

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

*In the matter of an application under and in
terms of Article 126 of the Constitution of the
Democratic Socialist Republic of Sri Lanka*

1. Hitihamilage Don Oshala Lakmal Anil
Herath
No. 22,
Wata Mawatha,
Kesbawa.

SC.FR. APPLICATION NO: 103/2020

PETITIONER

-VS-

1. Hon. Pavithra Wanniarachchi
Minister of Health,
Nutrition and Indigenous Medicine,
Ministry of Health Indigenous Medical
Services,
Suwasiripaya,
No.385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo - 10.
2. Dr. Anil Jasinghe,
Director General of Health Services,
Ministry of Health and Indigenous
Medical Services,
Suwasiripaya,
No.385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo - 10.

3. Dr. Bhadrani Jayawardena,
Secretary - Ministry of Health and
Indigenous Medical Services,
Suwasiripaya,
No.385,
Rev. Baddegama Wimalawansa Thero
Mawatha,
Colombo - 10.
4. Hon. Attorney General
Department of the Attorney General,
Colombo - 12.

RESPONDENTS

**TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS THE
OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF
THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 9th day of May 2020

The Petition of the Petitioner above named appearing by Mrs. Gowry Shangary Thavarasha, his registered Attorney-at-Law, state as follows;

1. The Petitioner states that he is a citizen of Sri Lanka and a permanent resident of the District of Colombo. The Petitioner further states that he is a devout Roman Catholic. The Petitioner is married and has one child.

A true copy of the National Identity Card of the Petitioner is annexed hereto, marked as "P- 1" respectively and is pleaded as part and parcel hereof.

2. The Petitioner states that:
 - a) The 1st Respondent is the Minister of Health, Nutrition and Indigenous Medicine of the Democratic Socialist Republic of Sri Lanka.

- b) The 2nd Respondent is the Director General of Health Services of the Ministry of Health and Indigenous Medical Services in the Democratic Socialist Republic of Sri Lanka.
 - c) The 3rd Respondent is the Secretary of the Ministry of Health and Indigenous Medical Services in the Democratic Socialist Republic of Sri Lanka.
 - d) The 4th Respondent is the Hon. Attorney General who is made a Respondent in terms of the Constitution.
3. The Petitioner states that he is making the present application both in his own personal interest as well as in the public interest.
4. The Petitioner states that on or about 31.12.2019 the People's Republic of China reported a cluster of cases of pneumonia in Wuhan, Hubei Province which was eventually identified as a novel corona virus (hereinafter sometimes called and referred to as “the virus”).

A true copy of the timeline of the dissemination of the virus published by the World Health Organization on their website is annexed hereto, marked as “P- 2” and is pleaded as part and parcel hereof[<https://www.who.int/news-room/detail/08-04-2020-who-timeline---covid-19>].

5. The Petitioner states that the virus (now referred to technically as “Covid-19”) is an infectious disease caused by Severe Acute Respiratory Syndrome Corona virus 2 and is an ongoing viral pandemic. The said virus has been named Covid-19.
6. The Petitioner states that on or about 27.01.2020 Sri Lanka reported its first confirmed case of the virus, a 44-year-old Chinese woman from Hubei Province in China.

7. The Petitioner states that on or about 10.03.2020 the first Sri Lankan local national tested positive for the virus.
8. The Petitioner states that on or about 28.03.2020 Sri Lanka recorded its first death due to the virus and that the remains were cremated.

A true copy of an article dated 28.03.2020 and appearing on the "Daily mirror" website is annexed hereto, marked as "P- 3" and is pleaded as part and parcel hereof[http://www.dailymirror.lk/top_story/First-COVID-19-death-reported-in-SL/155-185811].

9. The Petitioner states that since 28.03.2020 there have been occasions when the remains of a person who died in the context of the virus has been disposed of by the Government of Sri Lanka in exclusion of the right of the deceased's or his or her relatives right to choose a mode of disposal of the cadaver in the context of the virus.
10. The Petitioner states that upto the date of this Petition, there have been nine deaths reported from Covid-19. There has been some uncertainty as to whether the 9th person who died in fact died of Covid-19.
11. The Petitioner states that on or about 24.03.2020 the World Health Organization published interim guidance for the safe management of a cadaver in the context of the virus (hereinafter sometimes called and referred to as "the Interim Guidance").

A true copy of the Interim Guidance is annexed hereto, marked as "P- 4" and is pleaded as part and parcel hereof

[https://apps.who.int/iris/bitstream/handle/10665/331538/WHO-COVID-19-IPC_DBMgmt-2020.1-eng.pdf?sequence=1&isAllowed=y].

12. The Petitioner states that pursuant to the Interim Guidance a cadaver in the context of the virus can be either buried or cremated.
13. The Petitioner states that according to the Interim Guidance, the virus is transmitted between people through droplets, fomites and close contact, with possible spread through faces.
14. The Petitioner further states that hitherto there has been no Interim Guidance or even evidence of any persons having been infected from exposure to the cadaver of persons after its burial so as to justify cremation over burial.
15. The Petitioner states that in March 2020, the Ministry of Health published Provisional Clinical Practice Guidelines on COVID-19 suspected and confirmed patients (MoH Guideline). This circular includes a chapter on the autopsy practice and the disposal of dead bodies. Up till the third version of the MoH Guideline published on 27 March 2020, it was provided that a body related to death either confirmed (Category I) or suspected (Category II & III) of COVID-19, should be disposed within 24 hours (preferably within 12 hours) according to the following guidance:
 - a) the body should never be washed under any circumstance.
 - b) Cremation or burial is allowed.
 - c) However, burial is allowed provided that all steps to prevent contact with body [are] ensured.
 - d) The body has to be placed in an airtight sealed body bag and a sealed coffin.
 - e) The grave should have a depth of 6 feet (deep burial). It should not contaminate with ground water.
 - f) The grave should be identifiable and traceable.
 - g) The disposal of bodies must be monitored by police, Ministry of Health and Public Health Inspector.

h) The police and other government agencies must follow the legal aspect and their procedures.

16. The Petitioner states that however, on 31 March 2020, immediately after the second Covid-19 death who is identified as a person of the Islamic faith, the Ministry of Health without any notice suddenly amended the Guideline and the fourth version with the amendments provided that a body related to death either confirmed (Category I) or suspected (Category II & III) of COVID-19, should be exclusively cremated within 24 hours (preferably within 12 hours).

17. The Petitioner states that on or about 11.04.2020 the government of Sri Lanka issued a Gazette Extraordinary (hereinafter sometimes called and referred to as “the Gazette”) purporting to create regulations pursuant to **Section 2 and 3 of the Quarantine and Prevention of Diseases Ordinance** (hereinafter sometimes called and referred to as “the Ordinance”) for the disposal of a cadaver in the context of the virus.

A true copy of Gazette Extraordinary No. 2170/8 of the Democratic Socialist Republic of Sri Lanka, published on 11.04.2020 is annexed hereto, marked as “P- 5” and is pleaded as part and parcel hereof.

18. The Petitioner reproduces herein the following excerpt of the Gazette for the easy reference of your Lordships.

“ 61A. Cremation of Corpse of a person who has died of Corona virus Disease 2019 (COVID-19) –

(1) Notwithstanding the provisions of regulations 61 and 62, the corpse of a person who has died or is suspected to have died, of Corona virus Disease 2019 (COVID-19) shall be cremated –

(a) *at the temperature of 800 to 1200 degrees Celsius for a minimum period of forty-five minutes to one hour for complete burning, for the purpose of prevention of any potential biological threat; and*

(b) *at a cemetery or place approved by the proper authority under the supervision of such authority,*

in accordance with the directions issued by the Director General of Health Services."

19. The Petitioner states that Section 3(1)(i) of the aforesaid Ordinance permits Regulations to be made for the following purposes, namely -

*" (i) for prescribing the **mode of** burial or cremation of any person dying of disease;"*
(Emphasis Added)

20. The Petitioner is advised to state that the aforesaid Regulation 61A is *ultra vires* the powers granted to the 1st Respondent under Section 3(1)(i) the Ordinance.

21. The Petitioner is advised to state that the aforesaid Section 3(1)(i) of the Ordinance only allows the 1st Respondent to prescribe the mode of burial or cremation in the context of the virus but does not allow the 1st Respondent to prescribe cremation in preference to burial or vice versa.

22. The Petitioner states that he is advised that the said Regulations are contrary to the provisions of written law including the provisions relating to sudden deaths and inquests in the Code of Criminal Procedure Act No 15 of 1979 as amended.

23. The Petitioner states that there is no scientific evidence to support a conclusion that cremation is safer than burial to prevent the infection from virus. The Petitioner state that to the best of his knowledge, despite millions of infections of the virus across the world and hundreds of thousands of deaths and burials of cadavers across the World, hitherto there is not even a single report of infection being caused by burial of a cadaver.

24. The Petitioner states that even prior to 11.04.2020 those who were suspected of having died of Covid-19 have been cremated, despite there being demands that the religious beliefs and concerns of the dead and of their families be respected, in the light of the existing scientific evidence and in the light of there being no scientific evidence that burial was inimical to public health.

25. The Petitioner is therefore further advised to state that the aforesaid Regulation 61A is *ultra vires* in as much as-

(a) it is unreasonable and/or irrational;

(b) it is premised on an assumption that is unsupported by any evidence;
and

(c) it contravenes the rules of proportionality.

26. The Petitioner states that the Government Medical Officers Association (GMOA) has by letter dated 03.04.2020 written to the Director General Health Services observing that the WHO guidelines prescribe both burial and cremation and suggesting that a team of experts of all relevant areas be consulted to decide on the best course of action.

A true copy of the said letter which is in the public domain is marked as "P- 6" and is annexed and pleaded as part and parcel hereof.

27. The Petitioner states that there have been requests of (under the Right to Information Act, No. 12 of 2016) evidence of verification from any relevant authority that the Ministry of Health may have relied on prior to the formulation of the aforesaid regulations encapsulated in the document marked "P- 5" from the Ministry of Health but are yet to receive a response.

A true copy of the letter dated 04.04.2020 written requesting corroboration, inter alia, of the Ministry of Health's claims as noted above, is annexed hereto, marked as "P- 7" and is pleaded as part and parcel hereof.

28. The Petitioner is aware that by letter dated 08.04.2020 bearing REFERENCE: AL LKA 2/2020, the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on minority issues; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism have written to the Government of Sri Lanka seeking observations on several matters relating to the decision to cremate the human remains of Covid-19 patients.

A true copy of the letter dated 08.04.2020 from the said Special Rapporteurs is, marked as "P- 8" and is pleaded as part and parcel hereof.

29. The Petitioner states that he is a traditional Roman Catholic.

30. The Petitioner states that preferred religious practice for disposal of mortal remains for a faithful Catholic is burial. The Petitioner further states that faithful Catholics take care to honor and bury the dead because St. Paul writes that Catholics are to regard their bodies as temples of the Holy Spirit, that God lives in their very bodies and therefore that they should honor God with their bodies (1 Corinthians 6:19-20). The Petitioner states that he professes a belief in the Resurrection of the body when they pray the

Apostles' Creed, 'We look for the resurrection of the dead, and the life of the world to come.' The Petitioner states that faithful Catholics believe that a deceased's body will be returned to him when Jesus returns a 2nd time, in the same manner as Jesus's body was raised from the dead on the 3rd day. The Petitioner states that burying the bodies of the dead reminds them of the hope they have in the resurrection. It anticipates the reuniting of their body with their soul in heaven. The Petitioner further states that this hope is fundamental to their belief as Roman Catholics. The Petitioner further states that burial in the aforesaid context is not simply a disposal of the body but is a corporal work of mercy. The Petitioner further states that burial encourages family members and the whole Catholic community to pray for and remember the dead, while at the same time fostering the veneration of martyrs and saints. The Petitioner states that he believes that the rite for the burial of the dead expresses more clearly the paschal character of Christian death and as such reiterate that burial is the preferred and possibly the only viable option for devout and faithful Catholics.

31. The Petitioner therefore states that given the gravity and unalienable nature of the belief Catholics must be given the opportunity to bury their dead and their right to refuse to be cremated must be upheld.
32. The Petitioner states that Article 10 of the Constitution of the Democratic Socialist Republic of Sri Lanka obligates the State to guarantee to every person the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. The Petitioner states that Article 14(1)(e) of the Constitution of the Democratic Socialist Republic of Sri Lanka further guarantees that every person has the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

33. The Petitioner states that in the circumstances the law obligates the State to respect the religious and cultural worship, observance, practices and teaching of every person in the disposal of human remains.
34. The Petitioner states that respect for human remains and respect for the dead is an important aspect of every society and that failure to respect such observances without reasons, will have a serious impact on the mental and emotional wellbeing of relatives who are traumatized by the death of their loved ones due to Covid-19
35. The Petitioner has made a complaint dated 07.05.2020. on the said matter to the Human Rights Commission of Sri Lanka.

A true copy of the said complaint is marked as "P- 9" and is annexed and pleaded as part and parcel hereof.

36. The Petitioner is advised to state that in the totality of the aforesaid circumstances the decision to enact the aforesaid Regulation 61A in Gazette Extraordinary No. 2170/8 of the Democratic Socialist Republic of Sri Lanka, published on 11.04.2020 marked "P- 5" is;
- a) without jurisdiction;
 - b) contrary to law;
 - c) *ultra vires*, arbitrary and capricious;
 - d) unfair, unreasonable and irrational;
 - e) procedurally improper;
 - f) disproportionate; and

is an infringement of

- a) Article 10 of the Constitution guaranteeing freedom of thought, conscience and religion;
- b) Article 12(1) of the Constitution guaranteeing equality before the law and the equal protection of the law;
- c) Article 12(2) of the Constitution guaranteeing freedom from discrimination inter alia on the grounds of religion;
- d) Article 14(1)(a) of the Constitution guaranteeing freedom of speech and expression including publication;
- e) Article 14(1) (e) of the Constitution guaranteeing freedom of religious worship, observation, teaching and practice.

37. The Petitioner state that he is therefore entitled in law to seek an Order quashing Regulation 61A in Gazette Extraordinary No. 2170/8 of the Democratic Socialist Republic of Sri Lanka, published on 11.04.2020 marked "P- 5".

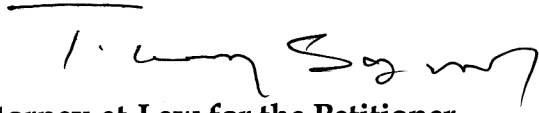
38. The Petitioner state that irreparable loss and damage will be caused and the final relief will be rendered nugatory unless Your Lordship's Court be pleased to grant and issue the interim orders prayed for herein until the final hearing and determination of the instant application.

39. The Petitioner state that he respectfully reserve the right to add further parties and/or to tender other documents, affidavits and materials in of this Application and also to tender to Your Lordship's Court the originals or certified copies of the documents annexed hereto if not originally provided with the Petition.

40. The Petitioner states that he has not previously invoked the jurisdiction of Your Lordship's Court in respect of the subject matter of this application.

WHEREFORE THE PETITIONER RESPECTFULLY PRAYS THAT YOUR LORDSHIP'S COURT BE PLEASED TO;

- a) Grant leave to proceed in the first instance;
- b) Declare that one or more or all of the Respondents and/or the State have infringed /are in imminent infringement of the fundamental rights of the Petitioner and other citizen as guaranteed to them under Articles 10, 12(1), 12(2), 14(1)(a) and 14(1)(e) of the Constitution;
- c) Grant and issue an Order quashing Regulation 61A published in Gazette Extraordinary No. 2170/8 of the Democratic Socialist Republic of Sri Lanka, published on 11.04.2020 marked "P- 5";
- d) Grant and issue such other orders or directions that may be deemed just and equitable under and in terms of Article 126 of the Constitution;
- e) Grant and issue an Interim Order staying the operation and/or suspending the operation of Regulation 61A published in Gazette Extraordinary No. 2170/8 of the Democratic Socialist Republic of Sri Lanka, published on 11.04.2020 marked "P- 5"until the final hearing and determination of this Application.
- f) Grant costs;
- g) Grant such other and further reliefs that Your Lordship's Court shall seem meet.


Attorney-at-Law for the Petitioner

MRS.GOWRY SHANGARY THAVARASHA, LLB
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