

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

In the matter of and application in terms of
Articles 17 and 126 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka

W.M. Namal Sanjeewa of
No. 24/B, Deepankara Road,
Medaketiya, Tangalle.

SC FR Application No. 244/2012

Petitioner

Vs.

1. Neville Gunawardena
Director General of Customs,
Customs House, No. 40,
Main Street, Colombo 11.
- 1A. Jagath Wijeweera,
Director General of Customs,
Customs House, No. 40,
Main Street, Colombo 11.
- 1B. R. Semasinghe,
Acting Director General of Customs,
Customs House, No. 40,
Main Street, Colombo 11.
- 1C. Mr. Chulananda Perera,
Director General of Customs,
Customs House, No. 40,
Main Street, Colombo 11.

2. Dr. P.B. Jayasundara
Secretary Ministry of Finance and
Planning,
Ministry of Finance and Planning,
The Secretariat, Colombo 01.
- 2A. Dr. R.H.S. Samaratunga
Secretary, Ministry of Finance,
Ministry of Finance, The Secretariat,
Colombo 01.
3. W.M.N.J. Pushpakumara
Commissioner General of
Examinations,
Department of Examinations,
Sri Lanka.
4. Sathya Hettige
Chairman
- 4A. Mr. Dharmasena Dissanayake
Chairman
5. Kanthi Wijetunga
Member
- 5A. Mrs. V. Jagarasasingam
Member
6. Dr. N.I. Soyza
Member
- 6A. Mr. Santi Nihal Seneviratne
Member
7. S.I. Mannapperuma
Member

- 7A. Mr. A. Salam Abdul Waid
Member
- 7B. Prof. Hussain Ismail
Member
8. Ananda Seneviratne
Member
- 8A. Ms. D. Shirantha Wijayatilaka
Member
9. S. Thelleinadaraja
Member
- 9A. Mr. S. Ranugge
Member
10. Sunil A. Sirisena
Member
- 10A. Mr. Sarath Jayathilaka
Member
11. S.A. Mohamed Nahiya
Member
- 11A. Mr. D.L.Mendis
Member
12. N.H. Pathirana
Member
- 12A. Dr. Prathap Ramanujam
Member
13. T.M.L.C. Senerathne
Secretary

- 13A. H.M.G. Senevirathne
Secretary,
The Public Service Commission,
No.177, Nawala Road, Colombo 05.
14. Sudharma Karunarathna
Customs House,
No.40, Main Street, Colombo 11.
15. P.A. Abeysekara
Deputy Secretary to the Treasury,
Ministry of Finance & Planning,
The Secretariat, Colombo 01.
16. W.P. Karaunadasa
Customs House,
No. 40, Main Street, Colombo 11.
17. The Honorable Attorney-General
Attorney-General Department,
Colombo.

Respondents

Before: Sisira J de Abrew, J.,
Vijith K. Malalgoda, PC J. and
Murdu N.B.Fernando, PC J.

Counsel: Amaranath Fernando for the Petitioner
Rajiv Goonetilake SSC for the Attorney General

Argued on: 31-07-2018

Decided on: 17-07-2020

Murdu N.B. Fernando, PC J.

The Petitioner a graduate of the University of Colombo, an unsuccessful applicant to the post of Assistant Superintendent of Customs, by a petition filed before this Court in 2012

alleged that his fundamental rights guaranteed in terms of Article 12(1) and 14(1)(g) of the Constitution had been violated by the Respondents. The Court on 21-09-2012 granted leave to proceed against all the Respondents in respect of the alleged violation of Article 12(1) of the Constitution.

The facts of this application, as submitted by the Petitioner, albeit brief is as follows:-

By a notice published in the gazette dated 07-01-2011, the then Secretary to the Ministry of Finance and Planning (the 2nd Respondent) called for applications for the post of Assistant Superintendent of Customs Grade II of the Sri Lanka Customs Department.

According to the said notice, an open competitive examination was to have been conducted in or around April 2011 by the 3rd Respondent Commissioner General of Examinations and the applicants had to face a written examination. Those successful at the written examination were to have been called for a structured interview.

The Petitioner applied for the said post and sat for the written examination. Thereafter, the Petitioner was called for the interview by the 1st Respondent District General of Customs by letter dated 26-09-2011 (P2). The said letter indicated that there would be a general interview at which the applicants were required to produce for examination the documentation and certificates called for and a structured interview at which marks would be given for achievements in sports.

The Petitioner on the relevant date attended the interview and presented the relevant documentation. Thereafter, at a structured interview 'achievements in sports' were examined by the Board of Interview consisting of the 13th, 14th and 15th Respondents.

In April 2012 the Petitioner received a letter from the Department of Examinations indicating the marks the Petitioner obtained at the open competitive examination as follows:-

Aptitude Test	-	074
English Language	-	060
Structured Interview	-	<u>004</u>
Aggregate marks	-	<u>138</u>

The Petitioner also became aware that appointments had been made to the post of Assistant Superintendent of Customs and that several applicants who had obtained an aggregate mark of 139 had been selected and given letters of appointment to the said post.

The Petitioner thereafter made representations to the 1st and 2nd Respondents that at the structured interview for 'achievements in sports' he should have been given nine marks and not four marks as reflected in the letter issued by the Department of Examinations. His contention was that the said additional marks would place him above the cut-off mark of 139 and entitle him to be appointed to the post of Assistant Superintendent of Customs.

The 1st Respondent replied the said appeal stating that it was the interview board (appointed by the Public Service Commission) that had given marks and the maximum marks for a single sport that could be given has been awarded to the Petitioner by the said board. Being aggrieved by the said communication the Petitioner came before this Court alleging that his fundamental rights had been infringed by the actions of the Respondents.

The Petitioner further alleged that according to the gazette notice calling for applications (P1), a maximum of 10 marks were to be awarded at the structured interview for achievements in sports at National, District and Zonal Levels, that he had only been given four marks whereas he had produced certificates demonstrating his 'achievements in sports' viz. being placed first in weight lifting (85 kg) at inter divisional secretarial games of the Hambantota District in the year 2009 and 2010; being placed 2nd at the inter district games of the Southern Province in the year 2009; and other achievements at provincial and university level. Therefore, he alleged that his achievements had not been adequately and properly considered and evaluated by the interview board. His main grievance was that he had not been given marks simply because it was for a single sport, namely weight lifting and the said decision is arbitrary, capricious and beyond reasoning.

The Petitioner also alleged that in the said gazette notice marks were to be awarded for achievements at 'National, District and Zonal level' whereas the letter calling the Petitioner for the interview (P2) requested submission of certification pertaining to achievements at 'National, Provincial and District level' and therefore the Petitioner averred that the marking scheme for the structured interview was wrong, arbitrary, unreasonable, capricious, unlawful, malafide and in violation of the principles of natural justice and therefore violated the Petitioners' fundamental rights guaranteed by the Constitution under Article 12(1).

Thus, the Petitioner prayed that the marking scheme be set aside and for a declaration that his fundamental rights were infringed by the Respondents. The Petitioner also moved Court for a direction to place the Petitioner in his proper ranking in terms of the aggregate marks and to take steps to consider the Petitioner for appointment in terms of the gazette

notice and to appoint the Petitioner to the said post with effect from the date of the appointment of the other successful candidates.

In response to the Petition, the 1st Respondent, then Director General of Customs, in his affidavit averred that the Petitioner was only given marks for ‘achievements in sports’ at the level at which he competed, namely district level. Further, he averred that the gazette notice did not refer to awarding of marks at provincial level or at university level and only considered success in a sport at National, District and Zonal level and in any event success achieved at provincial and university level were equated to district level. The 1st Respondent further averred that in terms of the gazette notice more marks were assigned for candidates who had achieved excellence in more than one sport or many sports at National, District and Zonal level and achieving success for the same sport during different years did not earn additional marks. Elaborating further, the 1st Respondent averred that if a candidate has achieved excellence at National level, District and Zonal level, marks were awarded only for success at the National level being the highest level and not for District and Zonal level. Similarly, if a candidate has achieved success at District and Zonal level, marks were awarded only for success at District level being the highest level and not at Zonal level the lowest level of competition.

The 1st Respondent therefore averred that as the Petitioner had participated and achieved excellence only for one sport namely weight lifting, that he was given four marks for the said sport weight lifting and at district level being the highest level at which the Petitioner had competed. Therefore, the 1st Respondent averred that the Petitioner’s fundamental rights guaranteed under Article 12(1) of the Constitution was not violated or infringed by the Respondents.

The Petitioner did not submit any material or documentation to counter the said proposition of the 1st Respondent.

Having referred to the factual matrix of this application, let me now move on to consider and analyze the said facts in order to ascertain whether or not the Petitioner’s fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by the Respondents.

Article 12(1) of the Constitution reads as follows:-

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

Article 12(1) of the Constitution has been interpreted by this Court on numerous occasions. It is settled law that the said clause treats persons who are ‘similarly circumstanced similarly’ and permits classification of persons who are ‘differently circumstanced differently’ based upon accepted norms and principles of law. It is trite law that the said clause prohibits discrimination of citizens by executive and administrative action not only by substantive law but also by procedural law.

Hence, the matter in issue before this Court for determination is whether the actions alleged by the Petitioner falls within the ambit of the said regime.

The grievance of the Petitioner is in respect of the procedural law; allocation of marks at an interview and not in respect of the substantive law.

The Petitioners’ main submission before this Court was that he was given less marks by the interview board, a mere four marks out of a possible ten marks whereas he should have been given nine marks for achievements in sports, viz 4 marks for inter divisional secretarial games in 2009; 4 marks for inter divisional secretarial games in 2010; and 1 mark for inter district games in 2010. Thus, the Petitioner submitted that the marking scheme was arbitrary among other grounds and violated his fundamental rights.

The Petitioner also submitted that in the letter calling the Petitioner for the structured interview the terminology used for achievements in sports was ‘National, District and Zonal level’ at two instances and ‘National, Provincial and Zonal Level’ at a third instance and the disparity in the reference made the marking scheme referred to in the gazette notice (P1) unlawful and violated the Petitioners’ fundamental rights.

In the first instance, I wish to examine the Petitioners’ application upon the said submission with regard to the terminology. In my view what is material is the gazette notice (P1) calling for applications. In the letter (P2) calling the Petitioner for the interview the marking scheme was reproduced in its entirety and the correct terminology was used. However, at one point instead of the word ‘district’, ‘provincial’ has been used. The gazette notice and the letter calling for the interview are two distinct documents and the above disparity in terminology in my view will not invalidate the gazette notice.

The gazette calling for applications (P1) on the other hand clearly and specifically laid down the criteria for selection. Based upon same, applications were tendered and if conditions were satisfied an applicant was called for the written examination. Upon an applicant obtaining the required marks at the written examination and falling among the

limited number of candidates being called for the interview, an applicant would be evaluated on physical fitness and achievements in sports. Thus, I see no merit in the said submission of the Petitioner that reference to the word 'provincial' at one point in the letter P2 would make the entire marking scheme wrong, arbitrary, capricious, unlawful, unreasonable or malafidae as alleged by the Petitioner.

This brings us to the more contentious submission of the Petitioner pertaining to the award of marks.

According to the gazette notice calling for applications (P1), from among the successful candidates at the written examination the applicants who had obtained the highest marks, were called for a structured interview at which a maximum of 10 marks were to be given for 'achievements in sports' in the following manner.

For individual events and team events respectively,

- at Zonal level - 1st, 2nd and 3rd places - 3, 2, 1 marks
- at District level - 1st, 2nd and 3rd places - 4, 3, 2 marks
- at National level - 1st, 2nd and 3rd places - 5, 4, 3 marks.

Thus, it is observed that a rational criterion has been used to award marks in a scale of 5 to 1 for excellence in sports. Marks were given to a candidate at the highest level of participation either at National, District or Zonal level. Participating and achieving success in more than one sport would entitle a candidate for additional marks, whether it be an individual event or a team event. However, achieving success in the same sport for many years or a continuous number of years will not entitle a candidate for more or additional marks. The total marks awarded to a candidate had to be limited to the maximum ten marks allotted under the said classification. Thus, if a candidate had excelled and placed 1st at national level for two sports he would be awarded 5+5 marks.

In my view the criterion adopted by the Respondents in selecting the best candidate was based upon legitimate, reasonable and intelligible differentia. Hence, the said classification cannot be termed discriminatory or arbitrary as contended by the Petitioner. The main object of the Respondents were to select the most suitable candidates from a number of eligible candidates and an elimination system had to be adhered to, in such a situation.

Therefore, the Petitioners' argument that the marking scheme was unlawful, arbitrary, capricious and violated the Petitioners' fundamental rights is without merit and untenable in law. The Petitioner has also failed to satisfy this Court that he has been discriminated in any

way or establish before us that another similarly circumstanced applicant had been treated differently by the Respondents' to the detriment of the Petitioner.

I wish to consider the grievance of the Petitioner from another perspective. It is common knowledge that sports competitions are conducted at different levels. The successful sportsman at one level then competes at the next level and thereafter at all island or national level. The certificates tendered by the Petitioner clearly establishes that for weight lifting (85kg) he competed at the 2nd level, district level, at an inter divisional secretarial meet of the Hambantota District, in the year 2009 and also in the year 2010 and was placed 1st in both instances. The Petitioner does not aver that he achieved success at zonal or national level in either year. In the year 2009 at another meet, inter district meet of the Southern Province the Petitioner had been placed 2nd for the same sport, under the same weight category. That too was at district level and not at national level. The other meets/games the Petitioner had participated and obtained achievements was at provincial and university level games which were considered on par with district level meets.

In any event, the Petitioners' achievements were evaluated not at 'zonal level' but at 'district level'. Thus, the Petitioners' achievements had been correctly classified as 'district level' and awarded four marks for his success and achievement being placed 1st at district level in weight lifting. This is the highest level the Petitioner has achieved in terms of the marking scheme referred to in P1 and P2 and adopted by the interview board for all candidates. This Court cannot falter the marking scheme applied by the Respondents in respect of the Petitioner in question. Moreover, the guidelines given in the marking scheme had not been violated by the Respondents and the interview board has acted within the said guidelines.

In the said circumstances, I am of the view that the marking scheme adopted by the interview board cannot be deemed arbitrary, capricious or defy reasoning as contented by the Petitioner. Similarly, the marking scheme cannot be deemed unreasonable, or in violation of the fundamental rights of the Petitioner as submitted by the Petitioner before this Court.

If I may consider this application from another angle and accept the contention of the Petitioner that the Petitioners' achievements in weight lifting for each and every year of success should have been considered and marks given, then similarly a candidate who had competed at all levels and come up the ladder and had achieved success at all three levels Zonal, District or National level will also have to be given marks accordingly ignoring the limitation placed on the highest level of achievement. If a candidate has achieved success in a team event in addition to an individual event in more than one occasion then marks will

have to be given to such applicants for the said achievements also. For example, if a candidate was placed 1st at an individual event at Zonal, District and National level in one given sport on a particular year, then he would obtain 3+4+5=12 marks for one sport, which would exceed the maximum ten marks but would be granted only ten marks. If he had competed in the same sport on a different year or in a team event or in a different sport in the same year or on a different year and achieved success, still for all he cannot get any marks for the said success since he had already got the maximum ten marks which would amount to a clear injustice to such a candidate. In my view such a contention would make the marking scheme an absurdity.

In order to avoid such a situation as contended by the Respondents, certain measures were introduced by the interview board for awarding the said ten marks for ‘achievements in sports’ to give a ‘level playing field’ so to speak to all candidates. Hence, the criteria referred to earlier was introduced. Marks were awarded only for the highest level of achievement for one sport and limited for one year though a candidate was successful in that sport on more than one occasion. These types of limitation and classifications in my view stand to reason and are required to streamline the suitability of candidates at a highly competitive examination and for this reason too, I cannot accept the submission of the Petitioner, that the scheme adopted by the interview board was, arbitrary, capricious and violated the fundamental rights of the Petitioner.

Another argument put forward by the Petitioner before this Court was that the acts of the Respondents were in any event unreasonable and violated the principles of natural justice from the context of the administrative law regime of this country. Whilst appreciating the fact that the principles governing fundamental rights have incorporated the administrative law principles in granting equal protection to the citizenry, in my view the case presented before this Court does not fall within the said ambit. In this regard, I agree with the dicta of Mark Fernando J, in **Gamaethige Vs Siriwardena and others [1988]1 SLR 384 at page 399**, where his Lordship opined, that *It is useful to appreciate that the remedy under Article 126(2) cannot be equated to prerogative writs;...* Hence, on the said ground too, the Petitioner has failed to establish that his fundamental rights have been violated by the Respondents.

Before concluding, I wish to observe that unlike in the many reported judgements pertaining to promotions of public officers, in this application the Petitioners’ grievance is with regard to the recruitment process to the Public Service itself and the award of marks at a structured interview. As discussed earlier the Petitioner has failed to establish before this Court that an injustice was perpetrated upon him by the Respondents or that the Respondents have failed to comply with accepted legal norms and principles and the due process of the law.

Further the Petitioner has failed to disclose an act clearly and flagrantly wrongful of one or all or any of the Respondents which is discriminatory of him or infringes his fundamental rights.

The Petitioner also has failed to establish that he had been discriminated in any manner or that another similarly circumstanced applicant has been treated differently to the Petitioner. Hence, the question of breach of principles of equal protection of the law does not arise in this application.

For the aforesaid reasons, I hold that the Petitioner has failed to establish that the 1st to 16th Respondents have violated the fundamental rights of the Petitioner guaranteed in terms of Article 12(1) of the Constitution.

Application is dismissed.

Judge of the Supreme Court

Sisira J de Abrew, J

I agree

Judge of the Supreme Court

Vijith K. Malalgoda, PC J

I agree

Judge of the Supreme Court