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.

Case No: CA/WRIT/765/2023

1. E. Sandumini Navanjana Edirisinghe
   No. 08A, Victoria View,
   Haragama,
   Kapuliyadda,
   Kandy.

PETITIONER

-Vs-

1. University Grants Commission
   20, Ward Place,
   Colombo 07.

2. Prof. Sampath Amaratunge
   Chairman,
   University Grants Commission,
   20, Ward Place,
   Colombo 07.

3. Dr. Priyantha Premakumara

Secretary,
University Grants Commission,
20, Ward Place,
Colombo 07.

4. University of Peradeniya
PO. 20400,
Peradeniya.

5. General Sir John Kothalawala
Defence University
PO. 20400,
Peradeniya.

RESPONDENTS

Before: Hon. D.N. Samarakoon, J.

Counsel: Shantha Jayawardane with Niroshika Wegiriya instructed by Dinesh de Silva for the Petitioner.

Maithree Amerasinghe for the Respondents.

Argued on: 08.04.2024

Written Submissions: 24.04.2024 by the Petitioner.

24.04.2024 by the Respondents.

Decided on: 10.05.2024

D. N. Samarakoon J.,

The facts narrated by the petitioner are as followed,

> "2. Facts in Brief
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> 2.1 The Petitioner received her primary and secondary education at Mahamaya Girts' College, Kandy. As morefully described in the Petition (Vide paragraph 02 to 04), the Petitioner excelled in her studies and extracurricular activities, in particular athletics (short distance running) from her young age and received school colours from 2011 to 2017 continuously. (vide: P2(a) to P2(e), P3(a) to P3(h)
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> 2.2 The Petitioner sat for the General Certificate of Advanced Level Examination of 2021, (held in February 2022) in her second attempt and secured 2Bs and 1 A in the Bio Science stream with a Z score of 1.5155 (vide: P6)
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> 2.3 In early September 2022 the UGC called for applications for admissions to the universities under its purview for the academic year 2021/2022 based on the results of the GCE Advanced Level Examination of 2021 and the UGC issued the guidelines for admissions for the academic year 2021/2022 by way of a book. (Vide: P7)
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> 2.4 The Petitioner thereafter submitted an application (vide P.8) to the UGC over online, as well as by post, for admission to a State university under the UGC based on her results at the GCE Advanced Level examination 2021 for the academic year 2021/2022. The Petitioner in her application indicated the courses of study in order of preference based on her Z Score as required. The 1st to 19th Courses indicated by the Petitioner, in order of preference are set out in paragraph 10 of the Petition
>
> 2.5 After the Petitioner submitted the application to the UGC, and whilst the said application was being processed, in September 2022, General Sir John Kothalawala Defence University (hereinafter referred to as KDU) by

an advertisement published in the newspapers (Vide: P9), called for applications for admission of students, inter alia, for the course of Medicine as Cadet Officer students. The Closing date for the submission of applications for same was 01.10.2022. The Petitioner submitted an application for admission to KDU as well.

2.6 As pleaded in the Petition, (vide: Paragraph 13) the petitioner faced the selection process, including Physical Performance Test and Academic and Mental Performance Test and the Final Medical Test successfully and she was enrolled as an Enlisted Cadet Officer at KDU.

2.7 After the petitioner was selected to the KDU the UGC informed her via an email dated 30.11.2022 (vide: P15) that her university admission application was rejected under Section 1.7 of the UGC Admission Handbook 2021/2022.

2.8 The 'military training' was an integral component of the Degree Programme at KDU and the Military Training commenced on 16.12.2022. The said military training was part of the daily routine and it included, inter alia, long distance running, rope climbing and other rigorous physical exercises, which lasted for approximately 4 hours per day, split between morning and evening sessions.

2.9 Despite the record winning ability to excel in short distance running during the Petitioner's school days, long distance running was challenging from the inception of the military training due to a chest pain that occurred while performing the long-distance running. The Petitioner failed to perform the given targets.

2.10 As morefully pleaded in paragraph 17, the Petitioner's health condition was deteriorated and she was referred to the KDU Hospital and the Army hospital Narahenpita continuously from 27/01/2023. The KDU management granted her medical leave from 27/01/2023.

2.11 Since the medical condition of the Petitioner was not improving, the Board of Management of the KDU at the Board Meeting held on 26.06.2023 granted approval to discharge the Petitioner from KDU and Sri Lanka Army with effect from 18.06.2023 on medical grounds without having to make any payment as per the agreement and bond entered into by her with the university. (vide:P20)

2.12 **Thus, the Petitioner ceased to be a registered student of KDU with effect from 18.06.2023**. [Emphasis in the Original]

2.13 Discharge Certificate of the Petitioner from KDU was issued on 06.09.2023 and the letter discharging as an Officer Cadet of Sri Lanka Army was issued on 08.09.2023. (vide: P21)

2.14 Thus, the Petitioner lost her registration at the KDU on the medical grounds. **That was not foreseeable for the Petitioner**. Nor was such a medical condition detected in the rigorous selection process followed by the KDU, which included a physical and mental performance and test (Vide: P11) as well as a Medical Test Vide: P13) **With the said discharge from the KDU the Petitioner was no longer a registered student of a State funded university, receiving higher education free of charge**. [Full passage highlighted in "bold" in the original. In this judgment it was selectively and variably highlighted]

2.15 Thereafter, the Petitioner on 07.09.2023 submitted an appeal to the UGC, pleading to consider admitting her to a state university based on her Z Score and the preferences in her university application. (vide:22). The Petitioner had also submitted an appeal to the President of the Republic, and the President's Office had forwarded the same to the UGC for consideration.

2.16 Thereafter, the UGC by P27, rejected the Petitioner's appeal, on the purported premise that in terms of Clause 1.7.3(ii), the Petitioner is

disqualified from being considered for admission to the State university under the purview of the UGC.

2.17 It is the said decision of the UGC, contained in P27, which is made consequent to the appeal of the Petitioner that is impugned in this application".

The gist is that,

(i) The petitioner applied to the UGC
(ii) Then she applied to the KDU
(iii) The UGC rejected her application under section 1.7 of the UGC Admission handbook on 30.11.2022
(iv) She failed KDU's rigorous military training test
(v) She was discharged from it and ceased to be a student of it from 18.06.2023
(vi) She reapplied to UGC to admit her to a university on her Z score
(vii) It was rejected

The UGC's position is that the petitioner is not entitled to enter into a university under Clause 1.7.3(iii) of the handbook.

The petitioner says Clause 1.7.3(iii) was given an over rigid interpretation and thereby the UGC fettered its discretion.

What does the clause say?

Its material part is as follows,

"Students who were/are registered under free education as internal students to follow a degree course in a State University/institute established under any other Act of Parliament in Sri Lanka other than the Universities Act, No. 16 of 1978 (as amended)".

The petitioner says, that, she was a student of the KDU.

But she ceased to be one.

The synopsis for the respondents says, that, the petitioner continued as a student of the KDU until she was compelled to discontinue the degree programme due to health reasons and was issued with a certificate of dismissal by the KDU on 06.09.2023 which was followed by a letter of discharge.

She has submitted a letter dated 12.08.2023 (P.26) to be considered for a state university.

It was replied by P. 27.

What did P.27 say?

It says as per the Hand Book for 2021/2022, paragraph 1.7.3(iii) when a student is / was registered as an Enlisted Officer Cadet of the KDU such a student does not qualify to be admitted to a state university.

Four questions arise,

(i) How could the petitioner foresee at the time she applied to KDU that she will not be able to pass a rigorous military test?

(ii) Has not the petitioner on the strength of her Z score a right to select the course of study she likes best?

(iii) Was it the fault of the petitioner, that, she could not pass the rigorous military test?

(iv) When the UGC rejected her second application, was she a student of a recognized state university or institution receiving education free of charge?

The above (ii) will be considered ahead of one. It is true that under the system of "free" education there is limited scope of choice. But why should that limited scope too is fettered? Although education is "free", the funds spent belongs to the public. The petitioner is a member of the public.

A former Director of Education, whose outstanding contribution to the education of this country especially at Matara and Kandy and thereafter at the Open University at Nawala as its first Director, Regional Educational Services, was notable, at a felicitation ceremony for senior educationist, on or about 12.12.2016 commented, in the presence of the then Minister of education, that, what this country needs is the "**freedom in education**," rather than "free education." The Minister said in his speech that he takes serious note of it. That is the freedom a child (student) has to select the course of study and the institution of his or her choice. Before the officials who make decisions on such questions rigidly and harshly deprive children of opportunities for education, they must realise that the funds employed for the "free education" are not coming from the prerogative power of the executive, but from the funds of the working class, especially not influential entrepreneurs who effect big turn overs (which is the transfer of money, not the production of wealth) but those who till the rough land to produce wealth with scarcely available water.

The difference between money and the production of wealth, is explained, the way it has been done best up to now, by **Adam Smith** in his work '**An Inquiry into the Nature and Causes of the Wealth of Nations**' **(commonly called "The Wealth of Nations**" and in its Third Part, '**Of the different Progress of Opulence in different Nations**' and in the second chapter in that section named '**Of the Discouragement of Agriculture in the ancient State of Europe after the Fall of the Roman Empire**'. Alice O'Connor, better known by her pen name Ayn Rand, was a Russian-born American author and philosopher. She is known

for her fiction and for developing a philosophical system she named Objectivism[1]. Among other famous quotes of her, she has said,

> "What greater wealth is there than to own your life and to spend it on growing? Every living thing must grow. It can't stand still. It must grow or perish[2]."

Although it is not certain, whether, she meant that or not, the growth of life without education does not make that "growth" appreciate, that, the value the money represents ceases when it cannot transact any more, but, the efficacy of wealth would remain independent of transactions.

It would be obvious, now, that, (i) and (iii) must be answered in the negative.

In regard to (iv) there is no doubt, that, the emphasis by the decision makers was on the words, "Nidahas adyapana awasthawak yatathe abyanthara sisun lesa liyapadinchi wee siti / sitina sisun…"

The purported rationale is in clause 1.6 of the same Handbook, which is reproduced below,

> "1.6
>
> 3. එයට හේතුව වන්නේ; යම්කිසි ශිෂ්‍යයෙකු විශ්වවිද්‍යාල ප්‍රවේශය සඳහා තේරී ඇති පාඨමාලාවේ ලියාපදිංචිය අවලංගු කර ගැනීම නිසා හෝ එහි ලියාපදිංචි වීමෙන් පසු අධ්‍යන කටයුතු සඳහා වාර්තා නොකිරීම නිසා එම ශිෂ්‍යයා විසින් වළක්වාලන්නේ එම වසරේම වෙනත් ශිෂ්‍යයෙකුට විශ්වවිද්‍යාලයට ප්‍රවේශ වීම සඳහා තිබූ අවස්ථාවක් වීමයි".

[1] Born and educated in Russia, she moved to the United States in 1926. After two early novels that were initially unsuccessful and two Broadway plays, Rand achieved fame with her 1943 novel The Fountainhead. In 1957, she published her best-selling work, the novel Atlas Shrugged. Afterward, until her death in 1982, she turned to non-fiction to promote her philosophy, publishing her own periodicals and releasing several collections of essays.
[2] https://www.azquotes.com/author/12074-Ayn_Rand/tag/money

An answer to this lopsided logic, a better one, has been given by Justice Upali de Z. Gunawardana. It is as follows,

Expelling for Life:

The News Paper "the Morning" in its issue of 05th April 2021 under title "**Expanding judicial review guides, not undermines, public authorities**" reported about an article written by the then President of the Court of Appeal, Justice Arjuna Obeyesekera. The title of the article was "Expanding the scope of substantial judicial review." It was said that Justice Obeysekera noted the proposition, which was the title of the news item.

The news item said, [quoting from the article of Justice Obeyesekera]

> "The principle of proportionality is another standard ground for judicial review. In the case of **Premaratne vs. University Grants Commission and Others,** the Court of Appeal (**Justice Upali De Z. Gunawardana joined by Justice Hector S. Yapa, the latter who later became a Judge of the Supreme Court {SC})** concurred with the view of the Master of the Rolls (MR) of the Court of Appeal of England and Wales, Lord Alfred Thompson Denning in R vs. Barnsley Metropolitan Borough Council, Ex parte Hook "which illustrates that if any action or measure is considered to do more harm than good in reaching a given objective, it is liable to be set aside, for the court has to consider whether the ends justify the means".
>
> .....
>
> "In the subsequent case of Neidra Fernando vs. Ceylon Tourist Board and Others, the Court of Appeal (**Justice Gunawardana**), while holding that the allegation of bias regarding the recommendation to dismiss the petitioner from service was well founded, added however that the recommended punishment was disproportionate, even though the Court noted that "there has been and remains some uncertainty as to the extent

to which the notion of 'proportionality' may or should be considered to be a ground of review."

.....

"The Court of Appeal has however held that the case of N.V. Gooneratne vs. The Sri Lanka Land Reclamation and Development Corporation and Others (**Justice Anil Gooneratne joined by the then President of the Court, President's Counsel {PC} Sathya Hettige, both of whom later became Judges of the SC**) was "a fit and proper case to apply the doctrine of proportionality." [the remarks within parentheses are by Justice Obeyesekere].

It is to be noted, that, the first two judgments were authored by Justice Upali de Z. Gunawardana, one of the finest Judges of this country.

It must also be noted, as evident from the remarks Justice Obeyesekera made in the parenthesis, that, like the other justices whose names have been mentioned, Justice Gunawardana had not been elevated to the Supreme Court, the highest authority of justice.

Justice Gunawardana who was a practitioner in Kalutara Bar was a career Judge who was appointed a Magistrate, District Judge, High Court Judge and a Judge of the Court of Appeal. He chose the career of a judge.

The other three justices whose names are mentioned were not career judges. They joined public service as officers of the Attorney General's Department.

But all three of them were elevated to the Supreme Court.

All three of them joined the Judiciary as Judges of the Court of Appeal.

The judgment of Justice Upali de Z. Gunawardana, in the Court of Appeal, cited by its former President Justice Arjuna Obeyesekera in **R. L. Premarathne vs. The University Grants Commission** is in itself a "tour de force" to say the least.

It was a case of expelling "for life," as Justice Gunawardana said, a final year MBBS Student of Ruhunu University, who has even sat the Final MBBS Examination and awaiting results, on the basis that she had earlier registered to follow a course in biological science in Sri Jayewardenepura University which she failed to disclose in her later application to follow MBBS course.

While the commendable propositions enunciated in that judgment as far as the law is concerned, one of which had attracted the attention of Justice Obeyesekera too, are many, only one passage from it, on facts, is cited below to show the judicious character in which Justice Gunawardane dealt with the matter.

> "What I am seeking to pin point is this: that is, if the petitioner had known on the very day that the results of the GCE Advanced Level examination held in the year 1979 were released, ie on 12.10.1979 that she was qualified to be admitted to the faculty of medicine - she wouldn't have allegedly got herself registered two days later, ie on 15.10.1979 to follow a course in Biological science on the basis of the results of the GCE Advanced Level examination held in the year 1978. It was somewhat of a queer situation. It is not the case that the petitioner acquired the qualification to be eligible for admission on a date later than 12.10.1979 on which date the results (of the GCE Advanced Level examination held in 1979) which qualified her or made her eligible for admission to the faculty of Medicine were released; although she was later held or found to be qualified on the self-same results that were in fact released on 12.10.1979 to be admitted to the medical faculty - yet she did not know of it till after she got herself admitted to faculty of Biological science assuming of course, that she had done so. **This is one of the mitigating circumstances that deserved or rather demanded consideration in favour of the petitioner but which had not been taken into the reckoning at any level or stage by those who were instrumental in**

imposing the punishment of getting the petitioner to withdraw from the faculty of medicine for life or for ever." [Emphasis added in this judgment].

Justice Gunawardana noted, that, it is, by no means, rational conduct on the part of the authorities concerned to permit a student to sit for the GCE Advanced level examination a second time and yet impose a prohibition against the student seeking admission to the faculty of the student's choice on the better performance at the later (subsequent) examination.

While there was no admission, at any stage, by the said student that she fraudulently withheld information (her personal file from the Sri Jayewardenepura University was not forthcoming) the judgment did not have to make a ruling on it since the 01st respondent, The University Grants Commission, after 06 years of its decision to expel her has rescinded that decision. The Court also noted, that, the Commission, which had the authority under the statute to decide upon the punishment has merely and mechanically followed the recommendation of the Inquirer, who was a retired Judge of the Supreme Court (retired in 1984). Justice Gunawardana said that the Commission merely acted as a "conduit" to convey that recommendation as its decision. Even after the Commission rescinded its decision to expel her for life, the Ruhunu University was withholding the release of her results, for which she sought a mandamus. The Court while formerly granting a certiorari to quash the decision of the Commission granted mandamus too.

Justice Gunawardana in one of His Lordship's noteworthy passages said,

"**The reasoning of the inquirer reproduced above, with respect, typifies "an outrageous defiance of logic**". After all, what can one do after one has been found guilty, rightly or wrongly, except to plead for forgiveness or mercy. It is to be observed, even as remarked by the inquirer, the petitioner had stoutly protested her innocence throughout. **Plea for mercy or leniency is never an unerring pointer to or**

"**confirmation" of guilt**, **as the inquirer seems to have thought** - as it would have been, if the petitioner had admitted guilt and pleaded for mercy. Consequences of deprivation ought to be considered for a penalty to be proportionate and a penalty which is disproportionately draconian must be quashed as being an excessively severe penalty. The doctrine of proportionality which works on the assumption that any action or punishment ought not to go beyond the scope necessary to achieve its desired result has found a place in case law, for instance, in R. v. Barnsley ex. p. Hook H 4) which illustrates that if any action or measure is considered to do more harm than good in reaching a given objective it is liable to be set aside for the court has to consider whether ends justify the means".

When Justice Gunawardana was a senior High Court Judge in Colombo he had to hear the trial in the criminal defamation case of Sinha Ratnatunge (Editor of "The Sunday Times") vs. The State. The virtual complainant was the President of the Republic. It was a prolonged trial and Hon. Gunawardana's promotion to the Court of Appeal which was due could not be effected during its pendency. The Editor was convicted. Hon. Gunawardana was appointed to the Court of Appeal within two weeks of that. "The Sunday Times" published that the Free Media Movement questions this. What actually happened was, that, due to that High Court Trial his promotion to be effected in the ordinary course was delayed. That and the comparatively advanced age of career judges when appointed to the Court of Appeal, after an island wide long career as a judge, prevented Justice Gunawardana, that erudite and sagacious Judge reaching the Supreme Court.

Justice Gunawardana as High Court Judge of Colombo had to face an occupational hazard common to most career judges, at sometime or the other in their **comparatively** long career, when they had to give decisions in cases that arouse public attention. **It is only the judge who hears the evidence in full and reads every material part of the brief who knows, that, the public**

sentiment is not always right and often based on preconceived misconceptions. This is the greatest drawback in a democracy which however most countries have accepted despite that having several drawbacks, as a somewhat better alternative for monarchy, anarchy, bureaucracy or communism.

Like, the student in **R. L. Premarathne vs. The University Grants Commission** how could the petitioner know, that, she will not pass the physical fitness test? Furthermore, it was not due to her fault or negligence. It was beyond her control.

The petitioner cites Wade and Forsyth Administrative Law 12th Edition page 268 which says,

"4. OVER-RIGID POLICIES

A. POLICY AND PRECEDENT

An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully **by blindly following a policy laid down in advance** (*For discussion see (1972) 18 McGill LJ 310 (H. L. Molot); [1976] P.L. 332 (D. J. Galligan*)….). It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case:

each one must be considered on its own merits and decided as the public interest requires at the time. The Greater London Council was criticised for disregard of this principle when it proceeded to make a large subsidy to the London bus and underground services as a matter of course because the ruling party had promised to do so in their election campaign (*Bromley LBC vs. Greater London Council [1983] 1 AC 768 (Lords Diplock and Brandon)*). They regarded themselves as irrevocably committed in advance, whereas their duty was to use their discretion. **Nor may a local authority lawfully refuse all applications for housing for children of families considered to be "intentionally homeless"** (*see above page 57*) **since the power to produce housing implies a duty to consider the**

different circumstances of each child (*A G ex rel Tilley vs. Wandsworth LBC [1981] 1 WLR 854 (declaration that resolution was unlawful)*). Another example was where the Home Office took a decision to delay consideration of older asylum applications in order that they might meet the targets set for consideration of the more recent applications. ….

In enforcing this rule, the courts are underlining the difference between judicial and administrative processes. The legal rights of litigants are decided according to legal rules and precedents so that like cases are treated alike. But if an administrative authority acts in this way its decision is ultra vires and void. **It is not allowed to 'pursue consistency at the expense of the merits of individual cases** (*Merchandise Transport Ltd., vs. British Transport Commission [1962] 2 Q. B. 173 at 193*). This doctrine is applied even to statutory tribunals, despite their resemblance to courts of law (*See Regina vs. Greater Brimingham Appeal Tribunal ex P Simper [1974] Q. B. 543 (tribunal applied rule of thumb instead of exercising discretion: decision quashed)*). But it does not apply to prerogative powers.

Just how far they may enforce a fixed policy is often a difficult question for authorities granting licences or permits. A clear instance was where an applicant for permission to sell pamphlets in public parks for the benefit of the blind was told that the Council had decided to grant no such permits, and could make no exception even in the most deserving case. The court regarded that 'not as the adoption of a policy in the exercise of a discretion but as a refusal to exercise any discretion' (*quoted from Banks L. J., in Rex vs. Port of London Authority ex p. Kynoch Ltd., [1919] 1 K. B. 176 at 185*) and granted mandamus to compel the Council to consider the application (*Rex vs. London County Council ex p. Corrie [1918] 1 K. B. 68*). It did not follow that they must give permission or that they might not follow a policy: their duty was merely to exercise their discretion in each

case and not to shut the door indiscriminately either on all applicants or on applicants who did not conform to some particular requirement.

Consequently a local education authority may follow its own rules in allotting pupils to schools provided that its motives are not unreasonable, capricious or irrelevant, and provided that it is ready to consider exceptional cases (*Cumings vs. Brikenhead Cpn [1972] Ch. 12, where Lord Denning M. R. expounds the rules as to policy*). Where it is at liberty to make a choice between conflicting policies, it may decide to make no exceptions, as where it adopts a policy of making all schools in its area into comprehensive schools and abolishing all grammar schools (*Smith vs. Inner London Education Authority [1978] 1 All E R 411*). But even then it is in a stronger position if it has listened fairly to the objections of parents and others concerned. Similarly, a decision-maker may depart from their usual policy provided they act fairly and rationally and give those adversely affected an opportunity to make representations why the usual policy should be followed". [Emphasis added in this judgment].

The petitioner cites the book of Dr. Stanley de Smith, which now goes as "De Smith's Judicial Review" and Harry Woolf is the Chief Editor.

"Underlying rationale

The underlying rationale of the principle against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law), **may be balanced by another equally legitimate public law value, namely, that of responsiveness** (*Regina vs. Minister for Agriculture, Fisheries and Food Ex p. Hamble Fisheries (Offshore) Ltd [1995] 2 All E R 714 at 722*). **While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the**

individual case (*D. Galligan, "The Nature and Functions of Policy within Discretionary Power" [1976] P. L. 332*). **Moreover, it must be remembered that an inflexible policy could prioritize consistency at the expense of equal treatment in fact**....." (page 515). [Emphasis added in this judgment].

Wade and Smith both, it appears to this Court, referred to D. J. Galligan [1976] *"The Nature and Functions of Policy within Discretionary Power".*

The book "Due Process and Fair Procedures" "A Study of Administrative Procedures" by the same writer D. J. Galligan, Clarendon Press Oxford, 1996, available at the Judges' Library also has a part that is relevant. In Chapter 03 titled "Rights, Procedures and Costs" and at page 108, under "3.2.4 The Right to Consideration", he says, that,

"3.2.4 The Right to Consideration

Against that background, let us now consider how to give content to the general principle, to identify the values which should be inserted into it. **One idea is often expressed in terms of non-arbitrariness, the claim being that each person has a right to be treated in a way that is non-arbitrary** (*For a discussion on these lines, see T. M. Scanlon, 'Due Process' in Pennock and Chapman, Due Process, n. 19 above*). Now arbitrariness is an elusive concept, but it does convey an idea of what is important in the relationship between citizen and state: the individual with (Pg 109) his interests and concerns in some sense counts in the deliberations of the discretionary decision-maker (*One of the difficulties in trying to use arbitrariness as a critical concept is that what amounts to arbitrariness depends on what it means, in different contexts, to take a person into account; arbitrariness is of no help in answering that question*). Individual persons are very much affected by discretionary decisions where the wider public interest is the main concern, and the fact that some of the most fundamental interests in liberty, property, livelihood, and status are vulnerable to administrative action is a sound basis for restraint in pursuit of the public

interest. It is then a short step to a normative principle which takes account of that vulnerability and justifies minimum standards of protection.

The principle may be called the principle of consideration, suggesting that the interests of those affected must be taken into account, while allowing that ultimately they may be overridden by wider notions of public interest. But while a sense of public interest may prevail, it does so only after proper account is taken of the interests affected. The principle insists on the official responding to those interests while retaining the decision as to the course of action finally to be followed. **The principle of consideration guarantees no result, but it shows that the interests of persons are an element of the public interest and should be taken seriously**. The principle of consideration in turn generates a right to consideration (*The argument here is presented in more detail in D. J. Galligan, 'Rights, Discretion and Procedure' in Sampford and Galligan, Law, Rights and the Welfare State, n. 13 above*). We now have a clear thread running between basic, moral, and legal rights: the basic right to be treated with respect as a person justifies a moral right to consideration in the affairs of government, while that moral right provides the case for a legal right to certain standards of fair treatment governing the exercise of discretion. The standards in turn generate rights to appropriate procedures.

The right to consideration in discretionary decisions might be compelling in principle but seems hopelessly vague in practical application. The sentiment is noble: each person should count and administrators are never justified in simply ignoring the interests of those affected. But how does it help the prisoner seeking parole, the applicant for a licence, or the objectors to the motorway? What is necessary in such cases to satisfy the right to consideration and so to avoid treating the person unfairly? The answers to such questions are unlikely to be clear or simple; since the range of administrative decisions is variable, and the interests that may be affected are diverse, the right balance between the public interest and regard for the individual person is likely also to be variable. This

can be illustrated by contrasting an individualized decision, whether to grant parole for example, and the decision as to which route a motorway should follow (*For the classification of administrative decisions as adjudicative, modified adjudicative, specific policy, and general policy, see my discussion in Discretionary Powers, n. 12 above, 114-17*). In the parole case, it is (Pg 110) reasonable to expect close attention to be paid to the situation of the prisoner, even though, finally, the decision might be made to deny parole because of the need to protect the public. But in order for the decision to be justifiable, the parole agency should inquire closely into the facts about the prisoner's case, his record in prison, and the likely risk he would pose to the public. In making the motorway decision, on the other hand, many people, interests, and factors are involved and, while all must be considered, the principle of consideration in respect of any one person or interest would demand less. It might be enough, in justifying the decision, to show that the many claims and arguments put forward have been looked at, that some of them are irreconcilable, and that finally a course has been settled which is rational, reasonable, and in good faith…."

……

Pg 111

"**The right to consideration adds to policy decisions a value which must be respected in decision-making. The value remains constant across different decisions, but the practical standards needed to ensure respect for it vary according to the context**[3]. The right to consideration in turn justifies rights to procedures, the procedures being those necessary to ensure proper consideration in the discretionary process. They will normally include familiar procedural forms: knowing the issues to be decided and where possible the criteria to be applied; having an opportunity to make one's case, to address the issues, and to respond to others; and being provided with an explanation and justification for the final decision. The right to consideration does not necessarily

[3] This is very important as this Court sees.

mean that all or any of these particular procedures are to be followed; for example, the right to consideration does not necessarily include the power to participate. Participation will normally be a part of the right, but participation is an instrument to proper consideration and whether it is needed in a given context will depend on the context. The same applies to other procedures; the justification for each is that it is instrumental to the principle of consideration. Sufficient steps may have been taken at an earlier stage to ensure adequate consideration of those affected, with the result that no special procedures are needed at the administrative level. According to the principle of selective representation it is necessary to ensure only that, taking the policy process as a whole, the interests of groups and individuals are properly considered (*On the principle of selective representation, see Galligan, Discretionary Powers, n. 12 above, section 7.3.2*). The principle of consideration can be satisfied in a number of ways at a number of points in the regulatory process (*A point along these lines is well made by T. M. Scanlon in his essay 'Due Process' in Pennock and Chapman, Due Process, n. 19 above*).

To conclude, the starting point in developing the right to consideration was the recognition that important values about the treatment of persons apply to discretionary decision-making even where the overriding concern is the public interest. The basis for those values and the standards based on them is a moral view about the relationship between the citizen and the state. Views may differ about the precise terms of the relationship and therefore about the normative standards governing it. I suggest, how- ever, that there is a central and irreducible principle that, in the discretionary, policy-making functions of the administrative state, the interests, circumstances, and concerns of individuals and groups should be taken into account in making a decision. This right to consideration of course has to be (Pg 112) interpreted in each context, but my suggestion is that it is morally compelling in the sense that it should be included in any set of acceptable principles governing the citizen-state relationship. ***The right to consideration can be seen at work in notions of non-arbitrariness,***

purposiveness, and reasonableness; but it goes beyond them and constitutes a dynamic principle of fair treatment. The right to consideration in turn generates and justifies suitable procedural rights. Finally, the right to consideration is not the only right in the discretionary, policy-making context. There may be other standards of fair treatment which ground other rights, principles of consistency and non- discrimination being examples[4]." [Emphasis added in this judgment, to Professor Galligan's text].

It is hoped, that, such "Diamonds of First Water[5]," contained in the Judges' Library would be allowed to reflect their lucence more in the decisions of the superior courts of this country.

In the case cited by the petitioner **M. D. Malik Sachinthana vs. The UGC S. C. F. R. 311 2019 Thurairajah J.**, has concluded his lordship's judgment saying,

> "**The UGC as an Institution advocating free education must not deprive a student of his future. In doing so it's breaking down the**

[4] Professor Denis J. Galligan, Professor of Socio-Legal Studies, Oxford University (since 1992), Professorial Fellow, Wolfson College, Oxford (since 1992), Recurrent Visiting Professor, Woodrow Wilson School of International and Public Affairs, Princeton University (since 2001)
https://www.law.ox.ac.uk/sites/default/files/migrated/obor_galligan_bio.pdf

[5] In the gemstone trade, first water means "highest quality." *["Definition of first water". Collins English Dictionary. Retrieved 7 December 2012*]. The clarity of diamonds is assessed by their **translucence**; the more like water, the higher the quality. The 1753 edition of Chambers's Encyclopaedia states "The first water in Diamonds means the greatest purity and perfection of their complexion, which ought to be that of the clearest drop of water. When Diamonds fall short of this perfection, they are said to be of the second or third water, &c. till the stone may be properly called a coloured one." **The phrase first water is also used more generally to refer to the highest quality or most extreme example of a person or thing, not just gemstones**. *["Definition of first water". Collins English Dictionary. Retrieved 7 December 2012*].

The comparison of diamonds with water dates back to at least the early 17th century, and Shakespeare alludes to it in Pericles, 1607. [*Pericles 3.2/113–117, Folger Shakespeare Library*].

... heavenly jewels which Pericles hath lost—
... The diamonds of a most praisèd water doth
appear to make the world twice rich.

Do people deserve the diamonds of the first water." "Toute nation a le gouvernement qu'elle mérite" is attributed to the French Philosopher Joseph de Maistre 1753 to 1821 [and also to Benjamin Disraeli, the English politician and philosopher] It translates as "Every nation has the government it deserves" or "People get the government that they deserve". That is a principle.

very futures of the students it is trying to build. Therefore, I do not see a reasonable explanation as to why the UGC should reject the petitioner's application as the petitioner is not a validly registered student of ATI to start with. The critical need everywhere in the world is for education to prepare students to lead successful, fulfilling lives." (pages 11 and 12) [Emphasis added in this judgment].

The petitioner does not seek now to follow a course that would produce a physician in a state university. She still has a legitimate expectation of obtaining a qualification in either

(i) Food Science and Technology in the Faculty of Agriculture
(ii) Agricultural Technology and Management in the Faculty of Agriculture and
(iii) Biological Science in the Faculty of Science

The petitioner has filed an application under the Right to Information Act.

The request was for the 4th respondent University of Peradeniya to reveal the number of vacancies still available for above three courses of study.

The documents marked P.36(a), P.36(b), P.37 and P.45 have been produced by that University, which would not have been produced if not for the Right to Information Act.

The following is the result.

Course	The number of vacancies as at 22.09.2023 and the minimum Z score required		The number of vacancies as at 23.11.2023 and the minimum Z score required	
Food science and technology	13	1.4106	09	1.3644

Agricultural Technology and Management	36	Not available	22	0.5461
Biological Science	29	Not available	Not available	Not available

So, vacancies are there, which have not been filled; and if not filled, as it is the case in almost all instances, that wastes an opportunity for "a life to grow", in a way that is fruitful to the society, due to no fault of the public of this country.

It may be recalled, that, clause 1.6 (3) said,

The first sentence.

It is highly unlikely, that, the above particulars would have been available if not for the existence of the Right to Information Act.

The new approach taken by this Court in two of the Right to Information cases referring, among other things, to the "panopticon" and "anti panopticon" two concepts attributed to Jeremy Bentham was appreciated as a step in the right direction.

In the article "**There is so much more to the RTI Act**" published in "**The Daily Star**," of Bangladesh, on Monday, 13th March 2024, Dr Shamsul Bari and Ruhi Naz who are the chairman and assistant director (RTI), respectively, at Research Initiatives, Bangladesh (RIB) said as follows,

> "**Two most recent examples from Sri Lanka may help to illustrate the point. Since the adoption of the RTI Act there in 2016, alert citizens and a supportive information commission, assisted by a helpful judiciary, have made strategic use of the law. So much so that it led the International Monetary Fund (IMF) to recommend promotion of greater use of the law by citizens to accelerate the country's recovery from the severe economic crisis it suffered recently**. [Emphasis added in this judgment]

In the first case, a February 2024 ruling by the Court of Appeal (CA) upheld a 2021 directive by the Right to Information Commission (RTIC) of Sri Lanka which ordered a state bank to release the marksheets of candidates who sat for the island-wide competitive recruitment examination. The directive was related to an appeal filed at the RTIC by an unsuccessful candidate wanting to know why she was not recruited despite passing the examination.

In upholding the commission's directive, the CA dismissed the bank's revision application. And Justice DN Samarakoon, who authored the judgment, further underlined that, though the marks obtained by other candidates could indeed qualify as "personal information," it was "in the interests of the public that public examinations on the basis of which citizens are recruited to occupations on merit, must be honest, upright and transparent." He emphasised that since the information concerned was related to a public activity or interest, a concerned citizen had the constitutional "right to know" it. There was, therefore, no unjustified invasion of privacy in releasing the merit list prepared on individual marks.

A more incisive observation by the judge was that the RTI Act brings the state to the "**receiving end of asymmetrical surveillance**." Citizens now have the power to question the state while "**the State has to police itself for fear of adverse public opinion**." **This is the "opposite of the surveillance State ... the roles have been changed; the observer has now become the observed." A profound observation with deep implications for all concerned**! [Emphasis added in this judgment]

In the second case, the RTIC directed Litro Gas Lanka Ltd of Sri Lanka to release the salary and loan details of some top officials of the company to an appellant who claimed that he was unfairly terminated by the company, which, despite its claim otherwise, was indeed a Public Authority as 99.7 percent of its shares were owned by the state. A key aspect of the CA

judgment was that while information on salaries is indeed personal information, it is overridden where public funds are involved.

The court went on to add that grounds such as commercial interests, trade secrets, and competitive position of a third party are not relevant when salary information is sought, and that Litro Gas, in challenging the directive of the RTIC, had "failed to understand the true nature ... of the Sri Lankan RTI Act." The court further added that reputation, rights of others and privacy were overridden by public interest according to the Sri Lankan Constitution itself.

Unfortunately, RTI use in Bangladesh so far has given rise to very few cases involving such in-depth interpretation of key provisions of the law by the Information Commission. And even in the few cases where such possibilities exist, it is rare for our citizens to challenge them in the High Court. **It's time our civil society leaders, social and political elites, and ardent change-makers discovered the tremendous scope and promise of the RTI Act**[6]". [Emphasis added in this judgment]

The message of the Chairman of the UGC in the handbook in question begins saying,

> "උසස් අධ්‍යාපනය සඳහා ප්‍රවේශ වීම තරුණ දරුවන් විශාල පිරිසකගෙ ඒකායන ප්‍රාර්ථනාවයි. ඒබැවින් විශ්වවිද්‍යාල වල වගකීම වන්නෙ යාවත්කාලීන දැනුමින්, හැකියාවන් ගෙන්, නිවැරදි අදහස් වලින් පමණක් නොව නිසි මානසිකත්වයකින්ද හෙබි උපාධිධාරින් බිහිවීමට අවැසි පරිසරය සකසා දීම සහ ඒමගින් ඔවුන් තොරා ගත් මාවත්හි සාර්ථකත්වය කරා පියනැගීමට ඉඩ සළසා දීමයි."

They have the wherewithal to implement these lofty ideas.

[6] RTI act in Bangladesh | There is so much more to the RTI Act (thedailystar.net)

The application is allowed with costs.

The reliefs under paragraphs (c) (d) (e) and (f) are granted.

Judge of the Court of Appeal