
**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 & 126 of the Constitution of the Republic as read with Article 134(3) thereof.

1. **Lal Wijenayake**, No. 36/21, Sangaraja Mawatha, Kandy.
2. **G. A. Sunil Jayaratne**, No. 100/2, Rajagiri, Hakmana Road, Matara.
3. **Luxman Jothikumar**, No.3, Damburugiriya Road, Hatton.
4. **R. A. Namal Rajapakse**, No. 44/46, Agoda Village, Kandy Road, Peliyagoda.

PETITIONERS

SC (FR) Application. No-

Vs.

1. **Hon. Attorney General**, Attorney General's Department, Colombo 12.
2. **Hon. Speaker, Mr. Karu Jayasuriya**,
3. **Hon. Prime Minister, Mr. Ranil Wickremesinghe**,
4. **Hon. Leader of the Opposition, Mr. Mahinda Rajapakse**,
5. **Hon. Member of Parliament, Mr. Mahinda Samarasinghe**,

6. **Hon. Member of Parliament Mr. Bimal Rathnayaka,**
7. **Hon. Member of Parliament ,Mrs. Thalatha Atukorale,**
8. **Mr. Jayantha Dhanapala,**
9. **Mr. Naganathan Sellvakumaran,**
10. **Hon. Member of Parliament, Mr. Chamal Rajapakse,**
11. **Mr. Javed Yusuf,**

The 2nd to 11th Respondents of; Constitutional Council, Parliament of Sri Lanka, Sri Jayawardhenepura Kotte.

12. **Hon. Justice Deepali Wijesundera,** *Judge of the Court of Appeal, Court of Appeal, Superior Court Complex, Colombo 12.*
13. **Mr. Udaya Ranjith Seneveiratne,** *Secretary to the President, Presidential Secretariat, Galle Face, Colombo 01.*

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 11th day of March 2019

The Petition of the Petitioners abovenamed appearing by Mr. Mohan Balendra, their registered Attorney-at-Law, states as follows.

THE PETITIONERS

1. The Petitioners are citizens of the Democratic Socialist Republic of Sri Lanka, and the Sovereignty of such Republic is vested in the People of Sri Lanka which includes Petitioners. The Petitioners are also vested with certain Fundamental Duties such as, *inter alia*, upholding and defending the Constitution and the Law as set out in Article 28(a) of the Constitution. The Petitioners are all, *Attorneys-at-Law* with several decades of experience in the profession who have continuously and actively committed to protection of Rule of Law and safeguarding the Independence of the Judiciary. The Petitioners are also conveners of *Lawyers for Democracy* a group of lawyers, which has been actively engaged in promoting Democratic Values, Human Rights and Independence of the Judiciary. The network of the *Lawyers for Democracy* is active in several parts of the country, since the year 2010.
2. The Petitioners state that the Petitioners practice law in various Courts, including Superior Courts and further states as follows;
 - a) The 1st Petitioner is a senior lawyer with active legal practice for over 48 years;
 - b) The 2nd Petitioner is a senior lawyer with an active legal practice for over 30 years;

- c) The 3rd Petitioner is a senior lawyer with an active legal practice for over 30 years;
 - d) The 4th Petitioner is a senior lawyer with an active legal practice for over 20 years;
3. In the instant application, the Petitioners impugn, *inter alia*, the actions complained of hereinafter, and in particular the failure to act in a manner that upholds *Chapter VII A* of the Constitution.

THE RESPONDENTS

4. The Petitioners state that;
- a) The 1st Respondent is the *Hon. The Attorney-General*, who is made a party hereto in terms of the Law. Such Respondent is the *Chief Legal Officer* of the Republic, and *inter alia*, action can be filed against the said *Hon. The Attorney General* in respect of anything done or omitted to be done by the President in his official capacity as provided for under *Article 35* of the Constitution. In any event such Respondent has also been named under *Supreme Court Rule 44* read with *Article 134(1)* of the Constitution;
 - b) The 2nd to 11th Respondents are the members of the incumbent Constitutional Council;
 - c) The 12th Respondent is a Judge of the Court of Appeal who has purportedly been appointed as the Hon. Acting *President* of the Court of

Appeal, contrary to the procedures set out in the Constitution. The said Respondent is made party to the instant application only on account of the fact that the actions impugned through this application impacts her as well, having been designated by the Hon. The President [represented through these proceedings by the 1st Respondent] to **act** in the office and position of *President of the Court of Appeal*;

- d) The 13th Respondent is the *Secretary* to the Hon. The President;
- e) The Petitioners respectfully reserve their right to add any further or other parties as Respondents *in limine*, and/or in the event of any matter or further material disclosing their complicity or involvement in the actions complained of hereinafter.

BRIEF BACKGROUND TO THE INSTANT APPLICATION

- 5. The Petitioners state that on or around 9th January 2019, vacancies arose in the *Court of Appeal* on the elevation of *Hon. Justice Padmasena Surasena*, [the then President Court of Appeal] to the *Supreme Court*.
- 6. The Petitioners are aware that the Hon. The President, represented in these proceedings by the 1st Respondent AG, on or around 9th January 2019 purported to appoint the 12th Respondent as Acting President of the *Court of*

Appeal. Such was for a period of two weeks. The Petitioners are aware that thereafter on or around 24th January 2019, the Hon. the President *again* purported to make an acting appointment for a further two weeks, appointing the same *Learned Judge* of the *Court of Appeal* [the 12th Respondent] as the acting *President* of the *Court of Appeal*. The Petitioners have now become aware that on or around 22nd February 2019, the Hon. The President for the *third time* purportedly appointed the *same* Hon. Judge as the acting *President of the Court of Appeal* and thereafter on or around 6th March 2019 made a similar appointment. Each of the said appointments are, with respect contrary to the provisions of the Constitution in the manner hereinafter set out and entails a refusal and/or failure to take steps as constitutionally mandated in respect of filling the said vacant position of *President of Court of Appeal*.

7. The Petitioners state that despite having conducted a diligent survey, the Petitioners were unable to find any Gazette notifications disclosing the official communication on Honourable 12th Respondent's appointment or any legal provisions in relation to the 12th Respondent's appointment as Acting *President* of the *Court of Appeal*. The Petitioners, however, were able to obtain a copy of a News item in proof of the fact that 12th Respondent has been sworn in as the Acting *President* of the *Court of Appeal* by the Hon. President on 06-03-2019.

Annexed herewith marked **P1** is a copy of a news item appeared on Dailymirror official website (www.dailymirror.lk) on 06-03-2019 under the headline "New Court of Appeal Justice appointed" available online at http://www.dailymirror.lk/caption_story/New-Court-of-Appeal-Justice-appointed/110-163457.

8. The Petitioners specifically state that therefore, from on or about 9th January 2019, the Court of Appeal does not have a lawfully and duly appointed President Court of Appeal as mandated by Article 137 of the Constitution, which states as follows:

"137 The Court of Appeal shall consist of the President of the Court of Appeal and not less than six and not more than eleven other Judges who shall be appointed as provided in Article 107"

[emphasis added]

Annexed herewith marked **P2(a)** is a printout of the official webpage of the Court of Appeal available online at <http://courtofappeal.lk> which discloses an Acting Appointment as the President Court of Appeal accessed on 01-03-2019. Further annexed herewith marked **P2(b)** is a copy of an extract of the daily court list for 05-03-2019 as available on the said official website of the court of appeal accessed on 01-03-2019

9. The Petitioners are reliably made to understand that the Constitutional Council's approval was not given for the initial acting appointment, nor for subsequent re-appointing the same Honourable Judge as the acting President of the Court of Appeal. The Petitioners state that such is contrary to **Article 41C** of

the Constitution and in particular the *proviso* to *Article 41C(2)*. The Petitioners further state that there is no provision in *Article 109(1)* for The Hon. The President to make acting appointments, in the manner done to date. Further, such is in contravention of *Article 137* of the Constitution.

10. The Petitioners are made to understand that The Hon. The President has conveyed the name of the 12th Respondent to the *Constitutional Council* for consideration and approval for appointment, as the *President* of the *Court of Appeal*. The Petitioners are made to understand from information available in the public domain, that such name as not been approved on several occasions by the said *Constitutional Council*.

*Annexed herewith marked **P3** is a copy of a news item contained on Daily FT Web accessed on 03-01-2019 titled Constitutional Council again rejects President's nominee for Appellate Court Chairman available online at <http://www.ft.lk/news/Constitutional-Council-again-rejects-President-s-nominee-for-Appellate-Court-Chairman/56-671643>*

CONTINUED ACTING APPOINTMENT TO PRESIDENT COURT OF APPEAL

11. The Petitioners state that the Hon. 12th Respondent has thus been continuously and successively appointed as the acting *President* of the *Court of Appeal* from on or around 9th January 2019 up to date. The Petitioners state that “acting appointments” to the office and position of *President* of the *Court*

of Appeal are permitted only in the limited circumstances set out in *Article 109(1)* of the Constitution where such existing President is “(...) is temporarily unable to exercise, perform and discharge the powers, duties and functions of his office, by reason of illness, absence from Sri Lanka or any other cause (...)”. The Petitioners state that in any event such appointment can be made only subject to the approval of the *Constitutional Council*, and after such Hon. Judge takes/makes and subscribed to the required oath as required under *Article 107(4)* of the Constitution.

To the best of the Petitioners’ knowledge and belief, the Constitutional Council has not approved the Acting Appointment of the 12th Respondent and respectfully seeks an appropriate Order from Your Lordships’ Court directing any one or more of the Respondents to submit to Your Lordships’ Court all such approvals (if any).

12. The Petitioners state that making several consecutive “acting appointments” to the *Court of Appeal* in the said premises and manner, is *inter alia*, arbitrary, capricious, irrational and *ultra vires* the Constitution and in particular *Article 137* as read with *Article 109* and *41C*. The Petitioners state that therefore The Hon. The President [represented in these proceedings by the 1st Respondent AG] is not acting in accordance with the relevant mandatory provisions of the Constitution. The Petitioners state that such actions have an **adverse impact on the dispensation of / administration of justice** and as such, The Hon. the President is under a **constitutional duty to make a permanent appointment**

to the position of President of Court of Appeal with the approval of the Constitutional Council had and obtained as required by the Constitution.

13. The Petitioners state that in view of the public importance of the matter, on or around 09-02-2019, *Lawyers for Democracy* issued a public statement, clarifying the constitutional provision on this regard and calling upon the President to respect the Constitution in appointing Judges.

Annexed herewith marked P4 is a copy of the full text appears on DailyNews Online accessed online on 12-02-2019 titled 'Lawyers for Democracy urges President to uphold Constitution' available online at <http://www.dailynews.lk/2019/02/12/law-order/177182/lawyers-democracy-urges-president-uphold-constitution>

APPOINTMENT TO THE HIGHER JUDICIARY

14. The Petitioners state that the career judiciary in Sri Lanka is the Minor Judiciary and commences with a selection and appointment process by the *Judicial Service Commission (hereinafter abbreviated as 'JSC')* with appointments and promotions being made by the said *JSC* up to the stage of the *High Court*, in respect of the appointments to which the *JSC* recommends appointments to the *High Court* to the Hon. The President, who thereafter makes appointments under and in terms of *Article 111* of the Constitution.

15. The Petitioners state that where appointments to the *Court of Appeal* and the *Supreme Court* are concerned, appointments to such office are made by The

Hon. the President [represented in these proceedings by the 1st Respondent AG] **upon the approval of the Constitutional Council** as such appointed to the *Court of Appeal* and the *Supreme Court* are not promotions *per se*, but stand alone appointments to a constitutional position.

16. The Petitioners state that as set out by Sir Gerard Brennan “(...) Judicial appointment is not a stepping stone in a career: it is prima facie a dead-end job of the highest importance”. Accordingly, appointments to the Higher Judiciary must be made in accordance with the Constitution which requires the approval of the Constitutional Council.

*Annexed herewith marked **P5** is a copy of the cover page and page 585-586 of Dr. A.R.B. Amerasinghe's book Judicial Conduct Ethics and Responsibilities.*

FAILURE TO DULY RECOMMEND NAMES TO THE CONSTITUTIONAL COUNCIL & CONCLUDE APPOINTMENT PROCESS

17. The Petitioners state that since 9th January 2019, no appointment has yet been made to the office and position of President of the Court of Appeal. The Petitioners are aware that such has resulted in the constitution of the benches of the *Court of Appeal* being unconstitutional and disrupted, and on occasion resulting in concerns of the public *vis-à-vis* the effective hearing of cases. Such adversely affects the due dispensation of justice by the *Court of Appeal*.

18. The Petitioners state that there is a constitutional duty incumbent on The Hon. the President to duly recommend names to the *Constitutional Council*, for approval for appointment by him to the office and position of President of the Court of Appeal, in light of the circumstances hereinbefore morefully enumerated.

VIOLATION OF FUNDAMENTAL RIGHTS

19. In the totality of the aforesaid circumstances hereinbefore morefully set out, the Petitioners are advised to state that the actions of The Hon. the President, *and* the aforesaid failure to duly recommend names to the *Constitutional Council*, for the office and position of *President* of the *Court of Appeal*, is arbitrary, capricious, irrational and/or *ultra vires* the Constitution and violative of their rights under Articles 12(1) for the following reasons amongst others that may be formulated by way of Counsel at the appropriate time;

- a) By virtue of *Article 33(1)(a)* it shall be the duty of The Hon. the President to ensure that the Constitution is respected and upheld and therefore, it is his constitutional responsibility to make chapter *VII A* of the Constitution workable to achieve the objectives of the Nineteenth (19th) Amendment to the Constitution. As such, The Hon. the President is under a constitutional duty to recommend (an)other name(s) to the *Constitutional*

Council, enabling thereby the *Constitutional Council*, to accept suitable nominees under *Article 41C* of the Constitution;

- b) Continuously forwarding the same name which had been previously rejected several times is arbitrary, capricious, irrational and/or for a collateral purpose;
- c) No acting appointment can be made without approval of the Constitutional Council and any such acting appointment sans approval is contrary to *Article 41* of the Constitution [as read with *Article 109*];
- d) Consecutive actions making acting appointments as *Acting President Court of Appeal* in the given circumstances are contrary to *Article 4(d)* of the Constitution;
- e) The continued delay and failure to make nominations to the *Constitutional Council* violates the **Rule of Law** and adversely impacts on the **Independence of the Judiciary**
- f) The said decisions are clearly contrary to the President's powers and duties as set out in *Article 33* of the Constitution, and in particular *Article 33(1)(a)* as read with *Article 33(1)(c)* as read with *Article 33A* of the Constitution;

20. In the circumstances hereinbefore morefully enumerated, the Petitioners state that;

- a) The actions complained above, are unconstitutional, and violative of their rights under Article 12(1) of the Constitution;
- b) The said actions of the Hon. The President are **unconstitutional**, arbitrary, capricious, steeped in *mala fides* and appear to be for some undisclosed **collateral purposes**.

21. The Petitioners are advised to state that Article 35 of the Constitution, *only* confers immunity on the President in respect of civil or criminal proceedings, and the exercise of Your Lordships Court's jurisdiction under Article 126 is unfettered in *this* regard, except in so far as, it is only open to the Petitioners to move Your Lordships' Court against the 1st Respondent AG.

22. The Petitioners state that the effect of the actions impugned through this application is the negation of the efficacy of the 19th Amendment to the Constitution, which was enacted *inter alia*, to act as a check and a balance on the ability of the Executive President from unilaterally appointing persons to function in important judicial and public offices, including that of *President, Court of Appeal*, so as to confer assurance of greater independence and integrity to the higher judiciary.

23. The Petitioners state that grave and irreparable loss would be caused, and the instant application would be rendered nugatory, unless Your Lordships' Court grant and issue an *Interim Order* that The Hon. the President [represented in these proceedings by the 1st Respondent AG] should desist from making any further acting appointments to the office and position of President, Court of Appeal, until the hearing and final determination of this application.

24. The Petitioners respectfully seek the indulgence of Your Lordships' Court, considering the limited material readily available in the public domain and the severe time restraints, to reserve their right to:

- a) Amend pleadings, add any person/persons as parties to this application in the event of further material revealing their complicity of the actions complained in the preceding paragraphs;
- b) Tender any further evidence or affidavits and documents as necessary substantiating the averments contained above.

25. The Petitioners are advised to state and therefore state that the aforesaid actions of the Respondents amount to *executive and/or administrative* action within the meaning of *Articles 17 and 126* of the Constitution. The Petitioners specifically state that none of the asseverations contained hereinbefore come under *Article 33(2)(g)* of the Constitution.

26. The Petitioners state that they have not invoked the jurisdiction of Your Lordships' Court previously in respect of matters pleaded herein.

WHEREFORE the Petitioners most respectfully pray that Your Lordships' Court be pleased to grant and issue:

- (a) the Petitioners *leave to proceed* with this application in the first instance;
- (b) an *Interim Order* that The Hon. the President [represented in these proceedings by the 1st Respondent AG] should desist from making any further acting appointments to the office and position of President, Court of Appeal, until the hearing and final determination of this application.
- (c) A Declaration that the Petitioners' fundamental rights under *Article 12(1)* have been and continue to be violated by the actions of The Hon. The President, represented by the Respondent AG;
- (d) Appropriate *Interim Directions* that The Hon. The President represented by the Hon. the Attorney General, and/or the 13th Respondent of the Presidential Secretariat to submit to Your Lordships' Court;
 - i) The decisions and actual letters of appointments, pertaining to the Acting Appointments made to the Office of President Court

of Appeal from on or around 9th January 2019 and thereafter from time to time;

ii) The Approvals and/or correspondence (if any) of the *Constitutional Council*, received by The Hon. the President pertaining to the Acting Appointments made to the office and/or position of President, Court of Appeal after 9th January 2019.

(e) An *Interim Direction* on the 2nd to 11th Respondent CC, to submit to Your Lordships' Court, all decision(s), correspondence and deliberation(s) pertaining to any acting appointments as President, Court of Appeal purporting to have been made in respect of the Hon. 12th Respondent;

(f) A direction that The Hon. the President, represented by the Hon. the Attorney General, is required to forward fresh suitable nominations acceptable to the *Constitutional Council* for the office and position of President of the Court of Appeal;

(g) A Declaration that the decision to consecutively make acting appointments to the office and position of President of the Court of Appeal without the approval of the Constitutional Council is violative of the Constitution and in particular *Article 41C* of the Constitution read with *Article 12(1)*;

- (h) Declare that the actions of The Hon. the President represented by the Hon. the Attorney General, have violated and/or continue to violate the Constitution and in particular, Articles 33, 41C & 109 thereof;
- (i) Declare that The Hon. The President represented by the Hon. the Attorney General, has acted contrary to the Constitution, and in particular Articles 33(1)(a) 33(1)(c) & 33A as read with Article 4(d) of the Constitution;
- (j) Grant exemplary costs,
- (k) Make such further and other just and equitable orders as to Your Lordships' Court shall seem fit, in the circumstances of this application, under and in terms of *Article 126(4)* of the Constitution of the Republic; and
- (l) Such further and other reliefs as to Your Lordships' Court shall seem meet.

Attorney-at-Law for the Petitioners