

LIVERPOOL NAVIGATION (PVT) LIMITED

v.

**CHANDRANANDA DE SILVA,
SECRETARY, MINISTRY OF DEFENCE AND OTHERS**

SUPREME COURT
DHEERARATNE, J.,
WIJETUNGA, J. AND
BANDARANAYAKE, J
SC APPLICATION NO 312/99 (FR)
1ST OCTOBER, 1999

Fundamental rights - Right to equality - Article 12(1) of the Constitution - Entry into Prohibited Zone established by Emergency Regulations - Refusal to permit entry - Restrictions imposed on fundamental rights - National Security - Article 15(7) of the Constitution.

The petitioner company complained of infringement of its rights under Article 12(1) by the respondents by reason of the failure on their part to grant security clearance for the petitioner's vessel to operate between Colombo and Jaffna. The petitioners claimed that they had chartered the said vessel from another company. Security clearance is granted by the 1st respondent (the Secretary, Ministry of Defence) on the recommendation of the Navy Commander (the 3rd respondent). The Commander Northern Naval Area (the 4th respondent) and the Commander of the Eastern Naval Area (the 5th respondent), in terms of the Emergency (Establishment of a Prohibited Zone) Regulations No. 4 of 1995 which were applicable to the North and East. Matters pertaining to the grant of security clearance were handled by the 2nd respondent (the Additional Secretary, Ministry of Defence) under the supervision of the 1st respondent.

The petitioner applied to the 1st respondent for security clearance for its vessel. Clearance was not given for the reason that in response to inquiries made from the Director of Internal Intelligence, it was reported that the conduct of one of the Directors of the petitioner Company was under investigation by the C.I.D. It was alleged that he was involved in the large scale transfer of foreign currency from Sri Lanka. The authorities were probing the possibility of such monies being used for the purchase of arms and ammunition for the LTTE.

The available evidence showed that the Charter Party relating to the vessel in respect of which security clearance was sought was a sham.

Held :

1. Article 15(7) of the Constitution states inter alia, that the fundamental rights provided by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security. "Law" in that Article includes regulations made under the law for the time being relating to public security; and the concerns of the executive regarding national security must be given due consideration.

Per Wijetunga, J.

"Considering the grave security situation that prevails in this country, more particularly in the North and East it goes without saying that national security is a predominant factor in the determination of the matter"

2. The petitioner had failed to disclose to the authorities or to the court, the true nature of the transaction between it and the company which owned the vessel which the petitioner claimed to have chartered to carry cargo from Colombo to Jaffna.

3. In the circumstances it could not be said that the respondents had acted in an arbitrary, illegal, unreasonable, capricious or mala fide manner, in violation of the petitioner's rights under Article 12(1) of the Constitution.

Cases referred to :

1. *Tennakoon v. T.P.F. de Silva and Others* (1997) 3 Sri LR 16
2. *Premachandra v. Jayawickrama and Another* (1994) 2 Sri LR 90
3. *Council of Civil Service Unions and Others v. Minister for the Civil Service* (1984) 3 ALL ER. 935

APPLICATION for relief for infringement of fundamental rights.

Faisz Musthapha, P.C. with *Manohara de Silva* and *Saliya Peiris* for petitioner.

R.A.F. Arsecularatne P.C., Addl. Solicitor General with *Gihan Kulatunga*, State Counsel for respondents.

January 28, 2000

WIJETUNGA, J.

The petitioner-company complains of the infringement of its fundamental rights under Article 12(1) of the Constitution by the 1st to 5th respondents, by reason of the failure and/or refusal and/or delay on their part in granting security clearance for the petitioner's vessel to operate between Colombo and Jaffna.

Certain areas in the North and the East have been declared "Prohibited Zones" by regulations made by the President under the Public Security Ordinance. It is necessary to obtain the permission of the Competent Authorities constituted by these regulations to enter such areas. The officers declared to be Competent Authorities for the purposes of the said regulations are the Commander of the Sri Lanka Navy (3rd respondent) the Commander of the Northern Naval Area, Karainagar (4th respondent) and the commander of the Eastern Naval Area, Trincomalee (5th respondent). Security clearance by these respondents is a condition precedent to the grant of necessary permission by the Secretary, Ministry of Defence (1st respondent), who states that all matters pertaining to the grant of security clearance by the Ministry of Defence are handled by the 2nd respondent under his supervision; the 2nd respondent is the Additional Secretary, Ministry of Defence.

The petitioner states that it made an application to the 1st respondent on 4. 12. 98 for security clearance, which was marked for the attention of the 2nd respondent. It appears that on receipt of this application, the 2nd respondent addressed a letter on 8. 12. 98 to the Director, Internal Intelligence seeking security clearance in respect of the Directors and other Executives of the petitioner-company. According to the particulars furnished to the 1st respondent by the petitioner-company on 15. 12. 98, its Directors were Sathasivam Vincendrarajan (Chairman), Mrs. Sumathy Vincendrarajan (Managing Directress), Mrs. Khemalie Lasita Rachel Tennakoon (Directress), Velupillai Sinnappu Balachandran (Director) and Mohamed Illyas Mohamed Rizly (Director).

On or about 22. 12. 98, CID had arrested Sathasivam Vincendrarajan, the Chairman of the petitioner-company and the Additional Director-General of the Directorate of Internal Intelligence by letter dated 2. 1. 99 replied the 1st respondent that "an inquiry is being conducted by the CID against the Chairman of the Company, Mr. Sathasivam Vincendrarajan, where the allegations are of a serious nature. In view of the above, I do not recommend the application, please".

The 2nd respondent states in his affidavit dated 22. 7. 99 *inter alia* that "in view of the fact that the petitioner company has suppressed relevant material and there is an investigation pertaining to the alleged involvement of Sathasivam Vincendrarajan with the LTTE, granting of security clearance to the petitioner to operate a vessel to the North and the East would be prejudicial to the national security"

Consequent to the arrest of Vincendrarajan, he filed a fundamental rights application bearing No. S.C. 7/99 and this Court by its order in regard to the interim relief prayed for therein held *inter alia* that "no reasonable inference could be drawn that the petitioner had any links with the LTTE or that the petitioner's business ventures were financed by such organisation"

It is relevant to note that, according to the petitioner's own documents, changes have been made in the Board of Directors of the petitioner-company on three occasions since the date of the application for security clearance.

As at 26. 11. 98 the Directors were :

1. Sathasivam Vincendrarajan
2. Mrs. Sumathy Vincendrarajan
3. Thirunavukarasu Sadachcharan
4. Khemalie Lasita Rachel Tennakoon
5. Velupillai Sinnappu Balachandran
and
6. Mohamed Rizly Illyas

As at 15. 12. 98 the name of Thirunavukarasu Sadachcharan had been deleted and the Board of Directors consisted of the remaining five persons.

As at 9. 1. 99 the names of Sathasivam Vincendrarajan and Mohamed Rizly Illyas had also been deleted and the Board of Directors consisted of the remaining three persons.

As at 15. 2. 99 the name of Mrs. Sumathy Vincendrarajan had also been deleted and two other persons S.W.J.I. Pushpakumara and Sathasivam Puwaneswaran had been included and the Board of Directors thus consisted of four persons.

The petitioner's letter to the 1st respondent dated 15. 2. 99, under the hand of Mrs. K.L.R. Tennakoon as Chairperson/ Managing Directress, states *inter alia* that "you had indicated that certain Directors are under surveillance of the authorities concerned and thus we have to experience a delay. Now those of whom you had doubts have since tendered their resignations". The letter further states that "your early approval of *security clearance* for this vessel will enable us to immediately commence the proposed cargo service to the North"

Though the petitioner sought to justify the numerous changes in the Directorate of the company on the basis that they were done in the interests of the company and were merely commercial decisions, the respondents were entitled to view these changes with suspicion as they appeared to be a mere facade to obtain security clearance.

In its petition, the petitioner has laid emphasis on the fact that Mrs. K.L.R. Tennakoon is the wife of the Deputy Minister of Labour, Janaka Bandara Tennakoon. Perhaps that may be the reason why the letter was conveniently under her hand as Chairperson/Managing Directress, soon after the deletion of the name of Mrs. Sumathy Vincendrarajan, the wife of Sathasivam Vincendrarajan.

The petitioner relied heavily on the judgement of this Court in S.C. Application No. 7/99 (FR) which pertains to the arrest and detention of Sathasivam Vincendrarajan, the then

Chairman of the petitioner-company. It must be borne in mind that the Court in that case was dealing with a matter relating to the liberty of the subject and the considerations which applied to that question are not the same as those applicable to the instant case. Furthermore, the investigations into the activities of Sathasivam Vincendrarajan by the CID continued even after the interim order made by this Court and further material was obtained by the authorities in consequence.

Sathasivam Vincendrarajan's alleged involvement in the large scale transfer of foreign currency from Sri Lanka by dubious means has been the subject of further investigations by the CID. The authorities were probing into the possibility of such monies being utilized for the purchase of arms and ammunition for the LTTE, which would ultimately be shipped to the North. The ramifications of such investigations could well be imagined, having regard to their international connections and the many subterfuges resorted to by those concerned. In such a scenario, the concerns of the executive regarding national security must be given due consideration.

The Constitution of Sri Lanka in Article 15 recognizes certain restrictions even in regard to the exercise and operation of fundamental rights. Article 15(7) states *inter alia* that :

"The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security For the purposes of this paragraph 'law' includes regulations made under the law for the time being relating to public security."

Learned President's Counsel for the petitioner rightly submitted that he was not challenging the regulations made under the Public Security Ordinance, and recognized the need for such restrictions in the interests national security.

The Emergency (Establishment of a Prohibited Zone) Regulations No. 4 of 1995 made by the President under Section 5 of the Public Security Ordinance, published in the Gazette of

20. 4. 95 have undoubtedly been made in the interests of national security. Regulation 4(a) thereof requires that "no person shall enter the Prohibited Zone in any boat or vessel or in any other manner or remain within or ply any boat or vessel within such zone for any purpose whatsoever except with the written authority of the Competent Authority."

It is common ground that for the purpose of this regulation permission is granted by the 1st Respondent or an officer authorized in that behalf by the 1st Respondent, who acts on the recommendations of the 3rd, 4th or 5th respondents.

The petitioner-company claims that it had chartered M. V. City of Liverpool on or about 19. 11. 98 to carry cargo from Colombo to Jaffna and/or other coastal areas in the North. It further states that while awaiting security clearance, the vessel has been berthed in the Colombo Port, incurring expenses of approximately Rs. 200,000/- per day.

However, the petitioner has failed to disclose to the authorities or even to this Court, the true nature of the transaction between it and Nithan Trading Enterprises (S) Pte. Ltd., the owners of the vessel. The respondents instead have produced a photocopy of the Charter Party which clearly shows that it has been signed surprisingly on behalf of Nithan Trading Enterprises of Singapore by Sathasivam Vincendrarajan and Mrs. Sumathy Vincendrarajan - (their signatures being identical with those appearing in the Articles of Association of Liverpool Navigation (Private) Ltd., the petitioner-company). The signatories on behalf of the petitioner-company on the other hand are Mohamed Illyas and V.S. Balachandran, two of its Directors, though at the time Sathasivam Vincendrarajan was the Chairman and Mrs. Sumathy Vincendrarajan was the Managing Directress of the said company. The suppression of this vital document creates serious doubts as to the *bona fides* of the petitioner-company and leads to the inference that the whole transaction was a sham.

It would, at this stage, be useful to consider the attitude of the Courts to the question of national security. In *Tennakoon*

v. T.P.F. de Silva and others,⁽¹⁾ Fernando, J. observed at page 31 that "while it is true that Article 126 does not authorise this Court to usurp the 1st respondent's discretion in regard to transfers, yet it does not allow this Court to accept a mere assertion of that sort-for that would be to abdicate its duty to examine whether the 1st respondent's conduct fell short of the norms mandated by the fundamental rights, and thus indirectly to invent a new official immunity," - but went on to state: **"let me add that, of course, different considerations would apply where national security is involved."** (emphasis added)

In *Premachandra v. Jayawickrema and another*,⁽²⁾ G.P.S. de Silva, C.J., Bandaranayake, J. and Fernando, J. in the Order of the Court observed at page 105 that "there are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, **and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted**". (emphasis added)

In *Council of Civil Service Unions and others v. Minister for the Civil Service*,⁽³⁾ the House of Lords carefully considered the question of national security. Lord Scarman said at page 948 that "once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officers as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable Minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review."

Lord Diplock in the same case said at page 952 that "national security is the responsibility of the executive government; what action is needed to protect its interests is a matter on which those on whom the responsibility rests, and

not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.”

Considering the grave security situation that prevails in this country, more particularly in the North and the East, it goes without saying that national security is a predominant factor in the North and the East, it goes without saying that national security is a predominant factor in the determination of this matter. From the point of view of the authorities concerned, the paramount consideration in granting security clearance is whether it would in anyway undermine the security of the State; more so, as the transport of certain classified items to North and the East is prohibited for security reasons, on account of the on going war between the government and the LTTE. It is against this background that the Court must consider the complaint of the petitioner-company.

Viewed in that light, it cannot be said that the respondents have acted in an arbitrary, illegal, unreasonable, capricious or *mala fide* manner as alleged, in violation of the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. Nor do I see any justification for interfering with the decision of the respondents not to grant security clearance for the petitioner's vessel to sail to the North.

The application is accordingly dismissed, but without costs.

DHEERARATNE, J. - I agree.

BANDARANAYAKE, J. - I agree.

Application dismissed.