

**KUNANANTHAM  
VS  
UNIVERSITY OF JAFFNA AND OTHERS**

COURT OF APPEAL,  
MARSOOF, P. C., (P/CA) AND  
SRISKANDARAJAH, J  
C.A. No. 1559/2003  
AUGUST 23 AND  
SEPTEMBER 13 AND 27, 2004.

*Universities Act; No. 16 of 1978, sections 19 (2) (and 71 (1) - Petitioner selected by Selection Board - Board certification not given - Subsequently waived by the U. G. C. - Public duty to appoint teachers to the University - Power and authority of U. G. C. - Does writ lie? - Powers of the University Appeals Board*

The 1st respondent - University of Jaffna by a public advertisement called for applications for the post of Professor of Surgery, Associate Professor of Surgery and Senior Lecturer Grade I. The Petitioner applied for the aforesaid posts. The 8th respondent the University Grant Commission (U. G. C) informed the University that the petitioner is eligible to be considered for the post of Senior Lecturer Grade I in surgery provided he has Board certification by the PGIM. The Selection Board had selected the petitioner. The 8th respondent UGC subsequently waived the requirement of the Board Certification and requested the University to appoint the petitioner to the said post. The petitioner as he was not appointed moved for a writ of mandamus on the respondents to appoint him to the said post.

**Held :**

- (i) Under section 71 (1) of the Universities Act, the appointment of the staff to a Higher Education Institution shall be made by the governing authority of such institution or in accordance with the schemes of recruitment and the procedure for appointments prescribed by Ordinance. The power to make Ordinance, schemes of recruitment and the procedure for appointment of staff to the Higher Education Institutions are vested with the UGC under section 18 (1). The determination of qualification for different posts is a matter for the UGC and it is not a matter for the University.
- (ii) The 1st to 8th respondents have a public duty to appoint teachers to the 1st respondent University. The petitioner has a right to be appointed to the said post as he was selected by the Selection Board and the 8th respondent UGC, had given its approval for the appointment.

The respondents have no absolute power to refuse or delay the appointment of the petitioner.

- (iii) Powers of the Appeal Board are limited to conduct investigations into appointments and promotions alleged to have been made to the staff of the Commission and to the Higher Educational Institutions. The Appeal Board does not have the power to investigate into the non-appointment of staff to the Higher Education Institution.

**APPLICATION** for a writ a of mandamus

**Cases referred to :**

1. *W. K. C. Perera vs Prof. Daya Edirisinghe and others* (1995) - 1 Sri LR 148 (SC)
2. *Heater Mudy vs Central Environmental Authority and others* S. C. 58/03 - SCM 20. 01. 2004.

*Dr. J. de Almeida Gunaratne, P. C. with Kishali Pinto — Jayawardene and Dr. Mangala Wijesinghe* for petitioner,

*Eva Wanasundara*, Deputy Solicitor General with *Yurasha de Silva*, State Counsel for 1st - 9th respondents.

November 01, 2004

**S. SRISKANDARAJAH, J.**

The petitioner submitted that he obtained his MBBS degree from the University of Peradeniya in 1970. In 1973 he passed his preliminary examination in FRCS and after obtaining training in the United Kingdom he passed his FRCS in 1980. On his return to Sri Lanka he got an appointment in the Jaffna Teaching Hospital. He worked there from 1981 to 1985. Thereafter he left for the United Kingdom and obtained a further FRCS in Neurosurgery in 1990. In 1995 he returned to Sri Lanka and worked in the 1st respondent University as a visiting lecturer for a brief period and left for the United Kingdom due to the unsettled condition in Jaffna. In 1997 he returned to Sri Lanka and functioned as a visiting lecturer and examiner of the 1st respondent University; thereafter he left for the United Kingdom to complete his Ph. D. While he was in the United Kingdom he was assured by the 3rd respondent by his letter of 30. 04. 1997 (P11) that he would be given a permanent appointment in the 1st respondent University. In this letter the 3rd respondent stated *inter alia*:

" Enclosed is a letter appointing as 'senior lecturer on contract', don't get upset. The normal selection process for the post of Professor

takes at least 3 months. In order to avoid unnecessary delay I requested the Vice - Chancellor to appoint you on contract. This does not go through the normal process of selection ..... In the mean time your application for the chair is being processed and we will fix the date well after your arrival”.

The petitioner submitted that on this assurance he got an early retirement and returned to Sri Lanka and took appointment as a Visiting Professor of Surgery on contract basis. He was also appointed as the Head of the Department of Surgery for three years by the letter dated 29. 09. 1997 (P11) of the 7th respondent, Professor P. Balasunderampillai the former Vice Chancellor, of the 1st respondent University. This appointment letter states *inter alia*:

“ I am pleased to inform you that the Council of the University of Jaffna has appointed you as the Head of Department of Surgery with effect from the 04. 09. 1997 for three years or up to your period of appointment whichever is earliest.”

The petitioner submitted that a selection board of the 1st respondent University interviewed him in May, 1998 for the post of Professor and thereafter he was informed that the recommendation of the 1st respondent University had been rejected by the 8th respondent, the University Grants Commission. The 2nd respondent admitted this position and stated that the selection board of the 1st respondent University recommended that the petitioner should be appointed to the post of Professor of Surgery subject to the approval of the UGC. After considering the recommendation of the 1st respondent University, the University Grants Commission informed the Vice Chancellor of the University of Jaffna by its letter dated 26 May 1998 (2R5) that the petitioner has not been qualified to be appointed to the post of Professor of Surgery in terms of circular No. 547. The 3rd respondent and two other former Deans of the Faculty of Medicine of the 1st respondent University lodged their protest to the 8th respondent against the non-appointment of the petitioner for the post of Professor Surgery.

The petitioner thereafter worked for about five years on extensions of his contract as Visiting Professor of Surgery at the 1st respondent University during which period the post of Professor of Surgery at the 1st respondent University remained vacant.

In August 2002 in response to an advertisement inviting for applications for the post of Professor of Surgery, Associate Professor of Surgery, and Senior Lecturer Grade 1 in Surgery the petitioner applied for the above mentioned posts. In May 2003 the 8th respondent had informed the 2nd respondent in replying to a query of the 2nd respondent that the petitioner is eligible to be considered for the post of Senior Lecturer Grade 1 in Surgery in terms of Part 1 & 2 of the scheme of recruitment for the post of Senior Lecturer Grade 1 provided he has Board Certification of the Postgraduate Institute of Medicine (P30). By that time on the 8th March, 2003 the Postgraduate Institute of Medicine has informed the petitioner that the Board of Management has decided to grant the privilege of Board Certification to the petitioner subject to confirmation of the Senate of the University of Colombo (P31). The 2nd respondent thereafter informed the petitioner by his letter of 17. 06. 2003 that the selection board has decided to wait until the time of submitting the Board Certification of Postgraduate Institute of Medicine after confirmation by the Senate of the University of Colombo (P32a). The petitioner submitted that even though the 8th respondent by its letter of 17. 07. 2003 requested the 2nd respondent to appoint the petitioner to the post of Senior Lecturer Grade I, the 1st respondent University has not taken any action to appoint him to the said post but on the contrary the 2nd respondent terminated his services as a Visiting Professor by not extending his services after 18. 08. 2003 by his letter of 28th July, 2003 (P34). When he inquired about his appointment to the post of Senior Lecturer Grade 1 the 2nd respondent replied by his letter of 01. 08. 2003 (P35), that no recommendation has been made by the selection committee, which met on 25th July, 2003, for the post of Senior Lecturer Grade I. The petitioner in this application is seeking to quash the decision communicated by the letter of the 2nd respondent dated 01. 08. 2003 and to issue a writ of mandamus to appoint him to the post of Senior Lecturer Grade I.

The 2nd respondent in his objection heavily relied on the relevant circulars and attempted to demonstrate that the petitioner does not have the necessary qualification other than the requirement of the Board Certification, to be appointed to the post of Senior Lecture Grade I. If the 2nd respondent is confident that the petitioner is not qualified for the post of Senior Lecturer Grade 1 there is no necessity for the 2nd respondent to inquire from the University Grants Commission by his letter of 29. 04. 2003 (P28) on the eligibility of the petitioner for the post of Senior Lecturer Grade I. The 8th respondent in reply to this letter (P28) has categorically

stated that the petitioner is eligible to be considered for the post of Senior Lecturer Grade I in Surgery in terms of Part 1 & 2 of the scheme of recruitment. But as the vacancy had occurred in the Clinical Department, the 8th respondent insisted on Board Certification (P30). The Court takes serious note of the averments contained in paragraph 24(h) of the 2nd respondent's affidavit and the annexes marked 2 R13. The 2nd respondent has stated therein that there are many instances of medical negligence on the part of the petitioner. These incidents have also created a public opinion in the medical community at the University of Jaffna regarding the petitioner's non-suitability to hold the post he was holding. The Court also notes that the documents marked as 2 R 13 contain letter of the 5th respondent and other documents given by different persons at the request of the 5th respondent (this is specifically stated in those letters). These letters appear to be prepared by one person and they are similar to that of the format of the letter of the 5th respondent and they bear the same date. These letters begin with, "We Consultant Surgeons", and "I Intern Medical officer"; but does not include the names of those persons in the body of the letter. These letters contain serious allegations against the petitioner and appear to have been obtained after the institution of this application. One does not know how these documents and the observation of the 2nd respondent would have a bearing on the appointment of the petitioner as appointment was considered by the selection board before the institution of this application. If these complaints were there at the time of the consideration of the application of the petitioner for the said post the respondents could have considered these complaints and rejected the application of the petitioner on the first instance without seeking clarification on his qualification from the University Grants Commission (P28). They would not have subsequently informed the petitioner that they are waiting for the board certification for this appointment (P32a). The above statements and the documents marked 2 R 13 shows the *mala fides* of the 2nd respondent and the 5th respondent towards the petitioner. The 2nd respondent has also made an attempt to misrepresent facts to this Court by stating that the petitioner was not recommended for the post of Senior Lecturer Grade I by the selection board. He has not submitted the minutes of the selection board to confirm this fact instead he relied on a reply sent to the petitioner dated 01. 08. 2003 marked (P35). This letter reads as follows:-

"This is to inform you that no recommendation is made by the selection committee which met on 25th July, 2003, for the post of Senior Lecturer Grade I"

By reading this letter in the context of letter of the 2nd respondent dated 17. 06. 2003 (P32a) the only conclusion that could be arrived at is that the selection committee has not made any further decision on 25th July, 2003 in relation to this appointment. But in any event this letter does not state that the petitioner was not recommended for the said post. In fact the selection board had met before 29. 04. 2003, considered the application of the petitioner for the said post, and decided to seek clarification from the 8th respondent in relation to the eligibility of the petitioner by its letter of 29. 04. 2003. This fact is borne out by (P30).

The letter of 01. 08. 2003 (P35) does not contain a decision or determination; therefore the Court makes no order in relation to prayer (a) of the Petition.

Under the provisions of the Universities Act, No. 16 of 1978 as amended, the 1st respondent and its officers are under a public duty to offer university education (section 3), for which purpose, they are under a public duty with regard to the appointment of persons to relevant posts. Section 71 (1) of the Universities Act provides for the appointment of a 'teacher' which includes a senior lecturer. According to this section the appointment shall be made by the Council of the University in accordance with the scheme of recruitment and the procedures for appointment prescribed by Ordinance. It is the duty of the University to appoint teachers to ensure that the courses conducted by the University could be continued without interruption and the students who are following these courses will not be adversely affected. The 1st respondent in August, 2002 by a public advertisement called for applications for the post of Professor Surgery, Associate Professor of Surgery and Senior Lecturer Grade I. The petitioner applied to the aforesaid posts. The 2nd respondent has not disclosed in his affidavit the steps taken to process the petitioner's application or the decisions of the selection board. It appears from P30 that the selection board had met before 29. 04. 2003 to consider the application of the petitioner but the 2nd respondent had failed to submit the relevant minutes made by the selection board at the time of considering this application. The court has to gather information only from the documents filed by the petitioner. The 8th respondent by its letter of 7th May 2003 (P30) informed the 2nd respondent regarding a clarification sought by 2nd respondent that the petitioner is eligible to be considered for the post of Senior Lecturer Grade I in Surgery in terms of Part 1 & 2 of the scheme of recruitment for the post of Senior Lecturer Grade I provided

he has Board Certification by the Postgraduate Institute of Medicine. The 2nd respondent has informed the Petitioner by its letter of 17. 06. 2003 that the selection board has decided to wait until the time for submitting the Board Certification of PGIM after confirming by the Senate of the University of Colombo (32a). These correspondence show that the selection board has selected the petitioner for the said post but was awaiting the confirmation of the Board Certification. If the petitioner is not otherwise selected the 2nd respondent would have informed the petitioner accordingly. The petitioner's application to the post of Senior Lecturer Grade I is not otherwise rejected by the selection board. Thereafter once the petitioner fulfils the requirement of the confirmation of the Board Certification he will be entitled to this appointment. The selection board has no discretion to exercise at this stage as it has already made a decision in relation to the appointment of the petitioner subject to the confirmation of the Board Certification. The respondent has not produced any material to contradict this position as the minutes of the selection board are in the possession of the 2nd respondent.

Under section 71(1) of the Universities Act the appointment of the staff to a Higher Educational Institution shall be made by the governing authority of such institution, in accordance with the schemes of recruitment and the procedure for appointment prescribed by Ordinance. The powers to make Ordinances, the schemes of recruitment, and the procedure for appointment of staff to the Higher Educational Institutions are vested with the University Grants Commission under section 18(1). Therefore the determination of qualification for different post is a matter for the University Grants Commission and it is not matter for the University.

The petitioner applied for the post of Professor of Surgery in 1998 and the selection board of the 1st respondent recommended the petitioner for the said post (2R4). But the University Grants Commission reluctantly rejected the recommendation observing;

"Dr. Kunanandam should be interviewed for the post, the situation be explained to him and he be offered the post of a consultant carrying the emoluments of a full Professor. He should be assured that as soon as he acquires the points required to qualify him to become an Associate Professor he would be appointed to the post he has applied for. Considering that he had acquired a PH. D whilst working as Neurosurgeon Dr. Kunanandam should be able to fulfil the requirement in short time (2R5)."

Thereafter the petitioner was continuously working in the 1st respondent University as a Visiting Professor until he made this application in August 2002 for the post of Senior Lecturer Grade I. Even on this occasion the selection board sought clarification from the 8th respondent and the 8th respondent stated that the petitioner had fulfilled the criteria provided he has a Board Certification. By that time on 8th March, 2003 the Postgraduate Institute of Medicine has informed the petitioner that the Board of Management has decided to grant the privilege of Board Certification to the petitioner. However this decision is subject to confirmation of the Senate of the University of Colombo (P31). In the meantime the 8th respondent by its letter of 17. 07. 2003 requested the 2nd respondent to appoint the petitioner to the post of Senior Lecturer Grade 1. He pointed out in his letter that he was working for the last six weeks to obtain a Board Certification confirmatory letter from the Director, Postgraduate Institute of Medicine (PGIM). The Director/ PGIM stated that she is working on this matter and it will be placed before the Board of Management meeting of the Postgraduate Institute of Medicine. The letter of Board Certification would be issued after that. The Director, Postgraduate Institute of Medicine is the 9th respondent. He did not file objection or explain the delay in issuing the Board Certificate to the petitioner. The requirement of Board Certification was made as a condition for this appointment by the 8th respondent for the reason that the vacancy had occurred in the Clinical Department (P30). The 8th respondent thereafter waived this condition for the reasons stated in his letter of 17. 07. 2003 (P33) and requested the 2nd respondent to appoint the petitioner to the post of Senior Lecturer Grade I. The 8th respondent has the authority to do so under section 18 (2) (c) of the Universities Act. In these circumstances, this Court does not view Board Certificate as an indispensable prerequisite. The only impediment the 2nd respondent had for the appointment of the petitioner was the condition laid down by the 8th respondent. The 8th respondent by the above letter (P33) has not only given approval to the appointment but also requested the 2nd respondent to appoint the petitioner to the post of Senior Lecturer Grade 1. Under these circumstances the petitioner is entitled for this appointment. In *W. K. C. Perera v Prof. Daya Edurisinghe and Others*<sup>(1)</sup> the Supreme Court held;

“Article 12 of the Constitution ensures equality and equal treatment even where a right is not granted by common law, statute or regulation, and this is confirmed by the provisions of Articles 3 and 4 (d). Thus



whether the rules and examination criteria have statutory force or not, 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 where 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.

The petitioner, having satisfied the rules and examination criteria, was entitled to the award of the Degree of Bachelor of Fine Arts on the rules of the final examination held in 1990. The University of Kelaniya and the Institute are public bodies set up by statute and performing public functions, using public funds. Under the rules and examination criteria read with Article 12 there was a public duty cast upon its officers, enforceable by mandamus to take necessary steps to award the appellant that degree."

His Lordship Justice M. D. H. Fernando in *Heater Mundy vs Central Environmental Authority and Others*<sup>(2)</sup> held that;

"The jurisdiction conferred by Article 140, however is not confined to "prerogative" writs or "extraordinary remedies" but extends — "subject to the provisions of the Constitution" - to orders in the nature of writs of certiorari, etc. Taken in the context of our Constitutional principles and provisions, these "Orders" constitute one of the principal safeguards against excess and abuse of executive power; mandating the judiciary to defend the sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the crown and its agents. Further this court itself has long recognized and applied the "public trust" doctrine; that powers vested in public authority are not absolute or unfettered but are held in trust of the people, to be exercised for the purpose for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes."

The 1st to the 8th respondents have a public duty to appoint teachers to the 1st respondent University. For the reasons stated above and in the background of the decisions cited above, the petitioner has a right to be appointed to the said post as he was selected by the selection board and the 8th respondent had given his approval for the appointment of the petitioner. The 1st to the 6th respondents have no absolute power to refuse or delay the appointment of the petitioner under the given circumstances.

The respondents have raised a preliminary objection that the petitioner has made an appeal to the University Services Appeals Board and therefore he has not exhausted all the alternate remedies available to him prior to filing of his application.

The powers, duties and functions of the Appeals Board are provided, under section 86 of the Universities Act;

86. The Appeals Board shall have and may exercise the following powers duties and functions:-

(a) To conduct investigations into appointments and promotions alleged to have been made to the staff of the Commission and to Higher Educational Institutions in contravention to the scheme of recruitment and the procedure for appointment in force at the time such appointments or promotions were made:

(b) .....

(c) .....

(d) .....

The powers of the Appeals Board are limited to conduct investigation into appointments and promotions alleged to have been made to the staff of the Commission and to the Higher Educational Institution. The Appeals Board does not have the power to investigate into the non appointment of staff to the Higher Educational Institutions. In this application the petitioner complains that he was not appointed to the post of Senior Lecturer Grade 1 and is seeking a mandamus from this Court to direct the 1st respondent to appoint him to the said post. Therefore the preliminary objection that the petitioner has not exhausted the alternate remedy available to him prior to filing of this application has no merit and this Court dismisses the preliminary objection.

For the reason stated above the Court issues a writ of mandamus directing the 1st to the 6th respondents to appoint the petitioner forthwith to the post of Senior Lecturer Grade 1. The Court makes no order of cost.

**MARSOOF, P.C., P/CA** - I agree.

*Application allowed.*

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