IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal to the Supreme Court in terms of Article 128(2) of the Constitution from the Order of the Court of Appeal dated 6th March, 2013.

SC Appeal No. 16/2014

SC (Spl) LA Application No. 104/2013

CA Writ Application No. 813/2010

1. Dr. K.M.L. Rathnakumara
   No. 50A-9, 6th Lane,
   Hansagiri Road,
   Gampaha.
2. Dr. A.D.S.R.T. Siriwardhana
3. Dr. R. Indralingam
4. Dr. S. I. V. Dahanayake
5. Dr. S.H. Gunathilaka
6. Dr. K.A.P. Thushantha
7. Dr. A.J. Dharmawansa
8. Dr. V. Athukorala
9. Dr. M.G. Jeevathasan
10. Dr. Nirthasaran Sathiyavanj
11. Dr. N. Gallage
12. Dr. S. Kalaialagan
13. Dr. A.S.Hennanayake
14. Dr. G. T. Gunawardena

Petitioners

Vs.

1. The Postgraduate Institute of Medicine,
   No.160, Norris Canal Road,
   Colombo 07.
   And 48 others.

Respondents

AND NOW BETWEEN

1. Dr. K.M.L. Rathnakumara
   No. 50A-9, 6th Lane,
   Hansagiri Road,
   Gampaha.

2. Dr. A.D.S.R.T. Siriwardhana
3. Dr. S.H. Gunathilaka
4. Dr. K.A.P. Thushantha
5. Dr. A.J. Dharmawansa
6. Dr. V. Athukorala
7. Dr. M.G. Jeevathasan
8. Dr. N. Gallage
9. Dr. S. Kalaialagan
10. Dr. A.S.Hennanayake

Petitioners – Appellants

Vs.

1. The Postgraduate Institute of Medicine,
   No.160, Norris Canal Road,
   Colombo 07.
   And 52 others.

Respondents – Respondents

Before : Chandra Ekanayake, J
Priyantha Jayawardena, PC, J
K.T. Chitrasiri, J

Counsel : Faiz Musthapha, PC with Faiza Markar, Ashiq Hassim, Janaka Kroon and M. Imthiyaz for Appellants.
Farzana Jameel, Senior DSG with Yuresha de Silva, SSC for 3rd, 7th, 12th, 13th, 15th, 21st, 23rd, 25th, 28th, 29th, 33rd, 36th, 39th, 41st, 46th and 48th Respondents.

Argued on : 11th January, 2016

Decided on : 30th March, 2016

Priyantha Jayawardena, PC. J,

The Appellants filing their Petition stated that they are medical officers currently practicing in various posts and that they were following a training programme in 'MD (Medicine)' at the Postgraduate Institute of Medicine (hereinafter sometimes referred to as the "PGIM").

The Appellants have filed the writ application bearing No. CA / Writ - 813/2010 in the Court of Appeal challenging the decision to limit the number of attempts that they can sit for the final examination of 'MD (Medicine) / MD Part II'.

The Appellants stated that the University of Colombo, the 49th Respondent was established in terms of the Universities Act No. 16 of 1978 (as amended) (hereinafter referred to as the Universities Act) and the PGIM, the 1st Respondent was established by Ordinance No. 1 of 1980 made by the University Grants Commission under the Universities Act and is governed by a Board of Management. The PGIM being the only authorized institute in Sri Lanka for the specialist training of medical doctors its academic programmes are planned and executed by the Boards of Study with the approval of the University of Colombo.

The Board of Management of the PGIM is the principal administrative, financial and academic authority and is in charge of the power and duty to approve recommendations and reports that have been submitted to it by Boards of Study of the PGIM on all matters connected with the courses of study and examinations, and also to approve and issue draft regulations relating to the courses of study and examinations in the various specialties in medicine.

The Board of Study of the PGIM exercises, inter-alia, the power to draft regulations relating to courses of study in respect of the relevant specialty (i.e. 'MD Medicine') and to submit such drafts to the Board of Management.

The Appellants stated that they being desirous to further their training and study for a programme in 'MD (Medicine)' conducted by the PGIM enrolled for the said programme in 'MD Medicine' which comprises of 5 stages. i.e.;

Stage I – is qualifying exam referred to as "MD Part I (Medicine) Examination / Qualifying Examination" (hereinafter referred to as MD Part I) which qualifies individuals to follow the said "MD (Medicine)" programme.

Stage II – is a training programme titled "Registrar Training" which is an in-service training period of approximately 30 months.

Stage III – is the final examination for the said programme titled "MD (Medicine) Examination" and / or referred to as MD Part II (Medicine) Examination which consists of inter-alia, an essay paper, and a viva voce.

Stage IV – commences upon successful completion of Stage III and consists of training as a "Senior Registrar".

Stage V – consists of training at a foreign teaching centre.

All the Appellants have enrolled for the said programme in 'MD Medicine' after passing the aforesaid Stage I "MD Part I" examination and were served with letters to that effect.

The Appellants stated that;

(a) The 1st Appellant sat for the aforesaid examination in or around October 2002 and commenced the said programme in or around January 2003;

(b) The 2nd to 6th Appellants (2nd to 8th Petitioners in the Writ Application) sat for the aforesaid examination in or around October 2003 and commenced the said programme in or around January 2004; and

(c) The 7th to 10th Appellants (9th to 14th Petitioners in the Writ Application) sat for the same in or around October 2004 and commenced the said programme in or around January 2005.

Consequent to successful completion of the MD Part I examination, the Appellants were summoned to the PGIM for "Allocation of Trainees in Medicine for Training Units" and assigned to the units that they would be trained at and were also given the Prospectus – 2003 (Regulations and Guidelines) for the said programme.

According to the Appellants, all the Appellants were issued with the same Prospectus at the time of commencement of the said programme. The Appellants stated that the said Prospectus made no reference to the number of attempts an individual can sit for the MD Part II examination.

The Appellants commenced following the aforesaid programme in "MD (Medicine)" and participated in the Stage II 'Registrar Training' conducted by the PGIM which consisted of inter-alia training in General Internal Medicine, Cardiology, Neurology, Psychiatry and Dermatology lasting approximately 30 months.

Upon the successful completion of the training period required for Stage II and having all requisite eligibility criteria for entry into Stage III the Appellants applied and sat for the same which consists of inter-alia, an essay paper, case histories, data and slide interpretations and viva voce. The Appellants were able to successfully complete the essay paper and only some other components of the examination, thus failing the entire exam and requiring that they re-sit the same.

Accordingly, the 1st Appellant's first attempt of the aforesaid examination was in or around July 2005. The 2nd to 6th Appellants' (2nd to 8th Petitioners' in the Writ Application) first attempt of the aforesaid examination was in or around July 2006. The 7th to 10th Appellants' (

9th to 14th Petitioners' in the Writ Application) first attempt of the aforesaid examination was in or around July 2007.

The 1st Appellant's sixth attempt was in or around February 2008. The 2nd to 6th Appellants' (2nd to 8th Petitioners' in the Writ Application) sixth attempt was in or around February 2009. The 7th – 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in or around February 2010.

However, the Appellants after six attempts at the aforesaid MD Part II were still unsuccessful in passing all the components of the examination. After the sixth attempt at the aforesaid examination they were informed that they had exhausted six attempts at the said examination and therefore could not make another attempt for the same.

The Appellants produced the copies of some of the said letters informing the Appellants that they had exhausted their six attempts marked as P4(a), P4(b), P4(c) and P4(d).

Consequent to several inquiries the Appellants became aware that a new Prospectus (Regulations and Guidelines) for MD (Medicine) – 2005 had been issued by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination (MD Part II). Further, it applied retrospectively i.e. with effect from 01.01.2004.

The Appellants stated that the said new Prospectus also provided that " a continuous assessment of the trainee will take place at regular intervals " during Stage II and that marks awarded will be carried forward to the MD Part II.

Moreover, the PGIM has issued Circular No. 49/2008 which indicated that candidates for the MD Part II are allowed only 6 attempts has expressly excluded those candidates who have sat for the MD Part I examination before 1998 and according to Appellants they are unaware as to any justification for such categorization.

The Appellants contended that at the time of the introduction of the said new Prospectus, they had already been enrolled at the PGIM and had passed MD Part I examination and were subjected to the former Prospectus – 2003 and therefore, the said decision to limit the number of attempts cannot be applied to them.

The Appellants stated that on or around 03.12.2009 the aforementioned Appellants met the 35th Respondent then Chairman, Dr. M.K. Rangunathan and informed him about the restrictions placed on the number of attempts for sitting the final examination (i.e., MD Part II). The said 35th Respondent Chairman in fact assured the Appellants that the matter would be raised at the next Board Meeting. The Appellants requested that the said repositioning be cancelled, but to no avail.

In the circumstances, the Appellants filed a Writ Application in the Court of Appeal and prayed inter-alia for;

(a) a Writ of Certiorari quashing the decision(s) contained in the Prospectus and Circulars marked P5 read with P6 insofar as they are applicable;

(b) a Writ of Certiorari, quashing the decision(s) contained in the letters marked P4(a) to P4(d) and all similar letters received by the Appellants; and

(c) a Writ of Prohibition, preventing the application of the new Prospectus and Circulars marked P5 read with P6 above, to the Appellants.

The 1st – 27th and 35th – 48th Respondents filed their Statement of Objections in the Court of Appeal and stated inter alia that;

(a) the 1st Appellant enrolled for the MD (Medicine) Programme on 1.1.2003, the 2nd to 6th Appellants (2nd - 8th Petitioners in the Writ Application) on 1.1.2004 and the 7th to 10th Appellants on 1.1.2005 (9th – 14th Petitioners in the Writ Application),

(b) the Board of Management is the academic and executive body of the PGIM and the Boards of Study is in charge of general direction of instruction, education, research and examinations in respect of each specialty in medicine,

(c) the 'MD (Medicine)' programme in 'MD Medicine' consists of 5 stages, which have been designed to provide a trainee with a comprehensive training in various aspects of Internal Medicine,

(d) in addition to the Prospectus – 2003 containing Regulations and Guidelines for MD (Medicine) marked as P3, circulars are also issued pertaining to policy decisions of the Institute which are published in the website maintained by the Institute,

(e) the Prospectus containing Regulations and Guidelines for MD (Medicine) marked as " P5 " was issued in the year 2005, with retrospective effect from 1.1.2004,

(f) Prospectus marked as P5 contained the restriction that only six attempts would be allowed at the MD (Medicine) Part II examination,

(g) the 1st Appellant's sixth attempt was in January 2008, 2nd and 4th to 6th Appellants' (2nd - 4th and 6th – 8th Petitioners' in the Writ Application) sixth attempt was in February 2009, 3rd Appellant's (5th Petitioner's in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in February/March 2010,

(h) the Appellants sat for the said examination under the new Prospectus, marked as " P5 ", which contained the aforementioned restriction,

(i) upon the Appellants exhausting all six attempts, they were informed of same,

(j) each Board of Study formulates regulations and guidelines that are required / necessary for each discipline of medicine and such regulations and guidelines in that regard vary from discipline to discipline,

(k) as per the procedure stipulated in the Ordinance, the Board of Management is empowered to draft regulations pertaining to courses of study and examinations upon considering the Reports submitted by the relevant Board of Study, which have to be submitted to the Senate of the University for its approval, and

(l) the Circular No. 49/2008 was issued by the Institute on the 13th August 2008 (P6), stating that the said restriction does not apply to those who sat for the MD Part I examination before 1998.

After the hearing of the Writ Application the Court of Appeal delivered the judgment dismissing the Appellants' application.

In the said judgment the Court of Appeal inter-alia held that " the decision to restrict the number of attempts a candidate can sit for the final examination of MD (Medicine) (MD Part 2) is based on a policy decision, of the Senate of the University. The Board of Management is empowered to draft regulations on training pertaining to the course of study and examination upon considering the reports submitted by the relevant Board of Study and these regulations are approved by the Senate of the University. In relation to policy matters, the court cannot interfere as these matters cannot be considered as exercising judicial or quasi judicial power. For the above reasons the application for a writ of certiorari is refused. "

Being aggrieved by the said judgment of the Court of Appeal the Appellants filed a special leave to appeal application in this Court. The Appellants prayed inter-alia for;

(a) the setting aside of the said judgment of the Court of Appeal dated 06.03.2013;

(b) an interim Order staying the operation of the said judgment of the Court of Appeal dated 06.03.2013 and the decisions contained in P4(a) to P4(d) read with documents marked P5 and P6, in so far as it relates to the Appellants; pending the final determination of this application;

(c) a Writ of Certiorari quashing the decisions contained in the Prospectus (P5) and the Circular (P6), in so far as it relates to the Appellants;

(d) a Writ of Certiorari quashing the decisions contained in letters marked as P4(a) – P4(d) and all similar letters, in so far as it relates to the Appellants;

(e) a Writ of Prohibition, preventing the application of the new Prospectus and Circular, marked P5 read with P6 to the Appellants.

This Court has granted special leave to appeal on the following questions of law;

(a) Did the Court of Appeal err in law in applying the Prospectus (P5) to the Appellants retrospectively?

(b) Did the Court of Appeal err in failing to appreciate that the Appellants had a legitimate expectation that the Prospectus applicable to them was the Prospectus produced marked as P3, which was in operation at the time they commenced the course?

(c) Did the Court of Appeal fall into error by coming to a finding that the said decision as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a "policy decision" and therefore not amenable to writ jurisdiction?

(d) Did the Court of Appeal err in failing to take cognizance of the fact that, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the said Board was amenable to the writ jurisdiction of the Court of Appeal?

The learned Deputy Solicitor General invited the Court to decide the following substantive question of law on behalf of the Respondents;

(e) Can a substantive legitimate expectation arise in the absence of an express undertaking by the relevant authority on a matter of policy?

Thereafter, this appeal was taken up for hearing and both parties filed their respective written submissions.

During the course of the hearing of this appeal parties admitted the following;

(a) the Appellants enrolled for the training and study for the programme in 'MD (Medicine)' conducted by the PGIM which consists of 5 stages with two examinations,

(b) the 1st Appellant enrolled for the MD (Medicine) Programme on 1.1.2003, the 2nd, 3rd, 4th, 5th and 6th Appellants (2nd - 8th Petitioners in the Writ Application) on 1.1.2004 and the 7th to 10th Appellants (9th – 14th Petitioners in the Writ Application) on 1.1.2005,

(c) all the Appellants were furnished with the Regulations and Training Program – MD (Medicine) issued by the PGIM of the University of Colombo (hereinafter referred to as the Prospectus) issued in 2003 marked as " P3 " at the time of commencement of the said programme. The said Prospectus made no reference to the number of attempts that an individual can sit for the MD Part II examination,

(d) a new Prospectus (Regulations and Guidelines) for MD (Medicine) marked as " P5 " had been issued in the year 2005 by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination / MD Part II. The inner cover of said Prospectus contained the following;

" ***This prospectus is applicable from 1.1.2004*** ", [emphasis added]

(e) both the said Prospectus contained the following Clause;

" ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes***. ",

(f) the 1st Appellant's sixth attempt was in January 2008, 2nd and 4th to 6th Appellants' (2nd to 4th and 6th to 8th Petitioners' in the Writ Application) sixth attempt was in February 2009, 3rd Appellant's (5th Petitioner's in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants' (9th to 14th Petitioners' in the Writ Application) sixth attempt was in February/March 2010,

(g) On the 13th of August, 2008 PGIM issued the Circular No. 49/2008 in respect of MD (Medicine) examination – February / March, 2009. Clause No. 6 stated;

" ***Please note that candidates are allowed only 6 attempts at the Part II which must be made within a period of 8 years from the date of passing the Part I or equivalent examination to the said qualification. This requirement does not apply to those candidates who have sat the MD (Medicine) Part I examination before 1998.*** ", and

(h) after the sixth attempt at the aforesaid exam the Appellants were informed that they had exhausted six attempts at the said examination.

Is the restriction imposed on number of attempts at MD (Medicine) II stated in Prospectus – 2005 (P5) applicable to the Appellants ?

At the time the Appellants enrolled at the PGIM for the 'MD Medicine' programme the Prospectus – 2003 (P3) was applicable to the Appellants which contained the regulations and training programmes relating to MD Medicine Board Certification in General Medicine and Allied Specialties etc. All the Appellants registered for the MD Medicine Programme under the said Prospectus. Accordingly, the Appellants have all commenced and completed Stage I and II of MD Medicine under the old Prospectus.

The said Prospectus – 2003 made no reference to the number of attempts that an individual can sit for the MD Part II examination.

It is important to note that both the said Prospectus contained the following Clause;

*" **The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.** "* [emphasis added]

The Prospectus issued in the year 2005 contains the following Clause;

" **4.3 STAGE III (MD Exam)**

4.3.1 ……

4.3.2 The eligibility for entry to this examination will be -

(g) Only six attempts will be allowed within a period 8 years from the date of passing Part 1. *"* [emphasis added]

Some of the Appellants were informed the detailed results of the MD (Medicine) Examination held in February / March, 2010 by letters of 20th April, 2010. The said letters marked as "P4(a)" to "P4(d)" stated that the Appellants had been unsuccessful in the above examination. The letter further stated " ***Please note that you have already exhausted six attempts*** ".

Though prospectus issued in the year 2003 stated " ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.*** " no notice had been given that the regulations and guidelines stipulated in the Prospectus – 2003 would be revised prior to publishing the Prospectus in the year 2005.

Further, the Prospectus – 2005 neither contained any transitional provisions with regard to the candidates who registered and commenced the program in MD (Medicine) under the Prospectus – 2003 nor had any reference to such candidates what so ever. Moreover, the Prospectus did not refer to the Prospectus – 2003 at all.

Thornton's Legislative Drafting (Fifth Edition) by Professor Helen Xanthaki at page 532 states " Where subordinate legislation is to contain repeal provisions, the necessity for savings and transitional provisions must be considered in the same way as if that legislation were principal legislation.

The same style and technique should be adopted for the amendment and repeal of subordinate legislation as for principal legislation. It is usual to 'revoke' rules and regulations and to 'cancel' notices and orders but the function is that of repeal and there seems no good reason why that word should not be used for subordinate as well as principal legislation. "

Amending provisions are not construed as altering completely the character of the principal law unless clear language is found indicating such an intention. In the absence of any reference to the previous Prospectus, the Prospectus – 2005 cannot be construed as an amendment or a replacement of the Prospectus – 2003.

Therefore, I am of the opinion that the Prospectus issued in the year 2005 did not replace or amend the Prospectus – 2003 and, thus the Prospectus issued in the year 2005 has no application to the candidates who registered for the MD (Medicine) program under the Prospectus – 2003.

Can the Subordinate Legislation be enacted with Retrospective effect ?

Article 76 (3) of the Constitution of Sri Lanka permits the Parliament to make any law containing any provision empowering any person or body to make subordinate legislation for prescribed purposes.

Article 75 of the said Constitution states that the Parliament shall have power to make laws, including laws having retrospective effect. Sri Lankan Legislature enacted the Offences against Aircraft Act No. 24 of 1982 with retrospective effect under this Article.

Section 17 of the Interpretation Ordinance stipulates the general provisions with respect to power given to any authority to make rules, regulations, and by-laws.

Thornton's Legislative Drafting at page 424 says " Delegated legislation may have retrospective effect only if the primary legislation containing the delegation either has that effect or authorities the delegated legislation to have that effect, ' … no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act.' " This principle was adapted by Sharvananda J. in the case of ***the Attorney – General of Ceylon and W.M. Fernando, Honorary Secretary, Galle Gymkhana Club*** **79 (1) NLR 39.**

Constitutional and Administrative Law of Sri Lanka by Joseph A. L. Cooray at page 329 says " The doctrine that subordinate legislation is invalid if it is *ultra vires* is based on the principle that subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivative nature and must be exercised within the periphery of the power conferred by the enabling Act. For example, subordinate legislation having retrospective effect is *ultra vires* unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation. "

At page 323 of the said book states " Unless Parliament has in the enabling or parent Act expressly or impliedly authorized the sub-delegation, the maxim *delegatus non potest delegare* applies to make the sub-delegation unlawful. "

The Postgraduate Institute of Medicine was established by the Ordinance No. 1 of 1980 made by the University Grants Commission (hereinafter referred to as the UGC) under the Universities Act No. 16 of 1978 as amended. However, the said Universities Act did not delegate power to the UGC to make Regulations or Ordinances with retrospective effect.

Hence, UGC has no authority or power to delegate the power to the PGIM to make Regulations with retrospective effect. In fact the said Ordinance did not confer power on the PGIM to make Regulations with retrospective effect. Thus, PGIM has no power to make Regulations with retrospective effect.

Moreover, the inner cover of the Prospectus – 2005 states " This Prospectus is applicable from 01.01.2004 ". However, in order to give retrospective effect to principal legislation or to subordinate legislation it is necessary to have a specific clause to that effect in the operative part of such legislation. A statement in an inner cover, outer cover or a foot note would not satisfy such criteria.

Therefore, though the Prospectus (Regulations and Guidelines) for MD (Medicine) marked as " P5 " is issued in the year 2005 it cannot be applied with effect from 1.1.2004. i.e. with retrospective effect.

Thus, the limitation of attempts at the MD Part II examination stipulated in the said Prospectus – 2005 has no application to the candidates who registered for the MD (Medicine) programme under regulations and guidelines stated in the Prospectus – 2003.

Can the Subsidiary Legislation give rise to a Legitimate Expectation ?

The Appellants enrolled for the training and study for a programme in 'MD (Medicine)' conducted by the PGIM which consists of 5 stages with two examinations. All the Appellants were issued with the same Prospectus (Regulations and Training Program) – MD (Medicine) issued by the PGIM (hereinafter referred to as the Prospectus) issued in 2003 marked as " P3 " at the time of commencement of the said programme. The said Prospectus made no reference to the number of attempts an individual can sit for the MD Part II examination. A new Prospectus (Regulations and Guidelines) for MD (Medicine) – 2005 marked as " P5 " had been issued by the PGIM stipulating that only six attempts are permitted for the successful completion of the final MD (Medicine) Examination/ MD Part II in the year 2005. By the time the Prospectus marked as " P5 " was issued the Appellants had completed part of their MD (Medicine) program under the Prospectus marked as " P3 " issued in 2003.

Though prospectus issued in the year 2003 stated " ***The prospectus is subject to revision from time to time. Adequate notice will be given of such changes.*** " no notice had been given of any change of the said Prospectus – 2003.

Section 6 (1) of the Interpretation Ordinance states " Whenever any written law repealing either in whole or part a former written law is itself repealed, such repeal shall not, in the absence of any express provision to that effect, revive or be deemed to have revived the repealed written law, or any right, office, privilege, matter, or thing not in force or existing when the repealing written law comes into operation.

(2) …….

(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

(a) the past operation of or anything duly done or suffered under the repealed written law ;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ;

(c) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

(4) Subsection (3) shall apply in the case of the expiration of any written law in like manner as though that written law had been repealed and had not expired.

(5) …… ”

Though the aforementioned section has no direct bearing to the instant appeal as the instant appeal is in respect of subordinate legislation, any person who commences an act under a particular “Regulation” has an expectation to finish the same under the same terms and conditions stated in the said Regulations. Thus, it gives rise to a legitimate expectation for such persons to complete their actions under the same terms and conditions.

However, the regulations can be amended or rescinded by giving reasonable prior notice unless the circumstances warrant an immediate change of the regulations. In fact, keeping in line with this principle both the Prospectus contained a Clause which stated that an adequate notice will be given of any changes.

It is important to note that the 1st Appellant’s sixth attempt was in January 2008, 2nd and 4th to 6th Appellants’ (2nd - 4th and 6th – 8th Petitioners’ in the Writ Application) sixth attempt was in February 2009, 3rd Appellant’s (5th Petitioner’s in the Writ Application) sixth attempt was in July/August 2009 and 7th to 10th Appellants’ (9th - 14th Petitioners’ in the Writ Application) sixth attempt was in February/March 2010. After the sixth attempt at the aforesaid exam the Appellants were informed that they had exhausted six attempts at the said examination.

Therefore, imposing a restriction on the number of attempts at the MD (Medicine) without giving adequate prior notice, is a violation of the legitimate expectation of the Appellants.

Further, though the Appellants sat for the MD (Medicine) examination after the new Prospectus marked as P5 which contained the aforementioned restriction was published in the

year 2005, there is no material before Court that the Appellants sat for the said examination under the said Regulations stipulated in the said Prospectus.

Moreover, Clause 6 of the Circular No. 49/2008 issued in respect of MD (Medicine examination – February / March, 2009 by the PGIM on the 13th of August, 2008 exempted the candidates who sat for the MD (Medicine) Part I examination before 1998 from the six attempts rule.

Both the Prospectus contained Regulations relating to the MD (Medicine) Program which are subordinate legislation. Therefore, it is not possible to amend the subordinate legislation by circulars or by notices published on web-sites. Hence, the said Clause 6 of the Circular No. 49/2008 has no force and effect in law and is a nullity.

Are the Subordinate Legislation subject to Judicial Review ?

The PGIM was established by Ordinance No. 1 of 1980 made by the University Grants Commission under section 140 read with section 18 of the Universities Act No. 16 of 1978.

Section 12 of PGIM Ordinance No. 1 of 1980 provides inter-alia as follows;

‘‘

(1) Subject to the provision of the Act and of any appropriate Instrument, the Board shall exercise the powers and perform and discharge the duties and functions conferred or imposed on, or assigned to, the Institute by this Ordinance.

(2) Subject to the provisions of the Act and of any appropriate Instrument, the Board shall have control and general direction of instruction, education, research and examinations in the Institute.

(3) Without prejudice to the generality of the powers conferred upon it by sub-paragraphs (1) and (2), the Board shall exercise, perform and discharge the following powers, duties and functions –

(g) to recommend to the University, in consultation with the Board or Boards of Study concerned, the postgraduate degrees, diplomas, certificates and other academic distinctions which shall be awarded in the several specialties in medicine, and the courses of study and training to be followed, the examinations to be passed and other conditions to be satisfied by students who wish to qualify for such degrees, diplomas, certificates and other academic distinctions;

(i) to draft, after consideration of reports from the Board or Boards of Study concerned, Regulations relating to courses of study and examinations, and to submit such drafts to the Senate of the University for enactment;

(j) to draft Rules for any matter in respect of which Rules are authorized to be made or may be made and to submit such drafts to the Council or the Senate as the case may be, of the University for enactment; ”

The legislation made under a delegated power is known as subordinate legislation / delegated legislation. Though a principal enactment can contain the policy matters, subordinate legislation cannot contain policies. Further, subordinate legislation can be made only to facilitate the implementation of the principal enactment and to achieve its objects. Moreover, subordinate legislation cannot be made to implement a decision of a policy other than the policy stated in a principal enactment.

Thus, it cannot be said the said clause as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a “policy decision” and thus, it is not amenable to judicial review. In any event, such restriction on the number of attempts is a condition in the regulations that is applicable to the candidates and affects their rights.

Article 80(3) of the Constitution “ Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. ”

Unlike for the principal legislation there is no statutory prohibition on the jurisdiction of courts to consider the validity of subordinate legislation. Thus, the validity of subordinate legislation is subject to challenge in the courts.

Administrative Law (9th edition) by H.W.R. Wade and C. F. Forsyth at page 746 says “ It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and subordinate law-making power. Even where, as is often the case, a regulation is required to be approved by resolution of both Houses of Parliament, it still falls on the ‘subordinate’ side of the line, so that the court may determine its validity.”

In the case of ***The Ceylon Workers' Congress and Superintendent, Beragala Estate*** **76 NLR 1 at page 8** it was held “ Can a Regulation outside the ambit of Section 39 (1) become valid by reason of the fact that Parliament subsequently approved it ? In our opinion the subsequent approval by the Senate and House of Representatives cannot make valid that which previously was invalid, and it is therefore only an *intra vires* rule approved by Parliament that will be “as valid and effectual as though it were enacted” in the Act. ”

Thornton's Legislative Drafting (Fifth Edition) by Professor Helen Xanthaki states " An attack on the validity of subordinate legislation may be directed against the manner in which the delegated power has been exercised, that is to say it may be argued that the statutory conditions attached to the exercise of the power by the enabling provision or some other law of general application were not fulfilled. Alternatively, it is more likely that an attack may be directed against the content of the subordinate legislation, that is to say it may be argued that the exercise of the power was not in its substance within the scope of the delegated power."

H.W.R. Wade and C. F. Forsyth at page 28 says " The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct ? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted ? On an appeal the question is 'right or wrong ?' On review the question is 'lawful or unlawful ?' "

At page 732 it further says " For the most part, however, administrative legislation governed by the same legal principles that govern administrative action generally. For the purpose of judicial review, statutory interpretation and the doctrine of ultra vires there is common ground throughout both subjects. "

In the case of ***The Attorney – General of Ceylon and W.M. Fernando, Honorary Secretary, Galle Gymkhana Club*** **79 (1) NLR 39** Sharvananda J. held " A clear distinction has to be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in a resolution passed by the House of Representatives, a limb of the Legislature. A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation, the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made. "

At page 329 of the book titled Constitutional and Administrative Law of Sri Lanka states " The legal principles governing judicial control of subordinate legislation in relation to the doctrine of *ultra vires* are generally similar to those governing other administrative action. "

It further states " Subordinate legislation may be declared ultra vires and void by the courts on two main grounds: (1) procedural, (2) substantive. "

Moreover, in the case of ***Mixnam's Properties, Ltd. V. Chertsey U.D.C.*** **(1963) 2 All E.R. 787 at 799** Lord Diplock held that " the various special grounds on which subordinate legislation has been said to be *ultra vires* and void – e.g. because it is unreasonable; because it is uncertain, because it is repugnant to the general law or to some other statute. "

Where the executive has been allowed by the legislative to make law, it must abide strictly by the terms of its delegated authority. The subordinate legislation can be challenged on the

basis that it is ultra vires and therefore void because it does not fall within the scope of what is authorized by the enabling power.

There are many instances where Sri Lankan courts have declared the regulations ultra vires when the regulations were made exceeding the power or authority given by the principal enactment.

In the case of ***The Ceylon Workers' Congress v. Superintendent, Beragala Estate*** **76 NLR 1** the court agreeing with the judgment of Weeramantry J. delivered in the case of ***Ram Banda and River Valleys Development Board*** **71 NLR 25** held that Regulation No. 16 is invalid for the reason that it is ultra vires the rule making powers vested in the Minister. The Industrial Dispute Act itself does not contain any provision which limits the time within which an application may be made under section 31 B (1). An unlimited right granted by a statute cannot be validly limited by a regulation without an express power conferred for that purpose by the Act.

Further, in ***King-Emperor v. Benoari Lal Sarma*** **(1945) AC 14 at 24** it was held that there is a presumption that a delegate of legislative power cannot sub-delegate it to another person or body unless sub-delegation of the delegated legislative power is expressly provided for.

However, there is an exception to the aforementioned general rule. Those are the instances where the Legislature itself enacts the relevant regulations as part of an Act. In the case of ***Inspector Joseph v. Sandanam Meenatchy*** **28 NLR 205**, the by-laws in Schedule D of the Ordinance have been enacted by the Legislature as a part of the Ordinance, and the question arose whether these by-laws can be treated and tested in the same way as by-laws made by a Board or Council vested with power to make by-laws for certain specific purpose.

It was held that the by-laws in Schedule D must be treated as an integral part of the Ordinance and as having the same force and effect as the main provision of the Ordinance.

It was further held that the absolute right of the Legislature to enact whatever laws it likes whether in the form of by-laws or otherwise cannot be questioned by courts.

In the instant appeal, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the regulations made by said Board are amenable to the judicial review.

In the foregoing circumstances the following questions of law are answered as follows;

(a) Did the Court of Appeal err in law in applying the Prospectus - 2005 (P5) to the Appellants retrospectively?

Yes.

(b) Did the Court of Appeal err in failing to appreciate that the Appellants had a legitimate expectation that the Prospectus applicable to them was the Prospectus produced marked as P3, which was in operation at the time they commenced the course?

Yes. As the Appellants commenced and completed part of their program in MD (Medicine) under the Prospectus – 2003 marked as " P3 ", they entertained a legitimate expectation to complete the said program under the same Prospectus. However, the said Prospectus can be amended or rescinded with reasonable notice.

(c) Did the Court of Appeal fall into error by coming to a finding that the said decision as reflected in the Prospectus (P5), to restrict the number of attempts permitted to sit for the Final Examination of MD Medicine (MD Part II) is based on a "policy decision" and therefore not amenable to writ jurisdiction?

Yes. Subordinate Legislation cannot contain policy decisions. In any event, the restriction on the number of attempts is a condition of the regulations.

(d) Did the Court of Appeal err in failing to take cognizance of the fact that, in terms of Ordinance No. 01 of 1980, the Board of Management of the Postgraduate Institute of Medicine is empowered to make Regulations relating to the courses of study in respect of the relevant specialties, and as such, the said Board was amenable to the writ jurisdiction of the Court of Appeal?

Yes. Subordinate Legislation is not immune from judicial review.

(e) Can a substantive legitimate expectation arise in the absence of an express undertaking by the relevant authority on a matter of policy?

Subordinate Legislation is enacted to effectively exercise, perform and discharge powers, duties and functions under a principal enactment. As such the Subordinate Legislation cannot contain a " policy " and a legitimate expectation may arise based on the contents of the Subordinate Legislation.

For the reasons stated above I set aside the said judgment of the Court of Appeal dated 06.03.2013.

It is not necessary to issue a Writ of Certiorari quashing the number of attempts contained in the Prospectus – 2005 marked as " P5 " and the Circular marked as " P6 " or to issue a Writ of Prohibition, preventing the application of the said Prospectus – 2005 and the said Circular, to the Appellants as they are not applicable to the Appellants.

I issue a Writ of Certiorari quashing the following decision contained in letters marked as P4(a) – P4(d). i.e. " **Please note that you have already exhausted six attempts** ".

Subject to the above I allow the appeal without costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree

Judge of the Supreme Court

K.T. Chitrasiri, J.

I agree

Judge of the Supreme Court