

VADIVELU
v.
OFFICER-IN-CHARGE, SITHAMBARAPURAM
REGIONAL CAMP POLICE POST, VAVUNIYA AND OTHERS

SUPREME COURT

FERNANDO, J.

J. A. N. DE SILVA, J. AND

WEERASURIYA, J.

SC NO. 44/2002 (FR)

JULY 01, 2002

Fundamental Rights – Restrictions against travel and residence imposed on a refugee – Permissible limits of such restrictions – Article 14 (1) (h) of the Constitution.

The petitioner was a Tamil refugee living in a refugee camp in Vavuniya. He was subjected to severe restrictions against travel to and residence in Colombo once in June, 2001, for taking his sick child to Colombo for treatment, and again on visiting a sick relative in Colombo in December – January, 2002, accompanied by his two children. An application was filed in court on 16. 01. 2002 in respect of the January, 2002, restrictions. The petitioner had this application filed first before returning to Vavuniya from Colombo complying with the conditions of travel pass.

The petitioner had to purchase a form, supply the photographs of himself and his two children who accompanied him to Colombo and find a sponsor in Colombo paying Rs. 1,000 (to that sponsor). The sponsor had to be approved by the Police, to stand surety for producing the petitioner and his two children. The petitioner had to then attend an inquiry. Further, the petitioner and the two children were videographed and given a pass for two weeks to travel to Colombo and to reside at Modera at a given address.

Held:

- (1) The petitioner's failure to complain on account of the June, 2001, travel restrictions within one month did not estop him from complaining against the subsequent restrictions. The application was therefore, not time-barred.
- (2) The impugned restrictions were burdensome, time consuming and costly and effectively restricted the right of travel and residence. They were not

permitted by law or emergency regulations in terms of Articles 15 (6) and 15 (7) of the Constitution.

3. The petitioner's fundamental rights under Article 14 (1) (h) has been infringed by executive action by application to him of the travel pass system.

APPLICATION for relief for infringement of fundamental rights.

M. A. Sumanthiran with P. S. Bandaranayake, K. Prabakaran and Renuka Senanayake for petitioner.

I. Demuni de Silva, Senior State Counsel for respondents.

Cur. adv. vult.

September 05, 2002

FERNANDO, J.

This application was argued together with *Dias v. Secretary, Ministry of Defence*, SC application No. 604/2001 (FR).⁰¹

The petitioner was compelled to apply for and obtain a "travel pass" in order to travel from Vavuniya to Colombo, which he claimed was an infringement of his fundamental rights under Articles 11, 12 (1), 12 (2) and 14 (1) (h). Leave to proceed was not granted in respect of Article 11.

The petitioner is a Tamil citizen of Sri Lanka who had been living in Killinochchi and carrying on business as a merchant. In 1990 he had to leave Sri Lanka, with his family, on account of the then prevailing armed conflict. In 1995 they were brought back to Sri Lanka¹⁰ by the United Nations High Commissioner for Refugees, and were placed in the Sithambarapuram Refugee Camp (or "Welfare Centre") in Vavuniya.

From the inception, they were not permitted to leave the Camp premises without obtaining a pass. At first, a pass was valid only for the date of issue, but later it was valid for three months at a time. The pass entitled the holder to travel only in the areas "cleared" by the Security Forces, and that too only within the Vavuniya District. The petitioner claimed that because of the restrictions on travel imposed by the pass system, he and other members of his family were unable to obtain any form of gainful employment. ²⁰

The petitioner alleged that in June, 2001, his three-year old granddaughter suffered attacks of epilepsy, and was admitted to the Vavuniya General Hospital; that from there she was transferred to the Anuradhapura General Hospital; and that the District Medical Officer Anuradhapura, advised that she be taken to Colombo. For that purpose the petitioner had to apply for travel passes for himself and his daughter. He had to submit a "Referral of Patients for Special Management" form issued by the DMO, Vavuniya and to arrange for a sponsor to guarantee their return. That "Referral" was dated 26. 09. 2001, and contained an endorsement by the DMO : "This letter is given to get pass at Sanasa Camp", and it had been signed by the Consultant Paediatrician of the Lady Ridgeway Hospital on 06. 10. 2001. The petitioner averred that they were granted travel passes limited to seven days, and therefore had to return within seven days although the child's treatment had not been completed. The respondents stated that the relevant books and records did not show that the petitioner had made an application for travel passes in *June* 2001, and accordingly denied the petitioner's version. That denial has been made without due care, and is unacceptable, as it is quite clear from the documents produced by the petitioner that the child had been examined in Colombo in *October* 2001. An application under Article 126 was not filed within one month, and accordingly that incident is not the real issue in this case, although it does help to understand the petitioner's state of mind in regard to the pass system. ³⁰ ⁴⁰

Thereafter, on 19. 12. 2001, the petitioner received a telegram that his wife's uncle was seriously ill in Colombo, and wished to see

his family. His complaint is in relation to the several delays and difficulties which he and his two children experienced in regard to their journey to Colombo to see their sick relative. He alleged that he had to purchase an application form; to supply photographs; to furnish the address of the place in Colombo at which they intended to stay; and to produce a sponsor who would guarantee their return. He made his application on 22. 12. 2001, giving an address at Modera, and was told to go back to the Camp and wait until a response was received from the Modera police. The petitioner averred that the sponsor had to be "a person who was deemed as a qualified surety by the Police for this purpose", and that he had to pay that sponsor a sum of Rs. 1,000. They had also to present themselves for an inquiry at the Sanasa police post of the Vavuniya police and satisfy the police that their travel was for a *bona fide* purpose. The sponsor had to surrender her own "pass", and was given time till 25. 01. 2002 to produce the petitioner and his two children in order to reclaim her "pass". On 02. 01. 2002, the petitioner and his two children were videographed at the police post, and given two-week travel passes. The instructions on the reverse of the travel pass required the holder, on reaching his destination, to hand over the pass to the OIC of the relevant police station "and obtain a Residence Registration Pass within 24 hours on arrival", and, on his return, to surrender the Residence Registration Pass to the police, to recover the travel pass from the police, and to hand it back to the authority which issued it. They complied with all those conditions. They did not risk overstaying in Colombo, fearing that the police might take them into custody and that the sponsor might forfeit her own pass, and decided to return to Vavuniya on time. Before leaving Colombo, however, the petitioner gave instructions to make this application, which was filed on 16. 01. 2002.

The petitioner contended that the several conditions imposed on him were restrictions on his freedom of movement, that those conditions and restrictions had not been imposed on other persons similarly circumstanced, and that they had been imposed on him on account

of his race; and also that they were not authorized or imposed by any law or emergency regulation. He submitted that thereby his fundamental rights under Article 14 (1) (h), 12 (1) and 12 (2) had been infringed.

The respondents contended that although the "Residential and Travel Pass System" was not introduced by any law or emergency regulation, that system was implemented in the Vavuniya District in the interests of national security as "it is the duty of the State to safeguard the independence, sovereignty, unity and territorial integrity of Sri Lanka and ensure the safety of every citizen and property". That system had been introduced in 1992 as a security measure "and was operated with the assistance of the Police, Armed Forces and other civilian authorities in order to prevent LTTE cadres from infiltrating into the Vavuniya District and areas south of Vavuniya to engage in acts of sabotage, killings and other terrorist activities". A similar system was in force for those who wished to enter Vavuniya. Further, the petitioner was a displaced person residing in a Welfare Centre, and "it was to his advantage to have the security of computer embossed "travel pass" as it helped the establishment of his identity wherever he travelled [as there was a computer system which] enabled the authorities to verify the identity of such persons within a short period and avoid undue delays and inconvenience to visitors such as the petitioner". They also produced several internal circulars and memoranda regarding the implementation of the pass system, relying on which they urged that if the petitioner had so desired his pass could have been extended "up to a period of 3 months", and that if the petitioner had failed to return "steps would be taken to investigate the matter and if it is established that [he had] left the Island or settled down in any other part of the country the [sponsor's] pass would be duly released to the sponsor". The respondents also submitted that the petitioner's application was out of time.

In regard to the steps which the petitioner had to take in order to obtain travel passes, learned Senior Counsel did not concede that

he had to purchase an application form and to make a payment to the sponsor. However, the respondents have offered no explanation as to how applicants obtain application forms, and it is also likely that a sponsor acceptable to the authorities would have expected some compensation in return for his guarantee. I find the petitioner's version to be more probable.

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The procedures with which the petitioner had to comply did not prevent him travelling to Colombo, and hence there was no total denial of his right to freedom of movement. However, the question arises whether those procedures were nevertheless so burdensome as to amount to an infringement or impairment of that right. The respondent's contentions raise two issues. Were those procedures and restrictions no more than mere formalities which no sensible person would complain of, and to which the maxim *de minimis non curat lex* would apply? Was the freedom of movement, intrinsically and inherently, subject to implied restrictions of that sort?

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If the procedures which the petitioner had to follow were broadly comparable to the requirements of obtaining a boarding pass, having luggage security checked, and completing an embarkation card on leaving a country by air, I would readily have agreed that there was no infringement. However, those procedures were for beyond maintaining a record of the identity of persons travelling to and from Vavuniya, and their places of residence. They were quite burdensome, time-consuming and costly, and effectively restricted the right of travel and residence. A delay of ten days in the issue of travel pass would sometimes make a journey futile. Thus, where the intended travel was for the purpose of urgent medical treatment, or visiting a dying relative, the patient might have died before a pass was issued. Again, if travel was in order to attend a function, or to vote at an election, or to institute legal proceedings (such as this very application), delay might have defeated the purpose of travel. Finding an acceptable sponsor, and making the necessary payment, would be more than mere formalities, particularly for a resident of a refugee camp. The requirements in regard to notifying a place of residence and obtaining

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a residence registration pass had the the effect of discouraging a change of residence in Colombo, and to that extent affected movement and residence within Colombo. Although the respondents claim that the petitioner could have applied for a travel pass for a longer period, or that the stipulated period could have been extended, they appear to concede that the maximum was three months. Further, although they assert that if the petitioner left Sri Lanka or chose a place of residence outside Vavuniya his sponsor would not have forfeited her pass, yet an inquiry was necessary before the sponsor could be released from her guarantee and her pass returned. In any event, the fact that the relevant circulars and memoranda governing all these matters were unpublished and inaccessible to the petitioner was itself an unacceptable restriction. Laws and regulations affecting fundamental rights must necessarily be published and accessible to citizens.

In my view, the restrictions on the freedom to travel were comparable to the procedures often applicable to obtaining a visa for travel to a foreign country, with no assurance that permission would be granted. Cumulatively, they were significant restrictions on the petitioner's freedom of movement and residence guaranteed by Article 14 (1) (h).

I must add that Article 27.(12) requires that "the State" – and that includes the Judiciary – "shall recognize and protect the family as the basic unit of society". It is true that the directive principles of State policy do not confer or impose legal rights and obligations, and are not enforceable in any Court, but that does not mean that the Judiciary is bound to ignore them. In considering the nature of the restrictions placed on the petitioner's right to travel to Colombo, it is relevant that they tended to weaken rather than to protect the family and family ties. Besides, they did not facilitate the full realization of his fundamental rights and freedoms (as contemplated by Article 27 (2) (a)).

A further question is whether, having regard to the then prevailing armed conflict, the freedom of movement was impliedly subject to such restrictions. It has been observed that the freedom of speech does

not extend to falsely crying, "Fire!" in a crowded theatre. An express restriction imposed by law or delegated legislation is not necessary in order to ensure that the freedom of speech is not abused by such conduct. Likewise, the freedom of movement does not give persons engaged in armed conflict with the State the liberty to move around as they please. There are many inherent limitations of that sort. It requires no express provision to conclude that the freedom of movement does not grant a citizen the right to enter, without consent, the premises in which State institutions are situated or private premises. 190 Such access can legitimately be controlled or regulated in various ways. However, the right of citizens to travel on public highways and to have access to public places may only be curtailed by restrictions imposed in terms of Articles 15 (6) and 15 (7).

There is force in the respondent's contention that the restrictions complained of were imposed in the interests of national security, and were reasonably necessary for that purpose. However, Article 15 (7) required that such restrictions be imposed by a law, or by regulations made under the law relating to public security. Accordingly, the travel pass system constitutes a restriction not authorized by Article 15 (7). 200

I hold that the petitioner's fundamental right under Article 14 (1) (h) had been infringed by executive action by the application to him of the travel pass system.

In his petition the petitioner had pleaded a violation of Article 11. The restrictions imposed were undoubtedly burdensome and inconvenient, but they were not cruel, inhuman or degrading. Leave to proceed under Article 11 was therefore refused.

The petitioner also claimed that Articles 12 (1) and 12 (2) had been infringed. There is evidence that the travel pass system applied not only to those living in refugee camps in Vavuniya, but to all those 210 travelling to and from Vavuniya; and that they applied to persons of all communities (*Dias v. Secretary, Ministry of Defence* is an example). Article 12 has not been infringed.

I must now turn to the respondents' contention that the application was time-barred. It was argued that the petitioner became aware of the travel pass system in June, 2001, and that he should have challenged the system within one month; and that he had acquiesced in the system, and therefore could not later challenge it. It is true that the petitioner could have challenged the system on the first occasion when it was applied to him. But, each violation gives rise ²²⁰ to a separate cause of action. This situation cannot be compared to a circular or scheme which purports to change an employee's terms and conditions of service. The failure to make a prompt challenge would often preclude a subsequent challenge – on the ground that the change in terms and conditions has become final. There is distinction between that and other violations of fundamental rights. The failure to challenge an unlawful arrest (or detention, or torture, or denial of freedom of speech) on one occasion does not mean that the victim can thereafter be subjected to subsequent violations with impunity. I hold that the petitioner's complaint in respect of the December travel ²³⁰ pass was within time and was not barred by acquiescence.

As for relief, there is evidence that even before this application was filed, steps were being taken to relax the travel pass system, and that it was ultimately abolished on 05. 03. 2002; perhaps by filing this application the petitioner accelerated that process. He has succeeded in vindicating the principle involved, and having regard to all the circumstances I consider costs and nominal compensation to be adequate.

I grant the petitioner a declaration that his fundamental right under Article 14 (1) (h) has been infringed and award him compensation ²⁴⁰ and costs in a sum of Rs. 30,000 payable by the State on or before 31. 10. 2002.

J. A. N. DE SILVA, J. – I agree.

WEERASURIYA, J. – I agree.

Relief granted.