

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution

Sriyanee Dhammika Kumari Semasinghe,
424/16, Samagi Mawatha, Hokandara.

Petitioner

SC /FR/ Application No. 83/2018

Vs,

1. Mr. Dharmasena Dissanayaka, Chairman,
2. Mr. A. Salam Abdul Waid, Member
- 2a. Prof. Hussian Ismail, Member
3. Ms. D. Shirantha Wijayatilaka, Member
- 3a. Ms. Sudarma Karunarathna, Member
4. Dr. Prathap Ramanujam, Member
5. Mrs. V. Jegarasasingam, Member
6. Mr. Santi Nihal Seneviratne, Member
- 6a. Mr. G. S. A. de. Silva P.C, Member
7. Mr. S. Ranugge, Member
8. Mr. D. L. Mendis, Member
9. Mr. Sarath Jayathilaka, Member
10. Mr. H. M. Gamini Seneviratna, Secretary,
- 10a. M. A. B. Daya Senarath, Secretary,
11. H. A. D. C. Jayasekera,
Senior Assistant Secretary,

The 1st to 11th Respondents of:

Public Service Commission,

No. 1200/9, Rajamalwatte Road, Battaramulla.

12. Mr. Sarath Dissanayake,
Director General Overseas,
Administration Division.

12a. Mr. M. K. Pathmanathan,
Additional Director General.

13. Mr. Prasad Kariyawasam, The Secretary,

13a. Mr. Ravinatha Aryasinha, The Secretary,

13b. Admiral Prof. Jayanath Colombage,
Secretary, Foreign Ministry

The 12th to 13th Respondents of;

Ministry of Foreign Affairs,

The Public Building, Colombo 01.

14. Hon. Attorney General,

Attorney General's Department, Colombo 12.

Respondents

**Before: Justice Vijith K. Malalgoda PC
Justice Mahinda Samayawardhena
Justice Arjuna Obeyesekere**

**Counsel: Uditha Egalahewa PC with Pulasthi Hewamanne for the Petitioner
Viveka Siriwardena DSG for the Attorney General**

Argued on: **16.07.2021**

Judgment on: 15.12.2021

Vijith K. Malalgoda PC J

Petitioner Sriyane Dhammika Kumari Semasinghe an officer belonging to Grade II of the Sri Lanka Foreign Service (hereinafter referred to as SLFS) had complained before this court, the failure by the Respondents to appoint her to Grade I of the SLFS in violation of her Fundamental Rights guaranteed under Articles 12 (1) and 14 (1)g of the Constitution. On 04.07.2018 this court granted leave to proceed on the above alleged violations.

As submitted by the Petitioner, she was recruited to the SLFS as an Assistant Director Grade III on or around 18/04/1996 after an open competitive examination. The Petitioner was placed 3rd on the merit list.

Thereafter she was posted to several positions in foreign missions as well as in the Foreign Ministry and at the time she filed the instant application before this court she was attached to the Foreign Ministry as Acting Director General of the European Union (Bilateral), Russia and other CIS, and the Caribbean and Counter Terrorism Unit, holding the substantive post of Director Grade II.

Even though the Petitioner was placed No.3 on the merit list, when she was recruited as an Assistant Director Grade III in the year 1996, (she refers to this as 1996 batch) most of the batchmates in the 1996 batch are now promoted to Grade I of the SLFS and some of them are holding positions as Ambassadors in various countries. However, the Petitioner was denied of the promotion to Grade II until 2015 and as revealed before us, in the year 2015 the Petitioner came before the Supreme Court to secure her promotion to Grade II of SLFS. (SC FR 393/2015)

The said matter before the Supreme Court was concluded when the Petitioner was granted the relief by the Respondents and the Journal Entry dated 11.08.2016 reveals the outcome on that day as follows;

“The learned Senior State Counsel submits to court that the Petitioner had been granted the promotion and promoted to Grade II of the Sri Lanka Foreign Service with effect from 18.04.2006. The learned Senior State Counsel also Submits that the Petitioner’s salary had been computed commensurate with the promotion granted to her and also arrears had been paid.

However, learned President’s Counsel for the Petitioner submits that some of the payments had not been paid yet. Learned President’s Counsel further submits that the Petitioner is willing to withdraw this application if the foreign Ministry is directed to ensure her dues are expeditiously paid.

The 4th Respondent is directed to ensure, through the 3rd Respondent, that all dues and entitlements of the Petitioner are paid expeditiously.

Application to withdrawal is permitted. Application is proforma dismissed.”

As revealed before us, the main reason for the delay in granting the promotion to the Petitioner at that stage was the Petitioner's failure to fulfill the Efficiency Bar requirements as stipulated in the service minute of SLFS 2001, and it is relevant at this stage to consider the factual Metrix, for this court to come to a correct finding.

As already discussed, the Petitioner had joined the SLFS as an Assistant Director Grade III in the year 1996, she was placed No. 3 in the merit list. The said recruitment was based on the SLFS service minute published in Gazette extraordinary 842/8 dated 25.10.1994 and the said Service Minute had been revised in 2001 by the Minute published in Gazette extraordinary 1168/17 dated 24.01.2001.

The first promotion to which the Petitioner would be eligible, both under the service minutes published in 1994 and 2001 was the promotion from Grade III to Grade II and the officer should complete 10 years satisfactory service to become entitled to the said promotion. Therefore, the scheme that was relevant for the Petitioner's first promotion was the minute that was published in 2001.

Clause 7 of the said Service Minute refers to the promotions as follows;

7 promotions

Scheme of promotion;

7.2.I. Promotion form Grade III to Grade II - The criteria for promoting a SLFS officer from Grade III to Grade II shall be as follows;

- (i) The officer should have completed 10 years satisfactory service in Grade III
- (ii) The officer should have completed the second Efficiency Bar Examination before reaching the salary step of Rs. 116,400 and the Third Efficiency Bar, and the other official and link language requirements before reaching the step of Rs. 135,300 on the Grade III scale.
- (iii) The officer should have reached the salary step of Rs. 135,300 on the Grade III scale.

Even though the Petitioner had completed the first Efficiency Bar Examination as per Chapter III Clause 4 of the 1994 service minute, she was not been able to fulfill the Efficiency Bar requirement by completing the second Efficiency Bar Examination as per Clause 7:2: I referred to above. Whether the Petitioner had fulfilled the above requirement was unsolved, even at the time she came before this

court in 2015 in SCFR 393/2015, and an appeal submitted by the Petitioner on 30.10.2014 to the 10th Respondent Secretary Public Service Commission (1R6) and the subsequent correspondence between the 10th Respondent, 13th Respondent and the Petitioner confirms this position. (1R7, 1R8, 1R9, 1R10, 1R11)

As recorded before the Supreme Court on 11.08.2016, the decision of the Public Service Commission to promote the Petitioner to Grade II with effect from 18.04.2006 was a result of several decisions, by the said Commission taken in favour of the Petitioner and if I summarize the reliefs granted to the Petitioner by the said commission as evinced from the documents referred to above, reads as follows;

1. Extend the grace period from 18.04.2003 to 02.12.2003 (up to the seventh Efficiency Bar since 02.09.1996)
2. Further extend the grace period from 02.12.2003 to 27.04.2007
3. Since the Petitioner could not sit for the Efficiency Bar Examination conducted on 27.04.2007 due to a reason beyond her control and she passed the said examination on the subsequent examination held on 30.05.2009, to consider that she got through the said examination on 27.04.2007.

Based on the decisions reached above, the Public Service Commission had decided to grant the promotion of the Petitioner from Grade III to Grade II with effect from 18.06.2006 and the said decision was officially communicated to the 13th Respondent on 20.05.2016 and was also communicated to the Supreme Court through the Attorney General on 11.08.2016.

The grievance Petitioner complains before this court in the instant application, refers to the next promotion the Petitioner was entitled, and in this regard our attention was drawn to Clause 7.2.2. of the service minute published in 2001 by the learned President's Counsel. The said Clause reads thus;

7.2.2 Promotion from Grade II to Grade I –

The criteria for promoting a SLFS officer from Grade II to a vacancy in Grade I will be that the officer should have completed 6 years satisfactory service in Grade II.

As revealed before us, when the Petitioner was granted the promotion from Grade III to Grade II by letter dated 20.05.2016, to be operative from 18.04.2006 the Petitioner was qualified to receive the next promotion under the above Clause, since by that time she had already completed six years

satisfactory service in Grade II. In the said circumstances Petitioner wrote to the 13th Respondent to take steps to grant her the promotion to which she is already entitled.

As further submitted by the Petitioner, by backdating her promotion to Grade II with effect from 18.04.2006, on which day the 1996 batch completed the 10 years satisfactory service, she maintained the same seniority in her batch and therefore was entitled to be promoted to the next grade maintaining the same seniority.

The above position maintained by the Petitioner was conveyed to the Respondents by the Petitioner and the response she received from the Respondents were explained as follows;

- a) That by letter dated 11.07.2016, the Ministry of Foreign Affairs notified the Petitioner of adjusting her salary and payments of arrears from 2003 onward (P6a)
- b) That in the absence of any positive steps from the Ministry of Foreign Affairs with regard to her promotion which is overdue, wrote to the Secretary, Foreign Affairs on 27.04.2017
- c) That the Petitioner had submitted an appeal to the Public Service Commission through Secretary of Ministry of Foreign Affairs on 18.07.2017, requesting the Commission to grant her promotion which is pending before the Commission for nearly one year (P-6d)

In paragraphs 6-13 of the said appeal, the Petitioner explains her grievance as follows;

6. Due to administrative lapses, my due promotion from Grade III to Grade II of the SLFS was delayed for nearly 10 years from the date of such promotion, which was 18 April 2006. As a result, I was compelled to file the above captioned SC (FR) application to seek natural justice.
7. That application was settled on 11th August 2016 on the basis **that my promotion to Grade II SLFS be reinstated retroactively on 18 April 2006 without loss of seniority just as the other officers in the SLFS batch of 1996**. My salary too, was to be computed commensurate with the promotion granted to me with due arrears to be so awarded.
- 8 Further, the Seniority List of the Sri Lanka Foreign Service needs to reflect the above retroactive promotion/reinstatement, i.e. I should be **reinstated as number 3 in the seniority list of the SLFS officers recruited in 1996**.

9. As you are aware, my colleagues in the SLFS batch of 1996, have been promoted to Grade I with effect from on or around December 2012 (i.e., on successful completion of six (6) years of satisfactory service *vide* 7.2.2. of the *Sri Lanka Foreign Service Minute (2001) published in Gazette Extraordinary dated 24.01.2001*)
10. SLFS Officers in the 1996 batch are currently serving as Ambassadors/High Commissioners abroad.
11. To the best of my knowledge, a revised seniority list, as at 5 May 2017 given to me by the Overseas Administration Division, reflects my seniority as number 1 under SLFS Grade II and not parallel to my batch of 1996 (ANNEX 'B'). Further, I have been placed at the basic salary of 57,781.00 as at June 2017.
12. I have completed 6 years of the requisite satisfactory service earning increments up until 18 April 2013 as per sub section 7.2.2. in the SLFS Minute 2001 (*"promotion from Grade II to Grade I"*)
13. Therefore, **concomitant** with the Supreme Court decision and the retroactive reinstatement of my seniority and promotion to Grade II in the SLFS on 18 April 2006 and given that my promotion to Grade II on 18 April 2006 was delayed due to administrative lapses (*not holding EB exams twice a year as prescribed by SLFS Minute 2001 and failing to forward Grade II promotion appeals addressed to the PSC by the Ministry*) on the part of Ministry, the subsequent promotion to Grade I on 3 September 2013 after completion of 6 years of satisfactory service should, therefore, be effected **retroactively** on the date **vacancy became available, i.e. on 3 September 2013.**

d) Even though the Petitioner had not received any response to the appeal, the decision of the Public Service Commission to the effect "එස්. ඩී. කේ. සේමසිංහ මෙනවිය ශ්‍රී ලංකා විදේශ සේවයේ නව සේවා ව්‍යවස්ථාවේ 10.2.1 වගන්තියෙහි (V) හි සඳහන් පශ්චාත් උපාධි සුදුසුකම හැර අනෙකුත් සියලුම සුදුසුකම් සපුරන්නේ නම් 2015.10.13 දින සිට ශ්‍රී ලංකා විදේශ සේවයේ I ශ්‍රේණියට උසස් කළ හැකි බව රාජ්‍ය සේවා කොමිෂන් සභාව විසින් තීරණය කර ඇති බව එහි නියමය පරිදි දන්වා ඇත." was conveyed to the Petitioner by letter dated 23.08.2017 by the head of her division in the Foreign Ministry (P6-e)

e) Petitioner being dissatisfied with the said decision submitted another appeal on 21.09.2017 to the Public Service Commission and in the said Appeal the Petitioner re-iterate the following;

“e” The **basis of the current PSC decision** (*date of promotion as 13th October 2015*) is not clear, as the above date of promotion places **me below two SLFS batches (1996 and 1998, respectively)**. This is especially troubling **when the Ministry itself had placed me as number 1 under Grade II in its revised Seniority List as at 05.05.2017 (Annex “E”)**

“f” As you may be aware, due to administrative lapses, my due promotion from Grade III to Grade II of the SLFS was delayed for nearly 10 years from the date of such promotion, which was 18 April 2006. As a result, I was compelled to file the **SC FR Application No. 393/2015** to seek natural justice.

“g” The **Supreme Court petition was decided on 11 August 2016 my promotion to Grade II in the SLFS was made effective retroactively from 18 April 2006 and without loss of seniority on the basis of relevant provisions of the 2001 SLFS minute**. I was placed number 3 on the merit list at the recruitment to the SLFS on 18 April 1996.

“h” Further according to IA of the 2016 SLFS Minute, the new minute “shall substitute without prejudice to any steps taken or purported to have been taken in terms of the provisions as per the Sri Lanka Foreign Service Minute... Dated 24th January. 2001 of the ...” (Annex ‘F’)

“i” On the same basis as above (g. and h.) **my promotion to Grade I in the SLFS, should also be considered under the 2001 SLFS Minute and retroactively granted in September 2013 between the dates 17.05.2013 and 03.09.2013** (*date of promotion to Grade I of number 2 and number 4 on the merit list SLFS 1996*)

after completion of 6 years of satisfactory service under the 2001 SLFS Minute.

- f) That the decision of the Public Service Commission on the said appeal was communicated to the Ministry of Foreign Affairs by letter dated 28.11.2017 (P-8) and the said decision was conveyed to the Petitioner by the head of her division by his letter dated 05.12.2017 (P-7)
- In the new decision the Public Service Commission had ruled that;

“එස්. ඩී. කේ. සේමසිංහ මෙනවිය, පැරණි විදේශ සේවා ව්‍යවස්ථාව අනුව 2013.09.03 දිනට ශ්‍රී ලංකා විදේශ සේවයේ වසර 6ක සතුටුදායක සේවා කාලයක් සම්පූර්ණ කර තිබුණ ද, එදිනට එම සේවයේ I වන ශ්‍රේණියේ පුරප්පාඩු නොමැති වීම හේතුවෙන් සහ එදිනට අදාළව අධිසේවක පදනමින් තනතුරක් ඇතිකිරීම කළමනාකරණ සේවා දෙපාර්තමේන්තුව මගින් ප්‍රතික්ෂේපකර තිබීම හේතුවෙන්, එස්. ඩී. කේ. සේමසිංහ මෙනවිය 2015.10.13 දින සිට විදේශ සේවයේ I වන ශ්‍රේණියට උසස් කිරීමට හැකි බව”

- g) The Petitioner being dissatisfied with the said decision of the Public Service Commission had first complained to the Human Rights Commission and later filed the instant application before this court
- h) That by letter dated 12.03.2018 foreign Secretary (13th Respondent) once again wrote to the Public Service Commission requesting their intervention to find an alternative solution to resolve the issue of promoting the Petitioner without affecting her seniority, but by the time the said appeal was submitted, the instant application was pending before this court.

On behalf of the Petitioner, it was argued that the Respondents cannot simply reject the request by the Petitioner informing that there is no vacancy in Grade I, when in fact there was a vacancy in Grade I of SLFS on 03.09.2013 and the person who was placed below her on the merit list was granted promotion on that day. The Petitioner further submitted that the Public Service Commission too had acknowledged this fact in its letter dated 28.11.2017 (P-8 and 1R4) and therefore the Petitioner was entitled to be promoted to Grade 1 under the service minute that was issued in the year 2001.

The Petitioner has further submitted that,

“the Public Service Commission has an obligation to promote officers ‘on due time’ in accordance with the Service Minutes and back date a grade-to-grade promotion where the

delay in promotion was due to unavoidable circumstances and due to no fault of the officer concerned” (PSC Rules 184,188)

and argued that the objection by the Department of Management Service to create a supernumerary post cannot be a reason for the Public Service Commission to neglect its constitutional obligations.

In this regard the Petitioner relied on the decisions by this court in ***Chief Inspector W.A.J.H. Fonseka and Others Vs. Neville Piyadigama and Others, SC (FR) 73/ 2009 SC Minute dated 08.09.2020, Jayawardena Vs. Dharani Wijethilake [2001] 1 Sri LR 132.***

As against the above Position taken up by the Petitioner, the Respondents, whilst raising several preliminary objections to the maintainability of the instant application, had objected to the grant of any relief. It was the position of the Respondents, that the Applicant is not entitled to maintain the instant application for the reason that;

- a) The application is filed out time
- b) The necessary parties are not before the court

When raising the above objection, the learned Deputy Solicitor General relied on the material submitted on behalf of the Respondents before this court and therefore it is necessary to first consider the material placed on behalf of the Respondents. In the said circumstances, I will first consider the merits of the case and will consider the preliminary objections at appropriate stages.

In his affidavit filed before this court, the 1st Respondent had submitted the following;

- a) Recruitment and promotion in the SLFS is governed by the Provisions of the Service Minute of SLFS and according to the said minute issued on 24.01.2001 it was a requirement for the Petitioner to have passed the second Efficiency Bar within 7 years of her recruitment i.e. by 18.04.2003
- b) Petitioner could not complete the second Efficiency Bar within the stipulated period but completed it only on 30.05.2009
- c) However, the Petitioner was not eligible to be promoted to Grade II when she completed the second Efficiency Bar, under the Provisions of the Service Minute of SLFS

- d) The Petitioner made use of a Public Service Commission Circular issued in the year 2014 (Circular 01/2014) to obtain relief in order to complete Efficiency Bar requirement and submitted an appeal to the Public Service Commission on 30.10.2014
- e) In the said appeal the Petitioner admits the lapse on her part in paragraph 3 as follows;
- “3. I have completed eighteen years (18) and six (6) months in the SLFS as at October 2014. However, my promotion to SLFS Grade II has been delayed due to non-completion of one subject, Administration and Office Methods, under EB II by April 2003, the stipulated period from April 1996 for completion of the Second EB”
- f) The Petitioner had pleaded for a grace period for completion of her Efficiency Bar requirement in paragraph 4 as follows;
- “4. I am appealing for a retroactive grace period for the completion of Administration and Office Methods, the EB II requirement, on the basis of the Public Service Commission Circular No. 01/2014 issued on 31 January 2014”
- g) Whilst considering the above appeal, Public Service Commission had granted several concessionary reliefs to the Petitioner including
- i. Extend the grace period form 18.04.2003 to 02.12.2003
 - ii. Further extend the grace period form 02.12.2003 to 27.04.2007
 - iii. To consider that the Petitioner got through EB II on 27.04.2007 when in fact she sat for the examination on 30.05.2009
and finally granted the promotion to Grade II on 20.05.2016 to be effective form 18.04.2006
- h) The other batchmates who completed the Efficiency Bar requirement within the stipulated period were eligible to be promoted to the next Grade and they were granted promotions under Clause 7.2.2 when there were vacancies in Grade I
- i) When the Petitioner become eligible after receiving several concessionary reliefs from the Public Service Commission, several of her batchmates including some, who were placed below her in the original merit list were promoted based on the provisions of the service minute that was in operation at that time,
- j) However, the Petitioner appealed to grant her the next promotion (promotion to Grade I) from a date between 17.05.2013 and 03.09.2013 in order to maintain her seniority but in the

absence of any cadre vacancy in SLFS Grade I, the Public Service Commission could not grant the said promotion to the Petitioner.

- k) The question of creating a supernumerary vacancy retrospectively, was turned down by the Department of Management Services during a meeting between the Foreign Ministry, Department of Management Service and Public Service Commission since that was against Regulation 70 of the Financial Regulations (1R 16)
- l) A new service minute was introduced to SLFS on 06.12.2016 and the said Service Minute was operative from 12.10.2015 (Clause 01)
- m) Officers in SLFS were absorbed under the new Service Minute and accordingly the Petitioner too was absorbed to Grade II of SLFS with effect from 12.10.2015
- n) The Public Service Commission had decided to promote the Petitioner to Grade I of SLFS with effect from 13.10.2015 as per the provisions of the New Service Minute and it is the said decision the Petitioner had challenged in the instant application claiming that she is entitled to be promoted with effect from 03.09.2013 and not with effect from 13.10.2015

When considering the position taken up by the 1st Respondent before this court, it is clear that the Petitioner when submitting an appeal to the Public Service Commission on 30.10.2014 concede that the delay in promoting her to Grade II was due to non-completion of one subject under Efficiency Bar II and appealed for a grace period for the completion. The said request had been made under a Public Service Commission Circular issued in the year 2014. In these circumstances it is clear that, even though the Public Service Commission had finally granted the promotion to Grade II with effect from 18.04.2006, question of granting the next promotion was unsolved and the Petitioner was not considered as a person who has fulfilled the necessary requirements to be promoted to Grade II of SLFS by the end of year 2014. However, some of her batchmates including the 2nd and the 4th persons in the merit list were promoted to Grade I, by the beginning of the year 2014, based on the available vacancies, and by that time the Petitioner's promotion to Grade II was not finalized.

In the said circumstances, it is observed that the submission by the Petitioner to the effect that she maintained her position in the seniority by backdating the promotion to 18.04.2006 cannot be accepted for the reason that some of her batchmates had already promoted to Grade I when the said promotion was granted to her.

As already referred to in this judgment, SC FR 393/2015 was concluded before the Supreme Court when the state informed court that the Petitioner's promotion from Grade III to Grade II had been

granted to her and therefore the petitioner was permitted to withdraw the said case by court. However, when the petitioner appealed to the Public Service Commission seeking the promotion to Grade I, whilst referring to the said case the Petitioner had submitted.

“The application was settled on 11th August 2016 on the basis that my promotion to Grade II SLFS be reinstated retroactively on 18th April 2006 without loss of seniority just as the other officers in the SLFS batch of 1996.” (Appeal dated 18.07.2017 – P6D)

Once again, she referred to the said case in her appeal against the decision of the Public Service Commission which was communicated to her on 23.08.2017 as follows;

“The Supreme Court petition was decided on 11th August 2016 and my promotion to Grade II in the SLFS was made effective retroactively form 18th April 2006 and without loss of seniority on the basis of relevant provisions of the 2001 SLFS minute.” (Appeal dated 21.09.2017 P6-h)

However, the said position taken by the Petitioner cannot be considered as correct, in the absence of any reference to that effect in the Journal Entry dated 11.08.2016 in SC FR 393/2015.

The Petitioner insisted that her promotion to Grade I should be considered under the Service Minute that was introduced in the year 2001. However, Clause 7.2.2 which refers to the promotion from Grade II to Grade I was very specific, that the promotion from Grade II to Grade I can only be effected if there is a vacancy in Grade I. As submitted by the Respondents before this court, when the Petitioner was granted the promotion on 20.05.2016 to operate retrospectively from 18.04.2006, and when six years satisfactory period is calculated since then, she becomes eligible to be promoted to Grade I by 03.09.2013 but, there were no vacancies available in order to grant her promotion under the said Service Minute.

Public Service Commission in its decision dated 28.11.2017 had admitted this position. Even though the Petitioner was silent on all efforts by the Public Service Commission as well as the Foreign Ministry to create a supernumerary vacancy, that too was failed since the Financial Regulation does not permit to do so.

Even though the Petitioner had repeatedly referred to the fact that there were administrative lapses on the part of the Public Service Commission in refusing her due promotion, she had failed to establish a single lapse on the part of the Public Service Commission but as she had admitted in her own appeal dated 30.10.2014 submitted to the Public Service Commission, that her promotion to SLFS Grade II has

been delayed due to the non-completion of one subject, Administration and Office Methods, under Efficiency Bar II by April 2003 and the said lapse on the part of the Petitioner had created a situation where the Public Service Commission could not help the Petitioner to grant the Promotion to Grade I of SLFS for the reasons referred to above.

Petitioner's argument that the Department of Management Service had no power to grant final approval to create new cadre vacancies based on the decision in the case of Chief Inspector **W.A.J.H. Fonseka and others Vs. Neville Piyadigama and others** should be looked into in the light of the decision of this court, in the case of **C. W. Mackie & Company Ltd. Vs. Hugh Molagoda, Commissioner General of Inland Revenue and others** to the effect, "..... 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. I respectfully agree with what the court said in **Venkata Subbiah Shetty Vs. Bangalore Municipality,**

"Article 14 (corresponding to our Article 12) cannot be understood as requiring the authorities to act illegality one case, because they have acted illegality in other cases."

As revealed before us a special meeting was convened to discuss the issue of creating a supernumerary vacancy in Grade I of the SLFS in order to grant the promotion to the Petitioner between the Foreign Ministry, Public Service Commission and the Department of Management Service and at the said meeting it was revealed that the financial Regulation 70 does not permit the Department of Management Service to recommend creating such vacancy.

In this regard, I would like to consider the relevant provisions in the Financial Regulation which reads as follows;

Regulation 70 Creation of posts may be done following the procedure laid down in F.R. 71. No posts shall be created with retrospective effect extended back to lapsed financial years.

As observed by me, Regulation 71 provides the procedure that should be followed when creating posts, cadre, scales of salary during a financial year and Regulation 70 does not permit such creation for a lapsed financial year. Any Government Officer is bound to follow the above Regulation and he cannot be compelled to violate such Regulation.

Petitioner's argument that there was a vacancy in Grade I of SLFS as at 03.09.2013 and the vacancy could have been filled by appointing the Petitioner under 2001 Service Minute maintaining the seniority, should be looked in the light of the second preliminary objection raised on behalf of the Respondents.

When raising a preliminary objection, Respondents argued that the Petitioner had failed to add necessary parties and therefore the application of the Petitioner should be dismissed in limine.

Requirement of having necessary parties before court was considered by this court under several jurisdictions of this court and in the case of ***Don Shelton Hettiarachchi V. Sri Lanka Ports Authority and Others (2007) 2 SLR 307*** question of non-inclusion of all the parties who would be affected in an application filed under Article 126 was considered by Shirani Bandaranayake J (as she then was) and held that, "It was therefore an essential requirement that the parties, who were necessary to this application, should have been brought before this court and the Petitioner had not adhered to this requirement"

As already discussed by me, the Petitioner's promotion to Grade II was delayed due to non-completion of one subject under Efficiency Bar II by April 2003, until several concessions were considered under Public Service Commission Circular issued in 2014. By this time several members of the 1996 batch including the 2nd and 4th persons in the merit list were promoted to Grade I. In these circumstances it is clear that there are members in Grade I of the SLFS, who were promoted to Grade I during this period, when they fulfilled the necessary requirements within the stipulated period under the relevant Service Minute and their appointments would be affected by the appointment of the Petitioner with effect from 03.09.2013 as submitted by the Petitioner. In the said circumstances, those who were promoted to Grade I of SLFS between 03.09.2013 and 13.10.2015 are necessary parties to the instant application. The Petitioner should have brought them before this court and had failed to adhere to this requirement.

Service minute of the SLFS was once again replaced in the year 2016 and the said Service Minute was to operate from 12.10.2015. All members of the SLFS were to be absorbed under Clause 14 of the new Service Minute to their respective grades with effect from 12.10.2015, the effective date of the Service Minute.

In the said Service Minute, promotion from Grade II to Grade I was identified under Clause 10.2.1 as follows;

10.2.1. Requirement to be completed;

- i) should have completed at least seven (07) years active and satisfactory service in Grade II Service category and earned seven (07) salary increments.
- ii) Should have passed the second Efficiency Bar examination on the due date.
- iii) Should have completed a period of satisfactory service during the preceding five (5) years from the date of gaining eligibility for promotion.
- iv) Should have shown a satisfactory or a higher-level performance during the preceding seven (7) years of gaining eligibility for promotion.
- v) Should have obtained a postgraduate degree in International Relations or an equivalent qualification from a university recognized by the UGC or an institution, a university recognized by the UGC as an institution of degree awarding or a foreign university recognized by the UGC, as per Appendix D.

However, the Transitional Provisions identified under Clause 15.1.2 provides certain exceptions to the officers belonging to Grade II who were recruited prior to 01.01.2001 (including the Petitioner)

The said exception reads thus;

15.1.2 Promotion from Grade II to Grade I

- i) An officer absorbed to Grade II under the provisions of Section 14 of this Minute will be eligible for promotion to Grade I provided he/she has fulfilled the qualifications under 10.2.1. of the Service Minute. However, the requirement for the fulfillment of qualifications under sub section (v) of 10.2.1. will not apply regarding the promotion of officers recruited before 01.01.2001 from Grade II to Grade I during the transition period

As revealed before us, the said Service Minute had taken away the Cadre requirement in the previous Service Minute and the transitional provision had taken away the postgraduate degree requirement imposed by Clause 10.2.1 (v) of the new Service Minute,

Since the Petitioner had fulfilled all the necessary requirements under the new Service Minute, the moment she is absorbed under Clause 14 of the new Service Minute, she became entitled to be promoted to Grade I under the new Service Minute and as submitted by the Respondents before us, the Public Service Commission had granted the Petitioner the promotion from Grade II to Grade I with effect from 13.10.2015 acting under the above provisions of the new Service Minute.

The next matter that needs to be looked into by this court is the 1st preliminary objection raised by the Respondents. When raising a preliminary objection with regard to the maintainability of the instant application, the Respondents argued that the application was filed out of time.

As I have already observed in this judgment the Petitioner had come before this court alleging violation of her Fundamental Rights guaranteed under Article 12 (1) and 14 (1)g of the Constitution on 27.02.2018. When complaining the said violations, the Petitioner further moved that,

“Declare that the purposed decisions reflected in the letter dated 28.11.2017 (Marked P-8) as read with letter dated 05.12.2017 (marked as P7) are null and void and no force or avail in law.”

In the said circumstances, it is clear that even though the Petitioner made several representations to the 1st to 10th and 13th Respondents with regard to her promotion from Grade II to Grade I, she finally decided to come before this court, when the Public Service Commission informed her that she could be granted the promotion with effect from 13.10.2015, in absence of a vacancy in Grade I, since the Department of Management Services had refused to create a vacancy on supernumerary basis with effect from the said date.

When raising the preliminary objection, the Respondents submitted that the decision conveyed by the Public Service Commission in P-8 was based on the decision by the Department of Management Service made in the year 2016. In his decision dated 07.12.2016, Director General Department of Management Service had informed the 13th Respondent and the Public Service Commission that it is not possible to create a supernumerary vacancy, back dated to the year 2013 since it is contrary to the provisions of the Financial Regulations. (1R15)

The Respondents argue that the Petitioner was well aware of this decision since 2016 but, had never challenged the said decision, but come before this court seeking an order to promote her to Grade 1 with effect from 03.09.2013, in the year 2018 in violation of Article 126 (2) of the Constitution.

However as already referred to by me, the Petitioner's grievance was not the refusal by the Department of Management Service to create a supernumerary vacancy in Grade I with effect from 03.09.2013 but, it was the failure by the Public Service Commission to appoint her to Grade I, to the vacancy that was available on 03.09.2013, and the subsequent decision by the Public Service Commission to appoint her to Grade I with effect from 13.10.2015 which was conveyed to her on 28.11.2017.

The Respondents have not challenged the application on the basis that it was filed out of time since 28.11.2017, but it was challenged on the basis that the application is filed out of time since 2016. This court is not inclined to accept the above argument.

When considering the matters that has been discussed in this judgment, I hold that the petition was unsuccessful in establishing any violation of her Fundamental Rights guaranteed under Article 12 (1) and 14 (1)g of the Constitution.

Application of the petitioner is therefore dismissed but I make no order with regard to the costs.

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court

Justice Arjuna Obeyesekere,

I agree,

Judge of the Supreme Court