

**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 of the Republic of Sri Lanka.*

1. Ranjitha Traders (Private) Limited
No:180, Colombo Street,
Kandy.
2. P. Kisho Kumar
Director,
Ranjitha Traders (Private) Limited,
No:180, Colombo Street,
Kandy.

CA/WRIT/338/2021

Petitioners

Vs.

1. Hon. Basil Rohana Rajapaksa,
Hon. Minister of Finance,
- 1A.Hon. Ranil Wickremasinghe
Hon. Minister of Finance,
The Secretariat,
Colombo 01.
(1A Substituted Respondent)

2. S. R. Attygalla,
2A.K. M. Mahinda Siriwardana
Secretary to the Minister of Finance &
Secretary to the Treasury,
Ministry of Finance,
The Secretariat,
Colombo 01.
(2A Substituted Respondent)

3. T. V. D. Damayanthi S. Karunarathne
3A.T. T. Upulmalee Premathilake
Controller General,
Department of Imports & Exports Control,
No: 75 1/3, 1st Floor, Hemas Building,
York Street,
Colombo 01.
(3A Substituted Respondent)

4. Major General G. V. Ravipriya (Retd.)
4A.P. B. S. C. Nonis,
Director General of Customs,
Sri Lanka Customs,
Sri Lanka Customs House,
Main Street, No:40,
Colombo 11.
(4A Substituted Respondent)

5. B. A. S. P. I. Balasooriya,
Director of Customs,
(At that time in Social Protection
Directorate)

And

The Inquiring Officer,

(In the Customs Inquiries bearing Nos:

ENSP/PCU/2020/000109/CCR/02811,

ENSP/PCU/2020/000110/CCR/02812,

ENSP/PCU/2020/000111/CCR/02813)

5A.G. W. Paninee Wijayawardene

Director of Customs,

Social Protection Directorate,

Sri Lanka Customs,

Sri Lanka Customs House,

Main Street, No:40,

Colombo 11.

(5A Added Respondent)

6. G. B. Gnanaraj

Deputy Director of Customs,

Port Control Unit,

Sri Lanka Customs,

Sri Lanka Customs House,

Main Street, No:40,

Colombo 11.

7. Gagani Liyanage,

Government Printer,

Department of Government Printing,

No: 118, Dr. Danister De Silva Mawatha,

Colombo 08.

8. W. B. Dhammika Dassanayake
Secretary General of Parliament,
Parliament Complex,
Sri Jayawardenapura- Kotte.

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

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : K. Deekiriwewa with Dr. M. K. Herath, Dr. Kanchana de Silva and Jagath
Jayaweera Arachchige for the Petitioners.

Vikum De Abrew PC, SDSG with S. Wimalasena DSG, N. De Zoysa SC
and M. Fernando SC for the Respondents.

Argued on : 03.11.2022,14.12.2022 and 16.02.2023

Written Submissions: Petitioner - 16.11.2022, 30.12.2022 and 23.02.2023
Respondents - 14.02.2023

Decided on : 17.05.2023

Sobhitha Rajakaruna J.

The Minister of Finance in terms of the powers vested in him by Section 20 read together with Sections 4(1), 6 and 14 of the Imports and Exports (Control) Act No. 1 of 1969 ('Act') as amended by Act No. 48 of 1985 and Act No. 28 of 1987 promulgated Imports and Exports (Control) Regulations No. 09 of 2020 ('Regulations'). The said Regulations were published in Gazette Extraordinary No. 2199/20 dated 29.10.2020 ('X4'). By virtue of the said

Regulations, the relevant Minister made sugar a licensable item and the import control license fee is also declared in the same Regulations.

As per the proceedings (marked 'X10') of the inquiry into the customs case in relation to the particular consignments of brown sugar (subject goods) which were birthed at Colombo harbour after 29.10.2020 and such consignments were withheld due to the reason that the consignee (M/S Ranjitha Traders (Pvt) Ltd.-1st Petitioner) had not obtained valid Import Control Licenses from the Department of Imports and Exports Control for such shipments at the time of importation. Accordingly, Sri Lanka Customs forfeited the consignments and mitigated the same to release on a payment of mitigated forfeiture.

The Petitioners primarily challenge the said Gazette Notification 'X4' mainly on the alleged grounds that;

- i. Regulations are lapsed and invalid,
- ii. the actual date of publication of 'X4' has been antedated,
- iii. the Respondents are not entitled to invoke and apply the 'X4' till 30.11.2020 being the date that the Regulations were published and displayed in the electronic form of Gazette in the Government Printer's official website (www.documents.gov.lk),
- iv. Regulations have not been presented to the Parliament within a period of one month from the date of publication,
- v. Regulations were not actually gazetted on 29.10.2020 as required by Section 20(3) of the Act and Section 17(1)(e) of the Interpretation Ordinance No. 21 of 1901 (as amended) ('Interpretation Ordinance'). In other words, the Regulations were not gazetted immediately after the Minister endorsed the Regulations on 29.10.2020,
- vi. 'X4' has been antedated by belatedly publishing the electronic form of Gazette in the Government Printer's official website on 30.11.2020 while the actual date of printing and publication was on 07.12.2020,
- vii. publishing the Regulations in the website of the Department of Imports and Exports Control on 29.10.2020 is not sufficient and it will not confer any legality to the draft Regulations until it is duly gazetted and such Regulations cannot be implemented without gazetting,

viii. Regulations do not acquire the status of a subordinate legislation in terms of Article 76(3) of the Constitution and under section 17(1)(e) of the Interpretation Ordinance until it is duly gazetted.

The contention of the Respondents is that the mitigated forfeiture has been imposed due to the importation of those consignments by the Petitioners without having obtained valid Import Control Licenses ('License') from the 3rd Respondent. The Respondents have taken such steps against the Petitioners in terms of Regulations marked 'X4' and also by virtue of Section 12 of the Customs Ordinance No. 17 of 1869 (as amended) ('Customs Ordinance') read together with its Section 43. Further, it is submitted that the Respondents have taken steps to publish the Regulations in terms of Section 20(3) of the Act and there is no requirement under the law to publish such Regulations immediately by way of a Gazette Notification.

It is important to note that the Petitioners are not challenging the legality of the Regulations per se. But the Petitioners strongly assert that the said Regulations have not been immediately published by way of a Gazette Notification and the Gazette Notification which was published subsequently has been antedated and was not approved by the Parliament within a period of one month. Based on such assertions, the Petitioners argue that 'X4' is a nullity although, the Parliament has approved the same on a later date.

At the outset, I must sift the distinctive elements of Section 20(3) of the Act which reads;

'Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication or on such later date as may be specified in the regulation.'

It appears that the said Section has two significant limbs. Firstly, it indicates the requirement of publishing the Regulations in the Gazette. Secondly, the said Section describes the date on which the said Regulations will come into operation. On a careful perusal of the wordings therein, it appears that the legislature while conferring the power on the relevant Minister under Section 20(1) to promulgate Regulations has further empowered him under Section 20(3) to decide a date that the Regulations should come into operation. If the Minister does

not specify a date in view of the said provisions, then the date of operation of the Regulations should be the date of publication of such Regulations. It seems that those two limbs of the said Section are not interdependent.

It is obvious that the task of publishing the Gazette Notification containing the Regulations is in the hands of the Government Printer. The Minister exercising his powers under Section 20(1) of the Act has made Regulations on 29.10.2020 and has decided it should come into operation with effect from 30.10.2020 by virtue of Section 20(3) of the Act. Despite the powers of the Cabinet where the relevant Minister is a member, it cannot be assumed that the Minister when he endorsed the Regulations on 29.10.2020 had any authority, under normal circumstances, to control the affairs of the Department of Government Printing. If I am to accept the argument that the relevant Gazette Notification should also be published immediately after such endorsement, then it eventually curtails the powers vested in the Minister under said Section 20(3) of the Act in deciding the date of operation. It is simply because the Minister would not know the date that the Government printer would print the Regulations when he stipulates the date on which the Regulations should come into effect. The said Section 20(3) has been formulated in a manner where the Minister has the discretion to decide the date of the commencement of operation, but that should be a date later than the date of endorsement of the Regulations. In this case, the Minister has decided that the Regulations should come into operation on the day following the date of endorsement. It is paramount that there is no requirement stipulated in Section 20(3) that the regulations should be published in print form on or before such date specified by the Minister.

In this regard, it should be noted that making subordinate legislation such as the Regulations, marked 'X4', involves an established process within our system of legislation. Initially the Minister endorses the Regulations. To my mind, this endorsement can be done perhaps being in his office of the relevant ministry. Then the Regulations should be published in the Gazette by the Government Printer. Such publication should be done immediately only if the main statute or the regulation itself provides that the regulations shall come into operation on the specified date by mandatory publication of the Gazette on the specified date or before that. If no such provision is available in the main statute or the regulations, the Gazette can be published on a later date without contravening the other laws. Once the Gazette is published,

the final step of the said process will be to forward the Gazette Notification to the Parliament by the line ministry and that is also required only if the main statute provides for the necessity of the sanction of the Parliament.

In light of the above and on a careful consideration of the language embraced by the Section 20(3), I am not inclined to accept the Petitioner's argument that the Regulations made under the relevant Act should be published immediately after endorsement by the Minister for such Regulations to become effective. It is no doubt that such Regulations should be mandatorily published by way of a Gazette Notification, perhaps on a later date. I have arrived at this conclusion as the relevant Act or the Regulations 'X4' does not illustrate the requirement of immediate publication of the Regulations by way of a Gazette Notification. At the same time, I observe that the provisions of Section 20(3) do not specifically provide that the required publication should be via a Gazette Notification or any other mode of publication since the word 'such' (or its) is not seen immediately before the word 'publication' as usually adopted by other Acts of Parliament in their respective provisions.

At this stage, I must draw my attention to certain formats used by the legislature in different Acts of Parliament when delegating power to make subordinate legislation. The respective provisions used in National Housing Development Authority Act No. 17 of 1979, Urban Development Authority Law No. 41 of 1978 (as amended), Inland Revenue Act No. 24 of 2017 (as amended), Finance Act No. 35 of 2018, Value Added Tax Act No. 14 of 2002 (as amended) and Customs Ordinance are similar to Section 20(3) of the Act to a certain extent. However, in those provisions the mode of publication is the publication of a Gazette Notification, whereas in Section 20(3) it is not specified by omitting the word 'such' or 'its' immediately before the word 'publication'.

Section 76(3) of *National Housing Development Authority Act No. 17 of 1979*;

'Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation'.

Section 21(2) *Urban Development Authority Law No. 41 of 1978 (as amended)*;

'Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation'.

Section 194(2) and Section 194(4) of *Inland Revenue Act No. 24 of 2017 (as amended)*;

'(2) A regulation made under this section, other than a regulation—

(a) prescribing a penalty for; or

(b) enhancing a penalty prescribed for, the contravention of or failure to comply with, a regulation made under this section, may be declared to take effect from a date earlier than the date of its publication in the Gazette'.

'(4) Every regulation made by the Minister other than a regulation referred to in subsection (2), shall come into operation on the date of its publication in the Gazette or on such other date as may be specified in the regulation'.

Section 51(2) of *Finance Act No. 35 of 2018*;

'Every regulation made by the Minister under subsection (1) shall be published in the Gazette and shall come into operation on the date of its publication or on such later date as may be specified therein'.

Section 75(2) of *Value Added Tax Act No. 14 of 2002 (as amended)*;

'Every regulation made by the Minister shall come into operation on the date of its publication in the Gazette or on such date as may be specified in the regulation'.

Section 101(1) of *Customs Ordinance No. 17 of 1869 (as amended)*;

'The Minister may make regulations in respect of any matter required by this Ordinance to be prescribed or in respect of which regulations are required to be made under this Ordinance and in particular for any of the following purposes:.....and such regulations shall be published in the Gazette. Any person who shall disobey the same shall be guilty of an offence and shall on conviction after summary trial by a Magistrate be liable to a fine, not exceeding twenty five thousand rupees or to imprisonment of either description for a term not exceeding three months or to both

such fine and imprisonment. The Collector may, having regard to the circumstances in which the offence was committed, compound an offence under this section on payment of an amount equal to one fifth of the fine imposable for such offence. The compounding of an offence under this section shall have the effect of an acquittal.'

The provisions adopted in Industrial Disputes Act No. 43 of 1950 (as amended), Registration of Persons Act No. 32 of 1971 (as amended) and Citizenship Act No. 18 of 1948 (as amended) following a different format, stipulate the requirement of mandatory publication of a Gazette for respective Regulations to become effective.

Section 39(2) of *Industrial Disputes Act No. 43 of 1950 (as amended)*;

'No regulation made under subsection (1) of this section or under subsection (2) of section 31A shall have effect until it is approved by Parliament and notification of such approval is published in the Gazette.

Every regulation so approved shall be as valid and effectual as though it were herein enacted'.

Section 52(3) of *Registration of Persons Act No. 32 of 1971 (as amended)*;

'No regulation made by the Minister under this Act shall come into force until it has been approved by Parliament, and notification of such approval is published in the Gazette'.

Section 27 of *Citizenship Act No. 18 of 1948 (as amended)*;

'No regulation made by the Minister shall have effect until it has received the approval of Parliament and notification of such approval is published in the Gazette'.

The Parliament has used a completely different format in Section 11 of the Public Security Ordinance No. 25 of 1947 (as amended) where it provides that the Emergency Regulations made under the said Act come into force forthwith upon it being endorsed by the President.

Section 11 of *Public Security Ordinance No. 25 of 1947 (as amended)*;

'Notwithstanding anything in the Interpretation Ordinance or in any other law, every emergency regulation shall come into force forthwith upon its being made by the

President, and shall be deemed to be as valid and effective as though it were herein enacted'.

By considering the above Clauses taken randomly from the respective Acts of Parliament, it appears that the legislature has expressly declared how to determine the date of operation of subordinate legislation. It must be borne in mind that the purpose of subordinate legislation such as Regulations is to provide for procedural matters or matters which are subsidiary to the provisions of the main statute. In N. S. Bindra's 'Interpretation of Statutes' (9th Edition Butterworths, 2002, p.1121), it is stated that 'the power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate; Parliament is supreme and its power to legislate is, therefore, unlimited'. In a comparative analysis with the Statutes of United Kingdom (UK), it is observed that the Statutory Instruments Act 1946 of UK has not laid down in its Section 4 a specific requirement of publishing the Gazette Notification before the date of operation of a regulation etc. The said Section 4(2) stipulates that; 'Every copy of any such statutory instrument sold by or under the authority of the King's printer of Acts of Parliament shall bear on the face thereof: (a) a statement showing the date on which the statutory instrument came or will come into operation; and...'

Thus, it is significant that the regulations made under the power delegated by the Parliament become effective in the manner prescribed in the main statute. If there is no such prescription about the date of commencement of operation, it can be assumed that the regulations need to be published in such a way that those who are subjected to those regulations become aware of the same. In the circumstances, subordinate legislation generally come into operation as specifically described by the Parliament and in the instant case the Regulations 'X4' have come into operation on the date specified by the Minister even in the absence of immediate publication of a Gazette Notification.

The Petitioners make strong assertions based on the provisions in Section 17(1)(e) of the Interpretation Ordinance by which the requirement of publishing all rules in the Gazette is emphasized. Although, the said Section 17(1)(e) demands the necessity of publishing the rules in the Gazette, the said Section does not make any provisions upon the date on which such rules should come into operation. In light of the reasons given above, the validity of the

Regulations marked 'X4' has not been affected by the provisions of this Section as the Parliament has specifically determined as to when the Regulations under the said Imports and Exports (Control) Act should come into operation. Based on the material available to Court, the impugned Gazette Notification containing the Regulations has been approved by the Parliament. Hence, it cannot be assumed that any provisions in Article 148 of the Constitution have been violated as alleged by the Petitioner.

It is very well noted that, in the instant Application, the Regulations have been published by the Gazette Notification No. 2199/20 dated 29.10.2020 ('X4'). As I mentioned earlier, the Section 20(3) of the Act has not specifically mentioned a mode of publication. My mind drifted at this stage to the aspect of mode of publication due to the reason that mere printing of a Gazette Notification and publishing a Gazette Notification would usually take place at two different occasions. One can argue that due 'publication' is the stage that enables a citizen to peruse a Gazette Notification and not mere completion of the printing process under the roof of the Government Printing Press. The Section 9 of the Electronic Transaction Act No. 19 of 2006 also has an importance in this regard and the said Section stipulates that; 'where any Act or enactment provides that any Proclamation, rule, regulation, order, by-law, notification, or other matter shall be published in the Gazette, then such requirement shall be deemed to have been satisfied if such rule, regulation, order, by-law, notification or other matter is published in an electronic form of the Gazette.'

In light of the above, I cannot agree with the stand taken by the Petitioners that the Respondents have antedated the Regulations when publishing the same, as the said Regulations have duly come into operation with effect from 30.10.2020. I have no doubt as to what the Government Printer has done on 07.12.2020 and it was only mere printing the Regulations endorsed by the relevant Minister on 29.10.2020. Such task of printing on a later date through a printing machine cannot be considered as antedating and thus, there cannot be any contravention of the provisions contained in Article 76(3) of the Constitution. Anyhow, I take the view that delaying unreasonably the printing of such Gazette without valid and sufficient reasons cannot be accepted.

Now, I must advert to the other main argument of the Petitioner that the Parliament has not approved the Gazette Notification 'X4' within a period of one month. The Section 20(4) of the Act requires the Regulations made by the Minister to be brought before Parliament within a period of one month from the date of the publication of that Regulations under Section 20(3) of the Act. As I have mentioned earlier, there is an ambiguity in respect of the mode of publication described in the said Section 20(3). To my mind, in view of Section 20(3) of the Act, there is a possibility for any person to raise an argument that the publication should mandatorily be by way of a Gazette Notification and at the same time one may argue that the publication could be by way of an electronic form of the Gazette in an appropriate website.

It is an admitted fact that the Regulations endorsed by the Minister on 29.10.2020 have been published in the website of the Department of Imports and Exports Control. However, this Court has no evidence as to whether the relevant Ministry has published the electronic version of the Gazette Notification or only the documents containing Regulations endorsed by the Minister, in the said website.

The Controller General of the Department of Imports and Exports Control has affirmed in her affidavit that the operating instructions dated 29.10.2020, marked 'X5A' had been issued to the 4th Respondent and to Chief Executive Officers of all Commercial Banks informing about the new Regulatory Scheme governing the importation of sugar. She further affirms that the travel restrictions due to the COVID-19 pandemic and public health policies resulted in the relevant Regulations not being duly published. While the Respondents are finding an excuse under the guise of COVID-19, the Petitioners also attempt to highlight the hardship underwent during the said pandemic as a defence against the preliminary objections raised by the Respondents that the Petitioners are guilty of laches. The Petitioners plead that the COVID-19 pandemic attributed to delay in filing the instant Application. It is alleged that the impugned Regulations were promulgated as a means of addressing the foreign exchange crisis faced by the country following the COVID-19 pandemic.

Anyhow, the electronic form of the said Regulations was published by the Department of Government Printing on 30.11.2020 whereas it has been printed and published by the said Department on 07.12.2020. The 3rd Respondent on the strength of the document, marked

'3R(2)', asserts that the Regulations were forwarded to the Parliament within a period of one month from the date of actual printing of the Gazette and its publication. It is important to note that both the Petitioner and the Respondents have not addressed on the point whether a line ministry can forward an electronic version of the Gazette Notification to the Parliament before such Gazette being printed by the Government Printer. The Court is unaware of the decisions taken by the respective Parliamentary Business Committee which prevailed during the time material to the affairs of this Application specifically with regard to the mode of acceptance of Gazette Notifications submitted for Parliamentary approval. At the same time this Court is aware such modalities are usually being regulated by the said Committee on Parliamentary Business.

The Respondents rely on the precedent laid down in *S. K. T. Traders (Pvt) Ltd and another vs. Hon. Mahinda Rajapaksa and 6 others, CA/Writ 423/2020 decided on 08.02.2021* where the Court has held that the phrase "brought before Parliament within a period of one month" in Section 20(4) of the Imports and Exports (Control) Act only requires the regulations to be submitted to the Parliament within a period of one month from their publication and there is no burden placed on a governmental department/ministry to have the regulations placed on the order paper of Parliament. The defence taken in this regard by the Respondents is that the relevant Gazette Notification was forwarded to the Parliament exactly within one month from the date of printing (& publishing) by the Government Printer on 07.12.2020. Considering the consequences faced by the public sector as well as the private sector in the country due to COVID-19 pandemic and also considering the lacuna in clarity in reference to the word 'publication' in Section 20(3) of the Act (as described above) together with the ambiguity on the issue whether the electronic form or the printed form of the Gazette should be forwarded to the Parliament, I take the view that the Gazette Notification 'X4' should be considered as duly forwarded to the Parliament for its approval. Similarly, I need to emphasize that the date of forwarding the Gazette Notification 'X4' to Parliament should not be an impediment to classify the relevant Regulations as valid in law based on the circumstances of this case and also based on the grounds that;

- a) the said Regulations have duly come into operation with effect from 30.10.2020 and

- b) the Parliament which has the total control over the said Regulations under Section 20(4) of the Act has finally approved such Regulations without any encumbrances.

Finally, I must draw my attention to the Petitioners' contention that it is the Court's duty to ensure that the powers delegated to Ministers are not exceeded or abused and are exercised lawfully to uphold the rule of law. Observing the manner in which the relevant Minister has exercised his powers in enacting the Regulations 'X4' and the circumstances surrounding COVID-19 pandemic when the Regulations were made, I am of the view that the Minister has duly exercised his authority without exceeding his powers.

In the above circumstances, I am of the view that the provisions of Sections 20(1), 20(3) & 20(4) have been sufficiently complied with and the Regulations 'X4' have duly come into operation on 30.10.2023. Thus, the Regulations 'X4' & operating instructions 'X5A' are valid in law and the Petitioners are not entitled for writs of Certiorari as prayed for in the prayer of the Petition. In view of the above conclusion, there is no necessity to take into consideration the other reliefs particularly for writs of Prohibition and Mandamus sought by the Petitioners. Therefore, I proceed to dismiss the Application of the Petitioners.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal