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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(FR) Application No. SC/Ref 343/19

1. Herath Mudiyanselage Dilshan Mahela Herath,
   No.39, Boyagama,
   Peradeniya.
2. Liyanage Lakni Eshini Perera,
   350/2, Sanasa Lane,
   Nagahawila Road,
   Kotikawatte.
3. Gajanayaka Mudalige Ashani Mihika Bastiansz,
   No. 27/6C,
   Deepananda Mawatha,
   Waidya Road, Dehiwala.
4. Galawata Henegedara Pamodya Madhubhashini
   Guruge Niwasa, Wattakgoda,
   Weligama.
5. Halpandeniya Hewage Charith Madhuranga,
   No.109/7 Dehiwala Road,
   Maharagama.
6. Kuruwalana Prabhavi Arushika Chathubashini,
   "Ramani",
   Dharmapala Mawatha,
   Naththandiya.
7. Weliweriya Liyanage Don Achinthya Sahan Wijesinghe,

No.42/B2, Awriyawatta,
Sisila Uyana, Alubomulla,
Panadura.

8. Wannakuwaththa Mitiwaduge
Sachini Shehara Perera,
No.42/12A, 6th Lane, Nagoda,
Kalutara.

9. Nambu Nanayakkara
Palliyaguruge Nayanathara
Palliyaguru,
"Sri Manthi", Rikillagaskada.

10. Athapaththu Arachchige Sanduni
Athapaththu,
93/46,1st Lane, Pragathipura,
Madiwela, Kotte.

11. Wijendra Gamalath Acharige
Karunadika Nimaya Veenavi
Morayas.
270/Hettiwaththa,
Thambagalla,
Kakkapalliya.

12. Gamvari Naveen Tharanga
"Sri Anura" Bogahawaththa.
Ambalangoda.

13. Warnakulasooriya Krishmal
Malintha Fernando,
Kanubichchiya
Dummalasuriya.

14. Wanninayake Mudiyanselage
Yasara Amarashmi Kumari
Wanninayaka
Near the Town Board,
Kurunegala Road,
Anamaduwa.

15. Weeramuni Arachchilage Seneth
Rashmika Deewanjana,
No. 133, Hiripitiyawa,
Galnewa.

16. Kondasinghepatabandilage
Dulakshi Amaya Kularathna,
Rathna Iron Works,
Thammannawa,
Hurigaswawe.
17. Kalpani Erandi Nanayakkara
316/1, Vishwakala Road,
Mampe,
Piliyandala.
18. Weerasinghe Mudiyanselage
Sachintha Piumal ,
No.26/2, Dalukhinna,
Dematawelhinna
Badulla.
19. Rathnayaka Mudiyanselage
Buddhika Prabhath Rathnayake
"Buddhi".Pahalanagahamura,
Nannapurawa
Bibila.
20. Adikari Arachchilage Ahinsa
Dulanjani Adikari
Meegahapelessa.
Welipennagahamulla.
21. Pabasara Hansini
Handunneththige
202/12,, Kotagedara Road,
Bataketththara,
Piliyandala.
22. Witharanage Neranjana
Thathsarani Pieris,
Neranjana Sangeetha Asapuwa,
Kajuwaththa
Medapura
Pohoranwewa
Dambulla.
23. Hansini Emali Mallikarathna
No. 140/1C, Sethsiri Mawatha
Thalahena
Malabe.

24. Pahalagedara Hewayalage Udani Hansamala
Sandawikumgama
Nagahaliyedda
Lolgoda.
25. Kodimarakkalage Nashen Madhuhansa Fernando
25/6, Blasius Road,
Indibedda
Moratuwa.
26. Welathanthrige Miran Archana Botheju
Sumangala Road,
Assedduma
Kuliyapitiya.
27. Welisarage Hiruni Kavindya Perera
No. 175/4 Gangadisigama
Madapatha
Piliyandala.
28. Siripalage Dilshan Madhuranga
No.160, Hendegama
Kebithigollewa.
29. Konasinghe Arachchilage Dinith Sachintha Sampath
No.5, Panthiyawaththa,
Munagama
Horana.
30. Maliduwa Liyanage Navindi Tharushika
N.191/2 Poramba
Akuressa.
31. Madawalage Tishani Diwyangi
No. 4/25, Sunrise Park
Kamburugamuwa
Matara.
32. Weligamage Don Kavindi Nimni Rashmika Silva
No. 30, Uyanwatta, Dissagewatta

Matara.

33. Ovitagala Vithanage Giranka Deshani
Princess Tailor
Samagi Mawatha
Bathalahena
Hallala
Weligama.

34. Kandapeli Arachchillage Navoda Nethmini Nandasiri
174, Iddamalgoda
Getaheththa.

35. Pinnagoda Liyanarachchige Don Dinindu Sachinthana
400 'A' Ihala Opalla
Kobawaka
Govinna.

36. Kalubovilage Don Sahan Pramudhith Gunawardana
"Sahan" Millagahawala Kanda Road,
Kobawaka
Govinna.

37. Thiththagalla Gamage Sanka Sadeepa
"Aradana" Tea Room
Kalubowitiyana.

38. Hamanduwa Gamage Thisara Sudarshana
Kospalakanaththa
Wewahamanduwa
Matara.

39. Udawaththa Kankanamlage Vimansala Viduranga Priyashantha
"Wasana", Mussenduwa
Watagedara
Nadugala

Matara.

40. Kankanamalage Avya Sandalee Ariyasinghe
289/14, Peak View
Colombo Road
Ratnapura.

41. Dissanayake Mudiyanselage Chinthaka Madushan Wimalasiri Dissanayaka
Gonathalawa Road
Dambagalla
Monaragala.

42. Asurappulige Senani Uththara Adhikari
"Sirikatha", Hunuwila
Eladadagama.

43. Gunasekara Seeman Arachchige Danajaya Krishan Gunasekera
No.39/B, Thispahegama
Kashyapapura.

44. Kodikara Gedara Pradeepa Chalani Kodikara
No.272, Mahadamana
Allewewa.

45. Thanthulage Amasha Meheruni Fernando
No. 7A, Mangala Mawatha
Kalutara North.

46. Gangabada Arachchilage Mudra Padmapani Gunathilaka
Kethsiri
Kuripoththa
Pothuhera.

47. Rathnayake Mudiyanselage Tharindu Sampath
T169, 24th post
Kandaketiya
Badulla.

48. Palligoda Arachchige Don Shenal Radeesha Jayawardena,
No. 240/D,
Sri Jinarathana Mawatha,
Batakattara
Piliyandala.
49. Ilukvinna Koralage Madhubhashani Senarath
Kapuwatta, Mahawalathenna,
Balangoda.
50. Narissa Gamaethige Dilmini Saranga
122/E/3, Balawinna,
Godakawela.
51. Thenuwara Kumarawanshalage Taneeja Kithmini Kulathunga.
300/1, Dodampegoda, Pinnawala
Balangoda.
52. Ranasinghage Sashini Hansana Madubhani
4/1, Katapitiya, Kahanwila,
Horana.

Petitioners

-Vs-

1. University of the Visual and Performing Arts
No.21, Albert Crescent
Colombo 07.
2. Senior Prof. Sarath Chandrajeewa
Former Vice Chancellor, Former Chairman of the Governing Council of the University of the Visual and Performing Arts.
2A. B. Asoka Keerthi De Silva,
Competent Authority,
University of the Visual and Performing Arts.

2AA. Emeritus Prof. W.M. Abeyrathna Bandara
Competent Authority,
University of the Visual and Performing Arts
No.21, Albert Crescent
Colombo 07.

2AAA. Senior Professor Rohana P. Mahaliyanaarachchi
Vice Chancellor, Chairman of the Governing Council of the University of the Visual and Performing Arts.

3. Senior Prof. Mudiyanse Dissanayake
Dean, Faculty of Dance & Drama,
Member of the Governing Council of the University of the Visual and Performing Arts.

3A. Dr. Indika Ferdinando
Dean, Faculty of Dance & Drama,
Member of the Governing Council of the University of the Visual and Performing Arts.

4. Senior Lecturer Chiltus Dayawanasa
Dean, Faculty of Music, Member of the Governing Council of the University of the Visual and Performing Arts.

4A. Dr, Saman Panapitiya
Dean, Faculty of Music, Member of the Governing Council of the University of the Visual and Performing Arts.

5. Senior Lecturer M. Jagath Raveendra,
Dean, Faculty of Visual Arts,
Member of the Governing Council

of the University of the Visual and Performing Arts.

6. Dr. S.P.D. Liyanage
Dean, Faculty of Graduate Studies, Member of the Governing Council of the University of the Visual and Performing Arts.

6A. Dr. Priyantha Udagedara
Acting Dean, Faculty of Graduate Studies, Member of the Governing Council of the University of the Visual and Performing Arts.

7. Prof. (Mrs.) Kusuma Karunaratne
Member of the Governing Council of the University of the Visual and Performing Arts.

8. Retired Prof. (Mrs.) Mangalika Jayatunga
Member of the Governing Council of the University of the Visual and Performing Arts.

8A. Professor Rohana Lakshman Piyadasa
Member of the Governing Council of the University of the Visual and Performing Arts.

9. Dr. Sunil Wijesiriwardena.
Member of the Governing Council of the University of the Visual and Performing Arts.

9A. Emeritus Prof. N.K. Dangalla.
Member of the Governing Council of the University of the Visual and Performing Arts.

10. Mr. C. Maliyadda
Member of the Governing Council of the University of the Visual and Performing Arts.

11. Mr. Gunasena Thenabadu

Member of the Governing Council of the University of the Visual and Performing Arts.

12. Mr. D. Bandaranayake
Member of the Governing Council of the University of the Visual and Performing Arts.

12A. Mr. Lakshman Abeysekara
Member of the Governing Council of the University of the Visual and Performing Arts.

13. Mr. B.M.K. Mohottala
Member of the Governing Council of the University of the Visual and Performing Arts.

13A. Mr. Ranjith Liyanage.
Member of the Governing Council of the University of the Visual and Performing Arts.

14. Mr. T. Darmarajah
Member of the Governing Council of the University of the Visual and Performing Arts.

15. Senior Lecturer Dr. Indika Fernando
Senate Nominee
Member of the Governing Council of the University of the Visual and Performing Arts.

15A. Senior Lecturer J.A.S.P. Aravindana
Senate Nominee
Member of the Governing Council of the University of the Visual and Performing Arts.

16. Senior Lecturer Iranga Samindinee Silva Weerakoddy
Senate Nominee

Member of the Governing Council
of the University of the Visual
and Performing Arts.

17. Mr. B. M. Dayawansa
Secretary to the Governing
Council and the Registrar of the
University of the Visual and
Performing Arts.
3rd to 17th Respondents all of No.
21, Albert Crescent
Colombo 07.

18. University Grants Commission
No20, Ward Pace,
Colombo 07.

19. Prof. Mohan de Silva
Chairman
University Grants Commission.

19A. Senior Prof. Sampath
Amaratunge,
Chairman
University Grants Commission.

20. Dr. Priyantha Premakumara
Secretary
University Grants Commission.

21. Prof. P.S.M. Gunaratne
Vice Chairman.
University Grants Commission.

21A. Prof. Jaynitha Liyanage,
Vice Chairman.
University Grants Commission.

22. Prof. Malik Ranasinghe,
Commission Member,
University Grants Commission.

23. Prof. Kollupitiye Mahinda
Sangharakkhitha Thero.
Commission Member,
University Grants Commission.

24. Prof. Hemantha Senanayake,
Commission Member,

University Grants Commission.

25. Dr. Ruvaiz Haniffa
Commission Member,
University Grants Commission.

26. Prof. R. Kumaravadivel.
Commission Member,
University Grants Commission.

27. Dr. Kapila Senanayake
Commission Member,
University Grants Commission.

27A. Prof. Ananda Jayawardena
Commission Member,
University Grants Commission.

27B. Prof. Premakumara De Silva
Commission Member,
University Grants Commission.

27C. Prof. Vasanthy Arasaratnam
Commission Member,
University Grants Commission.

27D. Mr. Palitha Kumarasinghe PC
Member,
University Grants Commission.
19th to 27C Respondents all of
University Grants Commission
No.20, Ward Place
Colombo 07.

28. J. H. M.T. N. Jayampathma
Samurdi Mawatha,
Ihala Uswewa,
Maha Usweea.

29. W.M.S. Nethmini
Walgama North,
Beligalgoda Road, Thawaluwila
Ambalanthota.

30. M.R.P.L.A. Rathnayaka
53/1, Liyanage Road,
Dehiwala.

31. Hon. Attorney General
Attorney General's Department,

Colombo 12

Respondents.

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BEFORE : **L.T.B. DEHIDENIYA, J.**
A.L.S. GOONERATNE, , J.
ACHALA WENGAPPULI, J.

COUNSEL : Upul Kumarapperuma with Muzar Lye and Ms. Radha Kuruwitabandara instructed by Ms.Darshika Nayomi for the Petitioners.
Senany Dayaratne with Ms.Nishadi Wickramasinghe for the 18th – 27C Respondents.
Ms. Sureka Ahamed S.C. for the 1st to 17th & 31st Respondents.

ARGUED ON : 26th March, 2021

DECIDED ON : 26th November, 2021

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ACHALA WENGAPPULI, J.

This is an application filed by fifty-two Petitioners, who invoked the jurisdiction conferred on this Court by Article 126(1) of the Constitution, alleging that they legitimately expected to gain admission to the Faculty of Music of the University of the Performing and Visual Arts (the 1st Respondent University), since they possess the requisite qualifications for admission, as stipulated in the admission policy published by the 18th Respondent Commission (The University Grants Commission) in its handbook P2 (UGC Handbook). Despite the Petitioners' eligibility to be selected for University admission, it is alleged that one of more Respondents, in selecting students for admission, had acted contrary to the said published admission policy,

by inclusion of students who have failed to satisfy the said admission criterion. Hence the Petitioners claim that the said administrative/executive act of the Respondents is in violation of their fundamental right to equality as guaranteed under Article 12(1).

The Petitioners sat for the Advanced Level Examination held in August 2018, offering three subjects in the Arts stream and have secured Z-scores, which made them eligible to seek admission to a State University. The Petitioners have aspired for admission to the Faculty of Music of the 1st Respondent University for the academic year 2018/2019, as undergraduates of the degree Bachelor of Performing Arts–Music (Special). They have accordingly tendered their applications to the 18th Respondent Commission, in compliance with the instructions contained in the said UGC Handbook.

The entry requirements to the Faculty of Music in the 1st Respondent University, as stipulated in the UGC Handbook, are that each student to have sufficient Z-score, at least a Credit pass for the subject of Music and also to 'pass' the mandatory aptitude test conducted by the 1st Respondent University, under its bylaws. The Petitioners have taken the mandatory aptitude test, conducted by a total of 20 Judges who sat in four separate panels. Those four panels had examined supportive documents in their skills and abilities, subjected them to a *viva voce* examination and assessed them in singing and instrumental performances. In May 2019, they were informed in writing by the 1st Respondent University that they had "*passed the aptitude test*".

When the 18th Respondent Commission had eventually released the names of the 250 students, who had been selected for admission to the Faculty of Music of the 1st Respondent University, the Petitioners

found that their names were not included in that list. The Petitioners claim that in August 2019 they learnt that some of the students, who did not 'pass' the said mandatory test, were selected for admission to the 1st Respondent University for admission by the 18th Respondent Commission, leaving them out. It is also alleged that the 30th Respondent is one such student, who had been selected to the Faculty of Music of the 1st Respondent University, "*despite being failed from the mandatory aptitude test*" and they were unaware whether the 28th and 29th Respondents too were selected to the said faculty.

In alleging violation of their fundamental rights, the Petitioners claim that "… *consideration of the applicants who failed in the mandatory aptitude test, being the foremost requirement that needed to be complied with and the subsequent selection of them to the final list of 250 students to be enrolled to the 1st Respondent University by the 18th Respondent, over the Petitioners who have passed the mandatory test by obtaining 50 or above marks*" is violative of their right to equality.

The Petitioners further allege that the 18th Respondent Commission's failure to consider only the 360 students, inclusive of the 52 Petitioners, who scored 50 or more marks and 'pass' the mandatory aptitude test, coupled with the act of making selections contrary to the declared admission policy, as contained in the UGC Handbook, by considering students who ought not to have been considered for admission to the 1st Respondent University. The Petitioners further allege that the decision of the said Commission is therefore illegal, unfair, arbitrary, unreasonable and violative of their '*legitimate expectation*' to be enrolled to the said University.

In resisting the Petitioners' application, the 2AA Respondent, being the Competent Authority of the 1st Respondent University, takes up the position that the said application is misconceived in law and they had failed to establish any violation of their fundamental rights.

In his statement of objections, it is averred that the 18th Respondent Commission, had directed the 1st Respondent University to conduct an aptitude test, in order to select students for admission. This was in conformity with the admission policy as published in the UGC Handbook. The Senate of the 1st Respondent University had thereupon approved a set of guidelines under which the said aptitude test is to be held. It also stipulated that the pass mark at 50. Of the 787 students who had taken part in the aptitude test, only 360 students had obtained marks above 50 and only their names were sent to the 18th Respondent Commission in the first instance. The said Commission then insisted that the 1st Respondent University comply with the requirement of sending three times the proposed intake, as indicated in its letter P16(i), which '*compelled*' the 1st Respondent University to "*bring down pass mark to 26*" and to prepare a 2nd list of 393 names of students, based on that revised 'pass mark'.

In the statement of objections of the 19A Respondent, the incumbent Chairman of the 18th Respondent Commission, in seeking dismissal of the Petitioners' application, had averred that their application is without merit or basis and they have no entitlement, either in law or in fact, to have and maintain the instant application.

In clarifying the applicable criterion in selection of students for admission to the 1st Respondent University, the 18th Respondent Commission states that it places primacy on the individual Z-score of

each student, in making selections for University admissions, based on the District Quota, in addition to All Island Merit Quota, in conformity with the national policy for University admission. Therefore, it was imperative to the 1st Respondent University to tender a list of 750 names of students, which is three times in value to the actual intake, in order to apportion the placement of students in terms of the said quota system. This is a requirement imposed by the 18th Respondent Commission on all the Universities that conduct aptitude tests.

It is further stated by the 19A Respondent that the marks of the aptitude test conducted by each such University, despite being a mandatory requirement, is only a secondary consideration and therefore does not supersede the primary consideration, namely the individual Z-score obtained by each student, at the G.C.E. Advanced Level examination. It is also stated by the said Respondent that the students have already had practical tests in the relevant subjects, such as music, in that examination.

The requirement of '*three times the proposed number*' was necessitated due to the national policy imperatives and therefore the pass mark of 50 as stipulated by the 1st Respondent University, at best, is only a '*notional figure*' and not determinative. Since the proposed intake for the degree in Music was 250, the 18th Respondent Commission required 750 names of students who had passed the aptitude test to make the selection. He further asserts that the pass mark of the aptitude test could not be pre-determined, as the 1st Respondent University did in this particular instance, since it essentially is a variable figure, which is dependent upon the marks obtained by the said 750th student.

He further alleges that setting up of a pass mark is a *nullity* as it had not been set up according to the by-laws of the 1st Respondent University. He further states that the intake of students for the Faculty of Music of the 1st Respondent University consists of students who have been selected from both these lists sent by the said University and the 18th Respondent Commission had, in fact, utilised both these lists to reconcile and adjust the District Quota, adhering to the National Policy.

When the Petitioners have supported their application on 04.08.2020, this Court granted leave to proceed on their allegation of the violation of Article 12(1) of the Constitution. The Court also made order granting interim relief, as prayed for by the Petitioners, by issuance of a stay primarily on the admission process, initiated by the 1st Respondent University on the selections of students made by the 18th Respondent Commission.

At the hearing of this application, learned Counsel for the Petitioners contended that the decision of the 18th Respondent Commission to consider the Z-scores of the students, who have '*failed*' the aptitude test, contrary to its published admission criterion, is illegal, unfair, arbitrary and unreasonable.

Learned Counsel for the Petitioners had founded his contention on the premise that once the 1st Respondent University has forwarded the list of names of the students, who have passed the test in the order of merit, the 18th Respondent Commission then "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" and "*accordingly the 250 applicants selected to the Faculty of Music in the 1st*

Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …". He added that the said Commission had failed to provide with a substantial justification for disregarding the results of the mandatory aptitude test, lowering of the pass mark, changing the selection criteria laid down by the 1st Respondent University, in making the selection of students for admission.

In view of these factors, learned Counsel for the Petitioners had contended that the 18th Respondent Commission had prevailed upon the 1st Respondent University, compelling it to lower the threshold mark, in order to accommodate the students who did not initially pass the aptitude test. He submits that it is an act that should be regarded as a clear interference with the authority of the 1st Respondent University over its academic affairs and therefore *ultra vires*. It was his contention that the said departure from the declared admission policy had forestalled the Petitioners' legitimate expectations to be admitted to the Faculty of Music of the 1st Respondent University and thereby violated their right to equality.

The Petitioners have made the allegation of right to equality on frustration of their legitimate expectation, in denying admission to the Faculty of Music of the 1st Respondent University contrary to the declared admission policy. The Petitioners totally rely on the admission policy as published in the UGC Handbook in support of their contention. Therefore, it is relevant to consider as to how the Petitioners have perceived the admission procedure, as described in the UGC Handbook.

The Petitioners' perception of the selection process of 250 students to the Faculty of Music are found in paragraphs 8 to 15 of their petition. The Petitioners assert therein that the 250 vacancies for students are to be filled by the ones who have obtained at least a Credit pass to the subject of music, in addition to two Ordinary passes at the Advanced Level Examination. Upon fulfilment of the said basic requirement, the Petitioners state that a student then had to "… *qualify the mandatory aptitude test conducted by the 1st Respondent University according to the University's own guidelines*". Once the 1st Respondent University conducts the aptitude test, it would then "*constructs a list of the applicants who have passed the aptitude test, in the order of the highest receiving mark, and refer the same to the 18th Respondent*". Having received the said list, the 18th Respondent Commission, then, "… *selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*." The Petitioners further state "… *accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*".

It would appear from the above quoted segments of the petition, that it reflects the reading of the Petitioners as to the declared policy on the selection process the 18th Respondent had published in the UGC Handbook and therefore the policy it must adopt, in making selection of students for admission to the Faculty of Music. The 18th Respondent Commission, however asserts that the primary determinant factor is the Z-score and not the individual marks received by a student at the aptitude test, as the Petitioners contend.

In view of these conflicting claims, it is necessary for this Court to examine the admission process of the 18th Respondent Commission as described in the said UGC Handbook, particularly in relation to the interplay of the marks of the aptitude test and the individual Z-score of each student.

The UGC Handbook issued by the 18th Respondent Commission consists of 10 sections. Section 1 dealt with the overarching policies and principles governing selection for admission to undergraduate degree programs conducted by the State Universities and such other institutions. In ***Kaviratne and Others v Commissioner General of Examination and Others*** *2012 [B.L.R.] 139* at p. 150, it was stated that *"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 description of subjects at G.C.E. (A.L.) that made a particular student eligible to enter the 1st Respondent University is indicated in the UGC Handbook (at p.35) as it states " … *a student wishing to follow Music must have a Credit pass or more in Music in the Advanced Level Examination*". It also states that "*The University also conducts practical/aptitude tests for selection. These are for Music, Dance, Drama and Theatre and Visual Arts. The examination is conducted under the by-laws of the university*". Importantly, it is further stated in the said UGC Handbook (at p.36) "*If a student fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*."

There is no dispute that all of the 52 Petitioners have satisfied the minimum entry requirements that are needed to be satisfied, inclusive of the 'pass' at the aptitude test, in order to be considered for admission

to the 1st Respondent University. Since the dispute among the parties revolves around the results of the aptitude test, the statement that "*If a student fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*", needed to be considered in a little more detail.

The said sentence is obviously had been constructed in the negative form, for it indicates that the failure of the aptitude test is deemed to be a disqualification for university admission rather than passing of the aptitude test is taken as a qualification. However, what is important is that statement does not offer an undertaking or a promise of benefit to any prospective student that passing of the aptitude test alone is sufficient for University selection. It is thus fair to infer that the said sentence was intentionally inserted into the UGC Handbook by the 18th Respondent Commission, after taking extra care not to create a hope or a promise for a placement upon merely passing the aptitude test.

But the UGC Handbook also states that the aptitude test is conducted under the "*by-laws of the university*".

The origin of the alleged violation of right to equality, based on frustration of legitimate expectation, could easily be traced to the initial decision of the 1st Respondent University, to consider only the students who scored 50 or more in the aptitude test, as students who have '*passed*' the said test. The 1st Respondent University seeks to justify its action of setting up a pass mark of 50, on the basis that the aptitude test conducted by it under the by-laws of the University, and that should be given adequate weightage, in the selection of students for admission to the aesthetic courses of study it conducts. When the 18th Respondent

Commission instructed it to send the names of students who have 'passed' the test, it is entitled to determine the threshold of a pass mark, at which point the distinction of pass or fail could be made.

The Petitioners have pushed that position another step further when they contended that the selection should primarily be based on the order of merit of the results of the aptitude test and the cut-off point of the Z-score should also be decided by picking the Z-score of the student, who was placed at the 250th position, in the said test. It is therefore contended by the Petitioners, that when the 18th Respondent Commission directed the 1st Respondent University to conduct an aptitude test under the by-laws of the University, that University had the power to set the 'pass mark' and decided 50 as the pass mark for the aptitude test in 2018.

The 19AA Respondent, in his objections had stated that the 'Pass Mark' for the aptitude test cannot be pre-determined, as the 1st Respondent University did in this particular instance and could be determined only on the mark received by the 750th candidate. The requirement of the names of students who passed the aptitude test, three times the proposed intake, is insisted by the 18th Respondent Commission, because of the applicable national policy imperatives.

The Petitioners position that the 1st Respondent University, being an autonomous institution, had the authority to conduct the aptitude test under its own by-laws and also to set up a 'pass mark' to the said test. They further contend that the 18th Respondent Commission had interfered with the affairs of the Senate of the 1st Respondent University, the academic authority of the said University, when it intervened to "*lower the pass mark set by the University and thereby*

admitting students who had not met the required aesthetic competence" contrary to section 46 of the Universities Act. This alleged act of interference, which the Petitioners have termed as an act of the 18th Respondent Commission, in *ultra vires* of its powers.

It was also contended by the Petitioners that the 1st Respondent University must accordingly decide the 'pass' mark of a student and the 18th Respondent Commission must accordingly accept the 1st list that had been sent containing only 360 names of students, who have scored above 50 marks for the aptitude test. The Petitioners claim that the said Commission had no power to call for a list of 750 names. Learned Counsel, in the course of his submissions stressed the point that the students who are admitted to the 1st Respondent University should possess an inherent aesthetic talent and hence it was important for the 18th Respondent to give adequate weightage to the assessment of the said University had on such talents of the students.

In the objections of the 2AA substituted Respondent, it is indicated that the Senate of the said University had approved a set of guidelines for the conduct of the aptitude test in respect of the course of study in music, and made it effective from 2018 and applicable in relation to the aptitude test held in 2019 as well. The Senate also decided that a student should score from all segments of the aptitude test, a minimum of 50 marks in total (2R2). It is claimed that the said set of guidelines were made available to the students.

Learned State Counsel who appeared for the 1st Respondent University, contended that when the 18th Respondent Commission directed the 1st Respondent University to send the names of the students who have 'passed' the aptitude test, the University must first

determine if a student had 'passed' the test and it can make such a determination only by having a 'bench mark' and therefore a pass mark of 50 was set up. In view of this fact, she submitted that the 18th Respondent Commission should not be permitted to fault the University for fixing a pass mark, in order to determine if a student had passed the aptitude test, as it was done in compliance with the instructions contained in P16(i). In her reply to the Petitioners' contention, she also submitted that if the 18th Respondent Commission had not intended the 1st Respondent University to determine a pass mark for the aptitude test, then the Commission should have issued clear instructions of what is expected of the 1st Respondent University. In the absence of such instructions, she submitted that the 18th Respondent Commission should not be allowed to find fault with the University for complying with their "badly drafted" directions, contained in P16(i)/X2/2R4.

It is the position of the 19A Substituted Respondent that for certain selected disciplines, subject to the objects and powers of the 18th Respondent Commission entrusted to it under the Universities Act No. 16 of 1978 as amended, the relevant Universities are empowered to conduct an aptitude/practical test for students and the 1st Respondent University is one such University. It is specifically stated by the said 19A substituted Respondent that the "*sole objective of the said aptitude/competency test is to select the candidates that would be forwarded to the 18th Respondent for processing, from and amongst the students who have applied to the relevant course of study. Consequently the 'pass mark' at the said test would be based on the number of students that the 18th Respondent requires for the purpose of making its selections*".

The contention of the Learned Counsel for the 18th Respondent Commission, was that the pass mark of the aptitude test cannot be pre-determined as it is dependent on the mark obtained by the 750th student, since the 750 names of the students who passed the aptitude test are warranted by the National Policy imperatives. Therefore, he contends that the pass mark of 50, that had been initially indicated by the 1st Respondent University, in relation to the aptitude test, is a decision which the 18th Respondent was not informed of, and therefore should be considered as 'notional' at its best and not determinative on the selection for admission.

It is evident from the above that the submissions made by the learned Counsel for the Petitioners and submissions of the Learned State Counsel who appeared for the 1st Respondent University are at variance with the submissions of the learned Counsel for the 18th Respondent Commission as to the practicality and legality of setting up of a pre-determined 'pass mark' of 50 to the aptitude test, that had been conducted in response to the direction issued by the 18th Respondent Commission with P16(i).

It is advisable that these aspects are considered at the very outset of the judgment, before I venture out to other contentious areas.

When the 18th Respondent directed the 1st Respondent University to call for applications and to conduct practical/aptitude tests by its letter dated 16.01.2019 (2R4), it was acting under the powers conferred under sections 3(5) and 15(vii) of the Universities Act, as amended. Importantly, this letter also directs the then Vice Chancellor of the said University to send " … *the lists of names of the students who have passed the practical/aptitude tests on or before 16th April 2019, indicating the full name,*

index number of the A/L Examination 2018 and the National Identity Card Number, as a soft copy as well as a hard copy. Importantly, make sure that you send three times the proposed intake of students who have passed the practical/ aptitude tests from each course of study for the academic year 2018/2019".

The 1st Respondent University, after calling applications from the Petitioners and other students, conducted an aptitude test during the time period commencing from 01.03.2019 and ending with 05.04.2019. It then compiled a list of 330 names of students, who have received 50 or more marks in that test. In compliance with the direction on 09.05.2019, the 1st Respondent University had then forwarded " … *the details of the students who have passed in the practical test*" consisting of those 336 names of students, inclusive of the names of the Petitioners, instead of sending a list consisting of "*three times the proposed intake of students*", as required by the 18th Respondent in 2R4.

The 19th Respondent, in view of the partial compliance of his direction by the 2nd Respondent, reminded the latter that " *you are required to send three times the proposed intake of students who have passed the practical /aptitude test*" and had redirected him to "*take immediate actions to send the details of not less than three times the proposed intake of students who have passed the practical /aptitude test*". It is said that this requirement was insisted upon due to the policy imperatives in University admission. It is important to note the emphasis placed by the 18th Respondent Commission on the requirement of sending three times the proposed intake of students who have passed the aptitude test in the said letter 2R4.

On 27.05.2019, the 1st Respondent University had then forwarded another 393 names of students after compiling a 2nd list, in addition to

the 360 names that had already been sent to the 19AA Respondent (X5) by its 1st list. In the covering letter of the 2nd list, the then Vice Chancellor of the 1st Respondent University informed the 19th Respondent, the then Chairman of the Commission, that " *we were compelled to bring down the pass mark of the aptitude test to fulfil the proposed intake*". This letter also conveyed his disapproval of the insistence of 750 names, as it indicated that "*it is unfortunate that we would have to enrol students to the UPVA based on the Z-score requirement, but not on the marks they obtained in the aptitude test*".

However, the 1st and the 2nd lists sent by the 1st Respondent University indicate that all 750 names sent to the 18th Respondent Commission are of the students "*who have passed the practical /aptitude test*". Thus, the 2nd list consisting of 393 names of students are students who have also been termed by the 1st Respondent University as students who have '*passed the aptitude test*', contrary to the claim of the Petitioners that the Commission had admitted students who have '*failed*' in the aptitude test conducted by the 1st Respondent University.

The Petitioners claim that the 1st Respondent University has the power to decide the admission requirements of students, a position strongly countered by the 18th Respondent Commission. Thus, it is necessary to refer to the statutory provisions contained in the Universities Act in relation to the power to admit students to the Universities under the purview of the 18th Respondent Commission.

Section 3(5) of the said Act recognises that "*the regulation of the admission of students to each Higher Educational Institution;…*" as one of the objects of the 18th Respondent Commission while section 15(vii) had

conferred power on it "*to select students for admission to each Higher Educational Institution, in consultation with an Admissions Committee…*".

In contrast, section 29 confers power to the Universities, including the 1st Respondent University, but they are to be exercised subject to the powers, duties and functions of the Commission. It states that a University shall have power;

(a) to admit students and to provide for instruction in any approved branch of learning;
(b) to hold examinations for the purpose of ascertaining the persons who have acquired proficiency in different branches of learning

Thus, it is clear that the 18th Respondent Commission alone has the power to "*select students for admission*" to the Universities and other Higher Educational Institutions, while the Universities that are under its purview were obligated to "*admit*" such students who had been selected by the said Commission, based on the national policy of selecting students to be admitted to the State Universities. This Court, in ***Kaviratne and Others v Commissioner General of Examination and Others*** (supra) at p.150 observed that the "*objectives and the powers vested with the Commission clearly indicate 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.*"

In this connection, this Court must consider, *albeit* briefly, the contention of the Petitioners that once the 1st Respondent University has forwarded the list of names of the students, who have passed the test in the order of merit, the 18th Respondent Commission then "*selects*

the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year." Clearly, this contention presupposes that the list of names of the students of those who have passed the test had been prepared inclusive of the marks each student had individually received and is arranged and presented in the order of merit. However, in the 1st list of 360 names, which included the Petitioners' names, or in the 2nd list that had been sent to the 18th Respondent Commission by the 1st Respondent University does not contain such detailed information.

The Petitioners have annexed the said 1st list to their Petition, marked as P16(vi). It is similar in format to the 2nd list of 393 names, marked as P16(vii). The 2AA Respondent too had annexed those two lists annexed to his objections, marked as 2R4 and 2R4A respectively.

Thus, it is noted that in any of these lists, neither the individual marks obtained by any of the 750 students nor the marks of each student in the order of merit were made available to the 18th Respondent Commission by the 1st Respondent University. This is a factor in support of the position of the said Commission. The 1st Respondent University describes the 393 students whose names appear in the 2nd list (2R4A) also as students who have 'passed' the aptitude test in fulfilling the 750 names of students who have passed the aptitude test requirement.

The 18th Respondent Commission, upon the receipt of the said 2nd list of students, who are now confirmed by the 1st Respondent University as students who also have 'passed' the said test, had in turn conveyed to the said University by letter dated 14.06.2019 (X6) that it

had "*decided to consider all the students in the lists sent*" by the said University for admission, including the names of the 52 Petitioners.

The validity of contention of the Petitioners that the 1st Respondent University forwarded the names of the students who have scored 50 and above, in their order of merit, is negated when the two lists of names that had been sent are perused. In the absence of details as to the individual marks received by each student and without having their names arranged in an order of merit, even if this was the methodology adopted in making selections, it is impossible for the 18th Respondent Commission to select "*the mark obtained by the 250th applicant in the said list and sets the Z-score received by the by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" in the absence of such information.

In this context, it is important to note that the insistence to have "*three times the proposed intake of students who have passed the practical /aptitude test*" by the 18th Respondent Commission commenced with the selection of students for the Faculty of Music of the 1st Respondent University from academic year 2018/2019. The 18th Respondent Commission, as a result of a situation that had arisen in selecting students for the course of study in Speech & Hearing Sciences at the University of *Kelaniya*. The act of the University of *Kelaniya,* in setting the 'pass mark' of the aptitude test it conducted at 70, resulted in the non-selection of students, who ought to have been selected on Z-score. The 18th Respondent Commission had to make arrangements to admit them at a later point of time, in excess of the number of vacancies. Therefore, the said Commission had decided on 09.08.2018 to "*inform all*

the universities who conduct aptitude tests, that after the test the university must submit three times more names than the enrolled number" (X1).

In this respect it is important to bear in mind that when the 18th Respondent Commission issued the UGC Handbook and thereby set out the selection criteria for the University selection process for the academic year 2018/2019, the mode of the selection process had already been formulated upon the national policies and communicated to the 1st Respondent University, inclusive of the requirement of sending " … *three times the proposed intake of students who have passed the practical /aptitude test*".

It is thus clear, when the Petitioners were sitting for their Advance Level Examination in August 2018 the 18th Respondent had already instructed the 1st Respondent University of the requirement to send "*three times the proposed intake of students who have passed the practical /aptitude test*". By then the Petitioners were yet to be informed of their respective Z-scores by the Department of Examinations (a necessary pre-qualification even to apply in seeking University admission) and are yet to complete the basic requirement even to apply for University admission.

The series of correspondence between the two State institutions, namely the 18th Respondent Commission and the 1st Respondent University, over the issue of sending insufficient number of the names of students who 'passed' the aptitude test, as reflected by P16(i)/X2/2R4, P16(iii)/X4/2R5, P16(iv)/X5/2R6 and P16(v)/X6, also indicative of the consistency of the application of the said admission policy that had already been formulated by the 18th Respondent Commission and published in the said UGC Handbook.

The reason as to why the contents of these correspondents were referred to in such detail in the preceding paragraph was that the Petitioners had annexed those letters to their petition, marked P16(i) to P16(v), as documents, which are supportive of their contention. Therefore, its contents had to be examined carefully, in order to verify, whether they contain some indication of any undertaking made by the said 18th Respondent Commission for the Petitioners to entertain a substantive legitimate expectation, even though they were not addressed to the Petitioners. If there was such an undertaking or a promise of benefit, then only the Petitioners could demand the said Commission to act on that undertaking i.e. only the students who have scored 50 and above at the aptitude test will be admitted to the Faculty of Music of the 1st Respondent University.

In view of the submissions of the learned Counsel for the Petitioners as well as of the learned State Counsel, it is necessary to consider the allegation that the 18th Respondent Commission had acted in *ultra vires* in interfering with the affairs of the 1st Respondent University.

Section 46(1) of the University Act states that "*the Senate shall be the academic authority of the University*" while proviso to section 45(2)(xviii) defines the term " academic matter "*to mean any matter which is subject to the control and general direction of the Senate*". Describing powers and functions conferred on a Senate of a University, section 46(5) and (6) lists out the specific areas that are placed under it. Section 46(6)(viii) states that a Senate could "*recommend to the Council requirements for the admission of students to courses of study.*"

This is relevant, in view of the contention advanced by the learned Counsel for the Petitioners that the 1st Respondent University, being a University established under the Universities Act, under sections 29(a), 46 and 46(5) of the said Act, the Senate of that University had the autonomy to make decisions relating to their academic functions, to have by-laws relating to admittance of students, and also in determining the selection criteria to admit students into the said University. He submits therefore the setting up of a pass mark and the stage at which it is decided to set up the pass mark are clearly within the purview of the Senate.

Apparently, the basis for the allegation of the Petitioners that the 18th Respondent Commission had interfered with the affairs of the Senate in excess of its powers could be found in the contents of the letter of instructions the said Commission had issued to the University on 23.05.2019, marked as P16(iii). In that letter, the 18th Respondent Commission informed the 1st Respondent University of the reasons as to why it insists on three times the proposed intake of students who have 'passed' the aptitude test and reminds that the University had not sent the requested number of students who passed the aptitude test. The allegation of interference is therefore clearly referable to the insistence of sending 750 names of students "*who passed the aptitude test*" by the 18th Respondent Commission.

The requirement of sending 750 names was first mentioned in the letter P16(i) by which the 19th Respondent, the then Chairman, on behalf of the 18th Respondent Commission had instructed the 2nd Respondent, the then Vice Chancellor of the 1st Respondent University, to conduct an aptitude test and send the names of students who have passed that test.

In order to have a clear understanding of the nature of the instructions, in the context in which it had been issued, the relevant paragraph from the said letter is reproduced below in its entirety:

> *"Moreover, please send me the lists of names of students* ***who have passed*** *the practical/aptitude test* ***on or before 16th April 2019*** *indicating the* ***Full Name, Index Number of the A/L Examination, 2018 & the National Identity Card Number,*** *as a soft copy as well as a hard copy. Importantly, make sure that you send* ***three times the proposed intake*** *of students who have passed the practical/aptitude tests from each of course of study for the academic year 2018/2019." (emphasis original)*

The letter P6(i) is a letter addressed to all Universities.

As already referred earlier on in this judgment, it is this act of non-compliance by the 2nd Respondent, in his failure to send three times the proposed intake, prompted the 19th Respondent to insist on sending of 750 names of students who passed the test by letter P6(iii) addressed to the 2nd Respondent, by which the latter had provided an explanation for the insistence of 750 names. It is stated that "*this requirement is to satisfy the district quota allocated for the particular course of study from each district. Moreover, there is a tendency that the students who passed the practical/aptitude tests getting selected to some other courses of study of Universities due to the Z-score obtained and the preferences indicated by them in their application forms. Therefore, if an adequate number of students who passed the practical/aptitude tests are not provided by the Universities, the proposed intake of such courses of study may not be satisfied*."

The 2AA Respondent had tendered a document containing the methodology which had been adopted in conducting the aptitude test on the students inclusive of the Petitioners as 2R1. In that document it is clearly stated that the methodology of conducting the aptitude test and the applicable criteria, inclusive of the pre-determined pass mark of 50 are applicable from the year 2018.

Strangely, the then Vice Chancellor of the 1st Respondent University has placed his signature to that document only on 14.02.2019 whereas the 18th Respondent Commission, almost a month before, had issued instructions by P16(i)/X2/2R4 on 16.01.2019, insisting that the 1st Respondent University to send three times the proposed intake of students "*who have passed the practical /aptitude test*". The said requirement in P16(i) is descriptive enough to put the 1st Respondent University on notice, in foreseeing the practical consequences of its decision to apply the 'pass mark' of 50 and classifying the students on that pre-determined 'pass mark'.

It appears that the 1st Respondent University had not taken any note of the requirement of sending three times the proposed intake at that point of time despite the insistence by the 18th Respondent Commission in P16(i) of that requirement. The 1st Respondent University nevertheless proceeded to classify the students who have 'passed' the aptitude test with the pass mark of 50, it had already set up.

The act of the 1st Respondent University in sending only 360 names of students in its 1st list upon a pre-determined pass mark is a direct result of adopting a methodology it had set up on 14.02.2019 (2R1) and said to be made applicable retrospectively to the year 2018, in

relation to the aptitude test conducted for the academic year 2018/2019, without giving effect to the set of instructions given by the 19th Respondent by issuance of P16(i). Given the fact that the said requirement, which had been formulated by the 18th Respondent to prevent the recurrence of the practical difficulties it had to deal with over the insufficient number of names sent by the University of *Kelaniya,* in falling short of the required number of student intake, as indicated by X1, a more responsible approach should have been adopted by the 1st Respondent University.

In adopting a pre-determined pass mark had an inherent defect attached to it. There existed the risk of occurring an eventuality of not having sufficient numbers of students, who have scored 50 and above, in order to fill in the required number of 750 names. The overall performance of the students who took the aptitude test was not known by then. If the University, with the full awareness of what is required of that institution, had considered the said eventuality, then it could easily have avoided proceeded along with that particular course of action, in view of the unnecessary risk factor. There is no material in the statement of objections or in the supportive documents to indicate that the 1st Respondent University had in fact considered the practical implications of its decision to set up a pre-determined pass mark, inclusive of the situation that resulted in the filing of the instant application.

If the University could have considered the several options before proceeding on the course of action it had adopted, it could very well have left the issue of fixing a pass mark shifted down to a point at which an overall assessment of the performance of students could be

undertaken. It appears that, by setting up a pre-determined pass mark, the 1st Respondent University had clearly painted itself into a corner.

Interestingly, it is noted that not only the 1st Respondent University, but several other Universities too were troubled with the identical practical problem, after applying a pre-determined pass mark. Those institutions also, have adopted the same escape route, as the 1st Respondent University did, in order to satisfy the requirement of sending '*three times the proposed intake*' of names of students who have passed the aptitude test by lowering the pass mark. This is indicative from the correspondence the 18th Respondent Commission had with the University of *Sri Jayawardenepura* and *Swami Vipulananda* Institute of Aesthetic Studies of the Eastern University, that have been tendered marked as Y2 and Y3.

In replying to the submissions of the Commission on the setting up of a pre-determined pass mark, Learned State Counsel accused the 18th Respondent Commission for its alleged failure to give specific and clear instructions in the manner of setting up of such a 'pass mark'. In view of the powers and functions that have been conferred on a University by section 29 of the Universities Act, the reluctance of the Commission to do so could be understood as, in its act of issuing instructions to send the names of those "*who have passed the practical /aptitude test*", the Commission had clearly left the task of determining the students who have passed, to the 1st Respondent University itself. The manner in which it conducts the aptitude test and the criterion of selection of students for the purpose of compilation of the pass list too were therefore left to the discretion of the 1st Respondent University.

Nowhere in any of these letters of instructions it did indicate that the 19th Respondent had 'interfered' with the affairs of the 1st Respondent University by 'forcing' them to lower the pass mark as alleged by the Petitioners. The insufficient number of 360 students in the 1st list was a direct consequence of the act the 1st Respondent University in setting up of a pre-determined 'pass mark', simply by following the guide lines it had set up for the previous year's aptitude test, and thereby not complying with the instructions that made it imperative that the University to send 750 names of students who have 'passed' the aptitude test for the current academic year.

In order to comply with the instructions of the 18th Respondent Commission of 750 names of students, who have 'passed' the aptitude test, subsequent to its insistence, the 1st Respondent University had on its own decided to lower the pass mark to 26 from the previous 50. This was due to the decision of the 1st Respondent University, upon realisation of the practical impasse it had created, in setting up a pre-determined pass mark even before it conducted the aptitude test. It is only in order to reconcile with the requirement of 750 names, the 1st Respondent University did revise the pass mark and lower it to 26 from 50.

By this subsequent revision of the pass mark, the 1st Respondent University had shifted the point at which it had set up the pass mark and thereby made its earlier pass mark of 50, changed into a provisional pass mark. The decision to shift the point of fixing the pass mark, from a point prior to the aptitude test further down to a point, after the aptitude test is conducted and thereby enabling the University to identify 750 names of students who passed the test, made a way out of the difficult situation. That decision was taken by the University itself

and the said shift of the point of fixing the pass mark and its subsequent revision were made clearly within its scope and powers.

In these circumstances, the pass mark of 50, as set up by the 1st Respondent University, should clearly be considered only as a 'provisional' pass mark, as the said University had subsequently reduced the pass mark to 26, on its own motion.

These factors effectively negates the Petitioners' contention that the 1st Respondent University was compelled to lower the pass mark by the 18th Respondent Commission to accommodate the students who have 'failed' the aptitude test, since the 1st Respondent University, in setting up its own '*notional*' pass mark, should have been mindful of the requirement that had been insisted upon by the 18th Respondent Commission in P16(i) that the University must forward a list "*three times the proposed intake of students who have passed the practical /aptitude test*".

Contrary to the allegation, these factors support a conclusion that the 18th Respondent Commission only directed the 1st Respondent University to conduct a practical/aptitude test and to send names of students who have passed the test in three times of the proposed intake and did not instruct them to determine a 'pass mark' at any stage, let alone instructing them to lower the pass mark to accommodate students, who have initially *'failed'* the aptitude test, as the Petitioners have alleged.

This certainly is a convenient point to turn to the contention of the Petitioners that the selection for university admission should primarily be based on the marks received by each student at the aptitude test, shifting the Z-score to a secondary consideration. This position is clearly indicated in the petition of the Petitioners that the 18th

Respondent Commission, having received the list of the students who have passed the aptitude test, would thereupon "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*" and "*accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*".

Learned Counsel for the 18th Respondent Commission submitted that the aptitude test cannot be considered as the sole determinative factor in proof of proficiency in respect of the relevant artistic field, as the Advanced Level examination also has a inbuilt stringent practical component that each candidate had to complete and therefore regardless of how the Petitioners have fared at the aptitude test, all students who have a Credit pass to their chosen field of study possesses sufficient level of proficiency in that field to be able to productively pursue a degree course.

In section 1 of the UGC Handbook, under the heading 1.1, admissions policy for State Universities and Higher Educational Institutes under the 18th Respondent Commission are spelt out. Section 2.1. refers to "*Titles of each course of study under different subject streams*"

Under the heading 1.2, with the title '*Minimum requirements for University Admission*', the UGC Handbook makes reference to the Z-score as it states " *Selection of students for university admission for the academic year 2018/2019 will be determined on the basis of rank order on average Z-scores obtained by candidates at the G.C.E. (Advanced Level)*

Examination held in year 2018, released by the Commissioner General of Examinations."

The UGC Handbook, under the heading of admission policy, stated " *For students seeking admission to Arts courses mentioned in 1 to 9 of the section 2.1.(1) of this Hand Book All Island Merit is the main criterion used for selection*."

Section 2.1.(1) in turn states that admission to courses of study mentioned in 1 to 9 above will be made on an 'All Island Merit' basis and the 1st Respondent University is identified as its 13th institution. Courses of study 1 to 9 are described under the heading 2.2.2.1 and Music, the course of study the Petitioners seek admission to, is listed as item 8, i.e. "*Music, Dance, Drama and Theatre and Visual Arts in the University of the Visual and Performing Arts, Colombo*".

The said section specifically refers to students, who seek admission to Arts courses in 1 to 9 of the section 2.1, which is inclusive of the course of study in Music, of the selection criterion it had stipulated. It states, "*All Island Merit is the main criterion used for selection*." However, section 1.1 also states that there is one exception to All Island Merit selection criterion for selection of students to Arts Courses inclusive of "Music", under the heading 1.1.1, and adds that "*selection for these courses is based on the district quota system*". The manner in which the district quota system operates too had been described in that section, to which I shall refer in more descriptive terms, at a later stage in this judgment.

Thus, the selection criterion for Music is clearly laid out as 'All Island Merit' basis and that in turn is based on the 'rank order on average Z-scores obtained by candidates at the G.C.E. (Advanced Level)

Examination held in year 2018'. As noted earlier on, in relation to Music, only the failure of the aptitude test would disentitle a candidate for admission to the 1st Respondent University.

It had been observed in ***De Alwis v Anura Edirisinghe and seven Others*** (2011) 1 Sri L.R. 18 at p.24 that "*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*." There was no contention before this Court that the Z-score should be ignored in selection for university admission.

It is already noted that the selection for the course of study of Music, as stated in pages 8 and 9 of the UGC Handbook, is "*based on the district quota system*". It is also stated that up to 40% of the available places are selected on the Z-score ranking of 'All Island Merit'. Of the remaining 60%, up to 55% are selected on the district quota system and accordingly available places in each course of study will be allocated to the 25 districts, in proportion to the total population of each district on the ratio calculated by taking into consideration of the total population of that particular district and the total population of the country. In addition, 16 districts had been categorised as "*educationally disadvantaged districts*" and the remaining 5% of the total available places are given to students of these districts. Of that 5%, the number of places allocated to each of the 16 districts would be decided, upon the ratio of the population in a particular district to the total population of the 16 districts. Having allocated the number of places for each of the districts, the students are grouped on the basis of their district, after the 'All Island Merit' criterion is complied with, and thereupon are

arranged in their district ranking on the Z-score. The Z-score of the last student in the order of merit, who fills the number places allocated to a particular district last, is taken as the cut of mark for that particular academic year for that district. Then only the selection process for university admission is finalised by the 18th Respondent Commission, leaving only the task of issuing a notification to the respective Universities of the selected students.

At this juncture, it is prudent to consider the relative Z-scores of the students who have been selected for admission to the said Faculty by the 18th Respondent Commission, especially in view of the allegation of the Petitioners that the 2nd list, sent by the 1st Respondent University, did contain names of students who have *'failed'* the aptitude test and therefore are disentitled to be selected for admission.

The 18th Respondent Commission had tendered a list it had prepared in a table form, along with its limited objections (XII), based upon the information contained in the two lists of names of students sent by the 1st Respondent University; with separate columns under the following headings - the index number, full name, the District considered for admission, the individual Z-score, the cut off mark, selection status along with the category and finally, remarks. Under the said 'remarks' column, the 18th Respondent Commission had described the relative status of the Petitioners, stating whether each of them would have been selected for admission under list 1 or list 2. Based upon that classification, the 18th Respondent Commission averred that, out of the 52 Petitioners, 24 of them could not be selected because of their low Z-scores while the balance of 28 Petitioners could have been selected on their Z-scores, if only the 1st list is considered. It is also indicated, if the selections are made, out of the 336 names of the 1st list

containing the names of students who have passed the aptitude test by obtaining 50 or more marks, only 96 students would qualify to be admitted, thereby leaving wide gulf of 154 vacancies for admission to 1st Respondent University vacant.

The 18th Respondent Commission had determined the cut off marks for each of the districts after selecting students from the 1st list and the 2nd list. Since the Z-score being the primary consideration, exclusion of students with low Z-score from the selection list is clearly justified as it had been the declared and accepted selection policy contained in the UGC Handbook.

In order to have a clear understanding of the relative Z-scores of the students who had been selected from the districts from which the Petitioners also have sat for their Advance Level Examination, the highest and the lowest of Z-scores for that district along with the relevant cut off marks, and the Z-scores of the 52 Petitioners are arranged in tabulated form below, based on the information contained in the document P1 tendered by the Petitioners as well as the document marked X11 by the 18th Respondent Commission. In P1, the Petitioners have indicated the districts in which they sat for the Advanced Level Examination and the Z-score each of them has obtained.

Colombo District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Colombo District
		Highest Z-score: 1.7738 (Index

2nd Petitioner	0.2383	No. 1136321
3rd Petitioner	0.5451	Lowest Z-score: 0.9382 (Index No. 1046535)
6th Petitioner	0.6353	Cut off Mark 0.9382
10th Petitioner	0.6949	
17th Petitioner	0.8401	
21st Petitioner	0.8558	
23rdPetitioner	0.7811	
25th Petitioner	0.2124	
27th Petitioner	0.2943	
29th Petitioner	0.2391	
48th Petitioner	0.5233	

Kalutara District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Kalutara District
5th Petitioner	0.3011	Highest Z-score: 1.7478 (Index No. 1765264)
7th Petitioner	0.5105	Lowest Z-score: 0.93 (Index No. 1682474)
8th Petitioner	0.6353	Cut off Mark 0.93
35th Petitioner	0.9208	
36th Petitioner	0.3555	
45th Petitioner	0.5339	
52nd Petitioner	0.9149	

Matara District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Matara District
4th Petitioner 30th Petitioner 31st Petitioner 32nd Petitioner 33rd Petitioner 37th Petitioner 38th Petitioner 39th Petitioner	0.8698 0.6966 0.9854 0.3473 1.0242 1.0955 0.9705 0.7828	Highest Z- score: 1.7834 (Index No. 2005123, but selected for a higher preference) Lowest Z -score: 1.1571 (Index No. 2106086) Cut off Mark 1.1571

Ratnapura District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Ratnapura District
34th Petitioner 40th Petitioner 49th Petitioner 50th Petitioner 51st Petitioner	0.2383 0.5451 0.6353 0.6949 0.8401	Highest Z- score: 1.5552 (Index No. 2311160) Lowest Z -score: 1.0971 (Index No. 2289911) Cut off Mark 1.0971

Anuradhapura District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Anuradhapura District
15th Petitioner 16th Petitioner 22nd Petitioner 28th Petitioner	1.0145 1.0522 0.3687 0.9300	Highest Z- score: 1.8504 (Index No. 3022889) Lowest Z -score: 1.054 (Index No. 2938820) Cut off Mark 1.054

Puttalam District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Puttalam District
11th Petitioner 14th Petitioner 20th Petitioner 26th Petitioner	0.3389 0.4370 0.4958 0.4466	Highest Z- score: 1.1669 (Index No. 2916860) Lowest Z -score: 0.7412 (Index No. 29116894) Cut off Mark 0.7412

Kurunegala District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Kurunegala District
13th Petitioner 42nd Petitioner 46th Petitioner	0.9179 0.738 1.0805	Highest Z-score: 1.5859 (Index No. 2670496- but selected for a higher preference) Lowest Z -score: 1.0922 (Index No.2752867) Cut off Mark 1.0922

Badulla District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Badulla District
18th Petitioner 47th Petitioner	0.6052 0.3101	Highest Z- score: 1.9434 (Index No. 3660559) Lowest Z -score: 0.8746 (Index No.3592260) Cut off Mark 0.8746

Monaragala District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Monaragala District

19th Petitioner 41st Petitioner	0.2533 0.8243	Highest Z- score: 1.6043 (Index No. 3694631) Lowest Z -score: 0.974 (Index No. 3701883) Cut off Mark 0.974

Polonnaruwa District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Polonnaruwa District
43rd Petitioner 44th Petitioner 20th Petitioner 26th Petitioner	0.6418 0.6416 0.4958 0.4466	Highest Z- score: 1.8446 (Index No. 3121429) Lowest Z -score: 0.9903 (Index No. 3111091) Cut off Mark 0.9993

Kandy District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Kandy District
1st Petitioner	0.8055	Highest Z- score: 1.4974 (Index No. 3247260 - but selected for a higher preference) Lowest Z -score: 0.9954 (Index No.

		3272117) Cut off Mark 0.9954

Nuwara Eliya District		
Petitioner	Z- Score	Highest and the cut off mark of the Z- score of the students from both lists for Nuwara Eliya District
9th Petitioner	0.4141	Highest Z-score: 1.0141 (Index No. 3498794) Lowest Z-score: 0.7472 (Index No. 3479498) Cut off Mark 0.7412

Kegalle District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Kegalle District
24th Petitioner	1.0424	Highest Z- score: 1.8558 (Index No. 2477297) Lowest Z -score: 1.0591 (Index No. 2503034) Cut off Mark 1.0591

Galle District		
Petitioner	Z- Score	Highest and the cut off mark of the Z-score of the students from both lists for Galle District
12th Petitioner	0.8314	Highest Z-score: 1.6250 (Index No. 1946358) Lowest Z -score: 1.0014 (Index No. 1897551) Cut off Mark 1.0014

It is already noted that the Petitioners have primarily relied on the instructions contained in the UGC Handbook in support of their claim of frustration of legitimate expectation. Therefore, it is important to examine the applicable instructions and policy statements contained in the said document, particularly in order to determine whether there was an undertaking or a promise of such a benefit, based on aptitude test marks, had been offered to the Petitioners by the 18th Respondent Commission. It is for this reason, the Petitioners contentions were considered against the policy statements contained in the UGC Handbook, in the preceding paragraphs.

But before I proceed with that undertaking, it is prudent to examine the applicable legal principles that defines the concept of legitimate expectation beforehand, since it is the basis on which the Petitioners have sought intervention of this Court to redress their grievance.

In *De Smith's Judicial Review,* 8th Ed, at p. 673, it is stated that "*It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public*." The first use of the phrase 'legitimate expectation', in the context of Public law, is attributed to *Lord Denning* MR in the judgment of ***Schmidt v. Secretary of State for Home Affairs*** [1969] 2 Ch. 149, and only in the House of Lords decision in ***Council of Civil Service Unions v. Minister for Civil Service*** [1985] A.C. 374 where it was identified by the Court of the two situations in which a 'legitimate expectation' would arise. It had been stated by the House of Lords that legitimate expectation would arise if a person is deprived of some benefit or advantage which either he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until it is communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or, he has received assurance from the decision maker will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should not be withdrawn.

De Smith (at p. 676) and Craig on *Administrative Law* 5th Ed (at p.421) has described a third category on which legitimate expectation could arise, as an extension from the second category referred to above. *De Smith* describes it as "*Such an obligation to consult will arise if, without any promise, a public authority has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitle to rely on its continuance and did so*" and identifies the

expectation of the continuance of the policy as a "*substantive expectation*".

What is understood as '*substantive legitimate expectation*' as against procedural legitimate expectation was clarified by *Weerasuriya* J in ***Sirimal & Others v. Board of Directors of the Co-operative Wholesale Establishment & Others*** (2003) 2 Sri L.R. 23, at pg.28 with the statement *"If the legitimate expectations are protected only procedurally, the most employees could hope for, would be an order requiring consultation before a change of policy is affected. If however, the legitimate expectations are substantive the position is different, in that it is open to a Court to require the public authority to confer upon the person the substantive benefit which he is expected to receive under the earlier policy."*

In a more recent pronouncement of ***Ariyarathne and Others v. Illangakoon and Others*** (SC FR Application No. 444/2012 – decided on 30.07.2019) *Prasanna Jayawardena* J had observed that the "… *phrase 'substantive legitimate expectation' captures the situation in which the applicant seeks a particular benefit or commodity, such as a welfare benefit or a license, as a result of some promise, behaviour or representation made by the public body*". To elaborate the point further, his Lordship had cited Professor *Craig* on Administrative Law, 7th Ed. at p.679, where the learned author states that "*the doctrine of substantive legitimate expectation is based on the "principle of legal certainty" which requires that a person should be "able to plan action" on the basis of representations made to him by a public authority and which he has "reasonably relied on*".

When viewed in the light of the above principles, it appears that the Petitioners are in fact alleging frustration of their 'substantive' legitimate expectations as they seek a substantive relief, in the form of a direction from this Court on the Respondents, in admitting the

Petitioners to the Faculty of Music of the 1st Respondent University. The Petitioners' prayer seeking the said relief is a clear indication that they do not seek a procedural legitimate expectation, by which they could only seek an opportunity of being heard, before a decision is taken.

Where an applicant relies on frustration of his legitimate expectation, in seeking to challenge a decision made by a public authority, the Court would have to satisfy itself as to the '*legitimacy*' of that expectation. In ***R v. North and East Devon Health Authority, ex p Coughlan*** [2000] 3 All E.R. 850, it was stated that in a situation where frustration of substantive legitimate expectation is alleged, the "*Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy*". But it would undertake that task "*once the legitimacy of the expectation is established*". In ***Kaviratne and Others v Commissioner General of Examination and Others*** *2012 [B.L.R.] 139* at p.149, it was declared that *"whether an expectation is legitimate or not is a question of fact".*

Therefore, it is necessary for this Court to satisfy itself that the undertaking or promise of a benefit from which the 18th Respondent Commission had resiled from, as alleged by the Petitioners in support of their claim of frustration of legitimate expectation, is a "*clear, unambiguous and devoid of relevant qualification*" per Lord Justice *Bingham* in ***R v. IRC Ex p. MFK Underwriting Agencies*** [1990] 1 W.L.R. 1545 at 1570. In examining whether such an undertaking is a "*clear, unambiguous and devoid of relevant qualification*", the House of Lords, in the case of ***Francis Paponette and Others v. The Attorney General of Trinidad and Tobago*** [2010] UKPC 32, adopted the test used in ***R***

(Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence [2003] QB 1397at para 56: by stating "*… how on a fair reading of the promise it would have been reasonably understood by those to whom it was made*."

How, this objective test is applied is illustrated by the reasoning adopted in the judgment of ***R v. North and East Devon Health Authority, ex p Coughlan*** [2000] 3 All E.R. 850. This was an instance where a woman with special needs was assured by the National Health Service that she would receive nursing care 'for life' at a purpose-built facility by that service. At a later point of time, the National Health Service had decided to transfer her care to a local authority, after closing down that facility.

In determining the question whether the "*legitimacy of the expectation is established*", the Court considered the words used in a letter issued by a General Manager of the predecessor to the local health authority, which stated:

> *"I am writing to confirm therefore, that the Health Authority has made it clear to the Community Trust that it expects the Trust to continue to provide good quality care for you at Mardon House for as long as you choose to live there. I hope that this will dispel any anxieties you may have arising from the forthcoming change in management arrangements, about which I wrote to you recently.*"

When the National Health Service challenged her application on the basis that there was no legitimate expectation since the letter did not actually use the expression '*home for life*', the Court, after accepting that

the words of the letter did create a legitimate expectation for care for life in a dedicated facility, said: " *once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy*".

In relation to the consideration, whether there is frustration of substantive legitimate expectation, the Court observed:

> *"The Court has, in other words, to examine the relevant circumstances and to decide for itself whether what happened was fair. This is of a piece with the historic jurisdiction of the Courts over issues of procedural justice. But in relation to a legitimate expectation of a substantive benefit (such as a promise of a home for life) doubt has been cast upon whether the same standard of review applies."*

De Smith, (supra) states (at p.680) that the judgment of ***R v. North and East Devon Health Authority, ex p. Coughlan*** (ibid) is where " *a personally directed representation occurred in one of the earliest cases on the substantive expectation (although those words were not used)*" and adds that an example for the creation of a legitimate expectation would be " *where an express undertaking is given which induces an expectation of a specific benefit or advantage*" and the "*form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow*." Professor *Craig* describes this judgment as the "*leading decision*" at that point of time on substantial legitimate expectation, in the 5th edition of his book (at p.649).

The 18th Respondent Commission is the sole authority who decides whether a student is selected for university admission or not. That is a decision taken on the basis of the individual Z-score of the student. The 1st Respondent University had no such authority to select students for admission. The 1st Respondent University, in informing each Petitioner of his or her result in relation to the aptitude test, through letters P11(i) to P11(lii), thought it fit to remind them of the fact that their selection to the University is dependent on the result of the aptitude test as well as their Z-score. Hence, the fact that, in securing 50 or more marks in the aptitude test, the Petitioners have satisfied an additional entry requirement for University admission, in turn offered them of no undertaking or a promise of a benefit by the 18th Respondent Commission.

Irrespective of the selection criterion for the admission to the State Universities, whether they are selected under the *'All Island Merit'* or the *'District Quota'*, the primary consideration adopted by the 18th Respondent Commission is the "rank *order of the Z-scores obtained by the candidate*" for that particular year in the Advance Level Examination. The said Commission asserted that it had selected the students for the Faculty of Music of the 1st Respondent University on that basis and the above table referring to the relative Z-scores supports that position. The emphasis of Z-score in selection for admission by the 18th Respondent Commission is clearly stated in the UGC Handbook. The achievement of 50 or more marks at the aptitude test by the Petitioners, only indicated that they are not disqualified for admission to the course of study in music. If they were to be selected to the 1st Respondent University, they had to have the required level of the Z-score, which is set under the district basis scheme and also to 'pass' the aptitude test.

Thus, I am of the view that the contention of the Petitioners, that once the 1st Respondent University conducts the aptitude test, it would then "*constructs a list of the applicants who have passed the aptitude test, in the order of the highest receiving mark, and refer the same to the 18th Respondent*" as one of the important procedural requirements that had to be followed in the selection process, is based on an erroneous assumption made on the selection policy, as declared in the UGC Handbook.

It is already noted elsewhere, that the manner in which the Petitioners have perceived the selection process employed by the 18th Respondent Commission for selection of students for University admission is that the said Commission, having received the list of the students who have passed the aptitude test from the 1st Respondent University, then, "*selects the mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*".

It is clearly evident from the above considerations that this is not the procedure of selection as set out in the UGC Handbook issued by the 18th Respondent Commission. Clearly the Petitioners have misled themselves in adopting the said view in relation to the actual selection process for admission to the Faculty of Music in the 1st Respondent University. It is not a situation where the application of a simple equation in which the names of the students who have scored 50 or more are arranged in the order of merit and then the 18th Respondent Commission picks the Z-score obtained by the 250th student as the cut off mark for university admission.

The perception of the Petitioners, in relation to the selection process that "*accordingly the 250 applicants selected to the Faculty of Music in the 1st Respondent University, first and foremost pass the mandatory aptitude test and then subsequently must satisfy the minimum Z-score set by the 18th Respondent …*" could not be termed as a perception that had been created upon 'fair reading' of the statements contained in the UGC Handbook.

The factual situation as well as the legal principles that had been relied upon by the Petitioners are more or less akin to what had been relied upon by the Petitioner in her application under Article 126, as indicative from the judgment of this Court in ***De Alwis v Anura Edirisinghe and Others*** (2011) 1 Sri L.R. 18.

In that application, the Petitioner, being a student who had been initially selected for the medical faculty on her Z-score, as indicated in a provisional list, was subsequently selected to the dental faculty. The said provisional list was revised upon the release of re-correction results of other candidates. The re-correction results had changed the overall Z-score of students, which in turn resulted in receiving a lower Z-score by the Petitioner than her previous Z-score. In these circumstances she had, in support of her allegation of violation of Article 12(1) of the Constitution, claimed frustration of substantive legitimate expectation, alleging 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 up the position that her selection to Medical Faculty was made on the provisional Z-score and therefore is not final. They also contended that there was no change in the applicable policy and accordingly she could not have entertained any legitimate expectation, based on the said provisional Z-score result.

This Court, having relied on dicta of Lord *Diplock* in ***Council of Civil Service Unions v. Minister for the Civil Service (The GCHQ Case)*** - (1984) 3 All E.R. 935, that *'if a person relies on legitimate past practice that had been withdrawn or changed suddenly without any notice or reason for such withdrawal or change*', determined that there was no '*promise or an undertaking*' on the part of the Respondents, which established a past conduct on which the student could have founded her claim on a legitimate expectation.

It is held by the Court that :

> " … *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 in 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*."

Similarly, in this instance too, there was no change in the declared admission policy by the 18th Respondent Commission. The 1st Respondent University partially complied with the directive of the 18th Respondent Commission to send names of students who have passed the aptitude test in three times the proposed intake. In fulfilling the said requirement, the 1st Respondent University therefore revised its pre-determined pass mark and made an additional list of another 393 names of students in its 2nd list, as students, who also have passed the aptitude test.

This fact does not validate the contention advanced by the Petitioners that the students, whose names are contained in the 2nd list, were selected to be admitted to the 1st Respondent University by the 18th Respondent Commission, in spite of the fact that they had 'failed' in the aptitude test. The said 1st list of names of 360 students could be taken only as a provisional list, in view of the subsequent revision of the pass mark by the 1st Respondent University in compiling the 2nd list. Hence none of the students included in the 2nd list can be considered as disqualified for admission, as they too have passed the aptitude test.

Learned Counsel for the 18th Respondent Commission contended that the Petitioners have failed to demonstrate to this Court that there has been an established practice by the said Commission of giving primacy to the results of the aptitude test over that of the Z-score obtained by students and had relied on the following quotation from the judgment of Ariyaratne ***et al v. Illangakoon et al*** (SC FR Application No. 444/2012 – SC minutes of 30.07.2019), in support:

> *"… the first characteristic which will sustain a Petitioner's claim that he has a substantive legitimate expectation the respondent public authority will act in a particular manner with regard to him, is that the petitioner must establish the public authority gave him a specific, unambiguous and unqualified assurance that it will act in that manner [or, alternatively, that the respondent 57 public authority has followed an established and unambiguous practice which entitled the petitioner to have a legitimate expectation the public authority will continue to act in that manner or that the facts and circumstances of the dealings between the public*

authority and the petitioner have created such an expectation."

As in the case of, ***De Alwis v Anura Edirisinghe and Others*** (supra) in this instance too, the Petitioners have failed to establish that there is an undertaking or a *'promise of a benefit'* contained in the UGC Handbook or in any other notification addressed to them stating that the selection for admission for the Faculty of Music of the 1st Respondent University by the 18th Respondent Commission would be made on the basis that the *" … mark obtained by the 250th applicant in the said list and sets the Z-score received by the 250th applicant as the final cut off Z-score for the enrolment of applicants to the Faculty of Music of the 1st Respondent for the respective year*".

In applying the objective test of '*fair reading*' on the policies and the applicable selection criterion as stated in the UGC Handbook, on which the Petitioners have founded their contention before this Court, I find that there never was an undertaking or a '*promise of a benefit'* given to any of the Petitioners by the 18th Respondent Commission that in selecting students for admission to the Faculty of Music of the 1st Respondent University, it would only consider the students who have scored 50 marks and above in the aptitude test. In the absence of any undertaking or a promise of a benefit, the legitimacy of the expectation, being an integral component of the Petitioners contention, remain an unestablished factor.

On the other hand, the UGC Handbook (P2) indicates the consistency of the position adopted by the 18th Respondent Commission before this Court, in very clear terms to any Petitioner, who took the trouble to read the 20th question and answer in the section titled

"*Frequently Asked Questions by the Students*" (at p. 215). It is appropriate to quote the particular frequently asked question and its answer relevant to this application in *verbatim*, to illustrate how the 18th Respondent Commission had indicated its admission policy on this aspect.

The question No. 20 reads as follows:

> "What, if I pass the practical/aptitude test but not within the cut off for the same course of study?
>
> To enter the course of study that requires a practical/aptitude test, you must obtain required Z-score in addition to passing the practical/aptitude test. You will not be selected to a course of study merely by passing the practical/aptitude test, if you have not obtained sufficient Z-score."

This question and its answer under FAQ, provides an unambiguous answer to the issue, whether there was any undertaking or a *promise of a benefit,* that had emanated from the 18th Respondent Commission, that students with 50 or more marks are only considered for admission to the 1st Respondent University irrespective of their individual Z-score, clearly in the negative. It is explicitly stated therein that only the students, who obtained the '*required Z-score*', in addition to '*passing*' the aptitude test are selected. In applying the said objective test of 'fair reading' of the highlighted policies and instructions contained in the UGC Handbook (P2) I am of the view that there never was such an undertaking or a promise of a benefit given to any of the Petitioners by the 18th Respondent Commission.

It is indeed unfortunate that if the internal squabble between the two State institutions that are invested with statutory powers and functions relating to tertiary level education over the failure to send 750 names, had created a mistaken belief of a '*legitimate expectation*' in the minds of the Petitioners for selection for admission to the 1st Respondent University, to which they had no reasonable prospect of, due to their relatively low Z-score values. This Court empathies with the Petitioners and understands their frustration in failing to fulfil their aspirations to pursue higher education in their chosen areas of study. Not only the Petitioners have scored more than 50 marks at the aptitude test; most of them have secured A passes for the subject of music in the Advanced level examination, a clear indication of being gifted with a natural talent in music. But the highly competitive and therefore tightly-regulated University selection process designed to minimise inequality, based on the national policies on University admission, and gave them no undertaking or a *'promise of a benefit*' of making the selections the way they have expected. Accordingly, the Petitioners are not entitled to relief under the public law principle of substantive legitimate expectation.

The imposition of an additional requirement of a 'pass' in the practical/aptitude test, in the selection for admission to the degree programs in the Arts, apparently had a troubled history. The 1st Respondent University strongly felt the result of such a test should be the determinant factor for selection of students to the degree programmes conducted by it. However, the 18th Respondent Commission is not so convinced of the validity of an argument for attributing an enhanced status to the results of the aptitude test in the University selection process. Essentially, this is a policy issue best left to

be resolved by the concerned public entities, who possess the required expertise to formulate a policy that addresses these concerns, in the light of the Directive Principles of State Policy, as set out in the Article 27(2)(h) of the Constitution.

Before I part with this judgment, there is one more allegation of the Petitioners that should be considered. In their act of citing the 28th, 29th and 30th Respondents, the Petitioners would have intended to demonstrate to Court that at least in the selection of one of the said three Respondents to the Faculty of Music of the 1st Respondent University, the 18th Respondent Commission had acted contrary to its own selection of policy of admitting students who "… *fails the practical/aptitude test he/she is deemed ineligible for admission for the relevant course of study*."

Despite making the claim that the 28th, 29th and 30th Respondents have 'failed' the aptitude test, the Petitioners did not substantiate that assertion by making reference to them in the two lists sent by the 1st Respondent University to the 18th Respondents, marked as 2R4A and 2R6A/XII. These two documents contain only the names of the students who have 'passed' the aptitude test along with their index numbers and the NIC numbers, as confirmed by the 1st Respondent University. No individual marks were mentioned in any of these two lists. It is only in the list, marked as 2R3, details of the marks received by each student is disclosed to Court but that too under the reference "Exam No" with no mention of their names, index numbers or the NIC numbers. Hence, whether the 28th and 29th Respondents have passed or failed in their aptitude test were not established or could be ascertained.

Name of the 30th Respondent is listed under No.4 in *Colombo* district with a Z-score of 1.2032 and included as No.114 in the list of selected students for admission (2R2A). It is clear from the above tabulation that the 30th Respondent has a Z-score over and above the cut off mark of 0.9382 for *Colombo* district. The Z-score of the 21st Petitioner, who had the highest Z-Score of 0.8558, when compared with the other Petitioners who sat for the Advance Level Examination from the *Colombo* district, is obviously a lower Z-score than the said cut off mark. The 30th Respondent's name is included in the 2nd list containing names of the students who have 'passed' the aptitude test conducted by the 1st Respondent University under No. 169 and therefore does not disqualify herself for admission, since the applicable policy consideration clearly stipulated that the failure of the aptitude test only made a particular student "*ineligible for admission for the relevant course of study.*"

Considering all the facts and circumstances that had been placed before this Court and for the reasons set out above, I have reached the conclusion that the Petitioners have failed to establish the legitimacy of their expectation in the selection of the students for admission to the degree program of Bachelor of Performing Arts – Music (Special) conducted by the Faculty of Music in the 1st Respondent University, for the academic year 2018/2019 by the 18th Respondent Commission. Therefore, the said selection made by the 18th Respondent Commission could not be termed as an illegal, unfair, arbitrary or an unreasonable act, which had violated any of the 52 Petitioners' fundamental right to equality as guaranteed under Article 12(1) of the Constitution, by frustrating their substantial legitimate expectation.

Therefore, I hold that the Petitioners have not been successful in establishing that their fundamental rights guaranteed under Article 12(1) of the Constitution were infringed by one of more Respondents.

This application is accordingly dismissed. I make no order as to costs.

JUDGE OFTHE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

A.L.S. GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT