

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

In the matter of an Application for Writs of Certiorari, Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No.

0062-20

Neelalogini Jekatheeswaran,
Palavodai, Inuvil West, Chunnakam.

PETITIONER

Vs.

1. R. P. A. Wimalaweera,
Commissioner General of Labour,
Department of Labour,
2. C. N. Withanachchi,
Additional Commissioner General of Labour
(Admin),

The 1st and 2nd Respondents above are of
Labour Secretariat, No. 41,
Kirula Road,
Colombo 05.
3. D. M. Sarath Abayagunawardana,
Secretary,
Ministry of Skills Development Employment
and Labour Relations,
4. Lal Samarasekara,
Additional Secretary (Admin) - Labour
Relations Division,
Ministry of Skills Development Employment
and Labour Relations,

5. K. G. Wijesiri,
Additional Secretary (Admin),
Ministry of Skills Development Employment
and Labour Relations,

6. Hon. Dinesh Gunawardhana,
Minister of Skills Development,
Employment & Labour Relations,

The 3rd to 6th Respondents above are of:
"Mehewara Piyasa",
Narahenpita,
Colombo 05.

7. P. M. Amza,
Additional Secretary (Economic Affairs),
Ministry of Foreign Relations,
Republic Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

8. P. G. R. Chandrawansa,
District Labour Office,
Avisawella.

9. H. P. D. N. K. Jayasekara,
District Labour Office,
Kuliyapitiya.

10. B. A. S. P. K. Balasuriya,
District Labour Office (Kandy South),
Yatinuwara Veediya,
Kandy.

11. W. D. B. S. Walpita,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

12. K. L. K. Perera,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

13. L. T. G. D. Dharshana,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

14. D. M. J. Bandara,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 05.

15. P. V. M. N. Ranatunge,
District Labour Office,
Maharagama.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Saliya Pieris PC with Sharith Perera for the Petitioner.

Sanjeeva Jayawardena PC with Ms. Lakmini Warsawithana and

Ms. Chaya Sri Nammuni DSG for the 1st to 4th Respondents.

Ms. Ridmi Benaragama for the 8th to 15th Respondents.

Written submissions tendered on:

20.09.2022 by the Petitioner.

16.09.2022 by the 1st to 4th Respondents.

Argued by way of written submissions

Decided on: 27.02.2023

S.U.B. Karalliyadde, J.

The Petitioner to this Writ Application is serving as the Commissioner of Labour (Special Investigation Division) (Acting) in the Department of Labour. By the Notice dated 13.05.2019 marked P9A the Additional Commissioner General of Labour (Administration), the 2nd Respondent called applications from the Officers in the Labour Department to fill the vacancies in the Sri Lanka Missions Abroad. Accordingly, the Petitioner also preferred an application on 28.05.2019 for a Post and faced an interview on 04.01.2020 held at the Ministry of Skills Development, Employment & Labour Relations. The Petitioner has averred in the Petition to this Writ Application that even though, she is the most eligible applicant to be assigned to a Post in a foreign mission as per the Notice marked P9A, she could not be selected as the 1st, 3rd, 4th, 5th and 7th Respondents who were the members of the interview panel had not given marks which she is entitled to according to her qualifications and working experience. She has further averred that, the interview panel had selected the 8th - 15th Respondents who had not fulfilled the qualifications as per P9A and the decision of the interview panel had been approved by the Minister of Skills Development, Employment & Labour Relations, the 6th Respondent. As depicted in the marking sheet used at the interview conducted on 04.01.2020 marked P12, the 14th and 15th Respondents are serving in the Department of Labour as Labour Officers for a period of 17 years, the 8th – 11th Respondents, each have 18 years' service experience in the Department of Labour as Labour Officers and Assistant Commissioners of Labour. The 12th Respondent has served as an Assistant Commissioner, a Deputy Commissioner and now serving as a Commissioner of Labour having 12 years of service experience. The 13th Respondent is having experience in the Labour Department as an Assistant Commissioner and a Deputy Commissioner of Labour for a period of approximately 9 years. According to the Petitioner, the interview panel had failed to give due weightage to the seniority and the service experience of the applicants and she has not been given full marks which

she is entitled for English and Computer skills. Therefore, the learned President's Counsel appearing for the Petitioner argued that the 1st, 3rd, 4th, 5th, 6th and 7th Respondents have acted in an illegal, irrational, capricious, unfair and unreasonable manner towards the Petitioner. On that premise the Petitioner is seeking reliefs, *inter alia*, Writs in the nature of Certiorari quashing the decision of the 1st, 3rd, 4th, 5th and 7th Respondents to select the 8th to 15th Respondents for the vacancies in the labour sector in the offices of the Sri Lanka Missions Abroad as reflected in P-12, the approval of the 6th Respondent for the selection of the 8th to 15th Respondents to the said vacancies, a Writ of Prohibition preventing the 8th to 15th Respondents from assuming duties as Officers in the foreign diplomatic missions and Writs of Mandamus directing one or more or all of the 1st to 7th Respondents to appoint the Petitioner to one of the said Posts or to conduct fresh interviews alternatively.

One of the arguments of the learned President's Counsel for the Petitioner is that even though, the marks should be given at the interview under the heading of 'service period' considering both the experience and the positions serving, the marks had been given only considering the experience. Therefore, as a result, the Petitioner who has over 29 years of service experience as well as the 14th and 15th Respondents who have 17 years' service experience, had got the same marks. Accordingly, the learned President's Counsel appearing for the Petitioner argued that the criteria adopted by the interview panel to allocate marks for the 'service period' is highly irrational and unreasonable. As a remedy to the alleged injustice, the learned President's Counsel for the Petitioner suggested that the scheme mentioned in the Public Service Commission Circular No. 1/2019 marked P-13A could be followed in allocating marks for the 'service period'.

As per the Notice marked P9B, to be eligible for a Post to serve in a foreign mission, the applicants should have the following qualifications;

“(a) Possess not less than 3 years' service as a Commissioner of Labour/Deputy Commissioner of Labour

(b) Possess not less than 5 years of Service as an Assistant Commissioner of Labour, an aggregate of not less than 5 years' service in a post referred to at (a) above and Assistant Commissioner of Labour

(c) Possess not less than 10 years' service as a Labour Officer

(d) Not undergoing any disciplinary punishment.”

The guidelines are mentioned in the R6 as to how the marks should be given to the applicants for the ‘service period’ in recruiting Officers to the Posts in the Diplomatic Missions as follows;

“3. Service Period (Maximum 40 Marks) *

- *For each year of Service Period - SLAS Officers – 3.0 Marks*
- *For Additional one year of Service including Labour Officers Period-CL/DCL/ACL (Departmental Service) Officers -4.5 Marks*
- *For Additional one year of Service Period - Labour Officers-4.4 Marks”*

Therefore, according to the documents marked as P9B and R6, it is evident that the applicants had been interviewed under three categories. Those categories were; Sri Lanka Administrative Service Officers, Departmental Service Officers and the Labour Officers.

In terms of the Notice marked P9B, the applicant should possess either not less than 3 years’ service experience as a Commissioner of Labour/ Deputy Commissioner of Labour or not less than 5 years of Service as an Assistant Commissioner of Labour (an aggregate of 5 years' service as a Commissioner of Labour/Deputy Commissioner of Labour and Assistant Commissioner of Labour) to be eligible under the ‘Departmental Service’ category (the Commissioner, Deputy Commissioner and Assistant Commissioner of Labour). The document marked R6 indicates that separate marking criteria applies to the applicants of each category for their period of service. This ensures that any one of the above mentioned Officers who has fulfilled any of the

requirements mentioned in P9B is eligible to apply for a Post in a Foreign Mission under any one of the three categories. When perusing the marking sheet used by the interview panel marked P- 12 it is clear that, the Petitioner as well as the 8th to 11th Respondents who have less experience than the Petitioner had been given the maximum marks of 40 under the 'service period'. The Petitioner and the 8th-11th Respondents have been interviewed under the 'Departmental Service' category. If the number of years, the Petitioner and the 8th-11th Respondents have served in the Department individually is taken into consideration, they should get more than 40 marks according to the R6. Nevertheless, as per the R6 the highest mark which could be awarded to an applicant for the 'service period' is 40. Hence, the Court could presume that the interview panel had rounded down the marks of the Petitioner and the 8th to 11th Respondents to 40 for the 'service period'.

The position of the learned President's Counsel appearing for the Petitioner is that the marking scheme mentioned in the Public Service Commission Circular marked P13A could be followed as it is more reasonable and fair than the marking scheme R6. However, the position of the learned Deputy Solicitor General appearing for the Respondents is that the said Circular cannot apply for the reason that the assignment to the Posts in dispute are neither internal promotions approved by the Cadre Commission nor the appointments made by the Public Service Commission but merely the assignment of employees of the Labour Department to the Foreign Missions for a period of 6 years and at the end of the tenure they return to the same substantive positions they held in the Department. The Court can observe that the marking scheme R6 had been formulated for the particular purpose of selecting Officers who work in the Department of Labour to the foreign diplomatic missions and not any other Government servants other than the employees in the Labour Department. Therefore, when considering the said facts of the case, the Court can accept the position of the learned Deputy Solicitor General. On the other hand, the marks had been given by the interview panel to all the applicants adopting the same criteria mentioned in R6 and not followed more than one

marking scheme in allocating marks. Hence, the Court can be satisfied that no discrimination has been caused to the applicants when giving marks to them. Under the said circumstances, the Court is of the view that a necessity does not arise to make an order to adopt the marking scheme P9A.

Another argument of the learned President's Counsel for the Petitioner is that even though, in terms of the marking scheme R6, the Petitioner should get 8 marks under the heading of 'Language proficiency', she had been given only 2 marks by the interview panel. That argument is based on the fact that the Petitioner has passed English as a second language being a subject in the 1st examination of the Bachelor of Business Administration Degree (vide P-28) and/or that the Petitioner has passed 'English for Academic Purposes' during her Bachelor of Laws Degree Programme (vide P7B). According to the marking scheme R6, if an applicant has passed English as a subject in the bachelor's degree or higher or possesses an English language Diploma would get 8 marks. Nevertheless, as per P28 the Petitioner has passed 'English as a second language' and according to P7B she has got through 'English for Academic Purposes'. Hence, on the face of P28 and P7B the Court could not be satisfied that the Petitioner has fulfilled either of the above stated qualifications mentioned in R6 to be entitled to 8 marks. The learned Deputy Solicitor General appearing for the Respondents brought to the attention of the Court to the fact that as per P7B, the Petitioner has not passed English as a subject in her Bachelor's degree. The Court has no competence to decide whether the Petitioner's said English qualifications are equivalent to any one of the above stated qualifications mentioned in R6. The Petitioner has failed to produce any document from an institution which has competence to certify that the qualifications mentioned in P-28 and P7B are equivalent to one of the above qualifications mentioned in R6.

In the case of *Abeyasinghe and 3 others Vs. Central Engineering Consultancy Bureau and 6 others*¹ the court had to consider whether a foreign degree in engineering is equivalent to a

¹ (1996) 2 Sri L. R. 36.

degree in engineering or its equivalent in Sri Lanka. Fernando, J. held that, “Learned Counsel for the Petitioners submitted that the 5th Respondent's Leningrad Diploma could not be regarded as being a degree in Engineering, or its equivalent, as it was a qualification in Geology, and not in Engineering as understood in Sri Lanka. The Respondents produced details of the subjects offered for that Diploma, and Counsel submitted that these could not be considered equivalent to those prescribed for a local degree in Engineering. **It is not for us to determine, on the merits, whether the Diploma conferred by the Leningrad Institute of Mining was the equivalent of a degree in Engineering from a recognized University; that was a matter for the 1st Respondent and the Interview Board,** and as long as their decision was not perverse or unreasonable, or tainted by procedural error, this Court would not seek to substitute its views” (Emphasis added).

Since the Petitioner has a Credit pass for English Language at the G.C.E. (O/L) Examination (as per P7G), the interview panel had given 2 marks which she is entitled for in terms of R6. Under the above stated circumstances, the Court is of the view that the marks given to the Petitioner under the ‘Language Proficiency’ is correct according to her educational qualifications and the marking scheme R6 and no prejudice or injustice therefore, had been caused to the Petitioner.

The learned President’s Counsel appearing for the Petitioner further argued that the Petitioner had not been given any marks for the ‘Computer Literacy’ even though, she is entitled at least 3 marks in terms of R6. That argument was on the premise that the Petitioner has passed ‘Computer Programming and Operational Research’ as a subject during her Bachelor of Business Administration degree programme (as per P29) and she has a Diploma in Microsoft Office conducted by the ITS Computer Centre in Jaffna (as per P7J). The learned Deputy Solicitor General appearing for the Respondents producing the document R2 argued that the institution which P7J had been issued is not a recognised institution to award IT Diplomas. R2 has been issued by the Tertiary and Vocational Education Commission which has competence to certify whether P7J is issued by a recognised institution to award IT Diplomas. When considering R2, the

Court cannot accept the position of the learned President's Counsel appearing for the Petitioner that the Petitioner has an IT Diploma awarded by a recognized institution which is entitled to award IT Diplomas. According to the P29, the 'Computer Programming and Operational Research' is one of the subjects the Petitioner has passed during her Bachelor of Business Administration degree programme and the Court has no competence to decide whether it could be considered as an IT subject in a bachelor's degree for the Petitioner to be entitled to 3 marks in terms of R6.

The learned President's Counsel appearing for the Petitioner also argued that even though, under the 'Language Proficiency' the 15th Respondent had been given 6 marks for the English Certificate Course she has completed at the British Council, she is not qualified for any marks since it is not a Certificate Course of minimum period of 3 months as required by the R6. According to the Certificate marked R29 issued by the British Council, the duration of the English Course which the 15th Respondent had followed is 2 months and one week. In terms of R6 to be entitled to 6 marks, the English Course should be a full time course of a recognised University or Institution and its duration should be 3 months or more. Even though, the British Council could be considered as a recognized institution to conduct English Courses, it is evident that the duration of the English Course followed by the 15th Respondent is under 3 months.

On the marks of the interview, eight applicants had been selected to serve in the Foreign Missions and accordingly, the 8th to 15th Respondents had been selected. As per the marking sheet marked as P12, out of those Respondents, the maximum total marks of 82 had been scored by the 12th Respondent and the minimum overall marks of 70.3 had been obtained by the 13th Respondent. The 15th Respondent had got 76.2 marks and the total marks which the Petitioner had scored was 63.4. Even if, 6 marks given to the 15th Respondent for 'Language Proficiency' is deducted from his total marks, he would be entitled to 70.2 marks ($76.2 - 6 = 70.2$) which is higher than the total marks obtained by the Petitioner. Therefore, even if the 15th Respondent is entitled to the total marks of 70.2, he would be placed in the 8th place in the list and as 8 applicants were selected,

he could be selected to serve in a foreign mission. Under the above stated circumstances, the view of this Court is that any prejudice or injustice had not been caused to the Petitioner or any other applicant by allocating 6 marks to the 15th Respondent for the English Language Course he had completed.

The learned President's Counsel for the Petitioner has drawn the attention of the Court to the fact that there is a calculation error in P12 in totalling the marks of the 13th Respondent. By highlighting that fact, the learned President's Counsel attempted to convince the Court that there are calculation errors in the marks given to the applicants. The 13th Respondent had been selected to serve in a Foreign Mission and according to the P12 he had scored total marks of 70.3. Nevertheless, when adding the marks which the 13th Respondent had scored under the different headings mentioned in the R6, he should be entitled to 70.8 marks which is higher than the marks allocated to him as the final marks by the interview panel. The applicants who had not been selected had not scored total marks more than 49.2. Therefore, even if there are any errors in totalling the marks of the applicants, it had not caused any prejudice or adverse effect on the selection of applicants for the foreign missions.

The learned President's Counsel appearing for the Petitioner also brought the attention of the Court to the fact that in P12, the marks given to H.M.G. Jayasekara who is a Labour Officer had been altered. According to the P12, the total marks obtained by him is 55.2. Among the eight applicants who had been selected to serve in the foreign missions, the 15th Respondent is the person who had scored the lowest overall marks. He had scored 76.2 marks. The marks obtained by the said Mr. Jayasekara is lower than the marks obtained by the 15th Respondent. Therefore, even after the alteration was done to the marks of Mr. Jayasekara he had not been placed in a position where he could be selected to serve in a foreign mission. Therefore, the view of the Court is that injustice or prejudice could not be caused to the Petitioner or any other applicant as a result of the alleged alteration.

According to the marking scheme marked R6, the applicants are entitled to 15 marks for their overall performance during the employment in the Department of Labour. In R6, the manner which 15 marks should be allocated has been explained as follows;

“ 10.1. General performance (10)

- *Excellent - (10)*
- *Good – (08)*
- *Satisfactory – (05)*

10.2. Specific performance other than routing duties – (05)”

The learned President’s Counsel for the Petitioner submitted to the Court that the performance of the 8th and 11th Respondents had not been evaluated during the periods of 2014 and 2015 whereas the performance of the 12th Respondent had not been evaluated for the period of 2017. Thus, the learned President’s Counsel argued that the allocation of 5 marks for the 8th Respondent and 8 marks for the 11th and 12th Respondents is without any basis and therefore, illegal.

When perusing the document marked P19, it is evident that the services performed by the 12th Respondent for the years 2014, 2015, 2016 and 2018 had been evaluated as ‘good’ and given him 8 marks for the ‘general performance’. The services of the 11th Respondent for the periods 2016, 2017 and 2018 had been evaluated as ‘good’ and the interview panel had given him 8 marks. Similarly, the services of the 8th Respondent for the periods of 2016, 2017 and 2018 had been evaluated as ‘satisfactory’ and given him 5 marks. Thus, the Court cannot accept the argument of the learned President’s Counsel that the interview panel had given marks to the 8th, 11th and 12th Respondents for the ‘overall performance’ without any basis and illegal manner. Furthermore, it had been stated on the page 2 in P19 that the performance of the 12th Respondent for the period 2017 had not been evaluated for the reason that during that period he was on overseas leave.

The learned President's Counsel appearing for the Petitioner also contended that the marking scheme R6 had not defined the term 'specific performance other than the routine duties' and it is unclear as to how the interview panel had allocated marks for the applicants under that heading. Even though, the learned President's Counsel argued that it is unclear as to what the interview panel had meant by 'specific performance other than the routine duties' he did not argue that when allocating marks for the applicants under that heading any injustice or prejudice had been caused to the Petitioner or any other applicant. It has been stated in the written submissions of the Respondents that the candidates who were to be chosen for this specific mission an emissary of nation of foreign soil should be able to go above and beyond their allocated duties in order to meet the extra-ordinary demands of the new assignment. Briefly explaining the duties and the responsibilities of the appointees, it has been stated in the written submissions that they need a lot of interpersonal skills, communication abilities, personal relations, thinking on the feet and such soft skills that can go beyond a statutory stipulated job description and further that the interview panel has looked to see whether they can think outside the box, and take that extra effort to execute the task that they are entrusted with. The position of the Respondents is that when allocating marks under the 'specific performance other than the routing duties' the above stated facts had to be considered.

The learned President's Counsel appearing for the Petitioner also argued that the appointments of the 8th – 15th Respondents to the ranks they had appointed in the Foreign Missions violates the requirement mentioned in the Foreign Ministry Instructions Circular No. 154 marked P8/8R39 and they are not entitled, therefore, to be appointed to the ranks mentioned in their letters of posting marked as 8R33, 8R33(A) - 8R33(G). The ranks to which the selected employees were posted in the Foreign Missions has no relevance whatsoever for the selection of the applicants to the Foreign Missions. It does not have an effect on the marks given to the applicants at the interview.

Under the said circumstances, the Court will not consider the above-mentioned argument of the learned President's Counsel.

The learned President's Counsel for the Petitioner submitted to the Court that the Respondents had failed to communicate or to publish the purported marking scheme pertaining to the interview prior to the interview or even after the interview was held. The Petitioner had averred that even though, she had made requests under the Right to Information Act by P21, P24 and P26, she was not provided with the marking scheme marked as R6/8R-38. The learned Deputy Solicitor General appearing for the Respondents argued that the marking scheme and criteria need not be disclosed prior to the interview and that the fairness and justification of an interview are judged on whether the same criteria had been applied to all candidates and whether they had been given the same opportunities.

In the case of *B.S.E.M. Perera Vs Victor Perera, Inspector General of Police and 22 Others*,² considering the same matter Justice Sathya Hettige held as follows;

*"...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..."*
(Emphasis added).

Hence, after perusing the facts and circumstances of the case at hand, this Court is not satisfied that the failure of the Respondents to communicate or to publish the purported marking scheme prior to the interview or even after the interview has caused any injustice or prejudice to the Petitioner.

² (CA. Writ Application No. 410/08) at page 13.

Under the above stated circumstances, the Court is satisfied that the manner in which the interview has been conducted was fair, impartial and no prejudice or injustice has been caused to any applicant. Hence, I hold that this Writ Application is without merit and it should be dismissed. Accordingly, the Writ Application is dismissed. The Petitioner should pay Rs. 15 000/- as cost to each 8th to 15th Respondents.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL