

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

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

CA (Writ) Application

NO: 398/2021

1. Dr.S.M.P.D. De Silva
Consultant Interventional Radiologist
Head of the Department of Radiology
Member,
Board of Study in Radiology,
The National Hospital of Sri Lanka,
Colombo 10.

2. Dr.B.M.P. Bandaranayaka
Consultant Interventional Radiologist
The National Hospital of Sri Lanka
Colombo 10.

3. Dr. Pandula Hettiarachchi
Consultant Interventional Radiologist
The National Hospital of Sri Lanka
Colombo 10.

4. Dr. Sangaradas Nimalan
Consultant Interventional Radiologist
Teaching Hospital
Jaffna

5. Dr. K.M.R.Kannangara
Consultant Interventional Radiologist
National Censer Institute
Maharagama

6. Dr. P. Udayakumaran
Consultant Interventional Radiologist
Teaching Hospital
Kalubowila

7. Dr. B. Danawardena
Consultant Interventional Radiologist
Teaching Hospital
Karapitiya, Galle

8. Dr. A.S. Pallewatte
Consultant Radiologist
Member, Board of Study in Radiology
The National Hospital of Sri Lanka,
Colombo 10.

Petitioners

Vs

1. Dr. A.D.P. Athukorala
Acting Interventional Radiologist
Neuro Trauma DSA Unit
The National Hospital of Sri Lanka
Colombo 10

2. Professor Senaka Rajapakse
Director, Postgraduate Institute of
Medicine

No.160, Prof. Nandadasa Kodagoda Mawatha
Colombo 07.

3. The Deputy Director

Postgraduate Institute Of Medicine
No.160, Prof. Nandadasa Kodagoda
Mawatha, Colombo 07.

4. Professor S.D.Jayaratne

Chairman, Board of Management
Postgraduate Institute Of Medicine
No.160, Prof. Nandadasa Kodagoda Mawatha,
Colombo 07.

5. Mr. T.B.M. Atapattu

Member, Board of Management
Postgraduate Institute Of Medicine
No.160, Prof. Nandadasa Kodagoda Mawatha
Colombo 07.

6. Major General Dr. Sanjeewa Munasinghe

Member, Board of Management,
PGIM & Director General of Health Services
385, Ven. Baddegama Wimalavans Thero Mw
Colombo 10

7. Dr. Asela Gunawardena

Member, Board of Management,
PGIM & Director General of Health Services
385, Ven. Baddegama Wimalavans Thero Mw
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8. Ms. W.E. Godagama
Member, Board of Management
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9. Professor Vajira H.W. Dissanayaka
Member, Board of Management
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10. Professor S.D. Dharmaratne
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11. Professor Vasantha Devasiri
Member, Board of Management
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12. Dr. S. Raviraj
Member, Board of Management
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13. Professor A. Pathirana
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14. Professor S.J.De S. Hewavisenthi
Member, Board of Management
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15. Dr. A.N. Arulpragasam
Member, Board of Management
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16. Dr. Senaka Pilapitiya
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17. Professor A.M. Attygalla
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18. Professor Jayantha Jayawardena
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19. Professor Nandadeva Samarasekera
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20. Dr. Harsha Cabral
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21. Professor Lakshman Ratnayake
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22. Professor Arjuna De Silva
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23. Mr. Rajan Asirwatham
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24. Rev. Father Ivan Perera
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25. Professor S. Karunaratne
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26. Dr. Ranjan Dais
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27. Dr. S. Rosairo
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28. Dr. R.A.N.K.K.Samarasighe
Secretary, Board of Study in Radiology
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29. Dr. Udari Liyanage
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34. Dr. M.U.J.Fernando
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- 43 Dr. U.G. Rodrigo
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47. Dr. C.L. De Silva
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48. Dr. R.M.S.T. Samaraweera
Former Member
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49. Dr. C. Sirigampala
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50. Dr. A.M.A.D.M.. Alagiyawanna

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53. Dr. I.N. Lekamge

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54. Dr. Kamani Samarasinghe

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55. Professor Chandrika N. Wijeyaratne
Vice Chancellor,
University of Colombo.

56. Dr. Prathiba Mahanamahewa
Rector, Sri Palee Campus.

57. Professor Nayani Melegoda
Dean, Faculty of Graduate Studies
University of Colombo.

58. Professor Lasantha Manawadu
Dean, Faculty of Arts
University of Colombo.

59. Dr. L. M. Kapila Bandara
Dean, Faculty of Education
University Colombo.

60. Dr. N.S. Punchihewa
Dean, Faculty of Law
University of Colombo.

61. Professor M.P.P.Dharmadasa
Dean, Faculty of Management & Finance
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62. Professor Vidya Jothi Vajira H.W.
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Dean, Faculty of Medicine
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63. Professor Upul Sonnadara
Dean, Faculty of Science
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64. Professor S.S.P.Warnakulasuriya
Dean, Faculty of Nursing
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65. Professor J.K.D.S. Jayanetti
Dean, Faculty of Technology
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66. Professor K.P. Hewagamage
Director, School of Computing
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67. Professor Priyani Paranagama
Director, Institute of Indigenous Medicine
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68. Professor H.D. Karunaratne
Director,
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69. Dr. K.G.P.G. Wijethunga
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70. Professor Chrishantha Abeysena
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71. Professor Shiroma Handunnetti
Director, Institute of Biochemistry,
Molecular Biology & Biotechnology
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72. Professor S. Sutharsan
Director, Institute of Agro Technology
& Rules Science
University of Colombo.

73. Dr. D.C. Kuruppu
The Librarian,
University of Colombo.

74. Mr. K.A.S. Edward
The Registrar, University of Colombo
(55th to 74th Respondent above)
Members of the Senate
University of Colombo
College House
94, Kumaratunga Munidasa Mawatha
Colombo 03

75. Hon. Attorney General
Attorney General's Department
Hulftsdorp
Colombo 12

Respondents

Before: D.N Samarakoon, J
B. Sasi Mahendran, J

Counsel: Mahendra Kumarasinghe with S. Dissanayake and Darshika
Sugathadasa for the Petitioners
Romesh de Silva, PC with Viran Fernando for the 1st
Respondent
Shaheedha Barrie, DSG with Navoda de Soysa, SC for the 2nd to
75th Respondents

Supported On: 08.11.2021 and 12.01.2022

Written Petitioners On 15.02.2022
Submissions : 1st Respondent On 25.02.2022
2nd to 75th Respondents On 18.02.2022

Decided On : 16.03.2022

B. Sasi Mahendran, J

The Petitioners are distinguished medical professionals practicing in leading hospitals around the Country as Consultant Interventional Radiologists and Consultant Radiologists. In their application for a Writ of Certiorari, they have sought to quash the 'Board Certification' of the 1st Respondent as an Interventional Radiologist, the relevant documentation of which has not been submitted to this Court. They have also prayed for a Stay Order, pending the final determination of this application, to restrain the 6th and/or 7th Respondents from

taking any action towards appointing the 1st Respondent to a post of Consultant Interventional Radiologist at any government hospital including the recommendation thereof to the Public Service Commission.

The Petitioners' main contention is that the Board Certification (i.e. the formal recognition of a member of the medical profession as a Specialist in a specialty established in terms of Paragraph 13(1) of Postgraduate Institute of Medicine Ordinance No. 1 of 1980, as amended) was conferred on the 1st Respondent by the Postgraduate Institute of Medicine (hereinafter referred to as "PGIM"), without the 1st Respondent having undergone a vital part of training and without fulfilling certain other mandatory requirements. Given the nature of the irregularities alleged, the Petitioners state the 1st Respondent should not have been 'Board Certified' or even recommended for Certification.

Further, the Petitioners claim that despite them raising these concerns about the **training** of the 1st Respondent at the meetings of the Board of Study, it has not been considered by the Board of Management.

The learned President's Counsel for the 1st Respondent informed this Court that the Health Service Committee of the Public Service Commission has, by letter dated 04.10.2021, appointed the 1st Respondent as a Specialist Medical Officer with effect from 14.12.2019 (the effective date of his 'Board Certification'). As a result, it was argued, these proceedings will be futile. On account of the appointment, it was urged that this application be dismissed without hearing. The parties were directed to file written submissions on this preliminary objection as to the legality of the proceedings. This Order pertains to whether notices should be issued to the Respondents.

The Respondents have taken the following preliminary objections to maintaining this action which, in a nutshell, are as follows:

- A decision of the Public Service Commission is immune from legal challenge owing to the ouster clause in Article 61A of the Constitution.

- Consequently, an application to quash the Board Certification is futile, as the appointment of the 1st Respondent by the Public Service Commission cannot be challenged

Before dealing with the validity of Board Certification it is pertinent to consider the procedure for obtaining such certification.

The PGIM, which is the sole authority in Sri Lanka responsible for the specialised training of medical doctors, is an institute established by the Postgraduate Institute of Medicine Ordinance No. 1 of 1980, as amended, made by the University Grants Commission under the Universities Act, No. 16 of 1978, as amended. It is governed by a Board of Management. The 2nd to 26th Respondents constitute the Board of Management of PGIM. The Board of Management establishes a Board of Study, in respect of each of the specialties of medicine, approved by the University Grants Commission. The 27th to 43rd Respondents along with 1st and 7th Petitioners constitute the Board of Study of Radiology of PGIM. The Board of Study is responsible for the formulation of the details of the programme of study including curricula, teaching and learning, scheme of examination in the area of its specialty. Such syllabus and eligibility criteria are published in a prospectus that is approved by the Board of Management and the Senate of the University of Colombo.

The training programme for Interventional Radiology was introduced in Sri Lanka in 2016 by the PGIM. As submitted by the learned President's Counsel for the 1st Respondent, the 1st Respondent was one of the first two doctors to enroll in it. Reference is made in the written submissions tendered by the 1st Respondent to the process of training conducted by PGIM. The training programme involves 18 months of training within Sri Lanka at a training centre recognized by the PGIM and a further year's training at an overseas training centre of repute. Upon the conclusion of the training period, a trainee is assessed by assessors appointed by the Board of Study for Radiology. Where the assessors return a favourable assessment of the trainee to the Board of study, the Board of Study recommends that the trainee be Board Certified to the Board of Management of the PGIM.

Thereafter, the PGIM seeks the approval of the Senate of the University of Colombo for such certification. The Senate of the University of Colombo finally confers board certification.

In relation to the training received by the 1st Respondent, the Petitioners raise the following concerns:

1. The 1st Respondent received training in General Interventional Radiology far below the level required by the syllabus since the 1st Respondent was confined to training only in the Neuro Trauma Unit. That Unit was not geared to provide what the syllabus required.
2. An Extraordinary effort was taken by the Board of Study to expedite Board Certification of the 1st Respondent, in comparison to other trainees, even when it was clear that his training in General Interventional Radiology was lacking.
3. All three individuals appointed (27th, 33rd, and 54th Respondents) to conduct the 1st Respondents Pre-Board Certification Assessment were not Interventional Radiologists. It is averred that a plain reading of the Guidelines for Examiners requires that at least two of the examiners had to be trainers in Interventional Radiology. Further, the 27th and 33rd Respondents were working directly under the 44th Respondent who, at the relevant time, was the Chairperson of the Board of Study responsible for appointing them as examiners.

When the 1st and 8th Petitioners, who were members of the Board of Study during the relevant period, raised these concerns at meetings of the Board of Study, the Board of Study on 09.07.2021, resolved to appoint the 4th Petitioner to review the portfolio of the 1st Respondent and, together with the 27th, and 33rd Respondents, to conduct a fresh Pre -Board Certification Assessment. However, later they were informed that the Board of Management had decided to confirm the Board Certification of the 1st Respondent.

The contention of all Respondents that this Court patently lacks jurisdiction to issue the Stay Order prayed for by the Petitioners will now be adverted to.

Article 61A of the Constitution reads as follows:

Subject to the provisions of Article 59 and of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

Whether Article 61A ousts the writ jurisdiction of this Court is discussed in the following cases.

In Katugampola v. Commissioner- General of Excise & Others 2003 (3) SLR 207 Her Ladyship Shiranee Tilakawardane, J held,

“The State Counsel appearing on behalf of the Attorney-General and the other respondents raised a preliminary objection pertaining to jurisdiction, stating that this Court did not have jurisdiction to entertain this application in view of Article 61 A, which has been introduced by the 17th Amendment of the Constitution of the Democratic Socialist Republic of Sri Lanka.

.....Accordingly, this Court holds that the ouster clause contained in Article 61 A of the Constitution precludes the jurisdiction of this Court.....”

In Ratnasiri & Others v. Ellawala 2004 (2) SLR 180 His Lordship Marsoof, PC, J held,

"In view of the elaborate scheme put in place by the Seventeenth Amendment to the Constitution to resolve all matters relating to the public service, this Court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this Court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner

as to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

In Hewa Pedige Ranasingha & others v. Secretary, Ministry of Agricultural Development and Agri Service & others, SC Appeal 177/2013 decided on 18.07.2018, His Lordship Sisira J de Abrew J held,

"When I consider Article 61A of the Constitution, I hold that the Court of Appeal has no power to inquire into the above examination conducted by the Secretary to the Ministry of Agricultural Development. Therefore, the Petitioner-Petitioners could not have invoked the jurisdiction of the Court of Appeal to quash the said examination."

And most recently in K.V. Gamini Dayarathna v. P.B. Wickremarathna & others CA (WRIT) Application No. 347/2018 decided on 30.04.2021, His Lordship Arjuna Obeysekere, J. held,

"Thus, I am of the view that the Petitioner cannot challenge the decision of the Public Service Commission in this application. Even though the Petitioner has appealed the said decision to the Administrative Appeals Tribunal, the Petitioner is not seeking to quash the findings of the Administrative Appeals Tribunal in this application. In these circumstances, I am of the view that the Petitioner is not entitled to the relief sought in paragraphs (d)- (g) of the prayer to the Petition relating to his dismissal from service."

In the light of the foregoing authorities, We are of the view that this Court has no jurisdiction to issue a Stay Order against the appointment of the 1st Respondent made by the Public Service Commission. Further, the Public Service Commission has not been made a party to this action.

Bearing in mind that the Petitioners seek to quash the Board Certification of the 1st Respondent as an Interventional Radiologist this Court must now

consider whether this is an exercise in futility as the 1st Respondent has already been appointed as a Consultant.

The dispute relates to whether 1st Respondent has **adequately** completed the training, as per the requirements of the prospectus. The prospectus which sets out the syllabus and eligibility criteria is one that is approved by the Board of Management and the Senate of the University of Colombo. Thereby, a matter relating to the adequacy of training is an internal matter that must be determined by the authorities vested with the power to confer certification, and if they are satisfied with the adequacy of his training it is beyond the institutional competence of this Court to test the adequacy. This is an assessment to be made only by an academic mind such as a specialist in this subject.

The contention as to whether issues in academia fall within the domain of this Court was referred to by Wade and Forsyth in their text, Administrative Law 11th Edition (at p. 537), quoting the judgment in Clark v. University of Lincolnshire and Humberside (2000) 1 WLR 1988 as follows,

“The courts will, in any case, 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 included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified’.”

The judicial attitude in cases where academic judgment is contested was discussed in R v. Higher Education Funding Council ex parte Institute of Dental Surgery (1994) 1 WLR 242, in which Sedley LJ held,

“We would hold that where what is sought to be impugned is on the evidence no more than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners’ meeting where irrelevant and damaging personal factors have been allowed to

enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment.”

This dictum has been cited with approval by our Courts as well.

In Dr. Karunadasa v. Open University of Sri Lanka & Others [2006] 3 SLR 225, Her Ladyship Shirani Bandaranayake, J (as she then was) held,

“Therefore, although this Court may not interfere with purely an academic issue the Court would not hesitate to intervene in any other dispute relating to academic matters if it infringes the rights guaranteed in terms of the provisions stipulated in the Constitution.....

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.” (Emphasis mine)

Recently His Lordship Nawaz J in Abeyesundara Mudiyanseelage Sarath Weera Bandara v. University of Colombo, CA Writ Application No. 844/2010 decided on 08.06.2018, observed:

“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.”

The passage of Sedley LJ in R v. Higher Education Funding Council ex parte Institute of Dental Surgery (supra) has been referred to with approval in judgments of the Australian courts.

In King v. The University of Notre Dame [2015] NSWSC 309 Davies J of the Supreme Court of New South Wales, having referred to this passage, also cited a passage from Harding v. University of New South Wales [2002] NSWSC 113, which held,

“However, it remains true that this Court does not sit as a Court of factual review over decisions of such committees. Rather, it can only intervene in accordance with accepted administrative law principles, for example where the Committee has not been properly constituted, where it failed to follow proper procedure, where it acted in a way constituting a denial of natural justice, where it otherwise reached a decision which was contrary to law, or where its decision was such that no reasonable committee, acting with a due appreciation of its responsibility, could have arrived at it.”

A similar view was echoed by Kirby J in the High Court of Australia in Griffith University v. Tang [2005] HCA 7.

“I recognise that universities are in many ways peculiar public institutions. They have special responsibilities, as the University Act envisages in this case, to uphold high academic standards about which members of the academic staff will often be more cognisant than judges. There are issues pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review: the marking of an examination paper; the academic merit of a thesis; the viability of a research project; the award of academic tenure; and internal budgets. Others might be added: the contents of a course; particular styles of teaching; and the organisation of course timetables. As Sedley LJ noted in Clark v

University of Lincolnshire and Humberside, such matters are "unsuitable for adjudication in the courts ... because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate". Judges are well aware of such peculiarities. The law, in common law countries, has consistently respected them and fashioned its remedies accordingly."

A similar attitude is prevalent in the following decisions of the Indian Courts as well.

In Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth (1984) 4 SCC 27, the Indian Supreme Court held,

"As has been repeatedly pointed out by this court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice."

De Smith's Judicial Review (8th Edition), in setting out limitations inherent in the court's institutional capacity, (at p.25) notes that one such limitation is the "lack of relevant expertise". It is observed that,

“Particularly, as the review of fact, or the merits of a decision, is not routinely permitted in judicial review, there are some matters which are best resolved by those with specialist knowledge.”

In the instant case, in the absence of the Petitioners disclosing a violation of a principle of Administrative Law, and solely contesting the adequacy of training, they are requiring this Court to step beyond its institutional competence into the province of academic judgment which it is ill-suited to do.

Thus, this Court holds that this is an exercise in futility as the Petitioners have failed to demonstrate that the said Certificate was issued illegally, arbitrarily, and without their authority or that there existed a grave procedural impropriety.

Accordingly, this application is dismissed without issuing notice.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J

I AGREE

JUDGE OF THE COURT OF APPEAL