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 Mandamus and Prohibition under and in terms of Article 140 of the constitution of the Democratic Socialist Republic of Sri Lanka.

CA. (Writ) Application No. 190/2016

G.W.W.B.R.M.M. Dambagalle,
25, Walala,
Menikhinna.

Petitioner

Vs.

1. Justice S.I. Imam
   Chairman,
   Administrative Appeals Tribunal,
   No. 35, Silva Lane, Rajagiriya.

2. Justice N.E. Dissanayake
   Chairman,
   Administrative Appeals Tribunal,
   No. 35, Silva Lane, Rajagiriya.

3. Justice Anil Gunaratne
   Chairman,
   Administrative Appeals Tribunal,
   No. 35, Silva Lane, Rajagiriya.

4. G.P. Abeykeerthi
   Member,
   Administrative Appeals Tribunal,
   No. 35, Silva Lane, Rajagiriya.

5. A. Gnanadasan, PC
   Member,
   Administrative Appeals Tribunal,
   No. 35, Silva Lane, Rajagiriya.

Respondents

Before:	**R. Gurusinghe J.** **&** **M.C.B.S. Morais J.**
Counsel:	Manohara de Silva, PC with Kaveesha Gamage for the Petitioner. N. Kahawita, SC for the Respondents.
Written Submissions:	By the Petitioner – on 31.01.2024, 22.03.2021, 03.02.2020 By the Respondents – on 13.10.2020
Argued on:	15.12.2023
Decided On:	**22.02.2024**

M.C.B.S. Morais J.

The petitioner joined the Department of Sri Lanka Police as a sub-inspector in 1988. Thereafter, he was promoted to the rank of Inspector in 1996, to the rank of Chief Inspector in 2006 and promoted to the rank of Assistant Superintendent of Police in 2007. Applications for promotion to the rank of Assistant Superintendent of Police were invited by circular EU2/22/97 dated 03.09.1998. The process involved a limited competitive written examination, and successful candidates would then be required to participate in a *viva voce*. The petitioner was successful in the aforementioned examination and he was called for an interview as per the scheme of recruitment. Fourteen officers were promoted to the rank of Assistant Superintendent of Police by the Public Service Commission (PSC) through a letter dated 25.06.1999, Ref No. P/1/12/253. However, the petitioner did not get selected.

Through writ applications filed in the Court of Appeal and FR Applications filed in the Supreme Court, a number of officers who were not promoted contested the decision on multiple occasions. These applications led to the occasional promotion of a number of other officers to the rank of Assistant Superintendent of Police. It was discovered that the

examination marks had been given incorrectly in the statement of objections submitted in SC (FR) 641/99, one of the FR cases above stated. The marks of the language competency/ proficiency and general knowledge papers were found to have been converted into a percentage rather than being marked out of 150, indicating that the Commissioner General of Examinations had departed from the scheme authorized by the Public Service Commission and the Cabinet of Ministers.

On the basis that the petitioner along with four others filed an application bearing No. C.A. (Writ) 1484/2002 seeking mandates in the nature of Writs of Mandamus directing the respondents to accept the amended results sheets and to promote the petitioners to the rank of Assistant Superintendents of Police. However, the said application was dismissed by the Court of Appeal on the basis that the original marks sheet filed in S.C.FR No.641/99 remains valid. Then, the petitioner along with other four petitioners appealed to the Supreme Court in cases bearing Nos. S.C. (Spl.) L.A. 13/2005 and 14/2005. While pending those applications this petitioner along with the other four petitioners submitted appeals to the Secretary of the Ministry of Defense and as a result of those appeals, the petitioner was also promoted to the rank of Assistant Superintendent of Police with effect from 29.03.2007 and the Supreme Court dismissed the said cases. However, the other officers other than the petitioner all who were promoted on several occasions based on the same examination, were promoted with effect from 07.06.1999.

Because he was serving in Sudan as a Civilian Police Officer for UNMIS (Sudan) on an official assignment starting on 22nd of February 2007, and returning to Sri Lanka on the 8th of April 2008, the petitioner claims he was unable to file an appeal backdating the date of his promotion. Additionally, he claims that despite having filed an appeal with the National Police Commission (NPC), shortly after his return to Sri Lanka, requesting that his promotion be retroactively set to 7th June 1999, of which he does not have a copy of it with him. The fact that he has appealed to the NPC is substantiated by paragraph 3.ii. of the document 'P 21' and it is quite evident the petitioner has appealed to the NPC on 11th of June 2008. The petitioner states that soon after he submitted his appeal to the National Police Commission, the term of office of the National Police Commission expired and new appointments were not made and petitioner did not receive any response.

During the two years 2009 to 2010, the PSC was also defunct as its members were not appointed. All PSC matters were handled by the cabinet while certain matters were delegated to the ministry secretaries.

As per the petitioner, though, he has submitted an appeal to the Appeals Tribunal of the Department of Police on 28.06.2010 a response has not been received. In June of 2011, the Inspector of Police called upon all the officers to submit their appeals to the Public Service Commission and National Police Commission due to the said commissions not functioning for a considerable length of time. On 26.09.2011 he submitted his appeal to the Public Service Commission. As he did not receive a reply, again appealed on 18.08.2012. On 05th of October 2012 the petitioner was requested by the Department of Police to submit an appeal using the format gazette in Gazette Extraordinary No. 1589/30. On 21st of September 2013, The Public Service Commission refused to backdate the petitioner's promotion. Then he appealed to the Administrative Appeals Tribunal (AAT) against the decision of the Public Service Commission and it also refused the petitioner's application.

The petitioner filed this application alleging that his fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by the respondents.

Therefore, the petitioner seeks the following substantive reliefs from us.

- Issue a mandate in the nature of a writ of certiorari quashing the decision of the order of the Administrative Appeals tribunal dated 02.03.2015 made in case bearing No. AAT/259/2013 (PSC);

- Issue a mandate in the nature of a Writ of mandamus directing the 1st to 3rd Respondents or anyone or more of them to vary the decision of the Public Service Commission to grant the petitioner the said promotion to the rank of Assistant Superintendent of Police with effect from 07.06. 1999

When this is argued on 15.12.2023, parties have agreed to file a short synopsis of submissions on or before the 31st of January 2024. But only the petitioner has filed such and I would consider the written submissions filed by the respondents on 13th of October 2020, in addition to the arguments submitted orally.

This petitioner challenges the validity of the order of the AAT made on 02nd of March 2015 on the basis that being arbitrary, capricious and unreasonable. Furthermore, the petitioner

alleges that the said order violates the fundamental rights guaranteed by Article 12 (1) of the constitution.

In ***Wickremasinghe V. Ceylon Petroleum Corporation and Others*** [2001 (2) Sri LR 409 at 416-417], Chief Justice Sarath Silva, after analyzing whether Ceylon Petroleum Corporation's decision to end the petitioner's lease was arbitrary given that the decision was deemed unreasonable, the following was stated:

"The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.

The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. But, the test once again is one of being reasonable and not arbitrary. Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time, it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis.

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that

have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority." [emphasis added]

In ***Karunathilaka and Another V. Jayalath de Silva and Others*** [2003 (1) Sri LR 35], Shirani Bandaranayake, J. held that;

"The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which have a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions."

In ***W.P.S. Wijerathna V. Sri Lanka Ports Authority and Others*** [SC (FR) Application No. 256/2017; SC minutes of 11th December 2020], Kodagoda, PC, J, citing the extensive series of decisions that examined the implementation of the equality principle included in Article 12 (1) concerning appointments and promotions within the Public Service, it was stated that;

"... as pointed out repeatedly by numerous erudite judges, 'arbitrariness is the anathema of equality'. In India's former Chief Justice Bhagwati's words, 'equality and arbitrariness are sworn enemies'."

In **'Fundamental Rights in Sri Lanka – A Commentary'** by Chief Justice S. Sharvananda (1993), stated as follows at page 81:

"Equal protection means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the law … The guiding principle is that all persons and things similarly circumstanced shall be treated alike. Equality before the law' means that among equals the law should be equal and should be equally administered and that the like should be treated alike. What it forbids is discrimination between persons who are substantially in similar circumstances or conditions… It is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same."

Since equality rests on the solid foundation of the Rule of Law, appropriate classification is not prohibited. It would be necessary for a categorization to be based on acceptable differentia in order for it to be considered legitimate and permissible if it is not arbitrary.

In ***Ruchira Arjuna Meeriyagalla and others V. Hon. Attorney General*** S.C.S.D.No. 06/2019;

Article 12(1) of the Constitution reads as follows;

"All persons are equal before the law and are entitled to the equal protection of the law".

This Court, in its determination on the constitutionality of the "Private Medical Institutions (Registration) Bill" observed that, "equality as enshrined in Article 12 of the Constitution, permits legislation based on a reasonable classification where the criteria for such classification advances its objectives. The Bill undoubtedly subjects Private Medical Institutions to a different legal regime than the one applicable to State Sector Institutions as contended by Counsel for Petitioners. But we are of the view that there is a reasonable basis for such classification."

According to the ***Shri Ram Krishna Dalmia V. Shri Justice S.R. Tendolkar*** (AIR (1958) SC 538) for a categorization to be deemed genuine, two requirements must be met. These requirements could be expressed as follows:

In order, however, to pass the test of permissible classification two conditions must be fulfilled, filled namely,

1. That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and,

2. That the differentia must have a rational relation to the object sought to be achieved by the statute in question.

In the case of ***The State of Bombay and Another V. F.N. Balsara*** *(1951) AIR 318(SC)**,** it is stated that;*

"Art.14 of the Constitution (which provides that the State shall not deny to any person equality before the law or the equal protection of the laws) in as much as the relaxation of the general law in respect of the persons contemplated by the section is not arbitrary or capricious but is based on a reasonable classification."

Equals must be treated equally, which means it is necessary to implement a classification system that treats people in comparable circumstances fairly.

It would be up to the respondents to justify any categorization if any. The respondents state that the appeal to the AAT by the petitioner was time-barred. In addition, the petitioner has been in abroad on official duty, from 22.02.2007 to 04.06.2008. It should be noted that both the PSC and the NPC were non-functional in 2009-2010. The petitioner has appealed to the PSC in 2011. The AAT has upheld a preliminary objection by the PSC that the appellant has not appealed to the NPC or the AAT in time. However, it should be noted that neither the NPC nor the PSC was functional in 2009-2010 and appellant could not have gone to the AAT until the decision of the PSC on 26.09.2011. Further, it is apparent that the PSC has not refused or rejected the petitioner's appeal on it being delayed or the application being time barred.

The petitioner has been successful in the test selecting the promotions to the rank of ASP in 1998 and nowhere in the objections of respondents that claim that the petitioner has not reached the necessary criteria and the standard. Therefore, the question is whether the AAT properly evaluated the material before them as for the facts. Whereas the petitioner secured 371 marks and two other officers namely Dayananda having obtained 363.2 and Ellepola 363.8 marks, have already been promoted to the rank of ASP with effect from 7th of June 1999.

When considering the decision of the AAT marked and produced as 'P 23' in the first paragraph of that order, it is said that "*The "Ap" did not appeal to the National Police Commission nor to the AAT (Administrative Appeals Tribunal) at the moment, but tendered an appeal to the PSC only on 18.08.2012."*

It is evident that the petitioner has in fact appealed to the NPC on the 11th of June 2008. As far as appeal to the PSC is concerned, one of the grounds that the PSC having rejected the appeal is that the petitioner has agreed on the date of promotion as 29th of March 2007 before the Supreme Court. However, it should be noted that the petitioners have not withdrawn the case but the court has dismissed it. Therefore, it would be incorrect to allege that the petitioner has accepted the subsequent date of promotion.

The petitioner has submitted an order of the AAT dated 21st of May 2015, concerning some other party marked as 'P 26'.

When comparing the two orders dated 21st of May 2015 and 2nd of March 2015, they are identical factually. However, in the said 'P 26' the AAT has allowed the appeal for the reasons set out therein. Having considered the present case, I do not see any reason to differentiate this from the decision contained in the said 'P 26'. Therefore, by the impugned order 'P 23' the AAT has taken into consideration incorrect factors and it fails the test of reasonableness and equality and accordingly, the order of AAT could not stand.

Therefore, with regret of have to set aside the order of the AAT dated 2nd of March 2015 and grant relief (b) in the prayer of the petition. Though the AAT has dismissed the petitioners appeal on a preliminary objection, when considered the order 'P 26' the line of thinking of the AAT is quite evident. As I do not see any reason to deviate from the said findings, there is no purpose in ordering a fresh hearing. Therefore, the relief (c) as prayed for should also be granted. Accordingly, I direct the AAT to backdate the promotion of the applicant on 07th of June 1999 and relief prayed in prayer b) and c) are to be granted as prayed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal