

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

*In the matter of an Application for a
mandate in the nature of Writ of Mandamus
made under and in terms of Article 140 of
the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

Herath Mudiyanseelage Vijitha Herath,
No. 464/20, Pannipitiya Road,
Pelawatta, Battaramulla.

Petitioner

Court of Appeal case

No. CA 08/2015 Writ

Vs.

1. Inspector General of Police,
Police Head Quarters,
Colombo 01.
2. Secretary to the Ministry of Defence,
Ministry of Defence,
15/5, Baladaksha Mawatha,
Colombo 03.
3. Controller General of
Immigration and Emigration,
No.41, Ananda Rajakaruna Mawatha,
Colombo 10.
4. Commander of Army,
Army Head Quarters,
Colombo 03.
5. Commander Security Forces,
Kilinochchi, Security Forces,
Head Quarters, Army Camp,
Iranamadu, Kilinochchi.

6. Director,
Terrorist Investigation Division.
Criminal Investigation Division,
New Secretariat,
Colombo 01.
7. The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
8. Shanmugam Kumaran Tharmalingham
alias Tharmalingham Shanmugam Kumaran
alias Kumaran Pathmanathan *alias* Kutti
Master *alias* Kutti Siri LTTE, *alias*
Thambiah Selvaraja *alias* Kuldi who was
known as "KP", NERDO Office,
Thondaman Nagar Road,
Kanagambigai Kulam,
Kilinochchi.

Respondents

Before : L.T.B. Dehideniya J, (P/CA)

&

A.L. Shiran Gooneratne J.

Counsel : Upul Kumarapperuma with Wajirani Wickramasinghe for the
Petitioner.

Priyantha Nawana ASG, PC for the Respondents.

Supported on : 07/11/2017

Decided on : 30/11/2017

Order

A.L. Shiran Gooneratne J.

The Petitioner has filed Petition dated 19th January 2015, pleading *inter alia*, to grant and issue a mandate in the nature of a Writ of Mandamus on the 1st and 7th Respondents.

- a) directing them to arrest the 8th Respondent;
- b) produce the 8th Respondent before the relevant Court/ Courts and subject the 8th Respondent to judicial custody;
- c) investigate the offences committed by the 8th Respondent;
- d) institute judicial proceedings against the 8th Respondent;

According to paragraph 28 of the Petition the said directions are sought based on the information provided therein, by the Government of Sri Lanka to the nation regarding the offences committed by Shanmugam Kumaran Tharmalingham *alias* KP,.... (8th Respondent). In support of the above contention, the Petitioner has attached to the Petition documents marked P-1 to P-7 all of which are printouts obtained from the World Wide Web.

In terms of paragraphs (e), (f), (g) and (h) to the prayer, the Petitioner has sought mandates in the nature of Writ of Mandamus against the Respondents on the failure to perform specific acts. that is:

1. to arrest the 8th Respondent.
2. to investigate the crimes committed by the 8th Respondent.
3. to institute judicial proceeding against the 8th Respondent.
4. to produce the 8th Respondent before a relevant Court/ Courts of law and subject him to judicial custody.

Counsel appearing for the Respondents submit that at present the 1st, 3rd, 6th and 7th Respondents have investigated alleged offences committed by the 8th Respondent. In support, the attention of Court is drawn to reports submitted by the 7th Respondent dated 20th October 2015, 13th November 2015 and 26th January 2016, filed of record. Counsel further submits that the directions sought in respect of paragraphs (e), (f) and (h) are subject to discretion and to official Judgement of the relevant public Authorities and therefore does not come within the ambit of a Writ of Mandamus.

Directions sought can be given by a Court where a statute imposes a clear and qualified duty to perform specific acts. However where a public body is exercising a discretionary power as in this instance, a Writ of Mandamus can issue to order such public body to consider whether or not to exercise such discretion and not interfere in any manner with the exercise of such discretion. As pointed out by the A.S.G.

“If a clear and specific duty is positively required by law to be done by any authority and the duty is of a ministerial nature involving no element of discretion and no exercise of official judgement, Mandamus is the appropriate remedy to compel its performance in the absence of any other adequate and specific remedy.” (Writ Remedies, Justice B.P. Banerjee, 6th Edition at page 173)

Judicial Remedies in Public Law, Clive Lewis, 2nd Edition at page 193 states,

“Public bodies may not be under a duty to act, but may be given a discretion as to whether or not to act. Such bodies are under a common law duty to consider whether or not to exercise their discretion. Where a public body fails to consider exercising its discretion or makes a reviewable error in deciding not to exercise it, mandamus can issue to order the body to consider according to law whether or not to exercise the discretion.”

The Petitioner is seeking directions in the nature of Writ of Mandamus to compel the 1st to 7th Respondents to perform specific acts. As pointed out, when discretion is vested with a public authority to act and when such discretion is subject to official judgement, to compel such authority by directing the performance of an act, which is not imposed by statute or without a clear legal right to perform, is misconceived in law.

In the circumstances application for notice is refused. Petition dismissed.

We make no order as to costs.

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya J, (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL