

JANAPRIYA

v.

**SRI JAYAWARDENAPURA GENERAL HOSPITAL
AND OTHERS**

SUPREME COURT
G P S DE SILVA, C.J.
KULATUNGA, J., AND
RAMANATHAN, J.
SC APPLICATION 531/92
17th NOVEMBER, 1993

Fundamental Rights – Sri Jayawardenapura General Hospital (SJGH) – Eligibility for appointment as a Consultant Surgeon – Appointment of a doctor serving on contract or in acting capacity without advertisement – Whether Post Graduate Institute of Medicine (PGIM) certificate of a candidate's foreign qual-

ification is a condition of eligibility to appointment – Article 12(1) of the Constitution.

The petitioner, a doctor employed at the General Hospital, Galle as a Consultant Surgeon challenged a direction of the Minister of Health dated 27.7.1992 given to the SJGH Board under section 9 of the SJGH Board Act, No. 54 of 1983 to interview without advertisement eight candidates who had responded to an advertisement in 1986 for appointment as a Consultant Surgeon at SJGH. That direction was supported by two orders of the Court of Appeal against the SJGH, the advice of the Attorney General and the service record of the 2nd respondent (Dr. D.D. Ranasinghe) at the SJGH.

The aforesaid eight candidates included the 2nd respondent who was functioning as the Resident Surgeon at the SJGH since 1984 and who had also been appointed as Acting Consultant Surgeon for a few months in 1985 and in 1991 when the post of 3rd Consultant Surgeon became vacant.

Both the petitioner and the 2nd respondent had foreign qualification including FRCS (Edin.) and FRCS (Eng.) whilst the 2nd respondent had additional experience in surgery and academic experience acquired in England during several years. He also had a record of service at the SJGH from 1984-1991 as Resident Surgeon and as acting 3rd Consultant Surgeon whenever that post fell vacant.

The petitioner claimed that he was eligible to apply for the post of Consultant Surgeon from June 1988.

The post of Consultant Surgeon was advertised in 1984, 1986 and 1987. The 2nd respondent was called for an interview on each such occasion. However, the SJGH Board, the Government Medical Officers Association (GMOA) and the Association of Medical Specialists of Ceylon (AMSC) challenged the eligibility of the 2nd respondent on the ground that he lacked certification of his foreign qualification under the PGIM circular No. 1389 dated 20.09.1979 whereas the other candidates including the petitioner had obtained such certification. At each interview the SJGH Board disqualified or attempted to disqualify the 2nd respondent for appointment to the permanent post of Consultant Surgeon on the ground that he lacked PGIM certification which according to legal opinion was not an absolute necessity at the SJGH which was established by Act, No. 54 of 1983.

Held:

- (1) The 2nd respondent is qualified for the post of Consultant Surgeon, SJGH.
- (2) Even though the counsel for the petitioner submitted that the petitioner's grievance was the failure to advertise the vacancy of the 3rd Consultant Surgeon in 1991 all parties concerned including the SJGH Board dis-

criminated against the 2nd respondent for lack of certification under the PGIM Circular 1389 dated 20.09.1979 which circular had been declared violative of Article 12(1) of the Constitution and ultra vires by the Supreme Court in *Weligodapola v Secretary, Ministry of Women Affairs*.

Per Kulatunge, J.

"It seems that the salutary guidelines laid down by the Weligodapola Case (*supra*) have had no effect"

- (3) There is unfairness in the process of selecting persons for appointment to posts and lack of clearly formulated schemes of recruitment in the SJGH for the appointment of medical specialists.
- (4) The conduct of the SJGH Board led to victimization or the breakdown of morale within the Institution.
- (5) The petitioner had failed to establish an infringement of his rights under Article 12(1) of the Constitution.

APPLICATION for relief for infringement of fundamental rights.

Cases referred to:

1. *Weligodapola v Secretary, Ministry of Women's Affairs* (1989) 2 SRI LR 63
2. *Gunasinghe v Sri Jayawardenapura Hospital Board* SC Application No. 55/92 SCM 22.7.93

E.D. Wickremanayake with Sanatha Jayatilake and A. Cooray for petitioner.

Faisz Musthapha, PC., with Mahinda Relepanawa, Mahanama de Silva and Amarasiri Panditharatne for 2nd respondent.

Asoka de Silva Deputy Solicitor General for 1st, 3rd and 4th respondents.

Cur.adv.vult

January 12, 1994

KULATUNGA, J.

By this application, the petitioner seeks to challenge the validity of a direction dated 27.07.92 (Exhibit A) given by the the Secretary, Ministry of Health and Women's Affairs (3rd respondent) to the Board of Management of the Sri Jayawardenepura

Government Hospital (the 1st respondent) to make an appointment to the post of 3rd Consultant Surgeon of that Hospital by interviewing the applicants who had responded to the advertisement dated 11.06.86 (Exhibit B). It is the petitioner's position that the vacancy sought to be filled by the proposed appointment arose in or about 1991; that as such the post should be readvertised; and that the direction to make an appointment without such advertisement has deprived the petitioner of the opportunity of applying for the said post in violation of his right to equality guaranteed by Article 12(1) of the Constitution.

THE PETITIONER'S CLAIM

The petitioner states that he obtained the degree of MBBS (Cey.) 2nd Class Honours, with a distinction in Gynaecology and Obstetrics in 1972. He then obtained his FRCS (Primary) in 1974 at an examination held in Sri Lanka. He served in Sri Lanka in the Department of Health Services from October, 1972 to July 1978 when he obtained LRCP – MRCS in December 1978, FRCS (Edin) in 1979 and FRCS (Eng.) in 1981. He then returned to Sri Lanka and served at various hospitals and is presently serving as Consultant Surgeon, General Hospital, Galle (Teaching) and is a Visiting Lecturer at the Faculty of Medicine (of the Ruhuna University) Galle. He states that having served for a continuous period of 7 years in the Department of Health after having obtained his foreign qualifications he is qualified as from June 1988 to apply for the post of Consultant Surgeon at the Sri Jayawardenepura General Hospital. The petitioner expected the vacancy in the said post to be advertised. As this has not been done in view of the impugned direction, the petitioner prays for a declaration that the said direction is violative of his rights under Article 12(1) of the Constitution and for a direction to the 1st respondent to readvertise the post calling for applications from persons who are eligible for appointment.

THE 2ND RESPONDENT'S CLAIM

The 2nd respondent also claims to be qualified for appointment to the post of 3rd Consultant Surgeon, Sri Jayawardenepura General Hospital. He is presently the Resident Surgeon at the SJGH having been appointed to that post on contract on 18.12.84.

His contract has been extended every three years. He has also served as Acting Consultant Surgeon at the SJGH from 02.05.85 until July that year and was again appointed to act in that post when it became vacant in 1991. Out of the applicants who are qualified to be interviewed in terms of the impugned direction the 2nd respondent alone has been made a party to this application, possibly for the reason that the 2nd respondent is perhaps the strongest contender among those applicants to the post of 3rd Consultant Surgeon.

The 2nd respondent proceeded to Moscow prior to 1971, for medical studies on a government scholarship and obtained M.D. (Hon) Class 1 from the People's Friendship University in Moscow. His foreign specialist qualifications are FRCS (Edin) October, 1976 and FRCS (Engl.) November, 1976. He acquired clinical experience in general surgery having served in leading hospitals in England between 1971 to 1979. On his return to Sri Lanka he served as Resident Surgeon, General Hospital, Colombo from 15.08.79 to 20.12.80. His foreign surgical experience includes vascular surgery, plastic surgery, thoracic surgery, genito urinary surgery and renal transplant surgery. In 1981 he ceased to be in Government Service by overstaying his leave abroad; and from 01.02.81 to 30.11.83 he served as Registrar, Ipswich General Hospital, U.K. and was involved in facio maxillary and ENT surgery. From 01.12.81 to 30.11.83 he held the post of Registrar and Clinical Tutor in Surgery at St. James University Hospital Leeds, U.K. He also obtained DLO (Rcs.Eng.) in November, 1983.

The above record appears in exhibits 'C', 'D' and 'G' filed with the petition. There is also the document 2R16 which is a letter dated 16/23 September, 1992 sent by the Registrar North Colombo Medical College to the 2nd respondent as "Consultant Surgeon Sri Jayawardenapura General Hospital" requesting him to accept 18 students to do two months clinical work in surgery.

CAUSE OF THE DISPUTE

The petition and in particular Exhibit 'K' indicate that the petitioner and his Trade Union, The Medical Officers' Association insist that the post in dispute be advertised; and it is the implication of the available material that they take up the position that the appoint-

ment should strictly conform to the requirements of the Circular No.1389 dated 20.09.79 on the subject of Post-Graduate Institute of Medicine (Exhibit 'H'). They appear to contend that the petitioner is qualified for appointment under that circular whilst the 2nd respondent is not qualified.

Circular No. 1389 issued by the Secretary, Ministry of Health announced *inter alia* as follows:

Para (1)

No Foreign Primary Examination may be held in Sri Lanka after 01.01.1980.

Para 2(a)

Post-Graduate examinations of the Institute will be held from 1980 leading to the M.D. or M.S. degrees in the respective specialities.

Para (4)

Those medical officers who have passed Primary Part I of foreign examinations will be permitted to go abroad on no-pay study leave to complete the final examinations on a phased programme.

Para (5)

Medical officers who have the Foreign Primary Part I Examination could sit the final examination of the Institute, provided they have the requisite training and will on successful completion of the examination be found assignments for further training upto one year in selected institutions abroad, by the Ministry.

Para (6)

Officers who have obtained full qualifications and have over-stayed their periods of leave abroad, will be entitled to have their qualifications recognised for appointments to posts of Specialists in the Department of Health, provided they return to the Island before 01.01.1980.

Para (7)

Medical Officers who have been sent abroad by the Department on no-pay study leave will be entitled to have their qualifications recognised for appointment for posts of Specialists in the Department, provided they return within the stipulated period of leave.

Para (8)

Subject to (6) and (7) above, with effect from 01.01.80, qualifications of the local Post-Graduate Institute of Medicine will be given definite preference in appointments to the posts of Specialists in the Department, including Teaching Hospitals.

**CLAIMS OF THE PETITIONER AND THE 2ND RESPONDENT
WITH REFERENCE TO THE PGIM CIRCULAR**

The petitioner is presumably claiming to be qualified under para (7) above on the assumption that this circular applies to SJGH. The 2nd respondent's position is that SJGH was established by the Sri Jayawardenepura Hospital Board Act, No.54 of 1983, S.7(2)(c) of which empowers the Board to appoint and employ officers and servants of the said hospital and to make rules regarding their appointment etc.; that as such the SJGH is not governed by the same rules applicable to other Teaching Hospitals coming under the Ministry of Health & Women's Affairs; that notwithstanding a settlement in the Court of Appeal that he is eligible for the post of Consultant Surgeon, the previous Board of Management of the Sri Jayawardenepura General Hospital excluded him from being selected for that post on the ground that he lacked PGIM Board certification; that the material placed before this Court by the petitioner establishes that it is not the petitioner's but the 2nd respondent's rights under Article 12(1) which have been violated; that the impugned directive was given to grant a measure of relief to the 2nd respondent who has a legitimate grievance by reason of being unlawfully disqualified from being considered for appointment to the post of Consultant Surgeon. The 2nd respondent further states that on 11.08.92 the SJGH Board held an interview in compliance with the said directive.

The 1st and 3rd respondents have taken up the position that the 1st respondent acted lawfully in complying with the impugned directive given by the Minister of Health & Women's Affairs on legal advice received from the 4th respondent (Attorney-General)

THE FACTS

(1) APPOINTMENT OF 1ST & 2ND CONSULTANT SURGEONS

According to the Minutes of the Board of Management of the SJGH held on 07.03.84 at the office of the Ministry of Women's Affairs & Teaching Hospitals (Exhibit 2R11) it was decided that the qualifications for the post of Consultant in Surgery would be -

FRCS +7 years post graduate experience or M.S.(Colombo) with PGIM Board certification + 5 years post graduate experience.

On 21.07.84 the said post was advertised in the "Ceylon Daily News" (2R2) The qualifications therein set out are:

"As acceptable to the Teaching Hospitals in the Ministry, preference will be given to those already holding Consultant positions".

At an interview held on 01.01.84 Dr. K.Yogeswaran and Dr. S.A.W. Gunawardena were appointed to fill two posts of Consultant Surgeon with effect from 01.12.84. The 2nd respondent who also applied for the post did not come within the first four who were short listed for selection out of 31 applicants. A third vacancy was not filled as the hospital was not fully functional. However, on 18.12.84 the 2nd respondent was appointed Resident Surgeon, on contract.

(II) 2ND INTERVIEW FOR APPOINTMENT OF (3RD) CONSULTANT SURGEON

On 11.06.86 the post of 3rd Consultant Surgeon was advertised, the requisite qualifications being the same as in the 1984 advertisement. The interview was held on 11.07.86. The interview Board consisted of 3 members but on the morning of 11.07.86 the then Chairman of the Board of Management of the SJGH added a

4th member allegedly to ensure the selection of a particular applicant for appointment, namely, Dr. Rodrigo. However, two members voted for Dr. Rodrigo whilst two members voted for the 2nd respondent. In the result, no appointment was made.

(III) **DR. RODRIGO'S REPRESENTATIONS**

Dr. Rodrigo (who is a Consultant Surgeon attached to the Colombo North General Hospital) sent two letters, namely a letter dated 13.07.86 addressed to the Chairman, the SJGH Board (2R5) and a letter dated 04.08.86 addressed to the Minister of Women's Affairs & Teaching Hospitals (2R6) canvassing that he be appointed to the post of 3rd Consultant Surgeon as he alone is qualified whilst the 2nd respondent is not qualified for want of M.S. Sri Lanka and Board Certification by the PGIM which he submitted were the requisite qualifications for that post.

(IV) **THE VIEWS OF THE MINISTRY**

In response to 2R6, the 3rd respondent addressed a letter dated 26.08.86, to the Chairman, SJGH Board (2R7) in which the 3rd respondent made the following points:

- (a) Dr. Rodrigo has canvassed his own selection to the post of 3rd Consultant Surgeon which conduct constitutes a disqualification for appointment to a post in the public service.
- (b) The question of the 2nd respondent's qualification for the post does not arise as he holds the position of Resident Surgeon which position was filled from applicants who responded to the 1984 advertisement for filling vacancies in the post of Consultant Surgeon; and the Chairman of the SJGH Board had in his first annual report highly commended the 2nd respondent for his work and recommended that he be confirmed in his post.
- (c) According to legal opinion the PGIM qualification is not an absolute necessity.
- (d) In any event, the SJGH should adopt the policy followed in the Ministry of automatically promoting Resident

Surgeons to Consultant status which would help in building up a team with an identity and commitment to that hospital. If there are no such career prospects, it would only contribute to the brain drain that the government is keen to reverse.

- (e) The Ministry therefore believed that the Chairman would make a fair presentation of the 2nd respondent's case to the Board.

The letter 2R7 was marked urgent and sent by hand.

(V) **DECISION OF THE SJGH BOARD – 2ND RESPONDENT'S APPLICATION TO THE COURT OF APPEAL**

Had the SJGH Board heeded 2R7, the 2nd respondent might have been appointed to the post of the 3rd Consultant Surgeon on the basis of the interview held on 11.07.86. However, the Board appears to have been of a different mind for it held a meeting on 26.08.86 itself and after considering the letters written by Dr. Rodrigo and the 3rd respondent, decided to readvertise the post after stating the conditions of eligibility.

Consequently, the 2nd respondent filed application No.CA 1087/86 (Exhibit 'D') in the Court of Appeal praying for writs of certiorari and mandamus against the Board alleging that the Board was seeking to amend the rules to render him ineligible for the post.

(VI) **SETTLEMENT IN THE COURT OF APPEAL**

At the hearing of the application before the Court of Appeal, the dispute was settled on 22.01.87. In terms of this settlement as amended on 06.02.87, parties agreed as follows:

"The 1st respondent Board will make an appointment to the post of 3rd Consultant Surgeon, without advertising the said post on the basis of the advertisement marked 'B' dated 11.06.86, after interviewing the following eight applicants as eligible"

The applicants referred to in the settlement include the 2nd respondent. The 2nd respondent undertook not to canvass before Court the appointment which would be made in terms of the said settlement but reserved his right to proceed administratively, if so

advised. In view of the settlement, the application was withdrawn and it was dismissed (Exhibits 2R8 & 2R9).

(VII) MINISTER'S DIRECTION

On 17.02.87 the Minister of Women's Affairs & Teaching Hospitals gave a direction to the SJGH Board in terms of S.9 of the Act to fill the vacancy of 3rd Consultant Surgeon by promoting its eligible resident staff thereby ensuring the principle of recruiting persons to Consultant positions in the ratio of two persons from outside the hospital to one person within the hospital (Exhibit 2R10). Had this directive been complied with the 2nd respondent would have been appointed to the post. However, on 10.03.87 the Minister withdrew the said directive on representations made by the Board that implementing it might amount to a failure to comply with the Court order dated 22.01.87.

**(VIII) THIRD INTERVIEW FOR APPOINTMENT OF
CONSULTANT SURGEON**

On 21.03.87 the Board held an interview. Only five of the original eight applicants attended it. At the preliminary discussions the Board ruled out the 2nd respondent and two other applicants as being "unsuitable". The discussion proceeded on the "merits" of Dr. Rodrigo and Dr. Premaratne and the latter was selected for appointment by a majority decision. (Exhibits 2R12, 2R13).

**(IX) 2ND RESPONDENT'S COMPLAINT TO THE
MINISTER**

In November, 1989 Dr. Premaratne proceeded to the United Kingdom for one year, on no pay study leave. He did not resume duties thereafter with the result that the post of 3rd Consultant Surgeon became vacant. In the meantime the 2nd respondent had been unhappy with the selection made on 21.03.87. In view of the terms of the settlement 2R8 wherein he had undertaken to limit his rights to proceed administratively he complained to the Minister by his letter dated 16.12.89 (Exhibit G). The 2nd respondent complained that despite the undertaking given in Court and notwithstanding the Ministry directive 2R10 the SJGH changed the rules and deprived him of his promotion.

(X) **APPOINTMENT OF JAYALATH COMMITTEE - ITS REPORT**

The SJGH Board at its meeting held on 20.12.89 discussed the above representations made by the 2nd respondent and decided to request the Minister to appoint an independent person to ascertain the facts. The Minister appointed Mr. D.G.Jayalath (retired Judge of the Court of Appeal) who conducted an exhaustive inquiry and submitted his report dated 17.06.91 (Exhibit C). Mr. Jayalath reached the following conclusions:

1. That the 2nd respondent was entitled to preference in appointing the 2nd Consultant Surgeon, in view of the Ministry directive 2R10 though it was later withdrawn.
2. That it has been established beyond reasonable doubt that the management of the SJGH had, at the stage of the 2nd interview, introduced, the PGIM Board certification as a qualification for the post to exclude the 2nd respondent and some others from being selected.
3. That at the 3rd interview the management also erred in insisting on the principle of 'merit' alone as against the principle of 'merit' and service: and that the said interview was not conducted in a just and fair manner and was violative of the Court of Appeal settlement in case No.1087/86.

On the lawfulness of insisting on the PGIM qualifications, Mr. Jayalath cited the decision of this Court in *Welligodapola v. Secretary Ministry of Women's Affairs*⁽¹⁾ where it was held by the majority that the circular 1389-(Exhibit H) is violative of Article 12(1) of the Constitution and is *ultra vires*, bad and of no force or avail. Fernando, J.was of the view that it was only 'pro tanto' void.

(XI) **ATTEMPT TO IMPLEMENT JAYALATH REPORT – PROTEST BY THE GMOA**

On 08.08.91 the Attorney-General gave his opinion to the Director General of Health Services wherein he referred to the findings contained in Mr.Jayalath's report and advised that the said report be forwarded to the SJGH Board with a direction of the Minister under S.9 of the Act to hold a fresh interview of the origi-

nal eight applicants including the 2nd respondent who were eligible on the basis of the advertisement on 11.06.86 and to make an appointment bearing in mind the conclusions of Mr. Jayalath (Exhibit 3R1).

It would appear from the minutes of a meeting of the SJGH Board held on 18.12.91 (2R18) that the Ministry had instructed the Board to hold a fresh interview for the original applicants and this was fixed for 15.10.91. However, the GMOA and the Association of Medical Specialists of Ceylon by their letters addressed to the Minister, protested against it; whereupon the Ministry instructed that the interview be postponed, pending further discussions and clarifications from the Attorney-General. The interview was accordingly postponed.

(XII) 2ND RESPONDENT SEEKS RELIEF FROM THE COURT OF APPEAL

On 12.11.91 the 2nd respondent filed a petition seeking to reinstate the Court of Appeal Application No. 1086/86 on the ground that the SJGH Board had failed to honour the settlement dated 22.01.87. The petition recites the facts relating to the appointment of the 3rd Consultant Surgeon and alleges that as it is evident from a news report appearing in the "Daily News" of 08.10.91, the Ministry had agreed to call for fresh applications for the post, acting under the pressure brought to bear on the authorities by the GMOA and the AMSC against the interview fixed for 15.10.91. The petitioner sought a direction on the SJGH Board to comply with the settlement dated 22.01.87 (Exhibit 1)

(XIII) UNDERTAKING BY THE BOARD TO HONOUR THE ORIGINAL SETTLEMENT

On 13.01.92 the Board represented by an Additional Solicitor General gave an undertaking to the Court that the Board was prepared to give effect to the settlement arrived at on 22.01.87 as amended on 06.02.87. In view of this undertaking, the 2nd respondent moved to withdraw the application for relisting, which was allowed and the application was accordingly dismissed (Exhibit J).

(XIV) GMOA RENEWS ITS DEMANDS

On 04.06.92 a meeting chaired by the Minister of Health & Women's Affairs was held at which the representatives of the GMOA, the SJGH Board and officials were present. According to the minutes of that meeting (K) the Secretary GMOA requested that the post of 3rd Surgeon SJGH be advertised. The Minister agreed to consult the Attorney-General in the matter and to act on his advice. The minutes also recorded a statement by the Chairman of the SJGH Board that neither the Chairman nor the Board gave instructions to the Attorney-General that the Board (as respondent in the Court of Appeal) was prepared to give effect to the settlement dated 22.01.87.

(XV) ACTION BY THE MINISTRY

On 27.07.92 the 3rd respondent conveyed to the 1st respondent's Board the impugned direction to interview the applicants who responded to the previous advertisement. The direction adds that this is to give effect to the settlement arrived at, in regard to the post of 3rd Surgeon SJGH. As stated at the beginning of this judgment, (according to the 2nd respondent) an interview was held on 11.08.92; but no appointment appears to have been made presumably in view of this application.

(XVI) SUBMISSIONS OF COUNSEL

Learned Counsel for the petitioner submitted that the Court settlement dated 22.01.87 was complied with and the said settlement was exhausted with the appointment of Dr. Premaratne after the interview held on 21.03.87; that as per Board minutes 2R13 the 2nd respondent and two other applicants had been excluded as they were unsuitable; hence it is not correct to contend that they were excluded for want of the PGIM qualifications; that as such the proceedings of the interview held on 21.03.87 could not have been legally challenged in CA Application No.1087/86 as late as 1991; that the present vacancy arose in 1991 and hence it should be advertised; and that the rights of the petitioner to be considered for appointment are not affected by the second settlement between the 2nd respondent and the SJGH Board, reached on 13.01.92. Counsel also drew our attention to the statement of the Chairman of the SJGH Board, in Exhibit K that the Board had not given

instructions to the Attorney-General to enter into the said settlement. He therefore, argued that the directive to make an appointment without advertising the post violates the petitioner's right to equality under Article 12(1) in that the petitioner who is also qualified to apply for the post is unreasonably deprived of the right to be considered for appointment.

Learned Counsel for the 2nd respondent submitted that the purpose of the impugned direction is to remedy an injustice committed against the 2nd respondent by the previous management of the SJGH who under the pretence of implementing a Court settlement, summarily deprived him of the appointment on the ground that he lacked the PGIM Board certification. Counsel conceded that the normal procedure for making an appointment should be after advertisement and that the right of an individual who is qualified to apply for a post cannot be taken away by a Court settlement to which he is not a party. He however, argued that here there is no discrimination against the petitioner because it is the 2nd respondent who has been discriminated against by being unfairly deprived of an appointment. The impugned directive was given not capriciously or arbitrarily but after a full inquiry and on the advice of the Attorney-General for ensuring that the 2nd respondent's fundamental rights are assured. In short, the petitioner and the 2nd respondent are not similarly circumstanced and hence there is no discrimination which attracts Article 12(1).

(XVII) **CONSIDERATION OF THE CASE**

The bulk of the relevant material has been placed before us by the 2nd respondent. Some of this material is very vital but it was not produced by the petitioner. There is thus some justification for the 2nd respondent's complaint that the petitioner has failed to place before this Court the accurate facts and has arranged the facts in such a way as to suit his application.

From the facts set out by me it is clear that the 2nd respondent is qualified for the post of Consultant Surgeon. If he is not qualified, he could not have been summoned for three interviews; he could not have been appointed to act as Consultant Surgeon for in the public service a person can be appointed to act in a post only if he is in all respects qualified for appointment to the post in terms

of the approved Scheme of Recruitment (Cap.11 13:1:2 of the Establishments Code). I have to assume that this principle applies to the SJGH. Neither the petitioner nor the 2nd respondent has obtained MS (Sri Lanka). They are both relying on their foreign qualifications except that the petitioner appears to contend that he satisfies the requirement of para 7 of circular 1389 (Exhibit H) whereas the 2nd respondent is not so qualified, on the basis of his foreign qualification.

Counsel for the petitioner himself did not challenge the 2nd respondent's claim for want of the PGIM Board certification. His simple complaint is that the proposed appointment without advertisement is an infringement of Article 12(1). However, the PGIM Board certification requirement has been used throughout to disqualify the 2nd respondent. It is there in 2R12 and 2R13 which show that the SJGH Board considered that the PGIM Board certification is a requirement for Consultant positions. The notes of interview (2R12) and the Board decision (2R13) make this very clear. It is there in Dr. Rodrigo's representations 2R5 and 2R6. It is also the conclusion of Mr. Jayalath, after an exhaustive inquiry that the SJGH Board considered that the PGIM qualification is a pre-requisite to all specialist posts. Even as late as 04.06.92, the record of discussions between the Minister and the GMOA shows that the GMOA considered that the PGIM Board certification is a must.

It seems to me that the salutary guidelines laid down by the *Weligodapola's case (supra)* have had no effect. There the majority of the Court held that the PGIM Circular 1389 is *ultra vires*. It held that the State is entitled to lay down conditions of efficiency and other qualifications for securing the best service, and when it does so this Court will not insist that the classification is scientifically perfect and logically complete. The Court held that the classification of doctors with foreign qualifications provided for in paras 6 and 7 of the circular violates Article 12(1) and that the circular is *ultra vires*, bad and of no force or avail. Fernando, J. who held that the circular was only '*pro tanto*' void said:

"Paragraphs 6 and 7 (of the circular) conclusively establish that those foreign qualifications are fully recognised, and that no preference will be given to persons having local PGIM qualification *vis-a-vis* persons having aforesaid foreign quali-

fications and falling within the ambit of those paragraphs. Further, it would be a legitimate management practice, designed to improve motivation and to retain staff, to have a promotional scheme based on internal promotions only (or giving preference to, or reserve a quota for, those already in service), even though this may result in the exclusion of better qualified persons. A policy of insisting upon appointment of an "outsider" as being the best qualified person, regardless of other factors, may sometimes result in a deterioration of morale among (and even loss of) staff already in service, with a consequent decline in the overall efficiency of the institution"

One would have expected that after the decision in the *Weligodapola case (supra)* the uncertainty and the caprice that was associated with the enforcement of the PGIM certification requirement for appointment of medical specialists would have ceased. The instant case shows that instead, the arbitrary insistence on the strict application of this requirement has been continued, leading to victimization or the break down of morale. It also appears that there is unfairness in the process of selecting persons for appointment to posts, which situation is partly attributable to pressures being applied by interested groups. The extent to which the authorities are affected by such pressure groups is demonstrated by the fact that at the meeting with the GMOA on 04.06.92, the Chairman of the SJGH said that neither he nor the Board instructed the Attorney-General to enter into the Court settlement on 13.01.92, which statement is plainly incredible.

What is more, there appears to be a lack of clearly formulated schemes of recruitment in the SJGH which are published and freely available, resulting in uncertainty as to the requisite qualifications for the appointment of Medical Specialists. Thus in *Gunasinghe v. Sri Jayawardenapura General Hospital Board*⁽²⁾ the Court had to interpret a number of documents for ascertaining the applicable qualification for the post of Consultant Cardio Thoracic Surgeon as being "M.S.Surgery majoring in that branch". This is not a requirement contained in a service minute at the SJGH but in Gazette No. 662/11 of 17.05.91 providing for rules for medical personnel of the Government Health Services. The Court held it to be applicable to the SJGH on the

ground that the SJGH Board had earlier acquiesced in Health Service rules regarding minimum qualifications for a Consultant appointment. The petitioner was the Resident Cardio Thoracic Surgeon at the SJGH. he had excellent foreign qualifications and a high standard of work and experience. He was interviewed and selected for appointment as Consultant CTS but (on a protest by the GMOA), the Minister directed the Board to readvertise the post. Consequently, another doctor who had the PGIM Board certification was appointed to the post. The Court dismissed the petitioner's challenge to that appointment. The judgment makes no reference to *Weligodapola's case* (*supra*).

CONCLUSION

I am of the opinion that on the material before us the petitioner has failed to establish that his rights under Article 12(1) have been infringed. The application is accordingly dismissed with costs in a sum of Rs. 3500/- payable by the petitioner to the 2nd respondent. It is hoped that the authorities will take steps to put an end to the several anomalies in the appointment of Medical Specialists referred to in this judgment.

G.P.S. DE SILVA, C.J. - I agree.

RAMANATHAN, J. - I agree.

Application dismissed.