

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

**In the matter of an Application for a mandate
in the nature of *Writ of Certiorari and
Mandamus* under article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka**

Chamath Kavinha Gunawardena

Appearing by his next friend

Patrick Milton Gunawardena

National Housing Scheme,

Serpentine Road, Borella,

Colombo 08.

PETITIONER

CA/WRIT/480/2015

Vs,

1. J.H.M.W. Ranjith,
Principal,
Nalanda College,
Colombo 10.
2. P.N. Ilepperuma,
Director of Education for the National Schools,
Ministry of Education,
'Isurupaya'
Battaramulla.
3. W.M. Bandusena,
Secretary,
Ministry of Education,
'Isurupaya'
Battaramulla.

RESPONDENTS

**Before: Vijith K. Malalgoda PC J (P/CA) &
S. Thurai Raja PC J**

Counsel: Manohara de. Silva PC with Hirosha Munasinghe for the Petitioner
M. Jayasinghe SC for the Respondents

Argued on: 01.12.2016, 06.12.2016

Judgment on: 20.01.2017

Order

Vijith K. Malalgoda PC J

Petitioner to the present application Chamath Kavintha Gunawardena appearing by his next friend Patrick Milton Gunawardena had come before this court seeking for the grant and issue writs in the nature of *Certiorari* and *Mandamus* in order to,

- a) Quash the decision contained in the letter dated 20.07.2015 marked 'P-20' and letter dated 26.10.2015 marked 'P-29' of the 2nd Respondent.
- b) Compelling the 1st to 3rd Respondents to perform the public duty cast on them and to admit the Petitioner to year one of Nalanda College Colombo for the current year 2015 or in an alternative to admit the Petitioner to year two in the year 2016 or other according to law
- c) Directing the 2nd Respondent to act according to the letter marked P-22 dated 07.08.2015 which was issued by the 2nd Respondent and to admit the Petitioner to year one of the Nalanda College Colombo for the current year 2015

Petitioner who had submitted an application to gain admission to Nalanda College Colombo through his father (Next Friend to the present application) and mother had submitted before this court that,

- a) Applications were called in June 2014 for admission of students for Government Schools by circular 23/2013 dated 18.06.2014
- b) An application was submitted to Nalanda College Colombo under the category of Residence in close proximity in accordance with the above circular by the next friend Patrick Milton Gunawardena
- c) Petitioner was called for an interview on 26th August 2014
- d) Next Friend and the Mother of the Petitioner attend the said interview with the Petitioner
- e) Before going through any document carried by the next friend on behalf of the Petitioner, the 1st Respondent requested the Next Friend to submit his School Leaving Certificate
- f) The 1st Respondent who went through the said leaving certificate had informed the next friend that, "according to the school leaving certificate of the next friend, the religion of the next friend is Christian and Nalanda College being a Buddhist School the Petitioner cannot be admitted and returned the school leaving certificate
- g) Even though the next friend had clarified the religion appeared in his leaving certificate the 1st Respondent did not change his decision and was not prepared to hold the interview to consider the other eligibility criterion of the Petitioner and the interview was concluded

When the request made by the next friend on behalf of the Petitioner to allow the Petitioner to face the interview was rejected by the 1st Respondent, the next friend who was aggrieved by the said decision had appealed to the 1st Respondent twice, by letter dated 01.09.2014 (P-3) and 18.09.2014 (P-4) but was not received any response from the 1st Respondent.

As observed by this court the next friend of the Petitioner was not possessed with any material to establish his religion when he was confronted with his school leaving certificate at the interview by the 1st Respondent, but when he appealed by P-3 and P-4 to the principle he had placed proof to establish his religion but the 1st Respondent had failed to consider the said material and inform his decision to the next friend to the Petitioner.

However with regard to the decision taken by the 1st Respondent at the said interview, the said Respondent had taken up the following position before this court,

“The policy of Nalanda College is to restrict admission only to Buddhists. A non- Buddhist will be eliminated from the admission process at the earliest stage. In implementing this policy Nalanda College has resolved upon a criterion for determining the religion of an intended student. In terms of this criterion the religion of the child is deemed to be the religion of the father as reflected in the father’s school leaving certificate with it transpiring that the Petitioner’s next friend’s leaving certificated his religion as ‘Christian’ the authorities were left with no choice than to refuse admission to the Petitioner”

As submitted by the 1st Respondent the only criterion adopted by Nalanda College to decide the religion of the student is the religion of the father appeared in the school leaving certificate. If the father had not attended a school, question arises as to how the school will decide the religion of the student, even if the student had fulfilled all the other requirements to get selected to Nalanda College, since establishing the religion of the student as Buddhist is the main factor in selection criterion. When the next friend of the Petitioner wrote to the 1st Respondent P-3 and P-4, he placed several material before the 1st Respondent to prove his religion including,

- a) A letter from Borelle Athula Nayaka Thero to confirm that the members of the Petitioner’s family are Dayakaya’s of the Buddhist Temple in Chandraleka Mawatha Borella
- b) Photographs to confirm the last rituals of the Petitioner’s grandfather (next friend’s father) was conducted under the Buddhist Customs.
- c) A letter to confirm that the Petitioner’s eldest sister Upada Devmini Gunawardena is following Buddhism as a Buddhist student at Yashodara Balika Vidyalaya Borella

- d) The marriage certificate under the General Marriages Ordinance to establish that the marriage between the next friend and Petitioner's mother was not registered at a Catholic Church
- e) A document to establish that, the son of the eldest brother of the next friend, Pasindu Bawantha Gunawardena is studying at Nalanda College in grade 4B as a Buddhist Student
- f) An affidavit signed by the next friend on 25.06. 1997 when the next friend submitted papers before the Supreme Court to take oath as an Attorney at Law

but the position taken up by the 1st Respondent before this court was that, non of those materials were useful for the 1st Respondent since the sole criterion of Nalanda College to decide the religion of the student was the school leaving certificate of the father.

When considering the above position taken by the Respondents it comes to our mind Lord Diplock's exposition of the principles of Judicial review in *Council of Civil Service Union V. Minister for the Civil Service [1985] AC 374 at 408* where Lord Diplock had observed,

"By 'irrationality' I mean what can by now be succinctly referred to a 'Wednesbury unreasonableness' (*Association Provincial Picture House Ltd V. Wednesbury Corporation [1948] 1 KB 223*). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role resort I think is today no longer needed to viscount Radcliffe's ingenious explanation in *Edwards V. Bairstow [1956] AC 14* of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision maker.

Irrationality by now can stand upon its own feet as an accepted ground on which decision may be attached by judicial review.

I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of Natural Justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

As revealed before this court the circular applicable to school admission to year one 2015, circular 23/2013 has identified certain criterion and category of residence in close proximity is one such criterion identified in the said circular. However there is no guide line given in the said circular for the identification of the religion of an applicant but under section 3.2 of the said circular the government schools are bound to maintain the same student percentage as at 1961 when the schools were vested with the government and this factor has been accepted both by the Supreme Court as well as by the Court of Appeal when considering applications for school admission.

In the absence of an accepted criterion for the identification of the religion of an applicant, the school authorities are bound to consider the material placed before them and reach a fair conclusion. They cannot be unreasonable to the applicant who comes before them.

When discussing the term unreasonableness the famous case of *Associated Provincial Picture House Ltd V. Wednesbury Corporation [1948] 1 KB 233* Lord Greer MR expounded it as follows,

“It is true that discretion must be exercised reasonably Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion often used the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance a person entrusted with discretion must, so to speak, direct himself properly in-law. He must call his own attention to the matters which he is bound to consider....

Lord Denning MR in the case of *Tameside (1977) AC at 1028* identified unreasonableness as, “so wrong that no reasonable person could sensibly take that view”

As observed by this court the next friend of the Petitioner submitted additional material before the 1st Respondent, but the 1st Respondent had failed to consider any one of them and his conduct clearly shows his reluctance or refusal to consider the said material placed before him even at a later stage.

As further observed by this court, the next friend had written two letters requesting an opportunity for him to place additional material to establish his religion. In this regard this court is mindful of the fact that the decision to reject the application by the Petitioner was not taken after evaluating the application submitted by the Petitioner after a proper interview but merely on an arbitrary decision by the 1st Respondent and therefore question of appealing under the said circular 23/2013 will not arise in such a situation.

The Petitioner’s next friend had repeatedly requested an opportunity to face the interview but he was not given the opportunity by the 1st Respondent and thereby he has failed to observe the basic rules of natural justice or failed to act with procedural fairness.

As observed by Wade, It is fundamental to fair procedure that both sides should be heard, *audi alteram partem*, hear the other side. This is the more far-reaching of the principles of Natural Justice; since it can embrace almost every question of fair procedure, or due process and its implications can be worked out in great detail. It is also broad enough to include the rule against bias since a fair hearing must be an unbiased hearing, but in defence to the traditional dichotomy that rule has already been treated separately.

(Administrative Law H.W.R WADE and C.F FORSYTH 10th Edition Page 402)

The applicability of the said rule in Administrative decisions were further discussed by Wade as “Every administrative act was thus treated ‘Judicial’ if it adversely affected any person’s rights or

entailed a penalty. Exactly the same abuse of language was adopted in requiring a ‘duty to act judicially’ as a condition of the availability of the remedies of *Certiorari* and *Prohibition*;”

(Administrative Law H.W.R. WADE and C.F. FORSYTH 10th Edition Page 407)

In the said circumstance it is clear that the impugned decision contained in P-20 and P-29 where the 1st Respondent had decided to consider the Petitioner as a Christian student based on the school leaving certificate of the next friend of the Petitioner was an unreasonable and arbitrary decision taken by him without giving any opportunity for the next friend to explain and therefore the said decision is liable to be quashed by a writ of *Certiorari* as prayed by the Petitioner.

During the arguments before this court the Learned State Counsel brought to our notice that the Petitioner’s application made to Nalanda College was not considered under the category it was submitted and requested the court to consider granting an opportunity to hold a fresh interview rather than issuing a writ of *Mandamus* directing the 1st to 3rd Respondents to admit the Petitioner as prayed in paragraph (b) and (c) to the Petitioner. The Learned State Counsel went to the extent of inviting the Petitioner for an interview to consider admission to the school to which the Petitioner did not agree.

However in this regard this court is mindful of the fact that the two appeals submitted by the Petitioner’s next friend on 01.09.2014 and 18.09.2014 where the next friend has pleaded with the 1st Respondent,

“මා විසින් ඉදිරිපත් කොට ඇති ඉහත ලිඛිත කරුණු කාරණා කෙරෙහි ඔබතුමාගේ විශේෂ අවධානය සහ සැලකිල්ල යොමුකොට ඇතුළත් කිරීම සඳහා පවත්වනු ලබන සම්මුඛ පරීක්ෂණය සඳහා සහභාගී වීමට නැවතවරක් මාවෙත අවස්ථාව සලසා දෙන ලෙස හෝ මේ සම්බන්ධයෙන් සාධාරණව කටයුතු කරමින් මාගේ දරුවා වෙනුවෙන් සාධාරණය හා යුක්ති සහගතව ඉටුකර දෙන ලෙසමින් උදක්ම ඔබතුමාගෙන් ඉල්ලා සිටිමි.”

But the 1st Respondent neither granted the Petitioner an opportunity to face the interview nor replied the said appeal,

The next friend being dissatisfied with the conduct of the 1st Respondent on 22.09.2014 lodged a complaint with the Human Rights Commission.

At the inquiry before the Human Rights Commission criterion under which the Petitioner's application was submitted was discussed and it was revealed that the Petitioner could only get 67 marks as against 75 marks which is the cut off point for admission. This position was confirmed by the 2nd Respondent to the Human Rights Commission by his letter dated 20.07.2015 (P-20)

However during the inquiry before the Human Rights Commission it was revealed that another student applied for admission to Nalanda College from the same Housing scheme where the Petitioner lived had gained admission to Nalanda College and this position too was looked in to by the 2nd Respondent once again by P-22 but the outcome of the said inquiry was not available before this court.

The Respondents along with their objections had submitted the applications submitted by the Petitioner (R6a and R6b) as well as by the other applicant namely K.K.D. Nelundeniya (R5a and R5b). As admitted by the Respondents before this court, both the above applicants were residents from National Housing Scheme Cirpantine Road. As submitted by the Respondents when they calculate the distance to the school from each house applicant Nelundeniya was residing 600 meters away from the school and the Petitioner was residing 1000 meters away from the school. Due to this discrepancy in the distance, the Petitioner has lost 25 marks for schools between his house and Nalanda College and Nelundeniya had lost only 10 marks. It was further submitted by the 1st Respondent that the Petitioner had got only 67 marks as against the 75 marks which is the cut off point. Even though the 2nd Respondent by his letter dated 27.08.2015 had called for a report from the 1st Respondent with regard to the said position, it was not clarified either before the Human Rights Commission or before this court. However when the Human Rights Commission conveyed its decision to the 2nd Respondent directing him to admit the Petitioner to Nalanda College, the 2nd Respondent by his letter dated 26.10.2015 informed his inability to enforce the said decision only for the reason that the Petitioner is

a non Buddhist but failed to confirm that the Petitioner is not eligible to gain admission to Nalanda College on the criterion under which he submitted his application.

When considering the two contradictory position taken by the 1st Respondent when he allocated marks to two applicants from the same housing scheme and the failure by the 2nd Respondent to submit the report he called from the 1st Respondent with regard to the above discrepancy, it is clear that the said Respondents were acting in collusion and *mala-fide* when the Respondents refused to implement the directive of the Human Rights Commission based only on a criterion where no guide lines had been given under the circular 23 of 2013 to identify the religion of the applicant.

In the said circumstance the Petitioner is entitled under law to gain admission to Nalanda College as prayed by him in paragraph (c) to the Petition.

When considering material discussed above we make order,

- a) Issuing a writ of *Certiorari* quashing above decision contained in P-20 an P-29 to consider the Petitioner as a Christian student based on the school leaving certificate of the next friend
- b) Issuing a writ of *Mandamus* directing the 1st to 3rd Respondents to admit the Petitioner to the corresponding grade based on the application submitted to gain admission to grade one of Nalanda College in the year 2015.
- c) Directing to pay cost fixed at 15,000/-

Application allowed with cost fixed at 15,000/-.

President of the Court of Appeal

S. Thurairaja PC J

I agree,

Judge of the Court of Appeal