DR. KARUNANADA
VS.
OPEN UNIVERSITY OF SRI LANKA AND OTHERS

SUPREME COURT.
SHIRANI BANDARANAYAKE, J.
DISSANAYAKE, J.
FERNANDO, J.
SC FR 450/2003
SEPTEMBER 2, 2005.
FEBRUARY 27, 2006.
APRIL 24, 2006.
MAY 31, 2006.

Fundamental Rights-Article 12(1)-Constitution - Article 126- Non appointment as a Professor - Academic decisions - Could these decisions be challenged ? - Can Universities be considered pari - passu with other State institutions? - Difference between academic issues and other disputes relating to academic matters - Distinction ?

The petitioner, a senior lecturer attached to the Open University complained against his non-appointment as a Professor/Assistant Professor in Computer science, stating that, the said non-appointment is unreasonable, mala-fide, discriminatory and arbitrary and is in violation of Article 12 (1).

HELD:

(1) The Universities of Sri Lanka are creatures of statutes as they have been established under and in terms of the Universities Act.

HELD FURTHER:

(2) This Court may not interfere with purely an academic issue, the Court would not hesitate to intervene in any other dispute relating to academic matters if it infringes rights guaranteed in terms of the provisions stipulated in the Constitution more particularly the

fundamental rights jurisdiction and its exercise is determined in terms of Article 126(1).

Per **Shirani Bandaranayake, J.**

"I am not in agreement with the view that academic decisions are beyond challenge, there is no necessity for the Courts to unnecessarily intervene in matters 'purely of academic nature' since such issues are best dealt with by academics who are fully equipped to consider the questions in hand; however if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment".

(3) The case of the petitioner refers to the failure of the respondents to appoint him as Professor/Assistant Professor where he had the required marks-the petitioner has not questioned the correctness of the assessment of the external experts or the examination panel, the question at issue does not revolve around matters relating to allocation of marks of examinations, methodology of teaching or matters regarding the curriculum, which are purely of an academic nature.

Held further :

(4) The procedure followed in the evaluation process of the petitioner's application for the promotion had been dealt with unfairly without adhering to procedural fairness. Procedural safeguards should be the cornerstones of individual liberty and their right to equality.

AN APPLICATION under Art. 126(1) of the Constitution.

Cases referred to :

(1) *Regina vs. Higher Education Finding Council Ex-parte Institute of Dental Surgery* - 1944-1WLR 242
(2) *Phillips vs. Bury* - 1558-1774-All ER 53
(3) *St. Johns College, Cambridge vs. Todington-* (1751)-1 Bur 200
(4) *Rv. Bishop of Ely* - (1794)- STR 477
(5) *Ex-parte Thomas Lamprey* - (1737) West T. Hard 209

(6) *R vs. Hertford College, Oxford* - (1878) 3 QBD 693
(7) *Attorney General vs. Stephens* - (1737) 1 AIR 358
(8) *In Re Dean of York* - (1841) 2 QB 1
(9) *R vs. The Chancellor Masters and Scolars of the University of Cambridge* (Dr. Bentleys case) - (1723) 1 Str. 557
(10) *Clark vs. University of Lincolnshire* - (2000) 2 Al ER 752
(11) *Thorne vs. University of London* - (1864) - 33 LJ ch 625
(12) *Thomson vs. University of London* - (1996) - 1 All ER 338
(13) *Patel vs. University of Bradford Senate and others* 0-(1979) 2 All Er 582
(14) *Hines vs. Birkbeck College* - 1985 - 3 All ER 156
(15) *Manohara vs. President, Peradeniya Campus University of Sri Lanka* - BALR (1983) - Vol. Part II - 45
(16) *W. K. C. Perera vs. Prof. Daya Edirisinghe* - 1995 - 1 Sri LR 148
(17) *Culasubadhra vs. University of Colombo* - 1985 - 1 Sri LR 244
(18) *Sannasgala vs. University of Kelaniya* - 1991 - 2 Sri LR 193
(19) *Mcnabb vs. United States* - 1943 - 318 US 332
(20) *Shaughnessy vs. United States* - 1953 -345 - US 332

J. C. Weliamuna with *Shantha Jayawardane* for petitioner.
Harsha Fernando SSC for 1st -7th and 11th respondents.

August 3, 2006.

SHIRANI BANDARANAYAKE, J.

The petitioner, who is a Senior Lecturer attached to the Open University of Sri Lanka, has complained against his non-appointment as a professor/Associate Professor in Computer Science of the Faculty of Natural Science of the 1st respondent University stating that the said non-appointment is unreasonable, mala-fide, discriminatory and arbitrary and in violation of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution, for which this Court had granted leave to proceed.

The facts of the petitioner's case are briefly as follows :

The petitioner is a Bachelor of Science (Honours) Graduate in Mathematics of the University of Colombo, who obtained his degree in 1985 (P1A). He had obtained the Degree of Master of Philosophy in Computer Science from the Open University of Sri Lanka in 1993 (P1B)

and the Degree of Doctor of Philosophy in Computer Science - Artificial Intelligence from the University of Keele, United Kingdom in 1995 (P1C). Since his graduation in 1985, he had served in the capacities of Lecturer, Senior Lecturer and the Head of the Department of Mathematics and Computer Science at the 1st respondent University. The petitioner has carried out extensive research in the area of Computer Science and Artificial Intelligence, had published around 80 research papers in international and national journals and had made presentations at International Conferences. He has also published around 10 books in Sinhala on Computer Science for the use of schoolchildren, general public and University Students. The petitioner had been instrumental in introducing Computer Science as a subject for the Degree of Bachelor of Science in the 1st respondent University. He had developed the entire curriculum and had taught the subject at undergraduate and post graduate levels.

The petitioner had submitted his application for the post of Professor/ Associate Professor in Computer Science of the 1st respondent University in terms of University Grants Commission Circular No. 723 dated 12.12.1997 (hereinafter referred to as the Circular). The Senate of the 1st respondent University in terms of the Circular, had appointed two external Experts and the Panel to evaluate the said application. Thereafter the petitioner had become aware that the two External Experts and the panel of Members had submitted their evaluation reports in respect of the petitioner's application. In July 2002, the 1st respondent University had convened the Selection Committee to consider the petitioner's application.

By letter dated 18.07.2002, the petitioner was informed by the Senior Assistant Registrar (establishment) of the 1st respondent University that the Selection Committee had not recommended the petitioner for promotion either as Professor or Associate Professor on the basis that the petitioner had failed to obtain the required minimum marks in accordance with the marking scheme (P6).

The petitioner stated that although it was the practice of all the Universities in Sri Lanka to call the applicant before the Selection Committee and inform the results, the petitioner was not called before the Selection Committee for the said purpose. Nevertheless, the 3rd

respondent, on a request made by the Selection Committee, had informed the petitioner that he had not obtained the minimum marks for 'research and creative work', since one of the external experts had awarded him less than 25 marks. The 3rd respondent had also informed him that as he had failed to obtain the minimum marks for 'teaching and academic development' the application of the petitioner was not referred to a 'third external expert'.

As the petitioner had firmly believed that in terms of the marking scheme he was entitled to more than 20 marks for 'teaching and academic development', he was of the view that a grave injustice had been caused to him on the evaluation of his application by the Panel, which consisted of internal academics of the 1st respondent University. Therefore by his letter dated 09.08.2002, he had made a request to the 2nd respondent to re-consider his application (P7). A Grievance Committee was appointed as a result of his letter and such Committee had recommended, *inter-alia* that the application of the petitioner be re-considered. Accordingly, a 'new panel' and a third External Expert were appointed by the Senate to evaluate the petitioner's application.

Subsequently' the Selection Committee was re-convened on 16.07.2003 and by letter dated 07.08.2003 the petitioner had inquired from the 1st respondent as to why his application has not been processed for over 2 1/2 years (P9). On 08.08.2003 the 2nd respondent had informed the petitioner that his application is still being processed. (P10).

The petitioner alleged that by the failure of the 1st respondent University to appoint him as an Associate Professor or a Professor when he had obtained the necessary marks, the respondents have infringed his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

At the hearing learned Senior State Counsel, by way of a preliminary objection raised on behalf of the respondents, contended that the Universities cannot be considered *pari passu* with other State institutions, which are subjected to judicial review under Articles 126 and 140 of the Constitution. His contention was that in a classical sense the University is or ought to be a 'community of scholars'

irrespective of the fact that the organizational aspects of the University may have the trappings of an institution. The post of Professor is one of the most senior academic positions and therefore the process for the conferment of such position is also highly specialized and unique that such would be executed only by persons, who are qualified and placed in equal or higher standing.

Learned Senior State Counsel further contended that the scheme of evaluation which stipulated the criteria for the promotion to the posts of Professor or Associate Professor would take into account the specific attributes a Professor should possess which would include research and creative work, dissemination of knowledge, contribution to teaching and academic development to the University and national development. Accordingly, the contention of the learned Senior State Counsel is that such attributes could be assessed only by an 'academic mind' and that such evaluations may not be on par with the reasoning of a judicial mind and therefore such assessments could only be carried out by similarly qualified peers from the academic community. He further submitted that the petitioner's intention is to invite this Court to 'step into the shoes' of the petitioner's academic peers and decide whether the evaluation carried out by them is right or wrong. The contention of the learned Senior State Counsel is that this Court should not perform such function in the absence of allegations of serious *mala-fides* or grave procedural impropriety.

In support of his contention learned Senior State Counsel referred to Wade and Forsyth (Administrative Law, 9th Edition, Oxford University Press, 637), where it was stated that–

> "The Courts will, in any case, be reluctant to enter into 'issues of academic or pastoral judgment', which the university was equipped to consider in breadth and in depth but on which any judgment of the Courts would be *jejune* and inappropriate".

He also referred to the decision in *Regina vs. Higher Education Funding Council Ex-parte Institute of Dental Surgery*[1] where it was stated that–

"..... we would hold that where what is sought to be impugned is on the evidence no more that an informed exercise of academic judgment, fairness alone will not require reasons to be given."

Learned Counsel for the petitioner's submissions on the objections taken by the respondents were two fold : firstly it was submitted that the authorities relied on by the respondents do not support their contention and that it is not correct to state that the academic decisions are beyond challenge. In support of his contention learned Counsel for the petitioner referred to the decision in *R vs. Higher Education Funding Council, Ex-parte Institute of Dental Surgery*, (supra) a decision which the learned Senior State Counsel had relied on, where Sedley, J. had stated that–

"This is not to say for a moment that academic decisions are beyond challenge."

Secondly, he took up the position that the respondents have based their submissions on the misconceived premises that the petitioner is challenging an academic decision of the respondents whereas the contention of the petitioner is that the failure to appoint him as a Professor or an Associate Professor when he had obtained the required marks is unreasonable and therefore violative of Article 12(1) of the Constitution.

Regarding the second matter, learned Counsel for the petitioner submitted that the petitioner is not challenging the assessment by the External Experts or the panel. The question is issue according to the learned Counsel for the petitioner, is the appointment of a professor or an Associate Professor and for this purpose the Circular No. 723 of the University Grants Commission sets out the entire procedure and the fact that an application for promotion is evaluated by an academic does not make the assessment/evaluation an academic issue.

Having set down the submissions by both learned Counsel for the petitioner and the respondents, let me now turn to consider the objection raised by the learned Senior State Counsel.

The question that is at issue on the basis of the objection raised by the learned Senior State Counsel for the respondents is that whether an academic issue could be - subjected to judicial review in terms of Article 126 of the Constitution.

The petitioner's complaint, as stated earlier, clearly refers to the failure of the 1st respondent University to appoint him to the post of Professor or Associate Professor and that it amounts to an infringement or an imminent infringement of the petitioner's fundamental rights.

There is another matter that I wish to state in this regard. Learned Senior State Counsel referred to several English authorities, which were cited earlier, in support of his contention that Courts would be reluctant to enter into issues of academic or pastoral judgments of the University.

It is to be borne in mind that in England, since the ancient times, where Universities and Colleges' were established for 'the promotion of learning', provision was made to appoint a 'visitor' for the purpose of administering justice regarding internal matters. The powers and duties of such a visitor was clearly described in *Philips vs. Bupy* [2] where Sir Jon Holt, C. J., stated that,

> "The office of visitor by the common law is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear appeals of course. And from him, and him only, the party grieved ought to have redress, and in him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations are final and examinable in no other Court whatsoever."

Since that decision, the Courts have repeatedly taken the view that, if a visitor is appointed and if he had been given the jurisdiction to hear and determine the complaints of the members of the college, no action could be instituted in the courts of law. *St. John's College, Cambridge vs. Todington* [3], *R vs. Bishop of Ely* [4], *Ex parte Thomas Lamprey* [5] *R vs. Hertford College, Oxford* [6], *Attorney General vs. Stephens* [7].

However, in later decisions, the scope of the visitatorial jurisdiction was given careful consideration and it was held that the visitor cannot claim to be entirely free from any kind of control by the common law Courts and in the event of the visitor exceeding his jurisdiction that the Courts could declare his acts null and void *Dean of Yorks case*[8].

It is also necessary to note that the mere existence of a visitor was not sufficient to exclude the jurisdiction of the Court, as the fact that there is a visitor should also be brought to the notice of the Court. For instance in *R vs. The Chancellor, Masters and Scholars of the University of Cambridge* [9] commonly known as Dr. Bentley's case, where a doctor had refused to submit to the jurisdiction of the Vice-Chancellor of the University in an action against him when he was deprived of his academic qualifications. Writ of mandamus was granted to restore him of his degrees, chiefly due to the reason that the existence of the visitor was not raised as a defence. Considering the actions taken by the University, Pratt, C. J. stated thus.

> " I think the return has fully justified us in sending the mandamus ..... as it is not pretended there is any visitor, or any other jurisdiction, to examine into the reasonableness of the deprivation, but that of this Court."

It is therefore evident that the Universities are amenable to the jurisdiction of the Court irrespective of the fact, whether the question in issue is academic or otherwise and the only exception, where the jurisdiction of the Court would be excluded was only when there was a visitor. There again the visitor's mere presence alone was not sufficient for the purpose of excluding the jurisdiction of the Court, and it was an essential requirement that in such instances the fact that there being a visitor must be brought to the notice of the Court.

There is one other factor which is of vital importance regarding the question of jurisdiction of Court vis-a-vis the presence of a visitor in a University. Most of the older English Universities had provision for a charter and thereby for a visitor. The modern Universities are mostly creatures of statute and therefore would not have provision for a visitor. This position was confirmed in *Clark vs. University of Lincolshire*[10], where it was held by Sedley L. J. that,

"The University of Lincolshire and Humberside is one of the new Universities brought into being by the Education Reform Act, 1988. Section 121 gave the status of bodies corporate to advanced further education Institutions meeting statutory enrolment criteria of which ULH (as I will call it) was one. By section 123 they are called higher education corporations. The Further and Higher Education Act, 1992 gave all such institutions the full status of a University and made provision for their internal government, but without altering their legal character. Such an institution, therefore, unlike the majority of the older English and Welsh Universities, have no charter and no provision for a visitor, if it had, it is common ground that the common dispute would lie within the visitor's exclusive jurisdiction..... But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers."

Having said that let me also refer to Sedley, J.'s views expressed in *Clark vs. University of Lincolnshire (supra)* regarding the jurisdiction of Courts in a situation, where there is no recourse to a visitor. In such a situation, according to Sedley, J., the issues would not be susceptible to adjudication as contractual issues. However, it is to be borne in mind, that Sedley, L. J., had made this observation in the light of decisions such as *Thomson vs. University of London*[11], *Thorne vs. University of London*[12] and *Patel vs. University of Bradford Senate and another*[13]. In Thomsons's case *(Supra)* the question at issue was of the award of a gold medal, where as *Thorne*'s and *Patel's cases(Supra)* were regarding the plaintiff's academic competence. Accordingly, Clark's case was distinguished from the aforementioned cases on the ground that it was a case which did not belong to the earlier group. Referring to such distinction Sedley, L. J. stated that,

"It is on this ground, rather than on the ground of non-justiciability of the entire relationship between student and university, that the judge was in my view right to strike out the case as then pleaded. The allegations now pleaded by way of amendment are, however, not in this class. **While capable, like most contractual disputes, of domestic**

resolution, they are allegations of breaches of contractual rules on which, in the absence of a visitor, the Courts are well able to adjudicate (emphasis added)".

Thus it is quite clear that, in situations where there is no visitatorial jurisdiction in process, the academic matters would be divided into two categories, which would include issues capable and not capable of being decided by Courts. As stated by Hoffman, J. in *Hines vs. Brikbeck College*[14], the Courts have no difficulty in deciding whether principles of natural justice have been observed or rules of procedure incorporated into contracts of employment correctly applied. Allegations of breach of contractual rules also would therefore fall into the category of cases that would be able to be adjudicated by Courts.

The Universities of Sri Lanka are creatures of statutes as they have been established under and in terms of Universities Act, No.16 of 1978 as amended. The Act does not provide for a visitor as in the case of majority of the English and Welsh Universities. Long line of cases, filed against the decisions of Sri Lankan Universities indicate that there had been no objections taken by the University administration that the Courts cannot intervene in reviewing their decisions. *Manohara vs. President, Peradeniya Campus University of Sri Lanka*[15], *W. K. C. Perera vs. Prof. Daya Edirisinghe*[16], 148 *Cula Subadhra vs. University of Colombo* [17], *Sannasgala vs. University of Kelaniya*[18]. In fact in *W. K. C. Perera vs. Prof. Daya Edirisinghe(Supra)*, learned Senior State Counsel had contended that this Court should not compel the award of a degree by way of granting the writ of *mandamus*, but only to request the relevant authorities to **consider** the question of awarding the degree in question. It was also contended that there was no public duty to award a degree and that no one had a right to the award of a degree. Further it was submitted that, any institution awarding degrees had a residual discretion to withhold a degree, even if the candidate had satisfied the relevant regulations. Considering the submissions of the Senior State Counsel, Mark Fernando, J. was of the view that,

"..... Article 12 ensures equality and equal treatment even when a right is not granted by common law, statute or

> regulation, and this is confirmed by the provisions of Article 3 and 4(d). Thus, whether the Rules and Examination Criteria, read with Article 12 confer a right on a duly qualified candidate to the award of the Degree and a duty on the University to award such Degree without discrimination, and even when the University has reserved some discretion, the exercise of that discretion would also be subject to Article 12, as well as the general principles governing the exercise of such discretion."

It is to be borne in mind that in *W. K. C. Perera's* case *(supra)* the question at issue was whether the appellant was entitled to the award of the degree which was clearly an academic issue, which this Court had decided in favour of the appellant.

Therefore, although this Court may not interfere with purely an academic issue the Court would not hesitate to intervene in any other dispute relating to academic matters if it infringes the rights guaranteed in terms of the provisions stipulated in the Constitution. More importantly the fundamental rights jurisdiction and its exercise is determined in terms of Article 126(1) of the Constitution. In terms of that Article the Supreme Court shall have sole and exclusive jurisdiction to hear and determine **any question** relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized under Chapter III or Chapter IV of the Constitution. Article 12(1), which is contained in Chapter III of the Constitution clearly stipulates that all persons are equal before the law and are entitled to the equal protection of the law. In terms of the aforementioned constitutional provisions, the Court would have to inquire into, for the purpose of ascertaining whether there is an infringement or an imminent infringement in connection with the equal protection guaranteed to the petitioner/s in terms of Article 12(1) of the Constitution. If there is *prima facie* such an infringement, then it is the duty of this Court to inquire into the matter before Court.

Therefore, although there may be cautionary remarks indicating reluctance to enter into academic judgment, I am not in agreement with the view that academic decisions are beyond challenge. There is no necessity for the Courts to unnecessarily intervene in matters "purely of academic nature," since such issues would be best dealt

with by academics, who are 'fully equipped' to consider the question in hand. However, if there are allegations against decisions of academic establishments that fall under the category stipulated in terms of Article 126 of the Constitution, there are no provisions to restrain this Court from examining an alleged violation relating to an infringement or imminent infringement irrespective of the fact that the said violation is in relation to a decision of an academic establishment. In fact in *R vs. Higher Education Funding Council ex-parte Institute of Dental Surgery (Supra)* Sedley, J. referring to a question which he termed as 'an academic judgment' stated thus :

> "The question 'why' in isolation as it can now be seen to be, is a question of academic judgment. We would hold that where what is sought to be impugned is on the evidence no more than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. **A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more that an informed exercise of academic judgment** (emphasis added)".

The case of the petitioner refers to the failure of the respondents to appoint the petitioner as a Professor or an Associate Professor, where he had the required marks and therefore his allegation is that such non-appointment is unreasonable and arbitrary and therefore is violative of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioner has not questioned the correctness of the assessment of the external experts or the examination panel. The question at issue does not revolve around matters relating to allocation of marks at examinations, methodology of teaching or matters regarding the curriculum, which are purely of an academic nature. Therefore even if I am to accept the position that decisions, which are purely academic by nature cannot be questioned by this Court, I am unable to agree with the contention of the learned Senior State Counsel that this is a matter, which cannot be looked into by this Court.

For the reasons aforementioned, the preliminary objection raised by the learned Senior State Counsel is overruled.

Having stated that let me now consider the alleged infringement complained by the petitioner.

The contention of the learned Counsel for the petitioner is that the non-appointment of the petitioner to the post of Professor or Associate Professor when he had obtained the requisite marks, is in violation of Article 12(1) of the Constitution.

It is common ground that the promotion to the post of Professor or Associate Professor on merit of the 1st respondent University is governed by UGC Circular No. 723 dated 12.12.1997 (P3). This Circular clearly stipulates that the applications would be evaluated on the basis of the contribution to teaching and academic development, research and creative work and dissemination of knowledge and contribution to University and national development.

The minimum marks for each component of evaluation and the minimum total mark that an applicant for the promotion of Associate Professor or Professor of a given discipline should obtain, in order to qualify for the relevant appointment in terms of the Circular (P3) was as follows :

Table I

		Associate Professor (Internal)	*Associate Professor (External)*	*Professor*
1.	Contribution to Teaching and Academic Development	20	10	20
2.	Research and creative work	25	35	45
3.	Dissemination of knowledge and contribution to University and national development	10	10	15
4'	Minimum total mark	65	65	90

The Circular refers to the method of selection process and the said process with regard to Associate Professor/Professors was as follows :

"(ii) The Senate shall appoint two (2) experts in the relevant field from outside the higher education institution concerned to evaluate the applicant's contribution to :

- research and creative work
- dissemination of knowledge.

The experts should not be teachers/supervisors of the candidate at post-graduate level.

(iii) Evaluation of the contribution to :

- teaching and academic development
- University and national development

will be carried out by a panel appointed by the Senate which shall consist of the following "

- Vice-Chancellor/Deputy Vice-Chancellor/Dean of the Faculty concerned.

- Two (2) Professors, **one of whom** is either from within or outside the Institution concerned and has a knowledge of the discipline or a related discipline and **the other** from another Faculty of the Higher Educational Institution concerned. The Head of the Department concerned shall report on the attendance of the candidates at meetings of the Faculty Board and Senate (where relevant) and other statutory bodies and he may be called upon to serve as an observer in the panel.

(iv) The final selection will be made by the Selection Committee based on the evaluation reports specified in (ii) and (iii) above and in conformity with the Procedure of appointment. Appointments on merit promotions are made on 'personal-to-the-holder' basis and do not necessarily reflect cadre positions."

On the basis of the aforementioned criteria, the Senate had appointed two external experts and the panel, to evaluate the petitioner's

application and in July, 2002, the 1st respondent University had convened the Selection Committee to consider the reports of the two external experts and of the panel. Since this panel had not recommended the petitioner his promotion as he had not obtained required marks for Research and Creative work, on the basis of an application made by the applicant to the 'Grievance Committee' of the University a second panel was appointed and the marks allocated by the two panels as submitted by the 2nd respondent was as follows :

Table II

	External Expert I	*External Expert II*	*External Expert III*	*Minimum Marks required for Associate Professor*	*Minimum Marks required for Professor*
Research and creative work	9.8	34.85	71.5	25	45
Dissemination of knowledge and contribution to University and National Development	4.5	10.00	22.0	10	15
Total marks				65	90

The marks given by the external expert III for Research and creative work and by Panel 2 for dissemination of knowledge and contribution to University and National Development are reflected in column 3 of the above table and it appears that the petitioner was awarded 71.5 and 22 marks respectively.

Thereafter the Selection Committee was reconvened and had met on 16.07.2003 and had observed that even with the marks of the 3rd External Expert there was a high degree of variance. At that point, according to the 2nd respondent the Selection Committee had decided to refer all the material pertaining to the application made by the petitioner to the original evaluation of Panel 1 and to the 3rd External Expert requesting them to reconsider the marks they had awarded to the petitioner. Out of the three, two members including the 3rd External

Expert had informed that they did not see any basis that warranted changes to the original marks they had awarded, whereas one person did not respond. On the basis of the aforesaid response, the Selection Committee had considered the circumstances and was of the opinion that the petitioner cannot be recommended for the post of Professor or an Associate Professor as he had not obtained the necessary points or marks according to the UGC Circular No. 723. As it appears, this decision had been purely on the basis of the original marks that were awarded to the petitioner.

Admittedly the petitioner was not recommended for promotion either to the post of Associate Professor or to the Post of Professor as the 1st respondent University had taken the view that he had not satisfied the minimum standard required for Research and Creative work. By her letter dated 02.12.2003, the 2nd respondent informed the petitioner of her decision which stated as follows :

"Application for the Post of Professor/Associate Professor

> This has reference to your letter dated 11th November, 2003 on the above matter.
>
> Since you have not satisfied the minimum standard required for Research and Creative work the Selection Committee did not recommend the promotion either to the Post of Associate Professor or to the Post of Professor (P14)."

It is not disputed that on the basis of the appeal submitted by the Petitioner, the 1st respondent University had decided to appoint a 3rd External Expert to evaluate the work carried out by the petitioner for his promotion. In fact it had been a decision of the 1st respondent University on the basis of the appeal submitted by the petitioner after considering it at the Council, which is the governing authority of the University that the complaint should be referred to a Grievance Committee. The said Grievance Committee consisted of three (3) members of the Council of whom two were UGC appointed members and one a representative of the Committee of Vice-Chancellors and Directors (CVCD). That Committee, after considering the grievance of the petitioner had made the following recommendation :

"One of the experts appointed for evaluation had given 34 points and the other had given 9.8 points.

To qualify for promotion he should obtain 25 points under this category ..... Since there is a high variance ..... recommended to obtain an evaluation report from a 3rd expert."

The consideration given and the recommendation made by the Grievance Committee clearly indicates that, they had accepted the fact that,

(a) there was a high variance of assessment between the 1st and the 2nd External Experts, and

(b) due to the aforementioned fact that it is necessary to obtain an evaluation report from a 3rd External Expert.

However, after the appointment of the 3rd External Expert and after obtaining the evaluation report, the decision of the Selection Committee had been to refer the material pertaining to the petitioner to panel I and to the 3rd External Expert to re-consider the marks they had awarded to the petitioner.

A series of questions arise at this juncture. Whether the procedure adopted by the 1st respondent University is fair, reasonable and justifiable? What was the purpose of appointing a 3rd External Expert when there was a high degree of variance of assessment between the 1st and the 2nd External Experts, if the marks were to be ignored thereafter? Wasn't it fair and reasonable to have considered the average of the two positive marks, if the 3rd External Expert had awarded more than the minimum marks? Couldn't the Selection Committee have considered the average of the three sets of marks available to them?. In such circumstances, couldn't the Selection Committee have considered recommending the petitioner to be promoted to the Grade of Associate Professor of the 1st respondent University?

Looking at Table II, referred to earlier, which stipulated the marks given by the three External Experts, (2R1) it is apparent that both External Expert II and External Expert III had given more than the minimum marks required for the promotion to the post of Associate Professor. Thus it is apparent that the procedure followed in the evaluation process of the petitioner's application for the promotion of Professor or Associate Professor had been dealt with unfairly without

adhering to procedural fairness. Procedural fairness, in my view, cannot be regarded as a matter which is unimportant. Procedural safeguards should be the cornerstones of individual liberty and their right to equality. Referring to the importance of procedural fairness, Frankfurter, J. in *McNabb vs. United States*[19] stated that,

> "The history of liberty has largely been the history of the observance of procedural safeguards."

A decade later considering an issue on the same lines, Jackson, J. in *Shaughnessy vs. United States*[20] stated that,

> "Procedural fairness and regularity are of the indispensable essence of liberty. Several substantive laws can be endured if they are fairly and impartially applied."

On a consideration of the aforementioned circumstances, it is evident that the 1st respondent University has acted arbitrarily, unreasonably and contrary to the provisions stipulated in Circular P3. I therefore hold that the respondents had acted in violation of the petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution. The 2nd respondent and the 3rd - 10th respondents, who were the members of the Selection Committee, are directed to take all necessary steps within the scope of their powers, duties and functions to re-consider the application made by the petitioner on his promotion to the post of Associate Professor/Professor in Computer Science, in terms of the UGC Circular No. 723 dated 12.12.1997 (P3), and the assessments given by the three (3) External Experts, according to law.

I make no order as to costs.

DISSANAYAKE, J. – I agree

FERNANDO, J. – I agree

Application allowed.