HAPUTHANTIRIGE AND OTHERS
v
ATTORNEY GENERAL

SUPREME COURT
SARATH N. SILVA, C.J
DISSANAYAKE,.J.
SOMAWANSA,.J.
SC FR 10,11,12, 13/07
MARCH 14, 15, 2007

Fundamental rights-Constitution Art 12(1), Art 29, Art 126 (4) – 13th Amendment – Grade 1 admissions to National Schools – Circular arbitrary unequal and capricious – National Policy – Affirmed by Cabinet of Ministers?– Classification – 'Royster formulation '– National Education Commission Act 19 of 1991 – S2 – Education Ordinance.

The petitioners in all the applications allege infringement in respect of the refusal to admit the several children named in the petition to Grade 1 of the respective National Schools. The allegations are related to unequal, arbitrary and capricious application of the Circular. The scheme of the Circular is to state the National Policy for admission of student to schools. The circular also states that the National Policy has been affirmed by the Cabinet of Ministers.

Held:

Quarere

"It is stated in paragraph 1.0 that the National Policy has been approved by the Cabinet of Ministers and reference is made to a letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers, however it is noted that the Circular itself is dated two days prior – this by itself renders it doubtful whether in fact the Cabinet of Ministers considered a National Policy on school admission as claimed in the Circular.

1) The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Art 12(1) sets out the positive element of the right that all persons are equal before the law, and guarantees "the equal protection of the law" and the bar

against discrimination on grounds of race, religion, language, caste, sex political opinion or place of birth – the safeguards that assume equality before the law.

2) Taken in the context of the Republican principle of equality and the fundamental guarantee thereof the phrase the law in Art 12 has to be interpreted in a wider connotation than the term law and within law in Article 170 to encompass any binding process of legislation.
3) The guarantee of the right of equality in Art 12 should extend to any binding process of legislation laid down by the executive or the administrative which affects in its application.
4) The law in its primary sense is contained in the Education Ordinance, but the Ordinance has not been amended and the elaborate system of regulations has fallen into disuse, and there is no law that is operative as regards National Schools or for that matter in regard to any School. Education, being the foremost responsibility of the Government has been operating for a long time in a legal vaccum.
5) The impugned Circular does not have of the general characteristics that, pertain to policy, it has a classification of 7 categories, from a functional perspective it is the binding process of legislation laid down by the executive as regards the matter of admission to government schools.

Per S.N. Silva, C.J.

"Both from the perspective of the application of the equal protection of the law guaranteed by Art 12 (1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admissions of students to schools should be that it assures to all students equal access to education".

6) The classification in the impugned Circular is not based on the suitability and the need of particular child to resume education in a National School or any other State School. It is based on wholly extraneous considerations and the suitability and the need of the particular student to receive education in the school is not ascertained in the process nor is there any method and criteria specified to ascertain such matters. The system of weighted marking contained in the Circular consequently defeats the objective of providing equal access to education.

7) The impugned Circular is inconsistent with the fundamental right to equality before the law and equal protection of the law guaranteed by Art 12(1), in so far it relates to the admission of students to Grade 1 of national/other school to which the Circular has been made applicable.

8) Section 2 of the National Education Commission Act 19 of 1991 empowers the President to declare from time to time the National Educational Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy has to be formulated on the recommendation and advice of the Commission.

APPLICATION under Art 126 of the Constitution.

Cases referred to :-

1. *Gulf Colarado and Santa Railway Co.* v *Ethis* – (1897) 165 US 150 165
2. *Royster Guano C* v *Commonwealth of Virginia* – 1920 – 253 US 412 at 415
3. *Brown* v *Board of Education Topika* – 347 US 483

Wijedasa Rajapakse PC with *Rasika Dissanayake and Gamini Hettiarachchi* for peririoners

Nuwan Peiris for 19th and 30th respondents

Sanjay Rajaratnam DSG for 2 - 8th and 10th - 12 respondents

Cur.adv.vult.

March 29, 2007

SARATH N SILVA, C.J.

The petitioners in all the application have been granted leave to proceed on the alleged infringement of their fundamental rights guaranteed by Article 12 (1) of the Constitution. The infringements they allege are in respect of the refusal to admit the several children named in the petitions to Grade 1 of the respective National School.

Admission to Grade I in Government school have resulted in a large number of applications being filed each year in this Court alleging infringement of the fundamental rights guaranteed by Article 12(1) and also in the Court of Appeal for *writs of certiorari* and *mandamus*. These matters have been generally dealt with as being urgent since the children on whose behalf the jurisdiction of the Court have been invoked are denied schooling and require relief without delay. With the intervention of Court administrative relief has been granted in many of the cases by admitting the children to the particular school concerned or to an alternative school.

The allegations have related to unequal, arbitrary and capricious application of the relevant circulars resulting in less

suited children securing admission to the detriment of the children who have been thereby compelled to invoke the jurisdiction of Courts. Quite apart from the thrust and parry of allegations and counter allegations, the underlying cause of this pervasive malady is the ever increasing demand for admission to leading schools in Colombo and other principal cities, administratively designated as National Schools within the purview of the Central Government as distinct from other schools within the purview of Provincial Councils and, the limited and number of places in such schools. Plainly, it is a situation of demand out stripping by far the availability of places. The response of the authorities to this classic situation of a gross mismatch in supply and demand has been to narrow down, through an intricate system of criteria contained in circulars (that would be examined hereafter), the area that would feed a particular school described in the Sinhala Circular as "පාසලේ පෝෂිත ප්‍රදේශය" "The feeder area" of the leading school have become preposterously narrow to be as low as 600 meters for D,S Senanayake Vidyalaya located between Bullers Road and Gregory's Road in Colombo 7 and 1000 meters for Ananda College abutting Maradana Road, in Colombo 10. It is probable that none of the children admitted live within this narrow official "feeder area". If the Officials and particularly the principals of the schools stay outside the gates at commencement and close of school hours, they would see that the "feeder" buses and vans, that transport school children are from as far out as Gampaha, Nittambuwa, Negombo and Kalutara. The upshot is the nightmare of school time traffic which disrupts all other activity in the city. The reality of the faulty process that we have to address from a legal perspective was pithily captured in an editorial comment of a leading newspaper early this month as follows:

> "That, the education sector is in a total mess becomes manifestly clear, year in year out from the brouhaha over the Grade One admissions. If the objective of education is to produce good citizens, the opposite of that happens in this country. Children are trained to be liars from the very beginning of their schooling. Parents forge bundles of documents to "prove" that they live within the stipulated distance from the schools of their choice and children are trained to memorize and utter blatant lies to cover up that

crime at the interviews, where they are debriefed by teachers and principals to check whether their parents are lying! In a country where children are trained to lie at a very tender age, it is not surprising that more and more people want to enter politics! How can the Ministry of Education, which cannot deal with at least a child's school admission properly, handle his or her education efficiently thereafter?"

Notwithstanding virulent criticism, the authorities have continued in the same way allowing matters to be resolved in Court. Recourse to Court has increased over the years to reach a remarkably high figure this year. Often, when leave to proceed is granted the authorities agree to the admission of the children concerned rendering it unnecessary to proceed with the matter further. In view of the persistent allegations of infringements it was decided that number of cases be grouped together and heard on two dates by this Bench.

With the assistance of counsel, including counsel of the Attorney General's Department, we have been able to comprehensively examine the relevant provisions of the impugned Circular and the ramifications of applying them....

The lead cases in which pleadings are complete relate to Sujatha Vidyalaya, Matara (S.C.F.R 10 – 13 of 2007) Mr. Wijyadasa Rajapakse, President's Counsel who appeared for the petitioners presented submissions on a two fold basis, viz:

(i) That the application of the provisions of the Circular to the relevant facts by the Respondents has been arbitrary and capricious, resulting in infringements of the fundamental rights guaranteed to the Petitioners by Article 12(1) of the Constitution.

(ii) That the classifications and criteria in the Circular applicable to the admission to Grade I are *per se* unreasonable and cannot be rationally related to the object of providing equal access to education.

President's Counsel strenuously submitted that the object of free education provided by the State is not to favour particular groups by reserving the best facilities to pre-

identified categories such as children of past pupils, and brothers and sisters of those already in a particular school. Such reservations do not pertain to the suitability of the child for admission and are in any event inconsistent with the character and purpose of a National School.

The facts relevant to the four applications in first group typify the complaints of alleged violation that are based on a combination of unreasonable and vague criteria and the arbitrary application thereof. The petitioners in the four cases made applications for the admission of their respective children to the Sujatha Vidyalaya, Matara, on the basis of Circular No. 20 of 2006 dated 23.05.2006 issued by the 10th respondent, being the Secretary of Ministry of Education, titled "Admission of Children, to Schools" (P1). The Circular is available only in Sinhala.

The petitioners admittedly reside within close proximity of the Sujatha Vidyalaya and their common complaint is that on the elaborate system of assigning marks which would be considered later, they infact received sufficient marks to secure admission of their children. However, 30 other children, residing further away secured admission depriving the petitioners' children of their due places in view of a decision of the respondents (stemming from a decision of the Acting Director of Education, as contained in document 6R4) to assign 15 marks to each child who was born at the Matara Hospital. As a result the petitioners children fell below the cut off point giving an undue advantage to children who were born in the Matara Hospital.

The case of arbitrary exercise of power in applying the Circular was unanswerable and the respondents agreed as an interim measure to admit the children to school. However, this would be in addition to the 30 children who secured admission due to the fortuitous circumstance that they were born in the Matara Hospital and not in any other Hospital. That would have ordinarily concluded the case but for the decision to deal with the alleged infringements vis-à-vis, the Circular in a comprehensive manner.

In this background I would examine the impugned Circular (P1) issued by the Secretary Ministry of education, referred to above. The Circular has several parts including that relevant to

these applications dealing with the admissions to Grade I. The scheme of the Circular is to state in Part I, the national policy for admission of students to schools. It is stated in paragraph 1.0 that this national policy has been affirmed by the Cabinet of Ministers and reference is made to letter dated 25.5.2006 of the Secretary to the Cabinet of Ministers. However, it is noted that the Circular itself is dated two days prior, that is on 23.05.2006. This by itself renders it doubtful whether infact the Cabinet of Ministers considered a national policy on school admission as claimed in the Circular. Be that as it may, similar Circulars appear to have been issued even in the previous years and the Circular is examined on the premise that it is an act of the executive.

The national policy in respect of the different levels of admission to schools as contained in the Part I, is elaborated in the other parts of Circular and the schemes of marking are contained in the schedules at the end.

Admissions to Government schools are effected mainly at two levels

They are;

i) Admission to grade I being the subject matter of this application; and

ii) Admission to Grade VI based entirely on an island-wide scholarship examination;

The second level of admission at Grade VI rarely result in complaints, since it is based on the marks assigned at an examination conducted by the Department of Examinations. Thus, a merit based scheme is less prone to allegations of abuse provided it is properly structured to ensure transparency. The main submission of the President's Counsel is that the scheme for Grade I as contained in the Circular is totally devoid of a merit criteria in the sense of the suitability of a child for admission to particular school and is based on extraneous criteria such as ownership/occupation of property: the record of the parent as a past pupil (when both parent have been past pupils marks being attributed in respect of the parent having the better record); and the record of any brother or sister of the applicant child, already in that school. The extent to which the suitability of the child is excluded from the process is seen from the fact that no marks whatsoever are attributable on that account.

Counsel submitted that the resources of the State being public funds are spent largely on National School and that it is essential that the facilities in such schools being limited, the suitability of the child should be the principal criteria with a "feeder area" being realistically fixed with reference to Divisional Secretaries areas. That, the assignment of quotas to past pupils and brothers and sisters is an unreasonable classification which negates equal access to education being be the objective of the law.

In the light of these submissions being far reaching in their ambit, I would at first examine the specific classification that are made in Circular P1 in respect of admission to Grade I. The circular classifies seven categories specifying a percentage of admission for each as follows:

1) Householders children 40%
2) Children of the past-pupils of the school 25%
3) Brothers and sisters of the children receiving education in the school 15%
4) Children of the public officers who have received transfers and taken residence in the area in which the school is located and the children of MP's and Provincial Councilors who have to live outside their area of residence 06%
5) Children of persons who are not householders 07%
6) Children of persons who are directly involved in institutions connected with school education 05%
7) Children of persons who have returned from abroad 02%

In addition to the foregoing, clause 1:1 (d) provides that the initial selection should be of 34 student per class and 5 places be reserved for children of members of the Armed Forces and the Police who are engaged in service in operational areas. One place is reserved for the children of persons who get transferred after the initial admissions on the basis of exigencies of state service. Thus a total of 40 student is specified for each class.

Clause 5:1 specifies the qualifications for admission from the householders category for 40% of the vacancies. It is stated that children permanently resident close to the school would qualify on the basis of residence of their parents or their grand parents where the parents are living in the same house.

5:1 (b) provides that residence should be for six years or more and to gain priority following criteria is set out. They are

i) ownership of the place of residence;

ii) evidence of permanent residence and the period;

iii) distance to the school from the place of residence;

5:1(c) states that evidence of ownership would be:

i) Title deed;

ii) Householders list;

iii) Permit granted by the National Housing Authority;

iv) Title deed of the grand parents if the residence is the grand parents house

v) A certificate issued by the head of the Institution as regards residence in official quarters;

vi) Any other applicable document

Schedule II contains a scheme of marking in reference to particular documents.

A maximum of 50 marks will be assigned as follows:

i) a document confirming the ownership	25
ii) birth certificate of the child(the relevant address to be included)	15
iii) certificate of the Grama Sevaka confirmed by the Divisional Secretary	05
iv) electricity, water, telephone and the like	03
v) any other documents	02

Clause 2 of the schedule assigns further total of 150 marks for the period of residence in the particular place. If the residence is over 6 years 150 marks, if it is 5-6 years 90 marks and 4-5 years 30 marks.

Clause 3 gives the marks on the basis of distance from the school. The distance is calculated from the office of the primary section of the school. If it is calculated from the office of the primary section of the school. If it is within 500 meters – 60 marks, and the number of marks get reduced proportionately as it goes further and where the distance is more than 3000 meters only 5 marks will be given.

President's Counsel made serious criticism of this entire scheme. He submitted that the document as to residence being the most important on which the marks as to distance and so on are also calculated, is specified as a title deed. He submitted that the persons before whom the documents are produced are not qualified, in any way to decide on the validity or otherwise of a title deed. The validity of a deed and the title conveyed thereby is a vexed question in civil litigation. It appears that the only matter looked into is the fact of registration. Under our law, registration does not attribute title to land is at best a claim to priority, which has to be considered in the light of the other registered documents. We have to yet move into a system of title registration.

Counsel accordingly submitted that this has left open an avenue for fabrication of deeds, especially in urban areas. He further contended that in any event one could have ownership of property that is not reflected in a title deed. In a situation where property is inherited from a parent who has died and the testamentary proceedings are not concluded there would be no registered document. Similarly, an instance of co-ownership or of prescriptive possession cannot be proved by a title deed as required in Clause I (i) of the schedule. Such a person would fall outside the entire scheme of marking. Thus the scheme favours the person who secures a title deed by hook or crook and may well exclude the genuine owner. The editorial comment of "bundles" of forged documents stems from these requirements in the scheme of marking.

It was revealed that several criminal prosecutions have been instituted against applicant parents; a sad ending to an endeavour to secure the admission of a child to a school of choice.

The extent of the prevarication of documents that take place is reflected in Supreme Court case No. 101/2005 which relates to an application for admission to Ananda College. The parent had obtained a lease for premises bearing No. 142 Temple Road, Colombo 10. These premises are said to be located 50 meters away from Ananda College. The document P8 produced in that case is the electoral list in respect of the said premises. The name of the applicant parent who is a member of the Armed Forces appears as chief householder. The second name is that of the mother. The third is an entirely different name of a medical officer. The fourth is a lecturer of a University who appears to be the wife of the third person. The fifth and sixth are persons bearing different names who have no occupation. The sixth is described as a Coordinating officer. The eighth is described as being self employed. There is yet another, making a total of nine. The *modus operandi* appears to be that each year the particular applicant shifts to the top position and present chief occupant who has made use of that position drops down. Ironically, the owner who has purported to give the lease is also included as one of the occupants. Hence, there is no change in the actual possession of the premises.

Being located 50 meters away from Ananda College the place is of high demand. Quite apart from fraudulent school admissions this situation presents a serious danger to the exercise of the franchise and the electoral process.

The next basis of assigning marks to a householder is on the birth certificate of the child concerned. This requirement is misconceived since the child is not given an address in the birth certificate. The particulars given of the mother and father in the birth certificate are places of their birth. It appears that the authorities have had in mind, the address of the informant specified in the reverse of the birth certificate who could be any person furnishing the information to the Registrar of Birth. In respect of birth at the Matara Hospital, in place of name of the informant the rubber stamp of the DMO had been placed. In these circumstances the authorities

decided to assign the full 15 marks to children born in the Matara Hospital. It is inexplicable that the acting Director herself who is supposed to be in charge of subject has given instructions on such a nonsensical basis. No person with an iota of common sense would give such an instruction. In view of this atrocious mistake 30 children secured admission.

President's Counsel then took on category of past pupils. He submitted that in terms of schedule 03 of the Circular marks are given on the basis of the period spent by the parents in the school; the examinations passed, performance including participation in musical band and so on. The significant point raised by Counsel in that where a parent had gained admission to the school pursuant to the year 5 scholarship examination only 2 marks are assigned. A clear instance of discrimination in respect of parents, long stayers preferred as against scholars. Whereas when parent had entered at grade I and continued 13 marks are assigned. Counsel submitted that it is irrational to assign marks on the basis of the period the parent has spent in school and his achievements both as a student and in extra curricular activities.

There is indeed merit in the submission of Counsel and when one peruses the scheme it appears as if though the scheme is designed to ascertain the suitability of the parent for re-admission to the school and not that of the child whose suitability is totally ignored.

Similarly, in the other category of brothers and sisters marks are assigned in respect of achievements of the brother and sister already in school. In respect of both categories residence is also a criteria which has to be decided as in relation to householders. That scheme as revealed in the preceding analysis is totally flawed.

As regards the category of "transfers" Counsel submitted that Members of Parliament and Provincial Councillors are given maximum of 20 marks although they are not in a transferable service. It has to be noted that upon election they should remain to serve their electorates and not move to urban centers and be removed from the area where their attention is most needed. If the elected members remain in their particular areas those schools will develop and the demand for leading school would gradually diminish. The scheme is totally misguided in respect of elected representatives.

President's Counsel submitted that reserving of 2% of the vacancies for persons who return from abroad results in an incongruity where places may have to be kept vacant for such persons denying facilities to children who have had continued residence within the country. These vacancies are later filled in a surreptitious way. It appears that there is no end to the list. The maximum of 40 for a class is exceeded by far and at times a whole new class is established to accommodate those who are favoured.

Since the challenge to the validity of the Circular has far reaching implications, I have to examine the grounds urged from the ambit of the fundamental right to equality guaranteed by Article 12(1) of the Constitution.

The Preamble of the Constitution states the "immutable republican principles" on which it is based as being "Representative Democracy" and the assurance to all people "Freedom, Equality, Justice, Fundamental Human Rights and the independence of the judiciary". These principles partake of Democracy and Socialism being the components of the name of the Republic.

The principle of equality acquires a functional dimension as the fundamental right to equality guaranteed by Article 12 of the Constitution. Sub Article (I) sets out the positive element of the right, that "all persons are equal before the law". The other provision in Sub Article (1) which guarantees "the equal protection of law" and the bar against discrimination on grounds of race, religion, language, caste, sex, political opinion or place of birth contained in Sub-Article (2), are the safeguards that assure equality before the law. Taken in the context of the republican principle of equality and the functional guarantee thereof, the phrase "the law" as appearing in Article 12 has to be interpreted in a wider connotation than the terms "law" and "written law" defined in Article 170 of the Constitution, to encompass any binding process of regulation. Since the jurisdiction of this Court in terms of Article 126 and the right as contained in Article 17 to invoke such jurisdiction is in relation to executive or administrative action, the guarantee of the right to equality in Article 12 should extend to any binding process of regulation laid down by the executive or the administration which affects persons in its application.

It is necessary at this point to ascertain "the law", including any binding process of regulation, from the perspective of which the alleged infringement has to be judged.

The law in its primary sense of an Ordinance or Enactment of the legislature relating to Education, is contained in the Education Ordinance originally proclaimed in 1939, prior to the granting of independence. A perusal of the provisions of the Ordinance reveals that these provisions have fallen into disuse. A similar observation has to be made as regards the exhaustive regulations that have been made under the Ordinance. They are contained in nearly 200 pages in the Volume of Subsidiary Legislation.

I have to digress at this point to state albeit briefly the sequence of events in which the Education Ordinance as amended and the Regulations made thereunder fell into disuse.

The Ordinance established the Department of Education as the Central Authority for Education which functioned under the general direction and control of the Minister. There was a Central Advisory Council to advise the Minister and Local Advisory Committees in different parts of the country at the level of Municipal Councils, Urban Councils, Town Councils and Village Councils. These Advisory Committees looked into the educational needs of the particular areas. The Government functioned as the regulator of education and standards were laid down and enforced through a system of School Inspectors, Directors and the like. The schools were separately managed by religious and non religious bodies and received assistance from the Government. Hence there were mainly the "Assisted Schools" and a few Private Schools. The education system thus structured including the Central Colleges became a model for the whole Region and the country achieved the much acclaimed high levels of literacy and of academic excellence. There have been drastic changes in the system commencing from 1961 when the management of "Assisted Schools" was taken over by the Government. Thereby, the Government became the manager of virtually all schools and shed its role as the regulator and supervisor. The well structured law and the comprehensive Regulations became mere pages in the Statute books.

Then, we come to the 13th Amendment to the Constitution which *inter alia*, provided for the devolution of power to Provincial Councils. In terms of section 3 of List 1 in the 9th Schedule to the 13th Amendment, "Education and Educational Services" to the extent set out in Appendix III are devolved to Provincial Councils. Section 1 of Appendix III states that the provision of facilities to all State schools, other than specified schools shall be the responsibility of the Provincial Council. It is there provided that specified schools will be "National Schools". The concept of "National Schools" derives solely from its single reference to it in Appendix III. Almost all leading Government schools have been declared as being "National Schools". The Education Ordinance has not been amended to provide for the newly emerged situation and there is no law that is operative as regards National Schools or for that matter, as far as I could discover in regard to any school.

The alarming situation is that Education being the foremost responsibility of Government has been operating for a long period of time in a legal vacuum. Where there is no law it is anarchy that prevails. In this vacuum shorn of the carefully structured regulatory and supervisory system, with Advisory Councils at different levels, self styled experts exercising the freedom of the wild ass have dangerously tampered with the process, to bring about chaos. The resultant tragedy is revealed in a survey carried out by the National Education Commission, according to which reportedly 18% of the Grade VI students are illiterate. It is unnecessary for the purpose of this judgment to delve into the other alarming revelations of this survey.

It appears that the impugned Circular P1 itself is referable to the opening line of List II (Reserve List) in the 13th Amendment which states that "National Policy on all subjects and functions" will come within the Central Government. Hence we have a situation where the law as contained in the Education Ordinance and the elaborate system of regulations having fallen into disuse and the matter of admission to schools being regulated by a Circular purporting to be a statement of National Policy. It is plain to see that the Circular does not have any of the general characteristics that pertain to policy. It has a classification of 7 categories, a scheme of weighted marking and a related identification of documents that

could be received in evidence. From a functional perspective it is the binding process of regulation laid down by the executive as regards the matter of admission to Government Schools. On the reasoning stated above it would constitute "the law" within the purview of Article 12(1) of the Constitution in reference to which the alleged infringement of the right to equality has to be judged.

I have now to revert to the right to equality guaranteed by Article 12(1) and the basis on which its content would be applied to judge an alleged infringement. Dr. Wickremaratne (Fundamental Rights in Sri Lanka - 2006 Second Edition at page 286) citing from the renowned exponent of Socialism, Harold Laski (A Grammer of Politics), C.G. Weeramantry and the Judgment of Brewer J., sums up the concept of equality and the manner in which the equal protection of law applies, as follows:

> "*Equality, as Laski stated, does not mean identity of treatment. 'There can be no ultimate identity of treatment so long as men are different in want and capacity and need'. Men are unequal in strength, talent and other attributes. While some of these are natural, others are referable to the society in which they live. Some are born with advantages. Other factors and combinations of factors may favour some people and place others at a disadvantage. To quote Weeramantry:*
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> *"As the myriads of constituent units of a society keep thus shifting their positions relative to each other, absolute equality among (men) even in one characteristic of for a moment of time is patently an impossibility. Far greater is the impossibility of preserving general equality for any period, however short. A permanent state of equality is only the remotest dream."*
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> *Equal protection does not mean that all persons are to be treated alike in all circumstances. It means that persons who are similarly circumstanced must be similarly treated. The State is however permitted to make laws that are unequal and to take unequal administrative action when dealing with persons who are placed in different circumstances and situations. Thus the State has the right to classify persons*

and place those who are substantially similar under the same rule of law while applying different rules to persons differently situated. "A classification should not be irrational or arbitrary. It must be reasonable and based on some real and substantial distinction, which bears a reasonable and just relation to the act in respect of which the classification is proposed and can never be made arbitrary and without any such basis."

The requirement stated by Brewer J., in the case of *Gulf Colarado and Santa Railway Co* v *Ethis*[1] cited above, has been subsequently stated as the "Basic standard" to be satisfied in a permissible clarification. The classic formulation of the "basic standard" is that stated in the case of *Royster Guano Co.* v *Commonwealth of Virginia*[2] at 415. It reads as follows:

"..... classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Therefore in applying what has been described as the "Royster formulation" to test the validity of classification we have to first look at the object of the law and then consider whether the classification could be reasonably related to achieve the object. As noted above the law as contained in the Ordinance and Regulations have fallen into disuse. The constitutional scheme for devolution of power in the subject of education has been defeated to a great extent by recourse to a single reference to "National Schools" in Appendix III. We are confronted with a jurisprudential paradox of a Circular purporting to be a statement of National Policy being is the only binding process of regulation as regards admission of students to Government Schools. The Circular has been issued in the exercise of the power reserved to the Government to formulate "National Policy" on all subjects and functions.

There is no provision in the 13th Amendment that defines the ambit of Government action that would come within the broad phrase, 'National Policy'.

Maxwell on The Interpretation of Statutes, under the heading "An Act is to be regarded as a whole" (12th Ed. Page 58) states that

"..... *one of the safest guides to construction of sweeping general words which are hard to apply in their full literal sense is to examine other words of like import in the same instrument, and see what limitations must be imposed on them.....*"

The relevant principle of interpretation with particular reference to the interpretation of provisions in a Constitution is set out in Bindra's Interpretation of Statutes – 9th Ed. page 1182 as follows:

"*The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.*"

In applying these principles of interpretation I am of the view that the broad phase "National Policy" appearing at the top List II should be interpreted together with the relevant provisions in Chapter VI of the Constitution which contains the "Directive Principles of State Policy."

The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the 'Directive Principles of State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society." Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert.

As regards education, the policy objective is stated in section 27(2) (h) as follows:

"The state is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include –

.....

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

This objective as to equal access to education has gained recognition in section 3(2) of the Tertiary and Vocation Education Act No. 20 of 1990.

Equal opportunity in the matter of education was held by the Supreme Court of the United States to be a requirement of the Equal Protection Clause (similar to Article 12) of the Fourteenth Amendment to the Constitution. In *Brown* v *Board of Education Topika*(3) - Chief Justice Warren delivering the opinion of the Court stated as follows: (at 493):

> *"Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."*

Hence both from the perspective of the application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admission of students to schools should be that it assures to all students equal access to education.

On the reasoning stated above the question before this Court narrows down to whether the classifications of students for admission in the impugned Circular P1 and the criteria laid down

therein can be reasonably related to the objective of providing equal access to education.

The preceeding analysis reveals that the classification in P1 is not based on the suitability and the need of a particular child to receive education in a national school or any other State School. The classification is based on wholly extraneous considerations such as the residence of the parents to be ascertained from the ownership of property; whether the parent is a past pupil and if so for what period and his achievements; whether the child to be admitted has a brother or sister in the school and if so the brother's or sister's achievements or whether the parent has been transferred in the manner that has been referred to above. The suitability and the need of the particular student to receive education in the school is not ascertained in the process, nor is there any method and criteria specified to ascertain such matters.

Similarly, the system of weighted marking referred to above as contained in the Circular completely defeats the objective of providing equal access to education.

For the reasons stated above we hold that the Circular P1 applicable in the matter of admission of students is inconsistent with the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution, in so far as it relates to the admission of students to Grade I of national schools and other schools to which the Circular has been made applicable.

We are mindful of the resultant position, that there would be no binding process of regulation in the matter of admission of students to Grade I. This would not normally be the consequence of a declaration of invalidity of executive or administrative action since fresh action can be taken under the applicable law. In this instance, as noted above law and written law relevant to education have fallen into disuse resulting in a legal vacuum.

Since the jurisdiction of this Court in terms of Article 126(4) of the Constitution empowers the court to make "directives as it may seem just and equitable in the circumstances," we consider it appropriate to indicate a course of action which in our view may alleviate the situation that has come to an impasse.

The authorities have failed over the decades that elapsed to provide an effective to legal machinery to manage, regulate and supervise education. The Ministry of Education appears to have formulated P1 as the purported National policy outside the framework of the law, which fact by itself would suffice to declare invalid. Section 2 of the National Education Commission Act No. 19 of 1991, empowers the President to declare from time to time the national Education Policy which shall be conformed to by all authorities and institutions responsible for education in all its aspects. The policy is formulated on the recommendations and advice of the Commission and in terms of section 2(2) includes, *inter alia*:

"..... methods and criteria for admission of students"

This in our view is the proper guideline for the formulation of a policy. The Ministry fell into error by laying down classifications, quotas and a system of weighted marking being elements completely antithetic to the guarantee of equality before the law whereas the focus should be on appropriate methods and criteria that would apply in the process of effecting admissions.

In the situation that has arisen we are of the view that it is appropriate for immediate action to be taken in terms of the National Education Commission Act for the formulation of a policy setting out methods and criteria for admission of students.

Counsel submitted that leading private schools in Colombo have adopted different methods to be applied in the admission of students. The methods have been in certain instances structured to include interviews with parents and children and a suitable test which should be faced by the children seeking admission. These tests not being written tests are based on the methodology that is adopted in pre-school education. It has now been established by clear scientific evidence that all the elements that go to develop character and personality are in place by the time a child reaches the age of 5 years. Detailed studies have been done in the United Kingdom in this regard under a separate Ministry in charge of the subject of Children. In the circumstances there is a wealth of experience, both in this country and outside on the basis of which a suitable methodology and criteria could be adopted for admission of children particularly to Grade 1.

The National Education Commission may if it is considered appropriate seek the assistance of child psychologists and competent pre-school educators in formulating the appropriate methods and criteria. The process of interviews and tests to be included have to be transparent and all safeguards should be put in place to minimize allegations of favourism.

The present situation has resulted in a gross abuse of the process of admission of students. In the circumstances it would be necessary to devise a new process in which the participation of authorities who have brought about the tragic situation be excluded and the process to be administered directly under the purview of the President as provided in the National Education Commission Act.

The demand for education in leading schools in Colombo and other urban centers result from the lack of appropriate facilities in the outer areas. In the circumstances the national policy should also encompass a suitable program to develop a minimum of two schools in each Divisional Secretariat Division so that with the passage of time these schools would reach the same standard as that of national schools.

The final matter to be addressed is in relation to the other applications pending before this Court and the Court of Appeal. Further litigation is not warranted in view of the finding of illegality as to the Circular P1 in respect of admission to Grade 1. In the circumstances suitable administrative relief should be granted to the persons affected. Since the availability of places in schools is a variable factor which cannot be addressed in Court, a Committee may be established to ascertain the grievances of the persons who have already invoked the jurisdiction of Court and to grant administrative relief, if it is established that any student concerned is suitable for admission to a particular school. This process would be available only to persons who have already invoked the jurisdiction of Court considering the administrative difficulties that would otherwise arise if the floodgates are opened at this stage for another series of applications for relief in the matter.

Considering the directions that are made in this Judgment, the Registrar of this Court is directed to send a copy of this judgment

to the Secretary, to His Excellency the President to facilitate action as stated above.

The national policy on school admission to be formulated may be submitted to Court for the policy to be examined from the perspective of the fundamental right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution.

S.C.(FR) Applications 10 to 13/2007 are allowed and the petitioners are granted the declaration that their fundamental rights guaranteed by Article 12(1) of the Constitution have been infringed by executive and administrative action.

It is further declared that the Circular marked P1 is inconsistent with Article 12(1) of the Constitution and is invalid and of no force or avail in law in respect of admission of students to Grade 1 in the schools to which the Circular is addressed.

No costs.

DISSANAYAKE, J. – I agree.

SOMAWANSA, J. – I agree.

Relief granted.

National Policy on school admission to be formulated and submitted to the Supreme Court