

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

**S.C. Application (FR)
No.578/2009**

In the matter of an application under
and in terms of Article 126 of the
Constitution.

Warahenage Pavithra Dananjanie De Alwis,
No.176/4, 10th Lane,
Philominawatta,
Dodangoda, Kalutara South.

Petitioner

Vs.

1. Mr. Anura Edirisinghe,
Commissioner General of Examinations,
Department of Examinations,
P.O. Box: 1503,
Colombo.

2. The University Grants Commission,
No.20, Ward Place,
Colombo 7.

3. Mr. Gamini Samaranayake,
Chairman,
University Grants Commission,
No.20, Ward Place,
Colombo – 07
4. Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.
5. Secretary,
Ministry of Higher Education,
Ward Place,
Colombo 7.
6. The Principal,
Kalutara Balika National School,
Kalutara.
7. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
S.I. Imam, J. &
R.K.S. Suresh Chandra, J.

COUNSEL : Saliya Pieris with Thanuka Nandasiri
for Petitioner.

M. Gopallawa, SSC., for the Respondents.

ARGUED ON : 23.02.2011.

WRITTEN SUBMISSIONS

TENDERED ON : for the petitioner - 28.03.2011 and
16.05.2011.

for the respondents - 28.04.2011.

DECIDED ON : 01.11.2011.

Dr. Shirani A. Bandaranayake, CJ

The petitioner was a student of Kalutara Balika National School, who sat for her General Certificate of Examination (Advanced Level), (hereinafter referred to as

the Advanced Level Examination) for the second time in August 2008. She complained that, on the basis of her results at the said examination, she verily believed that she had attained a satisfactory Z score to follow the course of studies in Medicine. However, she had applied for her third attempt for the said Examination in 2009 prior to the release of the cut-off marks. The petitioner alleged that the respondents had arbitrarily reduced and /or had amended her Z score without any basis for such reduction and without giving any explanation for such reduction and thereafter had released a revised schedule of the Advanced Level results and thereby had decided that the petitioner has not been selected to a Faculty of Medicine.

The petitioner accordingly complained that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the respondents for which this Court had granted leave to proceed.

The facts of this application, as submitted by the petitioner, *albeit* brief are as follows.

The petitioner had sat for the Advanced Level Examination for the first time in August 2007 and had obtained two very good passes (B) for Biology and Physics and a Credit Pass (C) for Chemistry. Having received a Z score of 1.5567, on the basis of the said results, she had applied for University admission and had been selected to follow a course in Bio Science in the University of Sri Jayawardeanapura. Since the petitioner's ambition was to follow a course in Medicine and as the Z score she had obtained was insufficient for the said purpose, she had not taken steps to register at the said University, but decided to sit for the Advanced Level Examination for the second time.

The results of the Advanced Level Examination of August 2008 were released on 03.01.2009 and the said results were put on the school's Notice Board.

Accordingly she had obtained a Distinction (A) for Biology and two very good passes (B) for Chemistry and Physics. She had also obtained a Distinction for General English and 072 marks for the Common General Test.

According to the said results, the petitioner had obtained a Z score of 1.8887 with a District Rank of 49 from the Kalutara District.

The petitioner stated that applications were called for admission to the Universities and accordingly she had sent her application for which she had received an acknowledgement.

The petitioner submitted that although the results were released on 03.01.2009, the 2nd respondent had failed to release the cut off marks for University admissions until 03.07.2009. She further submitted that during previous years, the said marks were released within two to three months from the date of the release of the results, which had helped the students to decide whether they should re-sit the said Examination.

However, the petitioner did not pay much heed to the said delay as she had, in her view, obtained a Z score which was over and above the general requirement to enter a Faculty of Medicine, when compared with the Z scores of previous years.

The petitioner had received a fresh sheet of results on 07.07.2009, which was backdated to 03.01.2009. According to the said document her Z score had been reduced to 1.8860 from the earlier Z score of 1.8887. On a comparison of the two sets of Z scores, the petitioner had realised that the Z score given in July 2009 was not sufficient for her to enter into a Faculty of Medicine.

Later on 10.07.2009, the petitioner had received a letter from the University Grants Commission that she has been selected to follow the course of study in Dental Surgery in the University of Peradeniya and had informed her to meet the Registrar of the University of Colombo for the purpose of registration. The petitioner stated that she had registered with the Faculty of Dental Surgery at the said University although she verily believed that the reduction of her Z score was incorrect, arbitrary and discriminatory and had no legal basis.

The petitioner had appealed to the Commissioner General of Examinations to rectify the error with regard to her Z score and to allow her to follow a course of study in a Faculty of Medicine. She submitted that she had decided to register with the Faculty of Dental Surgery as she would be deprived of her chances to undergo higher studies.

The petitioner accordingly has complained that her fundamental right to equal protection had been violated by the respondents and this allegation is based on the grounds that,

1. the respondents had arbitrarily reduced or amended the petitioner's Z score without any basis and without giving any reasons for such reduction;
2. the release of a revised schedule of the results of the Advanced Level Examination after the cut off mark for the University admissions were released; and
3. by causing a delay in the release of the results of the Advanced Level Examination and the cut off mark for the University Admissions.

The 1st respondent, being the Commissioner of Examinations, had averred that although the results of the Advanced Level Examination held in August 2008, were initially released on 03.01.2009 by the Department of Examinations, that they were subject to change and were considered as provisional until confirmed by the official results issued by the Department of Examinations. The 1st respondent had further averred that all the Principals of schools were informed of this situation by his letter dated 01.01.2009 (1R1). The reason for such change was based on the fact that time had to be granted for candidates who sat for the Advanced Level Examination to apply for re-scrutiny and the notice for such re-scrutiny was published on 09.01.2009.

The process of re-scrutiny had taken over 5 months and the final results including the revised Z scores had been issued to the University Grants Commission on 24.06.2009 and to the candidates on 29.06.2009. Accordingly, the petitioner had received a Z score of 1.8860, which was below the cut off point of 1.8864 that was necessary to be admitted to follow a course of study in Medicine.

The petitioner's grievance is based on the revision of her Z score. Admittedly along with her results released on 03.01.2009 it was stated that her Z score was 1.8887, which was over and above the cut-off point of 1.8864 from the Kalutara District to enter a Faculty of Medicine. This position clearly indicates that two sets of Z scores were issued to the petitioner on which the petitioner had stated that she had a legitimate expectation that she could enter a Faculty of Medicine without sitting for the Advanced Level Examination for a further time. The respondents had taken the position that the first sets of results were only provisional and not final and therefore there cannot be any legitimate expectation based on the original sets of results. A question therefore arises as to at which point the Z score could be finalized.

It is not disputed that since 2001 in Sri Lanka, the University admissions were based on the Z scores obtained by the individual candidates at the Advanced Level Examination. This method was introduced by the University Grants Commission in order to avoid any unfairness in the process of selection. The said method, which was commonly known as the Z score, was a process of standardization, which was carried out using the statistics that were based on the marks obtained by the students. The Z score was calculated using the following formula.

The said formula of the Z score could be described as follows:

$$Z - score = \frac{\text{Raw marks obtained by a student} - \text{Mean mark for the subject}}{\text{Standard deviation of marks for the subject}}$$

This clearly indicates that the mean mark for the relevant subject is necessary to arrive at the Z score. Such mean marks would have to be obtained, not at the time the original results are released, but only after the re-scrutiny results are finalized. Therefore although the provisional results may be released on an earlier date, such a release would not assist the students to decide as to which course of study that they would be able to follow. The reason for this process is that by its nature, the Z score would depend not only of the marks a particular student had obtained, but of the marks the others students had scored at that examination in a given subject.

Accordingly it is not correct for the petitioner to state that although the results were released on 03.01.2009, the cut-off marks were not released until 03.07.2009. Due to the very nature of the calculation of the Z score, it would not have been possible to release the cut-off marks until the re-scrutiny results were finalized by the Department of Examination.

The petitioner's complaint as clearly stated earlier was that in terms of the results issued prior to the re-scrutiny results were released, she had a Z score which was over and above the cut-off point that was necessary to enter a Faculty of Medicine. Due to the said position, the petitioner had stated that she had a legitimate expectation that she could enter the Medical stream.

As stated earlier the introduction of the method of selecting students to Universities and their different Faculties on the basis of the Z score was to eliminate difficulties and distortions caused to candidates by varying standards of marking adopted in different subjects. However, since its inception in 2001, it was known that the Z score of a subject could always vary due to the re-scrutiny marks. This would occur even in situations where the candidate in question had not applied for re-scrutiny. The formula for the Z score, as shown earlier, is based on the Mean and the Standard Deviation in respect of subjects and whenever there is any change in the marks occur that would affect the Z score.

Referring to the said changes, the 1st respondent had averred that due to the changes in marks of the other candidates who had applied for re-scrutiny and due to the changes in their marks, there had been a downward revision of the petitioner's Z score from the original Z score of 1.8887 to 1.8860. Consequently, the petitioner's district ranking also got revised from 49 to 52. In support of his averment, the 1st respondent had tendered a document which contains the details of the manner in which the changes during re-scrutiny had affected the Z score of the petitioner (1R7).

On an examination of the documents which were placed by the petitioner as well as the respondents, it is quite clear that the applicable final Z score and the District Ranking of a candidate would be available only after the re-scrutiny marks are finalized.

It is not disputed that the final results of the re-scrutiny were released on 29.06.2009 and the cut-off points for the admission to universities and to their different Faculties were issued only on 02.07.2009 by the University Grants Commission. The petitioner had stated that she had received the final results on 07.07.2009. By 07.07.2009, the petitioner was well aware that the Z score she had obtained was not sufficient to enter into a Faculty of Medicine.

In such circumstances, could the petitioner rely on the concept of legitimate expectation?

Legitimate expectation is a concept which has been developed through the years since its introduction by Lord Denning in **Schmidt v Secretary of State for Home Affairs** ([1969] 1 All E.R. 904) mostly on the basis of procedural fairness and the removal of arbitrary decisions. In **Schmidt** (supra), the Court, referring to a decision of the Government to reduce the period already allowed to an alien to enter and stay in England, had held that the said person had a legitimate expectation to stay in that country, which cannot be violated without following a reasonable procedure. The decision in **Schmidt** (supra) was followed soon after in **Breen v Amalgamated Engineering Union** ([1971] 1 All E.R. 1148).

Legitimate expectation has been described as a concept which derives from an undertaking given by someone in authority. There is no compulsion for such an undertaking to be in written formula, but would be sufficient if that could be

known through the surrounding circumstances. Discussing this concept, David Foulkes (Administrative Law, 7th Edition, Butterworths,1990, pg.272) had expressed the view that a promise or an undertaking could give rise to a legitimate expectation. Discussing his position with regard to the concept, Foulkes had stated that,

“The right to a hearing, or to be consulted, or generally to put one’s case, may also arise out of the action of the authority itself. This action may take one of two, or both forms; a *promise* (or a statement or undertaking) or a regular *procedure*. **Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the Courts will enforce**” (emphasis added).

Prof. Galligan (Due Process and Fair Procedures, A Study of Administrative Procedures, Clarendon Press, Oxford, 1996, pg.320) had described the concept of legitimate expectation to something equal to the idea of an interest raised due to an undertaking that had been given. Explaining his theory, Prof. Galligan had stated thus:

“In one sense legitimate expectation is an extension of the idea of an interest. The duty of procedural fairness is owed, it has been said, when a person’s rights, interests or legitimate expectations are in issue. **One might have no right or interest at stake, but because of something said or done by the authority, an expectation may be raised, which should not be disappointed without**

following certain procedures. An example is an alien seeking an extension of a visa to stay in the United Kingdom. Under English Law he has no right or legitimate interest in being allowed to stay; but he might acquire a legitimate expectation from an undertaking or holding out that he will be allowed to stay” (emphasis added).

The concept of legitimate expectation was examined in **Re Westminster City Council** ([1986] A.C. 668), where Lord Bridge had stated that,

“The Courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

The observations of David Foulkes (supra) in the applicability of the concept of legitimate expectation was clearly illustrated by the decisions in **Attorney General of Hong Kong v Ng Tuen Shiu** ([1983] 2 All E.R. 346) and **Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case)** ([1984] 3 All E.R. 935).

In **Ng Tuen Shiu** (supra), the decision of the Court that the aggrieved party had a legitimate expectation was based on a promise given by the Government, whereas in **Council of Civil Service Unions** (supra), the decision was based on the legitimate expectation that arose out of a regular practice. In the circumstances, it is evident that a mere hope or an expectation cannot be treated as having a legitimate expectation.

It is therefore quite clear that it would be necessary for the party which claims the benefit of legitimate or reasonable expectation to show that such expectation arises from a promise or hope given by the authority in question. As stated earlier, it is not disputed that the results of the Advanced Level Examination were released on 03.01.2009 by the Department of Examinations and it is not an unknown fact that after every such release of results there would be a time period allocated to apply for re-scrutiny by candidates who are so inclined. In fact the 1st respondent had annexed to his affidavit a document (1R1), dated 01.01.2009, which had referred to the likelihood of changes to the Z score at the re-scrutiny stage. Further it had been stated that the results that were released in January 2009 were only provisional and subject to change after re-scrutiny, giving a clear indication that the results that were released in January 2009 were provisional, and the Z scores that were released would change after re-scrutiny results are released.

The petitioner's main grievance is based on the fact that her Z score was varied due to the changes that were made after the re-scrutiny and based on her original results she had a legitimate expectation in entering into a Medical Faculty of a local University. In the **Council of Civil Service Unions** (Supra), Lord Diplock had clearly referred to the applicability of legitimate expectation in such a situation. Considering the doctrine in terms of expectation to be consulted or heard, Lord Diplock had stated that, if a person relies on legitimate expectation, such a person would have to satisfy that he had been deprived of a past practice that had been withdrawn or changed suddenly without any notice or reason for such withdrawal or change.

In the present application, as has been shown clearly, there is no material to indicate that the past practice has been changed or withdrawn at the time the petitioner had sat for the Advanced Level Examination or at the time the results were released. On the contrary the same system which was used on the

previous year had been followed and the candidates were told that depending on the results of the re-scrutiny of papers, the Z scores could change. In fact by the year 2008 the students who sat for the Advanced Level Examination knew that the selection to Universities and to their different Faculties were based on their individual Z scores and those students who sat for the Advanced Level Examination were quite aware as to how it worked, as there was general awareness of the said system. In these circumstances it would not be correct for the petitioner to state that the previous scheme had been changed without giving her an opportunity to express her views on the selection of candidates to universities.

The petitioner's complaint that her fundamental rights guaranteed in terms of Article 12(1) had been violated is based on the concept of legitimate expectation as she had such an expectation that she would be selected to follow a course in Medicine.

Article 12(1) of the Constitution, which refers to the right to equality reads as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

The concept of equality means that equals should be treated alike. As has been clearly stated in **Gauri Shankar v Union of India (AIR (1995) SC 55)**,

". . . that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike."

Article 14 of the Indian Constitution, which deals with the equality provision and is similar to Article 12(1) of our Constitution has been examined and considered by several Indian decisions. In **Ashutosh Gupta v State of Rajasthan** ((2002) 4 SCC 34) it was pointed out that to apply the principle of equality in a practical manner, the Courts have evolved the principle that if the law in question is based on rational classification it is not regarded as discriminatory. The Indian Supreme Court has accordingly underlined the said principle in several decisions (**Western Uttar Pradesh Electric Power and Supply Co. Ltd. v State of Uttar Pradesh** (AIR (1970) SC 21, **R.K. Garg v Union of India** (AIR (1981) SC 2138) **Re: Special Courts Bill** (AIR (1979) SC 478) **State of Uttar Pradesh v Kamla Palace** (AIR (2000) SC 633) and enumerated the principle that reasonable classification in order to treat all in one class on an equal footing is allowed. It was stated in **Western Uttar Pradesh Electric Power and Supply Co. Ltd.** (Supra) that,

“Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law.”

Considering the basis on which the Constitutional provision in Article 12(1) deals with the right to equality and the applicability of legitimate expectation on that basis, it is apparent that the expectation in question should have been founded upon a statement or an undertaking given by the authority in question,

which would make it inconsistent or irrational with the general administration to deny such an opportunity a petitioner has been claiming of through his petition. Otherwise the petitioner must show that, as has been stated in **Council of Civil Service Unions v Minister for the Civil Service** (Supra) that there is the existence of a regular practice, on which the petitioner can reasonably rely upon to continue in his favour.

Considering all the aforementioned, it is clear that the 1st or the 2nd respondents had not given any promise or an undertaking that the Z score would be decided on the basis of the provisional results released on 03.01.2009. In fact the 1st respondent had informed the school authorities that the results released in January 2009 were only provisional. The indication that was given was that there would be two classes of students as there would be one group who would be applying for re-scrutiny. It is also to be born in mind that the Z scores would be finally determined and announced only after the re-scrutiny of the results are finalized and this had been the practice for several years.

Considering all the aforementioned facts and circumstances, it is evident that the steps that were taken by the respondents cannot be categorized as arbitrary and unlawful, which had violated the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons aforesaid, I hold that the petitioner has not been successful in establishing that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been infringed by the respondents. This application is accordingly dismissed. I make no order as to costs.

Chief Justice

S.I. Imam, J.

I agree.

Judge of the Supreme Court

R.K.S. Suresh Chandra, J.

I agree.

Judge of the Supreme Court