

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

**S.C. (FR) Application
No. 391/2009**

Walawe Durage Dulani,
No. 323, Olcott Mawatha,
Galle.

Petitioner

Vs.

1. Nimal Bandara,
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.
2. H.A.K.R. Tissera,
Additional Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.
3. Susil Premjayanth,
Minister of Education,
Isurupaya,
Battaramulla.
4. H.H.A. Amarabandu,
No. 53, New City,
Gonamulla.
5. H.N.D. Jayamaha,
Teacher Educator,
Siyanae National College of Education,
Veyangoda.
6. U.G.N. Kumari,
'Sampath', Udumalagala,
Nakiyadeniya.

7. University Grants Commission,
No. 20, Ward Place,
Colombo 07.
8. Secretary,
Public Service Commission,
No. 356 B, Carlwil Place,
Colombo 03.
9. Hon. The Attorney-General,
Attorney General's Department,
Colombo 12.
10. C.R. Jayasundara,
11. J.D.T.U.K. Jayasinghe,
12. J. Peduruhewa,
13. C.P.K. Wijekoon,
14. P.S. Kumara,
15. M.P. Uduwage,
16. P.K. Chandramala,
17. A.J. Gamage,
18. P.D.G. Geethika,
19. A.M.A.B. Adikari,
20. D.D.R.P. Wanigasekera,
21. P.G.B. Kalpani,
22. M.H.C.S. Tissera,
23. H.M.T.K.D. Bandara,
24. R.M.K. Rajapaksa,
25. K.D. Anuradha,

26. D.D.S.P. Jayasinghe,
27. W.K.P.D. Gunaratne,
28. N.I. Kulasinghe,
29. W.A.K.P. Wickramasinghe,
30. M.V.T. Malinda,
31. S.J. Abeygunawardena,
32. I.M.N.K. Yatagammana,
33. G.P.O.V. Perera,
34. S.W.N. Samarasinghe,
35. A.C. Senanayake,
36. K. Galappaththi,
37. H.A.M. Priyangani,
38. M.H.M.M. de Silva,
39. J.N. Waduge,
40. P.P. Widanapathirana,
41. P.K. Premachandra.

Respondents

- BEFORE** : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
K. Sripavan, J.
- COUNSEL** : Viran Corea with S. Gunaratne for Petitioner
S. Barrie, SC, for 1st - 3rd and 7th - 9th Respondents

ARGUED ON: 31.05.2010

WRITTEN SUBMISSIONS

TENDERED ON: Petitioner : 07.07.2010
Respondents : 11.10.2010

DECIDED ON: 31.01.2011

Dr. Shirani A. Bandaranayake, J.

The petitioner, who is a Teacher Educator serving at the Ruhunu National College of Education on secondment, had alleged that her fundamental rights guaranteed in terms of Articles 12(1) and/or 12(2) and/or 14(1)g of the Constitution had been violated due to her non-appointment as a Teacher Educator in Information Technology. This Court had granted leave to proceed for the alleged infringement of Articles 12(1) and 14(1)g of the Constitution.

The facts of this application, as submitted by the petitioner, *albeit* brief, are as follows:

The petitioner was appointed as a Teacher in English Language by the Uva Province Public Service Commission by letter dated 09.06.1992 (P1). At the time the petitioner filed this application she was in Grade 2-II in the Teachers Service. Whilst in the Teachers Service, the petitioner had followed various courses to improve her knowledge and qualifications. Accordingly the petitioner had successfully completed the Degree of Bachelor of Science at the Open University of Sri Lanka with a second class in the Lower Division (P3A and P3B) and had further followed a Postgraduate Diploma in Computer Technology at the University of Colombo in 2002 (P4A and P4B).

The Ministry of Education, by Gazette notification dated 09.09.2005 (P5), had called for applications for the post of 'Teacher Educator' in National Colleges of Education of the Sri Lanka Teacher Education Service (hereinafter referred to as SLTES). The petitioner, being eligible to

apply for the said post under the subject of Information Technology, had forwarded an application. Thereafter she had attended three interviews at which she had presented all the relevant documents and details pertaining to her experience, qualifications and commendations in service (P6A and P6B).

In the meantime, due to the delay in making permanent appointments to the National Colleges of Education and as the petitioner was eligible to be appointed as a Teacher Educator in terms of the criteria in the Gazette notification dated 09.09.2005 (P5), the petitioner was attached to the Ruhunu National College of Education as a Lecturer on secondment for the Teaching service. Her services were extended from time to time and the petitioner had continued to function as a Teacher Educator entertaining a legitimate expectation that her application for formal recruitment would be considered in terms of the criteria published in the Gazette notification dated 09.09.2005 (P5).

In or around October 2007 the petitioner was recalled to the school where she was serving previously and later at the request made by the President of the Ruhunu National College of Education and at the request of the petitioner herself, she was temporarily released from Teacher Service to the Ruhunu National College of Education to serve on secondment on the basis that her salary would be paid by the said National College of Education (P10).

In mid 2008 the petitioner had reliably learnt that she had been placed 7th in the rank after the interviews held for the recruitment for Teacher Educators to National Colleges of Education. By 01.04.2009, the petitioner learnt that the list of recruits for the subject of Information Technology was amended and there were 31 names above her. Later she had become aware that her name was not among the 35 persons, who were selected, but was placed as No. 38 in the list.

The petitioner had made several representations regarding her grievance. Letters had been sent to HE the President, the Minister of Education, Secretary to the Public Service Commission

and the Human Rights Commission stating her entitlement and/or eligibility to be appointed as a Teacher Educator to National Colleges of Education in Information Technology.

Having stated the facts of this application, let me now turn to consider the submissions of the learned Counsel for the petitioner and the respondents. It is also to be noted that although leave to proceed was granted in terms of Articles 12(1) and 14(1)g of the Constitution, submissions were made only on the basis of the alleged infringement of Article 12(1) of the Constitution.

Learned Counsel for the petitioner contended that the requirement under Clause 6.4.6 (i) had been wrongly interpreted by the respondents and the meaning given by the 1st respondent that Computer Science, Library and Information Technology being considered as 'a subject' is in clear violation of the Gazette notification.

The 1st respondent, being the Secretary to the Ministry of Education, had averred that by the Gazette notification dated 09.09.2005, (P5) applications were called for 'Teacher Educators' and the initial interview had been conducted in 2006. Thereafter the Public Service Commission had nullified the results of the said interview and consequent to the directions given by the Public Service Commission fresh interviews had been held in January, February and March 2007. Since there was a delay in appointing Teacher Educators, and as there were a shortage of teachers, a decision had been taken to temporarily attach teachers from the Sri Lanka Teachers Service to such Colleges of Education. Several lecturers, including the petitioner, were thus temporarily attached to Colleges of Education until the vacancies in 'Teacher Educators' were filled. At the time the said attachments were made it was clearly laid down that such temporary attachments would not give rise to any right in respect of a permanent appointment to the 'Teacher Educators' service.

In fact the letters issued to the petitioner extending her attachment had clearly laid down this position, where it was stated that (P8A),

“ඔබ විදු පීඨයේ සේවය කිරීම හුදෙක් තාවකාලික අනුයුක්ත කිරීමක් පමණක් වන අතර එය ස්ථිර තනතුරක් ලබා ගැනීම සඳහා අයිතිවාසිකමක් නොවේ. ස්ථිර වශයෙන් තනතුරු පිරවීමේදී ඔබ පෙර සිටි තනතුරට යා යුතු බව දන්වනු කැමැත්තෙමි.”

Applications were called by Gazette notification dated 09.09.2005, to fill vacancies *inter alia* in Class III of the SLTES. Educational and other qualifications, which were necessary for Class III of SLTES, were given in Clauses 6.1 to 6.3 of the said Gazette notification. Clause 6.4 of the said Gazette notification had made provision for candidates with lesser qualifications to apply for the subject areas in English, Physical Education, Technological Education, Food Technology, Special Education, Information Technology and Western Music, when there are no candidates having the qualifications referred to in Clauses 6.1 to 6.3 of the Gazette notification. The said Clauses are as follows:

“6. Educational and other qualifications

- 6.1 Should have obtained a first or second class (upper) Degree on Education from a recognized University or a higher Degree on Education, or
- 6.2 Should have obtained a Degree relating to the subject area from a recognized University and a Post Graduate Diploma in Education with a Distinction or Merit pass; or
- 6.3 Should be a person not exceeding 40 years of age having a satisfactory period of not less than 3 years in teaching and holding a permanent post in Sri Lanka Teachers’ Service or Sri Lanka Educational Administrative Service and having a Degree with a First or Second Class Pass (upper) in the relevant subject area issued from a recognized University

and Post Graduate Diploma in Education, or a Post Graduate Diploma in Education with a Degree on the relevant subject.

Note: The upper age limit shall not be applicable for the officers serving in the post of Lecturers on performing basis in the National Colleges of Education and in Teachers' Colleges."

It is common ground that the petitioner had made an application for the subject of Information Technology under the category given in Clause 6.4.6 of the Gazette notification. The said Clause is as follows:

"6.4.6. Information Technology

- i) A Degree obtained from a recognized University with Computer Science, Library and Information Technology as subject; or
- ii) A Degree obtained from a recognized University and a Post Graduate Diploma in Information Technology and teaching experience of not less than Five years; or
- iii) A Diploma Certificate in the relevant subject conducted by the Department of Examination or National Diploma in Teaching with a Distinction/Merit pass; or
- iv) A Diploma in Information Technology of not less than two years duration from a government recognized institute and Trained Teacher Certificate with teaching experience of not less than Ten years after teacher training."

It is not disputed that the petitioner had made her application under Clause 6.4.6 (ii) of the Gazette notification and as has been stated earlier, in terms of the 'Note' under the said Clause, vacancies had to be first filled by those who qualified under Clause 6.4.6 (i) and applications under Clause 6.4.6 (ii) could be considered only if any further vacancies existed.

The 1st respondent in his affidavit had averred that applications had been called to fill 35 vacancies in Class III of the service. The interview panel had recommended 34 applicants under category 6.4.6 (i) and therefore only one vacancy had remained to be filled under Clause 6.4.6 (ii). The person who had ranked No. 1 under category 6.4.6 (ii) was selected (35th in the overall list) and the petitioner was placed 4th (38 in the overall list) and therefore could not be appointed.

Learned Counsel for the petitioner contended that the respondents had given a wrong interpretation to Clause 6.4.6 (i) in clear violation of the published criteria in the Gazette notification. It was also contended that the 4th and 5th respondents possessed Degrees in Mathematics and have followed Information Technology only 'as a subject' and not 'as subject' as required by the Gazette notification (P3). It was further submitted that the University of Kelaniya offered a Degree in Bachelor of Arts in Library and Information Science conducted by the Department of Library and Information Science of the Faculty of Social Science of the University of Kelaniya.

Clause 6.4.6 (i) of the Gazette notification refers to a Degree **with** Computer Science, Library and Information Technology as subjects. Clause 6.4.6 (ii) on the other hand refers to **A Degree** and a Post Graduate Diploma in Information Technology.

With reference to Clause 6.4.6 (i) it is quite evident that what is required by an applicant is to possess a Degree which would have consisted of subjects including Computer Science, Library and Information Technology. There is no specific mention as to whether the Degree should be from the discipline of Science or Arts. The requisite qualification for the appointments in question was to possess a Degree consisting of subjects referred to in Clause 6.4.6 (ii). It is also

important to note that Clause 6.4.6 (i) does not call for a Degree **in** Computer Science, Library and Information Technology.

A careful scrutiny of the wording in Clause 6.4.6 (i) clearly indicates that it does not require a Degree in the discipline of Computer Science, Library and Information Technology. In fact the University Grants Commission, having referred to the academic years 1999/2000, 2000/2001, 2001/2002, 2002/2003 and 2003/2004 had stated that no Degree had been awarded by a Sri Lankan University in Computer Science, Library and Information Technology.

Furthermore, the University Grants Commission, on 28.06.2010 had informed the learned State Counsel for the 1st – 3rd and 7th – 9th respondents (hereinafter referred to as respondents) that,

“As at today no degree has been awarded carrying the title B.Sc/BA in Computer Science, Library and Information Technology.”

University Grants Commission, it is not disputed, is the apex body of the University system of Sri Lanka, established under the Universities Act, No. 16 of 1978. The said Commission plans and co-ordinates the University education in the country. It is also to be noted that the applications for the posts in Clause 3 of SLTES were called for in September 2005 and what is relevant to this application would be the courses conducted as at the time the Gazette notification was published, calling for such applications.

It is also relevant to note that the Degree referred to in Clause 6.4.6 (ii) is totally different to what is stated in Clause 6.4.6. (i). Clause 6.4.1 (ii) deals with candidates, who possess a Degree obtained from a recognized University and a Post Graduate Diploma **in** Information Technology and teaching experience of not less than five years. Accordingly to fall within the said Clause 6.4.1 (ii), the required Post Graduate Diploma should be **in** Information Technology.

As referred to earlier, the preferred qualifications for appointment to Class III of the SLTES are set out in sections 6.1 to 6.3 of the Gazette notification dated 09.09.2005 (P5). In the absence of applicants with qualifications referred to in Clauses 6.1 to 6.3, provision was made under Clause 6.4 to consider applicants with lesser qualifications. In such an event, the applicants had to be considered in order of priority under Clauses 6.4.1 to 6.4.7 of the Gazette notification dated 09.09.2005 (P5).

It is therefore apparent that in order to fill the vacancies in the subject area of 'Information Technology', consideration had first to be given to applicants qualified under Clause 6.4.6 (i) and the applicants under Clause 6.4.6 (ii) could only be considered only if any further vacancies existed.

Considering all the circumstances, it is apparent that in terms of Clause 6.4.6. (i) what is necessary is a not a Degree in Computer Science, Library and Information Technology, but a degree which consists of the aforementioned and other subjects.

The petitioner also complained of the selection of one P.K. Premachandra, who had been appointed as a Teacher Educator to the Ruwanpura National College of Education.

The respondents had admitted that the said P.K. Premachandra was selected as a Teacher Educator at the interview held for such selection. It was submitted on behalf of the respondents that the said P.K. Premachandra had scored the highest marks at the interview under the category referred to in Clause 6.4.6 (ii) of the Gazette notification. Learned State Counsel for the respondents further submitted that although the petitioner's post graduate qualification in Information Technology had been accepted by the interview panel to have fulfilled the requirements referred to in Clause 6.4.6 (ii) of the Gazette notification, she had obtained lesser marks than the said P.K. Premachandra, at the interview. Applications under the said Gazette notification had been called to fill 35 vacancies in Class III of SLTES. The interview panel had recommended 34 applicants under the category referred to in Clause 6.4.6 (i) and therefore there had been only one vacancy that could have been filled in terms of Clause

6.4.6 (ii) of the Gazette notification. The interview panel had selected the person who had ranked 1st in the category under Clause 6.4.6 (ii) and the said P.K. Premachandra had been so recommended. The petitioner who was placed 4th under the said category therefore had not been selected and was not appointed.

In such circumstances, it would not be correct to state that the petitioner's application for the post in question had not been duly assessed at the interview, as the Gazette notification had clearly laid down that candidates were to be selected in order of priority under Clause 6.4.6 of the Gazette notification.

Such differentiation cannot be said to be arbitrary or discriminatory and is in violation of Article 12(1) of the Constitution, as every differentiation is not discrimination. Article 12(1) of the Constitution, which speaks of the right to equality, has clearly laid down that,

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

When all persons are treated as equals, there cannot be any discrimination between two persons. However, it is to be borne in mind that this concept is to be applicable to situations, where the two persons in question are similarly circumstanced. Thus, the concept of unequal treatment is based on the premise that equals cannot be treated unequally and that unequals cannot be treated equally. The underlying principle of this concept is that, if founded on an intelligible differentia, a classification could be good and valid and cannot be treated as arbitrary, discriminatory and in violation of Article 12(1) of the Constitution. This position was clearly laid down in the well known decision in **Ram Krishna Dalmia v Justice Tendolkar** (A.I.R. 1958 S.C. 538), where it was stated that, there are two conditions to be satisfied for a classification to come within the ambit of being reasonable. They are as follows:

1. that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and
2. that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved.

In terms of the Gazette notification dated 09.09.2005 (P5) applicants had been categorized into several different categories according to their qualifications. Considering individual qualifications, it was necessary to have such classifications in order to fill the relevant vacancies. Therefore it is apparent that such classification had not been either irrational or arbitrary. The non selection of the petitioner had been due to the fact that there were others, who had scored higher marks under the relevant categories and therefore there was no violation of Article 12(1) of the Constitution.

For the reasons aforesaid I hold that the petitioner had not been successful in establishing that the respondents had violated her fundamental right guaranteed in terms of Article 12(1) of the Constitution. This application is accordingly dismissed. I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.
I agree.

Judge of the Supreme Court

K. Sripavan, J.
I agree.

Judge of the Supreme Court