

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui

Mr. Justice Adnan Iqbal Chaudhry.

C.P. No. D-6554 of 2019	Ms. Urooj Fatima versus Pakistan Medical and Dental Council and three [03] others.
C.P. No. D-6439 of 2019	Javeria versus Province of Sindh and four [04] others.
For the Petitioners	Mr. Moin Azhar Siddiqui, Advocate in C.P. No. D-6554 of 2019. Mr. Nadir Khan Burdi, Advocate in C.P. No. D-6439 of 2019.
For Respondents	Pakistan Medical and Dental Council through Mr. Suhail Hayat Khan Rana Advocate. Liaquat University of Medical and Health Sciences through Mr. Abdul Salam Memon Advocate along with Vice Chancellor, LUMHS.
For Province of Sindh	Mr. Ali Safdar Depar, Assistant Advocate General Sindh.
Federation of Pakistan	M/s. Muhammad Nishat Warsi, Deputy Attorney General and Durdana Tanveer, Assistant Attorney General.
Dates of hearing	01.11.2019, 04.11.2019 & 05.11.2019
Date of decision	14-11-2019

J U D G M E N T

Adnan Iqbal Chaudhry J. - The Petitioners are aspiring for admission to a medical university/college for the MBBS course for the session 2019-2020. They are aggrieved of amendments dated 30-05-2019 made by the Pakistan Medical & Dental Council to the

MBBS and BDS (Admission, House Job and Internship) Regulations, 2018 whereby amongst other amendments, the eligibility for admission to medical and dental courses for a candidate who passed the F.Sc (pre-medical) examination, was revised and enhanced from a minimum of 60% marks to 70% marks. Consequently, the Petitioners who had obtained 69% marks became ineligible for admission.

2. First, a brief discussion on the scheme of admission to medical universities/colleges. The MBBS and BDS (Admission, House Job and Internship) Regulations, 2018 as initially framed are hereinafter referred to as the **“Original Admission Regulations”**; and the amendments dated 30-05-2019 made to the said Regulations are hereinafter referred to as the **“Amended Admission Regulations”**.

Original Admission Regulations:

3. Under Regulation 9(2), the National Health Services, Regulations and Coordination Division or the Provincial Department dealing with admissions to medical/dental institutions shall, each year by notification authorize one recognized public-sector medical university as ‘Admitting University’ for each Province or Region. Under Regulation 2(a), the process of admission is the responsibility of the ‘Admitting University’ by conducting a centralized Provincial or Regional test for admission to all public and private sector colleges of a Province/Region. The admission test is also referred to as the ‘Entry Test’ or the ‘MDCAT’. For the admission process of 2019, Liaquat University of Medical and Health Sciences, Jamshoro [LUMHS], is the designated ‘Admitting University’ for the Province of Sindh.

Regulation 4 provides for a Provincial or Regional Admission Committee for each Province/Region with the power to oversee and monitor the admission process and to ensure transparent conduct of admission test in its area of jurisdiction.

Under Regulation 9(7), candidates desirous of admission to the MBBS and BDS course in a public or private medical/dental

institution of a Province or Region shall apply to the Admitting University of that Province or Region, who shall process the applications on merit and prepare separate merit lists for public and private medical/dental institutions.

Regulation 6 provides a ceiling to the number of admissions.

Under Regulation 7, the eligibility for admission to medical/dental courses for a candidate who passed the F.Sc. (pre-medical) or equivalent examination was a minimum of 60% marks. Under Regulation 9(8), for the purposes of admission, the Admitting University was to compute a candidate's aggregate marks by applying a weightage formula as follows:

- (a) Marks in Matriculation or equivalent - 10%
- (b) Marks in F.Sc. (pre-medical) or equivalent - 40%
- (c) Marks in Admission/Entry Test - 50%

The Original Admission Regulations did not prescribe a pass percentage for the Entry Test and it appears that that was left to the decision of the testing authority.

Under Regulation 9(19), after the display of the third merit list by the Admitting University, if there are any vacant seats in a public-sector medical/dental institution, top merit students of a private-sector medical/dental institution shall be offered admission against the vacant seats, and the consequent vacant seats in the private-sector medical/dental institution shall be offered to the students next on the merit in the waiting list.

Amended Admission Regulations:

4. Under the amended Regulation 7, the eligibility for admission to medical/dental courses for a candidate who passed the F.Sc. (pre-medical) or equivalent examination, was revised and enhanced from a minimum of 60% marks to a minimum of 70% marks.

Under the amended Regulation 9(8), the weightage formula to be applied for computing a candidate's aggregate marks was changed as follows:

- (a) Marks in F.Sc (pre-medical) or equivalent – 50%
- (b) Marks in Admission/Entry Test – 50%

Additionally, a pass percentage for the Entry Test was fixed at 60% marks and it was further stipulated that after applying the revised weightage formula, the candidate must have obtained an aggregate merit of not less than 70% for admission to a medical course, and 60% for admission to a dental course.

5. Mr. Moin Azhar Siddiqui, learned counsel for the Petitioner in C.P. No.D-6554/2019 submitted that the Amended Admission Regulations were never published in the official gazette as required of section 20-A of the General Clauses Act, 1897, and therefore do not have the force of law, and that it is the Original Admission Regulations that continue to hold the field under which the Petitioner is eligible for admission. In the alternative, Mr. Moin submitted that the Amended Admission Regulations apply prospectively and not to candidates such as the Petitioner who had already sat for her F.Sc. examination in May 2019 before the Amended Admission Regulations had come about. Mr. Moin further submitted that the Petitioner was entitled in the very least to 'apply' for admission, but the on-line portal at the website where such an application can be made, does not accept the admission application if the candidate's marks in the F.Sc examination are less than 70%.

6. Mr. Nadir Khan Burdi, learned counsel for the Petitioner in C.P. No.D-6439/2019 further added that the Amended Admission Regulations are invalid inasmuch as section 42(2) of the PMDC Ordinance, 2019 under which the said amendments were made, did not empower the Council to make Regulations with regards to admissions. Mr. Burdi submitted that while these petitions were pending before us, a learned single judge of the Lahore High Court had on the said ground, vide judgment dated 10-10-2019 in W.P. No.52871/2019 etc., struck-down the Amended Admission Regulations. However, on the next date of hearing of these petitions before us, we were informed by Mr. Burdi that the said judgment had been suspended by a learned Division Bench of the Lahore High

Court in Intra Court Appeal No. 62074/2019 vide order dated 21-10-2019.

Recently, the aforesaid appeal has been allowed, and vide judgment dated 05-11-2019 a learned Division Bench of the Lahore High Court has restored the Amended Admission Regulations essentially on the ground that the Council under the PMDC Ordinance, 2019 had the power to amend the Original Admission Regulations. We have gone through that judgment, however, with all reverence for the Lahore High Court, we are inclined to form our own opinion on the matter.

7. Mr. Abdul Salam Memon, learned counsel for LUMHS, the designated 'Admitting University' for the Province of Sindh, submitted that the Amended Admission Regulations were made in exercise of powers under sub-section (2) of section 33 of the PMDC Ordinance, 1962 which did not require the prior approval of the Federal Government and therefore, the publication of the Amended Admission Regulations in the official gazette was not mandatory. However, he submitted that the Admitting University has no say in the making of the Admission Regulations and it can only follow the same. He informed the Court that given past experience, admission to medical/dental universities/colleges invariably closes above 75% marks.

8. Mr. Muhammad Nishat Warsi, learned Deputy Attorney General, submitted that the Amended Admission Regulations were valid and that the matter of admissions to medical/dental institutes was within the domain of the Council/regulator.

9. Pending these petitions before us, there was yet another turn of events. The President of Pakistan promulgated the Pakistan Medical Commission Ordinance, 2019 [PMC Ordinance, 2019], published in the official gazette on 21-10-2019, which repealed the PMDC Ordinance, 1962, dissolved the erstwhile Council, and changed the constitution of the regulatory body that was the PMDC.

Mr. Sohail Hayat Khan Rana, learned counsel who was previously representing the PMDC, submitted that his attempts to obtain instructions from the new regulatory body constituted under the PMC Ordinance, 2019 have gone in vain and he regretted that he could not assist this Court further in the matter.

10. As to the effect of the promulgation of the PMC Ordinance, 2019, all learned counsel including the learned Deputy Attorney General submitted that any change brought about by the said Ordinance to the procedure of admission to medical/dental institutes would only apply prospectively; that under section 50 of the PMC Ordinance, 2019 the Admission Regulations had been saved; and now it is for this Court to determine whether the Original Admission Regulations hold the field or the Amended Admission Regulations.

11. Heard the learned counsel and perused the record.

In our view, the legal question underlying these petitions is similar if not identical to the one discussed and answered by the Supreme Court of Pakistan in a case that incidentally also related to the PMDC and is reported as *Pakistan Medical and Dental Council v. Muhammad Fahad Malik* (2018 SCMR 1956). There, the Honourable Supreme Court of Pakistan held that temporary legislation by way of an Ordinance under Article 89 of the Constitution of Pakistan is distinct from and cannot be equated with temporary legislation made by Parliament; that the effect of an amending Ordinance on a permanent statute remains temporary; that the General Clauses Act, 1897 including section 6-A thereof which preserves textual amendments made by the repealed Act, cannot be pressed in aid to construe a Constitutional provision such as Article 89; that the saving provisions of Article 264 of the Constitution run “except as otherwise provided in the Constitution”, therefore those do not have the effect of giving permanency to amendments brought by an Ordinance when Article 89 of the Constitution itself does not give such permanency except by way of an Act of Parliament; therefore

any amendment made by an Ordinance would not survive its repeal/lapse. Given that, it was held by the Supreme Court that on the lapse of the PMDC (Amendment) Ordinance, 2015, the amendments made by it to the PMDC Ordinance, 1962 did not survive; consequently, the Council that had been freshly constituted under the amending Ordinance, 2015 had ceased to exist on the lapse of such Ordinance, and the Admission Regulations, 2016 that had been made by the defunct Council after the lapse of the amending Ordinance, were invalid. However, the ordinary day-to-day actions and decisions taken by the defunct Council were protected under the *de facto* doctrine until revised by a Council duly constituted under the PMDC Ordinance, 1962, and till such time, the Supreme Court constituted an Ad-hoc Council with the power to revisit Regulations framed under the PMDC Ordinance, 1962. It was in this backdrop that the said Ad-hoc Council in exercise of powers under section 33(2) of the PMDC Ordinance, 1962, had framed the Original Admission Regulations which were approved by the Supreme Court vide order dated 14-12-2018 passed in Suo Moto Case No.01/2010.

12. Subsequent to the Original Admission Regulations, the PMDC Ordinance, 1962 was repealed by the PMDC Ordinance, 2019 (published in the official gazette on 09-01-2019). Sections 3 and 4 of the PMDC Ordinance, 2019 changed the constitution of the Council that existed under the PMDC Ordinance, 1962. Consequently, a new Council was appointed on or about 11-03-2019. However, by way of section 49, the PMDC Ordinance, 2019 had saved the Original Admission Regulations until repealed or modified by the new Council.

13. The PMDC Ordinance, 2019 was temporary legislation. Under Article 89 of the Constitution, it was promulgated for 120 days. As required by Article 89(2)(a)(ii) of the Constitution, the PMDC Ordinance, 2019 was laid before the National Assembly and the Senate. Vide Resolution dated 29-04-2019, the National Assembly

extended the PMDC Ordinance, 2019 for another 120 days. Thereafter, on 30-05-2019, the Council that had been constituted under the PMDC Ordinance, 2019 framed the Amended Admission Regulations. Although the recital to the Amended Admission Regulations reads that the same were made in exercise of power under section 33(2) of the PMDC Ordinance, 1962, all learned counsel agreed that that is a typographical error as the PMDC Ordinance, 1962 did not exist at the time, and that the letter dated 13-06-2019 under which the Amended Admission Regulations were circulated, stated that the same had in fact been made in exercise of power under section 42(2) of the PMDC Ordinance, 2019.

14. On 29-08-2019, when the PMDC Ordinance, 2019 came up before the Senate for approval or otherwise in terms of Article 89(2)(a)(ii) of the Constitution, the Senate passed a resolution to disapprove the same, and thus the PMDC Ordinance, 2019 stood repealed. Since the repeal of the PMDC Ordinance, 1962 by the PMDC Ordinance, 2019 was only temporary, on the repeal of the latter, the former i.e. the PMDC Ordinance, 1962 was revived. The question that then remains is whether the Amended Admission Regulations, which were made when the PMDC Ordinance, 2019 was in the field, survived the repeal of the said Ordinance ?

15. To answer the above question, it is to be noted that the repeal of the PMDC Ordinance, 2019 was by virtue of Article 89(2)(a)(ii) of the Constitution, i.e., by a resolution of the Senate disapproving the same and not by way of any repealing enactment. Therefore, the effect of repeal contained in sections 6, 6-A and section 24 of the General Clauses Act, 1897, which otherwise apply only when a repeal is by way of a repealing enactment, were neither triggered nor would those serve as an aid in construing the effect of repeal under a Constitutional provision such as Article 89. In other words, on the repeal of the PMDC Ordinance, 2019 by the effect of Article 89 of the Constitution, nothing contained in the General Clauses Act, 1897 would come to save the Amending Admission Regulations that

had been made under the repealed Ordinance. In view of *Pakistan Medical and Dental Council v. Muhammad Fahad Malik (supra)*, Article 264 of the Constitution also did not have the effect of saving or giving permanency to the Amended Admission Regulations when the effect of the PMDC Ordinance, 2019 was only temporary as it was never accorded approval by the Parliament. Therefore, on 29-08-2019, when the PMDC Ordinance, 2019 was repealed by the effect of Article 89 of the Constitution, the Amended Admission Regulations also stood repealed and the Original Admission Regulations were revived. Further, on the repeal of the PMDC Ordinance, 2019 as aforesaid, the Council that had been constituted thereunder, which was different from the Council constituted under the revived PMDC Ordinance, 1962, also ceased to exist. Having concluded so, we need not consider the effect of the non-publication of the Amended Admission Regulations under section 20-A of the General Clauses Act, 1897.

16. We now proceed to examine what effect does the recently promulgated PMC Ordinance, 2019 have on the Original Admission Regulations.

The PMC Ordinance, 2019 was published in the official gazette on 21-10-2019 whereby the PMDC Ordinance, 1962 was repealed; the Council under the previous PMDC Ordinance, 1962 was dissolved; and a Pakistan Medical Commission was established comprising of the Medical and Dental Council, the National Medical and Dental Academic Board, and the National Medical Authority. Section 50 of the PMC Ordinance, 2019 reads as follows:

“50. Repeal and savings.- (1) Subject to section 6 of the General Clauses Act, 1897 (X of 1897), the Pakistan Medical and Dental Council Ordinance, 1962 (XXXII of 1962) herein after reflected as repealing Ordinance herein after referred as repealed Ordinance, shall stand repealed.

(2) Notwithstanding the repeal of the repealed or anything contrary contained herein, all decisions taken, regulations made or amended and disciplinary action taken by the Council, Ad-hoc Council, Executive Committee or any Committee or authority of the dissolved Pakistan Medical and Dental Council pursuant to the

repealed and the Pakistan Medical and Dental Council Ordinance, 2019 shall be deemed to have been validly made:

Provided that all regulations made and promulgated pursuant to repealed Ordinance, or the Pakistan Medical and Dental Council Ordinance, 2019 stand repealed and shall not be enforceable subject to sub-section (7).

(3) The dissolved Pakistan Medical and Dental Council as formed pursuant to the repealed Ordinance stands dissolved upon the promulgation of this Ordinance.

(4) All assets, rights, moveable and immovable properties, records, cash, bank accounts, deposits etc., of the dissolved Pakistan Medical and Dental Council under the repealed Ordinance shall stand transferred to the Commission and shall be deemed to be the assets, rights, properties, records, case, bank accounts, deposits etc., of the Commission.

(5)

(6)

(7) All admission processes for medical and dental colleges initiated prior to the promulgation of this Ordinance pursuant to regulations framed or amended under the repealed and as amended by the Council notified under the Pakistan Medical and Dental Council Ordinance, 2019, shall be completed pursuant to such repealed regulations subject to medical and dental colleges publicly informing all admitting students in advance of the five year fee plan applicable to them.”

17. It will be seen that while the proviso to sub-section (2) of section 50 of the PMC Ordinance, 2019 repeals all previous Regulations, but that is subject to sub-section (7) which provides that the previous Regulations will continue to apply to the on-going admission process. The repeal of the PMDC Ordinance, 1962 by the PMC Ordinance, 2019, the former being a permanent statute under the 1973 Constitution, is not a repeal by virtue of Article 89 of the Constitution, but a repeal by a repealing statute, *albeit* a temporary one, and one which has been expressly made subject to section 6 of the General Clauses Act, 1897, which in turn provides that “the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect”. We have already discussed above that on 29-08-2019 the Amended Admission Regulations had ceased and the Original Admission Regulations had revived. Therefore, when sub-section (7) of section 50 of the PMC Ordinance, 2019 provides

that the previous Regulations will continue to apply to the on-going admission process, those can only be the Original Admission Regulations.

18. Since the admission process this year has continued thus far under the Amended Admission Regulations which had ceased to hold the field as aforesaid, and since the Petitioners have been denied an admission form on the threshold of the Amended Admission Regulations, we are constrained to consider certain directions. But before that, the following facts are relevant.

19. Though the Entry Test for admission to medical/dental universities/colleges took place on 15-09-2019, after the repeal of the Amended Admission Regulations, but the public notice of that Entry Test had been published in July 2019. That public notice read that:

*“As per Admission Regulations, 2018 (as amended on 30-05-2019) of PM&DC, a candidate MUST have passed Intermediate/HSSC Pre-Medical Group or equivalent examination (e.g. A-Level, 12th Grade etc.) with minimum 70% unadjusted marks. **However those awaiting results can also apply.**”*

Though the Petitioners had secured 69% marks in their F.Sc. (pre-medical) examination, and per the above mentioned public notice they were not eligible to sit for the Entry Test, they were nonetheless allowed to sit for the Entry Test. That was explained by learned counsel for the Petitioners, so also by learned counsel for LUMHS, accompanied by the Vice Chancellor LUMHS, by submitting that since at that time many of the examining Boards of Sindh had yet to declare results of the F.Sc. examination, and since candidates awaiting results were allowed by the public notice to sit for the Entry Test, therefore, ultimately the PMDC and the Admitting University did not stop any candidate from sitting in the Entry Test. In other words, the Petitioners before us are not aggrieved of that part of the Amended Admission Regulations which had prescribed the eligibility for sitting in the Entry Test. In the Entry Test, the Petitioner of C.P. No.D-6554/2019 secured 53.5%

marks and the Petitioner of C.P. No.D-6439/2019 secured 67% marks.

20. After the Entry Test dated 15-09-2019, notices were published in newspapers by LUMHS, the Admitting University in Sindh, inviting applications for admission to MBBS and BDS courses offered by medical universities/colleges in Sindh. The first notice was published for admission to universities/colleges in the public-sector, the process to commence from 23-09-2019 up till 14-10-2019. A separate notice dated 22-09-2019 was published for admission to universities/colleges in the private-sector, the process to commence from 02-10-2019 up till 21-10-2019. Both sets of public notices (read with a corrigendum) stipulated that the eligibility to apply for admission was that a candidate must have secured minimum 70% unadjusted marks in the F.Sc. (pre-medical) examination, and a minimum of "50%" marks in the Entry Test. It appears that the passing marks for the Entry Test had been relaxed in the Province of Sindh from "60%" to "50%".

21. At the time these petitions were filed, the process of submission of forms for admission to public-sector medical universities/colleges had already concluded. The Petitioners before us seek to apply for admission to a private-sector medical university/college. Their grievance is essentially that they have been denied the right to apply for an admission on the basis of the eligibility criteria of 70% F.Sc. marks which is prescribed by the Amended Admission Regulations.

22. Having seen that it is the Original Admission Regulations and not the Amended Admission Regulations that presently hold the field, and that under the Original Admission Regulations the Petitioners are eligible to apply for an admission to a medical university/college, the denial of the admission form to the Petitioners on the basis of the Amended Admission Regulations is unlawful. Needless to state that it will be merit that will eventually

determine whether the Petitioners succeed in an admission to a medical university/college.

23. In view of the foregoing, we decide these petitions as follows :

(i) In terms of Article 89(2)(a)(ii) of the Constitution of Pakistan, the PMDC Ordinance, 2019 stood repealed on 29-08-2019 when the Senate passed a resolution disapproving it, and consequently the PMDC Ordinance, 1962 was revived;

(ii) On 29-08-2019, when the PMDC Ordinance, 2019 was repealed as aforesaid, the Amended Admission Regulations also stood repealed and the Original Admission Regulations were revived;

(iii) On the repeal of the PMDC Ordinance, 2019 as aforesaid, the Council that had been constituted thereunder, which was differently constituted from the Council under the revived PMDC Ordinance, 1962, had also ceased to exist;

(iv) Subject to the directions that follows, we observe that after the repeal of the Amended Admission Regulations, the admission process carried on thereunder by the Council or the LUMHS under the PMDC Ordinance, 1962 or the PMDC Ordinance, 2019, was not *malafide* and can therefore be protected under the *defacto* doctrine;

(v) Section 50 of the PMC Ordinance, 2019 (gazetted on 21-10-2019) has the effect of saving the Original Admission Regulations until those are amended or substituted by the competent authority under the PMC Ordinance, 2019. Till such time, and save as what follows below, the on-going process of admission to medical/dental universities/college in Sindh shall be completed under the Original Admission Regulations;

(vi) The Petitioners, and other candidates in Sindh who are placed similar to the Petitioners, i.e. who have obtained a minimum of 60%

marks in their F.Sc. or equivalent examination, and a minimum of 50% marks in the Entry Test dated 15-09-2019 (the latter percentage was fixed in public notice by LUMHS inviting admission applications), and who are not otherwise ineligible under the Original Admission Regulations, are eligible to apply for admission to medical universities/colleges in Sindh for the session 2019-2020;

(vii) LUMHS is directed to issue public notice inviting admission applications within a specified time-line from candidates covered by para (vi) above, and to make all necessary arrangements as it deems fit and expedient for providing such candidates with an opportunity to submit an admission form to LUMHS at the earliest, be that on-line or manually. The Pakistan Medical Commission under the PMC Ordinance, 2019 (including any succeeding or superseding authority), is directed to facilitate LUMHS in that regard.

The petitions stand disposed off in the above terms.

JUDGE

JUDGE

Karachi
Dated: 14-11-2019