

**DR. GAJAWEERA
VS
AIR MASHALL G.D. PERERA AND OTHERS**

COURT OF APPEAL,
SRIPAVAN, J.
BASNAYAKE, J.,
CA 1416/2004,
JUNE 3, 2005

Writ of Certiorari - Mandamus-Promotion not recommended-Sri Lanka Air Force-Consideration of a requirement non-existent at the time of enlisting-validity ? - Reasonableness ? - Legitimate expectation - Are decisions affecting such legitimate expectation subject to judicial review ?

The petitioner who is a Medical Doctor from a foreign Medical Institute, was provisionally registered as a Medical Practitioner in 1993. She joined the Sri Lanka Air Force as a Medical Officer-in the rank of Flight Lieutenant. The minimum qualifications required were MBBS or equivalent and provisional or full registration with the Sri Lanka Medical Council.

She became entitled to be promoted to the rank of Squadron Leader after 5 years and the only examination required to be passed was the Officers

Promotion Examination B, which she passed. However, she was told to pass the Act 16 Examination to be promoted.

The petitioner contends that to consider a requirement non-existent at the time of enlisting is unreasonable and arbitrary.

HELD

- (i) Up to 1997 overseas Medical Graduates obtained their provisional registration before completing Act 16 Examination. From 1997 Act, 16 Examination was made compulsory for the provisional registration.
- (ii) The petitioner passed out as a Medical Doctor in 1992, and was provisionally registered in 1993 and had also successfully completed her internship and had further received her post intern appointment, before joining the Sri Lanka Air Force.
- (iii) The petitioner had a legitimate expectation of being promoted without having to pass Act 16 examination as the only examination that is required for promotion is the officers examination B, which the petitioner has successfully completed.
- (iv) The advertisement called for applications from either or both the provisionally/fully registered doctors, nowhere in the advertisement did it mention of any requirement of having to pass the Act 16 examination.
- (v) Prior to 1997 Doctors without Act 16 were taken to the Department of Health and were entitled to their grade promotions and salary increments as per the Medical Officers with full registration.

Per Eric Basnayake, J

* In the field of Public Law individuals may not have strictly enforceable rights but they may have legitimate expectations, such expectations may stem either from a promise or representation made by a public body. Decisions affecting such legitimate expectations are subject to judicial review.

APPLICATION for a writ of certiorari/ Mandamus

Cases referred to :

1. *Dr. Ishanthe Gunatilake vs. Vice Air Marshall H. C. A. C. Tissera*,
Commander of the Navy and others - SCM 09.12.03, S. C. Application 76/
01-CA 366/99
2. *Werasinghe Vs. Gamage* - SC 682/2001-SCM 19.09.02

J. C. Welliamuna with Shantha Jayawardena for petitioner.

Yuresha de Silva, State Counsel for respondents.

Cur. adv. vult

ERIC BASNAYAKE, J

The petitioner filed this application seeking a writ of certiorari to quash the decision of 1st to 3rd respondents not recommending the petitioner for promotion and a writ of mandamus compelling the respondents to recommend and promote the petitioner to the rank of Squadron Leader from 06.09.1999.

The petitioner passed out as a Medical Doctor from Zaporozhye Medical Institute of the Soviet Union in 1992. On 24.08.1992 (P1) the Sri Lanka Medical Council had accepted the petitioner's foreign degree. On 26.03.1993 she was placed in the merit order list of medical graduates for the post of Intern Medical Officers for the year 1993. She had been placed at 394 out of 423 officers. On 31.03.1993 the petitioner was provisionally registered as a Medical Practitioner at the Sri Lanka Medical Council under section 31 of the Medical Ordinance (P3, P3a). The petitioner having completed her internship received her post intern appointment at the General Hospital, Galle.

The petitioner had applied for the post of Medical Officer in the Sri Lanka Air Force in response to an advertisement appearing in The Sunday Observer on 24.04.1994 (P7).

The advertisement invited applications for Commissioned officers in the Medical and Dental Branches in the Regular and Volunteer Air Force. The minimum qualifications required were MBBS or BDS/LDS or Equivalent

and provisional or full registration with the Sri Lanka Medical Council. Those following internship too were eligible to apply and the selected candidates would be commissioned in the rank of Flight Lieutenant or Squadron Leader in keeping with their qualifications and experience. The advertisement said "Excellent prospects for further promotions exist for those seeking to make a career in the Air Force" (emphasis added).

The petitioner was called for an interview on 02.08.1994 which she attended and was selected on the 2nd itself as a student officer of the Regular Force. She was commissioned as a Flight Lieutenant after successful completion of her training.

The petitioner states that a Medical Officer who serves in the Air Force for a continuous period of not less than 5 years shall on the recommendation of the Commander and with the approval of Her Excellency the President of Sri Lanka, be promoted to the rank of Squadron Leader provided he has passed such examinations. In terms of the Air Force Order 375 (P12) the only examination the petitioner is required to pass is the Officers Promotion Examination B which would qualify her for the promotion to the rank of Squadron Leader. The petitioner passed Examination B on 16.11.1998 (P13). The respondents marked 2R3 the Regulations 1961 made by the Minister of Defence and External Affairs under section 155 of the Air Force Act, 41 of 1949.

Nos. 5, 6 and 8 of those Regulations are as follows :-

5. "Every medical or dental officer of the Air Force shall on appointment be commissioned in the rank of Flight Lieutenant.

6. (1) A medical or dental officer who has served in the Air Force for a period of eight years shall, on the recommendation of the Commander of the Air Force and with the approval of the Governor-General, be promoted to the rank of Squadron Leader, provided that he has passed such examination as may be determined in that behalf by the Commander of the Air Force.

7.

8. Notwithstanding the provisions of regulations 6 and 7 of these regulations the Commander of the Air Force may, in such circumstances as he may deem exceptional, determine the rank of a medical or dental officer. Every such determination shall be made with the concurrence of the Permanent Secretary, Ministry of Defence and External Affairs and with the approval of the Governor-General".

The petitioner states that although eligible, she was not promoted and states that she made constant inquiries from the 2nd respondent with regard to her promotion without any result. The petitioner was summoned for an interview by the 2nd respondent and at the interview held on 15.07.2003 the petitioner was informed that she has to pass Act 16 examination to be promoted. However the petitioner was not officially informed of the reason not to promote her in spite of her agitation (P17).

The petitioner states that she became aware of a letter sent by the Director General of Health Services to the 2nd respondent on 19.12.2003. This letter admittedly was in response to a query made by the 2nd respondent on 12.11.2003. The 2nd respondent had apparently sought advice from the Director General of Health in terms of Regulation 10 of the regulations of 1961 which states thus,

"the rates of pay and allowances of medical and dental officers of the Air Force shall be revised to equate them to those recommended and accepted at any future date for medical and dental officers in the Department of Health Services".

The letter (2R2) addressed to the Director General of Health with the heading **Appointment of medical officers with foreign degrees - Sri Lanka Air Force** states thus,

"The Sri Lanka Air Force has enlisted medical officers, who have obtained their basic MBBS/MD qualification (recognized by the Sri Lanka Medical Council) from abroad. However some of the SLAF medical officers have not completed their Act 16 examination.....to obtain full registration from the Sri Lanka Medical Council. This has created dilemma in placing them on a proper salary scale.

Hence it is kindly requested that the SLAF is advised regarding the salary scale pertaining to the following categories.

- a
- b
- c. Medical officer with provisional registration and has completed internship training but not completed Act 16.
- d.

The Director General states in reply by his letter (P 15) dated 19.12.2003 as follows :-

1.....

2. **Up to 1997 overseas medical graduates obtained their provisional registration before completing Act-16 examination**, once their degrees were accepted by the medical council they were then selected for the Internship. Act 16 examination is not compulsory for this purpose but they have to complete Act 16 to obtain full registration.

3. From 1997 Sri Lanka Medical Council has made Act 16 a compulsory requirement for the provisional registration and these medical officers cannot start Internship without the provisional registration. Therefore Act-16 examination at present is a compulsory qualification to join the Department of Health.

4. **Those Medical Officers (medical officer who has completed medical degrees before 1997) absorbed into the department without Act 16 examination are entitled for their grade promotion and salary increments as per the medical officers with full registration. Once they complete two years of service and pass E-bar examination they can be confirmed in service with the promotion to grade II (emphasis added).**

The petitioner states that she has a reasonable expectation of being promoted without having to pass Act 16 examination. The petitioner also complains that Squadron Leader K. R. Jayalath, a Registered Medical

Practitioner, was enrolled as a Pilot Officer and was promoted to the rank of Squadron Leader. The petitioner also complains that one could remain as a Flight Lieutenant only for a period of 11 years. By reckoning the period of stay of the petitioner, she is only left with about few more months in the Air Force.

The petitioner complains that to consider a requirement non-existent at the time of enlisting and to introduce a new condition for promotion is unreasonable and arbitrary.

The respondents categorically state that a medical officer having foreign qualifications is required to sit Act 16 examination in order to be fully registered and to be promoted.

Admittedly the petitioner has served in the Air Force until today having been enlisted as a Flight Lieutenant in 1994. The petitioner is a foreign graduate whose degree was accepted by the Medical Council of Sri Lanka. In view of that acceptance she was provisionally registered as a Medical Practitioner. She has completed her internship. Soon after her internship she had seen this advertisement calling for applications to join the Air Force. The Air Force called for applicants with MBBS etc or equivalent qualifications. The first question to be considered is whether those who had obtained degrees from foreign universities had the 'equivalent qualifications'. Then the Air Force wanted provisionally registered ones. Who had provisional registration? Were those who possessed degrees from foreign universities eligible for such registration? The advertisement did not specifically call for applications from "fully registered" doctors but first invited the provisionally registered doctors to apply. It called for applications from either or both the provisionally/fully registered doctors. The attraction of the advertisement was for those with provisional registration. It appears that the advertisement was directed at the foreign graduates. This may be due to the dearth of doctors. This is evident by the fact of extending the invitation to interns. Nowhere in the advertisement did it mention of any requirement of having to pass Act 16 examination.

In terms of Regulation 6 (1) a medical or dental doctor shall on the recommendation of the Commander of the Air Force and with the approval of Her Excellency the President be promoted to the rank of Squadron

Leader after eight years of service, provided he or she has passed such examination as may be determined by the Commander. The only examination that is required for promotion is the Officers Examination B which the petitioner had successfully completed.

The petitioner was perturbed when she found some officers junior to her had been promoted. In the meantime the petitioner too was summoned for an interview. The petitioner was summoned as she possessed the necessary qualifications for promotion and not to be informed that her case cannot be considered as she has not obtained the full registration or that she has not passed Act, 16 Examination. It appears that the authorities themselves were not certain with regard to the rules that should be applied. This is what prompted the 2nd respondent to write to the Director General of Health, the letter marked 2R2. In response to this letter the D. G. H. sent P15 to the 2nd respondent which is self explanatory. According to this letter Act 16 became a requirement only after the year 1997. Prior to 1997, doctors without Act 16 were taken to the Department of Health and are entitled to their grade promotions and salary increments as per the medical officers with full registration.

The petitioner joined the Air Force to make it a carrier in view of the "**excellent prospects for further promotion**". It does not appear that the petitioner ever intended to leave the job after eleven years. She had successfully completed the "Officers Examination B" with the intention of rising in her chosen carrier. It may have been humiliating to see others junior to her rise above her position (due to an invalid reason). That period is sufficient for any officer to gain the next promotion. It may be too late for her to choose another carrier now. She had served in several stations in the Force and has a legitimate expectation of getting her promotions in due time.

She was qualified to join the Department of Health as a Medical Practitioner without having to sit Act 16 examination. The Act 16 examination became compulsory only after year 1997. Instead of joining the Department of Health, she chose a carrier in the Air Force. If she was in the Department of Health, without Act 16 examination she would have obtained her promotions provided she passed the Efficiency Bar examination. After serving in the Air Force for nine years, to be told that she needs to pass Act 16 examination is unreasonable.

The respondents reluctantly admit promoting K. R. Jayalath a Registered Medical Practitioner who was enlisted as a Pilot officer in 1987 to the rank of Squadron Leader on 18.11.2001. The respondents state that K. R. Jayalath was promoted after having served as Flight Lieutenant for approximately 10 years. Why does not the petitioner then, having joined the service as Flight Lieutenant and served more than 10 years in that capacity, deserve a promotion ?

In *Dr. Ishanthe Gunatilake vs. Vice Admiral H. C. A. C. Tissera, Commander of the Navy and others*⁽¹⁾ Fernando J said "all medical doctors, were invited to join as Surgeon Lieutenants, including those who only had "temporary registration", and there was nothing which even hinted at the possibility that "temporary registration" would be given lower priority or might result in a lower rank or position, or that "full registration" must be obtained even later..... There was thus no ambiguity in the advertisement. Had there been an ambiguity, that would have had to be construed *contra proferentem*, and in favour of the petitioner. A notice calling for applications for employment must be clear guide for the honest applicant, and public institutions and their advisers must not resort to strained constructions in order to covert them into devious snares for the unwary.....If the Navy wished to impose any condition, it should have done so in the advertisement or at the stage of appointment". Fernando J held further that "as I had occasion to point out in *Weerasinghe vs. Gamage*⁽²⁾ an employer must exercise his powers with due care and restraint, for just as it is implicit in every contract of service that the employee shall be loyal, shall treat his superiors with due respect, and shall guard the reputation of the employer, so also it is implicit that the employer in his treatment of employees shall have care for their dignity and reputation and shall not cause them unnecessary personal distress and prejudice. Often distress and prejudice cannot be avoided, but where it can be avoided, it must be avoided. The petitioner was entitled in law to a full explanation, and as a matter of courtesy, to an expression of regret for the alleged error. The impugned message was hardly the kind of signal which builds morale and inspires loyalty and dedication, especially in those called upon to risk their lives in the course of duty ; and a prolonged failure to disclose a reason would have added to the petitioner's stress and frustration, liable to result in poor

performance of duties to the detriment of the Navy" is equally fitting to the facts of the present case.

One could see how desperate the Air force was at that time by not only inviting provisionally registered Medical Practitioners and Interns, but by inviting the petitioner to accept the appointment at the interview itself. This appears to be the first job that the petitioner applied for no sooner than she finished her internship. She too, it appears, accepted the job no sooner than it was offered to her.

In the field of public law, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or representation made by a public body.....Decisions affecting such legitimate expectations are subject to judicial review ² thus the decision of the respondents not to recommend Judicial remedies in Public Law by Lewis the petitioner for promotion is therefore liable to be quashed. However this court is unable to quash the said decision since it is not before court. However the court issues a writ of Mandamus directing 1 to 3 respondents to make the necessary recommendation within one month to Her Excellency the President to promote the petitioner to the rank of Squadron Leader with effect from 06.09.1999, the date on which others who joined along with the petitioner were promoted. I also award Rs. 25,000.00 as costs of this application to the petitioner payable by the 1st respondent.

SRIPAVAN J. — I agree.

Writ of Mandamus issued.
