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

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

CA (Writ) Application No: 47/2020

A.M. Fathima Nazeefa,
152, Girls School Road,
Sammanthurai.

PETITIONER

Vs.

1) Open University of Sri Lanka.

2) Prof. S.A. Ariyadurai,
Vice Chancellor.

3) Dr. A.P. Madurapperuma
4) Prof. S.P Karunanayake
5) Prof. D. Dolage
6) Dr. S.N. Morais
7) Prof. J.C.N. Rajendra
8) Prof. V. Sivalogathasan
9) Prof. G.R. Ranawaka
10) Prof. K.S. Weerasekara
11) Prof. S.R. Weerakoon
12) Dr. Anura Ekanayake
13) A. Jayasekara
14) Dr. C. Thalpahewa
15) Dr. N. C. Kumarasinghe
16) Ranjith Rubasinghe
17) Ruban Wickremarachchi
18) Tissa Nandasena
19) Prof. K.K.C.K. Perera
20) D.P.U. Welaratne
21) Prof. Dhammika Thanthrigoda
22) P. Ranepura.
23) Prof. Ranjith Jayasekara

24) M.M.J.R. Bogamuwa
25) Dr. T.D.T. Leslie Danapala
26) Vindhya Jayasena

All of The Open University of Sri Lanka,
P.O. Box 21, Nawala, Nugegoda.

27) University Grants Commission,
No. 20, Ward Place, Colombo 7.

28) K.G.H Pavithra Kalpani,
The Open University of Sri Lanka,
Ampara Study Centre, Ampara.

29) S. Palitha Fernando. P.C.
30) Neville Abeyratne, P.C.
31) Dr. Leela Gunasekara

University Services Appeals Board,
No. 20, Ward Place, Colombo 7.

RESPONDENTS

Before:	**Arjuna Obeyesekere, J / President of the Court of Appeal** **Mayadunne Corea, J**
Counsel:	K.G. Jinasena for the Petitioner
	Dr. Charuka Ekanayake, State Counsel for the 1st – 27th Respondents
Supported on:	10th March 2021
Written Submissions:	Tendered on behalf of the Petitioner on 30th March 2021
	Tendered on behalf of the 1st – 27th Respondents on 1st April 2021
Decided on:	3rd June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner had been appointed as Assistant Director, Regional Education Services on 10th October 2013 by the 27th Respondent, the University Grants Commission. The Petitioner had thereafter been attached to the 1st Respondent, the Open University of Sri Lanka and is subject to the disciplinary control of the 1st Respondent. The Petitioner admits that she was required to serve a probationary period of three years.

By letter dated 30th October 2013, the Petitioner had been assigned to the Ampara Study Centre of the 1st Respondent. Having reported for duty at the Ampara Study Centre, the Petitioner states that she had issues with the 28th Respondent, who, prior to the appointment of the Petitioner, had been carrying out the functions that had been assigned to the Petitioner.

By letter dated 9th October 2015 marked '**P3**', the Petitioner had been requested to appear before a Preliminary Investigation Committee appointed by the Vice Chancellor of the 1st Respondent to inquire into examination malpractices that had occurred at the Ampara Study Centre. The Petitioner states that she was subsequently transferred to the main office of the 1st Respondent in November 2015.

In January 2016, the Petitioner had been issued with a charge sheet marked '**P5**'. Having considered her response, the Council of the 1st Respondent had decided to conduct a disciplinary inquiry and had appointed the 7th Respondent, Professor J.C.N. Rajendra as the Inquiry Officer. It is admitted that:

(a) The inquiry was held over several days with the participation of the Petitioner;

(b) The prosecution and the defence had each led the evidence of three persons; and

(c) The Petitioner did not give evidence at the inquiry.

For the reasons set out in his report dated 6th April 2018, the 7th Respondent had found the Petitioner guilty of six of the eight charges in '**P5**'. Having considered the said report, the Council of the 1st Respondent had decided to terminate the services of the Petitioner with immediate effect. This decision had been communicated to the

Petitioner by the 1st Respondent by letter dated 28th May 2018 marked '**P12**'. Aggrieved by the said decision, the Petitioner had filed an appeal with the University Services Appeals Board (USAB).

The appeal filed by the Petitioner was taken up for hearing before the USAB on 23rd July 2019, where the Petitioner was represented by an Attorney-at-Law. According to the proceedings of that date, the primary argument of the Petitioner had been that the main witness, the 28th Respondent bore a grudge towards her and therefore implicated her. The USAB had heard the submissions of the parties and thereafter recorded the following as being the four matters that required a determination by the USAB:

1) Should the University act on the evidence of the 28th Respondent?

2) Should the Petitioner have disclosed that her husband was a candidate at the examination where the custody of the question papers had been entrusted to her?

3) Did the Petitioner as a probationary officer know that she had to disclose such fact?

4) Is the decision of the 1st Respondent to terminate her services too harsh?

In its Order dated 10th December 2019 marked '**P19**', the USAB, while stating that the credibility of a witness must be determined by the Inquiry Officer, has held as follows:

> "*... this Board notes that the charges are in respect of undue interferences in the examination process of a Higher Educational Institution. Such interferences affect the credibility of the examination process and tarnish the image of the Institution in the public eye. Once charges have been proved against an employee in respect of such offences, this Board is of the view that the Governing Body is at liberty to decide whether it would be advisable to retain such an employee in the services of the Institution. In these circumstances, this Board is of the view that the punishment of termination of services cannot be considered as unduly harsh.*"

The USAB had thereafter dismissed the appeal of the Petitioner. Aggrieved by the decision of the USAB, the Petitioner filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the charge sheet marked '**P5**';

b) A Writ of Certiorari to quash the Inquiry Report marked '**P7**';[1]

c) A Writ of Certiorari to quash the letter of termination marked '**P12**';

d) A Writ of Certiorari to quash the decision of the USAB marked '**P19**'.

The learned Counsel for the Petitioner submitted that he is seeking the above relief on the following four grounds:

1) There was no evidence to establish the charges against the Petitioner.

2) The rejection of the application of the Petitioner to be represented by an Attorney-at-Law was contrary to the provisions of the Establishments Code.

3) The charge sheet issued to the Petitioner has not been approved by the Council.

4) The Inquiry Officer was a member of the Council, which took the decision to terminate the services of the Petitioner.

Section 86 of the Universities Act has provided a person employed by a University who is dismissed from service a right of appeal to the USAB against such decision. If that statutory remedy is availed of by an employee, he or she must plead before the USAB all complaints and grievances with regard to the action taken by the University, thus enabling the University to place its side of the story before the USAB. This would in return provide the USAB the opportunity of considering all matters of fact and arrive at a suitable decision.

[1] What has been marked as 'P7' is a letter written by the Petitioner.

Where a person dissatisfied with a decision of the USAB invokes the Writ jurisdiction of this Court, this Court can consider if the decision of the USAB is illegal, unreasonable or whether there has been any procedural irregularity in the manner in which the appeal was heard by the USAB. In considering the decision of the USAB, this Court would be cautious to confine its review to the issues that were raised before the USAB. It would not be proper for this Court to consider issues that are being raised for the first time before this Court. It is clear from the four questions that have been identified by the USAB, to which I will advert to later, that the Petitioner has not raised during the hearing before the USAB, the issue relating to her request to retain the services of an Attorney-at-Law and the issue relating to the charge sheet not being approved by the Council of the 1st Respondent.

Be that as it may, I shall now proceed to consider each of the issues raised before this Court by the learned Counsel for the Petitioner.

The first argument of the Petitioner is that there was no evidence to establish the charges against the Petitioner. As Lord Brightman stated in the House of Lords in **Chief Constable of North Wales Police v Evans**: [2]

> "*Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.*"

This Court can consider the factual circumstances and the evidence that was considered by the Inquiry Officer where an argument is presented, as in this application, that the punishment is excessive, or where an argument is taken that there was no material at all to arrive at a decision, resulting in an error on the face of the record. Even in such cases, Courts will only consider the factual circumstances to the extent of determining whether the decision maker took into account relevant considerations from the evidence placed before him, in making a decision. If a decision has been influenced by considerations which either expressly or implicitly

[2] [1982] 1 WLR 1155 at 1174.

cannot lawfully be taken into account, a Court may hold that such power has not been exercised validly. The reasons provided for a decision would allow Courts to effectively scrutinize the decision and detect what factors have influenced the decision maker.

According to the report of the Inquiry Officer, the charges against the Petitioner are as follows:

1) Having been entrusted with the custody of the question paper packets for the Final examination of the Postgraduate Diploma of Special Needs Education held at the Ampara Study Centre from 19th July – 2nd August 2014, the Petitioner failed to disclose to the 1st Respondent the fact that her husband was a candidate at the said Final examination, thereby failing to act in terms of Section B-43 of the Procedural Manual issued by the 1st Respondent;

2) Opening a packet containing the question paper relating to the said examination and taking home a question paper, prior to the date of the examination;

3) Taking home a blank answer book after having the date of the examination affixed thereon by a staff member;

4) Allowing the answer scripts of her husband to be replaced by an answer script brought from home;

5) Allowing her husband to be engaged in supervision/invigilation duties at the said examination;

6) Allowing her husband to take away the packets containing the answer scripts in order to be sent for correction without following the due procedure of handing it over to a courier company;

7) By the above actions, the Petitioner has breached the trust reposed in her by the 1st Respondent;

8) By the above actions, the Petitioner had tarnished the reputation of the post held by the Petitioner and the image of the 1st Respondent.

As noted earlier, the Inquiry Officer had exonerated the Petitioner of Charge Nos. 4 and 5, but had found her guilty of Charge Nos. 1-3 and 6-8.

The primary grievance of the Petitioner, both before the USAB as well as before this Court was that the Inquiry Officer has failed to evaluate the evidence of the witnesses, and in particular failed to consider the following:

a) The fact that the 28th Respondent had admitted that she bore a grudge against the Petitioner;

b) The fact that the evidence of P.G.U.K. Gunasinghe was in her favour

I have examined the Inquiry Report and find that the Inquiry Officer has not acted on the evidence of Gunasinghe relating to Charge Nos. 2 and 3 as it had transpired during the Inquiry that the Petitioner and her husband had visited the residence of Gunasinghe and unduly influenced Gunasinghe to give evidence in favour of the Petitioner, and even offered money to Gunasinghe for doing so. Due to the pressure brought upon him, Gunasinghe had recorded the conversations that had taken place between him, the Petitioner and her husband, and the said recordings had been played before the Inquiry Officer. It is interesting to note that the Petitioner had admitted during the Inquiry that the female voice on those recordings is that of the Petitioner.

In his report, the Inquiry Officer has recorded the relevant parts of the conversations that the Petitioner and her husband had with Gunasinghe, and arrived at the following findings:

> "*During the 11th inquiry session, Mr. P.G.U.K. Gunasinghe revealed that the accused along with her husband Mr. A.S.M Nafeer repeatedly pressurized him to give evidence in favour of the accused. He also complained that the accused visited his boarding place once and the accused's husband visited him twice. He further stated that due to the continuous pressure, he was deeply disturbed and*

has mentally suffered. This continuous pressure led him to record the conversations.

It is evident and could be concluded that the accused and her husband Mr. A.S.M Nafeer has continuously pressurized and troubled Mr. P.G.U.K. Gunasinghe to give evidence in favour of them.

It is clear that the accused was trying her level best to bribe Mr. P.G.U.K. Gunasinghe with money and trying to trap him, and pressurise him so that the witness statements will be in favour of her."

I must note that the Petitioner has very conveniently avoided mentioning anything about the recorded conversations to this Court.

The Inquiry Officer has arrived at similar findings with regard to the 28th Respondent trying to influence Gunasinghe and another employee, Senaratne. The Inquiry Officer had in fact recommended that the conduct of the 28th Respondent be further investigated.

The fact that the Petitioner was in charge of the said examination and the fact that her husband sat for the said examination has not been denied by the Petitioner. The defence of the Petitioner was that a copy of the said Manual was not made available to her and that she was unaware of such a requirement. The factual position however is that the Petitioner has been in employment with the 1st Respondent since 2009 until her appointment in 2013 to a permanent position. In my view, it is elementary that one cannot be in charge of question papers of an examination which your spouse is due to sit as a candidate.

The Inquiry Officer, in finding the Petitioner guilty of Charge No. 1, had stated that the letter of appointment issued to the Petitioner specifically states that she is bound by the Rules and Regulations of the 1st Respondent. In terms of Rule B-43 of the said Rules, '*It is the responsibility of those involved in examination work to declare any close relationship/s they have with candidates. When a relative of a member of staff*

sits an examination, the staff member should refrain from relevant examination functions and not accept examination duties on his/her part.'[3]

The Inquiry Officer has proceeded on the basis that the Petitioner ought to have disclosed this fact to the 1st Respondent, as required by the Procedural Manual. The Petitioner, being the custodian of the question paper packets should therefore have acted with integrity and declared that her husband was a candidate at the said examination and recused herself from examination duties, which the Petitioner failed to do. It must be noted that even if the position of the Petitioner that the 28th Respondent bore a grudge towards her is accepted, that does not affect the finding of guilt with regard to Charge No.1. Hence, there is no merit in the argument that there was no evidence with regard to Charge No.1.

With regard to Charge Nos. 2, 3 and 6, it is clear that the evidence of the 28th Respondent is sufficient to support such charges. Whether a witness bore a grudge or not and whether that witness is trying to implicate the accused, or in other words, the demeanour and credit worthiness of a witness, are matters that must be best left to the Inquiry Officer. It is certainly not the function of this Court in the exercise of its writ jurisdiction to consider such matters.

In finding the Petitioner guilty of Charge No. 7, the Inquiry Officer has acted on the failure of the Petitioner to disclose her relationship and conflict of interest, which he has considered as being a serious breach of discipline. In finding the Petitioner guilty of Charge No. 8, the Inquiry Officer has acted on the evidence of Gunasinghe that the Petitioner and her husband had influenced and pressurized him. The Inquiry Officer had concluded by stating that:

> "*From the facts and evidence it is clearly visible that Mrs. Nazeefa and her husband have continuously pressured, influenced and attempted to probe Mr. Gunasinghe who is one of the prime witnesses for this inquiry. These actions by Mrs. Nazeefa has proved that she is dishonest and not trustworthy person to handle administrative and responsible work at the Open University*. "

[3] A copy of the said Rule has been tendered with the Written Submissions of the 1st Respondent.

The Inquiry Officer has clearly proceeded on the basis that the conduct of the Petitioner in trying to exert pressure on the witness, is scandalous, to say the least. The Inquiry Officer has not considered the evidence of the 28th Respondent in finding the Petitioner guilty of Charge Nos. 7 and 8.

It is therefore clear that the Inquiry Officer has found the Petitioner guilty of three charges on the Petitioner's own conduct, as opposed to the evidence of the 28th Respondent or Gunasinghe. In the above circumstances, I do not see any merit in the first argument of the learned Counsel for the Petitioner.

The second argument of the learned Counsel for the Petitioner was that the Petitioner was not permitted to retain the services of an Attorney-at-Law. In terms of Paragraph 10.2 of the University Establishments Code, an accused person who wishes to be represented by a defence officer must obtain the permission of the Vice Chancellor. The learned State Counsel submitted that the Petitioner has been represented by a defence officer at the commencement of the Inquiry as permitted by the Establishments Code and that she continued to be represented by such officer until the Petitioner made a request by letter dated 16th February 2017 marked '**P7**' that she be permitted to retain the services of an Attorney-at-Law. By letter dated 3rd March 2017 marked '**P8**', the 2nd Respondent had informed the Petitioner that her request cannot be granted as neither the Inquiry Officer nor the Prosecuting Officer are Attorneys-at-Law.

The learned State Counsel submitted that the Council of the 1st Respondent had taken a decision that Attorneys-at-Law will not be permitted at inquiries due to the delays that are caused; that this decision had been applied across the board; and that there was no justification to deviate from that decision. It was submitted further that the Petitioner continued to be represented by a defence officer. The Petitioner has not raised this issue at the hearing before the USAB. In any event, there is no material that the Petitioner has been prejudiced by the said decision of the 1st Respondent. For all of the above reasons, I do not see any merit in the second argument of the learned Counsel for the Petitioner.

The third argument of the learned Counsel for the Petitioner was that the charge sheet issued to the Petitioner had not been approved by the Council. The learned Counsel for the Petitioner relied on the judgment of the Supreme Court in **University of Ruhuna and Others vs Dr. Dharshana Wickremasinghe**[4] where it was held that the charge sheet issued to a teacher must be approved by the Council. This argument too has not been taken up at the hearing before the USAB, thus making the opportunity of preferring an appeal to the USAB an exercise in vain. The learned State Counsel submitted that the Petitioner is not a teacher or officer. He submitted that disciplinary control in respect of any person who is not a teacher or officer can be delegated by the Council to the Vice Chancellor and that the charge sheet '**P5**' has been signed by the Vice Chancellor. Periodic reports of the Inquiry relating to the Petitioner have been placed before the Council.[5] Thus, it is clear that the above judgment has no application to the facts of this application, and that there has been compliance with the provisions of the Universities Act. In the above circumstances, I do not see any merit in the third argument of the learned Counsel for the Petitioner.

The final argument of the learned Counsel for the Petitioner was that the Inquiry Officer was a member of the Council that took the decision to terminate the services of the Petitioner. This too has not been raised at the hearing before the USAB. It is indeed ironical that the Petitioner is complaining of a conflict of interest on the part of the Inquiry Officer. Be that as it may, the learned State Counsel, while admitting that the Inquiry Officer was a member of the Council having been nominated by the Senate, submitted that the Inquiry Officer did not participate in the decision making process relating to the Petitioner.

I have examined the minutes of the meetings of the Council held on 22nd July 2016, 26th August 2016, 21st October 2016, 18th November 2016, 31st March 2017, 28th April 2017, 26th May 2017 and 30th June 2017, and observe that the 7th Respondent has recused himself from each of the said meetings when matters relating to the Petitioner were taken up for discussion.[6] Thus, I see no merit in this argument.

[4] SC Appeal No. 111/2010; SC Minutes of 9th December 2016.
[5] Vide Minutes of the meetings of the Council which have been annexed to the Written Submissions of the 1st Respondent.
[6] The minutes of the meeting have been tendered with the Written Submissions of the 1st Respondent.

The learned State Counsel submitted further that the Petitioner is guilty of suppression, in that even though the Petitioner is complaining that the Inquiry Officer failed to evaluate the evidence, the Petitioner has deliberately refrained from producing the entire proceedings before the Inquiry Officer. This argument has much merit, especially with regard to the suppression of the tape recordings between the Petitioner, her husband and Gunasinghe. It is trite law that a litigant must come to Court with clean hands, which the Petitioner has failed to do. I am therefore of the view that this application is liable to be dismissed on this ground alone.

The learned State Counsel submitted further that the Petitioner was employed in a position of trust and confidence by the 1st Respondent, and that by her failure to disclose her conflict of interest, she has breached a core aspect of the employer – employee relationship. I agree with the said submission as it explains the reason why the 1st Respondent decided to terminate the services of the Petitioner, and why that punishment is not disproportionate to the charges against the Petitioner.

In the above circumstances, I do not see any legal basis to issue formal notice of this application on the Respondents. This application is accordingly dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal