

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

In the matter of an application for an order
in the nature of Writ of Mandamus under
and in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

1. Shanmugaratnasarma
Jegatheeswarasarma
2. Jessiammah
Jegatheeswarasarma
Both of No. 1036,
Selvanayagapuram
Trincomalee.

PETITIONERS

C.A. (Writ) Application No. 697/10

Vs

1. Secretary to the Treasury
Republic Building
Colombo 01.
2. Secretary to the Ministry of
External Affairs
Ministry of External Affairs
3. Honourable Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE

: Deepali Wijesundera J.

COUNSEL

: A.R. Surendran P.C. with

N
22/10/15
H. Kandeepan, M. Jude Dinesh,
Marthant
A. Shelrin and R. Hythreyi for the
Petitioners.

Shavindra Fernando P.C., A.S.G.

with Nayomi Kahawita for the

Respondents.

ARGUED ON

: 12th November, 2014

DECIDED ON

: 16th October, 2015

Deepali Wijesundera J.

The petitioners have filed this application praying for a writ of Mandamus against the first respondent directing him to pay them a sum of Rs. 3,888,000/= as compensation determined by the Human Rights Commission of Sri Lanka.

The son of the petitioners' who was a qualified Motor Mechanic employed in a garage in Trincomalee had been abducted by some members of the Sri Lanka Army in June 1990 during military operations.

The petitioners after complaining to several State Authorities and not getting any redress have complained to the United Nations Human Rights Committee. The first petitioner had alleged that by abduction and disappearance of his son Thevarajah Sarma the Republic of Sri Lanka had violated his rights under *Article 6, 7, 9 and 10 of International Covenant on Civil and Political Rights* and that the petitioners' are victims for violation by state party of *Article 7 of the covenant*.

United Nations Human Rights Committee after considering the communication of the petitioners' and the response by the State had come to the conclusion that the state is responsible for the disappearance of the first petitioner's son and requested the state to provide an effective and enforceable remedy and to communicate the measure taken to enforce the committee's findings. The Secretary to the Ministry of Foreign Affairs referred the matter to the Human Rights Commission of Sri Lanka to recommend the computation of the quantum and payment of compensation.

The Human Rights Commission of Sri Lanka in the presence of the petitioners and the officer from the Attorney General Department representing the State has recommended a total sum of Rs. 3,888,000/= to be paid as compensation to the petitioners. The petitioners states

though they made several requests to pay them the compensation the State failed to comply with the said request. In these circumstances the petitioners have filed the instant application for a writ of Mandamus to compel the first respondent to pay the said compensation.

The petitioners stated that the person who abducted their son was indicted and convicted in the High Court (**P8b**) of Trincomalee but no compensation was paid to them by the State. The petitioners stated the respondents are using the judgment in *Sinharasa case* as a convenient shield to escape from the obligation under protocol. He submitted that the State while on one hand claims that the payment of compensation to the petitioners would be contrary to the judgment in *Sinharasa case* on the other hand continues to remain a party to the protocol in contravention of the said judgment and stated that the purported grounds for non-compliance is totally devoid of merit.

The petitioners stated that the United Nations Human Rights Committee's views in the petitioners case is not contrary to the judgment of the High Court and unlike in the *Sinharasa case* and not in direct conflict with decisions of the Sri Lankan Courts. The petitioners further stated that the United Nations Human Rights Committee had the

legal competence to receive and inquire into the complaint made by the petitioners.

The petitioners submitted that after the enactment of *ICCPR Act No. 56 of 2007* all the provisions of the ICCPR have been incorporated into our law and as such the right to compensation for victims guaranteed by *Article 9-5 and 2 of the ICCPR* became part of the Sri Lankan law hence the respondents can not deny the petitioners their right to compensation. Petitioners stated that under *Article 27 (115)* of our Constitution the State is duty bound to honor International conventions to which it is a party.

The petitioners further submitted that the State by remaining as a party to the optional protocol and by not invoking the provisions of *Article 12 of the ICCPR protocol* which provides the mechanism by which a State party could denounce and exit from the protocol obligations has fostered the legitimate expectations of the petitioners.

The petitioners stated that after the decision of the United Nations Human Rights Committee the Attorney General advised the Secretary to the Foreign Ministry to refer the matter to the Human Rights

Commission of Sri Lanka to make recommendations with regard to payment of compensation therefore the petitioners are entitled to seek a writ of Mandamus to compel the first respondent to pay them compensation.

Referring to the judgment in **Lukmanjee and another Vs Sylvester and others 2005 (1) SLR** the petitioners submitted that relevant officers who are servants of the State can be compelled by a writ of Mandamus to pay compensation where it is due from the State, and that in the instant case the Secretary to the Treasury could be compelled to pay compensation to the petitioners.

The respondents stated that the petitioners did not taken any steps to vindicate their fundamental rights under *Article 11 and 13 (2) of the Constitution* and the jurisdiction of the Supreme Court was not invoked. The petitioners had made an application to the United Nations Human Rights Committee stating *Article 6, 7, 9 and 10 of the ICCPR* had been violated. After the expression of views by the Committee the State took possible measures in good faith to comply with the said views and referred the matter to Human Rights Commission of Sri Lanka for computing of compensation to be paid, the respondents argued. The respondents stated that the decision of the Supreme Court in

Nallaratnam Sinharasa changed all these and no steps were taken by the State under the optional protocol of the ICCPR. The petitioners stated the Supreme Court left no doubt not only that the optional protocol would be inapplicable within the domestic sphere of Sri Lanka but in fact it is to be deemed as never having been applicable since the very act of accession was held to be unconstitutional and thereby a nullity. Respondents further stated that the United Nations Human Rights Committee despite adopting the view that the rights of the petitioners under Article 7 and 9 of the ICCPR had been violated stopped short of quantifying the compensation to be paid to the petitioners. The respondents stated that the State refrained from taking further steps to give effect to the views of the United Nations Human Rights Committee in compliance with the decision of the Supreme Court and that the said decision precludes this court from giving effect to a decision of the United Nations Human Rights Committee.

The respondents further submitted no rights or expectations can flow from an unconstitutional Act which is the Act of accession of the said optional protocol. Respondents stated the ICCPR only envisaged qua state that the states would take steps in accordance with their constitutional processes to domestically recognized rights.

The respondents stated that the rights envisaged under *Articles 7 and 9 of the ICCPR* have been available in the domestic sphere under the constitution even prior to the ratification of the ICCPR which are recognized as fundamental rights and that the *Article 126 of the Constitution* provides the legal remedy available for the violation of the same.

Both parties referred to the case of **Minister of State for Immigration and Ethnic Affairs Vs Ab Hin Teoh 1995 HCA 20**. In this case the court has dealt with consideration of International Law in domestic policy.

The respondents stated that no writ of Mandamus shall lie with regard to the implementation of a recommendation by the Human Rights Commission of Sri Lanka as the procedure to be followed in the event that such a recommendation is not observed is set out in the Human Rights Committee *Act No. 21 of 1996* and stated that this position has been emphasized in the judgments of **Mahanayake Vs Chairman Petroleum Corporation and others 2005 2 SLR 193** and **Sri Lanka Telecom Ltd Vs Human Rights Commission of Sri Lanka AA/writ/app/519/2008**.

On the arguments put forward and the documents placed before this court it has to be decided whether the petitioners are entitled to a writ of Mandamus, to implement a recommendation by the Human Rights Committee of Sri Lanka. *Sec. 11 (9) of the Human Rights Committee Act No. 21 of 1996* refers to the discretion of the Human Rights Commission on awarding of money to aggrieved parties. *Sec. 11* deals with powers of the Commission. *Sec. 21* states how a person can be punished for contempt, when a person disregards the orders of the commission.

The judgments cited by the petitioners in their submissions are not relevant to the instant case since what has to be decided is whether a Writ of Mandamus can be issued to implement the recommendations of the Human Rights Committee of Sri Lanka. There is no issue regarding the awarding of compensation and the person who abducted the petitioners' son has been convicted by a Sri Lankan High Court.

The learned counsel for the petitioners at great length made submission on the United Nations Human Rights Committee and the optional protocol which is not disputed. The matter to be decided by this court is something else.

The petitioners have for reasons best known to them failed to seek redress in the constitutionally stipulated manner though such remedy was available. Having failed to seek redress they cannot claim that they possessed a legitimate expectation under the ICCPR or relief under the Optional Protocol when the identical rights and remedy were available here.

Article 9 of ICCPR reads thus;

- 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
- 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
- 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

Article 13 of the Sri Lankan Constitution states;

1. *No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*
2. *Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*
3. *Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*

4. No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

5. Every person shall be presumed innocent until he is proved guilty;

Provided that the burden of proving particular facts may, by law, be placed on an accused person.

6. No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

7. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefore, shall not be a contravention of this Article.

Article 126 of the Constitution states;

1. The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

2. Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.

From the above it is clear that the rights envisaged under *Article 7 and 9 of the ICCPR* have been available in the constitution even prior to the ratification of the ICCPR. The said rights are recognized as fundamental rights and *Article 126 of our Constitution* provides the legal remedy available for violation of the same.

The petitioners claimed the *International Covenant on Civil and Political Rights Act No. 56 of 2007* by way of incorporation of the rights in the covenant gave rise to a legitimate expectation to the petitioners. The preamble of the Act indicates the limited purpose of the Act which does not envisage or provide for adoption of the entirety of the ICCPR into domestic law. In the circumstances the petitioners can not claim any legitimate expectation stemming from the said Act.

For the afore stated reasons this court decides not to grant a writ of Mandamus as prayed for by the petitioners. The application of the petitioners' is dismissed. I make no order for costs.

JUDGE OF THE COURT OF APPEAL