

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 2**

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The concept of legitimate expectation was examined in

*Re Westminister City Council* (3), where Lord Bridge had stated

that,

“The Courts have developed a relatively novel doctrine in

public law that a duty of consultation may arise from a

legitimate expectation of consultation aroused either by

a promise or by an established practice of consultation”.

The observations of David Foulkes (supra) in the

applicability of the concept of legitimate expectation was

clearly illustrated by the decisions in *Attorney General of Hong*

*Kong v Ng Tuen Shiu* (4) and *Council of Civil Service Unions v.*

*Minister for the Civil Service (The GCHQ case)* (5).

In **Ng Tuen Shiu** (supra), the decision of the Court that

the aggrieved party had a legitimate expectation was based

on a promise given by the Government, whereas in **Council**

**of Civil Service Unions** (supra), the decision was based on

the legitimate expectation that arose out of a regular practice.

In the circumstances, it is evident that a mere hope or

an expectation cannot be treated as having a legitimate

expectation.

It is therefore quite clear that it would be necessary for

the party which claims the beneft of legitimate or reasonable

expectation to show that such expectation arises from a

promise or hope given by the authority in question. As stated

earlier, it is not disputed that the results of the Advance

Level Examination were released on 03.01.2009 by the

Department of Examinations and it is not an unknown fact

that after every such release of results there would be a time

period allocated to apply for re-scrutiny by candidates who

are so inclined. In fact the 1st respondent had annexed to

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his affdavit a document (1R1), dated 01.01.2009, which had

referred to the likelihood of changes to the Z score at the

re-scrutiny stage. Further it had been stated that the results

that were released in January 2009 were only provisional

and subject to change after re-scrutiny, giving a clear indica-

tion that the results that were released in January 2009 were

provisional, and the Z scores that were released would change

after re-scrutiny results are released.

The petitioner’s main grievance is based on the fact that

her Z score was varied due to the changes that were made

after the re-scrutiny and based on her original results she had

a legitimate expectation in entering into a Medical Faculty

of a local University. In the **Council of Civil Service Unions**

(Supra), Lord Diplock had clearly referred to the applicability

of legitimate expectation in such a situation. Consider-

ing the doctrine in terms of expectation to be consulted or

heard, Lord Diplock had stated that, if a person relies on

legitimate past practice that had been withdrawn or changed

suddenly without any notice or reason for such withdrawal

or change.

In the present application, as has been shown clearly,

there is no material to indicate that the past practice has

been changed or withdrawn at the time the petitioner had

sat for the Advanced Level Examination or at the time the

results were released. On the contrary the same system

which was used in the previous year had been followed and

the candidates were told that depending on the results of the

re-scrutiny of papers, the Z scores could change. In fact by

the year 2008 the students who sat for the Advanced Level

Examination knew that the selection to Universities and to

their different Faculties were based on their individual Z

scores and those students who sat for the Advanced Level

Examination were quite aware as to how it worked, as there

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was general awareness of the said system. In these circum-

stances it would not be correct for the petitioner to state

that the previous scheme had been changed without giving

her an opportunity to express her views on the selection of

candidates to universities.

The petitioner’s complaint that her fundamental right

guaranteed in terms of Article 12(1) had been violated is

based on the concept of legitimate expectation as she had

such an expectation that she would be selected to follow a

course in Medicine.

Article 12(1) of the Constitution, which refers to the right

to equality reads as follows:

*“All persons are equal before the law and are entitled to*

*the equal protection of the law.”*

The concept of equality means that equals should be

treated alike. As has been clearly stated in *Gauri Shanker v.*

*Union of India* (6),

“. . . . that equals should not be treated unlike and

unlikes should not be treated alike. Likes should be

treated alike.”

Article 14 of the Indian Constitution, which deals

with the equality provision and is similar to Article 12(1)

of our Constitution has been examined and considered

by several Indian decisions. In *Ashutosh Gupta v. State*

*of Rajasthan*(7) it was pointed out that to apply the

principle of equality in a practical manner, the Courts have

evolved the principle that if the law in question is based on

rational classifcation it is not regarded as discriminatory.

The Indian Supreme Court has accordingly underlined the

said principle in several decisions *Western Uttar Pradesh*

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*Electric Power and Supply Co. Ltd. v. State of Uttar*

*Pradesh*(8), *R.K. Garg v. Union of India*(9) *Re: Special Courts*

*Bill*(10) *State of Uttar Pradesh v. Kamla Palace*(11) and

enumerated the principle that reasonable classifcation in

order to treat all in one class on an equal footing is allowed.

It was stated in **Western Uttar Pradesh Electric Power and**

**Supply Co. Ltd.** (Supra) that,

“Article 14 of the Constitution ensures equality among

equals: its aim is to protect persons similarly placed

against discriminatory treatment. It does not however

operate against rational classifcation. A person setting

up a grievance of denial of equal treatment by law must

establish that between persons similarly circumstanced,

some were treated to their prejudice and the differential

treatment had no reasonable relation to the object sought

to be achieved by the law.”

Considering the basis on which the Constitutional

provision in Article 12(1) deals with the right to equality and

the applicability of legitimate expectation on that basis, it is

apparent that the expectation in question should have been

founded upon a statement or an undertaking given by the

authority in question, which would make it inconsistent or

irrational with the general administration to deny such an

opportunity a petitioner has been claiming of through his

petition. Otherwise the petitioner must show that, as has

been stated in **Council of Civil Service Unions v. Minister**

**for the Civil Service** (Supra) that there is the existence of a

regular practice, on which the petitioner can reasonable rely

upon to continue, in his favour.

Considering all the aforementioned, it is clear that the

1st or the 2nd respondents had not given any promise or an

undertaking that the Z score would be decided on the basis

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SC *Of Examinations) And 7 Others (Dr. Shirani A. Bandaranayake, CJ)* 33

of the provisional results released on 03.01.2009. In fact the

1st respondent had informed the school authorities that the

results released in January 2009 were only provisional. The

indication that was given was that there would be two classes

of students as there would be one group who would be

applying for re-scrutiny. It is also to be borne in mind that

the Z scores would be fnally determined and announced only

after the re-scrutiny of the results are fnalized and this had

been the practice for several years.

Considering all the aforementioned facts and circum-

stances, it is evident that the steps that were taken by the

respondents cannot be categorized as arbitrary and unlawful,

which had violated the petitioner’s fundamental rights guar-

anteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid, I hold that the petitioner has

not been successful in establishing that her fundamental

rights guaranteed in terms of Article 12(1) of the Constitution

had been infringed by the respondents. This application is

accordingly dismissed. I make no order as to costs.

**IMaM, J.** - I agree.

**SUrESh ChaNdra, J** - I agree.

*application dismissed.*

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**ROSAIRO VS. BASNAYAkE**

CouRt of AppeAl

ABDUS SALAM, J

CA 901/2004 (F)

DC (COLOMBO) 21706/M

JULy 4Th 2007

***Motor Accident - Damages - Negligence of defendant while driving***

***car - Injuring passenger - Pleading guilty in Magistrate’s Court - Is***

***it relevant? - Evidence Ordinance Section 41 (A), Section 41 (A) 2,***

***- Damages under law of Tort.***

The plaintiff instituted action against the defendant-appellant follow-

ing a vehicular accident alleged to have taken place due to the neg-

ligence of the defendant driver - the plaintiff was a passenger in the

car. After trial Court awarded Rs. 1,17040/50 as special damages and

Rs. 4,956,000/- as general damages. on appeal - it was contended that

there was no proof of negligence and that in any event the computation of

damages was wrong.

**held:**

(1) The trial Judge has in her order quite correctly taken into consid-

eration the evidentiary value of the order in the Magistrate’s Court

case - where the defendant had pleaded guilty to the charges of

negligent driving of the motor car and failing to avoid the accident

complained of.

per Abdus Salam, J.

“A plea of guilt is most relevant and ought to be taken into

consideration in assessing the plaintiff’s case and further plea

of guilt on a charge of failing to avoid an accident by the driver

cannot be lightly ignored in considering as to whose negligence

it was which caused the accident” - Section 41 (A) (2) - Evidence

Ordinance.

(2) The evidence adduced by the plaintiff, before the trial Judge was

such which is capable of giving rise to a reasonable inference

*Rosairo Vs. Basnayake*

CA *(Abdus Salam. J.)* 35

of negligence on the part of the driver of the offending vehicle.

The defendant has not been able to negative the allegation of

negligence.

(3) The damages awarded appear to be reasonable and in no way

excessive. The trial judge has assessed the damages partly based

on the loss of opportunity of the plaintiff’s wife to engage in an

employment as she has to care for the plaintiff. having placed the

earning capacity of the plaintiff’s wife at Rs. 3000/- a month, the

trial Judge has fxed damages resulting from loss of employment

opportunity to the wife at Rs. 1,116,000/- and arrived at the general

damages as Rs. 3,840,000/- + Rs. 1,116,000/- = Rs. 4,956,000/-.

Since the wife was not employed the trial Judge could not have

awarded Rs. 1,116,000/- as being part of general damages result-

ing from the wife of the plaintiff having to care for the husband.

(4) Taking into consideration the plight of the plaintiff the trial Judge

could have awarded suffcient compensation for loss of comfort,

pain of mind and the amount the plaintiff may have to incur to

employ someone to care for him in the future. This amount could

be reasonably fxed at Rs. 1,000,000/- not on the basis of the wife

being deprived of employment opportunities but on the basis that

the plaintiff is entitled to such damages to look after himself.

General damages that should have been awarded is Rs. 3,840,000

+ Rs. 1,000,000/- = Rs. 4,840,000/-.

**Cases referred to :-**

(1) *A.W. A. Hemachandra vs. Mohomed Ismail Ayoob* - 1986 CAlR

550

(2) *Sinniah Nadaraja vs. Ceylon Transport Board* 79 NlR (iii) 48

(3) *Hollington vs. New thorn & Co. Ltd* 1943 2 All eR 35

*Prasanna Jayawardane* with *Millinda Gunatilaka* for substituted

appellant.

*Mayura Gunawansa,* with *Viraj Premasinghe* and *A. Sathyendran* for

plaintiff-respondent.

*Cur.adv.vult*

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July 21th 2008

**abdUS SaLaM. J.**

This is an appeal from the judgment of the District

Court of Colombo dated 1.6.2004, awarding damages to the

plaintiff-respondent (hereinafter referred to as the plaintiff)

in a sum of Rs. 4,956,000/- and Rs. 117,040.50 as special

damages.

The plaintiff instituted action against the defendant-

appellant (hereinafter referred to as the defendant) follow-

ing a vehicular accident alleged to have taken place due to

the negligence of the defendant while driving a motor car.

The plaintiff who was a passenger in the said car sustained

severe injuries and lost his eyesight. By his amended plaint

he claimed damages in a sum of Rs. 5,000,000/=, as general

damages and Rs. 1,17040/50 special damages. the

defendant by his amended answer denied liability.

It is common ground that the plaintiff on 30.10.1997

travelled in the vehicle bearing No. 12 SRI 3561 driven by

the defendant along Makola-Kiribathgoda road towards

Sapugaskanda. The matter of the dispute regarding the

alleged liability of the defendant proceeded to trial on 15

issues of which the frst 10 were suggested by the plaintiff

and the rest by the defendant.

At the trial, the plaintiff gave evidence and also led

the evidence of Dr. S. J. pathirana (eye surgeon), W. M.

Bathiyathissa, pC 8909 attached to peliyagoda police station

and M/s Shyamalee Gunathilake, deputy personal manager

of the petroleum Corporation and closed his case reading in

evidence documents marked as p1 to p23 (a).

In unfolding the defence, the defendant gave evidence

and produced documents marked D1 to D2 (c). Thereafter,

*Rosairo Vs. Basnayake*

CA *(Abdus Salam. J.)* 37

the learned trial judge in his judgment awarded the full sum

prayed for as special damages and a sum of 4,956,000/= as

general damages.

When the matter was taken up for argument the

defendant relied mainly on two grounds to avoid liability.

In the frst place the defendant took up the position that there

was no proof of negligence on the part of the driver of the

vehicle in question and that in any event the computation of

damages was wrong.

As regards the frst ground urged by the defendant, it

must be stated that the evidence of the plaintiff, the police

constable (together with the document marked p5) and that

of the evidence given by the defendant cannot warrant a

fnding than, what the learned additional district judge has

in fact arrived at, in regard to the negligence of the driver.

As it has been stressed in several authorities the unqualifed

admission of guilt tendered by the defendant in the Magis-

trate’s Court on both counts namely, for failing to avoid the

accident and negligent driving cannot lightly be taken. The

evidence adduced by the plaintiff, before the learned district

judge was such which is capable of giving rise to a reason-

able inference of negligence on the part of the driver of the

offending vehicle. The defendant has not been able to

negative the allegation of negligence. Whilst giving evidence

he admitted that it was raining when the accident occurred

and there were no street lights either. By taking up this

position the defendant has attempted to take undue

advantage of the lack of street lights and the adverse weather

condition to have him absolved from liability. As has been

quite correctly suggested by the learned counsel of the

plaintiff the said adverse driving conditions in fact had placed

the driver of the vehicle in which the plaintiff travelled, the

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duty to exercise greater care in relation to the safety of the

plaintiff. Taking into consideration the manner in which the

collision has taken place with the vehicle that is said to have

been suddenly reversed on to the road on a crest of a hill, it

is quite clear that the defendant has failed in his duty of care

which he owed to the plaintiff.

The defendant admitted in his evidence that he was

able to observe the container lorry being reversed across the

road only at a point when his vehicle was fve meters away.

This evidence of the defendant suggests the lack of proper

attention for the traffc ahead of him. taking into consider-

ation the length and breadth of the container lorry which is

said to have been reversed suddenly across the road, it is

very unlikely and unsustainable to accept the version of the

defendant that he saw the container lorry only ahead of fve

meters or within a couple of seconds. Therefore, I am totally

in agreement with the submissions of the learned counsel for

the plaintiff. hence the decision in *A. W. A. Hemachandra vs.*

*Mohamed Ismail Ayoob* (1) has no application to the present

case.

Admittedly, the defendant has been charged in the

Magistrate’s Court of Colombo in proceedings No. 21266/97

for negligent driving and failure to avoid the accident that

gave rise to the present suit. Upon his pleading guilty to

both charges, a state cost of Rs. 750/- has been imposed on

him. The trial judge in her order has quite correctly taken

into consideration the evidential value of p5. According to

p5 the defendant had pleaded guilty to the charges of negli-

gently driving the motorcar and failing to avoid the accident

complained of.

In the case of S*inniah Nadarajah, vs. The Ceylon*

*Transport Board*(2) Wimalaratne, J. with the concurrence of

*Rosairo Vs. Basnayake*

CA *(Abdus Salam. J.)* 39

Rajaratnam, J. and Walpita, J., following the decision in

*Hollington v. Hewthorn & Co. Ltd*(3), held that a plea of guilt in

the Magistrate’s Court was, most relevant and ought to have

been taken into consideration in assessing the plaintiff’s case.

In the same case Walpita J, observed that the plea of guilt on

a charge of failing to avoid an accident by the driver cannot

be lightly ignored in considering as to whose negligence it was

which caused the accident.

In terms of section 41(A)(2) of the Evidence Ordinance,

where in any civil proceedings, the question whether any

person to any civil proceedings or not, has been convicted of

any offence by any court in Sri Lanka, or has committed the

acts constituting an offence, is a fact in issue, a judgment

or order of such court recording a conviction of such person

for such offence, being a judgment or order against which no

appeal has been preferred within the appealable period, or

which has been fnally affrmed in appeal, shall be relevant

for the purposes of proving that such person committed such

offence or committed the acts constituting such offence.

It is signifcant to reproduce the illustration given

under section 41(A) of the Evidence Ordinance in so far as it is

relevant to this case. The illustration reads that when B

injures C while driving A’s car in the course of B’s employ-

ment with A, B is convicted for careless driving. In an action

for damages instituted by C against A and B, B’s conviction

is relevant.

In the light of the overwhelming evidence adduced by

the plaintiff and the evidence of the defendant in so far as it

relates to the duty of care owed by him towards the plaintiff

in the adverse driving condition, I am not disposed to

interfere with the fnding of the learned district judge as

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to the negligence of the defendant in driving the vehicle

in question that had caused damages to the plaintiff.

In relation to the other ground urged by the defendant,

I would like to make the following observations. As at the

time, the accident had taken place the plaintiff was 44 years

of age and drawing a salary of Rs. 23,000/- per month. He

had 2 children aged 9 years and 7 years. Further as a direct

consequence of the infrmities suffered by him, his services

under the petroleum Corporation has been terminated with

effect from 18/05/1998.

the position of the plaintiff was that he had expended

Rs. 117,040/50 to obtain medical treatment in attempting

to restore his eye sight but without any success. The

documents produced by the plaintiff marked as p1 to

p23A are quite signifcant to proving the negligence of the

defendant and the patrimonial loss suffered by the plaintiff

as a result. It included the plaintiff’s Salary slip pertaining to

the month of September 1997 (pI), Medical certifcate dated

19/05/1998 issued to the plaintiff by the Colombo eye

Hospital (p6), Medical bills relating to the treatment received

in Sri lanka by the plaintiff (p8, p9 and p10), Receipt issued

by Mackinnon’s Travels relating to the cost of the Airline

tickets in respect of the travel to India for treatment

(p11, p12), Receipts relating to the treatment received in

India (p13 to p16), Receipts relating to the Hotel expenses

whilst taking treatment in India (p20 to p21).

The learned Counsel of the defendant has also taken

up the position that the computation of the damages by the

learned district judge was wrong. According to the evidence

led at the trial the retiring age of the plaintiff is 60 years.

As the defendant did not dispute this position, the learned

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additional district judge cannot be faulted for arriving at the

conclusion that the plaintiff could have worked until his 60th

year, had he not been faced with the diffculties that arose

from the vehicular accident.

As a result of the accident the plaintiff became blind for

life at the age of 44 years. The learned counsel of the plaintiff

submitted that no amount of money can ever compensate

the pain of mind and the suffering, the plaintiff has been

subjected to, throughout his life as a result of this accident.

In the circumstances the damages awarded to the

plaintiff appear to be reasonable and in no way excessive.

The defendant has submitted that the amount of compen-

sation received by the plaintiff from the petroleum Corpora-

tion should have been taken into consideration in awarding

damages. In any event, it has to be observed that since the

liability of the defendant to pay damages arises under the

law of torts, it is not open to the defendant to seek refuge

behind any payment made to the plaintiff under the contract

of employment he has had with the petroleum Corporation.

The learned additional district judge has considered the

impaired vision and the related disabilities of the plaintiff

resulting from the negligence of the defendant which required

constant care and attention. The trial judge has assessed

the damages partly based on the loss of opportunity of the

plaintiff’s wife to engage in an employment, as she has to

care for the plaintiff. having placed the earning capacity of

the plaintiffs wife at Rs. 3000/- a month, on an assumptive

basis the additional district judge has fxed the damages re-

sulting from loss of employment opportunity to the wife of the

plaintiff at Rs. 1,116,000/- and arrived at the general dam-

ages as Rs. 3,840,000 + Rs. 1,116,000/- = Rs. 4,956,000/-.

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Since the wife of the plaintiff was not employed the learned

additional district judge could not have awarded Rs.

1,116,000/- as being part of general damage resulting from

the wife of the plaintiff having to care for husband. In any

event the wife of the plaintiff has not claimed any damages

for loss of any employment opportunities. hence taking into

consideration the miserable plight of the plaintiff who has

lost his eye sight at the age of 44 years, the learned additional

district judge could have considered awarding suffcient

compensation for loss of comfort, pain of mind and the

amount the plaintiff may have to incur to employ some one

to care for him in future. The learned district judge could

have reasonably fxed this amount at Rs. 1,000,000/- not

on the basis of the wife of the plaintiff being deprived of

employment opportunities as a result of the plight of the

plaintiff but on the basis that the plaintiff is entitled to such

damages to look after himself. hence the general damages that

should have been awarded is Rs. 3,840,000 + Rs. 1,000,000

= Rs. 4,840,000.

Hence the plaintiff would be entitled to Rs. 4,840,000

as general damages and Rs. 117,840.50 as special damages

aggregating to 4,957,840.50. Subject to the above variation

the appeal of the defendant stands dismissed with costs fxed

at Rs. 51,500/-.

*appeal dismissed.*

*subject to variation.*

*Dr. Perera v. Justice Perera and 11 others*

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**DR. PERERA V. JUSTICE PERERA AND 11 OTHERS**

SupReMe CouRt

DR. SHIRANI A. BANDARANAyAke, J.,

RAtNAyAke p.C., J. AND

IMAM. J.

S.C. (f.R.) ApplICAtIoN No. 598/2008

JULy 5Th 2010

***Fundamental Right - Constitution - Article 12(1) - Right to equality***

***- All persons are equal before the law?***

the petitioner, a Senior Consultant of the Department of Secondary

and Tertiary Education of the Faculty of Education, Open University

of Sri Lanka, alleged that the purported directions of the 1st to 9th

Respondents not to re-instate the petitioner in the public service and

not to release the petitioner to the open university until and unless the

petitioner pays to the State the cost of his foreign studies funded by the

Government, are arbitrary, irrational and unreasonable and in violation

of the petitioner’s fundamental rights guaranteed in terms of Article

12(1) of the Constitution.

**held:**

(1) Equality before the law does not mean that all should be treated

alike or that the same law should be applicable to all persons.

What is meant is that equals should be treated equally and similar

laws should be applicable to persons, who are similarly circum-

stanced.

(2) Article 12(1) of the Constitution postulates that all persons, who

are similarly circumstanced should be treated alike. Accordingly,

the doctrine of equality before the laws would not be applicable to

persons, who are not similarly circumstanced. Unequals cannot

be treated equally, not equals be treated unequally.

(3) Every wrong decision cannot and would not attract the consti-

tutional remedies guaranteed under the fundamental rights

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incorporated in the Constitution. In reference to Article 12(1) of the

Constitution it would be necessary to show that there had been

unequal treatment and therefore discriminatory action against the

petitioner.

(4) the decision taken by the public Service Commission with regard

to the petitioner in no way could be categorized as arbitrary,

unlawful and irrational and is not in violation of the petitioner’s

fundamental rights guaranteed in terms of Article 12(1) of the

Constitution.

**Cases referred to :-**

(1) *Snowden v. Hughes* (1943) 321 U. S. 1, 64 S. Ct. 297, 88L.

Ed. 497 (1944)

(2) *Ram Krishna Dalmia v. Justice Tendolkar* A. I. R. 1958 S.C. 538

**aPPLICaTIoN** under Article 12(1) of the Constitution.

*J. C. Weliamuna* with *Maduranga Ratnayake* for petitioner.

*Indika Demuni de Silva, D S. G.* for 10th - 12th Respondents.

*Cur.adv.vult*

March 10th 2011

**dr. ShIraNI a. baNdaraNayakE, J.**

the petitioner, a Senior Consultant of the Department of

Secondary and Tertiary Education of the Faculty of Education,

Open University of Sri Lanka (hereinafter referred to as the

open university) at the time of fling this application, alleged

that the purported directions of the 1st to 9th respondents not

to re-instate the petitioner in the public service and not to

release the petitioner to the Open University until and unless

the petitioner pays to the State the cost of his foreign studies

funded by the Government, are arbitrary, irrational and

unreasonable and in violation of the petitioner’s fundamental

rights guaranteed in terms of Article 12(1) of the Constitu-

tion, for which leave to proceed was granted by this Court.

*Dr. Perera v. Justice Perera and 11 others*

SC *(Dr. Shirani A. Bandaranayake, J)* 45

The facts of this application, as submitted by the

petitioner, *albeit* brief, are as follows:

The petitioner had obtained his Degree of Bachelor of

Arts (Hons.) from the university of peradeniya in 1985 (p2a).

thereafter he had obtained his post Graduate Diploma in

education from the university of Colombo in 1993 (p2b). He

had obtained two Degrees in Master of Education; one in 1996

from the university of Colombo (p2c) and the other in 1999

from the university of Wollongong, Australia (p2d). later in

2004, he had obtained the Degree of Doctor of Education

from the same university in Australia (p2e). the petitioner

had also obtained a professional qualifcation in the form of

a Diploma in Counselling from the Institute of psychological

Studies in 2006 (p2f).

The petitioner had joined the public service in July 1989

as an Assistant Teacher and thereafter had served in the

Vavuniya National College of Education in different capacities

ranging from Assistant Lecturer, Senior Lecturer to the Dean

of the College since 1995.

Whilst he was serving as the Dean of the said College

of Education, the petitioner had received a scholarship

offered by the Government to read for a Degree in Master of

education at the university of Wollongon, Australia in 1998.

he had successfully completed the said Degree in 1999.

Thereafter, the petitioner had been serving as a Senior

Lecturer at the Siyane National College of Education and

in 2001, he was selected by the university of Wollongong,

Australia to read for the Degree in Doctor of Education. The

said programme was funded by the World Bank General

education project - 2 in Sri lanka. prior to leaving the country,

as a pre-condition, the petitioner was required to sign an

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Agreement with the Government of Sri Lanka, which stated

that after completion of his studies he should return to

Sri Lanka and shall serve the Government, if so required,

for a term of eight years and seven months (p5). He had

left the country on study leave in November 2001 and after

successfully completing his Degree in Doctor of Education

had returned to the country in January 2004 and had

resumed his duties at the Siyane National College of Educa-

tion.

Immediately thereafter, in February 2004, through the

president (Head) of the Siyane National College of education,

the petitioner had applied for the post of Senior Lecturer of

the Department of education in the university of peradeniya

(p6). By letter dated 26.08.2004 (p7), the said university

had informed the petitioner that he was selected to the said

position on contract basis for a period of one year. On receipt

of the said letter, the petitioner had sought permission to

be released from Siyane National College of Education. The

president (Head) of the Siyane National College of education

had verbally instructed the petitioner to assume duties at the

university of peradeniya pending permission for the petitioner

to be released from Siyane National College of Education.

The petitioner had assumed duties at the University of

peradeniya on 01.10.2004.

By letter dated 25.08.2004 (p8), the Secretary to the

Ministry of Education had informed the petitioner declining

to release the petitioner to the university of peradeniya. He

had referred to Clause 4:4 in chapter XV of the Establish-

ments Code.

In May 2005, the Open University had called for appli-

cations for the post of Senior lecturer in education. Whilst

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Serving at the university of peradeniya, the petitioner had

applied for the said post through the head of the Siyane

National College of education (p9). After an interview, by

letter dated 29.08.2005 (p10), the petitioner was appointed

to the post of Senior Lecturer in Education at the Open

university (p10). thereafter, the petitioner had made a

request through the head of the Siyane National College of

education to the public Service Commission, for him to be

released to the open university (p11).

Since no steps were taken to release the petitioner,

in October 2005, he had made a complaint to the human

Rights Commission (p14). the Human Rights Commission

had made recommendations in favour of the petitioner and

on the strength of such recommendations and the letter of

the Director-General of Establishments sent in October 2005

(p13b), the petitioner had assumed duties on 21.11.2005 at

the Open University. By letter dated 14.12.2005, the Vice

Chancellor of the Open University had made a request to

the then Secretary of the Ministry of Education to formally

release the petitioner to the open university (p16).

By letter dated 30.05.2006, the Ministry of Education

had informed the petitioner that he was released to the

university of peradeniya (p17).

Meanwhile, whilst the petitioner was serving at the Open

University, in July 2006, he had received a letter of vacation

of post dated 27.06.2006 from the Siyane National College of

education (p18). the petitioner had tendered an explanation

to the Secretary of the Ministry of Education with a copy to

Siyane National College of Education. Later a copy of the

explanation was sent to the public Service Commission (p19).

In July 2006, the Director (Colleges of Education) of the

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Ministry of Education had informed the petitioner that the

public Service Commission had rejected the request made by

the petitioner to release him from Government service (p20).

The petitioner had preferred an application to the

Administrative Appeals Tribunal against the said decision

of the public Service Commission (p21). By its order dat-

ed 07.02.2008, the Administrative Appeals Tribunal had

dismissed the petitioner’s appeal on the basis that the

petitioner sought to serve outside the public service and that

without the Secretary’s recommendation the petitioner could

not be released from the government service (p22).

In the meantime, the Open University had terminated

the petitioner’s service with effect from 29.02.2008 on the

basis that for over two years he had not been formally

released from the government service (p23). the open

University had however, appointed the petitioner as a Senior

Consultant attached to the Department of Secondary and

Tertiary Education, on contract basis.

By letter dated 14.11.2008 (p25), the public Service

Commission had informed the petitioner that the public

Service Commission had decided to consider reinstating the

petitioner, provided that he agreed to pay the State before

31.12.2008, such sum of money in terms of the obligatory

service to the Government under the said Agreement (p5).

Later the petitioner had received the copy of a letter dated

26.11.2008 (p26), addressed to the president (Head) of

Siyane National College of Education by the Additional

Secretary of the Education Service, Ministry of Education,

stating that if the said sum of money, in terms of the obliga-

tory service to the Government under the Agreement (A5) is

not paid to the State on or before 31.12.2008, the previous

notice of vacation of post would stand.

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The petitioner alleged that both letters dated 14.11.2008

(p25) and 26.11.2008 (p26) have failed to appreciate the

correct legal position under Clause 4.14 in chapter XV of the

Establishments Code read with section 77(5) of the Univer-

sities Act, No. 16 of 1978 (as amended). It was also stated

that the petitioner was reliably informed that the hon. The

Attorney-General in November 2005 had advised the National

Institute of Education on the identical issue in respect of one

R.M.S.k. Ranasinghe stating that under section 77(5) of the

Universities Act, any service to a higher educational institute

could be considered as service to Government. The petitioner

had also become aware that the public Service Commission

had allowed similarly circumstanced Teacher Educationists

to serve in higher educational institutes without serving

notices of vacation of post. he had referred to one A.C.A.M.

Mansoor, W.D.C.p. perera and p.R.k.A. Vitharana as such

instances.

The petitioner alleged that the aforementioned decisions

and the conduct of the respondents are unreasonable,

arbitrary, irrational and in violation of Article 12(1) of the

Constitution.

Learned Counsel for the petitioner contended that

although the petitioner was granted a scholarship to study

abroad whilst he was serving at the Siyane College of

education, the fnances for the said scholarship were not

allocated from the said College, but from a World Bank

project. It was also contended that the Agreement p5 was

between the petitioner and the Secretary to the Ministry

of Education and had no reference to Siyane College of

Education nor to any similar Colleges of Education.

Learned Counsel for the petitioner submitted that the

said Agreement marked p5 does not mention the fact that

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the petitioner must serve at the Siyane College of Education

or any similar College of Education and as such there cannot

be any diffculty in releasing the petitioner from the Siyane

College of Education. Further it was submitted that in terms

of section 77(5) of the Universities Act there are no legal

impediments to release the petitioner to another Government

institution or agency and that even the public Service

Commission had in principle conceded this position.

Learned Deputy Solicitor General for the 10th, 11th and

12th respondents (hereinafter referred to as the respondents)

contended that the petitioner had accepted the appointment

at the Open University on 05.09.2005 and had assumed

duties in the said post on 21.11.2005 without obtaining

approval for his release from the public Service Commission.

It was also contended that the petitioner had disregarded

the letter sent by the Secretary to the Ministry of Education

in December 2005 (10R4), as he had failed and/or neglected

to report for duty when he was called upon to do so. In the

circumstances learned Deputy Solicitor General strenuously

contended that there had been no violation of the petitioner’s

fundamental rights.

having referred to the facts of this application and the

contentions of the learned Counsel for the petitioner and the

learned Deputy Solicitor General for the respondents, let me

now turn to consider the alleged infringement complained by

the petitioner.

The contention of the learned Counsel for the petitioner

was that, although the petitioner had obtained study leave at

the time he was an employee of the Siyane National College

of Education, after entering into an Agreement with the

Government of Sri Lanka that he would serve the obligatory

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period on his return or in lieu of that he would pay the

required sum of money, that such period of obligatory service

could have been rendered either at the Siyane National

College of Education or at any other Government institution.

Learned Counsel for the petitioner had relied on section

77(5) of the Universities Act and Clause 4:14 chapter XV

of the Establishments Code in support of his contention.

Section 77(5) of the Universities Act is as follows:

*“Where a Higher Educational Institution employs any*

*person who has entered into a contract with the Gov-*

*ernment by which he has agreed to serve the Govern-*

*ment for a specifed period, any period of service to that*

*Higher Educational Institution by that person shall be re-*

*garded as service to the Government for the purpose of*

*discharging the obligations of such contract.”*

According to section 77(5) of the Universities Act, the

service of a person to a higher Educational Institution, who

has entered into a contract with the Government, shall be

regarded as service to the Government. however, as it could

be clearly seen, for the applicability of section 77(5) of the

Universities Act, it would be necessary for the person in

question to be **employed** by the said Institution. For such an

employment, it is necessary for the said person to be released

for such service. Clause 4:14 of chapter XV of the Establish-

ments Code refers to such a release. The said Clause is as

follows:

*“Where an offcer is released for service in a public*

*corporation, such service will be counted as part of his*

*obligatory service for discharging his obligations under an*

*Agreement.”*

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Accordingly the release for service of the offcer in

question from his place of work would be an essential

requirement for the purpose of employment in a higher

Educational Institution. The applicability of section 77(5)

of the universities Act depends on the fulflment of the

requirement specifed in Clause 4:14 of chapter XV of the

Establishments Code. It is therefore apparent that it would be

necessary to consider whether the petitioner could have been

released from the public service.

The Establishments Code refers to the procedure, which

governs the release of a public offcer and chapter V of the

Establishments Code deals with such release, reversion and

termination of employment. Reference has been made in this

chapter regarding the release of offcers for appointment to

another post in the public service as well as releasing offcers

for service outside the public service. Since the petitioner had

frst accepted the appointment at the open university whilst

he was serving at the Siyane National College of Education,

he would come within the category of offcers referred to in

Clause 2 of chapter V, viz., release for service outside the

public service.

Under the said Clause 2, the relevant provisions, as

correctly pointed out by the learned Deputy Solicitor-General

for the respondents, are Clauses 2.1 and 2.3. These two

provisions are as follows:

“2:1. An offcer may be released for service outside

the public Service (as for instance in a public

Corporation) only with the sanction of the

Appointing Authority and any other authority whose

concurrence is required by the law under which the

Corporation or Board is constituted.

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2:3. An application for release (temporary or permanent)

should be made on a form as in specimen given

at Appendix 6 by the Appointing Authority of the

offcer’s substantive post through the Secretary

to his Ministry and the Secretary to the Ministry

under which the public Corporation to which it is

proposed to release the offcer.”

It is therefore apparent that, in order to obtain a release,

it is necessary to make an application as prescribed in Clause

2:3 of chapter V of the Establishment Code to the Appoint-

ing Authority, for such authority to consider the release. It

was common ground that the public Service Commission

was the Appointing Authority of the petitioner and therefore

it was necessary for the public Service Commission to have

sanctioned the release of the petitioner.

Learned Deputy Solicitor General for the respondents,

referred to provisions contained in the Universities Act,

No. 16 of 1978 as amended and drew our attention to section

77(1) of the said Act, which states as follows:

*“At the request of a Higher Educational Institution, an*

*offcer in the Public Service may, with the consent of that*

*offcer, the Secretary to the Ministry by or under which*

*that offcer is employed, and the Secretary to the Ministry*

*charged with the subject of Public Administration, be tem-*

*porarily appointed to the staff of the Higher Educational*

*Institution for such period as may be determined by such*

*Institution with like consent, or be permanently appointed*

*to such staff.”*

In terms of the provisions of section 77(1) of the Univer-

sities Act, read with Clause 2:3 of chapter V of the Estab-

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lishments Code, the release of the petitioner from the Siyane

National College of Education could be made only if such

release was sanctioned by the public Service Commission,

which was the Appointing Authority, with the concurrence of

the Secretary to the Ministry of Education, under which the

Open University functioned at the time concerned.

It is also to be clearly noted that although in terms of

Clause 2:1 of chapter V of the Establishments Code the

petitioner could be released only with the sanction of the

public Service Commission, that being the Appointing

Authority in terms of Clause 2:3 of chapter V of the Estab-

lishments Code, the petitioner’s application for permanent

release should be considered by the Secretary to the Ministry

of Education and the Secretary to the Ministry under which

the Open University had functioned. Since at the time under

review the Open University had come within the purview of

the Ministry of Education, it was necessary that the Secretary

to the Ministry of Education consider the petitioner’s

application for a permanent release.

the public Service Commission, although it had the fnal

authority either to sanction or to refuse the application for

a permanent release, it is quite apparent that it was essen-

tial to have obtained the recommendations and observations

from the Secretary of the Ministry of education as that off-

cer was in a better position to analyse whether the petitioner

could be granted such a release.

The Secretary to the Ministry of Education by letter dated

25.08.2004 had informed the petitioner that his request

cannot be acceded to, as he had not completed the obligatory

service period on his return to the country. The Secretary to

the Ministry of Education, by letter dated 03.11.2005 had

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referred to several other factors on which the scholarship had

been granted to the petitioner and had also drawn attention

to the provisions contained in the Minutes of the Sri Lanka

teacher educator’s Service. Referring to the selection of the

petitioner for the 3 year scholarship to further his studies at

the university of Wollongong in Australia, the Secretary to

the Ministry of Education had stated thus:

—ví,sõ' t,a' ã' tia' mS' fmf¾rd uy;d jõkshd cd;sl wOHdmk

úoHd mSGhg uq,a m;aùu ,enQ YS%' ,x' .=' w' fia' 2 - II fY%AKsfha iaÓr

lÓldpd¾hjrfhls' fudyq wdpd¾h Wmdêh i|yd .=re wOHdmk yd

.=re ia:dmk jHdmD;sfhka cd;sl wOHdmk úoH mSG lÓldpd¾hjrekag

fjkafldg we;s úfoaY YsIH;ajhla ,en 2001'01'14 isg 2004'01'01 olajd

´iafÜ%,shdfõ fjdf,dka.ka úYaj úoHd,fha bf.kqu ,nd we;'

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.=re wOHdmk yd .=re ia:dmk jHdmD;sh u.ska .=re wOHdmk{hka

wdh;k jYfhka j¾. fldg Tjqkag foaYSh yd úfoaY YsIH;aj ,nd §

we;' fuys§ cd;sl wOHdmk úoHd mSG .=re uOHia:dk cd;sl wOHdmk

wdh;kh yd úYajúoHd, jYfhka wdh;k j¾. lr tla tla wdh;k

j,g ksYaÑ; YsIHhka ixLHdjla fjkafldg we;' fuu YsIHhkag cd;sl

wOHdmk úoHd mSGj,g ,nd§ we;af;a úoHd mSG moaO;sfha .=Kd;aul

ixj¾Okh iy;sl lrkq msKsih' tA wkqj Wla; ks<Odßhdg fulS

YsIH;aj ,nd § we;af;ao úoHd mSG moaO;sfha .=Kd;aul ixj¾Okhg

lemùu i|ydh'˜

This letter clearly indicates the basis on which the

petitioner was selected for the scholarship in question and

the objectives the Government wished to achieve through

such a scholarship.

When a lecturer is sent on a scholarship to further his

studies, the intention of the relevant authority is to see that

the scholar on his return would be in a position to serve that

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institution for a stipulated period. In the event that offcer

is unable to serve such obligatory period then he should be

in a position to pay the money expended during that period

in accordance with the agreement he had entered into with

the relevant institution. When scholarships are granted for

the purpose of professional development of its staff members,

any institution would require such an offcer to continue to

serve in that place, at least for a specifc period.

The provisions contained in the Minutes of the Sri Lanka

Teacher Educator’s Service, substantiates this position.

According to Clause 21 of the said Minute, which deals with

professional development, it is clearly stated that,

“Scholarships, attachments and study tours may be

awarded to the member of the Service for study within

Sri Lanka or abroad depending on the suitability of

the candidate and the requirements of the respective

programmes and the recommendations of the Colleges

of Education Board to enable the Teacher Educators

to become more professionally qualifed. the selection

procedure and other requirements for selection will be

stipulated by the Secretary of the Ministry. The Teacher

Educators on completion of the course of study tour or

attachment are required to continue to serve as Teacher

Educators.”

It is therefore abundantly clear that the petitioner had

to serve the obligatory service period at the Siyane National

College of Education and according to the Agreement the

petitioner was bound to serve the Government unless other-

wise directed, for a period not less than 8 years and 7 months

at the Siyane National College of Education. It is not disputed