

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

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

SC (FR) Application No. 61/2019

M. A. Shamly Mohammed,
No. 104/2, Madulbowa, Hemmathagama.

PETITIONER

vs.

1. Professor Mohan De Silva
- 1A. Senior Professor Sampath Amaratunga
Chairman, University Grants Commission
2. Professor P.S.M. Guneratne
- 2A. Senior Professor Janitha A Liyanage
- 2B. Senior Professor Chandana P Udawatte
Vice Chairman, University Grants Commission
3. Professor Malik Ranasinghe
4. Rev. Professor K M Sangarakiththa Thero
5. Professor Hemantha Senanayake
6. Dr. Y Haniffa
7. Professor K. Kumara Vadivel
8. Dr. Kapila Senanayake

8A. Senior Professor A.K.W. Jayawardena

8B. Professor Vasanthi Arasaratnam

8C. Professor Premakumara Silva

8D. Rev. Professor Kotapitiye Rahula Thero

3rd – 8D Respondents are members of the
University Grants Commission

9. Dr. Priyantha Premakumara,
Secretary to the University Grants Commission

10. University Grants Commission

1st – 10th Respondents at 20, Ward Place, Colombo 7

11. Hon. Attorney General,
Attorney General's Department, Colombo 12.

RESPONDENTS

Before: Jayantha Jayasuriya, PC, CJ
Murdu N. B. Fernando, PC, J
Arjuna Obeyesekere, J

Counsel: M. Nizam Kariapper, PC with A. Ilham N. Kariapper and Chathurika Perera
for the Petitioner

Viveka Siriwardena, PC, Additional Solicitor General for the Respondents

Argued on: 20th July 2023 and 8th May 2024

Written Tendered by the Petitioner on 14th July 2023 and 18th July 2024

Submissions:

Tendered by the Respondents on 7th July 2022, 5th June 2024 and 11th
September 2024

Decided on: 25th October 2024

Obeyesekere, J

The Petitioner filed this application on 15th February 2019 complaining that the decision of the 10th Respondent, the University Grants Commission, preventing him from submitting through its online platform an application seeking admission to a State University for the academic year 2018 – 2019 is illegal and arbitrary and is violative of his fundamental rights guaranteed under Article 12(1) of the Constitution. Leave to proceed was granted on 22nd November 2019 for the alleged violation of Article 12(1).

The Petitioner and the GCE Ordinary and Advanced Level examinations

The Petitioner is a permanent resident of Hemmathagama situated in the District of Kegalle. He had his primary and secondary education leading up to the General Certificate of Education (Ordinary Level) examination in December 2013 at the Al – Ashar Muslim Maha Vidyalaya, Hemmathagama. Having secured 8 ‘A’ grade passes and a ‘B’ grade pass at the said examination, and being desirous of pursuing further studies in the mathematics stream, the Petitioner states that he resigned from Al – Ashar Muslim Maha Vidyalaya and started attending a tutoring at Kekunagolla in Kurunegala, together with a group of other similarly circumstanced students.

The Petitioner states further that he sat for the General Certificate of Education (Advanced Level) examination as a school candidate from the Kahatagasdigiliya Madya Maha Vidyalaya situated in the Anuradhapura District in August 2016 and obtained an ‘A’, ‘B’ and a ‘C’ grade in Combined Mathematics, Chemistry and Physics, respectively, with a ‘Z’ score of 1.1774. The Petitioner was thus eligible to apply for admission to a State university, with the next step being the submission of an application through the online platform in terms of the criteria laid down in the handbook issued by the University Grants Commission relating to admission of students for the academic year 2016 – 2017. I shall refer to this handbook as the ‘First Handbook’.

I must state at the outset that in order to maintain the integrity of the application and admission process, the First Handbook, and all subsequent handbooks as well, required every applicant for university admission to certify that the information provided therein

is true. Paragraph 1.7 of the First Handbook specified further that while a student who makes a false declaration or produces forged documents for application and registration for university admission will be ineligible for admission, if the information provided by the student with the application is found to be false or inaccurate after admission, action will be taken to dismiss the student from the university.

Change of district

It would perhaps be relevant to understand at this stage the reason for the Petitioner who sat for the Ordinary Level examination from the Kegalle District to have shifted to the Anuradhapura District for the purpose of sitting the Advanced Level examination.

A great majority of the admission of students to State universities is carried out on the results obtained by each student at the Advanced Level examination. Although the basis of selection is through one common examination where all students sitting for that examination compete on what appears to be a single level playing field, the reality is that the facilities available in each district may vary significantly, thus distorting the level playing field. The State has thus intervened to balance the inequalities that exist among the different districts by having separate university entrance qualification marks for each district.

The University Grants Commission has accordingly identified several districts as being educationally disadvantaged with the district of Anuradhapura being one of them. Thus, the qualifying mark required for admission to a State university from a district such as Anuradhapura is generally less than for example students who qualify from the Colombo, Kandy, Kegalle or Jaffna districts. Accordingly, a student such as the Petitioner who is a permanent resident of the Kegalle district seeking admission to a State university must obtain a higher 'Z' score than a student seeking admission from the Anuradhapura district. This explains the decision of the Petitioner to sit for the Advanced Level examination as a candidate from the Anuradhapura district, and gain an advantage that he would not have been entitled to had he continued his schooling in the Kegalle district.

Restrictions on the change of district

Of course, if shifting from one district to another is easy and hassle free, one would expect many students to make this shift and gain an unfair advantage thus distorting the steps taken by the State in levelling the playing field. In order to prevent the system from being abused and prevent a student who has his or her permanent residence within a district which requires a higher 'Z' score and who has completed his or her education until the Ordinary Level examination in a school situated within such district from crossing over to a school situated in an educationally disadvantaged district, the Ministry of Education has issued circulars stipulating the criteria that must be satisfied in order for a student to gain admission to the Advanced Level stream of a school situated in a district that is different from the district from which that student had sat for the Ordinary Level examination. Thus, a student studying in a school situated in a district which has not been classified as an educationally disadvantaged district for purposes of university admission will not be permitted to seek admission to a school situated in a district classified as an educationally disadvantaged district, unless the exceptional situations identified in such circulars apply to such student.

The above restriction is also reflected in the admission criteria stipulated by the University Grants Commission. According to the First Handbook, in order to decide the district of a school candidate for university admission, the candidate must provide evidence of enrolment in a school/s for a period of three years preceding the date of the Advanced Level examination. For this purpose, the head of the school must certify, on the basis of school records, the accuracy of the information provided by the candidate.

The aforementioned three-year period is calculated backwards from the month immediately preceding the month in which the student sat the Advanced Level examination to qualify for university admission. The district where the school at which the applicant studied for more than one year during this period is situated will be considered as the district of the candidate for university admission. If the applicant has enrolled in more than one school during the said three-year period, then, the district within which the school at which the applicant has studied the most number of days is situated is considered as the district of that applicant. If however the applicant has not

enrolled in any school for his or her Advanced Level studies during that period, the district where the permanent place of residence of the applicant is situated is the district considered for university admission, with the applicant required to submit his original school leaving certificate and a certificate from the Grama Niladhari together with his application. I must observe that Section 1.5 and Section 8 of the First Handbook clearly explain the manner of determining the district under which an applicant is eligible to apply, leaving no ambiguity in the mind of an applicant.

Resort to illegal means

Having successfully completed the Ordinary Level examination and being desirous of continuing with his studies, one would have expected the Petitioner to have either continued in the same school at Hemmathagama or at another school within the Kegalle district as he was a permanent resident of Kegalle. The Petitioner did neither and instead, opted to follow classes at a tutoring in Kurunegala. But, probably having realised that he would have to compete for university admission as a student of Kegalle district and not being eligible to gain admission to a school outside Kegalle in terms of the criteria laid down by the Ministry of Education, the Petitioner had resorted to illegal means and registered himself as a student at the Kahatagasdigiliya Madya Maha Vidyalaya. It is indeed interesting to note that nowhere in the petition to this Court does the Petitioner state that he was a student at the said Maha Vidyalaya, for the simple reason that his registration was part of a scam which appears to have been orchestrated by the then Principal of the said school.

In his letter dated 21st March 2018 sent to the University Grants Commission [P9], the Petitioner has explained his actions in the following manner:

“I followed the GCE (A/L) in the maths stream in a private academy. In between I got registered in Kahatagasdigiliya MMV for GCE (A/L). After my registration I did not go to that school for my GCE (A/L) studies. But last moment I went to the above Government school and stayed for my studies for a few days. As I was wrongly guided I admit my fault regarding this.”

The learned Additional Solicitor General, Ms. Viveka Siriwardena, PC submitted that the Petitioner was one of over 80 students whose names had been fraudulently entered by the Principal of that school as students who had enrolled in September 2014. These students did not follow any classes in that school and certainly could not have followed the subject of Chemistry, for the reason that the said school did not have a Chemistry teacher. The Principal had thereafter issued the school leaving certificate [P2] certifying that the Petitioner had been a student of that school until he sat for the Advanced Level examination in August 2016, which is factually false. Thus, on the face of P2, the Petitioner was 'eligible' to be considered for university admission from the Anuradhapura district. With the University Grants Commission relying on the school leaving certificate to determine the district from which admission was to be considered, all those involved in this scam may have felt that their actions are foolproof.

Application for admission

I have already stated that the Petitioner was eligible to apply for admission to a State university for the academic year 2016 – 2017. Having in his possession the school leaving certificate, which the Petitioner clearly knew was false, he had proceeded to the next stage of submitting a formal application to the University Grants Commission. It is admitted that in the application submitted online, the Petitioner had declared Kegalle as the district from which he was seeking admission but had by a letter sent to the University Grants Commission thereafter in February 2017 [R3c] changed the district to Anuradhapura. The Petitioner's application had accordingly been processed by the University Grants Commission as a student seeking admission from the district of Anuradhapura. During the period between 12th June 2017 and 9th August 2017, the Petitioner was offered admission, initially to the Physical Science stream of the University of Kelaniya and thereafter at the University of Sri Jayawardenapura, and finally to the course of study in Industrial Statistics and Mathematical Finance at the University of Colombo. The Petitioner had not accepted any of these offers and had instead sat for the Advanced Level examination held in August 2017.

Parallel to the application of the Petitioner being processed by the University Grants Commission, the fraudulent manner of registering students at the Kahatagasdigiliya Madya Maha Vidyalaya had caught the attention of the Ministry of Education. The investigation that followed had revealed that while more than 80 students had been registered contrary to the circular issued by the Ministry of Education and that false entries had been made by the then Principal to effect such registrations, 28 students had qualified for university admission from that school. Incidentally, during such investigation, and prior to the Petitioner submitting his application seeking admission to university, the statement of the Petitioner too had been recorded. Thus, by the time the Petitioner submitted his application for admission, the Petitioner was aware that his actions were under review.

Upon the completion of the said investigation, the Ministry of Education had notified the above matters to the University Grants Commission. I must state that disciplinary action had been taken against the Principal of the said school who is the main perpetrator of this scam and who manipulated this entire transaction by enticing young school children to engage in fraudulent activity. Pursuant to being interdicted followed by a formal disciplinary inquiry, the Principal had been reinstated in service subject to the suspension of two salary increments and being transferred to a school which does not offer a course of study leading up to the Advanced Level examination. The Principal had thus got away with an extremely lenient punishment leaving in the lurch the beneficiaries of his scam.

Action by the University Grants Commission

It is in this factual background that the University Grants Commission informed the Petitioner by its letter dated 13th December 2017 [R13] that he has submitted, "*wrongful information regarding (his) schooling period in the application form for university admission for the academic year 2016 – 2017.*" The University Grants Commission had accordingly requested the Petitioner to provide an explanation on or before 27th December 2017 and informed the Petitioner that, "*If you fail to submit an explanation by 27th December 2017, action will be taken to **cancel your application for university admission for the academic year 2016/2017** considering that you have no justification to provide regarding the above act.*"

It is admitted that the Petitioner did not respond to the above letter and that the University Grants Commission proceeded to disqualify the Petitioner from being admitted to a State university for the academic year 2016 – 2017, even though there was no further intimation in this regard by the University Grants Commission. As borne out by the explanation contained in his aforementioned letter P9, the Petitioner was aware of what he was getting into, and he must take full responsibility for his actions and face the consequences. To my mind, the decision of the University Grants Commission to reject the application of the Petitioner for the academic year 2016 – 2017 is completely in order. The said decision however is not the subject of review in this application, but only gives context to the issue that must be considered in this application.

Fresh application for university admission – 2018/2019

The issue that culminated in this application commenced in March 2018, when the Petitioner, having sat for the Advanced Level examination for the second time in August 2017 had attempted to submit through the online platform his application for admission to a State university but had been prevented from proceeding any further the moment he entered his National Identity Card number. Having realised that he has been *blacklisted* as a punishment for the above misdemeanor committed by him, and probably for the reason that his 'Z' score was not sufficient to secure admission for the academic year 2017/2018, the Petitioner had not pursued his rejection any further. However, by P9 the Petitioner had informed the University Grants Commission that he will be sitting for the Advanced Level examination for the third time in August 2018. While repenting his actions, the Petitioner had made a fervent appeal by P9 that he be allowed to apply on the results of the examination that he was to sit in August 2018. Although the receipt of this letter is admitted by the University Grants Commission, a formal reply has not been sent to the Petitioner.

The Petitioner obtained two 'A' grades and one 'B' grade in Physics, Chemistry and Combined Mathematics, respectively in his third attempt in August 2018 and was thus eligible to apply for admission to the Engineering stream of a State university for the academic year 2018/2019. When the Petitioner attempted to submit his application for admission through the online platform he once again found that the system has

permanently blocked any application from being submitted under his National Identity Card number. Having been prevented from submitting an application, the Petitioner, by letter dated 18th January 2019 [P8] addressed to the University Grants Commission expressed regret for what he had done, and requested that he be permitted to apply for admission to a State university.

In the absence of a reply, the Petitioner filed this application complaining that the decision of the University Grants Commission to permanently disqualify him from applying to a State university is arbitrary and illegal, and is violative of his fundamental right to the equal protection of the law.

This application must be considered in the light of three matters, namely the provisions of Article 12(1), the provisions of Article 126(4) and the right to education.

Article 12(1)

Article 12(1) of the Constitution guarantees that *“All persons are equal before the law and are entitled to the equal protection of the law.”*

In **Karunathilaka and another v Jayalath de Silva and others** [2003 (1) Sri LR 35 at page 41] Shirani Bandaranayake, J (as she then was) observed as follows:

“The basic principle governing the concept of equality is to remove unfairness and arbitrariness. It profoundly forbids actions, which deny equality and thereby becomes discriminative. The hallmark of the concept of equality is to ensure that fairness is meted out. Article 12(1) of the Constitution, which governs the principles of equality, approves actions which has a reasonable basis for the decision and this Court has not been hesitant to accept those as purely valid decisions.”

In **Wickremasinghe v Ceylon Petroleum Corporation and others** [2001 (2) Sri LR 409], Chief Justice Sarath Silva, having considered whether the decision of the Ceylon Petroleum Corporation to terminate the lease agreement that it had with the Petitioner was arbitrary in the context of the said decision being unreasonable, stated as follows:

“The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.

The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. But, the test once again is one of being reasonable and not arbitrary. Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis.

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority.”

Article 12 and Article 126

The negation of arbitrariness and unreasonableness embodied in the right to equality is further reflected in the just and equitable jurisdiction of this Court recognised under Article 126(4), where it is stated that, *“The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article...”*.

As observed in the minority judgment delivered by Priyantha Jayawardena, PC, J in **Athulasiri Kumara Samarakoon and Others v Hon. Ranil Wickremesinghe and Others** [SC FR 195/2022, 212/2022; SC Minutes of 14th November 2023], *“The phrase ‘just and equitable’ allows the court to consider relevant factors connected with the averments in the petition and the prayer to the petition. The word ‘just’ denotes fairness and reasonableness, and not arbitrariness. The word ‘equitable’ has the meaning of ‘just’. The phrase ‘just and equitable’ falls within the branch of civil law that is connected with fairness and justness. It ensures that the law will not impose unnecessary or unintended harsh outcomes which unfairly prejudice some of the parties in a case.”*

Right to education and Article 12(1)

In the absence of any specific provision in the Constitution, the right to education has been recognised by this Court as coming within Article 12(1).

Sri Lanka has a long and rich history in providing free education to its children. The manner in which State responsibility for primary and secondary education has evolved since the turn of the twentieth century, and the critical importance of education including the medium of instruction was considered by this Court in **Secretary, Ministry of Education and another v Weragoda Kapuge Priyantha and others** [SC Appeal No. 52/2020; SC Minutes of 13th January 2023].

In **Rienzie Perera v University Grants Commission** [(1978-79-80) 1 Sri LR 128], Justice Sharvananda (as he then was) stated that, *“Education is one of the most important functions of the State today. The large expenditure of money incurred by the State for education signifies its recognition of the importance of education to a democratic society. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the State undertakes to provide it, is a right which must be made available to all on equal terms. The Constitution enjoins the organs of Government to secure and advance and not deny this fundamental right of equality of treatment.”* [emphasis added]

S. Thuraiaraja, PC, J observed in **M D Malik Sachinthana v University Grants Commission and others** [SC (FR) Application No. 311/2019; SC Minutes of 9th June 2022] that, *“although there is no specific provision dealing with the right to Education in our Constitution as such in the Universal Declaration of Human Rights, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12 (1) of the Constitution. In doing so, the Supreme Court has not only considered that the Right to Education should be accepted as a fundamental human right, but also had accepted the value of such Education, which has been described by James A. Garfield (in his letter accepting the Republican nomination to run for President on 12th July 1880), as, “next in importance to freedom and justice is popular Education, without which neither freedom nor justice can be permanently maintained.”*

In the '**National Education Policy Framework 2020 - 2030**', the National Education Commission, having observed that reforms in the education sector have enabled large numbers of children to access education at the undergraduate level and improve their social and economic standing in society, have gone onto state as follows:

"... the total number of admissions to Grade 1 in 2004 was 302,000, and from this cohort, only 57,000 or a 18.9% entered university or professional level study programmes following the completion of G.C.E. (A/L) examination. This means that from a cohort of about 302,000 students, 245,000 (81.1%) leave the academic education stream without entering higher education. They either join the Technical and Vocational Education or Training sector to acquire skills to enter into the middle-level skilled labour force or join the labour force as unskilled labour. From this group, many appear to remain as youth in Not in Education, Employment or Training (NEET group)" [page 13]

"As of UGC data in the year 2019, 24,890 graduates obtained their qualifications from public universities. These numbers account for only 7.8% of the 19 – 23-year-old population in the country. Out of this 24,890, 9,380 (37.8%) are arts stream graduates and 5,445 (21.9%) commerce and management stream graduates. Both these groups have consistently experienced low to medium employability in the employment market. On the other hand, only 3,242 (13.0%) of graduates were from the streams of biological sciences (that include medicine, dental science, veterinary science, agriculture, allied health sciences, and indigenous medicine), and 5,871 (23.6%) of graduates from physical science stream (that includes engineering, computer science, science, architecture) who face moderate to high employment prospects."

"As regard to 2018/2019 intake, data have shown that the enrolment into arts, management, and commerce study programmes which reflect relatively low employability accounted for 48.2% of the intake, while the rest of the disciplines, mostly science-based study programmes — science, engineering, medicine, dental science, veterinary science, agriculture, allied health sciences, computer science,

technology and architecture and allied fields which have high to medium employability accounted only for 51.8% of the total undergraduate enrolment. This pattern is not different in private higher education institutions (PHEIs) either as the fields such as management, business and ICT are the most offered, affordable, and widely enrolled study programmes.” [page 16]

“Thus, the legacy of problems of skewed enrolment and distribution in favour of arts and commerce streams in secondary education is also reflected in the programme of choices of those entering higher education. This skewed distribution in favour of arts graduates has put Sri Lanka in an unenviable place in global context. As of the World Bank Sector Review Report (2017), Sri Lanka in global comparison produces the highest proportion of graduates in humanities and social sciences (ranking 1st) while producing one of the lowest percentages of graduates in science, engineering and allied fields (ranking 92nd). It has been statistically shown, graduates from the humanities and social sciences fields have difficulties in finding gainful employment, and when they do, often end up in sectors that are only tangentially related to their fields of study, whereas the science, engineering and IT graduates, who are relatively few, have little difficulty in finding a job, and it usually corresponds to their discipline.

Therefore, there are compelling reasons to improve science and mathematics education in the country and this requires a multipronged approach - improving the quality and quantity of teachers in mathematics and science subjects, improving opportunities for science and mathematics education at senior secondary and upper senior secondary level, and increasing opportunities for science and mathematics, engineering and technology streams of education at the university level, etc., are the few interventions among many to give high priority.” [page 17]

Thus, although I am mindful that the impugned actions of the University Grants Commission must be examined from a much wider angle, with the equality provision in Article 12 being the antithesis to arbitrariness, a determination by this Court that the right to equality guaranteed to the Petitioner by Article 12(1) has been violated must be preceded by a finding that the aforementioned decision of the University Grants Commission is unreasonable, unfair and therefore is arbitrary.

Has the Petitioner come to Court with clean hands?

I must at this stage consider the preliminary objection raised by the learned Additional Solicitor General that this application is liable to be dismissed *in limine* for the reason that the Petitioner has not come to Court with clean hands. The basis for this objection was that the Petitioner has tendered with the petition the school leaving certificate P2 in support of his case before this Court, knowing fully well that P2 is a false document and that the Petitioner has thereby tried to mislead Court into accepting P2.

I have carefully examined the petition in order to understand the context in which P2 has been presented. While it was known to the University Grants Commission prior to the filing of this application that P2 is a false document, P2 is the school leaving certificate of the Petitioner and whether he likes it or not, P2 is a document that the Petitioner must live with. Therefore, by producing P2, it is not possible to state that the Petitioner has not come to Court with clean hands. What is also important is that the Petitioner's case is not founded upon P2 nor is the Petitioner claiming that he had attended the Anuradhapura school as claimed in P2. On the contrary, the Petitioner has admitted that he attended a tutoring in Kekunagolla and that although he registered at the Anuradhapura school, he only attended the said school for a short period. In these circumstances, I am not in agreement with the submission of the learned Additional Solicitor General that the Petitioner has not come to Court with clean hands.

The basis for the disqualification

Prior to considering the basis for the permanent disqualification of the Petitioner, I must emphasise that the facts of this application fall into two phases. In Phase One are those events that occurred prior to, and which eventually led to, the decision of the University Grants Commission to deny the Petitioner's admission to a State university for the academic year 2016 – 2017. I have already stated, and will reiterate, that what the Petitioner did is wrong and cannot be condoned by whatever yardstick one would assess his conduct with. The learned President's Counsel for the Petitioner conceded that the Petitioner has committed a serious misdemeanour by submitting an application with false

information and thereby seeking to gain an unfair and illegal advantage over candidates who have complied with the law. He stated further that although the Petitioner was only 18 years of age when he got involved in this scam, the Petitioner must face the consequences of his actions. Being deprived of university admission for that year and being compelled to re-sit the Advanced Level examination is a sufficient punishment. Phase Two consists of those events that occurred after R13 and P9, culminating in the Petitioner being permanently prevented from applying for admission to a State university.

This brings me to the main issue in this application, that being whether the decision of the University Grants Commission to disqualify the Petitioner from seeking admission to a State university in 2018-2019 (in Phase Two) on the basis of what occurred during Phase One is reasonable and fair.

The learned Additional Solicitor General drew our attention to Section 1.7 of the First Handbook which reads as follows:

“Ineligibility for admission to a State University or a Higher Educational Institute established under the Universities Act No. 16 of 1978, as amended

The following categories of students do not qualify for seeking admission as internal students to a State University or a Higher Education Institute under the UGC:

- (9) *A student who has made a false declaration or produced forged documents for application and registration for university admission.*

Note: If the information provided by the student along with the application for university admission or at the registration is found to be false or inaccurate after his/her admission, action will be taken to dismiss the student from the university/higher educational institute.”

In terms of the above Section, a student who makes a false declaration and/or produces forged documents when seeking university admission is ineligible for admission to a State university. This was the position in 2016 – 2017 when the Petitioner submitted his application seeking admission and is conceded to by the Petitioner.

The learned Additional Solicitor General submitted further that in terms of the Handbook for 2018 – 2019, which I shall refer to as the ‘ Second Handbook’:

*“If the information provided by the candidate along with the application for university admission or at the registration is found to be false or inaccurate prior to his/her admission to the University/Higher Educational Institute, action will be taken to cancel the selection and the application for university admission submitted by the candidate for that particular academic year and he/she will not be allowed to apply for university admissions **in any of the future academic years.**”* [emphasis added]

It was therefore the position of the learned Additional Solicitor General that the submission of a false declaration results in a permanent disqualification in that a student cannot thereafter seek admission to a State university. The learned President’s Counsel for the Petitioner however submitted that the First Handbook issued for 2016/2017 did not stipulate that a candidate once disqualified will be permanently barred from seeking admission to a State university, and that the above provision referred to by the learned Additional Solicitor General was introduced only in the Second Handbook and was applicable only from the academic year 2018/2019 and thereafter. He therefore submitted that to apply the above provision with retrospective effect is arbitrary, unfair and illegal. The response of the learned Additional Solicitor General was that even under the First Handbook, disqualification was permanent, and that the Second Handbook only made this position clearer.

I have considered the effect of the above provision in both Handbooks and it is clear that it is a punishment that is imposed on an applicant for submitting false information. Although Article 13(6) in terms of which, *“No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and **no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed**”* applies only with regard to the retrospective creation of offences and the increase in the severity of a punishment for an offence, the principle behind Article 13(6) is applicable in this instance. The effect of the above provision in both Handbooks being penal in nature, any

retrospective application of such punishment or the increase of the punishment is to my mind illegal.

Once the conduct of the Petitioner was brought to the notice of the University Grants Commission, it issued the Petitioner R13, which stated as follows:

*“Accordingly, you are hereby required to provide an explanation in writing on or before 27th December 2017 as to why **your application for university admission for the academic year 2016/2017** should not be cancelled as per Section 6 of the printed online application for university admission for the academic year 2016/2017.*

*If you fail to submit an explanation by 27th December 2017, action will be taken to **cancel your application for university admission for the academic year 2016/2017** considering that you have no justification to provide regarding the above act.”*
[emphasis added]

This position is reiterated in paragraph 15(m) of the affidavit of the Chairman of the University Grants Commission where he has stated as follows:

*“Accordingly, since students who make false declarations or produce forged documents for university admission become ineligible for admission to a State University as per Section 1.7(9) of the University Admission Handbook for the academic year 2016/2017, the UGC had sent a show cause notice dated 13.12.2017 **seeking explanations from the Petitioner as to why his application for university admission for the academic year 2016/2017 should not be rejected** for providing false information regarding the period of enrolment at Kahatagasdigiliya Muslim Maha Vidyalaya as well as for making false declarations that the particulars given by him in his application are true and accurate.”* [emphasis added]

A careful consideration of the aforementioned provision in the First Handbook makes it clear to my mind that the disqualification as it stood in the First Handbook was not of a permanent nature and was to apply only in respect of the academic year when the infringement took place.

Furthermore, the position of the University Grants Commission that permanent disqualification was permissible in terms of the First Handbook is not supported either by R13 or by the affidavit of its Chairman. If the position of the University Grants Commission is to be accepted, then, R13 should have clearly conveyed that position to the Petitioner. Instead, what was conveyed is that his application for admission for the academic year 2016/2017 shall be cancelled if he fails to provide an explanation. Even when the Petitioner informed the University Grants Commission by P9 that he will be sitting for the Advanced Level examination in 2018, the University Grants Commission did not reply that letter. To extend the provisions of the Second Handbook to the Petitioner for a violation that occurred prior to the introduction of the Second Handbook is therefore clearly unreasonable and arbitrary, and is violative of the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

As pointed out by the National Education Commission, university education is of critical importance for a youth to forge ahead in life and to permanently deprive such opportunity is not a decision that can be taken or should be taken lightly. I wish to emphasise however that the right to education is not a blanket cover to shield one's own fraudulent activities to obtain university admission. I must also state for the sake of clarity that I have not considered the legality, rationality or desirability of a permanent disqualification or whether it is disproportionate in view of my finding that the First Handbook did not provide for a permanent disqualification.

Three other issues

There are three other issues that I must advert to.

The first is a mitigating factor in favour of the Petitioner. The Petitioner has stated that irrespective of whether he was considered from Anuradhapura or Kegalle district, he was qualified to be admitted for the Physical Science programme in 2016/2017. The Respondents have denied this position but the document R2 submitted to support their position that the cut off mark for Kegalle was higher than Anuradhapura is in respect of those who have been selected to follow a course in Engineering whereas the Petitioner was offered admission to the Physical Science programme. I have examined the

Handbook for 2017/2018 which contains the 'Z' score for 2016/2017 and it appears that the Petitioner's version may be correct. Thus, although the conduct of the Petitioner was fraudulent, it may not have made any difference in the final assessment.

The second is the submission of the learned Additional Solicitor General that the requirement to tender the school leaving certificate is mandatory and since P2 contains false information, the requirement for the Petitioner to certify that the information contained in his application is true can never be satisfied. This argument is the other side of the submission that disqualification is permanent. While on the face of it, this submission is factually correct, I am not inclined to agree with the learned Additional Solicitor General for two reasons. The first reason is that the Petitioner has been punished once for the said infringement and to continue to punish him in terms of the First Handbook would be unreasonable and unfair. The second reason is that in any event, as set out in Section 1.5 of the First Handbook, the requirement for an applicant to tender his school leaving certificate is to determine the district of such applicant for university admission and to be satisfied that the applicant has in fact attended such school. This would be in respect of an applicant who has attended a school in order to follow the programme of study leading up to the Advanced Level examination.

However, when the Petitioner sat the Advanced Level examination in 2018, he did so, not as a school candidate but as a private candidate. Section 1.5 states further that where *"the candidate has not enrolled in any school for advanced level during that period, the district where the permanent place of residence of the candidate is located is the district considered for university admission"*. The reference to 'during that period' is to the three year period preceding the Advanced Level examination held in August 2018. Thus, although the school leaving certificate must still be submitted, the district of the Petitioner will be determined on the basis of his residence which shall be confirmed by a certificate of the Grama Niladhari countersigned by the Divisional Secretary, and not on the school leaving certificate.

The third matter that I wish to advert to is the judgment of this Court in **Nafees v Kiriella, Minister of Higher Education and Others** [SC (FR) Application No. 56/2018; SC Minutes of 29th September 2022] cited by the learned Additional Solicitor General. That

application had been filed by a student who was part of the 28 students who had fraudulently registered themselves at the Kahatagasdigiliya Madya Maha Vidyalaya, challenging the decision of the University Grants Commission to permanently prevent him from applying to a State university. Although the said application had been dismissed, I observe that this Court, (a) has not arrived at any conclusion with regard to the legality of a permanent disqualification, and (b) has not considered the applicability of the principle underlying Article 13(6) for the reason that the argument that there cannot be a retrospective application of the provisions of the Second Handbook had not been presented by the petitioner in that case.

Conclusion

In the above circumstances:

- (A) I declare that the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution have been violated by the University Grants Commission;
- (B) I direct the University Grants Commission to:
 - (a) Permit the Petitioner to tender through its online platform an application for admission to a State university;
 - (b) Disregard the information contained in P2 regarding the school in Anuradhapura;
 - (c) Process the Petitioner's application for admission in accordance with the provisions of the Second Handbook on the basis of the district within which the permanent residence of the Petitioner is situated and on the 'Z' score obtained by the Petitioner at the Advanced Level examination 2018; and
 - (d) Offer the Petitioner a course of study at a State university for the next academic year commensurate with the 'Z' score obtained by the Petitioner at the Advanced Level examination 2018, provided the said 'Z' score obtained by

the Petitioner is sufficient to secure admission to a State university for the academic year 2018/2019.

I make no order for costs.

JUDGE OF THE SUPREME COURT

Jayantha Jayasuriya, PC, CJ

I agree.

CHIEF JUSTICE

Murdu N. B. Fernando, PC, J

I agree.

JUDGE OF THE SUPREME COURT