JAYAWICKREMA
v.
PROF. W. D. LAKSHMAN, VICE CHANCELLOR, UNIVERSITY OF COLOMBO AND OTHERS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
GUNASEKERA, J.
SC APPLICATION NO. 648/96
19TH JUNE AND 22ND JULY, 1998.

Fundamental rights – "Board certification" as a Consultant Anaesthetist – Failure of PGIM to arrange for suitable foreign training – Article 12 (1) of the Constitution.

The petitioner who had obtained the degree of MD (Anaesthesiology) of the Postgraduate Institute of Medicine (PGIM) and successfully completed the period of local training was sent for foreign training to Sir Charles Gairdner Hospital, Western Australia. Foreign training was a requirement before she could receive Board certification as a Consultant Anaesthetist. At the end of the training in December, 1995, Dr. Davis under whom she trained and Dr. Cuerden visiting consultant at the Australian Hospital issued her certificates stating that she had satisfactorily completed her training there. However unknown to her there had been a correspondence between the PGIM and Dr. Davis in the course of which Dr. Davis who in the cetificate issued to the petitioner had made no complaint against her, made adverse comments regarding her competence. Consequently, the PGIM refused the petitioner Board certification and decided to extend her post MD training by one year, in Sri Lanka.

Held:

1. The decision to refuse Board certification was taken on the basis of adverse comments by Dr. Davis which were unjustified, contradictory and perverse which comments were entertained without giving the petitioner an opportunity of defending herself, in breach of the *audi alteram partem* rule. Hence the decision of the PGIM was fatally flawed. The relevant regulations did not permit the substitution of a further period of local training.

2. The PGIM had failed to send the petitioner for training to an approved centre within the meaning of regulation 5 (3) (*b*).

3. The PGIM and its Board of Management and the Board of Study in Anaesthesiology infringed the petitioner's right under Article 12 (1) of the Constitution.

Case referred to:

1. *Allinson v. General Council of Medical Education* (1894) 1 QB 750, 760-761.

APPLICATION for relief for infringement of fundamental rights.

N. B. D. S. Wijesekera for the petitioner.

K. Sripavan DSG for the respondents.

Cur. adv. vult.

September 25, 1998.

FERNANDO, J.

The petitioner alleges that in violation of her fundamental right under Article 12 (1) the Postgraduate Institute of Medicine (PGIM) – the Board of Management of which consisted of the 4th respondent, its Chairman, and the 5th to 17th respondents – had refused her "Board certification" as a Consultant Anaesthetist. She asks for an order quashing that decision, for compensation in a sum of five million rupees, and for a declaration that the PGIM should grant her such "Board certification".

Mr. Sripavan, DSG, appearing for the respondents, drew our attention to the Postgraduate Institute of Medicine Ordinance, No. 1 of 1980, (published in *Gazette* No. 83/7 of 10.4.80) made by the University Grants Commission (UGC) under section 140 read with section 18 of the Universities Act, No. 16 of 1978. The PGIM was established by section 2 of that Ordinance; by section 4 the PGIM was attached to the University of Colombo; section 5 gave the PGIM power to provide postgraduate instruction, training and research in such specialities in medicine as may be approved by the UGC upon the recommendation of the PGIM and the University, and to conduct postgraduate examinations for the purpose of ascertaining the persons who have acquired proficiency in such specialities; section 13 required the PGIM to establish Boards of Study for various specialities in medicine, including of Anaesthesiology; and section 15 (2) empowered each Board of Study to draft, and to submit to the Board of Man-

agement of the PGIM, regulations relating to courses of study and examination in the relevant speciality, and to recommend to the Board of Management persons who having passed the prescribed examinations and having satisfied other prescribed conditions are eligible for the award of postgraduate degrees, diplomas, certificates and other academic distinctions in that speciality.

It is common ground that regulations had been made relating to the training programme in Anaesthesia leading to the degree of MD (Anaesthesiology), and to Board certification as a Consultant Anaesthetist. There is no dispute that the petitioner had satisfactorily completed the MD and the clinical training programme. Regulation 5.3 prescribes the other requisites for Board certification:

"Trainees who have completed the clinical training programme without exemptions shall –

(*a*) complete a period of one year as Senior Registrar in Sri Lanka *in a teaching hospital approved by the Board* under the supervision of a fully-qualified Consultant and be certified by him. This period need not be continuous.

(*b*) undergo a period of training abroad of at least one year, *in a centre approved by the Board.*"

It is admitted that she successfully completed the period of local training required by regulation 5.3 (*a*).

There had been some delay on the part of the PGIM in sending the petitioner for foreign training. Although the petitioner alleged bad faith, the correspondence shows that PGIM officials did make reasonable efforts to send her abroad. There is no other evidence of bad faith or ill-will, and I reject that allegation.

Three questions arise for determination. Was the decision of the PGIM, that the petitioner had not completed her foreign training satisfactorily, reached in violation of her rights under Article 12 (1)? If such foreign training had not been satisfactorily completed, was the PGIM entitled to substitute a further period of local training? Had the PGIM sent her for training at a centre which had been approved in terms of regulation 5.3 (*b*)?

1. *Satisfactory Completion of Foreign Training*

The petitioner was sent to the Sir Charles Gairdner Hospital, Western Australia (the Hospital), for training under Dr. N. J. Davis, from February to December, 1995. In December, 1995, she received the following certificate from Dr. Davis:

> "Dr. Y. de S. Jayawickrema was [*sic*] completed 12 months in the Department of Anaesthesia as a postgraduate trainee. She has been in a hands-on position and has had wide clinical experience during that time. She has been conscientious and diligent with her work.

She also received a certificate dated 27.12.95 from Dr. Cuerden, a visiting Consultant:

> "I have known Dr. Jayawickrema for the year that she has spent as an overseas visitor at [the Hospital]. She has performed *similar duties to the other trainee Anaesthetists* which include pre-operative assessment and anaesthesia for the whole spectrum of surgery except paediatrics and obstetrics. During my time working with her I have found her to be *an experienced and skilled Anaesthetist* who is *happy and able to work on her own.* She was always *punctual, reliable and obliging to the other team members* and took a *conscientious and workmanlike approach to her duties.* I know she is looking forward to returning home to Sri Lanka and her family and I wish her every success in her career there."

The respondents do not claim that any performance appraisal, report, or other observations relating to any aspect of the petitioner's performance or conduct had been communicated to the petitioner, either by Dr. Davis or anyone else on behalf of the Hospital, or by the respondents or anyone else on behalf of the PGIM, at any time during her training period, or after its conclusion.

On 3.1.96 the petitioner applied for Board certification, enclosing the required certificate from the local Consultant that she had satisfactorily completed her local training, as well as the two certificates which she had received in December, 1995, from the Australian Consultants.

Thereafter, at the petitioner's request, Dr. Davis sent her, by facsimile, yet another certificate, dated 19.3.96, addressed to the former Director of the PGIM:

> "Dr. Y. de S. Jayawickrema has asked me *to confirm* with you that she has been given sufficient training to work as a Consultant Anaesthetist in Sri Lanka. I have (previously?) written regarding her performance. She was given 12 months training under my supervision. I believe that *her training has been sufficient for her to work as a Consultant Anaesthetist in Sri Lanka* and I think she is capable of doing so."

There was considerable delay in dealing with the petitioner's application. She protested, requesting that in the meantime appointments of Consultants to various hospitals should be delayed until a decision was taken upon her application. Her trade union, the GMOA, also protested. A letter of demand was sent by an Attorney-at-law on her behalf. Finally, by letter dated 29.8.96, the decision of the PGIM was conveyed to her:

". . . the Board of Management has approved the recommendation of the Board of Study in Anaesthesiology that your Post MD training be extended by one year in Sri Lanka. The decision of the Board of Study submitted to the Board of Management was made after consideration of all reports relating to your Post MD training."

No reason was stated, either then or thereafter. The certificates tendered by her were not queried or doubted. She was not told what reports had influenced the Board of Study and the Board of Management in reaching that decision, and was given no opportunity whatever of explaining her position in relation to any adverse comments in those reports.

With his affidavit the 2nd respondent tendered copies of two letters dated 11.6.96 and 18.6.96 written by the 3rd respondent (the Chairperson of the Board of Study in Anaesthesiology) and the former Director of the PGIM, respectively, to Dr. Davis. He also stated that Dr. Davis had submitted confidential assessments dated 21.4.95, 3.8.95 and 21.12.95, and had replied to the aforesaid two letters; and claimed that these "contain very confidential information, (and) will be made available if so required" by this Court. The petitioner responded that she had only been given (presumably by Dr. Davis) a copy of the report dated 3. 8. 95.

At the hearing, Mr. Sripavan tendered copies of six letters written by Dr. Davis: four to the former Director of the PGIM, and two to the 3rd respondent. Dr. Davis had neither marked any of these as "confidential", nor requested confidentiality for their contents. Indeed, these should have been disclosed by the PGIM to the petitioner at the outset, and she should have been asked for her observations. We declined to allow them to be produced for perusal only by the court, for that would again deny the petitioner an opportunity of controverting or explaining them; and in any event we would have had to quote relevant extracts in our judgment, thereby destroying whatever "confidentiality" they might have had. On the other hand, if they were not produced, the impugned decision would have had to be set aside as being one made without reasons, and unsupported by any relevant material. Mr. Sripavan was therefore constrained to produe them, and to disclose them to the petitioner. Indeed, if he had not done so, we ourselves would have directed their production.

It is necessary to refer to the entire correspondence in sequence.

Dr. Davis first wrote to the former Director, PGIM, on 21.4.95:

> "It is difficult to give a real assessment of progress of Dr. Jayawickrema as she has had an unfortunate start to her time here due to not having all the paperwork required for registration. As she did not have a certificate of good standing from Sri Lanka she could not be registered until this arrived. This certainly slowed her progress as there was a limit to what she could do without medical registration.
>
> There are some real concerns about her communication skills. It is not easy to ascertain how much she understands and although I believe she understands English very well, it is not easy to know if she has absorbed what has been said to her. There is therefore a reluctance to allow her too much clinical freedom at this stage. I shall report to you on her further progress at a later date."

He wrote again on 3.8.95 to the former Director:

> "Dr. Jayawickrema has now been with us for six months. She has worked with many different consultants in the department over a wide range of specialties. There has been concern expressed to me that *communication with Dr. Jayawickrema is not easy and this has impeded her performance.* For this reason she has not

been placed on the night duty roster up to this stage although it had been my intention for her to be on the night roster. It is felt that she needs quite close supervision yet is clearly an experienced Anaesthetist. *It is not felt she is at the stage of independent practice.* She is *very willing and does all that is asked of her."*

About the same time that he gave the petitioner a favourable certificate (already quoted), Dr. Davis submitted his formal evaluation to the former Director on 21.12.95:

"Dr. Jayawickrema has now come to the end of 12 months with us.

During that time she has had hands on experience and supervision and teaching in most branches of adult anaesthesia. She has during that time been *keen and willing and has shown a good level of knowledge.*

I wrote previously that I thought that difficulties with communication were impeding her performance. These difficulties still exist. I have discussed her performance with my consultant colleagues and there is still *a lack of confidence in her ability to practice (sic) independently* in this environment.

I do not believe that this is just a language thing. She does not seem to always be aware of what is going on around her. *I would not be in a position to say that at the end of her time here that I would consider her at a level that she would be able to be considered to be at consultant level for Australia.*

I do not have access to old reports or assessments from early in her training but *I would be surprised if she had really good reports.*"

This was followed by Dr. Davis' letter dated 19.3.96 (already quoted), stating his opinion that the petitioner's training had been sufficient for her to work as a Consultant Anaesthetist in Sri Lanka.

That was acknowledged by the 3rd respondent, by her letter dated 11.6.96:

". . . in view of the previous assessment . . . the Board of Study in Anaesthesiology was not willing to consider her Board certification as a Specialist since the practice of anaesthesia as a consultant in Sri Lanka demands a high standard of independent practice similar to that required in Australia.

Please be good enough to clarify your statement: "I would not consider her at a level that she would be able to be considered to be at consultant level in Australia." *Is it felt that she was unable to fit into the Australian system or was it because of a gap in skills and competence expected of a consultant . . .*"

His reply dated 14.6.96 to the 3rd respondent avoided a specific answer to that question:

"I feel uncomfortable about this matter *as I certainly did not mean to imply that standards were lower in Sri Lanka than we would expect here.* I felt that I was in a difficult position with this lady as she is quite experienced and has been practising at senior level in Sri Lanka, but as you know from my previous assessments she did not seem to be able to function at a level expected of a consultant. *Her approach to patients upset a number of both Anaesthetists and nursing staff* – this was put down to "culture difference" but I don't really believe there should be any such difference.

She has faxed me to get in ahead of you and stated: "Please confirm your recommendation".

I believe she needs a thorough assessment and evaluation. I would not be happy to recommend her as a consultant. There were *major difficulties in routine communication* which suggests to me *she needs a period of formal evaluation* in your country."

Thereafter the former Director, PGIM, wrote a similar letter to Dr. Davis on 18.6.96, adding:

". . . If there was a deficiency in skills and competencies in December, 1995, at the time of your second assessment in March, 1996, were these deficiencies corrected . . ."

He had overlooked the fact that the petitioner had left Australia in December, 1995.

In his reply dated 21.6.96, Dr. Davis recited a whole litany of deficiencies:

> "I received your fax yesterday. Last week I faxed a report to the Chairman of the Board of Study in Anaesthesiology. I hope this has been passed to you. I am sending a copy. I am not very comfortable with the situation as *this doctor did not come up to the same standards as our trainees, or of the other trainees we have had from overseas countries.* She was *rough with patients,* had *poor sterile techniques, poor communication skills.* These things did improve during her time here but the staff of the department *all found her difficult to teach.* She just did not come up to what we expect of a consultant. I certainly tried to give her the benefit of any doubt regarding cultural difficulties but there were *quite a lot of problems of a public relations nature.* She *just did not seem to listen* to what was said."

Was that the same person of whom he had said in March: *Her training has been sufficient for her to work as a Consultant Anaesthetist in Sri Lanka?*

Finally, after the PGIM decision of 29.8.96 which referred to reports on the petitioner's training, Dr. Davis wrote to the 3rd respondent on 4.9.96 when the petitioner asked for those reports:

> "I have had a fax today from Dr. Y. de S. Jayawickrema asking again for a favourable report. She says her whole career is at stake. She says *the local consultants in Sri Lanka have given very good reports.*
>
> She has sent me a copy of a report from Dr. Cuerden, who is a visiting consultant at this hospital – *he works here only one day per week* and is not involved at all in department administration.
>
> She wants a good report and wants a copy, and a *copy of other reports.*
>
> I have again discussed her with senior consultants in the department and I cannot provide a favourable assessment. She is putting me in a difficult position – she says the letter must state she has completed her training satisfactorily.
>
> I want nothing more to do with this lady – do you have a suggestion?"

I must now analyse this correspondence, according to its several stages.

The only significant shortcomings which Dr. Davis noted *during* the petitioner's training related to about communication difficulties and the need for "quite close supervision" which precluded "independent practice". On the other hand, he acknowledged that she had worked with many different Consultants over a wide range of specialities; that she was "clearly an experienced Anaesthetist", and that she was "very willing and does all that is asked of her".

At the end of her training in December, 1995, Dr. Davis gave her a certificate which mentioned no shortcomings at all, thereby necessarily implying that she had completed her training satisfactorily; and that the difficulties observed earlier were no longer relevant. He noted that she had wide clinical experience, and was conscientious and diligent. However, at the same time but behind her back, he gave the PGIM a different version. Not only did he refer again to the shortcomings initially observed, but he concluded, in a rather convoluted fashion, that he *"would not* be in a position to say that *at the end of her time here* that (he) *would consider her* at a level that she *would be able to be considered* to be at Consultant level for Australia". Her training period was over. What was required was his assessment at that point of time, and not at some stage in the future; and if he really did not consider her fit to be a Consultant, why could he not say so directly, in so many words. And in view of what transpired later, it is significant that he mentioned no other shortcomings, let alone details.

The *third stage* was when, in March, 1996, he had to try to resolve the glaring contradiction between the two certificates he had given in December: he said – without any reservation – that her training had been sufficient for her to work as a Consultant Anaesthetist in Sri Lanka and that she was capable of doing so. In effect, he thereby retracted his adverse evaluation.

However, that explanation gave rise to another serious inconsistency, which he was asked to explain *in June, 1996.* In his 21.12.95 evaluation he seemed to be saying that she was not fit to be a Consultant in Australia, but in March, 1996, he confirmed that she was fit to be one in Sri Lanka. Naturally, the inevitable question arose:

Were there two different standards? In obvious discomfort, he said that he certainly did not mean to imply that the required standards were lower in Sri Lanka than in Australia. If so – he was pressed to explain – were the deficiencies noted in December, 1995, sufficiently remedied by March, 1996, so that she had reached those (common) standards and was fit to be a Consultant? He could not take the easy way out, of claiming a "cure" between December and March, because after December she was not in Australia. If he said that there had been no significant deficiencies in December, that would have been an admission that his December evaluation that she was not fit to be a Consultant in Australia was false. In stages, he came out, in three successive letters, with different stories. First he merely said – and that, too, for the first time – that her "*approach* to patients *upset* a number of both Anaesthetists and nursing staff". That was quite vague – what sort of "approach", and "upset" in what way? When asked a second time, he trotted out a string of very serious allegations: "rough with patients", "poor sterile techniques", "difficult to teach", and "quite a lot of problems of a public relations nature". Finally, in September, 1996, he was confronted with Dr. Cuerden's very favourable report: he tried to brush it aside without explanation, lamely saying that "he works here only one day per week". He did not claim that Dr. Cuerden's evaluation was either untrue or unreliable, and he furnished no material which might have justified the rejection of Dr. Cuerden's evaluation by the PGIM. That evaluation could only have been reconciled with Dr. Davis' final evaluation on the fanciful assumption that the petitioner's performance was quite satisfactory for just the one day of the week that she worked with Dr. Cuerden, and was exactly the opposite during the rest of the week. Dr. Davis' allegations that the petitioner did not come up to the same standards as other trainees, that all found her difficult to teach, and that she just did not seem to listen, cannot easily be squared with his previous observations that she was keen and willing, and had shown a good level of knowledge, and did all that was asked of her.

Indeed, any reasonable person would have thought that Dr. Cuerden and Dr. Davis were referring (in the three certificates which they disclosed to the petitioner) to a completely different *trainee* to the one evaluated by Dr. Davis (in his certificates he sent the PGIM in December, 1995, and in June and September, 1996).

In order to decide whether or not the petitioner had satisfactorily completed her foreign training, there were several serious matters

which the PGIM should have considered before acting on Dr. Davis' adverse evaluations. First, whether the allegations in the June, 1996, evaluations were quite belated, having been made for the first time only six months after the end of the petitioner's training; and whether his conclusions should have been accepted without calling for some particulars. For example, what were the "poor sterile techniques"? Had even a single instance of "poor sterile techniques" been recorded, and the petitioner given a caution as well as guidance about improvement – both as an essential part of the trainee's instruction, and in order to ensure that there would be no repetition likely to injure patients and to expose the Hospital to damaging publicity and claims for damages? Was not some evidence necessary? Second, was it safe to act on those allegations, considering that they were completely contrary to Dr. Cuerden's certificate, which was not seriously impugned? Third, could any reliance be placed on Dr. Davis' evaluations, as one or more of his assessments were tainted by deliberate untruths, and/or suppression of the truth and/or shifting standards of evaluation? If the certificate he gave the petitioner in December, 1995, was true, did it not follow that all his other adverse evaluations were necessarily incorrect? And even if that certificate could properly be ignored, yet – since he later accepted that common standards were applicable to Australia and Sri Lanka – could Dr. Davis' certificates dated 21.12.95 and 19.3.96 both be true? Was not one or the other necessarily untrue? Fourth, if in fact the petitioner had been guilty of the serious lapses enumerated for the first time in June, 1996, how could Dr. Davis have concluded in March, 1996, that she was fit to work as a Consultant in Sri Lanka? Did he believe people and bacteria to be antipodally different in Sri Lanka so as to make roughness with patients and poor sterile techniques cease to be a bar to Consultant status? Finally, having regard to the serious allegations made against the petitioner in reports which had not been disclosed to her, should she not have been informed of those allegations and given an opportunity of defending herself – the more so because of their doubtful probative value?

In relation to the last aspect, I must note Dr. Davis' comment that he "would be suprised if (the petitioner) had really good reports" in respect of her previous training. Obviously, he felt the need for some confirmation of his opinion – thus betraying uncertainty about his own evaluation. With her petition the petitioner produced reports from five Consultant Anaesthetists under whom she had worked in 1992 and

1993. They indicate that the petitioner was competent and conscientious, had a pleasant personality, and enjoyed cordial relations with the staff. Obviously, the PGIM had failed to consider them, because in the affidavit he filed in these proceedings, the 2nd respondent stated – incorrectly, as it turns out – that the petitioner had not submitted them to the Board of Management. In her counter-affidavit the petitioner replied that these reports had been submitted – some to the Board of Management, and the rest to the Board of Study – in 1993 and 1994. She can hardly be blamed for not reminding the PGIM in 1996, as she was never told the basis on which her application was being considered.

I hold that the decision of the PGIM to refuse the petitioner Board certification, on the basis that she had not satisfactorily completed her foreign training, was fatally flawed. In regard to the substance, or the merits, of that decision, it was based entirely on Dr. Davis' adverse evaluations, and those were so riddled with contradictions and inconsistencies that it was unreasonable and perverse to act on them. Indeed, the PGIM should have scrutinized the manner in which Dr. Davis supervised the petitioner's training, and issued hopelessly contradictory reports about her performance to the PGIM, which was the professional body having the power to grant her Consultant status. He had made statements which were either defamatory of the petitioner or, at best, so wildly inconsistent as to betray a total lack of concern for the truth; and he made them about a fellow professional, to a professional body, knowing that they would influence that body in respect of a matter which vitally affected her professional standing and advancement. Even though he gained no financial benefit, the PGIM ought to have considered whether those evaluations were tainted by professional misconduct:

> "If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be resonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to hold that he has been guilty of "infamous conduct in a professional respect. . ."
>
> There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his

patients or to his professional brethren, may be fairly considered "infamous conduct in a professional respect. . ."

It seems to me that it may be fairly said that the plaintiff has endeavoured to defame his brother practitioners, and by that defamation to induce suffering people to avoid going to them for advice, and to come to himself, in order that he may obtain the remuneration or fees which otherwise he would not obtain . . ." (*Allinson v. General Council of Medical Education,* (1894) 1 QB 750, 760–761).

As for the decision-making process, in a matter of vital importance to the petitioner in her professional capacity, the PGIM deprived her of the protection of the *audi alteram partem* rule.

The decision refusing to grant the petitioner Board certification must therefore be quashed. But that does not imply that the petitioner did complete her foreign training satisfactorily, nor is it the function of this Court to decide that matter, and to substitute its own view, on a question of fact relating to professional competence, for that of the PGIM. I therefore refuse her prayer for a declaration that the PGIM should grant her Board certification.

The petitioner has been unjustly denied Board certification. What steps should now be taken to remedy that? Should the PGIM be asked to reconsider her application dated 3.1.96? Should the PGIM be directed to provide another period of foreign training? Or a period of local training instead?

2. *Substitution of a Further Period of Local Training*

The impugned decision purported to extend the petitioner's post, MD training by one year in Sri Lanka. Regulation 5.3 (*b*) requires one year's foreign training, and does not provide for any exemptions, exceptions or alternatives. Mr. Sripavan referred to the high cost of providing foreign training, and the difficulty of securing places for such training, and submitted that in several previous instances, where a trainee had failed to complete foreign training satisfactorily the PGIM had required an additional period of local training in lieu.

The regulations deal with postgraduate education and training leading to Board certification. They prescribe foreign training as a pre-condition to Board certification. They have been made by a professional body which, it must be assumed, was not only competent but acted after due deliberation – in order to ensure that Consultants have the necessary knowledge, skills, experience and training. If all that could have been provided through local training, then the requirement of foreign training would have been superfluous and unreasonable: one which placed an unnecessary barrier on Board certification, thereby not only increasing the cost to the nation of producing Consultants but also unduly curtailing the number of Consultants at a time when the undoubted need was for more. That is nobody's case. Indeed, if the PGIM was at any time of the confirmed opinion that there are circumstances in which local training could appropriately be substituted, it was duty-bound to amend the regulations accordingly. As of now, this court must proceed on the basis that the purpose of regulation 5.3 (*b*) was to enable aspiring Consultants to acquire some knowledge, skill or experience which local training could not provide; as the 3rd respondent said, "to gain knowledge of Anaesthesia in other countries and to be trained in fields which are not so well-developed in Sri Lanka".

It is true that the regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and disregarding its own regulations is not a method by which that authority can amend them. The conclusion is that the PGIM, and the Board of Management and the Board of Study, could not dispense with foreign training – either *ab initio* or after a period of foreign training which was unsatisfactory in any material respect.

I realise that there may be borderline cases in which foreign training is completed satisfactorily but for some trifling shortcoming. I do not have to consider whether an exception could be made in such a case. Here, the PGIM accepted Dr. Davis' adverse evaluations, and continued to reiterate such acceptance, without reservation, even in the pleadings filed in this case. If Dr. Davis is to be believed, it would be quite unsafe to grant the petitioner Board certification; he alleged extremely serious shortcomings, particulars of which he did not reveal even to the PGIM; and it was not a mere matter of accents, or idiom, or communication difficulties. If the PGIM believed Dr. Davis, she had

not benefited from her foreign training, and needed another full period of foreign training. If the PGIM did not believe Dr. Davis, the available material about her performance did not justify the refusal of Board certification, and the question of any further local training would not have arisen.

Any past practice by the PGIM of substituting local training for foreign cannot result in amending regulation 5.3 (*b*). On a matter of such importance – to patients, the profession and the nation – nothing short of an express amendment made after due consideration will suffice. Nothing in this judgment should be taken to stand in the way of any such amendment being made, and future applications for Board certification being considered thereunder.

I hold that, on the facts of this case, the regulations, as they now stand, do not permit the substitution of local training.

3. *Was the Hospital an Approved Centre?*

It is necessary now to turn to another issue which surfaced only during the oral arguments. Regulation 5.3 requires training at places approved by the Board. Thus in the case of local training, it must be "in a teaching hospital approved by the Board"; and in the case of foreign training, "in a centre approved by the Board". On the first day of hearing we asked Mr. Sripavan whether the Sir Charles Gairdner Hospital was "a centre approved by the Board". Even on the next day he was unable to produce any Board decision expressly or impliedly approving that hospital in terms of regulation 5.3 (*b*) ; nor could he show that any trainee in Anaesthesiology had previously been sent to that hospital. He argued, however, that the decision to send the petitioner to that hospital made it an approved centre; that the practice was not to approve hospitals, but to approve of trainees being placed in various hospitals; and that in any event the petitioner had acquiesced in being sent to that hospital, and could not now raise an issue of irregularity in that respect.

The relevant correspondence is scanty. By letter dated 12.10.94, Prof Walters of the Department of Pathology of the hospital, informed the former Director, PGIM, that Dr. Davis had agreed to offer the

petitioner a post. On 19.10.94 the former Director conveyed that offer to her, adding that "in the event you are unable to accept the offer . . . you will have to undergo the consequences of your Board certification being delayed". On 24.10.94 she accepted. All that took place before the Board of Study considered the matter. At a meeting held on 4.11.94 the Board of Study dealt with the matter only by recording under "Correspondence":

> "(*a*) Letter from Dr. Walters offering (the petitioner) a training post for a year . . .
>
> (*b*) Letter from (the petitioner) accepting the above post."

There was no decision by the Board of Study to approve the hospital. Indeed, before the question of the petitioner's placement reached the Board of Study, the former Director had pre-empted any issue of approval of the hospital or her placement. The placement had already been offered to the petitioner, and her acceptance obtained. What remained for the Board was a formality; to give covering approval for that placement. The Board did nothing more than to note the correspondence, without even going through the motions of approving the hospital or the placement.

What is more important is that it was the Board of Management which alone had the power under regulations 5.3 (*b*) to approve the hospital. The respondents did not produce any Board paper or minute of the Board of Management relevant to such approval, or referring to the petitioner's placement. In my view, regulation 5.3 (*b*) requires the board actively to consider the suitability of the place to which the trainee is being sent, by reference to factors such as the nature of the training, and the arrangements for its supervision and evaluation. The purpose of foreign training, to which I have already referred, would not be achieved if trainees are simply sent to just any hospital anywhere abroad, merely because a place happens to be available there, without considering those factors. Indeed, the present dispute would not have arisen if proper arrangements had been made in respect of continuing supervision, evaluation and guidance.

It is clear that the petitioner was given no opportunity of stating her views as to the country or the hospital at which she was to be

trained. Approval being a matter for the PGIM, she was entitled to assume that the appropriate Board would take all necessary steps in respect of approval; she was never told what decisions the Board took in that respect. As far as she was concerned, there was virtually a threat that if she did not accept that placement, her foreign training and Board certification would be further delayed. No question of acquiescence by her arises.

I therefore hold that the PGIM has failed to send the petitioner for training to an approved centre within the meaning of regulation 5.3 (*b*). In view of that finding, it would be futile to direct the PGIM to consider the petitioner's application for Board certification afresh in terms of the regulations as they now stand.

Order

I grant the petitioner a declaration that the PGIM, and its Board of Management and the Board of Study in Anaesthesiology infringed her fundamental right under Article 12 (1). I direct the PGIM, at its expense, to send the petitioner for foreign training, in terms of regulation 5.3 (*b*), commencing not later than February, 1999 (with full pay or upon the payment of the equivalent amount). Considerable delay has been caused to the petitioner in her efforts to obtain Board certification, and the professional recognition and financial rewards it brings. I therefore direct the PGIM to pay her on or before 16.11.98 a sum of Rs. 400,000 as compensation and a sum of Rs. 15,000 as costs.

WADUGODAPITIYA, J. – I agree.

GUNASEKERA, J. – I agree.

Relief granted.