

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

In the matter of an application under
Articles 17 and 126 of the Constitution

S.C.FR. Application No. 230/2015

1. Safra Travels and Tours (Pvt) Ltd.,
No. S/L/G4, Dias Place,
Gunasinghepura,
Colombo 12.

2. Nawas Samsudeen Mohamed
Althaf and Ainul Fouzia Mansoor
of No. 751, Blumandol Road,
Colombo 15.

Carrying on the business in the
name and style of

Transworld Travels and Tours,
at 476, Maradana Shopping
Complex, Colombo 10.

3. Kara Travels and Tours (Pvt) Ltd.,
60 B, Green Lane, Kotahena,
Colombo 13.

Petitioners

Vs

1. M.H.M. Zameel,
Director,
Department of Muslim Religious and
Cultural Affairs, No. 180,
T.B. Jayah Mawatha,
Colombo 10.

2. M.H.M Haleem,
Minister of Muslim Religious and
Cultural Affairs and Posts,
No. 310, D.R. Wijewardena Mawatha,
Colombo 10.

3. Abdul Majeed,

4. Y.L.M. Navavi,
5. Fahim M. Hashim,
6. Dr. Thaha Ziyad,
7. Ash Sheikh M.S.M. Thassim,
8. A.A.M. Ilyas,
9. Mr. Yaseen,

3rd to 9th Respondents
All of c/o

Hajj committee,
Ministry of Muslim Religious and
Cultural Affairs and Posts,
No. 310,
D.R. Wijewardena Mawatha,
Colombo 10.

10. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
11. Welcome Travels,
Nooraniya Street,
Muttur-05.
12. Hamdan Travels,
95, Amugamuwa Road,
Gampola.
13. Amana Travels,
No. 37, Kolonnawa Road,
Kolonnawa.

Respondents

* * * *

BEFORE : **Eva Wanasundera, PC., J.**
P. Jayawardena, PC., J. &
Anil Gooneratne, J.

COUNSEL : Manohara de Silva, PC. with Mrs. Pubuduni Wickramaratne
for the Petitioner.

Suren Gnanaraj, SSC., for 1st - 3rd & 10th Respondents.

S.A. Parathalingam, PC. With Lakshmanan Jeyakumar &
S.W. Jayasekara for 5th & 8th Respondents.

M. Maharooof with S. Savahim for 6th, 7th, & 9th Respondents.

ARGUED ON : 20.07.2015

DECIDED ON : 23.07.2015

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Eva Wanasundera, PC., J.

In this application the Petitioners by Petition dated 10th June, 2015 are challenging the findings of the 1st to 9th Respondents whose acts constitute executive and/or administrative action as contemplated by Articles 17 and 126 of the Constitution. The Petitioners complained that their Fundamental Rights protected by Article 12 and Article 14 have been infringed by the 1st to 9th Respondents.

Leave to Proceed was granted by this Court on 15th June, 2015 for the alleged violation of Articles 12(1) and 14(1) (e) of the Constitution. Court further granted an interim order directing the 1st Respondent to comply with the order made by this Court on 30.07.2013 made in SC. FR. 264/2013.

On 19.06.2015, Counsel Mr. N. Kariapper made an application to intervene in this matter on behalf of three Companies, who have, as claimed, been in this business for 15 to 25 years, namely Al Hikma Haj Services (Pvt) Ltd., Sadiyan Halaldeen Sirajudeen Kakiya Travels and Tours and Kubaa Travels (Pvt) Ltd. as they have not got any quota for this year. However this application for intervention was not supported.

Senior State Counsel Mr. Suren Gnanaraj informed Court on 23.06.2015 that the 1st Respondent shall comply with the interim order issued by this Court. In SC. FR. 264/2013, this Court had made order on 30.07.2013 to read: "... However this Court is of the view that strict compliance with the guidelines as laid down by this Court must be strictly complied with unless there is an intelligent rationale for any departure. Counsel for the parties also concur with this view. This Court therefore, directs State Counsel to convey to the authorities that in the future any unexplained deviation from the applicable guidelines will have to be explained to this Court prior to any arrangement being put in place in respect of any future pilgrimage. " (a copy is attached to the petition as P4).

Accordingly the Senior State Counsel informed that the 1st, 2nd and 3rd Respondents had held fresh interviews in terms of the guidelines and in terms of the interim order of this Court and moved to file copies of the final marks, mark sheets and quotas allocated to Hajj Travel Operators. On 13th July 2015 the 1st Respondent filed an affidavit as objections to the Petition of the Petitioners, dated 10th June, 2015 with documents Z 1 , a document in the Tamil Language with an English translation and 8 annexure letters, Z 2 with 2 annexure letters, Z 3 , and Z 4 , two documents in the Tamil Language with translations in English of the same. The objections of the 6th and 7th Respondents were filed with an affidavit dated 10th July 2015. The 9th Respondent has filed objections on 10th July 2015. The 5th and 8th Respondents have filed objections on the 9th July 2015. The 2nd and 10th Respondents have filed before this Court the mark sheets of all the 166 Hajj Travel Operators marked as 'X' and the list of quotas given to the selected 93 Operators marked as 'Y'. The Petitioners also filed counter objections to the objections of 1st, 2nd 3rd and 10th Respondents.

Court observes that the "Hajj" is an annual pilgrimage made by the Muslims around the world to the city of Mecca in the Kingdom of Saudi Arabia. It is the largest annual pilgrimage in the world. In Sri Lanka the government regulates the whole process of Hajj pilgrims going to Mecca through the Department of Muslim Religious and Cultural Affairs. A Hajj Committee is appointed for the purpose of negotiating the number of pilgrims allowed by Saudi Arabia, registering the Hajj Tour Agents and the pilgrims who are willing to make the pilgrimage, supervision of Hajj process etc. Guidelines to

regulate Hajj/Umra Pilgrimages from Sri Lanka was drafted and given effect to with effect from 01.05.2013 at the request of the Supreme Court in relation to cases SC. FR. 345/06 and SC. FR. 500/12 in which the Department of Muslim Religious and Cultural Affairs was required to formulate a series of comprehensive guidelines for the operation of the Hajj Pilgrimage in this country.

The said Guidelines was marked as P1 and produced with the Petition by the Petitioners. At page 9 of the Guidelines under the Heading "The Hajj Travel Operators", the basic process number 4 explains that a special interview panel would be chosen to interview, assess and recommend the list of worthy Tour Operators. The evaluation criteria that would be used for this purpose would be found in the Annexure II for reference and that document is marked as P 1 A. The Heading in P 1 A is "Criteria Evaluation". Criteria is laid down under 6 headings, namely, Registration, Physical Capabilities, Financial Capabilities, Experience, Reliabilities and Special Facilities. They are again subdivided into sub- categories giving different marks under each category. They are Company/Business Registration, Previous Year Hajj License, Tourist Board license, Civil Aviation, IATA Registration, Active Management with Front Office, Competency of Guide (Moulavi), Efficient Group Leader, Good Services-Food, Accommodation, Medical Facilities, Bank Statements/Reference, Payment of Income Tax, Value of Capital Assets, Audited Accounts/ P&L or Income, Number of Years, Additional Experience, Effective Arrangement with Mu'allim, No Complaints* Absence of Mismanagement/casualties, Contingency Fund, Orientation Program, Training on Ethics, Grievance Handling, and Publications. The total number of marks which can be given is 100. The last paragraph mentions that the cut off mark is 50. Anyone getting less than 50 marks are not eligible to take any pilgrims as Travel Operators. If anyone gets more than 75 marks, they are eligible to be considered for the increase from the minimum quota numbers. The interview panel recommends the operators and submit the list to the Minister for approval.

In the present case there are three Petitioners, namely (1) Safra Travels and Tours (Pvt) Ltd., (2) Nawas Samsudeen Mohamed Althaf and Ainul Fouzia Mansoor carrying on the business as Transworld Travels and Tours and (3) Kara Travels and Tours (Pvt) Ltd. The marks given at the interview held afresh after the interim order of this Court,

was filed on 07.07.2015 marked 'X' and the quota allocation was marked and produced as 'Y'. Out of the 166 applicants as Tour Operators only 93 were selected to be given the quotas. The Petitioner No. 1, Safra Travels & Tours (Pvt) Ltd., has got 87 marks and has gained 40 quotas, Transworld Travels and Tours has got 64 marks and has gained 15 quotas and Kara Travels & Tours (Pvt) Ltd. has got 97 marks and has gained 50 quotas.

The Petitioner's Counsel submitted that the 1st Respondent's affidavit dated 13.07.2015, paragraph 5 has shown the basis on which the Hajj Committee has allocated quotas and the bands given in the chart which is shown herein below is not consistent and therefore arbitrary. I observe that the number of quotas allotted to Sri Lanka is a "given". It is static. That number is not adjustable as it is given by the Kingdom of Saudi Arabia. This year the allocated quota is 2240. When marks are given to all the participants, the first step is to take those who have obtained 50 marks or more into one separate category. In this instance there were 93 companies/persons amongst whom the 2240 quotas have to be distributed. There are persons who have received similar marks, eg. 71 marks were obtained by 5 persons, 91 marks were obtained by 6 persons etc. There are others who have received separate stand alone marks. A mathematician has to make a plan as to how similar quotas would be given to those who have got similar marks without any discrimination. It is not an easy task, to divide 2240 quotas amongst many groups with similar marks and others to add up to 93 persons.

<u>Marks Range</u>	<u>Quotas</u>
92 and above	50
90-91	45
85-89	40
81-84	35
80	30
75-79	25
70-74	20
60-69	15
50-59	10

This table at the 1st glance could look arbitrary but it is definitely not so. Discrimination has been eliminated and quotas have been given exactly according to the marks. It is my view that an ordinary person could not have done this task. The Hajj Committee has got the assistance of a mathematician proper and performed this task.

I observe that this allocation of 2240 quotas amongst 93 persons without a discrimination cannot be done by arithmetic or algebra which the common person would understand but by certain formulas taught only in advanced mathematics. It is only after determining the quotas that the table aforementioned is made ready for a normal person to understand how it was allocated. There is no arbitrariness in this table. The table would be having different bands in different years depending of the number of quotas allocated and the marks received by Travel Operators at the interview.

The Petitioner's Counsel argued that the 1st Petitioner should have got maximum marks (4) for "Active Management with office premises", maximum marks (4) for "Payment of Income Tax", maximum marks (2) for "Programme for Hajj Orientation and Training", maximum marks (2) for "Arrangements for training on ethics of congregation, social living (planning social living orientation program)", and maximum marks (2) for "Handbook on Service Delivery", thus adding 4 more marks which would make his total as 91 marks. Then he would be entitled to 45 quotas (Vide table above).

If he is given 45 quotas, then the whole table will have to be changed according to the mathematical formula used to prepare the table, to include him in that band. The 5 quotas he gains will have to be deducted from some person or other or any number of them, to keep the total number of quotas as a static, i.e. 2240. Then the whole table will have to be changed once again. Anyway as argued by the Counsel for the 1st Respondent, the 1st Petitioner is not entitled to 4 more marks but one more mark. Then he is yet in the range of 85-89 marks getting 40 quotas.

I am at a loss to understand how to get it adjusted if he has to be given 4 more marks because those from whom those quotas should be taken away from, are not before Court. They are not made parties to this case by the Petitioner.

Petitioner's Counsel again argued that the quotas given to 'bessa' (Officials quotas) can be taken and given to the Petitioners which is an untenable argument since they are given if at all, subject only to donations and not to Tour Operators, who operate for money on business.

The Petitioner's Counsel also argued that the 2nd Petitioner should not have been deprived of 3 marks under the criteria 'medical facilities', since Medical Facilities are granted by the Doctors who get the quota allocated under the category of "Bessa" meaning "Official travellers" who are normally sent by the Ministry as a practice. Opposing Counsel explained that those who are taken under 'bessa' are not allowed to go beyond a certain point in the whole area and only pilgrims are allowed into a particular area. If one goes under 'bessa' he/she cannot enter the ritual area. "Medical Facilities" is a part of Evaluation Criteria in the guidelines and as such cannot be ignored. If the operator has medical facilities with a medical person in the team he would get more marks than another operator who does not have them. Even if he gets those 3 marks, his total marks would be 67. According to the aforementioned table yet he would be getting 15 quotas only.

The 3rd Petitioner Kara Travels and Tours (Pvt) Ltd. has got the highest marks of all. As claimed by him to get 2 more marks, still he would be within 50 quotas range as his total will be then 99 marks. It would not make any change for the 3rd Petitioner.

Other Counsel representing some of the members of the Hajj Committee also made submissions opposing the Petitioners' application before this Court. They pointed out that the marks given at the interview to any Travel Operator cannot be changed without making all other operators as parties to this application simply because the quotas given to them will be affected.

The interview panel consisting of members of the Hajj Committee should be able to decide on the marks to be given to any operator as they feel is correct after consideration of the material before them. This process, I observe is not easy considering the members who come before them as applicants to take pilgrims to Mecca, the holy land. The pilgrims who go under their care have to be looked after by the operators and whether the operators are competent to give them the necessary

care and comfort and satisfy them is the key point when the operators are interviewed. The members of the Hajj Committee are competent experienced persons who should not be tied down to technical evaluations of the capabilities of operators. Instead they should be given the freedom to use their authority in a just and reasonable manner, directed by the 'guidelines', under different categories. They are able only to give marks. The table as aforementioned giving the quotas of who will get how much quotas is really decided by the mathematical formula which distributes the static figure given by the Kingdom of Saudi Arabia, into quotas to the eligible operators, in accordance with the marks obtained.

A travel operator who fights for one or two more marks coming under Article 12 or 14 of the Constitution hardly thinks of what would happen to others who are less fortunate and have get lesser marks meaning lesser quotas. Anyway this Court was educated by Counsel in the manner the operators who get 10, 15 or 20 quotas make the pilgrimage. They get together into groups of 50 and appoint a leader and take the pious pilgrims to the holy land. Since the Petitioners have filed this fundamental rights application, opposing Counsel was heard to say that Sri Lanka might not get any quotas as Sri Lanka has delayed. Who will suffer as a result? It is none other than the pilgrims who have high expectations of reaching Mecca and doing the rituals. I hold that the 'guidelines' have been adhered to in a rightful manner.

This Court holds that the fundamental rights of the three Petitioners have not been infringed. This application is dismissed. However, I order no costs.

Judge of the Supreme Court

P. Jayawardena, P.C., J.

I agree.

Judge of the Supreme Court

Anil Gooneratne, J.

I agree.

Judge of the Supreme Court

