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 of the Republic.

1. K. L. I. Amarasekera,
   No. 2,
   Kuruppu Mulla Road,
   Panadura.

2. Jayasumana Munasinghe,
   No. 315/6,
   Vidyala Mawatha,
   Makol-South,
   Makola.

3. E. M. Premaratne,
   673/21,
   Bluemendal Road,
   Colombo 15.

4. D. M. Anura Jayaweera,
   20B, Liyanage-wagura,
   Kandy.

5. K. U. R. Upali,
   Kanthi Niwasa,
   Aladeniya,
   Werellagala.

Supreme Court Application No:
S.C. (F/R) 52/2015

PETITIONERS

Vs.

1. Sri Lanka Ports Authority,
   No. 19,

Chaithya Road,
Colombo 01.

2. Dr. Lakdas Panagoda (Chairman)

3. Capt. Asitha Wijesekera (Vice Chairman)

4. Mr. Jagath P. Wijeweera (Director)

5. Mr. Saliya Senanayake (Director)

6. Suresh Edirisinghe (Director)

7. Mr. Athula Bandara Herath (Director)

8. Capt. Nihal Keppetipola (Managing Director)

   The 2nd to 8th Respondents of; Board of Director, Sri Lanka Ports Authority, No. 19, Chaithya Road, Colombo 01.

9. L. H. R. Sepala,
   Chief Human Resource Manager,
   Sri Lanka Ports Authority,
   Kochchikade,
   Colombo 13.

10. Hon. Attorney General,
    Attorney General's Department,
    Hulftsdorp,
    Colombo 12.

RESPONDENTS

BEFORE : **PRIYANTHA JAYAWARDENA, PC., J.**
VIJITH K. MALALGODA, PC., J.
K.KUMUDINI WICKREMASINGHE, J.

COUNSEL : Pulasthi Hewamanna with Harini Jayawardhana instructed by Sanjeewa Kaluarachchi for the Petitioners.

Yuresha de Silva, SSC for the Respondents.

ARGUED ON : 24.11.2021

WRITTEN SUBMISSIONS : Petitioners on 27.07.2021 and 08.12.2021
Respondents on 03.08.2021 and 13.01.2022

DECIDED ON : 27.09.2023

K. KUMUDINI WICKREMASINGHE, J.

This is an Application filed under Article 126(1) of the Constitution by the Petitioners seeking, *inter alia*, for a declaration that their fundamental rights to equality before the law and equal protection of the law as guaranteed by Article 12(1) of the Constitution and freedom of occupation as guaranteed by Article 14(1)(g) have been violated, as a result of the arbitrary, capricious and/or irrational manner in which the Petitioners were deprived of their appointments to the rank of Assistant Security Officer, in contravention of established procedures and assurances of the Sri Lanka Ports Authority (hereinafter referred to as the 1st Respondent).

On 13.08.2015, having heard the Counsel for the Petitioners in support of this Application and the Learned DSG who appeared for the Respondents, this court granted leave to proceed under Article 12(1) of the Constitution.

The Petitioners, aged 53-56 years at the time of filing this Application, have joined the 1st Respondent between 1981 and 1986, as Security Guards. At the time of filing this Application, they were serving as Security Sergeants. They have been appointed to the said positions after a written examination and an interview.

The Petitioners have become aware of an internal notice dated 11.02.2013 calling applications for appointments of Assistant Security Officers, and have submitted the duly completed application forms as required, which have been then accepted by the 1st Respondent. The requisite application form at clause 11 specifically provided for applicants who were 50 years and above, to notify the 1st Respondent whether they would opt to sit for a written examination or not, to which all the Petitioners in their respective application forms opted not to face such written examination. The Petitioners state that the accepted practice at the 1st Respondent has been to permit applicants who are over 50 years of age who apply for internal appointments, to forego a written examination and have their internal appointments based solely on the interview process. They further state that approximately 30% of vacancies are, as a practice, set aside for such method of internal appointments. The Petitioners have later found out that such established practice is based on **Circular 16/2003** dated 28.05.2002.

However, the Petitioners state that they were asked by the officers of the management of the 1st Respondent to nominally sit for the said written examination, with the assurance that their appointments would be solely based on their performances at the interview. Accordingly, the Petitioners have nominally sat for the said written examination on or around 13.03.2014 on the said verbal assurance that their performances at the written examination would not be a deciding factor in being chosen for the appointments.

The results of the said written examination were released in or around July 2014, according to which the Petitioners have obtained average marks between 50 to 62, as against the pass mark of 40. Soon after, the Petitioners except the 1st Petitioner have been summoned for interviews. The said Petitioners have attended the said interview and later, on or around 22.09.2014, they have become aware that approximately 46 individuals, a majority of whom are junior to the Petitioners, have been appointed as Assistant Security Officers based on their performances at the written examination and interview. However, none of the Petitioners were included amongst the said appointments. Thereafter, the Petitioners have made several representations to the management of the 1st Respondent enquiring as to the prospects of their appointments to the said position, to no avail.

The Petitioners state that the assurances made to them by the 1st Respondent and/or its officers that the Petitioners need only nominally sit for the written examination, and the results thereon would not be a deciding factor in being appointed to the rank of Assistant Security Officer gave rise to a legitimate expectation that they would be considered for appointments

to the said positions, as the verbal assurances made to that effect were clear and unambiguous which were reasonable for the Petitioners to rely on. Moreover, they claim that the conduct and established practice of the said 1st Respondent of allocating 30% of vacancies to be filled by those above the age of 50 years, disregarding the written examination and based solely on the interview further engendered in them a legitimate expectation that such established practice would be followed in respect of the appointments of the Petitioners as well.

In the circumstances, the Petitioners plead that their fundamental rights guaranteed under Article 12(1) and Article 14(1)(g) of the Constitution have been violated by the Respondents for the reasons of acting contrary to publicly disclosed criteria as stipulated in **Circular 16/2003** and established practice pertaining to appointments of persons above 50 years of age, failing to disclose the number of vacancies for the rank of Assistant Security Officer and such being done for a collateral purpose, appointing officers junior to the Petitioners to positions senior to the Petitioners in violation of published criteria and established practice, and in breach of the principles of natural justice and legitimate expectations of the Petitioners.

Accordingly, this Court granted leave to proceed for the alleged infringement of fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

Thereafter, the Chairman of the 1st Respondent filed an affidavit dated 26.11.2015 and stated, *inter alia*, that the 3rd Petitioner was promoted to the post of Assistant Security Officer on 08.09.2015 with effect from 03.26.2015. He further stated that the application forms issued to some of the Petitioners, with the exception of the 5th Petitioner who had filled the correct application form, contained the option to indicate whether they opt to sit for a written examination or not. Such application forms were in fact old application forms, prepared based on the previous Scheme of Recruitment which was in place prior to the establishment of the presently applicable Scheme of Recruitment. Thus, he contended that **Circular 16/2003** is no longer in force, in view of the notice calling for applications dated 11.02.2013, which is the presently applicable Scheme of Recruitment. The said notice calling for applications contains the requirement to sit for a written examination. As such, the Chairman of the 1st Respondent in his affidavit further stated that it had been an inadvertence on part of the officers who issued the application forms as well as the officers who accepted the duly filled application forms.

He further stated that the Petitioners secured 27.94, 33.91, 24.60, 29.33, and 31.62 marks respectively, at the written examination and the 1st Petitioner was in fact unsuccessful at the said written examination.

The Chairman of the 1st Respondent also stated that the relevant notice calling applications for the positions of Assistant Security Officers filed by the Petitioners is incomplete as it contains only two pages as opposed to the actual notice which contained three pages. Therefore, the Petitioners have deliberately/mistakenly left out the actual page two of the said notice which discloses the necessity to sit for a written examination. He further claimed that pages of the said notice have not been numbered properly as both the second and third pages of the said notice have been numbered as page 2.

Moreover, he stated that the said notice was published on 11.02.2013 and the Petitioners cannot now claim that they were unaware of the requirement to sit for a written examination, and if they were aggrieved by the said requirement, they could have taken appropriate measures soon after. He further stated that the 3rd Petitioner was informed of the requirement to sit for a written examination, to which all the Petitioners subsequently complied.

He has denied the remaining averments which are inconsistent with what is stated above and stated that the Respondents have not violated fundamental rights of the Petitioners, they are not entitled to any of the reliefs sought and the Application should accordingly be dismissed.

The Petitioners in their Counter Objections stated that the letter of appointment of the 3rd Respondent had been issued after the filing of the instant Application and the said letter of appointment, in any event, affected his seniority since others similarly circumstanced as the Petitioners have been so appointed with effect from at least 10.09.2014. Further, the Petitioners stated that the notice they have submitted to Court was the notice that was available to them at the time of filing this Application. As such, the notice calling for applications submitted by the Chairman of the 1st Respondent in his Affidavit, marked **2R2**, was not the document available to the them. Moreover, the Petitioners claimed that the application forms that they submitted were in fact accepted by the 1st Respondent and they were never informed of any defect when the said applications were accepted.

The Petitioners stated that the Respondents acted contrary to the disclosed criteria in **Circular 16/2003** and have failed to disclose any change in such criteria. Therefore, such criteria are still in force and as such, **2R2** is *void ab initio.*

The Respondents in their further written submissions stated that by a joint-motion dated 08.12.2021, the Letters of Promotion of the 1st, 2nd, 4th and 5th Petitioners to the rank of Assistant Security Officer were tendered as directed by the Court. The said promotions were granted based on a Notification issued in 2017, applications submitted by the said Petitioners and based on interviews held in 2018, pursuant to the filing of this Application and tendering of Objections on behalf of the Respondents. The Respondents further stated that the Petitioners have now retired from service and therefore, the only remaining issue is with regard to the effective date of promotions to the 1st, 2nd, 4th and 5th Petitioners to the said posts.

Accordingly, the Respondents have submitted that the 1st, 2nd, 4th and 5th Petitioners were promoted as Assistant Security Officers based on a process which commenced subsequent to the filing of this Application and they were not eligible to be promoted to the said posts based on the process which commenced in 2013. Therefore, the Respondents have not infringed upon the fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

Before moving to determine the Application of the Petitioners upon its merits, I have to first consider the preliminary objection taken by the Respondents in their written submissions that the Petitioners Application is time barred and therefore, it should be dismissed as the Petitioners have failed to comply with the mandatory time limit requirement prescribed in Article 126(2) of the constitution.

Article 126(2) reads as follows;

"Where any person alleges that any such fundamental right 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…"

The effect of Article 126(2) as stipulated above is that a Petition alleging an infringement or imminent infringement of fundamental rights should be filed within a period of one month of such alleged infringement or imminent infringement and failure to comply with this requirement would render such Petition time barred and unmaintainable.

Accordingly, the Respondents contend in their written submissions that the Application of the Petitioners is time barred for the reason that it was

preferred on 06.03.2015 challenging the purported new Scheme of Recruitment, marked **2R2**, introduced on 11.02.2013.

This Court has time and again held that the time limit stipulated in Article 126(2) is a mandatory requirement.

In the case of ***Demuni Sriyani de Zoysa and others v. Dharmasena Dissanayake and others*** **[SC (FR) 206/2008, SC Minutes of 09.12.2016]**, Prasanna Jayawardena, PC., J. observed that;

"The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution. Thus, in ***EDIRISURIYA Vs. NAVARATNAM [1985 1 SLR 100 at p.105- 106]****, Ranasinghe J, as he then was, stated "This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution is mandatory.".*

In the above case, the Petitioners contended that failure of the Respondents to allocate marks in the selection process for Class II Grade II of the Sri Lanka Administrative Service for the period the Petitioners served on a supernumerary basis in the 'Supra Class' of the General Clerical Service and subsequently, in the Public Management Assistants' Service, amounted to a violation of their fundamental rights as guaranteed by Article 12(1) of the Constitution. The said selection process was based on the Combined Services Circular No. 01/2007 issued on 05.02.2007 by the Secretary of the Ministry of Public Administration and Home Affairs. The Petitioners had been well aware that in terms of the said Circular they would not be allocated marks for their period of service on a supernumerary basis. Since the Petition was filed on 05.06.2008, 16 months after the said Circular was issued, the Respondents contended that the Application of the Petitioners was time barred. Prasanna Jayawardena, PC., J., upholding the said preliminary objection, elucidated that;

"Therefore, it is clear that, the alleged infringement occurred on or soon after 05th February 2007 when the Circular marked "P9" was issued and made known to the Petitioners."'

Therefore, it was held in the above case that;

"The Petition has been filed on 05th June 2008 which is more than 16 months after the day the Petitioners themselves state the alleged infringement occurred. Therefore, the Petition is time barred and liable to be dismissed

unless the Petitioners can seek an extension of the time limit on grounds that, they were prevented from filing the Petition earlier."

The case of ***Dayaratne and others v. National Savings Bank*** **[2002] 3 SLR 116** is also important in this regard, where Mark Fernando, J. observed that;

"The first limb of the respondents' preliminary objection is that after the lapse of one month the petitioners were not entitled to challenge the scheme of promotion. The 1st respondent was entitled, from time to time, and in the interests 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. I, therefore, uphold the objection."

However, as held by Mark Fernando, J. in the case of ***Gamaethige v. Siriwardena*** **[1988] 1 SLR 344**, that in exceptional circumstances this Court has the discretion to entertain an application not made within the stipulated 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."

A similar view was enunciated by Aluwihare, PC., J. in the case of ***K.H.G. Kithsiri v. Hon. Faizer Musthapha MP, Minister of Provincial Councils and Local Government and others*** **[SC (FR) 362/2017, SC Minutes of 10.01.2018],** as well.

"This court, however, in exceptional circumstances where the Petitioner was prevented, by reason beyond his control, from taking measures which would enable the filing of a Petition within one month of the alleged infringement and if there had been no lapse on the part of the Petitioner, has exercised its discretion in entertaining fundamental rights applications and had not hesitated to apply the maxim lex non cogit ad impossibilia."

Aluwihare, PC., J. further went onto state in the same case that;

"… the time limit of one month prescribed by Article 126 of the Constitution to invoke the fundamental rights jurisdiction for an alleged violation is mandatory. In a fit case, however, an application made outside the time limit of one month stipulated in Article 126 could be entertained where the delay had resulted due to a reason or reasons as the case may be that are beyond the control of the Petitioner or where the court is satisfied that the circumstances prevailed at the time relevant, it would have been impossible for the Petitioner to have invoked the jurisdiction within 30 days and to be more precise where the Principle lex non cogit ad impossibllia would be applicable."

The contention of the Respondents in this case is that the Petitioners have preferred this Application on 06.03.2015 challenging the purported new Scheme of Recruitment introduced on 11.02.2013, and as such this Application is time barred. Further, the Respondents have also submitted that the Petitioners have failed to establish that the reason they were unable to comply with the said time limit requirement as stipulated in Article 126(2) was due to circumstances beyond their control and therefore, this Application should be dismissed.

However, the Petitioners claim that Circular No. 16/2003 is still in force and a valid rule within the Authority. As such, it must be followed until such time it is duly changed. It is their submission that the document marked **2R2**, which the Respondents state as being the new Scheme of Recruitment, is an internal notice calling for applications and therefore, it does not have the power of overruling a Circular issued by the Chairman of the 1st Respondent.

Since the success of the preliminary objection taken by the Respondents is contingent on the submission that a change of rule has taken place in view of the document marked **2R2**, I will firstly move to consider the contentions of parties pertaining to the presently applicable Scheme of Recruitment in respect of the Petitioners.

In examining the material placed before this Court, it is apparent that the document marked **2R2** is not numbered properly. Although the first page has been numbered correctly as page 1, both the second and third pages have been numbered as page 2. This was also accepted as such by the Respondents themselves. Further, the application forms received by four out of the five Petitioners, with the sole exception of the 5th Petitioner, contained the option to indicate their preference as to whether they are willing to sit for the written examination or not. Thus, as pleaded by the Petitioners, an 80% of application forms in the given instance can be deduced as being based on **Circular 16/2003**.

Although it is submitted by the Respondents that the said Circular is no longer in force, the duly completed said application forms of the Petitioners were in fact accepted by officers of the 1st Respondent. The Chairman of the 1st Respondent stated in his Affidavit that it had been an inadvertence on part of the officers who accepted the duly filled application forms. The Petitioners state that thereafter, the officers of the management of the 1st Respondent have given assurances to the Petitioners that they need only nominally sit for the said written examination. Further, the Petitioners were never informed of the purported change in the said Scheme of Recruitment until this matter was brought before this Court.

Moreover, the document marked **2R2**, which the Respondents claim as being the presently applicable Scheme of Recruitment is a notice calling for applications signed by the Chief Human Resource Manager of the 1st Respondent as opposed to **Circular 16/2003**, which is signed by the then Chairman of the 1st Respondent.

Section 17(1)(a) of the **Interpretation Ordinance of Sri Lanka**, which I find as directly applicable and conclusive in this regard, provides the procedure for changing of rules as follows;

> *(1) Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules: -*
>
> *(a) any rule may be amended, varied, rescinded, or revoked by the same authority in the same manner by and in which it was made;*

Section 7(1)(e) of the **Sri Lanka Ports Authority Act** grants the 1st Respondent the power to *"make rules in relation to the officers and servants of the Authority"*, including, *inter alia,* their appointments and promotions. **Section 9** of the same Act holds the Chairman of the Sri Lanka Ports Authority as being responsible for the administration of the affairs of the said Authority.

Thus, I am of the opinion that **Circular 16/2003**, as a rule applicable to internal appointments issued in accordance with the aforesaid provisions will cease to have force, only if another Circular to that effect is issued by the Chairman of the said Authority himself, in light of **Section 7(1)(e)** and **Section 9** of the **Sri Lanka Ports Authority Act** read together with **Section 17(1)(a)** of the **Interpretation Ordinance of Sri Lanka.**

Therefore, after careful consideration of the law and discrepancies inherent in the submissions of the Respondents, I reject the argument of the Respondents that **Circular 16/2003** is no longer in force in view of the document marked **2R2,** and hold that **Circular 16/2003** is still in force and as such, it is the presently applicable Scheme of Recruitment in respect of the Petitioners.

Accordingly, I also reject the preliminary objection of Respondents that the instant Application is time barred as they have preferred the Application on 06.03.2015 while the purported new Scheme of Recruitment was introduced on 11.02.2013, as I have already held that **Circular 16/2003** is still in force and has remained in force during the entirety of the time period concerned and is in fact the applicable Scheme of Recruitment to the Petitioners.

As leave to proceed was granted under Article 12(1) of the Constitution, it is now necessary to analyze the relevant facts and material submitted before this Court to ascertain whether the decision of the 1st Respondent to depart from **Circular 16/2003** amounts to a violation of fundamental rights as aforesaid.

Article 12(1) of the Constitution reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

The Respondents in their written submissions have brought forth the contention that they have acted in good faith and in terms of the Scheme of Recruitment marked **2R2**. Thus, in order for the Petitioners to successfully plead that their right to equality as guaranteed under Article 12(1) of the Constitution has been violated, they must prove that they were in fact discriminated against other persons who were similarly circumstanced as them, which they were in fact not in the current situation at hand. However, the Petitioners, on the other hand, have contended that the concept of equality as guaranteed by Article 12(1) has since evolved and the violation of a rule laid down by an authority would also amount to an infringement of the right to equality, as the Court has in several Judgments, focused on the requirement of ensuring reasonableness as opposed to requiring arbitrariness to find an infringement of Article 12(1).

The former position taken up by the Respondents in respect of the right to equality was upheld in the case of ***Perera v. Jayawickrama*** **[1985] 1 SLR 285** by a Full Bench of this Court. The majority opinion delivered by Sharvananda, CJ. held that;

"This Article is violated both by unequal treatment of the equals and equal treatment of the unequals. The aim of the article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answers the same though the concept of equality does not involve the idea of absolute equality among human beings. Hence, equality before the law does not mean that things which are different shall be treated as they were the same. Thus, the principle of equality enacted under Article 12 does not absolutely prevent the State from differentiating between persons and things. The State has the power of what is known an "classification" on a basis of rational distinction relevant to the particular subject dealt with. So long as all persons failing into the same class are treated alike there is no question of discrimination and there is no question of violating the equality clause. The discrimination which is prohibited is treatment in a manner prejudicial as compared to another person in similar circumstances. Discrimination is the essence of classification; so long as it rests on a reasonable basis there is no violation of the constitutional rights of equality."

However, the latter view taken up by the Petitioners was endorsed by Wimalaratne, J., who delivered a dissenting opinion in the same case:

"In order to establish discrimination, it is not necessary for the Petitioner to show that correct procedure was applied in the case of others and that he has been singled out for the adoption of a different procedure. Nor is it necessary for him to show that no others were victims of the wrong procedure now applied for the first time, perhaps in his case."

An identical stance to that of the Respondents was followed by Sharvananda, CJ. in the case of ***C.W. Mackie and Company Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and others*** **[1986] 1 SLR 300**, where His Lordship held that;

"In order to sustain the plea of discrimination based upon Article 12(1) a party will have to satisfy the court about two things, namely (1) that he has been treated differently from others, and (2) that he has been differently treated from persons similarly circumstanced without any reasonable basis."

The requirement of proving unequal treatment was further emphasized by Dr. Shirani Bandaranayake, J., in the case of ***Farook v. Dharmaratne, Chairman, Provincial Public Service Commission and others*** **[2005] 1 Sri LR 133**, as follows;

"…. the petitioner quite clearly has sought to obtain relief on the basis of unequal treatment. When a person does not possess the required

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

In the case of ***Thilak Lalitha Kumara v. S.S. Hewapathirana, Secretary, Ministry of Youth Affairs and Skills Development*** **[SC (FR) 451/2011, SC Minutes of 17.09.2015]**, Anil Gooneratne, J. dismissing an application claiming a violation of fundamental rights as guaranteed by Article 12(1), also held that;

"To survive equal protection attack the different treatment of two classes of persons must be justified by a relevant difference between them."

Similarly, in the case of ***Wasantha Disanayake and others v. Secretary, Ministry of Public Administration and Home Affairs and others*** **(SC (FR) 611/2012, SC Minutes of 10.09.2015)**, K. Sripavan, CJ. held that it is necessary to show unequal treatment and discriminatory action against the Petitioners in pleading a violation of right to equality;

"Article 12(1) of the Constitution contemplates the right to equality and states that, 'All persons are equal before the law and are entitled to the equal protection of the law'. What is meant here is that equals should be treated equally and similar laws and regulations should be applicable to persons who are similarly circumstanced. In reference to Article 12(1) of the Constitution, it would be necessary to show that there had been unequal treatment, and therefore, there exist discriminatory action against the Petitioners."

Further, in the more recent Judgment of ***R.M. Premil Priyalath de. Silva and others v. Akila Viraj Kariyawasam (M.P), Hon. Minister of Education and others*** **[SC (FR) 97/2015, SC Minutes of 20.02.2018]**, taking a similar stance, Vijith K. Malalgoda, PC., J. referring to the Judgment in the case of ***Samadi Suharshana Ferdinandis and another***

V. S.S.K. Aviruppola, Principal, Visakha Vidyalaya and others **[S.C. F.R. No. 117/2011]** held that;

"As referred to above in this judgment, the Petitioners have failed to place before this court any material to establish that they were treated differently by any of the above Respondents when they decide not to admit the 3rd Petitioner to Dharmashoka Vidyalaya, Ambalangoda. In the said circumstances I hold that Petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12 (1) of the Constitution had been violated by the Respondents."

However, the latter view taken up by the Petitioners with regards to right to equality is supported by the case of ***Jayasinghe v. Attorney General [1994]*** **2 SLR 74**, where Mark Fernando, J. took the view that the Court must take judicial notice in instances where the fundamental requirements of justice and fair play were not followed. It was further stated in the same case by Mark Fernando, J. that the Full Bench decision in the case of ***Perera v. Jayawickrama*** is doubtful as to laying down an inflexible principle of universal application and that the facts of each case must be considered in perusing a violation of Article 12(1):

"I doubt whether that decision must be regarded as laying down an inflexible principle of universal application: the facts of each case must be considered. If an employee alleges a denial of equal protection because he was compelled to participate in a disciplinary inquiry without ever being told what the charges against him were, would a Court demand evidence to prove at least one other contrary instance? I think not. The Court must take judicial notice, that ordinarily - and not merely in a few instances - charges are disclosed prior to inquiry."

Further, in the case of ***Wickremasinghe v. Ceylon Petroleum Corporation*** **[2001] 2 SLR 409**, while holding that a decision of the Respondent Corporation to terminate the dealership of the Petitioner is violative of his right to equality guaranteed under Article 12(1) of the Constitution, Sarath N. Silva, CJ. took the view that;

"The case of ***Perera v. Jayawickrema*** *demonstrates the ineffectiveness of the guarantee in Article 12(1) which results from the rigid application of the requirement to prove that persons similarly circumstanced as the Petitioner were differently treated. Such an application of the guarantee under Article 12(1) ignores the essence of the basic standard which is to ensure reasonableness as opposed to arbitrariness in the manner required by the basic standard."*

This position was further strengthened by the recent Judgment in the case of ***Wijerathna v. Sri Lanka Ports Authority*** **[SC (FR) 256/17, SC Minutes of 11.12.2020]**, where Yasantha Kodagoda, PC., J. held that;

"It is now well accepted that, the 'right to equality' covers a much wider area, aimed at preventing other 'injustices' too, that are recognized by law. Equality is now a right as opposed to a mere privilege or an entitlement, and in the context of Sri Lanka a 'Fundamental Right', conferred on the people by the Constitution, for the purpose of curing not only injustices taking the manifestation of discrimination, but a host of other maladies recognized by law."

At p. 17 of the said Judgment, His Lordship further elaborated that the Court has since moved on from the decision of ***Perera v. Jayawickrema*** towards a more progressive definition of the concept of equality;

"Of course, since the pronouncement of the majority judgment in ***Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and Others****, the Supreme Court of Sri Lanka has somewhat distanced itself from the interpretations provided by Chief Justice S. Sharvananda to the concepts of 'equality' and 'discrimination', and provided an expansive and more progressive definition of the concept of equality, founded upon the concept of 'substantive equality', aimed at protecting persons from arbitrary, unreasonable, malicious and capricious executive and administrative action."*

The case of ***E.P. Royappa v. State of Tamil Nadu,*** **AIR 1974 SC 555**, from the Supreme Court of India, is enlightening in this regard, owing to the former Chief Justice of India P. N. Bhagwati's exceptional elucidation of the concept of equality;

"Now, what is the content and reach of this great equalizing principle? It is a founding faith, to use the words of Bose J, 'a way of life', and it must not to be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional doctrinal limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14."

The Article 14 of the Constitution of India which recognizes equality before the law is remarkably similar to Article 12(1) of the Constitution of Sri Lanka and although it is *ex-facie* apparent that the latter Article is wider in scope compared to the former, whereas the jurisdiction of the Supreme Court of India pertinent to petitions and appeals claiming infringements of fundamental rights is wider than that of the Supreme Court of Sri Lanka, such divergences, as very correctly expounded by Yasantha Kodagoda, PC., J. in the Judgment of ***Wijerathna v. Sri Lanka Ports Authority***, at p. 18, *"should not debar Sri Lankan justices from where appropriate, taking persuasive cognizance of Indian jurisprudence relating to the interpretation of the substantive legal concepts embodied in the 'right to equality'."*

Therefore, after cautious perusal and contemplation of the law, the need for such law and the development of the concept of equality as discussed above, I am inclined to align myself with the interpretation that a Petitioner being discriminated against another person who was similarly circumstanced as the Petitioner is not the sole criterion for successfully pleading a violation of right to equality, as arbitrary, mala fide and unreasonable executive action is also seen as being inconsistent with the very concept of equality, thereby infringing upon the right to equality before the law as guaranteed under Article 12(1) of the Constitution.

Accordingly, I hold that the decision of the 1st Respondent to depart from the already established criteria for internal appointments in the form of **Circular 16/2003** in this instance is arbitrary, mala fide and unreasonable, and thereby violated the fundamental rights of the Petitioners as guaranteed by Article 12(1) of the Constitution.

I will now briefly examine whether the practice of the 1st Respondent of allocating 30% of vacancies to be filled by those above the age of 50 years, disregarding the written examination and based solely on the interview, and assurances made to the Petitioners by the 1st Respondent and/or its officers that the Petitioners need only nominally sit for the written examination and the results thereon would not be a deciding factor in selection for appointments, gave rise to a legitimate expectation.

In the case of ***Fernando v. Associated Newspapers of Ceylon Ltd.*** **[2006] 3 Sri LR 141**, Gamini Amaratunga, J. held that;

"The existence of a legitimate expectation, as opposed to a legally enforceable right, is a relevant factor in considering the just and equitable relief this Court may grant under Article 126 (4) of the Constitution when it is shown that the action of the executive which frustrates the legitimate expectation amounts to

a denial of the right to equal protection of the law guaranteed by the Constitution."

Moreover, Priyantha Jayawardena, PC., J. in the case of ***Nimalsiri v. Fernando*** **[SC (FR) 256/2010, SC Minutes of 17.09.2015]**, at p. 8, remarked on the Judgment of ***Dayaratne v. Minister of Health and Indigenous Medicine [1999] 1 SLR 393*** by Justice Amarasinghe, as follows;

"In ***Dayaratne v. Minister of Health and Indigenous Medicine [1999] 1 SLR 393****, Amarasinghe J, held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution."*

However, in the aforesaid case, Priyantha Jayawardena, PC., J. after analyzing all the relevant facts and circumstances dismissed the said Application holding that the Petitioner did not have a legitimate expectation to be enlisted in the Sri Lanka Army for a third time.

Dr. Shirani Bandaranayake, J., in the case of ***Lancelot Perera v. National Police Commission and others*** **[2007] 2 ALR 24**, expounded on the concept of legitimate expectation as follows;

"Legitimate expectation, as was stated by me in ***Anushika Jayatileka and others v. University Grants Commission [S.C. (Application) No. 280/2001 – S.C. Minutes of 25.10.2004]*** *derives from an undertaking given by someone in authority and such an undertaking may not even be expressed and would have to be known from the surrounding circumstances.*

Priyantha Jayawardena, PC., J., in the aforesaid Judgment of ***Nimalsiri v. Fernando***, also sheds light on the concept of legitimate expectation;

"The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection."

Therefore, the doctrine of legitimate expectation can be further divided into two aspects as procedural legitimate expectation and substantive legitimate expectation. Prasanna Jayawardena, PC., J. citing an extract from Prof. Paul

Craig's book Administrative Law 7th Edition in the case of ***M.R.C.C. Ariyarathne v. N.K. Illangakoon*** **[SC (FR) 444/2012, SC Minutes of 30.07.2019]**, has explicated on the said two aspects as follows:

"The phrase 'procedural legitimate expectation' denotes the existence of some process right the applicant claims to possess as the result of a promise or behaviour by the public body that generates the expectation …. The phrase 'substantive legitimate expectation' captures the situation in which the applicant seeks a particular benefit of or commodity, such as a welfare benefit or a license, as the result of some promise, behaviour or representation made by the public body."

Moreover, as stated by Priyantha Jayawardena, PC. J., in the Judgment of ***Nimalsiri v. Fernando***, the applicability of the doctrine of legitimate expectation depends on the facts and circumstances of each case;

"In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the said doctrine is based on the facts and circumstances of each case."

In the instant Application, the Petitioners argue that they had a procedural legitimate expectation based on the established procedure and practice of the 1st Respondent of allocating 30% of vacancies in internal appointments to be filled by those above the age of 50 years disregarding the written examination and based solely on the interview, as borne out by the **Circular 16/2003**. The Petitioners also argue that they had a substantive legitimate expectation in light of the substantive benefit of 30% of vacancies being set aside for such a method of internal appointments for those over 50 years of age in conformity with the same Circular.

The case of ***Lancelot Perera v. National Police Commission and others*** is important in this regard, where the Petitioner, a Senior Superintendent of Police, successfully claimed that the decision of the Respondents to not appoint him to the post of Deputy Inspector General of Police after being

called for interviews and being placed third in order of merit out of 52 candidates, amounted to a violation of his fundamental rights as guaranteed by Article 12(1) of the Constitution. Although the Police Commission had arbitrary decided not to allow the Petitioner to apply for further promotions, the Respondents had later decided to depart from the said position and directed the Petitioner to attend the said interview. Accordingly, the Petitioner claimed that the decision to call him for the said interview gave rise to a legitimate expectation on his behalf that he would be promoted to the post of Deputy Inspector General of Police if he becomes successful at the interview. Dr. Shirani Bandaranayake, J., after a thorough analysis of the interconnection between substantive legitimate expectations and the right to equality, held that;

"Considering all the circumstances, it is apparent that the application for the promotion and the invitation to attend the interview and by its successful completion the petitioner had a legitimate expectation that he would be promoted to the rank of Deputy Inspector General of Police."

Circular 16/2003 is unambiguous in respect of such practice and procedure, that 30% of vacancies will be allocated to applicants over 50 years of age who are excused from sitting for the written examination. The Respondents themselves have admitted in their Affidavit and written submissions that the past practice of the 1st Respondent was to have 30% of vacancies set aside in internal appointments for those over 50 years of age and to select such applications solely based on the interview process in accordance with the said Circular. I have already held that **Circular 16/2003** is still in force, and has been in force throughout the concerned period and remains as the applicable Scheme of Recruitment in respect of the Petitioners.

Further, the officers of the management of the 1st Respondent have given assurances to the Petitioners that they need only nominally sit for the written examination and the results of the said examination would not be a deciding factor in their selection for appointments to the posts of Assistant

Security Officer. The said assurances can be construed as a promise made by the 1st Respondent to the effect that the established practice would be followed in the situation at hand as well and 30% of the vacancies would be allocated for the said method of appointment.

Moreover, the relevant applications issued to all the Petitioners, with the exception of the 5th Petitioner, contained the option to indicate whether they opt to sit for a written examination or not and they have all opted not to sit for such written examination. Subsequently, the duly completed application forms of Petitioners have been accepted by the 1st Respondent. Further, the 1st Respondent has neither informed the Petitioners nor brought to their attention that the said Circular is no longer in force and a change of policy has taken place until proceedings were instituted before this Court.

Therefore, after careful perusal of the aforementioned facts and circumstances, I am inclined to hold that the Petitioners had justifiable reasons to form a legitimate expectation, both in terms of a procedural legitimate expectation and substantive legitimate expectation, that the established procedure and practice of allocating 30% of available vacancies to the said method of appointment would be followed by the 1st Respondent. As such, a legitimate expectation was in fact accrued to the Petitioners to such extent, which was subsequently violated by the Respondents owing to their failure to follow the established procedure for internal appointments for those over 50 years of age and allocate the said percentage of 30% of vacancies to such method of appointment, in accordance with the **Circular 16/2003**.

Since it is established as aforesaid that destroying of a legitimate expectation is a ground for judicial review which amounted to an infringement of right to equality as guaranteed by Article 12(1) of the Constitution, in the circumstances, I am of the opinion that the fundamental rights of the Petitioners guaranteed under Article 12(1) have been violated by the 1st Respondent.

Having examined the facts of the case and material placed before this Court, I allow the Application of the Petitioners and hold that their fundamental rights as guaranteed by Article 12(1) have been infringed upon by the acts of the 1st Respondent, owing to the arbitrary, capricious and irrational manner in which the Petitioners were deprived of their appointments to the rank of Assistant Security Officer, in contravention of established procedures and assurances of the 1st Respondent.

Therefore, in accordance with the powers vested in this Court to make an appropriate, just, and equitable order under Article 126 of the Constitution when an aggrieved party establishes a violation of their fundamental rights guaranteed under the Constitution, and in consideration of the fact that the Petitioners have now retired from service, I direct the 1st Respondent to backdate the promotions of the Petitioners to the post of Assistant Security Officers with effect from 10.09.2014.

The 1st Respondent is further directed to pay back wages up until the date of retirement to each Petitioner.

Application Allowed without costs.

Judge of the Supreme Court

Priyantha Jayawardena, PC., J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda, PC., J.
I agree.

Judge of the Supreme Court