right to be challenged within one month of the said infringement. It has been held 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 9<sup>th</sup> December 2016] that, other than the limited exceptions which have been referred to therein, it is mandatory to comply with the provisions of Article 126(2). The fact that the Department of Examinations had converted the marks at the written examination to 500 and that the initial 14 appointments had been made on the results of the said converted mark sheet, should have been known to the Petitioners as far back as 1999 when the converted mark sheet and the appointments that were made on the basis of that mark sheet were made public in the pleadings tendered to this Court by the respondents in SC (FR) Application No. 607/1999, or, at the very least soon thereafter and definitely much earlier than 2008, given the number of promotions made pursuant to the aforementioned litigation. This application has been filed almost nine years after this Court delivered its judgment in SC (FR) Application No. 607/1999, where the converted mark sheet and the consequential appointments were disclosed for the first time. In the absence of any of the exceptions referred to in **Demuni Sriyani De Soyza**, I am of the view that the Petitioners cannot challenge the preparation of the converted mark sheet and the appointments made thereon in this application. Nor can they now claim that the raw mark sheet is the correct mark sheet, as such a challenge is not only contrary to the provisions of Article 126(2), but with the judgment of this Court in SC(FR) Application No. 607/1999.

#### The appointment of the 12<sup>th</sup> Respondent - revisited

The second argument of the learned President's Counsel for the Petitioners was that the appointment of the 12<sup>th</sup> Respondent, who had identical or less marks than the Petitioners on the raw mark sheet is in violation of the Petitioners' right to equality guaranteed by Article 12(1). In essence, the Petitioners are asking this Court to continue to cross refer between the two mark sheets, as has been done on previous occasions when promotions were granted, except for the first appointment of 14 candidates.



As this argument of the learned President's Counsel centres around the 12<sup>th</sup> Respondent's appointment as an ASP through the actions of the National Police Commission, it would be apt at this point to consider in detail the basis on which the said Commission effected the promotions, first in SC Spl L/A Application Nos. 13/2005 & 14/2005 and thereafter in SC (FR) Application No. 6/2008.

The learned Deputy Solicitor General submitted that pursuant to this Court directing the parties in SC Spl L/A Application Nos. 13/2005 and 14/2005 to make representations to the National Police Commission and seek administrative relief, the National Police Commission had appointed a sub-committee to consider the grievance of the petitioners in those two cases. It must be observed that the petitioners in the above two cases, namely Wedasinghe, Mapalagama, Chulasiri, Premashantha and Dambagalla had obtained more marks than M.K. Dayananda and D.G.R.M. Ellepola on the raw mark sheet but the latter two officers had been appointed as ASPs as a result of them having been placed at the 34<sup>th</sup> and 36<sup>th</sup> positions (and higher than those petitioners) in the converted mark sheet [vide CA (Writ) Application No. 736/2000].

In its report [3R7], the Sub-Committee had observed as follows:

*"The sub-committee in deference to the wish of the Supreme Court considered a way to resolve the problem with the view to granting administrative relief to those who secured more raw marks than Mr. Dayananda and Mr. Ellepola. In doing so, the Committee arrived at the following formula.*

*Those who had obtained above 340 marks as raw marks, and above 284 marks as converted marks, and who possessed an unblemished record of service, as stipulated in the advertisement calling for applications for promotion, may be promoted to the rank of ASP."*

Although the Sub-Committee had not given a basis for determining the above cut-off mark, had the said cut-off mark proposed by the Sub-Committee been adopted, whether it be under the converted mark sheet or the raw mark sheet, 70 of the 72 candidates who had faced the interview would have been eligible for promotion. However, that was not

an issue in SC Spl L/A Application Nos. 13/2005 and 14/2005 as the petitioner who had scored the lowest mark on the converted mark sheet [Dambagalla] had 300 marks, and the petitioner who scored the lowest mark on the raw mark sheet [Wedasinghe] had scored 364.8 marks. Be that as it may, the above recommendation to have a cut off mark in respect of each mark sheet was acted upon and the petitioners in SC Spl L/A Application Nos. 13/2005 and 14/2005 were appointed as ASPs with effect from 8<sup>th</sup> August 2007.

As I have already stated, the above settlement was followed by the filing of SC (FR) Application No. 6/2008, with the petitioners in that application claiming that in terms of the converted mark sheet, one or more of them had more marks than those appointed as per the settlement in SC Spl L/A Application Nos. 13/2005 and 14/2005. The National Police Commission considered the position of the petitioners in the former application, and in their decision [3R10] concluded as follows:

*“Notwithstanding the cut-off marks decided earlier, the Commission felt that 60% of the total marks for the five papers ought to be 360; and 60% of the converted marks for the five papers ought to be 300 marks. An officer who stands above either of the two marks could claim for promotion.”*

Thus, the National Police Commission gave equal importance to both mark sheets but in the process ensured that cross-referencing between each mark sheet shall not be done henceforth. As L.A Guneratne, Dhanasekara, E.M.U.V Guneratne, Sandanayake and Somaratne had all obtained over 300 marks in the converted mark sheet, they became eligible to be appointed as ASPs in accordance with the decision of the National Police Commission to promote any candidate who had obtained over 300 marks in the converted mark sheet. Accordingly, the petitioners in SC (FR) Application No. 6/2008 had been promoted to the rank of ASP with effect from 29<sup>th</sup> March 2007.

In order to capture the above in its proper context, the marks obtained by the Petitioners under each of the mark sheets vis-à-vis the 12<sup>th</sup> Respondent are produced below:

Name	Marks in the converted mark sheet	Rank in the converted mark sheet (P5)	Marks in the raw marks sheet	Rank in the raw mark sheet (P7)
1 <sup>st</sup> Petitioner	297.4	56	362.4	49
2 <sup>nd</sup> Petitioner	297.2	58	357.2	54
3 <sup>rd</sup> Petitioner	291.6	62	355.6	56
4 <sup>th</sup> Petitioner	285	66	354	57
5 <sup>th</sup> Petitioner	289.8	63	351.8	60
6 <sup>th</sup> Petitioner	297.6	55	351.6	61
7 <sup>th</sup> Petitioner	284.8	68	350.8	64
12 <sup>th</sup> Respondent	301.8	52	350.8	63

The disparity in the marks under the two mark sheets is amply demonstrated by the document marked P8 annexed to the petition, in which the Petitioners have set out the names of the 72 candidates and the marks obtained by each of them in terms of both the converted mark sheet and the raw mark sheet.

The resultant position of the above decision of the National Police Commission, as reflected in P8, can be summarised as follows:

- (a) The 12<sup>th</sup> Respondent has obtained 301.8 marks in the converted mark sheet, and was therefore eligible to be appointed as an ASP;
- (b) The last candidate from the converted mark sheet to have been promoted was Dambagalla, who had 300 marks;
- (c) All seven Petitioners had marks less than 300 in the **converted mark sheet** and were therefore not eligible for promotion;
- (d) Under the **raw mark sheet**, the 12<sup>th</sup> Respondent had only obtained 350.8 marks and was ineligible to be promoted. However, the 12<sup>th</sup> Respondent was not promoted on the results he had on the raw mark sheet;

- (e) While the 1<sup>st</sup> Petitioner had scored 362.4 marks under the raw mark sheet and was eligible to be promoted as an ASP in terms of the said decision, the other Petitioners had scored less than 360 marks in the raw mark sheet and were therefore not eligible for promotion;
- (f) Although the 7<sup>th</sup> Petitioner had identical marks to that of the 12<sup>th</sup> Respondent in terms of the raw mark sheet, all other Petitioners had scored more marks than the 12<sup>th</sup> Respondent. However, this was irrelevant as the 12<sup>th</sup> Respondent had not been promoted on the result he had obtained in terms of the raw mark sheet.

I shall now consider whether the decision to recognise two distinct mark sheets and the imposition of a cut off mark by way of a minimum percentage in respect of both mark sheets, is a violation of Article 12(1).

#### Article 12(1)

Article 12(1) of the Constitution provides that, *“All persons are equal before the law and are entitled to the equal protection of the law.”*

In **Karunathilaka and Another vs Jayalath de Silva and Others** [2003 (1) Sri LR 35], Shirani Bandaranayake, J (as she then was) pointed out as follows:

*“The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. **Article 12(1) of the Constitution**, which governs the principles of equality, **approves actions which have a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.**”*  
[emphasis added]

In Wickremasinghe vs Ceylon Petroleum Corporation and Others [2001 (2) Sri LR 409 at 416-417], Chief Justice Sarath Silva, having considered whether the decision of the Ceylon Petroleum Corporation to terminate the lease agreement that it had with the petitioner was arbitrary in the context of the said decision being unreasonable, stated as follows:

*“The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.*

*The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. **The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary.** In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. **But, the test once again is one of being reasonable and not arbitrary.** Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. **It necessarily follows that reasonableness should be judged from an objective basis.***

*When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.*

*Therefore, **when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds** that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority.” [emphasis added]*

In **W.P.S. Wijerathna vs Sri Lanka Ports Authority and Others** [SC (FR) Application No. 256/2017; SC minutes of 11<sup>th</sup> December 2020], Kodagoda, PC, J, having referred to the long line of cases which had considered the application of the principle of equality enshrined in Article 12(1) in the context of appointments and promotions in the Public Service, observed that, “... *as pointed out repeatedly by numerous erudite judges, ‘arbitrariness is the anathema of equality’. In India’s former Chief Justice Bhagwati’s words, ‘equality and arbitrariness are sworn enemies’.*”

The resultant position would then be that while the executive or administrative action in question must be reasonable and based on discernible grounds, reasonableness must be linked to the manifest object of the power that is vested with the particular authority and looked at in the context of the measure, consistent with that object, sought to be achieved.

### Is the decision of the National Police Commission arbitrary?

I must state at the outset that the situation that has arisen is extremely unusual. Candidates who sit for the same written examination and face the same interview board must stand on the same level playing field and must be treated equally. There must be only one mark sheet and the successful candidates must be selected according to merit, based on the results of the examination and interview. The fact of the matter is that the preparation of the converted mark sheet by the Department of Examinations was accepted by this Court, and thereafter all appointments should have been made in terms of the converted mark sheet.

Wittingly or not, the decision of the Public Service Commission to promote Ratnatilleke, Moses and Chandrasiri on the basis of the marks obtained by them in the raw mark sheet has resulted in the Public Service Commission making appointments based on the results of one examination under two separate mark sheets. However, by cross-referring to both mark sheets in making appointments, and by comparing the marks obtained by one candidate in one mark sheet with the marks obtained by another candidate in the other mark sheet, the two mark sheets have been integrated into one another and effectively been considered as one.

Although 13 of the 14 candidates who were initially appointed featured in both sets of mark sheets, it was not so with regard to the other candidates, and switching between mark sheets was similar to a game of snakes and ladders. As is evident from the above narration, by cross-referring to the marks in the two separate mark sheets, whenever an appointment was made under the converted mark sheet, this gave rise to a situation of the appointee having less marks than another candidate in terms of the raw mark sheet, or *vice versa*. The end result was that an examination that was scheduled to select 14 candidates for appointment to the rank of ASP and for which 72 candidates had been interviewed, had resulted in the appointment of an additional 40 candidates, well above the cadre requirement of the Police Department.

As I have already stated, the problem arose when the Public Service Commission acted on the raw mark sheet despite this Court having sanctioned the converted mark sheet. The result was complete pandemonium as candidates who were otherwise not eligible for promotion by virtue of not being within the first 14 successful candidates suddenly found that they could claim unequal treatment, with the end result being that 54 Chief Inspectors of Police or Inspectors of Police were promoted to the rank of ASP, when the number of vacancies was only 14. In my view, a solution had to be found to the absurd situation that resulted from the ill-considered actions of the Public Service Commission.

By its aforesaid decision 3R10, the National Police Commission has:

- (a) formally recognised the existence of two separate mark sheets; and
- (b) created two distinct and parallel streams from which promotions could be made,

subject to the limitation that irrespective of the mark sheet from which a candidate is selected, in order to be promoted to the rank of ASP, a candidate must have scored a minimum mark.

None of the Petitioners have achieved the said cut off mark under either of the mark sheets, except the 1<sup>st</sup> Petitioner, who has scored 362.4 marks, as per the raw mark sheet, and who has since been promoted.

As this is the basis on which the promotion of the Petitioners has been denied, the question that must be answered is whether the said course of action adopted by the National Police Commission is arbitrary and therefore a violation of the provisions of Article 12(1).

In '**Fundamental Rights in Sri Lanka – A Commentary**' by Chief Justice S. Sharvananda (1993), he has stated as follows at page 81:

*“Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the law ... The guiding principle is that all persons and things similarly circumstanced shall be treated alike.*



*‘Equality before the law’ means that among equals the law should be equal and should be equally administered and that the like should be treated alike. What it forbids is discrimination between persons who are substantially in similar circumstances or conditions... It is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same.”*

True enough, the Petitioners and those who have been promoted prior to that have all stood together at the starting point. But as submitted by the learned Deputy Solicitor General, as they went along, they have branched out into two separate and distinct streams, and thus, those in one stream ceased to be similarly circumstanced with those in the other stream. While candidates in each stream were placed in equal circumstances within that stream, they were not so equally circumstanced, vis-à-vis the other stream. In other words, cross-referencing between the two streams could not be done as the basis for their selection had changed and were distinct to one another. To that extent, I am of the opinion that the Public Service Commission, and later the National Police Commission had erred when they started comparing the marks of one mark sheet with that of the other.

It is in these circumstances that a solution had to be found, in order to put a stop to the absurdity that had arisen. The resulting solution [3R10] was to treat the candidates under two distinct mark sheets, and thereafter impose a cut off mark by way of a minimum percentage in respect of each mark sheet, thus bringing a semblance of uniformity and common sense to the issue before us.

I am of the view that the said decision is reasonable, when considered in the backdrop of the following factors:

- (a) There existed only 14 vacancies, and thus, a candidate knew very well that in order to be promoted, he must be within the first 14;
- (b) While the first 14 in the converted mark sheet had obtained a mark ranging from 375 – 329, the Petitioners had obtained between 284.8 – 297.6 marks;

- (c) While the first 14 in the raw mark sheet had obtained a mark ranging from 444.6 – 390.6, the Petitioners had obtained between 350.8 – 362.4 marks;
- (d) In terms of the converted mark sheet, none of the Petitioners had scored more marks than the 12<sup>th</sup> Respondent who was promoted by virtue of having scored 301.8 marks on the converted mark sheet;
- (e) In view of the recognition of two distinct streams, and as the Petitioners were no longer similarly circumstanced as the 12<sup>th</sup> Respondent, comparing the marks of the 12<sup>th</sup> Respondent on the raw mark sheet with the marks obtained by the Petitioners on the raw mark sheet is both illegal and unwarranted;
- (f) If, as has been done previously, the Petitioners are promoted by virtue of having either an identical or higher mark than the 12<sup>th</sup> Respondent on the raw mark sheet, that would result in a further seven candidates from the converted mark sheet who are placed higher than the Petitioners being promoted, with the result that 69 of the 72 candidates who faced the interview must be promoted. And, the cycle would continue;
- (g) There is no proof of discriminatory intent or purpose, and nor has the National Police Commission acted with an evil eye and an unequal hand so as to discriminate between persons in similar circumstances.

In the above circumstances, I am of the view that:

- (a) Other than the 1<sup>st</sup> Petitioner who has already been appointed as an ASP, the other Petitioners are not entitled to be promoted to the rank of ASP on the basis of the results obtained by them at the examination held in November 1998 and the interview that followed;

(b) The fundamental rights of the Petitioners guaranteed by Article 12(1) have not been infringed by the 1<sup>st</sup> – 9<sup>th</sup> and 11<sup>th</sup> Respondents.

This application is accordingly dismissed, without costs.

**JUDGE OF THE SUPREME COURT**

**P. Padman Surasena, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**Mahinda Samayawardhena, J**

I agree.

**JUDGE OF THE SUPREME COURT**