

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

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Adam Bawa Issadeen,
55/16, A3, Peiris Road,
Mt. Lavinia.

Petitioner

SC FR Application No. 248/2011

Vs.

1. Sudharma Karunaratne,
Director General of Customs,
Customs House,
Sri Lanka Customs,
Bristol Street,
Colombo 1.
And 20 others.

Respondents

Before : S. Marsoof PC. J
Rohini Marasinghe, J &
Priyantha Jayawardena PC. J

Counsel : A.S.M. Perera PC with Neville Ananda for the
Petitioner

Rajitha Perera SC for the Respondents

Argued on : 25.11.2014

Decided on : 17.12.2014

Priyantha Jayawardena, PC, J

The Petitioner has made this application in terms of Article 126 (1) of the Constitution alleging violation of his fundamental rights guaranteed under Article 12(1) of the Constitution by reason of the Petitioner not being absorbed to post of Deputy Superintendent of Customs.

Petition

The Petitioner in his Petition stated that he applied to the Sri Lanka Customs to join as an Assistant Superintendent of Customs Class II consequent to a Gazette Notification. Thereafter, the Petitioner had sat for an open competitive examination conducted for the purpose of recruitment to the aforesaid post by the Commissioner of Examinations on 22nd August, 1992. As he was successful at the said examination he had been then required to come for an interview which was held on 27.03.1993. Though the Petitioner had performed well at the said interview he had not been selected for appointment.

A Political Victimization Committee had been established in 1994 and the Petitioner had submitted a written complaint to the said Political Victimization Committee. The Additional Secretary to the Ministry of Finance, Planning, Ethnic Affairs and National Integration had called the Petitioner for an interview at the Ministry of Planning, Ethnic Affairs and National Integration, "Sethsiripaya" which was conducted by the said Political Victimization Committee in the presence of custom officials representing the Department of Sri Lanka Customs. All the documents pertaining to the said interview held for the purpose of recruiting officers to the posts of Assistant Superintendent of Customs Class II had been disclosed by the custom officials before the committee. Those documents revealed that the cut off mark for selection of candidates for the said post was 99 marks and that the Petitioner had been placed 7th in the order of merit securing 113 marks. It was also revealed that candidates who had got lesser marks than the Petitioner had been recruited to the said post overlooking the Petitioner. Thus, the Political Victimization Committee has recommended to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages. The Cabinet approved the said decision of the Political Victimization Committee and he was appointed to the said post with effect from 31.08.1992. The Petitioner has produced a copy of his

letter of appointment to the post of Assistant Superintendent of Customs Class II dated 21.07.1999.

The Petitioner further stated that he is not entitled to the back wages as during the period from 01.04.1992 to 15.06.1998 he was employed as a Plan Implementation Officer and later absorbed as a Project Officer at the Divisional Secretariat, Akkaraipattu which he had held as a public servant. The Petitioner stated that he stood appointed to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992.

The members of the same batch as the Petitioner who had attended the same interview and the examination had been recruited with effect from 15.07.1993 whereas the date of appointment of the Petitioner has been ante-dated as 31.08.1992, based on the aforesaid political victimization committee recommendation approved by the Cabinet of Ministers. The Petitioner had been then requested by some Customs officers of the 1993 batch to give a letter stating his willingness to accept his seniority at 7th place of 1993 batch. As a result the Petitioner had consented to have him placed at the 7th place in the seniority of 1993 batch.

Later, interviews had been held for the absorption of Assistant Superintendents of Customs Class II officers to the post of Deputy Superintendants of Customs and the 315 most senior officers except the Petitioner had been called for such interviews. The Petitioner had not received a letter calling him for such interview. Therefore, he addressed a letter to the Additional Director General of Customs (Administration) informing him that his name was omitted in the list of officers that were to be called for interviews and had sought a clarification with regard to any amendments in the seniority list by the Department of Sri Lanka Customs. Subsequently, the 3rd Respondent had issued a letter calling him over for an interview held for the purpose of absorbing candidates to the post of Deputy Superintendent of Customs.

The Petitioner had attended the interview for absorption to the post of Deputy Superintendent of Customs. However, upon the apprehension that he had not been absorbed into a post of Deputy Superintendent of Customs he had written to the 1st Respondent requesting to take steps to have him absorbed to the post of Deputy Superintendent of Customs but up to now no action has been taken in response to that request.

In the circumstances, the Petitioner prayed that a declaration be made that his fundamental rights guaranteed by Article 12(1) of the Constitution have been violated and to direct the respondents to absorb the Petitioner to the post of Deputy Superintendent of Customs and place him at the appropriate position in the seniority list.

This Court has granted leave to proceed for the alleged violation of Article 12(1) of the Constitution.

Statement of Objections of the 1A Respondent

The 1A Respondent stated in his Objections that the other applicants who were successful and recruited were appointed with effect from 15.07.1993 and had assumed duties on or around the said date.

He further stated that the Petitioner had assumed duties on 15.06.1998 in the post of Assistant Superintendent of Customs Class II and that in terms of Section 1.9 of Chapter II Volume I of the Establishment Code the effective date of the Appointment of the Petitioner was on 15.06.1998. The said section of the Establishment Code states as follows;

‘ The effective date of an appointment or promotion is the date specified in the letter of appointment or the date on which the officer first assumes the duties of his new post, whichever is later, subject to Section 1.10, but in no case should it be earlier than the date on which this post was created or on which it was rendered vacant. ’

He also stated that the Petitioner cannot be considered for the 1993 batch as he had assumed duties only in 1998.

He produced a copy of the interview schedule which stated that interviews had been held for the purpose of recommending Assistant Superintendent of Customs Class II to the post of Deputy Superintendent of Customs. He further contended that the promotions were given on seniority and merit and that there were many others who were senior to the Petitioner in service and furnished a list of officers who had assumed duties before the Petitioner.

Statement of Objections of the 5th Respondent

The 5th Respondent stated in his Statement of Objections that he was one of the five members of the interview board which was held to absorb the Assistant Superintendents of Customs Class II to the posts of Deputy Superintendents of Customs. He averred that the Petitioner was called before the said interview board not as a candidate to be considered for the absorption to the post of Deputy Superintendents of Customs, but to clarify the appeal made by the Petitioner. The 5th Respondent annexed a copy of the extract of the marks of the interview board which states

“Called to clarify”. He further contended that the Petitioner was notified that though he was appointed with effect from 31.08.1992 he had assumed duties on 15.06.1998.

He also stated that other recruits of the examination relevant to the Petitioner’s appointment had assumed duties on 15.07.1993 and therefore the others are senior than the Petitioner for the reason that they had assumed duties earlier than the Petitioner.

Counter affidavit of the Petitioner

Thereafter, the Petitioner filed his counter affidavit and produced an abstract of the committee report of the committee set up to consider cases relating to political victimization within the Department of Sri Lanka Customs.

The Petitioner also stated that the reason for assuming duties with effect from 15.06.1998 was beyond his control. Based on the marks he had obtained at the open competitive examination and the interview he was placed 7th in the order of merit and accordingly he should have been appointed as an Assistant Superintendent of Customs Class II with effect from 15.07.1993. However, consequent to a decision of the Cabinet of Ministers to appoint the Petitioner as an Assistant Superintendent of Customs Class II in order to rectify a wrong caused to him, he was appointed as an Assistant Superintendent of Customs Class II and the date of appointment was ante dated to 31.08.1992 by the Public Service Commission. The Petitioner further stated that therefore neither the Director General of Customs nor any other officer attached to Customs and / or the Ministry of Finance can alter the said date.

The Petitioner further asserted in his counter affidavit that the post of Assistant Superintendent of Customs, Class II was vacant at the time he was appointed to such post and that he had joined Government Service with effect from 31.08.1992 and has continued as such government servant up to date.

The Petitioner also stated that the Interview Board constituted to recruit candidates for the posts of Deputy Superintendents of Customs did not have any power or authority to sit as an appellate body in relation to the Petitioner’s application for promotion as a Deputy Superintendent of Customs. The Petitioner asserted that he was called for the interview conducted for the purpose of absorbing candidates for the posts of Deputy Superintendents of Customs.

Redress of Political Victimization Committee in the constitutional setting

Arising for determination in this application is the question of whether the Department or a public officer can by reference to provisions of the Establishment Code, override a decision made by the Cabinet of Ministers to rectify a wrong caused by such Department to a public officer, which wrong involves *inter alia* violations of the Establishment Code in the first instance.

Therefore, I will first consider the applicable provisions of the Establishment Code.

In terms of Article 55(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka the power of appointment to the Public Service is vested in the Cabinet of Ministers. However, certain powers of the Cabinet of Ministers are delegated to the Public Service Commission.

The recruitment procedure is set out in Chapter II of the Establishment Code (Volume I). In terms of Sections 5:3:1 and 5:3:2 the appointments will have to be made in the order of merit ascertained according to the marks obtained by the candidates at the written examination and the interview. (Emphasis added).

Section 1:9 of the Establishment Code states that;

‘ The effective date of an appointment or promotion is the date specified in the letter of appointment or the date on which the officer first assumes the duties of his new post, whichever is later, subject to Section 1.10, but in no case should it be earlier than the date on which this post was created or on which it was rendered vacant. ’

It is now necessary to consider the powers of the Cabinet of Ministers with regard to the appointment, promotion, transfer, disciplinary control and dismissal of public servants. In terms of Article 55 of the Constitution the appointment, promotion, transfer, disciplinary control and dismissal of all heads of department is vested in the Cabinet of Ministers. Subject to the provisions of the Constitution some of those powers have been vested with the Public Service Commission. Article 57 of the Constitution has permitted delegation of the powers of the Public Service Commission subject to the approval of the Cabinet of Ministers.

The Establishment Code has been issued by the Ministry of Public Administration under the authority of the Cabinet of Ministers. It is pertinent to note that the procedure in respect of the appointment, promotion, transfer, disciplinary control and dismissal have been stipulated in the Establishment Code with the approval of the Cabinet of Ministers. Therefore, I am of the view any failure to comply with the provisions of the Establishment Code by an authority or officer can be rectified by the Cabinet of Ministers.

The question there is whether the fundamental rights of the Petitioner declared and recognized by Chapter 3 of the Constitution have been infringed, by executive or administrative action - in this instance, Article 12(1) of the Constitution.

In the instant application the candidates applied for vacancies for the post of Assistant Superintendents of Customs Class II. The vacancies were to be filled on the basis of merit. Applicants had to sit for a competitive exam and successful candidates were called for an interview. It is common ground that notwithstanding the fact that the Petitioner had been placed 7th in the order of merit at the examination held to recruit Assistant Superintendents of Customs Class II, he was not appointed to the said post along with the other candidates who were successful at the said examination, contrary to the provisions of the Establishment Code which requires the candidates to be appointed in order of merit. The marks of the interview were not published.

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. “Merit” must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks appointment or promotion. In the instant application there were no grounds to deviate from the merit principle that can be justified for the non-appointment of the Petitioner to the post of Assistant Superintendent of Customs Class II.

Subsequently, consequent to a recommendation made by a Political Victimization Committee the Cabinet of Ministers decided to appoint the Petitioner to the said post without back wages with effect from 31.08.1992. The Public Service Commission gave effect to the said decision of the Cabinet of Ministers and approved appointment accordingly.

However, the Department of Customs did not place him in the 7th place in the order of merit of his initial batch (1993 batch) on the basis that the ante dating of the Petitioner’s date of appointment would violate Section 1:9 of the Establishment Code (Volume I). The Petitioner’s position is that the failure to back date his appointment and to place him in the order of merit in his original batch (1993) has affected his promotional prospects, namely, for the absorption of him to the post of Deputy Superintendent of Customs and he is challenging the non absorption of himself to the post of Deputy Superintendent of Customs in these proceedings.

Therefore, it is necessary to consider the applicability of Section 1:9 of the Establishment Code in the light of the recommendation made by the Cabinet of Ministers to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages. Particularly, the powers of the Cabinet of Ministers to grant redress to those whose

rights have been infringed due to the non compliance of the provisions of the Establishment Code.

Appendix 4 of the Establishment Code Volume I contains draft letters of appointment. The applicable letter of appointment to the instant case is contained in Specimen I of the said appendix.

Clause 1 of the said draft states as follows;

‘You are appointed to the post of in this Department / in (with effect from).’

However, the letter of appointment issued to the Petitioner on 21.05.1998 has the following clause;

‘You are hereby informed that you have been appointed as an Assistant Superintendent of Customs Class II, with effect from 31.08.1992 as per Cabinet decision of 22.04.1998’. (Emphasis added).

Prior to the issuing of the said letter of appointment the Department of Customs has obtained the approval of the Public Service Commission to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages.

Therefore, it is pertinent to note that the Director of Customs (Administration) has thought it fit to deviate from the normal draft of a letter of appointment given in the Establishment Code and incorporate the reason for the issuing of the said letter of appointment and backdating the same.

I am of the view that the decision taken by the Cabinet of Ministers pursuant to a recommendation made by the Political Victimization Committee has been incorporated into the contract of employment of the Petitioner and the said clause has become a condition in the letter of appointment issued to the Petitioner. Further, the conditions in the said letter of appointment supersede Section 1:9 of the Establishment Code as the said condition was introduced to the letter of appointment consequent to the said decision of the Cabinet of Ministers to grant redress to the Petitioner due to an injustice caused to him.

The Department of Customs has had an interview to absorb Assistant Superintendent of Customs Class II as Deputy Superintendent of Customs. However, the Petitioner was not called for the said interview. Consequent to an appeal made by the Petitioner he was requested to be present before the said interview board that was established to interview Assistant Superintendents of

Customs Class II for absorbing them as Deputy Superintendents of Customs. The Respondents furnished the mark sheet of the said interview along with the objections filed in this application. In the 1st column which deals with the date of appointment of the candidates it has been stated as 15th June, 1998 and in the priority column it has been stated 'called to clarify'. After the conclusion of the interview the panel of interviewers has sent the marks to the 6th Respondent. In that they have stated No. 307 (Petitioner) 'was called for the interview to examine his appeal by the Board'.

This has been done despite the fact that the Petitioner was issued with a letter to be present before the interview board for an interview for the post of Deputy Superintendents of Customs. I am of the view that the interview board had no authority or power to consider the said appeal submitted by the Petitioner. On the contrary, the said interview board should have interviewed the Petitioner for the post of Deputy Superintendent of Customs based on his seniority stated in the letter of appointment issued to him.

Article 12 of the Constitution deals with the equality before the law and equal protection of the law. What is postulated in the said article is equality of treatment to all persons in disregard of race, religion, language, caste, sex, political opinion, place of birth, or one of such grounds. I am of the view that the non-appointment of the Petitioner to the post of Assistant Superintendent of Customs Class II along with the others recruited in the 1993 batch denied him equal protection of law. This does not end the matter. Considerable prejudice has been caused to the Petitioner.

Administrative processes such as recruitment and public examinations must be carried out with due regard to the rights and interests of the public, and errors should be corrected. Such correction of errors shall redress an undue harm, loss or prejudice caused to a person. An authority vested with discretion must act fairly and equitably.

The wide powers vested in those responsible for recruitment and promotions have to be exercised in the public interest and for the benefit of public. The powers granted to the appointing authority are public in nature, to be held in trust for the public, and to be exercised for the benefit of public. Failure in the exercise of these powers according to the stipulated rules warrants the intervention of courts. Further, the power to make appointments and promotions should be exercised without discrimination and any violations of the procedure. The delay in rectifying an error would display lack of concern for the rights and interests of candidates constituting a denial of the equal protection of law.

Article 55(4) of the Constitution states that;

‘ 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 Rule of Law, in particular, that the administration should be conducted within the framework of recognized rules and principles and that, in general, the decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The provisions of the Establishment Code are in conformity with this concept and through Article 55(4) are made complementary to Article 12 of the Constitution.

It was submitted to Court that the selection was effected on the basis of merit. In this case the criteria adopted in making the appointments have failed to give due weightage to the marks obtained by the Petitioner and his order of “merit”. I am of the view that in situations where express provisions are made for the adoption of guidelines or procedures they must be followed. Further, the Cabinet has the power to grant redress to employees of the Public Service who are denied of their rights due to the failure to adhere to the provisions of the Establishment Code. In such an instance the Cabinet has the power to direct the relevant authorities to rectify the injustice as done in the instant case and in such a situation the relevant authority is bound to give effect to the said decision of the Cabinet. In this instance, I am of the view that the decision of the Cabinet is not subject to Section 1:9 or any other provision of the Establishment Code as the Cabinet has taken the decision under consideration to grant redress to an employee of the Public Service whose rights were denied due to non compliance of the provisions of the Establishment Code, namely, to appoint the candidate according to the order of merit as required by the Establishment Code. However, the Petitioner was not placed in the order of merit in the 1993 batch as decided by the Cabinet of Ministers by the Department of Customs. The view taken by the 1st Respondent effectively deprives the Petitioner the benefits attached to his appointment granted by and in terms of the said decision of the Cabinet of Ministers. In this instance he has been denied his promotional prospects.

For the foregoing reasons, I declare that the Petitioner’s fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the denial to ante-date his appointment to the post of Assistant Superintendent of Customs Class II to be effective from 15.07.1993, and the

Petitioner consequentially being deemed ineligible for consideration for the post of Deputy Superintendent of Customs.

I further declare the Petitioner was entitled to be placed 7th in the order of the list of persons appointed on 15.07.1993 (1993 batch) to the post of Assistant Superintendent of Customs Class II and to have the said seniority be considered for all purposes pertaining to his employment with the Department of Customs, and was therefore entitled to be considered for the post of Deputy Superintendent of Customs, at the interviews held for such purpose, taking 15.07.1993 as his effective date of appointment to the post of Assistant Superintendent of Customs Class II.

I accordingly direct the 1st Respondent to forthwith place the Petitioner at the 7th place in the order of the list of persons appointed on 15.07.1993 (1993 batch) to the post of Assistant Superintendent of Customs Class II, and that the said seniority be considered for all purposes pertaining to his employment with the Department of Customs.

Since the Petitioner was not considered for the post of Deputy Superintendent of Customs at the interviews already held for that purpose I hereby direct the 1st Respondent to have the Petitioner interviewed for the post of Deputy Superintendent of Customs forthwith, by a suitable interview panel constituted for the purpose, with instructions to the said interview panel to review the Petitioner's eligibility for appointment for such absorption, taking 15.07.1993 as his effective date of appointment to the post of Assistant Superintendent of Customs Class II.

I further direct the 1st Respondent, subject to the outcome of such interview, and to the availability of vacancies, to appoint the Petitioner to the post of Deputy Superintendent of Customs, which appointment shall be effective from the same date that the 1993 batch of Assistant Superintendent of Customs Class II have been appointed to the post of Deputy Superintendent of Customs, but without back wages.

In all the circumstances of this case, I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC, J

I agree

Judge of the Supreme Court

Rohini Marasinghe, J

I agree

Judge of the Supreme Court