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

In a matter of an application for mandates in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 54/2017

Dr (Ms) Fathima Shemoon Marleen,
No. 24A, Bullers Road,
Colombo 7.

PETITIONER

Vs.

1. University of Colombo.

2. Prof. Lakshman Dissanayake,
   Chairman of the Council/Vice Chancellor,
   University of Colombo.

3. Mr. K.A.S. Edward,
   Secretary/Registrar.

4. Dr. R.C.K. Hettiarachchi Dean,
   The Rector, Sripalee Campus.

5. Prof. M.D.A.L. Ranasinghe,
   Dean, Faculty of Arts.

6. Prof. W. Chandradasa,
   Dean, Faculty of Education.

7. Ms. W. Indira Nanayakkara,
   Dean, Faculty of Law.

8. Dr. R. Senathiraja,
   Dean, Faculty of Management & Finance.

9. Prof. Jennifer Perera,
   Dean, Faculty of Medicine.

10. Prof. K.R.R. Mahanama,
    Dean, Faculty of Science.

11. Prof. Nayani Melegoda,
    Dean, Faculty of Graduate Studies.

12. Prof. Janaka de Silva.

13. Prof. J.K.D.S. Jayanetti.

14. Mr. Rajan Asirwatham.

15. Dr. Harsha Cabral P.C.

16. Mr. Tilak Karunaratne.

17. Mr. Nigel Hatch P.C.

18. Prof. Lakshman Ratnayake

19. Dr. (Mrs.) Ranee Jayamaha.

20. Mr. Jehan Prasanna Amaratunga.

21. Mr. J.M. Swaminathan.

22. Prof. Rohan Jayasekera.

23. Mrs. C. Mubarak.

    12th – 24th Respondents are members of the 1st Respondent

24. Prof. Chandu De Silva,
25. Prof. D.N. Samarasekera
26. Prof. Athula Kaluarachchi

    1st to 27th Respondents are at
    Kumaratunga Munidasa
    Mawatha, Colombo 3.

27. University Grants Commission,
No. 20, Ward Place, Colombo 7.

28. Prof. Mohan de Silva,
Chairman, University Grants Commission.

29. Prof. P.S.M. Gunaratne,
Vice Chairman, University Grants Commission.

30. Dr. Priyantha Premakumara,
Secretary, University Grants Commission.

31. Dr. Wickrama Weerasooriya.

32. Prof. Hemantha Senanayake.

33. Dr. Ruvaiz Haniffa.

34. Prof. Kumaravadivel.

31^{st} – 34^{th} Respondents are members of the University Grants Commission.

29^{th} to 35^{th} Respondents are at
No. 20, Ward Place, Colombo 7.

35. Hon. Lakshman Kiriella,
Minister of Higher Education and Highways.

36. Mr. D.C. Dissanayake,
Secretary to the Ministry of Higher Education & Highways.
No. 18, Ward Place, Colombo 7.

37. Dr. D.M.C.S. Jayasundera,
No. 393/36A, Kularathna Mawahta,
Kimbulapitiya Road, Negombo.

RESPONDENTS

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

Counsel: Faisz Mustapha, P.C., with Ms. Faiszar Mustapha Markar for the Petitioner

Suranga Wimalasena, Senior State Counsel for the 1st – 36th Respondents

Asthika Devendra with Ms. Kanchana De Silva for the 37th Respondent

Argued on: 28th July 2020

Written Submissions: Tendered on behalf of the Petitioner on 7th September 2020

Tendered on behalf of the 1st – 36th Respondents on 15th September 2020

Tendered on behalf of the 37th Respondent on 18th September 2020

Decided on: 3rd June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner has obtained her Bachelor of Medicine Bachelor of Surgery (MBBS) Degree from the "Manipal Academy of Higher Education (Deemed University), India" in June 2000.[1] According to the Statement of Marks marked '**P11**' issued by the Manipal Academy, she had passed the Final MBBS (Part II) examination with First Class Honours. The Petitioner had thereafter successfully completed the Doctor of Medicine (MD) Programme conducted by the Postgraduate Institute of Medicine (PGIM) of the 1st Respondent, the University of Colombo and had been awarded the Gold Medal for the best candidate at the MD Part II examination. At the time relevant to this application, the Petitioner was reading for a MD by research on ~~a~~ part time basis. Having acquired working experience both in Sri Lanka and the United Kingdom, the Petitioner has functioned as a Consultant on Obstetrics and Gynaecology at the Sri Jayawardenapura General Hospital, since April 2016.

[1] Vide 'P9' – 'P11' where the words, 'Deemed University' is used.

The 37th Respondent, whose appointment is being impugned in this application, was awarded the MBBS Degree by the University of Kelaniya with Second Class Upper Division Honours. At the Final examination, he had obtained a Distinction in Obstetrics and Gynaecology and was awarded the Gold Medal for best performance. The 37th Respondent had been placed first in the MD (Obstetrics and Gynaecology) programme conducted by the PGIM and had been awarded the Young Gynaecologist Award in 2015 by the Asia and Oceanic Federation of Obstetricians and Gynaecologists. The 37th Respondent had thereafter joined the Faculty of Medicine, University of Peradeniya as Senior Lecturer (Obstetrics and Gynaecology) and at the time this application was filed, was serving as a Consultant Obstetrician and Gynaecologist at the De Zoysa Hospital for Women.

The Petitioner states that by a notice marked '**P3**' published in May 2016, the 1st Respondent called for applications from suitably qualified candidates for the post of Lecturer (Probationary)/ Senior Lecturer Grade II/I in its Department of Obstetrics and Gynaecology, Faculty of Medicine. The Petitioner states that she possessed the relevant qualifications stipulated in '**P3**'and therefore she responded to the said notice by submitting her application dated 31st May 2016, marked '**P4**'.

The Petitioner admits that she was called for a Preliminary Interview that was held on 29th September 2016. The Petitioner states that she was allowed to make a presentation of her choice at the said interview and that she accordingly made a presentation relating to '*Systematic reviews to support evidence based Medicine.*' The Petitioner states that she felt satisfied with the presentation made by her, which lasted approximately ten minutes.

The Petitioner had thereafter been informed by letter dated 20th October 2016 marked '**P5**' to attend the Final Selection Interview on 1st November 2016. The Petitioner states that she duly attended the said interview and she is of the opinion that she fared well at the said interview.

The Petitioner states that she received an email on 20th November 2016 from a person unknown to her, to which was attached the signed Marks Sheet of the Final Interview Panel, marked '**P8**'. The Petitioner had made inquiries and found that '**P8**' is genuine. The Petitioner had subsequently found that the 1st Respondent had

issued a letter of appointment dated 4th January 2017 marked '**P6**' to the 37th Respondent, appointing him as Senior Lecturer (Grade II). It is admitted that the 37th Respondent, having relinquished his duties as Senior Lecturer (Grade II) at the University of Peradeniya had accepted the appointment as Senior Lecturer (Grade II) at the Department of Obstetrics and Gynaecology, Faculty of Medicine of the 1st Respondent on 9th January 2017.

Aggrieved by her non-selection for the post of Senior Lecturer (Grade II), the Petitioner filed this application on 21st February 2017, seeking a Writ of Certiorari to quash the decision of the 2nd – 26th and 32nd Respondents to appoint the 37th Respondent to the post of Senior Lecturer (Grade II).

The grievance of the Petitioner is twofold. The first is that she is the more qualified of the two candidates, and that she should have been allotted more marks than what was actually allotted for her qualifications and achievements. The second is that an allocation of thirty marks out of hundred for the interview component is excessive and can lead to manipulation of marks in favour of one candidate over another.

The learned Senior State Counsel for the 1st Respondent and the learned Counsel for the 37th Respondent has submitted that the Petitioner is guilty of *laches* and that in any event, proceeding with this application is futile as the Petitioner has not sought any other relief other than quashing the appointment of the 37th Respondent. I shall address these matters after having considered the grievance of the Petitioner.

As some of the complaints of the Petitioner relate to decisions taken by academics, I would begin by laying down the parameters within which Courts have previously acted when faced with such decisions.

In **Administrative Law** by Wade and Forsyth[2] it has been pointed out that Courts will be reluctant to enter into "*issues of academic or pastoral judgment which the University was equipped to consider in breadth and in depth but on which any judgment of the Courts would be jejune and inappropriate. That undoubtedly*

[2] H.W.R. Wade C.F, Forsyth, Administrative Law [11th Edition, 2014] Oxford University Press, page 537.

included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified."[3]

In **Abeysundara Mudiyanselage Sarath Weera Bandara vs University of Colombo and Others**[4] having considered several English cases in this regard, Nawaz, J held as follows:

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

In **Dr. Karunananda v. Open University of Sri Lanka and Others**,[5] the Supreme Court was called upon to consider whether the petitioner's fundamental rights guaranteed under Article 12(1) had been infringed by the refusal of the Open University to promote the petitioner as Professor. In the said case, the Supreme Court was confronted with an argument on behalf of the University that the decision whether to confer a professorship could be executed only by persons who are qualified and placed in equal or higher standing and accordingly, an application seeking appointment as a Professor, could only be assessed by similarly qualified peers from the academic community having an 'academic mind' and that such evaluations may not be on par with the reasoning of a judicial mind. In response to the said argument, the Supreme Court held as follows:

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[3] Clark v. University of Lincolnshire and Humberside [2000] 1 WLR 1988, as referred to in Administrative Law by Wade and Forsyth (supra).
[4] CA (Writ) Application No. 844/2010; CA Minutes of 8th June 2018.
[5] [2006] 3 Sri LR 225; at pages 236-237.

"*Therefore, although there may be cautionary remarks indicating reluctance to enter into academic judgment,* ***I am not in agreement with the view that academic decisions are beyond challenge****. There is no necessity for the Courts to unnecessarily intervene in matters "purely of academic nature," since such issues would be best dealt with by academics, who are 'fully equipped' to consider the question in hand. However, if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126 of the Constitution, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment*."

The above position is a restatement of the approach adopted by Courts when exercising judicial review of administrative decisions, as pointed out in the following passage from **Administrative Law** by Wade and Forsyth:[6]

"*The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the courts function to look further into its merits*."

In exercising judicial review, Courts play a limited role and must be mindful not to substitute its own decision for that of the public authority who has been conferred with the power of making that decision, unless the authority has disregarded material facts or where the decision is unsupported by substantial evidence. In the words of Lord Bingham, '*they (judges) are auditors of legality; no more, but no less*.'[7]

Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**,[8] classified three grounds upon which administrative action is subject to judicial review, namely 'illegality', 'irrationality' and 'procedural impropriety'. The Petitioner is not complaining of any procedural irregularity in the evaluation or selection

[6] Supra; page 302.
[7] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.
[8] [1985] 1 AC 374.

process. The grievance of the Petitioner is that the decision not to allot the marks she is entitled to is irrational and unreasonable, as well as illegal.

Having identified the above three grounds, Lord Diplock went onto describe 'illegality' and 'irrationality' as follows:

> *"By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it*."

> *"By 'irrationality' I mean what can now be succinctly referred* to as *'Wednesbury unreasonableness.'* [9] *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.* "

The test routinely applied to assess the reasonableness of a decision is the test set out in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation**,[10] where Lord Greene defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'* The famous example of the red-haired teacher who was dismissed due to the colour of her hair, illustrates the high threshold for "unreasonableness" that was expected to justify judicial intervention on this ground.

English Courts have attempted to reduce the rigour of "Wednesbury unreasonableness" over the years. The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,[11] decided prior to the **GCHQ case** provides for what can be considered a more balanced test:

> "*In public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct*

[9] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] (1) KB 223
[10] [1948] 1 K.B. 223 at pages 229 - 230.
[11] [1977] AC 1014.

which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

It has been held that *'the standard adopted in Tameside appears to be more realistic, and balanced'.*[12] I therefore intend to apply the less rigorous test in deciding whether the Respondents have acted reasonably.

This brings me to the first grievance of the Petitioner which is that she should have been allotted more marks for her qualifications and achievements than what was actually allotted by the 1st Respondent.

It is admitted that the applicable marking scheme consists of seven sections. The marks allotted to the Petitioner and the 37th Respondent under each of the said sections are set out below:

	Section 1	Section 2	Section 3	Section 4	Section 5	Section 6	Section 7	Total
Petitioner	05	00	15	3.25	03	07	08	41.25
37th Respondent	10	05	15	8.75	04	11.5	12	66.25

I shall deal with each Section separately. I shall first identify the criteria for the allotment of marks in respect of one Section. I shall thereafter discuss the grievance of the Petitioner in respect of that section, the response of the 1st Respondent and whether the decision not to allot the Petitioner more marks than what is set out above is illegal, unreasonable or irrational.

Under Section One, a maximum of 15 marks are allotted based on the results of the Final MBBS examination. Accordingly, a candidate who has obtained a First Class shall be allotted the maximum 15 marks, while 10 marks are allotted for 2nd Class (Upper) and 5 marks are allotted for Second Class (Lower).

[12]Colonel U.R. Abeyratne v. Lt. Gen. N.U.M.M.W. Senanayake and Others, CA (Writ) Application No. 239/2017; CA Minutes of 7th February 2020; Also see KIA Motors (Lanka) Limited v. Consumer Affairs Authority, CA (Writ) Application No. 72/2013; CA Minutes of 26th May 2020; U.A.A.J Ukwatte and another v. Minister of Education and others, CA (Writ) Application No. 403/2019; CA Minutes of 12th June 2020.

The 1st Respondent has allotted 10 marks to the 37th Respondent under Section One as he had obtained a Second Class – Upper Division. The Petitioner is not challenging the marks allotted to the 37th Respondent.

The Petitioner states that she obtained a First Class at the Final examination of the MBBS, and an aggregate of 624 marks out of 1000. She states that by virtue of having obtained a First Class, she should be allotted 15 marks. It is however admitted that the Petitioner was only allotted 5 marks for the MBBS Degree. Let me now consider the reason as to why the Petitioner was not allotted 15 marks.

The 1st Respondent states that according to the By-laws and Regulations of the MBBS (Colombo) Degree Programme 2012 issued by the 1st Respondent marked '**R2**', the following classification is used in deciding on Honours:

- 70% and above – First Class Honours
- Between 65% and 70% - Second Class (Upper Division) Honours
- Between 60% and 65% - Second Class (Lower Division) Honours
- Between 50% and 60% - Pass

The same classification has been used by the University of Kelaniya, which is the University that awarded the MBBS to the 37th Respondent – vide '**37R2**'.

As the MBBS degree possessed by the Petitioner had not been awarded by a Sri Lankan University, and as the minimum mark required for the awarding of First Class Honours by a foreign University may be different, the 1st Respondent, having received the application of the Petitioner, had made inquiries from the Manipal Academy of the basis on which it allocates a Class.

According to the reply of the Manipal Academy marked '**R1**':

> '*as per Manipal University Rules, class obtained in the Final MBBS – Part II examination is taken for Class declaration in provisional pass certificate.*

Cutoff percentage (based on the grand total marks obtained) for the award of Second Class is 50% -< 60% (500-599), First Class is 60% -< 70% (600-699) and First Class with Distinction is >= 70% (>= 700).'

The 1st Respondent has submitted that in the Sri Lankan context, a mark of 624 which is the mark that was obtained by the Petitioner would only have secured a Second Class (Lower Division) Honours. The 1st Respondent states that the members of the '*Interview Panel had decided to consider the 62.4% marks obtained by the Petitioner at the Final MBBS examination as a Second Class – Lower Division and accordingly allocated 05 marks for the said qualification*'. It is for this reason that the Petitioner received only 5 marks for the MBBS degree.

The issue that I need to consider is if the above decision is illegal, irrational or unreasonable. It is clear that in allotting marks to an applicant under the said marking scheme, the 1st Respondent adopts the classification [i.e. First Class, Second Class (Upper division) etc] as opposed to the final mark that has been obtained by each applicant at the MBBS Final examination. It is also clear that the Petitioner and the 37th Respondent have obtained their MBBS degrees from different countries. It was therefore necessary for the 1st Respondent to equalize the position of the different applicants and it is with that objective in mind that the 1st Respondent has adopted the above course of action, thereby maintaining a level playing field among the candidates.

It must also be noted that under the Sri Lankan system, a student who obtains over 70% at the Final MBBS examination would obtain a First Class, which is the highest classification that could be achieved while under the Manipal system of classification, a student who obtains 70% or more would be awarded a First Class with distinction. Thus, a student at Manipal who is awarded a First Class (marks between 60% - 70%) and a student from a Sri Lankan University who is awarded a First Class (marks over 70%) cannot be compared. Hence, the equalizer.

In the above factual circumstances, I am of the view that the decision of the 1st Respondent to adjust the grading of the Petitioner based on the marks received by her at the Final MBBS examination in order to level the playing field and bring her on par with the other candidates is not illegal nor is it unreasonable or irrational.

Under Section Two, a total of 10 marks are allotted for distinctions, medals and prizes won by an applicant at the Final MBBS examination. Under this Section, 3 marks are allotted for a distinction in the relevant subject, 1 mark each is allotted for a distinction in any other subject and 1 mark each is allotted for prizes and medals in other subjects.

The 37th Respondent had secured a Distinction in Obstetrics and Gynaecology at the Final MBBS examination for which he was entitled for 3 marks and a further 2 marks for being awarded the Gold medal for the best performance in Obstetrics and Gynaecology at the MBBS Final examination. The 37th Respondent has accordingly been awarded 5 marks for Section Two. The Petitioner has no complaint with this mark.

The Petitioner has not been awarded a distinction in any subject offered by her at the Final MBBS examination – vide Statement of Marks marked '**P11**' - nor has she declared in her application marked '**P4**' that she has obtained a distinction in any of the subjects or that she was awarded a prize or medal. For this reason, the 1st Respondent has not allotted any marks to the Petitioner under Section Two.

In her petition to this Court, the Petitioner has divulged that she obtained distinctions in five subjects offered by her at the 2nd MBBS examination and Part 1 of the Final MBBS examination - vide Statement of Marks marked '**P9**' and '**P10**'. The requirement however is for the distinction to be in a subject offered at the Final MBBS examination and the fact remains that the Petitioner has not obtained a distinction at the Final examination. In any event, the Petitioner has not declared in her application the distinctions that she achieved in the Second MBBS examination and the Final MBBS (Part I) examination. I must also observe that the 37th Respondent has obtained one distinction at the 2nd MBBS examination and three distinctions in the 3rd MBBS examination, for which he too has not been allotted any marks.

The Petitioner states further that she was awarded the Gold Medal for Outstanding Performance at the Postgraduate examination but no marks have been allotted. The position of the 1st Respondent is that marks were allotted for medals obtained at the

Final MBBS examination, and that even though it is a medal obtained at postgraduate level, the marking scheme does not provide any marks to be allotted. I agree with the explanation of the 1st Respondent that granting of marks outside the marking scheme would be illegal and would have prompted complaints from other candidates.

Taking into consideration all of the above facts, I am of the view that the decision not to allocate any marks for Section Two is neither illegal nor unreasonable or irrational.

Section Three provides for the allocation of 20 marks for other academic achievements. Under this category, 10 marks are allotted for a PhD or MD, 3 marks are allotted for Fellowship/Membership by examination and 2 marks are allotted for Certificates.

Under this Section, the 37th Respondent has been awarded 15 marks – 10 marks being for his MD, 3 marks for his Fellowship of the Royal College of Obstetricians and Gynaecologists and 2 marks for a Certificate.

The Petitioner too has been allotted 15 marks – 10 marks for her MD and a further 5 marks for the Diploma in Sexual and Reproductive Health ('**P14**'). The 1st Respondent has conceded that the Petitioner should have been awarded a further 3 marks for her Fellowship of the Royal College of Obstetricians and Gynaecologists ('**P15**'), thus giving her an aggregate of 18 marks for Section Three and thereby pushing her aggregate mark to 44.25.

The Petitioner claims that she possesses three certificates for Advanced Training at the Royal College of Obstetricians and Gynaecologists for which no marks have been allotted. Even if the Petitioner is correct, she would be entitled only to a further two marks as the maximum marks that can be given under Section Three is 20. The position of the 1st Respondent is that the said Certificates, marked '**P16a**' – '**P16c**' only certify that the Petitioner has *satisfactorily completed the Advanced Training Skills Module* conducted by the Royal College of Obstetricians and Gynaecologists relating to three subjects and that the marking scheme does not require allocation of marks for completing such modules. The Petitioner has not produced any evidence from the Royal College of Obstetricians and Gynaecologists to demonstrate that the

above position is not correct. It is important to bear in mind that marks under Section Three are allotted for academic achievements, and therefore the Certificates for which marks are allotted should relate to an academic achievement. In any event, the decision has been taken by two Interview Panels that comprised of experts in the relevant field. This Court certainly does not have the expertise to decide otherwise. Taking into consideration all of the above material, I am of the view that the decision that a certificate evidencing the completion of an Advance Training Skills Module cannot be considered as an academic achievement, is not unreasonable.

Section Four provides for an overall 20 marks for Research publications. Under this category, 2 marks are allotted for each article published in an indexed journal, 0.5 mark is allotted for each article published in a peer reviewed journal and 0.25 mark is allotted for each presentation.

In his application marked '**37R13**', the 37th Respondent has declared that he has four publications in reference journals, two publications in abstract form, and in addition has made presentations at five Seminars/symposia. The 37th Respondent has been allotted 8.75 marks under Section Four.

In her application '**P4**', under the Column, 'Research and Publications', the Petitioner has declared three articles under the heading, 'Full articles in peer reviewed Journals.' This would carry 1.5 marks in total. The Petitioner had also listed under a category called 'Scientific Communications' nine studies, of which seven are presentations, which would earn the Petitioner a total of 1.75 marks at the rate of 0.25 mark per presentation. The Petitioner has been accordingly awarded 3.25 marks under Section 4.

The Petitioner however states that '*15 published research papers have cited the Petitioner's research work but insufficient marks have been allocated to the Petitioner for her publications with international citations*'. As I have already observed, the Petitioner has cited only three peer reviewed articles in her application for which she has been allotted 1.5 marks. If she had more of such articles, it was incumbent upon the Petitioner to have declared the said papers in her application. Not having done so, I am of the view that the Petitioner cannot complain at this stage that she should be allotted more marks under Section Four. It is perhaps of

interest to note that even in her *Curriculum Vitae* marked '**P2**', the Petitioner has only listed the aforementioned three articles.

Under Section Five, an applicant was entitled to receive 5 marks for Extra Curricular activities. While the 37th Respondent has been allotted 4 marks under this Section, the Petitioner has declared at page 22 of '**P4**' her extra-curricular activities, which includes engaging in tennis, swimming and music. The Petitioner has been allotted 3 marks.

This brings me to Sections Six and Seven. Under Section Six, 15 marks are allotted to the Preliminary Interview, which consists of a presentation to the members of the Faculty on a topic of the applicant's choice. The Petitioner has been allotted 7 marks while the 37th Respondent has been allotted 11.5 marks. Section Seven deals with the Final Selection Interview and a presentation before the Selection Committee. Under this section, an applicant is entitled for 15 marks. While the 37th Respondent had been allotted 12 marks for the final interview, the Petitioner has been allotted only 8 marks.

It is admitted that the interview panel for the Preliminary Interview comprised of the following:

- 24th Respondent – Professor Chandu De Silva, Chair and Senior Professor of Pathology
- 25th Respondent – Professor Nandadeva Samarasekara, Chair and Senior Professor of Surgery
- 32nd Respondent – Professor Hemantha Senanayake, Head, Department of Obstetrics and Gynaecology.

As noted earlier, the Petitioner admits that she made a presentation of her choice at the Preliminary Interview and that she is satisfied with the presentation made by her.

The Petitioner states that the Selection Panel for the Final Interview comprised of the following:

- 2nd Respondent – Professor Lakshman Dissanayake - Chairman of the Council and Vice Chancellor of the 1st Respondent

- 9th Respondent – Professor Jennifer Perera - Dean, Faculty of Medicine and Chair Professor in Microbiology at the Faculty of Medicine

- 14th Respondent – Mr. Rajan Asirwatham (Council nominee)

- 21st Respondent – Mr. J.M. Swaminathan (Council nominee)

- 26th Respondent – Professor Athula Kaluarachchi (Senate nominee) - Department of Obstetrics & Gynaecology, Faculty of Medicine

- 32nd Respondent - Professor Hemantha Senanayake - Head, Department of Obstetrics and Gynaecology.

The Petitioner states that she was of the opinion that she fared well at the interview.

The complaint of the learned President's Counsel for the Petitioner with regard to Sections Six and Seven is twofold. The first is that allotting thirty marks out of hundred for the interview component is excessive and can lead to manipulation of marks to favour one candidate over another. The second is that the assessment of a candidate at an interview is subjective, and is not fair and uniform.

The post that is the subject matter of this application is that of Senior Lecturer (Grade II) in the Department of Obstetrics and Gynaecology at the Faculty of Medicine. According to the notice marked '**P3**', the ideal candidate should have achieved academic excellence at the Undergraduate level and should possess Postgraduate qualifications in the relevant discipline, and demonstrate the ability to engage in research and publications. In addition, the candidate must have six years experience, either in teaching at the University level, professional experience, research or postgraduate studies leading to a Doctoral degree. Thus, the ideal candidate that the 1st Respondent is looking for is a person with high academic qualifications and professional experience of six years. Prior teaching experience, although not mandatory, is certainly an advantage.

I have already discussed in detail the manner in which marks are allotted to an applicant. Out of an aggregate of 100, 45 marks are given for academic qualifications and achievements. Another 20 marks are given for research publications and presentations. The ability of an applicant to make a presentation is gauged at the Preliminary Interview where the applicant is afforded an opportunity of making a presentation on a subject of his/her choice. Only fifteen marks are allotted for this component. A further fifteen marks are given for performance at an interview before the Final Selection Committee. Thus, it is clear that the 1st Respondent has sought to strike the correct balance between academic achievement, research & writing capability and communication skills of a candidate and allocated the marks for each Section in a manner that ensures that the 1st Respondent recruits the ideal candidate.

The members of the Faculty Committee that heard the presentation of the Petitioner consisted of three Professors, of whom the 24th Respondent held the Chair of Pathology, the 25th Respondent held the Chair of Surgery in the Faculty of Medicine at the 1st Respondent and the 32nd Respondent was the Head of the Department of Obstetrics and Gynaecology. The Final Selection Panel consisted *inter alia* of the Vice Chancellor, the Dean of the Faculty of Medicine, the Head of the Department of Obstetrics and Gynaecology, and one more Professor attached to the Department of Obstetrics and Gynaecology.

The learned Senior State Counsel submitted that the members of the Selection Committee, together with the other two members who have achieved eminence in their respective fields, are fully aware of the skills that are required of an applicant for the post of Senior Lecturer and it is they who are in the best position to assess the suitability of an applicant at the interview that is held. The learned Senior State Counsel for the 1st Respondent submitted further that presentation skills reflect the ability of an applicant to engage in lecturing and communicate effectively with the audience, which is the core function of a Senior Lecturer, and that allocating fifteen marks each in two stages to assess that capability is not excessive. I therefore cannot agree with the learned President's Counsel that allocating 15 marks each out of 100 for the two core components of the selection criteria is excessive.

The Petitioner has stated in her petition that, '*a proper selection need not necessarily incorporate a marking scheme but if the selection is to be on the basis of marks, then the scheme must be clear, fair and uniform*'. Having said so, the Petitioner is now claiming that allocation of marks at an interview is subjective and can lead to abuse. It is common knowledge that an interview while having a structure cannot be limited to that structure. To do so would unnecessarily fetter the ability of the Selection Committee to apply their expertise and select the best candidate. If the argument of the Petitioner is to be accepted, an interview might as well be replaced by a written questionnaire to be filled by a candidate.

Even if the questions posed by the Interview Panel and the answers of the candidates were before this Court, it is not the role of this Court, in the exercise of its Writ jurisdiction to step into the shoes of the Interview Panel and decide whether the Petitioner should have been allotted more marks for her answers. Nor does this Court possess the expertise to do so. In the absence of any allegation of illegality or unreasonableness in the allocation of marks, it is important that this Court shows due deference to the opinions formed by experts. In the above circumstances, I cannot agree that the interview process has not been conducted in a fair and transparent manner, and I therefore do not see any merit in the grievance of the Petitioner with regard to Sections Six and Seven of the marking scheme.

This brings me to a matter that has been raised in the written submissions of the Petitioner. The 1st Respondent had annexed to its Statement of Objections marked '**R6**', the decision taken by the Council of the 1st Respondent on 9th January 2013 that the marks allocated at the Preliminary Interview should be on par with the marks given at the Final Selection Interview. Except for reiterating her position in the petition, the Petitioner did not raise any issue with regard to the said amendment in her Counter Affidavit. However, in the Written Submissions filed after the argument, an objection has been raised that even though the Scheme of Recruitment must be formulated by the University Grants Commission, the said amendment to the marking scheme has not been approved by the University Grants Commission, and thus, to act on the said amendment is illegal. While I can understand that the Petitioner would not have been aware of the decision in '**R6**' at the time she filed this application, any concern with the decision in '**R6**' should have been raised in the Counter Affidavit, thus affording the Respondents, including the University Grants

Commission who is the 27th Respondent an opportunity of placing before this Court any material to rebut the said argument, including the fact that the marking scheme does not form part of the Scheme of Recruitment. I am therefore of the view that the Petitioner is *estopped* from raising that argument at this belated stage.

I shall now consider the several objections raised by the learned Senior State Counsel and the learned Counsel for the 37th Respondent.

The first is that the Petitioner has not sought a Writ of Mandamus to appoint her as Senior Lecturer (Grade II) nor has she prayed for a Writ of Mandamus directing the 1st Respondent to re-advertise the post or conduct fresh interviews. Furthermore, even though the Petitioner is complaining of the allocation of 30% of the total marks for the presentation and interview, she has not sought an order directing the marking scheme to be amended. The failure to seek the said relief has prompted the learned Counsel for the 37th Respondent to argue that it would be futile for this Court to proceed with this application.

While on the face of it, it appears that the above submission has merit, on a close consideration, I am of the view that had it been established that the process followed by the 1st Respondent was illegal, improper or irrational, I would certainly have considered issuing the Writ of Certiorari to quash the said appointment. Although such a decision would have affected the 37th Respondent who took up this appointment having relinquished his previous appointment, this Court cannot ignore any illegality in the name of futility. The consequence of such a decision would be that the 1st Respondent would have to re-advertise the post, thus affording the Petitioner, the 37th Respondent and any suitably qualified person to apply.

This brings me to the question of *laches*, which is the next objection raised by the learned Counsel for the 37th Respondent. The final interview had been held on 1st November 2016. By letter dated 10th November 2016 marked '**P17**', the Petitioner wrote to the 2nd Respondent, the Vice Chancellor raising concerns regarding the marks awarded for Undergraduate performance, and that comparing marks obtained at the Undergraduate level is not proper. Thus, it is clear that by 10th November 2016, the Petitioner was aware of what the Final Interview Panel had decided on Section One.

The Petitioner states that she received an anonymous email marked '**P8**' on 20th November 2016 together with the marking scheme signed by all members of the Final Selection Committee. Thus, by 20th November 2016, the Petitioner was aware of the marks that the Interview Panel had allotted her, and the fact that 30% of the marks have been assigned to the two interview components of the marking structure. In other words, the Petitioner was aware by 20th November 2016 of all the grievances that are now before this Court. The Petitioner did nothing until 27th December 2016 when the letter marked '**P20**' was sent stating that legal proceedings will be instituted. And thereafter too, the Petitioner remained silent until this application was filed on 21st February 2017. Although there has been a delay of only three months – i.e. between 20th November 2016 and 20th February 2017 – given the facts and circumstances of this application, that delay in my view is significant.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus.

In **Biso Menika v. Cyril de Alwis**[13] Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

> "***A Writ of Certiorari is issued at the discretion of the Court****. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success*

[13][1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed."

In **Seneviratne v. Tissa Dias Bandaranayake and another**,[14] the Supreme Court, adverting to the question of long delay, held as follows:

"*If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,*[15] *and for other reasons refuses to assist those who sleep over their rights and are not vigilant*."

In **Issadeen v. The Commissioner of National Housing and others**[16] Bandaranayake J, dealing with a belated application for a Writ of Certiorari held as follows:

"*It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy*".

Sharvananda,J in **Biso Menike's** case went on to consider if an application for a writ should be dismissed on account of delay where the act complained of is an illegality, and held as follows:

"*When the Court has examined the record and is satisfied the Order complained of is* ***manifestly erroneous*** *or* ***without jurisdiction*** *the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay,* ***unless there are very extraordinary reasons to justify such***

[14] [1999] 2 Sri LR 341 at 351.
[15] For the law assists the watchful, (but) not the slothful.
[16] [2003] 2 Sri LR 10 at pages 15 and 16.

***rejection**. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction*."[17] (emphasis added)

The following passage from **Lindsey Petroleum Co., Vs. Hurd** was also referred to in **Biso Menike's** case:[18]

"*Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy*."[19]

The above judgments clearly illustrate four important matters. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court. The third is that delay can be ignored, if the act complained of is manifestly illegal, such as a decision of a statutory authority made in excess of jurisdiction. The fourth is the nature of the acts that have taken place during the time period between the impugned decision or act and the filing of the application. These factors are relevant when determining whether an application should be dismissed on account of the Petitioner being guilty of delay.

I have already noted that there is delay on the part of the Petitioner in filing this application. I have also held that the actions of the Respondents are not illegal. The next question that I must consider is whether the Petitioner has explained the delay. The explanation offered by the Petitioner for the delay is her inability to obtain a copy of the letter of appointment issued to the 37th Respondent. The grievance of the Petitioner related to sufficient marks not being allotted to her and the subjective nature of the interview. The fact that the appointment of the 37th Respondent had been made was irrelevant to the said grievances. The explanation of the Petitioner therefore does not help her to overcome the delay in invoking the jurisdiction of this Court.

[17] Supra; page 379.
[18] (1874) L.R., 5 P.C 221 at 239.
[19] Supra; page 378.

Had the Petitioner invoked the jurisdiction of this Court soon after she received the email and the marking scheme '**P8**', the 1st Respondent may not have appointed the 37th Respondent, or even if the appointment was made, the 37th Respondent may not have accepted the appointment. Therefore, the delay on the part of the Petitioner could have been excused had the appointment of the 37th Respondent not been done. I am therefore of the view that the Petitioner is guilty of laches and that this application is liable to be dismissed on account of delay.

Taking into consideration all of 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