

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for writs of
Certiorari and Mandamus under Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

B.S.E.M. Perera
09, Anthony Avenue
Peralanda Road,
Ragama.

Petitioner.

C.A. Writ Application No. 410/08, Vs.
CA 411/08, CA 419/08 and CA 420/08

1. Victor Perera
Inspector General of Police
Police Headquarters
Colombo-01.
- 2 Neville Piyadigama
Chairman,
National Police Commission
Rotunda Tower Level 3
109, Galle Road
Colombo-03.

- 3 **K.C. Logeswaran**
Secretary,
National Police Commission,
Rotunda Tower Level 3
109, Galle Road,
Colombo-03

4. **Chandrasa Nanayakkara**
Member,
National Police Commission
Rotunda Tower Level 3
109, Galle Road,
Colombo-03.

- 5 **R. Sivaraman**

Member
National Police Commission
Rotunda Tower Level 3
109, Galle Road,
Colombo-03.

- 6, **Ven. Elle Gunawansa Thero**

Member
National Police Commission
Rotunda Tower Level 3
109, Galle Road,
Colombo-03.

7 Ms. Charmane Madurasinghe

**Member
National Police Commission
Rotunda Tower Level 3
109, Galle Road,
Colombo-03.**

8. Nihal Jayamanne

**Member,
National Police Commission
Rotunda Tower Level 3
Colombo-03**

9. M.M.M. Mawjood

**Member,
National Police Commission
Rotunda Tower Level 3
109, Galle Road
Colombo-03**

10.S. Amarasekera

**Secretary,
Ministry of Highways and Road
Development
9th Floor, Sethsiripaya
Battaramulla**

11.H.M.D Herath

Deputy Inspector General of Police

Eastern Range (Central)

Batticaloa

12.L.A. Jayasinghe

Deputy Inspector General of Police

Training od Exam Range

Police Headquarters

Colombo-01.

13.P.S.K. Rajapaksa

Deputy Inspector General of Police

Ampara (Operations) Range

Ampara.

14. J. Abeysirigunawardena

Deputy Inspector General of Police

Central Range (East)

Nuwara Eliya.

15 W.P. Dayaratne,

Deputy Inspector General of Police

Ombudsman Range

Police Headquarters

5

Colombo.

16 A.N.S. Mendis

Deputy Inspector General of Police
CID, TID and DIU Range
Police Headquarters
Colombo-01.

17 VASP Nanyakkara

Deputy Inspector General of Police
North Western Range (West)
Puttlam

18 F, Mitchell

Deputy Inspector General of Police
Recruitment Range
Police Headquarters
Colombo-01.

19 HAD Gunathilake

Deputy Inspector General of Police
Monaragala (Operations) Range
Monaragala.

- 20 U.P. Hewage
Deputy Inspector General of Police
Crimes (PHQ) Range
Police Headquarters
Colombo-01.
- 21 The Secretary
Ministry of Defence
Colombo-01.
- 22 The Attorney General
Attorney General's Department
Hulftsdorp
Colombo-12.
- 23 The Inspector General of Police
Police Headquarters
Colombo-01.

Respondents.

BEFORE: Hon. Sathya Hettige P.C. J. President of the Court of Appeal
Hon. Anil Goonaratne J. Judge of the Court of Appeal

COUNSEL: D.P. Kumarasinghe PC with M.H.Kumarasinghe for the petitioner
Y.J.W Wijetilake ASG with Ms. Maithree Amarasinghe SC for 1st
to 10th 21st and 22nd respondents.

ARGUED ON: 13/01/2010, 24/02/2010 and 09/06/2010

Written Submissions tendered on 27/07/2010

DECIDED ON: 11.01.2011.

SATHYA HETTIGE P.C J, (P/CA)

When this matter was taken up for argument on 13/01/2010 the learned President's Counsel for petitioners informed court at the outset of the proceedings, that 4 petitioners filed four applications bearing nos. CA 410/2008, CA 411/2008 , 419/2008 and 420/08 seeking relief against the wrongful denial of promotion to the petitioners to the rank of Deputy Inspector General of Police (DIG). However, Mr. Kumarasinghe agreed that only CA application No. 410/08 should be taken up for argument as the petitioners in other application nos. CA 411/08, CA 419/08 and CA 420/08 have retired from service

Both counsel agreed at the outset that the decision of this application will apply to and will be binding on all parties in all four applications as the most of the facts in all four applications were identical and common.

The petitioner in this application is seeking inter alia, the following reliefs

- a) A Writ of Mandamus directing the 21st respondent to take all necessary steps or cause such steps to be taken to forthwith promote and appoint the petitioner to the rank of Deputy Inspector General of Police with effect from the date on which the 11th to 20th respondents were promoted or in the alternative,
- b) A writ of Certiorari quashing the
 - i the marking scheme marked P 10
 - ii the selection of the 11th to 20th respondents to the rank of DIG
- C) Writ of Mandamus directing the 21st respondent to hold fresh interviews for the selection of DIG upon a reasonable and rational marking scheme made known to all the candidates reasonably in advance

- d) Call for the marks sheet / notes kept by each member of the Interview Board in respect of the petitioner and each of 11th to 20th respondents.
- e) To make order directing the 21st respondent to pay suitable compensation to the petitioner.

On a careful perusal of the petition it appears that the case of the petitioner is that the marking scheme that was used by the Interview Board to assess the petitioners and the manner in which the marking scheme marked P 10 was applied at the interview is unreasonable. The said marking scheme which sets out six categories of assessment relating to this application is marked P10.

The petitioner claims that the Application of the marking scheme in respect of the petitioner at the interview was grossly unfair and the marking scheme marked P 10 should have been fair and just both in formulation and application. The petitioner further claims that as stated in paragraph 30 of the petition that in fact he was entitled to receive a minimum of 53.25 marks on the objectively assessable criteria of the same marking scheme marked P10.

The petitioner complains that denial of promotion to the petitioner as Deputy Inspector General of Police and the promotion of the 16th and 18th respondents are unreasonable and arbitrary, capricious and in violation of procedural fairness on the part of the 1st to the 10th respondents. Further, the petitioners complain that not only that they were denied of their promotions as Deputy Director General of Police but officers who were junior to the petitioners in the rank of Senior Superintendent of Police were promoted over the petitioners in this application and the petitioners in all connected applications. In that In the case of the petitioner in this application, the 16th and 18th respondents were promoted over the petitioner.

The 1st respondent by RTM dated 05/02/2008 marked P 9 informed the petitioner that National Police Commission has decided to hold interviews for selection of Deputy Inspectors General of Police (DIGs) and the said document marked P 9 set forth the eligibility criteria for application. The petitioner presented himself for the Interview on 07/03 2008 and by the RTM dated 13/03/2008 the successful candidates were announced by the 1st respondent. The petitioner had not been selected.

Marking Scheme referred to in P 9 and relevant to this application is marked P 10.

It appears that the marking Scheme marked P 10 used by the Interview Board sets forth several heads under which the candidates were evaluated and marks had been given namely,

- (i) Period of Service (45 marks),
- (ii) Capacity assessment (30 marks) ,
- (iii) Outstanding performances (10 marks),
- (iv) Medals (5 marks),
- (v) Specialized qualifications (6 marks) and
- (vi) Language Skills (4 marks).

The report of the Selection Board containing the final list of selected candidates in order of merits that the candidates were placed according to the marks they obtained is marked 1 R 4 by the respondents in the Statement of Objections. The petitioner in this application has received 64.25 marks and has been placed 25. However, the petitioner in the Counter affidavit filed on 21/01/2009, has failed to specifically admit or deny the document marked 1 R 4.

The respondents filed their objections raising several preliminary objections to the maintainability of the petitioner's application.

At the hearing of this application along with connected applications nos. CA 411/2008, CA 419/2008 and CA 420/2008 on 13/01/2010, 24/02/2010 and 09/06/2010 learned Additional Solicitor General raised several objections to the application.

Learned ASG submitted that the provisions contained in Article 155 © of the 17th Amendment to the Constitution precludes the petitioner from obtaining relief and in view of the preclusive clause of the Constitution the petitioner cannot seek relief by way Writ jurisdiction from this court.

Article 155 © reads as follows:

“ Subject to the jurisdiction conferred on the Supreme Court under paragraph 1 of Article 126, no court or Tribunal shall have the power or jurisdiction to inquire into , or pronounce upon or in any manner call in question any order or decision made by the Commission or Committee in pursuance of any power or duty , conferred or imposed on such Commission or Committee under this Chapter or under any other law.”

Learned ASG further submitted that as admitted by the petitioner an application was filed in the Supreme Court in respect of same issue seeking relief alleging violation of Fundamental rights under Article 12 (1) and his application was dismissed by the Supreme Court along with other connected applications. A copy of the SC Order in SC FR 135/08 is annexed to the Statement of Objections marked 1 R5.

Thirdly the preliminary objection was raised by the respondents that the petitioner has failed to exercise his right of Appeal to the Administrative Appeal Tribunal under section 4 (1) of the Administrative Appeal Tribunal Act which was an alternative remedy available to the petitioner.

It was further contended that the petitioner was possessed of the marking scheme (P10) at the time he presented himself for the interview and moreover, whilst challenging the said Marking Scheme on the same basis the petitioner relies on the same marking Scheme to be given marks to be considered for promotion.

It appears from the documents marked 1 R3 and 1 R4 that the 11th to 20th respondents have obtained higher marks than the petitioner. If the petitioners in all the applications before this court seeking higher marks based on the same marking Scheme and promotions as DIGs have failed to establish a legal right, are the petitioners in these applications entitled to obtain relief from this court.

In **Credit Information Bureau of Sri Lanka v Messrs Jafferjee and Jafferjee (Pvt) Ltd** 2005 1 SLR at 899 His Lordship the Former Chief Justice S.N. Silva set out the conditions to be satisfied by the applicant in an application for a Writ of Mandamus and held that

“there is rich and profuse case law on Mandamus on the conditions to be satisfied by the applicant.

- A) The applicant must have a legal right to the performance of a legal duty by the parties against whom the Mandamus is sought (R v. Bamstaple Justices 1937 54 TLR 36
- B) The right to be enforced must be a public right and the duty sought to be enforced must be of a public nature
- C) The foundation of Mandamus is the existence of a legal right (Napier ex parte 1852 18 QB 692 at 695.)
- D) The conduct of the applicant may disentitle him to the remedy (i) It would not be issued if the Writ would be futile in its result.
.....”

I am inclined to follow the above conditions as valid guidelines to be satisfied by the applicant when considering granting a Writ of Mandamus. The petitioner has to establish to the satisfaction of court that the petitioner has a legal right to the relief and the party against whom the relief is sought has failed to perform his public duty.

In **P.S Bus Company v. Ceylon Transport Board** 61 NLR 491 the court held that

“ A prerogative Writ is not issued as a matter of course and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ , for instance , will not issue where it would be vexatious and futile.”

I have carefully considered the objections raised by the State at the hearing of this application and I agree with the submissions of the learned ASG as to whether in fact, the petitioner has established a legal right in order to obtain relief from this court.

It is to be noted that the petitioners' Fundamental Rights applications on the same issue have been refused by the Supreme Court having carefully considered the mark sheet which is being disputed in this application.

The petitioner in this application complains that the allocation of 30 marks for “ capacity assessment in the “ marking Scheme “ marked P 10 is unreasonable and leaves ample room for abuse whereas the “capacity assessment” carried only 10 marks in the year 2006. However, it must be noted that under capacity assessment , there were 5 other distinct criteria namely, Personality, Leadership, Communication Skills, Application of conceptual / Analytical skills and Special Achievements carrying 6 marks each under which all the candidates including the petitioners were evaluated.

Learned counsel for petitioner submitted that the allocation of 30 marks for the criteria in P 10 is unreasonable and subjectively assessable and vague. However, it appears from the material placed before this court that

all the candidates had been assessed equally on the same criteria with the same amount of time allocation at the interview for each candidate.

It was submitted on behalf of the petitioner that the 16th and 18th respondents who were selected at the interview and promoted over the petitioner were very much junior in rank. However, it was the position of the respondents that the both the 16th and 18th respondents were promoted to the rank of Senior Superintendent of Police on the same day as that of the petitioner.

On a careful reading of the mark sheet marked 1 R 3 it is obvious that marks had been allocated for each category and total marks had been given from the marks received for each category in respect of all candidates.

It was contended by the learned ASG that the petitioner did not object to the marking scheme and or the manner in which the interviews were conducted and or the criteria on which the interviews were conducted any time prior to the announcement of the selected candidates.

It can be seen that 11th to the 20th respondents have obtained more marks than the petitioner at the interview. And as such I do not see that any injustice or prejudice has been caused to the petitioner at the Interview as all the candidates have been assessed by the interview board in good faith without any discrimination. I do not agree with the submission made by the learned counsel for the petitioner that the petitioners were prejudiced as marking scheme was made known to the candidates prior to the interviews.

The respondents heavily relied on the Constitutional ouster clause in Article 155 © of the 17th Amendment to the Constitution under which the petitioners are precluded from obtaining reliefs from this court.

Under Article 155 © referred to above this court has no jurisdiction to inquire into or pronounce upon or in any manner call in question the decision of the National police Commission. It should be noted that the ouster clauses as has been decided in a number of cases in this court and the Supreme Court causes a bar to the entertaining a Writ application and as such I am in agreement with the submission of the learned ASG and uphold the objections raised by the respondents that this court has no jurisdiction under Article 155 ©. The petitioners have failed to establish any malafides on the part of the 1st to 10th respondents from not selecting the petitioners for promotion as DIGs and I do not see any unfair treatment towards the petitioners and or the respondents have acted outside and beyond the powers granted by law for not granting promotions to the petitioners as DIGs.

I am inclined to uphold the objection raised by ASG Mr. Wijetilake that the petitioner's FR application filed on the same basis has also been refused by the Supreme Court and the petitioner has also failed to exercise his right of appeal against the decision of the Police Commission to the Administrative Appeals Tribunal before seeking any remedy by way of Writ application.

In any event, it must be stated that all four petitioners have now retired from police service and any reliefs sought by the petitioners are futile and no relief can be granted to the petitioner in his favor.

The prerogative remedies such as certiorari lie where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the public. I do not think that the 1st to the 10th respondents acted in a prejudicial or detrimental manner to the petitioners. It was the responsibility of the respondents to select the most suitable candidates for the post of DIG.

I have carefully considered the written submissions of the parties and material placed before this court and I reach the conclusion that the relief sought by the petitioners cannot be granted in favour of the petitioners .

Accordingly, the petitioner's application and the connected application nos. CA411/08, CA 419/08 and CA 420/08 are dismissed. There will be no order for costs.

PRESIDENT OF THE COURT OF APPEAL

Anil Goonaratne J,

I agree.

JUDGE OF THE COURT OF APPEAL.