

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

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

SC FR Application
No. SC/FR.361/2015

Rev. Watinapaha Somananda Thero
No.101, Sri Vajirasrama Buddhist Centre,
Ananda Rajakaruna Mw,
Colombo 10.

Petitioner

1. Hon. Akila Viraj Kariyawawam
Minister of Education,
Ministry of Education,
“Isurupaya” Pelawatta,
Battaramulla.
Sri Lanka
2. Mr. W. M. Bandusena,
Secretary, Ministry of Education,
“Isurupaya”, Pelawata, Bataramulla.
Sri Lanka.
3. Mr. S.U. Wijerathna
The Additional Secretary,
“Isurupaya”,Pelawatta, Bataramulla.

4. G.R.Chandana Kumara
Kadigamuwa
No.136 D,
Isuru Mawatha,
Ellakkla.
5. Hon. Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

Respondents

BEFORE: BUWANEKA ALUWIHARE, PC, J.
ANIL GOONERATNE, J &
VIJITH K. MALALGODA, PC, J.

COUNSEL: Ruwantha Cooray for the Petitioner
Dr. Avanti Perera, SSC for the Respondents

ARGUED ON: 30.05.2017

DECIDED ON: 14.12.2017

ALUWIHARE, PC, J:

This court granted leave to proceed in this application on alleged violations under Articles 12(1) and 14(1) (g) of the Constitution and court also granted interim relief by suspending the operation of letter P18, by which the Petitioner was transferred from Colombo District to Ampara District.

The Petitioner held the substantive post of Assistant Director of Education (Piriven) since 2011 and had been appointed an Acting Deputy Director of Education (Piriven) in 2013; the functions of the latter position have to be performed from Colombo.

The Petitioner had averred that he has more than the requisite educational qualifications and having held numerous portfolios relating to Piriven education, gained extensive experience in the sphere of administration and management in the relevant field. The Petitioner has also stated that he is responsible for making significant changes in management and the administration of the Piriven education system.

Petitioner says in view of the contribution he made towards Piriven education, he was appointed a Provincial Assistant Director of Education (Piriven) with effect from 1st September, 2010 (P5) and was appointed an Assistant Director (Piriven) with effect from 4th May, 2011 (P6) and was vested with duties relating to administration and management of the Piriven education, both in the Southern and Western Provinces.

The Petitioner asserts that the Additional Secretary (Planning) Ministry of Education, entrusted the Petitioner with the supervisory and planning duties, duties that were performed by the Director of Education (Piriven) who had retired in March 2013. In the same year the Petitioner has been appointed as Acting Deputy Director Education (Piriven) (Administration and Planning) by the Secretary Ministry of Education (P8). The Petitioner also had asserted that as a result of the positive contribution he made after assuming duties as Acting Deputy Director (Piriven), he was able to achieve tremendous progress in the sphere of Piriven education that some members of the staff of the Piriven education branch of the Ministry of Education, requested the then minister of Education Hon. Bandula Gunawardena to appoint the Petitioner to act in the post of Director Education (Piriven) (P12)

The Petitioner had contended that he obtained sick leave due to ill health from 26-2 2015 to 10th-03-2015 and on the 27th -02-2015 the Secretary to the Ministry of Education, the 2nd Respondent, had over the phone asked the Petitioner to request for a transfer to serve in a different district.

The Petitioner had responded by informing the 2nd Respondent that he is not inclined to request for a transfer.

It is the position of the Petitioner that when he reported back to work on 10.03-2015 the duties he performed in the capacity of Acting Deputy Director of Education (Piriven) had been entrusted to the 4th Respondent. It is alleged by the Petitioner that the appointment of the 4th Respondent to overlook the duties of Deputy Director is mala fide and had been done for political considerations. Furthermore, it was contended that the 4th Respondent is only an Acting Assistant Director of Education. (P16)

It was contended on behalf of the Petitioner that he had served in the capacity of Acting Deputy Director (Piriven) for a period of two years and performed his duties without any blemish whatsoever, and the removal of the duties he was performing as Acting Deputy Director, while his acting appointment was still in force, is demonstrative of the mala fide on the part of the Respondent.

The Petitioner thereafter had sought redress by bringing the attention of his predicament to both His Excellency the President and the Secretary to the Ministry of Education, but to no avail.

The Petitioner, however, had been transferred to Uva Province and Ampara District by letter P18 with effect from 17-09-2015. It is the position of the Petitioner that the holder of the post of Acting Deputy Director of Education is based in Colombo and accordingly, as long as the Petitioner holds that position he is entitled to be based in the Colombo district.

The Petitioner alleges that, although it is the Secretary to the Ministry of Education who is the competent authority to effect the transfers, the 4th Respondent acting in collusion with the 1st Respondent had taken steps to effect his transfer.

The Petitioner further alleges that his transfer to Uva Province is illegal and had been done at the instance and the instigation of the 4th Respondent to perpetuate his illegal appointment and complains that transferring him out of Colombo amounts to an unlawful constructive termination of the Petitioners' acting post of Deputy Director Education (Piriven).

The Petitioner states that he is the most senior officer attached to the Piriven branch of the Ministry of Education and removing him and appointing the 4th Respondent, who is not qualified to hold the said post, is due to his political affiliations.

The Petitioner has also averred that due to his present state of health, he is required to obtain medical treatment in Colombo and accordingly has informed the 2nd Respondent regarding his inability to assume duties at the place of work to which he had been transferred.

The 2nd Respondent in the objections filed, has taken up the position that way back in 2011, the then Minister of Education had sought cabinet approval to absorb 14 persons into the Sri Lanka Education Administrative Service (hereinafter referred to as SLEAS) and to make them permanent in the posts of Assistant Director Education (Piriven) (2R1). The said Cabinet memorandum (2R1) carries the names of 14 persons, 12 Bhikkhus and 2 lay persons. The Petitioner is one of the Bhikkhus whose name is among the 14 persons referred to, in 2R1. Consequent to the Cabinet memorandum, a decision had been taken by the Cabinet of Ministers and the decision is reflected in the memorandum issued by the Secretary to the Cabinet dated 12-05-2012 reference WUM 11/0482/530/016 (2R2). It appears that the Cabinet has granted approval to appoint the 12 Bhikkhus referred to in the Cabinet Memorandum referred to above, to the post of Assistant Director Education (Piriven) and the decision specifies in stating that these positions are outside the SLEAS cadre and are personal to the Bhikkhus so appointed.

Further, it also states that the said posts get rescinded whenever a post falls vacant and as such, these positions are to be considered as posts in the SLEAS (Special Cadre).

What is significant is that the approval sought by the said Cabinet memorandum to have the 14 persons “absorbed into the SLEAS (Special Cadre)” had not received the Cabinet approval (2R2).

Consequent to the Cabinet decision aforesaid, the Petitioner had been appointed as Assistant Director Education (Piriven) (2R3) along with the other 11 Bhikkhus, with effect from 4-05-2011.

The 2nd Respondent, however, states that the details with regard to these appointments were not conveyed to the Public Service Commission as the implementing authority happened to be the Ministry of Education.

The 2nd Respondent concedes that the Petitioner, in addition to his substantive post, was also appointed as Acting Deputy Director Education (Piriven) (Administration and planning) with effect from 15-08-2013 (P8). Subsequently a Cabinet memorandum dated 03-05-2014 had been submitted and by that memorandum, Cabinet approval was sought, inter alia, to have the Petitioner appointed to act in the post of Deputy Director Education (Piriven) which had fallen vacant by then.

Consequent to the Cabinet memorandum referred to above, the Cabinet of Ministers by its decision of 07-08-2014 granted approval (2R4), to appoint the Petitioner to act as Deputy Director Education (Piriven), upon obtaining the concurrence of the Public Service Commission (hereinafter also referred to as the PSC) (2R4). Accordingly, in compliance with the Cabinet decision, by letter dated 18-09-2014, the then Secretary to the Ministry of Education, had written to the PSC, seeking their concurrence to have the Petitioner appointed as Acting Deputy Director of Education (Piriven) (2R5).

The PSC, responding to the said communiqué, by letter dated 7th November 2014 had informed the Secretary, Ministry of Education that the PSC cannot grant concurrence to have the Petitioner appointed to the said post. The PSC in their letter had highlighted the fact that the post of Deputy Director Education (Piriven) is a SLEAS post and in terms of Rule IX:115 of the Code of Procedural Rules of the PSC, the Petitioner cannot be appointed as the Acting Deputy Director of Education (Piriven) (2R6)

The position of the 2nd Respondent is that the Petitioner has ceased to hold office of Acting Deputy Director of Education (Piriven), in view of the letter of the PSC (2R6).

It was contended on behalf of the 2nd Respondent that he sought the concurrence of the PSC as per the Cabinet decision (2R4) and his action is based on the response he received from the PSC (2R6).

The learned Senior State Counsel, at the hearing of this Application raised the issue that the Petitioner had failed to cite the parties necessary to prosecute this Application, namely the Public Service Commission, on whose decision, the Petitioner ceased to be the “Acting Deputy Director Education (Piriven)”. The decision of the PSC is not challenged in these proceedings and I cannot fault the 2nd Respondent giving effect to the letter 2R6 of the PSC which he was required to comply, in terms of the Cabinet decision (2R4).

The learned Senior State Counsel drew our attention to the decision of this court in the case of *Farook V. Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others* 2005 (1) SLR 133. In the said case the Petitioner who was in Grade 1-1 of the Sri Lanka Principal’s service

challenged his transfer to another school and alleged infringement of Article 12 (1) of the Constitution. Her Ladyship Justice Bandaranayke (as she then was) held:

“The petitioner's relief sought from this Court is to declare that his (Petitioner's) transfer as Principal of Pitarathmale No. 1 Tamil Vidyalaya, Haputale and the 6th respondent's transfer as Principal of Sri Razick Fareed Maha Vidyalaya, Bandarawela are null and void. In view of the foregoing analysis of the material placed before this Court the petitioner has no right to be the Principal of Razick Fareed Maha Vidyalaya as he has not got the requisite qualifications. However, 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 same case her ladyship referred to a passage in the case of *C. W. Mackie and Company Ltd. v Hugh Molagoda, Commissioner General of Inland Revenue and others* 1986 1 SLR 300 at page 309, with approval, wherein the court held:

"But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."

In the instant case too, the acting appointment of the Petitioner could not be regularised due to the fetter referred to by the Public Service Commission in their letter (2R6) which is not challenged in these proceedings.

Although the Petitioner has complained about his transfer to the Uva Province, it appears from the documents 2R7 and 2R8 (i) to 2R 8 (xi) that the duty stations of all other Bhikkhus appointed along with the Petitioner has been simultaneously changed. As such I do not see any discriminatory treatment peculiar to the Petitioner.

For the aforesaid reasons I hold that the petitioner has failed to establish the alleged violations of Articles 12 (1) and 14 (1) (g) of the Constitution. This application is accordingly dismissed, but in all the circumstances of the case without costs.

Judge of the Supreme Court

Justice Anil Gooneratne

I agree

Judge of the Supreme Court

Justice Vijith Malalgoda P.C

I agree

Judge of the Supreme Court