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. 332/2015

Professor Dharmabandhu Nandadeva Samarasekera,
No. 28/1, Ishwari Road, Colombo 06.

PETITIONER

Vs.

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

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

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

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

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

6. Professor Rohan Jayasekera,
   Department of Anatomy, Faculty of Medicine, Kynsey Road, Colombo 08.

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

8. Professor Rohan Rajapakse,

Faculty of Agriculture, University of Ruhuna, Mapalana, Kamburupitiya.

9. Mr. Rajan Asirwatham.

10. Mr. Nalin Atttygalle,.

11. Professor A.P.R. Aluvihare,
No. 132/7, Wariyapola Sumangala
Mawatha, Kandy.

12. Professor C. Ratnatunga,
No. 38/20 Aniwatte Road,
Kandy.

13. Professor H. R. Seneviratne,
No. 32 Sagala, 1st Chappel Lane,
Colombo 6.

14. Professor W.D. Ratnasooriya,

15. Professor Jayantha Jayawardena,
No. 2A, 6th Lane, Pagoda Road, Nugegoda.

16. Mr. W.N. Wilson,
Dept. of Geography, Faculty of Arts,
University of Colombo, Colombo 3.

17. Professor Amal Jayawardena,
Emeritus Professor,
Dept. of International Relations, Faculty of Arts, University of Colombo.

18. Professor S. Sandarasegaram,
Faculty of Education, University of Colombo.

19. Mr. N. Selvakumaran,
Faculty of Law, University of Colombo.

20. Professor T.R. Ariyaratne,
Dept. of Physics, Faculty of Science,
University of Colombo, Colombo 3.

21. Professor M.H.R. Sheriff,
    No. 21 Fairfield Gardens,
    Colombo 8.

22. Mrs. Ramanee Amarasuriya.

23. Vidyanidi Dr. N.R. de Silva.

24. Professor A.H.M. Hussain,

25. Mr. K. Kanag-Isvaran,
    104, Isipathana Mawatha, Colombo 05.

26. Mrs. Malini Peiris.

27. Mr. Chelliah Thangarajah
    No. 21/4, Sinha Road,
    Mabola, Wattala.

28. Dr. Kingsley Wickremasuriya
    No. 198/10, Nawala Road, Nawala.

29. Dr.Y.L.H. Yakandawala
    No. 19A, Pietrez Place,
    Kohuwala, Nugegoda.

30. Mr. S.J. Amarasekera.

.

31. Mr. L.P.J. Alexis Silva.

32. Dr. R.C.K. Hettiarachchi,
33. Professor Nayani Melegoda,
34. Professor W. Chandradasa,
35. Professor Sunil Chandrasiri,
36. Ms. W. Indira Nanayakkara,
37. Dr. (Ms) R. Senathiraja,
38. Professor Jennifer Perera,
39. Professor K.R.R. Mahanama,
40. Professor Lakshman Ratnayake,
41. Professor Savitri Goonesekere,
42. Mr. Thilak Karunaratne,
43. Mr. Nigel Hatch,

44. Mr. W.A. Wijewardena,
45. Dr. Sanjiva Weerawarana,
46. Dr. Mrs. Ranee Jayamaha,
47. Professor Janaka de Silva,
48. Dr. Harsha Cabral,
49. Mr. Jehan Prasanna Amaratunga,

27th – 49th Respondents are Members of the Council of the University of Colombo.

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

81. Professor D.T.U. Abeytunga,
82. Professor R.S. Dassanayake,
83. Professor S.W. Kotagama,
84. Professor T.D. Silva,
85. Dr. T.U. Hewage,
86. Professor C.P.D.W. Mathew,
87. Dr. G.R. Constantine,
88. Professor Priyadarshani Galappatthy,
89. Professor S. Sri Ranganathan,
90. Professor K.H.S. de Silva,
91. Professor D.G.H. de Silva,
92. Dr. A.P. Malalasekera,
93. Dr. M.R. Haniffa,
94. Dr. P.R. Warathanne,
95. Dr. A.H.M. Mawjood,
96. Dr. D.A.S. Athukorala,
97. Mr. G.K.A. Dias,
98. Professor A.P.G. Amarasinghe,
99. Professor E.R.H.S.S. Ediriveera,
100. Professor K.H. Tennakoon,
101. Ms. Shivanee R. Ilangakoon,
102. Dr. N.R. Dewasiri,
103. Professor J. Uyangoda,
104. Professor Asanga Tilakaratne,
105. Dr. P.R.N. Fernando,
106. Dr. S. Senarath,
107. Professor E.D. de Silva,
108. Mr. C. Kasturiarachchi,
109. Professor M.V. Vidhanapathirana,
110. Dr. A.A. Azeez,
111. Professor Nadira Karunaweera,
112. Professor D.R.C. Hanwella,
113. Professor Senaka Rajapakse,
114. Professor C. Ariaranee Gnanathasan,
115. Professor M.D.S. Lokuhetti,
116. Professor Deepika Fernando,
117. Professor W.K. de Abrew,
118. Professor Varuni A. de Silva,
119. Dr. Indika Karunathilaka,
120. Professor Athula Ranasinghe,
121. Professor A.M.G.N.K. Attanayake

122. Professor Ajantha Hapuarachchi,
123. Professor Roland Abeypala,
124. Dr. A.M. Hettige,
125. Professor Sharya Scharenguivel,
126. Professor P.S.M. Gunaratne,
127. Dr. J.K. Wijerathna,
128. Professor K.M.N. de Silva,
129. Professor M.D.P. de Costa,
130. Professor S.A. Deraniyagala,
131. Professor R.L.C. Wijesundera,
132. Professor H.D.K.G.A Weerakoon,
133. Professor W.S. Premawansa,
134. Professor D.N. De Silva,
135. Dr. Jean Perera,
136. Mr. M.D. Piyathilaka,
137. Mr. M. Senanayake,
138. Venerable Professor Agalakada Sirisumana Thero,
139. Professor Indralal de Silva,
140. Professor A.D.M.S. Abeyratne,
141. Professor G. Amala de Silva,
142. Professor T.D.K. Waleboda,
143. Professor L.A.D.A Tissa Kumara,
144. Professor Sarath Wijesuriya,
145. Professor S.T. Hettige,
146. Venerable Professor M. Dhammajothi Thero,
147. Mr. W.M. Pragnadarshana,
148. Ms. S. Segarajasingham,
149. Professor H.D. Karunaratne,
150. Dr. N.N.J. Nawaratne,
151. Dr. M.P.P. Dharmadasa,
152. Professor J.A.S.K. Jayakody,
153. Professor S.R.D. Rosa,
154. Professor D.P. Dissanayake,
155. Professor Rohoni Hewamanne,
156. Professor D.U.J. Sonnadara,
157. Professor K.P.S.C. Jayaratne,
158. Professor T.L.S. Tirimanne,
159. Professor M. Roshini Sooriyarachchi,

160. Professor Y.N. Amaramali Jayatunga,
161. Professor Preethi V. Udagama,
162. Dr. M.R. Wijesinghe,
163. Professor Saroj Jayasinghe,
164. Dr. Upul Senarath,
165. Dr. C.P. Senanayake,
166. Professor H.M. Senanayake,
167. Professor V.P. Wickramasinghe,
168. Professor M.V.C. de Silva,
169. Ms. Dinithi Fernando,
170. Professor Shyam Fernando,
171. Professor M.W. Gunatunga,
172. Professor W. Sulochana S. Wijesundera,
173. Professor P.R. Fernando,
174. Professor C.N. Wijeyeratne,
175. Professor A. Kaluarachchi,
176. Professor Preethika Angunawela,
177. Professor N.D. Kodikara,
178. Dr. B. Fonseka,
179. Dr. U.P.P. Serasinghe,
180. Dr. D.A.C. Silva,
181. Dr. J. Wanigasinghe,

50th – 181st Respondents are Members of the Senate of the University of Colombo.

182. Professor Carlo Fonseka,
88/14B, Ferry Road, Ethul Kotte,
Kotte.

183. Dr. R.M.K. Ratnayaka,
12144A, 3rd Lane, Kandahena Watta,
Depanama,
Pannipitiya.

184. Professor Mohan De Silva,
Chairman,
University Grants Commission.

185. Professor P.S.M. Gunaratne,
186. Professor Malik Ranasinghe,

187. Professor Hemantha Senanayake,
188. Dr. Ruvaiz Hanifa,
189. Dr. Wickrema Weerasuriya,
190. Ms. Pushpa Wellappili,
191. Dr. Priyantha Premakumara,
192. Professor R. Kumaravadivel,

184th – 191st Respondents at
University Grants Commission,
No. 20, Ward Place,
Colombo 07.

193. Professor Lalitha Mendis,
Former Competent Authority of the University of Colombo,
No. 352/3G, Sirikotha Lane,
Colombo 03.

194. Professor Lakshman Dissanayake,
Vice Chancellor,
University of Colombo.

195. University of Colombo.

196. Dr. Kumara Hirimburegama,
Former Vice Chancellor,
University of Colombo.

2nd, 9th, 14th, 17th – 19th, 22nd – 24th, 26th, 30th – 180th, 193rd – 195th Respondents at
No. 94, Cumaratunga Munidasa Mawatha,
Colombo 03.

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

198. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

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

Counsel: Uditha Egalahewa, P.C., with Damitha Karunaratne and Vishva Vimukthi for the Petitioner

Ikram Mohammed, P.C., with Roshaan Hettiarachchi and Vinura Jayawardena for the 1st Respondent

Kuvera De Zoysa, P.C., with Nishan Premathiratne, Ameer Maharoof and Krishan Fernandopulle for the 2nd Respondent

Faisz Musthapha, P.C., with Hemasiri Withanachchi for the 9th, 32nd, 35th – 40th, 46th, 49th, 50th, 120th, 193rd – 195th Respondents

Gamini Marapana, P.C, with Navin Marapana, P.C., Uchitha Wickremasinghe, Thanuja Meegahawatte and Saumya Hettiarachchi for the 42nd Respondent

M.U.M. Ali Sabry, P.C., with Ruwantha Cooray for the 156th Respondent

Romesh De Silva, P.C., with Chandimal Mendis, Sharafi Mohideen and Sarasi Paranamanna for the 184th –192nd and 197th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 9th December 2019 and 13th July 2020

Tendered on behalf of the 1st Respondent on 27th November 2019 and 14th July 2020

Tendered on behalf of the 2nd Respondent on 14th July 2020

Tendered on behalf of the 42nd Respondent on 10th July 2020

Tendered on behalf of the 184th – 192nd and 197th Respondents on 31st October 2019 and 10th July 2020

Tendered on behalf of the 9th, 32nd, 35th – 40th, 46th, 49th, 50th, 120th, 193rd – 195th Respondents on 4th August 2020

Argued on: 22nd June 2020 and 26th June 2020

Decided on: 10th March 2021

Arjuna Obeyesekere, J., P/CA

In this application, the Petitioner, who had been appointed to the post of Professor of Surgery (Chair of Surgery) of the Faculty of Medicine, University of Colombo in July 2008 is impugning the decision taken in July 2015 by the Council of the 195th Respondent, the University of Colombo to appoint the 1st Respondent as Professor of Surgery (**Co-Chair**) of the Faculty of Medicine, University of Colombo with effect from July 2008.

The 1st Respondent has filed CA (Writ) Application No. 398/2015 seeking a Writ of Certiorari to quash (a) the aforementioned appointment of the Petitioner in 2008, and (b) the decision taken by the Council of the 195th Respondent in 2015 not to withdraw the said appointment in view of the extraordinary circumstances that took place from April 2014, which I would discuss later.

This application was taken up for argument together with CA (Writ) Application No. 398/2015, as most of the facts relating to both applications are common. However, all parties agreed that this Court should deliver separate judgments. Accordingly, by judgment delivered on 10th March 2021, I have dismissed the application of the 1st Respondent in CA (Writ) Application No. 398/2015.

I shall commence with a consideration of the facts relating to this application.

Vacancy in the post of Professor of Surgery (Chair)

By an advertisement published in the *Daily News* newspaper of 10th September 2007, the Registrar of the 195th 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. It is not disputed that 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.

On 11th September 2007, the Registrar had issued a document marked '**1R4**', setting out details relating to the above appointment. In terms of '**1R4**', 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 was the Petitioner, who possessed the required qualifications. Having obtained the MBBS degree with Second Class (Upper Division) Honours from the 195th 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 Petitioner had been appointed as a Professor in Surgery at the 195th Respondent in August 2001. The Petitioner has been the Secretary, College of Surgeons of Sri Lanka and the President of the Sri Lankan Society of Gastroenterology from 2011-2015

The second applicant was the 1st Respondent, who too possessed the abovementioned qualifications. After completing his MBBS with Second Class (Upper Division) Honours, the 1st Respondent has obtained the degree of Master of Surgery (General Surgery) from the 195th 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 195th Respondent in 2002. The 1st Respondent too 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.

<u>Circular No. 869</u>

The marking scheme that was to be applied to the above selection which is referred to in '**1R4**' and which formed an annex thereto has been extracted from Circular No. 869 dated 1st December 2005 marked '**P12**' issued by the 197th Respondent, 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 '**1R4**', 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 Section 3.2 Section 3.3	Dissemination of knowledge Awards 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 allotting 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 1st Respondent by the Panel consisting of the two External Experts and the Senate Appointed Panel are as follows:

Section	**Petitioner**	**1st Respondent**
Section 1	39.50	41.50
Section 2	81.63	79.88
Section 3.1	05	04
Section 3.2	06	06
Section 3.3	10	10
Total	142.13	141.38

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 Petitioner

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.

It is admitted that the Petitioner and the 1st 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 1st Respondent was as follows:

	Petitioner	**1st Respondent**
Aggregate marks given by the two panels	142.13	141.38
Total marks on a scale of 90%	90	89.53
Marks given for the presentation	07	06
Total marks	97	95.53

By virtue of having scored more marks than the 1st Respondent, the Petitioner had been selected by the Selection Committee. The Petitioner had accordingly been appointed to the Post of Professor of Surgery (Chair) of the University of Colombo, by letter dated 10th July 2008.

The 1st Respondent states that even though he filed SC (FR) Application No. 305/2008 challenging the appointment of the Petitioner 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 1st Respondent.[1]

<u>2014 – unsolicited report by an External Expert</u>

The issue that culminated in this application commenced six years after the appointment of the Petitioner, when, in April 2014, one of the two External Experts, the 11th Respondent, whom I shall refer to as 'EE1' sent what I would call an unsolicited email marked '**<u>P20</u>**' addressed to the 196th Respondent, the then Vice Chancellor of the 195th Respondent, claiming that he had made a *mistake* in the allotment of marks to the Petitioner. The 1st Respondent claims that if not for this

[11] The petition in SC(FR) Application No. 305/2008 and the Order of the Supreme Court have been marked 'I1', and 'I4' respectively, and annexed to the petition in CA (Writ) Application No. 398/2015.

mistake, the 1st Respondent should have been appointed to the post of Professor of Surgery (Chair) by virtue of having scored more marks than the Petitioner.

What followed was a complaint by the 1st Respondent to the Presidential Secretariat, the findings by a Committee appointed by the Ministry of Higher Education,[2] refusal by the Council of the 195th Respondent on two occasions to interfere with the appointment of the Petitioner, and with the change in the hierarchy of the 195th Respondent, a recommendation by the Council of the 195th Respondent in July 2015 that the 1st Respondent should also be appointed as Co-Chair - Professor of Surgery, and finally the appointment of the 1st Respondent as Co-Chair - Professor of Surgery. The Council, for reasons recorded by it, did not interfere with the initial appointment of the Petitioner to the post of Professor of Surgery, and the Petitioner continued to hold the post of Professor of Surgery (Chair).

The Petitioner, aggrieved by the decision of the 195th Respondent to appoint the 1st Respondent to the post of Professor of Surgery (Co- Chair) filed this application challenging the said appointment of the 1st Respondent. This prompted the 1st Respondent to file CA (Writ) Application No. 398/2015, seeking a Writ of Certiorari to quash the decision of the Council of the 195th Respondent taken in 2008 to appoint the Petitioner as the Professor of Surgery (Chair) and a Writ of Certiorari to quash the decision of the Council of the 195th Respondent not to withdraw the above appointment of the Petitioner. The principal argument of the 1st Respondent in seeking the relief in CA (Writ) Application No. 398/2015 was that the Petitioner 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 arguments of the learned President's Counsel for the Petitioner, it would be important to start by referring to the issues that were raised in the unsolicited email of 'EE1'.

[2] Vide '195R3'.

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,[3] the Petitioner had listed under a separate category, seven abstracts of papers presented by him and *published in indexed journals as a supplement with the journal*[4] and claimed one mark for each of the said abstracts.[5] The complaint of the 1st Respondent 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 Petitioner had surreptitiously claimed the above seven marks.

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

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[3] Vide document marked 'G3' annexed to the petition in CA (Writ) Application No. 398/2015.
[4] Vide document marked 'G1' annexed to the petition in CA (Writ) Application No. 398/2015.
[5] Vide the said 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 Petitioner has been set out clearly in the reports submitted by them in 2008.

By letter dated 28th March 2008[6] 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 Petitioner has listed the said abstracts has thus caught the attention of 'EE1', who nonetheless chose to award the Petitioner seven marks.

By letter dated 3rd April 2008, marked '**195R2**', the 12th Respondent, who was the second External Expert had informed the then Vice Chancellor of the 195th Respondent as follows:

[6] Vide document marked '14R3(b)' annexed to the Statement of Objections filed by the Petitioner in CA (Writ) Application No. 398/2015.

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

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 not made any recognition of this."

The final paragraph makes it clear that the second External Expert too has identified that the Petitioner 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 aforementioned letter '**195R2**'.

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 Petitioner 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 195th 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**[7], 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-academic nature, or any glaring errors in the marks given by the experts or the*

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

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**[8], 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 1st Respondent is that the Petitioner has been erroneously awarded 7 marks by the first External Expert. Taking the average of the marks allotted by the two External Experts, the Petitioner had received an additional 3.5 marks for Section 2.1. The 1st Respondent claims that a reduction of the additional mark allotted to the Petitioner would result in the 1st Respondent having

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

scored more marks than the Petitioner, and in the 1st Respondent being appointed to the said post of Professor of Surgery (Chair) instead of the Petitioner.

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

This brings me back to the unsolicited email of 'EE1', marked '**P20**'. The 1st Respondent states that *he received unofficial information that the Petitioner had been awarded marks in violation of the UGC Circular* by 'EE1'. How the 1st Respondent received such information, and the circumstances in which he received such information has not been explained, thereby giving rise to an allegation by the Petitioner that it is fact the 1st Respondent who has acted surreptitiously.

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

The 1st Respondent states that pursuant to an inquiry made by him, 'EE1' had sent the email dated 4th April 2014, marked '**P20**', addressed to the Vice Chancellor of the 195th Respondent, with copy to the 1st Respondent and the Petitioner, 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 Petitioner, 'EE1' had followed the above email with a letter dated 24th April 2014, marked '**<u>P21</u>**', 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 1st Respondent had thereafter complained to the Secretary to the President, prompting the Secretary, Ministry of Higher Education to appoint a Committee consisting of the 182nd – 184th Respondents to inquire into the matter. In its report marked '**<u>195R3</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 University of Colombo and therefore, I am of the view that the University 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 Petitioner and the 1st Respondent an opportunity of clarifying any issues, prior to taking the above decision.

Refusal by the UGC to implement the recommendations of the Committee

Pursuant to the above Report, the Presidential Secretariat had directed the UGC to implement the above recommendations.[9] The then Chairman of the UGC had however sought a reconsideration of the said direction on the following basis:[10]

[9] Marked 'P7' and annexed to the Statement of Objections of the 5th Respondent in CA (Writ) Application No. 398/2015.

[10] Marked 'P9' and annexed to the Statement of Objections of the 5th Respondent in CA (Writ) Application No. 398/2015.

"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 195th Respondent

I must also observe that the Council of the 195th Respondent declined to take any remedial measures on two occasions. The first is at its 485th meeting held on 18th June 2014[11] 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,[12] where the Council of the 195th 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 1st Respondent to the UGC

The 1st Respondent states that as the 195th 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 Petitioner.*[13] By then, the Chairman of the UGC had changed and in office was a Medical Professional

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[11] Vide document marked 'P22'.

[12] Vide document marked Annexure 10 to 'P27'.

[13] Vide paragraph 53 of the petition in CA (Writ) Application No. 398/2015.

with whom the Petitioner has allegedly had a professional rivalry. The UGC had accordingly appointed the 185th, 186th and 189th 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 '**195R4**', had informed the 195th Respondent that its Council is empowered to carry out the directives made under Section 29(l) of the Universities Act.[14]

Re-consideration of the issue by the Council of the 195th Respondent

Having initially declined to review the issue, the Council of the 195th Respondent was invited by the 193rd Respondent, who by then had been appointed as the Competent Authority for the 195th Respondent, to re-consider the said issue. In her Memorandum No. 496/20 marked '**P27**' submitted to the Council of the 195th Respondent, the 193rd 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 Petitioner) especially given the small margin which demonstrates very clearly that the two applicants were equally poised.*"

The 193rd Respondent had thereafter reiterated the aforementioned recommendations of the Committee comprising of the 182nd – 184th Respondents.

The Council of the 195th Respondent had taken the following decision at its 496th meeting held on 9th July 2015:

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

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[14] 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;

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 195th Respondent, having sought and obtained approval from the UGC to create an additional cadre Chair, informed the 1st Respondent by letter dated 28th July 2015 that he had been appointed as Co-Chair of Surgery.[15]

Aggrieved by the decision of the Council of the 195th Respondent to appoint the 1st Respondent to the Professor of Surgery (Co-Chair of Surgery) the 1st Respondent filed this application seeking *inter alia* the following relief:

1. A Writ of Certiorari to quash the decision of the Council of the 195th Respondent, the University of Colombo dated 9th July 2014, to appoint the 1st Respondent to the post of Professor of Surgery (Chair of Surgery) of the Faculty of Medicine of the University of Colombo;

2. A Writ of Certiorari to quash the decision contained in the letter of the 193rd Respondent, the Competent Authority of the University of Colombo dated 14th July 2015 appointing the 1st Respondent to the post of Professor of Surgery in the Faculty of Medicine University of Colombo with effect from 10th July 2008.

[15] Vide letter marked 'N' annexed to the petition in CA (Writ) Application No. 398/2015.

3. Writs of Certiorari to quash the decisions of the 197th Respondent and the Council of the 195th Respondent to create an additional post of Professor of Surgery (Chair of Surgery) of the Faculty of Medicine, University of Colombo;

I shall now consider the several arguments presented to this Court by the learned President's Counsel for the Petitioner.

Finality in decisions made by public authorities

The first argument of the learned President's Counsel for the Petitioner is that there must be finality to a decision made by a public authority, and that the Council of the 195th Respondent should not be permitted to reconsider an issue which has been determined six years ago. The issue that I must consider then 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 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*

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

*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.

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*

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

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 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*:

[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.
[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 Sri Lankan Civil Procedure Code.
[27] [1956] 1 QB 702.

> *"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.

Mantell LJ held that:

> *"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 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 commonsense 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*

[28] [2004] EWCA Civ 244.
[29] Supra.

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 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

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

[31][2004] EWCA Civ 49.

judicial review application in **R v Criminal Injuries Compensation Board ex parte A [CICB]**.[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*."

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.

As the Petitioner 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. The 195th Respondent therefore did have the power, at least theoretically, to reconsider and revisit the issue and take steps to rectify the said mistake. The Council of the 195th Respondent however did not revoke the

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[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.

appointment of the Petitioner for reasons recorded by it, a decision with which I wholeheartedly agree, particularly in view of the conclusion that I have reached in CA (Writ) Application No. 398/2015 that the Petitioner had not misrepresented facts and/or made false and inaccurate statements in his application.

Should the Petitioner have been afforded a hearing?

This brings me to the second argument of the learned President's Counsel for the Petitioner, which is that the Petitioner was not given a hearing prior to the appointment of the 1st Respondent, and that this amounts to a violation of the principles of natural justice and procedural fairness. I shall consider this argument bearing in mind the peculiar circumstances of this application, which I have set out earlier, and the fact that the appointment of the Petitioner has been kept intact.

The Petitioner's purported right to a hearing is based on his claim that had he been given an opportunity to explain his case, and had he been provided an opportunity to peruse the mark sheets of the 1st Respondent, he may have been able to highlight certain discrepancies in the self evaluation of the 1st Respondent and thereby demonstrate that he had obtained higher marks than the 1st Respondent. While one candidate is not permitted to examine the mark sheet of another candidate, the fact is that no such material has been produced before me and it would be improper for this Court to speculate on what may have been if such an opportunity was in fact given.

In the Memorandum submitted by the 193rd Respondent, she had quite correctly stated that it would not be equitable to withdraw the Professorship from the Petitioner. 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 Petitioner been set aside. I must also say that a withdrawal of the post of Professor of Surgery from the Petitioner by the Council of the 195th Respondent in the above circumstances 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**

[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*.

Service,[34] in addition to it being challenged on the basis of procedural impropriety. Fortunately, sanity has prevailed and the appointment of the Petitioner has been kept intact.

While it certainly would have been desirable for the Petitioner and the 1st Respondent to have been afforded a hearing, I am of the view that a failure to afford a hearing to the Petitioner in this instance is not fatal to the decision of the 195th Respondent, for the reason that the appointment of the Petitioner was kept intact. If there was a decision to withdraw the appointment of the Petitioner, I would have had no hesitation in arriving at the conclusion that principles of fairness demanded not only that the Petitioner and the 1st Respondent be afforded a hearing, but that the decision be taken by the Selection Committee, as opposed to the Council of the 195th Respondent. The fact remains however that the Council of the 195th Respondent did not deem it fit to revoke the appointment of the Petitioner.

The learned President's Counsel for the Petitioner submitted further that having held the post of Professor of Surgery (Chair) since 2008, and carrying out the duties entrusted to him in such capacity, the appointment of the 1st Respondent as Co-Chair Professor of Surgery is a violation of his legitimate expectation that the Petitioner once duly appointed will continue to hold that post.

As I have concluded above, the fact remains that the appointment of the Petitioner remains untouched, despite there being an undisputed error in the marks allotted to the Petitioner. Therefore, I am of the view that his legitimate expectation to hold the position of Professor of Surgery (Chair) remains unaffected. True enough, the Petitioner now has to share the post of Professor of Surgery (Chair) with the 1st Respondent. But as I have said earlier, the facts and circumstances of this application are indeed peculiar. However difficult it may be to come to terms with, the fact remains that the Petitioner received 3.5 marks from the External Experts over and above the marking scheme provided for in the Circular No. 869. This, together with the decision to keep the appointment of the Petitioner intact has negated the

[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*."

necessity to give the Petitioner a hearing, as there has not been an affectation of his rights.

Failure to follow due procedure in the creation of the Co-Chair

The third argument of the learned President's Counsel for the Petitioner is that the procedure that was followed to create the additional post of Professor of Surgery (Co Chair) to *accommodate* the 1st Respondent is a violation of the provisions of the Universities Act, and the Establishment Code of the UGC and therefore the decision of the Council of the University of Colombo dated 09th July 2015 to create the additional Chair is *ultra-vires* the powers of the Council.

Section 29(l) of the Universities Act 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*."

The powers, duties and functions of a Council of a University are set out in Section 45 of the Universities Act. Section 45(1) of the Act provides as follows:

> "*Subject to the provisions of this Act, the Council shall exercise the powers and perform and discharge the duties and functions conferred or imposed on, or assigned to, the University.*"

Section 45(2) of the Act provides as follows:

> *"Without prejudice to the generality of the powers conferred upon it by subsection (1), the Council shall exercise, perform and discharge the following powers, duties and functions:-*
>
> *(xii) to appoint persons to, and to suspend, dismiss or otherwise punish persons in the employment of, the University:*
>
> *Provided that, except in the case of Officers and teachers, these powers may be delegated to the Vice-Chancellor;*

(xvii) to advise the Commission on –

> (a) *the institution, abolition or suspension of Professorships, Associate Professorships, Lectureships and any other academic post, in consultation with the Senate;"*

The cumulative effect of the above provisions is that the Council of the University has the authority to recommend to the UGC the institution of posts including the post of Professor.

Thus, the Council of the 195th Respondent having considered the Memorandum '**P27**' submitted by the 193rd Respondent had decided at its 496th meeting to create an additional cadre chair in the post of Professor of Surgery. Having taken the said decision, the 193rd Respondent, by letter dated 14th July 2015 marked '**195R6**' sought the approval of the UGC for the said decision.

The powers of the UGC have been set out in Section 15 of the Universities Act. Section 15(ix), (x)(a) and (xii) which are relevant to the issue at hand reads as follows:

"The Commission shall have and exercise all or any of the following powers -

(ix) *to formulate schemes of recruitment and procedures for appointment of the staff of the Higher Educational Institutions, and to determine from time to time, the various grades of staff and the numbers comprising each of such grades*;

(x) *to determine from time to time -*

> (a) *the structure and composition of each Higher Educational Institution established or deemed to be established under this Act or any appropriate instrument*;"

The UGC, by its letter dated 23rd July 2015 marked '**195R7**' had informed the 193rd Respondent that the UGC had unanimously agreed to the request made by '**195R6**' and approved an extra cadre chair for the Department of Surgery.

Thus, it is clear that the creation of the post of Professor of Surgery (Co-Chair) had been approved by the UGC, and to that extent, both the UGC and the 195th Respondent have acted in terms of the law.

Issues raised by the Petitioner relating to the approval by UGC

This brings me to three issues that have been raised by the learned President's Counsel for the Petitioner with regard to the above process. In sequence of time, the first issue is that when applications for the post of Professor of Surgery were called by paper advertisement dated 11th September 2007, it was for a single post of Professor of Surgery. The second is that the 1st Respondent was appointed Co-Chair to the post of Professor of Surgery on 14th July 2015 with effect from 10th July **2008**. The third is that the 1st Respondent was issued with the letter of appointment on 14th July 2015, prior to receiving the approval of the UGC.

I must at the outset state and acknowledge that the process which led to the decision by which the 1st Respondent was appointed Professor of Surgery (Co-Chair) was not the best, and that the 195th Respondent should certainly exercise more care and diligence in how such matters are dealt with in the future. However, given the present facts and circumstances, and most importantly the time that has already lapsed since the appointment of the 1st Respondent, I am of the view that the issues in procedure highlighted by the Petitioner, are not significant enough to justify this Court exercising its discretion in favour of the Petitioner and must be viewed relative to the administrative chaos and inconvenience that may be caused by upsetting the apple cart on those grounds.

I shall first deal with the third issue. The UGC, in response to an appeal made to it by the 1st Respondent, had informed the 193rd Respondent by its letter dated 23rd June 2015 that the entity empowered to carry out directives in terms of Section 29(l) of the Universities Act is the Council.[35] The Memorandum of the 193rd Respondent recommending the appointment of the 1st Respondent – vide '**P27**' – and the decision of the Council of the 195th Respondent to appoint the 1st Respondent as a Co-Chair at its 496th meeting held on 9th July 2015 was taken only thereafter, followed by '**195R6**'. The approval of the UGC was sought on 14th July 2015. While it

[35] Vide Annex 1 to 'P27'.

would have been ideal had the 195th Respondent awaited the approval of the UGC prior to issuing the letter of appointment to the 1st Respondent, the fact remains that the UGC has approved the creation of an extra cadre chair.

Let me now consider the aforementioned first and second issues. It is true that vacancies were called in 2008 for one post. While the approval given by the UGC did not specifically provide for the backdating of the appointment, it was open for the Council of the 195th Respondent to decide on the date of the appointment. In my view, a consideration of the said issues in the light of the facts and circumstances of this application, which I have already discussed in detail, would demonstrate that the decision of the Council of the 195th Respondent is not, if I may borrow the words of Lord Diplock, *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.*[36]

The final argument of the learned President's Counsel for the Petitioner is that the 184th Respondent, the Chairman of the UGC was biased towards him due to an old professional rivalry, which prompted the UGC to approve the creation of an extra cadre chair. When one considers the fact that the decision to appoint the 1st Respondent was taken by the Council of the 195th Respondent and that it is the entire membership of the UGC that arrived at the decision to approve the creation of an additional Chair, it is clear that this argument does not have any merit.

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

[36] Vide Council of Civil Service Unions v. Minister for the Civil Service; supra