**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 a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No. 398/2015**

Professor Serosha Mandika Wijeyaratne,
No. 11, Esther Avenue,
Park Road, Colombo 05.

**PETITIONER**

Vs.

1. Hon. Lakshman Kiriella,
   Minister of Higher Education.

1A Bandula Gunawardana,
   Minister of Higher Education.

   1 and 1A Respondents are at
   Ministry of Higher Education,
   No. 18, Ward Place, Colombo 07.

2. University Grants Commission,
   No. 20, Ward Place, Colombo 07.

3. University of Colombo.

4. Dr. W.K. Hirimburegama,
   Former Vice Chancellor,
   University of Colombo.

5. Professor Kshanika Hirimburegama,
   Department of Plant Sciences,
   Faculty of Science, University of Colombo.

6. Professor Dulitha Fernando,
   No. 198/9, Nawala Road, Nawala.

7. Professor R.L. Jayakody,
Department of Pharmacology,
Faculty of Medicine,
Kynsey Road,
Colombo 08.

8. Professor Nalaka Mendis,
No. 141, Jawatta Road,
Colombo 05.

9. Professor Nimal Senanayake,
No. 14, Mahamaya Mawatha,
Kandy.

10. Professor Rohan Rajapakse,
Faculty of Agriculture,
University of Ruhuna,
Mapalana, Kamburupitiya.

11. Rajan Asirwathan,

11A Anil Rajakaruna.

C/o. Registrar of the University of
Colombo, College House,
No. 94,Cumarathunga Munidasa
Mawatha, Colombo 3

12. Nalin Attigalle.

13. Prof. Rohan Jayasekara,
Department of Anatomy, Faculty of
Medicine, Kinsey Road, Colombo 8.

13A Ven Prof. Attanagalle Ratnapala
Department of Anatomy,
Faculty of Medicine,
Kynsey Road,
Colombo 08.

14. Prof. D.N. Samarasekera,
Professor of Surgery,
Department of Surgery, Faculty of Medicine,
Kynsey Road,
Colombo 08.

15. Emeritus Prof. Arjuna Aluvihare,
No. 132/7, Wariyapola Sumanagala
Mawatha, Kandy.

16. Prof. Channa Ratnatunga,
University of Peradeniya,
Department of Surgery,
Faculty of Medicine,
Peradeniya.

17. Professor H.R. Seneviratne,
No. 32, 1st Chapel Lane, Colombo 06.

18. Professor W.D. Ratnasooriya.

19. Professor Jayantha Jayawardena,
No. 2A, 6th Lane,
Pagoda Raod, Nugegoda.

20. Professor Mohan De Silva,
Chairman University Grants Commission,
No. 20, Ward Place,
Colombo 07.

21. Dr. R.M.K. Ratnayake,
12144A, 3rd Lane, Kanadahena Watte,
Depanama, Pannipitiya.

22. Professor Carlo Fonseka,(Deceased)
88/14B, Ferry Road, Etula Kotte, Kotte.

23. Professor Lalitha Mendis,
Former Competent Authority,
University of Colombo.

24. Prof. Lakshman Dissanayake,
Vice Chancellor,
University of Colombo.

24A. Professor Chandrika Wijeratne,
Vice Chancellor,
University of Colombo.

25. Professor P.S.M. Gunaratne
26. Professor Malik Ranasinghe
27. Dr. Wickrema Weerasuriya
C/O University Grants Commission,
No. 20, Ward Place, Colombo 07.

28. Mr. K. Kanag-Iswaran PC,
No. 104, Isipathana Mawatha, Colombo 05.

29. Dr. R.C.K. Hettiarachchi,
30. Professor Nayani Melegoda,
31. Professor W. Chandradasa,
32. Professor Sunil Chandrasiri,
33. Ms. W. Indira Nanayakkara,
34. Dr. (Mrs.) R. Senathiraja
34A. Dr. M.P.P.Dharmadasa,

35. Professor Jennifer Perera,
36. Professor K.R.R. Mahanama,
37. Professor Lakshman Ratnayake,
38. Professor Savithri Goonesekere,
39. Mr. Thilak Karunaratne,
40. Mr. Nigel Hatch
40A. Prof. P.A.J. Perera
41. Mr. W.A. Wijewardena,
42. Dr. Sanjiva Weerawarana,
43. Dr. (Mrs.) Ranee Jayamaha
43A. Mr. Mahinda Madihahewa
44.A. K P Hewagamage
44 B. Prof. V.T.Thamilmaran
45. Dr. Harsha Cabral,P.C.
46. Mr. Jehan Prasanna Amaratunga,

28th – 46th Respondents are Members of the Council of the University of Colombo.

47. Professor K.P. Hewagamage,
48. Dr. S.D. Hapuarachchi,
49. Professor J.K.D.S. Jayanetti,
50. Mr. R.P.P. Ranaweera,
51. Dr. S.N. Hadunnetti,
52. Dr. Pradeepa Wijetunge,
53. Dr. E.L.S.J. Perera,
54. Ven. Professor W. Wimalarathana Thero,
55. Dr. Dushyanthi Mendis,
56. Professor L. Manawadu,
57. Professor Samantha Herath,
58. Dr. J.H.C. Liyanage,
59. Professor Neloufer de Mel,
60. Professor Neluka Silva,
61. Professor S.A. Norbert,
62. Professor D.A.P. De Silva,
63. Dr. J.D. Jayawardena,
64. Mr. M. Kapila Bandara,
65. Professor M.E.S. Perera,
66. Professor Sumedha Wijeratne,
67. Mrs. R. Wijeyesekara,
68. Mrs. Nirmala Perera,
69. Dr. A.A.C. Abeysinghe,
70. Dr. B. Nishantha,
71. Dr. K. Kajendra,
72. Dr. Pavithra Kailasapathy,
73. Professor R.D. Wijesekera,
74. Professor P. Mahawatte,
75. Dr. S.M.W. Ranwala,
76. Dr. M.D.T. Attygalle,
77. Professor W.B. Yapa,
78. Professor D.T.U. Abeytunga,
79. Professor R.S. Dassanayake,
80. Professor S.W. Kotagama,
81. Professor T.D. Silva,
82. Dr. T.U. Hewage,
83. Professor C.P.D.W. Mathew,
84. Dr. G.R. Constantine,

85. Professor Priyadarshani Galappatthy,
86. Professor S. Sri Ranaganathan,
87. Professor K.H.S. de Silva,
88. Professor D.G.H. de Silva,
89. Dr. A.P. Malalasekera,
90. Dr. M.R. Haniffa,
91. Dr. P.R. Warathanne,
92. Dr. A.H.M. Mawjood,
93. Dr. D.A.S. Athukorala,
94. Mr. G.K.A. Dias,
95. Professor A.P.G. Amarasinghe,
96. Professor E.R.H.S.S. Ediriveera,
97. Professor K.H. Tennakoon,
98. Ms. Shivanee R. Illangakoon,
99. Dr. N.R. Dewasiri,
100. Professor J. Uyangoda,
101. Professor Asanga Tilakaratne,
102. Dr. P.R.N. Fernando,
103. Dr. S. Senerath,
104. Professor E.D. de Silva,
105. Mr. C. Kasturiachchi,
106. Professor M.V. Vidhanapathirana,
107. Dr. A.A. Azeez,
108. Professor Nadira Karunaweera,
109. Professor D.R.C. Hanwella,
110. Professor Senka Rajapakse,
111. Professor C. Ariaranee Gunanathasan,
112. Professor M.D.S. Lokuhetti,
113. Professor Deepika Fernando,
114. Professor W.K. de Abrew,
115. Professor Varuni A de Silva,
116. Dr. Indika Karunathilaka,
117. Professor Athula Ranasinghe,
118. Professor A.M.G.N.K. Attanayake,
119. Professor Ajanatha Hapuarachchi,
120. Professor Roland Abeypala,
121. Dr. A.M. Hettige,
122. Professor Sharya Scharenguivel,
123. Professor P.S.M. Gunaratne,
124. Dr. J.K. Wijerathna,
125. Professor K.M.N. de Silva,

126. Professor M.D. P. de Costa,
127. Professor S.A. Deraniyagala,
128. Professor R.L.C. Wijesundera,
129. Professor H.D.K.G.A. Weerakoon,
130. Professor W.S. Premawansa,
131. Professor D.N. de Silva,
132. Dr. Jean Perera,
133. Mr. M.D. Piyathilaka,
134. Mr.M. Senanayake

134A.Prof D.A.Premakumara De Silva

135. Venerable Professor Agalakada Sirisumana Thero,
136. Professor Indralal de Silva,
137. Professor A.D.M.S. Abeyratne,
138. Professor G. Amala de Silva,
139. Professor T.D.K. Waleboda,
140. Professor L.A. D.A. Tissa Kumara,
141. Professor Sarath Wijesuriya,
142. Professor S.T. Hettige,
143. Venerable Professor M. Dhammajothi Thero,
144. Mr. W.M. Pragnadarshana,
145. Ms. S. Segarajasingham,
146. Professor H.D. Karunaratne,
147. Dr. N.N.J. Nawaratne,
148. Dr. M.P.P. Dharmadasa,
149. Professor J.A.S.K. Jayakody,
150. Professor S.R.D. Rosa,
151. Professor D.P. Dissnayake,
152. Professor Rohini Hewamanne,(Deceased)
153. Professor D.U.J. Sonnadara,
154. Professor K.P.S.C. Jayaratne,
155. Professor T.L.S. Tirimanne,
156. Professor M. Roshini Sooriyarachchi,
157. Professor Y.N. Amaramali Jayatunga,
158. Professor Preethi V. Udagama,
159. Dr. M.R. Wijesinghe,
160. Professor Saroj Jayasinghe,
161. Dr. Upul Senarath,
162. Dr. C.P. Senanayake,
163. Professor H.M. Senanayake,
164. Professor V.P. Wickramasinghe,

165. Professor M.V.C. de Silva,
166. Ms. Dinithi Fernando,
167. Professor Shyam Fernando,
168. Professor M.W. Gunatunga,
169. Professor W. S. S. Wijesundara,
170. Professor P.R. Fernando,
171. Professor C.N Wijeyeratne,
172. Professor A. Kaluarachchi,
173. Professor Preethika Angunawela,
174. Professor N.D. Kodikara,
175. Dr. B. Fonseka,
176. Professor G.N. Wickramanayake,
177. Dr. D.A.C. Silva,
178. Dr. J. Wanigasinghe,
179. Dr. S.M. Handunnetti,
180. Professor Ranjith Bandara,
181. Ms. W. Seneviratne,
182. Professor M.J.M. De Zoysa,
183. Professor G.S.A Gunawardene,
184. Dr. G.D.D.K. Sri Ranjan,
185. Dr. K.V. Dhanapala,
186. Professor V.H.W. Dissanayake,
187. Professor A.U. Abayedheera,
188. Professor M.M.R.W. Jayasekera,
189. Professor Manouri Senanayake,
190. Dr. K. Dissanayake,
191. Professor N.S. Gunawardane,
192. Dr. W.N.P.N. Weerasinghe,
193. Dr. M.T.N. Mahees,

$47^{th}$ – $193^{rd}$ are Members of the Senate of the University of Colombo.

$3^{rd}$ – $5^{th}$, $11^{th}$, $12^{th}$, $18^{th}$, $23^{rd}$, $24^{th}$, $29^{th}$ – $193^{rd}$ Respondents are at ''College House'' University of Colombo,
No. 94, Kumaratunga Munidasa Mawatha,
Colombo 03.

**RESPONDENTS**

**Before:** **Arjuna Obeyesekere, J / President of the Court of Appeal**

**Counsel:** Ikram Mohammed, P.C., with Roshaan Hettiarachchi, Ms. Nadeeka Galhena and Vinura Jayawardena for the Petitioner

Romesh De Silva, P.C., with Chandimal Mendis, Sharafi Mohideen and Sarasi Paranamanna for the 2nd and 20th, 25th – 27th Respondents

Faisz Musthapha, P.C., with Hemasiri Withanachchi for the 3rd, 23rd, 24th, 29th and 33rd Respondents

M.U.M. Ali Sabry, P.C., with Ruwantha Cooray for the 4th Respondent

Kuvera De Zoysa, P.C., with Nishan Premathiratne, Ameer Maharoof and Krishan Fernandopulle for the 5th Respondent

Uditha Egalahewa, P.C., with Damitha Karunaratne and Vishva Vimukthi for the 14th Respondent

Gamini Marapana, P.C, with Navin Marapana, P.C., Uchitha Wickremasinghe, Thanuja Meegahawatte and Saumya Hettiarachchi for the 39th Respondent

**Written Submissions:** Tendered on behalf of the Petitioner on 27th November 2019 and 10th July 2020

Tendered on behalf of the 2nd and 20th, 25th – 27th Respondents on 31st October 2019

Tendered on behalf of the 3rd Respondent on 4th August 2020

Tendered on behalf of the 5th Respondent on 14th July 2020

Tendered on behalf of the 14th Respondent on 9th December 2019 and 13th July 2020

**Decided on:** 10th March 2021

**Arjuna Obeyesekere, J., P/CA**

In this application, the Petitioner is seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the decision taken in July 2008 by the Council of the 3rd Respondent, the University of Colombo, marked '**H2**' to appoint the 14th Respondent as the Professor of Surgery (Chair) at the 3rd Respondent University;

(b) A Writ of Certiorari to quash the decision of the Council of the 3rd Respondent taken in June 2014 not to withdraw the above appointment of the 14th Respondent.[1]

This application was taken up for argument together with CA (Writ) Application No. 332/2015, where the 14th Respondent is impugning the decision taken in July 2015 by the Council of the 3rd Respondent to appoint the Petitioner as Professor of Surgery (Co-Chair of Surgery) of the Faculty of Medicine, University of Colombo with effect from July 2008. Although most of the facts relating to both applications are identical, all parties agreed that this Court should deliver separate judgments. Accordingly, by a judgment delivered today – 10th March 2021 – I have dismissed the application of the 14th Respondent in CA (Writ) Application No. 332/2015.

Vacancy in the post of Professor of Surgery (Chair)

By an advertisement published in the *Daily News* newspaper of 10th September 2007, marked 'D', the Registrar of the 3rd Respondent had called for applications for the post of Professor, Department of Surgery, Faculty of Medicine of the University of Colombo from suitably qualified candidates. According to the Petitioner, the holder of this post, commonly referred to as the 'Chair of Surgery', is generally responsible for all academic, clinical and research activities of the Department of Surgery and provides academic leadership and shapes the future of surgery within the Medical Faculty.

[1] Reflected in the letter dated 14th July 2015 marked 'M'/ '3R4'.

On 11th September 2007, the Registrar had issued a document marked '**E**', setting out details relating to the above appointment. In terms of '**E**', an applicant was required to possess *inter alia* the following qualifications:

a) A MBBS Degree with First or Second Class (Upper Division) Honours;

b) A Masters Degree in Surgery obtained after a full time course of study of at least two years with a research component by way of thesis/dissertation or a Doctoral Degree or MD/MS and Board Certification by the Postgraduate Institute of Medicine;

c) Fifteen years of experience after obtaining the MBBS Degree;

d) The minimum mark laid down in the marking scheme for Professorship.

Two persons had responded to the said notice.

The first is the Petitioner, who possessed the abovementioned qualifications. After completing his MBBS with Second Class (Upper Division) Honours, the Petitioner has obtained the degree of Master of Surgery (General Surgery) from the 3rd Respondent in 1988 and the degree of Doctor of Medicine (MD) from Leeds University in 2005. He is a Fellow of the Royal College of Surgeons (FRCS) of England and had been appointed as a Professor in Surgery at the 3rd Respondent in 2002. The Petitioner has held the post of Secretary, College of Surgeons of Sri Lanka in 2001/02 and has been conferred with several awards for professional excellence.

The second applicant was the 14th Respondent, who too possessed the required qualifications. Having obtained the MBBS degree with Second Class (Upper Division) Honours from the 3rd Respondent with a distinction in Paediatrics, he had been awarded the degree of Master of Surgery in 1990 and the degree of Doctor of Medicine (MD) in 2007. He is a Fellow of the Royal College of Surgeons (FRCS) of England as well as Edinburgh. The 14th Respondent had been appointed as a Professor in Surgery at the 3rd Respondent in August 2001. The 14th Respondent too has been the Secretary, College of Surgeons of Sri Lanka and the President of the Sri Lankan Society of Gastroenterology from 2011-2015.

Circular No. 869

The marking scheme that was to be applied to the above selection which is referred to in '**E**' and which formed an annex to the said notice has been extracted from Circular No. 869 dated 1st December 2005 marked '**C**' issued by the University Grants Commission (UGC). By the said Circular, the UGC had approved the scheme of recruitment contained therein for the posts of Associate Professor and Professor in the University System. It is observed that the scheme of recruitment set out in Circular No. 869, which is effective from 1st December 2005, seeks to ensure uniformity in the selection of persons to be promoted to the posts of Associate Professor and Professor across all Universities in Sri Lanka.

The marking scheme set out therein provides for a candidate to be marked under three sections. Part 4 thereof specified the minimum mark that an applicant is required to obtain for each section and the minimum aggregate mark that an applicant should obtain in order to qualify for the relevant appointment. Qualified applicants were thereafter required to present themselves for an interview before the Selection Committee. It must be noted that when it came to the appointment referred to in '**E**', only the candidate with the highest mark was eligible to be appointed to the post, for the reason that there existed only one vacancy.

Details of the aforementioned sections and the minimum marks that should be obtained are set out in the following table.

| **Section** | **Description** | **Minimum mark** |
|---|---|---|
| Section 1 | Contribution to teaching and academic development | 25 |
| Section 2 | Research and creative work | 65 |
| Section 3.1<br><br>Section 3.2<br><br>Section 3.3 | Dissemination of knowledge<br><br>Awards<br><br>Contribution to University and National Development | 15 |
| Total minimum mark | | 115 |

I must note that each of the above Sections have been sub-divided into several sub-sections, with the Circular providing a detailed marking scheme for each of the sub-sections, including the marks that should be allotted for each such sub-section.

The Circular provides that an application must be accompanied by the following:

a) Curriculum vitae of the applicant;

b) A self assessed application of the applicant's whole career specifying the contribution made in respect of each of the above sections;

c) Three copies of the publications, research papers and other relevant documents;

d) Titles of three outstanding research papers/publications by the candidate.

Method of Evaluation

It is observed that the method of evaluation provided for in the said Circular is different to the traditional system of evaluation, in that the applicant makes an assessment of himself, with supporting documents, and specifies the marks that he or she is claiming for each sub-section, with the evaluators thereafter deciding the marks that should be allotted under each sub-section.

Under the heading, 'Method of Evaluation', the Circular sets out the manner of evaluating each application that is received by the relevant University. Accordingly, the Senate shall appoint two External Experts in the relevant field from outside the higher educational institution concerned to evaluate the applicants' contribution under Sections 2 and 3.1. Both experts shall be Senior Professors or Professors of a University in Sri Lanka or a recognized University abroad or an expert who has held professorial rank at a recognized University. It is therefore clear that the External Experts are professionals who have reached eminence in their field.

The role of the External Experts has been set out in the following manner:

> "*The experts are required to assess the research and creative work of the applicant based on the papers and the documents submitted by the candidate and they should allocate independent marks based on the Marking Scheme. The experts should be* ***specifically requested to comment*** *on the quality, impact of research on the discipline, profession, industry and wider community based on the papers, publications, reports and other documents submitted by the applicant, with special reference to the three outstanding papers as claimed by the applicant*."

The evaluation of the applicant under Sections 1, 3.2 and 3.3 is carried out by a panel appointed by the Senate consisting of three Senior Professors or Professors with specialty in the relevant field. The Dean of the relevant Faculty shall function as its Chairman. Whenever possible, the said Panel, which I shall refer to as the 'Senate Appointed Panel', should include at least one person from outside the University to which the applicant belongs, and one person from the same University but from outside the Faculty to which the applicant belongs. The Circular requires the Senate Appointed Panel, while alloting marks, to submit a report to the Selection Committee regarding the applicant's teaching ability, service to the University, profession, industry, national development, community etc, and leadership qualities.

The final marks of a candidate according to the scheme of recruitment will be the average of the total and component marks given by the Panel of Experts and the Senate Appointed Panel.

The marks that were allotted to the Petitioner and the 14$^{th}$ Respondent by the Panel consisting of the two External Experts and the Senate Appointed Panel are as follows:

| **Section** | **Petitioner** | **14$^{th}$ Respondent** |
|---|---|---|
| Section 1 | 41.5 | 39.5 |
| Section 2 | 79.88 | 81.63 |
| Section 3.1 | 04 | 05 |
| Section 3.2 | 06 | 06 |
| Section 3.3 | 10 | 10 |
| Total | 141.38 | 142.13 |

Method of Selection

Under the heading 'Method of Selection', Circular No. 869 requires the candidates with the required qualifications to appear before a Selection Committee consisting of the following:

a) The Vice Chancellor of the University, who shall be the Chairman;

b) Two nominees appointed by the University Grants Commission;

c) Two nominees of the University Council who were appointed to the Council by the University Grants Commission;

d) The Dean of the relevant Faculty;

e) Head of the relevant Department;

f) Two Senior Professors / Professors appointed by the Senate from among its members with knowledge of the subject at least at degree level.

The Circular goes on to state as follows:

> "*Every applicant shall appear before the Selection Committee and make a presentation on his/her main area of research or creative work. Audio visual, multimedia facilities etc may be provided for the presentation. This may be followed by a discussion with the Selection Committee. The Selection Committee shall arrive at a score on a scale of 10 for a candidate's presentation skills.*"

Appointment of the 14th Respondent

It is admitted that since both candidates had obtained the minimum mark set out in Section 4 of the said Circular, the final selection had to be made on the basis of the aggregate marks allotted to each candidate by the External Experts and the Senate Appointed Panel, with 90% being allotted to the candidate with the highest mark and the other candidate's marks being scaled accordingly. The balance 10 marks were allotted to the presentation of each candidate before the Selection Committee.

The Petitioner states that he and the 14th Respondent, having been awarded the minimum marks for Sections 1, 2 and 3, had appeared before the Selection Committee, and made presentations as required by the Circular.

The final mark obtained by the Petitioner and the 14th Respondent was as follows:

| | Petitioner | 14th Respondent |
|---|---|---|
| Aggregate marks given by the two panels | 141.38 | 142.13 |
| Total marks on a scale of 90% | 89.53 | 90 |
| Marks given for the presentation | 06 | 07 |
| Total marks | 95.53 | 97 |

By virtue of having scored more marks than the Petitioner, the 14th Respondent had been selected by the Selection Committee. The 14th Respondent had accordingly been appointed to the Post of Professor of Surgery (Chair) of the University of Colombo, by letter dated 10th July 2008, marked '**H2**'.

The Petitioner states that even though he filed SC (FR) Application No. 305/2008 challenging the appointment of the 14th Respondent on the basis that the composition of the Selection Committee was not in accordance with the provisions of the Circular, the Supreme Court had upheld the objection that the application has been filed out of time and by its judgment delivered on 5th February 2010 dismissed the application of the Petitioner.[2]

2014 – unsolicited report by an External Expert

The issue that culminated in this application commenced six years after the appointment of the 14th Respondent, when, in April 2014, one of the two External Experts, the 15th Respondent, whom I shall refer to as 'EE1' sent what I would call an unsolicited email marked '**J**' addressed to the 4th Respondent, the then Vice Chancellor of the 3rd Respondent, claiming that he had made a *mistake* in the allotment of marks to the 14th Respondent. The Petitioner claims that if not for this

[22] The petition in SC(FR) Application No. 305/2008 has been marked 'I1', while the Order of the Supreme Court has been marked 'I4'.

mistake, the Petitioner should have been appointed to the post of Professor of Surgery (Chair) by virtue of having scored more marks than the 14th Respondent.

What followed was a complaint by the Petitioner to the Presidential Secretariat, the findings by a Committee appointed by the Ministry of Higher Education,[3] refusal by the Council of the 3rd Respondent on two occasions to interfere with the appointment of the 14th Respondent, and with the change in the hierarchy of the 3rd Respondent, a recommendation by the Council of the 3rd Respondent in July 2015 that the Petitioner should also be appointed as Co-Chair - Professor of Surgery, and finally the appointment of the Petitioner as Co-Chair - Professor of Surgery. The Council, for reasons recorded by it, did not interfere with the initial appointment of the 14th Respondent to the post of Professor of Surgery.

It appears that the Petitioner was not unhappy with the above decision not to interfere with the appointment of the 14th Respondent made in 2008. The 14th Respondent however challenged the appointment of the Petitioner as Co-Chair,[4] which prompted the Petitioner to file this application, seeking a Writ of Certiorari to quash the decision of the Council of the 3rd Respondent taken in 2008 to appoint the 14th Respondent as the Professor of Surgery (Chair) and a Writ of Certiorari to quash the decision of the Council of the 3rd Respondent not to withdraw the above appointment of the 14th Respondent.

The principal argument of the learned President's Counsel for the Petitioner is that the 14th Respondent has misrepresented facts and/or made false and inaccurate statements in his application, thereby gaining more marks than he was entitled to and the appointment to the post of Professor of Surgery in 2008.

In order to place in perspective the above argument, it would be important to start by referring to the issues that were raised in the unsolicited email of 'EE1'.

[3] Marked 'P8' and annexed to the Statement of Objections of the 5th Respondent.
[4] CA (Writ) Application No. 332/2015.

Section 2.1 of Circular No. 869

I have already referred to the fact that applications for the said post are assessed in terms of the marking scheme, method of evaluation and method of selection set out in Circular No. 869 issued by the UGC. I have also set out that the marking scheme consisted of three principal sections numbered as 1, 2 and 3, with each section divided into several sub-sections.

The purported mistake relates to Section 2.1.1 which had been divided into three sub-sections, numbered as 2.1.1, 2.1.2 and 2.1.3. In terms of Sub-section 2.1.1, an applicant was entitled upto 3 points for each Research paper published in full in a refereed journal. The applicant was entitled to an additional 02 points if that paper had been published in an indexed journal, and to an additional 1 point if that paper had been published in a journal which has at least three issues a year. There was no limit to the maximum marks that could be allotted under this category.

Section 2.1.2 provided for marks to be allotted for peer reviewed presentations at National or International conferences, with one mark being allotted where the paper has been published in full, subject to a maximum of 15 marks, and half a mark where the paper had been published in abstract form, subject to a maximum of 10 marks.

In his self-assessed application marked '**G3**', the 14th Respondent had listed under a separate category, seven abstracts of papers presented by him and *published in indexed journals as a supplement with the journal* – vide '**G1**' - and claimed one mark for each of the said abstracts.[5] The complaint of the Petitioner is that the marking scheme set out in Circular No. 869 does not provide for marks to be claimed for such abstracts, and that the 14th Respondent had surreptitiously claimed the above seven marks.

The bone of contention therefore arises from the self assessed application of the 14th Respondent, where, having listed the Research papers published in full in a refereed journal under Sub Section 2.1.1, the 14th Respondent had listed separately, seven abstracts that had been published in refereed journals.

[5] Vide documents marked 'G1' and 'G3'.

The Reports submitted by the External Experts in 2008

The manner in which the two External Experts considered the above claim by the 14th Respondent has been set out clearly in the reports submitted by them in 2008.

By letter dated 28th March 2008 marked '**14R3(b)**' sent by 'EE1' to the Vice Chancellor, he had *inter alia* stated as follows:

> "*Please find here the marks in connection with the application of Prof. N. Samarasekara for the post of Professor of Surgery. I have made allowance for any possible duplication of content and also multiple authors. The numbering is the same as in his self assessment.*
>
> *Comments*
>
> *2) In Section 2.2 there are many many abstracts – very creditable – but there is overlap with the publications, orations and within the abstracts. However he more than deserves the total of ten for this part. Incidentally I feel he has been too strict with himself in marking the abstracts!* ***I also feel the abstracts which are part of the referred journal should be scored separately (7)***
>
> *Conclusions*
>
> *From what I have been asked to assess I feel his contribution to knowledge from work in Sri Lanka and abroad, and its publication in Sri Lanka and abroad, undoubtedly render him eligible to be considered for the post of Professor of Surgery*."

The fact that the 14th Respondent has listed the said abstracts has thus caught the attention of 'EE1', who nonetheless chose to award the 14th Respondent seven marks.

By letter dated 3rd April 2008, marked '**14R3(a)**', the second External Expert had informed the then Vice Chancellor of the 3rd Respondent as follows:

"*<u>Assessment of the Contributions made by the two applicants for the Post of Professor of Surgery, University of Colombo</u>*

*I forward herewith my assessments of the above applicants based on the marking scheme of the UGC dated 30th November 2005 forwarded to me by you.*

*I would like to make some observations on the assessment. I feel they are relevant as there is some contest in my mind in applying the marking scheme. However, as I have applied the interpretation to both applicants, there should be no bias.*

*In 2.1 of the marking scheme both candidates have added an additional point based on 2.1.1 111 for all articles in the indexed journals. Since one cannot index a journal unless published at least 4 x / year, I feel therefore there is an error.(If the marking scheme was to read 2.1.1 111 before 2.1.1 11 this anomaly could be corrected). Lest you wish to add the mark – I have given a breakdown of the marks, which will permit the selection board to do so.*

***One candidate has discriminated between an abstract of a presentation published as a supplement to an indexed journal as being of greater value. This point may need to be discussed. I have <u>not</u> made any recognition of this***."

The final paragraph makes it clear that the second External Expert too has identified that the 14th Respondent has listed abstracts published in supplements of indexed journals. While he has not given any marks for the said abstracts, the fact remains that the claim for marks for the said abstracts has been highlighted by the second External Expert in his letter, '**<u>3R1</u>**'.

The cumulative effect of the evaluation was that 'EE1' had allotted seven marks for the said abstracts while the second External Expert had allotted none. With the average marks of the two External Experts being the final mark for Sections 2.1 and 3, the result was that the 14th Respondent had received 3.5 marks for a category not provided for under Circular No. 869. I do not think this fact can be disputed by anyone.

The role of the Selection Committee

The final selection of the Petitioner was carried out by the Selection Committee chaired by the then Vice Chancellor of the 3rd Respondent. The above issue, although highlighted by the External Experts, had not caught the attention of the Selection Committee.

The fact remains however that the Selection Committee was made well aware of the issue that has now culminated in this application. It is in this context that the role of the Selection Committee, as the authority vested with the power of making the *final selection* of the most suitable candidate, comes into the forefront.

This Court, in the case of **Dr. Chelliah Elankumaran v. University of Jaffna and Others**[6], was called upon to consider the role of the Selection Committee under the provisions of the UGC Circular No. 723, which was the precursor to Circular 869. Having considered the provisions of the said circular, this Court held as follows:

> "*The Petitioner's complaint is that the Selection Committee does not have the power to adjust or alter the marks given by the External Experts or the Panel. What then is the role of the Selection Committee? Circular No. 723 sets out that the 'final selection shall be made by the Selection Committee based on the evaluation reports and in conformity with the procedure of appointment'. This Court is of the view that* ***the Selection Committee cannot merely rubber stamp the marks given by the External Experts and the Panel and that the Selection Committee must have the power to examine the marks given by each of the experts and the panel, and where necessary make adjustments.*** *However, this Court is mindful that granting the Selection Committee the power to make any adjustment it wishes would render nugatory the object that is sought to be achieved by having experts to review an application for Professor. Either way, this Court is of the view that Circular No. 723 does not contemplate a complete re-assessment of Sections 2 and 3.1, as in the instant case.*
>
> *Therefore, it is imperative that the right balance is struck between the two. This Court is of the view that where there are any inconsistencies which are of a non-*

[6] CA (Writ) Application No. 147/2013; CA Minutes of 17th May 2019.

*academic nature, or any glaring errors in the marks given by the experts or the panel, the Selection Committee has the power to rectify such errors or inconsistencies. However, where any adjustments are carried out, this Court is of the view that the Selection Committee must set out the reasons for such adjustment and if required, provide to Court the basis on which the marks given by the experts was adjusted. Furthermore, where the Selection Committee is of the view that adjustments need to be made in respect of marks given on academic issues, it is prudent that the Selection Committee consults the External Experts and arrive at a consensus which addresses the concerns of the Selection Committee*."

Similarly, in the case of **Dr. C.J.A. Jayawardena v. University of Colombo and Others**[7], this Court, interpreting the provisions of Circular No. 916 held as follows:

*"The use of the words, 'a final decision should be reached by the Selection Committee following the guidelines in the marking scheme' in 'R4' makes it clear that the final decision of selection must be with the Selection Committee, and that it cannot abdicate the powers conferred on it, by merely accepting whatever marks allotted to a candidate by either the Experts Panel or the Senate Appointed Panel."*

Therefore, it is clear that the purported mistake of 'EE1' had either escaped the scrutiny of the Selection Committee, or, the Selection Committee had in fact abdicated the power conferred on it by *merely accepting whatever marks allotted to a candidate by either the Experts Panel or the Senate Appointed Panel.* Whatever it may be, it appears that the members of the Selection Committee have not carried out the scrutiny that is required of them, particularly when the issues were *flagged* by both members of the Panel of Experts.

The result however, as claimed by the Petitioner is that the 14th Respondent has been erroneously awarded 7 marks by the first External Expert. Taking the average of the marks allotted by the two External Experts, the 14th Respondent had received an additional 3.5 marks for Section 2.1. The Petitioner claims that a reduction of the additional mark allotted to the 14th Respondent would result in the Petitioner having

[7] CA (Writ) Application No. 137/2018; CA Minutes of 22nd June 2020.

scored more marks than the 14th Respondent, and in the Petitioner being appointed to the said post of Professor of Surgery (Chair) instead of the 14th Respondent.

The unsolicited e-mail of the First External Expert in 2014 - revisited

This brings me back to the unsolicited email of 'EE1', marked '**J**'. The Petitioner states that *he received unofficial information that the 14th Respondent had been awarded marks in violation of the UGC Circular* by 'EE1'. How the Petitioner received such information, and the circumstances in which he received such information has not been explained, thereby giving rise to an allegation by the 14th Respondent that it is fact the Petitioner who has acted surreptitiously.

The purported violation related to Section 2.1 of the said Circular, which I have already discussed.

The Petitioner states that pursuant to an inquiry made by him, 'EE1' had sent the email dated 4th April 2014, marked '**J**', addressed to the Vice Chancellor of the 3rd Respondent, with copy to the Petitioner and the 14th Respondent, where 'EE1' had explained what had happened.

The email dated 4th April 2014 reads as follows:

> *"I write concerning the matter of the selection for the post of Professor of Surgery at which Profs. Samarasekera and Wijeratne were applicants and apologize for the delay in sending this letter.*
>
> 1. *I have realized that the marking in one of the assessments (Prof NS) included a mark for a category not in UGC circular 869 and that unfortunately the 7 marks 'allocated' by me were added to the total publications mark ignoring my remarks (shown here in bold type) in the letter I sent at that time – I quote*
>
>> *'Comments*
>> *I also feel the abstracts which are part of the referred journal should be scored separately (7) ….*

*5. The total for section 2 is 83. This should not be used to compare with any other applicant.'*

2. *Had the same been done by me for the other candidate (Prof. MW) he may have got between 6 and 11 more for this non-existent category – which unfortunately I did not notice.*

3. *In circular 869 the relevant paragraph in assessment used the words 'based on' not automatically added, so I feel it is reasonable for an assessor to anticipate that numbers and relevant remarks would have been considered. (The paragraph is reproduced below my signature)*

4. *This letter is written and copied to all concerned in the interests of fairness and transparency and with the hope that once any almost inevitable disquiet - for which I have to apologize - has settled our country will continue to benefit from the services and cooperation of two giants in the field of surgery, compared to whom I was and am a 'dwarf'.*

Having *stirred up a hornet's nest* by sending an unsolicited email six years after the evaluation and the appointment of the 14th Respondent, 'EE1' had followed the above email with a letter dated 24th April 2014, marked '**K**', the relevant parts of which reads as follows:

*"I write concerning the matter of the selection for the post of Professor of Surgery at which Profs. Samarasekera and Wijeratne were applicants in 2006-8. THIS IS MY DEFINITIVE LETTER – A PREVIOUS DRAFT DATED 4.4.2014 SENT FOR COMMENT ONLY TO THE PARTIES DIRECTLY CONCERNED HAS BEEN CIRCULATED I BELIEVE. PLEASE BEAR WITH ME TILL THE SUGGESTION AT THE END*

*This letter is written and copied to all concerned in the interests of fairness and transparency and with the hope that once any almost inevitable initial disquiet has settled our country will continue to benefit from the services and cooperation of all Colleagues in the field of surgery.*

*<u>But how</u>?*

*Both letters concerning the selection in 2006/8 for Professor of Surgery ended with the same paragraph.*

> *Conclusions*
>
> *From what I have been asked to assess I feel his contribution to knowledge from work in Sri Lanka and abroad, and it's publication in Sri Lanka and abroad, undoubtedly render him eligible to be considered for the Post of Professor in Surgery.*

***I do not think changing the selection is correct or appropriate or necessary, or should even be contemplated by any persons inside or outside the University**.*

*I consider this matter closed except to add my suggestion for your consideration is that you please Sir, with Prof. Samarasekera and the Faculty, Senate and Council, consider getting all concerned together and working towards a peaceful and constructive solution to benefit patients, students and the system as a whole."*

<u>Report of the Committee appointed by the Ministry of Higher Education</u>

The Petitioner had thereafter complained to the Secretary to the President, prompting the Secretary, Ministry of Higher Education to appoint a Committee consisting of the 20th – 22nd Respondents to inquire into the matter. In its report marked '**<u>3R2</u>**', the Committee had recommended as follows:

> *"(1) Considering the extra ordinary situation created by the erroneous marking in this instance, we recommend to the Council of the University of Colombo that Professor S.M. Wijeyaratne also to be appointed as a Professor of Surgery with effect from 10th July 2008, the date on which the appointment to the Professor of Surgery, University of Colombo, was made.*

(2) *Section 29(1) of the Universities Act of No. 16 of 1978, as amended thereafter, does not restrict the number of Chairs in a given discipline to one. Historically, the Colombo Medical School has had Co-Professors in some Clinical Disciplines including Surgery. So there is precedent for appointing Professor Wijeyaratne to the Chair of Surgery on an equal footing with Professor Samarasekera.*

(3) *Considerations of justice demand that both Professors of Surgery should be entitled to equal rights. Accordingly, we recommend that Professor S.M. Wijeyaratne should be appointed as the Head of the Department of Surgery for a period equal to the period Professor D.N. Samarasekera has functioned in that capacity.*

(4) *If any single event led to this regrettable state of affairs it was the arbitrary allocation of 7 extra marks to one candidate outside the provisions of Circular No. 869, and therefore future expert evaluators should be firmly instructed to strictly eschew arbitrariness in assessment.*"

The above Committee was not appointed by the 3rd Respondent. Therefore, I am of the view that the 3rd Respondent was not compelled to follow its recommendations. While the Committee is said to have been served with a dossier of documents running to 236 pages, it appears to me from the contents of its report, that the Committee had acted on the aforementioned email and letter sent by 'EE1' and that the Committee has physically verified the marks sheets of the External Experts. However, the Committee has not sought an explanation from the External Experts nor has it afforded the 14th Respondent and the Petitioner an opportunity of clarifying any issues, prior to taking the above decision.

<u>Refusal by the University Grants Commission to implement the recommendations of the Committee</u>

Pursuant to the above Report, the Presidential Secretariat had directed the UGC to implement the above recommendations.[8] The then Chairman of the UGC had however sought a reconsideration of the said direction on the following basis:[9]

[8] Marked 'P7' and annexed to the Statement of Objections of the 5th Respondent.

"*It is noticed that the inquiry committee has made their recommendations based on documents given by an Additional Secretary Ministry of Higher Education that had included a draft given by ... one of the two evaluators. I understand that the* ***officially signed letter (not a draft as an email) submitted to the Vice Chancellor, University of Colombo by the (external expert) has not been made available to the inquiry committee*****.**

*In terms of the principles of natural justice, a fair hearing should be given to both parties in order to come to a fair solution and recommendation. The inquiry committee appointed by the Secretary, Ministry of Higher Education has not obtained the views of the (external Expert) on whose draft the entire inquiry was based on. The fact that the (External Export) has not been summoned is a serious omission by the inquiry committee. I understand that the signed letter dated 24th April 2014 has not been looked into.. "*

Decision of the Council of the 3rd Respondent

I must also observe that the Council of the 3rd Respondent declined to take any remedial measures on two occasions. The first is at its 485th meeting held on 18th June 2014[10] where it was decided not to proceed any further in view of the aforementioned letter dated 24th April 2014 sent by 'EE1'. The second is at its 492nd meeting held on 11th February 2015,[11] where the Council of the 3rd Respondent had decided to "*close this matter and the Council having perused all the recommendations and the sequence of incidents which took place, decided not to comply with the directives given by the then officials of the Ministry of Higher Education and the Presidential Secretariat*."

Fresh Complaint by the Petitioner to the University Grants Commission

The Petitioner states that as the 3rd Respondent did not take any steps on the recommendations of the above Committee, he wrote to the UGC *to remedy the injustice caused to him by the said erroneous marking in favour of the 14th*

[9] Marked 'P9' and annexed to the Statement of Objections of the 5th Respondent.
[10] Document marked 'P22' annexed to the Petition in CA (Writ) 332/15.
[11] Document marked Annexure 10 to 'P27' in the Petition in CA (Writ) 332/15.

*Respondent.*[12] By then, the Chairman of the UGC had changed and in office was a Medical Professional with whom the 14th Respondent has allegedly had a professional rivalry. The UGC had accordingly appointed the 25th – 27th Respondents to look into the said complaint. While the recommendation of the said Committee is not known, the UGC, by its letter dated 23rd June 2015, marked '**3R3**', had informed the 3rd Respondent that its Council is empowered to carry out the directives made under Section 29(l) of the Universities Act.[13]

Re-consideration of the issue by the Council of the 3rd Respondent

Having initially declined to review the issue, the Council of the 3rd Respondent was invited by the 23rd Respondent, who by then had been appointed as the Competent Authority for the 3rd Respondent, to re-consider the said issue. In her Memorandum No. 496/20 submitted to the Council of the 3rd Respondent,[14] the 23rd Respondent had submitted as follows:

> "*We cannot get away from the fact that this selection has been seriously flawed.*
>
> *The University of Colombo has to take part of this responsibility.*
>
> *Seven years later, it would be a travesty of justice to remove (the 14th Respondent) especially given the small margin which demonstrates very clearly that the two applicants were equally poised."*

The 23rd Respondent had thereafter reiterated the aforementioned recommendations of the Committee comprising of the 20th – 22nd Respondents.

The Council of the 3rd Respondent had taken the following decision at its 496th meeting held on 9th July 2015:

[12] Vide paragraph 53 of the petition.
[13] Section 29(l) reads as follows: Subject to the powers, duties and functions of the Commission, a University shall have power - to recommend to the Commission the institution of Professorships, Associate Professorships, Senior Lectureships or Lectureships, and other posts as may be required for the purposes of the University;
[14] Vide P27, annexed to the petition in CA (Writ) Application No. 332/2015.

"*The Council in the full knowledge that both candidates were equally poised took the following decisions.*

*a) That it would not be equitable to withdraw the Chair Professorship from Professor Samarasekara six years after it was given.*

*b) That Professor Mandika Wijeratne qualified to be appointed as Chair Professor in Surgery and the error should be corrected.*

*c) That no additional funds were required.*

*d) That both Professor Samarasekara and Professor Wijeratne should share Headship equitably and amicably.*

e) *That when both Professor Samarasekara or Professor Wijeratne retires or leaves the Department, the Department of Surgery will revert to having only one Chair Professor.*"

The 3rd Respondent had thereafter sought approval from the UGC to create an additional cadre Chair, which request had been approved by the UGC. The Petitioner had been informed by letter dated 28th July 2015 marked '**N**' that he had been appointed as Co-Chair of Surgery.

It is in the above factual background that the Petitioner filed this application, seeking a Writ of Certiorari to quash the appointment of the 14th Respondent made in 2008 and the decision of the 3rd Respondent in 2015 not to withdraw the said appointment.

Has the 14th Respondent misrepresented facts in his self-assessed application?

As I have already observed, the principal argument of the learned President's Counsel for the Petitioner is that the 14th Respondent has misrepresented facts and/or made false and inaccurate statements in his application, thereby gaining (a) more marks than he was entitled to, and (b) the appointment to the post of Professor of Surgery in 2008.

I must at the outset observe that the entire self assessed application of the 14th Respondent has not been filed before this Court. However, there does not appear to be any dispute that the 14th Respondent listed seven abstracts under Section 2.1.2.[15] Having considered the overall scheme of Circular No. 869, I am of the view that an applicant, while following the marking structure set out therein, can claim marks for any other academic or professional work that he or she has carried out.

What is critical is that such a claim must not be made surreptitiously or in a manner which would be hard to detect by the evaluators or in a misleading manner. I must also state that the External Experts that are appointed are leading professionals in their academic spheres, who are expected to carefully analyse the self-assessed application prior to allotting marks. In other words, they are experts and not amateurs. It would indeed be a sad reflection on their professionalism if they are to later take up the position that they made a mistake or that they were misled.

In this instance, the 14th Respondent has openly listed the said abstracts. The 14th Respondent has not acted surreptitiously nor has he *hidden* the seven abstracts under a section in the marking scheme in a manner that is hard to detect. What is of significant importance is that it is for these reasons that the External Experts were able to identify the claim by the 14th Respondent for marks for the abstracts – *vide the Reports of 3rd April 2008 ('**14R3(a)**') and 28th March 2008 ('**14R3(b)**').* Having identified it, the External Experts drew the attention of the Selection Committee to the said issue. How the Selection Committee failed to detect it is irrelevant to the argument now presented by the Petitioner. What is important to this application is that the 14th Respondent did not act surreptitiously nor has he attempted to deceive and/or mislead the External Experts. Therefore the allegation that the 14th Respondent misrepresented facts and/or made false or inaccurate statements in his application which eventually misled the External Experts, is misconceived, to say the least, and I have no hesitation in rejecting the said allegation.

Although I share the same misgivings that the then Chairman of the UGC had with the report of the Committee appointed by the Presidential Secretariat, the question of whether the 14th Respondent has acted deceptively has been considered by the said Committee, as borne out by the following paragraph from its report:

[15] Vide 'G1' and 'G2'.

"*The Committee wishes to reiterate the truth that the present holder of the post (Professor Samarasekara) was not responsible for the fact that the candidate who would have scored higher marks if there had been no error in the computation (Professor Wijeratne) was not appointed to the post.*"

The Committee had in fact arrived at the conclusion that the subsequent letter of 24th April 2014 does not absolve 'EE1' from the error. I must however state that laying the blame on 'EE1' alone is not correct as he had done his part by highlighting this issue in his report to the Selection Committee in 2008.

In the above circumstances, I am unable to agree with the argument of the learned President's Counsel for the Petitioner that the 14th Respondent misrepresented facts and/or made false and inaccurate statements in his application. I therefore see no legal basis to issue a Writ of Certiorari to quash the appointment of the 14th Respondent, made in 2008.

Finality in decisions made by public authorities

This brings me to the second Writ of Certiorari sought by the Petitioner, which is to quash the decision of the Council of the 3rd Respondent taken in June 2014 not to withdraw the above appointment of the 14th Respondent.

In considering this relief, the first issue I would like to address is the finality that must be attached to decisions of public authorities and the circumstances in which a decision can nonetheless be set aside by that public authority itself.

I would like to commence by re-producing the following passage from **Administrative Law** by Wade & Forsyth[16]:

"*It may be necessary to determine whether there is power to revoke or modify the decisions or orders of an administrative authority or tribunal. The question here is whether the authority itself has power to do this. This is different from*

[16] H.W.R. Wade and C.F. Forsyth, Administrative Law (11th Edition, 2014, Oxford University Press), page 191.

*the question whether some other authority has power to do so, which may be affected by a statutory provision that the decision 'shall be final'*."

Having said so, the authors proceed to state as follows:

> *"In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, 'the power may be exercised and the duty shall be performed from time to time as occasion requires.' But this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the* ***courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised****. The same arguments which require finality for the decision of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.....****Citizens whose legal rights are determined administratively are entitled to know where they stand****."* [17]

What is in issue here is whether the same public authority who made the decision can revoke it or vary it, or whether a decision once made is final and conclusive and not capable of being revoked by the same authority. Where such decisions affect legal rights of people, Courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The general rule therefore is that once a decision is made by a public authority, such decision is final and cannot be varied, revoked or rescinded. **Wade & Forsyth** go onto state that, *"If a public authority has statutory power to determine some question, for example the compensation payable to an employee for loss of office*[18]*, its decision once made is normally final and irrevocable. This is not because the authority and the employee are estopped from disputing it, but because, the authority has power to decide only once and thereafter is without jurisdiction in the case."* [19]

There are however several well recognized exceptions to the above rule. The first exception is where the power of review is provided for in the statute itself. It must be stated that even in such a situation, the party prejudiced must be heard prior to any change of decision.

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[17] Supra, page 191.
[18] Livingstone v. Westminster Corporation [1904] 2 KB 109.
[19] Supra; page 202

English Courts have identified certain instances where decision-makers are empowered to review, rescind or vary their decisions, even though such a power has not been expressly provided. The following passage from **Administrative Law**[20] sets out in a nutshell what those instances are:

> "*Even where such powers are not expressly conferred, it seems that* ***statutory tribunals have power to correct slips****[21] and to set aside decisions obtained by* ***fraud*** *or based upon a '****fundamental mistake of fact****'.*[22] *There has been little discussion of the source of these powers;* ***presumably they are implied from the tribunal's statute****.*[23]

The second exception to the rule would therefore be the power to correct an accidental mistake.

In **Akewushola v. Secretary of State for the Home Department**,[24] Sedley LJ held that once the decision is made, *"the maximum power must be to correct accidental errors which do not substantively affect the rights of the parties or the decision arrived at."* He proceeded to state that, "*I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses inherent power to rescind or review its own decisions*."

In the case of **Fajemisin v The General Dental Council**[25] the above passage by Sedley LJ was interpreted as follows:

> "*The use of the word "ordinarily" suggests that Sedley LJ thought that there may be situations other than the need to correct accidental errors where a tribunal could re-visit its previous decision, but he did not say what they might be…In short, Sedley LJ was saying, I think, that a tribunal's power to re-visit a previous*

[20] Supra; page 191-192.
[21] Akewushola v. Secretary of State for the Home Department [2000] 1 WLR 2295.
[22] Fajemisin v The General Dental Council [2013] EWHC 3501 para 37-8 (Keith J) in reliance upon Porteous v West Dorset District Council [2004] EWCA Civ 244 (local authority had power to retake a decision where a fundamental error of fact was found); similarly Crawley Borough Council v. B [2000] EWCA Civ 50 disapproving of R v. Southwark LBC ex p Dagou (1995) 28 HLR 72 to the opposite effect).
[23] The High Court has an exceptional power to reopen proceedings it has already determined where it was shown there would otherwise be 'significant injustice' and there was no other remedy (such as an appeal): Taylor v. Lawrence [2002] EWCA Civ 90.
[24] Supra.
[25] [2013] EWHC 3501.

*decision was limited to cases analogous to the slip rule 40.12[26] of the Civil Procedure Rules. The fact that the tribunal proceeded to determine the appeal in ignorance of the true facts as a result of an administrative error was not something which was capable of being corrected by something akin to the slip rule. Sedley LJ was saying that ordinarily the only circumstance in which a tribunal can re-visit a previous decision it made was in the case of an accidental error."*

The third exception is where a decision has been obtained by fraud. Lord Denning held in **Lazarus Estate Ltd. v. Beasley**[27] *that*:

"*No Court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.* ***Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;"***

Whether a decision could be reviewed where there is a fundamental mistake of fact arose in **Porteous v West Dorset District Council**.[28] In this case, Miss Porteous had applied to the local housing authority to be housed as a homeless person. She had received a letter informing her that she was eligible for assistance. This decision however had been made in ignorance of the fact that she was the tenant of a property in another part of the country which was available to her, as she had mistakenly thought that her tenancy of the property had been transferred to her sister. When the correct position was discovered, the authority withdrew their decision. The Court held that this decision was correct, with Mantell LJ holding as follows:

*"Is the local housing authority entitled to revisit and change an earlier decision if the earlier decision resulted from a fundamental mistake of fact? It would seem surprising if it could not. If an exception may be made for fraud why not for fundamental mistake? After all the resulting harm may be no greater in the one case than the other. Here, without there being any suggestion of bad faith on*

[26] Civil Procedure Rule 40.12 of the Civil Procedure Rules which provides that 'the Court may correct an accidental slip or omission in a judgment or order.' Similar provision is found in Section 189 of the Civil Procedure Code.
[27] [1956] 1 QB 702.
[28] [2004] EWCA Civ 244.

*either side, unknown to either party there was accommodation available at the date of the original decision. Once the true position became known why in common sense and justice should the local authority be held to a duty to provide accommodation which the applicant does not need and which could be made available in another more deserving case?"*

In **Fajemisin v The General Dental Council**,[29] it was held further that:

*"it would be surprising if the original decision could not be changed even though it had resulted from "a fundamental mistake of fact." If the original decision could be changed if it had been brought about by fraud, such as the deliberate non-disclosure of relevant facts, why not for fundamental mistake? If "fraud unravels all", why should fundamental mistake not do so as well? The resulting harm would be no greater in one case than the other."*

Accordingly, it was held that the authority had been entitled to withdraw its earlier decision. Although Mantell LJ did not refer to **Akewushola** in his judgment (*presumably because it was not cited to the Court*), **Porteous** is authority for the proposition that, in addition to cases in which a public body can re-visit a previous decision under the equivalent of the slip rule, a public body can re-visit a decision which was made in ignorance of the true facts when the factual basis on which it had proceeded amounted to a fundamental mistake of fact. This would then be the fourth exception to the rule.

As observed by the authors of **De Smith's Judicial Review**:[30]

"*Our view is that mistake of fact in and of itself renders a decision irrational or unreasonable. In general it is right that courts do leave the assessment of fact to public authorities which are primarily suited to gathering and assessing the evidence. Review must not become appeal. On the other hand it should be presumed that Parliament intended public authorities rationally to relate the evidence and their reasoning to the decisions which they are charged with making. The taking into account of a mistaken fact can just as easily be*

[29] Supra.
[30] Harry Woolf, Jeffry Jowell, Andrew Le Sueur, De Smith's Judicial Review [6th Edition,2007] Sweet & Maxwell, pages 568-569.

*absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration; or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision upon any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention*."

The circumstances under which a public authority may review a decision on the basis of a mistake of fact was laid down by the Court of Appeal of England and Wales in the case of **E v Secretary of State for the Home Department**.[31] Although this was not an application for judicial review, the Court followed Lord Slynn's decision in the judicial review application in **R v Criminal Injuries Compensation Board ex parte A [CICB]** and held as follows:[32]

"*In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB.*

1. *First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter.*

2. *Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable.*

3. *Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake.*

4. *Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning*."

[31] [2004] EWCA Civ 49.

[32] [1999] 2 AC 330; the decision was made on the basis of "unfairness" as opposed to "ignorance of fact." However, the Court in E, held that there is no real distinction between the two.

Having identified the exceptions to the rule, I must state that a party who wishes to bring a decision under any of the above exceptions has a high threshold to satisfy, and that public authorities must exercise great caution in resorting to the said exceptions, and that too, only after all affected parties are afforded an opportunity of being heard and presenting their side of the story.

The decision of the 3rd Respondent not to withdraw the appointment of the 14th Respondent

I will now consider whether, in the present application, the 3rd Respondent was justified in revisiting its decision in light of the surrounding circumstances of this case.

As the 14th Respondent had received 3.5 marks (*being the average marks of the two External Experts*) for the said abstracts, it is clear that the Selection Committee erred when it failed to take into consideration, the aforementioned recommendations of the External Experts. Given the slender margin between the marks obtained by the Petitioner and the 14th Respondent, should the Council of the 3rd Respondent have corrected this mistake?

I must say that in the above circumstances, the 3rd Respondent did have the power, at least theoretically, to rectify the said mistake. However, the manner in which the Council of the 3rd Respondent addressed the mistake gives rise to three concerns.

The first is, if the Council wished to amend and/or supplement the decision taken in 2008 with regard to the decision to appoint the 14th Respondent to the Chair in Surgery, it ought to have called for a detailed explanation from the External Experts, and thereafter directed the Selection Committee to carry out a re-assessment of both applications in accordance with the marking scheme.

The second is that the 14th Respondent and the Petitioner should have been afforded a hearing. A person once appointed cannot have the *Sword of Damocles* hanging over his head and have his appointment quashed seven years later on the strength of unsolicited emails, without any hearing at all. Although it would certainly have been desirable for the 14th Respondent to have been afforded a hearing, the failure to

afford a hearing in this instance however cannot be considered fatal to the decision of the 3rd Respondent, as the appointment of the 14th Respondent was kept intact.

The third is that the Council had rejected the complaint of the Petitioner on two occasions. Hence, when the Competent Authority submitted her Memorandum in July 2015, the Council ought to have first considered the reasons for such rejection prior to addressing the matters raised in the said Memorandum inviting the Council to vary their decision.

There are two other matters that I must advert to. First is the manner in which decisions of the 3rd Respondent and the UGC are changed whenever there is a change in the post of Vice Chancellor or Chairman of the UGC. The second is the failure on the part of the Council members and others holding high office within the 3rd Respondent failing to recuse themselves from the decision making process, when there is an apparent conflict of interest.

Be that as it may, in the Memorandum submitted by the Competent Authority, she had quite correctly stated that it would not be equitable to withdraw the Professorship from the 14th Respondent. I am in agreement with the views expressed by the Competent Authority that it would indeed have been a travesty of justice had the appointment of the 14th Respondent been set aside. I must also say that in view of the aforementioned drawbacks in the manner in which the Council of the 3rd Respondent addressed this issue, a withdrawal of the post of Professor of Surgery from the 14th Respondent would certainly have attracted in full force the dicta of Lord Greene in **Associated Provincial Picture Houses Limited v. Wednesbury Corporation**[33] and the dicta of Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**[34], in addition to it being challenged on the basis of procedural impropriety. Fortunately, sanity has prevailed and the appointment of the 14th Respondent has been kept in tact.

[33] [1948] 1 KB 223 at 229 – Unreasonableness has been defined as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority*.

[34] [1985] AC 374 at 408 - *By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'. 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*."

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I am therefore of the view that:

(a) The decision of the 3rd Respondent not to withdraw the appointment of the 14th Respondent is neither illegal nor irrational or unreasonable;

(b) There is no legal basis to issue a Writ of Certiorari to quash the decision of the Council of the 3rd Respondent not to withdraw the appointment of the 14th Respondent.

In the above circumstances, I am of the view that the Petitioner is not entitled to the relief prayed for. This application is accordingly dismissed, without costs.

**President of the Court of Appeal**