

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

In the matter of an application for mandate in the nature of Writ of Certiorari, and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Gamaralalage Noyel Wijyaratne,
507 23rd Mile Post
Jayanthipura,
Polonnaruwa.
2. Bope Ralage Sarath Chandrawansa,
Polkotuwawatte,
Mawanella.

Court of Appeal Case No.
CA/WRIT/306/2013

PETITIONERS

Vs.

1. The University of Peradeniya,
Peradeniya
2. Prof. Athula Senaratne,
Vice Chancellor,
University of Peradeniya,
Peradeniya.
- 2A. Prof. Upul Disanayake
Vice Chancellor,
University of Peradeniya,
Peradeniya.
3. Prof. Navaratne Bandara,
The Dean,
Faculty of Arts,
University of Peradeniya,
Peradeniya.

- 3A. Prof. O. G. Dayarathne Banda,
The Dean,
Faculty of Arts,
University of Peradeniya,
Peradeniya.
4. Athula Samarakoon,
Head of the Department of Fine Arts,
Faculty of Arts,
University of Peradeniya,
Peradeniya.
- 4A. Dr. Manoj Alawathukotuwa,
Head of the Department of Fine Arts,
Faculty of Arts,
University of Peradeniya,
Peradeniya.
5. Prof Tissa Atukorala,
Head of the Department of Sociology,
Faculty of Arts,
University of Peradeniya,
Peradeniya.
6. R. Chandrasekara,
Member of the Council,
The University of Peradeniya
Peradeniya.
7. Kanchuka N Dharmasiri,
56/7 3rd lane,
Aruppola,
Kandy.
8. Prof. Shantha K Hennayake
8A. Prof. R. L. Wijayaweera
8B. Prof. S. H. P. Parakrama Karunaratne.
9. Prof. K. S. Samarasinghe
9A. Prof. K. Samarasinghe
9B. Prof. D. K. N. G. Pushpakumara

- 10. Prof. U. B. Dissanayake
- 10A. Prof. K. Samarasinghe
- 10B. Prof. N. A. A. S. P. Nissanka

- 11. Prof. L. Rajapakse

- 12. Prof. M. D. Lamawansa

- 12A. Prof. V. S. Weerasinghe

- 13. Prof. S. H. P. P. Karunaratne
- 13A. Prof. E. M. P. Rajaratne
- 13B. Dr. M. Alfred
(Acting Dean Faculty of Management).

- 14. Prof. H. P. S. Ariyaratne

- 15. Dr. D. B. M. Wickramaratne
- 15A. Prof H. M. D. R. Herath
- 15B. Prof. S. R. Kodituwakku

- 16. Prof. P. W. M. B. B. Marambe
- 16A. Prof. Thilakaratne
- 16B. Prof. W. M. Tikaratne

- 17. Prof. A. Wickramasinghe
- 17A. Dr. V. Nandakumar
- 17B. Prof. C. M. Maddumabandara.

- 18. M. Abeygunasekara
- 18A. Prof. K. N. O. Dharmadasa

- 19. B. M. N. Balasooriya
- 19A. I. M. K. Liyanage

- 20. A. Hewage
- 20A. Prof. P. B. Meegaskumbura

- 21. P. Jayasekara
- 21A. Dr. Ranil Abesinghe

- 22. S. Ratwatte
- 22A. Lal Wijenayake

- 22B. Maneesha Senevirathne
23. Dr. L. Weerasinghe
23A. Wijaya Wickramaratne
23B. Prof. Anoma Abayaratne
24. U. W. Attanayake
25. Prof. M. L. A Cader
25A. G. S. J. Disanayake
26. Dr. A. U. Gamage
26A. Dammika J. Amarasinghe
26B. Ruwan Wijeratne
27. H. M. G. Seneviratne
27A. Mohammed Thaha Ziyad Mohamed
28. M. S. Premawansa
28A. E. M. Palitha Elkaduwa
28B. Dr. D. B. Mahinda Wickramaratne
28C. Upul Kumarapperuma
29. M. Samaranayake
29A. K. D. Gayathri M. Abeyagunasekara

8th to 29th Respondents:
Members of the Council,
University of Peradeniya
Peradeniya.

30. S. K. H. Hapuhinna
The Registrar,
The University of Peradeniya,
Peradeniya

RESPONDENTS

Before: C.P Kirtisinghe, J
Mayadunne Corea, J

Counsel: Counsel for the Petitioner Shantha Jayawardena with Nayantha Wijesundara

Counsel for the Respondent Kushan De Alwis PC with Ayendra Wickramasekara for 1-5th, 8th, 10th & 14th Respondents

Argued on: 24th November 2021

Written Submissions: Written Submission of the Respondents 30th November 2018
Written Submission of the Petitioner 12th October 2018

Decided on: 08th February 2022

Mayadunne Corea J

The facts of the case briefly are as follows, the Petitioners state that in response to an advertisement placed in the newspaper inviting applications for the posts of ‘Lecturer (Probationary) / Senior Lecturer Grade III/Grade I for the Department of Fine Arts by the 1st Respondent University, the 1st Petitioner applied for the post of ‘Senior Lecturer Grade II and the 2nd Petitioner applied for the post of Lecturer (Probationary). The Petitioners attended the interview held on 04.01.2013.

The Petitioners contend that the composition of the Selection Committee consisting of the 2nd – 6th Respondents, who interviewed the Petitioners on 04.01.2013 were in contrary to the Ordinance as they did not possess the necessary qualifications pertaining to the field of study concerned, thus had no knowledge of it. Petitioners state that the Selection Committee has deviated from the established guidelines of selecting candidates to facilitate the appointment of the 7th Respondent. The Petitioners further state that the appointment of the 7th Respondent to the post of Lecturer (Probationary) is unlawful as the 7th Respondent did not attend the interview held on 04.01.2013 and does not possess the necessary qualifications to be considered as a suitable candidate for the post of ‘Lecturer (Probationary) in Fine Arts in the Department of the Fine Arts of the 1st Respondents University.

The Petitioners allege that the 7th Respondent is an acquaintance of the 4th Respondent who was part of the Selection Committee and communicated personally to the 4th Respondent requesting the interview to be held by way of Skype as the 7th Respondent was in the United States completing her doctorate when the interviews were rescheduled to be held. The advertisement calling for applications did not state that the interviews could be done via Skype and alleged that if this aspect was included in the said advertisement many candidates studying abroad would have applied for

the post. The Petitioners therefore state that there is inherent bias on the part of the Selection Committee towards the 7th Respondent thus breaching the rules of natural justice. The Petitioners filed this petition seeking the following reliefs among other things:

1. Grant and issue an order in the nature of **Writ of Certiorari** quashing the selection and recommendation of the Selection Committee for appointment of the 7th Respondent as Lecturer (Probationary) in the Department of Fine Arts of the 1st Respondents University.
2. Grant and issue an order in the nature of **Writ of Certiorari** quashing the appointment of the 7th Respondent as Lecturer (Probationary) in the Department of Fine Arts.
3. Grant and issue an order in the nature of **Writ of Certiorari** quashing the selection and recommendation of the Selection Committee. (2nd – 6th Respondents)
4. Grant and issue an order in the nature of **Writ of Mandamus** directing the 2nd to 6th and 8 to 29th respondent to hold interviews afresh

Petitioners' complaint

At the argument stage the Petitioners confined their grievances to three grounds namely;

- The 7th Respondent does not possess the qualifications required by the scheme of recruitment.
- There is actual bias or reasonable likelihood of bias towards the 7th Respondent.
- The selection committee was not constituted in terms of the appointment procedure.

Hence this application for Writ of Certiorari and Mandamus.

At the commencement of the arguments both the parties submitted that the 7th Respondent is no longer holding the post and has left the post and subsequent to a fresh interview being held, a new person has been appointed to the said post. The Petitioners' Counsel at this stage submitted that he is no longer pursuing the relief for a Writ of Mandamus.

The 1st Petitioner is a holder of Bachelor of Arts Special (Honors) Degree in 'Fine Arts' from the University of Kelaniya, in addition to Post Graduate Degrees from recognized universities in the related field with approximately 20 years of teaching experience. The 2nd Petitioner also holds a Bachelor of Arts Degree in Fine Arts from the University of Peradeniya, with several Post Graduate Degrees in this field of study with approximately 9 years of teaching experience. The Petitioners state that on or around 29.01.2012 an advertisement was placed in the Sunday Observer inviting applications for the posts of 'Lecturer (Probationary) / Senior Lecturer Grade III/Grade I'. The advertisement specified the required qualifications as, "The candidates who are qualified in Fine Arts or related fields may apply".

The Petitioners state that the scheme of recruitment applicable for the above posts is contained in the Commission Circular No. 721 dated 21.11.1997 (P33) issued by the University of Grants Commission which sets out the qualifications and the experience expected from the applicants'

seeking appointments in the said posts. This circular has since been modified and amended by the following circulars, Establishments Circular Letter No. 8 /2005 dated 11.08.2005 (P34), Commission Circular No. 935 dated 25.10.2010 (P35) and Establishments Circular Letter no. 3/2012 dated 18.01.2012 (P36).

The 4th Respondent, Head of the Department of Fine Arts by letter dated 01.06.2012 (R4) informed the 2nd Respondent, Vice Chancellor, that as per the mission statement of the Faculty of Fine Arts the course was designed to offer undergraduates a thorough theoretical knowledge of all aspects of the phenomenon of Art and elaborated the degree courses that is to be considered to follow under the related fields.

The Petitioners contend that the appointment of the 7th Respondent to the post of 'Lecturer (Probationary) in the Department of Fine Arts is unlawful as the 7th Respondent did not attend the interview on 04.01.2013 and is a holder of a Bachelor of Arts (Honors) Degree in English and Post Graduate Degree in Comparative Literature with teaching experience of one year in the English Department. The Scheme of Recruitment marked (P33) provides that the educational qualifications for the post of Lecturer (Probationary), shall be in the 'relevant subject'. However, the advertisement marked (P30) stipulates that 'the candidates who are qualified in Fine Arts or related fields may apply'. It was further contended that the term 'related fields' stated in the advertisement is vague and moreover the Scheme of Recruitment does not provide for appointment of candidates from 'related fields'. It is contended by the Petitioners that Literature was added to be a part of the related fields so that the qualifications of the 7th Respondent can be considered for the appointment. One of the Petitioners' main contentions is that the whole selection process was conducted with ulterior motive and deviated from the regular screening process to facilitate the appointment of the 7th Respondent.

The Petitioners also contended that the composition of the Selection Committee consisting of the 2nd – 6th Respondents, who interviewed the Petitioners on 04.01.2013 were in contrary to the Ordinance as they did not possess qualifications and knowledge in the field of study concerned and that there was only one member representing the Council of the University. The Selection Committees to select and appoint suitable candidates to the above posts is governed by the Procedure for Appointment Ordinance No. 196 (P37) made by the University Grants Commission.

The Respondents reply

The Respondents submit that the composition of the Selection Committee is governed by the Circular bearing No. 166 (R7) and that both P37 and R7 are identical but has been amended subsequently. Both parties were not at variance on the composition of the selection committee. Section 5(2) of the said Ordinance marked P37 demonstrates the composition of the Selection Committee. Following the interviews, the Selection Committee's recommendation to be submitted before the Council which is the appointing authority under the Universities Act.

The Petitioners further contend that there is actual bias or reasonable likelihood of bias towards the 7th Respondent. The Respondents in their objections took up several preliminary objections, This Court will deal with them later on.

This court will now consider the allegations made.

The Petitioners submits that the applications were called in contravention to the Scheme of Recruitment (P33).

The document marked P30 (R3) the advertisement published dated 29.01.2012 calls for applications to the posts of Lecturer (Probationary) and Senior lecturer Grade 11/Grade 1. The said advertisement clearly states "**the candidates who are qualified in fine arts or related fields may apply**". The advertisement does not contemplate what the related fields are. However, it is under the heading Department of Fine Arts. The SOR is common to the advertised post pertaining to Non-(medical/Dental). If the subject is for Fine Arts, then the Petitioners contention pertaining to the advertisement being not in line with the SOR has merit. The Learned Counsel for the Respondent's contention was to clear this ambiguity, the 4th Respondent as the head of the department of Fine Arts had informed the 2nd Respondent, Vice Chancellor the degree courses that can be considered as falling within the ambit of the term "Related fields" (R4). This letter is dated 01.06.2012. It was argued that this letter had been sent after considering the mission statement and the undergraduate curriculum of the department of Fine Arts, and to give the students an overall knowledge. The Petitioners failed to answer this contention but contended that the Scheme of Recruitment does not provide for the use of related field.

However, this Court observes that the Petitioners too had applied for this advertisement without any objections for the said term. Further the Petitioners had been present for the interviews and has failed to provide any material to show that they had objected to the advertisement for the way it had been published at the time of the interview. If there was an illegality, irregularity in the process of calling for interviews or a blunt violation of the Scheme of Recruitment in the way the applications were called the Petitioners could have challenged the said illegality/irregularity when it occurred instead of waiting for more than a year from the publication calling for applications and an appointment made. Without conceding the Respondents strongly contended that by applying to the advertisement and taking part in the interview process without any objections the Petitioners are now estopped from challenging the advertisement and also acquiesced with the process.

As per the said advertisement and (R4) a person who is qualified in fine arts or related fields are entitled to apply. The said letter states as follows, "*It has been brought to my notice that it is necessary to give a clearer interpretation to the term 'related fields' in order to make the recruitment process transparent and smooth. According to the Department mission statement and*

undergraduate curriculum, Fine Arts course at Peradeniya has been designed to offer undergraduate a thorough theoretical knowledge in all aspects of the phenomenon of Art by studying it from aesthetic, sociological, psychological and historical points of view. The course also has been designed to equip the undergraduate with computer and digital skills necessary. Under these circumstances any degree course on Mass Communication, Literature, Archeology, History, Anthropology, Fashion designing, Philosophy can be considered as 'related fields' for the Department of Fine Arts".

The learned Counsel for the Respondents contended that the 7th Respondent holds a masters in Comparative Literature and had been reading for a Doctorate at the University of Massachusetts, Amherst in Comparative Literature. It was further contended that the 7th Respondent's course content consists of drama and theater and both parties were not at variance on the fact that the 7th Respondent had directed dramas. At the argument stage it was submitted that at the conclusion of the interviews and subsequent to evaluation of all the applicants the selection committee had given the highest mark to the 7th respondent and selected her. This position was not challenged by the Petitioners. The interviews had been held on 04.01.2013. The 7th Respondent had been sent the letter of appointment dated 06.03.2013(R15) marked by the Petitioners as P43. The 7th Respondent had accepted the said appointment on 08.04.2013 (R16). Considering all these factors this Court is of the view that the Petitioners argument on qualifications as per R4 has not been established.

The Petitioners second ground of argument was that the selection process violated the rules of natural justice and submitted that the composition of the selection committee was faulty. The constitution of the selection committee is reflected in the document marked P37(Procedure for Appointments Ordinance [Section 5(2)]).

The same criteria have been set out in Circular No. 166 which was marked by the Respondents as R7. As per the said requirements this Court will now consider whether the Selection Committee composition violates the requirements. The parties were not at variance on the required qualifications to be a committee member.

In answering the Petitioners contention, the Respondents submitted what the composition should be and how it is satisfied. Accordingly, the following was submitted;

- (a) The principal executive officer who shall be the Chairman (the 2nd Respondent fulfils this criteria)
- (b) The Dean of the Faculty concerned (3rd Respondent fulfills this criteria)
- (c) The Head of the Department of study concerned (4th Respondent fulfills this criterion)
- (d) Two members appointed by the governing authority from among its members who have been appointed by the Commission (6th and 24th Respondents fulfill this criteria)

- (e) One member with knowledge of the subject of study concerned appointed by the Senate or the academic syndicate as the case may be from among its members (the 5th Respondent fulfills this criteria)
- (f) Where the post is in a University College, one member appointed by the Vice Chancellor of the University to which such University College has been affiliated from among the members of the appropriate Faculty of such University. (This criterion does not apply to the 1st Respondent University)

The Petitioners main grievance at the argument stage was that as per P37 there should be a member with a **knowledge of the subject of study concerned**. The contention of the Petitioners is that 2 - 6 Respondents nor the 24th Respondent are qualified to fulfill this requirement as their qualifications are not in Fine Arts.

In answering this the learned Counsel for the Respondents submitted that the 5th Respondent was the head of the Department of Sociology and is also a lecturer in the department of Fine Arts teaching among other subjects FNA498/499:Research method for dissertation in fine arts, FNA 501:Research methods in fine arts: Postgraduate Diploma Cours,FNAA601:Research methodology in fine arts: MPhil program and submitted that he clearly has the knowledge of Fine Arts and fulfills the criteria stipulated in P37.

It was also contended that as per the advertisement in any event the applications were called not only from persons qualified only in fine arts but from related fields as well. Thus reading with the mission statement and R4 the ambit of **the study concern** becomes very wide.

In this instance once again, this Court observes that these interviews were held on 04.01.2013. The Petitioners had taken part in the interviews. If the selection panel was not properly constituted as alleged then the Petitioners should have objected to it. If the Petitioners were unaware of the qualifications of the panel at the time of the interviews, they should have been more diligent and obtained the qualifications and challenged the composition without waiting for ten long months and without waiting till an appointment was made and the appointed person accepting work.

The Petitioner has submitted P40 a letter by an attorney-at-law sent to the Vice Chancellor dated 14.02.2013. This Court has considered the said letter and finds that it does not challenge the composition of the selection panel nor does it take issue for calling candidates who are qualified in fine arts or related fields.

However, it raises concerns on overlooking the 2nd Petitioner who holds a degree in fine arts and also a post graduate qualification in fine arts related fields.

Having considered the letter P40 it appears to this Court when the said letter was written the Petitioners were aware of the appointment of the 7th Respondent to the post. This Court also finds that instead of obtaining a clarification on what is meant by **related fields** the author of P40 has

assumed what the related fields were. If this clarification was obtained the 2nd Petitioner would have been in a substantial position to determine whether there were grounds to challenge the 7th Respondent on qualifications. As per the submissions of the Petitioners there had been no response to this letter. This letter had been sent on behalf of the 2nd Petitioner which means the 1st Petitioner had not taken any step to challenge the whole process for more than a year till the filing of this application.

At this stage this Court will address the Preliminary objection the Respondents have taken on unexplained delay. The Petitioners are challenging the appointment and are seeking a Writ of Certiorari to quash the recommendation of the selection committee and the appointment letter. The Petitioners have filed this application before Courts in the month of October which is after six months of the acceptance of the letter of appointment, nearly seven months from the date of the letter of appointment. This Court observes that the Petitioners had been aware of the appointment even when P40 was Written. Then why didn't the Petitioners take any steps to challenge the said appointment? This Courts finds that the Petitioners have failed to give a reasonable explanation to this Court to purge the delay.

Our Courts have constantly held that if there is an unexplained and inordinate delay the Petitioners will be not entitled to the reliefs. **In Senaviratne Vs Tissa Dias Bandaranayake & another (1992) 2 SLR 341** it was held *"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 dormeintibus, subveniunt, and for other reasons refuses to assist those who sleep over their rights and are not vigilant."*

In the case of **Biso Menika vs Cyril de Alwis (1982)1 SLR at Page 368 His Lordship Sharvananda J held, inter alia, that; "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 if 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 a inferior tribunal except in cases where he has disintitiled 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 by 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 reasonable excuse the chances of his success 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."**

This Court is mindful of the fact that it cannot assume the role of the interview panel but can look in to any irregularities in the process to ascertain whether due process had been followed and whether the Petitioners have promptly acted pertaining to their grievances.

The Petitioners also submitted that the 7th Respondent had been selected without facing an interview. Answering this allegation, the Respondents contended that the 7th Respondent at the time of the interviews had been reading for a doctorate at the University of Massachusetts. However, she had been present in Sri Lanka for the interviews scheduled for June in 2012, which had to be postponed due to a strike action of the University Staff. Thereafter she had proceeded back to her university to complete the doctorate. When the interviews were rescheduled for 04.01.2013 she had made a request to face the interview by skype due to financial constraints of having to come again due to no fault of hers. The Respondents contention was that this request had been allowed and the interview had been held by the same panel who interviewed the other applicants. This same committee had evaluated and given marks on the same basis as for others. Further it was submitted that under the circumstances if any other applicant had made a similar application the committee would have had no hesitation to permit such a request.

It is observed by the Court that the relevant Scheme of Recruitment does not specify the modalities of the interviews to be conducted. Quite contrary to the Petitioners allegation that the 7th Respondent had been selected without facing an interview, we find an interview had been held by the same panel and the marks given and evaluated. We also observe that the 7th Respondent had been present on the day first fixed for interviews and as the interviews had been postponed only had made this request. In the circumstances that is particular to this case and in the absence of the method or modalities stipulated in the SOR and without any specific prohibition to hold an interview by skype we are unable to agree with the contention of the learned Counsel for the Petitioners submission that the method used had violated the rules of natural justice.

However, if the Petitioners had provided this Court with any material to show that a similar request by another applicant under similar circumstances had been rejected or had provided material to show that by this method the Petitioners have been specifically affected or placed at a disadvantageous position or had allowed serious irregularities to occur on marking, then this Court would not have arrived at the conclusion which it has come to now.

The allegation of bias.

The Petitioners alleges bias on several grounds. One of the grounds are that the 7th Respondent had been interviewed by skype and that this facility had not been given to other applicants. This Court has already dealt with this ground and in the absence of any material to show any other party had been refused is not inclined to uphold the Petitioners contention on this ground.

It was alleged that the Vice Chancellor has not been present at the interview panel which interviewed the candidates bearing No. 14 to 21 but has interviewed the 7th Respondent thereby

when the marking is evaluated there is an additional person's marks. This was answered by the Respondents and submitted that whatever the number of panelists in the committee the total marks are divided by the number of panelists and then evaluated thereby, and no prejudice caused. At the argument stage this contention was not disputed by the Petitioners. In view of the Respondents contention the Petitioners have failed to establish this ground with additional material to show how the Petitioners have been affected.

However, this Court is of the opinion that this practice of a panelist not being present throughout the interviews should not be encouraged and the relevant authorities should take steps to avoid such situations.

The 7th respondent had been issued with a letter of appointment to state that her date of appointment would be the date she assumes duties. Further the 7th Respondent has sought further time to accept duties which has been allowed by the Respondents. The Respondents contended that the letter of appointment was in compliance with the Establishment Code. This fact was not challenged by the Petitioners and none of the parties submitted the University Establishment Code for the perusal of the Court. Further clarifying this argument, the Respondents submitted that the time was given for the 7th Respondent to complete her doctorate as it would be more beneficial to the University.

The Petitioners makes this allegation of bias mainly based on the fact that the 4th Respondent had acted in a drama that has been directed by the 7th Respondent. The Respondents do not deny that the 4th Respondent had been an actor in a drama directed by the 7th Respondent and submits that he had done that in his personal capacity. In this aspect the burden is on the Petitioners to demonstrate that by being in the cast, the 4th Respondent showed bias towards the 7th Respondent. The Petitioners contention was that there need not be actual bias but a likelihood of bias was sufficient to vitiate the decision. On this ground the Petitioners heavily relied on the decided case of **Mohamed Mohideen Hassen Vs Peiris (1982)1 SLR 195**. This Court has considered the said Judgement.

This Court has also considered the judgment of **Re RatnaGopal,70 NLR 409** which was considered in the **Mohamed Mohideen's case** where the test of real likelihood of bias was applied and it was held, *"The probable test to be applied is, in my opinion an objective one, and I would formulate it somewhat on the following lines; would a reasonable man in all the circumstances of the case believe that there was a real likelihood of the Commissioner being biased against him"*

Applying the real likelihood of bias test in **Abdul Hasheeb Vs Mendis Perera and others 1991 ISLR 243** the Court opined *"The totality of the circumstances relied on by the Petitioner do not show that the Judge has extended favours to one side "unfairly at the expense of the other" and I accordingly hold that the allegation of bias has not been established"*

The question that arises before us is whether the 4th Respondent was biased because he, in his personal capacity (as submitted by the Counsel for the Respondent) acted in the cast of the drama directed by the 7th Respondent. The Petitioners' submission is that there is a reasonable suspicion of likelihood of bias by the 4th Respondent as he had acted in the cast of a drama directed by the 7th Respondent. The Petitioners are relying on the test of reasonable suspicion of likelihood of bias while the Respondents contention is that the Court should apply the real likelihood of bias.

In this contention, our Courts in **W.D. Saimon & Others Vs the Commissioner of National Housing & Three others 75 NLR471** ... held....." *In so far as the ' real likelihood' and the ' reasonable suspicion' tests are inconsistent with each other "* submits de Smith (at p. 246) "*the former is normally to be preferred; the reviewing Court should make an objective determination, on the basis of the whole evidence before it, whether there was a real likelihood that the inferior tribunal would be biased "*.

It is the same view that T. S. Fernando, J. took in Re Ratnagopal¹ [1 (1968) 70 N.L.R .409.] (1968) 70 New Law Reports 409 when he said " The proper test to be applied is, in my opinion, an objective one and I would formulate it somewhat on the following lines: Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?"

The test of real likelihood of bias has been applied in the case of **Dr Karunaratne Vs Attorney General & another (1995) 2 SLR 298**. Considering the judgements cited this Court is of the view that our courts have been more inclined to apply the real likelihood of bias as opposed to the reasonable suspicion of likelihood of bias.

As per the above cited Judgments in considering the real likelihood of bias this Court has to consider all the relevant facts and the circumstances in which the decisions have been taken. This Court has considered the mark sheets of the candidates that were submitted to this Court and the respective marks given by the committee members and the marks obtained by the candidates. (R10) It is not disputed by the parties that the 7th Respondent had obtained the highest marks at the interview. Also, the fact that the interviews were done by a committee and not an individual. The interview committee was not an ad hoc committee but constituted according to the governing procedures and circulars and the said committee had decided to choose the 7th Respondent as the most suited. As stated earlier she is the person who has obtained the highest number of marks at the interview. The Committee had also selected a reserve candidate. The said reserve candidate is also an applicant who had faced the interview. This Court observes even the reserve candidate is not one of the Petitioners. In our view the decision to hold a skype interview in the given circumstances cannot be attributed to bias by the 4th Respondent especially in view of the fact the interview that was to be originally held could not be held not due to the fault of the 7th Respondent. It was due to an internal issue of the University namely a strike action. This Court also has taken

into consideration the fact that the 7th Respondent had made herself available on the date the interviews were first scheduled to be held.

The Petitioners also submitted that the 7th Respondent had sent an e-mail to the 4th Respondent and requested whether her interview can be conducted via skype. The attention of this Court was drawn to the fact that it has been referred to the Vice Chancellor by the 4th Respondent. As contended by the Respondents, the 4th Respondent being the head of the Department of Fine Arts, the request had been directed to the Vice Chancellor through the head of the department. This Court observes that the said e-mail is not only directed through the 4th Respondent but through the Dean of the Faculty of Arts as well. This request had been forwarded to the Vice Chancellor to take a decision. The E-mail (P42) gives its reasons as to why the said request is made.

Further the appointment of the 7th Respondent had been made by the Council after considering the marks and the evaluation. At this stage it is pertinent to consider the application of the test on real likelihood of bias in **Dr Karunaratne vs Attorney General and Another, (1995) 2 SLR 298** where it was quoted from R-Vs Camborne Justices ex parte Pearce; *"In the judgment of this court, the right test is that prescribed by Blackburn, J. in R v. Rand, namely that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown... The frequency with which allegations of bias have come before the courts in recent time; seems to indicate that the reminder of Lord Hewart, C. J. in R v. Sussex JJ ex parte Mc. Carthy, that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done"*.

Considering all these factors we are not inclined to agree with the Petitioners' contention of bias and we find the Petitioners have failed to establish a real likelihood of bias to the satisfaction of this Court.

At the argument stage both parties admitted that the 7th Respondent has now left the post. Thus even if this Court issues the reliefs the Petitioners seeks it would be futile. Granting of a Writ is a discretion vested with Courts and the Petitioners cannot seek this discretionary remedy as of a right. If the granting of the Writ is futile then even if the party seeking it has a strong case the Court will refuse to use its discretionary power in favor of the Petitioner.

In **P.S. Bus CO Ltd. VS Members and Secretary of Ceylon Transport Board** 61NLR 491 at Page 495 it was held; *“The prerogative Writs are not issued as a matter of course and it is 'in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A Writ, for instance, will not issue where it would be vexatious or futile.”*

In the case of **Sethu Ramasamy Vs. Moregoda** 63 NLR 115 Gunasekara J. Observed that *“A mandamus will not be granted when it appears that it would be futile”*. In **Selvamani Vs Dr Kumarvelupillai** (2005)1 SLR 99 it was held, *“Even if this application of the Petitioner is granted, he is not entitled to resume his earlier office in view of the Order of vacation of post. Therefore, issuing a Writ of Mandamus would be futile. A Writ of Mandamus will not be issued if it will be futile to do so and no purpose will be served....”*

Accordingly for the reasons set out in this Judgement we are not inclined to grant the reliefs prayed for in the petition. This application is dismissed without cost.

Judge of the Court of Appeal

C. P Kirtisinghe, J

I agree

Judge of the Court of Appeal