

DONA DIANA PEARLY
v.
PREMARATNE, ACTING SECRETARY EDUCATIONAL SERVICE
BOARD AND ANOTHER

SUPREME COURT.
FERNANDO, J.,
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPLICATION NO. 790/96.
JUNE 16, 1997.

Fundamental Rights – Appointment of Teachers – Course of training for appointment – Failure to appoint on successful completion of training – Article 12(1) of the Constitution.

The petitioner who was an applicant for a post of Assistant English Teacher was required to follow the District English Language Improvement Centre ("DELIC") course as a pre-condition for appointment. The eligibility to follow the course was decided on the basis of marks obtained at a competitive examination, and confirmed by the Commissioner-General of Examinations. After eight months from the commencement of the course, the petitioner was informed that there had been a mistake as regards her marks at the competitive examination. But she was allowed to complete the course. She followed the course successfully and passed the final examination. Over one year thereafter, she learnt that some of her colleagues had received teaching appointments.

Held:

1 To make a mistake and to correct it by itself involved no breach of equality or equal protection. But the time taken to correct the error and to inform the petitioner what effect it had on her eligibility for a teaching appointment were, unreasonably long. The appointing authority thereby acted unfairly and displayed

a lack of concern for the rights and interests of candidates constituting, in the circumstances, a denial of the equal protection of the law.

2. The application was not time barred as the petitioner complained to court promptly upon becoming aware that others had received appointments in violation of her rights.

APPLICATION for relief for infringement of fundamental rights.

Chula Bandara for the petitioner.

S. Fernando, S.C. for the respondents.

Cur. adv. vult.

July 30, 1997.

FERNANDO, J.

The petitioner claims that her fundamental right under Article 12(1) has been infringed by the failure to appoint her as an Assistant English Teacher.

The Education Services Committee of the Public Service Commission, by a gazette notification, announced that a competitive written examination for the selection of Assistant English Teachers would be conducted by the Commissioner-General of Examinations. Sixty percent of the vacancies were to be filled according to merit, as determined by the marks scored at that examination, as follows:

- (1) Those who scored more than a certain number of marks would receive direct appointments, and
- (2) The remaining vacancies (i.e. to make up the sixty percent) would be filled from among the candidates next in order of merit, but not directly – they would be considered for selection to follow the District English Language Improvement Centre ("DELIC") course, and appointed upon successful completion of that training course.

It was quite clear that the total number of appointments on that basis would not exceed sixty percent of the vacancies. How the remaining vacancies were to be filled is of no relevance to this application –

except that merit as determined by the marks scored at the competitive examination was one criterion.

Having sat for the examination in June 1994, the petitioner received from the Commissioner-General of Examinations a computerized results sheet showing her total marks as "053 OUT OF 100 (ZERO-FIVE-THREE)". There is no dispute that for direct appointment the minimum required was more than that, and the petitioner was certainly not eligible. However, on the basis that she had scored 53 marks, she was 126th in order of merit, and was thereby eligible for selection for the DELIC course (and appointment) under category (2). She received from the DELIC authorities a letter dated 23.1.95 informing her of her selection for the 1995 DELIC course commencing 7.2.95. That letter also stated:

"You are admitted to this course in terms of General Eligibility requirements specified in the [Gazette] and your eligibility will be checked by the Education Services Board [Committee?] of the Public Service Commission. If you are found ineligible you will be discontinued at any stage of the course ...

On successful completion of the course you will be appointed as an English teacher to a school in the district you have applied for."

It is not disputed that she was interviewed by the Education Services Committee. It is not clear when that was, but the petitioner says it was before she was admitted to the course.

Shortly before the end of the DELIC course, the petitioner received a letter dated 5.11.95 from the Commissioner-General of Examinations stating that at the competitive examination she had received 53 marks **out of 200**, and that her place in order of merit had changed, but not how it had changed. According to the 1st respondent's affidavit, the Commissioner-General had informed him that it had changed from 126 to 2403; there is no evidence that she was so informed. She was nevertheless allowed to complete the

course, and to sit for the final examination held in December 1995. By letter dated 21.5.96 she was simply told that she had passed. In November 1996, she came to know that some of her colleagues had received teaching appointments, and she filed this application on 26.11.96 complaining that she had not been given one.

While not disputing that an error in respect of the petitioner's marks had been corrected in good faith, learned Counsel for the petitioner submitted that on the basis of the marks originally disclosed, the petitioner had been eligible for admission, and had been duly admitted, to the DELIC course; and that having completed that course successfully, she was entitled to a teaching appointment. Alternatively, he contended that in terms of the scheme of recruitment, once admitted (rightly or wrongly) to the DELIC course, successful completion of that course was the sole criterion for a teaching appointment. The petitioner was therefore entitled to an appointment, and the refusal of an appointment was in violation of Article 12(1).

I have already summarized the relevant terms of the scheme of recruitment. An appointment under category (2) required, in my view, that two conditions be fulfilled: not only the successful completion of the DELIC course, but also merit, as demonstrated by the marks scored at the competitive examination. While merit was relevant for selection for the course, it did not cease to be relevant for appointment. But even if, contrary to my view, merit was relevant only for selection for the DELIC course, in this case it was discovered – **before** the petitioner was given an appointment – that she was actually not qualified for that course. To accept the petitioner's contention that she should nevertheless be given a post would be to sanction the appointment of a disqualified person, and would immediately give rise to a legitimate grievance among all other candidates, who had scored more marks than she did, that some one less qualified than them had not only been unfairly preferred for selection for the course, but had even been given an appointment.

While I accept that the *bona fide* correction of an error in the petitioner's marks, and the consequent refusal of an appointment to her, did not deny her equal treatment, nevertheless that does not end the matter. Considerable (and avoidable) prejudice has been caused to her. Apart from the expenses necessarily involved in following the course, it now turns out that almost an year of her life has been unprofitably spent, from the point of view of her future career and employment (followed by another year of anxious anticipation). Passing the DELIC examination is not likely to be accepted as a recognized qualification for a teaching appointment, in view of the terms of the scheme of recruitment. The question arose whether in the process of correcting that error there had been a denial to the petitioner of the equal protection of the law, and we asked State Counsel to address us on that matter.

Learned State Counsel referred to the Education Services Committee interview, at which (according to its Acting Secretary, the 1st Respondent) "it was found that some of the candidates were very weak in English compared to the marks they had obtained"; a rescrutiny was called for. It was then that the marks of the Petitioner and 33 others were found to have been erroneously reported as being out of 100. To make a mistake, and to correct it, by itself involves no breach of equality or equal protection. But the time taken seemed unreasonably long. A hypothetical example was put to State Counsel: if a law student who had successfully completed all his examinations gave six weeks notice of enrolment, at which point the Department of Examinations discovered, for the first time, that he had not obtained the requisite Advanced Level passes, and this Court had therefore to refuse to admit and enroll him as an Attorney-at-Law, had not that delay denied him the protection of the law? Administrative processes – such as recruitment and public examinations – must be carried out with due regard to the rights and interests of the public, and although errors can be corrected, the process of correcting errors must not cause undue harm, loss, or prejudice. While acknowledging the hardship caused, learned State Counsel replied that the petitioner's remedy was elsewhere – possibly

in delict, based on an alleged breach of the duty of care owed to her, against whoever owed her that duty, or the State.

Quite apart from delictual rights and duties, the wide powers vested in those responsible for recruitment have to be exercised in the public interest and for the public benefit. It is true that only the qualified must be appointed, and the unqualified kept out; but the unqualified must not be allowed, needlessly, to entertain the belief that they are qualified. While the executive should not be penalised for mistakes, yet mistakes must be promptly corrected. Here according to the 1st respondent, at an early stage – at the interview – it was suspected that the marks were incorrect. That was all the more reason why prompt action should have been taken to rectify the position. Not merely should the 34 who were unqualified have been immediately discontinued, but it was no less important, in the public interest, that the next 34 in order of merit should have been admitted to the course – and that did not happen because of the failure to act promptly. The power of appointment entrusted to the appointing authority had not only to be exercised correctly and fairly, but – when it came to the correction of an error – expeditiously as well. And it was not enough to correct the error, the petitioner should also have been told what effect it had on her eligibility for a teaching appointment. That was an expectation, an interest, a safeguard, and a protection, which the petitioner had. While a delay of a few weeks was permissible, I cannot assume that a delay of over eight months in correcting the error, and the failure for over a year to say how it affected her, were necessary, normal or usual; that displayed a lack of concern for the rights and interests of candidates constituting, in the circumstances, a denial of the equal protection of the law.

It was submitted on behalf of the respondents that the lapse, if any, was on the part of the Commissioner-General of Examinations, who was not a party, and that the petitioner was therefore not entitled to relief. However, it was the Education Services Committee which was responsible, from beginning to end, for the entire selection process, and of that the competitive examination was just one part. In any event, whether it was the responsibility of that Committee or the

Commissioner-General, both were acting as agencies of the State, and it is against the State that the petitioner now seeks relief.

In written submissions filed with permission after the oral hearing learned State Counsel submitted that in her petition dated 26.11.96 the petitioner made no complaint that the delay in correcting the error constituted a violation of her fundamental right under Article 12(1); that this position was taken up for the first time at the hearing; and that in any event it was out of time because the petition was filed more than one year after the error was corrected on 5.11.95.

The petitioner had set out the relevant facts and submitted that she was entitled to a teaching appointment, and that the denial thereof was in violation of Article 12(1). Her claim to a teaching appointment was based upon an interpretation of the Gazette, which I have held to be erroneous. While that claim failed, nevertheless the same facts on which she relied showed that she had been denied equal protection in the process of correcting the error. That, in my view, is a claim which is an alternative to that claimed in the petition; or a claim which was included in the original claim. The mere overstatement of a case or a claim should not ordinarily debar a Court from granting relief on the basis of what the facts actually establish. A petitioner who unsuccessfully alleges torture in violation of Article 11, should nevertheless be granted relief if the facts show degrading treatment, even though not specifically pleaded. While pleadings in fundamental rights applications must undoubtedly be clear and adequate, the constitutional time limit serves as a caution against undue technicality and formality.

As for the time bar, when the error was corrected on 5.11.95, the petitioner had not been told what precise change had taken place in her merit ranking; and no action was taken to discontinue her from the DELIC course (in terms of letter dated 7.2.95) or to debar her from the final examination. Months later she was told she had passed that examination: her results were not withheld, nor was she told she was ineligible for a teaching appointment. Even by November 1996

the Education Services Committee had not informed her that she was not eligible for a teaching appointment. It was only when she became aware in November 1996 that others had received appointments that she knew that her rights had been infringed. That objection fails.

I hold that the petitioner's fundamental right to the equal protection of the law has been infringed, and direct the State to pay her a sum of Rs. 25,000/- as compensation (for the breach of that right, and not on account of delictual damages) and costs.

WIJETUNGA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Relief Granted.