

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA

In the nature of a writ of mandamus under
and in terms of Article 140 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka.

CA/WRT/821/23

1. Namugoda Wijesinghe Atapattu
Mudiyansele Undawatte Keerthi
Kumara Edward Weerasinghe
No. 11/5
Sri Amarawansa Mawatha
Gatambe, Peradeniya
Kandy
2. Upcountry Manpower Agency (Pvt) Ltd
No.11/5 Sri Amarawansa Mawatha
Gatambe, Peradeniya
Kandy

Petitioner

Vs.

1. Manusha Nanayakkara
Minister of Labour and Foreign
Employment
Ministry of Labour and Foreign
Employment
6th Floor Meyawara Piyasa
Narahenpita
Colombo 5

2. The Chairman

Sri Lanka Bureau of Foreign
Employment

234, Denzil Kobbekaduwa Mawatha

Koswatta

Battaramulla

Sri Lanka.

3. Hon. Attorney General

Attorney Generals Department

Colombo 12.

Respondents

Before : N. Bandula Karunarathna, P/CA, J.
B. Sasi Mahendran, J.

Counsel: Hafeel Farisz with S. Bangsajayah for the Petitioner
M. Fernando, SC for the 1st-3rd Respondents

Written

Submissions: 30.08.2024 (by the Petitioner)

On Respondent Not Filed

Argued On: 10.07.2024

Judgment On: 30.09.2024

B. Sasi Mahendran, J.

The Petitioners instituted this action to obtain the following reliefs prayed for in the prayer of the Petition dated 30.11.2023.

- a. Grant and issue notice to the Respondents;
- b. Issue a writ of mandamus on the 2nd Respondent or any one or more of the Respondents to issue the licence to operate and/or carry out the enterprise of a Foreign Employment Agency for the period October 2023 to October 2024.
- c. Grant and issue an interim order to submit to your Lordship's court all relevant material pertaining to the issuance of the licence and/ or the non-issuance thereof for the year October 2023 to October 2024 to the application of the Petitioner
- d. Grant costs and
- e. Grant such Other further and other reliefs as to Your lordships' Court seems to meet.

The Facts of this case are briefly as follows:

The Petitioners have been operating as a Foreign Employment Agency under the purview of the Sri Lanka Bureau of Foreign Employment for the last 35 years. They have come before this Court on the basis that, the said Bureau had failed to issue or renew the license of the Petitioners for the year 2023-2024.

According to the objections filed by the 2nd Respondent dated 19.03.2024, it was revealed that, on the information received by the Bureau without obtaining the prior written approval of the Bureau under Section 37 (1) of the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 (as amended), the Petitioners have advertised calling for applications for employment in South Korea, the Bureau raided the business premises of the 2nd Petitioner Company and found passports of individuals who had submitted applications for employment in South Korea. Thereafter, they recorded statements of the individuals which confirmed that the Petitioners were engaged in issuing advertisements or notices calling for applications from persons for employment in South Korea. This is in violation of Section 37 (1) of the said Act which reads as follows:

“(1) A licensee shall not issue any advertisement or notice calling for application from persons for employment outside Sri Lanka or take any other action in

connection with, or incidental to, such employment without the prior approval in writing of the Bureau.”

Up to now, the Petitioners have failed to adduce any evidence of whether they have obtained the prior written approval of the Bureau to issue an advertisement in terms of Section 37 (1) of the Act.

On 11.06.2023, the Bureau filed a case against the Petitioners on the basis that, without possessing a valid job recruitment offer, they have committed an offence under the Act. In the meantime, the Petitioners applied for renewal of the license to carry out the business of the Foreign Employment Agency from the Bureau for October 2023 - October 2024 by providing a bank guarantee. The Petitioners state that, despite their application for license renewal, the Bureau has not renewed the said license for the above-mentioned period.

According to the Petitioner, the action and/or inaction in refusing and/or non-renewal of the license to carry out the business for the said period is arbitrary, unlawful, and ultra vires.

On the other hand, the Respondent in the objection has stated that there is no decision made with regard to the renewal. By document marked 2R4 dated 03.01.2024, they have requested the Petitioners to consult the Managers concerned (Investigation) to compromise and report the clearance to the Licensing Division at the earliest possible. According to the said document, still, the Bureau has not decided to grant or refuse the renewal of the license.

Therefore, I hold that this is a premature application to consider.

Further, there is an objection taken by the Respondents that, there is a provision available in the said Act for the Petitioners to apply against the decision.

According to Section 33 (1) of the said Act which reads as follows,

“1. The applicant or license, as the case may be, who aggrieved by a decision of the Bureau

- a. refusing the grant or the renewal of license; or
- b. cancelling his license;

may appeal against the decision to the Secretary to the Ministry of the Minister within fourteen days of the date on which the decision is communicated to him.”

It is clear that the Petitioners were provided with a comprehensive alternative remedy by the aforesaid Act. But the Petitioners have not availed themselves of this remedy.

In Tennakoon v. Director-General of Customs and Another (2004) 1 SLR 53 at page 56, his Lordship Wijayaratne, J. held that:

“The petitioner in this application seeks to challenge the forfeiture made under section 119 of the Customs Ordinance by a writ application when in fact the Customs Ordinance itself provides for such a course of action under section 154. The petitioner is not therefore without an alternative suitable remedy. The petitioner is not entitled to seek the writ jurisdiction of this court when there is an alternative remedy available to him. In the Sarvodaya case(1) it was held “Ordinarily the only remedy available to the petitioner for claiming the said goods is to institute proceedings in terms of section 154, challenging the validity of the seizures”

In Rev. Maussagolle Dharmarakkitha Thero And Another Vs. Registrar Of Lands And Others (2005) 3 SLR 11, His Lordship Sisira De Abrew J held that:

“The Petitioners had a right of appeal against the decision of the 1st Respondent contained in PS. This right has been given to them under section 3S(1) of the said Ordinance. The learned Counsel for the Petitioners contended that the Petitioners were unaware of the decision made by the 1st Respondent refusing to register the deed P4. The Commissioner of Buddhist Affairs, by his letter dated 16.06.1995 marked P7, informed the 3rd Respondent a copy of which was sent to the 1st Petitioner that transfer of property by deed No. 3062 (P4) could not be approved since the property was Sangika property. The petitioners, in their petition have admitted this position. Therefore it is safe to conclude that the 1st petitioner was aware of the decision of the Commissioner of Buddhist Affairs who is the 2nd respondent. Then it was within the knowledge of the 1st Petitioner that the 1st Respondent was going to refuse the registration of deed P4. For these reasons, I am unable to agree with the above contention of the learned Counsel for the Petitioners.

In view of the above facts it is clear that the Petitioners have not used the right of appeal given to them under section 3S (1) of the said Ordinance. The Petitioners have, therefore, not used the alternative remedy available to them.”

In the instant case, the Petitioners have failed to make an appeal to the relevant authority. We hold that failure to proceed with the appeal in terms of the said regulation is fatal.

In addition to that, the Petitioners seek from this Court to issue writs of Mandamus against the Respondents.

In *Administrative Law*, Eleventh Edition, H.W.R. Wade and C.F. Forsyth, page 528;

REQUIREMENT OF DEMAND AND REFUSAL

“It has been said to be an 'imperative rule that an applicant for a mandatory order must have first made an express demand to the defaulting authority, calling upon it to perform its duty, and that the authority must have refused. But these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily implied from conduct. The substantial requirement is that the public authority should have been clearly informed as to what the applicant expected it to do, so that it might decide at its own option whether to act or not.

The court does not insist upon this condition where it is unsuitable. As Channell J said:

The requirement that before the court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable to all possible cases. Obviously it cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time within which he can do it has passed.

An obvious case where no demand need be made is where a mandatory order is used as a substitute for a quashing order to quash a decision, as explained in the preceding section.”

In The King v. Revising Barrister for the Borough of Hanley., The King v. The Town Clerk of Stoke on Trent, (1912) 3 KB 518 at 531, His Lordship Channell J. held that:

“Those being the facts which I assume, a question of some difficulty arises as to whether that mistake can be set right. In my opinion it can, under a doctrine of this Court, which is an extremely useful one, and which was established by a majority of the judges in the Court of Exchequer Chamber in *Mayor of Rochester v. Reg.* (1) The principle laid down in that case is well established and has to my knowledge been acted upon frequently. The principle is that a mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed; and if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and been succeeded by another person, the writ may be directed to the successor, and it is his duty to obey it; and where there is no successor, but the person who ought to have performed the duty has become *functus officio*, the latter may be ordered to perform it, though the time within which he could of his own motion have performed it has passed. It is a most useful jurisdiction which enables this Court to set right mistakes. That principle, it seems to me, is applicable to the present case, and it is applicable not only to the non-performance of duties which the person who ought to have performed them has refused upon demand to perform, but also to cases where the non-performance arises from mere inadvertence, where he cannot have had his attention directed to the matter and cannot have refused upon demand to perform them. The requirement that before the Court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable

in all possible cases. Obviously it cannot apply where a person has by inadvertence G omitted to do some act which he was under a duty to do and ER. where the time within which he can do it has passed.”

In the instant case, the Petitioners have failed to establish that there was a demand and refusal.

Moreover, we note that there is a case pending before the Magistrate’s Court of Kandy where the allegations made by the Bureau is that, the Petitioners have violated the Act.

According to Section 31 of the said Act which reads as follows:

“1. The Bureau may cancel a license issued under this Act if it is satisfied that the licensee.

i. Has contravened any of the provisions of this Act or of any regulation made thereunder or of any agreement or bond entered into by the licensee under this Act;

2. The cancellation of a license under subsection (1) shall not take effect until the time for appealing against the decision of the Bureau has expired or if an appeal has been made within time unless and until the appeal is disallowed.”

In The document marked 2R4, the Petitioners have to submit the clearance to the relevant authority to consider.

I am mindful of the observation made by Sripavan J(as he was then) in Amarasinghe v. Jayathilake, Director-Director of Customs and Others, (2004) 2 SLR 169 at page 172, that;

“Condition precedent for the issue of mandamus is the presence of a statutory right. The discretion vested upon the 4th respondent cannot be claimed by the petitioner as of right. No person shall be compelled by mandamus to exercise his discretion one way or other if he has honestly and reasonably exercised his discretion.”

In the present application, there is a case pending before the Magistrate’s Court of Kandy regarding the violation of the said Act which is not concluded yet. Once the proceedings

before the Magistrate's Court of Kandy are concluded, the Petitioners have the right to re-adjudicate this matter to obtain the license, if they wish so.

The Petitioners have failed to adduce any document to show that, they have the prior written approval of the Bureau. Further, the Petitioners have not appealed to the relevant authority.

We observe that the Petitioners have failed to establish that, the Respondents have not followed proper procedure or they are biased.

For the above-said reasons, we dismiss this application with cost.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunaratna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL