

W. K. C. PERERA
v.
PROF. DAYA EDIRISINGHE AND OTHERS

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NO. 18/95
C. A. NO. 207/93
JULY 06, 1995

Writs of Certiorari and Mandamus – Rules and Regulations for the conferment of Degree – Main subject – Common subject – Core subject – Degree in Fine Arts – Articles 3,4(d) and 12 of the Constitution.

Held:

Under the Rules “Advanced Drawing” was not a main subject for the final examination for the Degree of Bachelor of Fine Arts. Where the Rules are clear and unambiguous it is impermissible and unnecessary to refer to the Examination Criteria in order to interpret the Rules. For a student who has selected Design, “Advanced Drawing” is a subject but not a “Main subject”.

In respect of a student who selected Design the only requirement for an ordinary pass is that she should obtain an average of 40% in the examination. The Art and Sculpture section includes Design and Graphics as well and the appellant had to obtain “C” (40 to 59%) passes. She satisfied both these

requirements. Thus the appellant satisfied all requirements of the Examination Criteria for an ordinary pass and thereby became entitled to the award of the Degree.

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 discretions.

The petitioner, having satisfied the Rules and Examination Criteria, was entitled to the award of the Degree of Bachelor of Fine Arts on the results 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.

The appellant is also entitled to an order in the nature of a writ of Certiorari to quash the refusal by the University of Kelaniya and/or the Institute of Aesthetic Studies and/or its officers to award her the Degree of Bachelor of Fine Arts.

Cases referred to:

1. *Sannasgala v. University of Kelaniya* (1991) 2 Sri LR 193
2. *Alphonso Appuhamy v. Hettiarachchi* (1973) 77 NLR 131.

APPEAL from judgment of the Court of Appeal.

R. K. W. Goonesekera with J. de Almeida Gunaratne for the petitioner-appellant.
Mohan Peiris Senior State Counsel for the respondent-respondents.

Cur. adv. vult.

July 27, 1992.

FERNANDO, J.

The Petitioner-Appellant ("the Appellant") claims that she is entitled to be awarded the Degree of Bachelor of Fine Arts of the Institute of Aesthetic Studies of the University of Kelaniya ("the Institute"),

because, she says, she had satisfied all the requirements of the applicable rules and regulations. She appeals to this Court against the order of the Court of Appeal dismissing her application for *Certiorari* and *Mandamus*.

It is common ground that, having joined the Institute in 1984, the Appellant successfully completed the first, second and third examinations. She was admitted in 1988 to the course of studies leading to the fourth (and final) examination, which was held in 1990 (the delay being due to the disruption of University courses in 1988-89). She obtained an average of over 40% at the final examination, her detailed results being as follows:

1. 3-dimensional Designs : C ("main subject")
2. Types, Colours and Decor : C ("main subject")
3. History of the Arts : C ("common subject")
4. Textile Printing : B ("common subject")
5. Advanced Drawing : D

Grading was on the basis that "A" was 75 to 100 marks, "B" was 60 to 74, "C" was 40 to 59, "D" was 35 to 39, and "E" was 0 to 34 marks.

Although in terms of the applicable Rules the Appellant should also have sat for another "common subject" (Scientific Foundation of the Arts) and for the "technical subject" which formed part of the "main subject" selected by her, it would seem that, as the Appellant avers, the requisite courses of studies had not been conducted because of the then prevailing conditions, and hence the Institute had decided not to require candidates to be examined in those two subjects. However, nothing turns on this, because the only dispute, in both Courts, was whether "Advanced Drawing" was a "main subject" and whether the Appellant should have obtained a "C" grade in that subject.

The question whether "Advanced Drawing" was a "main subject", and what grade was required, has to be determined by reference to two documents issued by the Institute to its students, namely its Rules prescribing the syllabi for each year of the degree course, and its published "Examination Criteria".

The relevant provisions of the Rules are as follows:

1. A fourth-year student must select a "main subject" from among four subjects: Art, Graphics, Sculpture and Design.
2. Every Student was obliged to take four "Common " subjects, namely –
 - (a) History of the Arts;
 - (b) One "subsidiary" subject (Art, Graphics, Sculpture, Leather, Textiles, Metal, Wood or Ceramics);
 - (c) Advanced Drawing; and
 - (d) Scientific Foundation of the Arts.
3. The course content of the four "main subjects" was described; each involved three or more subjects or papers.
4. "Design" which was the "main subject" selected by the Appellant, included:
 - (a) 3-dimensional Designs;
 - (b) Types, Colours and Decor; and
 - (c) Architecture, Arithmetic, Examples of Industrial Designs, and Geometrical Drawing (which, for convenience, I will refer to, collectively, as the "technical subject").
5. "Advanced Drawing" dealt, essentially with the human body, while the topics included in the "technical subject" related to knowledge and skills of a mathematical and technical nature, such as algebra, geometry, trigonometry, and the like.

Several contentions were advanced in support of the Institute's position that "Advanced Drawing" was a "main subject" – although the Rules described it as a "common subject" – because, it was argued, it was part of the course content for "Design". Firstly, it was said that "Advanced Drawing" was "a common *paper* on the main subject" of Design (and, presumably, of the other "main subjects" as well); secondly, that it was necessarily a *core* subject of any Degree

in Arts and Sculpture, and therefore a pass (presumably, a "C" pass) was mandatory; and finally, that in relation to the "main subject" of Design, "Advanced Drawing" must be regarded as the equivalent of the "technical subject". The Court of Appeal held that the paper on "Advanced Drawing" appeared to relate to the "technical subject"; that it was a component of the "main subject" Design; and that it was a "core subject" "in the Arts and Sculpture section in Artistic Designing".

These observations and conclusions are clearly erroneous. The Rules only draw a distinction between "main subjects" (which include their constituent components) and "common subjects" (one of which is termed a "subsidiary" subject). They recognise no other distinctions between subjects. They neither require nor permit the re-classification of a "common subject", under the guise of interpretation, as a "core subject", or as a "common paper of a main subject"; or the equating of a "core subject" to a "main subject". What they describe as a "common subject" **for the course**, cannot be treated as a "core subject" or as a "common paper" **of the "main subject"**. The Rules are clear, contain no ambiguities, and give rise to no manifest absurdity or injustice. To introduce new concepts, relating to "core subjects", "common papers", etc, is to depart from the process of interpretation, and thereby to amend or re-write the Rules based on subjective perceptions as to the importance of a subject, inconsistently with the intention of those who framed the Rules, as appearing from the language they used. Further, the Rules did not equate the (artistic) skills involved in drawing the human body, to the (technical) skills involved in the "technical subject", and there is a reasonable basis for the view that skills of the former kind, though vital for Art or Sculpture, were not so important for Design.

I have no hesitation in holding that under the Rules "Advanced Drawing" was not a "main subject".

It is both impermissible and unnecessary to refer to the "Examination Criteria" in order to interpret the Rules on this aspect, because the Rules are clear and unambiguous. However, scrutiny of the Examination Criteria reveals that they are wholly consistent with the Rules. They may be summed up thus:

1. The First three paragraphs prescribe, in sequence, the requirements which a candidate must satisfy to obtain honours (first class, upper second, and lower second, respectively), namely –

(a) a specified **average** in the whole examination (70%, 65% and 55%, respectively), and

(b) Specified **grades** (“A” for a first class, and at least “B” for a second class) in certain subjects.

2. Some of these subjects are specified in these three paragraphs, while the remaining subjects are described as “the subjects set out in the Note K, relevant to the main subject selected by the student in the Arts and Sculpture section”.

3. Note K refers to the four main subjects (there being a misdescription, in regard to “Design”, which I will ignore) and in relation to each main subject, three subjects are mentioned. “Advanced Drawing” is included in relation to all four main subjects.

4. Note K appears immediately after the third paragraph, and admittedly applies to the first three paragraphs.

5. Note K is followed by the fourth paragraph, which makes **no** reference to Note K. It sets out the criteria for an ordinary pass, namely –

“Pass: While an average of 40% is required to obtain an ordinary pass, in the Dance Section ..., and in the Art and Sculpture Section candidates must obtain a “C” grade pass in the main subject and in the History of the Arts.”

Learned Senior State Counsel submitted that Note K makes “Advanced Drawing” a “main subject” – both for honours and for an ordinary pass. Had there been some ambiguity in the Rules as to whether “Advanced Drawing” was a “main subject”, it might have been legitimate to resolve that ambiguity by reference to the

Examination Criteria and Note K. However, in the absence of any ambiguity, Note K cannot alter the Rules. That apart, Note K properly read, does not even suggest that "Advanced Drawing" is a "main subject". While the English translation is far from satisfactory, the Sinhala text of the first three paragraphs clearly refers to "the **subjects** set out in Note K, relevant to the main subject", and not, as the Respondents contend, to "the **main subject** set out in Note K ...". Thus, for a student who has selected Design, "Advanced Drawing" is a subject (but not a "main subject") in which she must obtain superior grades in order to obtain honours. However, since the fourth paragraph of the Examination Criteria does not refer to Note K, nothing in Note K can be treated as modifying the requirements for an ordinary pass specified in that paragraph. Even if there had been any doubt or ambiguity, since the document was one prepared and issued by the Institute, the *contra proferentem* rule of interpretation must be applied, so as to give the student, and not the Institute, the benefit of that doubt or ambiguity.

In my opinion, Note K is inapplicable to an ordinary pass, and in any event does not make "Advanced Drawing" a "main subject".

It is arguable that in respect of a student who selected Design the only requirement for an ordinary pass is that she should obtain an average of 40% in the examination. This requirement the Appellant satisfied. However, it may be that "the Art and Sculpture section" includes Design and Graphics as well, in which event the Appellant should also have obtained "C" passes in her "main subject" and in History of the Arts: this too she did. She therefore satisfied all the requirements of the Examination Criteria for an ordinary pass, and thereby became entitled to the award of the Degree.

Learned Senior State Counsel conceded that, upon this finding, we should grant *Certiorari* to quash the decision not to award the Appellant the Degree. He contended however, that we should not grant *Mandamus* to compel the award of the Degree, but only to require the relevant authorities to **consider** the question of awarding that Degree. He also claimed that there had been no refusal to award her the Degree. He also submitted, firstly, that there was no public duty to award a Degree, and that no one had a right to the award of a

Degree (citing *Sannasgala v. University of Kelaniya*⁽¹⁾), and secondly, that any institution awarding Degrees had a residual discretion to withhold a Degree, even if the candidate had satisfied the relevant regulations. He submitted that the Appellant was "weak" in "Advanced Drawing", having failed in that subject in the first, second and third examinations, and having passed in that subject, in each case, only on her second attempt. He suggested that the Appellant might more appropriately have sought relief under Article 126 for the alleged failure to apply the Rules and Examination Criteria uniformly.

It is clear from the conduct of the University, the Institute, and their officers (including the undue delay in replying to the Appellant's several appeals) that there was a refusal to award the Appellant the Degree to which she was entitled under the Rules. By a letter dated 12.11.92 she was informed that the original decision of the Board of Examination could not be changed. And indeed it is that refusal which we are now called upon to quash by *Certiorari*.

While it was possible for the Institute to have reserved the right to withhold the Degree, even where a candidate has satisfied the relevant rules and regulations, there is no such reservation in the Rules and Examination Criteria which have been produced. Our attention was not drawn to any other provision whereby any such discretion was reserved. The decision in **Sannasgala** is not relevant for two reasons. Firstly, it would appear that there were no rules entitling the candidate in that case to the award of a Degree. Secondly, although there are *dicta* suggesting that the University would have had a discretion, even if there had been such rules, those observations were in the context of a decision reached before fundamental rights were constitutionally entrenched in 1978. Prior to 1978 it was held in *Alphonso Appuhamy v. Hettiarachchi*⁽²⁾, that section 18(1) (a) of the 1972 Constitution did not itself confer a right to equality or to equal protection, and would come into operation only where a complainant was able to establish that he had acquired a right to be protected (i.e. under some **other** statute or regulation), because section 18(1) (a) "does not protect non-existent rights" (per Rajaratnam, J. at 140-141). Pathirana, J. who delivered the principal judgment did not refer to the fundamental rights aspect. But now there is no doubt that Article 12 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 discretions.

The fact that by entrenching the fundamental rights in the Constitution the scope of the writs has become enlarged is implicit in Article 126(3), which recognises that a claim for relief by way of writ may also involve an allegation of the infringement of a fundamental right. While learned Senior State Counsel is correct in suggesting that the Appellant may have sought redress under Article 126(2), she was also entitled to apply to the Court of Appeal for *Certiorari* and *Mandamus*, and when it appeared that there was, *prima facie*, an infringement of a fundamental right, the whole matter could have been referred to this Court under Article 126(3).

I hold that, having satisfied the Rules and Examination Criteria, the petitioner was entitled to the award of the Degree of Bachelor of Fine Arts on the results 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. I hold that under the Rules and Examination Criteria, read with Article 12, there was a public duty, cast upon its officers, enforceable by *Mandamus*, to take the necessary steps to award the Appellant that Degree.

The Appellant is entitled to an order in the nature of a writ of *Certiorari* to quash the refusal by the University of Kelaniya and/or the Institute of Aesthetic Studies and/or its officers to award her the Degree of Bachelor of Fine Arts, and to an order in the nature of a writ of *Mandamus* directing the 1st, 2nd and 3rd Respondents to take all necessary steps, within the scope of their powers, duties and functions, to award her that Degree.

The appeal is allowed, the order of the Court of Appeal is set aside, and orders for the issue of *Certiorari* and *Mandamus*, as aforesaid, are substituted. The Appellant is entitled to a sum of Rs. 20,000 as costs in both Courts.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.
