

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

In the matter of an application in terms of
Article 17 and Article 126 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

SC. FR Application No. 434/2016

Kamani Madhya Jinadasa

Attorney-at-Law
[for and on behalf of Citizen X, person
living with the Human Immuno Virus (HIV)]

Petitioner

Vs.

1. SriLankan Airlines Limited
Company Registration No.PB 67
Airline Centre
Bandaranayaka International Airport
Katunayaka
2. Dr. Anoma Jayasinghe
Group Medical Officer
SriLankan Airlines Limited
Bandaranayaka International Airport
Katunayaka
3. Nihal Somaweera
Secretary
Ministry of Transport and Civil
Aviation
7th Floor, Sethsiripaya stage II
Battaramulla.

4. Dr. Sisira Liyanage
Director
National STD/AIDS control
Programme
No.29, De Seram Place
Colombo 10.
5. Hon. Attorney General
Attorney General's Department
Colombo 12

Respondents

Before : Sisira J De Abrew J
Priyantha Jayawardena PC J
Nalin Perera J

Counsel : Senany Dayaratne with T Weragoda for the Petitioner
Sahanky Parathalingam with N Parathalingam
for the 1st and 2nd Respondents
Sanjaya Rajratnam ASG for the 3rd and 5th Respondents

Argued on : 8.9.2017

Decided on : 26.2.2018

Sisira J De Abrew

This court by its order dated 20.1.2017 granted leave to proceed against the 1st and 2nd Respondents for alleged violation of Articles 12(1) and 14(1)(g) of the Constitution.

The Petitioner who is an Attorney-at-Law of the Supreme Court of Sri Lanka has presented this application to this court in terms of Rules 44(2) and

44(3) of the Supreme Court Rules 1990 for and on behalf of a HIV positive person who does not want to disclose his identity. This HIV positive person is hereinafter referred to as Citizen X.

Citizen X who was attached to Mihin Lanka Ltd made an application to join Sri Lanka Airlines Ltd (the 1st Respondent) as Mihin Lanka Ltd was going to close down its operation with effect from 30.12.2016. He was called for an interview on 27.9.2010. The Petitioner further states the following facts.

1. Citizen X who was selected by the 1st Respondent reported to the Medical Centre of the 1st Respondent and filled up a medical form.
2. On 7.10.2016 Citizen X was informed by the 1st Respondent that he had been selected as a cabin crew member of the 1st Respondent. He was also requested to take his uniform.
3. On 19.10.2016 Citizen X was requested to present himself at Nawaloka Hospital for certain medical tests including HIV tests.
4. On 26.10.2016 Citizen X was informed by the 1st Respondent that he had passed the medical test and was requested to be present at the Human Resources Department of the 1st Respondent on 28.10.2016.
5. On 28.10.2016 Citizen X signed the contract of employment and the 1st Respondent issued the staff identity card.
6. Although Citizen X signed the contract of employment on 28.10.2016, the 2nd Respondent who is the medical officer of the 1st Respondent, in the same afternoon, requested Citizen X to meet him at Hilton Hotel Colombo. The 2nd Respondent at the said meeting inquired Citizen X with

regard to his HIV situation. Citizen X then divulged his HIV situation to the 2nd Respondent.

7. On 8.11.2016 one Samudrika attached to Human Resources Department of the 1st Respondent informed Citizen X that he had failed the medical test and therefore he had not been selected for employment with the 1st Respondent.

Learned Counsel for the Petitioner contended that Citizen X was not given the employment in the 1st Respondent company as Citizen X is a person who is positive for HIV and that the said decision was wrong in terms of 'National Policy of HIV and AIDS in the World of Work in Sri Lanka' published in June 2010 by the Ministry of Labour and Labour Relations.

Learned President's Counsel for the 1st and 2nd Respondents submitted that the 1st Respondent by letter dated 28.10.2016 marked Z2, offered Citizen X a contract of employment as Ground/Flight Attendant for a period of two months commencing from 1.11.2016 to 31.12.2016 subject to terms and conditions stated in the Secondment Agreement entered into by Sri Lanka Airlines Ltd with Mihin Lanka Ltd. However it has to be noted here that the Respondents have failed to produce the Secondment Agreement along with their pleadings. Learned President's Counsel for the 1st and 2nd Respondents further submitted that when Citizen X filled up the medical form (marked Z1) at the Medical Centre of the 1st Respondent, he declared in the said medical form that he did not have any sexual transmitted disease. Learned President's Counsel for the 1st and 2nd Respondents further submitted that after the medical test of Citizen X, the 1st Respondent became aware that Citizen X was HIV positive person; that the information furnished by him in the medical form (Z1) to the effect that he

did not have sexual transmitted disease was proved to be false; and that the 1st Respondent withdrew his letter marked Z2 offering the contract of employment to Citizen X on the basis that he (Citizen X) had provided false and dishonest information. The Petitioner in his petition has stated that Citizen X did not disclose, in the medical form, the fact that he is a HIV positive person as nurses attached to the Medical Centre would read the medical form and that therefore HIV story would be published. Learned counsel for the Petitioner too submitted the above facts and contended that Citizen X was not required to disclose the said information in the medical form marked Z1.

I now advert to these contentions. The Petitioner in his Petition admits that Citizen X became aware that he is a HIV positive person in 2013. Therefore when Citizen X declared on 10.10.2016 in the medical form (Z2) that he did not have sexual transmitted disease, his declaration was false. Learned counsel for the Petitioner further contended that in terms of 'National Policy of HIV and AIDS in the World of Work in Sri Lanka'[marked as A-1(b)] it was wrong for the 1st Respondent to request Citizen X to face a medical test including HIV test since Citizen X was a HIV positive person. I now advert to this contention. How does the 1st Respondent know that Citizen X was a HIV positive person? The 1st Respondent became aware that Citizen X was a HIV positive person only in October 2016. But Citizen X was aware that he was a HIV positive person in 2013. Citizen X on 10.10.2016 declared that he did not have any sexual transmitted disease. Under these circumstances, how can the 1st Respondent be found fault with for subjecting Citizen X to a medical test including HIV test. In my view, the 1st Respondent cannot be found fault with for subjecting Citizen X to the above medical test. For the Petitioner's counsel to be successful in the above contention, the 1st Respondent should have been aware about the HIV

status of Citizen X. For the 1st Respondent to become aware of the HIV status of Citizen X, he (Citizen X) should have informed the 1st Respondent about his condition which was only known to him. When I consider the above matters, I am unable to agree with the above contention of learned counsel for the petitioner. I therefore reject the above contention.

Citizen X in 2013 knew that he was a HIV positive person but did not disclose in 2016 at least in a confidential manner that he is a HIV positive person. But when the 1st Respondent after medical test discovered that Citizen X is a HIV positive person, he wants the protection provided in ‘National Policy of HIV and AIDS in the World of Work in Sri Lanka’. When I consider the above matters, I feel that Citizen X is blowing hot and cold. Such a person is not entitled to get relief from court.

When I consider all the above matters, I hold that the declaration by Citizen X in the medical form (Z1) that he does not have any sexual transmitted disease is false. Therefore Citizen X had breached the trust that an employee should keep with the employer. In my view, it is not safe to permit such a person to work as a cabin crew member. Citizen X had, in his declaration marked Z1, admitted that withholding of facts asked for in the medical form could be a cause for refusal or termination of his employment. When I consider all the above matters, I hold that the 1st Respondent cannot be found fault with when he withdrew the letter marked Z2 on the basis that Citizen X had provided false information. I further hold that the Petitioner has failed to prove the allegation that the 1st Respondent terminated the services of Citizen X or the 1st Respondent did not give him employment on the basis that he (Citizen X) was a HIV positive person.

For the aforementioned reasons, I am unable to hold that the 1st Respondent and/or the 2nd Respondent had violated the fundamental rights of Citizen X. I therefore dismiss the petition of the petitioner. Considering the facts of this case, I do not order costs.

Judge of the Supreme Court.

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.