
RANASINGHE
VS
RATHNASIRI AND OTHERS

SUPREME COURT,
BANDARANAYAKE, J.
DISSANAYAKE, J AND
FERNANDO, J,

S. C (FR) 638/2003

15TH JULY, 30TH, AUGUST AND 16TH NOVEMBER, 2004

Fundamental Rights - Appointment of Registrar of Births and Deaths and Registrar of Marriages - Article 12(1) of the Constitution - Most eligible candidate appointed - Appointment not vitiated - Insufficiency of evidence of alleged infringement of fundamental rights.

The petitioner's father was Registrar of Births and Deaths, Uduwara and Registrar of Marriages, Raigam Korala until his death on 06.11.2001. Thereafter, the petitioner was appointed to act in these posts by monthly extensions.

By Gazette dated 03.05.2002, the 2nd respondent (the Registrar -General) called for applications to fill the aforesaid vacancies. The Gazette prescribed the eligibility criteria, including educational qualifications. Ten applications were received. They were given to the 4th respondent (the District Registrar) for consideration by an Interview Board and recommendations. Next as required, the 2nd respondent submitted the recommendations to the 6th respondent (the Minister) for decision. The Panel of Members for interview of candidates recommended that seven of the candidates had minimum eligibility. The 1st respondent had the best educational qualifications, viz. in addition to more credits than others at the G. C. E. (O/L) Examination (in one sitting) against two sittings specified in the Gazette, she had also passed the G. C. E (A/L) for selection to the Kelaniya University, She was also a trained teacher until her retirement under Circular 44/90 dated 18.10.1990. The 6th respondent Minister decided to appoint her to both posts.

The appointments were impeached under Article 12(1) of the Constitution on the ground that firstly, the Interview Panel had given marks to the candidates which was not required by the scheme of recruitment ; secondly that the 7th respondent (Private Secretary to the Minister) had recommended to the 5th respondent (Senior Assistant Secretary) that the Minister had instructed the appointment of the 1st respondent which was tantamount to political intervention ; thirdly, that the 1st respondent had no right to be appointed a "public officer" after retirement from Government Service.

The 2nd respondent (Registrar General) averred in his affidavit that the Minister had decided to appoint the candidate who was educationally the most qualified candidate. The 2nd respondent made the appointment accordingly.

HELD :

- (1) There was no legal objection against marks being given at the interview.
- (2) The 2nd to 6th respondents had a discretion in the matter. Hence the decision to appoint the 1st respondent in the circumstances could not be impeached on the ground of political intervention.
- (3) As averred by the 2nd respondent, the candidate who had the best educational qualifications had been appointed.
- (4) The Minister and other respondents did not act arbitrarily but acted on relevant considerations. Hence the evidence was insufficient to hold that there was an infringement of Article 12(1) of the Constitution.
- (5) The first respondent's appointment was not that of a "public officer" and as such the objection taken on that ground fails.

Case referred to :

1. *Breen v Amalgamated Engineering Union* (1971) 2 QB 175

APPLICATION for relief for infringement of fundamental rights

J. C. Weliamuna with *Viran Corea* and *Sharmaine Gunaratne* for petitioner.

Saliya Peiris with *Chamath Madanayake* for 1st respondent.

M. Gopallawa, State Counsel for 2nd to 6th and 8th respondents.

Cur. adv. vult

February 25, 2005,

SHIRANI A. BANDARANAYAKE, J.

The petitioner, who was the Acting Registrar of Birth and Deaths of Uduwara Division and the Acting Registrar of Marriages of Raigam Korale Division, for a period of 2 years alleged that, the 2nd to 7th respondents have acted in violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution by the appointment of the 1st respondent as the Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division.

This Court granted leave to proceed for the alleged infringement of petitioner's fundamental rights in terms of Article 12(1) of the Constitution

The petitioner's grievance, *albeit* brief, is as follows :

The petitioner submitted that his father was the Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division until his death on 06.11.2001. Thereafter the petitioner was acting in the relevant post from 16.11.2001 (P1) which was extended on the completion of every 30 days, Extensions were granted on this basis until November, 2003 and by letter dated 19.11.2003, the 3rd respondent had informed the petitioner that his period of service was extended only for the period from 17th November, 2003 to 30th November, 2003 (P12). The petitioner submitted that by notification published in the Gazette No. 1235 dated 03.05.2002, the 2nd respondent called for applications for the posts of Registrars of Births and Deaths and Registrars of Marriages in several divisional secretariat areas in the Kalutara District including Uduwara (P2). The petitioner submitted that having possessed of the qualifications stated in the Gazette Notification referred to earlier, he had applied for the relevant post and submitted his application to the 4th respondent. Later the petitioner had become aware that the 1st respondent has been appointed to the relevant post by letter dated 13.11.2003 sent by the 2nd respondent to the 4th respondent. On an inquiry, he received a letter from the Additional District Secretary, Kalutara, writing on behalf of the 4th respondent, informing him that the petitioner's services will no longer be required from 30.11.2003 as the 1st respondent has been appointed to the post in question with effect from 01.12.2003.

The petitioner alleged that, according to the scheme of recruitment of Registrars of Birth and Deaths, the 4th respondent is required to make his recommendation to the 2nd respondent upon which the 2nd respondent has to submit his observations together with the relevant documents as well as the interview notes to the 6th respondent, who is the Minister of the relevant Ministry. Upon the 6th respondent granting his approval, the 2nd respondent is required to make the appointment and that must be published in the Gazette (P3). The petitioner alleged that the 7th respondent, who is the private secretary of the 6th respondent Minister, by letter dated 24.06.2003 has requested the 5th respondent to appoint the 1st respondent to the post in question.

It is common ground that applications were called for the post of Registrar of Birth and Deaths of Uduwara Division and the Registrar of Marriages (General) of Raigam Korale Division by Gazette Notification dated 30.05.2002 . According to the said Gazette Notification, the candidates should have possessed the following qualifications.

1. applicants should be permanent residents in the relevant divisions who possess sufficient assets and have acquired the respect of persons in that area ;
2. applicants should be persons who are not less than 21 years and not more than 60 years of age ;
3. applicants should be married ;
4. applicants should possess the required educational and other qualifications stipulated in the notices displayed at the office of the District Secretary, Kalutara.

The notices calling for applications displayed at the said office at Kalutara stipulated that the minimum educational qualification was six passes at the GCE (Ordinary Level Examination) in not more than two sittings including Sinhala/Tamil as a subject or an examination equivalent or higher to that standard and the ability to work in a second language to meet the requirements of the public of the area.

The 2nd respondent averred that clause 18(c) of the scheme of recruitment (P3) sets out the matters to be examined by the panel of members at the interview and that clause 19 further provides that the said panel should select candidates eligible for appointment based on the material submitted at the interview. He further averred that the panel is expected to only indicate the eligibility of a candidate and that there is no provision made according to the scheme of recruitment for the allocation of marks at the interview. Learned State Counsel correctly pointed out that the petitioner is not entitled to challenge the scheme of recruitment at this stage.

An examination of the Schedule of applicants for the post of Registrar of Births and Deaths of Uduwara Division and the Registrar of Marriages of Raigam Korale Division, reveals that there have been 10 applicants present at the interview. Out of these 10, the panel of members at the interview had recommended as suitable seven (7) applicants, which included the petitioner as well as the 1st respondent (2R2). All seven applicants have satisfied the minimum eligibility criteria. Except for the remark made stating suitable or non suitable, no other comment was made by the panel.

At the conclusion of the interview, the 4th respondent, based on the findings of the panel of members, had reported to the 2nd respondent and the 2nd respondent had sent the details of the 7 applicants to the 6th respondent informing him that the most suitable candidate out of the 7 eligible candidates be appointed to the post of Registrar (2R3)

According to the 2nd respondent, all the applicants including the petitioner was made aware of the requirements to produce certificates relied upon by them to establish their educational qualifications and this was even referred to in the letter calling them for the interview (P4)

Out of the petitioner and the 1st respondent, it is quite clear that the 1st respondent possessed higher qualifications than the petitioner. Whilst the petitioner had obtained six simple passes and one credit pass in two sittings at the GCE (O/L), the 1st respondent had obtained five simple passes and three credit passes in the GCE (O/L) examination in one sitting. Moreover the 1st respondent had also passed the GCE (A/L) examination and the General Arts Qualifying (GAQ) Examination from the University of Kelaniya. Furthermore, the 1st respondent had functioned as a Trained Teacher until his retirement in terms of Public Administration Circular No. 44/90 dated 18.10.1990 (P5).

The petitioner complained that, as the 1st respondent had retired from Government Service in terms of clause 4 of Public Administration Circular No. 44/90 dated 08.10.1990, that he will not be entitled to be appointed to a public post after such retirement. It is to be borne in mind that the provisions of Public Administration Circular No. 44/90 (P5) prohibits re-employment in the Public Service, Provincial Public Service, Statutory Bodies, Public Corporations, State Owned Companies and Government Owned Business Undertakings. The posts of Registrar of Births and Deaths and Marriages do not fall within the definition of the term 'Public Officer' as defined in the Constitution and the Establishment Code and are not considered as constituting posts in the Public Service. Moreover the provisions in Public Administration Circular No. 44/90 have been amended and restrictions imposed on the re-employment of officers who retired in terms of the said circular have been varied by subsequent Public Administration Circulars such as Public Administration Circular Nos. 44/90(iii) and Public Administration Circular No. 1/03. In the circumstances it would not be correct to say that the 1st respondent is disqualified from being appointed as a Registrar of Births and Deaths and a Registrar of

Marriages due to his optional retirement from the Public Service in terms of Public Administration Circular No. 44/90.

The petitioner has alleged that the 7th respondent who is the Private Secretary to the Minister had informed the 5th respondent by letter dated 24.06.2003 that the 1st respondent should be appointed to the relevant post. His allegation is that as the direction to the 5th respondent was given by the 7th respondent, there has been political intervention in the said appointment. Admittedly, the letter in question was written by the 7th respondent. However, he had written the letter in his capacity as the Private Secretary of the 6th respondent Minister and the contents of the letter clearly indicate that he is only conveying the decision of the Minister. The relevant portion of the said letter is reproduced below :

“එබැවින් අදාළ තනතුර සඳහා ගොනුවේ අංක 66 ක් වන සඳහන් මහවිත්තයේ දෙවන පුද්ගලයා රත්නසිරි මහතා පත් කිරීමට කටයුතු කරන මෙන් ගරු අමාත්‍යතුමාගේ උපදෙස් පරිදි කරුණාවෙන් දන්වා සිටිමි”

In such circumstances, it is abundantly clear that the 7th respondent was only carrying out the instructions of the 6th respondent Minister, which is within the framework of duties allocated to him in his capacity as the Private Secretary to the 6th respondent.

The main allegation of the petitioner is that the 7th respondent had arbitrarily issued the letter dated 24.06.2003 (P7) to the 5th respondent informing her to appoint the 1st respondent to the post in question.

The petitioner also alleges that there was no scheme of allocating marks to the candidates at the interview and therefore there was no stipulated criteria for the selection.

Admittedly there had been no scheme of allocating marks at the interview and the scheme of recruitment does not refer to any kind of guidelines, rules or principles, which would govern the criteria for the selection. In such circumstances, where no such guidelines for selection are laid down to be followed, the officer concerned is bestowed with unrestricted discretion ; if exercised without any fetters, such decision could become arbitrary negating equal protection and discriminating persons who are similarly circumstanced.

According to classical Constitutional Law, wide discretionary power, was incompatible with the Rule of Law. (A. V. Dicey, *Law of the Constitution*, 9th Edition, pg. 202). Coke, described discretion as “*scire per legem quod*

sit justum"; it was a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences and not to do according to their wills and private affections (De Smith's *Judicial Review of Administrative Action*, 5th Edition 1995, pg. 298). However, in today's context what the Rule of Law demands is not to eliminate the wide discretionary power, but to see that the law is able to control its exercise. This does not mean that utilizing arbitrary power and having unfettered discretion in decision making process can be countenanced. It is to be borne in mind that discretion should be exercised by a statutory body strictly according to law and according to the established procedure and, that means taking into account only the relevant considerations. Having guidelines or principles according to which the discretion is to be exercised would be a clear exhibition of how a public authority has carried out the administrative authority vested in them. Referring to the concept of discretion, Lord Denning, MR, in *Breen v Amalgamated Engineering Union*.⁽¹⁾ stated that,

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant"

It is common ground that the 2nd to 6th respondents had unfettered discretion with regard to the selection of a Registrar of Births and Deaths of Uduwara Division and Registrar of Marriages of Raigam Korale Division. However there is no material to indicate that the said respondents had abused such discretion given to them in making the said selection. Although there were no guidelines laid down, instead of any abuse, it appears that they have taken into consideration relevant criteria, in arriving at their decision. The sole basis for their selection according to the material available before this court is the qualifications obtained by the applicants. The 2nd respondent, in his affidavit averred that,

".....I state that the 1st respondent is the most eligible candidate amongst all applicants to be appointed to the advertised post of Registrar, whilst all candidates satisfied eligibility requirements relating to residence, age, character, mental status, income, office facilities, handwriting etc., *the educational qualifications of the 1st respondent are superior to the petitioner and other applicants (emphasis added)*"

It is thus apparent that although no guidelines were given with regard to the selection of candidates in terms of the scheme of recruitment the 2nd to 6th respondents had made the selection not taking into account any extraneous considerations, but on the basis of assessment of educational qualifications of the applicants. This is further established by the letter sent by the 7th respondent to the 5th respondent on 24.06.2003 (P7) which is in the following terms :

“කළුතර දිස්ත්‍රික්කයේ උඩුවර කොට්ඨාශයේ උප්පැන්න මරණ සහ රැකියා කොට්ඨාශයේ විවාහ (සාමාන්‍ය) රෙජිස්ට්‍රාර් ධුරය

ඉහත සඳහන් ධුරය සඳහා යෝජනා වී ඇති නම් ඉතුරින් වඩාත්ම අධ්‍යයන සුදුසුකම් සිදුරා ඇත්මත් අප 06හි නම සඳහන් මහජනතා දොන් සුමේද රත්නසිරි මහතා ය. එබැවින් අදාළ තනතුර සඳහා යොදාගැනීමට අප 06හි නම සඳහන් මහජනතා දොන් සුමේද රත්නසිරි මහතා පත් කිරීමට කටයුතු කරන මෙන් ගරු අමාත්‍යතුමාගේ උපදෙස් පරිදි කරුණාවෙන් දන්වා සිටිමි.”

In the aforementioned circumstances, it cannot be said that the 2nd to 5th respondents had acted arbitrarily abusing the discretion given to them for the appointment of the Registrar of Births and Deaths for the Uduwara Division and Registrar of Marriages for the Raigam Korale Division. When discretion is exercised, taking into account all relevant considerations, then there cannot be a situation where the said decision could be regarded as taken arbitrarily and the said process will not fall into the category which negates equal protection.

On a consideration of the aforementioned circumstances, I hold that the petitioner has not been successful in establishing that his fundamental right guaranteed in terms of Article 12(1) of the Constitution was infringed by the 2nd to 7th respondents. This application is accordingly dismissed, but in all the circumstances of this case, without any costs.

DISSANAYAKE, J. - I agree.

RAJA FERNANDO, J. - I agree.

Application dismissed.