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

In the matter of an application for mandates in the nature of Writs of Certiorari, Prohibition and Mandamus in terms of Article 140 of the Constitution.

Dr. P. B. Weerasooriya
Registered Medical Officer,
District Base Hospital, Rikillagaskada.

Petitioner

Case No. C.A. (Writ) 259/2014

Vs.

1. Jagath P. Wijeweera
   Director General of Customs

1A. K. A. Chulananda Perera
   Director General of Customs

1B. P. S. M. Charles
   Director General of Customs

2. M. Puviharam
   Additional Director General of Customs
   (Revenue and Services)

2A. D. A. I. Daranagama
   Additional Director General of Customs
   (Revenue and Services)

2B. K. D. Nicholas
   Additional Director General of Customs
   (Revenue and Services)

2C. U. Liyanage
   Additional Director General of Customs
   (Revenue and Services)

3. R. P. D. T. Seneviratne
Additional Director General of Customs
(Regional)

3A. Lesley Gamini
Additional Director General of Customs
(Regional)

3B. U. Liyanage
Additional Director General of Customs
(Regional)

3C. K. A. Dharmasena
Additional Director General of Customs
(Regional)

4. R. Rajendran
Additional Director General of Customs
(Corporate)

5. Lesley Gamini
Director of Customs (Legal)

5A. P. S. Senaratne
Director of Customs (Legal)

6. K. Premanath
Director of Customs (Declarations)

6A. M. R. Rajmohan
Director of Customs (Declarations)

6B. P. R. Athukorala
Director of Customs (Declarations)
1st to 6B Respondents are from –
Customs Department,
Customs House,
No. 40, Main Street, Colombo 11.

7. Hon. Attorney General
Attorney General's Department, Colombo 12.

8. Dr. P. B. Jayasundara
Secretary to the Treasury & Secretary to the Ministry of Finance and Planning

8A. Dr. R. H. S. Samaratunga
Secretary to the Treasury & Secretary to the Ministry of Finance

9. S. R. Attygalle
Deputy Secretary to the Treasury

10. R. Semasinghe
Director General,
Department of Trade, Tariff and Investment Policy

10A. K. D. N. Ranjith Asoka
Director General,
Department of Trade, Tariff and Investment Policy

10B. K. A. Vimalenthirajah
Director General,
Department of Trade, Tariff and Investment Policy

8th to 10B Respondents from –
Ministry of Finance and Planning,
General Treasury,
The Secretariat, Colombo 01.

11. Toyota Lanka (Private) Limited
"Toyota Plaza",
No. 37, Negombo Road, Wattala.

12. Hon. Ravi Karunanayake
Minister of Finance

12A. Hon. Mangala Samaraweera
Minister of Finance,
Ministry of Finance,
General Treasury,
The Secretariat, Colombo 01.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

T. Deekiriwewa with L.M. Deekiriwewa, Dr. M.K. Herath and Dr. K. De Silva for the Petitioner

Dr. Charuka Ekanayaka SC for the 1st to 10th and 12th Respondents

Niluka Wickremasinghe for the 11th Respondent

Argued On: 27.08.2019

Written Submissions Filed On:

Petitioner on 15.08.2019, 30.09.2019 and 18.10.2019

1st to 10th and 12th Respondents 09.08.2019 and 12.12.2019

Decided On: 22.06.2020

Janak De Silva J.

The Petitioner is a public officer who was entitled to import a motor vehicle with a specific concessionary rate under the Trade, Tariff and Investment Policy circular no. 01/2010 and its subsequent amendments including circular no. 01/2013. According to this scheme the maximum value limit of any vehicle which can be imported was US$ 35,000.

The Petitioner imported a brand-new Toyota Prado KDJ150 Diesel 7-seater car through the 11th Respondent of which the CIF value was US$ 35,000 according to the Petitioner. The Petitioner is challenging the actions of the customs in valuing the vehicle according to Gazette bearing no. 1857/3 dated 07.04.2014 (X17).

The Petitioner is further assailing the action of the customs in failing to implement excise duty exemptions which he claims to be entitled in terms of the law.

Cabinet Approval

Article 10 of Schedule E of the Customs Ordinance reads:

> "Notwithstanding the provisions of this Schedule, the Minister may, with the approval of the Cabinet of Ministers, in the interest of national economy or for any other reason, by Order published in the Gazette fix, for such period as may be specified in that Order, minimum values for any goods, and the duties on those goods shall be charged on the basis of such minimum values."

Gazette bearing no. 1857/3 dated 07.04.2014 (X17) is an Order made under this Article. There is no dispute between parties that when this Order was published on 07.04.2014, the Minister had not sought and obtained the approval of the Cabinet of Ministers. Cabinet approval was given on 04.09.2014 (X26).

The learned counsel for the Petitioner contends that obtaining the approval of the Cabinet of Ministers is a condition precedent to the power of the Minister to make an order in the nature of X17. The learned State Counsel rejected this position and submitted that in any event the approval of the Cabinet of Ministers has now been obtained.

The words *in the interest of national economy or for any other reason* in my view indicate that what is contemplated in this article is matter of policy. It is in this context that the legislature has required the approval of the Cabinet of Ministers.

In *Thirimavithana v. Urban Development Authority and Others* [(2010) 2 Sri.L.R. 262] this Court took the view that where section 18 of the Urban Development Authority Act allows the Urban Development Authority to alienate any land or interest in land with the approval of the Minister, any alienation without such approval is of no avail in law even where the approval of the Minister has been subsequently obtained.

Nonetheless, the Court did not give any consideration on the effect of subsequent ratification by the Minister. However, in *Ratnasiri and Others v. Ellawala and Others* [(2004) 2 Sri.L.R. 180] Marsoof J. P/CA held that the Public Service Commission as well as a Committee of the Commission or a public officer exercising delegated authority may in appropriate circumstances ratify an order made or action taken by a public officer without authority and that there is nothing in the Constitution or any law to prevent the Respondent Secretary, from making a decision in regard to a matter where some person or body of persons has previously made some decision without any authority to do so. Court did refer to established administrative practice of taking urgent action whenever exigencies of the service so demanded and obtaining necessary covering approval thereafter, a practice which is often resorted to and is sanctioned by administrative procedures and judicial decisions [*Rajapakse v. Tissa Devendra, Chairman, Public Service Commission and Others* (1999) 2 Sri.L.R. 331].

I see no reason why this rationale should not apply in the application of Article 10 of Schedule E of the Customs Ordinance. The interest of national economy may need urgent action to be taken there under by the Minister subject to ratification by the Cabinet of Ministers. Therefore, I hold that the subsequent approval of the Cabinet of Ministers on 04.09.2014 (X26) of the Gazette bearing no. 1857/3 dated 07.04.2014 (X17) gives it validity.

Rights of the Parties

Nonetheless, it is trite law that rights of the parties must be determined as at the date of institution of proceedings or action. [*Ponnammah v. Arumogam* (8 N.L.R. 223 at 226), *Silva v. Nona Hamine* (10 N.L.R. 44), *Ponnamma v. Weerasuriya* (11 N.L.R. 217), *Silva v. Fernando et al* (15 N.L.R.499), *Jamal Mohideen &Co. v. Meera Saibo et al* (22 N.L.R. 268 at 272), *Shariff et al v. Marikkar et al* (27 N.L.R. 349), *Eminona v. Mohideen* (32 N.L.R. 145), *De Silva et al v.*

Goonetilleke et al (32 N.L.R. 217), *De Silva v. Edirisuriya* (41 N.L.R. 457), *Lenorahamy v. Abraham* (43 N.L.R. 68), *Kader Mohideen & Co. Ltd., v. Gany* (60 N.L.R. 16), *Abayadeera and 162 others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and another* (1983) 2 Sri. L. R. 267), *Talagune v. De Livera* (1997) 1 Sri. L. R. 253, *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others* (1998) 1 Sri. L. R. 235, *Lalwani v. Indian Overseas Bank* (1998) 3 Sri. L. R. 197, *Jayaratna v. Jayaratne and another* (2002) 3 Sri. L. R. 331, *Sithy Makeena and others v. Kuraisha and others* (2006) 2 Sri. L. R. 341].

I have previously applied this principle to applications for judicial review [Tissa Abeywickrema and Two Others v. Mayor, Badulla Municipal Council and Others (C.A. (PHC) 111/2011, C.A.M. 22.02.2019].

Although the approval of the Cabinet of Ministers was given on 04.09.2014 (X26), this application was instituted on 04.08.2014. Hence there was no ratification of Gazette bearing no. 1857/3 dated 07.04.2014 (X17) by the time the Petitioner invoked the jurisdiction of this Court.

Yet, on the Petitioners own admission he had cleared the imported vehicle after paying the duty imposed based on the minimum value of the vehicle in terms of Gazette bearing no. 1857/3 dated 07.04.2014 (X17) [page 4 of written submissions dated 15.08.2019]. Nonetheless, the Petitioner has not sought a quashing of the decision made in relation to him based on X17.

Nullity

The learned counsel for the Petitioner submitted that X17 is a nullity and as such is automatically null and void without much ado, although it is sometimes convenient to have the court to declare it to be so.

In *Ashokan v. Commissioner of National Housing* [(2003) 3 Sri.L.R. 179 at 183] and *Leelawathie and Another v. Commissioner of National Housing*[(2004) 3 Sri.L.R. 175 at 179] where Sripavan J. (as he was then) quotes with approval Lord Denning in *Mcfoy v. United Africa Co. Ltd.* [(1961) 3 All E.R. 1169 at 1172] where he said "You cannot put something on nothing and expect it to stay there, it will collapse".

However, in *Ashokan v. Commissioner of National Housing* (supra) the Petitioner specifically sought a quashing of A9 which was the decision that was held to be a nullity. In *Leelawathie and Another v. Commissioner of National Housing* (supra) Sripavan J. (as he was then) was not confronted with a situation of futility arising from the absence of any relief sought against a decision that was a nullity.

It is apposite to briefly set out at this point the meaning of nullity in Administrative Law. Clive Lewis, *Judicial Remedies in Public Law*, 5th ed., South Asia Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):

> "The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problem arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. **Once its illegality is established, and if the courts are prepared to grant a remedy**, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as ever incapable of ever producing legal effects." (emphasis added)

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*, 9th Ed., Indian Edition, 281:

> "...the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings"

Prior to *Mcfoy v. United Africa Co. Ltd.*(supra), this approach was reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* [(1956) A.C. 736, 769-770] where he held:

> "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise

upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

In fact, Wade and Forsyth, *Administrative Law* (supra page 305), states that the statement of Lord Denning in *Mcfoy v. United Africa Co. Ltd.*(supra) relied on by the Petitioner is not the correct position in law.

Wade and Forsyth, *Administrative Law* (supra) page 304, after restating the above statement of Lord Radcliffe sets out the correct position as follows:

> "This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. **The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.** Lord Diplock spoke still more clearly [*Hoffmann-La Roche & Co. v. Secretary of State for Trade & Industry* (1975) A.C. 295 at 366], saying that
>
> It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction." (Emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court [*Hoffmann-La Roche and Co. v. Secretary of State for Trade & Industry* (1975) A.C. 295]. However, this 'presumption of validity' exists pending a final decision by the court [Lord Hoffmann in *R v. Wicks* (1998) A.C. 92 at 115, Lords Irvine LC and Steyn in *Boddington v. British Transport Police* (1999) 2 A.C. 143 at 156 and 161, and 173-4].

This presumption applies to subordinate legislation as well. It is in this context that Lord Irvine LC in *Boddington v. British Transport Police* [(1999) 2 A.C. 143 at 158] held:

> "The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever."

Accordingly, I reject the proposition of the learned Counsel for the Petitioner that as X17 is a nullity, there is no need for it to be set aside. Even if X17 is a nullity as alleged by the Petitioner, the 'presumption of validity' applies and it is to be considered as valid until and unless its legality is successfully challenged in appropriate proceedings.

Futility

Indeed, the Petitioner has sought a writ of certiorari to quash X17. Nonetheless, the Petitioner has failed to pray for a writ of certiorari to quash the decision by which a higher duty was charged from him in allowing him to clear the imported vehicle. Such a decision will be reflected on the Customs Declaration presented by the Petitioner. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition.

In these circumstances, even if Court issues a writ of certiorari to quash X17, the decision to charge a higher sum as customs duties from the Petitioner will remain and as such it will be futile to issue a writ of certiorari to quash X17.

It is the same in relation to the charging of excise duty. The Petitioner admits that the alleged excess excise duty has been collected from the Petitioner. Yet, he has not sought a writ of certiorari quashing that decision. Instead, he has sought writs of mandamus and prohibition which relate to enforcing a statutory or public duty and prohibiting a public functionary acting ultra vires. But the alleged ultra vires act has been already committed by the customs by recovering what is alleged to be excess excise duty. That decision must be quashed before directing the customs to act according to law.

For all the foregoing reasons, I dismiss the application of the Petitioner without costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal