

PERERA AND ANOTHER
v.
CYRIL RANATUNGA, SECRETARY DEFENCE AND OTHERS

SUPREME COURT.

FERNANDO J. KULATUNGA J. AND WADUGODAPITIYA J.

S.C. APPLICATION NO. 121/91.

MARCH 13th, 19th AND 24th, 1992.

Fundamental Rights – Scheme of promotion – Seniority and merit – Criteria applicable – Publicity for scheme of promotion – Article 12(1) of the Constitution.

The promotion of authorised officers of the Department of Immigration and Emigration was purported to be done on the basis of seniority and merit. The actual appointments were made by the 2nd respondent who was the Controller of Immigration and Emigration upon the recommendation of an Interview Board after a *viva voce* interview. The criteria and heads of assessment were as follows:

- (a) Seniority 15 marks
- (b) Personality 10 marks
- (c) Work performance based on number of detections 30 marks
- (d) Knowledge of Immigration & Emigration Law and practice 25 marks
- (e) Capacity to make instant decisions on problems 20 marks

Held :

- (1) There were deficiencies in the criteria and heads of assessment. Performance, including "work, attendance and conduct", efficiency, conscientiousness, commendations, "attitude to the reputation of the service", and "the interests of the Department" found no place in the scheme of marking.
- (2) Although "Work Performance" was the most significant criterion only 'detections' over the preceding 5 year period were considered without consideration for opportunities for detection during the preceding 5 years.
- (3) Another deficiency was in the weightage given to seniority. Obviously the weightage given to seniority *vis-a-vis* merit can vary. Less weight may legitimately be given where the post involves onerous responsibilities and requires special skills and aptitudes - and, correspondingly, greater weightage given to "positive" merit, and the candidates skills and aptitudes. However, in a promotional scheme based on "seniority and merit", in relation to the second lowest rung of the service, with restricted scope for promotion, 15% weightage for seniority is plainly unreasonable, and is tantamount to ignoring seniority.
- (4) In the absence of proof of "substantial demerit" against senior officers or considerations of special skills or aptitudes justifying the appointment of junior officers over their seniors, the test for selection should be the existence of the minimum competence in a candidate to discharge the duties of the higher post; and any officer having such competence would be entitled to appointment, in order of seniority.

(5) The *ad hoc* procedure adopted by the Board was arbitrary, unpredictable and unguided by any rule or principle known in advance. It is very desirable that all the criteria relevant to promotions should be publicized in advance so that all candidates have equal opportunities of advancing their claims; the more complex the scheme, the greater the need for such publicity.

(6) Material from the files of the officers or reports of the supervising officers or the individual assessments of the members of the Interview Board were not before Court.

(7) The impugned promotions have been influenced by subjective criteria.

(8) The petitioners have been denied the equal protection of the law and have been unequally treated on a basis which cannot be rationally justified.

Per Kulatunga, J. :

"..... the right to equality of opportunity in matters of public employment (which Article 16(1) of the Indian Constitution expressly provides for) is implicit in our Article 12"

Cases referred to :

1. *Buddhan Choudhry v. State of Bihar* AIR 1955 S.C. 191.
2. *Ram Krishna Dalmia v. Justice Tendolkar* AIR 1958 S.C. 538.
3. *Elmore Perera v. Major Montague Jayawickrema* (1985) 1 Sri LR 285, 321.
4. *Eheliyagoda v. J.E.D.B. and others* F.R.D. Vol. 1 p. 243, 246.
5. *Jaisinghani v. Union of India* AIR 1967 S.C. 1427, 1431, 1434.
6. *State of Mysore v. S.R. Jayaram* AIR 1968 S.C. 346.
7. *State of Mysore v. Krishna Murthy* AIR 1973 S.C. 1147, 1150.

APPLICATION for relief for infringement of fundamental rights.

R.K.W. Goonesekera with L.C.M. Swarnadhipathi and J.C. Weliamuna for petitioners.

A.S.M. Perera, D.S.G. for 1, 2, And 7 respondents.

No appearance for 3 to 6 respondents.

Cur. adv. vult.

May 27, 1992.

FERNANDO, J.

I have had the advantage of studying the judgment of my brother Kulatunga, and while agreeing with his conclusion, declaration and order, I wish to set out my views on the important questions that arise for decision in this case.

The Department of Immigration and Emigration consists of the Controller, 4 Deputy Controllers, 32 Assistant Controllers, 20 Senior Authorised Officers, and 106 Authorised Officers. Senior Authorised Officers are appointed by promoting Authorised Officers who have ten years of service (inclusive of service in a temporary or acting capacity). Assistant Controllers are appointed by promoting Senior Authorised Officers or from among S.L.A.S. Officers from outside; but at any given time not more than six of the 32 Assistant Controllers shall be promoted Senior Authorised Officers. The Controller and Deputy Controller are always S.L.A.S. Officers. It is therefore a relevant consideration that Authorised Officers have limited prospects of promotion as Senior Authorised Officers, and have little chance of being appointed as Assistant Controllers.

It is common ground that the promotion of Authorised Officers as Senior Authorised Officers should have been on the basis of "seniority and merit", the actual appointments being made by the 2nd Respondent, the Controller of Immigration and Emigration, upon the recommendation of an Interview Board after a *viva voce* interview. The contention of learned Counsel for the Petitioners gave rise to the following questions:

1. What does "merit" mean in the context of "seniority and merit";
- 2(a) Whether the scheme of marking (namely, the criteria and the weightage for each criterion) adopted by the Interview Board for the purpose of assessing the candidates was a *bona fide* application of the "seniority and merit" principle, or was discriminatory ;
- 2(b) Even if the scheme itself was valid and non-discriminatory, whether it was adequately publicised in advance, and duly and fairly applied at the interview.

1. "MERIT"

Learned Counsel for the Petitioner contended that in the public service both principle and practice required that a senior officer be preferred to a junior officer, unless there was "substantial demerit" ; upon joining the public service, an officer had definite expectations in respect of security of tenure, retirement, and promotion ; his "merit" was

constantly and continuously assessed throughout his career, in that increments were granted not as a matter of course but only if they were "earned", as evidenced by a superior officer's certificate in regard to the diligent discharge of his duties ; and efficiency was periodically tested by appropriate examinations ; censures and adverse comments had to be recorded in his personal file. Reference was made to the Establishments Code, Chap. 2, paras 10.1, 15.1, 15.2, and Chap 6. His submission was that one officer even marginally senior to another had necessarily to be preferred, if there was no "substantial demerit" in his case, even if the junior officer was unquestionably superior in "positive" merit – i.e. from the point of view of qualifications, performance, ability, and the like. He gave the example of the senior officer approaching retirement age as against a junior officer with many more years to go: the promotion of the latter, on the basis of "positive" merit, would result in the frustration of the life-long hopes and expectations of a senior officer with an unblemished record. That, he said, was never done. He added, however, that "positive" merit could be taken into account *after* promotion : if, for instance, there were two vacancies, and both officers were promoted, the junior officer could be placed over the senior officer in the new post or grade, if superior on the basis of "positive" merit.

I do not think that the interpretation of the "seniority and merit" principle depends on, or should be influenced by, such examples. Every such example can be countered by another. The first example can be contrasted with the case of a senior officer, younger than a junior officer, the latter being overwhelmingly superior in qualifications, performance and ability. Would the failure to promote the junior officer not only frustrate his expectations that outstanding service would be recognised, but even act as a disincentive to others as well? Apart from the expectations of public officers, would service to the public be improved or impaired by the failure to reward meritorious performance? The submission that "positive" merit can be recognised immediately after, but not for, promotion, results in anomalies ; "positive" merit would not be recognised if there is only one vacancy; but it will be recognised if there are two or more vacancies, for then the more meritorious junior officer will be placed ahead of the senior officer. If there are two vacancies not occurring simultaneously, but within a few days of each other, if each vacancy is filled separately, the mediocre senior officer would retain seniority: but if the vacancies are considered together the meritorious junior

officer would become senior. While subjective considerations are not irrelevant, the application of the "seniority and merit" principle cannot depend wholly or mainly on subjective factors and fortuitous circumstances.

The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to earn, or to deserve. In my opinion, "merit" must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks promotion. In relation to the individual officer, there is a negative and a positive aspect: whether there is demerit, e.g. incompetence and poor performance in his present post, and whether there is "positive" merit, such as a high degree of competence and excellent performance. It would also be legitimate to consider the suitability of the officer for the post, having regard to the aptitudes and skills required for the efficient discharge of the functions of that post, and the service to be rendered. By way of example, an officer who has performed well at a "desk" job, involving little contact with the public, may lack the qualities required for a post in the "field", or involving constant contact with the public, whereas a junior officer whose performance was only average at the "desk" job, may have all the aptitudes and skills required for duties in the field, or involving the public. To ignore the requirements of the post and the needs of the public would be to permit the unrestricted application of the "Peter principle" – that in a hierarchy a person will continue to be promoted until he reaches a level at which he is quite incompetent. "Merit" thus has many facets, and the relative importance or weight to be attached to each of these facets, and to merit in relation to seniority, would vary with the post and its functions, duties and responsibilities.

2. THE SCHEME OF MARKING, AND ITS APPLICATION

There is no material as to the scheme of marking adopted in previous years. It is very likely that this particular scheme was adopted for the first time for the 1991 interviews and promotions. It was not publicised in advance. I set out below the scheme of marking, as well as the marks obtained by the Petitioners and the eight officers who were promoted (four senior, and four junior, to the Petitioners):

	Seniority 15 marks	Personality 10 marks	Work Performance (No. of detections) 30 marks	Knowledge of Immigration & Emigration Law and Practice 25 marks	Capability of solving problems instantly 20 marks	Total
1.	13	4	(62) 15	8	10	50
2.	13	5	(40) 10	14	10	52
3.	13	5	(20) 5	11	16	50
4.	13	5	(96) 24	6	3	51
5. 1st Petitioner	12	4	(50) 12	8	4	40
6. 2nd Petitioner	12	6	(48) 12	8	4	42
7. 3rd Respondent	12	6	(85) 21	10	5	54
8. 4th Respondent	11	6	(158) 30	5	8	60
9. 5th Respondent	11	5	(120) 25	7	5	53
10. 6th Respondent	11	5	(150) 25	9	8	58

The 15 marks given for "Seniority" appear to have been allocated at the rate of one mark for each year of service after confirmation as Authorised Officers. "Work Performance" was thus the most important factor, and was based exclusively on the number of detections made during the preceding 5 years. Although not stated by the Respondents, it would appear that one mark was given for every four detections, subject to a maximum of 30. However, there are two computational errors: on this basis the 5th and 6th Respondent should each have received 30 marks (and not 25 marks). If, as my brother Kulatunga thinks, a greater number of detections were required from some junior officers, this would have been arbitrary.

By letter dated 14.6.91 the Controller informed the Secretary, Defence, that in assessing the candidates, personality, work, attendance and conduct, conscientiousness and detections during the preceding five years, and commendations in their personal files, were given special consideration. These factors were taken into account at the interviews in assessing their respective merits, and seniority was also considered. In another letter dated 18.7.91 to the 1st Petitioner, the Controller stated that promotions cannot be made solely on seniority; merit, conscientiousness, efficiency, and the attitude of candidates to the reputation of the service and the discharge of their duties, had also to be considered; in addition, the interests of the Department were also given special consideration.

The Controller stated in his affidavit that :

"at the interview held the candidates are subject to a penetrating analysis as to the ability and command in the enforcement of various laws and circulars issued by the Department and how they would react and cope in a given situation. Their personal files are made available to the members of the interview board and the detections they have made and/or commendations they have received are taken into account. Also the majority of the members who constituted the interview board consist of Senior Officers of the Department who are aware of the performances of these candidates during the relevant period."

The Petitioners in their counter-affidavits averred that 15 candidates were interviewed within a period of 1 1/2 hours, and that each candidate was interviewed for approximately 3 minutes. Further, the questions asked did not relate to knowledge of the relevant law and practice, or the ability to solve problems; at the hearing before us it was not disputed that the interviews took only a few minutes, and did not involve these aspects. It was urged, however, that as three of the four members of the Interview Board were senior officers of the Department, they would have become quite familiar with these aspects of the candidates knowledge and capabilities, in the course of their normal work.

The criteria actually adopted for the 1991 interviews do not reflect many of these factors. Performance, including "work, attendance and conduct", efficiency, conscientiousness, commendations, "attitude to the reputation of the service", and "the interests of the Department"

found no place in the scheme of marking ; although "Work, Performance" was the most significant criterion, with a weightage of 30%, only "detections" were considered thereunder.

A second deficiency in the scheme of marking is in regard to the weightage given to seniority. Obviously, the weightage given to seniority *vis-a-vis* merit can vary. Less weight may legitimately be given where the post involves onerous responsibilities and requires special skills and aptitudes – and, correspondingly, greater weightage given to "positive" merit, and the candidates skills and aptitudes. However, in a promotional scheme based on "seniority and merit", in relation to the second lowest rung of the service, with restricted scope for promotion, 15% weightage for seniority is plainly unreasonable, and is tantamount to ignoring seniority. The arbitrariness of the scheme in this respect is manifest : the 3rd Respondent was one year junior to the first promotee, but 23 additional detections over a five year period (carrying six extra marks), completely outweighed the latter's advantage based on seniority.

In fact eight extra detections were sufficient to displace and to reverse the effect of one year's seniority. Similarly, two extra marks earned for "personality" were sufficient to counter balance two years seniority as between the first promotee and the 4th Respondent. The principle of "seniority and merit" implies that seniority will be given more or less equal consideration as merit, unless there was very good reason for giving significantly higher weightage for "merit". The weightage in fact given seems appropriate only in a scheme of promotion "based on merit, regard also being had to seniority".

It was argued on behalf of the Respondents that even if equal weightage had been given, the Petitioners would not have been promoted. It was suggested that the marks given for seniority be multiplied by six, so that seniority would receive 90 marks out of a total of 175. Each petitioner would thereby obtain 60 additional marks, bringing their total to 100 and 102 respectively. The first four promotees would obtain 65 additional marks, the fifth 60 additional marks, and the last three 55 additional marks, and all eight would yet have more marks than the Petitioners. However, this ignores the effect of the other defects in the scheme and its implementation. "Work Performance" gave no place to factors other than detections ; even commendations were not explicitly recognised ; there was no evidence, and no averment, that all candidates had reasonably similar

opportunities of making detections during the preceding 5 years. Even assuming that the weightage given to the other two criteria (relevant legal knowledge, and problem-solving capacity) was fair - and the material placed before the court makes it clear that this was not assessed by *viva voce* interview - I am not satisfied that the candidates records were duly examined in regard to this aspect. The Respondents have also furnished material in regard to the linguistic and sporting abilities of the 3rd to 6th Respondents ; this was in reply to the Petitioners claim that they were graduates, while the 3rd to 5th Respondents had only G.C.E. (O./L.) qualifications, and the 6th Respondent a G.C.E. (A./L.) qualification. These are not matters referred to in the scheme. While they have some relevance, particularly if all other things are equal, it is very desirable that all the criteria relevant to promotion should be publicised in advance so that all candidates have equal opportunities of advancing their claims; the more complex the scheme, the greater the need for such publicity.

It appears to me that the scheme of promotion was a *bona fide* attempt to give due recognition to merit. However, it was seriously deficient in respect of the criteria, and the weightage given to each criterion ; the application of the scheme ; and the lack of adequate advance publicity. The Petitioners have therefore been denied the equal protection of the law, and have been unequally treated, on a basis which cannot be rationally justified.

The Petitioners expressly stated that they did not question the selection of the first four promotees; they were not made respondents, and were therefore unrepresented at the hearing. No stay order was requested or made in respect of their appointments.

For these reasons I agree that the fundamental rights of the Petitioners under Article 12 have been infringed, and that the appointments of the 3rd to 6th Respondents must be set aside, the 1st and 2nd Respondents being free to make fresh appointments after formulating a proper scheme of promotion consistent with Article 12.

KULATUNGA, J.

The two petitioners are Authorised Officers in the Department of Immigration and Emigration. They complain that in the year 1991 they were overlooked for promotion to the post of Senior Authorised Officer

as against the 3rd, 4th, 5th and 6th respondents (Authorised Officers) all of whom though junior in service and with less experience in the Department, have been promoted and appointed to the higher post. The position of the 2nd respondent (the Controller of Immigration & Emigration) is that promotion of officers are effected not on the basis of seniority alone but on seniority and merit and that the impugned appointments have been made accordingly. The petitioners challenge the validity of the selection of the said respondents for appointment on the ground of discrimination *inter alia*, for the reason that such selection has been made on the basis of subjective criteria ; and the petitioners urge that such selection is violative of their rights under Article 12(1) of the Constitution.

The learned Counsel for the petitioners submitted that in terms of the normal conditions of service of public officers which are recognised by the provisions contained in the Establishments Code the benefits of a public officer include the opportunity of advancement in the service and that in the normal course promotions should be made on the basis of seniority ; and that if it is sought to deviate from this principle on considerations of merit in making promotions, it should not be done on the basis of vague criteria but on a scheme known in advance or which can stand the scrutiny of Court if selections are challenged.

It was also submitted that the cadre composition in the department also requires that the petitioners should not have been overlooked for promotion disregarding their seniority. Thus the department consists of 1 Controller, 4 Deputy Controllers, 32 Assistant Controllers (of which 6 posts are filled by promotion of Senior Authorised Officers, the other posts being reserved for the Sri Lanka Administrative Service), 20 Senior Authorised Officers and 106 Authorised Officers. So that if the petitioners are denied promotion to the rank of Senior Authorised Officer they may have to retire without reaching the position of Assistant Controller which is the highest rung they may aspire to reach. At this point it is relevant to note that the petitioners had been overlooked for promotion in 1990 also, along with several other Senior Officers (who however have been selected for promotion in 1991) resulting in the petitioners having to lag behind for the second time. Each of them is 48 years of age and has served in the department for 19 years as temporary Authorised Officer from 1972–1978 and in the permanent post of Authorised Officer from 1978.

The learned Counsel for the petitioners initially submitted that in making promotions seniority should be followed in the absence of substantial demerit appearing in the record of an officer's service. When we indicated that this formulation of the merit principle is not acceptable having regard to the general interests of the public service, learned Counsel did not press his submission but was content for the purposes of this case to accept that seniority alone is not the test and that promotions may be made on the basis of seniority and merit. He also conceded that the concept of seniority and merit may vary from department to department. However, he maintained that the scheme for selection should be known and not left to the subjective determination of the interview board.

According to the scheme of recruitment (P1) Authorised Officers who have completed 10 years of satisfactory service and who have passed the first Efficiency Bar Examination are eligible to apply for promotion to the post of Senior Authorised Officer. Service as a Temporary Authorised Officer is reckoned for the purpose of computing the ten year period. Candidates are interviewed by a board chaired by the 2nd respondent and appointed on the recommendations of the Board.

The petitioners state that in 1987 there were 7 vacancies and that in 1989 there was one vacancy in the post of Senior Authorised Officer which vacancies were filled by promoting Authorised Officers according to seniority. This is not denied by the 2nd respondent except that he states that appointments are made according to seniority and merit. However, in 1990 when 5 vacancies were filled only one of them was filled according to seniority. The balance 4 vacancies were filled by appointing junior officers overlooking officers who were senior to them. There were 19 applicants of whom 2 officers numbered 14 and 15 in the schedule of applicants marked 2R5 (arranged according to seniority) were absent. The petitioners appeared as Nos. 10 and 12. On the basis of marks given at the interview (the breakdown of which is not shown) the applicants Nos. 1, 3, 11, 13 and 16 were appointed as Senior Authorised Officers.

The Authorised Officers Union by its letter addressed to the 2nd respondent (P4) protested against the said appointments made in derogation of seniority and requested an interview to discuss the matter. The 2nd respondent replied stating that appointments are

made on the basis of seniority and merit and added that no discussion of this subject was called for (P5). The petitioners state that they did not pursue the matter in view of the fact that further vacancies were due to arise in a few months.

In 1991, 16 Authorised Officers including the officers who had been overlooked for promotion in 1990 applied for appointment as Senior Authorised Officers. They were interviewed by a board chaired by the 2nd respondent, the other members of the board being a Deputy Controller of Immigration and Emigration, Senior Assistant Controller of Immigration and Emigration and an Assistant Secretary/Ministry of Defence. In the schedule of applicants marked 2R6 (arranged according to seniority), Nos. 1 to 8 were the officers who had been overlooked in 1990. Of them No. 5 was absent. No. 6 had an order against him stopping his increment for two years. The petitioners appear as Nos. 7 and 8. On the basis of marks given at the interview, the board recommended for promotion Nos. 1, 2, 3, 4, 9, 10, 12 and 13 and they were appointed. In the result the petitioners have been overlooked again and 4 officers junior to them (3rd, 4th and 6th respondents) have been appointed over them.

The petitioners do not object to the appointment of Nos. 1, 2, 3, and 4 in 2R6 who are senior to the petitioners but object to the appointment of officers who are junior to the petitioners on the ground that such appointment is discriminatory. The 2nd respondent states that on a correct assessment of seniority and merit, appointments have been lawfully made. The learned Deputy Solicitor General for the respondents submitted on the basis of the 2nd respondent's affidavit that the impugned appointments have been made on an assessment of the suitability of the applicants by senior officers in the department who were acquainted with their competence and their knowledge of the law and practice pertaining to their office; that the board has adopted a scheme of marking, and the applicants have been selected for promotion on the basis of marks given to them and other considerations enumerated in the affidavit of the 2nd respondent; and that as such the appointments cannot be challenged as being discriminatory. He contends that the petitioners are in effect inviting this Court to review the said appointments on their merits which is not the function of the Court in the exercise of its jurisdiction under Article 126.

The question is whether the 3rd to 6th respondents have been selected for promotion over the petitioners upon a reasonable classification. The test of permissible classification is that it must be founded upon an intelligible differentia having a rational relation to the object sought to be achieved. *Buddhan Choudhry v. State of Bihar* ⁽¹⁾ ; *Ram Krishna Dalmia v. Justice Tendolkar* ⁽²⁾. It is the petitioners case that they and the said respondents were all officers of the same class, eligible for promotion and were similarly circumstanced ; and that the selection of the said respondents for preferential treatment on the ground of merit is invalid. A determination on this question can be made by applying the legal principles on discrimination to the facts of this case.

In *Elmore Perera v. Major Montague Jayawickrema* ⁽³⁾ Sharvananda, CJ said –

"The principle of equality before the law embodied in Article 12 is a necessary corollary to the high concept of the Rule of Law underlying the Constitution".

He explained that the Rule of Law means, *inter alia* (a) that everything must be done according to law (b) that government should be conducted within the framework of recognised rules and principles which restrict discriminatory power. He added that the Supreme Court is empowered to review and strike down any exercise of discretion by the Executive which exhibits discrimination and for that purpose has jurisdiction to invalidate any rule which would enable an authority to discriminate or act arbitrarily.

In *Eheliyagoda v. J.E.D.B. and Others* ⁽⁴⁾ this Court invalidated a scheme for the reorganisation of service under the respondent Board which was discriminatory and adversely affected the petitioners as employees of the Board. After making due allowance for the need to reorganise the existing administrative structure, Wanasundera J. said –

".....We are not satisfied that the determinations relating to the petitioners are based on just and reasonable criteria. The discretion that has been exercised in these cases is one that is unfettered, unregulated and without guidelines. There is also nothing in the material to show that the cases of the petitioners were considered

on their merits and how their cases compared with those of the others who obtained appointments and *vice versa*" (p. 247).

He also observed (p. 246) that when the material placed before the Court is sufficient to establish a *prima facie* case of discrimination, the respondents must make an adequate disclosure of all materials which would justify the impugned act. In making its determination, the Court derived assistance from several decisions of the Indian Supreme Court on Articles 14 (right to equality) and 16(1) (right to equality in matters of public employment) in the Indian Constitution.

In *Jaisinghani v. Union of India* ⁽⁵⁾ the Court examined the validity of Income Tax Officers Service Recruitment Rules which provided for recruitment to Class I Grade II of the service by direct recruitment through a competitive examination and promotion from Class II Grade III in the proportion to be fixed by the government. The rules also laid down the principle for determining the relative seniority of officers so recruited, the promotees being at an advantage. The Court upheld the scheme for recruitment from two sources. The reason for the classification was the objective of filling the higher echelons of the Income Tax Service by experienced officers possessing not only a high degree of ability but also first rate experience. The Court observed –

"The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification" (p. 1431).

The Court, however, struck down the recruitments by promotion made in excess of the quota fixed under the rules as being violative of Article 16(1) holding that the quota rule is linked up with the seniority rule and should be strictly observed. Once the government fixed the quota under the rule it had no discretion to alter it according to the exigencies of the situation at its own will and pleasure. The Court also observed –

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law" (p. 1434)

In *State of Mysore v. S.R. Jayaram*⁽⁶⁾ the Court considered the validity of a rule relating to recruitment of officers to the Civil Service by an open competitive examination. Rule 9(2) of the Recruitment Rules relied upon by the government read –

"While calling for applications the candidates will be asked to indicate their preferences as to the cadres they wished to join. The government however, reserves the right of appointing to any particular cadre, any candidate whom it considers to be more suitable for such cadre".

The petitioner who was placed fourth in the order of merit at the examination indicated a preference for the post of Assistant Commissioner in the Administrative service which had better prospects than the other available post namely, Assistant Controller in the State Accounts Service. The government, however, assigned him to the latter post. The Court struck down the last part of Rule 9 (2) which gave a discretion to the government to appoint a candidate to a particular cadre regardless of his preference and merits. The Court observed that Rules 1–8, 9 (1) and the first part of Rule 9 (2) aimed at ensuring the equality of opportunity in the matter of employment and obtaining the service of the most meritorious candidates ; and that once a candidate is selected by examination as being suitable for all the cadres, the government cannot, in the absence of specific provision or other material, arrogate to itself an arbitrary power to decide his suitability for a particular cadre in derogation of his just claims for recruitment to offices under the State.

In *State of Mysore v. Krishna Murthy* ⁽⁷⁾ the question related to the validity of a rule relating to a division into two classes of members of the same service belonging to the same cadre for purposes of their promotion upon a reorganization of the service. In striking down the impugned rule the Court said –

".....inequality of opportunity of promotion, though not unconstitutional *per se*, must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of government servants, the object of such difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class.if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinction can be made in selecting the best". (p. 1150)

The learned Counsel for the petitioners draw our attention to certain provisions contained in chapters II, VI and VII of the Establishments Code Vol. 1 (1985) issued under the authority of the Cabinet of Ministers (by virtue of Article 55(4) of the Constitution). He submitted that these provisions are aimed at ensuring fairness in matters relating to public officers and preclude the exercise of wide discretionary power in such matters. He further submitted that all such provisions including those relating to promotion encompass the spectrum of a public officer's rights. The said provisions relate to subjects such as the procedure for appointment and promotion, confirmation in appointment, seniority, Efficiency Bar, departmental examinations including for promotion, confidential reports, salary (including increment, and the suspension, stoppage and deferment thereof) etc...

Article 55(4) of the Constitution states –

"Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers".

This is a constitutional recognition of the concept of the Rule of law, in particular, that government should be conducted within the framework of recognized rules and principles and that, in general, decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The relevant provisions of the Establishments Code are in conformity with this concept and through Article 55(4) are made complementary to Article 12. In this context it would be true to state that the right to equality of opportunity in matters of public employment (which Article 16(1) of the Indian Constitution expressly provides for) is implicit in our Article 12.

It should not be understood from the above discussion that the rule of law requires that every decision must be supported on the basis of a written rule. Thus there are (unwritten) discretionary powers which are implicit in the process of government to which no constitutional objection may be taken provided, however, that such exercise is fair, predictable and free from arbitrariness or discrimination. Thus notwithstanding the absence of express provision for promoting public officers on the basis of seniority and merit, promotion on that principle is indeed lawful provided, however, that the power to make such promotion is exercised without discrimination violative of Article 12 of the Constitution. This is supported by dicta contained in the judicial decisions cited above.

It is common ground that the petitioners and the 4 respondents who were promoted over them were all eligible for promotion under the scheme P1. This would mean that each of them being an Authorised Officer had –

- (a) completed 10 years of satisfactory service (for the computation of which any period of service as a temporary Authorised Officer is reckonable) ;
- (b) passed the first E.B. Examination.

As for the method of selection for promotion, all that the scheme states is that the applicants will be subjected to an interview by a board chaired by the 2nd respondent and on the recommendation of the board the appointments will be made. There is no rule specifying the criteria for selecting officers for appointment when there are more applicants than vacancies (as happened in 1991) there

being 16 applicants for the filling of 08 vacancies. Of them, 15 attended the interview. These applicants were all drawn from the same source and the petitioners contend that they (the petitioners) and the respondents who were promoted over them were similarly circumstanced ; that the selection of the said respondents who were junior to the petitioners was not based on rational criteria ; that in the normal course the petitioners should have been appointed Senior Authorised Officers over the said respondents, on the basis of seniority and merit, and that their exclusion constitutes an exercise of arbitrary power in subjective terms, without sufficient safeguards.

The petitioners state that the 1st petitioner holds the Degree of Bachelor of Arts from the University of Ceylon (Colombo) and the 2nd petitioner holds a Special Degree in Public Administration from the Vidyodaya University whereas the highest educational qualification of the 3rd, 4th and 5th respondent is G.C.E. (O.L.) Examination and the highest educational qualification of the 6th respondent is G.C.E. (A.L.) Examination ; that each of the petitioners had 19 years of eligible service for promotion whilst the 3rd and the 4th respondents had 17 years and the 5th and the 6th respondents had 12 years only at the time of their appointment ; and that the petitioners have no adverse entries in their personal files and have earned their salary increments regularly. All these averments are admitted by the 2nd respondent except that on the question of service he makes a point of the fact that the petitioners had been initially appointed temporary Authorised Officers and were made permanent only in 1978. This fact does not help the 3rd to the 6th respondents because a part of their period of eligible service too had been spent as temporary Authorised Officers. On these facts it is the petitioners claim that they had the superior claim for promotion over the said respondents on grounds of seniority, educational qualifications and experience.

The position of the 2nd respondent is that at the interview the applicants were subjected to a penetrating analysis on the relevant laws and departmental circulars and their competence. The board also had their personal files which contain a record of their work and commendations. On the basis of the performance of the applicants at the interview, marks were assigned to each candidate and the final selection was made on the basis of such marks. The petitioners filed counter affidavits stating that each candidate was questioned for 3 or 4 minutes only and that from the type of questions asked it was

not possible for the board to have made a penetrating analysis of the competence of the applicants as claimed by the 2nd respondent. Learned Deputy Solicitor General very properly did not contest this position. He, however, emphasized the fact that the interview board consisted of very senior officers of the department who knew the relative merits of the applicants on the basis of their performance over the years ; and that the impugned appointments have been made in the best interests of the department and hence the selections made by the board should be accepted by this Court.

Particularly in view of the fact that no *mala fides* have been alleged, I am prepared to accept the submission that the board may well have believed that the impugned appointments were in the best interests of the department. But the question we have to decide is not merely whether the appointments made were in the best interests of the department but whether the selection of officers for that purpose was free from discrimination in the light of the legal principles which I have set out above. This would require a closer examination of the procedure followed by the board.

In examining the procedure followed by the board, I have taken into consideration the following matters :-

- (i) It has not been alleged that the petitioners were overlooked on the ground of substantial demerit e.g. censures or adverse comments recorded in their personal files.
- (ii) No material has been placed before us to establish :-
 - (a) that the functions in the post of Senior Authorised Officer are such as to require it being filled by experienced officers possessing a high degree of ability and first rate experience ; Vide *Jaisinghani's case* (supra) ; or
 - (b) That there is any special consideration, in the light of which, the 3rd to the 6th respondents were selected for promotion over the petitioners e.g. that as against the petitioners the said respondents possess some special competence or aptitude which is indispensable for the efficient performance of the functions in the higher post.

It is my view that if it can be established that senior officers are adversely affected by any such consideration as indicated above, junior officers who are not so affected and possessing the requisite qualifications, competence or aptitudes, may constitute a class for purposes of promotion, to the exclusion of their seniors. If not, the test for selection should be the existence of the minimum competence in a candidate to discharge the duties of the higher post; and any officer having such competence would be entitled to appointment, in order of seniority.

In the instant case, we are told that the selection was effected on the basis of marks. The scheme of recruitment does not provide for this; nor is the marking according to any approved rule or principle. It has been done on an *ad hoc* scheme adopted by the Board. In the schedule for 1990 (2R5) only the total marks earned by each candidate is shown without a break down. In the schedule for 1991 (2R6) totals as well as the basis of marking are shown. The principle which has been consistently followed is that only the candidates who had obtained 50 marks and over were selected for promotion. On that basis, 5 appointments were made in 1990 overlooking 9 officers including the petitioners who were senior to the officers selected for promotion. In 1991, 8 appointments were made including 4 of the seniors who had been overlooked in the previous year; but once again 3 senior officers including the petitioners were overlooked for promotion.

The allocation of marks in 1991 was made on the basis of 100 marks for a candidate made up as follows :-

(a) Seniority	15
(b) Personality	10
(c) Work performance based on the number of detections	30
(d) Knowledge of Immigration & Emigration Law & Practice	25
(e) Capacity to make instant decisions on problems	20

At the interview, marks were given only for the detections made during the 5 years immediately preceding the date of the interview. Marks for detections appear to have been assigned on the formula of 1 mark for 4-6 detections depending on the seniority of the candidate. Marks for seniority appear to have been assigned on the formula

of 1 mark for each year of permanent service. On this basis, the maximum marks earned by any candidate on account of seniority was 3. The candidates earned 5–30 marks each on account of detections, the 2nd and the 3rd candidates who were selected for promotion receiving only 10 and 05 marks, respectively on that account. They were able to secure a pass for selection in view of the high marks given to them for their knowledge of law and practice and the capacity to make instant decisions on problems. The 3rd to the 6th respondents received the bulk of their pass marks on account of detections. They earned very poor marks for their knowledge of law and practice and the capacity to make instant decisions on problems.

Each of the petitioners earned 12 marks for seniority and 12 marks for detections. However, they were not given sufficient marks in other respects and were therefore unsuccessful. They earned more marks for their knowledge of law and practice than the 4th and the 5th respondents who (according to the marks) were very poor in that subject as well as in their capacity to take instant decisions on problems.

The 2nd respondent seeking to justify the impugned appointments states that the 3rd to the 6th respondents had many more detections to their credit than the petitioners and that the overall performance of the said respondents was better than that of the petitioners.

He also states that the 3rd and 4th respondents are outstanding sportsmen and speak English very fluently and that the 5th respondent has "a pleasing personality" and is "a dedicated worker" whilst the 6th respondent "has a very commanding ability and a pleasing personality". In this connection it is relevant to note that the maximum marks obtained by the successful candidates for personality are in the range of 4-6 marks (out of 100) and the 5th and the 6th respondents obtained 5 marks each on that account whilst the 1st and the 2nd petitioners obtained 4 and 6 marks respectively.

The above facts are self explanatory on the question whether the petitioners have been overlooked for promotion on the basis of a reasonable classification. Firstly, the weightage given to seniority at the interview was 15% which is woefully inadequate and would make the concept of seniority in service meaningless when it comes to

promotion. Secondly, the *ad hoc* procedure adopted by the Board was arbitrary, unpredictable and unguided by any rule or principle known in advance. Thirdly, no material has been placed before us either from the personal files of the petitioners or from supervising officers who had the opportunity of monitoring their progress in the department in support of the allegation that their knowledge of law and practice and the capacity to take instant decisions on problems were poor. It is also not known how individual members of the board assessed each of these candidates. Finally, the available evidence supports the criticism that the impugned promotions have been influenced by subjective criteria.

In effecting promotions, the State is entitled to take into consideration seniority and merit but without violating the right to equal protection of the law. The service of most public officers is life-time and the guarantee of fair treatment to them enshrined in Article 12 (1) of the Constitution would, if properly enforced, also help in maintaining a contented public service which is vital for its efficient functioning. I determine that on the facts of this case, the rights of the petitioners under Article 12(1) have been infringed by reason of the impugned promotions and grant them a declaration accordingly.

On the basis of my finding that the procedure adopted by the board for effecting promotions was discriminatory, I would ordinarily have set aside all the appointments made in 1991 as being invalid. However, the petitioners have averred that they are not questioning the appointments of Messrs Sivuratne, Thalaspitiya, Rajapakse and Ratnayake who were the most senior officers among the candidates. Consequently, the petitioners have not made the said officers parties to these proceedings ; and no interim order has been granted by this Court staying the operation of the appointments which have been effected. In these circumstances, I set aside the appointments of the 3rd, 4th, 5th and the 6th respondents only and direct the 1st and 2nd respondents to take steps afresh for making appointments to the posts of Senior Authorised Officers in the department, according to law. I also direct the State to pay each of the petitioners a sum of Rs. 2500/- (Rupees Two Thousand Five Hundred) as costs.

WADUGODAPITIYA, J. - I agree.

Relief granted.