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 Writ of *Certiorari and Mandamus* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. W.M. Jayaweera
2. P.G. Leelawathi Jayaweera
   No. 7/1, Fernando Road,
   Wekada,
   Panadura.

PETITIONERS

CA/ WRIT/ 633/ 2011

Vs,

1. The Commissioner General of Excise,
   Department of Excise,
   No.32, W.A. Ramanayake Mw,
   Colombo 02.

2. Mr. A. Boderagama,
   Deputy Excise Commissioner (Revenue),
   Department of Excise,
   No.32, W.A. Ramanayake Mw,
   Colombo 02.

3. a). Mr. Pradeep Rathnayake,
   Former Divisional Secretary, Panadura,
   Presently of the office of the Commissioner of Motor Traffic,
   Colombo 05.

b). Mr. M.A.T. Senerath,
Former Divisional Secretary, Panadura,
Presently Divisional Secretary, Bandaragama.

c). Mrs. Champa N. Perera,
Divisional Secretary, Panadura.

4. Mr. Nimal Karunaratne,
Inspector of police,
The Officer-in-charge,
Police Station,
Wadduwa.

5. The Inspector General of Police,
Police Headquarters,
Colombo 01.

6. Mrs. G. Nimal Silva,
The Assistant Excise Commissioner- Western Province II,
Department of Excise,
Nagoda,
Kalutara.

7. Mr. L.K.G. Gunawardena,
Commissioner of Excise (Revenue),
Department of Excise,
32, W.A. Ramanayake Mw,
Colombo 02.

8. Mr. K.M.G. Bandara,
Assistant Commissioner of Excise,

Department of Excise,
32, W.A. Ramanayake Mw,
Colombo 02.

9. Mr. Rohan Wijeratne,
Superintendent of Police,
Kalutara.

10. Ven Gonaduwe Gunananda Thero,
Purana Viharaya,
Korosduwa,
Wadduwa.

11. VenWadduwe Dhammawansa Thero,
Panadura Dakuna,
Sri Lankaramaya,
Wadduwa.

RESPONDENTS

Before: **Vijith K. Malalgoda PC J (P/CA) &**
H.C.J. Madawala J

Counsel: Romesh de. Silva PC with J. Wikramanayake and Migara Dass for the Petitioners,

Asthika Devendra for the 10th and 11th Respondents,

Vikum de. Abrow DSG for the 1st, 2nd, 6th and 9th Respondents

Argued On: 09.10.2015

Written Submission On: 30.10.2015

Order On: 13.01.2016

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioners to the present application, W.M. Jayaweera and P.G. Leelawathi Jayaweera had come before this court seeking inter alia,

a) for a *Writ of Certiorari* quashing the decision of the 1st Respondent as contained in the letter dated 12.10.2011 marked P-61 refusing to approve the application of the Petitioners to relocate the Petitioners licensed business to premises bearing number 645C Galle Road, Wadduwa.

b) For a *Writ of Mandamus* directing the 1st Respondent and/or his servants against and all those holding under and through him to approve the Petitioners' application for a transfer of their FL 04 Liquor License to premises bearing number 645C, Galle Road, Wadduwa.

c) For a *Writ of Mandamus* directing the 1st Respondent and/or his servants, against and all those holding under and through him to duly and forthwith grant and issue to the Petitioners the FL04 liquor license and consequential licenses in respect of premises bearing number 645C, Galle Road, Wadduwa.

Petitioners' who were issued with a FL 04 Liquor License by the 1st Respondent had complained against the 1st Respondent of his decision to refuse the application of the Petitioners to relocate the Petitioners licensed business premises conveyed to him by document P-61.

According to the Petitioners, the liquor license they referred to in the present application was originally issued to the Brother- in-Law of the 2nd Petitioner. It was originally issued in 1986 in Kandy but was transferred to Wadduwa with effect from 01.01.1994. In the year 2004 on the request of the original permit holder the said FL 04 permit was transferred in the name of 1st and 2nd Petitioners. Thereafter the two Petitioners continued the business at 412, Galle Road, Wadduwa until they made an application for relocate the said business in the year 2009.

As submitted by the Petitioners the above request for relocation was made due to,

a) The Government was acquiring the relevant premises for road widening
b) the tenancy agreement for the premises was coming to an end,

Since one of the grounds for the said request was "government activity" the Petitioners submitted that their request for relocate the business can be granted under guide line 27 of Excise Notification 902 which reads as follows,

> "No approval will be granted to relocate any liquor selling license. However in the case of a natural disaster or due to government activity or due to any other reason which Excise Commissioner General consider as reasonable, change of location of a licensed premises can be considered, if the relocation takes place within the same Divisional Secretariat Division."

Petitioners relied on documents produced marked P-15 and P-21 to establish the said fact. When the said request was made in writing to the officer-in-Charge of the Excise Office Panadura, the said officer had submitted the said request to the Assistant Commissioner of Excise, Western Province stationed in Kalutara with his observations.

The said application is before this court produces marked R-1A. We observe that the said officer who had submitted his observations, given full details of the said premises without any adverse comments but referred to a protest by the Maha-Sanga and the Public for the said relocation and recommended that a report should be called from Wadduwa Police before taking a decision.

Paragraph 13 of the Excise Notification 902 stipulates the requirements that should be fulfilled in order to obtain a new liquor license, renewal or transfer of the same and the said paragraph includes,

c) a report including the recommendations of the Officer-in-Charge of the Excise Station, Superintendent of Excise and Assistant Commissioner of Excise

e) any complaints are received to the contrary, the Commissioner General of Excise shall upon an inquiry as set out in paragraph 21

f) a report from the Officer-in -Charge of the Police Station where the licensed premises is situated that the applicant is not convicted of any offence under the Penal Code or Excise Ordinance during the preceding five (05) years and a report from the Divisional Secretary where the licensed premises is situated that the applicant is fit and proper

person to hold the said license and there is no objection from the public to the issue of the license.

The procedure that should be followed by the 1st Respondent in the event of any objection or protest is referred to in paragraph 21 of the said Notification 902.

During the arguments before us the Learned Senior Counsel for the Petitioner referred to 3 inquiries held under the said provision and he alleged malafides on the 6th Respondent who conducted the 1st inquiry for the personal interest he alleged to have had for the issuance of the license to the Petitioners.

However according to paragraph 13(c) it is necessary for the Assistant Commissioner of Excise to submit his recommendation when an application is made for new liquor license, removal or transfer as the case may be, and the 6th Respondent being the Assistant Commissioner (Western Province II) in charge of Kalutara has a duty to submit his recommendation to the 1st Respondent.

The said recommendation dated 07.07.2009 of the 6th Respondent submitted to the 1st Respondent through Deputy Commissioner of Excise (Revenue) and Commissioner of Excise (Revenue) is before us marked R-1C and in the said recommendation the 6th Respondent had referred to several objections raised by Maha-Sanga for the said relocation and proposed to call for a report from local police with regard to the said protests whilst referring to the fact that paragraph 21 of Excise Notification 902 does not permit him to take a decision with regard to the said protest.

Even though the said recommendation by the 6th Respondent to call for a report from the local police is not provided in the Excise Notification 902 the report submitted by him fulfilled the other requirements under the said notification.

However it is further observed by us that the Divisional Secretary Panadura did not recommend the transfer of the premises, based on the recommendation of the Gramasewaka of the Area which was received at the Excise Department Colombo on 22.07.2009.

It is evident before this court that when the 1st Respondent by letter dated 23.09.2009 conveyed his decision to the Petitioners that the proposed relocation could not be permitted and being dissatisfied with the said decision the Petitioners had gone before the Court of Appeal in case number CA/Writ/ 737/09 against the said decision seeking a mandate in the nature of *Writ of Certiorari* to quash the said decision dated 23.09.2009.

During the argument it was further revealed that the 10th and 11th Respondents to the present application had made an application for intervention but Court of Appeal did not allow the said intervention. However, when the 10th and 11th Respondents went before the Supreme Court by way of a Special Leave to Appeal application, the Supreme Court with the consent of all parties permitted the said intervention.

As a settlement in the said application, the parties agreed for a fresh inquiry and accordingly the second Respondent was appointed to hold the said inquiry.

Subsequent to the said inquiry conducted by the 2nd Respondent, the 10th and 11th Respondent came before the Court of Appeal seeking a mandate in the nature of *Writ of Prohibition* prohibiting the 1st Respondent from granting the license to petitioners [CA /Writ/ 255/2011] as recommended by the 2nd Respondent after the said inquiry. When the matter was called before this court on 28.04.2011 an undertaking was recorded by the counsel who appeared for the 1-4th and 8th Respondents (including the 1st Respondent who is the 1st Respondent in the present application too) to comply with the direction and the undertaking given in court in case No. 737/09 on 25.02.2011 and grant the license to the 6th and 7th Respondent (i.e. the two Petitioners) but however thereafter the 1st Respondent who came before the court filed an affidavit dated 02.06.2011 informing that license could not be issued to the Petitioners due to the Protest of the Buddhist monk and the residents of the area. The said application was withdrawn by the Petitioners' to the said application i.e. by the 10th and 11th Respondents to the present application on an undertaking given on behalf of the 1st Respondent to conduct a fresh inquiry under paragraph 21 of the Excise Notification 902.

As referred by me earlier in this judgment, the Petitioners have come before this court, seeking *Writ of Certiorari* and *Writ of Mandamus*, against the 1st Respondent's decision in the said inquiry conducted by him on the undertaking given in application CA/Writ/255/2011.

Whilst challenging the decision by the 1st Respondent as bias against the Petitioners, it was submitted that there was no necessacity for the 1st Respondent to change his position when the 10th and 11th Respondents filed a fresh application (CA/Writ/ 255/2011) contrary to his undertaking in the Writ Application 737/09 filed by the Petitioners to implement the recommendations of the fresh inquiry conducted by the 2nd Respondent, when the 2nd Respondent as validated all of the allegations made against the Respondents by the Petitioners, the most important being that,

a) The purported public protest referred to by the Respondents in the impugned document P-61 are not protests which are recognized in terms of the law

b) There are numerous other liquor licenses in the same area to which there are no objections

c) The Petitioners have been targeted on a personal basis, essentially bias

However when considering the present application before us, this court is not influenced by or has a duty to consider the recommendations of the said inquiry since what is challenged before us is not the said inquiry but a subsequent inquiry conducted by the 1st respondent on the undertaking given before the Court of Appeal by the 1st Respondent in CA /Writ Application 255/2011.

It is evident from the material placed before us that the undertaking to hold a fresh inquiry was recorded in the Court of Appeal on 22. 09.2011 and by letter dated 26.09.2011 the 1st Respondent had informed the 10th and 11th Respondents of the inquiry, scheduled for 04.10.2011 (R-4) with copies to the two Petitioners and several others.

When the inquiry was commenced as scheduled by R-4, it is evident that several parties were present before the 1st Respondent who conducted the said inquiry including the two Petitioners, the 10th and the 11th Respondents 3rd added Respondent , 4th and 6th Respondents and several others.

Even though the two Petitioners who were represented by an Attorney –at –Law at the said inquiry had raised that they were not properly informed by the 1st Respondent with regard to the inquiry, we observe that several witnesses including a retired Commissioner General of Excise was summoned to give evidence on behalf of the Petitioners. 10th and the 11th Respondents and few other Representatives of general public too had given evidence on behalf of the 10th and the 11th Respondents at the inquiry.

Whether the 1st Respondent had afforded a fair opportunity for both parties to present their cases at this inquiry is one important aspect this court will have to consider at this stage. In addition to the above, it is also important to consider whether the said evidence had been property evaluated by the 1st Respondent in coming to the final conclusion by giving reasons for his decision. The inquiry proceeding along with the decision of the 1st Respondent is produced marked R-5 by the Respondents before this court.

As observed by Wade and Forsyth whilst referring to the famous speech of Lord Loreburn, a proper hearing must always include, "a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view.' (H.W.R. Wade and C.F. Forsyth Administrative Law 10th Edition Page 419)

I observe that both parties to the said inquiry were properly represented and counsels representing both parties were also permitted to make submissions before the inquiry.

The said submissions and the evidence given by witnesses at the inquiry were recorded and that too was made available before us. The proceedings of the said inquiry was concluded on the same day and the parties have not moved further time in order to submit further material in support of their respective cases. Both parties were aware of what took place before the 1st Respondent since the inquiry was held in public at the Head Office of the 1st Respondent's Department.

Under these circumstances the court is satisfied with the opportunity given by the 1st Respondent to both parties when conducting the inquiry as undertaken before Court of Appeal in the CA/Writ/ 255/ 2011.

Importance of giving reasons irrespective of the fact that there is no express or implied obligation to do so had been clearly shown in many judicial decisions.

As Wade said "Nevertheless there is strong case to be made for the giving of reasons as an essential element of administrative Justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations, and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable tell whether it is reviewable or not, and so he may be deprived of the protection of the law". (H.W.R.Wade and C.F.Forsyth administrative Law 10th Edition page 436)

In the case of ***Mallak V. Minister of Justice, Equity and Law Referms 2012 1 ESC 59*** Supreme Court of Ireland had observed that the most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule; the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected persons have been enable to respond to the concerns of the decision maker there may be situation where the reasons for the decision are obvious and that effective Judicial Review is not precluded."

In the case of ***Karunadasa V. Unique Gem Stones 1997 (1) Sri LR 256 Mark Fernando J*** observed the need to give reasons as follows;

"to say that Natural Justice entitles a party to a hearing does not mean mearly that he is entitled to a reasoned consideration of the case which he presents and whether or not the parties are also entitled to be told the reasons for the decision, if they are with held, once judicial review commenced."

The impugned decision challenged before this court is produced marked P-61 and the court observes that even though there is reference to the continued public protest, on which the final decision was based on, the said decision, does not contain an evaluation of the material placed before the inquiry which resulted the 1st Respondent to reject the application made by the Petitioners for the re location of FL 04 license issued to them.

In the said case of ***Karunadasa V, Unique Gem Stones,*** Supreme Court concluded that, "But that does not end the matter. The Legal position was not clearly appreciated, and the parties do not seem to have realized the need to invite the Court of Appeal to call for and examine the record and the recommendation. In the course of the hearing in this court Mr. K. tendered the copies of the recommendation made by the 3rd Respondent and undertook to make the 2nd Respondent's file available when ever required. The 1st Respondent consented, in the interest of justice, to case being re-heard by the Court of Appeal, after calling for and examining the record and the recommendation.

However the above decision was not followed in ***Hapuarachchi and others V. Commissioner of Elections and Another 2009(1) Sri LR 1*** by Supreme Court and ordered the Respondents to re consider the application submitted by the Petitioners and to give reasons for his decision following such re- consideration.

When considering the circumstances in the present case, this court has already concluded that the Petitioner got a fair opportunity to present his case before the 1st Respondent and therefore I conclude that it is safe to follow the decision in ***Karunadasa V. Unique Gem Stones*** to the present case.

As observed by me earlier the Inquiry report submitted before this court by the 1st Respondent marked R-5 contained the decision of the 1st Respondent along with the proceedings. In the said decision the first Respondent, after considering the material placed before the inquiry had submitted his recommendation.

In the said recommendation whilst considering the material before him he has concluded that the objection raised by the residents of the area for the transfer of the Fl 04 license to the new location is a genuine objection and therefore issuance of the said license will be a threat to the maintenance of the law and order of the area and therefore decided not to allow the said transfer of the Fl 4 license.

Whilst reaching the said decision the 1st Respondent had acted within the powers vested on him under the provisions of the Excise Ordinance and the Excise Order 902. Even though the Petitioner had alleged bias on the part of the 1st Respondent when reaching the said decision, we see no merit in the said allegation.

In the circumstances I see no grounds on which the reliefs as prayed for by the Petitioners could be granted. Accordingly I dismiss the Petitioners application with cost fixed at Rs. 5000/-.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL