

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

In the matter of an application for orders in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 296/21

Dr. Liyana Arachchillage Tharanga
Madubhashini Liyanarachchi

5/2, Temple Road, Kalutara North.

Petitioner

- Vs-

1. Dr. Asela Gunawardena
Director General of Health Services,
Ministry of Health, "Suwasiripaya",
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.
2. Dr. H. S. Munasinghe
Secretary,
Ministry of Health, "Suwasiripaya",
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.
3. Dr. Lal Panapitiya
Director General (Medical service 1),
Ministry of Health, "Suwasiripaya",
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.

4. Dr. Ayanthi Karunaratne
Acting Director (Tertiary Care Services)
Ministry of Health, “Suwasiripaya”,
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.

5. Dr. Rasika Gunapala
Consultant Pediatrician,
Lady Ridgeway Hospital,
Colombo 8.
(Member of the Transfer Board)

6. Dr. Darshana Sirisena
Consultant Neurologist,
National Hospital of Sri Lanka,
Colombo 7.
(Member of the Transfer Board)

7. Dr. Sunil de Alwis
Additional Secretary (Medical Services)
Ministry of Health, “Suwasiripaya”,
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.

8. Mr. I. A. Kalukapuarachchi
Secretary,
Health Services Committee,
Public Service Commission,
1200/9, Rajamalwatte Road,
Battaramulla.

9. Dr. S. M. Senanayake
Consultant Gastroenterologist,
District General Hospital, Kalutara.

10. Dr. K. R. P. Perera
Consultant Gastroenterologist,
District General Hospital, Matara.
11. Dr. S. K. Kodisinghe
Consultant Gastroenterologist,
Provincial General Hospital, Badulla.
12. Dr. T. A. C. L. Piyaratne
Consultant Gastroenterologist,
Teaching Hospital, Anuradhapura.
13. Hon. Pavithra Wanniarachchi
Minister of Health,
Ministry of Health, "Suwasiripaya",
No 385, Baddegama Wimalawamsa
Mawatha, Colombo 10.
14. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Neville Abeyratne PC with Kaushalya
Abeyratne Dias for the Petitioner.
Harsha Fernando with Sharith Senanayake
and Yohan Cooray for the 9th to 12th
Respondents.
Chaya Sri Nammuni SSC for the
Respondents.

Argued On : 15.12.2021

Written Submissions tendered : On behalf of Petitioner : 13.01.2022
On behalf of 1st to 4th,
13th and 14th Respondents : 09.02.2022
On behalf of 09th- 12th
Respondents : 12.01.2022

Decided on : 05.05.2022

Dhammika Ganepola, J.

The Petitioner in the case in hand is a Specialist Medical Officer who currently serves the District General Hospital, Gampaha. The Petitioner after passing her MBBS examination in the year 2008 has served in the Department of Health holding various positions at various times. On 01.10.2015, the Petitioner has admitted herself to pursue the degree of MD Medicine and accordingly has completed her local and foreign training by 16.07.2020. The Petitioner, in order to obtain her appointment as a Specialist Medical Officer in Sri Lanka has applied for Board Certification with necessary documents to the Post Graduate Institute of Medicine (PGIM) on 03.09.2020. The Board Certification has been approved by the PGIM by its letter dated 11.02.2021 (P2) with effect from 30.09.2018. Accordingly, a certificate has been issued by the PGIM on 29.01.2021 certifying that the Petitioner has been certified as a Specialist in Gastroenterology as of 30.09.2018. Accordingly, the Health Service Committee (HSC) of the Public Service Commission (PSC) has appointed the Petitioner as a Specialist Medical Officer effective from 30.09.2018.

The issue pertaining to the instant application has arisen by calling for applications for the Annual Transfers of Specialist Medical Officers for the year 2021 by the Ministry of Health. The Secretary, Ministry of Health i.e. the 2nd Respondent has issued the Notification dated 29.03.2021 (P4) calling applications for Annual Transfers of Specialist Medical Officers for the year 2021. As per the said Notification

P4, the closing date of the applications for the Annual Transfers of Specialist Medical Officers for the year 2021 had been fixed for 15.04.2021. However, at a later stage, the 2nd Respondent has issued another Notification dated 05.04.2021 (P7) amending certain provisions of the previous Notification P4. In terms of the said Notification P7, the closing date for the submission of application is 18.04.2021. The Petitioner states that she had fulfilled the eligibility requirements as specified in Clause 5E of the Notification P4, required for her to apply for the Annual Transfer for the Year 2021, as she was certified as a Specialist Medical Officer as at the closing date for the Application. Therefore, the Petitioner has submitted her application for annual transfers on 10.04.2021.

The list of the '*Annual Transfers of Specialist Medical Officers- Draft Marks-2021;*' (P8) which determines the total mark that a Specialist Medical Officers should obtain for him or her to be eligible for the annual transfer, was published by the 4th Respondent on the 06.05.2021. The Petitioner has been allocated a placement in the said Draft Marks List (P8). Subsequently, a revised list of '*Annual Transfers of Specialist Medical Officers-2021; Amended Draft Marks*' (P9) has been published on 05.05.2021 in which the name of the Petitioner had not been included. Upon inquiries, the Petitioner has been informed that since the Petitioner's Board Certification letter had been issued on a date after the date specified in the Notification P7 i.e. 31.12.2020, her name had to be removed from the amended list of Draft Marks. In spite of that, the Final Marks List (P11) was also published without the Petitioner's name.

The Petitioner claims that she has obtained all the required qualifications and has fulfilled all requirements to secure a placement in the transfer list for Specialist Medical Officers 2021 in the category of "Specialty of Gastroenterology". Therefore, the Petitioner's stance is that the removal of the name of the Petitioner from the lists P9 and P10 as mentioned above is arbitrary, unjustifiable, and unreasonable. Hence, the Petitioner invokes the jurisdiction of this court *inter alia* by way of a *Writ of Certiorari* to quash the decision of the 1st to 8th Respondents to remove the name of the Petitioner from the said documents marked as P9, P10 and P11 and also a *Writ of Mandamus* directing the 1st to 8th Respondents to allocate the Petitioner a placement in the list of Annual Transfer of Specialist Medical Officers for the year 2021 in the category of Specialty of Gastroenterology.

The 1st to 4th, 13th and 14th Respondents in their Statement of Objections state that generally the applications for annual transfers are called for and finalized by the month of December each year so that all the transfers shall be effective from the 1st of January each year. Even for the year 2021, though the applications were called in the month of April the transfer list was to be effective from the 1st of January. Since the transfers got delayed in 2021 maximum benefit has been afforded to the Applicants by extending the date of Board of Certification until 31 of December. The Respondent's claim is that the first Notification P4 has been published without amendment due to a mistake and therefore said Notification P4 had been amended by the subsequent Notification P7 issued on 05.04.2021, 10 days before the closing date of the applications for transfers. The only amendment that appears in the Notification P7 when compared with the Notification P4 is that has specified that it the applicants who had obtained the Board Certification by 31.12.2021 may only apply for the Annual Transfers. However, it is observed that the Board Certification of the Petitioner has been approved only on 11.02.2021 (P2). Hence, the 1st to 4th, 13th and 14th Respondents claim that the Petitioner is not eligible to be included in the lists P9, P10 and P11 and that she will not be eligible for a transfer with effect from 1st of January 2021. The 9th to 12th Respondents also state that the due process has been followed in giving effect to the annual transfer of the Specialist Medical Officers for the year 2021.

When this matter was taken up for argument all parties made submissions and written submissions were also tendered on behalf the parties. The factual position that the Applications for annual transfers of Specialist Medical Officers for the year 2021 has been called for by the Notification dated 29.03.2021(P4) and that the said Notification P4 has been amended by the Notification dated 05.04.2021 (P7) is not in dispute. The Clause 5E of the said notification P4 disclosed the eligibility criteria for the Specialist Medical Officers for annual transfers for the year 2021.

Said Clause 5E is as follows;

*“Medical Officers, who are Board, certified as specialist by the PGIM by the **closing date of application and pending grade promotion to specialist Grade by Health Service Committee / Public Service Commission may also apply for this transfer. But this category of officers will be considered for allocation of placement only if they are formally great promoted to Specialist Grade by,***

*HSC/PHC at the time of approval of placement based on the decided transfer by HSC of PHC **approval of the transfer list**. These applications are requested to attach the board certification letter certified by PGIM along with the application.”*

The words “... **the closing date of application and ...**” in the Clause 5E of the P4 referred above have been replaced with the words “ **...31.12.2020 and Medical Officers ...**” in Clause 5E of the Notification P7 and the words “... **approval of the transfer list...**” in the Clause No. 5E of the P4 has been replaced with the words “**....by the time of approval of the annual transfer list by the HSC/PHC...**” in Clause 5E of the Notification P7. The closing date for applications specified in the Notification P4 is 15.04.2021 and closing date for applications specified in the amended Notification P7 is 18.04.2021.

However, it is observed that the Petitioner has not challenged the legality or validity of the notification P7. It is further noticed that the Petitioner has only submitted her application for the Annual Transfer for the year 2021 on 10.04.2021 i.e. after the publication of the Notification P7. Therefore, the applicability of the provisions of the Notification P7 in respect of the Petitioner's application for Annual Transfer for the year 2021, cannot be excluded.

The Petitioner has been Board certified by PGIM by its letter dated 11.02.2021 (P2), with effect from 30.09.2018. Therefore, the Petitioner's contention is that she has been board certified as Specialist since 30.09.2018 and therefore she is eligible to apply for transfers for the year 2021 in view of Clause 5E of the Notification P7. However, the Respondents contention is that by 31.12.2020 the date which referred to in the said Clause 5E, the letter P2 (which approves the Petitioner's Board Certification as a Specialist) had not been issued and no decision to board certify the Petitioner as a Specialist was in existence. The decision to board certify the Petitioner has only been taken up by PGIM on 11.02.2021 as stipulated in the letter P2. Therefore, the Respondents' contention is that even though the Petitioner's

board certification has been backdated to 30.09.2018, it cannot be considered that the Petitioner had her board certification by 31.12.2020.

It is observed that an explanation has been given by the 1st to 4th, 13th and 14th Respondents why the date of appointment of the Petitioner as a Specialist in Gastroenterology has been backdated to 30.09.2018. The foreign training is compulsory for Medical Officers to obtain their Board Certification. Some may find better opportunities on their own and may take them up if approved by PGIM. Some have difficulty in finding a post, hence their board certification may get delayed by one or two years. Some prefer to work abroad for two years. If the date they return to Sri Lanka is taken as the date of appointment, persons in the same batch will have different dates of appointment and they would miss batches. Therefore, the date they are supposed to face the MD Part II exam and passed, is taken as the date of appointment as a Specialist Medical Officer and therefore the appointment is backdated. Hence, the Respondents' contention is that the rationale behind backdating the appointment is to avoid any person from missing their batch so that it shall be of no effect to the seniority of such Medical Officers. However, it is observed such a position is not reflected in the said Notification P7 or P4. Therefore, I am of the view that there had been no opportunity for the Petitioner to be aware of such position by simply perusing the said Notification P7.

The Notification P7 specifies that the Medical Officers who have been Board Certified as at 31.12.2020, could apply for the transfers. Therefore, it has to be considered whether the Petitioner was Board certified as at 31.12.2020. The Petitioner claims that since her Board Certification has been backdated to 30.09.2018, she was Board Certified by 31.12.2020 and that she was entitled for a transfer. In supporting her position, the Petitioner relies on the case of **Dr. Preethi Weerasekera vs. Dr. Reggie Perera, Director-General of Health Services and Others (1999 2 SLR 241)**. When the facts of the above-cited case are taken into consideration, it is observed that the facts of the said case are in similar nature to that of the case at hand. In the afore-mentioned case, the Ministry of Health called for applications for the post of consultant Rheumatologist, Colombo South Hospital

Kalubowila by way of the Circular dated 9.5.97. The closing date for applications was 10. 6. 97. The Board Certification as a specialist by the PGIM was a condition for eligibility for appointment. The Petitioner of the said case had applied for the post but, had been overlooked on the ground that she had not been board certified as a Specialist on 10.06.97 i.e. the closing date for application. Hence, the authorities had decided that the Petitioner was not eligible for the said appointment. However, it is disclosed that there had been some correspondence between the PGIM and the Director-General of Health Service to the effect that the PGIM had approved Petitioner's Board Certification as a Specialist with effect from 17.12.95. Accordingly, it has been observed as follows in the case of **Dr. Preethi Weerasekera vs. Dr. Reggie Perera, Director-General of Health Services and Others** as follows;

“...The Transfer Board also had or ought to have had, the letter from the Director of the Post Graduate Institute of Medicine dated 2nd of September,1997, stating that the Petitioner had been Board Certified “with effect from 17th December 1995.” At the date of the meeting of the Transfer Board, therefore, the Petitioner was Board Certified. She was also Board Certified on the closing date for applications, namely the 10th of June 1997. What she lacked on the 10th of June was documentary proof of Board Certification. In the circumstances, the Consultants' Transfer Board misled itself in supposing that the Petitioner was not eligible for appointment and failed to afford her equal treatment in terms of the Minute on Health....”

In the case in hand, the Board Certification letter of the Petitioner (P2) has been issued by the Director of PGIM with effect from the 30.09.2018, on 11.02.2021. In view of the rationale upheld in the case cited above, when the Petitioner received the Board Certification on 11.02.2021 with effect from the 30.09.2018, such Board Certification shall have a retrospective effect. Furthermore, the Petitioner had documentary proof of Board Certification by the date of the meeting of the Transfer Board. Therefore, it could be deduced that the Petitioner in the instant case had received her Board Certification as at 31.12.2020 in view of P7.

Hence, I am of the view that the Petitioner was board certified by the 31.12.2020 (on the closing date of application i.e., 21.04.2021) for the reason that the requirement of possessing of a board certificate physically by 31.12.2020 as claimed by the Respondents, is not clearly reflected in the Notifications P4 or P7 Further it appears that there is no bar for PGIM in law to award the Board Certification retrospectively. On the reasons stated above I issue a mandate in the nature of Writ of Certiorari and Writ of mandamus as prayed in the prayers (c) and (d) to the petition. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna, J.

I agree.

Judge of the Court of Appeal