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

*In the matter of an Application under and in
terms of Articles 17 and 126 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka*

Athula Chandraguptha Thenuwara
60/3A, 9th Lane,
Ethul Kotte

Petitioner
(SC (FR) Application No.665/2012)

Janaka Adikari,
Palugaswewa, Perimiyankulama,
Anuradhapura

Petitioner
(SC (FR) Application No.666/2012)

Mahinda Jayasinghe,
12/2 Weera Mawatha,
Subhuthipura, Battaramulla

Petitioner
(SC (FR) Application No. 667/2012)

VS.

1. Chamal Rajapakse,
Speaker of Parliament,
Parliament of Sri Lanka,
Sri Jayewardenepura Kotte

and others

Respondents

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

WRITTEN SUBMISSIONS OF THE PETITIONERS
ON THE PRELIMINARY OBJECTIONS

BACKGROUND

1. These Written Submissions are made in response to the preliminary objections sought to be raised on behalf of Counsel for the Intervenient-Petitioners, when this matter was taken up for argument on 23rd October 2013.
2. For the convenience of Your Lordships' Court, the Counsel in SC FR Application Nos. 665, 666 and 667/2012 have consolidated their Written Submissions as follows.
3. It is submitted at the outset that, as conceded at the hearing by the Hon. Attorney General, the issues raised as preliminary objections, were raised and strenuously pressed by the learned Deputy Solicitor General at the stage of granting of leave. Although not recorded in the Minutes of Your Lordships' Court, it is obvious that same were overruled, as evidenced by the granting of leave to proceed.
4. As such, it is submitted that those Preliminary Objections, being *threshold issues* cannot be re-agitated in as much as they were duly considered by a duly constituted bench of Your Lordships' Court, and it is respectfully submitted that Your Lordships ought not to permit such purported preliminary objections to be raised and / or maintained as now sought.

5. Without prejudice to the above position, the following submissions are made on behalf of the Petitioners on the preliminary objections purported to be raised.

THE PURPORTED PRELIMINARY OBJECTIONS

6. The purported preliminary objections were that (allegedly):
 - (i) The alleged infringement of the Petitioners' Fundamental Rights was not by Executive and / or Administrative Action;
 - (ii) The Petitioners have no *locus standi*;
 - (iii) The Petitioners have not established a Fundamental Right which was violated;
 - (iv) Standing Orders are covered by Parliamentary Privilege and cannot be adjudicated upon by Your Lordships' Court.

BACKGROUND TO THE MAIN APPLICATIONS

7. The Order Paper of Parliament of 6th November 2012 included a Resolution for the presentation of an address for the impeachment of the incumbent Chief Justice (in terms of Article 107 of the Constitution) (Annexure **P1**)
8. Subsequently, the 1st Respondent, purporting to act in terms of Article 107(3) of the Constitution and the Standing Orders of Parliament, purported to appoint the 2nd – 12th Respondents to a Select Committee of Parliament (hereinafter 'PSC') to inquire into the charges contained in the impeachment motion against the Chief Justice. (See the relevant portion of the Hansard of 14th November 2012, marked **P2** and the purported Standing Order 78A contained in the Standing Orders of Parliament marked **P3** to the original Petition).

9. The purported PSC purported to find the incumbent Chief Justice guilty of 3 charges, by its purported Report / Findings / Order dated 8th December 2012. (See annexure **P4**)

10. By Determination dated 1st January 2013, the Supreme Court in **SC Reference 3/2012 (CA Writ 358/2012)** determined inter alia that:

*"It is mandatory under Article 107(3) of the Constitution for the Parliament to provide by **LAW** the matters relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."* (emphasis added)

11. Subsequently, considering a Writ Application filed by Hon. Dr. Shirani A. Bandaranayake, the incumbent Chief Justice, and in view of the aforesaid Determination of the Supreme Court, the **Court of Appeal by Judgment dated 7th January 2013 in CA Writ 411/2012 issued a Writ of Certiorari quashing the impugned PSC Report**, which included the purported Report / Findings / Order [**P4**].

12. Notwithstanding the Determination of the Supreme Court and the Judgment of the Court of Appeal the 1st Respondent purported to entertain the PSC Report (including the findings / order **P4**). (See true copies of the Order Paper of Parliament of 10th and 11th January 2013 marked **P5** and **P6**).

13. The Members of Parliament purported to debate on the impugned PSC Report, notwithstanding same having been quashed and thus being a nullity, and the proceedings of the PSC being unconstitutional in view of non-compliance with constitutional requirements (as set out in the Supreme Court judgment).

14. At the conclusion of the debate on the impugned PSC Report on 11th January 2013, the Members of Parliament purported to vote on the Resolution before Parliament.
15. In these applications the Petitioners sought, *inter alia*:
- a) **A declaration** that the Impeachment Process contained in Standing Order 78A to the extent that it seeks to permit judicial or quasi-judicial powers to be exercised by Parliament, contravenes Articles 4(c) and 3 of the Constitution, and the Petitioner's right to equal protection of the law guaranteed by Article 12(1) and the fundamental right guaranteed by Article 17 of the Constitution;
 - b) **A declaration** that the Impeachment Process contained in Standing Order 78A, has resulted in the infringement of the fundamental rights guaranteed to the Petitioner under *inter alia* Article 14(1)(a), Article 14(1)(b) and Article 12(2) of the Constitution;
 - c) **A declaration** that purported appointment of the 2nd – 12th Respondents to the PSC, to the extent that it seeks to permit judicial or quasi-judicial powers to be exercised by Parliament, contravenes Articles 4(c) and 3 of the Constitution, and the Petitioner's right to equal protection of the law guaranteed by Article 12(1) and the fundamental right guaranteed by Article 17 of the Constitution;
 - d) **A declaration** that Standing Order 78A is ultra vires the Constitution and null and void and of no force or effect in law;
 - e) **A declaration** that the purported appointment of the 2nd – 12th Respondents to the PSC (including the appointment contained in **P2**) is null and void and of no force or effect in law;

SUBMISSIONS

EXECUTIVE / ADMINISTRATIVE ACTION

16. It is submitted that Your Lordships' Court in numerous judgments has clearly recognized that the question of whether or not a particular act constitutes executive or administrative must be determined based on the **nature of the power** that is exercised, rather than the official exercising the power / function.
17. Thus in **Weerawansa v. The Attorney General and Others (2000) 1 SLR 387** Your Lordships' Court stated that:
- The act of a judicial officer done in the exercise of judicial power does not fall within the ambit of "executive or administrative action". It does not follow, however, that every act done by a judicial officer is excluded, because a judicial officer may sometimes perform some functions which are not judicial in character: Jayathevan v AG. Further, as Amerasinghe, J, observed in Farook v Raymond, "Judicial power can only be exercised if the court ... has jurisdiction".**
18. Similarly in **Faiz v. The Attorney General and Others (1995) 1 SLR 372** Your Lordships' Court stated that:
- ...it may well be that the act of a court or a legislative body in denying a language right guaranteed by Article 20 or 24 is "administrative" for the purpose of Article 126 even though it is done in the course of a judicial or legislative proceeding. "Executive or administrative action" includes, but is wider than "the acts of a public [i.e executive or administrative] officer"**
- ... Article 126, speaks of an infringement by executive of administrative action; it does not impose a further requirement this action must be by an executive officer.**

19. In the instant Applications the Petitioners impugn the appointment of the Members of the purported Parliamentary Select Committee ('PSC'), by the 1st Respondent, who happens to be the Speaker of Parliament.
20. **The question thus arises as to whether such (purported) appointment was a legislative act or whether it was an executive and / or administrative act.**
21. Your Lordships would appreciate that the appointment of the purported PSC was not a legislative act. It did not create any 'law'. Equally, it was not a judicial act. It was thus clearly an administrative act, just as much as the appointment of any public officer to a public office.
22. The APPOINTMENT of the purported PSC was thus CLEARLY an ADMINISTRATIVE act, subject to the jurisdiction of Your Lordships' Court in terms of Article 126 of the Constitution.

STANDING ORDERS ARE NOT 'LAW'

23. It is further submitted that the creation of Standing Orders 78A is an Administrative Act.

24. **Article 4(c)** of the Constitution provides that:

"4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:

*(c) the **judicial power** of the People shall be exercised by **Parliament through courts, tribunals and institutions created and established, or recognized,***

by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law.”

25. **Article 107(3) of the Constitution** provides that:

“Parliament shall by law or by Standing Orders provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative.”

26. Article 107(3) of the Constitution clearly mandates that by **Law** or **Standing Order** Parliament may set out the **process** by which inquiry is made with regard to the alleged misconduct or incapacity of the accused Judge.

27. Article 107(3) of the Constitution thus also *inter alia* requires Parliament to provide for a judicial or quasi-judicial mechanism whereby the existence or otherwise of the alleged misconduct or incapacity can be inquired into and determined.

28. Further, Article 107 read with Article 4(c) necessarily requires that the judicial mechanism / aspect of the impeachment process can **ONLY** be **carried out** by ***courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law.***

29. In fact, by Determination dated 1st January 2013, the Supreme Court in **SC Reference 3/2012 (CA Writ 358/2012)** determined inter alia that:

"It is mandatory under Article 107(3) of the Constitution for the Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity."

30. After a detailed analysis of the relevant legal provisions, Your Lordships' Court recognised that what was envisaged by Article 107(3) of the Constitution was that such acts capable of being provided for by Standing Orders could be provided for by Standing Orders OR Law, and those acts not capable of being provided for by Standing Orders MUST be provided for by LAW.

31. Article 75 speaks of the legislative power of Parliament.

32. However, the power to make Standing Orders is dealt with in Article 74, thus demonstrating that there is a distinction between Standing Orders and Legislation.

33. **Article 74** provides that:

(1) *Subject to the provisions of the Constitution, Parliament may by resolution or Standing Order provide for-*

(i) *the election and retirement of the Speaker, the Deputy Speaker and the Deputy Chairman of Committees, and*

(ii) *the regulation of its business, the preservation of order at its sittings and any other matter for which provision is required or authorized to be so made by the Constitution.*

(2) *Until Parliament otherwise provides by law or by resolution, the Standing Orders of the National State Assembly, operative immediately prior to the commencement of the Constitution, shall, mutatis mutandis, be the Standing Orders of Parliament*

- 34.** It is thus clear that Standing Orders were ONLY intended to be for INTERNAL matters of Parliament, and could be likened to the Articles of Association of a Company.
- 35.** Therefore it is respectfully submitted that Standing Orders are not LAW, and that the creation of such Standing Orders is not a legislative act,
- 36.** This is FURTHER evident on consideration of the provisions of Articles 121-124 of the Constitution which provide for pre-enactment review of legislation.
- 37.** It cannot be that Standing Orders (which are not subject to pre-enactment review) can be considered LAW. To hold otherwise would result in individual citizens being subject to consequences notwithstanding the denial of the right of pre-enactment review.
- 38.** The Standing Orders are clearly *ultra vires* Article 107(3) read with Article 4(c) of the Constitution. Thus the creation of these Standing Orders are not a legislative act.

39. The creation of Standing Order 78A is thus an administrative act, and in terms of Article 17 of the Constitution, read with Article 126 of the Constitution, constitutes an act subject to the fundamental rights jurisdiction of Your Lordships' Court.

STANDING OF THE PETITIONERS / VIOLATION OF THE PETITIONERS' FUNDAMENTAL RIGHTS

40. The Petitioners have alleged the violation and / or imminent infringement *inter alia* of their Fundamental Rights under Articles 12 and 17 of the Constitution.

41. The Petitioners have stated that they:

...makes this Application in his own right, and in the public interest, with the objective of safeguarding the rights and interests of the general public of Sri Lanka and securing due respect, regard for and adherence to the Rule of Law and the Constitution, which is the supreme law of the land.

42. Article 17 of the Constitution read with Article 126 of the Constitution gives the Petitioner the right to a judicial remedy for the infringement of fundamental rights by executive action by way of an application to the Supreme Court.

43. **Article 126(1)** of the Constitution states that:

The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

44. Thus it is clear that the right (under Article 17) to invoke the jurisdiction of the Supreme Court, is in itself a Fundamental Right, as recognised by Article 126(1).

45. As stated by Lord Denning in the case of **Morris v. The Crown Office [1970] 1 All ER 1079**:

Of all the places where law and order must be maintained, it is here in these courts. The courts of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society.

...

Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty.

46. Removal of a judge by unlawful means in violation of the Constitution directly infringes upon the independence of the judiciary. A judiciary under threat by the Legislature that can remove Judges by an unconstitutional and / or biased process, may be deterred from entering judgments against an Executive and / or Legislature.

47. The importance of the independence of the judiciary in terms of the Rule of law is recognized in the Constitution. The preamble itself reflects this. Further, to ensure the protection of the rights of the people, the Constitution also sets out mechanisms to ensure the Independence of the Judiciary

E.g.: Article 107(5) sets out fixed ages of retirement for judges. Article 108 states that judges' salaries are to be charged on the consolidated fund and that their pensions are not to be reduced after their appointment.

48. The importance of the judiciary in terms of the Rule of law has also been recognized time and again in case law.

Visuvalingam and Others v. Liyanage and Others 1983 2 SLR 311, citing the case of *Siriwardena and Others v. Liyanage and Others (Aththa Case)* - S.C. Application No. 120/82 - S.C. Minutes of 27.1.1985 stated that:

. . . there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the Courts.

49. In **Jayanetti v. LRC** (1984) 2 Sri LR 172 it was stated that:

*Article 12 of our Constitution is similar in content to Article 14 of the Indian Constitution. The Indian Supreme Court has held that Article 14 "combines the English doctrine of the rule of law with the equal protection clause of the 14th amendment to (the U.S.) Constitution". We all know that **the rule of law was a fundamental principle of English Constitutional Law and it was a right of the subject to challenge any act of the State from whichever organ it emanated and compel it to justify its legality.** It was not confined only to legislation, but extended to every class and category of acts done by or at the instance of the State.*

That concept is included and embodied in Article 12.

50. In the Determination relating to the **Nineteenth Amendment to the Constitution** (2002) 3 SLR 85, Court stated that:

It has been firmly stated in several judgments of this Court that the 'rule of law' is the basis of our Constitution (Visuvalingam v. Liyanage, Premachandra v. Jayawickrema.)

51. The maintenance of the Independence of the Judiciary, and ensuring that Impeachment mechanisms are such that they leave no room for a suspicion or fear that a Judge may be victimised for delivering judgments against the Executive and / or the Legislature, is essential.
52. Such in turn requires that the judicial or quasi-judicial aspects of the Impeachment Process are carried out in accordance with Article 4(c) and 3, and do not in and of themselves amount to a breach of natural justice and / or violation of Article 12(1).
53. Thus the Petitioners have clearly established that there is an infringement as well as a further imminent infringement of their Fundamental Rights under Articles 12(1) and 17 of the Constitution inasmuch as the Rule of Law is violated by the unconstitutional impeachment process and the purported appointment of the PSC, and there is an imminent infringement of the Petitioners' Fundamental Rights inasmuch as the relevant Respondents have sought to interfere with the independence of the judiciary.

STANDING ORDERS ARE SUBJECT TO JUDICIAL REVIEW

54. It is submitted that ALL proceedings of Parliament are not exempt from judicial review. In fact, it is for this reason that parliamentary legislation is specifically exempted from such review under Article 16 of the Constitution.
55. Both Bills (under Article 121 of the Constitution) and regulations are subject to judicial review. Your Lordships' Court has in fact on numerous occasions upheld Fundamental Rights by quashing regulations etc which have been approved by parliament. (E.g.: *Joseph Perera v. The Attorney General and Others (1992) 1*

SLR 199, *Wickremabandu v. Herath and Others* (1990) 2 SLR 348, *Wickramasinghe v. Edmund Jayasinghe, Secretary, Ministry of Media, Tourism and Aviation* (1995) 1 SLR 300).

56. **Article 80(3)** states that:

***Where a Bill becomes law** upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever*

57. Legislation, once enacted, (in the absence of ambiguity etc) cannot be tested for constitutionality.

58. No such similar ouster clause is enacted with regard to Standing Orders.

59. Thus, in the absence of any provision to the contrary the Standing Orders of Parliament are not exempt from judicial review.

60. As submitted above, this is FURTHER evident on consideration of the provisions of Articles 121-124 of the Constitution which provide for pre-enactment review of legislation.

61. It cannot be that Standing Orders (which are not subject to pre-enactment review) can be considered LAW. To hold otherwise would result in individual citizens being subject to consequences notwithstanding the denial of the right of pre-enactment review.

For example:

If Parliament sought to legislate that doing “ABC” was an offence, the Constitutionality of such legislation could be tested in proceedings under Articles 121-124 of the Constitution.

If Parliament purported to make the commission of “ABC” an offence through the promulgation of Standing Orders, the Constitutionality could not be tested in proceedings under Articles 121-124 of the Constitution since Standing Orders are not law.

This highlights the need for review of such non-legislative Standing Orders.

62. As submitted previously, Your Lordships’ Court has held numerous Regulations to be violative of Fundamental Rights, notwithstanding such Regulations having being approved by Parliament.
63. Thus **Section 3** of the **Parliament (Powers and Privileges) Act** which provides that “*there shall be freedom of speech, debate and proceeding in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament*” does not grant blanket immunity to acts purported to be done under the guise of acting under Standing Orders.
64. Immunity is only in so far as individual MPs cannot be held liable for otherwise defamatory statements made in the course of debates etc.
65. FURTHER, as set out above (and as recognised by Your Lordships’ Court in **SC Reference 3/2012 (CA Writ 358/2012)**), NO PROVISION could be made with regard to many of the matters contained in the impugned Standing Order 78A, EXCEPT by LAW.

66. Since the 1st Respondent purported to appoint the relevant Respondents to a PSC, which had NO JURISDICTION to exercise the powers sought to be conferred by the impugned Standing Order, it is clear that the purported Standing Order 78A and the purported appointment of the relevant Respondents was *ultra vires*.
67. As such IN ANY EVENT (while maintaining that there was no such immunity available in the instant circumstances) any immunity which may have otherwise being available in terms of Section 3 of the Parliament (Powers and Privileges) Act, would not be available.
68. It is trite law that **ouster clauses (especially when contained in pre-Constitution legislation such as the Parliament (Powers and Privileges) Act) must be given a narrow interpretation when they conflict with fundamental rights.**
69. In ***Atapattu v. People's Bank (1997) 1 SLR 208*** Your Lordships' Court held:
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...

...

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.

...

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

CONCLUSION

70. For the aforesaid reasons it is respectfully submitted that:

- (a)** The "Intervient-Petitioners" cannot be permitted to raise and / or maintain the purported preliminary objections, which constitute "threshold" issues, and were obviously decided at the *threshold* (hence the grant of leave to proceed);
- (b)** The Petitioners have clearly made out a case of the infringement and further imminent infringement of the fundamental rights guaranteed to them by Articles 12(1) and 17 of the Constitution;

- (c)** In fact, considering the *prima facie* case, leave to proceed was granted. The Respondents have filed no objections. Thus there is no reason why the final relief should not be granted!
- (d)** Further, the acts complained of by the Petitioners constitute Administrative acts within the meaning of Article 126 of the Constitution;
- (e)** In the aforesaid it is clear that the Petitioners have *locus standi*;
- (f)** Your Lordships' Court has already determined that certain of the acts envisaged by Article 107(3) of the Constitution can only be provided for by LAW;
- (g)** There is no ouster clause with regard to the contents of Standing Orders (as in the case of LEGISLATION – which is protected by Article 80(3));
- (h)** Standing Orders or acts done purportedly under such Standing Orders are not immune from suit;
- (i)** Your Lordships' Court has in many cases held Regulations (even if approved by Parliament) to violate Fundamental Rights, thus demonstrating that such regulations are subject to review in Article 126 proceedings. The same would apply to Standing Orders;
- (j)** The Parliament (Powers and Privileges) Act (Section 3), does not confer immunity in the instant case. As set out above, Regulations have been successfully challenged in proceedings under Article 126 of the Constitution. The same would apply to Standing Orders;
- (k)** In any event, as held by Your Lordships' Court, where there is a conflict between a pre-Constitution ouster clause and the rights guaranteed under the Constitution, the latter must prevail.

71. For the aforesaid reasons, it is respectfully submitted that Your Lordships' Court will be pleased to refuse to entertain the purported preliminary objections and / or to overrule same, to order that the "Intervenient-Petitioners" pay costs to the Petitioners, and to further hold that these Applications ought to be duly listed for hearing on the merits.

On this 12th day of November 2013

***Attorney-at-Law for the
Petitioner in SC FR 665/2012***

***Attorney-at-Law for the
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