

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

In the matter of an application in terms of Article 121 read with Article 120, of the Constitution to determine whether the Bill titled "Fisheries and Aquatic Resources (Amendment)" or any part thereof is inconsistent with the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. S.D. NO 42/23

Petitioner: Warnakulasuriya Charith Jayantha Peiris
67/A, Doowawatta Wella,
Marawilla.

Counsel: Nuwan Peiris,
Attorney-at-Law

Attorney-General

Counsel: Nirmalan Wigneswaran, DSG with SC
Navodi de Zoysa and SC Jehan
Gunasekare for the Hon. Attorney-
General.

Before: **P. PADMAN SURASENA, J**
SHIRAN GOONERATNE, J
ARJUNA OBEYESEKERE, J

The Bench assembled for hearing the petition on 24th July 2023 and 25th July 2023.

The Bill titled "Fisheries and Aquatic Resources (Amendment) Act, No. 2 of 1996 (hereinafter sometimes referred to as the Bill) was published in the Gazette on 28th February 2023 and was placed on the Order Paper of Parliament on 5th July 2023. The Petitioner has filed the instant petition in the Registry of the Supreme Court on the 17th of July 2023 invoking the jurisdiction vested in this Court by virtue of Article 121 read with Article 120 of the Constitution, in respect of the aforementioned Bill. The Petitioner has prayed for a determination from this Court under Article 123 of the Constitution.

Upon receipt of the petition, Court issued notices on the Hon. Attorney General as required by Article 134 (1) of the Constitution. Thereafter, Court on 24th July 2023, commenced hearing the submissions of the learned counsel for the Petitioner as well as the submissions of the learned Deputy Solicitor General who appeared for the Hon. Attorney General and concluded its hearing on 25th July 2023.

The Bill proposes to amend the principal enactment which is the Fisheries and Aquatic Resources Act No. 2 of 1996 as subsequently amended from time to time by several amendments passed by Parliament. The amendments proposed by this Bill are: to replace Section 14F of the Principal enactment; to insert new Part II B containing sections 14 O, 14 P to the Principal enactment; to repeal section 16 A of the Principal enactment; to amend section 49 of the Principal enactment; to insert two new sections 49B and 49C into the Principal enactment; and to amend section 66 of the Principal enactment.

Although there are 8 main clauses in the Bill, the Petitioner, according to his petition dated 17th July 2023, has challenged only Clauses 2, 3, 6 and 7 of the Bill. The Petitioner has not challenged Clauses 1, 4, 5 and 8 of the Bill.

Let us now proceed to determine whether the said Bill or any provision thereof is inconsistent with the Constitution.

CLAUSE 2 OF THE BILL

Clause 2 of the Bill seeks to replace section 14F of the principal enactment.

Clause 2 of the Bill reads as follows:

"Section 14F of the Fisheries and Aquatic Resources Act No. 2 of 1996 (hereinafter referred to as the "principal enactment") is hereby repealed and the following new section is substituted therefor: -

Prohibition of fishing in foreign waters

14F. (1) A person shall not use, or cause to be used, a local fishing boat to which a licence is granted under this Part, for fishing operations in waters within the national jurisdiction of another State, unless authorized to do so in accordance with the laws of that State.

(2) A person who contravenes the provisions of subsection (1) shall be guilty of an offence under this Act.

(3) For the purpose of this section, a person shall include the owner of the boat, the holder of the licence issued in respect of such boat, the skipper of the boat, any member of the crew and any person on board of such boat at the time of the commission of such offence:

Provided however, any person on board of such boat shall not be deemed to be guilty of an offence if such person proves that such offence was committed without the knowledge of such person or that he exercised all due diligence to prevent the commission of such offence."

Statement of Legal Effect of Clause 2 of the Bill which seeks to replace section 14 F of the principal enactment is stated as follows:

"This Clause replaces section 14F of the Fisheries and Aquatic Resources Act, No. 2 of 1996 (hereinafter referred to as the "principal enactment") and the legal effect of the section as replaced is to make, in addition to the holder of a licence granted under Part II of the Act, the owner of the boat, the skipper of the boat, any member of the crew and any person on board of such boat at the relevant time as persons liable for the offence committed under newly introduced section 14F."

In the course of the hearing before Court, the learned counsel for the Petitioner was content only to challenge the proviso to the new proposed section 14 F. He submitted that the proviso to the new proposed section 14 F applies only to "any person on board of such boat" which is only one category of several categories of persons referred to in proposed Section 14 F (3). The aforesaid several categories of persons in proposed Section 14 F (3) can be identified as follows:

- i) owner of the boat,
- ii) the holder of the licence issued in respect of such boat,
- iii) the skipper of the boat,
- iv) any member of the crew,
- v) any person on board of such boat,

(at the time of the commission of such offence).

It is the position of the Petitioner that the defence set out in the above proviso has been extended only to one category of persons namely "any person on board of such boat". We observe that this defence set out in the proviso has not been made available to the other four categories of persons who may commit the same offence. Thus, the other categories of persons who commit the same offence have not been afforded the same privilege of availability of that defense. This in our view violates Article 12(1) of the Constitution, which reads as follows:

"12(1) All persons are equal before the law and are entitled to the equal protection of the law"

Thus, the afore-stated Proviso as it stands at present, has afforded the protection of law by making available the defence set out therein, only to one category out of five other categories of persons. There is no justification to leave out the other four categories of persons in the said Proviso.

Therefore, we hold that the proviso to the new proposed section 14 F in Clause 2 of the Bill as it stands at present could only be passed by a special majority as required by Article 84(2) of the Constitution. i.e., only if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present).

The Court indicated this violation to the learned Deputy Solicitor General who appeared for the Hon. Attorney General.

Subsequently the learned Deputy Solicitor General has informed¹ this Court that the Hon. Attorney General would be advising the Minister to resolve the said inconsistency by moving to amend Clause 2 of the Bill at the Committee stage of Parliament in the following manner:

(a) Proviso proposed Section 14F(3) contained in to Clause 2

*Provided, however, any **such** person ~~on board of such boat~~ shall not be deemed to be guilty of an offence if such person proves that such offence was committed*

¹ By the written submission dated 25.07.2023 filed by the Hon. Attorney General.

without the knowledge of such person and that he exercised all due diligence to prevent the commission of such offence.

We agree with this submission of the learned Deputy Solicitor General. We hold that Clause 2 of the Bill if amended as set out above, would cease to be inconsistent with any provision of the Constitution.

Learned counsel for the Petitioner also has agreed with this arrangement. He has stated in his written submission,² that he is in agreement with the Hon. Attorney-General's amendments and that he would not seek to challenge the Bill on the grounds averred in the Petition and the written submission filed during the pre-hearing stage.

CLAUSE 3 OF THE BILL

Clause 3 of the Bill seeks to insert a new Part (Part II B) to the principal enactment. Clause 3 proposes to bring in two new sections under the proposed new Part II B. The proposed two new sections are sections 14 O and 14 P. The proposed new section 14 O reads as follows:

"14O. (1) A person shall not engage in any Illegal, Unreported or Unregulated fishing operations in Sri Lanka Waters or High seas.

(2) A person who contravenes the provisions of subsection (1) shall be guilty of an offence under this act.

(3) For the purpose of this section, a person shall include the owner of the boat, the holder of the licence issued in respect of such boat, the skipper of the boat, any member of the crew and any person on board of such boat at the time of the commission of such offence:

Provided however, any person on board of such boat shall not be deemed to be guilty of an offence if such person proves that such offence was committed without the knowledge of such person or that he exercised all due diligence to prevent the commission of such offence."

² Written submission dated 25.07.2023 filed by the Petitioner.

Statement of Legal Effect of the new section (section 14 O) proposed by Clause 3 of the Bill is stated as follows:

- a. Prohibit any person from engaging in any Illegal, Unreported and Unregulated fishing operation in Sri Lanka Waters or High Seas; and*
- b. Make the owner of the boat, the holder of the licence, the skipper of the boat, any member of the crew and any person on board of such boat at the relevant time as persons liable for any offence committed under newly inserted section 14O*

In the course of the hearing before Court, the learned counsel for the Petitioner was content only to challenge the proviso to the new proposed section 14 O. He submitted that the proviso to the new proposed section 14 O applies only to "any person on board of such boat" which is only one category of several categories of persons referred to in proposed Section 14 O (3). The aforesaid several categories of persons in proposed Section 14 O (3) can be identified as follows:

- i) owner of the boat,
 - ii) the holder of the licence issued in respect of such boat,
 - iii) the skipper of the boat,
 - iv) any member of the crew,
 - v) any person on board of such boat,
- (at the time of the commission of such offence).

It is the position of the Petitioner that the defence set out in the above proviso has been extended only to one category of persons namely "any person on board of such boat". We observe that this defence set out in the proviso has not been made available to the other four categories of persons who may commit the same offence. Thus, the other categories of persons who commit the same offence have not been afforded the same privilege of availability of that defense. This in our view violates Article 12(1) of the Constitution, which reads as follows:

"12(1) All persons are equal before the law and are entitled to the equal protection of the law"

Thus, the afore-stated Proviso as it stands at present, has afforded the protection of law by making available the defence set out therein only to one category out of five other categories of persons. There is no justification to leave out other four categories of persons in the said Proviso.

Therefore, we hold that the proviso to the new proposed section 14 O in Clause 3 of the Bill as it stands at present could only be passed by a special majority as required by Article 84(2) of the Constitution. i.e., only if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present).

The Court indicated this violation to the learned Deputy Solicitor General who appeared for the Hon. Attorney General.

Subsequently the learned Deputy Solicitor General has informed³ this Court that the Hon. Attorney General would be advising the Minister to resolve the said inconsistency by moving to amend Clause 3 of the Bill at the Committee stage of Parliament in the following manner:

(b) Proviso proposed Section 14 O (3) contained in to Clause 3

*Provided, however, any **such** person ~~on-board-of-such-boat~~ shall not be deemed to be guilty of an offence if such person proves that such offence was committed without the knowledge of such person and that he exercised all due diligence to prevent the commission of such offence.*

We agree with this submission of the learned Deputy Solicitor General. We hold that Clause 3 of the Bill if amended as set out above, would cease to be inconsistent with any provision of the Constitution.

Learned counsel for the Petitioner also has agreed with this arrangement. He has stated in his written submission,⁴ that he is in agreement with the Hon. Attorney-General's amendments and that he would not seek to challenge the Bill on the grounds averred in the Petition and the written submission filed during the pre-hearing stage.

³ By the written submission dated 25.07.2023 filed by the Hon. Attorney General.

⁴ Written submission dated 25.07.2023 filed by the Petitioner.

Let us now consider the other new section (section 14 P) proposed by Clause 3 of the Bill. The proposed new section 14 P reads as follows:

14P. The Director-General may, where he has reasonable grounds to believe that any person is engaged in any Illegal, Unreported or Unregulated Fishing Operations in waters within the jurisdiction of another State, and the fishing boat used for such operations is a local fishing boat registered under section 15, he may, after affording such person or the owner of such boat, as the case may be, an opportunity of being heard-

(a) Cancel or suspend for such period as may be determined by him, the registration of such boat as a local fishing boat under section 15; and

(b) Cancel or suspend for such period as may be determined by him, any licence issued in respect of that fishing boat, under section 6 or section 14A, as the case may be, authorizing the licensee to engage in any prescribed fishing operations in Sri Lanka waters or the High Seas, as the case may be."

Statement of Legal Effect of the new section (section 14 P) proposed by Clause 3 of the Bill is stated as follows:

"The legal effect of section 14P is to make provisions for the cancellation of the registration of any local fishing boat and the licence for fishing operations, in respect of persons engaging in Illegal, Unreported and Unregulated fishing operations in waters within the jurisdiction of another State."

The learned counsel for the Petitioner in the course of his submissions, did not seek to challenge this new section (section 14 P) proposed by Clause 3 of the Bill. Therefore, it is not necessary for us either to consider this new section (section 14 P) proposed by Clause 3 of the Bill or to make any pronouncement in that regard.

The learned counsel for the Petitioner in the course of his submissions, did not seek to challenge Clauses 4 and 5 of the Bill. Therefore, it is not necessary for us either to consider Clauses 4 and 5 of the Bill or to make any pronouncement in that regard.

CLAUSE 6 OF THE BILL

Clause 6 of the Bill seeks to insert two new sections to the principal enactment. The first of those new sections proposed by Clause 6 of the Bill is section 49 B which reads as follows:

"Penalty for Illegal, Unreported or Unregulated fishing in Sri Lanka Waters or High Seas.

49B. Any person who contravenes or fails to comply with the provisions of section 140 of this Act shall be guilty of an offence under this Act and if no penalty is expressly provided for such offence in the Act, shall on conviction after summary trial by a Magistrate be liable to a fine not less than one hundred thousand rupees."

The second of those new sections proposed by Clause 6 of the Bill is section 49 C which reads as follows:

"Penalty for offences for which no penalty is expressly provided.

49C. Subject to the provisions of section 49B, any person who contravenes or fails to comply with any provision of this Act (other than any regulation made under this Act,) in respect of which no penalty is expressly provided for, shall be guilty of an offence and shall on conviction after summary trial before a Magistrate be liable to a fine not less than fifty thousand rupees."

Statement of Legal Effect of the new sections (section 49 B and 49 C) proposed by Clause 6 of the Bill is stated as follows:

"This clause inserts new sections 49B and 49C in the principal enactment and the legal effect of the sections is to make provisions to impose a penalty if no penalty is expressly provided in the Act in respect of a person who contravenes section 140 of the principal enactment or any other provision of the principal enactment (other than any regulation made under the principal enactment.)"

Learned Counsel for the Petitioner first submitted that the legislature must specify an upper limit of the sentence also. It was his submission that in the absence of an upper limit to the sentence it would be possible for a Magistrate to impose arbitrary fines on a convicted person.

We observe that even in Clause 5, the Bill has not specified an upper limit of the sentence which could be imposed on a person who is found guilty of an offence under proposed section 49. The said section also has prescribed only minimum sentences. We further observe that the learned counsel for the Petitioner was content with no submission in that regard being made to challenge the said Clause. If the Petitioner is content with Clause 5 of the Bill which has only prescribed minimum mandatory sentences we do not see how and on what basis the Petitioner can canvass Clause 6 on the basis that it does not have an upper limit of the sentence. On the other hand, the learned counsel for the Petitioner was unable to show us how absence of a maximum sentence would violate any provision of the Constitution. Furthermore, the written submissions filed by the learned counsel for the Petitioner after hearing, clearly indicates that he would not maintain his afore-said submission anymore. Therefore, we are of the view that there is no merit in the submissions of the learned counsel for the Petitioner in regard to Clause 5 of the Bill.

CLAUSE 7 OF THE BILL

Clause 7 of the Bill seeks to amend section 66 of the principal enactment. The amendment proposed by Clause 7 of the Bill reads as follows:

"Section 66 of the principal enactment is hereby amended as follows:-

Amendment of section 66 of the principal enactment

(1) In the definition of the expression "authorized officer" by the substitution for the words "Sergeant and any officer of the Navy not below the rank of Petty Officer" of the words and figures "Sergeant and any officer of the Navy not below the rank of a Petty Officer or any Coast Guard officer of the Department of Coast Guard established by the Department of Coast Guard Act, No. 41 of 2009;"

(2) by the insertion immediately after the definition of "High Seas" of the following new definition:-

"Illegal, Unreported and Unregulated (IUU) Fishing Operations" includes fishing operations set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Fishing Plan of Action) adopted by the UN Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009, as adopted by the Resolutions of the Indian Ocean-Tuna Commission, fishing operations conducted in contravention of the management and conservation measures adopted by the other relevant Regional Fisheries Management Organizations (RFMOs) of which Sri Lanka is a party, and fishing operations which are conducted in contravention of Sri Lanka's obligations towards conservation of living marine resources under relevant provisions of the applicable International Laws;"

Statement of Legal Effect of the proposed amendment of section 66 proposed by Clause 7 of the Bill is stated as follows:

This clause amends section 66 of the principal enactment and the legal effect of the section as amended is to:-

- (a) Include in the definition of the expression "authorized officer", any Coast Guard officer of the Department of Coast Guard;*
- (b) Include new definitions for the expressions "Illegal, Unreported and Unregulated (IUU) fishing Operations" and "skipper", in the principal enactment.*

The proposed amendment has three subsections numbered as (1), (2) and (3). Learned counsel for the Petitioner made no submissions with regard to sub sections (1) and (3). However, he did make submissions in relation to subsection (2).

Learned counsel for the Petitioner submitted that the definition set out in subsection (2) of the proposed section 66 of the Bill lacks clarity with regard to the ingredients of the offence it creates. We also observe that the definition is based on several international instruments, the details of which cannot be found in the Bill. We are therefore of the view that any person must be in a position to ascertain and know exactly what he can do and cannot do before

going out to fish. Absence of clarity in ingredients of the offence would deprive citizens of the country of equal protection of law, a fundamental right guaranteed under Article 12(1) of the Constitution.

Therefore, we hold that the proviso to the new proposed section 66 in Clause 7 of the Bill as it stands at present could only be passed by a special majority as required by Article 84(2) of the Constitution. i.e., only if the number of votes cast in favour thereof amounts to not less than two-thirds of the whole number of Members (including those not present).

The Court indicated this violation to the learned Deputy Solicitor General who appeared for the Hon. Attorney General.

Subsequently the learned Deputy Solicitor General has informed⁵ this Court that the Hon. Attorney General would be advising the Minister to resolve the said inconsistency by moving to amend Clause 7 of the Bill at the Committee stage of Parliament in the following manner:

Illegal, Unreported and Unregulated (IUU) Fishing Operations mean:

With regard to Illegal Fishing, Fishing Operations conducted by

- (a) Sri Lankan or foreign fishing vessels in Sri Lanka Waters in contravention of any law or any regulation made under this Act;*
- (b) Any Sri Lankan fishing vessels in the High Seas in contravention of any laws or any regulation **made under this Act**, under this Act, including any regulation made to implement conservation and management measures adopted by the Indian Ocean Tuna Commission or other Fisheries Management Organisation to which Sri Lanka is a party;*
- (c) Any Sri Lankan fishing vessel in waters under the jurisdiction of another State, without the permission of such State;*
- (d) Any fishing vessel flying the flag of any foreign State, which is a party to the Indian Ocean Tuna Commission or another Regional Fisheries Management Organisation to which Sri Lanka is also a party, in Sri Lanka Waters, operating in contravention of regulations **made under this Act** implementing*

⁵ By the written submission dated 25.07.2023 filed by the Hon. Attorney General.

- (i) *the conservation and management measures adopted by the Indian Ocean Tuna Commission or such other Regional Fisheries Management Organisation, or*
- (ii) *the relevant provisions of any international agreement or obligations undertaken by Sri Lanka*

as the case may be;

With regard to Unreported Fishing, Fishing Operations

*which have not been reported, or have been misreported to the Director General in contravention of the prescribed reporting procedures under this Act or any regulation made hereunder, including any regulation that may be made by the Minister **under this Act** implementing any reporting procedures of the Indian Ocean Tuna Commission or any other Regional Fisheries Management Organisation to which Sri Lanka is a party or the relevant provisions of any international agreement or obligations undertaken by Sri Lanka, in the area of competence of the Indian Ocean Tuna Commission or such other Regional Fisheries Management Organisation or such other area, as the case may be*

With regard to Unregulated Fishing, Fishing Operations

(a) in the area of competence of the Indian Ocean Tuna Commission or any other Regional Fisheries Management Organisation to which Sri Lanka is a party conducted by a fishing vessel without nationality or flying the flag of a State that is not a party to Indian Ocean Tuna Commission or such other Regional Fisheries Management Organisation in a manner that is not consistent with or contravenes the conservation and management measures of the Indian Ocean Tuna Commission or such other Regional Fisheries Management Organisation, implemented by any regulation made under this Act

(b) in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with the responsibilities of Sri Lanka for the conservation of living marine resources under international law to the extent set out in any regulation made under this Act.

We agree with this submission of the learned Deputy Solicitor General. We hold that Clause 7 of the Bill if amended as set out above, would cease to be inconsistent with any provision of the Constitution.

Learned counsel for the Petitioner also has agreed with this arrangement. He has stated in his written submission,⁶ that he is in agreement with the Hon. Attorney-General's proposed amendments and that he would not seek to challenge the Bill on the grounds averred in the Petition and the written submission filed during the pre-hearing stage.

The Petitioner has not challenged Clause 8 of the Bill.

We place on record our appreciation of the assistance given by the learned counsel who appeared for the Petitioners, and the learned Deputy Solicitor General who represented the Hon. Attorney-General, in this proceeding.

P. PADMAN SURASENA J
JUDGE OF THE SUPREME COURT

SHIRAN GOONERATNE J
JUDGE OF THE SUPREME COURT

ARJUNA OBEYSEKERE J
JUDGE OF THE SUPREME COURT

⁶ Written submission dated 25.07.2023 filed by the Petitioner.