

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

*In the matter of an application for Writ, in the
nature of writ of Prohibition, under and in terms
of Article 140 of the Constitution.*

CA/WRIT/592/2021

Wellalage Don Wijedasa Jayatilake
Retired Associated Professor in
Chemistry,
No. 216/2, Athurugiriya Road,
Malapalla,
Pannipitiya.

PETITIONER

Vs.

1. Hon. Dinesh Gunawardena
Minister of Education,
Ministry of Education,
Isurupaya,
Battaramulla.

1A. Susil Premajyantha
Minister of Education,
Ministry of Education,
Isurupaya,
Battaramulla.

2. Prof. K. Kapila C. K. Perera
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.

2A. Nihal Ranasinghe
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.

3. Sanath Pujitha
Commissioner General of
Examinations,
Department of Examination,
Battaramulla.

3A. L.M.D. Dharmasena
Commissioner General of
Examinations,
Department of Examination,
Battaramulla.

3B. H.J.M.C. Amith Jayasundara
Commissioner General of
Examinations,
Department of Examination,
Battaramulla.

4. Members,
School Examination Advisory
Committee,
Department of Examination,
Battaramulla.

5. Sunil Jayantha Nawaratna
Director General,
National Institute of Education,
No.21 High Level Road,
Maharagama.

6. Members
Board of Examiners who prepared the
G.C.E. (A/L) Chemistry Paper I for
the year 2020 examination,
Department of Examination,
Battaramulla.

7. The Moderators,
G.C.E. (A/L) Chemistry examination
Part I (New Syllabus) paper for the
year 2020 examination
Department of Examination,
Battaramulla.

RESPONDENTS

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : S.N. Vijithsingh for the Petitioner.

Suranga Wimalasena, DSG with Rajika Aluwihare, SC for the 1st, 2nd, 3rd and
5th Respondents

Argued on : 02.12.2022

Decided on : 11.08.2023

Written submissions: Petitioners - 14.07.2023

1st, 2nd, 3rd and 5th Respondents - 17.07.2023

Sobhitha Rajakaruna J. (Acting P/CA)

The Petitioner claims that he is a 71-year-old, retired Associate Professor in Chemistry. The instant Application, filed by him, is based on alleged errors contained in Part I [Multiple Choice Questions] of the chemistry question paper [new syllabus] of the General Certificate of Education [Advanced Level] Examination ('G.C.E. [A/L] Examination') conducted in all three mediums, held on 21.10.2020. The Petitioner states that the participants of a meeting held on 18.12.2020, including the Petitioner and twenty others, have discovered errors in 26 questions out of 50 and such errors are contained in question numbers 1, 2, 4, 5, 7, 8, 10, 12, 14, 15, 21, 22, 25, 26, 27, 29, 31, 34, 37, 38, 39, 40, 42, 44, 48 and 49 (Vide- paragraph 9 of the Petition of the Petitioner) of the said chemistry question paper under the new syllabus ('chemistry paper'). The Petitioner asserts that the Commissioner of Examinations to a certain extent accepted that there were errors in Part I of the said chemistry paper. Another main complaint of the Petitioner is that no Schools Examinations Advisory Committee has been appointed by the Minister of Education in terms of the provisions of the Public Examinations

Act No. 25 of 1968. The Petitioner states that the Commissioner of Examinations cloaking himself under 'Secrecy' and/or 'Confidentiality' in conducting the said G.C.E. (A/L) Examination has not taken any remedial steps to avoid errors in future examination papers, and has also refrained from revealing the details of the members of the panel of the paper setters and moderators of the said chemistry paper. Hence, the Petitioner alleges that he is left with no other option other than to come before this Court to seek relief.

The Petitioner's only substantive relief is reflected in paragraph (D) of the prayer of the Petition and it reads:

"(D) Grant and issue writ in the nature of writ of prohibition, prohibiting / restraining the Commissioner of Examination (3rd Respondent) from selecting and or appointing the members of the panel of paper setters and moderators of the part I of the Chemistry examination (new syllabus) paper of the General Certificate of Education (Advanced Level) examination which was held on 21st October 2020 in setting and or moderating Chemistry examination paper of any future examinations"

The Respondents contend that the Petitioner has no legal right or ground to maintain the instant Application or to seek the reliefs contained in the prayer of the Petition. It is submitted that the Petitioner has made this Application solely on his personal opinion, which is unknown to the Respondents even without any inclination of the candidates who are purportedly affected. Further, the Respondents argue that the candidates sitting future G.C.E. (A/L) Examinations would be greatly prejudiced if the relief sought by the Petitioner is granted, as there would be no consistency in future question papers if the entire panel of paper setters is replaced. Moreover, the Respondents argue that this Court is not the proper forum to decide the matter regarding the purported erroneous chemistry paper.

Primarily, I must draw my attention to the report marked 'R7' annexed to the statement of objections of the Respondents. It should be considered a vital report as it has been issued after the aforesaid discussion held on 18.12.2020 between the sixteen resource persons, including four internal officers of the National Institute of Education ('NIE'). It is significant that the Petitioner was also a member of the said panel of resource personnel. The said meeting has been summoned on the instructions of the Director General of NIE based on a letter dated

17.11.2020, addressed to the Secretary to the Ministry of Education by the Petitioner on the purported errors contained in the said chemistry paper. Consequent to the said discussion, the Director General of the NIE has drawn the attention of the Commissioner General of Examinations as to what transpired at the said discussion, by his letter dated 18.02.2021 ('R6'). By such communication the said Director General expressed that the information contained in the said report would be useful to conduct future examinations successfully. It is to be noted that the said panel of resource persons has not recommended anything which has the same effect of the contents of the prayer of the Petition.

Subsequently, a marking scheme has been formulated considering the said report and also the outcome of the discussions held during the period between 24.10.2020 and 28.10.2020 in relation to the flaws of the said chemistry paper. The Respondent's contention is that formation of a marking scheme considering all above deliberations was to ensure that no student would be prejudiced by any errors that were prevalent in the said chemistry paper. As such, the Respondents argue that no prejudice has been caused to any of the respective students due to the existence of any errors in the said chemistry paper.

I am mindful of the fact that the G.C.E. (A/L) Examination is one of the most competitive examinations held in this country. To my mind this examination is a turning point in the life of a student who completes their secondary education at school. The G.C.E. (A/L) Examination has been widely considered to be a stepping stone for students who aspire admission to universities locally and internationally. Therefore, it is imperative to maintain the sanctity of this Examination. I do not attempt to concentrate in the instant Application as to how the future of a Sri Lankan student is steered by this competitive and crucial examination, although it is an area which needs to be focused on by all relevant stakeholders who are bound to gear the education system here. Making an error even in a single question of an examination paper of such a competitive examination cannot possibly be overlooked. A mistake of fact or difference of ideologies in respect of a certain paradigm of any of the subjects will cause immense prejudice to the candidates of the examination and such differences can only be avoided through consensus and due deliberation among the examiners/paper setters.

Now I need to advert to the provisions of the said Public Examinations Act, which specifically stipulates that a question paper that is set for any public examination shall, for the purposes of the said Act, be a secret document from the time such paper is set until the lapse of half an hour from the time fixed for the commencement of the answering of such paper by candidates at the relevant examination. Any person who is appointed to set a question paper or a person who is appointed to read answer scripts and assign marks to them is considered an 'examiner' according to the interpretation section of the said Act. In terms of Section 13, if any person, fraudulently or dishonestly communicates any information regarding the identity of any examiner appointed or to be appointed to set any question paper, or any information relating to the transmission of question papers or answer scripts, to any person who is not a person to whom he is authorized to communicate such information, he shall be guilty of an offence under this Act. Every person entrusted with any power, duty or function in connection with any public examination should take and subscribe an oath of secrecy. In light of the above, it is obvious that the hallmark of the provisions of the said Act is to duly conduct public examinations to maintain a high degree of secrecy therein.

In this backdrop, I need to examine as to what extent this Court can intervene into the process of setting the said chemistry paper and consider granting the reliefs prayed for in the prayer of the Petition of the Petitioner. In other words, I must examine the strength of the arguments raised by the Petitioner highlighting the said errors in order to arrive at a finality on the question as to whether this Review Court could grant any of the reliefs as prayed for in the prayer.

It is apparent that there is no specific denial by the Respondents to the effect that no errors prevailed at all in the said chemistry paper. On a careful perusal of the report marked 'R7' it implies that several experts after consideration have expressed views on several problematic questions and answers of this chemistry paper. Based on the facts and circumstances of this case, I cannot completely abstain from making any comment to the effect that no erroneous questions were contained in the said chemistry paper. Apart from the alleged errors referred to above, it is pertinent to note that the text in the 'instructions' cage on the 1st page of the question paper marked 'P2' declares that the said question paper consists of 9 pages whereas, it consisted of only 8 pages. Even a mistake of this nature would easily create confusion in

the mind of a candidate who is likely under pressure to complete the paper within the stipulated time. The Respondents have failed to defend the allegations that no School Examination Advisory Committee was appointed nor have they provided a reasonable explanation for their inadvertence.

Anyhow, the Respondents assert that if the relief sought by the Petitioner is granted, the 3rd Respondent would be compelled to appoint an entirely new panel of paper setters and moderators, which may result in the appointment of such paper setters and moderators who have no experience in paper setting. The Respondents further argue that the candidates who would answer the question papers in the subject of chemistry at G.C.E. (A/L) Examinations would be greatly prejudiced if the reliefs sought by the Petitioner is granted. It is contended that only 8 out of the 9 members, who were part of the panel of paper setters for the G.C.E. A/L chemistry paper for the year 2020, were re-appointed for the year 2021. Accordingly, the panel of paper setters for the year 2021 consisted of 11 members, including 3 newly appointed members. It is further submitted that a new moderator was appointed for the G.C.E. A/L chemistry paper for the year 2021 and as such, the moderator who functioned in 2020 was not re-appointed. This Court is not possessed with the reason behind the above changes and perhaps it is due to the requirement of maintaining the secrecy of the identities of the panel of paper setters and moderators.

For the reasons explained above and on an overall consideration of the circumstances of this case, I am compelled to take the view that this Court, unless it is highly essential, should not interfere in the process of setting question papers in A/L Examinations as it would affect the sanctity of such competitive examinations. The thrust of the Petitioner's case is not on the usual grounds of review, but on the necessity of taking punitive measures to prevent the recurrence of errors in question papers as averred by the Petitioner. According to the Petitioner, not allowing the same examiners to continue to be on future panels of paper setters and moderators is an essential step in order to ensure that the candidates will not be similarly prejudiced in the future. I am reluctant to interfere with the process of setting the chemistry paper as such a process demands a high degree of secrecy within it and also due to the unavailability of adequate material before Court to overcome the state of institutional incapacity in relation to the expert knowledge of this Court on the subject of chemistry. I do

not doubt the inherent power of this Court to make orders even in the absence of expert knowledge on chemistry if the process of decision making and the exercise of power by the relevant authorities is eminently irrational or unreasonable. At the same time, I shall draw my attention to the pronouncements in the case of *Attorney General vs. The Great Eastern Railway Co. (1880 (5) Appeal Cases 473)* where the house of Lords has stated that the doctrine of ultra vires ought to be reasonably, and not unreasonably, understood and applied.

The precedent enunciated in the said *Great Eastern Railway Co.* Case has been adopted by S. N. Silva J. (As he was then) in *Liyanage and others vs. Gampaha Urban Council and others (1991) 1 Sri. L.R. 1*. The House of Lords in the said case approved the doctrine of ultra vires with some refinement that lent 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)¹ ; 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."

In addition to the above precedent, proportionality should be adopted in these proceedings to strike a balance between the error highlighted by the Petitioner and the reliefs sought in the prayer of the Petition. I wish to borrow the below information depicted in the article (by Barak A, "Proportionality's Importance," *Proportionality: Constitutional Rights and their Limitations* [Cambridge University Press 2012]):

"Indeed, the theory behind proportionality is not intended to merely categorize a case into a group which solves the problem. Rather, proportionality is aimed at a constant review of the existence

¹ (1875) of the Law Reports 653

of a rational justification for the limitation imposed on the right, while taking into consideration each case's circumstances".²

Even in an event this Court decides to accept the position that the said chemistry paper is flawed by containing erroneous questions, it cannot be assumed that the Petitioner is entitled to the reliefs prayed for in the prayer of the Petition in the same way such reliefs have been formulated. This is because this Court should take serious cognizance of the fact that the candidates have been allocated additional and reasonable marks according to a fresh marking scheme prepared as a result of the deliberation and decisions reflected in 'R7'. Also, it is noted that there is no single complaint from any of the candidates who sat the said chemistry paper or from any other student who is to face future A/L chemistry examinations. In this vein, the standing of the Petitioner to maintain the instant Application also becomes highly questionable as raised by the Respondents, who assert that the Petitioner has no legal right whatsoever to demand the entire panel of paper setters and moderators to be changed in its entirety without any legal basis to seek reliefs. Prohibiting all the members of the panel of paper setters and moderators who set the said chemistry paper can be equated to a life time punishment against those officers whose names have not been divulged due to the requirement of confidentiality propounded in the said Act.

In light of the above, I need to arrive at the conclusion that it is highly unreasonable and disproportionate to grant the reliefs in the manner it was formulated in the prayer of the Petition. Further, the Petitioner has failed to transform his claim to a stage where this Court can use a reasonable ground of review to usurp the power of the 1st, 2nd, 3rd and 5th Respondents. Anyhow, based on the findings illustrated earlier, this Court makes an observation that it is the duty of the Commissioner of Examination and other relevant authorities to conduct an appropriate inquiry, preserving the secrecy of the process and take appropriate decisions in respect of the paper setters and the moderators of the chemistry paper for the best interest of the candidates who sit future A/L Examinations. Anyhow, for the

² <https://www.cambridge.org/core/books/abs/proportionality/proportionality-importance/6FFD68148BE4925B3A72DC8784D8B826?utm_campaign=shareaholic&utm_medium=copy_link&utm_source=bookmark > accessed 10 August 2023

reasons explained above, I proceed to dismiss this Application, subject to the above observations.

Application is dismissed.

Acting President of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal