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DIGEST

The concept of legitimate expectation was examined in *Re Westminister City Council* [3], where Lord Bridge had stated that,

> "The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".

The observations of David Foulkes (supra) in the applicability of the concept of legitimate expectation was clearly illustrated by the decisions in *Attorney General of Hong Kong v Ng Tuen Shiu* [4] and *Council of Civil Service Unions v. Minister for the Civil Service (The GCHQ case)* [5].

In **Ng Tuen Shiu** (supra), the decision of the Court that the aggrieved party had a legitimate expectation was based on a promise given by the Government, whereas in **Council of Civil Service Unions** (supra), the decision was based on the legitimate expectation that arose out of a regular practice. In the circumstances, it is evident that a mere hope or an expectation cannot be treated as having a legitimate expectation.

It is therefore quite clear that it would be necessary for the party which claims the benefit of legitimate or reasonable expectation to show that such expectation arises from a promise or hope given by the authority in question. As stated earlier, it is not disputed that the results of the Advance Level Examination were released on 03.01.2009 by the Department of Examinations and it is not an unknown fact that after every such release of results there would be a time period allocated to apply for re-scrutiny by candidates who are so inclined. In fact the 1st respondent had annexed to

his affidavit a document (1R1), dated 01.01.2009, which had referred to the likelihood of changes to the Z score at the re-scrutiny stage. Further it had been stated that the results that were released in January 2009 were only provisional and subject to change after re-scrutiny, giving a clear indication that the results that were released in January 2009 were provisional, and the Z scores that were released would change after re-scrutiny results are released.

The petitioner's main grievance is based on the fact that her Z score was varied due to the changes that were made after the re-scrutiny and based on her original results she had a legitimate expectation in entering into a Medical Faculty of a local University. In the **Council of Civil Service Unions** (Supra), Lord Diplock had clearly referred to the applicability of legitimate expectation in such a situation. Considering the doctrine in terms of expectation to be consulted or heard, Lord Diplock had stated that, if a person relies on legitimate past practice that had been withdrawn or changed suddenly without any notice or reason for such withdrawal or change.

In the present application, as has been shown clearly, there is no material to indicate that the past practice has been changed or withdrawn at the time the petitioner had sat for the Advanced Level Examination or at the time the results were released. On the contrary the same system which was used in the previous year had been followed and the candidates were told that depending on the results of the re-scrutiny of papers, the Z scores could change. In fact by the year 2008 the students who sat for the Advanced Level Examination knew that the selection to Universities and to their different Faculties were based on their individual Z scores and those students who sat for the Advanced Level Examination were quite aware as to how it worked, as there

was general awareness of the said system. In these circumstances it would not be correct for the petitioner to state that the previous scheme had been changed without giving her an opportunity to express her views on the selection of candidates to universities.

The petitioner's complaint that her fundamental right guaranteed in terms of Article 12(1) had been violated is based on the concept of legitimate expectation as she had such an expectation that she would be selected to follow a course in Medicine.

Article 12(1) of the Constitution, which refers to the right to equality reads as follows:

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

The concept of equality means that equals should be treated alike. As has been clearly stated in *Gauri Shanker v. Union of India* [6],

> ". . . . that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike."

Article 14 of the Indian Constitution, which deals with the equality provision and is similar to Article 12(1) of our Constitution has been examined and considered by several Indian decisions. In *Ashutosh Gupta v. State of Rajasthan*[7] it was pointed out that to apply the principle of equality in a practical manner, the Courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory. The Indian Supreme Court has accordingly underlined the said principle in several decisions *Western Uttar Pradesh*

Electric Power and Supply Co. Ltd. v. State of Uttar Pradesh[8], *R.K. Garg v. Union of India*[9] *Re: Special Courts Bill*[10] *State of Uttar Pradesh v. Kamla Palace*[11] and enumerated the principle that reasonable classification in order to treat all in one class on an equal footing is allowed. It was stated in **Western Uttar Pradesh Electric Power and Supply Co. Ltd.** (Supra) that,

> "Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law."

Considering the basis on which the Constitutional provision in Article 12(1) deals with the right to equality and the applicability of legitimate expectation on that basis, it is apparent that the expectation in question should have been founded upon a statement or an undertaking given by the authority in question, which would make it inconsistent or irrational with the general administration to deny such an opportunity a petitioner has been claiming of through his petition. Otherwise the petitioner must show that, as has been stated in **Council of Civil Service Unions v. Minister for the Civil Service** (Supra) that there is the existence of a regular practice, on which the petitioner can reasonable rely upon to continue, in his favour.

Considering all the aforementioned, it is clear that the 1st or the 2nd respondents had not given any promise or an undertaking that the Z score would be decided on the basis

of the provisional results released on 03.01.2009. In fact the 1st respondent had informed the school authorities that the results released in January 2009 were only provisional. The indication that was given was that there would be two classes of students as there would be one group who would be applying for re-scrutiny. It is also to be borne in mind that the Z scores would be finally determined and announced only after the re-scrutiny of the results are finalized and this had been the practice for several years.

Considering all the aforementioned facts and circumstances, it is evident that the steps that were taken by the respondents cannot be categorized as arbitrary and unlawful, which had violated the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid, I hold that the petitioner has not been successful in establishing that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been infringed by the respondents. This application is accordingly dismissed. I make no order as to costs.

IMAM, J. - I agree.

SURESH CHANDRA, J - I agree.

application dismissed.

ROSAIRO VS. BASNAYAKE

COURT OF APPEAL
ABDUS SALAM, J
CA 901/2004 (F)
DC (COLOMBO) 21706/M
JULY 4TH 2007

Motor Accident - Damages - Negligence of defendant while driving car - Injuring passenger - Pleading guilty in Magistrate's Court - Is it relevant? - Evidence Ordinance Section 41 (A), Section 41 (A) 2, - Damages under law of Tort.

The plaintiff instituted action against the defendant-appellant following a vehicular accident alleged to have taken place due to the negligence of the defendant driver - the plaintiff was a passenger in the car. After trial Court awarded Rs. 1,17040/50 as special damages and Rs. 4,956,000/- as general damages. On appeal - it was contended that there was no proof of negligence and that in any event the computation of damages was wrong.

Held:

(1) The trial Judge has in her order quite correctly taken into consideration the evidentiary value of the order in the Magistrate's Court case - where the defendant had pleaded guilty to the charges of negligent driving of the motor car and failing to avoid the accident complained of.

Per Abdus Salam, J.

> "A plea of guilt is most relevant and ought to be taken into consideration in assessing the plaintiff's case and further plea of guilt on a charge of failing to avoid an accident by the driver cannot be lightly ignored in considering as to whose negligence it was which caused the accident" - Section 41 (A) (2) - Evidence Ordinance.

(2) The evidence adduced by the plaintiff, before the trial Judge was such which is capable of giving rise to a reasonable inference

of negligence on the part of the driver of the offending vehicle. The defendant has not been able to negative the allegation of negligence.

(3) The damages awarded appear to be reasonable and in no way excessive. The trial judge has assessed the damages partly based on the loss of opportunity of the plaintiff's wife to engage in an employment as she has to care for the plaintiff. Having placed the earning capacity of the plaintiff's wife at Rs. 3000/- a month, the trial Judge has fixed damages resulting from loss of employment opportunity to the wife at Rs. 1,116,000/- and arrived at the general damages as Rs. 3,840,000/- + Rs. 1,116,000/- = Rs. 4,956,000/-. Since the wife was not employed the trial Judge could not have awarded Rs. 1,116,000/- as being part of general damages resulting from the wife of the plaintiff having to care for the husband.

(4) Taking into consideration the plight of the plaintiff the trial Judge could have awarded sufficient compensation for loss of comfort, pain of mind and the amount the plaintiff may have to incur to employ someone to care for him in the future. This amount could be reasonably fixed at Rs. 1,000,000/- not on the basis of the wife being deprived of employment opportunities but on the basis that the plaintiff is entitled to such damages to look after himself.

General damages that should have been awarded is Rs. 3,840,000 + Rs. 1,000,000/- = Rs. 4,840,000/-.

Cases referred to :-

(1) *A.W. A. Hemachandra vs. Mohomed Ismail Ayoob* - 1986 CALR 550

(2) *Sinniah Nadaraja vs. Ceylon Transport Board* 79 NLR (iii) 48

(3) *Hollington vs. New thorn & Co. Ltd* 1943 2 All ER 35

Prasanna Jayawardane with *Millinda Gunatilaka* for substituted appellant.

Mayura Gunawansa, with *Viraj Premasinghe* and *A. Sathyendran* for plaintiff-respondent.

Cur.adv.vult

July 21th 2008

ABDUS SALAM. J.

This is an appeal from the judgment of the District Court of Colombo dated 1.6.2004, awarding damages to the plaintiff-respondent (hereinafter referred to as the plaintiff) in a sum of Rs. 4,956,000/- and Rs. 117,040.50 as special damages.

The plaintiff instituted action against the defendant-appellant (hereinafter referred to as the defendant) following a vehicular accident alleged to have taken place due to the negligence of the defendant while driving a motor car. The plaintiff who was a passenger in the said car sustained severe injuries and lost his eyesight. By his amended plaint he claimed damages in a sum of Rs. 5,000,000/=, as general damages and Rs. 1,17040/50 special damages. The defendant by his amended answer denied liability.

It is common ground that the plaintiff on 30.10.1997 travelled in the vehicle bearing No. 12 SRI 3561 driven by the defendant along Makola-Kiribathgoda road towards Sapugaskanda. The matter of the dispute regarding the alleged liability of the defendant proceeded to trial on 15 issues of which the first 10 were suggested by the plaintiff and the rest by the defendant.

At the trial, the plaintiff gave evidence and also led the evidence of Dr. S. J. Pathirana (eye surgeon), W. M. Bathiyathissa, PC 8909 attached to Peliyagoda police station and M/s Shyamalee Gunathilake, deputy personal manager of the Petroleum Corporation and closed his case reading in evidence documents marked as P1 to P23 (a).

In unfolding the defence, the defendant gave evidence and produced documents marked D1 to D2 (c). Thereafter,

the learned trial judge in his judgment awarded the full sum prayed for as special damages and a sum of 4,956,000/= as general damages.

When the matter was taken up for argument the defendant relied mainly on two grounds to avoid liability. In the first place the defendant took up the position that there was no proof of negligence on the part of the driver of the vehicle in question and that in any event the computation of damages was wrong.

As regards the first ground urged by the defendant, it must be stated that the evidence of the plaintiff, the police constable (together with the document marked P5) and that of the evidence given by the defendant cannot warrant a finding than, what the learned additional district judge has in fact arrived at, in regard to the negligence of the driver. As it has been stressed in several authorities the unqualified admission of guilt tendered by the defendant in the Magistrate's Court on both counts namely, for failing to avoid the accident and negligent driving cannot lightly be taken. The evidence adduced by the plaintiff, before the learned district judge was such which is capable of giving rise to a reasonable inference of negligence on the part of the driver of the offending vehicle. The defendant has not been able to negative the allegation of negligence. Whilst giving evidence he admitted that it was raining when the accident occurred and there were no street lights either. By taking up this position the defendant has attempted to take undue advantage of the lack of street lights and the adverse weather condition to have him absolved from liability. As has been quite correctly suggested by the learned counsel of the plaintiff the said adverse driving conditions in fact had placed the driver of the vehicle in which the plaintiff travelled, the

duty to exercise greater care in relation to the safety of the plaintiff. Taking into consideration the manner in which the collision has taken place with the vehicle that is said to have been suddenly reversed on to the road on a crest of a hill, it is quite clear that the defendant has failed in his duty of care which he owed to the plaintiff.

The defendant admitted in his evidence that he was able to observe the container lorry being reversed across the road only at a point when his vehicle was five meters away. This evidence of the defendant suggests the lack of proper attention for the traffic ahead of him. Taking into consideration the length and breadth of the container lorry which is said to have been reversed suddenly across the road, it is very unlikely and unsustainable to accept the version of the defendant that he saw the container lorry only ahead of five meters or within a couple of seconds. Therefore, I am totally in agreement with the submissions of the learned counsel for the plaintiff. Hence the decision in *A. W. A. Hemachandra vs. Mohamed Ismail Ayoob* [1] has no application to the present case.

Admittedly, the defendant has been charged in the Magistrate's Court of Colombo in proceedings No. 21266/97 for negligent driving and failure to avoid the accident that gave rise to the present suit. Upon his pleading guilty to both charges, a state cost of Rs. 750/- has been imposed on him. The trial judge in her order has quite correctly taken into consideration the evidential value of P5. According to P5 the defendant had pleaded guilty to the charges of negligently driving the motorcar and failing to avoid the accident complained of.

In the case of S*inniah Nadarajah, vs. The Ceylon Transport Board*[2] Wimalaratne, J. with the concurrence of

Rajaratnam, J. and Walpita, J., following the decision in *Hollington v. Hewthorn & Co. Ltd*[3], held that a plea of guilt in the Magistrate's Court was, most relevant and ought to have been taken into consideration in assessing the plaintiff's case. In the same case Walpita J, observed that the plea of guilt on a charge of failing to avoid an accident by the driver cannot be lightly ignored in considering as to whose negligence it was which caused the accident.

In terms of section 41(A)(2) of the Evidence Ordinance, where in any civil proceedings, the question whether any person to any civil proceedings or not, has been convicted of any offence by any court in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

It is significant to reproduce the illustration given under section 41(A) of the Evidence Ordinance in so far as it is relevant to this case. The illustration reads that when B injures C while driving A's car in the course of B's employment with A, B is convicted for careless driving. In an action for damages instituted by C against A and B, B's conviction is relevant.

In the light of the overwhelming evidence adduced by the plaintiff and the evidence of the defendant in so far as it relates to the duty of care owed by him towards the plaintiff in the adverse driving condition, I am not disposed to interfere with the finding of the learned district judge as

to the negligence of the defendant in driving the vehicle in question that had caused damages to the plaintiff.

In relation to the other ground urged by the defendant, I would like to make the following observations. As at the time, the accident had taken place the plaintiff was 44 years of age and drawing a salary of Rs. 23,000/- per month. He had 2 children aged 9 years and 7 years. Further as a direct consequence of the infirmities suffered by him, his services under the Petroleum Corporation has been terminated with effect from 18/05/1998.

The position of the Plaintiff was that he had expended Rs. 117,040/50 to obtain medical treatment in attempting to restore his eye sight but without any success. The documents produced by the plaintiff marked as P1 to P23A are quite significant to proving the negligence of the defendant and the patrimonial loss suffered by the plaintiff as a result. It included the Plaintiff's Salary slip pertaining to the month of September 1997 (PI), Medical certificate dated 19/05/1998 issued to the Plaintiff by the Colombo Eye Hospital (P6), Medical bills relating to the treatment received in Sri Lanka by the Plaintiff (P8, P9 and P10), Receipt issued by Mackinnon's Travels relating to the cost of the Airline tickets in respect of the travel to India for treatment (P11, P12), Receipts relating to the treatment received in India (P13 to P16), Receipts relating to the Hotel expenses whilst taking treatment in India (P20 to P21).

The learned Counsel of the defendant has also taken up the position that the computation of the damages by the learned district judge was wrong. According to the evidence led at the trial the retiring age of the plaintiff is 60 years. As the defendant did not dispute this position, the learned

additional district judge cannot be faulted for arriving at the conclusion that the Plaintiff could have worked until his 60th year, had he not been faced with the difficulties that arose from the vehicular accident.

As a result of the accident the Plaintiff became blind for life at the age of 44 years. The learned counsel of the plaintiff submitted that no amount of money can ever compensate the pain of mind and the suffering, the Plaintiff has been subjected to, throughout his life as a result of this accident.

In the circumstances the damages awarded to the Plaintiff appear to be reasonable and in no way excessive. The defendant has submitted that the amount of compensation received by the Plaintiff from the Petroleum Corporation should have been taken into consideration in awarding damages. In any event, it has to be observed that since the liability of the defendant to pay damages arises under the law of torts, it is not open to the defendant to seek refuge behind any payment made to the plaintiff under the contract of employment he has had with the Petroleum Corporation.

The learned additional district judge has considered the impaired vision and the related disabilities of the plaintiff resulting from the negligence of the defendant which required constant care and attention. The trial judge has assessed the damages partly based on the loss of opportunity of the plaintiff's wife to engage in an employment, as she has to care for the plaintiff. Having placed the earning capacity of the plaintiffs wife at Rs. 3000/- a month, on an assumptive basis the additional district judge has fixed the damages resulting from loss of employment opportunity to the wife of the plaintiff at Rs. 1,116,000/- and arrived at the general damages as Rs. 3,840,000 + Rs. 1,116,000/- = Rs. 4,956,000/-.

Since the wife of the plaintiff was not employed the learned additional district judge could not have awarded Rs. 1,116,000/- as being part of general damage resulting from the wife of the plaintiff having to care for husband. In any event the wife of the plaintiff has not claimed any damages for loss of any employment opportunities. Hence taking into consideration the miserable plight of the plaintiff who has lost his eye sight at the age of 44 years, the learned additional district judge could have considered awarding sufficient compensation for loss of comfort, pain of mind and the amount the plaintiff may have to incur to employ some one to care for him in future. The learned district judge could have reasonably fixed this amount at Rs. 1,000,000/- not on the basis of the wife of the plaintiff being deprived of employment opportunities as a result of the plight of the plaintiff but on the basis that the plaintiff is entitled to such damages to look after himself. Hence the general damages that should have been awarded is Rs. 3,840,000 + Rs. 1,000,000 = Rs. 4,840,000.

Hence the plaintiff would be entitled to Rs. 4,840,000 as general damages and Rs. 117,840.50 as special damages aggregating to 4,957,840.50. Subject to the above variation the appeal of the defendant stands dismissed with costs fixed at Rs. 51,500/-.

appeal dismissed.

subject to variation.

DR. PERERA V. JUSTICE PERERA AND 11 OTHERS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, J.,
RATNAYAKE P.C., J. AND
IMAM. J.
S.C. (F.R.) APPLICATION NO. 598/2008
JULY 5TH 2010

Fundamental Right - Constitution - Article 12(1) - Right to equality - All persons are equal before the law?

The Petitioner, a Senior Consultant of the Department of Secondary and Tertiary Education of the Faculty of Education, Open University of Sri Lanka, 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.

Held:

(1) 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.

(2) Article 12(1) of the Constitution postulates 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. Unequals cannot be treated equally, not equals be treated unequally.

(3) Every wrong decision cannot and would not attract the constitutional remedies guaranteed under the fundamental rights

incorporated in the Constitution. 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.

(4) The decision taken by the Public Service Commission with regard to the Petitioner in no way could be categorized 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.

Cases referred to :-

(1) *Snowden v. Hughes* (1943) 321 U. S. 1, 64 S. Ct. 297, 88L. Ed. 497 (1944)

(2) *Ram Krishna Dalmia v. Justice Tendolkar* A. I. R. 1958 S.C. 538

APPLICATION under Article 12(1) of the Constitution.

J. C. Weliamuna with *Maduranga Ratnayake* for Petitioner.

Indika Demuni de Silva, D S. G. for 10th - 12th Respondents.

Cur.adv.vult

March 10th 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 Wollongon, 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 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 reinstating 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 (A5) 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 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 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 Estab-

lishments 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 the 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 consider the petitioner's application for a permanent release.

The Public Service Commission, although it 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 obtained 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:

"ඩබ්ලිව්. එල්. ඩී. එස්. පී. පෙරේරා මහතා වච්නියා ජාතික අධ්‍යාපන විද්‍යා පීඨයට මුල් පත්වීම ලැබූ ශ්‍රී. ලං. ගු. අ. සේ. 2 - II ශ්‍රේණියේ ස්ථිර කථිකාචාර්යවරයෙකි. මොහු ආචාර්ය උපාධිය සඳහා ගුරු අධ්‍යාපන හා ගුරු ස්ථාපන ව්‍යාපෘතියෙන් ජාතික අධ්‍යාපන විද්‍යා පීඨ කථිකාචාර්යවරුන්ට වෙන්කොට ඇති විදේශ ශිෂ්‍යත්වයක් ලැබ 2001.01.14 සිට 2004.01.01 දක්වා ඕස්ට්‍රේලියාවේ වොලොන්ගන් විශ්ව විද්‍යාලයේ ඉගෙනුම ලබා ඇත.

. . . . .

ගුරු අධ්‍යාපන හා ගුරු ස්ථාපන ව්‍යාපෘතිය මගින් ගුරු අධ්‍යාපනඥයන් ආයතන වශයෙන් වර්ග කොට ඔවුන්ට දේශීය හා විදේශ ශිෂ්‍යත්ව ලබා දී ඇත. මෙහිදී ජාතික අධ්‍යාපන විද්‍යා පීඨ ගුරු මධ්‍යස්ථාන ජාතික අධ්‍යාපන ආයතනය හා විශ්වවිද්‍යාල වශයෙන් ආයතන වර්ග කර එක් එක් ආයතන වලට නිශ්චිත ශිෂ්‍යයන් සංඛ්‍යාවක් වෙන්කොට ඇත. මෙම ශිෂ්‍යයන්ට ජාතික අධ්‍යාපන විද්‍යා පීඨවලට ලබාදී ඇත්තේ විද්‍යා පීඨ පද්ධතියේ ගුණාත්මක සංවර්ධනය සහතික කරනු පිණිසය. ඒ අනුව උක්ත නිළධාරියාට මෙකී ශිෂ්‍යත්ව ලබා දී ඇත්තේද විද්‍යා පීඨ 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 then 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, it is 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 respective programmes and the recommendations of the Colleges of Education Board to enable the 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