

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

In the matter of an application under and in
terms of Article 17 read with article 126 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

**S.C.F/R Application
No:466/2005**

1. Bandula Senadhi Wimalsundera,
No.43, Fife Road,
Colombo 5.
2. Waduge Denzil Fernando,
108/1, Galle Road,
Walana, Panadura.
3. Clement Rangivi Samaraweera,
5 B/81/L,
Raddolugama.

Petitioners

Vs

1. Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Mawatha,
Narahenpita,
Colombo 5.

2. Lionel Pinto,
Chairman,
Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Mawatha,
Narahenpita,
Colombo 5.
3. D.G.Dayarathna,
Vice Chairman,
Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Maatha,
Narahenpita.
4. Secretary,
Ministry of Skills Development
Vocational & Tertiary Education,
354/2,Elvitigala Mawatha,
Narahenpita,
Colombo 5.
5. W.A.Ranaweera,
Training Division,
Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Mawatha,
Narahenpita,
Colombo 5.
6. R.T.B.Thilakasiri,
Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Mawatha,
Narahenpita,
Colombo 5.
7. D.G.Mahinda Jayathilaka,
Vocational Training Authority of Sri Lanka,
354/2, Elvitigala Mawatha,
Narahenpita,
Colombo 5.

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

Respondents

Before J.A.N.De Silva CJ,
S.I.Imam J,
R.K.S.Suresh Chandra J.

Counsel : Manohara de Silva P.C. with S.N.Wijithsingh for Petitioners
Mr.Uditha Egalahewa for the 1st to 7th Respondents
Mr.Rajitha Perera SC for Attorney General

Argued on 2nd July 2010.

Written Submissions tendered on

For Respondents: 11th August 2010

Decided on:

R.K.S.Suresh Chandra J,

The Petitioners in their application dated 9th November 2005 have stated that the 1st and 2nd Petitioners started their careers at the Vocational Training Authority of Sri Lanka as Assistant Directors with effect from 3rd June 1996 and 1st February 1996 respectively. The 3rd Petitioner too had joined the said Authority as a Training Manager with effect from 1st December 1995 and that thereafter he had been promoted as an Assistant Director with effect from 1st April 1999. By letter dated 8th January 2003 the Chairman of the said Authority had appointed the 1st Petitioner to cover the duties of

Director , National Vocational Training Institute, Narahenpita. The 5th, 6th and 7th Respondents were Assistant Directors of the said Authority and were in equal status with the petitioners. The next promotion for the Petitioners was to the post of Deputy Director. No promotions had been effected from 1999. In 2001 applications had been called for the post of Deputy Director and the Petitioners having applied for same had presented themselves for interviews on 8th August 2001. However no appointments had been made after the interviews. When the employees of the said Authority had become aware that some employees were to be promoted to higher positions, 60 employees of the Authority had sent a letter of protest to the Chairman on 6th September 2005. The petitioners have stated they became aware of a report regarding political victimization and that according to the said report the 5th,6th and 7th Respondents were to be appointed as Deputy Directors. The Petitioners have stated that the 5th , 6th and 7th Respondents were not subjected to any political victimization in that there were no promotions made to any higher posts and there was no notice displayed in the Authority calling for the forwarding of any grievances regarding political victimization.

The Petitioners stated further that the 5th and 6th Respondents were appointed as Deputy Directors with effect from 3rd October 2005 and that they did not know whether the Cabinet had approved the said report and the promotions. They stated further that they came to know about the said appointment of 5th and 6th Respondents only on 19th October 2005 and by letter dated 20th October 2005 they registered their protest with the Chairman of the Authority. The petitioners allege that the promotions effected were violative of their fundamental rights guaranteed under Article 12(1) of the Constitution. In their prayer they sought to quash the letters of appointment issued to the 5th and 6th Respondents and the report of the Political Victimization Committee, and if any letter of appointment is issued to the 7th Respondent to quash such letter, an interim order restraining the 1st to 4th Respondent appointing the 7th Respondent as a Deputy Director, to quash any decision given by the Officers of the Ministry of Skills Development and Technical Education or by the Cabinet of Ministers. Leave to proceed had been granted in terms of Article 12(1) of the Constitution when the application of the Petitioners was supported.

The Acting Director General of the 1st Respondent Authority filed objections and stated therein that the 1st, 2nd and 3rd Petitioners have passed the ages of 58, 51 and 55 years respectively and that the Authority was not in a position to extend their services beyond the age of 55 years, that the 5th, 6th and 7th Respondents were appointed as Assistant Directors with effect from 1st January 1996, 18th December 1995 and 10th May 1996 respectively, and were Graduates and were senior to the Petitioners and to his knowledge the Petitioners were not Graduates. The change of Government had taken place in October 2001. No promotions had been made to the post of Deputy Director based on the results of the interviews held in August 2001 and the 5th, 6th and 7th Respondents had referred appeals to the Political Victimization Committee that was appointed in 2004, that consequent to an advertisement in the Dinamina published by the Ministry of Vocational Training, Skills Development and Technical Education calling for information and appeals of those subjected to political victimization, the Respondents had forwarded their appeals to the Committee and the committee had decided that they had been subjected to political victimization. Consequent to the recommendations of the said committee, the 5th and 6th Respondents were appointed as Deputy Directors from 1st September 2005 by letter dated 30th September 2005 in which reference was made to the Cabinet decision. That since the Petitioners had been aware of the appointments of the 5th and 6th Respondents by the 6th of September 2005 or at least by 19th September 2005 or 3rd October 2005 that their present application had been filed out of time, that the fundamental rights of the petitioners had not been breached, that the members of the Political Victimization Committee or the Cabinet of Ministers have not been made parties to the application.

It was brought to the notice of Court by the respondents on 11th August 2010 along with their written submissions that the 1st Petitioner had retired on 8th October 2007 on reaching 60 years, that the 2nd Petitioner had been promoted as Deputy Director Training from 21st August 2007 and that the 3rd petitioner is an Assistant Director Training and has been given three extension beyond the age of 57 years.

The Respondents have taken up the following objections regarding the maintainability of the application of the Petitioners:

- a. That the application of the Petitioners has been filed out of time

- b. That the necessary parties have not been brought in by the Petitioners in that they have not made the Political Victimization Committee and the Cabinet of Ministers parties to the application.

The Petitioners have filed their application on 09th of November 2005 on the basis that they became aware of the appointments of the relevant Respondents on or about the 14th of September 2005. On a perusal of the documents filed by the Petitioners it would seem that they have filed as P7 the report of the Political Victimization Report which the Petitioners state that they were made aware of in September 2005 which would indicate that they were aware of the steps that were being taken by the Vocational Training Authority regarding the promotions of its officers. Further it is hard to accept their assertion that they were not aware of the Political Victimization Committee. Though there is a doubt as to the exact date that the Petitioners became aware of the promotion of the relevant Respondents, It would seem that they were aware at least by the 3rd of October 2005 about the said promotions. Therefore when they made their application on 9th November 2005 their applications was out of time even though they seem to try and cover it up by saying that they were aware of the appointments on the 19th of October and that they sent a letter of protest on 20th October 2005.

The other objection taken up by the Respondents regarding the failure of the petitioners to make the necessary parties as Respondents is much more serious in nature. The Petitioners in their application appear to have surmised that the promotions had been made consequent to the recommendations of the Political Victimization Committee and that thereafter the Cabinet had approved same when they sought in prayer (g) of the petition to quash the decision to promote the relevant Respondents based on a Cabinet decision. Prayer (g) states as follows:

(g) Quash any decision given by the officers of the Ministry of Skills Development “Vocational and Technical education or by Cabinet of Ministers.

A party coming into Court must decide as to who should be made necessary parties to such application and it is not for a party to surmise what objections would be taken up by the opposing party and then decide to add parties to the application when it becomes necessary. Further an Applicant cannot take

up the position that it would add as parties those persons whom the Court considers necessary as has been stated in the petition of the Petitioners. There may be instances where such a recourse may be allowed which is not fatal for the maintenance of the application. But when it comes to a situation where the proper and necessary parties have to be brought in at the time of filing the application is a mandatory requirement, reserving a right to add parties would not be sufficient and would amount to a fatal defect in the maintaining of such an application.

In the present instance, the promotions that are complained of have been made after a recommendation had been made by the Political Victimization Committee and after obtaining Cabinet approval. In such a situation the Political Victimization Committee and the Cabinet of Ministers would be necessary parties to the application at the time of filing the application.

Failure to cite the Cabinet of Ministers as a necessary party at the time of filing an application has been held to be a fatal defect in several judgments of this Court.

In *Dr.K.D.G.Wimalaratne v The Secretary to the Ministry of Public Administration* S.C.Application 654/95 decided on 09/06/1997 the Petitioners application failed as they had failed to make the Cabinet of Ministers as parties to the application.

In *H.A.S.Hettiarachchi v Secretary of Public Administration and Home Affairs* S.C.Application 780/1999 decided on 25/01/2001 the failure to make the Cabinet of Ministers as Respondents was held to be a fatal irregularity resulting in the rejection of the petition.

Following the *cursus curiae* of this Court, therefore in the present instance since the Petitioners have failed to bring in the Cabinet of Ministers as Respondents at the time of filing their application, such factor is a fatal defect in the application and necessarily the objection raised by the Respondents has to be upheld.

The Petitioners submitted that the Cabinet of Ministers and the Political Victimization Committee had no authority regarding the appointments and promotions of the Vocational Training Authority. This submission would necessitate the making of the Political Victimization Committee and the Cabinet of Ministers as parties to the application of the Petitioners. Since the

Petitioners have failed to do so and since it is a fatal defect as stated above the said submission has no application.

In the above circumstances the application of the Petitioners is dismissed. There will be no costs.

Judge of the Supreme Court

J.A.N.de Silva C.J.,

I agree.

Chief Justice

S.I.Imam J,

I agree.

Judge of the Supreme Court