

DR. PREETHI WEERASEKERA
v.
DR. REGGIE PERERA, DIRECTOR-GENERAL OF HEALTH SERVICES AND OTHERS

SUPREME COURT
AMERASINGHE J.,
GUNAWARDANA, J., AND
WEERASEKERA, J.
S.C. APPLICATION NO. 816/97 (FR)
FEBRUARY 25, 1999

Fundamental rights – Appointment of a specialist medical officer – Failure to appoint the best candidate – Dispute regarding eligibility for appointment – Article 12 (1) of the Constitution.

By a circular dated 9.5.97 the Ministry of Health called for applications for the post of Consultant Rheumatologist, Colombo South Hospital, Kalubowila. The closing date for applications was 10.6.97. Board certification as a specialist by the Post-Graduate Institute of Medicine (PGIM) was a condition of eligibility for appointment. The petitioner applied for the post. There were four other applicants. On 5.9.97 the Consultants' Transfer Board appointed the 7th respondent instead of the petitioner who had the highest points at the selection. The petitioner was overlooked on the ground that as she had not been Board certified as a specialist on 10.6.97, the closing date for applications, she was not eligible for appointment. However, the petitioner had after obtaining the degree of MBBS in 1975 engaged herself in the field of Rheumatology since 1980, completed her MD examination in 1993 and received one year's foreign training in Rheumatology. On her return she was appointed acting Consultant in Rheumatology and Rehabilitation at the General Hospital, Anuradhapura.

Pending the selection of a candidate for the post in dispute, on 3.6.97 the Director PGIM informed the Director-General of Health Services that the petitioner had completed her training and that the Board of Studies would consider her for Board certification as a specialist with effect from 13.12.95. On 30.6.97 the Director of Health Services was informed that on 27.6.97 the Board of studies had recommended to the Board of Management PGIM that the petitioner be certified as a specialist with effect from 17.12.95 and on 2.9.97 the Director of Health Services was informed that the Board of Management had approved that the petitioner be certified as a specialist in Rheumatology and Rehabilitation with effect from 17.12.95.

Held:

In view of the correspondence between the PGIM and the Director-General of Health Services and the fact that the petitioner had been certified as a specialist with effect from 17.12.95 the petitioner was Board certified on the date of the meetings of the Transfer Board. She was also Board certified on the closing date for applications, namely 10.6.97 although she lacked documentary proof of such certification on that date. In the circumstance, the Transfer Board misled itself in supposing that the petitioner was not eligible for appointment, and infringed her rights under Article 12 (1) of the Constitution.

Case referred to:

1. *SmithKline Beecham Biological S.A. and Another v. State Pharmaceuticals Corporation of Sri Lanka and Others* (1997) 3 Sri LR 20 at 49-53.

APPLICATION for relief from infringement of fundamental rights.

R. K. W. Goonesekera with Ms. Shiranthi Jayatilake for petitioner.

S. Marsoof, DSG with K. Arulanandan for 1st, 2nd, 3rd, 6th and 7th respondents.

D. S. Wijesinghe PC with J. C. Weliamune for 4th and 5th respondents.

Cur. adv. vult.

April 26, 1999.

AMERASINGHE, J.

By Circular Letter No. 4974 dated the 9th of May, 1987, the Ministry of Health, Highways and Social Services invited applications from "Medical Specialists with appropriate specialist qualifications" for the post of Consultant Surgeon and the post of Consultant Rheumatologist, Colombo South Hospital, Kalubowila. Applicants were required to submit their applications to reach the Ministry "not later than 10.06.1997". The Circular Letter stated that the appointments would be made "in accordance with the Health Service Minute of 17th May, 1991". The Minute, which was published in *Gazette* No. 662/11 of 17th May, 1991, *inter alia*, provides as follows:

"5.6.4. Medical Officers in Grade II who have successfully completed the appropriate post-graduate training programme, and possessing qualifications as listed in Appendix I, and obtained Board Certification of the Post-Graduate Institute of Medicine,

University of Colombo, are eligible for appointment as Specialist Medical Officers." Appendix I does not list "Rheumatology" as a speciality and does not specify a "Recognized Qualification". Evidently it was regarded as a "sub-speciality", for the amendments to the Minute made by the Cabinet of Ministers and published in *Gazette* No. 818/1 of 9th May, 1994, although not including Rheumatology in the amended list of specialities, refers to it in prescribing the "Requirements for Specialized Training in sub-specialities". The amending Minute of 1994 provides, *inter alia*: "Following successful completion of the MD Part II, those intending to specialise . . . in . . . Rheumatology and Rehabilitation . . . will be required to spend a period of two to four years, of satisfactory training as follows: . . . A minimum period of 2 years post MD training in Rheumatology and Rehabilitation. This will include one-year training in a Rheumatology Unit in Sri Lanka with in-patient facilities and one year in an approved institution abroad". "The amended Minute goes on to deal with the subject of "Board Certification as a Consultant" in the following terms: "A trainee will be certified as a Consultant following the completion of a period of 2 to 4 years after the MD Part II examination, depending upon whether the trainee intends to be a general Physician or specialised in one of the branches of Medicine as has been indicated above." The amending minute states: "6.1.3. The seniority for specialist appointments would be Grade II seniority. In the case of appointments in Teaching Hospitals, it will be on a point scheme. Four points for Preliminary Grade (2 points per year), 24 points for Grade II (2 points per year) and 2 points per year for each year of service in Grade I and 1 point for each year of service as a Consultant."

The petitioner applied for the post of "Consultant Rheumatologist" of the Colombo South Hospital, Kalubowila. There were four other applicants for that post. The Hospital was a "Teaching Hospital", and it was not in dispute, as the respondents stated in their written and oral submissions, that, in terms of the Minute in regard to Medical Personnel of the Health Services of 1991, as amended in 1994, the appointment should have been made on the basis of the Ministry's "points scheme". The selection of candidates was made by the "Consultants' Transfer Board". According to the record of evaluation made by the Transfer Board marked as document 3R1 and filed as part and parcel of the affidavit of the third respondent, the "total points" obtained by the applicants were as follows:

Dr. (Mrs.) L. P. Weerasekera	. .	35.5
Dr. L. S. Wijyaratna	. .	34.5
Dr. K. A. N. Gunatilaka	. .	30
Dr. J. K. J. S. K. Jayanetti	. .	27.5
Dr. (Mrs.) A. N. H. Herath	. .	(No points mentioned)

Although, on the face of it, Dr. Mrs. Weerasekera, the petitioner, should have been appointed, Dr. L. S. Wijyaratna, the 7th respondent, was appointed instead. The explanation for this is found in the following minute made on document 3R1: "Dr. Mrs. L. P. Weerasekera was not board certified on the date fixed for computation of points for this appointment. Board of Study which met on 27.06.97 has *recommended* board certification, subject to ratification by the Board of Management. *Therefore, she* has not fulfilled the requirements for *eligibility* to apply for the post". (The emphasis is the Board's)

Eligibility, indeed, lies at the heart of the matter before this Court. Did the petitioner, in terms of the prescribed criteria, deserve to be recommended for appointment? Was she a suitable, fit and proper person to be appointed? It was not in dispute that today the petitioner is "a medical specialist with appropriate specialist qualifications" as required by the Circular Letter. Learned counsel for the respondents, however, contends that on the closing date for applications for the post of Consultant Rheumatologist, namely, the 10th of June, 1997, the petitioner had not received "Board Certification" as a Consultant and therefore at that date she was not a medical specialist with the appropriate specialist qualifications. Learned counsel for the respondents, cited *SmithKline Beecham Biologicals SA and Another v. State Pharmaceuticals Corporation of Sri Lanka and Others*,⁽¹⁾ in support of his submission that eligibility should be determined by reference to the "closing date".

In *SmithKline* applications for the supply of Rubella vaccine had been invited by the State Pharmaceuticals Corporation. The Court held that the only responsive offer was from the petitioner, for on the date and at the time specified for the closing of the tender, the only registered product in terms of the advertisement calling for applications was that of the petitioner.

Whereas, registration of the product, for the reasons explained in the judgment, was of critical importance in *SmithKline*, and

was an expressly stipulated condition of a responsive bid, Board Certification in the matter before this Court was not expressly specified as a condition precedent to the appointment of a Consultant Rheumatologist. It may be supposed that the requirement that the petitioner had to be 'a medical specialist with appropriate specialist qualifications' carried with it the corollary that the applicant was "Board Certified". However, in practice, "Board Certification" was qualitatively of less significance than the registration of the product required in *SmithKline*. For instance, there were four applicants for three posts of Paediatricians at Anuradhapura, Avissawella and Nawalapitiya. Dr. K. U. C. Perera was regarded by the Transfer Board as "eligible" despite the fact that he had not received "Board Certification" and was preferred to Dr. A. C. C. P. Amarasinghe who was "Board Certified". (Document 3R11).

Moreover, the facts of the case before us places it on an entirely different footing from *SmithKline*. The petitioner was not as it were an "unknown", "untested" product as the rival vaccines were in *SmithKline*. The petitioner passed her MBBS examination in 1975 and, among other things, served as Registrar, Rheumatology, Colombo Teaching Hospital (1992-1994) and Senior House Officer, Rheumatology (1980-1989). She completed her MD examination in 1993 and functioned as Senior Registrar in Rheumatology at the General (Teaching) Hospital, Colombo, from 1994 to 1996. She spent a year as Registrar Rheumatology at the Princess Alexandra Hospital, Harlow, UK in 1996-97. On her return to Sri Lanka she was appointed Acting Consultant in Rheumatology and Rehabilitation of the General Hospital, Anuradhapura.

In response to the Circular Letter dated 9th May, 1997, the petitioner had applied for the post of Consultant Rheumatologist, Colombo South Hospital, Kalubowila. The Director of the Post-Graduate Institute of Medicine, University of Colombo, on the 3rd of June, 1997, wrote to the Director-General of Health Services informing him that the petitioner had "completed all facets of training for Board Certification in Rheumatology and Rehabilitation". The letter went on to state as follows: "Her eligibility for Board Certification as a specialist with, effect from 17th December, 1995, will be taken up for consideration at the meeting of the Board of Study in Medicine to be held on 29th June, 1997 and ratification by the Board of Management in July, 1997".

The matter of 'Board Certification' would have been taken up on the 30th of May, 1997, but for the fact that on account of Trade Union action by the non-academic staff of the Post-Graduate Institute of Medicine, the meeting was postponed. This was pointed out to the Deputy Director-General of Health by the petitioner who requested that in the circumstances she should not be penalized for failing to submit the letter of Board Certification. The petitioner made a similar submission to the Government Medical Officers' Association (GMOA) which requested her to send her explanation on the question of Certification to the Director-General of Health Services "so that it could be discussed at the next Consultants' Transfer Board".

On the 30th of June, 1997, the Acting Director of the Post-Graduate Institute of Medicine wrote to the Director-General of Health Services, as follows: "This is to inform you that subject to ratification by the Board of Management, the Board of Study in Medicine at its last meeting held on 27th June, 1997, recommended that Dr. (Mrs.) L. P. Weerasekera be Board Certifiable as a Specialist in Rheumatology and Rehabilitation with effect from 17.12.1995. She could now be released from the training programme with immediate effect. The above facts may be considered when she applies for a specialist post in the Department of Health".

On the 2nd of September, 1997, the Director of the Post-Graduate Institute of Medicine informed the Director-General of Health Services that "the Board of Management having considered the recommendation of the Board of Study in Medicine has approved that Dr. (Mrs.) L. P. Weerasekera . . . be certified as a specialist in Rheumatology and Rehabilitation with effect from 17th December, 1995".

When the Consultants' Transfer Board met on the 5th of September, 1997, it had before it, or should have had, the petitioner's explanation for not submitting a document evidencing Board Certification. It also had, or should have had, the letters of the Director of the Post-Graduate Institute of Colombo dated the 9th of May, 1997 and the letter of the Acting Director of the Post-Graduate Institute of Medicine indicating that the petitioner had completed all facets of training and that certification was due to take place, and that when it did take place, it would be retrospective. The Transfer Board also

had or ought to have had, the letter from the Director of the Post-Graduate Institute of Medicine dated the 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 (as amended) and read with the Circular Letter of the 9th of May, 1997. Consequently, her rights under Article 12 (1) of the Constitution were violated.

I declare that the 1st-3rd respondents have violated the fundamental rights of the petitioner guaranteed by Article 12 (1) of the Constitution and that the selection of the Consultants' Transfer Board of the 7th respondent to the post of Consultant Rheumatologist, Colombo South Hospital, Kalubowila, was null and void.

The State shall pay the petitioner a sum of Rs. 25,000 as costs.

GUNAWARDANA, J. – I agree.

WEERASEKERA, J. – I agree.

Relief granted.