WELIGODAPOLA
v.
SECRETARY, MINISTRY OF WOMEN'S AFFAIRS AND TEACHING HOSPITALS AND OTHERS

SUPREME COURT
TAMBIAH, J., FERNANDO, J. AND AMERASINGHE, J.
S.C. APPLICATION NO. 5/88
FEBRUARY 23 AND 24, 1989

Fundamental Rights – Right of equality – Article 12(1) of the Constitution – Post Graduate Institute of Medicine (PGIM) – PGIM Ordinance No. 1 of 1980 – General circular letters 1089 and 1389 of 20.09.1979.

The law recognizes that the principles of equality does not mean that every law must have universal application for all persons who are not, by nature, attainment or circumstances in the same position. What is required is that persons who by nature, attainment or circumstances are similar are treated alike. If there is a classification which deals alike with those who are similarly situated, someone who is different cannot be allowed to complain that he has not been treated equally; for being different, he must necessarily expect to be treated differently.

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 classification may be refined but it should not be artificial or irrational.

The classification (in Circulars 1089 and 1389 of 20.09.1978) which distinguishes doctors with foreign qualifications who returned to the country before 1 January 1980 and those sent by the Department from others who obtained similar foreign qualifications for the purpose of deciding whether they should be equally recognized with PGIM (Post Graduate Institute of Medicine) graduates in the matter of appointment is not a classification founded on an intelligent differentia and therefore violates the pledge of equality given in Article 12(1) of the Constitution and is ultra vires, bad and of no force or avail.

The Circulars are discriminatory and violative of Article 12(1).

(Note by Ed: Fernando, J. while agreeing that the right of equality had been violated, held that the Circulars were only *pro tanto* void and did not award a *solatium).*

Cases referred to:

1. *Yick Wo* v. *Hopkins* 30 US L Ed. 220
2. *State of West Bengal* v. *Anwar Ali* AIR 1952 SC 75, 89
3. *Elmore Perera* v. *Monta ue Jayawickrema* [1985] 1 Sri LR 285, 296, 297, 388
4. *Palihawadana* v. *Attorney-General* [1979] 1 Fundamental Rights pp. 6 - 9

5. *Yasapala* v. *Ranil Wickremasinghe and others* [1980] 1 Fundamental Rights Decisions 143, 161
6. *Probhudas Morajee Rajkotia and others* AIR 1974 SC 1300
7. *State of Gujarat and another* v. *Shri Ambica Mills* AIR 1974 SC 1300, 1312, 1313, paras 52, 53
8. *State of Bombay* v. *F.N. Balasara* AIR 1951 SC 318, 326
9. *Ram Krishana Dalmia* v. *Justice Tendolkar* 1958 SC 538, 548
10. *Ganaga Ram* v. *Union of India* AIR 1970 SC 2178, 2179
11. *Harakchand et al.* v. *Union of India* AIR 1970 SC 1453, 1467
12. *Patchett* v. *Leathem* (1949) 65 TLR 69, 70
13. *Dhirendra Kumar Mandal* v. *Superintendent and Remembrancer of Legal Affairs* SCR (1954) 1 SCR 224
14. *Perera* v. *University Grants Commission* (1980) 1 Fundamental Rights Decisions 103, 114
15. *P.S.U.N. Union* v. *Minister of Public Administration* [1988] 1 Sri LR 229, 238
16. *Dayawathie and others* v. *Dr. M. Fernando and others* [1988] 1 Sri LR 371, 372
17. *Jammu and Kashmir* v. *Triloki Nath Khosa and others* AIR 1974 1 SC 1, 11
18. *Budhan Choudhry and others* v. *State of Bihar* AIR 1955 SC 191
19. *Jalan Trading Co.* v. *Mill Mazdoor Sabha* AIR 1967 SC 691, 705
20. *State of West Bengal* v. *Anwar Ali* AIR 1952 SC 75, 79, 83, 85, 86, 88, 93, 98, 99, 100, 102
21. *Reserve Bank of India* v. *Sahesranama* AIR 1986 SC 1830
22. *Union of India* v. *Soundara Rajan* AIR 1980 SC 959
23. *State of Mysore* v. *Narasinghe Rao* AIR 1968 SC 349
24. *Union of India* v. *Dr. Mrs. Kohli* AIR 1973 SC 811
25. *Pandurangarao* v. *The Andhra Pradesh Public Service Commission, Hyderabad and another* AIR 1963 SC 268
26. *Jaisinghani* v. *Union of India* AIR 1967 SC 1427, 1431
27. *Rajendran* v. *Union of India* AIR 1968 SC 507, 511
28. *Samarasinghe* v. *Bank of Ceylon* (1980) 1 Fundamental Rights Decisions 165, 171 - 172
29. *Katra Education Society Allahabad* v. *State of U.P.* AIR 1966 SC 1307, 1312
30. *Andhra Industrial Works* v. *Chief Controller of Imports and others* AIR 1974 SC 1539, 1541
31. *Western U.P. Electric Power and Supply Co. Ltd.* v. *State of U.P. and others* AIR 1970 SC 21, 24

APPLICATION under Article 126 of the Constitution complaining of infringement of the fundamental right of equality.

R.K.W. Gunasekera with *Gomin Dayasiri* for petitioner

K.M.P. Karunaratne S.S.C with *N. Kariapperuma SC* for 1,2,3 and 5 respondents.

Cur. adv. vult.

March 31, 1989.

AMERASINGHE, J.

This is an application under Article 126 of the Constitution in which the Petitioner prays for an order declaring that his rights to equality before the law and equal protection of the law guaranteed by Article 12 (1) of the Constitution have been violated. The essence of the Petitioner's complaint is that in the matter of employment as an ENT Surgeon he has been denied an equality of opportunity and discriminated against.

The Petitioner passed the Bachelor of Medicine and Bachelor of Surgery (M.B.,B.S.) Examination in 1971 and thereafter, in compliance with the provisions of the Compulsory Public Service Act No. 70 of 1961, served in the Department of Health in various places and in various capacities until 21 September 1976 when he assumed duties as House Officer ENT of the General Hospital in Kandy. He served in that capacity until 21 March 1978 when he resigned from the Department of Health to enable him to proceed to the United Kingdom to obtain specialist qualifications. In the United Kingdom the Petitioner qualified himself to obtain the Diploma in Laryngology and Otology from the Royal College of Physicians and the Royal College of Surgeons [D.L.O.(Eng.)] on 13 November 1980; and having completed the required form of training and passing the necessary examinations in Otolaryngology, he qualified himself on 23rd March 1983 to be admitted to the Fellowship of the Royal College of Surgeons of Edinburgh [F.R.C.S.(Edin.)]. During his period of training he was, at various times in several hospitals, Senior House Officer in ENT, Senior House Officer in General Surgery, Registrar ENT and Associate Clinical Specialist (Clinical Assistant).

When the Petitioner proceeded to the United Kingdom to obtain further qualifications, the Consultant ENT Surgeon under whom he had worked as a House Officer, Dr. S. Mahendran, M.B.B.S., F.R.C.S., in a letter dated 11 April 1978 (P 21), recommended that the Petitioner be given "all assistance and further training to enable him to realise his ambition and return to this land where ENT

Surgeons are the rarest species of doctors now."

The Petitioner having realized his ambition of obtaining the qualifications and training he sought, returned to Sri Lanka in May 1983 to explore the possibility of offering his recently acquired skills as an ENT Surgeon to Sri Lanka. He met Dr. Joe Fernando, the Additional Deputy Director of Medical Services, who said that the post of ENT Surgeon in the Galle General Hospital was vacant. The Petitioner was offered the post of Resident ENT Surgeon, Galle, on a temporary basis but on the salary scale of a Specialist as laid down by General Circular No. 1208 (III) of the Ministry of Health. (P3), on 25 May 1983(P2). According to the Petitioner he had been assured by Dr. Joe Fernando that the post of ENT Surgeon, Galle General Hospital, would be advertised after the Petitioner reported for duty at the General Hospital, Galle.

The Petitioner then returned to England, terminated his permanent employment as Associate Clinical Specialist at Colindale Hospital and brought his family back to Sri Lanka. He reported for work at Galle Hospital on 15 June 1983. On 18 June 1983 he wrote to the Director of Health Services through the Medical Superintendent of Galle (P4) requesting him to advertise the Post of Consultant ENT Surgeon in order to enable him to apply "and formally make the appointment effective as you agreed at my interview with you prior to my employment." There was no reply to this letter.

On 15 July 1983 the Director of the Post-Graduate Institute of Medicine wrote to the Director of Health Services (P5) stating that it had been brought to the notice of the Otolaryngology Board of Study meeting that the Department of Health Services had employed the Petitioner and two others as ENT Surgeons. The Director goes on to state as follows:- "It appears that these doctors have proceeded to the United Kingdom on their own and obtained the qualifications F.R.C.S.(Eng.) after 1.1.80. These appointments are contrary to the decision that qualifications obtained by doctors on their own (without the Department sending them) are not to be recognized as specialists qualifications. The qualifications to be recognized are the MS and MD given by the Post-Graduate Institute of Medicine.
The Board of Study in Otolaryngology has stated that if the three doctors wish recognition as ENT Specialists they should obtain the MS (ENT) offered by the Post-Graduate Institute of Medicine and fulfil the other requirements of the Board of Study.

As this is bound to happen in other disciplines too, I would be grateful if you could kindly let me know the policy decision on this matter so that I could convey same to the Board of Studies."

The Petitioner on 26 November 1983 (P6) wrote to the Government Medical Officers' Association (GMOA) appealing to it to take the matter up with the Director of Health Services and persuade him to advertise the post. On 4 January 1984 the Secretary of the GMOA wrote to the Director of Health Services (P7) stating that the GMOA had considered the Petitioner's case "in detail" and "would like to recommend that he be posted for 2 years to Galle initially on a permanent basis and "(sic.)" Post advertised at the end of 2 years so that this Post will be available if any officer has come back to the island after completion of his/her period of no pay leave."

On 20 January 1984 the Director of Health Services replied (P8) stating that the ENT Specialist Post at the General Hospital Galle "cannot be advertised for 04 years from the date of temporary appointment."

Having interviewed the Secretary to the Ministry of Women's Affairs and Teaching Hospitals, the Petitioner wrote to the Secretary on 26 July 1984 (P9) stating as follows:- "At the interview you agreed that I possessed full qualifications for appointment as a Consultant and that M.S. Part II was not a requirement in my case as I joined the Department with full Specialist Qualifications before the local M.S. Examination in E.N.T. has been held. I would be thankful if you would now consider advertising the post at an early date."

On 11 December 1986 the Petitioner wrote to the Director General of the Ministry of Women's Affairs and Teaching Hospitals (P10) stating that he had "Faithfully served the Government of Sri Lanka during the last 3 1/2 years with the belief that the post in Galle would be advertised." He went on to state as follows:

"I was made to understand by the relevant authorities in the Ministry of Women's Affairs and Teaching Hospitals that in my case it was not necessary to have board certification to obtain permanent employment as I joined the Department on permanent basis as a fully qualified specialist before the first MS Part II Examination in ENT was held by the PGIM.

I must respectfully submit that I am distressed and disillusioned because the post was not advertised as agreed to at my discussions.

In view of this situation the reorganization and efficient management of the ENT Department is hampered.

I should also like to submit that when I gave up my permanent appointment in U.K., I made that decision in the belief that I could serve my country better by returning home. The present situation has resulted in my losing a very lucrative post in England "(sic)" having an uncertain future here."

On 20 March 1987 the Petitioner wrote to the Director General, Teaching Hospitals (P11), referring to the letter of the Director of Health Services of 20 January 1984 (P8) stating that the Post could not be advertised for four years from the date of temporary appointment. The Petitioner pointed out that, since his appointment was on 25 May 1983, he was expecting the Post to be advertised on 25 May 1987 to enable him to apply.

On 3 November 1987 the Post of ENT Surgeon, General Hospital Galle, was advertised. The Petitioner passed the MS (ENT) Part II Examination held on 13 November 1987 and on 27 November 1987 applied for the Post which had been advertised and requested that the requirement of Board Certification be waived in his case in view of his qualifications and experience, the fact that the question of passing the M.S. Examination had not been communicated to him until 11 December 1986 and because the first opportunity he had to sit the M.S. Examination was in November 1987.

On December 16, 1987 the Director of Health Services wrote to the Petitioner (P16) transferring him to the General Hospital Colombo as Assistant Surgeon ENT with effect from 16 January 1988. In paragraph 33 of his Petition, the Petitioner states that by transferring him to Colombo as Assistant Surgeon he had been "penalised for sitting and passing the MS (ENT) Examination of the PGIM." He adds that he had for four-and-a-half years been the Specialist Surgeon (ENT) at the General Hospital, Galle (Teaching), and in which capacity he had been a Lecturer and Examiner in ENT at the Medical Faculty, Ruhuna, and was now "demoted as a PGIM trainee for 2 1/2 years."

The First, Second and Third Respondents deny this, and in their affidavits state that the Petitioner was transferred to complete the training required for Board Certification by the Board of Study and not as a punishment. The Second Respondent in paragraph 16 of his

Affidavit explains that the transfer to Colombo was because "this training was not available in Galle."

On 8 January 1988 the Petitioner filed papers in the Supreme Court alleging the violation of his fundamental rights under Article 12(1) of the Constitution and, among other reliefs, praying for an interim order preventing his transfer from the Galle Hospital to the General Hospital Colombo as Assistant Surgeon (ENT) and for an interim order staying the appointment of the Fourth Respondent pending the disposal of this application. The interim orders prayed for were granted on 12 January 1988.

Although on 18 January 1988 the Director of the Post Graduate Institute of Medicine (PGIM) had informed the Petitioner that he should serve a post-MS training period of 2 1/2 years (3R2); yet on 1 February 1989 the Director of PGIM informed the Petitioner (X) that this period had been reduced to two years and that this period would be reckoned from 13 November 1987 – the date he passed the MS Part II Examination. He was to continue the remaining year of training in Galle itself "supervised from time to time by Consultant ENT Surgeons from Kandy and from Colombo."

The career misfortunes of the Petitioner are inextricably linked with the happier events in the professional affairs of the Fourth Respondent, culminating in his appointment to the post of ENT Surgeon of Galle which the Peititioner eagerly desired to have. As if that were not enough, the PGIM by its letter of 1 October 1987 to the Director of Teaching Hospitals (2RIC) retrospectively dated the Board Certification of the Fourth Respondent to 10 March 1986, whereas he was, according to the PGIM's letter of 23 September 1987 to the Director of the Teaching Hospitals (2RIB), Board Certified on 18 September 1987.

The Petitioner declares and affirms in paragraph 34 of his Affidavit dated 7 January 1988 that the appointment of the Fourth Respondent in preference to him was "unjust and discriminatory," among other reasons, because he is "more qualified and more experienced" than the Fourth Respondent and because in terms of Circular No. 923 of 14.7.79 (P17), under which the appointment was made, he had "more points" than the Fourth Respondent. He goes on to allege in Paragraph 34(t) of his affidavit that "the post if not advertised earlier should have been advertised at the latest in May 1987 and it was deliberately delayed until November 1987 to coincide with Board

Certification given" to the Fourth Respondent. This, he claims, "was an action of purposeful discrimination by the 1st – 3rd Respondents to favour the Fourth Respondent." In paragraph 35 of his Affidavit the Petitioner repeats his assertion that there had been a "purposeful and hostile discrimination" against him by the First, Second and Third Respondents in the matter of the appointment of the Fourth Respondent to the post.

Counsel for the Petitioner did not press the claim that there was a purposeful discrimination by the First, Second and Third Respondents. He rested his case on the ground that discrimination arose out of the Circular itself, denying, as he said it did, his rights to employment equally with others who were similarly qualified. In these circumstances it is not incumbent on the Petitioner, before he can claim relief on the basis of the violation of his fundamental rights of equality before the law and equal protection of the law, guaranteed by Article 12(1) of the Constitution, to assert and prove that the Respondents acted with "an evil eye and unequal hand", *Yick Wo v. Hopkins* (1) (Cf. *State of West Bengal v. Anwar Ali* (2)). However, instruments of law which are discriminatory may, it seems, be regarded as "hostile" in the sense that they affect injuriously the interests of a person or class. (Cf. per Mukherjea, J in *State of West Bengal v. Anwar Ali* (2).)

And since learned Counsel for the Petitioner depended entirely upon the invalidity of the Circular itself, it is not necessary for me to consider the interesting submissions of learned Senior State Counsel that in order to show hostile discrimination there must be evidence of systematic, as distinguished from isolated, acts of discrimination if the Respondents had, as they claimed, acted in good faith. For the same reason it is also unnecessary for me to consider the effect of the Respondents acting in a discriminatory manner merely on account of an error of judgment or arbitrariness. The Petitioner claims that the Circular was ultra vires because it violated the Constitution. He does not merely complain of a discriminatory application of a valid Circular. If he had accepted the validity of the Circular, the reliefs he might have prayed for would, perhaps, been of a different nature. I am not called upon by the Petition or by the submissions of learned Counsel in this case to consider the appropriateness of other reliefs – a difficult matter upon which more than one opinion seems to have been expressed. (E.g. *Elmore Perera v. Montague Jayawickrema (3)).*

Senior State Counsel for the Respondents maintained that the only reason why the Petitioner was not appointed was that he lacked the necessary qualifications to be appointed to the post of permanent ENT Surgeon. This is difficult to understand. Firstly, according to his Letter of Appointment (P2) the Petitioner was paid a salary which in terms of Ministry of Health General Circular No 1208 (III) of 26 April 1982 (P3) was payable to a "fully qualified specialist." Secondly, if he was appointed as Resident ENT Surgeon because of the urgent need to have an ENT Surgeon in Galle, he could not have been so appointed, even temporarily, unless he was fully qualified, for Chapter II, I:7 of the Establishments Code of the Government required that "only a person eligible under the approved Scheme of Recruitment should be considered." Thirdly, he performed the duties and functions of a specialist ENT Surgeon for 4 1/2 years and functioned as a Lecturer and Examiner at Ruhuna during that time. Fourthly, he held foreign specialist qualifications (D.L.O.,F.R.C.S) which, the Petitioner states in his Affidavit of 19 August 1988, entitled Dr. A.C. Wijesurendra, F.R.C.S., Dr. R. Pathmanathan, F.R.C.S., Dr. Neil Halpe, F.R.C.S., Dr. D.S. Rajapakse, M.R.C.O.G., Dr. M.R. Badudeen, F.R.C.S., and Dr. D.G.M. Solangaarachchi, F.R.C.S., to appointments as permanent specialists.

The Second Respondent in his Affidavit dated 5 October 1988 states that Dr. Solangaarachchi was not in fact given a permanent, specialist appointment "on the same grounds as in the case of the Petitioner." What these grounds are, are not stated in that Affidavit.

As for the other appointments, the Second Respondent in his Affidavit of 5 October 1988 explains that the appointments were made by the Ministry of Health and not by the Ministry of Teaching Hospitals. Which Ministry of the Government made the appointments is quite irrelevant: Does it matter whether the right hand of the State or its left signed their letters of appointments? Moreover Paragraph 8 of the Circular clearly contemplates appointments to all "posts of specialists in the Department including" those in Teaching Hospitals. Learned Senior State Counsel said that appointments to Teaching Hospitals were made on the basis of a more careful selection of applicants. He was, however, unable to explain why the Circular itself recognized foreign qualifications as adequate or how the Petitioner came to be appointed even on a temporary basis, why he was paid the salary of a fully qualified specialist and how he had been called upon to perform the duties and functions of an ENT Specialist,

Lecturer and Examiner if his specialist qualifications were not adequate. I have no hesitation in rejecting the assertion of the First Respondent in Paragraph 22 of his Affidavit dated 19 February 1988, that of the Second Respondent in paragraph 20(b) of his Affidavit dated 22 July 1988 and that of the Third Respondent in Paragraph 18(a) of his Affidavit dated 10 February 1988 that the Petitioner was not appointed for want of qualifications.

In his Affidavit dated 5 October 1988 the Second Respondent explains that the other doctors, mentioned in the Petitioner's Affidavit of 19 August 1988, with foreign qualifications who were given permanent specialist employment had been taken "after they appealed to the Public Service Commission." No evidence was placed before us as to what the grounds of the appeal were. But we are entitled to assume that they would have been regarded as possessing adequate qualifications in terms of the Scheme of Recruitment. The maxim *omnia praesumuntur rite esse acta* applied and we are entitled to assume that official acts have been properly performed. (Cf. *Elmore Perera v. Major Montague 'ayawickrema).(3)*

Other categories of eligible specialists are set out in the Circular. The Circular bears the caption "Post-Graduate Institute of Medicine' and goes on to state that the Government has made the decisions set out in the Circular. It states that "no Foreign Primary Examinations will be held in Sri Lanka after 1.1.1980". Post Graduate Examinations of the Institute, it says, were to be held from 1980 leading to the M.D. or M.S. degrees in the respective specialities. It then sets out the fields in which Boards of Study had been set up and states that the information with regard to examinations would be notified from time to time.

The Circular then states as follows:

(4) Those Medical Officers who have passed Primary Part I of foreign Examinations will be permitted to go abroad on no-pay leave to complete the final examinations on a phased programme.

(5) Medical Officers who have the Foreign Primary Part I examination could sit the final examinations of the Institute, provided they have the requisite training and will on successful completion of the examination be found assignments for further training up to one year in selected

institutions abroad, by the Ministry.

(6) Officers who have obtained full qualifications abroad and have overstayed 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 1.1.1980.

(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.

(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."

Having regard to the material placed before us, it would seem that, in practice, the following classes of persons have been considered eligible and, therefore, appointed to specialist posts:

1. Medical Officers who resigned from Government Service to proceed to England to obtain the full foreign specialist qualifications and decide to rejoin the Department immediately after obtaining such qualifications in terms of the Minute in Regard to Medical Personnel of the Health Services. (P1).

2. Officers who had ceased to be in Government Service, having vacated their posts by over-staying the leave granted but who returned to the country with full foreign specialist qualifications before 1 January 1980 in terms of paragraph (6) of the Circular.

3. Officers who had been sent by the Department and returned to the country within the period of leave granted having obtained full foreign specialist qualifications.

4. Officers who obtained full foreign specialist qualifications provided the Public Service Commission ordered that they be appointed.

5. Officers who obtained full foreign specialist qualifications provided that the Ministry of Health and not the Ministry of Teaching Hospitals made the appointment.

6. Graduates of the Post-Graduate Institute of Medicine who had completed the prescribed course of training and obtained Board Certification.

The Petitioner complains that although he belonged to category (1), he was not appointed, the Fourth Respondent being preferred to him. The Respondents maintained that in terms of Paragraph (8) of the Circular, they were bound to give preference to the Fourth Respondent since he was a PGIM Graduate. The Petitioner complains that this differential treatment on the basis of the classification in the Circular makes it discriminatory and violates Article 12(1) of the Constitution.

Article 12(1) of the Constitution declares that "All persons are equal before the law and are entitled to the equal protection of the law." Undoubtedly, on the face of it, the classification in the circular discriminates against the petitioner. Indeed every classification discriminates between persons and things. The very concept of classification is that of inequality. Yet, unless classification is permitted, injustice is bound to take place, for it would result in unequals being treated equally.

It would also inevitably lead to the objects of good Government being defeated. If, for instance, the Government wishes to give the people an efficient medical service, then it is inevitable that it should appoint persons who have the relevant academic qualifications and experience as doctors. It would be strange if someone who did not have such qualifications and experience were to be appointed as a Surgeon on the basis that "all persons are equal before the law". It would subvert the object of Government to provide an efficient medical service, for rather than save lives, such a course of action would necessarily result in mass murder.

The Courts have evolved a solution to this paradoxical situation of honouring constitutional pledge of equality and at the same time recognizing the need to classify. The solution is this. The law recognizes that the principle of equality does not mean that every law must have universal application for all persons who are not, by nature, attainment or circumstances, in the same position. What is required is that persons who by nature, attainment or circumstances are similar, are treated alike. If there is a classification which deals alike with those who are similarly situated, someone who is different

cannot be allowed to complain that he has not been treated equally, for being different, he must necessarily expect to be treated differently. Our Supreme Court has recognized this position in several cases (E.g. see *Palihawadana v. Attorney-General*, (4); *Yasapala v. Ranil Wickramasinghe and Others*,. (5); *Elmore Perera v. Major Montague Jayawickrama*,(3). Several decisions of the Indian Supreme Court which were cited by Counsel also support this position. (E.g. see *Probhudas Morajee Rajkotia and Others v. Union of India*,(6); *State of Gujarat and another v. Shri Ambica Mills*,(7). Indeed, these principles were recognized by the Indian Supreme Court a very long time before the decisions cited to us.(E.g. see *State of Bombay v. F.N.Balsara*,(8).

In exercising its right to make distinctions between persons, I do not think that the State wastes its precious and limited energies in making them without a purpose. When the State makes distinctions, I therefore take it that it does so correctly appreciating the needs of our people and having regard to its experience, with a view to achieving something desirable because it is good for our people. (See *State of Bombay v. F.N. Balsara*,(8); *Ram Krishna Dalmia v. Justice Tendolkar*,(9); *Ganga Ram v. Union of India*,(10).

While I take it for granted at the beginning that the State had a purpose for making the distinctions it did, I must find out what the purpose was, for if the classification had no connection with that good purpose, then, surely, I cannot say that that classification was made to achieve that purpose. (Cf. per Ramaswami, J. in *Harakchand et al. v. Union of India*,(11)).

In trying to find out what purpose the State had in mind when making a classification, I ought to consider "Prior Law" (Cf. per Ramaswami, J. in *Harakchand et al. v. Union of India*,(11)). This includes legislation by Government Circulars and notifications, H.W.R.Wade, *Administrative Law*, 5th Edn. at pp. 745-7, even though they be, as described and explained by Justice Streatfield in *Patchett v. Leathem*,(12), "to be at least four times cursed" in comparison with legislation passed by Parliament. (Cf. *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs*,(13)). And so, I should consider the Minute in Regard to Medical Practitioners of the Health Services (P1). In finding the end, I must also look at statements of objects and reasons, matters of common knowledge, matters of common report and the history of the times in trying to find

out what was the purpose of the classification. (Cf. per Das, C.J. in *Ram Krishna Dalmia v. Justice Tendolkar*,(9)), AIR 1958 S.C. 538 at p. 543 para. 12 and K.K. Mathew in *Democracy, Equality and Freedom*, Eastern Book Co., 1978, at p. 217 *fin.* – 218.

In trying to find out what the purpose of the Circular was, I have considered :

1. the circular in question (P12 and P17);
2. the Minute in Regard to Medical Personnel of the Medical Services (P1), upon which Counsel for the Petitioner laid much reliance, and which Counsel for the Respondents did not suggest was irrelevant or inoperative;
3. the statement of Dr. S. Mahendran, M.B., B.S., F.R.C.S. in his letter referred to earlier (P21) in which he describes ENT Surgeons as "the rarest of species now";
4. the letters of the Government Medical Officers' Association (GMOA) dated 4 January 1984 (P7) and 19 November 1987 (2R2);
5. the letter of the Director of Health Services dated 20 January 1984 (P8) in response to the letter of the GMOA dated 04.01.1984 (P7);
6. the several affidavits of the Petitioner and Respondents;
7. the Hand Book and Prospectus 1987 of the Post-Graduate Institute of Medicine;
8. the oral and written submissions of Counsel for the Petitioner and the represented-Respondents on this matter.

What then was the context in which the Circular was formulated? What was the general good sought to be achieved or the harm sought to be eliminated? The Hand Book and Prospectus 1987 of the Post-Graduate Institute of Medicine provides the following information:

"Medical education in Sri Lanka started in 1870 with the establishment of the Ceylon Medical College which after 7 decades, was converted to the Faculty of Medicine in 1942 when the University of Ceylon was established.
Until 1952 no Post-Graduate Medical Examinations were conducted by the University of Ceylon. For the first time examinations for the degrees of MD and MOG were conducted in 1952. The examination for the degree of MS was started in the following year.
There was no organized teaching or training of any kind. The training

in the specialities of Medicine at post-graduate level had to be done in the U.K. and the diploma such as MRCP, FRCS, etc. of the U.K. Colleges were recognized for consultant appointments.
The Advisory Committee on Post-Graduate Medical Education, recommended to the Government in 1973 that a supervised in-service training period of 3 years followed by an examination should replace the existing scheme of training abroad. Accordingly the Institute of Post-Graduate Medicine (IPM) was established in 1976 under the provisions of the University of Ceylon Act No. 1 of 1976 and was attached to the University of Colombo. The Institute of Post-Graduate Medicine was formally inaugurated on 2nd March 1976 by Dr. Halfdan Mahler, the Director General of the WHO.
However, the work of the newly set up Institute was handicapped because various examinations of the U.K. Colleges continued to be conducted in Colombo and the doctors preferred these to the examinations of the Institute. Therefore, a review of the work of the Institute became necessary. At the same time the Government also decided to stop holding foreign examinations in Sri Lanka and to grant full recognition and preference to the post-graduate degrees of the Institute with effect from 1 January, 1980.
In order to achieve the objectives of the Institute, the Institute was re-established in 1979 under the provisions of the Universities Act No. 16 of 1978 and was re-named the Post-graduate Institute of Medicine (PGIM). Accordingly PGIM Ordinance No. 1 of 1980 made under the provisions of the Universities Act referred to above came into force on 10th April, 1980. The Boards of Study for various specialities in Medicine were reorganised and the courses of instruction and examination were arranged for the different specialities."

Learned Counsel for the Petitioner maintained that the "positive public good" to be achieved was the provision of a more efficient health service in Sri Lanka. The harm sought to be avoided, as learned Senior State Counsel claimed, was the "brain drain". These purposes were, it seems to me, two sides of the same coin.

Learned Senior State Counsel in his written submissions states that the impugned Circular "was brought into operation at a time when large numbers of medical personnel were leaving the country and it was purely intended to retain these medical personnel and also to offer them an opportunity to obtain further qualifications locally." He further states that "In the instant case the object of the Circular is to retain the medical personnel from leaving the country and to

offer them an opportunity of obtaining higher education. The rationale of the present classification is essential to retain those doctors who are in service and to give a preference to them. The persons who resigned from the Health Service must necessarily be classed separately."

The migratory propensities of professional people, ever in search of greener pastures, has always been a disturbing factor. There have been various methods, legislative and otherwise, adopted by Government and its agencies to eliminate or mitigate the impact of that phenomenon which is popularly known as the "brain drain". The requirement of compulsory public service for a stipulated period after University education prescribed by the Public Service Act No. 70 of 1961 was one such device. If, as explained by learned Senior State Counsel, the object of the Circular in question was to control the outward flow of doctors, in the interest of public welfare, it is difficult to understand how the imposition of disabilities on those doctors like the Petitioner, who were returning to the country to serve it could be justified. If at all the Circular would have the effect of discouraging people who wished to return from doing so. It would undermine the object of providing an efficient health service.

I am unable to agree with learned Senior State Counsel that in the pursuit of its object to have an efficient medical service the Government was only concerned with those already in Government Service. What was the need to provide incentives to those who had over-stayed their leave but returned before 1.1.80 if such persons were yet in Government Service? If they had over-stayed with the consent of the authority granting leave, the date, 1.1.80, would be irrelevant, for the relevant date then would be that specified by the authority granting leave. On the other hand if an officer had over-stayed his leave without permission, he would, in terms of the Establishments Code, be deemed to have vacated his post. Paragraph 6 of the Circular in my view was directed at those persons who had vacated their posts and who had therefore ceased to be in Government Service. According to the argument of learned Senior State Counsel the Government was prepared to take those who had ceased to be in Government Service by reason of the application of the punitive measure of vacation of post but unwilling to take back those who had honourably resigned. I do not think so.

The Minute in Regard to Medical Personnel of the Health Services

published in the Ceylon Government Gazette No. 14.840 of February 7 1969 (P1) clearly indicates that the Government hoped for and welcomed the return of all doctors who had left the service. Part B of the Minute deals with the terms of employment to be offered to "Medical Officers who join after obtaining full specialist qualifications or after years of private practice". A category specially dealt with in the Minute is one into which the Petitioner fits exactly, namely, category I. It refers to "Medical Officers who resign their appointments to proceed to England and obtain any of the full specialist qualifications given in Appendix I which are accepted by the Department and decide to rejoin the Department immediately after obtaining such qualifications."

The differential attributes set out in the Circular do not bear a rational nexus to the object of providing a more efficient health service by minimizing the brain drain and attracting qualified specialists to undertake employment in Government Service. In the circumstances, the classification in the Circular is violative of Article 12(1) of the Constitution and must be held to be ultra vires the Constitution and therefore bad in law and of no force or avail. (Cf. *Perera v. University Grants Commission*, (14); *P.S.U.N. Union v. Minister of Public Administration*, (15); *Dayawathie and Others v. Dr. M.Fernando and Others*, (16); *State of Jammu & Kashmir v. Triloki Nath Khosa and Others*, (17); *Ram Krishna Dalmia v. Justice S.R.Tendolkar*, (9); *Budhan Choudhry and Others v. State of Bihar*, (18); *Harakchand v. Union of India*, (11); supra, at p. 1467 per Ramaswami, J. at para. 23; *Jalan Trading Co. v. Mill Mazdoor Sabha*, (19); *State of West Bengal v. Anwar Ali*, (20)).

If they were, as claimed by the Respondents, giving effect to settled Government policy not to appoint foreign qualified specialists, I am at a loss to understand:

(1) why the Director of PGIM would need to write to the Director of Health Services on 15 July 1983 (P5) asking the Director to let him know "the policy decision on this matter";

(2) how the Government Medical Officers Association, after considering the case of the Petitioner "in detail", found it possible to recommend (P7) the appointment of the Petitioner as permanent ENT specialist for two years and then on 19 November 1987 writing to the Fourth Respondent (2R2) that the GMOA had been assured by the Director-

General, Teaching Hospitals, that the appointment would be made "strictly on the criteria laid down in the Circular and nothing else";

(3) why the Director of Health Services in January 1984, in response to the request of the GMOA, held out a promise that the post would be advertised "four years from the date of temporary appointment" of the Petitioner instead of saying that the Petitioner was not qualified at all;

(4) why the Ministry of Health (as distinguished from the Ministry of Teaching Hospitals) appointed foreign qualified specialists.

(5) why the Public Services Commission directed the appointment of foreign qualified specialists.

I agree with the submission of learned Senior State Counsel that the concept of equality in the matter of employment or promotion can be predicated only when the competing candidates are drawn from the same source. However, learned Senior State Counsel, citing the decision in *Reserve Bank of India and others v. G.N. Sahasranaman and others* (21) and *Union of India v. E.S. Soundara Rajan* (22), also submitted that "there cannot be a case of discrimination merely because fortuitous circumstances arising out of some peculiar developments or situations create advantages of disadvantages for one group or the other although in the earlier stages they were more or less alike."

The Reserve Bank case was concerned with certain Administrative Circulars of the Bank with regard to a scheme of promotion for Class III employees of the Bank. The main question for determination was whether a part of the scheme was violative of the constitutional guarantee of equality before the law and of equal opportunity in public employment enshrined in the Constitution. The controversy in the matter before the Court lay within a narrow area but, as Sabayasachi Mukharji, J. observed (at p. 1839 para. 34) aspects which were "strictly not germane to the present issue" were also examined because it was urged that the controversy was "against a vast compass".

I find no support for Learned Senior State Counsel's submission in *The Reserve Bank* decision. The Headnote in the case says this: "It is true that the chances of promotion in some areas occur more often in smaller centres than in other bigger centres like Bombay, Calcutta, Delhi but that is fortuitous and would not really affect the question

and violate articles 14 and 16 of the Constitution."

The chances of promotion were less in some places than in others. Where one happened to be serving at a given time was a fortuitous circumstance and "would not really affect the question and violate Articles 14 and 16. The justice of the case should be judged in conjunction with other factors, the convenience, the future of the family etc.", said Justice Sabayasachi Mirkharji at p. 1840 para. 40. The learned Judge, however, emphasised (at p. 1839 para. 39) that the "right of promotion should not be confused with the mere chance of promotion. Though the right to be considered for promotion was a condition of service, mere chances of promotion were not."

In the matter before us, the issue is not the mere chance of appointment but the right to be considered for employment. The submission of learned Senior State Counsel in this regard are couched in the words of Justice Krishna Iyer at p. 961 para. 4 in his judgment in the case of *Union of India v. E.S. Soundra Rajan* (22). The learned Judge went on to add in that case that "If one class has not been singled out for special treatment, the mere circumstance of advantages accruing to one or the other cannot result in breach of Article 14 of the Constitution.".

In the case before us, the complaint is not that some accidental circumstances have placed the Petitioner at a disadvantage in relation to others in the same class to which he belonged but that by, what Mathew J. in *State of Gujarat v. Shri Ambica Mills* (7), described as an "underinclusive" classification, the advantages conferred on others who were similarly stituated in the same class, that is doctors obtaining foreign specialist qualifications, were not conferred on him. He complains that PGIM graduates are in terms of the Circular to be given preference not over all foreign qualified specialists, but only over foreign qualified specialists who returned to the country after 1 January 1980 or those who were appointed by the Public Service Commission and those who were sent by the Department to obtain the qualifications.

The Petitioner specifically complains that he was passed over neither because he lacked the appropriate foreign specialist qualifications nor because those foreign qualifications were inadequate to equip him for the tasks of an E.N.T. Surgeon but,

curious as it may seem, because he had at his own expense and on his own proceeded to the U.K. to obtain those qualifications in a field where specialists were rare, as Dr. Mahendran had said in his letter of recommendation (P21) and at a time when appropriate qualifications could not be obtained from the PGIM or any other local institution. There was no mention of a Board of Study in Otolaryngology of PGIM in the impugned Circular nor in the Ordinance made by the University Grants Commission under Section 140 read with Section 18 of the Universities Act No. 16 of 1978 and published in Gazette Extraordinary No. 83/7 of April 10, 1980 (P23), although, as we have seen, specialists in that field were described as a "rare species." The First M.S. (ENT) Examination, according to paragraph 10 of the Second Respondent's Affidavit, was held in August 1983, that is, two months after he had returned to Sri Lanka and re-joined the service with full specialist qualifications (D.L.O., F.R.C.S.). The Examination was subsequently held in September 1984 and in November 1987. The Petitioner passed the M.S. (ENT) Examination of the Institute in 1987.

Despite the fact that the Petitioner possessed such full, specialist qualifications as those which, in the case of other doctors, had been recognised to be adequate by the impugned Circular, by the Public Service Commission, and by the Ministry of Health; and despite the circumstances in which he was compelled to privately seek those qualifications abroad, his professional attainments, sufficient though they undoubtedly were for the discharge of his duties and functions as an ENT Surgeon, did not entitle him to be appointed because he had not been sent abroad by the Department to acquire the relevant knowledge and skills. So the second Respondent seems to say.

In Paragraph 9 of his Affidavit of 22 July 1988 the Second Respondent states that "in terms of the General Circular Letter 1389 of 20.9.1979 with effect from 01.01.1980 foreign specialist qualifications would be recognized provided those officers were sent abroad by the Department. The Petitioner was not sent by the Department to obtain foreign specialist qualifications."

We do not know what "peculiar developments or situations" there were at the time the Circular was formulated except that it coincided with the resuscitation of the Post-Graduate Institute of Medicine.

The State, as I have said before, 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, in my opinion, insist that the classification is scientifically perfect and logically complete. (Cf. per Dua, J. in *Ganga Ram and others v. Union of India and others* (10)). It may, for instance, confer advantages in matters of appointment, promotion or remuneration on the basis of educational qualifications. (E.g. see *State of Mysore v. Narasingh Rao* (23) *Union of India v. Dr. Mrs Kohli* (24) *State of Jammu & Kashmir,* supra). Indeed in Dr. Mrs. Kohli's case, as refined a classification as between an F.R.C.S in General Surgery and an F.R.C.S in Orthopaedics was upheld in relation to the appointment to the post of a professor of Orthopaedics. (See per Alagiriswami, J. esp. at p. 813 para: 7).

Classifications may be refined but they must not be artificial and therefore irrational. They cannot be upheld if they are, as presented to us in this case, irrational. What has a date of return to the country or the mode of proceeding to obtain the qualifications to do with the duties and functions to be performed? Moreover, such matters have not, it seems, been considered to be relevant by the P.S.C. and the Ministry of Health in making appointments thereby recognising the fact that the micro-distinctions sought to be made by the Circular are not substantial in that they have no relation to the duties and functions to be performed by the persons preferred in relation to others similarly qualified. If the distinctions that are made are not qualitatively substantial, they must be regarded as unacceptable. This, I think, is what was decided by Krishna Iyer, J. at p. 4 para. 5 and by Justice Chandrachud, J. at P. 11 para. 37 in their decisions in *The State of Jammu v. Triloki Nath Khosa and others,* (supra).

Having upheld the classification based on variant educational qualifications in the case before him, Justice Chandrachud in *Kosha's* case says at p. 16 para. 56 that it was hoped "that this judgment will not be construed as a charter for making minute and microscopic classifications. Excellence is, or ought to be, the goal of all good government and excellence and equality are not friendly bed-fellows. A pragrmatic approach has therefore to be adopted in order to harmonize the requirement of public services with the aspirations of public servants. But let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in

wonderment: What after all is the operational residue of equality and equal opportunity?"

Is the classification in the Circular founded on "substantial differences" which distinguish doctors grouped together from those left out? The Circular does not suggest that a person will be appointed as a specialist only if he passes the M.S. and M.D. examination of the PGIM and serves a prescribed period of training and obtains Board Certification. Nor does it suggest that the basis for preferring a person so qualified to a doctor who has obtained foreign specialist qualifications is the superiority or greater relevance to local conditions of PGIM examinations and training. A preference based on such reasoning would have been unquestionable, for excellence, as Justice Chandrachud said in Khosa's case, (supra), "is or ought to be the goal of good government." Moreover, in those circumstances a foreign qualified specialist not possessing the PGIM qualifications could not have claimed equal treatment, being inferior and unequal.

The Circular, however, clearly recognises the equal suitability of both PGIM and foreign qualified doctors for appointment to specialists posts. In paragraph 5 it envisages continuing education abroad. Indeed, it would appear from the letter of the Director of PGIM dated 21 April 1987 to the Second Respondent (2RIA) that the Fourth Respondent had been sent to the United Kingdom on two years leave with full pay after passing his PGIM examination. In terms of paragraph 7 of the Circular read with paragraph 8 thereof, a person who obtains foreign specialist qualifications will not be placed in an inferior position in relation to a PGIM graduate if he is sent abroad by the Department and within the stipulated period of leave. Nor will he be passed over in favour of a PGIM graduate if he had returned to Sri Lanka before 1 January 1980.

What has the arbitrarily fixed date of return to do with the duties the Petitioner or others like him were called upon to perform as ENT Surgeons or as other medical specialists? How is one's competence to act as a medical specialist affected by the fact that he acquired his skills at the expense of the taxpayer or with the benediction of the Health Department? Discriminatory conditions and qualifications for employment must be related to the duties to be performed. Otherwise they must be regarded as insubstantial, arbitrary, fortuitous and artificial and therefore, irrational and unjustly discriminatory. (See *J. Pandurangarao et. al. v. The Andhra Pradesh Public Service*

Commissioner, Hyderabad, and another (25), (Cf. per Ramaswami, J. in *Jaisinghami v. Union of India* (26), *C.A. Rajendren v. Union of India*, A.I.R. 1968 S.C. 507 at p. 511 (27)). The classification which distinguishes doctors with foreign qualifications who returned to the country before 1 January 1980 and those sent by the Department from others who obtained similar foreign qualifications for the purpose of deciding whether they should be equally recognized with PGIM graduates in the matter of appointment is not a classification founded on an intelligible differentia and therefore, in my view, violates the pledge of equality given in Article 12(1) of the Constitution and must be declared to be ultra vires the Constitution and therefore bad and of no force or avail. (Cf. *Perera v. University Grants Commission;* (14); *Samarasinghe v. Bank of Ceylon*, (28); *P.S.U.N. Union v. Minister of Public Administration* (15); *Dayawathie and others v. Dr. M. Fernando and others* (16); *Ram Krishna Dalmia v. Justice Tendolkar* (9); *Budhan Choudhry and others v. State of Bihar,* (18); *Harakchand et. al. v. Union of India,* (1), *Jalan Trading Co. v. Mill Mazdoor Sabha* (19); *State of West Bengal v. Anwar Ali* (20).

This is not a case like that of *Elmore Perera v. Major Montague Jayawickrema* (3), where the majority of the Court agreed with the finding of Chief Justice Sharvananda (at p. 300 - 301) that the Petitioner had failed to prove that others similarly placed had been treated differently. There was no "unequal, selective or discriminatory treatment" in that case.

The Petitioner states in paragraph 34(1) of his petition that Circular Letter No. 1089 dated 20.9.1979 (P12) (which is in the same terms as P19 and which I have referred to as the 'Circular') was discriminatory and violative of Article 12(1) of the Constitution and being ultra vires could not be the legitimate basis for the preference of the Fourth Respondent in relation to the Petitioner. Learned Senior State Counsel, however, suggested that Article 12(1) merely recognized that all persons are equal before the law and declared them entitled to the equal protection of the law. True enough Article 12 of the Constitution does not, as the Indian Constitution does in Article 14, specially mention, the right of equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office. But those rights are necessary incidents of the application of the concept of equality enshrined in Article 12 of our Constitution. (Cf.

per Ramaswami, J. in *Jaisinghani v. Union of India* (26); per Ramaswami, J. in *C.A. Rajendran v. Union of India.* (27)).

Learned Senior State Counsel submitted that the Petitioner was not entitled to relief since the Petition was vague. I agree that a claim of unlawful discrimination cannot be adjudged unless the petition contains a full averment of the grounds on which equality is claimed and the denial of equality is pleaded as not being based on a rational relation to the object sought to be achieved. (Cf. *Perera v. University Grants Commission* (14), *Samarasighe v. Bank of Ceylon* (28); *Elmore Perera v. Major Montague Jayawickrema* (3) L.R. 285 at pp. 298 - 299 per Sharvananda, C.J., Cf. also *Katra Education Society, Allahabad v. State of U.P.* (29). However, I am satisfied that the Petitioner in this case adequately satisfied the requirements of law relating to this matter.

Learned Senior State Counsel reminded us that the onus of proof was on the Petitioner to establish that his fundamental rights had been violated. (Cf. *Andhra Industrial Works v. Chief Controller of Imports and others* (30) 1541 para. 10; *Jalan Trading Co. v. Mill Mazdoor Sabha (19).* I have in my judgment explained why, in my opinion, the Petitioner has sufficiently discharged the burden upon him. He has satisfied the test that as between persons similarly circumstanced, some (including himself) were unreasonably treated to their prejudice and that the differential treatment had no rational relation to the object sought to be achieved. (Cf. per Shah J. in *Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P. and Others* (31).

This case was unlike *Samarasinghe v. Bank of Ceylon,* (28) where Weeraratne, J. found (see p. 173) that the Petitioner had failed to place "any cogent and convincing evidence to establish discrimination."

For the reasons set out in my judgment, I make the following declarations and orders:

(1) I declare that General Circular No. 1089 of 20 September 1979 and General Circular Letter No. 1389 of 20 September 1979 issued by the Ministry of Health violate the provisions of Article 12(1) of the Constitution and being ultra vires the Constitution, they are, therefore, invalid in law.

(2) I further declare that the Petitioner's right to equal protection of the law pledged by Article 12(1) of the Constitution has been violated in that he has been denied an equality of opportunity to be appointed to the post of ENT Surgeon, Galle.

(3) I confirm the Order of this Court dated 12 January 1988 staying the appointment of the Fourth Respondent as ENT Surgeon, Galle, unless and until the direction in the next succeeding paragraph are complied with.

(4) I direct the First, Second and Third Respondents or their successors in office to advertise the Post of ENT Surgeon, Galle, within three months of the date of this decision and I further direct that an appointment be made to the said post of ENT Surgeon, Galle, taking due account of such educational and other qualifications of the applicants as are relevant to the duties and functions of the holder of the post of ENT Surgeon, Galle.

(5) I order the State to pay the Petitioner a sum of Rs.10,000/- by way of a *solatium* for the distress caused to him.

(6) I further order the State to pay the Petitioner a sum of Rs.5000/- as costs.

TAMBIAH, J. – I agree.

FERNANDO, J:

Having had the advantage of reading the judgment of my brother Amerasinghe, I need not to refer to the facts which have been so clearly set out by him.

While the State is entitled, as a matter of policy, to determine what foreign qualificiations it would recognise for recruitment and promotion of medical officers and Specialists, it cannot be argued here that the State, by the Circulars in question, refused to recognise the Petitioner's qualifications; paragraphs 6 and 7 conclusively establish that those foreign qualifications are fully recognised, and that no preference will be given to persons having the local P.G.I.M. qualification vis-a-vis persons having the aforesaid foreign qualifications, 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 reserving a quota for, those already in service), even though this may result in the exclusion of better qualified persons. A policy of insisting upon the appointment of an "outsider" as being the best-qualified person, regardless of other factors, may sometimes result in a deterioration in morale among (and even loss of) staff already in service, with a consequent decline in the overall efficiency of the institution: hence the maintenance of an efficient service would often justify some weightage being given to service within the institution. However, here both the Petitioner and the 4th Respondent were already in service when the specialist post was advertised. It seems to me that a State policy of giving preference, in regard to appointments and promotions in the public sector, to persons who have a longer period of service in Sri Lanka (even outside the public sector) would not necessarily amount, *per se,* to an improper classification. However, in this case, none of these factors would operate to justify the Petitioner being excluded from consideration for appointment as *ENT Surgeon, Galle, on the basis that he was not* qualified.

Despite the Respondents' original contention that the Petitioner did not possess the recognised post-graduate qualifications, and that the 4th Respondent was the only eligible candidate, learned Senior State Counsel had to concede that the Petitioner was eligible, that if he had not been eligible he could not have been given a temporary appointment in 1983, and that had the post been advertised a few months earlier, the 4th Respondent would not have been eligible and the Petitioner would inevitably have been appointed. It follows that the 4th Respondent was appointed on the basis that the Petitioner was not qualified, and not because of any "preference" given to the 4th Respondent.

The Circulars do not purport to permit such an exclusion, but that circumstance *per se* would not entitle the Petitioner to relief in these proceedings, although it might entitle him to relief in Writ proceedings.

The Circulars apply to all medical officers in regard to appointments to the posts of Specialists, and no distinction is drawn between Teaching Hospitals and other Hospitals. Several other

medical officers had admittedly been appointed to Specialist posts, and this cannot be explained away on the basis that it was done by some other Ministry or Department. In the result, the Circulars have not been applied equally, and the exclusion of the Petitioner was in denial of his rights under Article 12(1). That this infringement of his rights was not the result of inadvertence, a mistake, or an error of judgment, is apparent from the failure to fulfil the undertaking given to him, in 1983, to advertise the post soon: from the failure to advertise even in May 1987, although the Petitioner was told, in 1984, that the post would be advertised 4 years after his first (temporary) appointment; and from the fact that, inexplicably, the post was only advertised after the lapse of the time required for the 4th Respondent to become eligible for appointment, which in my view was no mere coincidence.

It is clear that there was no reasonable basis on which the 4th Respondent could have been "preferred" to the Petitioner. The Circulars contemplate that "definite preference" will be given to "*qualifications*"; that such qualifications will be preferred to other qualifications, but not that the *holder* of the former will, regardless of all other facts and circumstances, be preferred to the holder of the latter; it does not authorise the *exclusion* of others. "Preference" in that context would mean that, other things being equal, the person with the local qualification will be appointed; although as between competing qualifications, the local qualification will be preferred, possession of the local qualification will not have the result of entitling the holder to appointment although in every other respect another candidate is more suitable or better qualified. Thus by giving "preference" to the specified qualifications the Circulars do not authorise disregard of other relevant criteria, such as seniority, service, experience, or other relevant attributes. No ground whatever has been pleaded or urged before us as justifying the "preference" of the 4th Respondent, other than the Petitioner's lack of the P.G.I.M. qualifications. Every other relevant consideration cries out in favour of the appointment of the Petitioner. He obtained his basic qualification 9 years before the 4th Respondent; he has served in Sri Lanka in Government Service for a period of 11 years (as against 7 years by the 4th Respondent, of which 2 years was outside Sri Lanka); he has 4 1/2 years experience in the Specialist post itself, having acted for that period, while the 4th Respondent had none; he obtained his Specialist qualification 4 1/2 years before the 4th Respondent. It is

also relevant to mention that the Petitioner obtained his qualification before the local examination was first held; i.e. at a time when it was not possible for him to have obtained that qualification except by going abroad. In those circumstances, it is not surprising that the Respondents did not seek to justify the appointment of the 4th Respondent on the basis of a "definite preference" in terms of the Circulars, for that would have been unreasonable and perverse in the circumstances. But for the denial of his fundamental right, the Petitioner would undoubtedly have been appointed as ENT Surgeon, General Hospital, Galle. There has already been many a slip 'twixt cup and lip in the past 6 years, and the relief now awarded to the Petitioner must prevent another.

Although I find it unnecessary to determine whether the Circulars of 1979 violate the Constitution or are *ultra vires,* I would add that, if (contrary to my view as to the meaning of "definite preference" in paragraph 8 of the Circulars) that paragraph meant that where only one candidate had the local P.G.I.M. qualifications he must be appointed although his rivals had a recognised foreign qualification, totally ignoring all other factors normally considered relevant for such appointment, even then the entirety of the Circulars would not be *ultra vires* and void, but only *pro tanto.*

As the interim order made by this Court has prevented the purported transfer of the Petitioner, his Counsel has not pressed his claim to compensation. I would therefore grant the Petitioner the following reliefs:

(a) a declaration that the Petitioner's fundamental right to equality before the law and the equal protection of the law has been violated by the 1st, 2nd and 3rd Respondents, by their conduct in treating him as not having the qualifications required for appointment as ENT Surgeon, General Hospital, Galle;
(b) a declaration that the transfer of the Petitioner to the General Hospital, Colombo, as Assistant Surgeon (ENT) is null and void;
(c) a declaration that the appointment of the 4th Respondent as ENT Surgeon, General Hospital, Galle, is null and void;
(d) a declaration that the Petitioner was entitled to be appointed as ENT Surgeon, General Hospital, Galle, and a direction to the State, and the 1st, 2nd and 3rd Respondents (and their successors in office), to issue the requisite letter of appointment forthwith, to be effective from a date not later than 8th January 1988;

(e) costs in a sum of Rs.5,000 as against 1st, 2nd and 3rd Respondents and the State.

Application allowed.