

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

**S.C. (FR) Application
No. 598/2008**

Dr. W.L.D.S.G. Perera,
No. 59, Kattota,
Nittambuwa.

Petitioner

Vs.

1. Justice P.R.P. Perera,
Chairman,
2. Prof. Dayasiri Fernando,
Member,
3. W.P.S. Jayawardene,
Member,
4. Palitha M. Kumarasinghe,
Member,
5. Prof. M.S. Mookia,
Member,
6. Prof. M. Rohanadheera,
Member,
7. Gunapala Wickramaratne,
Member,
8. S.A. Wijeratne,
Member,

9. Dr. Bernad Soyza,
Member,

all of Public Service Commission,
No. 356/B, Galle Road (Carlwil Place), Colombo 03.

10. Nimal Bandara,
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.

11. K.Mohamed Thambi,
Additional Secretary (Educational Service
Establishments),
Ministry of Education,
Isurupaya,
Battaramulla.

12. Hon. The Attorney-General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
P.A. Ratnayake, P.C., J. &
S.I. Imam, J.

COUNSEL : J.C. Weliamuna with Maduranga Ratnayake for Petitioner

Indika Demuni de Silva, DSG., for 10th - 12th Respondents

ARGUED ON: 05.07.2010

WRITTEN SUBMISSIONS

TENDERED ON: Petitioner : 08.09.2010
10th – 12th Respondents : 02.11.2010

DECIDED ON: 10.03.2011

Dr. Shirani A. Bandaranayake, J.

The petitioner, a Senior Consultant of the Department of Secondary and Tertiary Education of the Faculty of Education, Open University of Sri Lanka (hereinafter referred to as the Open University) at the time of filing this application, alleged that the purported directions of the 1st to 9th respondents not to re-instate the petitioner in the public service and not to release the petitioner to the Open University until and unless the petitioner pays to the State the cost of his foreign studies funded by the Government, are arbitrary, irrational and unreasonable and in violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution, for which leave to proceed was granted by this Court.

The facts of this application, as submitted by the petitioner, *albeit* brief, are as follows:

The petitioner had obtained his Degree of Bachelor of Arts (Hons.) from the University of Peradeniya in 1985 (P2a). Thereafter he had obtained his Post Graduate Diploma in Education from the University of Colombo in 1993 (P2b). He had obtained two Degrees in Master of Education; one in 1996 from the University of Colombo (P2c) and the other in 1999 from the University of Wollongong, Australia (P2d). Later in 2004, he had obtained the Degree of Doctor of Education from the same University in Australia (P2e). The petitioner had also obtained a professional qualification in the form of a Diploma in Counselling from the Institute of Psychological Studies in 2006 (P2f).

The petitioner had joined the public service in July 1989 as an Assistant Teacher and thereafter had served in the Vavuniya National College of Education in different capacities ranging from Assistant Lecturer, Senior Lecturer to the Dean of the College since 1995.

Whilst he was serving as the Dean of the said College of Education, the petitioner had received a scholarship offered by the Government to read for a Degree in Master of Education at the University of Wollongong, Australia in 1998. He had successfully completed the said Degree in 1999.

Thereafter, the petitioner had been serving as a Senior Lecturer at the Siyane National College of Education and in 2001, he was selected by the University of Wollongong, Australia to read for the Degree in Doctor of Education. The said programme was funded by the World Bank General Education Project – 2 in Sri Lanka. Prior to leaving the country, as a pre-condition, the petitioner was required to sign an Agreement with the Government of Sri Lanka, which stated that after completion of his studies he should return to Sri Lanka and shall serve the Government, if so required, for a term of eight years and seven months (P5). He had left the country on study leave in November 2001 and after successfully completing his Degree in Doctor of Education had returned to the country in January 2004 and had resumed his duties at the Siyane National College of Education.

Immediately thereafter, in February 2004, through the President (Head) of the Siyane National College of Education, the petitioner had applied for the post of Senior Lecturer of the Department of Education in the University of Peradeniya (P6). By letter dated 26.08.2004 (P7), the said University had informed the petitioner that he was selected to the said position on contract basis for a period of one year. On receipt of the said letter, the petitioner had sought permission to be released from Siyane National College of Education. The President (Head) of the Siyane National College of Education had verbally instructed the petitioner to assume duties at the University of Peradeniya pending permission for the petitioner to be released

from Siyane National College of Education. The petitioner had assumed duties at the University of Peradeniya on 01.10.2004.

By letter dated 25.08.2004 (P8), the Secretary to the Ministry of Education had informed the petitioner declining to release the petitioner to the University of Peradeniya. He had referred to Clause 4:4 in chapter XV of the Establishments Code.

In May 2005, the Open University had called for applications for the post of Senior Lecturer in Education. Whilst serving at the University of Peradeniya, the petitioner had applied for the said post through the Head of the Siyane National College of Education (P9). After an interview, by letter dated 29.08.2005 (P10), the petitioner was appointed to the post of Senior Lecturer in Education at the Open University (P10). Thereafter, the petitioner had made a request through the Head of the Siyane National College of Education to the Public Service Commission, for him to be released to the Open University (P11).

Since no steps were taken to release the petitioner, in October 2005, he had made a complaint to the Human Rights Commission (P14). The Human Rights Commission had made recommendations in favour of the petitioner and on the strength of such recommendations and the letter of the Director-General of Establishments sent in October 2005 (P13b), the petitioner had assumed duties on 21.11.2005 at the Open University. By letter dated 14.12.2005, the Vice Chancellor of the Open University had made a request to the then Secretary of the Ministry of Education to formally release the petitioner to the Open University (P16).

By letter dated 30.05.2006, the Ministry of Education had informed the petitioner that he was released to the University of Peradeniya (P17).

Meanwhile, whilst the petitioner was serving at the Open University, in July 2006, he had received a letter of vacation of post dated 27.06.2006 from the Siyane National College of

Education (P18). The petitioner had tendered an explanation to the Secretary of the Ministry of Education with a copy to Siyane National College of Education. Later a copy of the said explanation was sent to the Public Service Commission (P19). In July 2006, the Director (Colleges of Education) of the Ministry of Education had informed the petitioner that the Public Service Commission had rejected the request made by the petitioner to release him from Government service (P20).

The petitioner had preferred an application to the Administrative Appeals Tribunal against the said decision of the Public Service Commission (P21). By its order dated 07.02.2008, the Administrative Appeals Tribunal had dismissed the petitioner's appeal on the basis that the petitioner sought to serve outside the public service and that without the Secretary's recommendation the petitioner could not be released from the government service (P22).

In the meantime, the Open University had terminated the petitioner's service with effect from 29.02.2008 on the basis that for over two years he had not been formally released from the government service (P23). The Open University had however, appointed the petitioner as a Senior Consultant attached to the Department of Secondary and Tertiary Education, on contract basis.

By letter dated 14.11.2008 (P25), the Public Service Commission had informed the petitioner that the Public Service Commission had decided to consider re-instating the petitioner, provided that he agreed to pay the State before 31.12.2008, such sum of money in terms of the obligatory service to the Government under the said Agreement (P5). Later the petitioner had received the copy of a letter dated 26.11.2008 (P26), addressed to the President (Head) of Siyane National College of Education by the Additional Secretary of the Education Service, Ministry of Education, stating that if the said sum of money, in terms of the obligatory service to the Government under the Agreement (P5) is not paid to the State on or before 31.12.2008, the previous notice of vacation of post would stand.

The petitioner alleged that both letters dated 14.11.2008 (P25) and 26.11.2008 (P26) have failed to appreciate the correct legal position under Clause 4:14 in chapter XV of the Establishments Code read with section 77(5) of the Universities Act, No. 16 of 1978 (as amended). It was also stated that the petitioner was reliably informed that the Hon. The Attorney-General in November 2005 had advised the National Institute of Education on the identical issue in respect of one R.M.S.K. Ranasinghe stating that under section 77(5) of the Universities Act, any service to a higher educational institute could be considered as service to Government. The petitioner had also become aware that the Public Service Commission had allowed similarly circumstanced Teacher Educationists to serve in higher educational institutes without serving notices of vacation of post. He had referred to one A.C.A.M. Mansoor, W.D.C.P. Perera and P.R.K.A. Vitharana as such instances.

The petitioner alleged that the aforementioned decisions and the conduct of the respondents are unreasonable, arbitrary, irrational and in violation of Article 12(1) of the Constitution.

Learned Counsel for the petitioner contended that although the petitioner was granted a scholarship to study abroad whilst he was serving at the Siyane College of Education, the finances for the said scholarship were not allocated from the said College, but from a World Bank Project. It was also contended that the Agreement P5 was between the petitioner and the Secretary to the Ministry of Education and had no reference to Siyane College of Education nor to any similar Colleges of Education.

Learned Counsel for the petitioner submitted that the said Agreement marked P5 does not mention the fact that the petitioner must serve at the Siyane College of Education or any similar College of Education and as such there cannot be any difficulty in releasing the petitioner from the Siyane College of Education. Further it was submitted that in terms of section 77(5) of the Universities Act there are no legal impediments to release the petitioner to another Government institution or agency and that even the Public Service Commission had in principle conceded with this position.

Learned Deputy Solicitor General for the 10th, 11th and 12th respondents (hereinafter referred to as the respondents) contended that the petitioner had accepted the appointment at the Open University on 05.09.2005 and had assumed duties in the said post on 21.11.2005 without obtaining approval for his release from the Public Service Commission.

It was also contended that the petitioner had disregarded the letter sent by the Secretary to the Ministry of Education in December 2005 (10R4), as he had failed and/or neglected to report for duty when he was called upon to do so. In the circumstances learned Deputy Solicitor General strenuously contended that there had been no violation of the petitioner's fundamental rights.

Having referred to the facts of this application and the contentions of the learned Counsel for the petitioner and the learned Deputy Solicitor General for the respondents, let me now turn to consider the alleged infringement complained by the petitioner.

The contention of the learned Counsel for the petitioner was that, although the petitioner had obtained study leave at the time he was an employee of the Siyane National College of Education, after entering into an Agreement with the Government of Sri Lanka that he would serve the obligatory period on his return or in lieu of that he would pay the required sum of money, that such period of obligatory service could have been rendered either at the Siyane National College of Education **or** at any other Government institution.

Learned Counsel for the petitioner had relied on section 77(5) of the Universities Act and Clause 4:14 of chapter XV of the Establishments Code in support of his contention. Section 77(5) of the Universities Act is as follows:

“Where a Higher Educational Institution employs any person who has entered into a contract with the Government by which he has agreed to serve the Government for a specified period, any period

of service to that Higher Educational Institution by that person shall be regarded as service to the Government for the purpose of discharging the obligations of such contract.”

According to section 77(5) of the Universities Act, the service of a person to a Higher Educational Institution, who has entered into a contract with the Government, shall be regarded as service to the Government. However, as it could be clearly seen, for the applicability of section 77(5) of the Universities Act, it would be necessary for the person in question to be **employed** by the said Institution. For such an employment, it is necessary for the said person to be released for such service. Clause 4:14 of chapter XV of the Establishments Code refers to such a release. The said Clause is as follows:

“Where an officer is released for service in a public corporation, such service will be counted as part of his obligatory service for discharging his obligations under an Agreement.”

Accordingly the release for service of the officer in question from his place of work would be an essential requirement for the purpose of employment in a Higher Educational Institution. The applicability of section 77(5) of the Universities Act depends on the fulfilment of the requirement specified in Clause 4:14 of chapter XV of the Establishments Code. It is therefore apparent that it would be necessary to consider whether the petitioner could have been released from the public service.

The Establishments Code refers to the procedure, which governs the release of a public officer and chapter V of the Establishments Code deals with such release, reversion and termination of employment. Reference has been made in this chapter regarding the release of officers for appointment to another post in the public service as well as releasing officers for service outside the public service. Since the petitioner had first accepted the appointment at the Open University whilst he was serving at the Siyane National College of Education, he would come

within the category of officers referred to in Clause 2 of chapter V, viz., release for service outside the public service.

Under the said Clause 2, the relevant provisions, as correctly pointed out by the learned Deputy Solicitor-General for the respondents, are Clauses 2.1 and 2.3. These two provisions are as follows:

“2:1. An officer may be released for service outside the Public Service (as for instance in a Public Corporation) only with the sanction of the Appointing Authority and any other authority whose concurrence is required by the law under which the Corporation or Board is constituted.

2:3. An application for release (Temporary or Permanent) should be made on a form as in specimen given at Appendix 6 by the Appointing Authority of the officer’s substantive post through the Secretary to his Ministry and the Secretary to the Ministry under which the Public Corporation to which it is proposed to release the officer.”

It is therefore apparent that, in order to obtain a release, it is necessary to make an application as prescribed in Clause 2:3 of chapter V of the Establishment Code to the Appointing Authority, for such authority to consider the release. It was common ground that the Public Service Commission was the Appointing Authority of the petitioner and therefore it was necessary for the Public Service Commission to have sanctioned the release of the petitioner.

Learned Deputy Solicitor General for the respondents, referred to provisions contained in the Universities Act, No. 16 of 1978 as amended and drew our attention to section 77(1) of the said Act, which states as follows:

“At the request of a Higher Educational Institution, an officer in the Public Service may, with the consent of that officer, the Secretary to the Ministry by or under which that officer is employed, and the Secretary to the Ministry charged with the subject of Public Administration, be temporarily appointed to the staff of the Higher Educational Institution for such period as may be determined by such Institution with like consent, or be permanently appointed to such staff.”

In terms of the provisions of section 77(1) of the Universities Act, read with Clause 2:3 of chapter V of the Establishments Code, the release of the petitioner from the Siyane National College of Education could be made only if such release was sanctioned by the Public Service Commission, which was the Appointing Authority, with the concurrence of the Secretary to the Ministry of Education, under which the Open University functioned at the time concerned.

It is also to be clearly noted that although in terms of Clause 2:1 of chapter V of the Establishments Code the petitioner could be released only with the sanction of the Public Service Commission, that being the Appointing Authority in terms of Clause 2:3 of chapter V of the Establishments Code, the petitioner’s application for permanent release should be considered by the Secretary to the Ministry of Education and the Secretary to the Ministry under which Open University had functioned. Since at the time under review the Open University had come within the purview of the Ministry of Education, it was necessary that the Secretary to the Ministry of Education to consider the petitioner’s application for a permanent release.

The Public Service Commission, although had the final authority either to sanction or to refuse the application for a permanent release, it is quite apparent that it was essential to have obtain the recommendations and observations from the Secretary of the Ministry of Education as that

officer was in a better position to analyse whether the petitioner could be granted such a release.

The Secretary to the Ministry of Education by letter dated 25.08.2004 had informed the petitioner that his request cannot be acceded to, as he had not completed the obligatory service period on his return to the country. The Secretary to the Ministry of Education, by letter dated 03.11.2005 had referred to several other factors on which the scholarship had been granted to the petitioner and had also drawn attention to the provisions contained in the Minutes of the Sri Lanka Teacher Educator's Service. Referring to the selection of the petitioner for the 3 year scholarship to further his studies at the University of Wollongong in Australia, the Secretary to the Ministry of Education had stated thus:

"වබලිච්චි. එල්. ඩී. එස්. පී. පෙරේරා මහතා වචනික ජාතික අධ්‍යාපන විදුලියට මුල් පත්වීම ලැබූ ශ්‍රී. ල. ග. අ. සේ. 2 - II ශ්‍රේණියේ ස්ථිර කතිකාවාර්ය වරයෙකි. මොහු ආවාර්ය උපාධිය සඳහා ගුරු අධ්‍යාපන හා ගුරු ස්ථාපන ව්‍යාපෘතියෙන් ජාතික අධ්‍යාපන විදුලිය කතිකාවාර්යවරුන්ට වෙන්කොට ඇති විදේශ ශිෂ්‍යත්වයක් ලෙස 2001.01.14 සිට 2004.01.01 දක්වා ඔස්ට්‍රේලියාවේ වොලොන්ගන් විශ්ව විදුලයේ ඉගෙනුම ලබා ඇත.

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ගුරු අධ්‍යාපන හා ගුරු ස්ථාපන ව්‍යාපෘතිය මගින් ගුරු අධ්‍යාපනඥයන් ආයතන වශයෙන් වර්ග කොට ඔවුන්ට දේශීය හා විදේශ ශිෂ්‍යත්ව ලබා දී ඇත. මෙහිදී ජාතික අධ්‍යාපන විදුලිය ගුරු මධ්‍යස්ථාන ජාතික අධ්‍යාපන ආයතනය හා විශ්ව විදුල වශයෙන් ආයතන වර්ග කර එක් එක් ආයතන වලට නියමිත ශිෂ්‍යයන් සංඛ්‍යාවක් වෙන්කොට ඇත. මෙම ශිෂ්‍යයන්ට ජාතික අධ්‍යාපන විදුලිය වලට ලබාදී ඇත්තේ විදුලිය පද්ධතියේ ගුණාත්මක සංවර්ධනය සහතික කරනු පිණිසය. ඒ අනුව උක්ත

නිලධාරියාට මෙකී ගිණුමක් ලබා දී ඇත්තේදී විදුලි පිට පද්ධතියේ ගුණාත්මක සංවර්ධනයට කැපවීම සඳහාය.”

This letter clearly indicates the basis on which the petitioner was selected for the scholarship in question and the objectives the Government wished to achieve through such a scholarship.

When a lecturer is sent on a scholarship to further his studies, the intention of the relevant authority is to see that the scholar on his return would be in a position to serve that institution for a stipulated period. In the event that officer is unable to serve such obligatory period than he should be in a position to pay the money expended during that period in accordance with the agreement he had entered into with the relevant institution. When scholarships are granted for the purpose of professional development of its staff members, any institution would require such an officer to continue to serve in that place, at least for a specific period.

The provisions contained in the Minutes of the Sri Lanka Teacher Educator’s Service, substantiates this position. According to Clause 21 of the said Minute, which deals with professional development, clearly stated that,

“Scholarships, attachments and study tours may be awarded to the member of the Service for study within Sri Lanka or abroad depending on the suitability of the candidate and the requirements of the respected programmes and the recommendations of the Colleges of Education Board to enable that Teacher Educators to become more professionally qualified. The selection procedure and other requirements for selection will be stipulated by the Secretary of the Ministry. The Teacher Educators on completion of the course of study tour or attachment are required to continue to serve as Teacher Educators.”

It is therefore abundantly clear that the petitioner had to serve the obligatory service period at the Siyane National College of Education and according to the Agreement the petitioner was bound to serve the Government unless otherwise directed, for a period not less than 8 years and 7 months at the Siyane National College of Education. It is not disputed that at the time the petitioner sought his permanent release from the public service, he had served only a period of nine (9) months at the Siyane National College of Education and one (1) year at the University of Peradeniya on a temporary release. It is therefore evident that the petitioner had not served the required obligatory period at the relevant Institution. In these circumstances, when the Secretary of the Ministry of Education has clearly refused to recommend the permanent release of the petitioner, it would not be possible to find fault with the decision of the Public Service Commission to have refused the petitioner's application to release him permanently.

The Assistant Secretary, on behalf of the Secretary to the Public Service Commission, by his letter dated 20.12.2005 had informed the Secretary, Ministry of Education that the Public Service Commission had decided to refuse the application made by the petitioner to release him permanently to the Open University (10R3). Accordingly by letter dated 21.12.2005 the Secretary to the Ministry of Education had informed the petitioner that since it is not possible to recommend the permanent release of the petitioner, that his temporary release to the University of Peradeniya has come to an end on 30.09.2005 and therefore the petitioner should report to the Siyane National College of Education within 14 days from 21.12.2005. The letter had further stated that,

“මෙදින සිට දින 14 කාලයක් තුලදී ඔබේ පෙර සේවා ස්ථානය වන සියනෑ ජාතික අධ්‍යාපන විද්‍යා පීඨයට වාර්තා කර ඒ බව පීඨාධිපති මගින් මා වෙත වාර්තා කළ යුතුය.

එසේ නොවන්නේ නම් විදේශ ශිෂ්‍යත්වය සඳහා ඔබ වෙනුවෙන් වැය කර ඇති සම්පූර්ණ මුදල ආපසු අය කර ගැනීමට නීත්‍යානුකූලව කටයුතු කරන බවද කාරුණිකව දන්වමි” (10R4).

It is not disputed that the petitioner had not reported for duty within the given time period. By letter dated 27.06.2006, the President (Head) of the Siyane National College of Education had informed the petitioner (P18) that he would treat as a person who has vacated his post.

Chapter V of the Establishments Code refers to vacation of post. Clause 7 of chapter V accordingly states that,

“7.1 An officer who absents himself from duty without leave will be deemed to have vacated his post from the date of such absence and he should be informed accordingly at once by registered post or by personal delivery to him.

7.2 An order of vacation of post under this section can be issued by the Disciplinary Authority or a Staff Officer who is a local Head of Department.

7.3 Charges should not be framed against him nor should he be called upon to submit an explanation for his absence without leave.

7.4 If he volunteers an explanation within a reasonable time (the Disciplinary Authority can determine the ‘reasonable time’ for furnishing the explanation), it should be considered by the appropriate Disciplinary Authority in terms of the disciplinary rules, and permission to resume duties may be allowed or refused by that Authority.”

Clauses 7:1 to 7:4 clearly establish the fact that in the event there is a vacation of post issued to an officer and in the event such officer attempts to volunteer an explanation, that should be carried out according to the procedure laid down in Clause 7 of chapter V of the Establishments Code. If and when such an explanation is volunteered within a reasonable time, the appropriate disciplinary authority may allow or refuse permission to resume duties.

As stated earlier, by letter dated 21.12.2005 (10R4), the petitioner was requested to report for duty at the Siyane National College of Education within 14 days from that date. The petitioner had not complied with the said request and had continued to work at the Open University for a further period of six months and the President (Head) of the Siyane National College of Education had served the vacation of post notice on the petitioner on 27.06.2006 (P18). Thereafter on 20.07.2006 the petitioner had tendered an appeal to the Public Service Commission on the notice of vacation of post. Clause 37 of chapter XLVIII of the Establishments Code states as follows:

“37.1 Where an officer who has been served with a Notice of Vacation of Post under the provisions of chapter V of Part 1 of the Establishments Code intends to tender an appeal against such Notice, such appeal should be tendered to the appropriate authority before the expiry of three months from the date on which the Notice of Vacation of Post was served on him.

37.2 If the Disciplinary Authority considers, in view of the matters represented in the appeal submitted to him in terms of sub-section 37.1 above, that the officer has not reported for duty because of acceptable reasons, he may order the reinstatement of the officer after imposing

punishment for not reporting for duty without permission.

37.3 Where the Disciplinary Authority has rejected the reinstatement of the officer, he may appeal against such decision to the Cabinet of Ministers or the Public Service Commission, as the case may be, within six months from the date of such decision.”

The aforementioned provisions therefore are quite clear that the disciplinary authority could order the reinstatement of the officer after imposing punishment for not reporting for duty without permission.

In fact the Public Service Commission had acted in terms of the provisions laid down in Clause 37 of chapter XLVIII of the Establishments Code. The letter dated 14.11.2008 sent by the Assistant Secretary, Public Service Commission to the petitioner bears ample evidence to this position. The said letter (P25) was in the following terms:

ණ්‍රභන කරුණට අඳුලව මබ විසින් ඉදිරිපත් කර ඇති 2008෧09෨ 18 දිනැති ලිපිය හා බැඳේ.

එම ලිපිය හා ඒ සම්බන්ධයෙන් අධ්‍යාපන ලේකම් විසින් ඉදිරිපත් කරනු ලැබූ කරුණු සලකා බැලූ රාජ්‍ය සේවා කොමිෂන් සභාව පහත සඳහන් කොන්දේසි වලට යටත්ව මබට නැවත සේවයේ පිහිටුවීම සලකා බැලීමට තීරණය කර ඇත.

I මබ විසින් අනිවාර්ය සේවා කාලයක් සේවය කිරීමට රජය සමග බැඳී ඇති ගිවිසුම කඩකිරීම සම්බන්ධයෙන් මබගෙන් රජයට අය විය යුතු ල අධ්‍යාපන ලේකම් විසින් යථා

කාලයේදී ඔබ වෙත දැනුම් දෙන මුදල් ප්‍රමාණය 2008 දෙසැම්බර් 31 දිනට පෙර ගෙවා අවසන් කළ යුතුවේ.

II ඔබ විසින් එසේ ගෙවීම් සිදු කිරීමෙන් අනතුරුව නැවත සේවයේ පිහිටුවීම රාජ්‍ය සේවා කොමිෂන් සභාව විසින් සිදු කළහොත් ඉන් පසු රාජ්‍ය සේවයෙන් ශ්‍රී ලංකා විවෘත විශ්ව විද්‍යාලයේ සේවය සඳහා මුද්‍රිත හැරීම සලකා බැලීමට 2008.11.30 දිනට හෝ ඔබගේ සේවය එම විශ්ව විද්‍යාලයට අවශ්‍ය බවට විශ්ව විද්‍යාලය විසින් ඉල්ලීමක් අධ්‍යාපන අමාත්‍යාංශයේ ලේකම් වෙත ඉදිරිපත් කළ යුතුය. එසේ කරන්නේ නම් පමණක් රාජ්‍ය සේවයෙන් පූර්ණ කාලීනව මුද්‍රිත හැරීම පිළිබඳව රාජ්‍ය සේවා කොමිෂන් සභාව තීරණය ගනු ලබන බව තව දුරටත් නියෝග කර ඇත."

A careful consideration of the relevant provisions contained in the Establishments Code and the decision conveyed to the petitioner by the Public Service Commission by its letter dated 14.11.2008 (P25) shows that, the Public Service Commission had examined the appeal tendered by the petitioner. It is to be borne in mind, as has been clearly stated by the petitioner himself, that immediately after his return to the country on 05.01.2004, the petitioner had been applying for positions in other Universities. The first of such was to the University of Peradeniya on 27.02.2004. He had assumed duties at the University of Peradeniya without obtaining his release from the Public Service in terms of the relevant provisions in the Establishments Code on 01.10.2004. As referred to earlier, since February 2004, the petitioner had accepted several other appointments without obtaining approval for a permanent release from the Appointing Authority. Having considered the aforementioned, the Public Service Commission had arrived at the decision, which was conveyed to the petitioner by letter dated 14.11.2008 (P25).

On a consideration of the totality of the aforementioned, it is evident that the decision of the Public Service Commission cannot be said to be unreasonable and unlawful.

The petitioner had stated that the Public Service Commission had allowed similarly circumstanced Teacher Educators to serve in higher educational institutions and no vacation of post notices had been served on them. Reference was made to one A.C.A.M. Mansoor, V.D.C.P. Perera and P.R.K.A. Vitharana.

Learned Deputy Solicitor General had made submissions on the aforementioned Teacher Educationists.

According to the said submissions, Ms. C.D.C.P. Perera, was **not released** to take up the appointment at the National Institute of Education. Accordingly she had retired under Circular No. 30/1988. Mrs. P.R.K.A. Vitharana had not been subject to any obligatory service. However, she had not been released from the Public Service and she had retired under Circular No. 30/1988 (X3).

A.C.A.M. Mansoor had read for a Degree in Master of Education at the University of Wollongong in Australia. He had been away on a scholarship and study leave was granted from 01.08.1998 to 31.07.1999. According to the Agreement he had entered into, Mansoor was to serve an obligatory service period of 4 years to the State. He had returned to the country one month before the due date and had resumed duties at the National College of Education at Adalanchanai on 30.06.1999 and therefore he was required to serve the State only for a period of 40 months.

After serving the said National College of Education for 33 months, he had applied for a temporary release from the Public Service to take up the post of Senior Assistant Registrar at the South Eastern University for a period of 2 years from 11.03.2002 (X7). He was permitted to take up the said appointment on 11.07.2002 pending his appeal before the Public Service Commission. The Public Service Commission had granted approval for the said application on 24.06.2003 (X8). At the time he took up the appointment on 11.07.2002 the said Mansoor had

served approximately 37 months out of his 40 months obligatory period of service. He was sanctioned a permanent release only on 11.03.2007.

It is to be noted that, Mansoor had been away in Australia only from a period of 11 months on a scholarship and had to serve an obligatory service period of 40 months whereas the petitioner was away for a period of over 3 years on two scholarships and therefore he had to serve an obligatory service period of 8 years and 7 months. As stated earlier, at the time the petitioner sought his release to the Open University, he had served the Siyane National College of Education only for a period of 9 months and had served at the University of Peradeniya for a period of 1 year. In such circumstances it would not be correct to state that the petitioner and the said Mansoor are similarly circumstanced.

The petitioner's complaint was that his fundamental rights guaranteed in terms of Article 12(1) was violated as the respondents had decided to issue a notice of vacation of post on him and the Public Service Commission had determined that the petitioner must pay to the State a such sum of money in lieu of obligatory service to the Government and until such time, that he was not allowed to serve at any higher educational institute. These decisions, according to the petitioner are arbitrary, irrational and unreasonable and violative of Article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and states that,

“All persons are equal before the law and are entitled to the equal protection of the law.”

Equality before the law does not mean that all should be treated alike or that the same law should be applicable to all persons. What is meant is that equals should be treated equally and similar laws should be applicable to persons, who are similarly circumstanced. Referring to the

concept of equality before the law, Sir Ivor Jennings (The Law and the Constitution, 3rd edition. Pg. 49) had stated that,

“It assumes that among equals the laws should be equal and should be equally administered, that like should be treated alike.”

It is therefore evident that what Article 12(1) of the Constitution postulates is that all persons, who are similarly circumstanced should be treated alike. Accordingly, the doctrine of equality before the laws would not be applicable to persons, who are not similarly circumstanced. In other words unequals cannot be treated equally nor equals be treated unequally.

Every wrong decision cannot and would not attract the constitutional remedies guaranteed under the fundamental rights incorporated in our Constitution. As stated earlier, in reference to Article 12(1) of the Constitution it would be necessary to show that there had been unequal treatment and therefore discriminatory action against the petitioner. In **Snowden v Hughes** ((1943) 321 U.S. 1, 64 S. Ct 297, 88L. Ed 497 (1944)), it was stated thus:

“The unlawful administration . . . of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discretion.”

When careful consideration is given to the facts of the petitioner’s case, it is not even possible to state that there had been any unequal treatment since the petitioner’s position is quite different to that of Mansoor, who had only 3 more months to serve as his obligatory period, whereas the petitioner had served only 9 months out of his 40 months obligatory service at the Siyane National College of Education. As has been clearly demonstrated in the well known case

of **Ram Krishna Dalmia v Justice Tendolkar** (A.I.R. 1958 S.C. 538), classifications are permitted provided that,

- “1. the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and
2. that the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved.”

Accordingly the classification must not be arbitrary, but should be based on substantial difference bearing a reasonable relationship to the object sought to be achieved.

It is common ground that the petitioner had obtained study leave from the Siyane National College of Education for his higher studies. Such absence from normal teaching and other related work would undoubtedly assist a lecturer to further his studies and also would provide an opportunity to enhance their skills and expertise in the relevant field. It would also bring in an opportunity to meet scholars from other countries and exchange views and to establish links with those Universities. The objective of granting study leave would therefore be to ensure that on his return, the lecturer would impart his experience to that institution, which had given him the opportunity to be away for a significant period.

Considering all the aforementioned facts and circumstances, it is therefore clear that the decision taken by the Public Service Commission with regard to the petitioner is in no way could be categorised as arbitrary, unlawful and irrational and is not in violation of the petitioner’s fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforementioned I hold that the petitioner has not been successful in establishing that the respondents had violated his fundamental rights guaranteed in terms of Article 12(1) of the Constitution. This application is accordingly dismissed. There will be no costs.

Judge of the Supreme Court

P.A. Ratnayake, P.C., J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court