

**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 and 126 of
the Constitution of the Republic.***

SC/FR No. 591/2012

1. H.K.W.K.Hitibandara,
208, Hitibandara Mawatha,
Udawela, Ibbagamuwa.
2. N.M.A. Kumara Nawarathna,
"Sriyawasa"
Ginigathgala, Haldummulla.
3. G.T.K. Sampath Perera,
59, Janatha Mawatha,
Nawinna, Maharagama.
4. Gamunu Sujith Uduwana,
211, Uduwana, Homagama.
5. K.K.ChampaShiromalie,
341/C, Thannahena,
Bengamuwa.
6. R.D.J. Udaya Rajapaksa,
698/121, Kahagolla Waththa,
Boralankada, Pilessa,
Kurunegala.
7. W.R. Ranjith Prematilake,
Thambiyagama,

Magulagama

8. J.S.N. Priyadarshana
Dharmawardena,
"Subhashini", Banduragoda Road,
Naranwatta, Veyangoda.
9. M.L. Pushparani Gunasekara,
111/D/26, Kahanthota Road,
Malabe.
10. D.M.Nandasiri Bandara,
64, Gangoda Arawa,
Mari Arawa, Monaragala.
11. W.H.D.C. Prabhath Wijesooriya,
352/A, Nilpanagoda,
Minuwangoda.
12. Vidhana Pathiranage Lalith,
80, Gramasanwardana Mawatha,
Molligoda, Wadduwa.
13. Marakkala Manage Darshani,
374/9A, Sangananda Mawatha,
Nalluruwa, Panadura.
14. Y.G.R. Ishanthi Kulathilaka,
"Deepani",
Waldura.
15. Siwasamy Thanabalasinham,
"Thanamathy Illam"

Panichchavil, Kottanthivu. (Postal Code 61252).

16. B.G.Kumari Pramalatha,
560B, Bopettha,
Getaheththa.

17. ChandraniJayawickrama,
Jayasewana, Madugata,
Neluwa.

18. Jayasampath Liyanage, Siripura,
Dodangoda,
Kaluthara South.

PETITIONERS

vs.

1. Director General,
Department of Census and Statistics,
4th and 5th Floors, Rotunda Tower,
109, Galle Road, Colombo 03.
2. Dharmasena Dissanayake, Chairman
3. Prof. Hussain Ismail, Member
4. Ms. D. Shirantha Wijeyathilaka
Member
5. Dr.Pradeep Ramanugam, Member
6. Mrs. V. Jegarasasingham, Member
7. Santi Nihal Seneviratne, Member

8. S. Ranugge, Member
9. D.L. Mendis, Member
10. Sarath Jayathilaka, Member
The 2nd to 10th Respondents of the
Public Service Commission,
No. 1200/9, Rajamalwatte,
Road, Battaramulla.
11. Secretary, Ministry of Finance and
Planning, The Secretariat,
Colombo 01.
12. Hon. Attorney General, Attorney
General's Department,
Colombo 12.
13. Statistician's Association
(P.O. Box 563) No. 15/12,
Maitland Crescent,
Colombo 07.

RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
A.L SHIRAN GOONERATNE, J AND
JANAK DE SILVA, J

COUNSEL : Faisz Musthapha, PC Keerthi Thillekaratne for Petitioners
M. Gopallawa, SDSG for 1st – 12th Respondents
Saliya Pieris, PC with Anjana Rathnasiri for 13th Respondent.

WRITTEN SUBMISSIONS : Petitioners on 27th January 2021

1st – 12th Respondents on 07th January 2021

13A Respondent on 04th September 2020.

ARGUED ON : 27th July 2022

DECIDED ON : 14th December 2022

S. THURAIRAJA, PC, J.

The 1st to 18th Petitioners are citizens of the Republic, attached to the Department of Census and Statistics. The Petitioners joined the said Department as Senior Statisticians, after sitting for an open competitive examination (as external candidates). The Petitioners state that they are all graduates with Honours passes from various Universities in Sri Lanka. As per the Petitioners, currently there are approximately 41 Senior Statisticians in the Department of Census and Statistics and the Petitioners were the last batch to be so appointed.

The 1st Respondent is the Director General of the Department of Census and Statistics, the 2nd to 10th Respondents are the Chairman and members of the Public Service Commission, the 11th Respondent is the Secretary of the Ministry of Finance and Planning and the 12th Respondent is the Hon. Attorney General. The 13th Respondent is the Statistician's Association.

The Petitioners filed an application under Articles 17 and 126 of the Constitution for the alleged infringement of their Fundamental Rights guaranteed under Article 12(1) of the Constitution against the 1st – 13th Respondents.

The Facts

The Petitioners state that they were appointed as Senior Statisticians, to the Department of Census and Statistics (hereinafter referred to as Department), after an

open competitive examination and interviews. As per the Petitioners, there was delay and various representations involved in their appointment.

As stated by the Petitioners, by Gazette dated 22/07/2005, applications were called from internal and external candidates for the post of Senior Statistician. The said Gazette (at Clause 8 thereof) provided for 50% of the existing vacancies to be filled by internal candidates and the Petitioners were aware that approximately 42 vacancies existed at the time. However, the Petitioners were not appointed as Senior Statisticians.

Petitioners state that examinations were held in or around February 2006, and the results were subsequently released in or around September 2006. As per the results released, they had passed and their names were on the pass list. However, the Petitioners had not been appointed as Senior Statisticians. Upon becoming aware that certain Trade Unions within the Department were objecting to external candidates being appointed, subsequently a committee was appointed by the then Director General of the Department to look into the same.

However, as the Petitioners were not appointed, they challenged the failure of the Department to appoint them as Senior Statisticians, by SC(FR) Application 431/2007, dated 06/12/2007 marked P2(a). Thereafter, by motion dated 03/04/2008 marked P2(b), (filed in the above application) the Hon. Attorney General informed the Supreme Court that the Public Service Commission (hereinafter referred to as PSC) had agreed to proceed with the open recruitment process for the post of Senior Statisticians. Therefore, in view of such undertaking, on 05/05/2008, the Petitioners withdrew the said application, and were of the legitimate expectation that their appointments would soon follow.

Petitioners state that, in or around 28/05/2009, fresh interviews were held for the post of Senior Statisticians, but appointments were delayed. On inquiry, the Petitioners were informed that the final list for appointments had been forwarded to the Ministry of Finance and Planning, but appointments could not be made pending

the hearing of SC(FR) Application 292/2005. On conducting a survey, the Petitioners of the instant case became aware that the Petitioners in SC(FR) Application 292/2005, could not be considered for appointment as Senior Statisticians, as they had not sat and passed the open competitive examination (as external candidates) held in or around February 2006 (which the Petitioners had sat for and passed). Therefore, the Petitioners sought to intervene in the aforesaid SC(FR) Application 292/2005, by Petition dated 10/09/2009 marked P2(d). However, on 18/09/2009, the Supreme Court refused leave to proceed to the Petitioners in SC(FR) 292/2005. Thus, removing any alleged obstruction to the Petitioners in the instant Application being appointed as Senior Statisticians. Thereafter, the Petitioners state that they were appointed as Senior Statisticians, and were placed in the 8th step of the SL-1-2006 Salary Scale.

Upon being appointed to the Department as Senior Statisticians, in or around October 2009, the Petitioners became aware of a move to draft a Scheme of Recruitment for Officers of the Department, by abolishing the position of Senior Statisticians, thereby considering both Senior Statisticians and Statisticians as one position. Therefore, by letter dated 25/11/2009 marked P4(a), the 1st to 13th Petitioners sought information about the proposed change, and an opportunity to be heard. By letter dated 12/03/2010 marked P4(b), the Petitioners were informed that in the new proposed Scheme of Recruitment there was provision for promotion to Deputy Director (Statistics). The said letter engendered in the Petitioners the apprehension that as they had only 6 months experience as of now, they should first acquire the necessary experience before aspiring to any promotions.

According to the Petitioners, they were of the apprehension, that between 2009 and 2010, a committee had been formed, and several discussions had been held between the Department and other stakeholders regarding the new draft Scheme of Recruitment. However, the Petitioners state that they were not privy to any such discussion, and were not permitted to make any representations therein. Therefore, by letter dated 25/02/2010 marked P5(a), several of the Petitioners sought permission to

make representations regarding the said new draft scheme. However, by letter dated 31/03/2010 marked P5(b), the Petitioners were informed, inter alia, that no such committee had been appointed.

Thereafter, the Petitioners had formed the Senior Statisticians (Open) Officers Association, a Trade Union, and through such Trade Union, sought to be included in any further discussions held. The Petitioners became aware of a subsequent move within the Department to cease further steps regarding the said new draft Scheme of Recruitment, and in lieu of the same, to draft a Service Minute.

The Petitioners further state that, on or around 21/07/2011, a meeting was held between, the 11th Respondent, and various other Stakeholders in the Department. Several Petitioners were present at the Meeting. At the said meeting it was disclosed that the new draft Scheme of Recruitment was before the PSC, however, it had been decided by the Department to stop proceeding with the same, and to draft a Service Minute instead. It was further disclosed that a committee would be appointed headed by D.C.A. Goonewardene, the then Director (Prices and Wages Division), to prepare the draft of the said Service Minute.

Accordingly, by letter dated 21/07/2011 marked P7(a), the Petitioners immediately sought to be included in any discussions conducted by the said committee, in drafting the said new Service Minute. By letter dated 22/08/2011 marked P7(b), their request was denied, as allegedly one U. Vasana Jayakody represented Senior Statisticians before the said Committee. However, the Petitioners specifically state that the said Jayakody did not sit for the open competitive examination with the Petitioners, thus had no connection to the Petitioners. She had not been elected by the Petitioners to represent them and in any event, she does not represent the views of the Petitioners. Therefore, by letter dated 31/08/2011 marked P7(c), the Petitioners objected to the same, and sought to be permitted to make necessary representations, to no avail. The Petitioners received no reply to the same.

Moreover, the Petitioners state that on or around 06/09/2011, the Petitioners were given a copy of the draft Service Minute, and their views regarding the same were immediately called for within a day. By letter dated 07/09/2011 marked P8, the Petitioners submitted their representations but received no reply to the same.

Thereafter, from January till April 2012, the Petitioners state that they were engaged in carrying out their duties in the field for conducting a Population and Housing Census. The Petitioners state that during this time, whilst in the field, by letter dated 26/01/2012 marked P9(a), the Petitioners were forwarded a copy of a new draft Service Minute marked P9(b), seeking their representations regarding the same. Due to the aforesaid Census, they were unable to properly respond, however, by letter dated 04/02/2012 marked P9(c), the Petitioners replied stating inter alia, that the seniority of the Petitioners be maintained, and drew special attention to Clause 23 of the said draft Service Minute, challenging the proposed move of placing the Petitioners in Grade III, and/or placing those currently in a lower substantive position than the Petitioners, in a higher grade (Grade II).

The Petitioners state that on making inquiries from the Department, they were informally informed that there was a move to revive the drafting of a new Scheme of Recruitment, which had previously been abandoned, and therefore, the Petitioners made several requests to be furnished with a copy of the said proposed draft to no avail. On 16/02/2012, the Petitioners submitted a complaint to the Human Rights Commission, under reference HRC 847/12, regarding inter alia, the proposed drafts.

By letter dated 11/05/2012 marked P12(a) issued by the Department, the Petitioners were informed that a Scheme of Recruitment marked P12(b), had been approved, and the Petitioners were supplied with a copy of the same. The Petitioners state that to the best of their knowledge such new Scheme of Recruitment is still not in use.

The Petitioners state the following with regard to the said new Scheme of Recruitment. According to Annexure VII (02) (b) of the said new Scheme of Recruitment, those Statisticians and Senior Statisticians, who fulfil all the relevant criteria set out in Clause 10.1.1.1 of the new scheme will be placed in Grade II, whereas those who do not, will be placed in Grade III. The said Clause 10.1.1.1 provides inter alia, that an individual must have 10 years' service period in Grade III, to be promoted to Grade II. The Petitioners state that thus Statisticians, have an opportunity to be placed in Grade II, prior to the Petitioners who are Senior Statisticians, regardless of whether those Statisticians have sat for the Senior Statisticians examination or not. Therefore, those in a lower grade than the Petitioners have the opportunity to be promoted prior to the Petitioners and thus have more promotional aspects.

By letter dated 06/05/2012 marked P13, the Petitioners were informed that as a new Scheme of Recruitment had already been approved by the PSC, there would not be a new Service Minute drafted for the Department, on the instructions of inter alia, the PSC.

The Petitioners state that to the best of their knowledge, though the new Scheme of Recruitment has not as yet been implemented, they are now aware of Gazette dated 21/09/2012 marked P14, calling for applications to fill vacancies for the post of "Statistician Executive Class III", purportedly under the new scheme. The Petitioners verily believe that steps are being taken to implement the new Scheme of Recruitment. According to the Petitioners the said Gazette does not disclose the number of vacancies available. The Petitioners are not aware whether the PSC and other authorities have approved the said new scheme.

The Petitioners state that, in the premises as hereinbefore more fully enumerated, the new Scheme of Recruitment would have several adverse consequences. These include placing those currently in positions/ grades lower to the Petitioners in a higher position/ grade. As such, the failure to consider the Petitioners'

current position/ grade and seniority, is unlawful, irrational, capricious, and a violation and/or continuous violation of their fundamental rights as guaranteed by Article 12(1) of the Constitution. Petitioners believe that the aforesaid actions of the Respondents amount to executive and/ or administrative actions within the meaning of Article 17 and 126 of the Constitution. Hence, the Petitioners prayed for an order to quash the new Scheme of Recruitment marked P12(b) in so far as it is applicable to the Petitioners who are presently holding Senior Statisticians position on the basis of the examination held in February 2006.

Objections of the Respondents

As per the preliminary objections filed by the 1st – 12th Respondents, they claim that the Petitioners were aware of the adoption of the Scheme of Recruitment and Promotion in respect of the Executive Category of the officers of the Department marked 1R1/ P12(b) at least from 06/05/2012. The Petition is filed on 09/10/2012, hence the 1st – 12th Respondents states that the Petition is filed out of time and must be dismissed in limine.

According to the Respondents the Petitioners were aware or could reasonably be expected to be aware that action would be taken to restructure the salaries and cadre in the Department pursuant to their appointment to conform to the provisions of the said Public Administration Circular No.6/2006.

Furthermore, the Respondents state that, the Scheme of Recruitment and Promotion marked 1R1/ P12(b), was formulated after entertaining and considering the views of all stakeholders in the Department and for such purpose, discussions were held with various Trade Unions. Views of the Trade Unions were consulted when the Service Minute for Sri Lanka Statistical Service was drafted prior to finalisation and submission for approval. Further, representations were received from several Trade Unions including the Trade Union representing the officers who had been recruited to the post of Senior Statistician.

Accordingly, the Respondents state that the provisions of recruitment and promotion are included in the Schemes of Recruitment that had been duly approved by the PSC on 27/01/2012 as well as the Cabinet of Ministers marked 1R8, and was since in force. It was also stated that the PSC had adopted the same standard format in its Guidelines for Schemes of Recruitment and Service Minutes prepared in accordance with the provisions of Public Administration Circular No. 6/2006.

The 1st Respondent states that the Scheme of Recruitment and Promotions in respect of the Executive category of the Department was never abandoned and that a Service Minute marked 1R7, for Sri Lanka Statistical Service was never adopted. Further, the said Scheme has been formulated in accordance with the law and upon a rational and reasonable basis.

The Respondents further state that the said Scheme was introduced in conformity with the Public Administration Circular No.6/2006, and contains a more rational and reasonable categorization of employees based on actual service and experience. It has also expanded opportunities for promotion, without compromising the service standards required by the Department. For instance, the said Scheme has introduced a time-based promotion from Grade III to Grade II (clause 10.1.1.1.(ii)), whereas promotion to the next higher post of Deputy Director was entirely dependent on the availability of cadre vacancies (which were very limited).

Respondents state that the said Scheme has been in operation since the approval of the PSC was granted on 06/05/2012. Therefore, the 1st – 12th Respondents state that Petitioners are collaterally and belatedly canvassing the provisions of the Public Administration Circular 6/2006 and on this basis, the application of the Petitioners has been filed out of time provided by law as it has only been filed on 09/10/2012.

Time Bar

Article 17 of the Constitution read with Article 126(2) requires a fundamental rights application in respect of an infringement or imminent infringement by executive or administrative action to be filed within one month of the alleged violation. The time limit of one month prescribed by Article 126(2) has been considered by this Court on many an instance and the said provision has been treated as mandatory, as held in the case of **Gamaethige vs Siriwardana (1988) 1 SLR 384** by Hon. Mark Fernando J,

"The time period of one month prescribed by Article 126(2) has been consistently treated as mandatory".

Furthermore, as held by Hon. Prasanna Jayawardane PC, J in the case of **Demuni Sriyani De Soyza and others v Dharmasena Dissanayake, Public Service Commission and others SC/FR 206/2008 (S.C. Minutes dated 9th December 2016)**,

"Where the time period of one month to be computed not from the date of occurrence of the alleged infringement but from the day the Petitioner becomes aware of the alleged infringement".

Therefore, in the instant case, I find it pertinent to determine the date on which the Petitioners have knowledge of the alleged violation. As stated by the Respondents in their objections, the Petitioners became aware of the adoption of the said Scheme of Recruitment at least from 06/05/2012. This was also admitted by the Petitioners in their Petition, that they were informed that the said Scheme was approved by the PSC by letter dated 06/05/2012 marked P13.

Moreover, the Petitioners state that by letter dated 11/05/2012 marked P12(a), the Petitioners were informed that the said Scheme was approved and were supplied with a copy of the same.

On perusing the documents before me, it is clear that the Petitioners became aware of the alleged infringement during the month of May 2012, whereas, the Petition

was filed on 09/10/2012, over 4 months after the alleged violation. It was on this basis that the Respondents contended that the said application had not been made within one month from the alleged infringement, as required by Article 126 (2) of the Constitution.

In the case of **Ilangaratne vs. Kandy Municipal Council (1995 BALJ Vol.VI Part 1 p.10)** Hon. Kulatunga J observed that,

*"the result of the express stipulation of a one month time limit in Article 126(2) is that, **this Court has no jurisdiction to entertain an application which is filed out of time** – ie: after the expiry of one month from the occurrence of the alleged infringement or imminent infringement which is complained of..... if it is clear that an application is out of time, the Court has no jurisdiction to entertain such application"*

(Emphasis added)

"... the general rule that had emerged is that, this Court will regard compliance with the one-month limit stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed after the expiry of one month from the occurrence of the alleged infringement or imminent infringement.

The Petitioners in the instant case, has neither adduced any evidence to show that there has been an inquiry on the said Scheme pending before the Human Rights Commission nor made any attempt to explain the long delay in filing this application. The Petitioners have not given any reasons for being unable to file the application within 30 days from the alleged infringement.

Although the Petitioners have submitted a complaint to the Human Rights Commission on 16/02/2012 as it was only regarding the proposed draft of the said

Scheme and filed prior to the approval and passing of the Scheme of Recruitment this does not negate the application of time bar as enumerated above.

Thus, for the foregoing reasons, I conclude that the Petitioners have failed to file the instant application within the one-month time period stipulated in Article 126 (2) of the Constitution. Therefore, I uphold the preliminary objection raised by the Respondents that the application is time barred and proceed to dismiss this application.

Application Dismissed.

JUDGE OF THE SUPREME COURT

A.L SHIRAN GOONERATNE, J

I agree.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

I agree.

JUDGE OF THE SUPREME COURT