

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

*In the matter of an application for the grant of  
Writs of Certiorari and Prohibition under and  
in terms of Article 140 of the Constitution.*

CA/WRIT/528/2021

Kaluhenage Kalindu Deshan  
Vimukthi de Silva  
No.180/B, Kurunegala Road,  
Liyanwala,  
Padukka.

**Petitioner**

Vs.

1. General Sir John Kotelawala Defence  
University  
Kandawala Road,  
Ratmalana.
2. General (Rtd) Gerard Hector de Silva  
Chancellor  
General Sir John Kotelawala Defence  
University  
Kandawala Road,  
Ratmalana.
3. General (Rtd) Kamal Gunaratne  
Chairman of the Board of Management  
General Sir John Kotelawala Defence  
University  
Kandawala Road,  
Ratmalana.
4. P. B. S. C. Nonis
5. General L. H. S. C. Silva
6. Vice Admiral Nishantha Ulugetenne

7. Air Marshall S. K. Pathirana
8. Major General Milinda Peiris
9. Prof. Sampath Amaratunge
10. Mr. P. A. S. A. Kumara
11. Mr. V. D. Kithsiri (Secretary/  
Convener)

All being members of the Board of Management of the General Sir John Kotelawala Defence University at Kandawala Road, Ratmalana.

12. Federation of University Teachers Association  
Department of Physics,  
The Open University of Sri Lanka,  
PO Box 21, Nawala.

**Respondents**

**Before** : Sobhitha Rajakaruna J.  
Dhammika Ganepola J.

**Counsel** : M. A. Sumanthiran, PC with Ermiza Tegal, Mark Schubert, M. Divya and Anu Kulanayagam for the Petitioner.

Sumathi Dharmawardana PC, ASG with S. Soysa SC for the 1<sup>st</sup> to 11<sup>th</sup> Respondents.

Upul Kumarapperuma with Shalini Weeraratne for the 12<sup>th</sup> Respondent.

**Argued on:** 09.03.2023

**Written submissions:** Petitioners- 20.06.2023

1<sup>st</sup> to 11<sup>th</sup> Respondents- 22.06.2023

12<sup>th</sup> Respondents - 17.05.2023

**Decided on:** 04.07.2023

**Sobhitha Rajakaruna J.**

The question which needs consideration by this Court in the instant application is whether the General Sir John Kotelawala Defence University ('University') is permitted to allow civilian students, particularly the students who do not come within the categories of students expressly mentioned in the Section 4 of the Sir John Kotelawala Defence Academy Act No. 68 of 1981 ('Act'), to follow Degree Programmes at the said University (Sir John Kotelawala Defence Academy is now identified as General Sir John Kotelawala Defence University as a result of the amendments introduced to the said Act by Act No. 27 of 1988 and Act No. 50 of 2007).

The contention of the Petitioner is that the decision of the 1<sup>st</sup> Respondent to advertise and prepare to conduct for new admissions of civilian students as reflected in 'P3' is arbitrary, irrational, capricious, unreasonable and/or ultra vires the powers of the relevant Respondents. The said 'P3' is an advertisement published by the University, advertising the degrees offered at the University (at Rathmalana) and at the KDU Southern Campus (Sooriyawewa). The Petitioner is seeking for a mandate in the nature of a writ of prohibition preventing any one or more of the Respondents from taking any decision/action to advertise, admit, instruct and/or conduct courses, trainings or programmes for persons who are not pre-cadet officers, cadet officers, officers or public officers at the said University.

The 1<sup>st</sup> to 11<sup>th</sup> Respondents ('Respondents') raising several preliminary objections contend that if the reliefs prayed for in the prayer of the Petition are granted, the process before the Parliament would be redundant as a Bill in relation to the University has been published in the Gazette on 11.04.2018, marked 'P4', and such Bill has not yet been approved by Parliament. The said Respondents submit that an additional category of students has been introduced during such process before the Parliament and the amendments to the said Act are to be suggested at the committee stages in the Parliament.

The Petitioner's main contention is that in view of the objects, powers and duties set out in the Act, the University has not been granted with any power to admit students other than (i) pre-officer cadets, (ii) officer cadets, (iii) officers, and/or (iv) public officers. Further, it is submitted that the University has no authority to conduct courses of study, hold examinations and/or grant or confer degrees, diplomas, certificates in academic

studies for students who do not come within the above four categories. The Petitioner asserts that in the context of recent public debate regarding the militarization of the higher education system in Sri Lanka, there were attempts to legitimize the intake of civilian students by the passage of the General Sir John Kotelawala National Defence University Bill ('P4'). It appears according to the pleadings that the Petitioner's main objective in the instant Application is to address the alleged illegality that will be prospectively committed by the University and limit the instant Application & its prayers to seek only prospective reliefs.

The Respondents raising preliminary objections submit that the Petitioner has failed to resort to Article 121 of the Constitution to invoke the constitutional jurisdiction of the Supreme Court in respect of the said Bill, marked 'P4' and accordingly, the Petitioner is indirectly attempting to obtain a relief that he did not resort to and/or cannot obtain directly. Raising another preliminary objection, the Respondents assert that the Petitioner is guilty of laches as the University has been admitting civilian day scholars since the year 2012. It is further contended that the necessary parties are not before Court and also that this Court has no jurisdiction to inquire into the purported infringements of rights and freedoms under Article 10 and 12(1) of the Constitution.

What needs consideration in the instant Application for judicial review is whether the Respondents have exceeded their powers by admitting the students who do not come within the categories of pre-officer cadets, officer cadets, officers, and/or public officers. The powers, duties and functions of the University are described in Section 4 of the Act by which the main focus is to accommodate the students who come within the above four categories. Thus, a pertinent question arises as to whether enrolling or admitting any student who does not fall into such categories would become a usurpation of the powers of the Respondents.

Nowhere in the said Section 4 or in the other provisions of the said Act does it expressly exclude the power of the Respondents to admit civilian day scholars to the University to follow degree programmes etc. It is important to draw attention to Section 4(ah) of the said Act by which power is vested in the University to recognize persons recommended by the Board of Management of the University. The said Section 4(ah):

“to confer honorary degrees and other academic distinctions on persons recommended by the Board of Management;” (Emphasis added).

In view of the provisions of Section 5 of the said Act, the management and the administration of the affairs of the Academy shall be vested in a Board of Management which shall consist of the members appointed by the President. A nominee from the University Grants Commission will also be a member of the said Board of Management. It implies that the said Board of Management has the power in terms of the above Section to confer honorary degrees and academic distinctions on civilian day scholars as well.

The overall position taken by the Respondents is that the Legislature has acknowledged the admission of civilian day scholars to the University by expressly permitting the students of the South Asian Institute of Technology and Medicines (SAITM) by way of the Act No.17 of 2018. It is submitted that the University Grants Commission ('UGC') has recognized the 1<sup>st</sup> Respondent University and the Chairman of the UGC ensures maintaining the quality and standards on par with other universities in the Country by participating at the meetings of the Board of Management of the University as a member.

Referring to the Report of the Internal Auditor of the University ('R3'), the Respondents contend that the Auditor General and Committee on Public Enterprises (COPE) of Parliament had praised and commended the move to make provisions for civilian students to have the benefit of the higher education opportunities at the University. The Respondents plead *inter alia* that;

- i. "Admission of civilian students to KDU to follow various degree programmes have increased greatly the higher educational opportunities available to Sri Lankan Students in various fields,"
- ii. "By providing higher educational opportunities locally, valuable foreign exchange is retained within the country which would otherwise have been spent in foreign countries,"
- iii. "Attracting foreign civilian students to follow various degree programmes at KDU has generated much needed foreign exchange,"

The above instances reflect the tendency of the Legislature or the other authorities who have control over public finance to recognize civilian day scholars for the purpose of admitting them to the University as students. In a significant development, the Parliament, without any ambiguity, established a university which shall be called the "General Sir John Kotelawala Defence Academy" by the Amendment Act No. 27 of 1988. In furtherance to this, the Parliament introducing the Amendment Act No. 50 of 2007

established a university which shall be called the "General Sir John Kotelawala Defence University".

The Section 2 of the Act (as amended by Act No. 27 of 1988);

'(1)There shall be established a university which shall be called "the General Sir John Kotelawala Defence Academy" (hereinafter referred to as the "Academy")'. (Emphasis added).

The Section 2 of the Act (as further amended by Act No. 50 of 2007);

'(1)There shall be established a University which shall be called the "General Sir John Kotelawala Defence University" (hereinafter referred to as the "the University")'. (Emphasis added).

In this context, I must examine the role of a 'university', a word derived from the Latin word *universus*, meaning 'whole, entire'. This definition is, sometimes, narrated as 'a world of its own'.

Fundamental Principles contained in the Preamble of the Magna Charta Universitatum<sup>1</sup> (Great Charter of Universities)<sup>2</sup> also can be taken into consideration when resolving my questions mentioned above. The said preamble states;

1. "The university is an autonomous institution at the heart of societies differently organised because of geography and historical heritage; it produces, examines, appraises and hands down culture by research and teaching.

To meet the needs of the world around it, its research and teaching must be morally and intellectually independent of all political authority and economic power."  
(Emphasis added)

When examining the role of the University, the contents of paragraph 15 of the Petition can also be taken into contemplation.

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<sup>1</sup> <https://www.cesaer.org/content/7-administration/legal-affairs/values/magna-charta-universitatum.pdf>

<sup>2</sup> 1988

Paragraph 15 of the Petition;

"The Petitioner states that universities discover and disseminate knowledge and develop skills including critical thinking. Higher education institutions ostensibly enhance human capital and human flourishing of a society and academia play an important role in contributing to leadership, policy and reforms. For these reasons, the illegality complained of in this application has wider implications that impact the nature and/or character of our society."

Similarly, I am influenced by the 'University Student Charter' published by our University Grants Commission in 2012<sup>3</sup> which serves as a guide for students enrolled in State universities as well as a document that displays the conditions of the contract that exists between the university and its students.

The Guiding Principles on which State Universities are governed are stipulated at p.11 of the said Charter and it provides, *inter alia*;

***"Principles of Openness, Equity and Diversity and Commitment to Uphold Democratic Rights and Social Norms***

*State universities are retreats for diverse groups of mature learners, to engage in higher learning and creative work with enthusiasm, excitement and harmony. Further, universities ensure that all inhabitants are well aware and appreciative of the norms of the civil society, and in return expect the commitment of their inhabitants to act as socially-conscious and responsible citizens, complying with all forms of social norms expected in the civil society.*

***Openness:*** *All state universities are fully committed to providing all information regarding admission, academic programmes, evaluation procedures, recruitment criteria, method of recruitment and also about the entitlements, privileges, opportunities as well as grievance redress and disciplinary procedures.*

***Equity and Diversity:*** *The state universities are fully cognizant of the fact that the Sri Lankan society is diverse in terms of ethnicity, religious faith, origin and socio-economic background. All national universities will ensure that no student or staff member receives less favorable treatment directly or indirectly, on the grounds of age, race or ethnic origin, religion or belief or creed, gender, disability, marital and parental status, or sexual orientation."*

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<sup>3</sup> [https://www.ugc.ac.lk/index.php?option=com\\_content&view=article&id=1139&Itemid=92&lang=en](https://www.ugc.ac.lk/index.php?option=com_content&view=article&id=1139&Itemid=92&lang=en)

At this juncture, it is important to note that the said University is a member of the Association of Commonwealth Universities<sup>4</sup> and also follows circulars of University Grants Commission when recruiting staff and payment of salaries (Vide-'R16'). It is observed that the vision of the Association of Commonwealth Universities is as follows:

"A world in which higher education transcends borders, strengthens societies, fosters innovation, and lifts the lives of people throughout the Commonwealth and beyond."

In light of the above, what I need to stress here is that the ideals of institutional autonomy and academic freedom of a 'University' is not to restrict the flowing of wisdom, but to enhance the knowledge and wisdom from a global perspective. The Parliament in its own wisdom has conferred the university status to General Sir John Kotelawala Defence Academy ('Academy'). Although this University is not established under the Universities Act No. 16 of 1978, it should be identified without demeaning the status accepted worldwide upon a 'university'. Functioning as an autonomous institution and having academic freedom should be key features of a university.

The University is empowered by virtue of the provisions of the Act to admit pre-cadet officers, cadet officers, officers or public officers in view of the phraseology in the said statute. The freedom of admitting students and formulating curriculum and study programmes by the University should not be restricted by giving a narrow interpretation to Section 4 of the Act. The legislations should generally be interpreted to uphold the public policy and the expressed or implied intention of the Legislature. Anyhow, always a strict interpretation is needed if a particular act of the public authority is not expressly permitted by the provisions of such legislation. I do not think it's possible or desirable to attempt to define the word 'student' who seeks admission to the University only in the ambit of the four categories of students mentioned in Section 4 of the Act as there is no express provision in the said Act to preclude the power of the Board of Management (of the University) to cleave only to the said four categories of students mentioned above. The Board of Management of the University should have the freedom to design and implement study programmes without any discrimination to the persons who come under the

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<sup>4</sup> <https://www.acu.ac.uk/our-members/>



category of 'student' as a whole and it is to uphold the true nature of a 'university' as a consequence to the powers and functions described in the said Act.

In *Liyanage and others vs. Gampaha Urban Council and others (1991) 1 Sri. L.R. 1* S. N. Silva J. held :

*"However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires'.*

S. N. Silva J. in the above *Liyanage and Others* case has referred to the case of *Attorney General vs. The Great Eastern Railway Co. (1880 (5) Appeal Cases 473)* where the House of Lords approved the doctrine of ultra vires with some refinement that lend it a greater flexibility. The Lord Chancellor (Lord Selborne) restated (at p. 478) therein the doctrine as follows,

*"I assume that your Lordships will not now recede from anything that was determined in The Ashbury Railway Company vs. Riche (1)<sup>5</sup>; It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires'.*

Hence, I am not convinced that admitting day scholars to the said University would be unlawful on the pretext of the provisions of Section 3 or Section 4 of the Act. Also, it cannot be assumed that such decision would contravene the purported wish of General Sir John Kotelawala and the stipulation in the preamble of the Act. I have arrived at that conclusion based on the decision of the Parliament to confer 'university' status to the aforesaid Academy. In my view, when the said Academy was conferred with 'university' status, the provisions in Sections 3 and 4 of the Act become only an additional criterion to enroll students and to decide on study programmes. There cannot be any specific reason to restrict admission only to limited categories after conferring the 'university' status. Determining the eligibility criteria for admitting students should be in the sole authority

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<sup>5</sup> (1875) of the Law Reports 653

of the board of management/senate, the governing body of a university. I take the view that the nature and the legal identification of the said Academy have completely transformed the Academy into a fully-fledged 'university' and the duty of the said University should be to cater to the 'students', as a whole, enhancing its scope and diversity in order to face the challenges of the students within the system of higher education.

It is noted that this University cannot be considered as a private institution, for the mere reason that a fee is being charged from the civilian day scholars. This factor is not a sufficient ground to exclude this University from the cluster of State Universities as the functions and affairs of the University are enriched with a statutory flavour. Based on my above findings and considering all such circumstances, it is highly unreasonable to employ the doctrine of ultra vires in respect of the decision of the Board of Management to publish the advertisement marked 'P3'.

The Petitioner pleads that the purported decision by the Respondents is unreasonable, irrational and extremely damaging to the fundamental principles of academic freedom and autonomy of higher education as recognized in the jurisprudence of the Supreme Court of Sri Lanka on fundamental freedoms guaranteed particularly by Articles 10 and/or 12(1) of the Constitution. On perusal of the pleadings along with the annexures thereto, I simply cannot understand whose fundamental rights will be infringed as pleaded by the Petitioner. The Petitioner definitely does not come within the aforesaid four categories of students. Apparently, nobody has obstructed him from applying to this University. Moreover, the Petitioner being a person who doesn't fall into any of those four categories has failed to establish any substantial prejudice has been caused to him or any member of the public by the impugned decisions of the Respondents and however, no material has been submitted to establish the alleged militarization of the civilian day scholars at the University. In light of the above, I am of the view that the decision of the said Board of Management of the University is not unreasonable or irrational.

It is observed that the 12<sup>th</sup> Respondent Trade Union (Federation of University Teachers' Association) associates with the submissions made on behalf of the Petitioner but at the same time the said Respondent in an equivocal manner has filed limited statement of objections and pleads in the same statement objections to grant reliefs prayed for by the Petitioner. No material was submitted to Court as to how the alleged blanket application of internal military regulations to civilian students would abnormalize the outcome of such

students to the general society; no single affidavit of a current or past civilian student has been tendered to Court. It is obvious that grave prejudice would be caused to the present civilian students if this Court issues an order adverse to them without hearing such students. The Petitioner rather than adding the present or past civilian day scholars have made the said Trade Union a party who seems to have no better interest on the instant application than the said day scholars. This clearly reflects the fact that the necessary parties are not before Court. It would in my opinion be irresponsible for any court, without hearing necessary parties including the current students at the University, to overrule the impugned decision on a matter which directly affects the students who intend to seek higher education within the country.

Based on my above findings, I do not think it's necessary to examine the Respondents' other preliminary objections fully. In the circumstances, I am not inclined to grant any of the reliefs prayed for by the Petitioner. Therefore, I proceed to dismiss the Application of the Petitioner.

*Application is dismissed*

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**