

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

In the matter of an Application for Mandates in
the nature of Writs of Certiorari and Prohibition
under Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

C.A. Writ Application
No. 844/2010

**Abeyesundara Mudiyanseelage Sarath Weera
Bandara**

No. 21, Wegolla Road,
Lewella, Kandy.

PETITIONER

-Vs-

1. **University of Colombo,**
No. 94, Cumaratunga Munidasa Mawatha,
Colombo 03.
2. **Prof.(Mrs.) Kshanika Hirimburegama**
Vice Chancellor,
University of Colombo,
No. 94, Cumaratunga Munidasa Mawatha,
Colombo 03.
3. **Prof. M.H.R. Sheriff**
Director, Institute of Postgraduate Institute of
Medicine,
Postgraduate Institute of Medicine,
No. 160, Norris Canal Road,
Colombo 07.

4. Dr. Tudor Weerasinghe
5. Prof. Indralal de Silva
6. Prof. Marie E.S. Perera
7. Prof. N. Selvakkumaran
8. Prof. Harshalal Seneviratne
9. Dr. P.S.M. Gunaratne
10. Prof T.R. Ariyaratne
11. Prof. Sunil Chandrasiri
12. Prof. Nayani Malagoda
13. Vidyanidhi N.R. de Silva
14. Mr. Rajan Asirwadam
15. Mr. K. Kanag-Iswaran
16. Mr. Thilak Karunaratne
17. Mr. Chelliah Thangarajah
18. Mr. C. Maliyadda
19. Mr. Mahinda Rajapakshe
20. Mr. H.M.N. Warakaulle
21. Mr. P.W. Senarathne
22. Mr. M. Wickramasinghe
23. Prof. G.N. Wickremanayake
24. Mr. Upali Amarasiri
25. Prof. Kamani H. Tennekoon
26. Prof. Sharya Scharenguivel
27. Prof. M.M.R.W. Jayasekera
28. Prof. T.R. Ariyaratne
29. Ms. Sumana Jaysuriya
30. Dr. S. Ukwatte
31. Prof. M.D.A.L. Ranasinghe
32. Prof. Neluka Silva

33. Mr. W.N. Wilson
34. Dr. S.I. Keethaponcalan
35. Dr. W. Chandradasa
36. Mr. N.V. Karunasena
37. Dr. A.A. Jayawardena
38. Mr. V.T. Thamilmaran
39. Dr. (Mrs.) Kumudinie Dissanayake
40. Dr. V.H.W. Dissanayake
41. Dr. Senaka Rajapakse
42. Prof. S. Rohini de A. Seneviratne
43. Dr. Shamy de Silva
44. Dr. (Ms) Mangala Gunatilake
45. Prof. D.N. Samarasekera
46. Dr. (Ms.) Tara de Silva
47. Prof. K.R.R. Mahanama
48. Dr. J.K. Wijeratne
49. Dr. S. Kulatunga
50. Dr. S.R.D. Rosa
51. Dr. (Ms.) M. Dilhari T. Attygalle
52. Dr. (Ms.) Nirmalie Pallewatta
53. Dr. D.N.N. Dewasiri
54. Prof. C.P.D.W. Mathew
55. Prof. K.A.P. Siddhisena
56. Prof. S.T. Hettige
57. Prof. W.D. Ratnasooriya
58. Prof. Y.N. Amaramari Jayatunga
59. Prof. S.A. Norbert
60. Prof. D.P. Dissanayake
61. Prof. A.D.M.S. Abeyratne

62. Prof. Preethi V. Randeniya
63. Prof. W.S. Premawansa
64. Prof. J.K.D.S. Jayanetti
65. Prof. G.A.C. de Silva
66. Prof. Ramani Jayathilake
67. Dr. Dushyanthi Mendis
68. Rev. Dr. N. Dias
69. Ms. Dilrukshi N. de Silva
70. Dr. K.P.S.C. Jayaratne
71. Ms. Shrinika Weerakoon
72. Dr. G.D.S.P. Wimalaratne
73. Dr. Ajanatha Hapuarachchi
74. Ms. Richira Kulasingham
75. Dr. Indika Karunatilake
76. Dr. W.K. Hirimburegama
77. Dr. R.A. Jayasinghe
78. Ven. Agalakada Sirisumana
79. Dr. Chandani Liyanage
80. Mr. G. Ranaweera
81. Dr. Pavithra Kailasapathy
82. Dr. M. P.P. Dharmadasa
83. Prof. Nadira Karunaworra
84. Prof. W. Kusum de Abrew
85. Dr. D.R.C. Hanwella
86. Prof. S.M. Wijeyeratne
87. Prof. C.N. Wijeyeratne
88. Prof. D. Thusitha U. Aluytunga
89. Prof. R.D. Wijesekera
90. Prof. Asanga Tilakaratne

91. Prof. M. Karunanithy
92. Mr. W.M. Pragnadharshana
93. Mr. J.A.S.K. Jayakody
94. Prof. Neloufer de Mel
95. Prof. E.D. de Silva
96. Prof. L.A.S. Perera
97. Prof. Dr. Buddhika Weerasundera
98. Prof. M. V.C. de Silva
99. Prof. Sriyanthi A. Deraniyagala
100. Prof. Sunethra Atukorala
101. Prof. S.W. Kotagama
102. Prof. R. Fernando
103. Prof. D.M.S.S.L. Dissanayake
104. Prof. L.A.D.A. Tissa Kumara
105. Prof. Rohini Parनावithana
106. Prof. S.A.S.R. Sirimanne
107. Prof. Hemamali Peiris
108. Prof. Rohini Fernandopulle
109. Prof. Amal Jayawardene
110. Prof. Laal Jayakody
111. Prof. Deepika Fernando
112. Prof. K.S.A. Jayasinghe
113. Prof. K.M.N. de Silva
114. Prof. Nalaka Mendis
115. Prof. Manaouri Senanayake
116. Prof. (Ms) M. Rohini Sooriyarachchi
117. Prof. Preethika Angunawela
118. Prof. D.U.J. Sonnadara
119. Prof. R.L.C. Wijesundeta

120. Prof. Roland Abeypala
121. Prof. H.M. Senanayake
122. Prof. Rohini Hewamanne
123. Prof. Sarath Wijesuriya
124. Prof. Shyam Fernando
125. Prof. A.M.G.N.K. Attanayake
126. Prof. J. Uyangoda
127. Ms. S. Segarajayasingham
128. Prof. W.P.G. de Alwis
129. Dr. Ranjan Dias
130. Dr. Premakumara de Silva
131. Mr. T.L.R. Silva
The Acting Registrar,
University of Colombo,
4th to 131st of University of Colombo,
No. 94, Cumaratunga Munidasa Mawatha,
Colombo 03.
132. Prof. Jayantha Jayawardene
133. Prof. Lalitha Mendis
134. Prof. Gamini Buthpitiya
135. Prof. T.R. Weerasooriya
136. Prof. A.R. Wickramasinghe
137. Prof. K. Sivapalan
138. Prof. M. Udupihille
139. Dr. U.B. Disanayake
140. Dr. K.E. Karunakaran
141. Prof. Mohan De Silva
142. Mr. R.M.P. Ratnayake
143. Dr. S.T.G.R. De Silva

144. Dr. T.R.C. Ruberu
145. Dr. Ajith Mendis
146. Dr. R.W. Jayantha
147. Dr. Ajith Mendis
148. Dr. J.M.W. Jayasundera Bandara
149. Dr. Samath Dharmaratne
150. Prof. Laal Jayakody
151. Prof. Lucien Jayasooriya
152. Mr. M.D.D. Peiris
153. Prof. Abdul Hussain
154. Prof. Mirani Weerasooriya
155. Mr. M.W. Gunathunga
156. Mr. M.H.J. Ariyaratne
157. Mr. S.L. Ekanayake
158. Dr. T.S. Nawaratnerajah
159. Dr. Samath Pranavithana
160. Prof. Rohan Jayasekara
161. Mr. M.T. Thilakasiri
162. Dr. Terrence de Silva
163. Prof. Nimal Attanayake
164. Dr. S. Dalpathadu
165. Dr. Kalyani Pethiyagoda
166. Dr. Indrasiri
167. Dr. Renuka Jayatissa
168. Dr. Reggee Perera
169. Dr. Paba Palihawadana
170. Dr. Champika Wickramasinghe

Secretary,

Board of Study in Medical Administration

171. Dr. Ananda Samarasekera
172. Prof. Anoja Fernando
173. Prof. Desmond Mallikarachchi
174. Dr. Ranjan Wijesinghe
175. Dr. Sarath Samarage
176. Dr. Champika Wickramasinghe
177. Dr. Risintha Premerathne
178. Dr. Sudath Peiris
179. Dr. Jagath Amarasekera
180. Dr. Hasitha Thisera
181. Mrs. Padma Yatapahana
182. Dr. S.A.R. Dissanayake
183. Dr. A. Danthanarayana
184. Dr. K.D. Jayalath
185. Dr. I.J. Muhandiramge
186. Dr. T.S. Arambegedara
187. Dr. W. Gurusinghe
188. Dr. Chandana Gajanayake
189. Dr. W.L.L.U.C. Kumaratilake
190. Dr. R.M.S.K. Ratnayake
191. Dr. P.V.D.S. Darmagunawardene
192. Dr. V.R. Guansekara
193. Dr. J.H.M.K.K.B. Jayasinghe
194. Dr. P.K.C.I. Jayasinghe
195. Dr. S.A.A.N. Jayasekera
196. Dr. A.D.U. Karunarathne
197. Dr. D.P.S. Kiriwandeniya
198. Dr. A.G. Ludowyke
199. Dr. S.P.A.L. Ranaweera

200. Dr. R.M.D. Rathnayake

201. Dr. H.M.K. Wickramanayake

202. Dr. K.D.P. Wijesinghe

203. Dr. K. Nandakumar

204. Dr. D.M.P.A. Gunawardena

205. Dr. S.A.H. Liyanage

206. Dr. T. Sathyamoorthy

132nd to 206th of the

Postgraduate Institute of Medicine,

No. 160, Norris Canal Road,

Colombo 07.

RESPONDENTS

BEFORE : P.P. Surasena, (P/CA) &
A.H.M.D. Nawaz, J.

COUNSEL : Asthika Devendra with Lilan Warusavithana and
Dinusha Mohan for the Petitioner
Rajiv Goonetilleke, SSC for the 1st to 181st
Respondents

Decided on : 08.06.2018

A.H.M.D. Nawaz, J.

After having abandoned a writ of prohibition preventing the Senate and Council of the University of Colombo approving the results of the MD (Administration) 2009/2010-Part 1 examination of the postgraduate Institute of medicine (PGIM), the petitioner who was the medical superintendent, Base (teaching) Hospital, *Gampola* at the time of this application for judicial review has now confined his application for relief to a writ of certiorari to quash the recommendation made to accept the results of the MD

(Administration) 2009/2010-Part 1 examination. This recommendation (P11) is in fact the results sheet that had been recommended by the board of examiners to the board of study in administration and the board of management of the PGIM. When this matter was taken up before another bench of this Court on 12.08.2015, the then Additional Solicitor General Murdu Fernando, P.C brought to the notice of Court that even the writ of certiorari could not be granted by this Court, since the Senate and the Council of the University of Colombo had already approved the results of the MD (Administration) 2009/2010-Part 1 examination, which had been marked by the petitioner as P11. Thus the submission of the learned Additional Solicitor General was premised on futility. The Counsel for the Petitioner sought to respond to the case of the learned ASG on futility and when this matter came on for argument before this bench, he persisted in his argument to impugn P11-the results sheet. He contended that he was seeking to challenge the process that resulted in P11. His complaint was that the Petitioner who had been following the MD (Administration) 2009/2010-Part 1 course was expecting to sit his examination on 11.10.2010, but unbeknownst to him, the 181st Respondent-a Lecturer (Probationary) conducted a special lecture on 6.10.2010 on a Statistics Module, just five days prior to the commencement of the examination.

In his petition he alleges that he could not attend this lecture as he was not notified of the lecture. Neither did some of his fellow students owing to this non notification. The learned Counsel for the Petitioner classified the results sheet (P11) as a recommendation and contended that it was the process through which it was arrived at, that he was seeking to impugn. In fact P11 the results sheet did not include the name of the Petitioner as one of those candidates who had passed the examination. He faulted the process on so many aspects. Broadly, they went as follows:-

- a) the delivery of the lecture just five days prior to the examination was wrong;
- b) the 181st Respondent presented a tutorial some aspects of which made their appearance in the final paper the petitioner sat.

The Counsel for the Petitioner took this Court through some of these aspects which he called were identical to the examination questions. For instance, the data set in Question No. 2 of the Tutorial (P10) was identical to the data found in Question No. 9 of P8-the examination paper. Question No. 2 in P10 was identical to Question No. 9 in P8. There were two more similarities that the Counsel for the Petitioner pointed out. Question No. 3 in P7 (which was also marked as a tutorial) was similar to Question No. 8 in P8. But I observe both questions cannot be classified as substantially similar. In Question No. 2 in P7 there was what was called a Pearson Correlation indicated by figure 737. The Counsel pointed out that this was the same as the figure in the Model Summary Chart in Question No. 9 of P8. But I must observe that the word Pearson, which was found in the tutorial was not seen in the examination paper except for the figure 737.

The Petitioner avers that a few other candidates and he were adversely affected at the examination since the final question paper P8 had concentrated on areas taught at this pre-examination lecture. This particular complaint of the Petitioner is made light of in the statement of objections filed by the 182nd, 187th, 189th, 197th, 198th, 201st, 202nd and 204th Respondents. They aver in their affidavits that as the trainees who followed the MD (Administration) 2009/2010-Part 1 course felt that they were somewhat weak in Statistics, they all agreed to have a discussion on Statistics Module which first took place on 2.10.2010. Mrs. Padma Yatapahana-the 181st Respondent received no payment for the said discussion which was done on a voluntary basis at the request of the said trainees. These Respondents make the assertion that even the petitioner attended the discussion. As the said discussion could not be concluded by 12 noon on 2.10.2010, the lecturer and the trainees agreed to continue the said discussion on another date and it was deferred for 6.10.2010 from 11a.m to 1p.m. There was nothing surreptitious or stealthy about it. All the trainees were informed of the next date. What the 202nd Respondent states by way of an affidavit is quite revealing. Dr. Pradeep Wijesinghe-the 202nd Respondent asserts that the Petitioner who did not attend the second discussion requested him to record the discussion by keeping his mobile phone on the table of the lecturer in a recording mode so that he could listen to the discussion. There is affidavit evidence before this Court that

prior to the discussion, Mrs. Padma Yatapahana forwarded the tutorial notes to a common email address.

Thus the joint affidavit filed on behalf of the aforesaid Respondents gives the lie to the assertion of the Petitioner. There is a denial of all this in the counter affidavit of the Petitioner though he admits that he requested the 202nd Respondent to keep the mobile in the recording mode but he could not listen to the lecture because of some background disturbances.

Certain salient features immanent in this case need reiteration. The affidavit of Professor Kshanika Hirimburegama, the Vice Chancellor, University of Colombo, brings out the fact that the final examination paper P8 was never leaked prior to the examination. She points out that the complaint was made quite belatedly. Both in the oral argument and the statement of objections of the 1st to 131st Respondents, the argument was made that the Petitioner had reached the required pass mark on the written component of the examination. In other words, the Petitioner passed the examination paper (P8) which according to him was reflective of some aspects of the tutorial that had been conducted. In such an event the Petitioner cannot complain of any prejudice in the way he faced the examination paper. No process or procedural aspects prior to this examination had imperilled him and this Court does not perceive any unfairness caused to the Petitioner.

Then what would be his principal complaint? It would appear that the petitioner failed at the oral component of the said examination, which was mandatory.

Professor Mohamed Hussein Rezvi Sheriff, who was the Director, Postgraduate Institute of Medicine (PGIM) at the relevant time, has affirmed in this affidavit that the said lecture was not held surreptitiously and all the candidates were duly informed beforehand. The lecture was conducted at the request of the trainees to clarify their doubts. Prof. Rezvi Sheriff asserted that the Petitioner was making a false statement by stating that the Petitioner and a few other students were not informed of the lecture. He affirmed that the Petitioner had reached the required pass mark on the written

component of the examination but failed to score the required marks under the compulsory oral component of the said examination.

I must observe that it was not shown that the PGIM stepped outside its Rules and Regulations and I do hold the view that there was nothing illegal immanent in this case, in the sense of illegality, irrationality and procedural impropriety as propounded in *R v. Minister for the Civil Service ex p Council of Civil Service Unions* (1985) 1 AC 374, that affected the holding of the examination.

If at all, the gravamen of the Petitioner's complaint has to be on the oral component of the examination which seems to have weighed in on his failure to reach the pass mark. Nothing is spoken about the process of the oral component in the petition and affidavit of the Petitioner. In fact, the existence of the oral component and the way it is assessed brings to the fore what Wade and Forsyth have been saying of academic or pastoral judgements in their tome *Administrative Law* (Oxford, Eleventh Edition, page 537).

"The courts will, in any case, be reluctant to enter into 'issues of academic or pastoral judgment which the University was equipped to consider in breadth and in depth but on which any judgment of the Courts would be jejune and inappropriate. That undoubtedly included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified.'"-*Clark v. University of Lincolnshire and Humberside* (2000) 1 WLR 1988 (Sedley LJ).

Conceived in another perspective, the arrangement between a fee-paying student and PGIM is a contract: see *Herring v. Templeman* (1973) 3 All E R 569, 584-5. Like many other contracts, it contains its own procedures principally in the form of Student Regulations. Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts. As Wade and Forsyth states as above, there would be issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate.

It has been clear, at least since *Hines v. Birkbeck College* (1986) Ch. 524 (approved in *Thomas v. University of Bradford* (1987) AC 795), that this distinction has no bearing

on the availability of recourse to the courts in an institution which has a Visitor. But where, as with PGIM, there is none, the decision of the New Zealand Court of Appeal in *Norrie v. University of Auckland Senate* (1984) 1 NZLR 129 and the remarks of Hoffmann, J. in *Hines* at 542-3 open the way to the distinction as a sensible allocation of issues capable and not capable of being decided by the courts. It would follow, I think, that the issues which the courts remitted with obvious relief to Visitors in such cases as *Thomson v. University of London* (1864) 33 L.J.Ch. 625 (which concerned the award of a gold medal), *Thorne v. University of London* (1966) 2 QB 237 and *Patel v. University of Bradford Senate* (1978) 1 WLR 1488 (both of which concerned the plaintiff's academic competence) would still not be susceptible of adjudication as contractual issues in cases involving higher education corporations.

It is on this ground, rather than on the ground of non-justiciability of the entire relationship between student and university, that we would refuse certiorari and strike out the case as pleaded.

The consistent judicial opinion, therefore, is that in matters which lie within the jurisdiction of the educational institutions and their authorities, the Court has to be slow and circumspect before interfering with any decision taken by them in connection therewith. Unless a decision is demonstrably illegal, arbitrary and unconscionable, their province and authority should not be encroached upon. This is mainly because of want of judicially manageable standards and necessary expertise to assess, scrutinise and judge the merits and/or demerits of such decisions.

Dealing with the scope of interference in matters relating to orders passed by the authorities of educational institutions, the Courts should normally be very slow to pass orders in regard thereto and such matters should normally be left to the decision of the educational authorities. This is not an inflexible rule though and in *R v. Higher Education Funding Council ex parte Institute of Dental Surgery* (1994) 1 WLR 242 Stephen Sedley, J. took care to emphasize the flexibility of the rule:

“This is not to say for a moment that academic decisions are beyond challenge.”

But in the same breath classifying an academic judgement, the learned judge stated;

“The question why in isolation as it can now be seen to be, is a question of academic judgement. We would hold that where what is sought to be impugned is on the evidence, no more than an informed exercise of academic judgement, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners’ meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate’s written paper is something more than an informed exercise of academic judgement.”

As I have stated before, the case of the petitioner boils down finally to the process of the viva voce assessment which has not been impugned in the petition as falling within the permissible parameters of challenge articulated by Sedley, J. It has not been alleged that the oral component took into account irrelevant and personal factors that would shift the decision of final results outside an informed exercise of academic judgement.

Therefore we would not venture into an impugnation of PII as it lies clearly outside the pale of judicial review.

In any event PII has since been approved by the Senate and the Council of the University of Colombo and it would be futile to engage in an impingement of PII which has resulted in practical consequences for those candidates who had passed the examination. Administrative inconvenience is another inhibiting factor against the exercise of discretion of the remedy and all these composite factors would impel us to hold that no grounds have been made out to issue a mandate in the nature of a writ of certiorari.

In the end we refuse the application for that remedy.

JUDGE OF THE COURT OF APPEAL

P.P. Surasena, PC/J.
I agree

PRESIDENT OF THE COURT OF APPEAL