

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

In the matter of an application for mandates in the nature of *Writs of Certiorari and Mandamus* under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. WRIT/ 119/2019

1. **Molagoda Gamage Thisura Nithish Ranhara**

No. 87/1,
Reservoir Lane,
Maligakanda,
Colombo 10

2. **Wannaku Ralalage Yasitha Dulanjali**

No. 87/1,
Reservoir Lane,
Maligakanda,
Colombo 10

PETITIONERS

-Vs-

1. **S.M. Keerthirathna**

The Principal of Ananda College and the Chairman of the Interview Board to admit Students to Grade 1 for the Year 2018

2. **Dhammika Perera**

Member of the Interview Board to admit Students to Grade 1 for the Year 2018

3. **R.M.C. Randeniya**

Principal of Primary School and Member of the Interview Board to admit Students to Grade 1 for the Year 2018

3A. K.P.B. Wijayasinghe

Member of the Old Boys' Association and
Member of the Interview Board to admit
Students to Grade 1 for the Year 2018

3B. T.W.C. Sethunga

Member of the School Development Society and
Member of the Interview Board to admit
Students to Grade 1 for the Year 2018

4. R.M.M. Rathnayake

Chairman of the Appeals and Objections Board
to admit students to Grade 1 for the year 2018

4A. A.P. Senanayake

Member of the Appeals and Objections Board to
admit students to Grade 1 for the year 2018

4B. M.B.S. Gunathilake

Member of the Appeals and Objections Board to
admit students to Grade 1 for the year 2018

4C. Indunil Udaya

Member of the Appeals and Objections Board to
admit students to Grade 1 for the year 2018

4D. K.S.P. Dalpathadu

Member of the Appeals and Objections Board to
admit students to Grade 1 for the year 2018

*All the above 1st to 4D Respondents are of Ananda
College, Colombo 10.*

5. Ranjith Chandrasekara

Director, National Schools,
Ministry of Education

6. Padmasiri Jayamanna

The Secretary to the Ministry of Education

6A. Upali Marasinghe

The Secretary to the Ministry of Education

7. Akila Viraj Kariyawasam

Minister of Education

All the above 5th to 7th Respondents are of Ministry of Education, “Isurupaya”, Battaramulla.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J. (P/CA) &
Sobhitha Rajakaruna, J.

COUNSEL : Asthika Devendra with Kaneel Maddumage
for the Petitioner

Madubashini Sri Meththa SC for the
Respondents

Argued on : 11.06.2020

Decided on : 25.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The Petitioners have filed the present application seeking the issuance of mandates in the nature of writs of *certiorari* to quash the decisions of the Interview Board and the Appeals and Objections Board respectively to award “zero marks”/ no marks to the Petitioners on the basis that the Petitioners have not established the 2nd Petitioner’s title to her place of residence and furthermore, the issuance of a mandate in the nature of a writ of *mandamus* directing/ compelling the Respondents to admit the 1st Petitioner to Grade-2 or an appropriate grade of Ananda College, Colombo 10. Alternatively, the Petitioners seek a mandate in the nature of a writ of *mandamus* compelling the Respondents to comply with the recommendations of the Human Rights Commission as reflected in the document marked “P-15.”

The facts of the instant case may be summed up as follows.

The 2nd Petitioner (the mother of the 1st Petitioner) tendered the application marked “P-3” for the purposes of admitting the 1st Petitioner to Grade-1 of Ananda College, Colombo 10 for the year 2018 under the category of “*Children of Residents within close proximity to the school*” under and in terms of the circular No. 22/2017 dated 30.05.2017 (marked “P-2”).

The Petitioners submitted that they had been residents of No. 87/I, Reservoir Lane, Maligakanda, Colombo 10 since birth and as Ananda College is located approximately 300 meters away from their place of residence, they had opted to apply under the category of “*Children of Residents within close proximity to the school.*”

In response to the application of the Petitioner dated 16.06.2017, the Petitioners were required to be present at an interview on 17.08.2017 along with the requisite documents which they were instructed to tender by the letter marked “P-4”. At the interview the Petitioners tendered extracts of the electoral register marked “P-5G” with a letter marked “P-5H” issued by the Department of Waterworks, Maligakanda. However, the Interview Board proceeded to reject the application of the Petitioners on the basis that the documents submitted were insufficient to establish the title of the 2nd Petitioner to her place of residence.

The Petitioners submitted that they also tendered a case record of the Magistrate’s Court of *Maligakanda* whereby the mother of the 2nd Petitioner was being prosecuted by the Colombo Municipal Council on the alleged basis of unlawful possession of the premises they resided in.

The Petitioners take the position that their residence had been given to the father of the 2nd Petitioner by the Colombo Municipal Council in 1974 and that they had been occupying the said premises since that year. Even though the 2nd Petitioner’s father had retired in 1997 and subsequently passed away in 1999, the 2nd Petitioner and her family had continued to occupy the premises relying on various promises and representations

made by political and administrative authorities that they would receive a favourable solution in the future. While the case regarding the unlawful possession of the premises of the 2nd Petitioner was ongoing at the time the application was submitted (16.06.2017), it was not until 04.12.2017 that a decision was reached by the Magistrate's Court, *Maliakanda* whereby an eviction order was issued against the mother of the 2nd Petitioner. Therefore at the time of tendering the application, the Petitioners were indeed residents of the said premises.

Subsequent to the interview the Petitioners aver that they were notified that their application had been rejected based on an amendment to the circular marked "P-2." The said amendment, marked "P-6", dated 31.07.2017 was to the effect that clause 7.1.3 of the circular marked "P-2" which read that *"marks should not be completely withheld where an applicant is unable to obtain marks for one part of the circular,"* was no longer operative.

However the Petitioners were also made to understand that a clarification dated 19.09.2017 to the amendment marked "P-6" had been issued by the Ministry of Education stating that the removal of clause 7.1.3 from the circular marked "P-2" did not mean that all marks should be refused where an applicant has failed to satisfy one part of the circular. The said clarification marked "P-8" also stated that an applicant would not be entitled to gain marks under a given category only if he/ she fails to satisfy the basic requirements of age and residence within the feeder area.

Aggrieved by the decision of the Interview Board, the Petitioners made an appeal before the Appeals and Objections Board and an inquiry was conducted on 16.12.2017. The decision of the Interview Board to award zero marks/ no marks for the failure of the 2nd Petitioner to prove title to her place of residence was upheld by the Appeals and Objections Board.

Thereafter the Petitioners received a letter from the 1st Respondent dated 08.01.2018 (marked "P-11") stating that the 1st Petitioner could not be admitted to Ananda College and that the cut off mark for the admission of students to Grade-I in respect of the said school was 71.75.

In light of these events, on or about 12.09.2017 the Petitioners lodged a complaint at the Human Rights Commission. Following an inquiry that was conducted on 10.01.2018, the Petitioners received a copy of the recommendations made by the Human Rights Commission dated 15.11.2018 recommending that the 1st Petitioner be admitted to Ananda College if he passes the cut off mark. The Commission also recommended that the Respondents, including the Principal, submit a report after the implementation of the said recommendations, prior to 17.12.2018.

The Petitioners assert that the 1st Respondent denied their request to implement the recommendations of the Human Rights Commission on the basis that it was not possible to do so without the approval of the Minister. Thereafter the 2nd Petitioner requested approval from the 5th Respondent via the letter dated 05.12.2018 (marked "P-17A") after which she was informed that the request had been forwarded to the 6th Respondent for necessary action. The Petitioner claimed that since no action has been taken in this regard the present application has been preferred to this court.

The position taken up by the Respondents is that the document submitted by the 2nd Petitioner marked "P-5H" was issued to her father who had retired in 1997 and is now deceased. Thus the said Government quarters were not given in the name of the Petitioner and therefore by virtue of the powers vested in the Interview Board in terms of clause 6.2.6 of the circular marked "P-2", the application of the Petitioners has been rejected at the threshold for failure to prove title to the residence.

Furthermore, the Respondents asserted that by virtue of the letter marked “P-8” regarding the clarification as to the removal of clause 7.1.3 of the circular marked “P-2”, marks can be withheld where an applicant does not fulfill the basic requirements necessary to come within the category under which he applies. It is the position of the Respondents that the Petitioners fall short of the minimum requirement of residence in the feeder area as they are illegal occupants of Government quarters and that thus the petition ought to be dismissed.

Having set out the respective positions of the parties I now proceed to consider the quintessential legal issues that arise in respect of the present application.

The decision to award zero marks/ no marks to the Petitioners on the basis that the Petitioners have failed to establish the title of the 2nd Petitioner to her place of residence.

In order to determine whether the initial decision of the Interview Board and the subsequent decision of the Appeals and Objections Board to reject the Petitioner’s application is in fact justifiable, it is fundamental that the circular marked “P-2” dated 30.05.2017 is closely scrutinized.

As per the aforementioned circular an applicant who wishes to tender an application for the admission of her child to Grade-1 must fulfill two basic requirements, namely, the child should have completed 5 years of age as at 31st January 2018 and the applicant-parent/legal guardian should be a resident of the feeder area of the school. It is in this context that the application of the Petitioners ought to have been assessed.

As per clause 7.2 of the circular marked “P-2”, any person residing in the feeder area is entitled to apply under the category “*Children of Residents within close proximity to the school.*” This raises the issue whether ownership of the premises is the sole factor that determines residence.

In the case of *Dasanayakage Gayani Geethika and two others v. D.M.D. Dissanayake, Principal, D.S. Senanayake College, Colombo 07 and five others* (SC/ FR 35/2011) (SC Minutes of 12.07.2011) Suresh Chandra, J. set out a comprehensive analysis of the concept of “residence” in the context of school admission cases.

“The ordinary meaning that is given to “Residence” is “the place where an individual eats, drinks, and sleeps or where his family or servants eat, drink and sleep”. (Wharton’s Law Lexicon)

Residence as envisaged by the said circular would imply a permanent abode which has been used for a continuous period..... Such residence does not necessarily connote ownership as the circular speaks of leases whether registered or unregistered being acceptable for the purposes of establishing residence. Credence is also given to the acceptability of other documents such as utility bills, employment letters, bank documents, letters received etc which would all serve as items establishing the genuineness of the residence.”

In line with the precedent laid down by the aforementioned case it is evident that ownership is not the sole decisive factor as to whether an applicant is a resident.

The application of the Petitioners was awarded no marks/zero marks on the ground that the primary requirement of being a resident of a feeder area had not been satisfied owing to the fact that the 2nd Respondent failed to establish title to the premises she resided in. In this regard, the stance of the Respondents is primarily based on the fact that the 2nd Petitioner was in unlawful possession of the place of residence mentioned in the application as the residence in question was handed over to the 2nd Petitioner’s father by the Colombo Municipal Council while he served there and the 2nd Petitioner had continued to occupy these Government quarters even after the retirement and subsequent death of her father.

It is an admitted fact that the 2nd Petitioner's mother was being prosecuted at the Magistrate's Court *Maligakanda* under the case bearing No. 12738/17 at the time the 2nd Petitioner tendered the application to admit the 1st Petitioner to Ananda College. However at the time the application was submitted (on or around 16.06.2017), no order had been issued against the Petitioners. An eviction order was issued against the 2nd Petitioner's mother on 14.12.2017, approximately 6 months after the Petitioners had tendered their application.

In my view these facts can only warrant one conclusion. At the time of the application the Petitioners continued to remain residents of the premises in dispute. These premises were to all intents and purposes their permanent abode, regardless of whether they had legal title to it. The eviction order by the Magistrate's Court, *Maligakanda* may have interrupted continued possession of the premises but at the time of application for admission the order of eviction was not in existence.

I am compelled to consider the fate that would have befallen the Petitioners in a series of hypothetical scenarios. Had the 2nd Petitioner's mother not been prosecuted under the Government Quarters (Recovery of Possession) Act, No. 09 of 1979 at the time the Petitioners tendered their application, but they continued to occupy the quarters offered to the 2nd Petitioner's father, would the Petitioners have still been awarded zero marks/ no marks on their application for failing to satisfy the requirement of residence within the feeder area?

Similarly, if the course of events were such that subsequent to the Petitioners tendering their application, a *vis major* or an act of God beyond the control of the Petitioners resulted in them losing their place of residence, would their application be rejected on the ground that they failed to prove residence within the feeder area?

Clauses 7.2.1, 7.2.2 and 7.2.3 of the circular are independent heads under which the residence of the applicant may be ascertained. Nowhere in the circular does it compulsorily require an applicant to have title to the premises of residence in order to prove residence.

Her Ladyship Justice Murdu N.B. Fernando, PC. J. in the case of *SC/FR 62/2018* (SC Minutes of 12.12.2018) clearly articulates the reasoning that one sub-clause in a circular should not get priority over another.

“Thus, I observe that out of the 5 items in Sub-Clause 7.4, excepting 7.4.4 where marks can be given only if 7.3.4 is fulfilled, all the other 4 Sub-Clauses are stand alone Sub-Clauses, independent to each other. One Sub-Clause does not get priority over the other Sub-Clause and there is no justification not to give marks for items (1) and (2) merely because items (3) or (4) are not fulfilled. On the corollary, in the Brother Category just because an applicant is not entitled to any marks under item (5) achievements and donations, should an applicant not be given marks under item (1) Brother in School. I consider such argument to be ludicrous.”

Furthermore in the case of *Pushparajan Rohan v. Kariyawasam* (SC/FR/ 06/2017) (SC Minutes of 03.11.2017) Vijith Malalgoda, J. with Wanasundara, J. and Perera, J. agreeing, held that it was arbitrary for the school to not grant any marks, merely because one of the documents listed to verify proof of residence had not been submitted.

On this basis I take the view that the failure of the 2nd Petitioner to prove title to the premises she resided in should not have been a bar in respect of marks being awarded since the submission of extracts of the electoral register (under clause 7.2.1 of the circular) and other relevant documents (under clause 7.2.2.2 of the circular) could have been utilized in substantiating the applicant’s residence. Furthermore, separate marks should have been awarded under the head of proximity to the school from the place of residence (clause 7.2.3 of the circular) taking into account the fact that both the Petitioners’ residence and the school are situated in the same area.

This court therefore takes the view that the decisions taken by the Interview Board and subsequently the Appeals and Objections Board to award the Petitioner zero marks/ no marks were unreasonable and irrational in the *Wednesbury* sense and that the said decisions must therefore be reversed- see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223 for its narrow and umbrella sense.

The legitimate expectation accrued on the Petitioners that the Interview Board and the Appeals and Objections Board would act in accordance with the circular marked “P-2”.

The Petitioners tendered their application under and in terms of the circular marked “P-2” dated 30.05.2017. Clause 7.1.3 of the circular reads as follows:

“මෙම ගණ සඳහා ලකුණු ක්‍රමයකට අනුව ලකුණු ලබා දෙන හෙයින් ලකුණු දීමේ පටිපාටියේ එක් කොටසකට ලකුණු ලබා නොගන්නද, ලකුණු හිමිවන අනෙකුත් කොටස් සඳහා ලකුණු ලබා දිය යුතු අතර, එවැනි අවස්ථා සඳහා සම්පූර්ණයෙන්ම ලකුණු ලබා දීම ප්‍රතික්ෂේප නොකළ යුතුය.”

The Petitioners submitted that they were subsequently notified that clause 7.1.3 had been amended by the document marked “P-6” dated 31.07.2017 which is to the effect that clause 7.1.3 of the circular marked “P-2” has been completely removed and that under and in terms of the said amendment, marks cannot be awarded to the Petitioners in circumstances where one sub-clause has not been satisfied under the category of which the application is made.

However taking into account the fact that the Petitioners tendered their application on 16.06.2017, it is evident that a legitimate expectation arose that their application would be assessed in terms of the circular marked “P-2” dated 30.05.2017.

In order for a legitimate expectation to accrue to a party a promise or a representation of some nature must have been made by the decision maker. In the instant case the representation was the mere fact that the application of the Petitioners would be considered and assessed in terms of the relevant circular that the Petitioners applied under. It is clear from the facts that at the time the application was made, the amendment to the circular had not come into operation.

In the case of *R v Secretary of State for the Home Department, ex parte Asif Mahmood Khan* [1984] 1 WLR 1337, 1347 where the issuing of a circular providing the criteria under which a child would be permitted entry into the United Kingdom was held to have created a legitimate expectation that the said criteria would be applied, Parker LJ, emphasized that a new policy could only be implemented in the case of such an individual after “full and serious consideration whether there is some overriding public interest which justifies” doing so.

The decision in *Khan* achieved two things:

- It allowed a measure of protection to *substantive legitimate expectations*: It held that a decision-maker cannot depart from an assurance previously given (whether in a policy or otherwise) unless he can point to overriding public interest reasons for doing so;
- It avoided conflict with the rule against the fettering of discretion by ensuring that a decision-maker can in exceptional cases depart from the legitimate expectation.

See *R v Home Secretary ex parte Ruddock* (1987) 1 WLR 1482; *R v Ministry of Agriculture, Fisheries and Foods ex parte Hamble Fisheries (Offshore) Ltd* (1995) 2 All ER 714; *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7.

Therefore the position taken up by the Petitioners is justifiable in that it was unfair and unreasonable for the Interview Board to assess the Petitioner's application under the circular marked "P-6".

In any case, the subsequent letter (marked "P-8") forwarded to School Principals regarding a clarification on the issue of the removal of clause 7.1.3 of the circular marked "P-2" lays down the position that the Ministry of Education expected Interview Boards to follow in respect of applications for admissions. The said clarification was issued on 19.09.2017.

Paragraphs 3 and 4 of the clarification letter are fundamental and go as follows:

“2017 වක්‍රලේඛයේ අදාළ ගණයන් හය සඳහා මූලික සුදුසුකම් හඳුන්වාදීමෙන් අනතුරුව ඒ ඒ ගණයට අදාළ ලකුණු පටිපාටිය දක්වා ඇත. යම් අයදුම්කරුවකු එම මූලික සුදුසුකම් සපුරා නොමැති නම් පමණක් අදාළ ගණයට හිමිකම් නොලබයි. එහෙත් නියමිත මූලික සුදුසුකම් සපුරා ඇත්නම්, ලකුණු පටිපාටියේ එක කොටසක් තහවුරු නොකිරීම මත සම්පූර්ණයෙන් ලකුණු ලබා දීම ප්‍රතික්ෂේප නොකළ යුතු ය.

විශේෂයෙන් ම, පාසලට ආසන්න පදිංචිකරුවන්ගේ දරුවන්ගේ ගණය යටතේ මූලික සුදුසුකම් වනුයේ පෝෂිත ප්‍රදේශය තුළ පදිංචි වී සිටීම ය. පදිංචිය තහවුරු කරන ලේඛන යටතේ වන පදිංචි ස්ථානයේ හිමිකම් යන්න ලකුණු පටිපාටියේ අන්තර්ගත එක් නිර්ණායකයක් පමණක් වන අතර එම වක්‍රලේඛයේ 9.3.3. උපවගන්තිය සම්බන්ධයෙන් අවධානය යොමු කර තවදුරටත් සත්‍ය පදිංචිය තහවුරු කරගත හැකිය.”

This affirms the fact that the essence of the circular marked "P-2" is to afford as many opportunities as possible to prospective applicants who satisfy the prerequisites and that a rigid and technical approach must not be adopted in assessing applications.

As the Petitioners appeared before the Appeals and Objections Board on 16.12.2017, almost three months after the clarification “P-8” was issued, it is only natural that a further legitimate expectation accrued to them that the Appeals and Objections Board would assess their appeal in light of the latest clarification, particularly since their expectation of being assessed under the terms of the initial circular marked “P-2” had been frustrated.

In the circumstances, I take the view that the legitimate expectations that the Petitioners entertained have been manifestly disappointed owing to the decisions taken by the Interview Board and the Appeals and Objections Board.

The recommendations made by the Human Rights Commission

Having failed to secure redress before the Appeals and Objections Board the Petitioner preferred an application to the Human Rights Commission. It was the recommendation of the Human Rights Commission that the 1st Petitioner be admitted to Ananda College, Colmobo-10 if he obtains marks above the requisite cut off mark. However the facts of the case demonstrate that the Respondents failed to take necessary action in this regard and that there has been undue delay on the part of the Respondents in complying with the recommendations of the Human Rights Commission.

I take the view that the Respondents are under an obligation to comply with the recommendations of the Human Rights Commission particularly in the instant case as the objections for not doing so are without any foundation.

In these circumstances this Court allows the application of the Petitioners and the Respondents are hereby directed to take necessary steps to admit the 1st Petitioner to Grade-2 or an appropriate Grade of Ananda College, Colombo 10.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL