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

S.C. (F/R) No. 341/2009

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mr. N.N. De Silva,
Superintendent of Police,
No. 26,
Wilfred Mawatha,
Biyagama Road,
Sinharamulla,
Kelaniya.

Petitioner

Vs.

1. Mr. Jayantha Wickremaratne,
Inspector General of Police,
Police Headquarters,
Colombo 1.
2. Mr. Neville Piyadigama,
Chairman,
National Police Commission,
Rotunda Tower, Level – 3, No. 109,
Galle Road, Colombo 3.
3. Mr. Nihal Jayamanna P.C.
4. Mr. R. Sivaraman
5. Ven. Elle Gunawansa Thero
6. Justice Chandradasa Nanayakkara
7. Ms. Charmaine Madurasinghe

8. Mr. M.M.M. Mowjood
   All Members of the National Police Commission,
   Rotunda Tower, Level – 3, No. 109,
   Galle Road, Colombo 3.
9. Mr. K.C. Logeswaran,
   Secretary,
   National Police Commission,
   Rotunda Tower, Level – 3,
   No. 109, Galle Road,
   Colombo 3.
10. Mr. B.P.I. Karunaratne,
   Senior Superintendent of Police,
   City Traffic,
   Mihindu Mawatha,
   Colombo 12.
11. Secretary,
   Ministry of Defence,
   Public Security, Law and Order,
   No. 15/5,
   Baladaksha Mawatha,
   Colombo 3.
12. Secretary,
   Ministry of Power and Energy,
   No. 493/1,
   T.B. Jayah Mawatha,
   Colombo 10.
13. Secretary,
   Ministry of Petroleum and Petroleum Resources Development, No. 80,
   Sir Ernest De Silva Mawatha,

Colombo 7.

14. The Honourable Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12.

Respondents

Mr. Mahinda Balasuriya,
Inspector General of Police,
Police Headquarters,
Colombo 1.

Added Respondent

BEFORE : **TILAKAWARDANE.J**
RATNAYAKE.J &
IMAM.J

COUNSEL : Sanjeewa Jayawardane with Senany Dayaratne for the Petitioner instructed by G.G. Arulpragasam.
Uditha Egalahewa with Ranga Dayananda for the 10th Respondent.
Ms. S. Barrie, S.C., for the 1st, 11th, 12th, 13th and 14th Respondents.

ARGUED ON : 21.01.2011 & 14.02.2011

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON : 11.03.2011

WRITTEN SUBMISSIONS OF THE 10TH RESPONDENT TENDERED ON : 14.03.2011

<u>WRITTEN SUBMISSIONS OF THE</u>
<u>1ST RESPONDENT TENDERED ON</u> : 08.03.2011

<u>DECIDED ON</u> : 19.07.2011

<u>Ms. Tilakawardane, J.</u>

The Petitioner was granted leave to proceed on 23rd October 2009 on alleged violations of Articles 17 and 126 of the Constitution, complaining that his Fundamental Rights guaranteed under Article 12(1) have been violated by the Respondents. The Petitioner alleges that he was similarly circumstanced as the 10th Respondent but was not granted relief equal to that bestowed upon the 10th Respondent by the National Police Commission of Sri Lanka (hereinafter referred to as the "NPC").

It is not in dispute that the Petitioner joined the Sri Lanka Police as a Sub Inspector on 15th October 1973, currently holds the rank of Superintendent of Police (Grade II), and serves as the Personal Assistant to the Deputy Inspector General of Police, Eastern Range (North), Trincomalee. Criteria for promotions to each succeeding rank in the Police vary from time to time and the threshold criterion is seniority which is assessed on the basis of the number of years an officer serves in a rank. The Petitioner alleged that his due promotions were not given in time although he was eligible for the same, taking into account the number of years he served in each rank. He further alleged that he was eligible to be promoted to the rank of Superintendent of Police (Grade I) on the 15th October 2000.

The Petitioner further alleged that he was politically victimized and promotions due to him were not granted in time owing to wrongful perception that he was partial towards the SLFP Government during the period from 1981 to 1994. The Petitioner states that political victimization was due, more specifically, to four primary factors:

15. The Petitioner's elder brother, Mr. Bradman De Silva, was one of the main witnesses for the prosecution in the S W R D Bandaranaike assassination case.

16. In 1981 during the time the Petitioner was the OIC of the Katharagama Police station, and claims that he legitimately authorized the use of the vacant Police Circuit Bungalow to the late Mrs. Sirimavo Bandaranaike, a former member of the SLFP and a former Prime Minister of Sri Lanka.

17. The Petitioner made a similar facilitation in 1982 to Mr. Vijaya Kumarathunga, the late husband of former president, Ms. Chandrika Kumarathunga, a member of the SLFP.

18. In 1984 whilst the Petitioner was the OIC of the Kelaniya Police station, the Petitioner detected and foiled the large scale theft of Petroleum from the underground product transfer pipe line of the Ceylon Petroleum Corporation, by a criminal gang headed by one Sunil Perera, alias, Gonawala Sunil who was known to have the political patronage and support of a very powerful and influential government minister representing the United National Party from the Biyagama Electorate.

The Petitioner appealed to the Ministry of Defense on 5th September 1994 regarding his political victimization. The Petitioner was thereafter summoned by a Political Victimization Committee constituted by the Ministry of Defense to inquire into acts of political victimization during the period of 1977 to 1994, (commonly referred to as the "Kadawatharachchi Committee" and hereinafter referred to as the same), which recommended that the Petitioner be promoted to the rank of Assistant Superintendent of Police with effect from 1989.

Further, a separate victimization committee appointed by the Ministry of Irrigation, Power and Energy to inquire into the irregularities having taken place in the Ceylon Petroleum Corporation during the period from 1977 to 1994 (commonly referred to as the “Premarathne Committee” and hereinafter referred to as the same) also recommended that the Petitioner be promoted to the rank of Assistant Superintendent of Police with effect from 1989. The then Secretary of Defense, by letter dated 14th July 1997, granted two salary increments to the Petitioner instead of implementing the recommendations of the Kadawatharachchi Committee. The Petitioner concedes that he accepted these two increments without demur.

Despite acceptance of the salary increments, the Petitioner subsequently lodged appeals dated 3rd August 1997 with the Public Services Commission of Sri Lanka and the Inspector General of Police seeking the implementations of the recommendations of the Premarathne Committee. Though the implementations were never put into effect, the Petitioner reached the rank of Assistant Superintendent of Police on 7th June 1999 upon succeeding at a limited competitive examination.

On 17th February 2006 the Petitioner sought the intervention of His Excellency the President Mahinda Rajapakse and the Human Rights Commission of Sri Lanka (hereinafter referred to as the “HRC”) to implement the recommendations of the Premarathne Committee. The HRC refused to entertain his complaint on the purported basis that the same was not tendered within one year of the alleged infringement of the Petitioner’s rights. An appeal lodged at the NPC on 25th May 2006 was rejected on 3rd November 2007 on the basis that the Petitioner was granted relief in the form of two salary increments for the political victimization he suffered. Notably, the Petitioner failed to challenge the said decision of the NPC in these proceedings.

In the case before us, the Petitioner invites this Court to entertain a grievance that he should be provided further relief pursuant to the Premarathne Committee since the 10th Respondent – despite being junior to him in service – has been afforded relief on the basis of a recommendation of the Premarathne Committee resulting in the 10th Respondent's promotion from the rank of Assistant Superintendent of Police to Senior Superintendent of Police. This cannot be done.

Article 17 provides that "*Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this chapter".* In turn, the relevant provision of Article 126 specifying timing provides that *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof****, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.* The strict enforcement of this timing requirement has been made clear in several cases. In Gunewardene v Senanayake F.R.D (1) F.178 the application was dismissed because the Petitioner had not come to court within the stipulated period of one month from the date of the alleged violation of the fundamental rights of equality - not even within one month of the petitioner becoming aware of the alleged discrimination which was the basis of his complaint. This was also approved in Jayawardene v A.G 1 F.R.D 175. In Thadchamamoorthy v A.G Vol. 1 F.Q. 129, the application was rejected on the ground that it had not been filed within the one month time limit and no explanation had been offered for the delay. In Edirisuriya v Navaratnam (1985) 1 SLR 100, the court held that the time limit of one month is mandatory but that in a fit case the court would entertain an application made outside the time limit of one month provided an adequate excuse for the delay could be adduced. In Siriwardene v Rodrigo (1986) 1 SLR 384 it was held that application for infringement for right of equality must be filed within one month of the date from the date of the commission of the administrative act which it is alleged, constitutes the infringement or imminent infringement of the right, but if the Petitioner establishes that he became aware of the infringement only on a later date, the one month would run from that later date. In Gamethige v Siriwardene (1988) 1 SLR 385, Fernando J. said “three principles are discernible in regard to the operation of the time limits prescribed by Article 126 (2). Time begins to run when the infringement takes place; if knowledge on the part of the Petitioner is required, time begins to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle ‘*lex non cogit ad impossibilia’*, if there is no lapse, fault or delay on the part of the Petitioner, this court has a discretion to entertain an application made out of time”.

The Petitioner argues that his motion is within time as it relates to the Order made by the National Police Commission marked P18, which granted relief to the 10th Respondent by back-dating his promotion to the rank of ASP. We find this argument to be untenable as the Petitioner is attempting to characterize the infringement of his rights as one emanating as a result of the 10th Respondent’s back-dated posting. It is clear from the procedural history detailed hereinabove that the infringement of the Petitioners right, his Claim Right, and the one underlying the substantial cause of the alleged infringement is one which occurred during the period in which the Petitioner claimed political victimization, which was at a very much earlier time. The Petitioner’s argument that an infringement of rights occurred because of the 10th Respondent’s back-dating inherently relates back to this period as the only way the relief granted to the 10th Respondent can in any sense be deemed relevant to the Petitioner is if the relief being addressed was an injustice upon the 10th

Respondent in a way that should have also been visited upon the Petitioner – in fact, this argument of “similar situation” is relied upon by the Petitioner. Put another way, the Petitioner’s allegation that he is similarly situated to the 10th Respondent – who suffered an infringement of rights long ago – itself disengages the Petitioner’s contention that the infringement of his rights only recently emanated , and therefore within the constitutionally allowed timeframe.

The Petitioner’s claim of being similarly situated to the 10th Respondent is a specious or unfounded one. Although a broad reading of the relevant histories behind the Petitioner and the 10th Respondent are somewhat similar, discrepancies between the two of enough materiality exist that we are of the opinion that the Petitioner has not met his burden to establish otherwise: “Whether there are other persons situated similarly as the Petitioner is a question of fact and whether the Petitioner is subjected to hostile discrimination is also a question of fact. That is why the burden of establishing the existence of these facts rests on the Petitioner”- Deena v India (1983) S.C. 1154 at 1167 and A.V Nachane v India (1982) S.C. 1126 at 1132. It is undisputed that the 10th Respondent, like the Petitioner, had appeared before the “Kadawatharachchi Committee” and was recommended by the committee to receive promotion to the position of Assistant Superintendent of Police. It is agreed that the 10th Respondent, like the Petitioner, had further been denied the promotion to the rank of Assistant Superintendent of Police by the then Inspector General of Police despite the recommendations of the said committee. It is also stipulated that both Petitioner and 10th Respondent received salary increments as relief in lieu of the desired promotion. This is where the similarities, however, end.

In response to the denial the 10th Respondent has continuously and persistently appealed to the relevant authorities for instatement to the position of ASP, including an initial refusal of the salary increments granted in lieu of the appoint to ASP and appeals to the Kadawatharachchi Committee and the John Senivarathne Comittee (hereinafter referred the "John Senivarathne Committee"), the latter of which the Petitioner failed to ever appeal to despite the fact that it was appointed to inquire into and grant redress to those who did not receive relief from the Kadawatharachchi Committee. The Petitioner states that he accepted the abovementioned salary increments due to compelling financial exigencies, but did so strictly without prejudice to his right to be promoted to the hereinbefore-mentioned rank. However, the persistent question remains as to why the Petitioner did not immediately challenge the decision of the Secretary of Defense before resorting instead to silent acceptance of such relief. He failed to avail himself of pursuing the matter any further even through correspondence, and appears to have tacitly accepted the finality of the decision on his grievance with no further communication as referred to in P17 dated 3rd November 2007. This is referred to in paragraph 46 of the Petition dated 28th April 2009 where he states that " he did not seek to and or impugned the said decision or determination of the NPC as referred to in P17 in as much as he was led genuinely and bona fide believe that the NPC had decided and or determined for reasons best known to itself not to give effect to the said Kadawatharachchi Committee and or the Premarathne Committee recommendations in full but to uniformly and similarly limit the relief granted to those police officers found to have been politically victimized by the said Committees to only two increments. "

The 10th Respondent on the other hand persistently with continuing correspondence commencing from the letter dated 01st July 1997 unequivocally pursued his rights keeping the agitation active, claiming unresolved justiciable rights had pursued every step with dogged insistence until he obtained the final relief, clearly rejecting any intermediate relief, claiming also that he had served in "A1" grade stations and therefore basing his claims not only on political victimization but also on merit and service.

This Court has duly noted that the Petitioner has not produced any evidence of the allegedly received communication issued by the 9th Respondent by post. It has been submitted to and confirmed by this Court that when an officer who is in Gazetted rank is either promoted or his promotion is backdated, such backdating or promotion is communicated to all ranges and divisions immediately through telephone messages or fax. Therefore, the assertion by the Petitioner as to his ignorance of the 10th Respondents promotion granted on 2nd January 2009, despite being the Personal Assistant to the DIG of Police, Eastern Range, (North) Trincomalee, is an unreasonable one, and invalidates his attempt to adjust the starting threshold from which the one month window for complying with Article 126 is to be measured.

It is the view of this court that the Petitioner has not established that he became aware of the alleged infringement on the specified later date. On the basis of the aforesaid findings, it is evident that the Petitioner's statements and evidence are contrary on a balance of probabilities. Therefore the Petitioner's application has no tenable basis in law, and is denied. Application dismissed. No costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree

JUDGE OF THE SUPREME COURT

IMAM.J

I agree

JUDGE OF THE SUPREME COURT