SURENDRAN
v.
THE UNIVERSITY GRANTS COMMISSION AND ANOTHER

SUPREME COURT.
FERNANDO, J.
GOONEWARDENA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 480/92.
JANUARY 13th AND 15th, 1993.

Fundamental Rights – Right to equality before the law – Article 12(1) of the Constitution.

The petitioner complained of the infringement of his fundamental right to equality before the law under Article 12(1) by reason of the failure of the University Grants Commission (the 1st respondent) to admit him to a University to follow a course of study in Engineering. He prepared for the G.C.E. (A./L.) examination to be held in August 1990 from the Jaffna District. However that examination was not held in that month in the District of Jaffna, Kilinochchi, Mannar, Mullaitivu and Vavuniya, and also in certain parts of the Districts of Trincomalee, Batticaloa and Ampara because of prevailing unrest. In April 1991 an examination was held in those areas on the same syllabi headed " General Certificate of Education

(Adv. Level) Examination August 1990 (Special 1991). There was no indication that this examination would be treated in any way different to the August 1990 examination. The petitioner secured an aggregate of 276 marks.

Rule 29 of the Rules Relating to Admission to Undergraduate Courses in the Universities read as follows.

.....admission.....is.....on the results of the G.C.E. A./L. Examination. Where more than one examination has been held in a particular year, the results of all the examinations held in that year, will be jointly considered for this purpose".

The petitioner contended that by virtue of this rule the August 1990 and April 1991 examinations should have been jointly considered. The petitioner was not selected for Engineering I or Engineering II ".

Held :

There can be no discrimination as between the August and April examinations. Candidates who sat for the April examination had a legitimate expection that Rule 29 would not be departed from.

The petitioner's fundamental right to equality was infringed by the sub-division of the Merit Quota on a geographical basis.

Cases referred to :

1. *Seneviratne v. U. G. C.* [1978-79-80] 1 Sri L.R. 170, 211.
2. *Ramupillai v. Minister of Public Administration* [1991] 1 Sri L.R. 11, 61.
3. *Perera v. U. G. C.* [1978-79-80] 1 Sri L.R. 128.

APPLICATION for infringement of fundamental rights.

R. K. W. Goonasekera with *Mano Devasagayam* and *W. S. Senthilnathan* for petitioner.

D. P. Kumarasinghe D. S. G. for respondents.

Cur. adv. vult.

March 26, 1993.

FERNANDO, J.

The Petitioner complains of the infringement of his fundamental right to equality before the law under Article 12 (1) by reason of the failure of the University Grants Commission, " the 1st Respondent ", to admit him to a University to follow a course of study in Engineering. The

Petitioner had been preparing for the G.C.E. (Advanced Level) examination to be held in August 1990, from the Jaffna District. However that examination was not held in that month in the Districts of Jaffna, Kilinochchi, Mannar, Mullaitivu and Vavuniya and also in certain parts of the Districts of Trincomalee, Batticaloa and Ampara ("the affected Districts"), because of prevailing unrest. An examination was later held in those areas in April 1991, on the basis of the same syllabi ; the question papers for that examination were headed " General Certificate of Education (Adv. Level) Examination, August 1990 (Special – 1991) "; there was no indication that this examination would be treated as being in any way different to the August 1990 examination. The Petitioner secured an aggregate of 276 marks at that examination, and having satisfied the minimum requirements for application for admission to a University, duly applied for admission, indicating Engineering I, Engineering II, Quantity Surveying, and Law, in that order of preference, as the courses of study for which he wished to be considered. The Petitioner's grievance is that the 1st Respondent's " Rules Relating to Admission to Undergraduate Courses in the Universities ", for the academic year 1991/92 ("1R1") had not been observed. Rules 2 and 29 provide :

"2. The following admission policy will apply in respect of the Academic year 1991/1992.

(a) Admission will be done on the basis of raw aggregate marks obtained by eligible candidates at the G.C.E. (A/L) Examination held in 1990.....

(c) (1) Merit Quota

In admitting students to courses of study other than Arts, 40% of the available places will be filled in the order of marks compiled on an all-island merit basis.

(2) District and Educationally disadvantaged District quota

(i) In the case of Medicine, Biological Science, Physical Science, Management Studies and Commerce.....

(ii) In the case of all other courses of study, the number of places allocated to each district shall be the number of places it would have secured under the criteria applied for the academic year 1989/90 and it will be ensured that no student from any district is at a disadvantage as a result of the new admission policy."

"29. ..... admission.....is.....on the results of the G.C.E. (A/L) Examination. Where more than one examination has been held in a particular year, the results of all the examinations held in that year, will be jointly considered for this purpose."

Although Rule 29 refers to examination held "in" that year, it was not suggested that this referred only to examinations held during a particular calendar Year ; it refers to the examinations held for the purposes of admission in respect of a particular academic year. Accordingly, says the Petitioner, the results of the August 1990 and April 1991 examinations should have been jointly considered, i.e. with no distinction whatever between the two examinations ; the 1st Respondent however treated the April 1991 examination as being a distinct and separate examination, and did not duly apply Rule 2(c) ; consequently the Petitioner was not selected for Engineering I or Engineering II.The effect of Rule 2 is that 40% of the available places will be filled on the basis of all-island merit, and the remaining 60% according to quotas allocated (in proportion to population) to the 25 administrative Districts, subject to an adjustment which is not relevant to the present dispute. In making selections in accordance with the aforesaid quotas, allowances had to be made for two matters. Firstly, if in respect of the last vacancy, there were several students who had obtained the same aggregate, all such students would be selected. Secondly, a certain number of places had to be reserved for " exceptional " cases provided for by Rules 43 to 56 (21 for Engineering 1 and 3 for Engineering II). There is some doubt as to the number of places available for Engineering I (either 611 or 570) and Engineering II (either 106 or 100). The 1st Respondent made selections on the basis that the number of places available, after making those two allowances, was 504 for Engineering 1 and 87 for Engineering II ; thus the 40% Merit Quotas amounted to 202 and 35 respectively.

In 1980 the District Quota system ("intended to be a temporary measure, valid for admission in 1979, and to be reviewed thereafter") was held not to be unconstitutional (*Seneviratne v. U.G.C.*, [1] ; in *Ramupillai v. Minister of Public Administration,* [2]. I expressed doubt as to its constitutionality a decade later. However, the Petitioner does not question the District Quota system in this application, as his position is that whether admission is solely on merit, or on the Merit-cum-District Quotas system, he was entitled to admission.

There were 202 candidates who obtained 281 marks or more ; 34 candidates who obtained between 277 and 280 marks ; and 11 candidates (including the Petitioner) who obtained 276 marks. If the two examinations had been considered together, the 202 candidates who obtained 281 marks or more would have been selected on the Merit Quota for Engineering I. (Of these, 59 would have been from Colombo, and 89 from Jaffna.) Thirteen of the 34 candidates who obtained between 277 and 280 marks, and four of the candidates who obtained 276 marks, were from the Jaffna District ; the District Quota for Jaffna appears to have been 17, so that the Petitioner would probably have been selected for Engineering I under that District Quota. If not, he would definitely have been selected for Engineering II, probaby on the Merit Quota (or at least on the Jaffna District Quota).

However the 1st Respondent treated the two examinations as distinct, and apportioned the Merit Quota of 202 for Engineering I on the basis of the number of students applying for admission for Engineering I on the results of the August 1990 (1853) and the April 1991 (571) examinations. On that ratio, 154 places were filled from among students who sat the August examination, and 48 from among those who sat the April examination. (This resulted in a complete reversal – 92 being selected from Colombo, and only 60 from Jaffna.) In consequence of the Merit Quota being sub-divided between the two examinations, 28 students from the Jaffna District who would otherwise have gained admission under the (undivided) Merit Quota, failed to do so ; instead 17 of them gained admission under the Jaffna District Quota ; eleven of them, and other students who would otherwise have gained admission under the Jaffna District Quota, failed to do so. The Petitioner was one of the latter ; he was also not selected for Engineering II, in consequence of the apportionment of the Merit Quota in respect of that course.

Learned Counsel for the Petitioner contended that under its own Rule 29, admittedly made after the decision of this Court in *Perera v U.G.C.* [3] the 1st Respondent was not entitled to treat the April Examination as being separate or distinct, and was not entitled to sub-divide the Merit Quota between the two examinations. In that case, consequent upon the abolition of the Higher National Certificate of Education (H.N.C.E) examination, two G.C.E. (Advanced Level) examinations were held in 1979 ; the April examination was the regular examination, and the August examination was a new examination to meet the requirements of students who would otherwise have sat for the H.N.C.E. These two examinations were different, and were based on different syllabi. The 1st Respondent decided that University admissions in respect of the year 1980 should be based on both these examinations. However, as the 1st Respondent considered that the two examinations were not of the same standard, and that there was no rational method by which the performance of candidates could be jointly considered, it decided that the allocation of available places as between the two examinations should be in the ratio of the number of students attaining the minimum requirement for admission at each examination. On that basis, a ratio of 7.2:2.8 was fixed. It was held :

" Once the qualified students from both sources were clubbed together, they constituted one class and there could not be a class within that class. There came to exist only one source of selection and not two sources of selection and there was no basis for any classification and no distinction could any further be made in selecting the best candidate for admission to the Universities. The preferential treatment of one source in relation to the other, based on the differences between the said two sources, can no further be justified. Also, there was no reasonable nexus between the differences in the two sources and the ultimate objective of selection, namely, to secure the best talent. The discriminatory ratio adopted by the Respondent is thus violative of Article 12 of the Constitution. Allocation of places in the Universities on the basis of the ratio decided on by the Respondent will result in candidates of an inferior calibre from the April batch being selected,.....candidates of a superior calibre from the August batch not being selected. In view of the fact that there is a larger number of candidates than places available in the Universities, the object being to secure the best possible material for admission to the Universities, merit

is the only fair and satisfactory basis of selection. The Respondent itself recognised the excellence of the merit criterion by allocating 30% of the available places on merit to be determined on an all-island basis. This object will be defeated by the ratio basis of selection. Selection of those who had obtained a less number of marks in preference to those who had obtained a higher number of marks in the examination who had been placed on par by the Respondent for purposes of qualifying for admission to the Universities is fundamentally unjust and cannot be sustained. The differences that are alleged by the Respondent to have existed in the two sources of admission are irrelevant for the ultimate selection." (p. 142)

The learned Deputy Solicitor General submitted that the 1st Respondent was entitled to depart from Rule 29 in order to prevent injustice ; that if a common merit list had been prepared for the two examinations only 104 applicants (out of 1,853) from among those who sat the August examination would have been selected on the basis of merit for Engineering I, as against 106 applicants (out of 571) from among those who sat the April examination ; the latter candidates had the advantage of an additional eight months time for preparation ; further, students who sat the April examination from the Jaffna District had performed better than in preceding years, whereas the performance of candidates from other Districts who sat the August examination showed no significant improvement ; he submitted that candidates at the April examination had the opportunity of scoring more marks. He conceded, however, that the 1st Respondent had not given any intimation whatsoever, prior to the April examination, that it would be treated as a separate examination or that the Merit Quota would be divided. He also conceded that at the August examination (and indeed at all previous examinations) no distinction had been made between candidates sitting for the first time and those having an additional year (or more) for preparation by virtue of repeating the examination.

The decision in *Perera v U.G.C.* compels me to hold that there can be no discrimination as between the August and April examinations. Further the 1st Respondent adopted Rule 29 after that decision, thereby confirming the principle that there would be no discrimination between two like examinations. Candidates who sat for the April examination had a legitimate expectation that this Rule would

not be departed from. The fact that, for any reason the 1st Respondent decided to depart from that Rule did not result in a valid amendment of the Rule (as suggested by the learned Deputy Solicitor General). Discrimination cannot be justified on the basis that candidates for the April examination had eight months more time for preparation, because candidates who repeat these examinations are treated equally with those who sit for the first time although they have twelve months more, and that advantage has never been the basis of discrimination against them ; in any event the petitioner has urged that he had to prepare for the examination under very difficult circumstances without electricity, while kerosene oil, torch batteries, Candles, etc., were scarce. If allowances have to be made for the difficulties under which children study, it will soon become necessary to make further adjustments to take account of the circumstances in which disadvantaged students, even in normal times, have to study and prepare for examinations. That exercise has to be carried out by reducing disparities in educational facilities and opportunities, and not by imposing arbitrary quotas.

The learned Deputy Solicitor General also sought to justify the "sub-division" of the Merit Quota relying on the following factors referred to in the affidavit of the Chairman of the 1st Respondent.

(a) " Performance levels of students who sat the special examination compared to the performance levels of the other districts – specially in the subject streams of Physical Sciences and Commerce." (In support, the document 1R2 was annexed) ;

(b) " The profile is different. The pattern of the results of the regular examination held in August matches with the previous years." (In support, the document 1R3 was annexed) ;

(c) " The level of admissions to various courses of study should be maintained at satisfactory levels in the national interest, despite the unsettled situation in the country. Hence it was decided to maintain the average level of admissions in the last 5 years. In 1987, 1988 and 1989 the G.C.E. (Advanced Level) Examinations were held under unsettled conditions in the country. 1985 and 1986 were normal years. Therefore, the 1st Respondent decided to maintain the average level of

admissions for the past 5 years." (In support, the documents 1R5 and 1R5A were annexed).

These submissions seek to " standardise " admissions in one year by reference to performance in previous years ; this would be wholly unacceptable where only one examination had been held ; it is equally unacceptable where two examinations are held, both being required by the relevant Rules, as well as the principle of equal treatment, to be treated as equivalent. However, I must point out that the " statistics " contained in the documents annexed do not support the assumptions on which these submissions are based.

The document 1R2 annexed in support of the first submission does not give any particulars in relation to Commerce. However, another document (1R4) entitled " Minimum Marks for Selection for the Various Courses of Study in respect of such District " shows that in all the Districts, other than the affected Districts, the general pattern was that the minimum aggregate for admission to Engineering I, Engineering II, Physical Science and Commerce were considerably less than for Medicine ; but in Jaffna admission for Engineering I, Engineering II, and Commerce required considerably *more* than for Medicine. Had the Merit Quota not been sub-divided, it is likely that the Jaffna results would have shown a similar differential. The document 1R2 shows the minimum aggregate required for admission (under the District Quota) from six Districts including Colombo and Jaffna, over a five year period ; In five Districts the minimum aggregate for admission for 1991/1992 was less than in the preceding four years, while in the Jaffna District alone it was higher. The Respondents suggestion is that so many students from the Jaffna District performed better at the April examination that a much higher minimum mark than before was required. But this is equally consistent with an unfair "sub-division" of the Merit Quota, for that would result in an additional number of students in the preferred Districts gaining admission on the Merit Quota (i.e. with lower marks than if the Merit Quota was not sub-divided). Such students would otherwise have had to gain admission through the District Quota ; consequently an equivalent number of additional students would gain admission through the District Quota, again with lower aggregates than otherwise. The converse process would take place in the affected Districts, with the result that the minimum aggregate required to gain admission through the District Quota would increase. 1R2 is therefore equivocal.

The document 1R3 gives the aggregates obtained by the first 100 students in the Physical Science stream for each of the five years 1986-1990, from the Colombo, Jaffna and Kandy Districts. Although the submissions referred to 1985 as having been a " normal " year, the figures for 1985 have not been furnished. This document was relied on as showing an unusually improved performance by students of the affected Districts ; however only the Jaffna figures have been furnished. I indicated to the learned Deputy Solicitor General that a proper statistical analysis was essential in order to make any rational deduction from these figures, but it appeared that no such analysis had been done. The entries relating to the best candidate in each of these years seemed to contradict the position that the performances of Colombo candidates was consistent with past years, while Jaffna candidates had performed better.

	1986	1987	1988	1989	1990
Colombo	351	376	381	328	372
Jaffna	372	353	354	351	350
Kandy	348	311	302	331	343

Colombo showed an improvement with reference to an "unsettled" year (1989), as well as a " normal " year (1986). Jaffna showed a decline in relation to all previous years. Hence a much closer scrutiny of these figures was necessary. The learned Deputy Solicitor General was unable even to furnish the *average* marks of each of these groups of 100 candidates. Hence his conclusion that these figures showed an unusual improvement in respect of the Jaffna District remained a mere assertion. However I have endeavoured to compare the performance of the first 25 students in Jaffna and Colombo on the basis of their *average* marks :

	1986	1987	1988	1989	1990
Colombo	326.4	319.8	310.9	307.9	314.1
Jaffna	314.4	311.5	313.5	313.4	318.2

These figures appear to suggest a declining trend in Colombo, with a slight improvement in 1990 ; and an almost constant level in Jaffna, with a similar improvement in 1990 ; they also show that

in three successive years Jaffna candidates scored three to five marks more than Colombo candidates. This cannot be explained away by any assertion that 1985 and 1986 were " normal " years ; quite apart from the absence of the 1985 figures, it is a matter of common knowledge that education was disrupted in 1987 to 1989 in Colombo (and in some other Districts), while the unrest in Jaffna did not seriously affect schools ; the performance of candidates from Colombo in 1990 may well have been adversely affected by the disruption of their education in 1988 and 1989.

However, a comparision of the performance of the other candidates does suggest that in the Colombo District performance in 1990 was about the same as in the previous year, while Jaffna candidates performed better in 1990 (scoring about twelve marks more than in 1989) ; the performance of candidates Nos. 25, 50, 75 and 100 were as follows :

Candidate No.		1986	1987	1988	1989	1990
COLOMBO	25	311	302	295	297	298
	50	293	281	277	283	284
	75	280	272	268	275	276
	100	269	265	262	268	269
JAFFNA	25	299	287	302	297	307
	50	278	272	284	282	294
	75	265	256	273	273	285
	100	255	242	261	264	278

These figures suggest that in 1990 these Jaffna candidates scored about 9 marks more than their Colombo counterparts (compared with an average of four marks more in the case of the first 25 candidates). This does not seem a sufficiently significant difference to warrant a correction.

Even if the performance of Jaffna candidates had been unusually better than in preceding years, the appropriate arithmetical remedy (assuming this to be legal) would have been to discount the aggregates of Jaffna candidates by a corresponding percentage ; e.g. if their performance had been found, after a proper statistical analysis, to be 10% better (or 20 marks more) than candidates at the August

examination, their aggregates should have been reduced by 10% (or 20 marks). Admissions should then have been determined by reference to the Merit and District Quotas. The arbitrary "sub–division" of the Merit Quota, by reference to the ratio of eligible applicants, does not bear any rational relationship to the extent by which performance in April was better than in August. Further, if the April examination was in fact easier, equality before the law would require other adjustments as well : for example, if a student had scored 40 in each of the four subjects in April, while another had scored 28 in the same subjects in August, it would be unfair to treat the former as having passed in all four subjects while treating the latter as having failed. The remedy applied by the 1st Respondent created a much greater distortion, as the following figures (of students selected and the minimum aggregate for admission) demonstrate :

	1989	1990 UNDIVIDED MERIT QUOTA	1990 SUB-DIVIDED MERIT QUOTA
COLOMBO	68 (277)	59 (281)	92 (271)
JAFFNA	59 (277)	89 (281)	61 (290)

In seeking to correct an apparent discrepancy of five or six marks in performance between the two examinations, the 1st Respondent seems to have created a gross distortion of 19 marks by the "sub-division " of the Merit Quota.

I therefore find that the documents produced by the Respondents do not support their submissions. There has been no proper analysis by the 1st Respondent of the raw statistical information contained in the several documents produced, in an endeavour to overwhelm the Court by, as it were, feeding it a diet of undigested (and seemingly indigestible) figures.

It appears to me that the methods used by the 1st Respondent are seriously flawed for several reasons. The object was to compare the performance of candidates from the affected Districts at the April examination, vis-a-vis preceding years, as against the performances of candidates from the other Districts at the August examination, vis-a-vis preceding years.

1. It seems desirable that the performance of *all* candidates, and not merely of those eligible for University admission, should have been considered.

2. However, assuming that this was too big a task, the performance of *all* eligible candidates should have been considered; not merely a small section of them. Such a comparison should have been according to a statistically acceptable method, possibly by ascertaining the arithmetical mean or average, and perhaps also the median, for each category for each of the years in question.

3. Even if (and this I cannot accept) it was permissible to compare a section or sample from each category, such section or sample should have been duly representative ; thus a comparison of the performances of only Jaffna candidates vis-a-vis only Colombo candidates could not give a correct picture of the April examination in relation to the August examination ; further, even if the Jaffna and Colombo candidates could have been regarded as truly representative (which I doubt) of the affected and other Districts respectively, an appropriate percentage should have been compared. Since there were 571 and 1,853 eligible candidates in the two categories, 100 candidates (i.e. 17.5% from the first category could not properly be compared with 100 (i.e. 5.4%) from the second.

4. Arbitrary assumptions have been made that 1985 and 1986 were " normal " years and that 1987 to 1989 were " unsettled " years, although the several Districts would have been differently affected in those years.

5. Since two of the subjects (Physics and Chemistry) were common to the Biological Science stream (which included Medicine) and the Physical Science stream, it is difficult to understand why the 1st respondent did not find a similar disparity in performance in the former.

I therefore hold that the Petitioner's fundamental right to equality has been infringed by the " sub-division " of the Merit Quota on a geographical basis. The 1st Respondent's decision was not only wrong in law, but was based on factual inferences incorrectly drawn from incomplete statistical data. I have given anxious consideration

to the question of relief. Clearly the Petitioner should have been admitted to a University for a course in Engineering I. Should others, similarly placed, who did not apply to this Court be treated as having acquiesced in the infringement of their fundamental rights ? Should students who have been selected under the new scheme, and who are not parties to this application (and of whose names the Petitioner would have been unaware), be prejudiced by their admissions being invalidated? I am conscious that in *Perera v U.G.C.* the 1st Respondent's decision to adopt the ratio basis of selection was quashed, and the Court directed that the two examination be considered jointly ; but the fact that successful candidates had not been heard was not referred to. In that case there were plausible grounds for differentiating between two examinations : that both the syllabi and the standards were different. Here there are none. The Rules required that the two examinations be jointly considered. The 1st Respondent's inferences from the statistical information were wrong, and in any event the proposed remedy was quite arbitrary. It is well known that social and political unrest of the not-so-distant past was only related to alleged unfairness in University admissions (see *Seneviratne v U.G.C.* at p. 211). Justice must not only be done, but must be seen to be done. And in the field of higher education this requires that the system of University admissions, both as formulated and as implemented, must not only be fair but seen to be fair. I therefore consider that granting the Petitioner relief personally would be insufficient, and that it is just and equitable that the entire scheme of admission be set aside.

I therefore hold that the Petitioner's fundamental right under Article 12(1) has been violated by the 1st Respondent by reason of the " sub–division " of the Merit Quota. I quash the 1st Respondent's decision to sub–divide the Merit Quota, and direct the 1st Respondent to select candidates for admission to Universities for courses in Engineering, in accordance with Rule 29. The Petitioner will be entitled to costs in a sum of Rs. 5,000.

GOONAWARDENA, J. – I agree.

WIJETUNGA, J. – I agree.

Relief granted.