

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

1. N. B. Krishantha Kumara
Assistant Director,
Ministry of Health of the North Central Province,
Dharmapala Mawatha, Anuradhapura.
2. Somasiri Ekanayake
Assistant Director,
Office for National Unity and Reconciliation,
21, 6th Floor, Janadhipathi Mawatha,
Colombo 01.
3. B. H. M. D. Herath,
Assistant Director,
Ministry of Development Strategies and Internal Trade, West Tower, No. 30, World Trade Centre, Colombo 01.
4. Planning Service Association,
Ministry of Health of the North Central Province,
Dharmapala Mawatha,
Anuradhapura.

Petitioners

SC /FR/ Application No. 460/2017

Vs,

1. Dharmasena Dissanayaka,
Former Chairman,
Public Service Commission
- 1A. Hon. Justice Jagath Balapatabendi
Chairperson,
Public Service Commission.
2. Prof. Hussain Ismail,
Former Member

- 2A. Mr. Indrani Sugathadasa,
Member
- 3. Mrs. Dhara Wijethilaka,
Former Member
- 3A. Sudharma Karunaratne,
Former Member
- 3B. Mr. Shivagnanasothy,
Member
- 4. Dr. Prathap Ramanujam,
Former Member
- 4A. Dr. T.R. C. Ruberu,
Member
- 5. Mrs. V. Jegarasasingham,
Former Member
- 5A. Mr. Ahamed Lebbe Mohamed Saleem,
Member
- 6. Nihal Seneviratne,
Former Member
- 6A. G. S. A. De Silva,
Former Member
- 6B. Mr. Leelasena Liyanagama,
Member
- 7. S. Ranugge,
Former Member
- 7A. Mr. Dian Gomes,
Member
- 8. Laksiri Memdis,
Former Member
- 8A. Mr. Dilith Jayaweera,
Member

9. Sarath Jayathilaka,
Former Member

9A. Mr. W. H. Piyadasa,
Member

All of the Public Service Commission,
No. 177, Nawala Road,
Narahenpita, Colombo 05.

10. J. J. Rathnasiri
Former Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local
Government,
Independence Square, Colombo 07.

10A. S. Hettiarachchi
Former Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local
Government,
Independence Square, Colombo 07.

10B. Mr. J. J. Rathnasiri
Secretary,
Ministry of Public Administration,
Home Affairs, Provincial Councils and Local
Government,
Independence Square, Colombo 07.

11. Hon. Mahinda Rajapakse
Former Minister of Finance and Planning,
No. 177, Wijerama Mawatha, Colombo 07.

11A. Mahinda Rajapakse
Prime Minister,
Minister of Finance, Economy and Policy
Development, Buddhasasana, Cultural and
Religious Affairs, Urban Development,
Water Supply and Residential Facilities,
Ministry of Finance, Economy and Policy

Development, Buddhasasana, Cultural and Religious Affairs, Urban Development, Water Supply and Residential Facilities,

Now:

Prime Minister's Office,
No. 58, Sir Ernest De. Silva Mawatha,
Colombo 07

Minister of Finance,
Minister of Buddhasasana, Religious and Cultural Affairs, Minister of Urban Development and Housing,
Prime Minister's Office,
No. 58, Sir Ernest De. Silva Mawatha,
Colombo 07

12. Hon. Mahinda Yapa Abeywardana
Former Minister of Agriculture,
0/5 A, Roberts Road, Kalubowila, Dehiwala

12A. Nimal Siripala de Silva
Minister of Justice, Human Rights and Le Reforms,
Superior Court Complex, Colombo 12.

Now,

Minister of Labour,
Kirula Road, Colombo.

13. Hon. Dullas Allahapperuma
Former Minister of Youth Affairs and Skills Development,
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13A. Mahinda Amaraweera
Minister of Passenger Transport Management, Power and Energy, Ministry of Passenger Transport Management,

Power and Energy, No. 72, Ananda Mawatha, Colombo 07.

Now:

Minister of Environment,
Sobasam Piyasa, No. 416/C/1, Robert Gunawardana Mawatha, Battaramulla.

14. Hon. A. L.M. Athaullah
Former Minister of Local Government and Provincial Councils,
“Kilakku Vasal”
Kathiriya Beach Road, Akkaraipattu-0.

- 14A. S. M. Chandrasena,
Minister of Environment and Wildlife Resources, Ministry of Environment and Wildlife Resources, No. 1090,
Sri Jayawardenapura Mawatha, Rajagiriya.

Now:

Minister of Lands,
“Mihikatha Madura”
Land Secretariat, No. 1200/6,
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15. Hon. Risad Badhurutheen
Former Minister of Industry and Commerce,
37C, Stanmore Crescent, Colombo 07.

- 15A. Ramesh Pathirana
Minister of Plantation Industries and Export Agriculture, Ministry of Plantation Industries and Export Agriculture,
11th Floor, Sethsiripaya,
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Now:

Minister of Plantation, 11th Floor,
Sethsiripaya, 2nd Stage, Battaramulla.

16. Hon. Chandrasena

Former Minister of Agrarian Services and Wildlife, Marale Road, Kurudankulama, Anuradhapura.

16A. Prasanna Ranatunga

Minister of Industrial Export and Investment Promotion Tourism and Civil Aviation, Ministry of Industrial Export and Investment Promotion Tourism and Civil Aviation, 7th Floor, Sethsiripaya, Battaramulla.

Now:

Minister of Tourism
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17. Hon. P. Dayarathna

Former Minister of State Resources and Enterprise Development, Deegagamini Mawatha, Ampara.

17A. Wimal Weerawansa

Minister of Small and Medium Business and Enterprise Development, Industries and Supply Chain Management, Ministry of Small and Medium Business and Enterprise Development, Industries and Supply Chain Management, No. 73/1, Galle Road Colombo 03.

Now:

Minister of Industries,
3, 73/1, Galle Road, Colombo 03.

18. Hon. Nimal Siripala de. Silva

Former Minister of Irrigation and Water Resources Management, No. 93/20, Elvitigala Mawatha Colombo 08.

18A. Arumugam Thondaman

Former Minister of Community Empowerment and Estate Infrastructure Development, Ministry of Community Empowerment and Estate Infrastructure Development, No. 45, St. Michaels Road, Colombo 03.

19. Hon. Doglas Devananda

Former Minister of Traditional Industries and Small Enterprise Development, No. 04, New Athiyady Road Jaffna.

19A. Dinesh Gunawardena

Minister of Foreign Relations, Skills Development, Employment and Labour Relations, Ministry of Foreign Relations, Skills Development, Employment and Labour Relations, 354/2, "Nipunatha Piyasa," Elvitigala Mawatha, Narahenpita, Colombo 05.

Now

Minister of Foreign, Republic Building, 1 Sir Baron Jayatilaka Mawatha, Colombo 01.

20. Hon. S. B. Dissananaye

Former Minister of Higher Education, 1070/2, Denzil Kobbekaduwa Mawatha, Battaramulla.

20A. Douglas Devananda

Minister of Fisheries and Aquatic Resources, Ministry of Fisheries and Aquatic Resources, New Secretariat, Maligawatta, Colombo 10.

Now

Minister of Fisheries,
Maligawatta, Colombo 10.

21. Hon. Johnston Fernando

Former Minister of Co-Operative and
Internal Trade, Rosewood Garden,
Rathkarawwua, Maspotha.

21A. Pavithra Devi Wanniarachchi

Minister of Women and Child Affair and
Social Security, Healthcare and Indigenous
Medical Service, Ministry of Women and
Child Affair and Social Security, Healthcare
and Indigenous Medical Service, 3rd and 5th
Floor, Sethsiripaya Stage II, Battaramulla.

Now

Minister of Health,
Ministry of Health, 385, Ven. Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

22. Hon. Milroy Fernando

Former Minister of Resettlement New
Road, Wennappuwa.

22A. Bandula Gunawardena

Minister of Information and
Communication Technology, Higher
Education, Technology and Innovation,
Ministry of Information and
Communication Technology, Higher
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437, Galle Road, Colombo 03.

Now

Minister of Trade,
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23. Hon. A.H.M. Fowzie
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23A. Janaka Bandara Tennakoon
Minister of Public Administration, Home
Affairs, Provincial Councils and Local
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Now

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Councils and Local Government,
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24. Hon. Piyasena Gamage
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24A. Chamal Rajapaksa
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Irrigation and Rural Development, Internal
Trade, Food Security and Consumer
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Now

Minister of Irrigation,
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25. Hon. D. E. W. Gunasekara
Former Minister of Rehabilitation and
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Now

Minister of Power,
72, Ananda Coomaraswamy Mawatha,
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26. Hon. Bandula Gunawardena

Former Minister of Education,
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26A.Johnston Fernando

Minister of Roads, Highways, Ports and Shipping, Ministry of Roads, Highways, Ports and Shipping, No. 19, Chaithya Road, Colombo 01.

Now

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27. Hon. Dinesh Gunawardena

Former Minister of Water Supply and Drainage, No. 84, Kirillapona Avenue, Colombo 05.

28. Hon. D.M. Jayarathna

Former Minister of Buddhasasana and Religious Affairs, Doluwa, Gampola.

29. Hon. Sumedha G. Jayasena

Former Minister of Parliament Affairs, 6/2,
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30. Hon. Thissa Karalliyadde
Former Minister of Child Development and Women Affairs, Secretary, Sri Lanka Parliament, Sri Jayawardenapura, Kotte.

31. Hon. Jeewan Kumaranathunga
Former Minister of Posts and Telecommunication, No. 26, Nandimithra Place, Colombo 06.

32. Hon. Gamini Lokuge
Former minister of Labour and Labour Relation, 157/10A, Mawittara, Piliyandala.

Now

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33. Hon. S.B. Navinna
Former Minister of National Languages and Social Integration, C-D-89, Hector Kobbekaduwa Mawatha, Colombo 07.

34. Hon. G.L. Peiris
Former Minister of External Affairs, No. 1316, Podujana Peramuna, Jayanthipura, Nelum Mawatha, Battaramulla.

Now

Minister of Education, Isurupaya, Battaramulla.

35. Hon. Felix Perera
Former Minister of Social Services, No. 125, Negombo Road, Tudella, Ja-Ela.

36. Hon. Susil Premajyantha
Former Minister of Petroleum Industries No. 123/1, Station Road, Gangodawila, Nugegoda.

37. Hon. Basil Rajapaksha
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38. Hon. Keheliya Rambukwella
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Now

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39. Hon. C. B. Rathnayake
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Now

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40. Hon. Mahinda Samarasinghe
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07.

40A. Mahindananda Aluthgamage
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41. Hon. Rajitha Senarathne
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- 41A. Wasudeva Nanayakkara
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42. Hon. Athauda Senevirathne
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- 42A. Udaya Prabath Gammanpila
Minister of Energy, No.72, Ananda
Coomaraswamy Mawatha, Colombo 07.
43. Hon. Jhon Senevirathne
Former Minister of Public Administration
and Home Affairs, Sabarahamuwa
Development Coordinating Office,
Moragahayata, Rathnapura.
- 43A. Hon. Rohitha Abegunawardene
Minister of Ports and Shipping, 19, 1
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44. Hon. Maithripala Sirisena
Former Minister of Health, Presidential
Secretariat, Galle Face, Colombo 01.
- 44A. Namal Rajapakse
Minister of Youth and Sports, No. 09, Phillip
Gunawardana Mawatha, Colombo 07.
45. Hon. Janaka Bandara Tennakoon
Former Minister of Land and Land
Development, No. 25/2, 'Rangiri,' sama
Uyana, Boralesgamuwa.
- 45A. Ali Sabry
Minister of Justice, Ministry of Justice,
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46. Hon. Arumugam Thondaman
Former Minister of Livestock and Rural
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Coomaraswamy Mawatha, Colombo 07.
- 46A.Sarath Weerasekara
Minister of Public Security, 15/5,
Baladaksha Mawatha, Colombo 03.
47. Hon. Tissa Vitharana
Former Minister of Technology and
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48. Hon Pavithra Devi Wanniarachchi
Former Minister of National Heritage and
Cultural Affairs, No. 18/228A, 3rd Cross
Avenue, Evergreen Park, E.D. Dabare
Mawatha, Narahenpita, Colombo 05.
49. Hon. W.A.Wiswa Warnapala
Former Minister of Higher Education
50. Hon. Wimal Weerawansa
Former Minister of Construction,
Engineering Services, Housing and Common
Amenities, No. 342/1/4, E.W. Perera
Mawatha, Kotte Road, Pitakotte.
51. Hon. Kumara Welgama,
Former Minister of Transport, No. 101A,
Manning Place, Colombo 06.
Deniston Estate, Horawala, Welipenna.
52. Hon. Rathnasiri Wickramanayake
Former Minister of Public Management
Reforms

53. Hon. Anura Priyadarshana Yapa
Former Minister of Environment, Minister
Office, Ministry of Disaster Management,
Vidhya Mawatha, Colombo 07.

Respondents

54. U.L.Samaratunga
Development Officer,
No.222/1, Wijerama Road, Gampaha.

55. S.M. Bandu
Development Officer, No. 61/18, Ingiriya
Road, Padukka.

56. R.M.N.S. Gunetilake,
Development Officer, No. 142, Baseline
Road, Colombo 09.

Intervenient-Respondents

Before: Justice Vijith K. Malalgoda PC
Justice Murdu N. B. Fernando PC
Justice Yasantha Kodagoda PC

Counsel: Manohara de. Silva PC with Hirosha Munasinghe for the Petitioners
Ms. Chamantha Weerakoon Unamboowe with Ms. Tersha Abeyratne
instructed by Ms. Chitra Jayasinghe for the 54th, 55th and 56th added
Respondents
Shaheeda Barrie, Senior SC, with Ms. Navodi De. Zoysa, SC for the 1st to
53rd Respondents

Argued on: 19.01.2021

Judgment on: 01.03.2023

Vijith K. Malalgoda PC J

The three Petitioners namely N.B. Krishantha Kumara, Somasiri Ekanayake, and B.H.M.D. Herath who are members of the Sir Lanka Planning Service and the 4th Petitioner Planning Service Association had filed the instant application before this Court challenging the decision of the 1st to the 9th Respondents contained in the letter dated 08.11.2017 which is produced marked P-10-B, to implement the Cabinet decision dated 23.06.2010 which is also produced marked as P-12, alleging that both P-10-B and P-12 are in violation of the Fundamental Rights guaranteed to them under Article 12 (1) of the Constitution.

The matter was supported before this Court on 28.09.2018 and the Court granted leave to proceed for the alleged violation of the Fundamental Rights guaranteed under Article 12 (1) of the Petitioners. After considering an application made by three Intervening Petitioners namely U.L. Samarathunga, S.M. Banu, and R.M.N.S. Gunathilake representing the Development Officers', the court granted permission for the said party to intervene in the instant application as 54th, 55th, and 56th Respondents.

During the Argument before us, the Respondents raised two preliminary objections, one with regard to the *locus standi* of the Petitioner before the Court and the other with regard to the jurisdiction of this Court in deciding an application filed before this Court under Article 17 read with article 126 for allegedly violating the Fundamental Rights of the Petitioners by a policy decision taken by the Executive.

The second objection referred to above needs to go into the facts of this matter and in the said circumstances the said objection will be considered, having considered the merits of this application

towards the later part of this judgment. However, the first objection raised will be considered by me now.

The first and the second Petitioners hold the positions of the Secretary and Assistant Secretary of the 4th Petitioner Association and the third Petitioner who also belongs to the Sri Lanka Planning Service is a committee member of the 4th Petitioner Association. The 4th Petitioner, the Planning Service Association is a trade union registered under section 10 of the Trade Union Ordinance.

Whilst referring to Article 126 (2) of the Constitution the Respondents relied on the decision in ***Ceylon Electricity Board Accountants' Association V. Patali Champika Ranawaka and Others SC FR 18/2015*** SC Minute dated 11.03.2016 where Sripawan CJ had held

“..... in the absence of a specific provision permitting a Trade Union to institute action on behalf of its members, the Petitioner Union cannot have and maintain this application on behalf of its members in terms of Article 17 read with Article 126 (2) of the Constitution.”

Article 126 (2) of the Constitution reads thus;

Where any *person* alleged that any such Fundamental Rights or Language Right relating to *such person* has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney at Law on his behalf, within one month thereof, in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.

It was the argument of the learned Senior State Counsel who represented the Respondents before us, that the Supreme Court had declined to make a broader definition to the term “person” referred to in Article 126 by extending it to unincorporated bodies such as Trade Unions.

The impugned decisions, before this Court, the Cabinet decision (P-12), and the letter by the 1st to the 9th Respondents (P-10-B) refer to the absorption of a certain category of officers into the Sri Lanka Planning Service (hereinafter referred to as SLPS) on supernumerary basis without making them eligible for certain benefits in the said service, but the main complaint before this court is that the said Cabinet decision and the subsequent letter by the 1st to 9th Respondents are in clear violation of the service minute of the SLPS which affects not only to the 1st to 3rd Respondents before Court but also to the entire cadre of the Sri Lanka Planning Service and therefore the 4th Respondent being the Trade Union which represents the entire cadre of the said service is entitled, to prosecute the instant application in the interest of its membership.

When a similar matter had arisen with the Nurses working in Government Hospitals, the Cabinet of Ministers approved additional salary increments to the non-striking staff on the recommendation of the Health Minister, the Public Services United Nurses Union, in which the majority of nurses in the Government Hospitals are members, challenged the said decision before this Court.

In the case of the ***Public Services United Nurses Union V. Montague Jayawickrema Minister of Public Administration and Others, 1988 1 Sri LR 229*** this Court held that the said decision violates equality provisions contained in Article 12 since the said decision had granted an *ad hoc* increment to a very limited class of officers.

However, in the case of ***Ceylon Electricity Board Accountants' Association V. Patali Champika Ranawaka and Others (Supra)***, the Supreme Court upheld an objection raised by the Respondents with regard to the maintainability of the said application on the ground that the Petitioner being a Trade Union has no *locus standi* to institute an application in terms Article 126 of the Constitution.

When deciding the above, Chief Justice Sripawan was mindful of the instances where this Court had permitted unincorporated bodies or persons to institute and maintain applications under Article 17

read with 126 (2) of the Constitution including the case of ***Public Services United Nurses Union V. Montague Jayawickrama and Others*** (*supra*).

Whilst referring to the Nurses Union case referred above Sripawan CJ observed;

“I do not find myself able to accede to the argument advanced by Mr.for two reasons. Firstly, no objection was taken by the Respondents in the said application that the Public Services United Nurses Union had no *locus standi* to institute an application under Article 126 of the Constitution and the Court did not have the benefit of any argument of the learned counsel on that issue. Secondly, in any event, the second Petitioner was a Nurse and the Secretary of the First Petitioner Union, whose Fundamental Right of equality guaranteed under Article 12 had been violated. Furthermore, the Second Petitioner is a “Person” within the meaning of Article 126 (2) of the Constitution. Thus, the case could have proceeded even if the First Petitioner, namely Public Services United Nurses Union was struck down”

With regard to an Incorporated body, a similar objection was raised by the Respondents in the case of ***Environmental Foundation Ltd. V. Urban Development Authority (2009) 1 Sri LR 123*** and S. N Silva CJ considered the said objection as follows;

“An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the Fundamental Rights guaranteed by Article 12 (1) and 14 (1) (a) can be invoked only by persons and in the case of Article 14 (1)(a) by a citizen. In my view, the word “persons” as appearing in Article 12 (1) should not be restricted to “natural” persons but extended to all entities having legal personality. In several cases, this Court has given relief to incorporated bodies that have a legal personality recognized by law..... Although counsel contended that Article 14 (1) should be read differently in view of the reference to a “citizen” I am of the view that this distinction does not carry with it a

difference that would enable a company incorporated in Sri Lanka, to vindicate an infringement under Article 12 (1) and disqualify it from doing so in respect of an infringement under Article 14 (1).

.....

In several cases, the Petitioner has assisted this Court in important matters with regard to the preservation of the environment. In this instance too the Petitioner has acted in the public interest....”

However, Sripawan CJ whilst referring to the decision in Environmental Foundation Ltd. (supra) and made a distinction between the two cases in the case of Ceylon Electricity Board Accountants’ Association (supra) as follows;

“His Lordship further noted that in several cases this Court has given relief to incorporated bodies that have a legal personality recognized by law..... In any event, Environment Foundation Ltd. (supra) case was filed in the public interest in order to preserve, safeguard and protect the public interest. Hence incorporated bodies recognized by law were permitted to file action in terms of Article 126 (2) of the Constitution.

The learned President’s Counsel who represented the Petitioner in the case of Ceylon Electricity Board Accountants’ Association (supra) made an attempt at a later stage to add one of its office bearers as an added Petitioner, but the said application was objected to by the Respondents. The said move by the Petitioner in Ceylon Electricity Board Accountants’ Association (supra) is a clear admission by the Petitioner himself with regard to the *locus standi* of the Petitioner in the said case.

In these circumstances it is clear that the *locus standi* of an unincorporated body that comes before the Supreme Court in an application filed under Article 17 read with Article 126 (2) is now settled

and the Court has permitted the members of the unincorporated body to pursue the application in the instances when their rights guaranteed under the constitution has been violated by the conduct of the Respondents. Therefore, I see no merit in the first objection raised by the Respondents before this Court.

With regard to the impugned Cabinet decision produced mark P-12 and the subsequent decision taken by the Public Service Commission which is contained in the letter produced P-10 B, the Petitioners have submitted as follows;

- a) That according to the service minute of the SLPS which was operative until the Public Administration Circular 6/2006 was published in Government Gazette 1134/5 on 30.05.2000, the said service consisted of Class II Grade II, Class II Grade I, and Class I officers.
- b) That a new service minute was introduced to the SLPS in terms of Public Administration Circular 6/2006 by Government Gazette 1670/32, which was published on 10.09.2010. According to this service minute the said service consists of four grades namely, Grade III, Grade II, Grade I, and Special Grade.
- c) That the recruitment Grade under the previous service minute was Class II Grade II of Sri Lanka Planning Service and under the new service minute it is Grade III.
- d) That under both these schemes, provisions had been made to recruit officers under two main streams, namely open and limited and there was a minimum requirement of obtaining 40% of the total mark from a written examination, in order to get through the examination under both schemes.
- e) That according to Clause 6.4 of the service minute which was operative until 2010, 75% of the vacancies in Class II Grade II of the SLPS were to be filled on the results of the Open Competitive Examination, and the balance 25% by the Limited Competitive Examination.

- f) That the Cabinet of Ministers had arrived at a decision on 24.10.2007 to allow a group of officers to sit for a special examination instead of the examination identified in Clause 6.5 in the service minute in order to absorb them to Class II Grade II of the SLPS on Supernumerary basis.
- g) That the said Cabinet decision and the Instructions issued by the Public Service Commission in order to implement the said Cabinet decision were challenged before the Supreme Court by two parties and those matters namely SC FR 236/2008 and 237/2008 were pending before the Supreme Court for determination even at the time the instant application was taken up for hearing before the present bench.
- h) That by Government Gazette 1565 dated 29.08.2008 which was amended by Government Gazette 1587 dated 30.01.2009 applications were called from the eligible candidates to sit for the said examination.
- i) That the minimum requirement to get through the said examination was unchanged and under paragraph 13 of the Government Gazette 1565 dated 29.08.2008 it was stated that;
- “B. තෝරා ගැනීම් ක්‍රමය;
- ප්‍රශ්න පත්‍ර සඳහා නියමිත ලකුණු වලින් යටත් පිරිසෙන් 40% ක් වත් ලබා නොගන්නා අපේක්ෂකයන් කැඳවනු ලැබීමට නුසුදුසු වනු ඇත. එක් කරනු ලැබීම සඳහා අපේක්ෂකයන් තෝරා ගනු ලබන්නේ විභාගයේ 40% වඩා ලකුණු ලබාගත් අයවලන් අතරිනි.
- j) That the said examination to appoint officers to Class II Grade II of the Sri Lanka Planning Service on a supernumerary basis was held in April 2009 and steps were taken to recruit those who got through the said examination by obtaining the minimum requirement of 40% of the total mark.

- k) That, a Cabinet Memorandum dated 10.06.2009 was submitted by the then Minister of Finance and Planning seeking approval to reduce the pass marks from 40% to 30% for the reasons contained in paragraph 3 of the said memorandum, which reads as follows;

“3. විභාග ප්‍රශ්න පත්‍රය සම්බන්ධයෙන් විභාග අපේක්ෂකයන් විසින් ඉදිරිපත් කරන ලද නියෝජනයන් තුළින් සහනයක් සලසාදෙන ලෙස කරන ලද ඉල්ලීම සලකා බලා, සම්පූර්ණ විභාගය අවලංගු කොට යළි පැවැත්වීම වෙනුවට විකල්ප ක්‍රියා මාර්ගයක් ලෙස රාජ්‍ය සේවා කොමිෂන් සභාව විසින් අනුමත කරන ලද සමත් වීමේ අවම ලකුණු ප්‍රමාණය වන 40% සිට 30% දක්වා සංශෝධනය කිරීම තුළින් අගතියට පත් අපේක්ෂකයන්ට සහනයක් සැලසීම සුදුසුයයි යෝජනා කරමි. මෙසේ ලකුණු දීමෙන් සමාර්ථය ලබන අපේක්ෂකයන් සංඛ්‍යාව 451 වී ඇති හෙයින් රාජ්‍ය සේවා කොමිෂන් සභාව විසින් බඳවා ගැනීමට අනුමැතිය දී ඇති 526 ප්‍රමාණය ඉක්මවා නොයන බවද සඳහන් කරමි. (P-5)

- l) That the said Cabinet Memorandum was approved by the Cabinet of Ministers and conveyed to the Secretary to the Ministry of Finance and Planning by P-6.
- m) That the above decision to deviate from the original scheme approved by the Cabinet of Ministers was never challenged, and steps were taken to implement the said decision.
- n) That subsequent to the introduction of the new scheme of recruitment in 2010, two rounds of recruitment to Grade III of the SLPS were taken place in 2012 and 2017 based on the new scheme of recruitment.
- o) That when the second round of the recruitment process was in progress the Petitioners were informed of an attempt to recruit another batch of officers to the Sri Lanka Planning Service from those who faced the special examination in the year 2009 and had not succeeded in obtaining 30% as required by the Cabinet decision dated 10.06.2009.
- p) That the Petitioners made requests from the Public Service Commission and the office of the Cabinet of Ministers under the provisions of the Right to Information Act No. 12 of 2016 in order to obtain information with regard to any decision reached in that regard and the

decision of the Public Service Commission dated 17.11.2017 (P10-B) was communicated to the 1st Petitioner by the Public Service Commission by letter dated 04.12.2017 (P-10-A)

- q) That, it was revealed from the information gathered, that there was another Cabinet Memorandum dated 17.06.2010 and a Cabinet Decision (P-11 and P-12) to recruit all candidates who faced the examination which was held in the year 2009 irrespective of any marks they received but fulfill the other requirements according to the relevant Gazette notification. However, the said decision was not implemented until 2017, but by letter dated 17.11.2017 (P-10-B), Public Service Commission had instructed the Secretary Public Administration Ministry to implement the said decision.

In these circumstances the Petitioners have further submitted before this Court, that;

- i. The said Cabinet decision dated 23.06.2010 (P-12) and the recent decision taken by the Public Service Commission to implement the said Cabinet decision as evinced in the letter dated 17.11.2017 (P10-B) are in gross violation of the service minute of the SLPS and the Government policy on recruiting officers to the SLPS.
- ii. The Petitioners have a legitimate expectation that all requirements and provisions in the Sri Lanka Planning Service will adhere in strict compliance with the approved service minute
- iii. The service minute clearly specifies that the pass mark for both the Limited and Competitive Examination is 40
- iv. When making the recruitments in 2009, the pass mark was lowered to 30, which is also in violation of the Service Minute

- v. The impugned decision of the Public Service Commission has the effect of recruiting to the Sri Lanka Planning Service, those who failed to score even 30 marks and thereby failed the examination
- vi. Two rounds of recruitment have taken place since 2010 under the new service minute
- vii. Grave anomalies would be caused within the SLPS if the impugned decision is implemented

On behalf of the Respondents, the 1st and the 10th Respondents, the Chairman Public Service Commission and the Secretary to the Ministry of Public Administration had tendered affidavits responding to the allegations made against them by the Petitioners and had denied any violation of the service minute of the SLPS. The Respondents have also taken up the position, that the recruitments referred to by the Petitioners had neither violated the legitimate expectations of the Petitioners nor it created any anomalies in the Sri Lanka Planning Service violating the Fundamental Rights of the Petitioners guaranteed under Article 12 (1) of the Constitution.

In this regard, the 1st and the 10th Respondents have taken up the position that;

- a) The secretary to the Ministry of Plan Implementation in consultation with some authorities decided to absorb the Development Officers who had completed 05 years of satisfactory service to SLPS Class II Grade II considering the provisions in the scheme of recruitment of the Development Officers
- b) The said decision was challenged before the Court of Appeal in CA 329/2007 and in the meantime Secretary to the Ministry of Plan Implementation wrote to the Public Service Commission seeking approval for the absorption of 349 Development officers to Class II Grade II of SLPS

- c) However, by letter dated 4th June 2007, the Public Service Commission refused to consent to the above request and also informed its decision to the Court of Appeal
- d) A Cabinet Memorandum titled “strengthening the Sri Lanka Planning Service with special emphasis to plan implementation” dated 14th August 2007 was submitted to the Cabinet by the predecessor in office to the 11th Respondent
- e) In the said Cabinet of Memorandum, it was recommended that,
 - a) a special examination be conducted (by the Sri Lanka Institute of Development Administration) for these officers to assess their suitability for absorption;
 - b) the examination focuses primarily on an assessment of applying knowledge relating to field-level experience in planning and plan implementation.
 - c) those who are successful at the examination be absorbed into supernumerary Class II Grade II posts in the SLPS with effect from a prospective date, provided they have completed five years of continuous active service, been confirmed in the post, and have passed the first Efficiency Bar examination specified in the scheme of recruitment;
 - d) those who are successful at the examination but have not passed the first Efficiency Bar examination at that time, but complete that examination subsequently, be absorbed as set out above, with effect from a prospective date after they pass the First Efficiency Bar Examination;
 - e) such number of supernumerary posts as are equivalent to the number of successful candidates be specially created at Class II Grade II level to enable these appointments to be made and that simultaneously the posts currently held by those officers are suppressed;

- f) The Cabinet of Ministers had approved the said recommendation and the said decision was communicated to the Public Service Commission in order to grant relief as proposed in the Cabinet Memorandum
- g) By letter dated 28th September 2007 the Public Service Commission had voiced its disagreement with the implementation of the said Cabinet Decision
- h) The Cabinet of Ministers by its decision dated 10.10.2007, rescinded the earlier decision and appointed an official committee to formulate a promotional scheme to the development officers in order to address the grievances of the development officers.
- i) On the recommendations of the said Committee the Cabinet of Ministers by its decision dated 24.10.2007 granted approval to conduct a special examination and appoint successful candidates to the Sri Lanka Planning Service on a supernumerary basis.
- j) Applications were called from those who were eligible to sit for the special examination referred to above by Government Gazette dated 29.08.2008 and those who were eligible to sit for the examination were identified in the notice itself.
- k) According to the said notice;
 - i. The post advertised (Class II Grade II of SLPS) is permanent and pensionable but is on a supernumerary basis and personal to the successful candidate who obtains more than 40 marks from the special examination
 - ii. If the candidates intend obtaining other benefits and promotions in the SLPS, he/she will have to face the competitive examination held under the provisions of the service minute of the SLPS.
- l) The special examination referred to above was held and steps were taken to give appointments to the successful candidates. However, by Cabinet Memorandum dated

10.06.2009, approval was sought to reduce the pass mark to 30% to grant further relief to the candidates. Cabinet has approved the said memorandum.

- m) By another Cabinet Memorandum submitted to the Cabinet on 23.06.2010 by the Minister of Finance and Planning, approval was sought from the Cabinet to absorb the balance of candidates who sat for the special examination into the SLPS.

The Cabinet approval granted to the said memorandum is as follows;

“අමාත්‍ය මණ්ඩල පත්‍රිකා අංක 10/1317/404/046 වූ ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පන්තියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) පත් කිරීම යන මැයෙන් මුදල් හා ක්‍රමසම්පාදන ඇමතිතුමා ඉදිරිපත් කල 2010. 06.17 දිනැති සංදේශය (..... 2009.06.10 දිනැති අමාත්‍ය මණ්ඩල තීරණයට අදාල) ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පන්තියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) බඳවා ගැනීම සලකා බැලීම සඳහා 2009.04.19 දින පවත්වන ලද විභාගයට පෙනී සිටි ඉතිරි නිලධාරීන්ද, අදාල ගැසට් නිවේදනය ප්‍රකාරව, සුදුසුකම් සපුරා ඇත්ද යන්න සම්මුඛ පරීක්ෂණ මණ්ඩලයක් විසින් පරීක්ෂාකර බලා, ඔවුන්ට පෞද්ගලික වනසේ, ශ්‍රී ලංකා ක්‍රමසම්පාදන සේවයේ II පන්තියේ II ශ්‍රේණියට (අධි සේවක පදනම මත) පත් කිරීම සඳහා අනුමැතිය දෙන ලදී.”

- n) Subsequent to the above approval, the qualifications of all the candidates who were not eligible under the two previous Cabinet decisions were also checked by an interview panel, and out of 242 candidates interviewed, 146 were shortlisted and another Cabinet Memorandum was submitted on 23.03.2011 recommending that they may be given appointments based on the previous Cabinet approval.
- o) However due to reasons not revealed before this court, the Cabinet of Ministers at their meeting on 26.04.2011 sought the views of the Minister of Public Administration and Home Affairs, without approving the Cabinet Paper submitted before the Cabinet.

p) The Public Service Commission which was defunct during this period was reconstituted on 19.05.2011 and the appointments to the Public Service were since then vested with the Public Service Commission and no steps were taken by the Public Service Commission to make those appointments until P-10-B was issued by the Public Service Commission in November 2017 directing those appointments be made with effect from 23.06. 2010 without back wages.

As further observed by this Court, the incumbent Chairman of the Public Service Commission, the 1st Respondent before this court when submitting an affidavit before this court had justified its decision contained in P-10-B stating that the decision of the Cabinet of Ministers dated 23.06.2010 (P-12) has not yet been canceled and it is a policy decision and the Public Service Commission has now decided to implement the said Cabinet decision.

In addition to the Respondents who were represented before this court by the learned Senior State Counsel, this Court had permitted three Interventient Parties, i.e., 54th, 55th, and 56th Respondents to make a submission through their counsel before this Court.

On behalf of the 54th to the 56th Interventient Respondents, several objections were raised and they objected to the granting of any relief to the Petitioners.

It was submitted on behalf of them that the Cabinet of Ministers has acknowledged the grievance of the Development Officers who were represented before this Court by the 54th to 56th Interventient Respondents. As submitted by them the only promotional prospect according to their service minute was referred to in note 3 to the scheme of Recruitment as, "provisions will be made for the recruitment of Department Officers to the Planning Service after 5 years of satisfactory Service."

By 2007 majority of the Development Officers attached to the Ministry of Planning had completed 5 years of service without any promotional opportunity. Even though the service minute of the SLPS introduced in the year 2000 had included the post of Development Officer to its schedule 'E' and under clause 6.5 provisions were made to hold a Limited Competitive Examination to recruit 25% of its vacancies, no such examination was held for 07 years depriving promotional opportunities to Development Officers.

According to the 54th to 56th Respondents, several services other than Development Officers were included in schedule 'E' and those services were also eligible to sit for the said examination along with the Development officers and therefore the only promotional opportunity available to the Development Officers could not be resolved effectively even by conducting the Limited Competitive Examination in the year 2008 to fill 100 vacancies. In the said circumstances the Respondents argue that conducting the Special Examination as provided by the Cabinet decision dated 24.10.2007 to recruit Development Officers to the SLPS Grade II Class II on a supernumerary basis was not in violation of the Fundamental Rights of the officers in SLPS.

On behalf of the Interventient Respondents, it was further submitted that there were several issues with regard to the question paper in the Special Examination and therefore the Cabinet of Ministers had first reduced the pass mark to 30 by Cabinet decision dated 10.06.2009 and thereafter decided to recruit all Development Officers who fulfill the other requirement to the Post of Grade II Class II officer in SLPS by the impugned Cabinet decision dated 23.06.2010. It was further submitted on behalf of the Interventient Respondents that both Cabinet decisions referred to above are policy decisions taken by the Cabinet of Ministers in resolving the promotional prospects of the Development Officers in the Planning Ministry.

At the time this case was taken up for argument, the court was unaware of the two applications that were pending before this court, where several parties have challenged the Decision of the Cabinet of Ministers arrived on 24.10.2007 with regard to the appointments made to Class II Grade II of the SLPS on supernumerary basis. However, after the arguments were concluded and the judgment was reserved, His Lordship the Chief Justice nominated this bench to hear the two cases which were pending before this Court for determination at that time. At that stage, this Court notified all parties, including the Petitioners, Respondents, and the Intervenient Parties in all three applications i.e., SC FR 460/2017, SC FR 236/2008, SC FR 237/2008, and with the consent of all parties, decided to conclude arguments in SC FR 236/2008 and SC FR 237/2008 before the delivery of the judgment in the instant case. 54th, 55th, and 56th Respondents in SC FR 460/2017 were also represented at the argument of those two cases and the parties finally agreed for this Court to deliver a separate judgment in SC FR 460/2017 and to deliver a combined judgment in SC FR 236/2008 and SC FR 237/2008.

The argument in SC FR 236/2008 and SC FR 237/2008 had enlightened this Court, of the background to the Cabinet decision dated 24th October 2007, and the Respondents in those proceedings had also taken up the objection, “that the decision challenged in those applications’ was a policy decision of the Cabinet of Ministers and therefore it was not amenable to the Fundamental Rights Jurisdiction of this Court.

The extent to which a Cabinet decision could be challenged before the Supreme Court was discussed in the case of ***Samastha Lanka Nidahas Grama Niladhari Sangamaya and Others V. D. Dissanayake, Secretary, Public Administration and Ministry of Home Affairs, and Others SC Appeal 158/2010*** SC minute 14.06.2013 as follows;

“The first substantive question that has to be determined on appeal, in this case, is purely one of the *vires* and arises in the context of certain constitutional provisions which seek to distinguish between two categories of decisions that can be made by the executive arm of Government. The first of these are decisions relating to “the appointment, transfer, dismissal and disciplinary control” of public officers, which was vested in the Public Service Commission by Article 55 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as “the Constitution of Sri Lanka”) as amended by the Seventeenth Amendment thereto, which was in force at the time of the pronouncement of the impugned judgment of the Court of Appeal. The second of these categories are decisions pertaining to policy, which in the context of the public service are exclusively vested in the Cabinet of Ministers by Article 55 (4) of the Constitution of Sri Lanka, as amended by the Seventeenth Amendment.”

In the case of ***Jathika Sevaka Sangamaya V. Sri Lanka Hadabima Authority SC Appeal 15/2013*** Supreme Court minute 16.12.2015 this court further observed that;

“As pointed out earlier under Articles 42 and 55 of the Constitution, the Cabinet of Ministers are performing executive functions under the Constitution and their decisions can be either policy decisions or administrative decisions or both. Accordingly, the decisions of the Cabinet of Ministers other than the policy decisions are amenable to judicial review.”

Therefore, it is clear that every decision taken by the Cabinet of Ministers cannot be excluded from it being challenged under Article 126 of the Constitution unless there is proof that the decision challenged before the Court is a Policy decision of the Cabinet of Ministers.

As observed by this Court, the Cabinet decision challenged in SC FR 236/2008 and SC SF 237/2008. i.e., the Cabinet decision dated 24.10.2007 and the impugned Cabinet decision in the instant case,

i.e., the decision dated 23.06.2010 both referred to the appointment of Development Officers to the SLPS Class II Grade II on a supernumerary basis based on a Special Examination held for the selection of those officers. However, we observe a significant difference between the two decisions for the reason that, the 1st Cabinet decision refers to a selection criterion based on the recommendations of the Committee of officials appointed by the Cabinet, to the effect,

- a) A Special Examination be held at which their **suitability will be tested.**
- b) The **successful candidates** be recruited to the SLPS on a supernumerary basis. (emphasis by me)

but the impugned cabinet decision recommends absorbing the balance candidates (who were not successful under the above criterion) who sat for the Special Examination, if they have fulfilled the other requirement, to be absorbed to Class II Grade II of SLPS on a supernumerary basis. In other words, it recommends absorbing those who had failed the Special Examination held under the 1st Cabinet decision to SLPS Class II Grade II on the supernumerary basis, whereas the 1st decision was specific to absorbing only those who were successful in the said examination.

The argument of the 54th to the 56th Respondents, that the two Cabinet decisions arrived subsequently, was to resolve the administrative lapses in conducting the Special Examination, is a clear indication that the impugned Cabinet decision was not a policy decision by the Cabinet of Ministers but was an administrative decision by the Cabinet of Ministers.

After analyzing the material placed before this Court in those cases, i.e., SC FR 236/2008 and SC FR 237/2008 this Court has now concluded, that the decision challenged in those cases, i.e., the decision by the Cabinet of Ministers taken on 24.10.2007 was a policy decision and therefore the said decision was not amenable to the Fundamental Rights Jurisdiction of this Court. It was further held in those

proceedings that, the Cabinet of Ministers by the Cabinet decision dated 24.10.2007 had resolved and decided the policy on the absorption of Development Officers to Class II Grade II of SLPS.

As already observed in those proceedings the Cabinet of Ministers when reaching the decision to absorb Development Officers to the SLPS Class II Grade II on a Supernumerary basis based on the results of the Special Examination held, had first appointed an officials committee comprising of several very senior public servants and had implemented the recommendations of the said committee, by way of the Cabinet decision dated 24.10.2007. However, the impugned Cabinet decision dated 23.06.2010 which is arbitrary in nature had cut across the policy already adopted by the decision dated 24.10.2007 and approved the appointment of Development Officers who were not successful and could not obtain the pass mark to become eligible to be absorbed to the SLPS Class II Grade II on supernumerary basis.

As further revealed before this Court, the Cabinet of Ministers themselves were not impressed with their own decision and put off the absorption of 146 candidates who were selected after an interview, based on the Cabinet decision dated 23.06.2010 and sought the view of the Minister of Public Administration and Home Affairs to implement the recommendations but no progress made for more than six years.

In the case of ***Public Services United Nurses Union V. Montague Jayawickrema 1988 1 SLR 229*** Wanasundara J had rejected a similar argument when the court observed that the Cabinet Decision to grant an Ad hoc increment to a group of public servants was in violation of the Fundamental Rights guaranteed under article 12(1) of the Constitution.

When considering the material discussed above, it is clear that the impugned Cabinet decision dated 23.06.2010 was an arbitrary decision that was contradictory to its own Cabinet decision dated

24.10.2007 by which the Government Policy on absorption of Development Officers to the SLPS was decided.

In the said circumstances, I am of the view that the Petitioners before this Court were successful in establishing that P-12 and P10B had violated their Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Therefore, I hold that the Fundamental Rights of the Petitioners enshrined under Article 12 (1) have been violated. Accordingly, I quash the Cabinet decision No 10/1317/404/046 dated 23.06.2010 produced marked P-12 and the subsequent decision of the Public Service Commission dated 07.11.2017 marked P-10B.

I make no order with regard to costs.

Application allowed.

Justice Murdu N. B. Fernando, PC

Judge of the Supreme Court

I agree,

Justice Yasantha Kodagoda, PC

Judge of the Supreme Court

I agree,

Judge of the Supreme Court