

**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 Article 126 of the Constitution of the Democratic Socialist
Republic of Sri Lanka.

**S.C.F.R APPLICATION
459/2019**

1. Denushi Vindya Kasthuriarachchi
No.109, Kingswood Park,
Maya Terrace, Kiribathgoda.

PETITIONER

1. Sri Lanka Medical Council,
No.31, Norris Canal Road,
Colombo 10
2. Hon. Attorney General,
Attorney General's Department,
Colombo-12

RESPONDENTS

Before: Jayantha Jayasuriya PC, CJ

L.T.B Dehideniya, J.

S. Thurairaja, PC, J.

Counsel: Chandana Liyanapatabendi P.C with Saduni Madhubashini and Hansini

Bandaranayake instructed by Sanjay Fonseka for the Petitioner.

Manohara de Silva P.C instructed by Ms. Bashini Hettiarachchi for the 1st
Respondent.

Suren Gnanaraj SSC for the A.G.

Argued on: 17.02. 2020

Decided on: 23.07.2020

L.T.B.Dehideniya, J

The application no: SC/FR 399/2019, 400/2019 & 459/2019 are on the same matter and the objections are also filed in the same manner. The parties agreed to argue these cases together and to abide by one judgement.

The Petitioner invokes the jurisdiction of this court alleging the infringement of her Fundamental Rights guaranteed under the Articles 12 (1) and the 14 (1) (g) of the Constitution by the Respondents.

The Petitioner states that, she has received medical education from the foreign universities and was awarded the relevant degrees of medicine after the completion of the specific periods of study. The Petitioner further states that, having obtained their degrees of medicine she returned to Sri Lanka and sought approval from the Sri Lanka Medical Council (hereinafter sometime called as 'SLMC') to sit for the Examination for Registration to Practise Medicine (hereinafter sometime called as 'ERPM') but the approval has not been granted. As per the contention of the Petitioner, the 1st Respondent has imposed a pre-entry qualification on the medical graduates from foreign universities which is bad in law and this application invoking the Fundamental Rights jurisdiction basically challenges the conduct of the 1st Respondent on the failure to grant permission to sit for the ERPM as grossly indefensible, unreasonable, arbitrary, capricious mala fide, unfair which involves in the violation of the principles of legitimate expectation, natural justice and reasonableness.

The 1st Respondent's contention is that the Petitioner does not possess the relevant qualifications. The 1st Respondent further states that, the Petitioner is not qualified to sit for the ERPM as she has not acquired the G.C.E Advanced Level qualification as adopted by the 1st Respondent in February 2010 as per the powers vested on the SLMC in terms of the section 29 (1) (b) (ii) (cc) of the Medical Ordinance.

Section 29(2) deals with provisional registration as a medical practitioner and provisions relating to such registration for a person who hold a degree of Bachelor of Medicine from a foreign university which is recognized by the SLMC are as follows.

The section 29 (2) of the Medical Ordinance states,

(iii) not being qualified to be registered under any of the preceding sub-paragraphs-

(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 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; or

The section 29 (2) (cc) of the Medical Ordinance reads as follows,

‘.....has passed the special examination prescribed in that behalf by the Medical Council’.

As per the aforesaid section 29(2)(iii)(bb)(i) of the Medical Ordinance, it is clear that, in addition to the requirement of having a good character (as sets out in Section 29(2)(a)), the most imperative requirement which is essential to be entitled for the provisional registration as a medical professional is the possession of a degree of a Bachelor of Medicine or an equivalent qualification of any university or a medical school of any country other than Sri Lanka, which is recognized by the SLMC. Further, the section gives a deep emphasis on the standards of medical education of such university or medical school. It is clear to this court that, the section 29 (2) of the Medical Ordinance surfaces two important facts. The first among such facts insists that, Sri Lanka has emphasized the freedom of medical education within or outside the country. Thus, the law facilitates the medical education in local and foreign universities. The second foremost fact signified by the section is the recognition which is given by the SLMC on the universities imparting medical knowledge. The Medical Ordinance has expressly recognized the freedom of Sri Lankan students to receive the foreign medical education.

The section 29(2)(iii)(cc) further stresses on the passing of a special examination prescribed in that behalf by the SLMC.

It is evident to this court that, the Petitioner of this case has complied with the section 29 (2)(iii)(bb)(i) of the Medical Ordinance, where she has attended and obtained medical degrees and equivalent qualifications from the foreign universities recognized by the SLMC. Subsequent to her university education, she requested the SLMC to issue a degree approval certificate which is a pre-condition to sit for the ERPM exam but until the institution of this action the Petitioner has not received a response and not been permitted up to date by the SLMC to sit the ERPM.

The details of the university of the Petitioner are as follows:

SC.FR/400/2019

| Name of the Petitioner | University | Year |
|-------------------------------|---|-------------|
| A.L.M Rushdhaan | Tbilisi State Medical University – Georgia | 2011 |
| R. W.D.L.H. Rajasekara | Virgen Milagrosa University – Philippines | 2008 |
| M.L.M Nasly | Tbilisi State Medical University – Georgia | 2010 |
| D.N.de Silva | Tver State Medical University – Russia | 2012 |
| W.I. Madushani | Tver State Medical University – Russia | 2012 |
| Francis Vijitharan | Tbilisi State Medical University – Georgia | 2010 |

SC.FR/ 399/2019

| Name of the Petitioner | University | Year |
|-------------------------------|---|-------------|
| M.R.N.Silva | Virgen Milagrosa University- Philippines | 2012 |
| M.D.K.P.M Bamunuge | Vitebsk State Medical University- Belarus | 2011 |
| V.G.H.E.K. Gunarathna | Tionjin Medical University- China | 2012 |
| M.N.F Nisadha | Tbilisi State Medical University – Georgia | 2012 |
| W.K.I. Dharmasena | Tver State Medical University – Russia | 2011 |
| M.S.M. Dhanasekara | Tbilisi State Medical University – Georgia | 2012 |
| Selvathurai Gobika | Vitebsk State Medical University- Belarus | 2011 |
| Emorian Fernando | Grodno State Medical University – Belarus | 2012 |

SC.FR./459/2019

| Name of the Petitioner | University | Year |
|------------------------------------|---|-------------|
| Denushi Vindya Kasthuriarachchi | Tbilisi State Medical University – Georgia | 2013 |

As per the provisions of the Medical Ordinance, SLMC is recognized as a corporate body which has a power to grant and issue provisional registration to the persons satisfying the requisite criteria under the Ordinance. The section 29(2)(iii)(cc) of the Medical Ordinance further empowered to prescribe special examinations which are to be followed by the relevant medical graduates. The authority of the SLMC is extended to carry out the ERPM under the said provisions.

The prominent attention of the Petitioner has been positioned on the pre-entry qualification imposed by the SLMC. The pre-entry qualification specifies as a mandatory educational entry qualification to follow courses in medicine/ dentistry which necessitates “Those who enter foreign medical schools from 01.June 2010 onwards should have obtained passes in Biology, Chemistry and Physics/Mathematics with credits in at least two of these subjects at the G.C.E. (Advanced Level) Sri Lanka or”(1R5 of case no SC/FR/399/2019)

The Petitioner holds that, the imposition of a pre-entry qualification is unreasonable, not justifiable and ultra-vires. The matter which is insisted by the Petitioner is that, even though she has complied with the black letter law of the country, imposition of the pre-entry qualification through an ultra vires decision has barred her illegally.

In S.F. Zamrath v. Sri Lanka Medical Council & Others (S.C.F.R.Application No: 119/2019 SC minutes of 23.07.2019), this court elaborated the purview which SLMC has been granted by law. There, the court has accepted that administrative authorities are bound to meet the challenging 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....’

The imposition of the pre-entry requirement was further seen as an instance where the SLMC has overridden its powers.

'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.'

The obligation on the part of the SLMC to comply with the provisions of the Medical Ordinance was further emphasized by his Lordship Justice Padman Surasena, in S.M Halpe & Others v. Dr. Anil Jayasinghe (S.C.F.R.Application No: 54/2019). His Lordship stated,

'The entitlement of the Petitioner and those who are similarly circumstanced, for provisional registration as medical practitioners, under section 29 (2) of the Medical Ordinance flows from the law of the country. They will therefore continue to have that entitlement. That entitlement cannot be taken away by the SLMC.....Thus, the SLMC is denying the equal protection of law and their right to engage in any lawful occupation, profession, trade business or enterprise.' This no doubt would be a continuous infringement of the fundamental rights guaranteed to them, by Article 12 (1) and 14 (1) (g) of the Constitution. Further, the said infringement continues to date. The said continuous infringement shows no signs of abating. Thus, the argument by the Respondent that the Petitioners' application is out of time cannot succeed.'

The speciality of his Lordship's statement lies on the fact that, he recognized the provisional registration guaranteed under the section 29 (2) of the Medical Ordinance as an entitlement. This signifies the very fact that, provisional registration does amount to a right which is sprung from the law of the country.

In the present application, SLMC fails to grant the approval to sit for the ERPM, thereby impeding the right of the Petitioner for provisional registration. It is very clear to this court that, SLMC's conduct resembles the usurpation of powers of the Parliament which stands as

the supreme legislative authority of the country. Further, it is surprising to see the arbitrariness of the SLMC which alters the procedures and laws of the country. The very essence of the view expressed by his Lordship Justice Padman Surasena in *S.M Halpe & Others v. Dr. Anil Jayasinghe* (Supra) emphasizes that, SLMC has no power to take out a right which has been granted by the law.

The same view was held in the FR applications 149/2019 and 145/2019 where this court held a similar notion on the supremacy of the Parliament and the regulatory authority of the SLMC. Thus, this court's view was that, ordinary law of the land is predominant and a law which was passed by the Parliament cannot be overridden by a regulation which has arbitrarily imposed by a subordinate authority.

The 1st Respondent's contention is that the court had held in the case of *Zamrath* (supra) that the pre-entry qualification of Advanced Level was held to be illegal only on the ground of violating the legitimate expectation and in the present case the requirement was imposed in 2010 and therefore the said judgment has no application. I cannot agree with this argument. In the said case the court had considered two aspects, that is, the violation of legitimate expectation and the ultra-vires nature of the SLMC decision. It has been held in the said case that,

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.

Further, it was held that, depriving the right to sit for ERPM does amount to a severe violation of the future prospects of professional life of the medical graduates.

It is pertinent to note that, the Parliament being the Supreme legislative body of the country has approved a certain level of minimum qualification to enter in to the medical education. In General Sir John Kotelawala Defence University (Special Provisions) Act No: 17 of 2018, by its section 2 (a) specifies that

‘The General Sir John Kotelawala Defence University shall have the power to absorb those students who have obtained basic qualifications from among the students who have registered with the South Asian Institute of Technology and Medicine (hereinafter referred to as the ‘SAITM’)

Further, the section 2(c) states,

‘to award to those students having basic qualifications and have completed the study programme leading to the award of the MBBS Degree at the SAITM on or before the appointed date.’

The section 4 of the act, interprets the term ‘basic qualification’ to mean,

‘minimum of S grade (simple) pass in Chemistry, Physics and Biology at the G.C.E. (Advanced level) examination conducted by the Examinations Department of the Ministry of Education of Sri Lanka or an equivalent foreign qualification...’

The wordings of the act clearly show the intention of the Parliament. The intention of the Parliament reflects that, the minimum qualification to be eligible for the MBBS degree is ‘minimum of S grade pass in Chemistry, Physics and Biology’. Thus, it is evident that, the Parliament has given the freedom to accept the minimum qualification as 3 ‘S’ passes. Medical Ordinance being the main legal enactment is silent on the requirement as to the minimum qualification. This manifests that, the minimum qualification to study medicine is a matter to be decided by the specific university based on the relevant criteria. It is evident that, SLMC cannot influence the decisions of the relevant universities and to impose their own qualifications.

The first Respondent’s argument is that he is entitled to prescribe a special examination for foreign medical graduates under S 29 (2) (ii) (cc) of the Medical Ordinance. The Medical Ordinance permits the SLMC to prescribe a special examination for the foreign medical graduates. It has to be a ‘special examination’. At present the SLMC is holding an examination called “Examination to Register Practice Medicine” (ERPM). Unless the foreign graduate

passes this examination he does not become entitled to 'Register Practise Medicine'. Under this Section the SLMC is not empowered to prescribe any pre-entry qualifications to enter into a foreign university. It is a matter for the said university to decide what the pre-entry qualifications should be. The SLMC can evaluate the said university and grant or refuse recognition. Other than granting or refusing recognition to the said university or medical school, the SLMC cannot decide the pre-entry qualifications. Nor the SLMC is empowered to impose further restrictions to sit for the ERPM other than the requisites stipulated by the statute. Therefore, I do not agree with the argument of the first Respondent in that regard.

This court sees a grave misunderstanding on the part of the 1st Respondent over the powers which have been allocated by the law. The SLMC, by section 29 (2) (cc) is empowered to hold examinations to select the suitable medical practitioners from among the medical graduates in the country. The section allows no interference with the Advanced Level qualifications which determine the eligibility for the medical education.

It is clear that, the very decision made by the SLMC has deeply influenced the substantive rights and obligations of others, mainly the Petitioner. The decision of the SLMC gravely violates the future prospects of the professional life of the Petitioner. The right to equality of the Petitioner is prima facie in violation.

The 1st Respondent further argues that the application of the Petitioner is time barred. This argument is based on the one month rule in the Fundamental Rights Jurisdiction. The 1st Respondent's position is that, the invoking of the Fundamental Rights jurisdiction should be taken place within one month from the alleged infringement and the Petitioner ought to have challenged the decision in the instance where she first came to know the decision. While justifying this contention in an unjust manner, the 1st Respondent states that, it was within the knowledge of the Petitioner that the decision of the SLMC influences their right to sit for the ERPM. It is apparent that, the decision of the SLMC is implemented in the year 2010. The Petitioner entered to the university which has been recognized by the SLMC and thereby derived a legitimate expectation that, they will be given an opportunity to sit for the ERPM. The conduct of the Respondent SLMC based on their ultra vires decision- the decision to impose 'pre entry qualification' to medical studies overseas and or to sit for ERPM- had impacted upon such legitimate expectation of the petitioner, adversely. Further, the Petitioner resorted to this Court, at the failure to grant approval and it is clear that, she is entitled to redress

her grievance as the said failure is clearly a continuing infringement of her right to equal protection of law.

It is clear to this court that, SLMC has arbitrarily imposed a pre-entry qualification for the provisional registration of the foreign medical graduates as the medical practitioners. It is apparent to this court that, the specific decision of the SLMC unjustly imposes a burden on the Petitioner over her professionalism and the purview of powers which has already been granted by the Medical Ordinance is overridden.

By concluding the judgement, this Court adopts the view that, the Fundamental Rights guaranteed to the Petitioner under the articles 12 (1) and 14 (1) (g) of the Constitution have been infringed by the act of Respondents which refused to grant permission to sit for the ERPM while imposing a pre-entry qualification against the law of the country. Thus, the Court reiterates on the fact that, the Respondents acted arbitrarily while making a decision which has influenced the substantive rights of the Petitioner in a great deal and orders the 1st Respondent to allow the Petitioner to sit for the ERPM.

Judge of the Supreme Court

Jayantha Jayasuriya, PC, CJ

I agree

Chief Justice

S. Thurairaja, PC, J

I agree

Judge of the Supreme Court

