

**DAYANA AND OTHERS**

**Vs.**

**SECRETARY, MINISTRY OF EDUCATION, SOUTHERN PROVINCE AND OTHERS**

COURT OF APPEAL  
SAMAYAWARDHENA, J.  
CA/WRIT/269/2016

**Writs of certiorari and mandamus—Scheme of recruitment of teachers by the Southern Provincial Council—Inconsistency of the scheme with the national policy of the Central Government—Articles 12(4) and 55 of the Constitution—Provincial Councils Act, No. 42 of 1987, section 32(3) — Irrationality—Interference with discretion on cogent grounds**

The petitioners who are graduates residing in the Southern Province filed this application against the respondents seeking to quash by way of a writ of certiorari the decision of the respondents to make appointments of graduates in the Southern Province to Class 3 Grade I of the Sri Lanka Teachers' Service based on a Divisional Secretariat basis; and to compel the respondents by way of a writ of mandamus to follow the recruitment procedure laid down in the Sri Lanka Teachers' Service Minute issued by the Central Government, which is not based on a Divisional Secretariat basis but on a Merit basis and subsequently a School basis.

The pivotal argument of the petitioners was that a Provincial Council cannot deviate from the National Policy of the Central Government on any subject or area including the scheme of recruitment.

**Held:**

1. In terms of section 32(3) of the Provincial Councils Act, No. 42 of 1987, the Governor is not mandatorily required to follow the schemes of recruitment prescribed by the centre, but shall endeavour as far as practicable to do so.
2. As much as the policy of the centre changes from time to time, such as, from Merit basis to School basis, the provincial policy on Divisional Secretariat Division basis is also bound to change. The impugned scheme of recruitment for the Teachers' Service has been introduced to address the, specific issue of the dearth of teachers in identified difficult schools and to maintain the continuity of service.

3. Article 12(4) of the Constitution allows special provisions to be made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons. The impugned decision was taken to address the issue relating to children, to be specific, the education of the children.

4. The argument that the Divisional Secretariat basis for recruitment is irrational, and that the School basis system introduced by the centre by the Service Minute is more logical and coherent cannot be accepted, as the court is ill-equipped and has no expertise to form an opinion on which policy is best suited to address the specific issue. Unless the scheme of recruitment adopted is patently irrational, the court would be slow to interfere with the exercise of discretion.

*Kamalawathie v. Provincial Public Service Commission, North Western Province [2001] 1 Sri LR 1 distinguished.*

**Cases referred to:**

1. Sujeewa Arjuna Senasinghe v. Ajith Nivard Cabraal (SC/ FR/457/2012, SC Minutes of 18. 09. 2014)
2. Public Interest Law Foundation v. Central Environmental Authority [2001] 3 Sri LR 330
3. Kamalawathie v. Provincial Public Service Commission, North Western Province [2001] 1 Sri LR 1

APPLICATION for Writs of Certiorari and Mandamus.

Shantha Jayawardena with Chamara Nanayakkarawasam for the Petitioner.

Kanishka De Silva Balapatabendi, S. S. C., for the Respondents.

*cur. adv. vult.*

July 29, 2019

**SAMAYAWARDHENA, J.**

The petitioners who are graduates residing in the Southern Province filed this application against the respondents seeking to quash by way of a writ of certiorari the decision of the 1st- 11th respondents to make appointments of graduates to the Teachers' Service in the Southern Province on a Divisional Secretariat basis; and to compel them by way

of writ of mandamus to follow the recruitment procedure laid down in the Sri Lanka Teachers' Service Minute; and to prohibit them by way of writ of prohibition from adopting the Divisional Secretariat basis in recruiting graduate teachers to the Southern Province. Further, they seek to compel the said respondents by way of writ of mandamus to consider the petitioners for fitting the remaining vacancies of the Teachers' Service in the Southern Province prior to making appointments based on the subsequent newspaper advertisement marked P17 and the results of the competitive examination held on 30. 07. 2016.

Although there were 59 petitioners initially, learned counsel for the petitioners in the written submission has stated that only 40 petitioners presently remain unemployed. They are the 1st, 3rd- 5th, 7th, 8th, 10th, 11th, 13th- 28th, 30th, 33rd- 37th, 40th, 42nd, 43rd- 46th, 48th, 49th, 51st- 59th petitioners.

The 1st respondent-Secretary to the Ministry of Education of the Southern Province by advertisement marked P2 called for applications to recruit graduates for Class 3 Grade I of the Sri Lanka Teachers' Service stating that recruitments would be done on Divisional Secretariat basis in terms of Sri Lanka Teachers' Service Minute.

In P2, the Divisional Secretariat Divisions in which vacancies exist and the subjects to be taught have been stated. In terms of this recruitment procedure, priority is given to applicants who reside in the Divisional Secretariat Divisions where vacancies exist.

According to the Sri Lanka Teachers' Service Minute published in the Gazette marked P3, which was operative when applications were called for by P2, recruitments to Class 3 Grade I of the Sri Lanka Teachers' Service shall be on Merit basis by way of a competitive examination.

The petitioners have tendered advertisements published by some of the other provinces marked P5- P10 to say that in those provinces, recruitments of graduates to Class 3 Grade I of the Sri Lanka Teachers' Service are done in terms of the procedure laid down in the Sri Lanka Teachers' Service Minute.

Irrespective of the Divisional Secretariat basis of recruitment, the petitioners have applied for the said vacancies.

Then by P13 the 1st respondent has inter alia informed the petitioners that direct recruitment would be made if the number of applicants is less than the vacancies in a particular Divisional Secretariat Division, and

otherwise, there would be a competitive examination as stated in the P2 advertisement. It has further been stated that the number of vacancies stated in the annexure to P13 have increased due to the subsequent retirement of teachers and steps would be taken to fill those vacancies also without delay.

The examination has been held on 14. 11. 2015 and the results have been released on 01. 01. 2016 and interviews have been held from January 2016 to February 2016. Selections have been made but the petitioners were not among them.

Thereafter the 1st respondent published a new advertisement marked P17 dated 30. 04. 2016 calling for applications for recruitment of graduates to Class 3 Grade I of the Sri Lanka Teachers' Service stating that recruitments would be done on Divisional Secretariat basis in terms of the Sri Lanka Teachers' Service Minute.

In P17 the relevant Divisional Secretariat Divisions in which vacancies exist, the schools, the subjects and the number of vacancies etc. have been stated. The petitioners have submitted applications in response to this advertisement as well and an examination had been conducted and interviews held but the petitioners have not been selected.

According to the Sri Lanka Teachers' Service Minute published in the Gazette marked P4, which was operative when applications were called for by P17, recruitments to Class 3 Grade I of the Sri Lanka Teachers' Service shall be on School basis.

The petitioners have shown irregularities in the appointment process in the counter affidavits. However, the said appointees are not parties to the case and therefore without affording them an opportunity to unfold their side of the story no finding can be made against them.

The pivotal argument of the learned counsel for the petitioners is that the decision of the respondents to recruit graduates in the Southern Province for the vacancies in the Sri Lanka Teachers' Service on Divisional Secretariat basis is against the National Policy of the Central Government, as reflected in the Service Minutes marked P2 and P3, where the former states that recruitments shall be on Merit base and the latter states that it shall be on School basis. The learned counsel emphasises that neither P2 nor P3 allows recruitments to be made on Divisional Secretariat basis. The learned counsel strenuously argues that

a Provincial Council cannot deviate from the National Policy of the Central Government on any subject or area including the scheme of recruitment. The counsel refers to Article 55 of the Constitution to say that it is the Cabinet of Ministers who is vested with the power to determine policy decisions on all matters relating to public officers including appointments. To buttress that argument, the counsel also refers to the Reserved List in the Thirteenth Amendment to the Constitution, which states that “*National Policy on all Subjects and Functions*” rests with the Central Government.

Assuming the P2 and P3 Service Minutes reflect the National Policy on recruitment to the Sri Lanka Teachers’ Service, the question is whether the Southern Provincial Council could have formulated their own scheme of recruitment. This appears to be permitted subject to limitations. This can be explained in reference to the Constitution and the Provincial Councils Act, No. 42 of 1987.

Item 4 of Appendix III of the Provincial Council List in the Thirteenth Amendment to the Constitution, which deals with “Education”, reads as follows:

*Recruitment into the Teaching Service of those with diplomas and degrees, from Colleges of Education and Universities, recognised as teaching qualifications.*

Section 32 of the Provincial Councils Act reads as follows:

*(1) Subject to the provisions of any other law the appointment, transfer, dismissal and disciplinary control of officers of the provincial public service of such Province is hereby vested in the Governor of that Province.*

*(2) The Governor of a Province may, from time to time, delegate his powers of appointment, transfer, dismissal and disciplinary control of officers of the provincial public service to the Provincial Public Service Commission of that Province.*

*(2A) The Provincial Public Service Commission of a province may, subject to such conditions as may be prescribed by the Governor of that Province, delegate to the Chief Secretary or any officer of the provincial public service of that Province, its powers of appointment, transfer, dismissal, and disciplinary control of officers of the provincial public service.*

*(2B) Any officer of the provincial public service of a Province aggrieved by any order made by the Chief Secretary or any officer of the provincial public service of that Province, to whom the Provincial Public Service Commission of that Province has delegated its powers under the preceding subsection, shall have a right of appeal to such Provincial Public Service Commission.*

*(3) The Governor shall provide for and determine all matters relating to officers of the provincial public service, including the formulation of schemes of recruitment and codes of conduct for such officers, the principle 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 such officers. In formulating such schemes of recruitment and codes of conduct the Governor, shall, as far as practicable, follow the schemes of recruitment prescribed for corresponding offices in the public service and the codes of conduct prescribed for officers holding corresponding offices in the public service.*

It is noteworthy that in terms of section 32(3) of the Provincial Councils Act, the Governor is not mandatorily required to follow the schemes of recruitment prescribed by the Centre, but shall endeavour as far as practicable to do so.

The reference to the Service Minutes of P3 and P4 in the advertisements P2 and P17 can be attributed to the said provision. That is to maintain the link between the National Policy and the Provincial Policy and to give the message that the Province is sensitive and aware of the Policy of the Centre and not intentionally trying to deviate from it. Hence it can safely be assumed that the Governor has been given considerable latitude in certain aspects to strike a balance between the National Policy and the unique needs of the province and formulate a scheme to address the issues peculiar to that province.

It may be noted that as much as the policy of the Centre changes from time to time, such as, from Merit basis in P3 to School basis in P4, the Provincial Policy on Divisional Secretariat Division basis is not forever. It is the scheme of recruitment to Teachers' Service for the time being, which, according to the Senior State Counsel for the respondents, has been introduced to address the issue of dearth of teachers in identified difficult schools and to maintain the continuity of service. The Southern

Provincial Council may have identified that issue as very unique to itself and may have thought it fit to address that issue in a particular manner.

Another argument of the learned counsel for the petitioners is that the recruitment on Divisional Secretariat basis is basically dependent on place of birth which is discriminatory and therefore contrary to Article 12(1) of the Constitution which ensures the right to equality. To meet that argument, the learned Senior State Counsel for the respondents draws the attention of Court to Article 12(4) of the Constitution which says that *“Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons”* to justify the impugned decision of the Southern Provincial Council which was taken to address the issue relating to children, to be specific, the education of children.

For the aforesaid reasons, I take the view that the main argument of the counsel for the petitioners fails.

The next argument of the learned counsel for the petitioners is based on irrationality. There is no dispute that irrationality is a ground for judicial review. The learned counsel says that the Divisional Secretariat basis for recruitment is irrational and does not provide an effective solution to the lack of teachers in rural or difficult areas. The learned counsel argues that the School basis system introduced by the Centre by Service Minute marked P3 is more logical and coherent. The learned Senior State Counsel in that regard draws the attention of this Court to the Supreme Court case of *Sujeewa Arjuna Senasinghe v. Ajith Nivard Cabraal*<sup>1</sup> where Sripavan J. (later C. J.) observed that *“The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned.”*

This Court is ill-equipped and has no wherewithal or expertise or assistance to form an opinion on which policy is best suited to address the issue of the dearth of teachers in difficult areas in the Southern Province. Such an attempt on the part of the Court would fall outside the purview of judicial review. Unless the scheme of recruitment which has been adopted is patently irrational, the Court would be slow to interfere with the exercise of discretion merely because one party to the action

says that another policy is more effective than the present one (*Public Interest Law Foundation v. Central Environmental Authority*<sup>2</sup>). I cannot bring myself to think that the recruitment of graduates as teachers to serve in difficult areas with continuity based on the Divisional Secretariat basis is outrageous or irrational.

The Judgment of the Supreme Court in *Kamalawathie v. The Provincial Public Service Commission, North Western Province*<sup>3</sup> cited by the learned counsel for the petitioners where it has been held that “While powers in respect of education have been devolved to Provincial Councils, those powers must be exercised in conformity with national policy. Once national policy has been duly formulated in respect of any subject, there cannot be any conflicting provincial policy on that subject, is on totally different facts. In that case the teacher transfer policy set out in Circular No. 95/11 dated 31. 03. 1995 had been approved by the Cabinet of Ministers as the National Policy. In that circular it has specifically been provided that transfers should be on the recommendations of the duly established teacher transfer board. However the impugned transfers had been effected without the recommendations of the teacher transfer board. Further in that case there had not been occasion to consider section 32(3) of the Provincial Councils Act, which allows the Province to deviate from the Centre to some extent.

Another argument of the learned counsel for the petitioners is that the P13 letter received by the petitioners, which I referred to earlier, created a legitimate expectation of the petitioners that they would be selected at least at the third stage but it was nullified by the advertisement P17 whereby fresh applications were called for to fill the remaining vacancies without proceeding to the third stage. Firstly, P13, in my view, does not specifically speak about a third stage but only the first and second stages. Thereafter P13 says that new vacancies created after the date relevant to the annexure will also be filled without delay without specifically stating that those vacancies will also be filled by the same applicants. Secondly, when the second advertisement P17 was published, the applicable Service Minute was different, and places of vacancies, number of vacancies etc. were also different.

For the aforesaid reasons, the application of the petitioners is dismissed but without costs.

*Application dismissed.*

*Judgment by: Mahinda Samayawardhena, J.*

*This PDF was produced by [paralegal.lk](http://paralegal.lk)*