

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

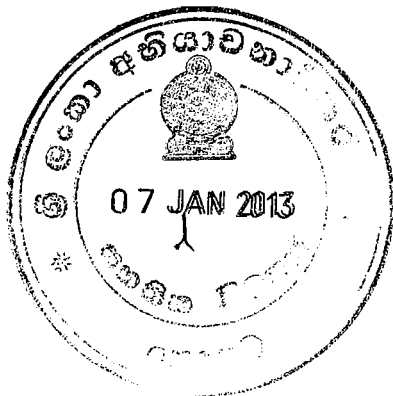
In the matter of an application for
mandates in the nature of writs of
Certiorari and Prohibition under
and in terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

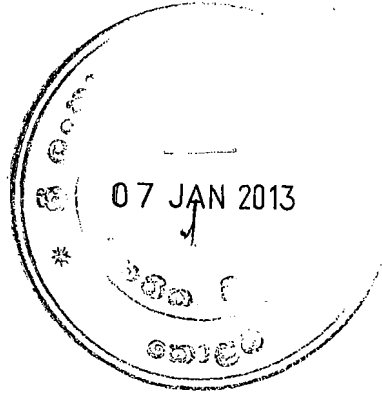
C.A(Writ) Application NO.411/2012

Hon. Dr. Upatissa Atapattu
Bandaranayake Wasala
Mudiyanse Ralahamilage
Shiranimala Bandaranayake,
Chief Justice of the Supreme
Court of Sri Lanka,
Residence of the Chief
Justice of Sri Lanka,
129, Wijerama Mawatha,
Colombo 7.

Petitioner

Vs.





1. Hon. Chamal Rajapakse,
Hon. Speaker of Parliament,
Speaker's Residence,
Sri Jayawardanapura Kotte.
And twelve (12) others.

Respondents

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**
ANIL GOONERATNE, J
A.W.A.SALAM, J

COUNSEL : Romesh de Silva, PC with Nalin Ladduwahetty PC, Saliya K.M.Peiris, Sugath Caldera, Riad Ameen, Buddhika Illangathilaka, Manjula Fernandopulle, Shanaka Coorey, Eraj de Silva and Vasantha Kumar Niles for the Petitioner. M A Sumandiran with Vinayagamoorthi for the 11th respondent and J C Weliamuna with Senura Abbeywardena and Mevan Bandara for the 12th respondent. Hon Attorney General Palitha Fernando PC with AGnanadasan PC Acting Solicitor General, Shavindra Fernando DSG, Sanjay Rajaratnam DSG, A H M D Nawas DSG Janak de Silva DSG, Nerin Pulle SSC, Suren Gnanaraja SC and Monohara Jayasingha SC as *amicus curiae*.

Argued and decided on : **07.01.2013**

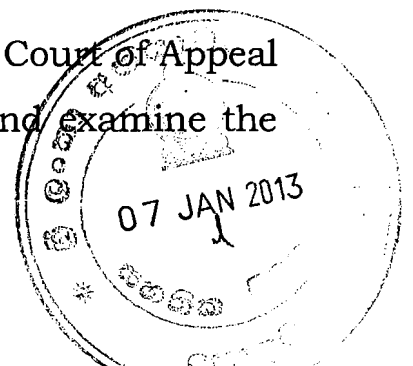
S.Sriskandarajah, J,

The Petitioner in this application has sought a writ of certiorari to quash the findings and/or the decision contained in the report of the 2nd to the 8th Respondents marked P17. The Petitioner stated that the 2nd to the 12th Respondents were appointed by the 1st Respondent the Hon Speaker of Parliament to a select committee (PSC) under Standing Order 78A of the Parliament to investigate into alleged acts of misconduct or incapacity of the Petitioner, pursuant to a resolution presented to the 1st Respondent in terms of Article 107(2) of the Constitution.

The power of the Court of Appeal to exercise judicial review on findings or orders of persons or body of persons exercising authority to determine questions affecting the rights of subjects are wide and this power has been provided to the Court of Appeal by the Constitution of the Democratic Socialist Republic of Sri Lanka. Therefore this power cannot be abdicated by the other arms of the government namely the Legislature or Executive.

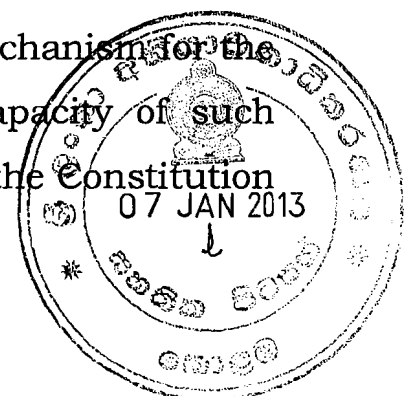
Article 140 of the Constitution provides that:

Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the



records of any court of first Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against the judge of any court of first instance or tribunal or other institution or any other person. The Honourable Attorney General contended that the jurisdiction conferred on the court of appeal under article 140 of the Constitution shall be exercised subject to the provisions of the Constitution. (Emphasis added)

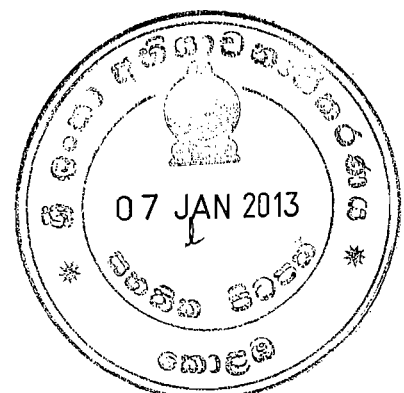
He adverted us to Articles 38(2) and 81 of the Constitution which deal with impeachment of the President, expulsion of members of parliament and imposition of civic disability. As regards impeachment of the President the jurisdiction is vested in the Supreme Court to inquire into the matter and in case of the members of Parliament a special Presidential Commission of inquiry established under the Special Presidential Commission of Inquiry Law No 7 of 1978, and consisting of a member or members each of whom is a judge of the Supreme Court, Court of Appeal, High Court or District Court recommends that any person should be subject to any disability. However, he further submitted that in the case of the impeachment of a Judge of the Supreme Court or Court of Appeal the Legislature in its own wisdom, under article 107 has not provided a mechanism for the Judiciary to determine the mishaviour or incapacity of such Judge. He further submitted that article 4 (C) of the Constitution



in addition to the legislative power of the people, the Parliament exercises judicial power of the people directly according to law. By this provision the Constitution has impliedly excluded the involvement of the judiciary in the impeachment process of the judges of the Supreme Court and Court of Appeal.

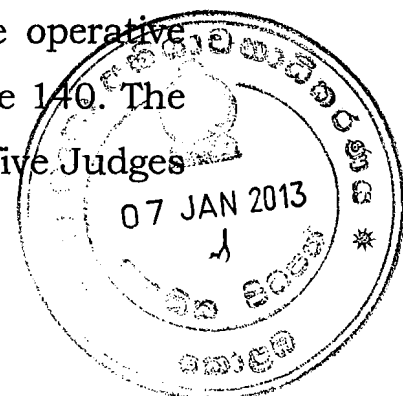
The learned Attorney General submitted that the provision contained in article 4 (c) of the Constitution, by necessary implication has the effect of ousting the jurisdiction of Court. As the exercise of powers under article 140 is subject to the provisions of the Constitution, the jurisdiction of the Court of Appeal with regard to judicial review is impliedly excluded as regards the impeachment of the aforesaid Judges.

The Constitution in Articles 80 (3), 81 and 124 expressly outs the jurisdiction of courts. If the legislature had intended that the jurisdiction of the court should be ousted under article 107 of the Constitution to impeach judges, it ought to have specifically provided for such an eventuality. As such, in my opinion the Legislature has clearly placed no such obstacle either directly or by necessary implication in the way of entertaining the present application.



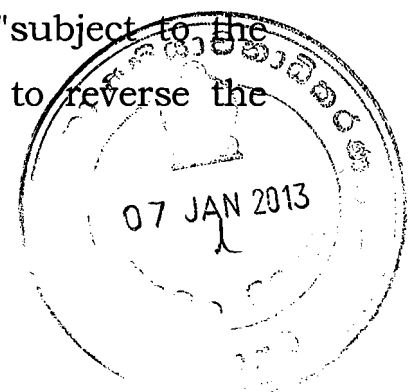
The jurisdiction under Article 140 of the Court of Appeal is not ousted by any ouster clause by any law. This principle is enunciated in *Atapattu and others Vs People's Bank and others* 1997 1 SLR 208 at 221, 222 and 223 it was held by the Supreme Court inter alia as follows..

“Since section 71(3) enacts that every determination of the Bank shall be final and conclusive and shall not be called in question in any court, it was contended that the effect of section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, was that a decision by the Bank refusing substitution could not be reviewed by the Court of Appeal in the exercise of its writ jurisdiction under Article 140. There is an apparent conflict between the ouster clause (which is pre-Constitution legislation), and Article 140. While generally a Constitutional provision, being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply. The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides: "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, **mutatis mutandis**, and except as otherwise expressly provided in the Constitution, continue in force." However, this would make the ouster clause operative only "except as otherwise expressly provided" in Article 140. The meaning of that phrase was considered by a bench of five Judges



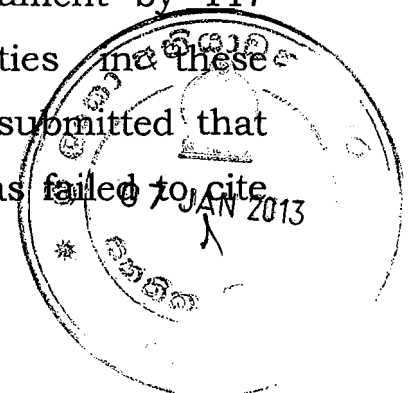
in *Wickremabandu v Herath*⁽¹¹⁾, in relation to a similar question, whether the ouster clause in section. 8 of the Public Security Ordinance derogated from the Jurisdiction of this Court under Article 17 and 126. H. A. G. de Silva, J, and I held that the conferment of jurisdiction of this Court by those Articles was express contrary provision, with the result that Article 168(1) did not make the ouster clause operative vis-a-vis the fundamental rights jurisdiction. The Privy Council held in *Shanmugam v Commissioner for Registration of Indian and Pakistani Residents* ⁽¹²⁾, that

"to be express provision with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference from it." Articles 17 and 126 constitute "express provision", because they directly confer jurisdiction; although they make no specific mention of the ouster clause in section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause. But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the



position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also *Jailabdeen v. Danina Umma* ⁽¹³⁾). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, and does not extend to provisions of other written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law".

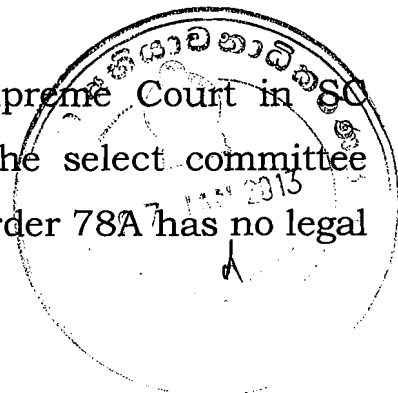
The impeachment motion under consideration was signed and presented to the Honourable Speaker of parliament by 117 members and as they are interested parties in these proceedings, the Honourable Attorney General submitted that they are necessary parties. As the petitioner has failed to cite



them as parties he contended that the application should be dismissed *inlimine*. The learned President's counsel for the petitioner responding to this submission, contended that by reason of the determination of the Supreme Court interpreting Article 107 of the Constitution, a Parliamentary select committee appointed in terms of standing order 78A derives its power and authority solely from the said standing order which is not Law. Therefore a select committee appointed under and in terms of standing order 78A has no legal power or authority to make a finding adversely affecting the legal rights of the judge against whom the allegation made in the resolutions moved under proviso to Article, 107 (2), is the subject matter its investigation. The power to make a valid finding, after the investigation contemplated in Article 107 (3), can be conferred on a court, tribunal a body, only by Law and by Law alone.

In view of the above determination the quashing of the impugned decision will not affect the rights of the members who subscribed to the impeachment motion, as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner in terms of the said determination.

According to the determination of the Supreme Court in SC reference No 3/2012 CA writ 358/2012 the select committee appointed under and in terms of standing order 78A has no legal



power or authority to make a finding affecting the in the legal rights of the judge against whom the allegation is made in the resolution under proviso to article 107 (2). In view of the above determination and the finding and/or the decision or the report of the 2nd to the 8th respondents marked as P17, has no legal validity and as such this court has no alternative but to issue a writ of *certiorari* to quash P17, thus giving effect to the determination of the Supreme Court referred to above.

In view of this finding this Court has not considered the grounds urged by the Petitioner. Application for writ of certiorari is allowed without costs.

President of the Court of Appeal

Anil Gooneratne, J

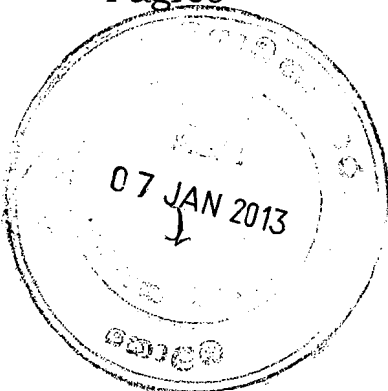
I agree.

Judge of the Court of Appeal

A W A Salam, J

I agree

Judge of the Court of Appeal



TRUE COPY
Chief Clerk
C/O COURT OF APPEAL
COLOMBO 12