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

In the matter of an application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for orders in the nature of Writs of Certiorari and Mandamus.

CA (Writ Application) No: 41/2021

1. Asaallage Binura Nisal Senadheera,
   Hanhamunawa, Maspotha.

2. Galhenage Yasith Kavishka Wijayananda,
   17/2, Udakotuwa,
   Budinapitiya Road, Wellawa.

3. Imiya Mudalige Tanuli Minsathi Gunewardena,
   311/7, Negombo Road, Kurunegala.

4. Jayakody Mudiyanselage Thumula Gandheewa Jayakody,
   Medalandawatte, Gemunu Mawatha,
   Kurunegala.

5. Buwaneka Manodya Wimalaratne,
   116/7, Dambulla Road,
   Kurunegala.

6. Alahakoon Mudiyanselage Gayali Nuwanya Alahakoon,
   492/4, Rathkarawwa, Maspotha.

7. Welikettiyage Gishara Sewmini Weliketiya,
   218/8F, Pubudu Mawatha, Colombo Road, Kurunegala.

8. Benthara Wellage Bulanjith Deshan Senarathne,
   Police Quarters, Narammala.

PETITIONERS

vs.

1. University Grants Commission,
   20, Ward Place, Colombo 7.

2. B. Sanath Poojitha,
   Commissioner General of Examinations,
   Department of Examinations,
   Pelawatte, Battaramulla.

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

RESPONDENTS

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

Counsel: Romesh De Silva, P.C., with Shanaka Cooray and Niran Anketell for the Petitioners

Nirmalan Wigneswaran, Deputy Solicitor General with Ms. Sureka Ahmed, Senior State Counsel for the Respondents

Supported on: 29th April 2021

Written Submissions: Tendered on behalf of the Petitioners on 21st May 2021

Tendered on behalf of the Respondents on 17th May 2021

Decided on: 10th June 2021

Arjuna Obeyesekere J., P/CA

The Petitioners state that in 2017, the University Grants Commission [**the UGC**] introduced a new syllabus for those sitting the General Certificate in Education (Advanced Level) examination [**the A/L exam**] for the first time in 2019. The introduction of a new syllabus meant that there were two categories of students sitting for the A/L exam in 2019 – the first being those who were sitting the A/L exam for the first time in 2019 under the new syllabus and the second being those who

had followed a course of study under the old syllabus and who were repeating the A/L exam in 2019 under the old syllabus.

The Petitioners are eight students who have sat the A/L exam from the Biological stream for the first time under the new syllabus from the Kurunegala District. The Petitioners state that having obtained a 'Z' score of 1.8172 and above, each of them entertained an expectation of being selected to a Medical Faculty of a State University. The Petitioners state further that in October 2020, the UGC released two 'Z' score cut off marks, one for those who were repeating the A/L exam under the old syllabus and another for those who were sitting the A/L exam for the first time under the new syllabus. Thus, the UGC was treating those who had the sat for the A/L exam under the new syllabus for the first time as a different population to those who were repeating the A/L exam under the old syllabus. The end result, as claimed by the Petitioners, was that the Petitioners did not secure entry to a Medical Faculty even though they had obtained a higher 'Z' score than those who had been selected to a Medical Faculty having repeated the A/L exam under the old syllabus.

Aggrieved by their non-selection, the Petitioners and several others who were similarly circumstanced as the Petitioners challenged the above decision of the UGC in the Supreme Court by way of several Fundamental Rights Applications. It is admitted that those applications were supported before the Supreme Court on several dates and that leave to proceed was refused by the Supreme Court on 23rd December 2020.

The Petitioners thereafter filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decision of the UGC to impose separate cut off marks for the old syllabus and the new syllabus;

b) A Writ of Mandamus directing the UGC to prepare the cut off mark based on one single list (for both at district level and at national level);

c) A Writ of Mandamus directing the UGC to admit the Petitioners to a Medical Faculty of a State University.

The learned President's Counsel for the Petitioners submitted that the facts of this application, the grievance of the Petitioners and the relief sought by the Petitioners are identical to the Fundamental Rights application filed by these same Petitioners.

Consequently, the learned Deputy Solicitor General raised the following three preliminary objections relating to the maintainability of this application:

a) The matters raised in this application have been considered by the Supreme Court in SC (FR) Application No. 329/2020 and the principle of *Res Judicata* would prevent this Court from going into this matter;

b) Even if the principle of *Res Judicata* does not apply, the identical issue has been considered by the Supreme Court and the principle of Issue Estoppel would prevent this Court from going into this matter;

c) This application is an abuse of process which does not warrant the discretion of this Court being exercised in favour of the Petitioners.

As this application involved the non-selection of students to a course of study of their choice, this Court proceeded to hear the learned President's Counsel and the learned Deputy Solicitor General on the merits of this matter as well as on the above legal objections.

I shall at the outset consider the grievance of the Petitioners.

Where there is only one syllabus that is offered by all students, irrespective of whether they are first time candidates or repeat candidates, all students are treated as one population in what is commonly referred to as the *Single Population Method*. Based on the Subject 'Z'-Scores, a common 'Z'-Score will be prepared for all the students and the aggregate of the subject 'Z' scores would determine selection to University.

The 2019 Advanced Level examination saw the introduction of two populations of students – first time students who followed the new syllabus that had been introduced two years earlier and repeaters (those who were sitting the A/L exam for the second and third time) who followed the old syllabus. Thus, with two distinct

populations of students, the UGC was required to determine the basis of selection to State Universities.

A similar syllabus change had been introduced in 2011. On that occasion, the UGC had grouped all the students (Old and New Syllabus) together and used one 'Z'-Score to determine entry to a university. That decision having been challenged by way of a fundamental rights application,[1] the Supreme Court had directed the UGC to treat the old syllabus and new syllabus students as two distinct populations and to have two separate 'Z'-Scores calculated for them.

The UGC had accordingly adopted and maintained two separate populations for 2019 and maintained that distinction right up to the admission of students to a University. The issue however was to determine the ratio between these two populations or in other words to determine how many from those who had followed the new syllabus should be admitted as opposed to those who had followed the old syllabus. This has been addressed by the UGC adopting a method known as the '*Composite Average*' – that is by taking the percentage of students who had gained University admission on their first attempt at the A/L exam during the preceding five year period and thereafter taking the average thereof, thereby determining the percentage of vacancies that must be apportioned to those who sat (for the first time) under the new syllabus. This would then automatically decide the percentage (of repeaters) that should get into a University from the old syllabus. The same procedure had been followed for the all-island merit list as well as the district list.

The above could be understood from the following example, where random figures have been used for the years 2013 – 2017.

Year	2013	2014	2015	2016	2017	**Composite Average**
Freshers	40%	45%	50%	43%	47%	45%
Repeaters	60%	55%	50%	57%	53%	55%

[1] Vide SC (FR) Application No. 29/2012; SC Minutes of 25th June 2012 marked 'P5'.

According to the method that was adopted by the UGC, the new syllabus students and old syllabus students are treated as two different populations, and subject 'Z'-Scores are calculated separately for old-syllabus and new syllabus subjects. Thereafter, the 'Z'-Score of the students are calculated separately for the two groups (Old Syllabus and New Syllabus). The two groups of students are ranked separately based on their 'Z'-Scores and the available places for a particular course of study are apportioned between the two groups on the basis of the composite average of the ratios between freshers and repeaters who were admitted to that particular course of study during the preceding five year period. The learned Deputy Solicitor General submitted that the UGC used the composite average from 2013-2017 for the 2019 Advanced Level Examinations (i.e. 2019/2020 University Admissions), as that was the processed data that was available to the UGC at the time. The above position has been conveyed to the public by a notice dated 8th April 2019 marked '**P8**'.

The learned President's Counsel for the Petitioners submitted that he does not have an issue with having two separate 'Z' scores for those who sat the A/L exam under the two different syllabi. His grievance is that having determined the separate 'Z' scores, the two-population system must stop at that point and that all students must be pooled together thereby having one population or what is referred to as a *combined list* in order to determine selection to a University. The learned President's Counsel for the Petitioner submitted further that the UGC erred when it decided to use the *composite average* method in allocating places to the Medical Faculty.

The issue that I must then consider is whether the decision of the UGC to adopt the *composite average* method as opposed to the *combined list* method is unreasonable or irrational.

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*.'[2]

[2] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.

As pointed out in **Administrative Law** by Wade and Forsyth:[3]

> "*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 **Council of Civil Service Unions v. Minister for the Civil Service**,[4] Lord Diplock having identified the three grounds upon which administrative action is subject to judicial review, went onto describe 'irrationality' as follows:

> *"By 'irrationality' I mean what can now be succinctly referred* to as *'Wednesbury unreasonableness.'*[5] *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**,[6] 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**,[7] decided prior to the **GCHQ case** provides for the following, which can be considered a more balanced test:

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[3]Supra; page 302.
[4] [1985] 1 AC 374 (the GCHQ Case).
[5] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] (1) KB 223
[6] [1948] 1 K.B. 223 at pages 229 - 230.
[7] [1977] AC 1014.

> "*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 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'.*[8] I therefore intend to apply the less rigorous test in deciding whether the UGC has acted reasonably.

The learned Deputy Solicitor General submitted that the Supreme Court decision in 2011 was silent on whether the Petitioners' method should be used or whether the Respondents' method should be used. The UGC had commenced the consideration of this issue well before the Advanced Level examinations in 2019. Preparatory work had started very early and the UGC had appointed an Expert Committee consisting of eminent academics in the field of Statistics and Mathematics as well as representatives from the Department of Census and Statistics and the Central Bank to consider the appropriate mechanism to deal with the special situation that would arise with the introduction of a new syllabus in 2019.

It is clear from the Report of the Expert Committee that they had considered different methods and arrived at two options. The first option recommended the "*composite average method*" as **Option 1** which involved allocating places based on the previous 5-year (2013 – 2017) composite averages of the entry percentages of first-time candidates and repeaters. The second option was to simply calculate the "Z-scores" of first-time candidates and repeaters as two different populations and thereafter place them on a common rank list. Option No.2 that was considered by the Experts Committee is referred to as the *Combined List*. Under this option, those students who had sat the new syllabus and old syllabus are treated as two separate populations and are assigned separate Subject 'Z'-Scores. Thus there would be separate Subject 'Z'-Scores for the Biology New Syllabus Paper and the Biology Old

[8] 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.

Syllabus Paper. Based on the separate Subject 'Z'-Scores, the average would be obtained, which would be the students' 'Z'-Score. Thus the two populations of Old Syllabus students and New Syllabus students will have two different 'Z'-Scores. Thereafter, the two groups are amalgamated for a "Combined List" and this Combined List will rank all the 'Z' Scores regardless of whether they are Old Syllabus or New Syllabus. This method was considered as **Option 2** in the Expert Committee Report. The Petitioners have requested that this method be used, and have filed an opinion from Professor R. Thatil, marked as '**P6**',[9] in support thereof.

The learned Deputy Solicitor General submitted that the second option was rejected by the Expert Committee due to the fact that the distributions of the two populations (of first-time candidates and repeaters) were not identical. He stated that the 'Z'-score method is based on the assumption that the underlying distributions are identical and that having examined the historical data, the Expert Committee confirmed that the "mean", "skewness" and "kurtosis" between the two populations were significantly different. It was his submission that when there is a significant difference in the distributions the 'Z'-score method is not reliable and will lead to anomalies.

The UGC accepted the recommendation of the Expert Committee and published the Notice '**P8**' in daily newspapers of all three languages and repeated the Notice on 12th May 2019 in the weekend newspapers of all three languages. The UGC issued the 'Handbook' relating to admission to undergraduate courses of the Universities in Sri Lanka for the Academic Year 2019/2020 around 5th March 2020. The said Handbook has specifically reiterated the method of admission indicated in the above Notices at pages 9 and 227, thereof. Thus, those sitting for the examination in 2019 were placed on notice and the position of the UGC has been made known even prior to them sitting the A/L exam in 2019.

When I consider the above material, which material I must state was available to the Supreme Court when it considered the application of the Petitioners in December 2020, it is clear that the UGC:

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[9] Prof. Thattil was part of the Presidential Committee that recommended the same approach in 2012, which was rejected by the Supreme Court, and a settlement order was issued in SCFR/418/2012 using the maximum ratio method described in the limited objections.

(a) has obtained the services of an Expert Committee to consider the various options that were available and propose the best possible solution that is reasonable to all;

(b) has specifically considered the method proposed by the Petitioners and has rejected it for the reasons set out in the report of the Expert Committee;

(c) has considered the issue thoroughly and in a timely manner;

(d) given all students timely notice of the proposed method even prior to them sitting the A/L exam.

I am therefore satisfied that the UGC has acted reasonably and that the decision of the UGC to apply the *composite average method* is a decision which a *sensible authority acting with due appreciation of its responsibilities would have decided to adopt.*

This brings me to the three legal objections that were raised by the learned Deputy Solicitor General. In view of the conclusion that I have reached that the decision of the UGC is neither unreasonable nor irrational, I do not think it is necessary for me to engage in a lengthy discussion on the first two objections, suffice to state that a Petitioner who has had a full hearing before the Supreme Court spanning over three days certainly cannot seek to re-agitate the same issue before this Court.

This issue has been considered on several occasions in the recent past in the context of petitioners who keep coming back to this Court after their first attempt has been unsuccessful. In **Vehicles Lanka (Private) Ltd and another v. Jagath Premalal Wijeweera, Director General of Customs and Others**,[10] Malalgoda, J / PCA (as he then was) stated that:

> "***this court is not inclined to reconsider the same issues which were considered once by this court.*** *It is trite law that there needs to be finality to litigation and therefore parties [are]* ***estopped from bringing multiple suits on the same issues*** *resulting in overburdening the court*."

[10] CA (Writ) Application No. 446/2014; CA Minutes of 12th February 2016.

Similar sentiments were expressed in **Ensen Trading and Industry (Pvt.) Ltd. v. Mangala Samaraweera and Others**[11] where this Court cited the following passage from *New Brunswick Rail Co. v. British and French Trust Corporation Ltd*,[12] to explain the rationale for adopting the principle that the same issue cannot be re-litigated:

> ''*The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be re-litigated afresh between the same parties or persons claiming under them*.''

The submission that a petitioner cannot continue to agitate the same matter over and over again brings me to the final objection raised by the learned Deputy Solicitor General, namely that this action is an abuse of the process of Court. I agree with the said submission and take the view that this Court, in the exercise of its Writ jurisdiction, will not exercise its discretion in favour of these Petitioners who are seeking to re-agitate an issue *ad nauseum.* Thus, on this ground alone, I am of the view that this is not a fit matter where the discretion of this Court must be exercised in favour of the Petitioners.

In the above circumstances, I see no legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal

[11] CA (Writ) Application No. 41/2019; CA Minutes of 1st April 2019.

[12] 1939 AC 1; at pages 19-20.