

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

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

S.C. F.R. Application

No: SC/FR/119/2019

S.F. Zamrath,

554/6E, Peradeniya Road,

Kandy.

PETITIONER

Vs.

- 1) Sri Lanka Medical Council,
No. 31, Norris Canal Road,
Colombo 10

- 2) Hon. Dr. Rajitha Senarathne,
Minister of Health Nutrition and Indigenous
Medicine,
Ministry of Health Nutrition and Indigenous
Medicine,
Suwasiripaya,
Colombo 10.

- 3) Wasantha Perera,

Secretary to the Ministry of Health Nutrition and
Indigenous Medicine,
Ministry of Health Nutrition and Indigenous
Medicine, Suwasiripaya,
Colombo 10.

4) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Prasanna Jayawardena, PC, J.
L.T.B. Dehideniya, J
Murdu N.B. Fernando, PC, J.

Counsel: Romesh de Silva, PC, with Sugath Caldera and Niran Anketell
Instructed by Sanjay Fonseka for the Petitioner.
Canishka Vitharana for the 1st Respondent.
Suren Gnaraja, SSC, for the 2nd, 3rd and 4th Respondents.

Argued on: 18. 06.2019.

Decided on: 23.07.2019

L.T.B Dehideniya J,

The parties in FR 119/2019, 121/2019, 122/2019, 123/2019, 124/2019, 125/2019, 126/2019, 127/2019, 128/2019, 129/2019, 130/2019, 132/2019, 133/2019, 134/2019, 137/2019 agreed to abide by this judgement. Therefore, this judgement has the binding effect in all the said cases.

The Petitioner invoked the jurisdiction of this court, alleging the violation of her fundamental rights guaranteed under the Articles 12(1) and 14(1) (g) of the Constitution. Further, the Petitioner alleged that, the acts, omissions and decisions of the 1st, 2nd and 3rd Respondents are

ultra vires to the provisions of the Medical Ordinance, and that such acts and omissions are arbitrary, irrational, unreasonable and amount to a violation of the principles of reasonableness, fairness, proportionality, legitimate expectation and natural justice.

The Petitioner is a graduate of the Odessa National Medical University, Ukraine which has been recognized by the Sri Lanka Medical Council for the purposes of provisional registration under the Medical Ordinance. She made an application to the Sri Lanka Medical Council (Hereinafter sometimes called as the 1st Respondent) for approval to sit for the Examination for Registration to practise Medicine (Hereinafter sometimes called as the 'EPRM'). The approval was granted on 30th September 2016 and the Petitioner passed the examination. The Petitioner's contention is that, the 1st Respondent has initially recognized that she has all the required qualifications to sit the EPRM. The Petitioner has passed all the stages of the EPRM and is placed 51st on the foreign graduates' merit list and 128th on the common merit list. Her attempts to obtain a copy of the common merit list were of no avail and unsuccessful. The Petitioner states that, she has applied for provisional registration under Section 29 (2) of the Medical Ordinance and the issue of the EPRM completion certificate. As per the petition, The 1st Respondent has not taken steps to provisionally register the Petitioner citing the purported ground that she has not fulfilled a pre-entry qualification relating to Advanced Level results said to have been imposed by the document marked 1R imposed by the former. Subsequently, the Petitioner has made an application for the internship, but it was rejected by the Ministry of Health on the basis that, there is no provisional registration number granted by the Sri Lanka Medical Council. On 6th of February 2019, the Registrar of the Sri Lanka Medical Council has informed the Petitioner that, no decision has been taken to register her provisionally. The Petitioner's contention is that, being a citizen of Sri Lanka she bears a good character and holds a degree in Medicine which has been recognized by the 1st Respondent, and there is an obligation on the part of the 1st Respondent to provisionally register her as a medical practitioner under and in terms of Section 29 (2) of the Medical Ordinance.

The 1st Respondent's contention is that, it has the sole authority and power to decide on the criteria for the recognition of universities or medical schools of any country by considering the standard of medical education of such universities or medical schools, and has the authority to introduce changes to such criteria and / or subjecting previously imposed criteria to additional qualifications at a subsequent stage. As per the contention of the 1st Respondent, it considers the standards in relation to the recognition, as at the date of submission of the application for

provisional registration under Section 29 (2) by any person. The pre entry qualification said to have been imposed by the 1st Respondent and set out in the Document marked in 1R specifies that, the medical students admitted to the medical schools shall have three passes in Biology, Chemistry and Physics / Mathematics with at least two credit passes in those subjects at the G.C.E. A/L or an equivalent examination approved by the Sri Lanka Medical Council prior the entry to the Medical school. The 1st Respondent further states that, pre-entry qualification requirement is stated in a document made available to the public. However, the Petitioner entered the Odessa University before 1R1 came into force. Before the newly imposed pre entry qualification set out in the circular, the minimum qualification to register at any recognized foreign university was the same as the minimum A/L qualification required for the admission to any other state university of Sri Lanka and does not require the credit passes. As per the contention of the 1st Respondent, it has acted within its powers and scrutinized the A/L qualifications of the Petitioner. The 1st Respondent further states that, the Petitioner has failed to promptly disclose her alleged pre entry disqualification and taken an inordinate period to complete the degree and pass the EPRM and thereby breached the standards of intelligence and enthusiasm necessary for the medical profession.

The Medical Ordinance, by its Section 29 describes the Registration of Medical Practitioners. The Section 29 (1) (a) and Section 29 (1) (b) (ii) of the Medical Ordinance read as follows:

*A person shall, upon application made in that behalf to the Medical Council,
be registered as a medical practitioner,*

a) If he is of good character: and

b) If he

(i)

(ii) Not being qualified to be registered under paragraph (i)

(aa) is a citizen of Sri Lanka,

(bb) holds a degree of Bachelor of Medicine or equivalent qualifications of any university or medical school of any country other than Sri Lanka, which is recognized by the, Medical Council for the purposes of this section having regard to the standard of medical education of such university or medical school.

cc) has passed the Special examination prescribed in that behalf by the Medical Council.

dd) holds a certificate granted by the Medical Council under section 32.

The Section 29 (2) (b) (iii) (i) (cc) states as follows,

(2) For the purposes only of enabling the acquirement of such experiences as is required for obtaining from the Medical Council. a certificate under Section 32, a person shall, upon application made in that behalf to the Medical Council, be registered provisionally as a, medical practitioner,

(a) if he is of good character,

(b) if he,

(i) holds a degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or a Degree Awarding Institute or General Sir John Kotelawala Defence University: or

ii) has passed the examination necessary for obtaining a degree of Bachelor of Medicine of the University of Ceylon or a corresponding university or of a Degree Awarding Institute, but has not obtained that degree owing to a delay on the part of the university or the Degree Awarding Institute or General Sir John Kotelawala Defence University in conferring that degree on him,

(iii) not being qualified to be registered under any of the preceding subparagraphs.

(aa) is a citizen of Sri Lanka;

(bb)

(i) holds a degree of Bachelor of Medicine or an equivalent qualification of any university or, medical school of any country other than Sri Lanka, which is recognised by the, Medical council for the purposes of this section having regard to the standard of medical education of such university or medical school or,

(ii) has passed the examination necessary for obtaining a degree of Bachelor of Medicine or an equivalent qualification of any university or medical school of any country other than Sri Lanka which is recognized by the Medical Council for the purposes of this section, having regard to the standard of medical education at such university or medical school but has not obtained that degree owing to the fact that, he has not completed the period of internship required for obtaining that degree and the Director – General of Health Service has permitted him to compete that period of internship in Sri Lanka,

(cc) has passed the special examination prescribed in that behalf by the Medical Council.

Upon a perusal of the law applicable to the case, it is clear that, in the case of the Petitioners the provisional registration as a medical practitioner in Sri Lanka under Section 29 (2) of the Medical Ordinance is grounded on two basic requirements namely:

- 1) The relevant person applying for provisional registration must possess a Bachelor's Degree in Medicine from any recognized university or medical school of a country other than Sri Lanka. The university must be a recognized university by the Medical Council of Sri Lanka having regard to the standard of medical education.
- 2) That person should have passed the special examination provided by the SLMC.

In the case of the Petitioner, it is evident that the university she attended is a foreign university which has been recognized by the 1st Respondent and that she has passed the EPRM. The conduct of the 1st Respondent of recognizing the University of the Petitioner itself is a fact which shows that, the 1st Respondent cannot deny the entitlement of the Petitioner for provisional registration. The 1st Respondent has recognized the aforesaid university as an institution which provides a standard medical education, which would entitle a graduate to be

recognized as a medical practitioner in Sri Lanka. I see that, the 1st Respondent is estopped from imposing a different and unjustifiable pre requirement subsequently.

The Medical Ordinance is a “law enacted by the Parliament”. A law enacted by the Parliament is of significant value, for two reasons. In one perspective, a law enacted by the parliament has a power to organize the society and in the other way, it protects the citizens. The sanctity of a law enacted by the Parliament is at the zenith. The 1st Respondent is not empowered to and impose rules, which override an enactment which has been passed by the Parliament.

Under section 29 (2) of the Medical Ordinance, a citizen of Sri Lanka who is of a good character and has a degree in medical education from a university recognized by the Medical Council is entitle to sit for the EPRM and on obtaining pass marks, become entitled to provisional registration. Pre entry requirement to the university is not a qualification specified by the Parliament as a pre requisite for provisional registration. Therefore, any other authority, like Medical Council, cannot bring in such a requirement, it can only recognize or not recognize a foreign university or medical school. It is overriding the power or authority of the Legislature.

If the Parliament says that certain requirements are necessary to do a certain thing, other administrative authorities are expected to follow the rule.

Kandiah v.Abeykoon (Sri Skantha Law Reports Volume IV, pg 96,

‘Upon the construction of a statute as a whole, the forms of notice, application and affidavit had to be in strict compliance with those which the legislature has thought important enough to set out in the schedules before the jurisdiction of the magistrate to eject the person in possession or occupation could be exercised’.

This court upholds compliance with the law enacted by the Parliament and the 1st Respondent has acted arbitrarily by subsequently imposing a pre entry qualification as a requirement for the provisional registration. John Quincy Adams, An American Lawyer has stated that, *‘Nip the shoots of arbitrary power in the bud, is the only maxim that protect the liberties of any people’.* (‘Companion to the cantos of Erza Pound’, by Caroll F.Terrell Pg.314).

This court being the apex court of the country upholds the tenets of rule of law. The court accepts the absolute predominance of the ordinary law of the land. A law enacted by the Parliament as the supreme Legislative organ cannot be overridden by a regulation which has been arbitrarily made by a subordinate authority. Such a regulation which has arbitrarily been enacted shall not have a retrospective effect. I hereby quote and uphold the view of Thomas Hardiman, as a judge in the United States. ('A look at Thomas Hardiman, Possible Trump Scotus Nominee', by Michelle Gorman).

'In the legislative branch, you make the laws....and our role as judges is to interpret the law, not to inject our own policy preferences. So our task is to give an honest construction to what laws are passed by the Legislature.'

The recognition of a university or a medical school is entirely within the purview of the Medical Council of Sri Lanka. If the 1st Respondent is of the view that a university or a medical school is giving admission to persons who are not qualified to study a medicine, it is for the Medical Council to re consider the recognition of the said university. The entry qualification to the university is a matter for the said university.

The Medical Ordinance, being the statutory law has not imposed a restriction on the Petitioner following a degree in Medicine of her choice with a view to qualifying as a medical practitioner subject to the requirement that the 1st Respondent must have recognized the said university. The university that the Petitioner studied medicine was a university recognized by the 1st Respondent. It has been mentioned in the list of universities that it had been recognized without any condition or limitation. Relying on that assurance, the Petitioner entered in the said university and obtained a degree of medicine.

The 1st Respondent's subsequent imposition of an alleged pre entry qualification to the university is now held out by the 1st Respondent as the alleged reason for denying the Petitioner provisional registration. The 1st Respondent has attempted to act in contrary to the existing law enacted by the Parliament. Thus, it is clear that, the 1st Respondent has exceeded the powers within its purview. The 1st Respondent is authorized to make rules in the instances where necessary, but no authority has been granted power to override a law enacted by the Parliament. Further, the 1st Respondent cannot expect that, the rules imposed by it can operate retrospectively to thrust a burden on the Petitioner whose qualifications for provisional registration met with the existing law at the time of entering the university prior to the arbitrarily imposition of the alleged pre entry qualification.

This court sees that there is a legitimate expectation on the side of the Petitioner, to have recognition as a qualified person to be entitled to the provisional registration (subject to obtaining pass marks in EPRM). The Petitioner had the expectation that, she is stepping in to a university, which is recognized by the 1st Respondent and afterwards, the 1st Respondent himself imposes a pre entry qualification which ultimately left the Petitioner with utmost desperation as to her future.

The doctrine of legitimate expectation is basically aimed at the prevention of administrative authorities from abusing their discretionary powers against the legitimate expectations of individuals, which have been engineered by the prior conduct of the authorities. The Petitioner has studied in a university which has been duly recognized by the 1st Respondent. It is evident that, the 1st Respondent's act of recognizing the university has engineered a legitimate expectation of the Petitioner. The legitimate expectation of a person ensures that, the administrative authorities are bound by their undertakings and assurances unless there are compelling reasons to change the policy subsequently. It further ensures legal certainty which is imperative as the people ought to plan their lives, secure in the knowledge of the consequences of their actions. The perception of legal certainty deserves protection, as a basic tenet of the rule of law which this court attempts to uphold as the apex court of the country. The public perception of legal certainty becomes negative when the authorities by their own undertakings and assurances have generated legitimate expectations of people and subsequently by their own conduct, infringe the so generated expectations.

Lord Denning has stated that, (in "Recent Development in the Doctrine of consideration") 'A man should keep his words. All the more so when promise is not a bare promise but is made with the intention that the other party should act upon it'. The principle of legitimate expectation is connected with an administrative authority and an individual. It emerges in an instance where an administrative authority affects a person by depriving him of some benefit or an advantage which he had been in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue. Thus as an essence, administrative authority must respect the expectations.

There are essential ingredients of legitimate expectation. Some are:

- a) The doctrine imposes a duty on the administrative body to afford an opportunity of hearing to the affected party, before acting contrary to the latter's legitimate expectation.

- b) The doctrine extends the protection of natural justice or fairness to the exercise of non statutory administrative powers where the interest affected is only an expectation, a privilege or a benefit.
- c) The doctrine applies to make a public authority's decision making process fair.
- d) A person may derive the legitimate expectation of receiving a benefit or privilege as a matter of public law even where that person has no legal right to it.
- e) An individual can claim a benefit or privilege under the doctrine of legitimate expectation only when such expectation is reasonable.
- f) The doctrine extends to the exercise of non statutory powers.
- g) The doctrine of legitimate expectation would arise from an express promise or existence of a regular practice.

In *Wickremaratne v. Jayarathne* [2001] 3 Sri L R 161, Justice Gunawardena held that,

“The doctrine of legitimate expectation is not limited to cases involving a legitimate expectation of a hearing before some right or expectation was affected, but is also extended to situations even where no right to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances. Simon Brown LJ explained this aspect in R. v. Devon Country Council, ex parte Baker and another in which the concept of legitimate expectation was used to refer to the fair procedure itself i.e. that the applicant claims to have a legitimate expectation that public authority will act fairly towards him. It is not procedurally fair for the State to have promised the petitioner an extent of land 2RR 21 PP in extent upon his surrendering the balance land and then proceed to acquire the whole of the land without the petitioner being given any opportunity to make representations.”

As De Smith elaborated in ‘Judicial Review of Administrative Action’ 5th Edition:

‘The protection of legitimate expectations is at the root of the constitutional principle of rule of the law, which requires regularity, predictability, and certainty in government’s dealing with the public’

The administrative authorities are empowered to meet the challenging needs of the society. It is appropriate to quote the perception of Justice C.G.Weeramantry, in his work ‘An Invitation to Law’ at page 139,

“No legal system achieves greatness unless it has within it a built in mechanism for adapting that legal system to change. Society is ever changing and as new circumstances arise, attitudes and moral standards change as well. If the legal system remains frozen and unalterable, there will sooner or later be a wild gulf between this system and the needs of the society”

As the apex court of the country, this court encourages the flexibility and adaptability of the administrative authorities in making policies and taking decisions, but still, insists on the fact that such conduct should not be used unfair and arbitrary. As the 1st Respondent states, it has powers to impose requirements on the subject of the recognition of foreign universities and medical schools. However, such powers should not be unfair and arbitrarily to deprive ones’ rights. The main function of this court in this type of case is to strike a balance between ensuring an administrative authority’s ability to change its policies when required, and make sure that in doing so they do not defeat the legitimate expectations of individuals by acting unfairly and arbitrarily.

Justice Sedley held in R v. MAFF (ex) P. Hamble (Offshore fisheries) 1995 2 All ER 714, that,

“Legitimacy in this sense is not an absolute. It’s a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must in the first instance, be for the policy maker to strike; but if the outcome is challenged by way of a judicial review, I do not consider that the court’s criterion is the bare rationality of the policy maker’s conclusion. While policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court’s concern (as of course the lawfulness of the policy). The court’s task is to recognize the constitutional importance of ministerial freedom to formulate and reformulate the policy, but it is equally the court’s duty, to protect the interest of those individuals whose expectation of different treatment has legitimacy in which in fairness out tops policy choice which threatens to frustrate it.”

The same view which the Justice Sedley observed was held by Justice A.R.B Amarasinghe, in *Dayarathne and Others v. Minister of Health and Indigenous Medicine and Others* [1999] 1 Sri L R 393,

“Evidently, there had been a change of policy. In my view, although the executive ought not in the exercise of its discretion, to be restricted so as to hamper or prevent the change of policy, yet it is not entirely free to overlook the existence of a legitimate expectation. Each case must depend on its circumstances, but eventually it seems to me, that the court’s delicate and sensitive task is one of weighing genuine public interest against private interests and deciding on the legitimacy of an expectation, having regard to the weight it carries, in the face of the need for a policy change”.

It is clear that, the legitimacy of an expectation emerges when it is lawful and proper. The Petitioner is a graduate who has sacrificed a considerable period of her lifetime for the medical education and it is evident that, she has a significant anticipation for her future as a medical practitioner. This court sees the dedication on the part of the Petitioner.

The legitimate or reasonable expectation arises from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. This court decides that, the expectation which is defined in the domain of this doctrine is not merely an anticipation. It is not just a wish, desire, hope, a claim or any kind of a demand. The legitimacy of an expectation can be inferred, if it is founded on the sanction of a law or custom or assurance or an established procedure by a public authority. It was stated in *Union of India v. Hindustan Development Corporation* (1993) SCC 499 at 540, that,

‘Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.’

It is evident from the circumstances of the case, that the Petitioner had a legitimate and protectable expectation to be provisionally registered under Section 29 (2). Medical Education is a sacrifice of 5 or more years in the life of a person which cannot be replaced and will be wasted if the legitimate expectation of being provisionally registered as a medical practitioner is not realized. In this instance I bring forth a quote from Jean Piaget, a psychologist on the concept of Education (‘conquering criticism’ by Pravin Bhatia at pg. 143) said.

‘The goal of education is not to increase the amount of knowledge but to create the possibilities for a child to invent and discover, to create men who are capable of doing new things.’

This perception can be applied to the instance of ‘Medical Education’ as well. The purpose of medical education is not the mere increase of knowledge and the skills of the respective students, but it is to apply such knowledge for the betterment of the field. The Petitioner, who has been denied provisional registration, has knowledge but he/she is being deprived of opportunity to put her talent, capacity and knowledge in to practice. Prior to the conclusion of the case, I quote a statement by Lord Hodge on the constitutional basis of the doctrine of legitimate expectation, in *Rainbow Insurance Company Ltd v. Financial Services Commission (Mauritius)* [2015]UKPC 15,

‘The courts have developed the principle of legitimate expectation as part of administrative law to protect persons from gross unfairness or abuse of power by a public authority. The constitutional principle of the rule of law underpins the protection of legitimate expectations as it prohibits the arbitrary use of power by public authorities.’

This court cannot reject the legitimate expectation on the part of the Petitioner, which is protectable. The 1st Respondent has exceeded its authority and has acted unfairly and arbitrarily and thereby infringed the Petitioner’s fundamental rights guaranteed under the Articles 12(1) and 14 (1) (g) of the Constitution. The 2nd and 3rd Respondents have similarly violated the aforesaid fundamental rights of the Petitioner by their acts and conduct.

Considering the above circumstances, this court decides that, the Petitioner’s fundamental rights guaranteed under the Article 12 (1) and 14(1) (g) of the Constitution have been infringed by the 1st, 2nd and 3rd Respondents. The court directs the 1st Respondent to provisionally register the Petitioner under the provisions of the Section 29 (2) of the Medical Ordinance, as prayed for in prayer (g) of the petition. Further, the Court makes Order in terms of prayer (h) of the petition, which is to be implemented if the 1st Respondent fail to grant provisional registration under Section 29 (2) of the Medical Ordinance to Petitioner within 30 days of this judgement.

The Petitioners in the cases mentioned at the beginning of this judgment are also entitled to the same relief. The Petitioners who were denied the provisional registration and those who were not allowed to complete the ERPM due to the fact that, they are not having the

subsequently imposed pre entry requirement prior to entering the recognized universities, shall be given provisional registration or be allowed to sit for the ERPM respectively.

Judge of the Supreme Court

Prasanna Jayawardena, PC, J

I agree

Judge of the Supreme Court

Murdu N.B.Fernando PC, J

I agree

Judge of the Supreme Court