

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

*In the matter of an application for Writs of
Mandamus and Prohibition under Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

CA/WRIT/320/2021

1. S.A.A.N Jayasekara
President,
Medical Administrators' Forum,
No. 22, 8th Lane, Nawala,
Rajagiriya.
2. Dr. A.P. Maduragoda
62, Illuppagedara Road, Kurunegala.
3. Dr. I.W.M.J. Wickramaratne
2-A, Newton Road, 2nd Canal,
Polonnaruwa.
4. Dr. W.M.T.S. Wijetunga
36A, Bandaranayake Mawatha,
Badulla.
5. Dr. M.D.U. Gunathilaka
Nailiya, Boyagane, Kurunegala.
6. Dr. K.Y.D. Perera
47/2/1/1, Adikaramwatta Lane,
Hittetiya Central, Matara.
7. Dr. R.S.J. Rathnayake
No. 74, Bollegoda Road,
Ambathenne.
8. Dr. D.M.M.L.A. Amjed
No. 21/1, Harmers Avenue,
Colombo-06.

9. Dr. Y. J. Samarasinghe
Shanthi Koskotuwa, Milewa,
Horana.
10. Dr. Y.G.A.C. Seneviratne
No. 68/10, Harasgama road,
Matale.
11. Dr. C. M. Abeysekara
308/68C, Middle Road, Welegoda,
Matara.
12. Dr. K.M.P.D. Jayasundara
No. 28, Darshanapura, Kundasala.
13. Dr. A.P.D.D. Chandrasena
No. 02, 'Susiri', Abeygunaratne
Mawatha, Pamburana, Matara.

Petitioners

Vs

1. Hon. Pavithra Wanniarachchi
Minister of Health,
385, Deans Road, Colombo 10.
2. Secretary
Ministry of Health,
385, Deans Road, Colombo 10.
3. Director General of Health
Services
385, Deans Road, Colombo 10.
4. Justice Jagath Balapatabendi
5. Mrs. Indira Sugathadasa
6. Mr. V. Sivagnanasothy
7. Dr. T.R.C. Ruberu
8. Mr. Ahamed Lebbe Saleem
9. Mr. Leelasena Liyanagama
10. Mr. Dian Gomes
11. Mr. Dilith Jayaweera

12. Mr. W.H. Piyadasa

4th and 5th to 12th Respondents are the Chairman and Members respectively of the Public Service Commission, all of No. 1200/9, Rajamalwatta Road, Battaramulla.

13. Janaka Sugathadasa

14. Mrs. N. Godakanda

15. D. Swarnapala

16. L.A. Kalukapuarachchi

13th and 14th to 15 and 16th Respondents are respectively the Chairman, Members and Secretary respectively of the Health Service Committee of the Public Service Commission, all of No. 1200/9, Rajamalwatta road, Battaramulla.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Romesh De Silva PC with Sugath Caldera and Niran Ankatell for the Petitioners

Manohara Jaysinghe, SSC with Indumini Randeny, SC for the Respondents

Argued on : 15.11.2021

Decided on : 26.01.2022

Sobhitha Rajakaruna J.

The 1st Petitioner is the President of the Medical Administrators' Forum which represents the medical administrators inclusive of Board-Certified specialists in medical administration. The Petitioners state that the Health (Medical) Service in Sri Lanka comprises, inter alia, (i) Grade Medical Officers. (ii) Specialists Grade Officers and (iii)

Administrative Grade Medical Officers. There are three Grades in the category of Administrative Medical Officers, namely, (a) Deputy Medical Administrative Grade, (b) Senior Medical Administrative Grade and (c) Deputy Medical Director Grade.

This application concerns appointments to the Deputy Medical Administrative Grade which is the entry level Grade for the Administrative Grade Medical Officers. The Petitioners plead that it is fit and proper and most appropriate that the posts in the medical administrative service should be filled with those who possess Post Graduate qualifications in medical administration, complying with the service minute applicable to the Health (Medical) Services.

The contents of paragraph 17 of the Petition of the Petitioners which have been admitted by the 2nd and 3rd Respondents, are as follows;

“However, after a long process, including several expert committee reports and two Cabinet sub-committees, a Cabinet decision was taken on 12th June 2018 to, inter alia, grant priority to medical officers with post graduate qualifications in medical administration when appointing officers to all posts except certain post identified separately, for which officers with post graduate qualifications in community medicine would be granted priority”

The original Health (Medical) Service Minute has been published in Extraordinary Gazette Notification No. 1883/17 dated 11.10.2014, marked X. The Public Service Commission has subsequently amended the said Service Minute and such amendments were published in the Extraordinary Gazette Notification No. 2218/50 dated 09.03.2021, marked 1R7(b).

The Petitioners’ complaint is that notwithstanding the publication of the amendments to the said Service Minute, no steps have been taken to fill the existing vacancies in the Deputy Medical Administrative Grade. The Petitioners’ contention is that there are approximately 70 vacancies that have currently been left unfilled and it is essential for the medical system, especially in the present circumstances, that the said positions are not left vacant and are filled. Further, the Petitioners state that the appointments have not been made to several posts in Community Medicine because of the practice of absorbing medical officers with qualifications in community medicine in to the Medical Administrative Grades. Petitioners contend that it is obligatory that the positions be filled in terms of the Health (Medical) Service Minute (as amended) and that due to political

and trade union pressure, steps may be taken by the 1st to 3rd Respondents to fill the said vacancies otherwise than in terms of and/or in contravention of the said Service Minute as amended. Accordingly, the Petitioners seek inter alia;

- a) A mandate in the nature of a Writ of Mandamus directing the Respondents to fill the vacant posts in the Deputy Medical Administrative Grade of the Health (Medical) Service under an in terms of the Health (Medical) Service Minute as amended by the Extraordinary Gazette Notification No. 2218/50 dated 09.03.2021; and
- b) A mandate in the nature of a Writ of Prohibition prohibiting the Respondents from taking any steps to fill vacant posts in the Deputy Medical Administrative Grade of the Health (Medical) Service otherwise than in terms of the Health Medical Service Minute, as amended by the Extraordinary Gazette Notification No. 2218/50 dated 09.03.2021.

It has been brought to the notice of this Court that several doctors with qualifications in community medicine have instituted an application bearing No. SC/FR 153/2018 in the Supreme Court seeking inter alia, to prevent implementation of the decision to give priority in the Deputy Medical Administrative Grade to medical officers with qualifications in medical administration. It was submitted that the President and the Secretary of the College of the Medical Administrators of Sri Lanka have sought to intervene in the said case and the matter has not been supported for leave to proceed (*vide*-paragraph 42 to 46 of the Petition of the Petitioners).

The issues in respect of this application begin by submitting a Cabinet Memorandum dated 28.06.2021, marked 1R8 by the former Minister of Health who sought approval to;

- i. temporarily suspend the implementation of the amended provisions included in the Gazette Notification bearing No. 2218/50 published on 09.03.2021; and
- ii. inform the Public Service Commission within two months, the recommendations for solution through making a new policy appointing a committee to study the existing Medical Service Minute with new recommendations in order to give an appropriate solution for the existing issues in Medical Administrative Grade.

The Respondents' contention is that such Cabinet Memorandum has been submitted due to the continued representations made to the Minister of Health on the basis that the aforesaid amendments to the Service Minute would result in discrepancies. The Cabinet of Ministers as specified in the Cabinet decision dated 12.07.2021 granted approval to both above recommendations in the said Cabinet Memorandum.

The Respondents state that in view of the aforesaid cabinet decision, the Respondents are not in a position to proceed with the amended provisions of the Medical Service Minute. The Respondents further state that the above 1st recommendation contained in 1R8 is only a temporary measure employed with the intention to find a more sustainable solution to the grievances of the stakeholders.

Therefore, the question that has to be examined here is whether the said Cabinet decision dated 12.07.2021 is a barrier for the 2nd and 3rd Respondents to make appointments to the Deputy Medical Administrative Grade in terms of the amended provisions of the Medical Service Minute marked 1R7(b). In view of resolving the above question, the material documents to be considered are the said Cabinet Memorandum dated 28.06.2021 (1R8), the Cabinet Decision dated 12.07.2021 (1R9) and the Health (Medical) Service Minute (X) including its amendments in 1R7(b).

By virtue of Article 55 (3) of the Constitution of the Republic, the appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Public Service Commission (PSC) subject to the provisions of the Constitution. The Section 2 of Chapter II of the Establishments Code deals with scheme of recruitment and accordingly, for every post in the public service or where such a post belongs to a Grade or Service, for every such Grade or Service, there should be a scheme of recruitment which specifies the salary scale of post, the qualifications required, age limits and other relevant particulars. The Medical Service Minute of Sri Lankan Health Service (hereinafter referred to as 'Service Minute') published in Extraordinary Gazette Notification No. 1883/17 on 11.10.2014 (X) by the PSC is basically a scheme of recruitment as contemplated by the said Section 2 of the Establishments Code. The Clause 2 of the said Service Minute stipulates that the PSC is the appointing authority in respect of all the posts other than the post of the Director General of Health Services. Therefore, PSC and the Ministry of Health are bound to make appointments to such posts including to the Deputy Medical

Administrative Grade only in terms of and within the scheme set out in the Service Minute marked X (as amended) issued by the PSC.

As observed above, the said Service Minute marked X has been amended by the PSC by virtue of the Gazette Notification No. 2218/50 dated 09.03.2021, marked 1R7(b). Now, it is important to ascertain as to whether those amendments introduced by the Gazette Notification marked 1R7(b) is still in operation in the backdrop of the above decision taken by the Cabinet on 12.07.2021. The Petitioners' argument is that the said Cabinet decision is only a conditional decision and in fact it cannot be considered as a proper Cabinet decision. Further, the Petitioners argue that the said Service Minute or the amendments in 1R7(b) have not been rescinded by the Cabinet or the PSC. In response to the said argument, the 2nd and 3rd Respondents assert that this Court in determining this application cannot disregard a Cabinet decision. However, as mentioned above the 2nd and 3rd Respondents in paragraph 3 (j) of their Statement of Objections categorically averse that the Respondents are not in a position to act according to the said amended Service Minute due to the said Cabinet decision marked 1R9.

On perusal of the said Cabinet decision marked 1R9, it is apparent that such approval has been granted, subjected to the condition that the Secretary to the Ministry of Health taking actions as follows;

- i. to ensure that there is no legal impediment pertaining to the implementation of the above 1st recommendation;
- ii. to obtain the concurrence of the Public Service Commission prior to implementing the recommendation in the **Memorandum**.

Therefore, in my view, the 1st recommendation in the said Cabinet Memorandum to temporarily suspend the implementation of the amended Service Minute 1R7(b) has been approved by the Cabinet subjected to a precondition but not to a postcondition. Hence, the temporary suspension approved by the Cabinet will become operative only upon the concurrence being granted in that regard by the PSC and also upon the Secretary to the Ministry of Health expressing an assurance that there is no legal impediment pertaining to the aforesaid 1st recommendation. The 1st to 3rd Respondents have not indicated to Court by way of their Statement of Objections or through the submissions made on their behalf

at the argument stage that such concurrence of the PSC or an assurance of the said Secretary had been issued.

On that footing, I am of the view that the said amendments made to the Service Minute in 1R7(b) are still in force as the suspension approved by the Cabinet has not become operative due to non fulfilment of the conditions imposed by the Cabinet.

Also, the Court observes that there is no direction issued on the 2nd and 3rd Respondents by the Cabinet and that the 2nd and 3rd Respondents are bound only by a decision of the PSC made in reference to the said Service Minute, by virtue of the delegated powers under the Constitution.

The Petitioners rely upon the judgement of ***K. W.S.P Jayawardhana and 24 others vs. Gotabaya Jayaratne, Secretary Ministry of Education and others SC FR Application No. 338/2012 decided on 07.09.2018***, in which Prasanna Jayawardena J. has held that;

“Before parting with this issue, it is relevant to state that, at times material to this application, the powers vested in the Cabinet of Ministers by Article 55 (1) of the Constitution to provide for and determine policy relating to the appointment and promotion of public officers, authorise the Cabinet of Ministers to direct that a Service Minute be amended or scrapped altogether and replaced with another or to direct that a specific procedure be adopted to meet the needs of specific circumstances, which are outside the compass of a Service Minute or are not met by the provisions of a Service Minute. In HETTIARACHCHI vs. SENEVIRATNE [1994 3 SLR 290], Fernando J, in a very brief judgment, expressed the view that the Cabinet of Ministers is not necessarily bound to act in terms of Service Minute such as “P2”. “

“But, I would think that, in the absence of a published directive issued by the Cabinet of Ministers to adopt a special procedure and follow specified guidelines which are required by reasons of policy and are based on objective and rational criteria, the Cabinet of Ministers would be expected to act in terms of the existing Service Minute marked “P2” other than in instances where a lacuna in “P2” is detected that and the Cabinet of Ministers acts specifically for the purposes of addressing that lacuna.” [Emphasis added]

In ***Ratnasiri & others vs. Ellawala & others [2004] 2 Sri LR 180***, the Court of Appeal has discussed on the issue of absence of specific legislation or subordinate legislation which expressly repeal and replace the existing law or regulation and the Court has observed that

the later cannot be 'wiped out'. Saleem Marsoof J. (as he was then P/CA) referring to a judgement of Wanasundera J. held as follows;

*“As Wanasundera J. observed in **The Public Service United Nurses Union v Montague Jayewickrema, Minister of Public Administration and Others (S.C. Application No. 4/87 decided on 29.04.1988) at 230** - “.....when existing general rules are sought to be altered, this too must be done in the same manner and following the identical procedures as for their formulation, namely, by enacting an ending rule.”*

The approval contained in 1R18 does not constitute rules, regulations and procedures of general application which could replace the pre-existing rules, regulations and procedures including the Establishments Code. In the circumstances, the court holds that 1R18 is not in any manner sanctioned by Article 61B of the Constitution. The court is of the opinion that the Public Service Commission has not made any contrary provisions which will discontinue the application of the pre-existing rules, regulations and procedures including the provision of the manual of transfer and Chapter III of the Establishments Code.”

In the circumstances, I am of the view that filling the vacancies in the Deputy Medical Administrative Grade otherwise than in terms of and/or in contravention of the Service Minute as amended would be ultra vires, arbitrary and unreasonable.

It is observed as per the 'justification' paragraphs of the Cabinet Memorandum marked 1R8 many representations have been made to the Ministry of Health and also to the Honourable Minister by individuals, stakeholders and associations quoting various discrepancies and discriminations resulting from the amendments in 1R7(b) and that the procedure followed in making such amendments is wrong. In the circumstances, I issue a Writ of Prohibition, prohibiting the 1st to 3rd Respondents from taking any steps to fill vacant posts in the Deputy Medical Administrative Grade of the Health (Medical) Service otherwise than in terms of the said Service Minute (as amended by Extraordinary Gazette Notification No. 2218/50 published on 09.03.2021) until the Public Service Commission expressly repeal or replace any provision of the existing Service Minute (as amended) concurring the Cabinet decision dated 12.07.2021.

However, I am not inclined to issue a Writ of Mandamus as prayed for in the prayer of the Petition as this Court does not wish to usurp the authority of 1st to 3rd Respondents in deciding as to when the existing vacancies in the said post of Deputy Medical

Administrative Grade will be filled. The Court is mindful of the fact that several other rules and regulations or circulars issued by the Ministry of Finance should be adhered to by the authorities before filling such vacancies in public service. Moreover, any material or facts relating to that aspect has not been placed before this Court.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal