

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

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

SC / FR No. 429/2016

1. H.M.M. Sedara,
No. 131/D,
Pahala Biyanwala,
Kadawatha.
2. K.A.P. De Silva,
No. 25/1, Kowila Mawatha,
Dadalla,
Galle.
3. W.M.C. Peiris,
No. 17/2,
Kammala South,
Waikkala.
4. D.D. Millaniya,
No. 31, Kottawa Road,
Miriswatta,
Piliyandala.
5. R.W. Asoka Sriyani,
No. 477/4, Batapola Road,
Kurudugahahethakma,
Elpitiya.
6. C.S. Gunatilaka,
No. 58 C 2, Kanaththa Road,

Asgiriya,
Gampaha.

7. K.S. Abrew,
No. 101/15, Bandarawatta,
Gampaha.
8. G.G. Seneviratna,
No. 78, Keerapana,
Gampola.
9. M.T. Ramya Renuka,
5B, Eral Jayawickrama Mawatha,
Hettiveediya,
Weligama.
10. B.G. Kumudu Nelum,
No. 145/C,
Meewathura,
Peradeniya.
11. N.P. Asoka,
No. 22, “Prabashi”,
Kuruduwatta,
Welipitiya
Weligama.
12. G.G. Dayani,
Muththettuwa Watta,
Nadugala Road,
Matara.
13. B.L.N. Thamalika,
No. 447/1/D, Pitipana North,
Moragahahena Road,
Homagama.

14. N.B. Silva,
No. 191, Weluwana Road,
Dematagoda,
Colombo 09.
15. G.D.A. Ariyaratna,
Suhada Mawatha,
Nagoda,
Kalutara.
16. K.M.P.K. Kodituwakku,
No. 239/7, Devalegawa,
Ratnapura.
17. P.D. Sriyani,
No. 300/7A, Old Galle Road,
Walliwala,
Weligama.
18. K.P. Sandaya,
No. 216/1, Mudiyansege Watta,
Dalugama,
Kelaniya.
19. W.I. Mallika,
No. 156/27, Peradeniya Road,
Kandy.
20. H.R.S. Perera,
Bilingahawatta Lane,
Matugama.
21. N.B.A.N. Ratnaseeli,
No. 600/7/A/3,
Ihala Biyanwila,
Mankada Road,
Kadawatha.

22. M.T.N. Sovis,
No. 45/7 S, Station Road,
Kapuwatta,
Ja-Ela.
23. A.G. Janaki,
No. 110/15, Sri Bidhiraja Mawatha,
Polwatta,
Pannipitiya.
24. Nalinda Peiris,
No. 160/1, Kumbuka West,
Gonapola.

Petitioners

Vs.

1. Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.
2. Rohan Pethiyagoda,
Chairman (Former),
Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.
- 2A. W.L.P. Wijewardena,
Chairman (Former),
Sri Lanka Tea Board,
No. 574, Galle Road,
Colombo 03.
- 2B. Jayampathy Molligoda,
Chairman,
Sri Lanka Tea Board,

No. 574, Galle Road,
Colombo 03.

3. Upali Marasinghe,
Secretary, (Former)
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.
- 3A. J.A. Ranjith,
Secretary (Former),
Ministry of Plantation Industries,
55/75, Vauxhall Lane,
Colombo 02.
- 3B. Ravindra Hewavitharana,
Secretary,
Ministry of Plantation Industries,
11th Floor,
Sethsiripaya 2nd Stage,
Battaramulla.
4. N. Godakanda,
Director General (Former),
Department of Management Services,
General Treasury,
Colombo 01.
- 4A. Ms. Hiransa Kaluthantri,
Director General,
Room 343,
3rd Floor, Ministry of Finance,
The Secretariat,
Colombo 01.
5. K.L.L. Wijerathne,
Chairman (Former),

6. Ashoka Jayasekara,
Secretary (Former),
Both of National Pay Commission.

- 6A. Anura Jayawickrema,
Secretary (Former),
National Pay Commission.

7. Nimal Bandara,
8. Dayananda Vidanagamachchi,
9. J. Charitha Rathwatte,
10. Prof. Kithsiri Madapatha Liyanage,
11. Leslie Shelton Devendra,
12. Suresh Shah,
13. Sanath Jayantha Ediriweera,
14. V. Regunathan,
15. Kamal Mustapha,
16. Prof. Gunapala Nanayakkara,
17. Nandapala Wickramasooriya,
- 17A. S. Naullage,
18. Sujatha Cooray,
19. Gerry Jayawardena,
20. S. Thillainanadarajah,
21. Dr. Anura Ekanayake,
22. Sembakuttige Swarnajothi,
23. P.K.U. Nilantha Piyarathne,
24. N.H. Pathirana,
25. H.T. Dayananda,
26. T.B. Maduwegedara,
27. Dr. Wimal Karadagoda,
28. A. Kadirawelupillai,
- 28A. W. Kumarawansa De Silva

All Members of the Former National
Salaries and Cadre Commission.

29. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
30. Upali Wijeweera,
Chairman,
National Pay Commission.
31. Chandrani Senarathne,
Secretary,
National Pay Commission.
32. Gotabaya Jayarathne,
Member,
33. Sujatha Cooray,
Member,
34. Madura Wehella,
Member,
35. M.S.D. Ranasiri,
Member,
36. Dr. Ananda Hapugoda,
Member,
37. Sanjeewa Somarathne (High Court Judge),
Member,
38. Ajith Nayanakantha,
Member,
39. Ravi Liyanage,
Member,

40. Sanath Ediriweera,
Member,
41. Prof. Ranjith Senarathne,
Member,
42. R.M. Amarasekara (Engineer),
Member,
43. Siri Ranaweera (Retired Major General),
Member,
44. W.H. Piyadasa,
Member,
- 32nd to 44th,
Members of National Pay Commission,
Room No. 2 – 116,
BMICH,
Colombo 07.

Respondents

Before: **Justice P. Padman Surasena**
 Justice A.L. Shiran Gooneratne
 Justice Achala Wengappuli

Counsel: Chamantha Weerakoon Unamboowa with O.L. Premarathne **for the**
 Petitioners.

S. Barrie, DSG **for the AG.**

Argued on: 25/01/2022

Decided on: 16/06/2022

A.L. Shiran Gooneratne J.

The Petitioners to this application are presently holding the post of “Management Assistant Non - Technological” in the Sri Lanka Tea Board (hereinafter sometimes referred to as the Respondent Board) with effect from 06/06/2012.

The Petitioners were originally recruited to the Clerical and Allied Services of the Respondent Board. The 1st to 13th Petitioners were recruited to Grade II Segment B of the Clerical Service while the 14th to 19th Petitioners were recruited to Grade II as Stenographers and the 20th to 24th Petitioners were recruited to Grade I, as Data Entry Operators.

In view of Public Administrative Circular 06/2006, a new salary structure was introduced and the employment criteria was recategorized as per the task performed. This was achieved through the Department Management Services Circular No. 30 dated 22/09/2006 referred to as DMS 30/06 marked ‘P5’ to the Petition. In terms of Annex II of the said Circular, a new salary structure was introduced to the public sector in line with State Corporations, Statutory Boards and Fully owned Government Companies. As per the new scheme, the Petitioners were placed in the salary scale MA - 1-1-2006 (P5).

Accordingly, the Petitioners received a salary increment on the above scale to coincide with a salary increment given to the public service (P7 and P8). On 25/10/2011, in terms of the said DMS 30/06, a new Scheme of Recruitment and Promotions (SOR) marked ‘P9’, was introduced by the Respondent Board and accordingly, the Petitioners were absorbed as “Management Assistant-Non-Technological - Grade I”. On 06/06/2012,

formal letters absorbing the Petitioners to the new Post of Management Assistant Non-Technical, was issued.

The Petitioners contend that according to the Scheme of Recruitment and Promotions which prevailed prior to the introduction of the new scheme (P3), a person holding the post of Clerk had a legitimate expectation of being promoted to the post of Staff Assistant after 5 years of service in Grade I, and to be promoted to the Executive Grade, three years thereafter. Similarly, a person who was recruited as a Stenographer had a legitimate expectation of reaching the post of Chief Stenographer and to be promoted to the Executive Grade with three years of service thereafter. The Petitioners state that in the new Scheme of Recruitment (SOR) (P9), there is no promotional path available to the Petitioners and therefore is arbitrary, discriminatory and violates their fundamental right of equality guaranteed by Article 12 (1) of the Constitution.

By application dated 30/11 2016, the Petitioners, *inter alia*, are seeking:

1. for a declaration that the 1st to 28th Respondents have violated the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution,
2. to issue an order directing the Respondents to provide a suitable promotional post/path for the Petitioners and
3. to issue an order directing the Respondents to promote the Petitioners to the next promotional grade/ post provided.

This Court has granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

Application is time barred.

When this application was taken up for hearing, the learned DSG appearing for the Respondents raised a preliminary objection that the instant application dated 30/11/2016, is time barred.

It is contended that the Petitioners application is filed outside the time limit prescribed by Article 126 (2) of the Constitution which *inter alia*, states that an aggrieved person may come before the Supreme Court within a period of one month from an infringement. The Respondents contend that the said time bar is contingent upon one or more of the following occurrences, i.e.

1. the placement of the Petitioners in the salary scale MA-1-1-2006, assigned to Management Assistants dated 13/12/2006 (P6),
2. the introduction of the composite SOR on 25/10/2011 (P9) and/or,
3. the formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical on 06/06/2012 [P11 (a) - (w)].

Since the preliminary objection relates to the jurisdiction of this Court under Article 126 of the Constitution, I would first deal with the objection raised by the Respondents.

The Petitioners were placed in the salary scale MA-1-1-2006 assigned to Management Assistant by Management Services Circular No. 30 dated 22/09/2006 (P5). The application to this Court seeking a direction that the Respondents provide a promotional post/ path to the Petitioners absorbed into the said service category, is dated 30/11/2016. Inasmuch as the 'lapse' to provide a promotional path to the Petitioners is contended to be a violation, the Petitioners do not allege that the said SOR (P9), *per se*, is discriminatory. This position is further fortified by several representations made by the Petitioners drawing attention to the said 'lapse' and requesting the Respondent Board to provide an administrative remedy to overcome the situation [P16 (a), (b), (c)]. The Respondent Board has considered the Petitioners request in their response [P17 (a), (b), (c)].

It is observed that, at the request of the Petitioners, the then Director General of the 1st Respondent Board made representations to the relevant authorities to seek an administrative remedy, which continued up to the hearing of this application. In pursuit of the said remedy, the Respondents were willing to make changes to accommodate the

Petitioners to create a special internal promotional path from Management Assistant to Junior Manager, which was rejected by the Petitioners.

Continuing Violation

The Petitioners counter argument to overcome the non-compliance of Article 126 (2), is based on continuing violation on the facts and circumstances of this case. This Petition was not presented to Court on that basis, however, was contended for the first time in the written submissions filed by the Petitioners.

The position of the Petitioners is that, the 1st to 3rd Respondents were contemplating the request of the Petitioners to grant them administrative relief and therefore no particular date is identifiable as the date when the Petitioners became aware of the omission or failure of the Respondents. It is stated that, since there is no refusal to provide a suitable promotional path, the violation continued, the Petitioners have also contended that the only date that may be fixed as the date the Petitioners became aware of the infringement is 24/06/2014 [P19 (a)], the date the HRC complaint was filed.

However, elsewhere in the Petition, it is also contended that, the Petitioners became aware of the Human Rights Commission (HRC) recommendation dated 29/08/2016 [P19 (b)], on 31/10/2016 (P22), the date the Petitioners became aware that the said recommendation was under consideration by the Department of Management Services.

In terms of Article 126 (2) of the Constitution, a fundamental rights application to be filed within one month of the alleged infringement is trite law. However, there are instances where the Court has justified exceptions to the strict applicability of one month, when manifested in the facts and circumstances in an application (*Edirisuriya vs. Navaratnam and others, (1985) 1 SLR 100; G.S. Premachandra vs. University Grants Commission (SC FR 573/2004); Rajakaruna vs. de Silva (1997) 2 SLR 209*).

In *Siriwardana vs. Rodrigo (1986) 1 SLR 384*, this Court held that,

“An application must be filed within one month from the date of the commission of the administrative or executive action which it is alleged constitutes the infringement or imminent infringement of the fundamental right relied on. Where, however, a Petitioner establishes he became aware of such infringement or imminent infringement only on a later date, the one month will run from that date”.

By document marked ‘P22’ dated 31/10/2016, the Petitioners were informed that their grievances were under consideration by the Department of Management Services. The Petitioners relied on ‘P22’ to demonstrate to Court that it should exercise its jurisdiction in the given circumstances, to grant relief on continuing violation due to the failure or omission to provide a suitable promotional path. Accordingly, the Petitioners submit that, even though no particular date is identifiable as the date when the omission or failure became known to the Petitioners, the relevant date of the infringement is 31/10/2016. Therefore, there seems to be an element of uncertainty on the part of the Petitioners to identify a date of the alleged infringement of their rights guaranteed by Article 12(1) of the Constitution.

The Petitioners position that no particular date is identifiable in the instant case, is based on the absence or a refusal by the 1st to 3rd Respondents to provide a suitable promotional path and therefore, it is contended to be an ongoing infringement.

In *Gamaethige vs. Siriwardena (1988) 1 SLR 384*, Fernando J. delivering the majority judgment laid down three principles in regard to the operation of the time limit prescribed by Article 126 (2), where His Lordship, *inter alia*, stated that,

*“time begins to run only when both infringement and knowledge exists. The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault*

or delay on the part of the Petitioner, this court has a discretion to entertain an application made out of time”.

For sake of completeness, I also wish to make note of the dissenting judgment delivered in ***Gamaethige vs. Siriwardana*** (*supra*), where Seneviratne J. opined that,

“the Petitioner in making this appeal to the Secretary, Ministry of Public Administration---- has exercised a right granted to him by the Establishment Code issued under Chapter IX of the Constitution ---- a fundamental right (in the administrative sense) of appeal available to him, the determination of the period of filling this application ---- should commence from the date of the refusal of the appeal”.

However, in this application, the Petitioners when seeking administrative relief, as considered in the above case, did not resort to an appeal given as of right, recognized by law.

In ***Demuni Sriyani De Soyza vs. Darmasena Dissanayake*** (SC FR 206/2008), Prasanna Jayawardena PC.J. upheld an objection raised by the Respondents that the application is time barred and dismissed the application. His Lordship observed that;

“if, upon the occurrence of an infringement of his Fundamental Rights, an aggrieved person does not file an application invoking the jurisdiction of this Court under Article 126 (1) of the Constitution but, instead, chooses to pursue other avenues of seeking relief, the time he spends perambulating those avenues will not, usually, be excluded when counting the one month he has to invoke the jurisdiction of this Court under Article 126 (1).”

The Petitioners placed much reliance in ***Demuni Sriyani De Soyza vs. Darmasena Dissanayake*** (*supra*), wherein His Lordship, considering the applicable principles when time spent by a Petitioner in making appeals or seeking other administrative or judicial relief, stated that;

“An infringement can be constituted by a single, distinct and one-off act, decision, refusal or omission. However, some other infringements can be constituted by a series of acts, decisions, refusals or omissions which constitute over a period of time. It is only the second type of infringement which can be correctly identified as a continuing infringement”.

In ***Lake House Employees Union vs. Associated Newspapers of Ceylon Ltd (SC FR 637/2009)***, Marsoof J. took a similar view when he observed that;

“any complain based on a continuing violation of fundamental rights may be entertained by the Supreme Court if the party affected invokes the jurisdiction of the Court within the mandatory period of one month from the last act from the series of acts complained of”.

In support of their contention of infringement based on continuing violation, the Petitioners have placed much emphasis on the refusal or omission to provide a suitable promotional path to the Petitioners, which admittedly, continued over a considerable period of time.

The Petitioners argument on continuing infringement rests on their pursuit of an administrative relief, and as such, it is contended that until a decision is made by the relevant authority, the alleged infringement is a continuing violation. In this application the Scheme of Recruitment and Promotions itself, is not challenged by the Petitioners. The introduction of the SOR on 25/10/2011, was followed by the issuance of formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical on 06/06/2012. Therefore, the act of issuance of formal letters absorbing the Petitioners to the said post can be identified as a distinct act fulfilled by the Respondent Board to absorb the Petitioners to the new post and which does not relate to any subsequent acts or decisions made, to justify a continuing violation.

In *Jayaweera vs. National Film Corporation (1995) 2 SLR 120*, Kulatunga J. held that,

“in the circumstances, the alleged violation of rights occurred in October 1990; pursuit of administrative remedies does not interrupt the time limit of one month”.

In the above case, having referred to *Gamaethige vs. Siriwardana (supra)*, His Lordship observed that,

“there was nothing to prevent the petitioners filling their applications before this court within time and then seeking administrative relief also, if so advised”.

In this application the Petitioners are not mitigating delay nor have the Petitioners identified a clear date which triggered the alleged infringement. As observed earlier, the timeline is drawn by the Petitioners from the alleged delay or failure to make a decision by the Respondents and not due to any expressed eventuality which caused a violation. Therefore, in all the above circumstances, I think it is reasonable to pose the question as to whether the alleged continuing violation is contended by the Petitioners in order to circumvent the delay in coming before this Court.

In *Dayaratne vs. National Savings Bank (2002) 3 SLR 116*, the Petitioners challenged the scheme of promotions and the implementation of the said scheme, *inter alia*, alleging that certain respondents did not possess the actual service requirements and that their qualifications had not been duly considered. Fernando J. upholding a preliminary objection raised by the respondents that the challenge to the scheme was time-barred, stated that;

“The 1st Respondent was entitled, from time to time, and in the interest of the institution, to lay down the basis on which employees would be promoted, and that became part of the contract of employment. The scheme of promotion published on 12.02.2001 was directly and immediately applicable to the Petitioners, and became part of the terms and conditions of their employment. If they did not consent to those terms and conditions, as being violative of their rights under Article 12, they should

have complained to this court within one month. They failed to do so. Instead, they acquiesced in those terms and conditions by applying for promotion without any protest”.

In the facts and circumstances of this application, the Petitioners should have become aware that there was no suitable promotional path in the new SOR, by 06/06/2012, the date on which the formal letters absorbing the Petitioners to the posts of Management Assistant Non- Technical were issued. There was certainty in that decision and a clear indication was given therein by the Respondents on the application of the SOR and the terms and conditions of their employment in the new posts. Therefore, in this case a clear last act in the process of appointment to the new post was taken by the Respondent Board on the 06/06/2012, which at that time, was amenable to complain.

The Petitioners were placed in the salary scale assigned to the new post by document dated 13/12/2006 (P6). The SOR was introduced to the 1st Respondent Board on 25/10/2011 and the formal letters absorbing the Petitioners to the post of Management Assistant Non-Technical were issued on 06/06/2012. Therefore, at least by the 06/06/2012, the Petitioners should have become aware that the terms and conditions of their employment is in violation of their rights under Article 12. The Petitioners were under no attachment, want of knowledge, influence, compulsion or any other inhibition preventing them from complaining to this Court within the said time period mandated by law. The Petitioners have failed to provide an acceptable reason to be excused for such failure. Accordingly, I hold that the alleged infringement does not constitute a continuing violation as contended by the Petitioners and the time limit of one month should commence from 06/06/2012, when the formal letters of appointment was sent to the Petitioners. The Petitioners cannot be vindicated of their failure in not filling this action within one month from that date.

Application made to the Human Rights Commission

In order to redress their grievance, the Petitioners by an application to the Human Rights Commission (HRC) dated 24/06/2014, complained about the new Scheme of Recruitment which they contended to be arbitrary and discriminatory. As submitted by the learned Counsel for the State, there is no evidence placed before this Court of the date of receipt of the said application, by the HRC.

The Petitioners complained to the HRC regarding their grievance on 24/06/2014 [P19(a)] and the Petitioners have been informed that the recommendations made by the HRC are under consideration by the Department of Management Services (P22). The date that is fixed by the Petitioners as the date when the Petitioners became aware of the violation i.e, 24/06/2014, is the date on which the alleged HRC complaint was filed.

Section 13 (1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 states;

“where a complaint is made by an aggrieved party in terms of Section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive and administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution”.

Therefore, in order to be within the statutory exception as contemplated in that section, firstly, the complaint has to be made to the HRC within one month from the alleged imminent infringement or infringement of a fundamental right. In the circumstances, as contained in Section 13(1), the complaint has to be made to the HRC before the expiry of one month from the time the Petitioner became aware of the alleged violation, i.e. 06/06/2012. The Petitioners have clearly exhausted that time limit prescribed by law.

Considering all the above, I uphold the preliminary objection raised by the Respondents that the application is time barred.

Application is dismissed without costs.

Judge of the Supreme Court

P. Padman Surasena J.

I agree

Judge of the Supreme Court

Achala Wengappuli J.

I agree

Judge of the Supreme Court