SC.FR.NO.30/18

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

In the matter of an application under Article 126 and Article 12 and 12(1) of the constitution of the Democratic Socialist Republic of Sri Lanka.

1. S.M.N.S. Thilakarathne,
   10/2, Baduwatta Lane, Dharmashoka Mawatha, Lewella, Kandy.

1a. Sajana Sathmina Gunarathne (minor)
   10/2, Baduwatta Lane, Dharmashoka Mawatha,
   Lewella, Kandy.

Petitioners

Application No. SC/FR/30/18.

1. M.W.D.T.P. Wanasinghe
   The Principal and the Chairman of the Interview Board,
   Dharmaraja College, Kandy.

2. W.M. Wijerathna,
   The Zonal Director of Education,
   Zonal Education Office,
   Kandy.

3. W.M. Jayantha Wickaramanayake,
   Director of National Schools Branch,
   Ministry of Education,
   "Isurupaya" Battaramulla.

4. Sunil Hettiarachchi,
   The Secretary, Ministry of Education,
   "Isurupaya" Battaramulla.

5. Herathmudiyanselage Kanishka Hemindra Hearth,

5a. H.M.C.D. Hearath (minor)
   Both are at:
   29/58, Nuwarawela, Ampitiya Road,
   Kandy.

6. T.B.G. Bulumulla,
6a. T.B.G.U.E. Bulumulla (minor)
   Both are at:
   96/39A, Rajapheela Mawatha, Kandy.

7. Hon. Attorney General,
   Attorney General's Department,
   Hultsdorp, Colombo 12.

Respondents.

Before : Murdu N. B. Fernando, PC, J.
P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.

Counsel : Shiral Lakthilake for Petitioners.
Viraj Dayarathna PC, ASG with Ganga Wakistarachchi, SSC for 1 – 4th and 7th Respondents.
P.L. Gunawardena with T.D. Douglas for 5th & 5A Respondents.

Argued on: 31.01.2019.

Decided on: 28.05.2019.

E.A.G.R. Amarasekara, J.

The Petitioners by their Petition dated 22.01.2018 have complained to this Court that their fundamental rights guaranteed by Article 12 and 12(1) of the constitution were infringed by the Respondents when the 1st Respondent refused to admit the 1st Petitioner's son (1a Petitioner) to Dharmaraja College Kandy by the letter dated 15.12.2017. The reason given for this refusal appears to be that the petitioners had failed to obtain required minimum marks under the applied category. The Petitioners state that the appeal board also later confirmed the said refusal. This court by its order dated 14.05.2018 granted leave to proceed under Article 12(1) of the constitution.

The 1st Petitioner who is the mother of the 1a Petitioner tendered an application to Dharmaraja College Kandy to get 1a Petitioner admitted to Grade 1. The said application was made under the category "Children of residents living in close proximity to the school". The Petitioners' stance is that they had submitted ample documentary evidence to show that the 1st Petitioner was an eligible resident who could get her child, 1a Petitioner admitted to Dharmaraja College Kandy.

Though the Petitioners, in their Petition, have referred to the circular No. 17/2016 as the relevant circular, the Respondents have correctly pointed out that the relevant circular is No. 22/2017. The Petitioners have admitted in their written submissions that they erroneously assumed that the admissions to schools in 2018 were based on circular No. 17/2016 (P 22) but the marking scheme for grade 1 was based on circular No.22/2017 marked as IR2.

As per the said circular marked as IR2, the Petitioners' application for the admission to grade 1 in 2018 is governed by clause 7.2 of the said circular. Under this clause marks are designed to be awarded under four different headings as detailed by its clauses 7.2.1 to 7.2.3., namely;

1. Proving the place of residence by evidencing the registration in the electoral register—Maximum 30 marks (Clauses 7.2.1 to 7.2.1.3).
2. Documents in proof of residency—Maximum 15 marks (Clauses 7.2.2 & 7.2.2.1).
3. Additional documents to confirm the place of residence—Maximum 5 marks (Clause 7.2.2.2).
4. Proximity to the school from the place of residence—Maximum 50 marks (Clause 7.2.3).

Clauses 7.2.1 to 7.2.1.3 – Proving the place of residence by evidencing the registration in the electoral register

Maximum of 30 marks is given under the provisions of clauses 7.2.1 to 7.2.1.3 for the proof of residence within the feeder area when it is proved by the registration in the electoral register. The Petitioners have tendered the applicable registration indicating that both the parents were registered in the electoral register for the relevant area for five years and they have obtained the maximum 30 marks allocated for proof of residence through the registration in the electoral register. Thus, there is no allegation about the marks given under the provisions of clauses 7.2.1 to 7.2.1.3.

Clauses 7.2.2 and 7.2.2.1—Documents in Proof of Residency

The clauses 7.2.2 and 7.2.2.1 provide how marks should be given for the documents or deeds that prove the title or entitlement of the relevant person to the place of residence.

A careful perusal of the said clauses shows that the relevant person referred to in the clause 7.2.2 has to be one of the following persons;

- The applicant - (As per clause 5.1, an application can be tendered by the parents or legal guardian of the child. In other words, the applicant has to be one of the parents or legal guardian).
- The spouse of the applicant.
- The father or mother of the applicant.
- The father or mother of the applicant's spouse.

The clause 7.2.2 allocates marks for the documentary proof of title or entitlement to the place of residence in the following manner;

- If the document in proof of residency shows the title or entitlement of the relevant person to the place of residence for five years or more as at the final date given to tender applications – Full marks (100%).
- If it is less than five years and more than three years—75% of the full marks.
- If it is less than three years and more than one year – 50% of the full marks.
- If it is less than one year and more than six months – 25% of the full marks.
- If it is less than six months and more than 3months – 10% of the full marks.
- If it is less than three months -- 05% of the full marks.

  As per the said clauses 7.2.2 and 7.2.2.1, the maximum one can gain under this heading 'Documents in proof of residency' is 15 marks. However, when one reads clause 7.2.2 with clause 7.2.2.1 (i), (ii) and (iii), it is clear that;

  a. If the ownership or entitlement to the place of residence is in the name of the applicant/spouse, the applicant can gain the maximum of 15 marks subject to the percentages referred to above in relation to the period of ownership.

b. If the ownership or entitlement is in the name of the mother/father of the applicant/spouse, the applicant can gain only 10 marks out of the maximum of 15 marks, which is further subject to the percentages referred to above in relation to the period of ownership.
c. If the applicant's residency is based on a registered leasehold right or as an occupant of a government quarters or as a tenant under the Rent Act, the applicant can gain only 6 marks out of the maximum 15 marks subject to the percentages referred to above in relation to his entitlement to the resident property.

However, the 1st Petitioner alleges that she was given only 11.25 marks out of 15 marks under the clauses 7.2.2 and 7.2.2.2 for the proof of title to the place of residence though she produced her title deeds marked as P5 (wrongly referred to as P4 in the petition) and P6 when she should have been given the maximum of 15 marks. P5 shows ownership in the name of the Petitioner only for 3 years and few months which is less than five years. As per clause 7.2.2, she is entitled only to 75% of the maximum 15 marks for this deed. However, the Petitioner's contention is that since the previous deed in the chain of title marked as P6 is in the name of her father she should have been given the maximum 15 marks. This contention of the Petitioner cannot be accepted since clause 7.2.2 gives marks to the document in proof of residency which is in the name of the relevant person. It contemplates only one relevant person not many. In the instant case, it is the Petitioner not her predecessors in title.

Furthermore, to give marks time is counted from the date the ownership or entitlement was transferred to the name of the relevant person to the final date given to tender applications. Since the time is counted until the final date given for applications, it impliedly indicates that the relevant person aforementioned is the person who holds the

relevant document in his/her name as at the final date given to tender applications. The father of the 1st Petitioner, the predecessor in title, did not hold the ownership in his name at the final date given to tender applications, since he gifted his right to the Petitioner by executing deed marked as P5. Therefore, I cannot accept the stance taken up by the 1st petitioner that she should have been given maximum 15 marks for the documents in proof of residency, which has to be in the name of the relevant person. On the other hand, there is no allegation that for any of the applicants, marks were given for his/her or his/her spouse's title documents as well as for the title documents of the father/mother of the applicant or his spouse causing discrimination.

Clause 7.2.2.2—Additional documents to confirm the place of residence

Maximum of 5 marks, i.e. at the rate of 1 mark for each document up to 5 documents, is given for the additional documents tendered to confirm the place of residence under the above clause. The Petitioner has been given the maximum marks under this heading. Thus, there is no allegation about the marks given under this heading.

Clause 7.2.3 - Proximity to the school from the place of residence

Maximum of 50 marks is given under this heading only if the applicant's place of residence is proved, and if there are no other Government Schools with primary sections located closer to the place of residence than the school applied for. In the event of having other Government schools with primary sections for the admission of the child which are closer to the place of residence than the school applied for, marks are deducted at the rate of 5 marks from the maximum marks for each such closer school.

As per the parenthesis of this clause, to reduce marks, other government primary school/schools which are closer to the place of residence must;

- have the learning medium the child has applied for,

- be a girls' or boys' school or a mixed school appropriate for the child and
- be able to admit 10% or more children of the religion to which the child belongs to.

The 1st Petitioner alleges that she should have been given 40 marks out of maximum 50 marks under this heading but was given only 30 marks. Her position is that marks should not have been deducted for D.S. Senanayake Vidyalaya, since it is not closer to the petitioner's residence when compared with the distance to Dharmaraja College. She further has taken up the position that the respondents have not been able to maintain a consistent policy, since in 2017 1st Respondent informed the Human Rights Commission that the interview board of that time had reached a common decision not to deduct marks for Sirimalwatte Vidyalaya on different reasons even when it was closer to the applicants who had applied for Dharmaraja Vidyalaya. She further states that the said Sirimalwatte Vidyalaya is situated in Kundasale Pradeshiya saba limits while the applicant resides and Dharmaraja college is situated at Kandy Municipal limits.

However, it appears that by the application marked as P1 with the petition, though the petitioners have claimed the maximum 50 marks, the 1st Petitioner herself has identified four schools as schools that are situated in closer proximity to the 1st Petitioner's residence which allows deducting 5 marks each totalling up to 20 marks out of 50 marks as per the marking scheme. Those four schools are Dharmashoka Vidyalaya, D.S. Senanayake Vidyalaya, Sangamitta Vidyalaya and Sirimalawatte Vidyalaya. Thus, on the face of the application, the respondents are entitled to reduce 20 marks out of the 50 marks given under this grouping. Anyhow, the petitioner now argues that the deduction of 10 marks for D.S. Senanayake College and Sirimalwatta Maha Vidyalaya was made in an arbitrary manner. In support of the petitioners' present argument that Dharmaraja

College is situated closer to her residence than D.S. Senanayake College, the 1st Petitioner has marked two letters issued by the Head of Land Division, Kandy Municipal Council marked as P17 and P18. P17 states that the aerial distance between 1st Petitioner's residence and Dharmaraja College is 1.25 Km., and as per the said letter P18, the distance between 1st Petitioner's residence and D.S. Senanayake Vidyalaya is 1.28 Km. The Petitioners complain that irrespective of such evidence five marks were deducted for the closer proximity of D.S Senanayake College. If members of the interview board have to rely on survey reports tendered by each applicant, the allocation of marks would be affected by and subject to the reliability, skills and experience of each surveyor giving others an opportunity to question the propriety of such reports. It is always prudent to use a common map or method to measure the distance between places of residence and the relevant schools. The clause 7.6.1 of the relevant circular provide proper guidance in this regard. As per the said clause, when considering proximity from the place of residence, the aerial distance shall be taken, and the map prepared by the Department of Surveyor General shall be used for this purpose.

Furthermore, the circle with the radius from the main door of the applicant's house to the main office of the school or the primary office if the primary office is on a separate place from the main school shall be drawn and if there are schools where child could be enrolled within the said circle, marks shall be deducted. However, even if any such school is located within the said circle, if it is difficult to access the said school due to natural barriers such as rivers, lagoons, marshlands, forests etc. marks shall not be deducted for such schools. The 1st petitioner does not complain that the relevant authorities did not use the aerial map prepared by the Department of Surveyor General or the calculation of distance is wrong according to such map prepared by the Surveyor General's Department. In her petition, she states that she was not informed how the marks were allocated or deducted indicating that she was not aware of how it was done,

but in contrast she avers that the methods adopted by the interview board to measure the distance between one's residence and the particular school were not based on a scientific and/or rationale method.-vide Paragraphs 30 and 32 of the Petition. However, the 1st Respondent has stated in his affidavit that in measuring the distance he adhered to the criteria stipulated in the relevant circular 22/2017.

The Petitioners do not allege that the schools which are in closer proximity cannot admit 10% or more children of the same religion to which the 1a Petitioner belong. Neither is there any allegation that natural barriers are making access to such schools difficult. The 1st Respondent asserts that the aerial distance was measured as per the criteria stipulated by the aforesaid clause 7.2.3. In fact, the aerial map was submitted to the court during the oral argument without objections, which clearly shows that the straight distance to D.S Senanayake Vidyalaya is less than the distance to Dharmaraja College. All other schools including Sirimalwatta Vidyalaya mentioned in the application marked as P1 are closer to the resident of the 1st Petitioner as per the said aerial map.

As far as Sirimalwatta Vidyalaya is concerned, it may be true that it is situated within the Kundasale Pradeshiya Saba area. As per clause 4.7, the feeder area of a school is the administrative district in which the school is situated, and when the school is situated on a border of an administrative district, nearest divisional secretary's division of the neighbouring administrative district is also considered as the feeder area of the given school. The 1st petitioner has not placed any material to indicate that the residence of the 1st petitioner does not fall within the feeder area of Sirimalwatta Vidyalaya. In the backdrop mentioned above, I do not see that there is any valid reason as per the relevant circular presented before this court to show that reduction of marks is not in accordance with the said circular marked as IR1.

As mentioned before, based on the documents marked P19 and P19a the Petitioners state that in 2017 1st Respondent informed the Human Rights Commission that the interview board had reached a common decision not to deduct five marks for Sirimalawatte Vidyalaya and admitted a student under application No. 182 to the school without deducting marks for Senanayake Vidyalaya and Sirimalwatte Vidyalaya. Petitioner submits that a cardinal principle in equal protection is that it does not mean all persons and things that are subject to classification should be treated alike. It means that persons or things similarly circumstanced must be similarly treated. In that sense, the Petitioners argue that it is difficult to categorise Dharmaraja College in Kandy Municipality and Sirimalwatte Vidyalaya in Kundasale Division as equally circumstanced schools in relation to socio-economic and geographical reasons. Petitioner states this is the reason why in the previous year education authorities have taken a common decision not to deduct five marks for Sirimalwatte Vidyalaya. The present application is not based on alleged discrimination or inequality before the law between Dharmaraja College or Sirimalwatta Vidyalaya but with regard to the rights of the Petitioners. In relation to the matters complained in the petition, the similarly circumstanced persons in comparison to the Petitioners have to be identified among the applicants for the year 2018 but not from the applicants for the previous year 2017.The number of vacancies, number of applicants and the relevant circulars and guidelines would have been different in the previous year. As such, methods used in selecting students in the previous year cannot be considered in deciding whether any discrimination or inequality before the law took place in selecting students for the year 2018.

The 1st Petitioner also states that the 1st respondent in an arbitrary manner made the 5th and 6th respondents to get more marks than the petitioner even when they do not reside

closer to Dharmaraja College compared to 1st Petitioner's residency causing discrimination-vide paragraph 34 and 35 of the Petition. In reply to this allegation, the 1st Respondent has explained that the 5th and 6th Respondents got more marks since there were no schools within the circle drawn in favour of the 5th Respondent and only one school within the circle drawn for the 6th Respondent. 5R1 tendered by the 5th respondent shows that he got 91 marks including the maximum 50 marks for the proximity of his residence to the school. Other than mere statements of the 1st Petitioner no material is placed before this court to show that the marks given to the 5th and 6th Respondents were not in accordance with the relevant circular.

It is clear that the total of 76.25 marks given to the petitioners was in compliance with the relevant circular and it was insufficient since the threshold was 85marks.
The Petitioners have submitted that the 1st Petitioner has based her case on the particular executive action that had been engaged with an unreasonable classification but not on an error on admission scheme itself-vide paragraph 20 of the written submission. Thus, the Petitioners' action is to challenge the decision of the 1st Respondent and/or interview board and/or appeal board alleging that they wrongly construed and applied the relevant circular in giving marks in relation to the admission of 1a petitioner to Dharmaraja College Kandy. What the petitioners allege is that the 1st Respondent failed in adopting proper principles to administer stipulated classification provided by the circular-vide paragraph 16 and 17 of the written submissions filed on behalf of the Petitioners. The Petitioners further have cited **Budhan Choudhry Vs State of Bihar AIR 1995 SC 191, Palihawadana Vs Attorney General 1978 (1) SLR 65, Ram Krishna Dalmia Vs Justice Tendolkar AIR 1958 SC 538, Tuan Ishan Ruban et al Vs T.I.de Silva (acting IGP) case No.SC/FR/599/2003** and bring to the attention of this court that to pass the test of permissible classification following two conditions have to be satisfied.

- The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and
- The differentia must have a reasonable or a rationale relation to the object and effects sought to be achieved.

The counsel for the petitioner argues that a classification to come within the framework of Article 12(1) of the constitution there must, therefore, be some rational nexus between the basis of classification and the objects to be achieved by such classification.

However, as elucidated before in this judgment the Petitioners failed in establishing that the Respondents wrongly applied the relevant circular and its clauses in the selection process and had been engaged with an unreasonable classification. The respondents, on the other hand, have explained that they have correctly followed the classifications and the marking scheme contained in the relevant circular. The Petitioners' case, as mentioned before, is not filed to challenge the classifications contained in the circular or its marking scheme. In fact, he failed to refer to the relevant circular and based his petition on the circular that was relevant to the admissions to grade 1 in the previous year. In that backdrop, I do not see any reason to apply the ratio decidendi of aforesaid cases in favour of the petitioners.

The Respondents have raised two preliminary objections as,

1. Members of the interview board or the appeal board have not been made parties to this application, and,
2. Petitioners have not appended the applicable circular No. 22/2017.

The Petitioners state that such omissions were due to lack of proper information. Whatever the reason for such omissions, even the merits of the case as elucidated above do not support the application of the Petitioners. Thus, the application of the Petitioners is dismissed without costs.

Judge of the Supreme Court

Murdu N. B. Fernando, PC, J.

I agree.

Judge of the Supreme Court

P. Padman Surasena J.

I agree.

Judge of the Supreme Court