

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

Professor Adikari Mudiyansele
Gamini Adikari,
No. 313/7,
Suriyapaluwa,
Kadawatha.
Petitioner

CASE NO: CA/WRIT/351/2016

Vs.

1. The University Grants Commission,
No. 20,
Ward Place,
Colombo 7.
2. Professor Mohan De Silva,
Chairman,
University Grants Commission,
No.20,
Wards Place,
Colombo 7.
And 5 Others
Respondents

Before: Mahinda Samayawardhena, J.
Counsel: Nimal Jayasinghe for the Petitioner.
Milinda Gunathilake, Senior D.S.G., for the
Respondents.
Decided on: 29.07.2019

Mahinda Samayawardhena, J.

The Post of the Director of the Postgraduate Institute of Archaeology has fallen vacant. Upon publication of notice in the newspapers, several applicants including the Petitioner have applied for the Post. As seen from P1, it is common ground that the appointing authority is the 1st Respondent University Grants Commission (UGC), which selects a suitable applicant from a panel of three names recommended by the Board of Management of the Post Graduate Institute of Archaeology. At the Meeting held on 01.04.2016, the Board of Management of the Post Graduate Institute of Archaeology has selected by vote the following three applicants in the presence of an observer nominated by the UGC.

1. Professor A.M.G. Adikari (the Petitioner) (10 votes)
2. Professor P.B. Manawala (7 votes)
3. Professor D.W.R.K. Somadeva (7 votes)

However the Petitioner who received the highest votes polled has not been notified by the UGC whether or not he has been selected, and, if not, why he was not selected to be appointed to fill the vacancy.

Instead, firstly, an Acting Director¹, and thereafter, another as the competent authority², has been appointed under the hand of the 2nd Respondent the Chairman of the UGC to cover the duties of the Director. The UGC has also by letter marked P7 dated 27.05.2016 informed the Acting Director to re-advertise the Post “to select a suitable person”.

However, in my view, contrary to the above, by letter marked P9 dated 13.09.2016, the UGC has informed the Acting Director that the UGC has not made any decision on the suitability of the candidates whose names were recommended by the Board of Management of the Postgraduate Institute of Archaeology. That refers to the three names mentioned earlier with the Petitioner's name on top.

The Petitioner filed this application by petition dated 12.10.2016, amended by amended petition dated 21.11.2016 seeking to issue a writ of certiorari to quash the decision to re-advertise the vacancy in the Post of Director of the Post Graduate Institute of Archaeology, and to issue a writ of mandamus to compel the UGC and its Chairman "*to consider*" the number of votes received and the rank order of the nominees recommended by the Board of Management of the Post Graduate Institute of Archaeology in order to select the nominee to fill the vacancy for the Post of Director of the Postgraduate Institute of Archaeology.

¹ Vide P6.

² Vide document marked C tendered with the motion of the Attorney at Law of the Petitioner dated 04.09.2017.

The 1st and 2nd Respondents, UGC and its Chairman, and the 5th Respondent, University of Kelaniya, filed objections to this application.

In these objections, the UGC admits that it did not so far inform the Petitioner whether he was selected or not, since, by 19.04.2016, i.e. just a few days after three names including the Petitioner was sent by the Board of Management of the Post Graduate Institute of Archaeology to the UGC, the UGC received an anonymous letter under the name of "*Dushana Virodee Peramuna*" marked R1 on alleged financial frauds committed by the Petitioner whilst he was functioning as the Director General of the Central Cultural Fund, and accordingly, the UGC at its Meeting held on 29.04.2016 decided to defer consideration of the three names recommended by the Board of Management of the Postgraduate Institute of Archaeology.

After this decision was taken, according to the objections, the UGC has by letter marked R2A dated 30.09.2016 inquired from the Financial Crimes Investigations Division of the Police whether there was such a complaint, and it has been replied by R2B dated 26.10.2016 that, upon a complaint being made to the FCID about alleged financial frauds against several former officers of the Central Cultural Fund including the Petitioner, investigations were completed and the file was sent to the Attorney General for advice.

The Petitioner is not even a suspect in a case. Hence upon an anonymous petition received by the UGC under the name of "*Dushana Virodee Peramuna*", the UGC cannot defer consideration of the three names recommended by the Board of Management of

the Postgraduate Institute of Archaeology to fill the vacancy and re-advertise the Post. If the consideration is deferred as opposed to rejection, I cannot understand why the UGC wants to re-advertise the Post. That means, the UGC has decided not to consider the Petitioner's name to fill that Post without any basis.

The UGC in its objections has also stated that the Petitioner has no legal right to be appointed to the Post of Director of the Postgraduate Institute of Archaeology as the UGC has the discretion to select any of the three candidates whose names have been submitted. In the first place, the Petitioner does not seek to compel the UGC to appoint him as the Director but to consider to appoint him as the Director as the candidate who secured highest polls.

On the other hand, the UGC has no absolute discretion to appoint any one of the three candidates as they please. In modern administrative law there is no unfettered unreviewable discretion. The discretion shall be exercised rationally with sound time-tested principles. In the exercise of discretion, the person in authority shall not do what he likes but what he ought.

In *Gunathileka v. Weerasena* [2000] 2 Sri LR 1 at 6-7, J.A.N. de Silva J. (later C.J.) stated:

It is observed that in Modern Administrative Law the concept of absolute discretion is unacceptable. "Parliament constantly confers upon Public Authorities, powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what Courts refuse to countenance. They have woven a network of restriction principles which

require statutory powers to be exercised reasonably and in good faith for proper purpose only.” Administrative Law - 7th Edition - Wade at page 379.

Justice Douglas in his dissenting judgment in U.S. vs. Wundarlich (1951) 342 US 98 observed,

“Law has reached its finest moments when it has freed man from unlimited discretion of some ruler, some civil or military official, some bureaucrats. Where discretion is absolute man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life; absolute discretion is a ruthless master.”

These Principles have been explained and elaborated in a series of English decisions over a long period of time. Lord Wrenbury in Roberts vs. Hopwood (1925) AC 578 at 613 stated that,

“A person who is vested with a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes but what he ought. In other words, he must by the use of reason, ascertain and follow the course which reason directs. He must act reasonably.”

When this case came up for the first time before me, counsel for both parties agreed to dispose of argument by way of written submissions, for counsel for the Petitioner first to file written submissions for counsel for the Respondents to reply. The written

submissions of the Petitioner have been filed as far back as on 06.08.2018 with notice both to the UGC and the Attorney General but those of the Respondents have not been tendered notwithstanding several dates were given for that purpose.

People's legitimate rights cannot be denied on anonymous petitions. I quash by way of certiorari the decision of the UGC to re-advertise the vacancy for the Post of the Director of the Postgraduate Institute of Archaeology, and direct the UGC and its Chairman by writ of mandamus first to consider the three nominees including the Petitioner recommended by the Board of Management of the Post Graduate Institute of Archaeology to fill the said vacancy.

Application of the petitioner is allowed with costs recoverable from the 1st Respondent UGC.

Judge of the Court of Appeal