IN THE SUPRME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. K. J. A Chathumi Sehasa,
2. K. J. A Aminda Kumara,

Both of 26A, Viyananda Mawatha, Weliwatta, Galle

S.C. [FR] Application No. 201/2017

PETITIONERS

-Vs-

1. Mrs. S. Irani Pathiranawasam,
   Principal, Southlands Balika Vidyalaya
   Light House Street, Fort, Galle.

2. Mr. Ranjith Tilakarathne,
   Principal, Aloysius College,
   Templers Road, Galle.

3. S. K. De Silva

4. D. L. Chitra

5. Ranga Mohotti

6. Upali Amaratunga

   2nd to 6th Respondents are Members of the Appeals and Objections Investigations Board, Southlands Balika Vidyalaya, Light House Street, fort, Galle.

7. Mr. Sunil Hettiarachchi,
   Secretary, Ministry of Education, 3rd Floor,
   Isurupaya, Battaramulla.

8. Hon. Attorney General,
   Attorney General's Department, Colombo 12.

RESPONDENTS

BEFORE:	Buwaneka Aluwihare PC, J. Priyantha Jayawardena PC, J. Murdu N. B Fernando PC, J.
COUNSEL:	Ms. Thushani Machado for the Petitioners Mr. Fazly Razik, SSC for the Respondents
ARGUED ON:	02. 04. 2018
DECIDED ON:	30. 05. 2018

Aluwihare PC, J.

The 1st Petitioner to the application was 5 years and 9 months old at the time of this application. The 2nd Petitioner is the father of the 1st Petitioner and is prosecuting this application as the next friend of the 1st Petitioner. In the present application, they claim that the 1st to the 7th Respondents have violated their right to equality and equal protection of law guaranteed under Article 12 (1) of the Constitution by denying school admission to the 1st Petitioner to Grade 1 in year 2017.

A brief account of the facts is as follows.

The 2nd Petitioner states that Southlands Balika Vidyalaya (hereinafter the 'school') published a Gazette Notification in June 2016 calling applications for the admission of students for Grade1. The 2nd Petitioner dispatched a duly completed application along with the supporting documents on or about 9th June 2016.

The instrument which regulates the procedure for School admission is the Education Ministry Circular No. 17/2016 (Admission of Students to Year I for the year 2017). According to Clause 6.1 of the Circular, an applicant can submit an application for school admission under one or more of the following categories:

(i) Children of Residents in close proximity to the School
(ii) Children of Parents who are past pupils
(iii) Brother/Sister of student already in the School
(iv) Children of officials employed in the Education Service
(v) Children of officers employed in the Government sector and transferred on exigencies of work
(vi) Children of persons presently in Sri Lanka after residing abroad with children

Although the 2nd Petitioner's wife is a past pupil of the Southlands Balika Vidyalaya, the 2nd Petitioner states that they only applied under the "proximity to the school" category as they were confident of obtaining admission under that category. As a response to this application, the petitioners were asked to present themselves for an interview on 18. 08. 2016.

At the interview, the panel examined the documents to verify whether the Petitioner fulfils the requirements under the said category. As per Clause 6.1 (III) of the Circular, an applicant who applies under the "proximity to the school" category loses 5 marks per school where there are schools, other than the one applied for admission, in the vicinity. The number of schools are determined by drawing a circle taking the distance between the residence and school as the radius. The map pertaining to the Petitioners is marked and produced as "P4".

Accordingly, the Petitioners state that they were awarded 90 marks at the interview—the missing 10 points being deductions made in view of two intervenient schools namely, Sangamiththa Vidyalaya and Covenant Balika

Vidyalaya within the said radius. The Petitioner has marked his copy of the marks sheet given by the interview panel marked "P 6" which shows the breakdown of the 90 marks;

a) The Applicant (2nd Petitioner) and the spouse have been registered in the Electoral Register for the past 5 years from the year prior to the application.	35 marks
b) Documents in proof of residency (Title deed)	10 marks
c) Additional documents in proof of Residency (NIC, Electricity and water bills, life insurance etc)	5 marks
d) Proximity to the school from the place of residence	40 marks

As per clause 8.3(b) of the Circular, once the interviews are concluded the relevant school must display a provisional list and a waiting list where the applicants who obtained the highest marks are listed in chronological order. Clause 8.3 (g) provides that objections and appeals to and against the interim list should be preferred within two weeks from the date of display. The School must constitute an Appeal and Objection Inquiry Board and refer all the appeals and objections to the said Board. In particular, where an objection is tendered the Board must interview the parties separately and verify the veracity of the objection. At the end of this process, as per clause 10. 9, the Board must enter the new marks (if there are additions/reductions) both in a separate registry maintained by them and in the 'objections/appeals' column in the applicant's copy of the marks sheet.

The 'Provisional List' of the Southlands Balika Vidyalaya was displayed on the School's Notice Board on 17. 12. 2016 and the 1st Petitioner's was ranked 12th in the said list. However, they were subsequently informed that an objection has been tendered against the 1st Petitioner's admission to the school. Accordingly,

they were required to present themselves for an inquiry before the School's Appeals and Objections Inquiry Board. The 2nd Petitioner states that at the said inquiry he was informed that no reduction of marks would take place. However, when the 'Final List' of students admitted to the School appeared on the School Notice Board on 14. 01. 2017 the Petitioners observed that the 1st Petitioner's name was not listed.

The 2nd Petitioner states that he attempted to prefer an appeal but that the 1st Respondent declined to accept it. He further claims that the list bore the names of several others who had obtained lower marks than him at the interview. Thereafter, the 2nd Petitioner complained to the Human Rights Commission, Matara on 08. 02. 2017 alleging that the 1st Respondent violated his right to equality. An inquiry was conducted by the HRC on 09. 05. 2017 and the 2nd Petitioner was informed on 31. 05. 2017 that there was no violation of his fundamental rights.

The Petitioners thereafter invoked the jurisdiction of this Court under Article 126 of the Constitution, pleading *inter alia*;

> To declare that the failure to admit the 1st Petitioner to Grade one for the year 2017 at Southlands Balika Vidyalaya, Galle by the 1st Respondent is an infringement or continuing infringement of the Petitioner's fundamental rights guaranteed to them under Article 12 (1) of the Constitution by the 1st to the 7th Respondents or any one or more of them;
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> To declare that the 1st Petitioner is entitled to be admitted to Grade 1 for 2017 at Southlands Balika Vidyalaya Galle;
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> To direct the 1st to the 7th Respondents or anyone or more of them to admit the 1st Petitioner to Grade 1 for 2017 at Southland Balika Vidyalaya Galle;

In their observations, the Respondents claim that the Court cannot grant the reliefs claimed by the Petitioners as it contravenes Circular No.17/2016. They

point out that although the Petitioners received 90 marks at the interview, pursuant to a site visit carried out by the Appeals and Objections Inquiry Board, it was revealed that there were not 2 but in fact 6 intervening schools within the radius. On account of this discovery, 5 marks per school were deducted—which in the end left the 1st Petitioner with only 75 marks. The 1st Respondent submitted that the cut off mark for that year under the "proximity to the school' category was set at 76 and as such, the 1st Petitioner was ineligible for admission. The 1st Respondent further states that a letter informing reasons for non-selection was sent by normal post to the Petitioners. They have produced a list marked "R2" containing the names of all persons to whom such letters had been sent.

With that, I turn to consider the legal question presented in the present application. The gravamen of the Petitioner is that the 1st to the 7th Respondents' failure to admit the 1st Petitioner to Grade one for the year 2017 at Southlands Balika Vidyalaya is arbitrary, capricious, unreasonable, discriminatory and amounts to an infringement of the Petitioners' right to equality and equal protection of law under Article 12 (1) of the Constitution.

For the complaint of an unequal treatment of law to succeed the petitioner must show that the unequal treatment was meted out in the performance of a lawful act. It is a cardinal principle that equal treatment should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is illegal in law.

In fact, the decision in ***C. W. Mackie and Co. Ltd. v Commissioner-General of Inland Revenue and others*** **(1986) 1 SLR 300** had considered this legal point where it was held that Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. In that case, Sharvananda, C.J., was of the view that,

"[…] the equal treatment guaranteed by Article 12, is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of an

illegal act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is valid in law."

In ***Gamaethige v Siriwardene (1988) 1 SLR 384*** the petitioner was the General Secretary of the Sri Lanka Government Clerical Union and was released for full time Trade Union work. In view of petitioner's participation in a strike from 17.07.1980 to 12.08.1980, he was treated as having vacated his employment, but later on appeal he was reinstated. Earlier in 1973 the petitioner's name had been registered in the waiting list for Government Quarters. In June 1984 prior to the petitioner's reinstatement in service, the petitioner's eligibility for quarters was re-examined, and upon it being reported that he was not in service, his name was deleted from the waiting list for Government Quarters. He alleged discrimination stating that preferential treatment was accorded to the respondent and four others who were not in the waiting list and another employed on contract after retirement who had been given Government Quarters though their names were not in the waiting list. Justice Mark Fernando, refusing the application observed that;

"*Here the petitioner's allegation that these persons were not in the waiting list and/or were not eligible for General Service Quarters amounts to an allegation that quarters were allocated in breach of the relevant rules. Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong.*"

In ***T. V. Setty v. Commissioner, Corporation of the City of Bangalore (1968) Mysore 251*** the petitioner complained that the Bangalore City Municipal Corporation violated Article 14 of the Indian Constitution, which corresponds to Article 12 of our Constitution, by refusing him a licence to carry on manufacture of soaps in the premises in which he has been so doing, while permitting a

number of other soap manufacturers to carry on the same in similar circumstances. Dealing with this submission Chandrashekhar J. expressed that:

"*Assuming that the Corporation has issued to those persons licences improperly and against the provisions of the Corporation Act and by laws thereunder, Article 14 of the Constitution cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases*".

This principle was followed by G.P.S De Silva J. (as he then was) in ***Jayasekera v Wipulasekera (1988) 2 SLR 237*** and by Dr. Shirani Bandaranayake J. (as she then was) in ***Seelawansa Thero And Two Others v Tennakoon, Additional Secretary, Public Service Commission (2004) 2 SLR 241.***

In the present case, as per the map marked "P4" it is clear that there are in fact 6 other schools within the perimeter. Although it is surprising as to how the said 6 intervening schools escaped the attention of the 1st Respondent during the first interview and resulted in the award of 90 marks, the Respondents have not committed an illegality by subsequently reducing the marks from 90 to 75. The 2nd Petitioner alleges that the Respondents have not reduced the marks of other applicants despite there been a similar number of schools intervening in their respective cases. While this speaks of an unfortunate turn of events, in so far as the Court is concerned, the conduct of the Respondents in admitting other applicants who have presumably received lower marks than the Petitioners cannot give rise to a 'legitimate' expectation. The petitioners cannot request this Court to compel the Respondents to act illegally in this case for the mere reason that they have acted illegally in previous cases. The relief which the Petitioner claims is a relief which this Court as a Court of law and Equity cannot provide since "Illegality and equity are not on speaking terms".

Before concluding, I wish to address certain other grievances which the Petitioners have complained of in the application. The Petitioner strenuously argued that, contrary to what the 1st and the 2nd Respondents claim in paragraph

14 in their respective objections, no site visit was carried out by members of the Appeals and Objections Inquiry Board on or about 30. 12. 2016. It is also observed that save and except for the aforesaid paragraphs in the objections, no other documentary proof substantiating the Respondents' position is before this Court. This is despite clause 8.3(c) of the Circular requiring them to maintain a separate comprehensive record of all the site visits, inclusive of the names of persons who conducted the visit, the date and their signatures. However, the 1st Respondent has brought to the attention of this Court that the officials of the Bribery Commission have taken custody of files relevant for school admission for the year 2017. In those circumstances, the Court is precluded from ascertaining the veracity of the respective claims. In any event, a finding in this regard would not make the Court come to a different conclusion.

In addition, the Petitioners also assert that a verbal assurance was given by the members of the Objections and Appeals Inquiry Board that no marks will be deducted. The Petitioners have adduced "P6" which proves this position. In terms of clause 10. 9 of the Circular, the members of the Appeals and Objections Inquiry Board must note the amended marks in red ink, in the Appeals and Objections Column in the applicant's copy of the mark sheet. However, there are no such marking on "P6", which lends credence to the Petitioners' position.

Nevertheless, the failure to mark the amended marks by itself does not preclude the Respondents from subsequently altering their position. In terms of clause 10.10 of the Circular, the Respondents are empowered to take steps which are necessary to ascertain the facts relevant for an application. This includes making site inspection. Furthermore, as per clause 8.2 (a) the Respondents are also authorized to subsequently deduct marks where any irregularity is detected. In terms of clause 8.2 (a) this risk was made known to the 2nd Petitioner when he signed and obtained the mark sheet "P6" at the very first interview. Thus, while in the ordinary course it is prudent that the amended marks be duly noted and

communicated to the applicants at the desired point, one must also be mindful that late discoveries that vitiate the eligibility of the applicant makes an exception to this practice.

In the result, I hold that the petitioners have not been successful in establishing that their fundamental right guaranteed in terms of Article 12(1) was violated by the respondents. This application is accordingly dismissed.

In the circumstances of the case I make no order as to costs.

Judge of the Supreme Court

Justice Priyantha Jayawardena PC.

I agree

Judge of the Supreme Court

Justice Murdu Fernando PC.

I agree

Judge of the Supreme Court