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

S.C . (FR) Application
No.29/2012

1. Visal Bhashitha Kavirathne,
   108/1, Sri Sunanda Mawatha,
   Walgama,
   Matara.

2. P.D. Chandana,
   Thimbala,
   Panaliya,
   Polgahawela.

3. Hamdulillan Mohomed Ramzan,
   185/22A, Stace Road,
   Colombo 14.

4. Dimuthu Kanchana Amerasinghe,
   Kanduwata Road,
   Katukaliyawa,
   Mihintale.

5. B.K.D.K. Rodrigo,
   No.32/2, Seva Mawatha,
   Puttalam.

6. L.P. Saumya Madhubhashini Premadasa,
   Mabopitiya,
   Alawwa.

7. P.N. Sarada Wickramatunga,
   No.16/H, Elawela Road,
   Dharmapala Mawatha,
   Matara.

8. H.R. Savindi Chanika Peiris,
   No.16/A, Sri Dharmarama Mawatha,
   Walpala,
   Matara.

9. Nisansa Chathumali Senaratne,
   'Senarath', Udupila,
   Mirissa.

10. H.G. Samindi Sathsarani,
    No.53, Somarama Mawatha,
    Navimana,
    Matara.

11. J.A. Koshila Gihani,
    75/12K, Abeygunarathne Mawatha,
    Pamburana, Matara.

12. R.M. Imodi Chamalka,
    No.45B, Green Hill Crescent,
    Bowalawatte,
    Kandy.

13. A.M. Roshika Madushani Attanayake,
    No.177, Uduwewala,
    Katugastota.

14. V.W. Dhanushka Sachintha Vasanthathilaka,
    203/8, Rajapihilla Terrace,
    Kandy.

15. Ginige Dilshan Kevin De Silva,
    40/8, Hilpan Kandura Mawatha,
    Kandy.

16. Sajani Devindi Lenadora,
    Aniwatte,
    Kandy.

17. Ceylon Teachers' Union,
    No.65/3,
    Chittampalam A. Gardiner Mawatha,
    Colombo 02.

Petitioners

Vs.

1. W.M.N.J. Pushpakumara,
   Commissioner General of Examinations,
   Department of Examinations,
   P.O. Box 1503,
   Colombo.

2. University Grants Commission,
   No.20, Ward Place,
   Colombo 07.

3. Bandula Gunawardene,
   Minister of Education,
   Ministry of Education,
   'Isurupaya',
   Battaramulla.

4. Professor R.O. Thattil,
   University of Peradeniya,
   Peradeniya.

5. Hon. The Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

1. D.S. Atapattu,
   19/100, Ramanadan Road,
   Colombo 13.

2. S.A.M.J.S. Seneviratna,
   09/111, Soratha Mawatha,
   Gangodawila, Nugegoda.

Intervenient-Respondents

BEFORE	:	Dr. Shirani A. Bandaranayake, CJ. N.G. Amaratunga, J. & K. Sripavan J.
COUNSEL	:	J.C. Weliamuna with Sanjeewa Ranaweera for Petitioners Faisz Mushapha, PC., with Kushan D' Alwis, Kaushalya Nawaratne, Faisza Markar and Ismeth Magdon-Ismail for 2nd Respondent Senany Dayaratne for Intervenient-Respondents Nerin Pulle,SSC., and Suren Gnanaraj, SC., for 1st , 3rd, and 5th Respondents 4th Respondent appeared in person
ARGUED ON	:	10.05.2012

WRITTNE SUBMISSIONS TENDERED ON :

Petitioners	:	21.05.2012
Intervenient-Respondents	:	25.05.2012
1st, 3rd & 5th Respondents	:	31.05.2012
2nd Respondent	:	28.05.2012
4th Respondent	:	25.05.2012

DECIDED ON : 25.06.2012

Dr. Shirani A. Bandaranayake, CJ

This is an application filed by 16 students, who sat for the General Certificate of Education (Advanced Level) Examination (hereinafter referred to as the Advanced Level Examination) held in August 2011 and a Trade Union registered under the provisions of the Trade Union Ordinance, No.14 of 1935, as amended. The petitioners complained that the application of an erroneous and unjustifiable common formula to calculate the Z-Scores of the candidates of both New and Old Syllabi of the Advanced Level Examination in 2011, which resulted in the failure to rank the most suitable candidates for admission to Universities is arbitrary, unreasonable, irrational, unjustifiable and is in violation of the petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

After hearing all learned Counsel this Court had granted leave to proceed for the said alleged infringement of Article 12 (1) of the Constitution.

When this matter was taken up for support on 13-02-2012, Mr. Senany Dayaratne, had informed Court that he had filed papers for intervention. Learned Counsel for the petitioners, learned President's Counsel for the 2nd respondent, and the learned Senior State Counsel for the 1st, 3rd and 5th respondents informed Court that they have no objection in allowing the said intervention. Accordingly the intervention was allowed to intervene as intervenient-respondents.

The facts of this application, as submitted by the learned Counsel for the petitioners, *albeit* brief, are as follows:

The 1st to 16th petitioners sat for the Advanced Level Examination held in August 2011. According to the petitioners the selection of students for admission to

Universities and other Higher Educational Institutions had been earlier based on the aggregate marks obtained by the candidates at the Advanced Level Examination. Prior to the recent reforms, during the preceding period, the subject streams such as Biological Science, Physical Science, Commerce and Arts contained four (4) subjects and therefore, a candidate had to sit for four (4) separate question papers. Along with the introduction of new educational reforms in the year 2000, the number of subjects relevant to a subject stream of the Advanced Level Examination was reduced to three (3). A candidate therefore had to sit for three (3) question papers in addition to a Common General Test that had to be successfully completed by all candidates. Accordingly in the year 2000, there were two groups of students who sat for the Advanced Level Examination. They were the students who sat for the first time for three (3) question papers apart from the Common General Test under the New Syllabus and the students who sat for four (4) subjects as repeat candidates.

Due to having two sets of syllabi and two sets of Advanced Level Examinations in the year 2000,the then Secretary to the Ministry of Education, Prof. R.P. Gunawardena, had appointed a Committee with a view to finding a suitable method to rank candidates for University admission. There had been several discussions on this and after much deliberation, the said Committee had decided to adopt a statistical method, which was widely accepted, known as the Z-Score method. This was decided on a comprehensive proposal submitted by the 4th respondent, who was serving as a Consultant to the Ministry of Education and the University Grants Commission, in order to implement the selection at that time.

Therefore since the year 2000, Z-Score had been used as the method by which the candidates of the Advanced Level Examination were selected for admission to Universities. It was also stated that since then there has been no alteration or

change in the method of calculating the Z-Score until the Advanced Level Examination held in 2011.

The petitioners stated that in 2009, further educational reforms were introduced and as a result there were two sets of Syllabi for the Advanced Level Examination for the year 2011 in respect of all subjects. According to the petitioners, approximately 250,000 students including the 1st to 16th petitioners had sat for the aforementioned Examination in 2011. Out of that, more than half had sat for the papers under the New Syllabus whereas the others had sat for the question papers prepared under the Old Syllabus.

The petitioners specifically stated that no prior announcement or intimation that the method of selection for admission to Universities and/or the method of calculating the Z-Score would be altered in any manner had been given to the students. The petitioners therefore had a legitimate expectation that the Z-Score would be calculated in the same manner as it had been carried out throughout the years since its introduction in the year 2000, without any alteration.

There had been a delay in releasing the results in 2011. However, when the provisional results were finally released on 25-12-2011, there had been a manifest disparity between the District Rank and the Island Rank of the candidates. Later the authorities concerned had admitted that there had been certain lapses on their part in preparing the District Ranks, and had taken steps to re-issue the results via internet together with the corrected District Ranks.

The Petitioners stated that in the year 2000, when the students sat separately under the New Syllabus and the Old Syllabus they were treated as two distinct populations for the purpose of calculating the Z-Scores of the respective candidates. Accordingly, the petitioners had a legitimate expectation that following the previous practice, even under the Advanced Level Examination held

in 2011, the Z-Score would be calculated on the same premise treating the New and Old Syllabi, as two distinct populations.

The petitioners submitted that to their surprise, the then Commissioner General of Examinations, had revealed that on the instructions of the 2nd respondent, a common formula had been used by the Department of Examinations to calculate the Z-Score of all the candidates. The petitioners stated that it was clear that the authorities including the 1st and 2nd respondents had erred in calculating the Z-Scores of the candidates, as they had treated the results under the New Syllabus and the Old Syllabus as belonging to a single population. The petitioners submitted that the application of the common formula to calculate the Z-Score of all the candidates is statistically, scientifically and mathematically erroneous, as the candidates who had sat for the New Syllabus and the candidates who had sat for the Old syllabus are entirely different populations. Furthermore, the petitioners submitted that the methodology known as the 'combined mean', which the respondents have used, is unknown to mathematics and/or to statistics and in any event such methodology is contrary to the basic concept of standard score/Z-Score. Accordingly, the petitioners stated that the Department of Examinations has committed a grave error as regards the calculation of the Z-Score, which in the final analysis has caused a gross distortion of the overall Examination results.

The petitioners therefore submitted that the said gross distortion that has taken place due to the said erroneous calculation of the Z-Score cannot be rectified without reviewing the overall results by re-calculating the Z-Score of the subjects on the premise that the New Syllabus and the Old Syllabus are two distinct populations. In view of the above, it was submitted that the usual method of re-correction is clearly not the appropriate means of addressing the issues complained in this application.

In the circumstances, the petitioners stated that the application of an erroneous and unjustifiable common formula to calculate the Z-Scores of the candidates of both New and Old Syllabi of the Advanced Level Examination of 2011, failed to suitably rank the candidates for University admission and is arbitrary, unreasonable, irrational, unjustifiable and is in violation and/or continuing violation of the petitioners' fundamental rights guaranteed in terms of Article 12 (1) of the Constitution for the following reasons:

1. the 1st and/or 2nd and/or 3rd respondents have failed to apply the statistical method known as the Z-Score logically, scientifically or in a mathematically acceptable manner, to select the most suitable students for admission to Universities;

2. the common formula applied to calculate the Z-Score is irrational, unjustifiable, arbitrary and discriminatory in as much as two entirely different classes of candidates have been treated equally;

3. the 1st and/or 2nd and/or 3rd respondents have failed to delegate and properly discharge their duties, which are entrusted to them by law and to ensure a smooth release of the results of the Advanced Level Examination in accordance with the internationally recognized norms and principles; and

4. the application of the aforesaid erroneous common formula is in frustration of the petitioners legitimate expectation as the past practice has been particularly in the Advanced Level Examination held in the year 2000 to consider the new and the old Syllabi as two distinct populations in calculating the Z-Score of the respective candidates.

The intervenient respondents are candidates who had sat for the Advanced Level Examination held in August 2011 under the Old Syllabus. Their main submission, as they had averred in their affidavit, was in line with the submission made on behalf of the petitioners. They too submitted that the 1st and/or 2nd and/or 3rd respondents had failed to delegate and properly discharge their duties as they had failed to apply the Z-Score logically, scientifically or in a mathematically acceptable manner to select the most suitable students for admission to Universities.

The intervenient respondents further submitted that the introduction of a 'Combined Mean Score' for a given subject in relation to students who sat for the Advanced Level Examination both under the Old and New Syllabi is erroneous. They urged that the intervenient respondents fully and completely associate themselves with the submissions made on behalf of the petitioners in their application before this Court.

Having stated the facts of this application as submitted by the learned Counsel for the petitioners and the learned Counsel for the intervenient respondents, let me now turn to consider the contention of the respondents and thereafter to examine the grievance of the petitioners for which leave to proceed was granted.

Learned Senior State Counsel for the 1st, 3rd and 5th respondents strenuously contended that there was no legal basis to treat the candidates who sat for the Old Syllabus and New Syllabus as forming two separate classes for the purpose of University admission and any such classification would be contrary to Article 12 (1) of the Constitution. Learned Senior State Counsel relied on the decision in **Rienzie Perera v University Grants Commission** ([1978-79-80] 1 Sri L.R. 128) and **Ramuppilai v Festus Perera** ([1991] 1 Sri L.R. 11) in support of his contention.

Learned Senior State Counsel contended that there was only one Advanced Level Examination held in 2011, which was the only qualifying examination for selection of students for admission to Universities for the academic year commencing in 2012. It was submitted that keeping in line with the said objective of the University Grants Commission to select the best students from among all students who sat for the Advanced Level Examination, the then Commissioner General of Examinations had made every endeavour to ensure that the standard and the levels of difficulty between examinations and their marking schemes under both Syllabi was the same and the weightage given to each subject component between the papers were similar. Therefore the contention was that all the candidates who sat for the Advanced Level Examination 2011 under both Syllabi were correctly treated as forming a single class or population. The 2nd respondent therefore after consulting a Committee of Experts had selected the 'pooled Z-Score method', which treated all the candidates who sat for the Advanced Level Examination 2011, under both New and Old Syllabi as forming a single class or population.

The contention of the learned Senior State Counsel for and on behalf of the 1st, 3rd and 5th respondents therefore was that there was no legal basis to treat the candidates who sat for the Advanced Level Examination under the New and Old Syllabi as forming two separate classes for the purpose of University admission.

Therefore it was strenuously contended that the 'pooled Z-Score method', which formed both the New and the Old Syllabus candidates as forming a single class was the most rational and appropriate formula that created no discrimination between the two groups.

Learned Senior State Counsel submitted that if the petitioners' are of the premise that the Old and the New Syllabi candidates who sat for the Advanced Level Examination belong to two different groups, the burden of establishing that the classification sought between the Old Syllabus and the New Syllabus being founded upon an intelligible differentia and that having a reasonable nexus with the object sought to be achieved is entirely with the petitioners. The contention of the learned Senior State Counsel was that the petitioners had failed to discharge the said burden of proof.

Learned Senior State Counsel relied on the decisions of **Rienzie Perera v University Grants Commission** (Supra), **Seneviratne v University Grants Commission** ([1978-79-80] 1 Sri L.R.182) and **Surendran v University Grants Commission** ([1993] 1 Sri L.R. 344) in support of his contention.

In addition to the aforementioned, learned Senior State Counsel took up the position that, the petitioners' contention that there were fundamental differences between the Old Syllabus and the New Syllabus of the Advanced Level Examination is entirely misconceived.

Learned President's Counsel for the 2nd respondent submitted that since there were two groups of students who had sat for the Advanced Level Examination under the New and Old Syllabi, the 2nd respondent had appointed a Panel of Experts to recommend the most suitable method of applying the Z-Score for the purpose of ranking students for University selection. As submitted by the learned President's Counsel for the 2nd respondent, the five (5) member

Committee had held four (4) meetings and several discussions among themselves and with the officials of the Department of Examinations. The Committee had also summoned representatives of the Department of Examinations in order to obtain information as the Advanced Level Examination was conducted under the Old and New Syllabi.

Learned President's Counsel for the 2nd respondent submitted that the said Committee had observed the following:

1. although the Advanced Level Examination was conducted under old and new syllabi in all the subjects, the setters were instructed to maintain the same level of difficulty in each paper of each subject. Also the same panel of setters had been involved in the setting process of the papers of old and new Syllabi in all subjects in the Advanced Level Examination held in 2011.

2. One member of the panel of experts who was also a member of the panel for setting of question papers for the Advanced Level Examination for 2011, for Combined Mathematics, Mathematics and Higher Mathematics had confirmed that the same level of difficulty was maintained in the question papers on the aforementioned three (3) subjects.

Learned President's Counsel for the 2nd respondent also contended that considering the decision in **Rienzie Perera v University Grants Commission** (Supra) that the adoption of a separate Z-Score method would be unconstitutional.

It is not disputed that as stated in **Dananjanie de Alwis v Anura Edirisinghe, Commissioner General of Examination** (S.C. Application (FR) 578/2009, S.C. Minutes of 01-11-2011), since 2001, the University admissions in Sri Lanka were based on the Z-Scores obtained by the individual candidates at the Advanced Level Examination.

The Advanced Level Examination had become highly competitive as the students for the State Universities were selected on the basis of the results obtained by the candidates at that Examination. Accordingly, the Z-Score method was introduced by the University Grants Commission in order to avoid any unfairness in the process of selection. This 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.

$$Z = \frac{X - \bar{X}}{S}$$

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

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

It is not disputed that the aforementioned formula had not been used for the calculation of the Z-Score for Advanced Level Examination held in 2011. In its objections filed on behalf of the 2nd respondent in March 2012 before this Court it is clearly stated that the following formula is used for the calculation of the Z-Score of the candidates who sat for the Advanced Level Examination held in 2011.

$$Mean_{Pooled} = \frac{N_{new} * \ Mean_{new} + N_{old} * Mean_{old}}{(N_{new} + N_{old})}$$

$$Stddev_{pooled} = \sqrt{\frac{N_{new} * Var_{new} + N_{old} * Var_{old}}{(N_{new} + N_{old})}}$$

Z-Score for a given subject is computed using the following formula.

$$Z_{pooled} = \frac{Raw\ mark - Mean_{pooled}}{Stddev_{pooled}}$$

The 2nd respondent also had categorically averred that the candidates who sat for the Advanced Level Examination under the New and Old Syllabi cannot be and should not be treated as two different categories.

The main thrust of the argument on behalf of the 1st to 3rd and 5th respondents therefore was that both the New and Old Syllabi candidates who sat for the Advanced Level Examination cannot and should not be treated as two different groups as both belong to the same category of students who sat for the Advanced Level Examination held in 2011.

According to the submissions made before this Court and as clearly stated earlier, the Advanced Level Examination held in 2011 consisted of two sets of students. One set of students sat for the question papers prepared under the Old Syllabus whereas the others sat for the question papers prepared under the New Syllabus. Learned Senior State Counsel contended that in 2011 there was only one Advanced Level Examination for selection of students for admission to Institutions of Higher Education for the academic year starting in 2012. It was also contended that in order to select the best students from and among all students who sat for the said Examination, the then Commissioner General of Examinations had made every endeavour to ensure that the standards and the levels of difficulty between Examinations and their marking schemes under both Syllabi was the same and the weightage given to each subject component between the papers were similar. Accordingly, it was submitted that the students who sat for the Advanced Level Examination in 2011 under New and Old Syllabi formed a single class or population.

The petitioners' complaint as stated in detail earlier, is that by the application of an unjustifiable common formula to calculate the Z-Score of the candidates of both New and Old Syllabi of the Advanced Level Examination 2011, the

petitioners' fundamental rights guaranteed in terms of Article 12 (1) of the Constitution had been violated.

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."

Article 12 (1) of our Constitution therefore had specifically referred to the right of a person to equal treatment as well as that person receiving equal protection of the law. With regard to the first aspect of the aforementioned provision, as stated by Sir Ivor Jennings (The Law of the Constitution, Pg.49), among equals the law should be equal and therefore should be equally administered. The claim on equal protection of the law has brought in a guarantee where persons who are similarly placed under similar circumstances would receive equal treatment and protection of the law.

The said guarantee on equal protection of the law clearly emphasises the fact that there should be no discrimination between one person and another. However, this does not mean that every differentiation could be interpreted as discrimination. The meaning of equal treatment therefore would be that within the ambit of the concept of equality, classification could be sustained, subject to the fulfilment of certain conditions.

The question of classification was discussed and considered in detail in **Charanjit Lal Chowdhury v The Union of India and Others** (1951 A.I.R. S.C. 41) where it was clearly held that,

> " A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it. Any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed."

The provision contained in Article 14 of the Indian Constitution, which refers to the concept of right to equality had been discussed before the Supreme Court of India since the decision in **Charanjit Lal Chowdhury** (Supra), in several cases. (**State of Bombay v F.N. Balsara** (A.I.R. 1951 S.C. 318), **State of West Bengal v Anwar Ali Sarkar** (A.I.R. 1952 S.C. 75), **Kathi Raning Rawat v State of Saurashtra** (A.I.R. 1952 S.C. 123), **Lachmandas Kewalram v State of Bombay** (A.I.R. 1952 S.C. 235), **Qasim Razvi v State of Hyderabad** (A.I.R. 1953 S.C. 156) and **Habeeb Mohamed v State of Hyderabad** (A.I.R. 1953 S.C. 287)).

Considering the meaning, scope and effect of the right to equality stipulated in Article 14 of the Indian Constitution, based on the dicta of the aforementioned decisions, it was clearly held in **Budhan Chaudhry v State of Bihar** (1955 A.I.R. S.C.191) that,

> " It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely,

i) that the classification must be founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group; and

ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different basis; namely, geographical; or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law, but also by a law of procedure."

This concept was again referred to and had been accepted in the well known decision in **Ram Krishna Dalmia v Justice Tendolkar** (1958 A.I.R. S.C. 538).

It is therefore quite clear that the concept of the right to equality does not forbid reasonable classification for the purpose of legislation. However, in order to overcome the test of permissible classification, it is necessary to fulfil two conditions which are as follows:

1. The classification must be founded on an intelligible differentia which distinguishes

persons or things that are grouped together from others left out of the group; and

2. That differentia must have a rational relation to the object sought to be achieved by the statute in question.

Learned Senior State Counsel for the 1st, 3rd and 5th respondents referred to the said conditions stated by Sharvananda, J. (as he then was) in **Rienzie Perera v University Grants Commission** (Supra). On the basis of the rationale of that judgment and of **Ramuppillai v Festus Perera** (Supra), the learned Senior State Counsel had stated that there was only one Advanced Level Examination held in 2011 and that was the only qualifying Examination for selection of students for admission to Institutions of Higher Education in Sri Lanka for the Academic Year Commencing in 2012.

Learned President's Counsel for the 2nd respondent and the learned Senior State Counsel for the 1st, 3rd and 5th respondents submitted, as stated earlier that, they are strongly relying on the decision in **Rienzie Perera v University Grants Commission** (Supra). Since submissions were made quite strenuously on the similarity of the facts in **Rienzie Perera** (Supra) and the present application, it would be necessary to examine the said decision in detail.

The 2nd petitioner in **Rienzie Perera** (Supra) (hereinafter referred to as the petitioner) was a candidate who was not selected by the University Grants Commission for admission to a Course of Studies in Medicine in a University. She challenged the validity of the selection process adopted by the University Grants Commission for admission to the Universities as infringing her fundamental right guaranteed in terms of Article 12 (1) of the Constitution.

In 1979, two Advanced Level Examinations were held. One examination was held in April and the new Advanced Level Examination was held in August.

The petitioner sat for the new Advanced Level Examination held in August 1979, in four subjects in the Bio-Science group. She had obtained two (2) A Grade Passes, One (1) B Grade and one (1) C Grade. A total of 12,857 students had sat for the Advanced Level Examination under the New Syllabus and out of them 1887 students, which was approximately 15% had obtained the minimum requirement for University admission. At the same time a total of 18,743 students had sat for the Advanced Level Examination under the Old Syllabus in the Bio-Science group. Out of them 4,863, which was approximately 26%, had obtained the minimum requirement for University admission.

The total number that obtained the minimum requirement for admission to the Bio-Science group at both April and August 1979 Advanced Level Examinations was 6,750. The Universities however had only 995 places for new entrants in Bio-Science out of which 400 were kept for Medicine.

Considering the restricted number of places available for new entrants and that there were two examinations held in 1979, the University Grants Commission had decided that it will first distribute the places available in each course of study between the successful candidates at the two Examinations in the ratio of the number of students who obtained the minimum requirement for admission at each Examination to the total number who sat for the Examination. On this basis, of the 400 places available for Medicine, 288 were set-apart from candidates who were successful at the April Examination, whilst 112 were allocated to candidates who were successful in the Advanced Level Examination held in August. From amongst those that were selected, there was a further decision made on the basis of 30% of the available places being distributed in

order of merit, 55% on district basis and 15% to students from educationally under privileged areas.

The petitioner while complaining that her fundamental right guaranteed in terms of Article 12 (1) of the Constitution, had been infringed by the decision of the University Grants Commission to apply the ratio basis, claimed that primary criterion for admission should have been on the basis of merit. It was also said that as there was no established differences between the two examinations held in April and August and since the University Grants Commission had applied the common qualifying minimum of 160 marks to both the Examinations, the decision to apply the ratio basis was unfair discrimination amongst those who should have been treated equally.

The Supreme Court whilst referring to the concept of equal protection of the law stipulated in Article 12 (1) of the Constitution and the inherent ability to consider reasonable classification within the concept of right to equality, had held that the Court is not concerned with the motivation for the impugned action, but only with its effects. It was therefore held that selection by application of the ratio basis resulted in discrimination between equals and accordingly should be struck down.

Learned Senior State Counsel for the 1st, 3rd and 5th respondents submitted that in **Rienzie Perera** (Supra) the Supreme Court had clearly held that where the qualified students from both sources were clubbed together they constituted one class and thereafter there should be only one source of selection. In that case Sharvananda, J (as he then was) infact had said that,

> " Once the qualified students from both sources were clubbed together, they constituted one class and there could not be a class within that class. There

> came to exist only one source of selection and not two sources of selection and there was no basis for any classification and no distinction could any further be made in selecting the best candidates for admission to the Universities."

Learned Senior State Counsel for the 1st, 3rd and 5th respondents contended that the Commissioner General of Examinations had made every endeavour to ensure that the standards and the levels of difficulty between Examinations under both Syllabi was the same. Therefore the candidates under Old and New Syllabi were treated as forming a single group and they had been clubbed together as in **Rienzie Perera's** (Supra) case. On that basis learned Senior State Counsel argued that candidates who sat for the Advanced Level Examination under the Old Syllabus could not be treated as forming a distinct and separate class or population from among those who sat the same Examination under the New Syllabus.

The contention of the learned Senior State Counsel therefore is that although there were two groups of students who sat for the Advanced Level Examination in 2011, they were equals who could be clubbed together. Learned President's Counsel for the 2nd respondent's submissions were in support of the contention of the learned Senior State Counsel. Accordingly, learned President's Counsel for the 2nd respondent contended that the question papers for both Old and New Syllabi candidates were prepared by the same set of Examiners who had maintained similar level of difficulty in both the New and Old Syllabi question papers. It was therefore contended that as both sets of question papers were of the same standard, both groups of candidates were similarly circumstanced and therefore both groups should be treated similarly.

Although submissions were made in this regard, except for the affidavit filed by the 2nd respondent, there is no evidence to show that same level of difficulty had been maintained by the Examiners in all the subjects. In paragraph 21 of his affidavit dated 19-03-2012, the 2nd respondent had stated thus:

> " (i) the question papers and marking schemes for the Old and New Syllabi have been set by the same setters;
>
> (ii) the said setters had standardized and/or levelled the degrees of difficulty in question papers and marking schemes, both Old and New Syllabi;
>
> (iii) therefore, it was just and equitable to use a combined and/or pooled method to calculate the Z-Score of the candidates who sat for the G.C.E. (Advanced Level) Examination held in 2011."

The 1st respondent has referred to the Examination Papers in paragraphs 12, 12 (c), (d) and (e) and 23 of his affidavit, which stated as follows:

> " 12(c) I state that in 2011, two groups of students sat for the G.C.E. (Advanced Level) Examination, namely under the Old (pre-2009 Syllabus) and the New Syllabus (introduced with effect from 2009).

(d) However the Examination Papers and the marking schemes under the Old and the New Syllabi for each subject (excluding Political Science and Islamic Civilisation) were prepared by the same Panel of Examiners, who were specifically instructed by the former Commissioner General of Examinations to maintain the same standard and same level of difficulty between the two papers.

(e) Accordingly I state that the Examination Papers and the marking schemes for each subject, under the Old and New Syllabi, were of the same standard and the same level of difficulty.

23 - Whilst responding to the Affidavit filed by the Intervenient respondents, I deny all and singular the several averments contained therein save and except the Examination Papers marked 1R1 (a) to 1R3 (b) annexed to the said affidavit. Answering further, I state as follows:

a) the Panel of Examiners which set the Chemistry I Examination Paper under the Old and New Syllabi was the same;

b) the Panel of Examiners which set the Physics I Examination Paper under the Old and New Syllabi was the same;

c) the Panel of Examiners which set the Biology I Examination Paper under the Old and New Syllabi was the same;

d) the standard of the above Examination Papers under the Old and New Syllabi was the same;

e) the curriculum under the Old and the New Syllabi for Chemistry, Physics and Biology contained in the same subject components."

Learned Counsel for the intervenient respondents strenuously contended that it is not correct to state that the same standards were maintained in all the subjects of the Old and New Syllabi. Learned Counsel submitted that the candidates who sat for the Advanced Level Examination under the Old Syllabus had to answer 60 Multiple Choice Questions (hereinafter referred to as MCQ's) in 120 minutes whereas candidates who sat for the Advanced Level Examination under the New Syllabus had to answer only 50 MCQ's within the same period of time of 120 minutes. It is to be noted that according to the submissions made, both sets of candidates were awarded 100 marks for the said MCQ papers. On the basis of the above, learned Counsel for the intervenient respondents contended that the candidates who sat for the Advanced Level Examination under the Old Syllabus had two (2) minutes to answer each question (120/60) and were awarded 1.6 marks for each correct answer (100/60). The candidates who sat under the New Syllabus on the other hand had 2.4 minutes to answer

each question (120/50) and were awarded 2 marks for each correct answer (100/50).

Accordingly, learned Counsel for the intervenient respondents contended that, the candidates who sat for the Advanced Level Examination under the Old Syllabus had less time to answer each question and were awarded less marks than the candidates who sat for the examination under the New Syllabus.

It was also brought to the notice of this Court by the learned Counsel for the intervenient respondents that Chemistry I Examination Paper (MCQ) held under the Old Syllabus (1R1 (a)) and the Chemistry I Examination Paper (MCQ) held under the New Syllabus (1R1(b)) had 33 questions which were identical.

Considering the aforementioned submissions it was evident that the candidates who sat for the Chemistry I Examination Paper (MCQ) under the Old Syllabus having less time to answer 33 identical questions (2 minutes per question) and was awarded less marks for each correct answer (1.6 marks) than the candidates who sat for the Chemistry I Examination Paper (MCQ) under the New Syllabus who had 2.4 minutes to answer each of the 33 identical questions for which 2 marks for each correct answer was awarded. This position clearly shows that the candidates who sat for the Chemistry I Examination Paper under the Old Syllabus had less time to answer and scored less marks and the candidates who sat for the Chemistry I Examination Paper (MCQ) under the New Syllabus had more time to answer and scored more marks for 33 identical questions.

On the basis of the above, the question arises as to whether there is any evidence to substantiate the submissions of the 1st to 3rd and 5th respondents that same level of difficulty had been maintained by the Examiners in all the subjects. Although the 1st – 3rd and 5th respondents had filed affidavits and had stated that same level of difficulty had been maintained in subjects such as

Mathematics, Combined Mathematics etc., there was no evidence produced by the 1st – 3rd and 5th respondents to show that the same standards were maintained in all the subjects that were offered at the Advanced Level Examination 2011 under the Old and New Syllabi. It was necessary for the respondents to have placed supporting evidence for this Court to decide that the candidates under the New Syllabus and the candidates under the Old Syllabus were to be treated equally.

In **R v Criminal Injuries Compensation Board** ([1997] S.L.T. 291) it has been said that one could weigh conflicting evidence which might justify a conclusion either way, or could evaluate evidence wrongly. Considering the said view Wade and Forsyth (Administrative Law, Ninth Edition, Pg.272) are of the view that to make insupportable findings is altogether different from that concept. Such finding is regarded as abuse of power, which would cause grave injustice, and pave the way for Courts to intervene. The said intervention is based on the no evidence rule. The meaning of this rule was clearly referred to in **Allinson v General Medical Council** ([1894] 1 Q.B. 750) where it was stated that no evidence does not mean only a total dearth of evidence, but situations where considering evidence taken as a whole, is not reasonably capable of supporting the finding. The no evidence rule was demonstrated quite clearly by Lord Denning MR in **Ashbridge Investments Ltd. v Minister of Housing and Local Government** ([1965] 1 W.L.R. 1320) where it was stated that,

> " . . . . the Court can interfere with the Minister's decision if he has acted on no evidence, or if he has come to a decision to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not

> to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the Court has power to interfere with the decision of a lower tribunal which has erred in point of law."

The rule of no evidence was followed thereafter in the decision of **Coleen Properties Ltd., v Minister of Housing and Local Government** ([1971] 1 W.L.R. 433) and the rule has developed into an extent taking its place as a further branch of the doctrine of ultra vires and the judicial policy of preventing abuse of power.

The no evidence rule has been accepted by our Courts as well. In **Chandrasena v Kulatunga and Others** ([1996] 2 Sri L.R. 327), the petitioner, a trained teacher, had complained that he was transferred without a valid reason or cause. The respondents had contended that the said transfer was on disciplinary grounds and was carried out with the consent of the petitioner. This position was however, inconsistent and contradictory to the documentary evidence that was placed before Court. The Supreme Court had thus recognized no evidence as a violation of Article 12 (1) of the Constitution, which would infringe the equal protection guaranteed by the Constitution.

The University Grants Commission is the only authority in Sri Lanka, which is empowered to determine the courses that shall be provided at the Universities, and select students for admission to Higher Educational Institutions in the country. It is indeed an onerous duty, which is cast upon on a single authority such as the University Grants Commission. When such type of authority is entrusted to a responsible institution such as the University Grants Commission, the Commission has a duty to act reasonably, objectively as well as without any bias. Furthermore in dealing with the selection of students to Universities which

has for many years become extremely competitive, the University Grants Commission should act with a scheme which is transparent and should be in a position to produce the relevant material on which the decisions were made. A mere statement to the effect that the decision of the University Grants Commission to treat the students who sat for the Advanced Level Examination under the New and Old Syllabi belong to one category would not be sufficient. It is necessary to present such material which would substantiate their position before this Court and if no such material is forthcoming such decisions could be struck down for not having substantiating their position. The decision in **Wicremabandu v Herath and Others** ([1990] 2 Sri L.R. 348) could be cited as a case in point. In that matter, a five member Bench had decided that a detention order made on the subjective satisfaction of the Secretary, it is no longer sufficient to produce an order valid on its face, even though mala fides are not alleged, since the scope of judicial review is now extremely wider. In such circumstances, in an appropriate matter, the Secretary may have to place before Court the relevant material on which the order was made. In the absence of such material the order is tenable to be struck down.

As repeatedly stated earlier, in 2011 there were two groups of students who sat for the Advanced Level Examination. When questioned at the stage of hearing, learned Senior State Counsel for the 1st, 3rd and 5th respondents and the learned President's Counsel for the 2nd respondent stated that the said respondents were aware that two sets of students would be sitting for the Advanced Level Examination in 2011. The said respondents had been aware of this fact since 2009.

It was not disputed that until end December 2011, none of the candidates who sat for the Advanced Level Examination of 2011 were aware of the formula that was to be used for the selection of students to the Universities. Learned Senior State Counsel for the 1st, 3rd and 5th respondents took up the position that since

no one was aware, all candidates were equally disadvantaged. It was also contended that the petitioner had not shown as to how the non disclosure of the formula had affected them. Learned Senior State Counsel referred to the decision of Mark Fernando, J. in **Abeysinghe and 3 Others v Central Engineering and Consultancy Bureau and 6 Others** ([1996] 2 Sri L.R. 36) where he had observed that:

> "While it is desirable that criteria for selection and the active weightage be disclosed in advance, particularly where the scheme of promotion is complex, in the present case the non-disclosure of the marking scheme in advance to all the candidates was not *per se* discriminatory or a fatal irregularity. . . . The apportionment of marks among the selected Criteria could not be characterized as illegal or unreasonable the scheme itself was therefore not improper."

In that case, it is to be noted that the scheme in question was with regard to promotions at the Central Engineering Consultancy Bureau. It cannot be disputed that the said promotions cannot be equated to the selection of students to Universities. It is also to be borne in mind that even in **Abysinghe's Case** (Supra) Fernando, J. had expressed the view that it is desirable that criteria for selection and the relative weightage be disclosed in advance.

There is also another important aspect in this regard. The petitioners contended that they had a legitimate expectation that the same formula that was used from the inception in the year 2000, would be used for their Examination as well.

The concept of legitimate expectation was discussed in detail in the decision of **Harshani S. Siriwardena v Secretary, Ministry of Health and Indigenous**

Medicine (S.C.(Application) (FR) 589/2009 S.C. Minutes of 10-03-2011). In that Judgment, it was specifically stated that, whether an expectation is legitimate or not is a question of fact. It was also stated that in order to decide on the said question it would be necessary to consider whether there had been any arbitrary exercise of power by an administrative authority. In this regard it is also important to refer to the decision in **Union of India v Hindustan Development Corporation** ((1993) 3 S.C.C. 499) where it was stated that, the legitimacy of an expectation can be inferred if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence.

The earlier formula of the Z-Score was used since 2000 until 2011. It is not disputed that no intimation was given by the 1st and/or the 2nd respondents prior to the Advanced Level Examination held in 2011, that the Z-Score formula would be changed for the purpose of selecting students to Universities on the basis of that Examination. It is quite clear that the procedure that was adopted for a period of 10 years was changed without giving any intimation to the students. **The students had a right to know if the 2nd respondent had wanted to change the criteria they had adopted in selecting students to Universities which had been used for a period of well over 10 years.**

The 2nd respondent, viz. The University Grants Commission, was established under the Universities Act, No. 16 of 1978 for the purpose of, *inter alia***,**

1. the planning and co-ordination of University education so as to conform to national policy;

2. the apportionment to Higher Educational Institutions, of the funds voted by Parliament in respect of University education, and the

control of expenditure by such Higher Educational Institution;

3. the maintenance of academic standards in Higher Educational Institutions;

4. the regulation of the administration of Higher Educational Institutions;

5. the regulation of the admission of students to each Higher Educational Institution.

The University Grants Commission is vested with power, *inter alia*,

a) to determine from time to time, in consultation with the governing authority of each Higher Educational Institution, the total number of students which shall be admitted annually to each Higher Educational Institution and the apportionment of that number to the different courses of study therein; and

b) to select for admission to each Higher Educational Institution, in consultation with an Admission Committee whose composition, powers, duties and functions shall be prescribed by Ordinance.

The said objectives and the powers vested with the Commission clearly indicates that the University Grants Commission has the overall authority in selecting the students for relevant and different courses of studies in the Higher Educational Institutions. It was common ground that the University Grants Commission issued every year their Hand Book with instructions for the students as to how they should apply for different Faculties in the Universities. Such publications should be admired and encouraged as they may be the only reliable source a student may have in getting the relevant information regarding his higher studies. Although many facilities are available in obtaining such important information in Colombo and suburban areas, one must not forget the fact that equal opportunities may not be available in all parts of the country. In such circumstances, the Hand Book issued by the University Grants Commission becomes an important Source Book for the students who are aspiring to commence higher studies in a National University. The value and the need for such information was emphasised by this Court in **R.I.K. de Silva v The University Grants Commission and Others** ([2003] 1 Sri L.R. 261) where reference was made to the affidavit filed by the Dean of the Faculty of Law of the University of Colombo which stated thus:

> " I further state that if the action of the 1st and 2nd respondents (the UGC and its Chairman) are transparent, complaints of this nature could have been minimized. I am of the view that the **University Grants Commission should publish openly every year its admission policy, criteria adopted to select candidates**, each candidate's marks and ranking, each one's choice of courses/disciplines, their choice of university and the selection made by the University Grants Commission. Transparency will not only make candidates to trust

the institution and the decision making process, but also cause the institution to be responsible and accountable" (emphasis added).

It is common ground that the question at issue deals with the selection criteria for Universities based on the Advanced Level Examination held in 2011. It is also not disputed that the Z-Score formula, which was adopted since 2000 had been changed and the students for the next Academic Year would be selected on the basis of a different formula. The whole question, it has to be admitted, revolves around the subject of Education.

The right to education is illustrated by the formulation in Article 26 of the Universal Declaration of Human Rights. Article 26 (1) of the said Declaration states that :

" Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and **higher education shall be equally accessible to all on the basis of merit**" (emphasis added).

Although Article 27 (2) h refers to the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to Education at all levels, this has been provided under the directive principles of State policy. However, Article 12 (1), which deals with the right to equality has embodied in itself that all are equal before the law and are entitled to the equal protection of the law. By way of application of Article 12 (1) of the Constitution this Court

from time to time had upheld the right to Education. In many decisions, the Supreme Court had made order not only with regard to the admission of children to Government Schools, but also to different faculties in the National Universities.

Therefore although there is no specific provision dealing with the right to Education in our Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12 (1) of the Constitution.

In doing so, the Supreme Court has not only considered that the Right to Education should be accepted as a fundamental human right, but also had accepted the value of such Education, which has been described by James A. Garfield (on 12th July 1880), as,

> " next in importance to freedom and justice is popular Education, without which neither freedom nor justice can be permanently maintained."

On an examination of all the aforementioned, it is abundantly clear that the New Syllabus and the Old Syllabus which were used for the Advanced Level Examination, 2011 cannot be considered as a single population as they belong to two different categories. It is also to be noted that in the year 2000, when the students sat separately under the New and Old Syllabi for the Advanced Level Examination, they were treated as two distinct populations for the purpose of calculating the Z-Scores of the respective candidates. Therefore the two groups of students who sat for the Advanced Level Examination in 2011, should be treated as they belong to two different populations.

The 4th respondent, Prof. R.O. Thattil, from the University of Peradeniya, who was instrumental in introducing the Z-Score as a formula for the purpose of

selecting students for admission to Universities, had suggested that the 2nd respondent should take steps to re-calculate the Z-Scores on the premise that the two groups of students, viz. The Old and New Syllabi students, belong to two distinct populations.

Since the 2nd respondent had taken steps to treat the two categories of students who sat for the said Examination under the Old Syllabus and New Syllabus as a single population, wherein they clearly belong to two distinct populations for the reasons aforementioned, I hold that the 2nd respondent has violated the petitioners' fundamental rights guaranteed by Article 12 (1) of the Constitution.

The petitioners had prayed that the results issued with respect to the Advanced Level Examination 2011 be declared as null and void. As could be clearly seen, the main issue in this application is with regard to the calculation of the Z-Scores of the students who sat for the Advanced Level Examination in 2011. What was challenged by way of this fundamental rights application was the way in which the said Z-Scores were calculated as both the Old and New Syllabi candidates were treated as belonging to a single population. Therefore it is not within the purview of this application to consider the validity of the raw results that had been released with regard to the Advanced Level Examination in 2011. Further, in the absence of any cogent material, this Court will not interfere with the results of the Advanced Level Examination held in 2011.

However, there was a complex question dealing with the Z-Scores that was issued to the said candidates calculated on the basis of the said results. Since the Z-Scores have been calculated on the basis of the Old Syllabus and New Syllabus being treated as a single population, which is incorrect, the said Z-Scores are declared as null and void.

The 2nd respondent is directed to comply with Section 15 (vii) of the Universities Act, No.16 of 1978, as amended and to take necessary and relevant steps to calculate the Z-Scores of the candidates who sat for the Advanced Level Examination, 2011 according to accepted statistical norms and principles on the basis that the Old Syllabus and New Syllabus are two distinct populations.

The 2nd respondent is also directed to take necessary steps according to law to re-issue the Z-Scores to all the candidates who sat for the Advanced Level Examination, 2011, after correcting the aforementioned errors and shortcomings, without any unnecessary delay.

Considering all the circumstances of this application, I make no order as to costs.

Chief Justice

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

K. Sripavan, J.

I agree.

Judge of the Supreme Court