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 in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 147/2013

Prof. (Dr.) Chelliah Elankumaran,
19A, Mariamman Lane,
Thirunelvely South, Jaffna.

PETITIONER

Vs.

1. The University of Jaffna

2. Prof. (Miss) V. Arasaratnam,
   Vice Chancellor.

3. Mr. K.K. Arulvel

3A. Dr. T. Mangaleswaran

4. Prof. S. Sathiaseelan

4A. Prof. G. Mikunthan

5. Prof. S.Srisatkunarajah

6. Prof. V.P. Sivanathan

6A. Prof. N. Gnanakumaran

7. Dr. (Mrs. S. Sivachandran

7A. Dr. (Mrs.) T. Mikunthan

8. Pro. T. Velnamby

9. Dr. S. Raviraj

10. Mr. S. Kuganesan

11. Dr. A Pushpanathan

12. Professor R. Vigneswaran

12A. Prof. P. Ravirajan

13. Dr. (Mrs.) S. Ramesh

14. Prof. P. Balasundrampillai

14A. Mr. R.M.W. Ratnayake

15. Rev. Fr.Dr. J.B. Gnanapragasam

15A. Prof. V. Tharmaratnam

16. Eng. M. Ramathasan

16A. Prof. S.K. Sitrampalam

17. Mr. K.Rushankan

17A. Prof. H.S. Hisbullah

18. Mrs. V.Selvaratnam

18A. Dr. P. Lakshman

19. Mr. E. Annalingam

19A. Dr. Jeyakumar

20. Mr. P. Thiyagarajah

20A. Mr. S. Rangarajah

21. Mr. Rajaratnam

21A. Dr. T. Nesiah

22. Mr. M. Sripathy

22A. Dr. S. Sivasekaram

23. Mr. M. Balasubramaniyam

23A. Mr. N. Vethanayagam

24. Ms. S.Sarangapani

24A. Dr. A. Thirumurugan

25. Miss Sherine Xavier

25A. Mr. Mano Sekaram

26. Mr. K. Theventhiran

26A. Mr. M.K. Kanapathipillai

2nd to 26A Respondents are members of the Council of the University of Jaffna.

27. Mr. V. Kandeepan,

Registrar and Secretary,
Council of the University of Jaffna.

28. Mr. T. Anpananathan,
Deputy Registrar,
Academic Establishments,
University of Jaffna.

28A. Mrs. S. Kumarasamy,
Deputy Registrar,
Academic Establishments,
University of Jaffna.

29. Justice G.W. Edirisuriya,
Chairman,
University Services Appeals Board.

30. Mr. Anton Alfred,
Vice Chairman,
University Services Appeals Board.

31. Dr. R.M.K. Ratnayake,
Member,
University Services Appeals Board.

32. Ms. Nadeesha Samarasinghe,
Secretary,
University Services Appeals Board.

29th to 32nd are of the University
Service Appeals Board,
No. 20, Ward Place, Colombo 7.

33. Dr. A. Atputharajah

34. Mr. D. Rengan

34A. Eng. P. Vigneswaran

34B. Mr. V Kanagasabapathy

35. Dr. (Mrs). S. Sivachandran

36. Mr. P. Easwaradasan

(33rd to 36th Respondents are also members of the Council of the University of Jaffna)

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Faisz Musthapha, P.C with Ms. Thushani Machado for the Petitioner

Sumathi Dharmawardena, Additional Solicitor General for the 1st – 15th, 15B – 36th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 18th October 2018 and 12th December 2018

Tendered on behalf of the 1st – 15th, 15B – 36th Respondents on 5th December 2018

Decided on: 17th May 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 30th July 2018, the learned President's Counsel appearing for the Petitioner and the learned Additional Solicitor General appearing for the Respondents moved that this Court deliver its judgment on the written submissions that would be tendered by the parties.

The Petitioner, having joined the 1st Respondent University of Jaffna as an Assistant Lecturer (Probationary) in Economics on 1st January 1990, is presently serving the 1st Respondent as an Associate Professor in Economic Statistics attached to the Department of Economics.

Being dissatisfied with the decision of the 1st Respondent, University of Jaffna in not appointing him as a Professor, and the order of the University Services Appeals Board (USAB) refusing the appeal lodged against the said decision, the Petitioner filed this application seeking *inter alia* the following relief:

1. A Writ of Certiorari to quash the order delivered by the USAB on 12th March 2013[1];

2. Writs of Mandamus on the 2nd – 26th Respondents:

    a) To promote the Petitioner to the post of Professor with effect from 29th November 2005;

[1] A copy of the said Order has been annexed to the petition marked 'G'.

b) To antedate the Petitioner's promotion to the post of Senior Lecturer Grade II from 1st December 1997 to 1st January 1995;

c) To antedate the Petitioner's promotion to the post of Senior Lecturer Grade I from 1st December 2003 to 1st January 2001.

This Court would first like to lay out the parametres within which Courts have previously acted when it was faced with decisions by academic institutions.

In **Administrative Law** by Wade and Forsyth[2], it has been pointed out that Courts will be reluctant to enter into "issues of academic or pastoral judgment which the University was equipped to consider in breadth and in depth but on which any judgment of the Courts would be jejune and inappropriate. That undoubtedly included such questions as what mark or class a student ought to be awarded or whether an aegrotat was justified."

In Abeysundara Mudiyanselage Sarath Weera Bandara vs University of Colombo and others[3] this Court, having considered several English cases in this regard, held as follows:

> "The consistent judicial opinion, therefore, is that in matters which lie within the jurisdiction of the educational institutions and their authorities, the Court has to be slow and circumspect before interfering with any decision taken by them in connection therewith. Unless a decision is demonstrably illegal, arbitrary and unconscionable, their province and authority should not be encroached upon. This is mainly because of want

[2] Oxford, Eleventh Edition, page 537.
[3] CA (Writ) Application No. 844/2010; CA Minutes of 8th June 2018.

of judicially manageable standards and necessary expertise to assess, scrutinise and judge the merits and/or demerits of such decisions.

Dealing with the scope of interference in matters relating to orders passed by the authorities of educational institutions, the Courts should normally be very slow to pass orders in regard thereto and such matters should normally be left to the decision of the educational authorities. This is not an inflexible rule though and in R v. Higher Education Funding Council *ex parte* Institute of Dental Surgery[4] Stephen Sedley J took care to emphasize the flexibility of the rule: 'This is not to say for a moment that academic decisions are beyond challenge..... A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment.'"

The Supreme Court, in **Dr. Karunananda v. Open University of Sri Lanka and Others**[5] was called upon to consider whether the petitioner's fundamental rights guaranteed under Article 12(1) had been infringed by the refusal of the Open University to promote the petitioner as a Professor. Incidentally, the Circular that was the subject matter of that application is the same circular that this Court needs to consider in this application.

In the said case, the Supreme Court, in response to the argument of the University that the decision whether to confer a professorship could be executed only by persons who are qualified and placed in equal or higher

[4] 1994) 1 WLR 242.
[5] (2006) 3 SLR 225

standing and accordingly, an application seeking appointment as a Professor, could only be assessed by similarly qualified peers from the academic community having an 'academic mind' and that such evaluations may not be on par with the reasoning of a judicial mind, held as follows:

> "Therefore, although there may be cautionary remarks, indicating reluctance to enter into academic judgment, I am not in agreement with the view that academic decisions are beyond challenge. There is no necessity for the Courts to unnecessarily intervene in matters "purely of academic nature," since such issues would be best dealt with by academics, who are 'fully equipped' to consider the question in hand. However, if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126 of the Constitution, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment."

This Court is therefore of the view that in the exercise of the jurisdiction vested in it by Article 140 of the Constitution, it can examine whether the impugned decision of the 1st Respondent is illegal, irrational or procedurally improper but would exercise extreme caution if asked to consider, for example whether the Petitioner is entitled to more marks than what has actually been given by the examiners.

This Court will first consider the facts relating to the decision of the 1st Respondent not to promote the Petitioner to the post of Professor and the order of the USAB in respect of such decision.

By Circular No. 723 dated 12th December 1997 annexed to the petition marked '**A48**', the University Grants Commission had approved the scheme of recruitment contained in the said Circular for the posts of Associate Professor, Professor and Senior Professor in the University System. It is observed that the scheme of recruitment set out in Circular No. 723 seeks to ensure uniformity in the selection of persons to be promoted to the post of Associate Professor and Professor across all Universities in Sri Lanka. The said scheme had come into effect on 1st January 1998 and had been valid, until it was replaced by Circular No. 869 dated 30th November 2005, which came into effect on 1st December 2005.[6]

According to Circular No. 723, a Senior Lecturer Grade I or Grade II may be considered for promotion to the grade of Associate Professor or Professor if he or she has obtained at least the minimum mark specified in the marking scheme contained in the said Circular. The marking scheme for selection to the posts of Associate Professor and Professor had been set out in an Annex to the said Circular and contained three sections under which a candidate was marked. The annex also specified the minimum mark that a candidate was required to obtain for each section and the minimum aggregate mark that an applicant should obtain in order to qualify for the relevant appointment. Details of the aforementioned sections and the minimum marks that should be obtained are set out in the following table.

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[6] A copy of Circular No. 869 has been annexed to the petition, marked 'A48a'.

Section	Description	Minimum marks for Associate Professor	Minimum marks for Professor
Section 1	Contribution to teaching and academic development	20	20
Section 2	Research and creative work	25	45
Section 3.1 Section 3.2	Dissemination of knowledge Contribution to University and National Development	10	15
Total minimum mark		65	90

In terms of Circular No. 723, an application for merit promotion should be accompanied by the following:

a) Curriculum vitae of the applicant;

b) A self assessment of the candidate's whole career specifying the contribution made in respect of each of the above sections;

c) Two copies of the publications, research papers and other relevant documents.

The Circular also sets out the manner of evaluating each application that is received by the relevant University. Accordingly, the Senate shall appoint two External Experts in the relevant field from outside the higher educational institution concerned, to evaluate the applicants' contribution under Sections 2 and 3.1. The evaluation of the contribution under Sections 1 and 3.2 is carried out by a panel appointed by the Senate consisting of the Vice Chancellor or the Dean of the relevant Faculty, and two Professors, one of whom is either from within or outside the institution concerned but has knowledge of the discipline or related discipline relating to the applicant, and the other person from another faculty of the same higher educational institution as the applicant. The final selection shall be made by the Selection Committee based on the independent evaluation reports submitted by the evaluators referred to above.

This Court observes at the outset that the scheme of evaluation set out in Circular No. 723 seeks to ensure that an application for a post such as Associate Professor or Professor is examined by those persons who have the expertise in the relevant discipline as that of the applicant or of the work carried out by the applicant. This is confirmed when one considers the fact that of the 90 marks that are required to be appointed as a Professor, approximately 60 marks must come from the External Experts. Similarly, of the 65 marks required to become an Associate Professor, approximately 35 marks would have to be allotted by the External Experts. Even with regard to Sections 1 and 3.2, the Panel will have at least one person from the particular discipline. Therefore, any deviation from this requirement of having experts in the area of the candidate evaluating the application of the said candidate would be outside Circular No. 723 and can be unreasonable by the applicant.

The Petitioner had submitted his application for merit promotion to Professor / Associate Professor of Economic Statistics on 29th November 2005. Copies of the covering letter and the application have been annexed to the petition marked as '**A26a**' and '**A26b**' respectively. According to the self assessment carried out by the Petitioner, the Petitioner had claimed that he is entitled to the following marks:

Section 1	Section 2	Section 3.1	Section 3.2	Total
29 marks	141 marks	42 marks	9 marks	221

It would thus be clear that according to the Petitioner's assessment of himself, he had earned sufficient marks to be eligible to be appointed as a Professor. The Petitioner had however only been appointed as an Associate Professor on the basis that he had not obtained sufficient marks to be appointed as a Professor. Being dissatisfied with the said decision, the Petitioner filed an appeal with the USAB against the said decision. The USAB, having afforded the Petitioner and the Respondents a hearing, had dismissed the appeal of the Petitioner. This application was filed thereafter, seeking the aforementioned relief.

The Petitioner has complained to this Court that the USAB failed to consider the several irregularities that are said to have been committed by the Respondents in the evaluation of his application as well as in the allocation of marks to him, inspite of the Petitioner having placed the necessary material to substantiate the said irregularities. The Petitioner is therefore claiming that the decision of the USAB is illegal, irrational and unreasonable. This Court must

observe at this stage that the detailed mark sheet of the Selection Committee had not been filed by the 1st Respondent before the USAB. A copy thereof had only been tendered to this Court with the counter affidavit, pursuant to same being made available to the Petitioner by the 1st Respondent, after the filing of the Statement of Objections. The failure to submit the mark sheet to the USAB has in effect deprived the USAB of making a considered decision in respect of the irregularities said to have been committed by the Selection Committee.

All Universities must understand that the legislature has made available to every staff member of an institute of higher education a right of appeal to the USAB in order to air their grievances and rectify any error committed by such University in respect of any matters set out in Section 86 of the Universities Act. With "openness" and "transparency" being the watchwords of our times and to make this process more meaningful, it is essential that all documents relied upon in making the impugned decision are placed before the USAB by the University. This would include making available the mark sheets and reports of the examiners, in particular where allegations are made that the examiners have been biased towards the applicant, or that the marks have been tampered with, as in this case. A failure to do so would deprive the USAB of making a detailed inquiry into the grievance of the applicant and would render the remedy provided by the Universities Act, meaningless.

It would be appropriate to consider at this stage, the several irregularities that the Petitioner is complaining of. These irregularities fit into the following three stages of the Petitioner's application, the first being the role of the 'Screening Committee' appointed by the 1st Respondent; the second is the manner in which the External Experts' reports were considered; and the final stage being

the manner in which the Selection Committee altered the marks given to the Petitioner by the Panel and the External Experts. This Court would consider whether the alleged irregularities committed by the 1st Respondent during each of these stages were illegal, irrational or procedurally improper and if so, whether the decision of the USAB to dismiss the appeal of the Petitioner without taking into consideration such irregularities can stand.

The first complaint of the Petitioner relates to the role played by a committee appointed by the 1st Respondent, known as the 'Screening Committee'. The Petitioner states that Circular No. 723 stipulates very clearly the manner in which the evaluation of an application is to be carried out, which has been outlined earlier in this judgment. The appointment of a Screening Committee however is not contemplated by Circular No. 723 and such a committee is therefore outside the approved scheme of promotion.

The Petitioner claims that contrary to the said scheme set out in Circular No. 723, the 1st Respondent University had established the 'Screening Committee' to examine each application and to "advise" the candidate on the correct allocation of marks. In fact, the 1st Respondent, in its Statement of Objections has explained the reasons for the setting up of the Screening Committee in the following manner:

> "According to the experts who evaluated the self assessments of candidates, 'the applicants self assessments were not in accordance with the marking scheme and that they had failed to identify the appropriate section in terms of which their contributions could be assessed and that the candidates had also claimed marks over and above the limits

permitted by the marking scheme thereby hindering the due completion of the process of recruitment;

That having considered the circumstances, the Council at its meeting held on 07th January 2004 recommended the appointment of a 'screening committee' to go through the self assessment of candidates and to advise the candidates to upgrade his/her self assessment in accordance with the relevant marking scheme."

Thus, by the Respondents own admission, the purpose of establishing the Screening Committee was to assist the candidates on how they should mark themselves. Even though the appointment of the Screening Committee is outside the scheme set out in Circular No. 723, on the face of it, this Court does not see any prejudice being caused to an applicant if what was stated above, was its only purpose. However, as demonstrated by the Petitioner and admitted by the 1st Respondent, unfortunately this was not the case.

The Petitioner states that his application had been subjected to screening by Professor R. Sivachandran, Associate Professor in Geography and the late Professor S. Krishnarajah, Professor in Philosophy, both of whom the Petitioner claims does not have the competency to decide on the Petitioner's application as their expertise do not lie in the area of expertise of the Petitioner. As referred to earlier, the Petitioner had applied for the post of Professor / Associate Professor in Economic Statistics. It does not take much to realise that a Professor in Geography and a Professor in Philosophy are certainly not the most competent persons to evaluate an application of a candidate who is seeking to become a Professor of Economic Statistics.

This Court is at a loss to understand how a Screening Committee consisting of the said Professors, however knowledgeable they may be in their areas of expertise, could have advised the Petitioner on the manner in which he should prepare his self-assessment. The Petitioner, by a letter dated 16th June 2009, annexed to the petition marked '**A28b**' had refused to accept the observations made by the Screening Committee with regard to his application on the basis that they were not eligible to study his application. This Court also observes that the Petitioner had in fact pointed out in '**A28b**' that it was the duty of the External Experts to decide on the relevance of the contributions made by him, a point which was later echoed by the University Grants Commission by its letter marked '**RR28**'.

The gravity of the complaint of the Petitioner that the appointment of a Screening Committee outside the scheme of evaluation set out in Circular No. 723 is illegal can only be understood when one considers the fact that the observations of the Screening Committee had been made available to the External Experts, completely undermining the independence expected from the said External Experts. The 1st Respondent has in fact admitted that the observations of the Screening Committee were sent to the External Experts[7]. This Court is of the view that while the appointment of the Screening Committee was in itself contrary to the procedure contemplated by Circular No. 723, this course of action goes a step further by being completely contrary even to the stated intention of appointing a Screening Committee, which was to advise the applicants on how to upgrade his or her self assessment. The Petitioner claims that the External Experts relied on the observations of the

[7] Paragraph 16(viii) of the Statement of Objections.

Screening Committee when evaluating his application and that the External Experts were prejudiced by the observations of the Screening Committee. The fact that at least one of the External Experts relied on the findings and observations of the screening committee is in fact borne out by the marking sheet produced by the Respondents marked '**RR34a**'.

This Court must observe that in March 2007, the 1st Respondent sought the views of the University Grants Commission on the legality of the Screening Committee.[8] The University Grants Commission, by its letter dated 6th November 2007, produced by the Respondents marked '**RR28**' had directed the 1st Respondent that "applications submitted to the posts of Associate Professor / Professor for appointment / promotion on merit should not be referred to a Screening Committee as it is the duty of the Selection Committee to scrutinize the experts report and other necessary documents related to the above appointment / promotion and make recommendations accordingly."

It does not appear that the 1st Respondent made any attempt to inform the External Experts of the above decision of the University Grants Commission, although it could have done so, as by then, the report of one of the External Experts had not been received by the 1st Respondent. This Court is of the view that making available the findings of the Screening Committee to the External Experts and the failure to withdraw the said findings upon receipt of the UGC's letter '**RR28**' was detrimental to the interests of the Petitioner and eventually prejudiced the application of the Petitioner.

[8] This letter has been marked 'R4-1' before the USAB.

Taking into consideration the totality of the Petitioner's complaints with regard to the Screening Committee, this Court is in agreement with the learned President's Counsel for the Petitioner that the 1st Respondent acted outside the scheme of promotion set out in Circular No. 723 when it subjected the Petitioner's application for assessment by the Screening Committee. Such action is both illegal and procedurally improper as the appointment and function of the said Screening Committee was not contemplated by Circular 723.

The above matters have been raised before the USAB by the Petitioner. This Court has examined the Order of the USAB, annexed to the petition marked '**G**' and observes that the USAB has not dealt with these issues raised by the Petitioner with regard to the Screening Committee.

The second stage of the Petitioner's complaints is with regard to the manner in which the 1st Respondent dealt with the reports of the External Experts.

The Senate of the 1st Respondent had appointed Emeritus Professor T. Jogaratnam and Professor A. Nanthakumar as the External Experts to evaluate Sections 2 and 3.1 of the application of the Petitioner. The Petitioner states that Professor Nanthakumar was an expert in Mathematics and was not familiar in Economic Statistics, which is the discipline for which the Petitioner had submitted his application. This Court observes that even though the Respondents have denied this position, this Court has not been provided with the qualifications of Professor Nanthakumar. However, the covering letter to the mark sheet submitted by Professor Nanthakumar confirms that he was a Professor of Mathematics and Statistics, which is indicative that he was

competent to evaluate the application of the Petitioner. This Court is however not in a position to make a determination whether Professor Nanthakumar possessed the expertise to evaluate the application of the Petitioner, except to state that it was imperative that each External Expert possessed the requisite expertise.

Be that as it may, the Respondents have submitted the detailed mark sheet of Professor Jogaratnam marked '**RR34A**'[9] and the detailed mark sheet of Professor Nanthakumar marked '**RR34B**',[10] according to which the Petitioner had obtained the following marks for Sections 2.1 and 3:

	Professor Jogaratnam	Professor Nanthakumar	Average	Average Marks sufficient for Professor/Associate Professor
Section 2	71.5	37.6	54.55	Professor (45)
Section 3.1	20	13.9	16.95	Professor (15)

Circular No. 723 does not specify that each External Expert must give the minimum mark stipulated in the Circular for Sections 2 and 3.1 nor does it specify the manner in which the final mark for Sections 2 and 3.1 should be arrived at. Therefore, in deciding the final mark for the said sections, it would be reasonable to take the average marks of the two External Experts. If that was done, the Petitioner would have qualified under Sections 2 and 3.1 for appointment as Professor, as demonstrated by the above table. However, no

[9] The Covering letter is dated 25th January 2007.
[10] The covering letter is dated 25th February 2008.

explanation has been offered by the Respondents as to why the average marks of the two External Experts were not considered by the 1st Respondent.

Instead of taking the average mark, the course of action adopted by the 1st Respondent in order to determine the eligibility of the Petitioner in respect of Sections 2 and 3.1 was to appoint a third External Expert to evaluate the said sections. The Petitioner has two sub complaints with regard to the appointment of a third External Expert. The first is that such a course of action is not provided for in Circular No. 723 which is the Circular in terms of which the Petitioner's application had to be marked. The second is that the third expert so appointed did not have a knowledge of Tamil and therefore was not competent to evaluate the Petitioner's application.

This Court has examined Circular No. 723 and observes that it does not provide for the appointment of a third External Expert, for whatever reason. This Court is therefore in agreement with the learned President's Counsel for the Petitioner that the adoption of such a course of action by the 1st Respondent is clearly outside the procedure laid down in Circular No. 723 and is illegal.

This Court observes that the procedure adopted by the 1st Respondent in appointing a third External Expert has a nexus with the procedure set out in Circular No. 869,[11] which replaced Circular No. 723, and which was in operation by the time the Petitioner's application was evaluated. Although Circular No. 869 is not applicable, the action of the 1st Respondent in appointing the third External expert can be justified under the procedure set out in Circular No. 869.

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[11] Circular No. 869 was effective from 1st December 2005 and a copy thereof has been annexed to the petition marked 'A48a'.

The relevant sections of Circular No. 869 are re-produced below:

> "The Senate shall appoint two experts in the relevant field from outside the higher educational institution concerned to evaluate the applicant's contribution to Research and Creative Work (Sections 2 and 3.1 of the marking scheme).
>
> Where one of the two outside subject experts gives marks above the minimum threshold to a candidate and the other does not ...., the Registrar or other person from the Establishments Division processing applications shall arrange for a discussion (in person or electronic) between the two subject experts with a view to reaching a consensus. Failing a consensus being arrived at, a third subject expert shall be appointed by the Senate."

A condition precedent for the appointment of a third External Expert is that the University must arrange for a discussion between the two External Experts in order to ascertain if a consensus can be arrived at between the two External Experts. If there is consensus, it would obviate the necessity for the appointment of a third expert. The Respondents have not submitted to this Court any material to establish that this discussion in fact took place between the two External Experts nor have they referred to any discussion in the Statement of Objections.

While reiterating that a reference to a third External Expert was outside Circular No. 723, if resort was to be had to the procedure laid down in Circular

No. 869, then the 1st Respondent ought to have complied in full with the conditions and the procedure set out in Circular No. 869. However, it is clear to this Court that not only has the 1st Respondent adopted a procedure of its own by having direct resort to a third External expert, outside of Circular No. 723 and even Circular No. 869, but also failed to explain as to why it adopted a course of action unknown to the procedure laid down in the said Circulars.

The next complaint of the Petitioner is that an evaluation of Section 3.1 requires a knowledge of the Tamil language as it involves an examination of the text books written by the Petitioner in Tamil. This Court has examined Section 3.1 and notes that under this section, marks are given for the following categories:

"3.1 Dissemination of knowledge

3.1.1. Textbooks for University students published by a recognized publisher

3.1.2 Scientific and literary communications (feature articles in newsletters, newspapers, scientific magazines etc)

3.1.3 Published Orations and Presidential addresses at National, Academic and Professional bodies

3.1.4 Commissioned report for national / international bodies."

The Petitioner states that the third External Expert, Professor R.O Thattil, Professor of Statistics (Biometry), Department of Crop Science, Faculty of Agriculture, does not have a knowledge of Tamil, and that Professor Thattil was therefore not competent to evaluate his application. This Court observes

that the Petitioner, by a letter dated 15th September 2009 annexed to the petition marked '**A39**' informed the 2nd Respondent, the Vice Chancellor of the 1st Respondent University that the text books referred to in Section 3.1.1 and the research articles referred in Section 2.3 are written in Tamil. This fact too has not been denied by the 1st Respondent, thus giving rise to the issue whether the review by the third External Expert was in fact effective.

This Court observes that the third External Expert has given the Petitioner the following marks:

Section	Mark
Section 2	67.75
Section 3.1	11

The above complaint of the Petitioner, which relates to Section 3.1 as well, appears to have some merit when one considers the fact that the Petitioner received only 11 marks for the said Section, which is below the threshold specified in Circular No. 723 for appointment as Professor.

Be that as it may, having gone through a third External Expert, what should the 1st Respondent have done with these marks? Should it act only upon the marks of the third External Expert? Or should it take the average of the marks given by the two External Experts and then combine with the marks of the third External Expert and thereafter take the average of these two marks as the final mark? Or should the 1st Respondent have taken the aggregate of the marks of all three External Experts and then taken an average, in order to decide the final mark? Or should the 1st Respondent disregard the lowest of the three

marks and take the average of the two highest marks? While no explanation has been offered by the 1st Respondent, as would be seen later, the procedure that was eventually adopted by the 1st Respondent was completely unknown to Circular No. 723, and even to Circular No. 869.

As the 1st Respondent has partially adopted the procedure laid down in Circular No. 869 by appointing a third External Expert, this Court will now examine the procedure laid down in Circular No. 869 with regard to the manner in which the marks allocated by the said third External Expert should be dealt with, even though a reference to a third External expert has not been provided for in Circular No. 723..

The relevant section of Circular No. 869 is re-produced below:

> "Whether a candidate is above or below the threshold shall be decided by whether the third subject expert gave marks above or below the threshold .....
>
> The final marks of a candidate shall be the averages of the total and component marks given by the two subject experts (and panel)[12] or, where a third subject expert had to be appointed, of the third subject expert and, that subject expert of the first two subject experts who assigned the highest total marks to the candidate, and the panel.[13]

This Court would like to consider what the position would have been, had the 1st Respondent, having appointed the third External Expert, had followed the

[12] The reference to a 'panel' is the panel of examiners that allocate marks for Sections 1 and 3.2.
[13] Ibid.

rest of the procedure in Circular No. 869, by examining a table prepared by the Petitioner which is annexed to the Counter Affidavit marked as '**CA11**', showing the marks given by the three External Experts and the average obtained. An extract thereof is re-produced below:

	Section 2	Section 3.1	Are the marks sufficient for Professor
First Expert	71.5	20	Yes
Second Expert	37.6	13.9	No
Average of First and Second expert	**54.55**	**16.95**	**Yes**
Third Expert	67.75	11	Only for Section 2
Average of all three	58.95	14.97	Yes (by adding 0.5 given for Section 3.2)
Average of the two highest	**69.62**	**15.5**	**Yes**
Marks of Third Expert combined with the average of First and second experts	61.15	13.975	Only for Section 2

If the Respondents had followed the provisions of Circular No. 869 and adopted the average of the two highest marks, the Petitioner would have been entitled to be appointed as a Professor, provided he had obtained sufficient marks for Section 1.

Taking into consideration the totality of the above circumstances, this Court is in agreement with the learned President's Counsel for the Petitioner that the 1st Respondent has acted completely outside the procedure laid down in Circular No. 723 when considering the marks given by the two External Experts for Sections 2 and 3.1. The procedure adopted by the 1st Respondent does not

comply in full with Circular No. 869 either, thereby demonstrating that the 1st Respondent has adopted a procedure of its own. Such arbitrary action is not only illegal but is procedurally improper, and cannot be condoned by this Court.

Once again, this Court observes that the USAB has not gone into the above complaints of the Petitioner at all, except to state that the appointment of a third External Expert accrued to the benefit of the Petitioner.

The final complaint of the Petitioner relates to the procedure followed by the Selection Committee, which has been tasked with the responsibility of the final selection.

The Petitioner has produced with his Counter Affidavit marked '**CA8**', the mark sheet of the Selection Committee and the summary of the marks given by the Selection Committee marked '**CA8(A)**'. This Court has examined **'CA8'** and observes that the Selection Committee had carried out its own marking of Sections 2 and 3.1 and allocated its own marks to the Petitioner.

According to '**CA8(A)**', the summary of the marks allotted by the Selection Committee is as follows:

	Minimum marks	Expert 1	Expert 2	Expert 3	Evaluation Panel	Selection Committee
Section 1	20/20				20.5	20.5
Section 2	45/25	71.5	37.5	67.75		52.8

Section 3.1 Section 3.2	15/10	20	13.9	11	 0.5	11.5 0.5
	90/65					85.3

The Selection Committee has thus given the Petitioner 52.8 marks for Section 2 and a further 11.5 marks for Section 3.1. When one considers this mark with the earlier table, it is clear that this mark does not tally with any of the four scenarios given therein and that the Selection Committee has reduced the marks given by at least two of the External Experts. The Petitioner has submitted to this Court a table marked '**CA12**' which sets out the manner in which the Selection Committee has reduced the marks given by the External Experts. The 1st Respondent has however not explained the basis on which the Selection Committee arrived at the above mark for Sections 2 and 3.1.

The Petitioner's complaint is that the Selection Committee does not have the power to adjust or alter the marks given by the External Experts or the Panel. What then is the role of the Selection Committee? Circular No. 723 sets out that the 'final selection shall be made by the Selection Committee based on the evaluation reports and in conformity with the procedure of appointment'. This Court is of the view that the Selection Committee cannot merely rubber stamp the marks given by the External Experts and the Panel and that the Selection Committee must have the power to examine the marks given by each of the experts and the panel, and where necessary make adjustments. However, this Court is mindful that granting the Selection Committee the power to make any adjustment it wishes would render nugatory the object that is sought to be achieved by having experts to review an application for

Professor. Either way, this Court is of the view that Circular No. 723 does not contemplate a complete re-assessment of Sections 2 and 3.1, as in the instant case.

Therefore, it is imperative that the right balance is struck between the two. This Court is of the view that where there are any inconsistencies which are of a non-academic nature, or any glaring errors in the marks given by the experts or the panel, the Selection Committee has the power to rectify such errors or inconsistencies. However, where any adjustments are carried out, this Court is of the view that the Selection Committee must set out the reasons for such adjustment and if required, provide to Court the basis on which the marks given by the experts was adjusted. Furthermore, where the Selection Committee is of the view that adjustments need to be made in respect of marks given on academic issues, it is prudent that the Selection Committee consults the External Experts and arrive at a consensus which addresses the concerns of the Selection Committee. In this instance, the 1st Respondent has neither given any reasons nor justified the downward adjustment of the marks allocated to the Petitioner.

It also appears from '**R4-1**'[14] that the adjustment of marks by the Selection Committee is contrary to the procedure that the 1st Respondent claims the Selection Committee would normally follow. What is even more disturbing is the fact that the mark sheet '**CA8**' and the summary '**CA8(A)**' has alterations on it, with the Petitioner alleging that the Selection Committee had entered the final mark after erasing an earlier mark.

[14] 'R4-1' is a letter dated 21st March 2007, sent to the Chairman of the UGC, produced by the 1st Respondent before the USAB.

In the above circumstances it is clear to this Court that the Selection Committee has deviated from the procedure contained in Circular 723. As pointed out at the commencement of this judgment, the USAB did not have the benefit of the mark sheet '**CA8**' or the summary '**CA8A**' as they were not produced before it by the 1st Respondent, and presumably for that reason, the Order of the USAB does not deal with this argument of the Petitioner.

This Court would like to refer to at this stage the abovementioned judgment of the Supreme Court in **Dr. Karunananda vs The Open University of Sri Lanka and others**[15], the facts of which very briefly are as follows. The petitioner complained against the decision of the Selection Committee to refuse his application for the post of Assistant Professor/ Professor. The petitioner did not challenge the correctness of the assessment by the External Experts and the panel, but rather the procedure followed in the evaluation process of his application. On the basis of the criteria in Circular 723, the Senate had appointed a panel and two External Experts to evaluate the application. The Selection Committee had not recommended the petitioner for either of the said posts on the basis that the panel had not given him adequate marks for 'Research and Creative work'. Pursuant to an appeal by the petitioner, a second panel and third External expert had been appointed[16] but owing to a high degree of variance in the marks even after the appointment of the third expert and a refusal by the third expert to review the marks given by him, the Selection Committee acting solely on the original marks awarded to the petitioner by the first panel and the first two External Experts, rejected the

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[15] Supra.

[16] The rationale for the appointment of a third expert is stated as follows: "One of the experts appointed for evaluation had given 34 points and the other had given 9.8 points. To qualify for promotion he should obtain 25 points under this category ..... Since there is a high variance..... recommended to obtain an evaluation report from a third expert."- at page 242.

application of the petitioner on the basis that he had not obtained the necessary marks as per Circular 723.

Commenting on the above procedure adopted by the Selection Committee, the Supreme Court observed as follows:

> "A series of questions arise at this juncture. Whether the procedure adopted by the 1st respondent University is fair, reasonable and justifiable? What was the purpose of appointing a third External Expert when there was a high degree of variance of assessment between the 1st and the 2nd External Experts, if the marks were to be ignored thereafter? Wasn't it fair and reasonable to have considered the average of the two positive marks, if the third External Expert had awarded more than the minimum marks? Couldn't the Selection Committee have considered the average of the three sets of marks available to them? In such circumstances, couldn't the Selection Committee have considered recommending the petitioner to be promoted to the Grade of Associate Professor of the 1st respondent University?"[17]

The Supreme Court, having held that the fundamental rights of the petitioner enshrined in Article 12(1) had been infringed as a result of the irregular procedure followed, directed the University to re-assess the application of the petitioner.

The concerns of this Court in this application are far greater, given the several complaints of the Petitioner with regard to the arbitrary manner in which the

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[17] Ibid. at page 242.

1st Respondent acted when evaluating the application of the Petitioner. The Petitioner has in fact submitted that he had a legitimate expectation that the Respondents would carry out the evaluation of his application according to the procedure laid down in Circular No. 723 and that the Petitioner's application would not be subject to any other procedure not stipulated in the said circular.

The importance of complying with due procedure has been succinctly stated in **Administrative Law** by Wade and Forsyth[18] in the following manner:

> "Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable. A judge of the United States Supreme Court has said: 'Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied'[19]. One of his colleagues said: 'The history of liberty has largely been the history of the observance of procedural safeguards."[20]

The following passage by Bhagwati J, in the case of **Ramana Dayaram Shetty v. The International Airport Authority of India and Others**[21] is relevant in this regard, although the facts of that case have no application to the present case:

> "It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions

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[18] Supra; page 373. This passage has been referred to by the Supreme Court in Dr Karunananda vs The Open University of Sri Lanka and others (supra, page 243).
[19] Shaughnessy v. United States, 345 US 206 (1953) Jackson, J.
[20] McNabb v. United States, 318 US 332 (1943) Frankfurter, J.
[21] AIR 1979, S.C. 1628.

to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton[22] where the learned Judge said..... "The defined procedure must be scrupulously observed....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."[23]

...this rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.[24]

...It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."[25]

In the above circumstances, this Court is of the view that the failure on the part of the USAB to consider the grounds urged by the Petitioner amounts to an error on the face of the record and that the said decision is liable to be quashed by a Writ of Certiorari.

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[22] (1959) 359 US 535: 3 L Ed 2d 1012.
[23] Ibid. at page 1635.
[24] Ibid. at page 1636.
[25] Ibid.

This Court would like to briefly consider the application of the Petitioner for a Writ of Mandamus to backdate his promotion to the post of Senior Lecturer Grade II from 1st December 1997 to 1st December 1995. The Petitioner, who had been appointed as an Assistant Lecturer (Probationary) on 1st January 1990, was required to obtain a post-graduate degree in order to become eligible for confirmation and the subsequent appointment to Senior Lecturer Grade II. The Petitioner however took up the position that he need not obtain a further post graduate degree as he already possessed a post graduate degree at the time he applied for the post of Assistant Lecturer in 1989. The 1st Respondent's position was that the said degree had been taken into consideration at the time he was appointed in 1990. During this time, the Petitioner had been placed under interdiction and had been reinstated only on 1st December 1997. The Petitioner was promoted as a Senior Lecturer Grade II with effect from the said date by virtue of the provisions of Circular No. 721. This Court observes that the Petitioner had accepted this appointment without any protest and had sought to ante date the appointment only in 2002. This Court is of the view that the Petitioner, having acquiesced with the date of appointment, is estopped from challenging it many years later. In any event, this Court does not see any legal basis to grant the aforementioned relief nor the backdating of the Petitioner's promotion to Senior Lecturer Grade I. The Writ of Mandamus is a discretionary remedy and this Court is of the view that its discretion ought not to be exercised with regard to the said relief, in view of the aforementioned acquiescence, inordinate delay on the part of the Petitioner in challenging the date of appointment and in view of the administrative inconvenience that can be caused.

Before concluding, this Court would like to advert to the several objections raised by the learned Additional Solicitor General appearing for the Respondents. The first objection raised is that the Petitioner is guilty of laches, as he is seeking to challenge the decision of the 1st Respondent made in 2010, only in 2013 and that the Petitioner has failed to explain the reasons for the delay in seeking relief from this Court. This Court observes that this application arises from the decision of the USAB which was delivered on 12th March 2013. This application has been filed on 1st June 2013, which is a period of less than three months from the date of the USAB order. This Court therefore holds that the application has been filed within a reasonable time. In any event, this Court has consistently held that where there is an illegality, the Court should exercise its discretion in favour of the Petitioner, even where there is a delay. This position is supported by the judgment of the Supreme Court in **Biso Menika v. Cyril de Alwis and others.**[26]

The second objection of the learned Additional Solicitor General is that the Petitioner has failed to disclose the breach of statutory duty necessary for granting of a Writ of Mandamus and that a Writ of Mandamus does not lie where the Respondents are meant to exercise discretion. Whilst agreeing with the authorities cited by the Respondents which support the contention that a Writ of Mandamus does not lie to compel the performance of a moral obligation, this Court is of the view that in the present application, there has in fact been a breach of statutory duty by the Respondents to carry out their functions within the boundaries of the law. There is no such thing as unfettered discretion in administrative law[27]. This Court is therefore of the

[26] 1982 (1) Sri LR 368 at 379-380.

[27] Administrative Law by Wade and Forsyth (supra); page 295: "Statutory power conferred for public purposes is conferred as is were upon trust, not absolutely – that is to say, it can validly be used only in the right and

view that the Respondents were under a statutory duty to exercise their discretion reasonably, in good faith and upon lawful and relevant grounds of public interest.

In this regard, this Court would like to cite the following passage from the judgment of the Supreme Court in **Heather Mundy vs Central Environmental Authority and Others**[28] where it was held as follows:

> "The jurisdiction conferred by Article 140, however is not confined to "prerogative" writs or "extraordinary remedies" but extends -"subject to the provisions of the Constitution"- to orders in the nature of writs of certiorari, etc. Taken in the context of our Constitutional principles and provisions, these "Orders" constitute one of the principal safeguards against excess and abuse of executive power; mandating the judiciary to defend the sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the crown and its agents. Further this court itself has long recognized and applied the "public trust" doctrine; that powers vested in public authority are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes."[29]

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proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act."

[28] SC 58/03; SC Minutes 20th January 2004.

[29] Referred to in Kunanantham v University of Jaffna (2005) 1 SLR 239.

An issue similar to this case arose in **W.K.C.Perera vs Professor Daya Edirisinghe and others**[30] where the Institute of Aesthetic Studies of the University of Kelaniya refused to award the degree to the appellant even though she had satisfied all requirements of the Examination Criteria for an ordinary pass and thereby had become entitled to the award of the Degree.

Although it was conceded by the University that the Court should grant a Writ of Certiorari to quash the decision not to award the Appellant the Degree, it was contended however, that Court should not grant a Writ of Mandamus to compel the award of the Degree, but only to require the relevant authorities to consider the question of awarding that Degree. It was also submitted, firstly, that there was no public duty to award a Degree, and that no one had a right to the award of a Degree and secondly, that any institution awarding Degrees had a residual discretion to withhold a Degree, even if the candidate had satisfied the relevant regulations.

The Supreme Court rejected the said argument and held as follows:

> "I hold that, having satisfied the Rules and Examination Criteria, the petitioner was entitled to the award of the Degree of Bachelor of Fine Arts on the results of the final examination held in 1990. The University of Kelaniya and the Institute are public bodies set up by statute and performing public functions, using public funds. I hold that under the Rules and Examination Criteria, read with Article 12, there was a public

[30] 1995 (1) Sri LR 148; judgment of Justice Mark Fernando.

duty, cast upon its officers, enforceable by Mandamus, to take the necessary steps to award the Appellant that Degree.

The Appellant is entitled to an order in the nature of a writ of Certiorari to quash the refusal by the University of Kelaniya and/or the Institute of Aesthetic Studies and/or its officers to award her the Degree of Bachelor of Fine Arts, and to an order in the nature of a writ of Mandamus directing the 1st, 2nd and 3rd Respondents to take all necessary steps, within the scope of their powers, duties and functions, to award her that Degree."

Thus, it is within the jurisdiction of this Court to grant a Writ of Mandamus where the Petitioner has satisfied the criteria set out in Circular No. 723.

The third and final objection of the learned Additional Solicitor General is that the Petitioner has acquiesced to the jurisdiction of the USAB when he participated in the proceedings before the USAB and is therefore stopped from challenging the findings of the USAB. This Court is of the view that the Petitioner is not challenging the jurisdiction of the USAB, but rather the fact that the USAB failed to consider the matters placed before it when arriving at its decision.

The final question that must be addressed by this Court is the relief that this Court can grant the Petitioner. When there is such a glaring violation of the procedure laid down, this Court would have preferred to have send this matter back to the 1st Respondent for a fresh appraisal and evaluation or to the USAB for a fresh consideration of the matters raised by the Petitioner. However,

such a course of action is not feasible in this instance and would be to the detriment of the Petitioner, for two reasons.

The first is the allegation of the Petitioner that there has been an undue delay on the part of the 1st Respondent in evaluating the Petitioner's application. This Court observes that the application submitted by the Petitioner on 29th November 2005 culminated in a decision by the Selection Committee only on 12th March 2010. This is indeed a long period of time to evaluate an application, when one considers the allegation levelled by the Petitioner that applications of other candidates were processed within 1 ½ to 2 years.

The second reason is that a period of 13 ½ years have lapsed since the Petitioner first applied for the post of Professor, inclusive of almost three years before the USAB and therefore, the ends of justice will not be met by referring this matter for a re-evaluation by the 1st Respondent or a re-consideration by the USAB.

This Court does not intend to venture into the arena of academic judgment by taking on the role of academic experts and awarding marks to the Petitioner. What this Court would endeavour to do instead is to determine the marks that the Petitioner was entitled to, if not for the procedural improprieties committed by the 1st Respondent, by applying the provisions of Circular No. 723. The result, as demonstrated by the table below is that the Petitioner was eligible to be appointed as a Professor and not Associate Professor.

	Minimum marks	Expert 1	Expert 2	Average of Expert 1 and Expert 2	Evaluation Panel	Final Mark
Section 1	20/20				20.5	20.5
Section 2	45/25	71.5	37.6	54.55		54.55
Section 3.1 Section 3.2	15/10	20	13.9	16.95	0.5	17.45
	90/65					92.5

The result would be no different if the provisions of Circular No. 869, although not applicable to the Petitioner, are applied, as borne out by the following table:

	Minimum marks	Expert 1	Expert 3	Average of Expert 1 and Expert 3	Evaluation Panel	Final Mark
Section 1	20/20				20.5	20.5
Section 2	45/25	71.5	67.75	69.625		69.625
Section 3.1 Section 3.2	15/10	20	11	15.75	0.5	16.25
	90/65					106.375

The Petitioner, having submitted an application, was entitled to be appointed as a Professor provided he received the minimum marks for each section and the minimum overall marks. Granting the appointment was not at the discretion of the 1st Respondent. Having received the required marks, it is the view of this Court that the Petitioner had a legal right to be appointed as Professor and the Respondents were under a legal duty to grant the said appointment. It is therefore reiterated that it is within the jurisdiction of this Court to grant a Writ of Mandamus where the Petitioner has satisfied the criteria set out in Circular No. 723.

In the above circumstances, this Court issues a Writ of Certiorari quashing the order of the USAB not to promote the Petitioner to the post of Professor, and a Writ of Mandamus on the Respondents to promote the Petitioner to the post of Professor with effect from 29th November 2005.

This Court makes no order with regard to costs.

Judge of the Court of Appeal