

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C)No.7208/2008

Date of Decision :May 3, 2011

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FAIZAN SIDDIQUI Petitioner

Through : Mrs. Gita Luthra, Sr. Adv. With Ms.
Akanksha Munjal, Adv.

versus

SASHASTRA SEEMA BAL Respondents

Through : Mr. AK. Bhardwaj and Mr. Gaurav
M. Librahan, Adv.

CORAM :-

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

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|--|-------------------|
| 1. Whether Reporters of Local papers may
to see the judgment? | be allowed
Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be
reported in the Digest? | Yes |

GITA MITTAL, J.

1. The instant case arises in unique facts relating to medical fitness of a female candidate seeking recruitment to Sashastra Seema Bal who had been diagnosed as suffering from a hormonal anomaly which is described as a 'Disorder of Sexual Differentiation' and had undergone the necessary surgery and thereafter placed on hormonal replacement therapy who has been found physically fit despite her having been found unfit in all evaluation tests. The medical unfitness was certified by the doctors of the Sashastra

Seemfa Bal who did not have expertise in the concerned field and without any expert opinion or scientific material.

2. The petitioner Faizan Siddiqui assails the rejection of her candidature for the post of Constable (General Duty) Female in the Sashastra Seema Bal (`SSB' hereafter) on grounds of medical unfitness by a medical examination conducted on 3rd February, 2008 and the review medical board conducted on 25th April, 2008.

3. The SSB had published an advertisement in the Employment News dated 24-30th November, 2007, also uploaded on the SSB website, inviting applications for appointment to 128 vacancies for the post of Constable (GD) Female to be filled from the UP State. Overall 763 vacancies were notified for various states and Union Territories. The recruitment notice informed the candidates that their place of duty would be anywhere within as well as outside the territory of India.

4. The selection procedure required the eligible candidates to appear in a recruitment test; to undergo screening for height and weight measurements and pass a Physical Efficiency Test (PET). A candidate was thereafter required to undergo a written examination of 50 marks and an interview of 15 marks to be eligible for the medical examination for assessment of medical fitness.

5. The petitioner was found eligible and was issued an admit card for the written examination conducted by the respondents on 28th January, 2008. She cleared the measurement stipulations. The

respondents state that between the 28th January, 2008 to 8th February, 2008, the petitioner qualified the physical standards test; physical efficiency test; as well as the written test and the interview at the SHQ, SSB, Gorakhpur.

6. It appears that at the age of 15, the petitioner had a complaint of swelling in her labia (private parts). She had got herself examined in the year 2002 about five years before the recruitment process at the Sanjay Gandhi Postgraduate Institute of Medical Sciences, a premier tertiary care referral hospital.

7. The petitioner's medical condition, treatment and the status of her fitness are best stated by her treating physician, Dr. V. Bhatia, a professor in the Department of Endocrinology, in the Sanjay Gandhi Post Graduate Institute of Medical Science at Lucknow who has summarised the petitioner's medical history and treatment in the certificate dated 12th May, 2008 as follows:-

“Faizan Siddiqui was seen by me in 2002, at age 15 years, for complaint of swellings in her labia (private parts). On examination, she had external gonads which appeared like testes, but no development of any male like sexual characteristics of her external genitalia. She had breast development and a feminine voice. The clinical suspicion of the disease Complete Androgen Insensitivity Syndrome was confirmed by the following tests: Karyotype 46 X Y, serum testosterone 1380 ng/dl, LH 15 IU/L. This is a condition where by birth, the action of male hormone on the body does not occur, so a baby who is born male has physical characteristics of a female, and throughout life develops like a girl, physically, mentally and psychologically.

After appropriate counseling with patient and her parents, a surgical opinion was sought and Dr.

Rakesh Kapoor, professor of urology at this institution, performed a removal of testes followed by vaginoplasty, in 2002. Since then, she has been on female hormones by tablet.

She is advised to take female hormone lifelong. She is not expected to have any serious illness as long as she is compliant with her medication. She can certainly have a normal married life, and her condition is compatible with any career a woman normally can undertake. However, she has been counseled that she will not be able to bear children in the natural way.

I am contactable for any clarifications or help in her matter."

(Emphasis supplied)

8. It would appear that under medical advise of the experts at the Sanjay Gandhi Postgraduate Institute of Medical Sciences, the petitioner is required to take female hormone replacement therapy by a daily oral tablet. The petitioner has placed before us a description of Hormone Replacement Therapy ('HRT' hereafter) and a copy of prescription of Dr. V. Bhatia dated 19th August, 2009 which show that the petitioner is taking 0.025 mg of the medication Lynoral every day. Lynoral is stated to be a birth control pill which is prescribed to minimize the risk of future ostrom.

9. The petitioner is thus stated to have been suffering from a hormonal anomaly which is described as a 'Disorder of Sexual Differentiation' ('DSD' hereafter). The surgical procedure undergone by the petitioner of removal of testes is described as a 'gonadectomy'.

10. As part of the selection process, on 3rd February, 2008 more than five years after being operated, the petitioner underwent the

medical examination as part of the selection process. She was informed that she had been declared medically unfit and her candidature was rejected without disclosing any grounds to her. The record of the medical examination conducted on 3rd February, 2008 placed before us discloses that the petitioner was declared medically unfit due to “congenital anomaly & pseudo hermaphroditism” by the Recruitment Medical Board.

11. In this background, the petitioner appealed against this declaration of medical unfitness to the Inspector General (Personnel) of the SSB with the following certificate dated 12th February, 2008 by Dr. V. Bhatia, endorsed thereon :-

“This is to certify that Faizan Siddiqui had a disorder of sexual differentiation (probable partial androgen insensitivity) for which a gonadectomy was necessary. This was performed 5 years back. Diagnosis and surgery were all performed at my hospital, Sanjay Gandhi PGIMS. Since then, she is on female hormone replacement by daily tablet. She follows up regularly in my OPD. She is in good general health; her weight is 55 kg and blood pressure 110/66 mmHg. I consider her fit for any kind of job or profession.”

(Emphasis supplied)

The fact that this certificate is endorsed on the form itself, manifests that Dr. V. Bhatia was aware that the petitioner was seeking employment with the respondent force and was certifying her fitness for the same.

12. The review medical board of the petitioner was conducted on 25th April, 2008. This Board rejected the petitioner's appeal on

grounds of medical unfitness endorsing the following remarks :-

“Psuedohermaphrodisism.
Congenital Anomaly
Vaginoplasty done”

As a result, the respondents rejected the petitioner's candidature for the said post.

13. It is pointed out that the petitioner had earlier filed a writ petition bearing WP (C) No.4016/2008. In this writ petition, the petitioner raised a question as to whether she can join the services of the SSB or not. The writ petition was filed before the petitioner knew of the grounds of her rejection in the review medical examination on 25th April, 2008. In this background, the writ petition was disposed of by an order passed on 26th May, 2008 with a direction to the respondents to forward copy of the Review Medical Examination to the petitioner within a period of one month from the date of passing the order to enable her to take necessary action.

These proceedings were forwarded to the petitioner under cover of a letter dated 19th June, 2008 and have been annexed with the writ petition.

14. In view of the petitioner's grievance that the respondents had failed to inform her about the reasons for her rejection by the first board, we had called upon the respondents to also produce before us the relevant records. The respondents have placed before us the original records relating to the medical examination of the

women candidates on 3rd February, 2008 and the further consideration. The same have been perused.

15. It appears that a representation made by the petitioner was also pending consideration with the respondents. It has been contended that in view thereof, the respondents had reconsidered the matter at the highest level. The record of this consideration has also been placed before this court. Shri S.K. Bhagat, Inspector General (Personnel) of the respondents who was considering the representation observed that though the petitioner is a normal female now, yet she is on regular hormonal medicine lifelong as per the medical summary given by Dr. V. Bhatia. He consequently, sought the advise of the Additional Director General (Medicine) CPMF on the issue. In this regard, Shri S.K. Bhagat recorded as below :-

*"3. Since, the matter is of a Medical fitness of candidate, the ADG Medical (MHA) can advice on the fitness or otherwise of the individual as this is a rare case where the petitioner **had undergone surgical operation for congenital sexual disorder**. Though, **she is a normal female now**, yet she is on regular hormonal medicine lifelong as per medical Summary as given by Prof. Vijayalakshmi Bhatia, Pediatric Endocrinologist, Deptt. Of Endocrinology Lucknow (UP)-226014 dated 12/05/2008 (Copy enclosed for ready reference) **(Flag-D)**.*

4. Keeping in view of the facts enunciated above, SSB is of the view to seek the advice of Addl. DG (Medical) CPMFs on this issue so as to apprise the petitioner."

16. The opinion rendered by Dr. K. Bhushan, Additional Director

General, CPMFs Ministry of Home Affairs dated 28th August, 2008 as an expert on this query, has been placed before us pursuant to our directions and deserves to be considered in extenso. The same is extracted below:-

*“Ms. Faisan Siddiqui as per medical record available is a **true hermaphrodite** as she is having both ovarian and testicular tissue. She has Karyotype 46 XY. The phenotype varies depending on a proportion of XY Cells and their distribution. Genetic sex is determined by the presence or absence of Y chromosomes. No matter how many X chromosomes are present, a single Y chromosome dictates testicular development and the genetic male gender. Ms. Faisan Siddiqui has undergone surgery for removal of testes followed by Vaginoplasty. She will have to remain on female hormone life long and **she may remain disease free as long as she is compliant to medication**. **Although she may have a normal married life yet she will not be able to bear children in natural way which may lead to adjustment problems in latter life**.*

*As it is apparent from the above discussion that Ms. Faisan Siddiqui **is not a healthy fighting fit female candidate** for recruitment in Armed Force and that she has to remain on medication through out her life failing which **she may develop serious illnesses and change in her sexual characteristics**. Therefore she is not fit for combatant duties in Armed Forces.”*

(Underlining supplied)

Petitioner's contentions

17. The petitioner has assailed the decision of the medical boards including the review medical board as well as the rejection by the respondents premised thereon contending that the respondents' decision declaring her unfit for service on medical grounds were

based on no material at all and were contrary to expert evaluation. The petitioner also contends that in view of her fitness, the decision rejecting her candidature has no nexus to the objective of the selection process of ensuring physical and medical fitness in recruits. It is contended that the decisions of the respondents are based on assumptions which were without any basis in fact or scientific evidence. It has further been urged that the declaration of her medical unfitness in the medical examination conducted on 3rd February, 2008; the review medical board on 25th April, 2008 and the opinion dated 28th August, 2008 of Dr. K. Bhushan, ADG, was not by persons who had the relevant expertise. It is consequentially urged that the decision of the respondents is irrational and arbitrary.

Respondents contentions

18. The respondents have contested the claim of the petitioner. Reliance is placed on the record of the medical examination and the review medical examination and the opinion of Dr. K. Bhushan. Mr. A.K. Bhardwaj, learned counsel for the respondent has also placed extensive reliance on the regulations governing medical examination to contend that the very fact that there was an issue of a congenital anomaly, rendered the petitioner medically unfit for recruitment.

Questions arising for adjudication

19. In the above facts, the questions which arise may be summed

up thus :-

(i) The first question which begs an answer is whether the decision of the respondents is based on relevant and material evidence which has been rationally considered.

(ii) The second question which arises for consideration is whether the rejection of the petitioner's candidature was premised on the reasonable objective of medical fitness for recruitment which is sought to be achieved by the respondents and therefore was not arbitrary or discriminatory.

(iii) The third question which requires to be considered is as to whether the petitioner's medical fitness has been fairly and appropriately evaluated by the competent persons. In other words, did the SSB adopt a fair, just and reasonable procedure as prescribed in conducting the medical examination/evaluation of fitness of the petitioner.

These questions may be considered in seriatum.

(I) Whether the decision of the respondents is based on relevant and material evidence?

20. It is trite that an administrative order could be held to be based on relevant material if it is duly supported by relevant material. Such an administrative order cannot be made the subject of judicial review.

21. To support a decision, the record relied upon by the respondents must also disclose that the decision was based on

substantive evidence which has been duly considered and justifies exclusion of the petitioner from the service.

22. Mr. Bhardwaj, learned counsel for the respondents has contended that the Medical Recruitment Rules set out aspects of the 'general examination' as well as the 'general grounds' of rejection of candidates. The relevant portion of these rules reads as follows:-

"General Examination

3. **While examining** the candidates (he/she) principal points which need careful attention are as under:

a) xxx xxx xxx

k) Should not **have** congenital malformation or defects.

xxx xxx xxx

h) He/She should **have** no inguinal, scrotal swelling.

General Grounds for Rejection

4. Candidates (Male/Female) presenting with any of the following conditions will be rejected:

xxx xxx xxx

q) Any congenital abnormality."

(Emphasis supplied)

Other than this reference to 'congenital malformation' and 'congenital anomaly', no other rule, regulation or guideline could be pointed out by the respondents.

23. Before proceeding any further, it is essential to understand

the meaning and impact of 'congenital malformation' and 'congenital abnormality'.

24. 'Congenital malformation' or defect or abnormality is any malformation of the body whether physical, mental or psychological, which is a deviation from the normal and is present at birth.

25. A genetic malformation is an abnormality in the genes and may manifest at birth or later in life or not at all. Congenital malformation could be due to a number of causes which may be genetic, environmental or a combination of both.

26. It is important to note that congenital malformation may be minor, causing little or no impairment. For instance, the same could be in the nature of a port wine stain of the face; an extra nipple on the chest; a short fourth finger; an extra finger or other abnormal facial or bodily features; formation of breasts in a male; formation of male genitalia in a female etc.

Some such defects as in the nature of a cleft lip or a cleft palate etc may be totally correctable. Other defects may cause serious impairments as in the nature of mental retardation, severe physical abnormalities, increased incidence of cancer etc.

27. It is also important to notice that existence of a particular condition in a candidate would not ipso facto render such candidate unfit for discharging the assigned duties in the service.

28. The meaning of the expression "congenital malformation" in

the standards appointed by the respondents cannot be interpreted generally or so broadly so as to include even such minor defects that do not impact functional efficiency in any manner. The same have to be of such a nature so as to impair the normal expected functioning of an individual. There are occasions when a man may develop female like breasts known as “gynaecomastia” and may undergo surgical correction. The respondents would not assess such a man as medically unfit for recruitment.

29. The respondents are conscious of these aspects and consequently their guidelines carefully utilised the expression “have” the defect which the examining doctor would give attention to “while examining the candidate”.

The aspects thus which are required to be kept in mind by the medical experts while examining the candidate specifically state that the candidates should not have a congenital malformation or defect nor any disease of genito urinary tract at the time of medical examination. The candidate presenting with such defects to the doctor examining the candidate would require to be rejected.

30. Learned counsel appearing for the respondents has also drawn our attention to an extract of the **Medical Recruitment Rules** which also manifest the above. It is pointed out that these rules inter alia contain the following directions :-

“General Examination
3. While examining the candidates (he/she)

principal points which need careful attention are as under :

Xxx

*(e) Should **not have** perceptible and visible glandular swelling any where in the body.*

Xxx

(k) Should not have congenital malformation or defects.

Xxx

*(n) He/She **should have no** disease of the genito urinary tract."*

31. These rules also contain certain 'General Grounds for Rejection', the material terms and instructions for examination of female candidates whereof read as follows :

"General Grounds for Rejection

4. Candidates (Male/Female) presenting with any of the following conditions will be rejected :

Xxx

(q) Any congenital abnormality.

23. General instructions for examination of female candidates

Xxx

2. Pregnancy at the time of PET will be a disqualification and pregnant female candidates will be rejected.

Female candidates should be properly examined for any lump or diseases of breast, and Genitourinary system after taking proper consent and in presence of female attendants."

32. Perusal of these rules also show that the respondents have themselves recognised that there may be certain conditions rendering a person temporarily unfit or which may be correctable. In para 22 of these rules relating to chronic skin diseases, the respondents have stipulated that a candidate suffering from pityriasis versicolor should be declared temporary unfit and advised treatment for 2-3 weeks after which he/she should be reviewed. It

is only if the candidate is not cured should he be rejected.

33. The respondents have also recognised that merely existence of a particular condition may not render a person unfit for recruitment. It notes that there may be defects which would not interfere with the efficiency of a candidate as a soldier in the future. In this regard, in para no. 5 of the medical recruitment rules, it is stipulated as follows :-

"5. Acceptance of candidates suffering from trifling defects :-

Candidates presenting with mild degree of the following defects may be accepted :-

- (a) *Slight degree of varicocele*
- (b) *Bowleg with separation of internal malleoli for less than 7 cms. Slight curvature of leg is normal and can be accepted.*
- (c) *Slight knock knee with a separation of less than 5 cm of internal malleoli*
- (d) *Perforation in the ear drum which **has healed** and closed leaving a firm healthy scar provided there is no hearing impairment.*
- (d) ***Healed** trachoma without residual gross deformity and no impaired vision*
- (e) *Mild hammer toe*
- (f) **Any other slight defect which in the opinion of the Recruiting Medical Officer will not interfere with the efficiency of a candidate as a soldier in future.**

The foregoing relaxation is permissible only in the case of candidates who conform to the prescribed level of measurements.

6. In all cases where a candidate suffering from a trifling defect is accepted the Recruiting Medical Officer should fully satisfy himself that the defect will not in any way affect the efficiency of candidate as a SI and the defects should be noted in the recruitment form."

34. The instructions relied upon by the respondents themselves

prescribe that the prohibited conditions and defects which must exist on the date of the medical examination. The instructions use the expressions 'have' and 'at the time of the examination'. Conclusions of unfitness cannot rest on the past history alone or on presumptions. Additionally, the respondents have prescribed relaxations and provided that candidates presenting with mild degree of the specified defects as well as any candidates suffering from any other slight defect which in the opinion of the Recruiting Medical Officer will not interfere with the efficiency of a candidate as a soldier in future may be accepted.

35. The petitioner's treating specialist has stated that the petitioner is having "Complete Androgen Insensitivity Syndrome" ('CAIS' hereafter). This is explained in medical literature which points out that normally the child growing inside the mother develops as a female child. The presence of the chromosome Y (present in the genetic male child) causes the formation and release of certain hormones and substances that help the growing child to develop into a male child.

36. Medically, 'sex' is considered to have various connotations including the genetic sex, phenotypic sex and psychological sex. Every person has 46 usual chromosomes and two sex chromosomes. If a person has XX sex chromosomes, then one develops as a female. If the person has an XY chromosome combination, then one develops as a male. This is genetic sex, the

genes determining which sex a person will be. This combination results by activation of certain hormones at crucial stages of the development process, resulting in various organs developing in a particular manner resulting in the explicit features of a male child.

The other corollary is that the hormones must act on specific receptors and internally produce the expected results. If the internally expected results do not occur due to the resistance of the receptors to the hormones in question, the result will still be a female child despite the child having an XY-sex chromosome structure. This outward manifestation of the sex that develops from the internal expression of the sex chromosomes results in what we call the 'phenotypic sex'.

37. To state this simply, to develop as a male, the hormones produced must act on certain tissues which then manifest changes. Absence of any response to the hormones results in the development of female characteristics inspite of having an XY sex chromosome structure.

38. So far as the petitioner is concerned, she has an XY-sex chromosome profile. However, the hormones produced did not result in the expected internal changes in the tissues that form organs that specifically distinguish male from females. This could be because the receptors on which they were to act were defective. She was insensitive to the hormones produced. It was as if no hormones were produced at all. So despite her genetic

chromosome profile, she expressed phenotypically as a female. She has also psychologically developed as a female.

39. Some rudimentary congenital defects, however, occurred later in the petitioner. These included rudimentary (non-functional) testes. As per her treating specialist, these rudimentary congenital defects were removed ('gonadectomy') and an artificial vagina created surgically ('vaginoplasty'). It is an admitted position that the petitioner had undergone the corrective surgery in the nature of a gonadectomy. The specialist had confirmed that the petitioner had no development of man-like sexual characteristic of her genitalia. The doctor had observed that not only her condition was compatible with any career which a woman could normally undertake but she could even have a normal married life. According to the medical documents and the expert report, the defects thus stand surgically corrected. So any malformation which had occurred, clearly stood corrected in the petitioner and was not existing at the time of her medical examination.

40. The only difference now between the petitioner and any other female thus is that she does not possess ovaries and so cannot produce the female hormones. Due to this she has to be on long term female sex hormone replacement therapy, which necessitates the intake of one hormone replacement therapy tablet daily. All other characteristics, physical and mental, are those of a normal woman. There is no dispute to this fact.

41. The respondents have declared Faizan Siddiqui medically unfit for service because of a congenital anomaly even though she met all the specified criteria for physical fitness.

42. We find that the petitioner has been labelled as a 'psuedo hermaphrodite' in the medical examination dated 3rd February, 2008 and the review medical examination on 25th April, 2008. Dr. K. Bhushan, the ADG (Medicine) in his comments dated 28th August, 2008 has gone further and labelled the petitioner as a 'true hermaphrodite'. These comments have an inherent contradiction.

In the counter affidavit, the respondents state that the petitioner was declared unfit due to "congenital anomaly? Psuedo hermaphrodism? Post operative Sequelea?" by the Recruitment Medical Board. The petitioner was declared medically unfit as a result of these comments.

43. Interestingly, none of the doctors, including Dr. K. Bhushan, physically or medically examined the petitioner. The opinions are also not rendered on any test(s) performed on the petitioner. No investigation was effected. The opinions and findings do not make any reference to any scientific texts in support. None of these comments disclose the basis of such findings.

44. In the medical summary drawn up by Dr. V. Bhatia, the treating specialist, clearly explained the petitioner's medical condition; the surgery performed on her as well as her treatment pointing out that the petitioner could even have a normal married

life and her condition was compatible with any career a normal women can undertake.

45. The Additional GM (M) has arrived at a conclusion that the petitioner is not a fit candidate for recruitment in armed forces and further concluded that upon failure to take the prescribed medication, the petitioner "may develop serious illnesses and change in her sexual characteristic". Admittedly, there is no illness or condition at present. No basis for this conclusion is disclosed.

Presumed side effects

46. The consideration by this court, however, cannot end here in view of the position taken in the counter affidavit before this court. In para 4 of the counter affidavit which is filed, the respondents have contended that the ADG (Medical) of the CPMF opined that the case of the petitioner was also examined by the Medical Directorate of the respondents organization which was of the view that as the applicant is regularly taking "cortisone and hormonal medicine", it would have "adverse reaction in due course of time" and shall "effect performance and endurance of individual" which would not be good for the force. It has been concluded therefore that she was not fit for combatised duties in the armed forces.

47. This stand in the counter affidavit is unfortunately also not supported by any scientific study, material or explanation.

48. We have carefully scrutinised the record which has been

produced before us. In addition to the aforementioned certificate dated 12th May, 2008 by Dr. V. Bhatia, we find that on the petitioner's application for the review medical examination, Dr. V. Bhatia has endorsed the abovenoted comments on 12th February, 2008 clearly pointing out that the petitioner was only on female hormone replacement therapy by a daily tablet. The prescriptions placed before us show that the petitioner is taking 'lynoral' as the medication prescribed from time to time.

49. No other material is available on record. There was therefore nothing at all before the respondents to suggest that the petitioner was required to take daily cortisone.

50. In view of the information disclosed by the respondents in respect of the opinions of the medical boards as well as that of Dr. K. Bhushan, the petitioner has placed a certificate dated 23rd July, 2010 issued by her treating specialist Dr. V. Bhatia, again which explains and certifies as follows :-

“ *To Whom It May Concern*

23 July, 2010

This is to give information about the hormone treatment that Faizan Siddiqui is receiving and should continue to receive. She has been under my care since 2002. She is on daily tablet of Lynoral, which is a type of female hormone, estradiol. All women have estradiol produced in their body by the ovary. Those who have a deficiency, failure or absence of the ovary must take the hormone in the form of a medicine. Female hormone has beneficial effects on the body, protecting and preserving female characteristics as well as bone strength. Estradiol is not cortisone or cortisol. In a person who is deficient in estradiol, administration of the

hormone by medical is not expressed to produce any side effects. The tablet is very stable, and can be purchased in bulk and stored in the house for a year or more, till the expiry date on the tablet.

I am contactable for any clarification or help in her matter.

Sd/-
Prof. Vijayalakshmi Bhatia”

(Emphasis supplied)

51. The counter affidavit refers to effects of “cortisone and hormonal medicine” which “may result in due course of time”. There is no material which even remotely suggests that the petitioner is taking “cortisone” as part of her treatment. Additionally, there is no opinion of any doctor that the condition of the petitioner or the medication has impacted her physical fitness at the time of her medical examination, review examination or on 28th of August, 2008 when Dr. Bhushan has evaluated her condition or when the counter affidavit was filed.

52. The petitioner is stated to be requiring a daily oral dose of 'lynoral'. The respondents have not made any scientific evaluation of the side effects of this medication in CAIS inflicted individuals. The medical literature placed before this court by the petitioner would show that this is in the nature of an oral contraceptive and is not a cortisone or a steroid. There is nothing to suggest that this medication has adverse side effects on the medical fitness of a personnel to perform duties which may be assigned to her in the para military force.

53. In the given facts, the respondents have considered 'lynoral' as a 'cortisone' or 'steroid', which is technically incorrect. There is nothing to support the expressed concerns about the debilitating side effects of lynoral.

54. The likelihood of the occurrence of the side effect from consumption of a prescribed medication and its severity may be a relevant consideration for assessing whether the daily medication would incapacitate the petitioner.

55. However, the respondents have defended their action on the vague statement that the petitioner "may develop serious illness" without even being aware of the medication being taken by the petitioner or being informed about the illness which the petitioner could suffer therefrom. It is trite that medical science is not a definite science and that merely because a person is on prescribed medication, there is no presumption that adverse side effects must necessarily result. There is no basis disclosed for the view that the petitioner's medication must necessarily result in any adverse reaction or serious illness.

56. As a result of the erroneous assumption that the petitioner had to take an oral dose of steroid, the respondents have obviously arrived at a wrong conclusion of the consequential side effects. The concerns of the respondents, thus, about the side effects of the petitioner's medication also are pure conjectures without any

scientific basis or evidence. Presumptions and innuendos of side effects of medication which have no scientific basis cannot be a ground for rejecting the candidature of a person for service. Clearly the inexperience in the clinical management of Disorders of Sexual Development (abbreviated as 'DSD') of the medical boards which examined the petitioner has lead to the arbitrariness in the manner in which the petitioner has been treated.

57. Learned counsel for the petitioner has pointed out that the purpose of the prescribed daily medication is only for maintaining the bone health of the petitioner and merely decreasing the risk of osteoporosis. It has been urged that it is even unclear to medical science, as to whether missing medication would result in the likelihood of developing fractures.

Osteoporosis is associated with the tendency to increased fractures. There is no confirmed study that compliance with the HRT regime does not always relate to poor compliance with the prescribed medication or to the timing of the gonadectomy. These issues are still in the areas of scientific research.

It needs no elaboration that so far as bone health or osteoporosis is concerned, there is nothing to suggest that the same may not occur in a personnel who was not afflicted with CAIS or was found without a medical problem at the time of recruitment.

58. Ms. Aakanksha Munjhal, learned counsel for the petitioner has

also placed reliance on certain judicial pronouncements of courts in other jurisdictions. Ms. Munjhal has referred to the judgment given by the United States District Judge James Robertson of the United States District Courts for the District of Columbia in Civil Action No. 05-1090 (JR) Diane J. Schroer vs. James H. Billington. This judgment was rendered in a case where the petitioner was denied employment by the Library of the Congress for the reason that she was transitioning from male to female. Schroer was well qualified for the job with which she had applied. At that time, she was diagnosed with “gender identity disorder” and was working with a licensed clinical social worker to develop a medically appropriate plan for transitioning from male to female. Because she had not yet begun presenting herself as a woman on a full-time basis, she applied for the position as 'David J. Schroer', her legal name at that time. She had proposed to begin the phase of her gender transition and presenting as a woman on a full-time basis after her interview and prior to joining the offered position.

59. It was held in this case that refusing to hire the petitioner because of her appearance and background did not comport with the decision maker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition-legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition of sex discrimination.

60. Learned counsel also places reliance on the judgment dated 30th April, 1996 of the European Court of Justice in Case No. C-13/94 entitled P v S and Cornwall County Council. This case raised an issue of dismissal of P on the ground of P's proposal to undergo gender reassignment. The court reiterated that there should be no discrimination arising on grounds of sex. The European Court also reiterated its earlier held principle that the right not to be discriminated on grounds of sex is one of the fundamental rights, whose observance, the court has a duty to ensure. In this background, the European Court of Justice observed as follows :-

“20. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the court has a duty to safeguard.”

61. Learned counsel for the petitioner has also drawn our attention to the judgment dated 3rd April, 2008 of the United States District Courts in Civil Action No. H-06-3999 entitled Izza Lopez

a/k/a Raul Lopez v. River Oaks Imaging & Diagnostic Group, Inc. In this case, a transgender job applicant was offered the position which offer was rescinded because she had 'represented' herself as a female'. The judgment was pronounced by Nancy F. Atlas, District Judge holding that the petitioner had contended that there was no legal duty to reveal her Gender Identity Disorder (GID) and accordingly, her male biological sex, to a prospective employer, absent evidence that her sex was a bonafide occupational qualification for the position she applied for and was offered. It was urged that rescinding the job offered on the ground that she was transgendered was in violation of Title VII.

62. Title VII provides that "it shall be an unlawful employment practice for an employer.....to discriminate against any individual.....because of such individual's sex." Through reference to case law, the contours of this prohibition against sex discrimination had been defined to include discrimination against individuals who fail to conform with traditional gender stereotypes. In this case, the court concluded that the plaintiff had stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes.

63. In the case in hand, there is no dispute that the petitioner is a female candidate and has been so treated for all purposes. The denial of employment is also not on such ground. The issue raised in the instant case is that the respondents' conclusion of the

petitioner's medical fitness is based on a complete misunderstanding about her medical status and medication. The above judgments would therefore have no relevance.

64. Learned counsel for the petitioner has also placed reliance on the ***Extract from the Report on the World Social Situation, 1997, Chapter VIII of the United Nations Expert Group Meeting on Managing Diversity in the Civil Service*** on the 3rd and 4th May, 2001 at the UN Headquarters at New York. The report has been presented by Larry Willmore from the United Nations Department of Economic & Social Affairs in the context of persons who have undergone sex change operations. In the instant case, it is nobody's case that the petitioner had ever presented herself as a male or that she has undergone a sex change operation.

65. In a given case, it may be urged that there is extrinsic evidence to support the respondent's decision to exclude a candidate as the petitioner from service. As noticed above, in the instant case, the respondents have proceeded on a totally erroneous basis so far as the petitioner's medical condition, treatment and medication is concerned.

66. The medical summary by Dr. V. Bhatia was the only material available to the doctors. Dr. Bhatia had repeatedly endorsed that the petitioner was a normal female and would even be able to have a normal married life though she would not be able to bear children

in the natural way.

67. The comments of the said doctors who evaluated the petitioner's fitness in the recruitment process clearly suggest that no reliance was placed on Dr. V. Bhatia's evaluation.

68. The rejection of medical fitness of the petitioner premised on observations that she is a "pseudo hermaphrodite" or "true hermaphrodite" or suffering from "sequelae" or that the petitioner's "sexual characteristics will change" thus are based on no material, let alone relevant evidence or material and are completely unsustainable from any angle.

(II) Whether the respondents decision to reject the petitioner's candidature based on a congenital anomaly was actually connected to the objective of medical fitness for service and therefore was not discriminatory or arbitrary?

69. The Sashastra Seema Bal is a para military force which is involved in securing the border states of the country. Its personnel perform such tasks which can be fulfilled only by physically fit personnel who are to be motivated by national security. Therefore, the evaluation of a person's fitness has to correlate to the objective of recruiting personnel who are able to perform the rigorous duties assigned to them.

70. It needs no elaboration that there can be no compromise in the standards of medical fitness inasmuch as national security has to be placed on much higher pedestal than any interest of the individual seeking recruitment.

71. There can be no dispute at all that the respondents have the right to prescribe recruitment criteria which would be motivated by interests of national security. SSB is a paramilitary force involved in securing the border states of India and its personnel perform arduous tasks which can be fulfilled only by physically and mentally fit personnel. Thus, so far as the intendment of the criteria is concerned, it cannot be disputed that the same is a valid and a clearly intelligible motive.

72. The question which the petitioner agitates is as to whether the rejection of her candidature on the ground of medical unfitness had any rational connection to the objective of recruiting fit personnel who were able to withstand the rigors of service and that the decision was not arbitrary. The respondents are therefore required to show that it had taken a rational decision in concluding that the petitioner's disorder would interfere with the duties assigned to a female constable.

73. Learned counsel for the parties could place no specific rules, regulations or guidelines with regard to persons who may have suffered Disorders of Sex Development ('DSD') as the petitioner. No instances could be placed of evaluation of their medical fitness for recruitment.

74. We find however that instances of persons with DSD have arisen and been considered by sports and athletic federations as

well as military organisations in other jurisdictions. Several of them have formulated policies to deal with such concerns.

75. Valuable light is shed on the consideration of similar issues by international sports bodies. The respondents must confer consideration on the issue and development of a fair approach in dealing with recruits who may be diagnosed with the DSDs so far as the norms which they must apply in India are concerned for recruitment to the force.

76. ***The Consensus Statement on Intersex Disorders***, formulated at the International Intersex Consensus Conference, states that all patients with 46, XY CAIS who are assigned female sex in infancy identify as females. The petitioner is of the female sex and so treated by the respondents. The developments did not cause the petitioner to experience any psychological discomfort that may afflict other persons as has been in issue qua other groups including transgenders. (Ref: ***Summary of Consensus Statement on Intersex Disorders and Their Management, Pediatrics Vol 118 No.2, August 2006, pp. 753-757***). We may not be considered as having rendered an opinion on the eligibility or fitness of transgendered persons in forces hereby as this is not in issue before us.

77. The ***International Olympic Committee's Stockholm Consensus Statement***, has concluded that individuals who are

diagnosed with androgen insensitivity disorder may compete as females at sporting events if they so wish; and that androgen insensitivity does not accord competitive advantage over other women competitors. (Ref : **Statement of the Stockholm Consensus on Sex Reassignment in Sports, IOC Medical Commission, 2003, available at:** <http://www.fims.uwo.ca/NewMedia2008/page1772927.aspx>.)

78. The International Olympic Committee allows even individuals who have undergone sex reassignment from male to female after puberty (and the converse) to be eligible for participation in female or male competition, if the surgical anatomical changes have been completed; legal recognition of assigned sex has been conferred by appropriate authorities; and hormone therapy has been administered for a verifiable amount of time so as to minimize competitive advantage from gender reassignment, if any. The Committee recommends that sportspersons should be eligible to compete two years after gonadectomy. Every case will be examined and evaluated confidentially in accordance with the above policy. Thus as per the **International Olympic Committee of 2003**; the **Statement of the Stockholm Consensus on Sex Reassignment in Sports**, androgen insensitivity does not accord competitive advantage over other women competitors and individuals who are diagnosed with the androgen insensitivity disorder may compete as females at sporting events if they so

wish.

79. Several studies conducted by other governments contradict the respondents' speculation of the medical and physical unfitness of a CAIS afflicted person per se premised on such affliction. In fact, the studies emphasise the similarity between individuals diagnosed with CAIS and ordinary women.

80. It is noteworthy that the para military forces did not always employ women candidates. This phenomena is relatively new and the respondents have themselves prescribed special guidelines and procedures for deployment of women personnel.

81. It is also necessary to understand the duties which are assigned to women personnel in the force. Fitness is to be evaluated in relation thereto.

82. Mr. A.K. Bhardwaj, learned counsel appearing for the respondents has also placed before us the **Guidelines in respect of amenities/deployment of Mahila Coys in BSF/ITBP/SSB** issued by the Ministry of Home Affairs circulated in December, 2008. Perusal thereof would show that the respondents have caused segregation of the SSB's mahila (female) personnel by the Combined Police Forces ('CPF' hereafter). These guidelines even provide that women gazetted officers should accompany such mahila personnel who are deployed for late night duties when they return to the camp.

83. The respondents have placed before this court the **Circular no.1/SSB/Ops/2008/2008(156)/1476-1551** dated **20th April, 2009** issued by the Ministry of Home Affairs of the Government of India relating to the “deployment and duties” of the Mahila Coys of the SSB. This Circular provides guidelines and lays down the following essential duties to be assigned /performed by the Mahila Company:-

- (i) *To carryout search/frisking of women at Integrated Check Posts”, Immigration points and trade routes and at other places along the Indo-Nepal and Indo-Bhutan borders.*
- (ii) *To prevent trans-border trafficking of women and children.*
- (iii) *To carryout relief and support activities in situations like natural calamities, riots/communal flare-ups, elections etc.and for providing succor to the victims.*
- (iv) *To be kept as a striking reserve during festivals, meetings, agitations etc.*
- (v) *Static guard at SSB establishments as and when required.*
- (vi) *To be deployed and discharge duties as ordered by MHA/D.G., SSB from time to time.*
- (vii) *As per MHA sanction order dated September 14, 2007, the Mahila component will be deployed with minimum of a Platoon strength. However, when deployed on static guard duty in less sensitive areas, they may be in less than a Platoon strength, provided their accommodation is at a single place for the entire platoon. Mahila personnel should not be accommodated in ones and twos.*
- (viii) *Female supervisory staff should be deployed alongwith the Coys to the extent possible/available.*
- (ix) *As far as possible, deployment during night hours should be avoided. If unavoidable, proper arrangements regarding security and logistics (especially toilets and bathrooms)appropriate for women contingents should be ensured.*
- (x) *The Mahila Coys will undergo AIRT and other training programmes as per the guidelines issued by the Training Directorate from time to time.*

84. The above guidelines and circulars would show that the respondents treat their women personnel as a special category and have drawn a distinction between duties which would be assigned to male and female candidates. The assessment of medical fitness is also thus to rest on evaluation premised on this distinction.

85. The eligibility conditions for the post prescribed physical standards in terms of height, weight and eye sight.

86. The recruitment notice states the following as part of selection procedure :-

"4. Selection procedure :

(i) The eligible candidates shall be issued Admit Card to appear in the recruitment test. The date and place of recruitment test will be indicated in Admit Card. Candidates will have to undergo the following tests :

(a) Physical Measurement: Candidates found eligible in documentation will be screened first for height and weight measurements.

(b) Physical Efficiency Test(PET) (25 Marks): The candidates who are found eligible as per physical efficiency test consisting of following events:-

- i) 800 metre race in 4 minutes
- ii) Long jump: 9 feet (3 chances will be given)
- iii) High jump: 3 feet (3 chances will be given)

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(v) Medical Examination

The candidates will be medically examined to assess their physical and medical fitness as prescribed in the eligibility conditions. Medical examination will be conducted after the interview."

Additionally, the notified 'General Standards' required for recruitment clearly stated as follows:-

*“Candidates must not **have** knock-knee, flat foot, varicose vein or squint in eyes and they should possess high colour vision. They must be in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of the duties. They should conform to the medical standards prescribed by the Force and should be declared fit by the Medical Officers of the SSB. The medical certificate obtained from elsewhere will not be entertained. In the event of any doubt or dispute decision of SSB shall be final.”*

(Underlining by us)

These standards are in consonance with the spirit and intendment of the respondents to recruit persons capable of discharging assigned functions. From the above discussion it is evident that a congenital malformation may be present in a person without causing any functional deficiency or disability or mental abnormalities.

87. On this issue, the observations of the Supreme Court in ***Air India vs. Nargesh Meerza*** reported at ***AIR 1981 SC 1829*** placing reliance on earlier pronouncements including those of the US Supreme Court while dealing with the factors to be considered while fixing the retiring age of airhostesses (AH) may be usefully adverted to and read as follows :-

“100. The next provision which has been the subject matter of serious controversy between the parties, is the one contained in regulation 46 (i) (c). According to this provision, the normal age of retirement of an AH is 35 years which may at the option of the Managing Director be extended to 45 years subject to other conditions being satisfied. A similar regulation is to be found in the Rules made by the I.A.C. to which we shall refer hereafter. The

question of fixation of retirement age of an AH is to be decided by the authorities concerned after taking into consideration various factors such as the nature of the work, the prevailing conditions, the practice prevalent in other establishments and the like. In *Imperial Chemical Industries (India) Pvt. Ltd. v. The Workmen*(1) this Court pointed out that in fixing the age of retirement, changing the terms and condition of service, the determination of the age on industry-cum-region basis would undoubtedly be a relevant factor. In this connection, Gajendragadkar, J. made the following further observations:

"There is no doubt that in fixing the age of retirement no hard and fast rule can be laid down. The decision on the question would always depend on a proper assessment of the relevant factors and may conceivably vary from case.

101. Similarly, in an earlier case in ***Guest, Keen, Williams Pvt. Ltd. v. P. J. Sterling and Ors.*(1960) 1 SCR 348 : (AIR 1959 SC 1279)** this Court made the following observations (at p.1287 of AIR):

"In fixing the age of superannuation industrial tribunals have to take into account several relevant factors. What is the nature of the work assigned to the employees in the course of their employment.. What is generally the practice prevailing in the industry in the past in the matter of retiring its employees'? These and other relevant facts have to be weighed by the tribunal in every case when it is called upon to fix an age of superannuation in an industrial dispute."

102. It is, therefore, manifest that the factors to be considered must be relevant and bear a close nexus to the nature of the organisation and the duties of the employees. Where the authority concerned takes into account factors or circumstances which are inherently irrational or illogical or tainted, the decision fixing the age of retirement is open to serious scrutiny."

(Emphasis supplied)

88. The standards prescribed by the respondents clearly prescribe that any present medical defect or malformation that can

reasonably impair the carrying out of the stated job description is certainly valid, but anything more is clearly discriminatory and unreasonable.

89. Medical standards needed for the performance of specific jobs need to be rationally read and interpreted. Reasonable medical standards help carrying out the required job functions with ease. Insisting on or interpreting a medical condition or standard in a manner that has no relationship with the level of medical fitness required to perform the stated job description is really not necessary and may even be discriminatory.

90. The record placed before this court also shows that the respondents have noted that one of the reason for rejecting the petitioner's candidature was that the persons diagnosed with CAIS cannot bear children naturally which "may lead to adjustment problems in latter life".

91. A reason for exclusion from service must bear a connection with the prime consideration of fitness for the service. Infertility is certainly not a listed ground for rejection of an individual's candidature from the service. No such condition has been stipulated for men or women candidates. The respondents rightly do not suggest that CAIS related infertility status plays any part in determination of the person's fitness or capacity for performing the assigned duties with the SSB. That this fact and issue is irrelevant

is apparent from the reality that the respondents also do not raise this question when male candidates are be examined for fitness to join the service.

In this background, it has to be held that infertility or inability to bear children normally plays no role at all in determining fitness for service.

92. The petitioner places reliance on several certificates of merit secured by her in sports competitions in which she had participated while at the Suman Singh Inter College at Allahabad in the year 2003. This was barely one year after the said surgery.

93. In fact, it is an admitted position that the petitioner has successfully completed the physical efficiency test. The record produced by the respondents before us contains the marks secured by the candidates. This record discloses that even in the physical efficiency test, written test and interview conducted as part of the recruitment procedure, the petitioner was placed at the top in the merit list which was drawn up by the respondents.

94. The medical examinations of the petitioner by the two boards conducted by the respondents or even the highest authority which have examined the same, do not state that the petitioner was physically unfit for performance of any of the duties which may be assigned to a mahila personnel in the SSB. The respondents also do not rely on any scientific findings which even remotely suggest

that a person who was affected with Complete Androgen Insensitivity Syndrome ("CAIS" hereafter) has to be unfit to perform the typical duties which would be assigned to the mahila personnel in this force. Dr. K. Bhushan rests his conclusions on the baseless presumption that the petitioner would be rendered unfit in the future.

95. The respondents thus clearly do not conclude that persons effected with CAIS are unable to perform the typical duties entrusted to mahila SSB personnel which would have been the relevant consideration for rejecting the petitioner's candidature. The conclusions of the respondents therefore do not satisfy the test of any nexus let alone a rational nexus to the objective sought to be achieved.

96. There is no material at all to arrive at a conclusion that such condition would have rendered the petitioner incapable of performing the assigned duties.

(III) Whether the respondents appropriately evaluated the material available with them, adopting requisite expertise.

97. It is well known that all professions have an hierarchy of knowledge and functioning. Regarding a technical question requiring expertise in, computer science engineering for instance, it would be unreasonable for, say, a civil engineer to overturn a decision of a computer science engineer. Also it would be unreasonable for a computer science engineer of only, say, three

years experience overturning the decision of another with fifteen years experience, unless for good reasons.

98. As in all technical fields a different opinion needs to be considered seriously only when given by a technical expert in the same field of expertise and with a similar though perhaps a slightly lesser degree of experience. Given the extreme variations in the nature of knowledge involved, this is more so in medicine. In any specialized field of medicine, one evolves by passing various specialised professional degrees and by work experience, from a simple physician to a specialist, and, then a super specialist. Knowledge in medicine has become so vast that even super specialist fields are splitting into sub-fields of knowledge and skill. It follows therefore that a specialist opinion in the specialist's field of expertise cannot be overturned by that of a family physician. Similarly a super specialist's, say a nephrologist's opinion in the field requiring special knowledge of nephrology, cannot be overturned by a specialist of another field, say a gynaecologist, a cardiologist or a neurologist.

99. We are informed that though there are no statutory standards, however in medical sciences, the generally accepted standard of an experienced super specialist in any super speciality is at least ten years of work experience after acquiring the super specialist degree. This would appear to be a reasonable standard. Only such experienced specialist can venture a valid opinion different

from that given by another super specialist in the same field. Opinion of any one lesser, that is to say either of a specialist or a super specialist of another field, or one in the same field but with lesser years of experience, must simply be ignored and a proper opinion from one who is of the same field with the same or some minimum required years of experience be sought.

100. Similar issues with regard to the constitution of the medical board to consider specific medical issues involving expertise and specialization have arisen before the court on several occasions prior hitherto. In the decision in **Anish Barla vs. Union Public Services Commission** reported at **2006 VIII AD (Delhi) 622** appointment to the post of Assistant Commandant Group A in the Central Police Forces was involved. The petitioner had been rejected by the respondents on grounds of medical unfitness. The petitioner who had suffered with a dermatology problem had assailed the rejection inter alia on the ground that he had been declared fit by a dermatologist of a recognized hospital of Delhi and that he had wrongly been declared medically unfit by a Board of the respondents which did not include a specialist of the required field. Observations in para 4 of the judgment rendered on 14th March, 2006 deserve to be considered in extenso which reads as follows:

"4. It may be mentioned by us that the above order has been passed by us on the basis of the statement made by the counsel appearing for the petitioner that the petitioner is now free from the aforesaid skin disease, and upon our noting with

anguish from the record of the respondent that although the petitioner was held unfit for appointment on the ground of inveterate skin disease, none of the members of the Medical Board who had thus disqualified the petitioner had any experience in dermatology. This is, to say the least, most unfortunate and we record our disapproval of the manner in which the case of the petitioner has been dealt with by the respondent. We hope that the respondent will desist from committing such mistakes in the future and will bestow earnest consideration to such like cases since the very right to life and livelihood of a person may be adversely affected by the same."

(Emphasis supplied)

101. In a decision rendered on **4th May, 2010** in **W.P.(C) No. 13685/2010 Birendra Singh vs. UOI & Ors.**, the Division Bench of this court, of which one of us, (Gita Mittal, J) was a member, placing reliance on the prior decision in **Anish Barla(supra)**, had observed as follows :-

"27. It is apparent that despite this pronouncement made on 14.3.2006, the respondents have not paid any heed to the composition of the Board which examines the fitness of the candidates. It also shows that the respondents have not at all given any heed to the material facts of the case which have certainly a bearing on the fitness of the petitioner. Mere amputation of the little toe of the left foot by itself may not necessarily render a candidate unfit for appointment to a particular post. Further the impact of declaring him as medically unfit may render him unfit for continuation in the post which he was occupying at the time of his medical examination.

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29. It may be noted that amputation of a part of a body may not in all cases be necessarily sufficient to

create a disability for appointment to a post. The very fact that a candidate seeking appointment is required to undergo a medical examination, manifests the intention that there has to be an assessment of the persons capabilities and fitness from the medical point of view. Different individuals have different capabilities. One person may have the capability to overcome the deficit, if any, created by such an amputation of the toe, while another person may not be able to do so. For this reason, it is essential that the fitness of a person is assessed only by experts of the specialty concerned. The respondents shall ensure that medical boards which are constituted in future for examining medical fitness of candidates, consist of members of the specialty concerned.

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32. In view of the above stand, this aspect deserves immediate attention of the Director General of the CISF. A copy of the counter affidavit shall be placed before the Home Secretary of the Central Government and the Director General, CISF for perusal who shall ensure that in case the annual medical examination is not being given the due and necessary importance, immediate steps in this behalf be taken."

(Emphasis by us)

102. We find from the record placed before us that the medical board on 3rd February, 2008 consisted of one chairman and four members. Mr. Bhardwaj, learned counsel for the respondents, has informed us that these four doctors possessed the MBBS degree only, which is the basic medical qualification, without specialisation in any field, let alone a super specialisation. While no anomaly was detected by these doctors, they have endorsed that the petitioner had "*congenital anomaly & pseudohermaphroditism*"

103. The Review Medical Board of the petitioner on 25th April, 2008

consisted of following two physicians :-

- “(i) Chairman - Dr. Mamta Agarwal
2nd in-Command (Med),
CH, Gorakhpur,
- (ii) Member - Dr. Urmila Gari
2nd in Command (Med)
CH, Barauni.”

104. We are informed by Mr. Bhardwaj, learned for the respondents that again both Dr. Mamta Aggarwal, Chairperson and Dr. Urmila Gari, member also had the basic medical degree of MBBS only without having specialisation in any field.

105. Dr. K. Bhushan, the Additional Director General CPMFs, MHA who had rendered the opinion on the 28th of August, 2008 is stated to be a psychologist and paediatrician.

106. Admittedly, so far as the evaluation of the petitioner's medical condition is concerned, expertise in the field of endocrinology is required.

107. Our attention is drawn to the communication dated 12th May, 2008 addressed by Professor Dr. V. Bhatia who was the treating endocrinologist to Mr. Gopal Sharma, Director General of the SSB in support of the petitioner's candidature and stating that the petitioner “should not be declared medically unfit based on her past history and if that has been the case, then she has been discriminated against”. The worthy doctor endorsed the petitioner's medical summary and also informed the Director General of the SSB that “if a second opinion on the medical issue involved was necessary, the opinion be sought from an

endocrinologist, department of Premier Institute such as All India Institute of Medical Sciences or similar such institution”.

108. An endocrinologist would normally possess the MBBS degree, followed by an MD in general medicine or paediatrics’ and then, a DM in Endocrinology. This is coupled with the expertise acquired from several years of practice in the field. Dr. Bhatia is holding the designation of professor, and obviously additionally holds valuable teaching experience in the speciality. To overturn such experts' opinion, one would require a medical board consisting of at least one, if not two, senior endocrinologists, having at least the equal qualifications and practical experience in endocrinology, or, in any case, more experience than that of the expert concerned. Thus the endocrinologist's opinion in this case cannot simply be overturned by a board of general physicians or a paediatrician/psychologist but can only be overturned by a contrary majority opinion of a board consisting of at least two senior endocrinologists. The opinion of the physician having a basic MBBS degree with no specialized training or experience in endocrinology, as in this case, tantamounts to no opinion at all, or atleast, not a binding opinion.

109. The ***International Association of Athletic Federation (IAAF) Policy on Gender Verification, IAAF and Anti-doping Commission, 2006*** clearly acknowledges that determining gender of an athlete who may be afflicted with DSD is a sensitive and complicated assessment where a laboratory based sex

determination cannot be regarded as conclusive. Therefore, the IAAF recommends that the panel making such a decision must include a gynaecologist, endocrinologist, psychologist, internal medicine specialist, and expert on gender/transgender issues.

Such is the seriousness which is attached by sporting bodies to examination of athletes. Matters of employment and lives certainly deserve as much, if not more attention and care.

110. In ***AIR 1981 SC 1829 Air India vs. Nargesh Meerza & Ors.***, a challenge was laid to the validity of Regulation 46 as well as Regulation 47 dealing with extension of service of the Air India Employees Service Regulations and Regulation no. 12 of Indian Airlines (Flying crew) Service Regulation prescribing the retiring age of an air hostess of Air India upon attaining particular age or on marriage, if it takes place within four years of service or on first pregnancy was the subject matter of challenge and consideration by the Supreme Court.

One of the main planks of challenge was that the termination of the services of air hostesses on the ground of pregnancy or marriage within four years is manifestly unreasonable and wholly arbitrary and violative of Article 14 of the Constitution and should therefore be struck down. It was also urged that the same tantamounted to hostile discrimination by the corporation mainly on the ground of sex or disabilities arising from sex and, therefore,

the regulations amount to a clear infraction of the provisions of Article 15(1) and Article 16(4) of the Constitution. It was held by the court that the regulation providing for termination of services on first pregnancy was wholly inconsistent and incongruous with the concession given to the airhostesses by allowing them to marry. Mr. Setalvad, appearing for the petitioner had cited a number of US Supreme Court decisions. However, the Supreme Court of India noticed the difference between Article 14, 15 and 16 of our Constitution and the due process clause as well as the 14th Amendment of the American Constitution. In para 90 of the AIR report, the Supreme Court of India endorsed the observations of the US Supreme Court in ***Mary Ann Turner vs. Department of Employment Security (1975) 46 L Ed 2nd 181*** and held that the US Supreme Court aptly applied to the facts of the present case (Air India vs. Nargesh Meerza) and observed as follows :-

“90. We fully endorse the observations made by the U.S. Supreme Court which, in our opinion, aptly apply to the facts of the present case. By making pregnancy a bar to continuance in service of an AH the Corporation seems to have made an individualised approach to a women's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.”

111. The reliance in ***Air India vs. Nargesh Meerza (supra)*** on a decision of the US Supreme Courts in para 91 also sheds valuable light on the issue raised before us and reads as follows :-

"91. Similarly, very pregnant observations were made by the U.S. Supreme Court in City of Los Angeles, Department of Water and **Power v. Marie Manhar (1978) 55 L Ed 2d 657**, thus:

" It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less....The question, therefore, is whether the existence or non-existence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command.

... ..
Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."

92. These observations also apply to the bar contained in the impugned regulation against continuance of service after pregnancy. In **Bombay Labour Union v. International Franchises Pvt. Ltd. (1966) 2 SCR 493 : (AIR 1966 SC 942)**, this Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U.S. Supreme Court in the decisions referred to above. In that case a particular rule required that unmarried women were to give up service on marriage-a rule which existed in the Regulations of the Corporation also but appears to have been deleted now. In criticizing the validity of this rule this Court observed as follows (at pp.943, 944 of AIR):-

"We are not impressed by these reasons for retaining a rule of this kind.... Nor do we think that because the work has to be done as a team it cannot be done by married women. We also

feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondent's rules provide and they would be availing themselves of these leave facilities."

112. So far as the instant case is concerned, the challenge premises on violation of Article 14 of the Constitution of India, in ***Air India vs. Nargesh Meerza (supra)***, the discussion of the prior case law in paras 95 to 98 is extremely material and reads as follows :-

"95. In view of our recent decision explaining the scope of Art. 14, it has been held that any arbitrary or unreasonable action or provision made by the State cannot be upheld. In ***M/s. Dwarka Prasad Laxmi Naraiyan v. The State of Uttar Pradesh & Ors. 1954 SCR 803: (AIR 1954 SC 224)***, this Court made the following observations (at p. 227 of AIR):-

"Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in reasonableness."

96. In ***Maneka Gandhi v. Union of India (1978) 2 SCR 621 : (AIR 1978 SC 597)***, Beg, C.J. Observed as follows (at pp 610, 611 of AIR):

"The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution..If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed." and Bhagwati, J. Observed thus (at p.624 of AIR):

"Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

97. In an earlier case in ***E.P. Royappa v. State of Tamil Nadu and Anr. (1974) 2 SCR 348 : (AIR 1974 SC 555)***, similar observations were made by this Court thus (at p. 583 of AIR):

"In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

98. In ***State of Andhra Pradesh and Anr. v. Nalla Raja Reddy and Ors.(1967) 3 SCR 28 : (AIR 1967 SC 1458) at P. 1468***, this Court made the following observations:

"Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately."

The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.”

113. The medical review board which made the final decision as well as the additional director general of the respondents who passed the order dated 28th August, 2000 regarding the petitioner’s medical fitness was obviously not qualified to deal with the DSD. Their conclusions also show that they had no experience at all even in clinical management of the DSD in view of their observations on the medication which the petitioner was required to take.

114. The respondents’ position with regard to the medical fitness of the petitioner is clearly based on misinformation and speculation which borders on ignorance. The medical experts of the respondents did not honestly recognise their lack of expertise in the given area. No medical review board was established with the requisite expertise. The clear inexperience of the experts who have given their opinion in the instant case has resulted in arbitrary treatment of the petitioner. Apart from arbitrariness in the conclusions arrived at, the same also tantamounts to violation of the petitioner’s right to fair procedure as prescribed by their regulations and guidelines as well as judicial precedent for evaluation and consideration of a candidature when she has been deprived of service for which she was otherwise qualified.

115. It is noteworthy that in ***Birendra Singh (supra)***, the

petitioner had assailed the action of the respondents in denying him the appointment to the post of Sub-Inspector (Exe.) with the Central Industrial Security Force and the order of the review medical board holding the petitioner medically unfit for promotion. Copy of the order was directed to be sent to the Secretary, Ministry of Home Affairs and Director General, CISF.

The copy of this order was consequently sent to the Secretary, Ministry of Home Affairs. In view of the observations of the court in **Anish Barla (supra)** in 2006 and **Birendra Singh (supra)** in 2010, the consideration of the petitioner's case by the medical boards is actually in violation of the specific directions by the court or as is required for a fair assessment of the candidate.

116. It would therefore appear that the medical boards clearly display complete arbitrariness in the assessment, valuation and treatment of the petitioner by the respondents. In this background, the petitioner cannot be deprived of employment based on findings of such boards/experts not of the speciality concerned.

Conclusions

117. In view of the above discussion, it has to be held that the rejection of the petitioner's candidature is based on sparse, highly speculative and completely misinformed evidentiary record. The same is not based on any intrinsic or extrinsic evidence at all. There is no rational basis for concluding that the petitioner's

appointment in any manner jeopardises or prejudices the Sashastra Seema Bal's legitimate interest in recruiting physically and mentally fit personnel to the force. The factual findings are based on conjectures and speculation and are clearly erroneous.

118. We also find that there is no evidence as well to support the respondent's conclusion to exclude the petitioner from service. The respondents' decision can be sustained only if it has some evidentiary basis therefore. The above narration would show that the findings are speculative and contrary to the petitioner's medical record.

119. The assessment by the respondents is also unsupported by any factual evidence on record. Lynoral, the prescribed medication, is a birth control pills is something which would certainly be accessible. Maintaining a reliable supply of birth control pills is not shown as a problem for any other recruit of the force.

120. There is also no material to suggest that advance planning by a personnel cannot compensate for non-availability of medication at the border areas. The petitioner can certainly plan and procure requisite medical supplies in advance.

121. For this reason, the respondents conclusion that SSB personnel are posted in the remote border areas where there is a difficulty in obtaining regular supply of medication or meeting

deadlines or follow up appointments with physician is equally presumptive and based on no objective consideration.

122. We also find that there was also no assessment at all by the respondents as to the follow up or the medical assistance which a CAIS patient needs. The female personnel of the force remain at comparatively easier postings. The circulars placed by the respondents would suggest that they are not posted at the remote border outpost. The respondents do not even remotely suggest that any of the SSB personnel have had any difficulty in accessing birth control pills.

123. It is unfortunate that all doctors of the CPMF who have been involved in reporting the petitioner's medical fitness in the organisation have used expressions '*pseudohermaphroditism*'; '*true hermaphrodite*' and '*postoperative sequelea*' as synonyms and interchangeable without paying any heed at all to the petitioner's medical condition or her fitness. The views of the treating expert find no place in the consideration.

124. The above discussion amply establishes that there is also no evidence at all nor any valid scientific explanation before the respondents which could have enabled them to arrive at a conclusion that CAIS afflicted individuals experience severe side effects of the prescribed medication which would obviously effect the individual's job performance.

125. The respondents have clearly misconstrued the effect of the

medication. The respondents have urged that in the absence of medication, the petitioner's "sexual characteristics will change". This assertion has not been supported by any scientific study or expert's opinion. We are appalled at the expression of such an opinion by medical experts, who though not of the speciality concerned, as doctors are expected to be trained to honestly accept limitations of their expertise or knowledge and to take the assistance of experts before rendering opinions which severally impact lives of parties.

126. We may also note that the purpose of a medical examination is not to create a body of persons in the community who have been labelled as "medically unfit" without any material or basis. Undoubtedly, definite State policy and positive action in this matter is immediately necessary inasmuch as there is growing awareness of issues as have been raised in the present case. The instant case also discloses the insufficiency of the regulations and guidelines on medical examinations by the respondents.

127. In this background, the decision of the respondents is based on no material at all let alone any relevant material.

128. We have no hesitation in holding that the findings of the respondents are speculative and have no relation or nexus to the goal of national security. The decision holding the petitioner has to be held to be completely arbitrary and irrational.

129. It is evident that an expert endocrinologist has certified that the petitioner is entirely capable of performing the duties of a mahila SSB constable. The medical doctors of the respondents who have conducted the medical examination have found no anomaly, no growth, no disability and no psychological impact at all on the petitioner. On the contrary, she has ably acquitted herself in the qualifying test conducted by the respondents. The respondents have also not arrived at any conclusion that she is incapable of performing the assigned duties. The petitioner's appointment even as per the respondents does not undermine the requirements of the duties to be performed by the SSB. In this background, the candidature of the petitioner certainly cannot be rejected on the sole ground that she had been previously diagnosed with complete androgen insensitivity syndrome and has undergone medical procedures for certain developments or merely because she is on medication admittedly without any side effects.

130. Unfortunately, while the petitioner has been making representations and has been compelled to seek redressal from this court, almost three years have passed since she underwent the review medical board on 25th April, 2008. In this background, while holding that the petitioner's candidature cannot be rejected on the said ground, it cannot be denied that the respondents would be entitled to ascertain her physical efficiency. Service personnel have to periodically undergo such testing.

131. In view of the above discussion, it is held and directed as follows:-

(i) The rejection of the petitioner's candidature for the post of constable general duty in the Sashastra Seema Bal on grounds of medical un-fitness in the medical examinations conducted on 3rd February, 2008 and 25th April, 2008 as well as the findings dated 28th August, 2008 of Dr. K. Bhushan, Additional Director General, CPMFs Ministry of Home Affairs are arbitrary, irrational and illegal and hereby quashed.

(ii) The respondents shall evaluate the physical standards of the petitioner and also conduct a physical efficiency test of the petitioner within a period of three months from today, after giving the petitioner at least two months notice of the date and time of the examination and test. If the petitioner clears the same, the petitioner would be held entitled to forthwith recruitment into the Sashastra Seema Bal.

(iii) The petitioner shall be entitled to costs of the present petition which are assessed at Rs.25,000/- and shall be paid within eight weeks from today.

The writ petition is allowed in the above terms.

GITA MITTAL, J

May 3, 2011(aa)

J.R. MIDHA, J