

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

In the matter of an application under and
in terms of Article 126 of the
Constitution.

F. A. Azeez
660/22, Main Street
Matale

Petitioner

SC [FR] Application No. 06/2011

Vs.

1. H. M. Gunasekera
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1A Upali Marasinghe
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1B W. M. Bandusena
Secretary, Ministry of Education &

Higher Education, Isurupaya
Battaramulla

1C Sunil Hettiarachchi
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

1D N. H. M. Chitrananda
Secretary, Ministry of Education &
Higher Education, Isurupaya
Battaramulla

2. M. S. Premawansa
Secretary, Ministry of Education
Central Provincial Council
Gatambe, Peradeniya

2A P. B. Wijeratne
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale

2B R. M. P. S. Ratnayake
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale

- 2C Gamini Rajaratne
Secretary, Ministry of Education
Central Provincial Council
Pallekelle, Kundasale
3. H. M. Wijesiri Herath
Provincial Director of Education
Department of Education
Central Province, Kandy
- 3A E. P. T. K. Ekanayake
Provincial Director of Education
Department of Education
Central Province, Kandy
4. A. H. M. H. A. Herath
Zonal Director of Education
Zonal Education office
Galewala
- 4A A. L. M. Zarudeen
Zonal Director of Education
Zonal Education office
Galewala
- 4B T. N. Hettiarachchi
Zonal Director of Education
Zonal Education office
Galewala

5. Secretary
Public Service Commission
Carl will Place, Colombo 3
6. Hon. Attorney General
Attorney General's Department
Colombo 12
7. Auditor General
Auditor General's Department
Independence Square, Colombo 7

Respondents

Before : Buwaneka Aluwihare, PC., J
Achala Wengappuli J
Arjuna Obeyesekere J

Counsel: Thilini Vidanagamage instructed by Faris and Associates for the
Petitioner
Yuresha De Silva, SSC for the Hon. Attorney General

Argued on: 27th January 2022

Decided on: 09th August 2022

Judgement

Aluwihare PC., J,

The Petitioner in the present application was granted leave to proceed for the alleged infringement of her fundamental rights guaranteed under Article 12(1) of the Constitution in respect of the administrative action taken to revoke her appointment to Class III of the Sri Lanka Education Administrative Service (hereinafter referred to as the SLEAS).

The Petitioner had applied for an appointment to Class III of the SLEAS, and had sat for the Limited Competitive Examination held in 1995. Based on the marks she had obtained at this examination, the Petitioner had been appointed to Class III of the SLEAS with effect from 4th January 1999, by the Education Service Committee of the Public Service Commission, by letter dated 4th December 1998 (P1).

Following this appointment, the Petitioner had assumed duties as an Assistant Director of Education in the Zonal Education Office of Galewala, with effect from 24th February 1999. In addition to the aforementioned duties the Petitioner had been required to cover the duties of an Assistant Director of Education of the Pallepola Division with effect from 1st May 2009.

The Petitioner states that she learnt that a letter dated 19th August 2009 (P9) had been sent by the then Zonal Director of Education (4th Respondent) to the then Provincial Director of Education (3rd Respondent), stating that the Petitioner's appointment to Class III of the SLEAS had been cancelled.

According to the letter (P9), there had been another letter dated 13th March 2000 (1R3), issued by the then Secretary of the Education Service Committee of the Public Service Commission, cancelling the Petitioner's appointment, a copy of which the Petitioner claims, was not given despite her several queries (vide communications marked P10[a]-P10[d]).

By letter dated 23rd August 2009 (P13), the 3rd Respondent had informed the 4th Respondent that consequent to the cancellation of the Petitioner's appointment to the SLEAS (Class III), she should be placed in her former salary scale. Thereafter, by letter dated 1st September 2009 (P14), the 4th Respondent had informed the Petitioner that her appointment to Grade III of the SLEAS had been cancelled by letter dated 13th March 2000 (IR3) and that she had been reverted back to the Teachers' Service with effect from 4th January 1999.

The Petitioner had been placed in Grade 1 of the Sri Lanka Teachers' Service with effect from 1st February 2003 subject to a new salary scale, by letter dated 16th September 2009 (P12[a] -[b]).

Thereafter, by letter dated 22nd September 2009 (P15), the Auditor- General had informed the 3rd Respondent to furnish information regarding the Petitioner, as she had been paid the salary of a Class III Officer of the SLEAS despite the revocation of her appointment. The Zonal Education Office had directed the Petitioner to furnish information on the matter, to which the Petitioner had responded by letter dated 30th September 2009 stating that she had been correctly paid for the services she had rendered as an officer of the SLEAS.

Aggrieved by the said cancellation of her appointment, the Petitioner had filed a complaint with the Human Rights Commission (HRC) on 10th October 2009 (P11), the receipt of which was acknowledged by the HRC by letter dated 11th November 2009 (P11[a]). The Petitioner states that she was summoned by the HRC for an inquiry as evinced by the summons for the inquiries held on 7th May 2010 (P11[b]) and 28th September 2010 (P17). The Petitioner, however, states that no recommendation or decision has been delivered by the HRC, to date.

The Petitioner contends that the decision to cancel her appointment to the SLEAS and to revert her back to the Teachers' Service, as well the recovery of the amount claimed to have been an overpayment constitutes an infringement of the Petitioner's rights guaranteed under and in terms of Article 12(1) of the Constitution.

The learned Senior State Counsel for the Respondents raised two preliminary objections. Namely, that the application is time barred and that in any event the

appointment was cancelled in deference to the order made by this Court, on 29th October 1999, in cases bearing Nos. SC/FR No. 129/1999, 130/1999 and 131/1999

Article 126(2) of the Constitution stipulates that a person who alleges that any of his fundamental rights or language rights has or is about to be infringed by executive or administrative action must within one month of the occurrence thereof file a petition in this Court praying for relief or redress in respect of such infringement.

The learned Senior State Counsel argued that the application is time-barred as the impugned documents marked P12, P14 and P15 had been issued on 16th September 2009, 1st September 2009 and 22nd September 2009 respectively, while the amended Petition was tendered on 13th May 2011 and the original Petition was tendered on 10th January 2011, which is more than one year since the Petitioner's fundamental rights under Article 12 (1) were allegedly infringed.

Although this Court has time and again had held that Article 126(2) should be treated as a mandatory provision, an exception to this rule can be found in the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

Section 13(1) of the Human Rights Commission Act No 21 of 1996 reads as follows;

*“Where a complaint is made by an aggrieved party in terms of Section 14 to the Commission, **within one month** of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, **the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution.**”* (Emphasis added).

The provisions of Section 13 (1) of the Human Rights Commission Act stipulate that if a complaint is made to the HRC within one month of the alleged infringement, then the period during which an inquiry is pending before the HRC shall not be taken into account in computing the period of one month within which

an application may be made to the Supreme Court in terms of Article 126 (2) of the Constitution.

The Petitioner has lodged a complaint with the Human Rights Commission on 10th October 2009 [P11], the receipt of which was acknowledged by the HRC by P11[a]. Copies of the summons for the inquiries held on 7th May 2010 [P11[b]] and 28th September 2010 [P17] have been submitted to the Court as evidence of its pendency. It is the position of the Respondents that the Petitioner has failed to adduce any material reflecting the present position of the inquiry, in order to invoke the exception of time bar on the basis that a complaint had been made to the HRC within one month of the alleged infringement in terms of Section 14 of the Act.

Having regard to the provisions of Section 13 (1) of the Human Rights Commission Act No. 21 of 1996, time ceases to run for the purpose of computing the one-month period stipulated in Article 126(2) of the Constitution, thus, we hold that this application is not time barred.

The cancellation of the Petitioner's appointment to Class III of the SLEAS

The Petitioner contends that the decision to cancel her appointment to the SLEAS and to revert her back to the Teachers' Service contained in the letters marked P12(a) and (b) is illegal and/or unreasonable and/or discriminatory in law.

The Respondents, however, maintain that the steps which resulted in the Petitioner's appointment to Class III of the SLEAS being revoked and the Petitioner being reverted back to the Sri Lanka Teachers' Service as well as the steps to recover the over-payment based on a query of the Auditor-General, were taken in deference to the order made by this Court, on 29th October 1999, in the cases bearing Nos. SC/FR No. 129/1999, 130/1999 and 131/1999.

The Petitioners in the cases referred to in the preceding paragraph, had applied for an appointment to Class III-General Cadre, of the SLEAS on the basis of the Gazette notification bearing No. 832 dated 10th June 1994 and had sat for the Limited Competitive Examination held in March 1995.

Paragraph 16 of the Gazette [referred to above] provides the scheme of selection which states that appointments would be given on the basis of the National Ethnic Ratio. However, appointments had been made on the basis of the language in which the candidates had sat for the examination.

Since recruitment was enforced contrary to the Gazette, the three Petitioners [in those cases] had filed fundamental rights applications for the violation of their rights guaranteed under Articles 12 (1) and (2) of the Constitution. In all three cases the Court held that there was a violation of Article 12 (1), and proceeded to quash the appointments made by the Education Service Committee of the Public Service Commission and ordered that the appointments be made in accordance with the National Ethnic Ratio which had been criteria published as the basis of selection in paragraph 16 of the Gazette.

The Respondents state that in deference to this order, those who were given appointments to Class III of the SLEAS including the Petitioner, had been informed that the said appointments were cancelled as evinced by the letter dated 13th March 2000 (IR3).

The cancellation of the said appointments has also been referred to in the Judgement of case No. SC/FR No. 451/2003. The Court had *inter alia* observed that;

“In compliance with that judgement the appointments that had been given were revoked by letter dated 13th March 2000 and new letters had been issued dated 29th March 2000.....”

The Petitioner contends that she was not a party to any of the Fundamental Rights Applications consequent to which the impugned SLEAS appointments had been cancelled.

Despite the Petitioner’s assertion that she was not a party to the proceedings of the aforementioned cases, the Petitioner’s name figures in the list of candidates who were originally recruited with effect from 4th January 1999, and whose appointments were subsequently quashed by the order made by this Court on 29th October 2000. (*Vide*; the list of the officers appointed to SLEAS Class III with effect

from 4th January 1999 which were submitted to court in SC/FR No.129/1999, on behalf of the Acting Secretary of the Education Service Committee of the Public Service Commission by motion dated 12th May 1999).

Furthermore, the Petitioner's name cannot be found in the list of candidates appointed on the basis of the National Ethnic Ratio, in terms of the order made on 29th October 1999, which was submitted to the Court in the aforementioned fundamental rights cases, by Motion dated 31st July 2000.

Since the Petitioner falls within the group of candidates whose appointment to Class III of the SLEAS had been quashed by the Court order dated 29th October 1999, the consequential steps taken by the Respondents to revoke the Petitioner's appointment to Class III of the SLEAS, and to reappoint her to the Teachers' Service do not amount to an arbitrary exercise of power which would violate the Petitioner's rights guaranteed under Article 12 (1) of the Constitution.

Recovery of excess payments

The Petitioner asserts that there is no justification whatsoever to recover the amount claimed to have been an overpayment in the letter marked P15.

Following the cancellation of the Petitioner's appointment to Class III of the SLEAS, the Auditor-General (7th Respondent) by letter dated 22nd September 2009 (P15) requested information from the 3rd Respondent with respect to the Petitioner, citing the fact that despite the revocation of the Petitioner's appointment by letter dated 13th March 2000 (1R3), the Petitioner had been receiving the salary and travelling allowances of a Class III Officer of the SLEAS.

The Petitioner denies having received the letter the letter dated 13th March 2000, and states that she became aware of its contents only when the letter was filed in Court by the State by way of motion dated 21st February 2012.

Thus, it was contended on behalf the Petitioner, that no reasonable inference can be drawn to establish her knowledge of the cancellation of her appointment [by the letter dated 13th March 2000], as she had performed her duties as a Class III officer of the SLEAS, her salary had been duly paid and she was granted promotions and salary increments.

Despite the cancellation of the Petitioner's appointment to Class III of the SLEAS by IR3, she had only been officially notified of the said cancellation and her reappointment to the Teachers' Service, by letter dated 1st September 2009 (P14). Up to that point, the Petitioner had been performing her duties as an officer of the SLEAS. This is further evinced by the fact that she has furnished information from the database of the Public Service Commission in 2009 [P5(e)]. She had been given a covering appointment as the Director of Education in charge of the Pallepola Division in addition to her regular functions with effect from 1st May 2009 (P8), and her salary increments for the year 2007 too had been approved (P7).

Although, by operation of law, the Petitioner had to revert back to the Teachers' Service, the fact remains that she served and performed duties entrusted to her as an officer of the SLEAS until she was formally notified that her appointment to the SLEAS had been cancelled and that she had been reverted back to the Teachers' Service, by letter dated 1st September 2009 (P14).

Although this application should be dismissed for the reasons set out above, we wish to note that under Article 126 (4) of the Constitution, this Court is vested with extensive power to grant relief or make such directions where deemed necessary in the exercise of its just and equitable jurisdiction in instances where the jurisdiction of this court is invoked in terms of Articles 126 (2) of the Constitution.

Referring to articles 17 and 126 of the Constitution, his Lordship Wanasundera J, in the case of **Jayanetti V. The Land Reform Commission** (1984) 2 S. L.R. 172, observed; *"These provisions vest this Court with sole and exclusive jurisdiction to hear and determine any question relating to an infringement of fundamental rights by executive or administrative action. We are empowered after such inquiries, as we consider necessary, to grant such relief or make such direction in the case as we may deem just and equitable. This is an extensive jurisdiction and it carries*

with it all implied powers that are necessary give effect and expression to our jurisdiction. We would include within our jurisdiction, inter alia, the power to make interim orders and to add persons without whose presence questions in issue cannot be completely and effectually decided. In fact, our present decision in no way widens the ambit of Article 126 but seeks to articulate its real scope and to make the remedy more effective.” [emphasis added]

As referred to earlier the Petitioner has enjoyed the promotion granted to her due to no fault of hers. Even though the relevant authorities had full knowledge of the fact that the promotions granted in 1999 were not in conformity with the law by the year 2000, no steps were taken to revert the Petitioner to the position she held before the promotion was granted. Not only were her services retained as a SLEAS officer of class III, but had granted her salary increments and furthermore entrusted her with covering duties of the Zonal Director of Education [P 19]. Thus, it appears that the Petitioner, clearly had been treated as a SLEAS officer of Class III by the authorities up to August 2009. As such, we do not see any justification in the demand made by the 7th Respondent [P15] to the 3rd Respondent to recover a sum of Rs. 1917464.03 from the Petitioner, on the basis that the said amount was an excess payment that the Petitioner had been paid, with her salary and other emoluments.

It appears from the documents filed along with the motion dated 19.02.2018, [X1, X3] that the 3rd Respondent had taken steps to recover certain sums of money from the Petitioner, presumably, on the basis of the overpayment aforesaid. It is not possible, however, for this court to ascertain the exact amount recovered from the Petitioner from the material available in this case.

Accordingly, I consider it appropriate to make the following direction;

The 2nd and 3rd Respondents or their successors are directed to take steps forthwith to have the amount recovered from the Petitioner, as an overpayment of salary that was paid to the Petitioner during the period she served as a Class III SLEAS officer, paid back to the Petitioner.

Subject to the above direction, this application is dismissed.

In the circumstances of the case, I order no costs.

Application dismissed

JUDGE OF THE SUPREME COURT

JUSTICE ACHALA WENGAPPULI

I agree

JUDGE OF THE SUPREME COURT

JUSTICE ARJUNA OBEYESEKERE

I agree

JUDGE OF THE SUPREME COURT