

**BURRENCHOBAY A D v THE HONOURABLE PRIME MINISTER & ORS**

**2022 SCJ 125**

**Record No: SCR No. 122131 – 5A/207/21**

**THE SUPREME COURT OF MAURITIUS**

**In the matter of:-**

**Asha Devi Burrenchobay**

**Applicant**

**v**

- 1. The Honourable Prime Minister**
- 2. The Public Service Commission**
- 3. The Secretary to Cabinet and Head of the Civil Service**

**Respondents**

**In the presence of: -**

**Boyramboli Bojrazsingh**

**Co-Respondent**

**JUDGMENT**

The applicant is praying for leave to apply for a judicial review of the decision-making process of the respondents for the assignment of duties of Secretary for Public Service to the co-respondent. The grounds on which her intended challenge of the impugned decision by way of judicial review is based are as follows:

- i. the procedure to assign the duties of Secretary for Public Service to the co-respondent is not in conformity with all the elements of fairness, reasonableness and legality and is in breach of the Public Service Commission Regulations;
- ii. the legitimate expectation of the applicant to be considered to a higher post in the civil service has been frustrated and she has never been made aware of the reasons thereof; and
- iii. the respondents have acted in an unfair manner, irrationally, in breach of procedural fairness and natural justice.

Although no affidavit in rebuttal has been filed by the respondents, they are resisting the application for leave on the following grounds:

***(a) the entire basis of the challenge on the grounds invoked is misconceived and flawed and the application does not disclose any arguable case for judicial review on any of those grounds; and***

***(b) the order prayed for at paragraph (ii) of the motion paper cannot be entertained by the Court inasmuch as granting such an order would be tantamount to the Court interfering with the lawful exercise of the powers which have been vested in Respondent No. 1 under the Constitution.***

The factual background of the application, as can be gleaned from the facts averred in the applicant's affidavit in support of her application, reveals that in 2003, the Pay Research Bureau (PRB) created the Senior Executive Service cadre with three high level administrative positions, namely, (1) Senior Executive (Generalist), (2) Permanent Secretary and (3) Senior Chief Executive.

In 2017, the post of Secretary for Public Service was created and published in the Civil Establishment Order following the PRB Report 2016. However, no scheme of service for the post indicating the mode of promotion and the pension entitlement of the holder upon retirement has been prescribed so far.

In a letter dated 21/06/2021 which was addressed to the Supervising Officers in Charge of Ministries and Departments, the Secretary for Public Service informed them that the duties of Secretary for Public Service had been assigned to the co-respondent with effect from 21/06/2021. This letter was followed by a circular dated 29/06/2021 issued by the Secretary to Cabinet and Head of the Civil Service to the same effect.

In the contentions of the applicant, she joined the public service on 13/09/1985 as a Trainee Administrative Officer and has since then served at various higher levels of the administrative cadre in a substantive capacity in various Ministries, as Administrative Officer which was restyled as Assistant Permanent Secretary, Principal Assistant Secretary and Permanent Secretary.

On 15/09/2016, the duties of Senior Chief Executive were assigned to her before she was appointed in that post in a substantive capacity as from 17/09/2018 and she is still serving in that capacity. Thus, she reckons 34 years of long-standing career and a sound and unblemished track-record in the public service.

During all these years she worked under the close supervision of the former Prime Ministers, Dr. N. Ramgoolam, GCSK, FRCP and late Sir Anerood Jugnauth, GCSK, KCMG, QC whose trust and confidence she enjoyed. She has even chaired a committee which was set up to examine the Report of the Director of Audit for the financial year 2017/2018. She was commended for the hard work and efforts which were put in for the elaboration of the Report.

With regard to what ought to be the procedural requirements and criteria for filling the post of Secretary for Public Service, the applicant professes that despite the absence of a prescribed scheme of service, the post of Secretary for Public Service is a promotional post from the grade of Senior Chief Executive. Furthermore, by virtue of **section 89(4)** of the **Constitution**, respondent no. 2 is required to consult the Hon Prime Minister before making any appointment to that post, as is the case for the posts of Secretary to the Cabinet, Financial Secretary, Permanent Secretary or of any other supervising officer within the meaning of **section 68**. Therefore, respondent no. 2 cannot make any appointment to the office of Secretary to the Cabinet, of Financial Secretary or of a Permanent Secretary unless the Prime Minister concurs in it. In the circumstances, the assignment of duties of Secretary for Public Service is a promotion, as defined in the **Public Service Commission Regulations 1967**, from the office of Senior Chief Executive, even in the absence of a prescribed scheme of service.

The applicant further contends that such a promotion ought to have been effected in accordance with the provisions of **regulation 19** of the **Public Service Commission Regulations 1967**, which deals with the mode of appointment or promotion to a post in the public service. In proceeding with the promotion exercise to the post of Secretary for Public Service, respondent no. 2 had also to act in accordance with **regulation 14** of the **Public**

**Service Commission Regulations 1967** which provides for the factors to be taken into consideration with regards to the selection of suitable candidates for appointment or promotion in the public service.

According to the applicant, respondent no. 2 did not carry out any selection exercise by means of an interview to assess the suitability of the person to be appointed for the post of Secretary for Public Service. In fact, in accordance with the provisions of the **Public Service Commission Regulations 1967** alluded to, respondent no. 3 had to submit the names of the eligible officers to respondent no. 2 so that the latter could carry out a selection exercise. It was only then that the concurrence of respondent no. 1, as Prime Minister, to the assignment of the duties of the post would have been required.

The applicant further points out that she is ranked fourth in the list of officers in the grade of Permanent Secretary and as the co-respondent is fifth, she was the one eligible for appointment as Secretary for Public Service. This is a fact which respondent no. 3 ignored since he neither submitted to respondent no. 2 her name as an eligible officer together with a report as regards her particulars of service nor gave any reasons for recommending her supersession.

The applicant also insists that in the circumstances, she has a right under the **Constitution** to veto the decision of respondent no. 1 since the latter is exercising a public duty and should act in accordance with the principle of natural justice. Had the respondents complied with the **Public Service Commission Regulations 1967**, they would have been able to assess her academic qualifications which are higher than those of the co-respondent. As she had intimated to respondent no. 1, in a letter dated 23/06/2021, for reasons unknown to her, she was being unfairly treated and as a result she was prejudiced as regards her legitimate aspirations for promotion.

At the hearing of the application, learned senior counsel for the applicant and learned counsel for the respondents offered elaborate submissions, both in law and on the facts. We have listened with interest to them in their attempt to, on the one hand, show that there is justification for us to exercise our discretion to grant the leave sought and on the other hand, in law that the application cannot succeed for the reasons stated. We do not propose to repeat the submissions offered as, in order to succeed in her present application for leave to apply for judicial review, the applicant must show that she has an arguable case warranting further investigation by way of a judicial review on the grounds invoked.

As a matter of fact, it is well settled that for an application for leave to apply for judicial review to succeed, the applicant must demonstrate that she has an arguable ground so that the judicial review of the impugned decision has a realistic prospect of success. This principle has been stated in a string of cases amongst which are the cases of **R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617**, **Nathoo v The Tourism Authority [2014 SCJ 385]** and **Securiclean (Mauritius) Ltd v The Ministry of Local Government & Outer Islands & Anor [2015 SCJ 327]**.

With regard to the meaning of “*a realistic prospect of success*”, one can appropriately refer to the views of Lord Diplock in **R v Inland Revenue Commissioners** (supra) to the effect that “*If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case....*”

Therefore, the question which arises is, whether after a careful consideration of the applicant’s contentions on both the facts and the law, it can be said that the requirements for arguable grounds to justify the grant of leave prayed for have been met.

In considering this question, we first note in the applicant’s own version that the post of Secretary for Public Service is of relatively recent creation, so far, with no prescribed scheme of service indicating the mode of selection of candidates to fill the post. In the circumstances, there is at this stage no prescribed mode of selection for the post which the respondents ought to have followed.

Secondly, the applicant has pitched her case on the argument that the post is to all intents and purposes a promotion from the offices of Senior Chief Executive and Permanent Secretary. Her contention is based on the fact that the PRB has, in recommending the creation of the post of Secretary for Public Service, also recommended how this post should be filled and particularly, from the pool of senior public officers. However, as we have pointed out above, this mode of selection, as matters stand at this stage, is only a recommendation of the PRB and has yet to be incorporated in the prescribed instrument or otherwise appropriate legal instrument to become a prescribed mode of selection, by which the respondents would be bound to comply with.

Therefore, it is difficult to accept the argument of the applicant that the appointment to the post of Secretary for Public Service should be considered as a promotion as defined under **regulation 2(1)** of the **Public Service Commission Regulations 1967**. This being so, the

applicant cannot also be right in arguing that the respondents had, in proceeding to the impugned assignment of duties, to follow scrupulously the procedures and comply with the other requirements for making a promotion as they have been defined under **regulations 14 and 19** of the **Public Service Commission Regulations 1967**.

Thirdly, one cannot obviate the fact that the impugned decision is a decision to assign the duties of the office in question which technically is not a conferment of that office to co-respondent in a substantive capacity. As a matter of fact, as rightly pointed out by learned counsel for the respondents, it can only mean an allocation of the duties of the office to the co-respondent which is entirely different from those of 'appointment' or "promotion" as defined under **regulation 2(1)** of the **Public Service Commission Regulations 1967**.

Furthermore, an assignment of duties does not have the character of a definite and permanent installation in an office, which a substantive appointment implies. It is a means of allocating the tasks of an office temporarily to an officer, most of the time for administrative convenience, which eventually does not entitle the officer to a claim to substantive appointment. That is why it is accepted that the recourse to an assignment of duties does not necessarily require strict compliance with the procedural requirements of an appointment or promotion.

In that respect, it is appropriate to cite the case of **Ramparsad v The Public Service Commission [2009 SCJ 189]** in which the Court made the following observations:

*As rightly submitted by Mrs A. Narain for the respondent, the applicant is wrongly equating ability with experience. Ability, which in fact is the capacity to do something, is a subjective element which can properly be gauged at an interview. And this is what the respondent precisely did and found that the co-respondent was a better candidate for the post. Likewise, the assignment of duties, as an administrative expediency and for short periods, does not confer any right on the applicant to claim permanent appointment; nor, we may add, any advantage over other candidates. In the circumstances, the decision to appoint the co-respondent cannot be said to be **Wednesbury** unreasonable.*

Finally, we have also considered the contentions of the applicant that in view of her unblemished and commendable record of service and her seniority and better qualifications in relation to the co-respondent, she could legitimately aspire to be considered for the assignment of duties in question. This cannot be a strong argument to establish an arguable case for the purpose of an application for leave for judicial review of the impugned decision. As a matter of

fact, there is authority making it clear that in law, although seniority is a matter for consideration, it is not the overriding criteria for the conferment of a higher office by promotion and that at the end of the day, merit should prevail.

On this score, it is appropriate to recall the other applicant's own averment that by virtue of **section 89(4)** of the **Constitution**, respondent no. 2 is required to consult the Hon Prime Minister before making any appointment to the post of Secretary for Public Service and cannot make such appointment without the concurrence of the latter. This provision suggests an unfettered discretion conferred on the Hon Prime Minister to determine at the end of the day who is to be appointed to the office.

In the light of the foregoing observations, we find that the applicant has failed to demonstrate arguable grounds with a realistic prospect of success to justify the grant of the leave prayed for. This being so, the present application cannot succeed and we accordingly set it aside with costs.

**J. Benjamin G. Marie Joseph**  
Judge

**D. C. N. D. Mootoo**  
Judge

**08 April 2022**

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**Judgment delivered by Hon. J. Benjamin G. Marie Joseph, Judge**

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| <b>For Applicant:</b>                  | <b>Mrs F. Maudarbocus Moolna, SA<br/>Mr R. Pursem, SC together with Mrs U. Boolell, SC<br/>and Mr A. F. Soreefan, of Counsel</b> |
| <b>For Respondent No. 1:</b>           | <b>Ms V. Nirsimloo, Chief State Attorney<br/>Ms P. Dunpath, Asst. Parliamentary Counsel</b>                                      |
| <b>For Respondents Nos. 2 &amp; 3:</b> | <b>Chief State Attorney<br/>Mr S. Bhoyroo, Principal State Counsel</b>   |
| <b>For Co-Respondent:</b>              | <b>Mr D. K. Manikaran, Principal State Attorney<br/>Mr K. A. Putchoy, State Counsel</b>  |