

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Application for mandates in the nature of Writs of *Certiorari* and *Mandamus* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Writ Application No:
255/2021

1. Hetti Arachchi Wickramage Aken
Thevnaka,
2. Galbokka Hewage Premani Dilani
Dilrukshi De Silva,
(both at No. 44/8, Rahula Road, Matara)

PETITIONERS

-Vs-

1. Francis Wellege,
The Principal of Rahula College (Matara)
and the Chairman of the Interview Board
to admit Students to Grade 1 for the year
2019.
- 1A. Sudath Samarawickrama,
The Principal, Rahula College (Matara).
- 1B. Samitha Kurukulasooriya,
The Principal, Rahula College (Matara).
2. S. S Rathnayaka,
The Vice Principal of Rahula College
(Matara) and a Member of the Interview
Board to admit Students to Grade 1 for the
year 2019.

- 2A. W. A. Wickramasinghe,
Deputy Principal of Rahula College
(Matara).
3. S. T Gunawardena,
Principal of Primary School of Rahula
College (Matara) and Member of the
Interview Board to admit Students to
Grade 1 for the year 2019.
- 3A. Pathmani Ganewatte,
Principal of Primary School of Rahula
College (Matara).
4. N. K Hettiarachchi,
Member of the School Development
Board of Rahula College Matara and a
Member of the Interview Board to admit
Students to Grade 1 for the year 2019.
5. Anura D. Kariyawasam,
Member of the Old Boy's Association of
Rahula College, Nupe, Matara and a
Member of the Interview Board to admit
Students to Grade 1 for the year 2019.
6. Sandya Pathiranawasam,
The Principal of Southland College
(Galle) and the Chairman of the Appeals
and Objections Board to admit Students
to Grade 1 for the year 2019.
7. Sarath Rubasinghe,
A teacher at Rahula College (Matara) and
a Member of the Appeals and Objections
Board to admit Students to Grade 1 for
the year 2019.

8. T. Hewawalgama,
Vice Principal of Sujatha College
(Matara) and a Member of the Appeals
and Objections Board to admit Students to
Grade 1 for the year 2019.
9. Lasitha Rajitha Walawage,
Member of the School Development
Board and a Member of the Appeals and
Objections Board to admit Students to
Grade 1 for the year 2019.
10. Vasika Nilan De Silva,
Member of the Old Boy's Association of
Rahula College, Nupe, Matara and a
Member of the Appeals and Objections
Board to admit Students to Grade 1 for the
year 2019.

All of the above 1st to 10th Respondents
are of Rahula College, Nupe, Matara.

11. Kithsiri Liyanagama,
Director - National Schools, Ministry of
Education.
- 11A. Prabath Nalaka
Director - National Schools, Ministry of
Education,
12. Prof. Kapila Perera,
The Secretary to the Ministry of
Education.

12A. N. M. Ranasinghe,
The Secretary to the Ministry of
Education.

13. Prof. GL Peiris,
Minister of Education.

13A. Dinesh Gunawardena,
Minister of Education.

13B. Prof. G. L. Peiris,
Minister of Education.

13C. Hon. Susil Premajayantha,
Minister of Education.

All of the above 11th to 13th Respondents
are of Ministry of Education,
"Isurupaya", Battaramulla.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Asthika Devendra with A. Madushanka for the Petitioners.

S. Wimalasena, DSG with Ms. A. Weerakoon, SC for the Respondents.

Written submissions tendered on:

06.10.2023 by the Petitioners

27.10.2023 by the Respondents

Argued on: 02.08.2023

Decided on: 13.12.2023

S. U. B. Karalliyadde, J.

This Writ Application has been filed against the Respondents seeking relief regarding the denial of the admission of the 1st Petitioner to Grade - 1 of the Rahula College, Matara for the year 2019. The 2nd Petitioner is the mother of the 1st Petitioner and they are residing at Rahula Road, Matara. The application for admission was preferred under the category of ‘children of residents within the proximity to the school’ mentioned in Clause 3.1 of Circular No. 24/2018 marked as P-2 issued by the Ministry of Education regarding the admission of children to Grade 1 in Government schools for the year 2019. At the interview held regarding the admission, the 2nd Petitioner was asked to enter marks in the First Column of the Chart in the 2nd Schedule marked as P-6 which the 1st Petitioner would be entitled to under that category according to her assessment. When entering marks in P-6 for the proximity from the residence to the school in terms of Clause 7.2.4 of P-2, the 2nd Petitioner had indicated only 32 marks out of 40. As provided by Clause 7.2.4, if there are no other government schools with primary sections located closer to the residence of the child than the school that applied for, the child is entitled to full marks which is 40. If there are any other government schools located closer to the residence of the child where he/she could be admitted other than the school that is applied for, four marks should be deducted from the full marks in respect of each such school. The 2nd Petitioner has put 32 marks after deducting 8 marks from the full marks in P-6 on the footing that there are 3 schools which could be applied for other than Rahula College. In terms of Clause 7.1.5 of P2, when deciding on

proximity to the desired school, straight distance (අනුස්ථ දුර) from the residence of the child to the school should be taken into consideration and marks would be deducted for the schools located within a circle drawn taking into consideration the distance between the main door of the child's residence and the main office of the desired school as a radius. If it is difficult to have access to a school due to any natural obstruction such as rivers, lagoons, marshy lands and forests, even though it is located within the circle marks would not be deducted. The Petitioners assert that even though there are three schools namely, D.S. Senanayake College, St. Thomas College and President's College located within the area of the circle, only 8 marks should be deducted in respect of D.S. Senanayake College and St. Thomas College and four marks should not be deducted in respect of the President's College in terms of Clause 7.1.5 for the reason that Nilwala River causes natural obstruction in accessing from the residence to that school. Nevertheless, the Interview Board (1st to 5th Respondents) had deducted four marks in respect of the President's College awarding 28 marks for the 'proximity from the residence' which resulted in the 1st Petitioner scoring only 88 marks in total at the interview and being placed below the cut-off mark of 89. Even though the 2nd Petitioner attempted to convince the Interview Board that the distance from their residence to the President's College is double the distance from their residence to Rahula College across Mahanama Bridge, the route which the Interview Board suggested, the 1st Petitioner was not selected to the Rahula College.

Being aggrieved by the said decision of the 1st to 5th Respondents, the 2nd Petitioner made an appeal dated 13.11.2018 marked as P7 to the Appeal and Objections Board which consisted of 6th to 10th Respondents. However, the said Board was also of the same view as the Interview Board and decided not to interfere with the marks allocated to the 1st Petitioner by the Interview Board. Thereafter the 2nd Petitioner had complained to the Human Rights Commission on 14.12.2018 (marked P8(a)) regarding the matter and consequent to that, an Inquiry was held by the Human Rights Commission (the Commission) and recommended to admit the 1st Petitioner to the Rahula College Matara (P-9). However, by letter dated 16.03.2021 marked as P12(a), the Ministry of Education intimidated the 2nd Petitioner that there was no possibility of implementing the recommendation of the Commission.

By this Writ Application, the Petitioners seek the following substantive reliefs;

- C. A mandate in the nature of Writ of Certiorari quashing the decision of the Interview Board not to admit the 1st Petitioner to Rahula College Matara for the year 2019;
- D. A mandate in the nature of Writ of Certiorari quashing the decision of the Appeal and Objections Board not to admit the 1st Petitioner to Rahula College Matara for the year 2019;
- E. A mandate in the nature of Writ of Mandamus directing/compelling one or more or all of the above Respondents to admit the 1st Petitioner to Grade - 3 or appropriate Grade of Rahula College Matara;

F. In the alternative to the above prayers/mandates, a mandate in the nature of Writ of Mandamus directing/compelling one or more or all of the above Respondents to comply with the recommendation of the Human Rights Commission as reflected in the document marked P9.

The position of the Petitioners is that even though the President's College is situated within the circle drawn (වෘත්තයක සීමාව) and the straight distance from their residence to the President's College (across Nilwala river) is 862 Meters, the accessible distance by road is about 2 Kilometres. The Petitioners state that from Rahula Road they do not have access to public transportation and therefore to reach a road which has public transportation, the 1st Petitioner has to come to either Hakmana Road, Galle Road or Akurassa Road which has a distance of 700 Meters, 750 Meters and 1 Kilometer from Rahula Road respectively. By public transportation, whichever road is used the 1st Petitioner has to cross the Mahanama Bridge and even then will only be able to reach Matara Bus terminal resulting in travelling another 550 Meters on foot to reach the President's College. When considering the straight distance, the applicants who reside in the Kumarathunga Mawatha and Thotamuna areas are in closer proximity to the President's College than the 1st Petitioner and those applicants have to travel only 350 Meters or 400 Meters to reach the Galle Road and by coming to Matara Bhodhiya through Kumarathunga Mawatha they could easily reach the President's College. Under the above-stated circumstances, the Petitioners argue that the 1st Petitioner is

entitled to the benefit of Clause 7.1.5 in P-2 and accordingly, the marks for the proximity to the school should not be deducted in respect of President's College.

However, the position of the Respondents is that marks were deducted in respect of the President's College as Nilwala River does not pose a natural obstruction to the Petitioners. Since the Petitioners are residing close to Mahanama Bridge which they could use to cross Nilwala River to reach President's College and they have access to public transportation as per the Google map marked R1. Therefore, the Respondents argue that the Petitioners cannot avail of the exception provided by Clause 7.1.5 of the Circular marked as P-2 and they are attempting to take undue advantage of this Clause. The position of the Respondents is that they have complied with the relevant Circular and have acted within the law.

The central issue that the Court has to decide in the instant Application is whether Nilwala River poses a natural obstruction in accessing the President's College from the residence of the 1st Petitioners to be eligible for four marks which the Interview Board had deducted. The Petitioners contend that Nilwala River is a natural obstruction but the contention of the Respondents is that it is not. Therefore, it is abundantly clear that both parties are at variance on a material fact that cannot be decided only on affidavit evidence without considering the evidence of the parties. When material facts are in dispute and the Court cannot make a decision only on the affidavit evidence, it refuses to exercise the discretionary powers to issue Writs.

A.S. Choudri in his book titled “Law of Writs and Fundamental Rights” (2nd edn, Vol.2) on page 449 states thus;

"Where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, a writ will not issue."

Referring to the above-stated quoting, in the case of *Thajudeen Vs. Sri Lanka Tea Board and Another*¹, this Court has held thus;

"That the remedy by way of an application for a Writ is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the Indian cases of Ghosh v. Damodar Valley Corporation, Porraju v. General Manager B. N. Rly."

The Supreme Court in *Francis Kulasooriya Vs. OIC-Police Station-Kirindiwela*² observed that,

¹ (1981) 2 Sri LR 471 at page 474.

² SC Appeal No. 52/2021, SC Minute of 14.07.2023.

“Courts are reluctant to grant orders in the nature of writs when the matters on which the relief is claimed are in dispute or in other words when the facts are in dispute.”

In *Dr. Puvanendran and Another Vs. Premasiri and Two Others*³ the Supreme Court held that;

“The writ of mandamus is principally a discretionary remedy - a legal tool for the dispensation of justice when no other remedy is available. Given the power of such a remedy, the Common Law surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by Court. The Court will issue a writ only if (1) the major facts are not in dispute and the legal result of the facts are not subject to controversy and

(2) the function that is to be compelled is a public duty with the power to perform such duty.”

Citing the above-stated decision, it was held in *Wijenayake and others Vs. Minister of Public Administration*⁴ that disputed facts cannot be decided by a writ court.

In “Administrative Law”, by H. W. R. Wade and C.F. Forsyth, (9th edn, at page 260) it has been stated that;

³ (2009) 2 SLR 107 at page 112.

⁴ (2011) 2 SLR 247.

"Although the contrast between questions which do and do not go to jurisdiction was in principle clear-cut, it was softened by the court's unwillingness to enter upon disputed questions of fact in proceedings for judicial review. Evidence of facts is normally given on affidavit: and although the rules of the court made provision for cross-examination, interrogatories, and discovery of documents, and for the trial of issues of fact, the court did not often order them. The procedure was well adapted for trying disputed facts. If the inferior tribunal had to self-try them, the court will not interfere except upon very strong grounds. There has to be a clear excess of jurisdiction' without the trial of disputed facts de novo. The questions of law and questions of facts were therefore to be distinguished, as was explained by Devlin J. (R. v Fulham etc. Rent Tribunal exp. Zerek).

Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns to a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere. Lord Wilberforce (R v Home Secretary Zamir) similarly described the position of the court, which hears applications for judicial review:

It considers the case on affidavit evidence, as to which cross-examination, though allowable does not take place in practice. It is, as this case will exemplify, not in a position to find out the truth between conflicting statements.

In case of conflict of evidence, the court will not interfere in the decision, where there is evidence to justify a reasonable tribunal reaching the same conclusion.”

Since in the instant Application, dispute between the parties is whether Nilwala River poses a natural obstruction for the 1st Petitioner to be entitled to the marks which were not given by the members of the Interview Board in respect of the President’s College is a material fact which cannot be decided on the affidavit evidence alone, on the light of the above-stated authorities and legal literature this Court decline to exercise its writ jurisdiction.

The Petitioners have sought a mandate in the nature of Writ of Mandamus directing/compelling Respondents to comply with the recommendation of the Commission in the document marked as P-9. The learned Counsel appearing for the Petitioners submitted to the Court that, in terms of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 (the Act), the Respondents abide by to implement the recommendations of the Commission. In terms of Section 14 of the Act, the Commission can investigate an allegation of infringement of a fundamental right by executive or administrative action. According to Section 15(3)(c) of the Act, if an

infringement is disclosed, the Commission can make such recommendations as it may think fit, to the appropriate authority or person/s concerned, to prevent or remedy such infringement. In terms of Section 15(7) of the Act, the Commission shall require any authority or person/s to whom a recommendation is addressed to report to the Commission/ action which such authority or person/s has taken to give effect to such recommendation and it shall be the duty of every such authority or person/s to report to the Commission accordingly. However, in terms of Section 15(8) of the Act, it is clear that when any authority or person/s to whom a recommendation is addressed fails to report to the Commission the action taken, the Commission can only report to His Excellency the President who shall in return cause a copy of such report to be placed before the Parliament.

In the case of *Silva and Others Vs. Director of Health Services and Others*⁵ Sriskandarajah J. held that, “*The recommendation of the Human Rights Commission contained in P1 la and P12 does not take effect proprio vigour. There is no provision in the said Act to enforce the recommendation of the said Commission. If the Commission's recommendations are not complied with, the Commission can only report to the President and in turn it can be placed in Parliament.*”

When considering the above-stated provisions of the Act and the authority, it is clear that the recommendation of the Commission mentioned in P-12(a)/R4 does not take

⁵ (2010) 1 SLR 285 at page 290.

effect by its own force (*proprio vigour*) nor does the Act provide a mechanism to implement its decision even though in the instant Application the Respondents had not complied with the recommendation of the Commission.

Under the above-stated circumstances, I hold that the Petitioners are not entitled to the Writs sought in the Petition to this Writ Application. Therefore, I dismiss the Application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J.
I agree.

JUDGE OF THE COURT OF APPEAL