JAYARATNE

v.

FERNANDO AND OTHERS

SUPREME COURT
FERNANDO, J.
WIJETUNGA, J. AND
GUNASEKERA, J.
SC APPLICATION NO. 333/98
27TH APRIL, 2000

Fundamental rights - Allocation of government quarters - Allocating Authority - Power of the Minister - Necessity to have a written record of Ministerial orders - Cancellation of an allocation of government quarters without reasons, notice or hearing - Article 12(1) of the Constitution.

The petitioner was a clerk working in the Railway Department. The allocation of government quarters in the petitioner's sub-department was done by the 2nd respondent (Chief Mechanical Engineer) as Allocating Authority acting on the recommendations of the House Allocation Board. (The Housing Committee) of which the 1st respondent (Chemist, Chief Mechanical Engineer's office) was the Chairman.

In June 1997 in anticipation of quarters No. G 3/2 Ratmalana falling vacant, the petitioner requested the Housing Committee to allocate it to her. On 06. 06. 97 the Committee decided in her favour as she was eligible and was the first in the waiting list. The 9th respondent also claimed the said quarters stating that the flat which had been allocated to her in June 1992 was too small for her. But the 9th respondent's claim was not accepted as she was not eligible for a period of five years having been in occupation of quarters for five years. The 9th respondent appealed first to the 5th respondent (General Manager of Railways) and then to the 8th respondent (the Minister of Transport and Highways). Consequently the matter was investigated on several occasions with the result that by 14. 10. 97 there were six reports re-affirming the decision of the Housing Committee made in favour of the petitioner which decision was in accordance with the criteria laid down by the Director of Establishments.

The disputed quarters fell vacant on 27. 10. 97 but it was not allocated to the petitioner as the 5th respondent stated that the Ministry had called for a report. But no report had been sent to the 8th respondent (Minister) although the 1st respondent had submitted a detailed report to the 5th respondent in favour of the petitioner. Finally as a result of intervention

of the 7th respondent (Deputy Minister of Transport and Highways, who was then the Acting Minister). The 1st respondent acting on the instructions of the 2nd respondent issued a letter dated 06. 11. 97 allocating the quarters to the petitioner.

The very next day, the allocation was cancelled without reasons, without notice and without hearing the petitioner purportedly on the orders of the 8th respondent, and she was ordered to vacate. The 2nd respondent sent the petitioner a letter dated 11. 11. 97 stating that the 5th respondent informed that the 8th respondent had made such order. The same position was taken by the 3rd respondent who alone filed an affidavit. By his letter dated 17. 12. 97, the 5th respondent also had informed the Director of Establishments that the 8th respondent had ordered the allocation of the disputed quarters to the 9th respondent. But no proof of any order by the 8th respondent was produced. In fact some other quarters were allocated to the 9th respondent, even though she was not eligible for quarters. At the same time the petitioner was charged penal rent, with effect from 11. 11. 97, for staying in the disputed quarters which had been allocated to her, and a quit notice was served on her on 31. 03. 98 under the Government Quarters (Recovery of Possession) Act, No. 7 of 1969.

Held :

(1) The evidence did not establish that the 8th respondent gave an order for the cancellation of the petitioner's allocation. Where an order given by a Minister in the due discharge of his functions is not in writing, it should be contemporaneously translated by the recepient into words in a document.

Per Fernando, J.

> **"The failure to have proper documentary evidence of Ministerial orders, would encourage public officers to evade responsibility for their own acts, merely by claiming that they acted upon unrecorded Ministerial orders."**

2. In any event, the 8th respondent had no power under the Establishments Code to order the allocation of quarters or the cancellation of an allocation; any such order would not be binding on the Allocating Authority and would not justify such allocation or cancellation.

3. There was a valid allocation of the quarters to the petitioner and the cancellation of that allocation infringed the petitioner's right under Article 12(1) of the Constitution.

Case referred to :

1. *Mallows v. Commissioner of Income Tax* (1962) 66 NLR 321

APPLICATION for relief for infringement of fundamental rights.

Elmore Perera with *Prince Perera* for Petitioner.

S. Rajaratnam, SSC for the 1st to 8th and 10th Respondents.

9th Respondent absent and unrepresented.

Cur. adv. vult.

July 14, 2000.

FERNANDO, J.

The petitioner, is a clerk who has been working in the Railway Department since 1980. On 06. 11. 97 Railway quarters No. G. 3/2 at Ratmalana ("the disputed quarters") were allocated to her, and she went into occupation. On 11. 11. 97 that allocation was cancelled pursuant to an alleged Ministerial order, and she was ordered to vacate. She did not. On 03. 12. 97 she was told that she would be charged penal rent with effect from 11. 11. 97. That was done. Her complaint is that the cancellation of that allocation was arbitrary, capricious and unreasonable. She asks for a declaration that her fundamental right under Article 12(1) had been infringed, for the quashing of the decisions ordering the vacation of the quarters and the deduction of penal rent from her salary, for an order that she be granted legal possession of the quarters for five years, for the repayment of the penal rent deducted upto date, and for compensation in a sum of Rs. 900,000.

ESTABLISHMENTS CODE

There is always keen competition for the limited number of Government quarters available. Chapter xix of the Establishments Code (read with the Railway Departmental Instructions) governs the allocation of Government quarters, and the grading of quarters (from grade 1 to grade 5A) in relation to the various categories of officers who are eligible for them. There is a separate waiting list for each category of

officers who have applied for quarters. The place of each officer on that waiting list depends on the number of points he has earned, and the criteria and points for each criterion are laid down. Neither the validity of the scheme nor the allocation of points has been questioned. The procedure for application and allocation is also laid down, and provision is made for a Housing Committee to advise the Allocating Authority. The following provisions of Chapter xix are relevant :

1. Classification. The term "Government Quarters" includes *any type of accommodation* at the disposal of the Government and allocated for the purpose of residence.

4.4 Housing Committee - The Allocating Authority may, if he considers (it) necessary, constitute and consult a Housing Committee in the matter of making selections.

The Housing Committee may recommend deviations from the point system only where the mechanical application of the system results in a grave and obvious injustice.

4.4.1 The Allocating Authority may deviate from the principles of selection outlined above for very special reasons with the prior approval of the Director of Establishments.

5.5 Officer sharing quarters - Two or more officers can be allowed to share Government Quarters at the discretion of the Allocating Authority . . .

6.1 Period - The occupant should be allowed to remain in quarters of grades 5A, 5 and 1 until the time of his transfer of his ceasing to be a public officer. *The period in respect of grades 4, 3 and 2 quarters will be 5 years . . .*

6.1.1 An officer who has enjoyed the privilege of occupying Government Quarters in a station for more than half the full period permitted in this Code would not be eligible to be considered for such quarters, in the same station for a period of five years from the date of completion of the earlier period of occupation of quarters.

6.3 They may be occupied only by the officer to whom they are allocated and by his wife, children and dependants. *No portion of any Government Quarters may be regularly occupied by any others without the specific approval of the Allocating Authority.*

6.9 Where two or more officers have been permitted to share quarters, the officer to whom the quarters was originally allocated, or if both were allocated the quarters simultaneously, one of them, as may be named by Allocating Authority, will be held responsible as tenant of the quarters for compliance with all the conditions on which the quarters were allocated. All correspondence in regard to the quarters will be conducted only with that officer.

6.15 An officer should vacate quarters *at the end of the period of tenure or when ordered to do so* by the Allocating Authority.

7.1 If an officer fails to vacate quarters when ordered to do so, he should be evicted under the Government Quarters (Recovery of Possession) Act, No. 7 of 1969, as amended by Act, No. 3 of 1971 and Act, No. 40 of 1974.

7.2 He should be charged for the period he overstays his tenure, a penal rent, a sum equivalent to the current open market rent of the quarters as assessed by the Chief Valuer plus 8% (eight) of the officer's salary. (emphasis added)

The relevant Railway Departmental Instructions make similar provisions. The dispute here involves the allocation of quarters to clerks, who are eligible for quarters of grades 2 to 4.

THE ISSUES

The Petitioner contends that she was eligible for quarters and was the first on the relevant waiting list; that there was a valid allocation of the disputed quarters to her by letter dated 06. 11. 97, in terms of which she duly went into occupation; that the summary cancellation of that allocation, without reasons, without notice, and without hearing her, was void;

that her continued occupation was lawful; and that the recovery of penal rent was unlawful.

Mr. Rajaratnam, SSC, on behalf of all the Respondents (other than the 9th), submitted that the Petitioner had been in occupation of other Government quarters (No. T.3/7) for over four years, and had thereby become ineligible (under section 6.1.1) for another allocation until September 1999; and that therefore the allocation was irregular, and its cancellation was lawful and justified. In any event, no allocation should have been made because an appeal dated 14. 09. 97, submitted by the 9th Respondent, another clerk, to the 8th Respondent, the Minister of Transport and Highways, against the decision to make that allocation was still pending on 06. 11. 97. Finally, he urged, the deduction of penal rent was consequential upon a valid cancellation.

It is also necessary to consider two other matters. First, whether the cancellation of the Petitioner's allocation was valid because it was said to have been ordered by the 8th Respondent-Minister, and second, whether the rival claimant, the 9th Respondent, was ineligible for quarters.

ALLOCATING AUTHORITY

The Petitioner averred in her affidavit that "the General Manager of the Railway is the sole authority for allocating Railway Quarters". However, in the only affidavit filed on behalf of the Respondents, the 3rd Respondent (the Senior Administrative Officer in the General Manager's Office) stated that "the House Allocation Board makes *recommendations*, which recommendations are duly considered by the allocating authority concerned", and that "the allocation of quarters in the Petitioner's sub-department is within the purview of the 2nd Respondent" (namely, the Chief Mechanical Engineer): and that appears to have been the practice, going by the documents produced in this case.

Our attention was not drawn to any provision conferring on the General Manager of Railways (who is the 5th Respondent) or the relevant Minister any power to entertain appeals against, or to review or to vary, the decisions of the Allocating Authority.

THE FACTS

There is hardly any dispute about the facts. The Petitioner had duly applied for Government quarters in 1986 and had been placed on the relevant waiting list. In 1997 she was occupying rented premises. Her landlord gave her notice to quit by the end of the year. In June 1997, learning that the disputed quarters would soon be falling vacant, she asked the Housing Committee (also referred to as the "House Allocation Board") to allocate those quarters to her. The Chairman of the Committee was the 1st Respondent, the Chemist, attached to the Chief Mechanical Engineer's Office, Ratmalana. In its report dated 06. 06. 97 the Committee decided in her favour observing that she was the first on the waiting list (having 57 points, while the next officer, the 9th Respondent had 54 points), and that there was no reason to deny her that allocation.

The 9th Respondent - who had applied for quarters only in 1991 - appealed against that decision by letter dated 09. 06. 97 (addressed to the 5th Respondent, through the 2nd Respondent). She said that she was already in occupation of Railway quarters No. A.4 - a small flat at Ratmalana which had been allocated to her in June 1992 - which was too small for her, and pleaded that the disputed quarters be allocated to her. She also claimed that the Petitioner was ineligible for allocation of quarters. The reason she urged was that the Petitioner had gone into occupation of Railway quarters No. T.3/7 (also at Ratmalana) in February 1990 on the basis of sharing them with one Mr G to whom those quarters had been allocated; that Mr G was actually residing elsewhere (which the Petitioner did not concede); that, consequently, the

Petitioner was *the sole occupant* of those quarters until September 1994; and that having occupied them for more than two and a half years, section 6.1.1 made her ineligible for another allocation of quarters for five years from September 1994.

The eligibility of the rival claimants and the merits of their claims were reviewed on several occasions thereafter.

(i) On 13. 06. 97 when forwarding the 9th Respondent's appeal to the 5th Respondent, the 2nd Respondent observed that persons occupying flats (like the 9th Respondent) were eligible to apply for (clerical) quarters, but that she was third on the waiting list. He reported that the Petitioner had shared quarters with Mr G with permission, and had duly vacated them when required to do so; and accordingly she had neither violated nor been punished for any violation of regulations. He added that the sharing of quarters did not take away an officer's right to apply for quarters in her own right; that the Petitioner was first on the waiting list; and that the Committee had decided to allocate the next vacant quarters to her.

(ii) The 5th Respondent directed that the Housing Committee should reconvene and review the facts, and on 27. 06. 97 the Committee re-affirmed the Petitioner's eligibility and claim.

(iii) On 02. 07. 97 the 2nd Respondent asked the 1st Respondent to take action on that recommendation. Nevertheless - it is not clear why - on 07. 07. 97 the 2nd Respondent appointed another committee to investigate the matter. That committee reported on 30. 09. 97 that the original decision should stand. Citing a letter dated 18. 05. 87 from the Director of Establishments, it added that the 9th Respondent was *not* eligible for another allocation until the expiry of five years, because she had been in occupation of the flat A.4 for five years.

(iv) In the meantime, in response to the 5th Respondent's request the 1st Respondent reviewed several pending request for clerical quarters, and reported, on 23. 07. 97, that there were only seven officers then eligible, the Petitioner being the first; the 9th Respondent was not among them.

(v) The 9th Respondent submitted a petition dated 17. 09. 97 to the 8th Respondent, requesting that the disputed quarters be allocated to her. Among the several claims she made was that she was the most suitable; that the 5th Respondent had twice directed the 2nd Respondent to cancel the allocation to the Petitioner; and that disciplinary action had been ordered against Mr G and the Petitioner. The 8th Respondent made an endorsement dated 19. 09. 97: "*G. M. R.* P1 give her a hearing and report". On 22. 09. 97, the 5th Respondent referred this petition to the 1st Respondent, using a cyclostyled form intended for forwarding to his subordinates letters referred to him by the Minister. He directed the 1st Respondent to prepare a draft reply, in English, to be sent to the Minister. On 01. 10. 97 the 1st Respondent submitted a draft reply re-iterating the factual position: in regard to the 9th Respondent, that she was not the most suitable, that she was ineligible under section 6.1.1 according to the Director of Establishments' letter dated 18. 05. 87, and that the 5th Respondent had never directed an allocation to her; and, in regard to the Petitioner, that she was in first place and should be allocated the disputed quarters, and that disciplinary action had never been initiated against her.

(vi) On 14. 10. 97, the 1st Respondent submitted yet another report to the 5th Respondent, in response to an oral request made on 03. 10. 97. That report dealt in great detail with several issues connected with the allocation of the disputed quarters, which by now were about to fall vacant. It explained how the 9th Respondent came into occupation

of the quarters A.4: in June 1992 it was one Pushpa Ranjini (who was then the first in the relevant waiting list) who was entitled to those quarters, but in violation of her rights those quarters had been taken over by the 9th Respondent secretly and forcibly. The report made reference to the General Manager's letter dated 29. 10. 85, according to which section 6.1.1 applied even to officers who had been allocated flats for five years. As for the allegation that Mr G had not been in occupation of quarters T. 3/7, the 1st Respondent observed that the report of the flying squad of the Railway Protection Service had been made belatedly on 17. 02. 93, eight months after a surprise check made on 17. 06. 92; that the report was contradictory; and that the then Chief Mechanical Engineer had directed that no action be taken on that report because it was vitiated by several flaws. One was that the flying squad officers had wanted to take revenge on Mr G, by putting him into trouble, because he had discharged his duties honestly regardless of threats. Another was that those officers had been prohibited from checking quarters, but had done so without authority. There was also suspicion that they themselves had fabricated the anonymous petition on the basis of which the quarters had been checked. Further, they had also alleged, without making inquiries, that Mr G had sublet the quarters to the Petitioner.

I must refer at this point to some of the documents produced by the Respondents. By letter dated 02. 02. 90 the Petitioner was granted permission to share quarters T. 3/7 with Mr G as chief occupant, on the condition that she would observe the relevant regulations, and that she would vacate the premises upon Mr G vacating them or upon receipt of notice to vacate. More than one year after the surprise check, a notice dated 30. 07. 93 was sent to Mr G alleging that he had *sublet* the quarters to the Petitioner and asking him to vacate. That notice was not copied to the Petitioner, nor was she then asked to vacate. Almost one year later, another notice dated

03. 07. 94 was sent (copied to the Petitioner), cancelling the first notice, alleging that Mr G was not in occupation since 17. 06. 92, and requiring both to vacate on or before 04. 10. 94. Neither of them denied the allegation of non-occupation by Mr G, and it is common ground that they duly vacated by 08. 09. 94 - four years and seven months after allocation.

The 1st Respondent also reported on 14. 10. 97 that it was due to the shortage of accommodation that the Railway permits officers to share quarters, and that such sharing was not regarded as a ground for reducing points or for denying an officer the right to be allocated quarters; and that when the Petitioner was given permission to share quarters T. 3/7 she was not informed of any such condition.

Having referred to and endorsed the Housing Committee's previous recommendations, the 1st Respondent concluded by stating that he was awaiting the 5th Respondent's speedy approval for allocation to the Petitioner. Nevertheless, the 5th Respondent neither sent a reply to the 8th Respondent nor informed the Petitioner and the 9th Respondent what his views were in regard to the allocation.

The reason which the 3rd Respondent now gives for that default is disturbing. He claimed that the draft reply prepared by the 1st Respondent (on 01. 10. 97) had been given to him by the 5th Respondent for his consideration, on 06. 10. 97: but that "no reply has been sent to the Minister, since this application was filed by the Petitioner before [he] could recommend a suitable reply to the 8th Respondent Minister". Since the Petitioner's application was filed in *June* 1998, that means that (if the 3rd Respondent was truthful) eight months was not enough for him to consider what should be said to the Minister. Had the allocation of the disputed quarters to await that reply, those quarters would have remained vacant for well over seven months, depriving an eligible public officer a legitimate employment benefit of a tenancy at a modest rental. I think it far more likely that the 3rd Respondent did not dare

to make any recommendation - despite the flurry of correspondence during the last quarter of 1997 - because he was unable to find a reason to deny the Petitioner's claim.

Thus by mid-October the position was that the Petitioner's claims and the 9th Respondent's allegations and counter-claims had been scrutinised repeatedly and in great detail. The Housing Committee had twice decided (on 06. 06. 97 and 27. 06. 97) in favour of the Petitioner; another differently constituted committee had agreed (on 30. 09. 97). Upon the 9th Respondent's first appeal, the 2nd Respondent had reported (on 13. 06. 97) to the 5th Respondent adversely to her. As for her second appeal, to the Minister, the 1st Respondent had submitted (on 01. 10. 97) at the 5th Respondent's request an exhaustive draft of the reply to be sent to the Minister as well as a later full report (on 14. 10. 97) - both confirming the Petitioner's entitlement. There were thus in effect *six* reasoned written reports, all favourable to the Petitioner's claim, but as yet no sign of a final decision. It seemed as if, paradoxically, a surfeit of "due process" was about to operate so as to deny justice to the Petitioner!

On 27. 10. 97 the disputed quarters fell vacant. Since they were not allocated to the Petitioner, she met the 5th Respondent on the 30th or the 31st together with her husband. What transpired appears primarily from the affidavits of her husband and herself. They averred that the 5th Respondent informed them that he had looked into the matter carefully and would not cause any injustice to her, but that the Ministry had called for a report and that a report had to be sent; and that he had no objection to their making inquiries at the Ministry. In what is virtually a contemporaneous letter dated 12. 11. 97, she also said that on that occasion the General Manager (Administration) as well as the 3rd Respondent had agreed that she was entitled to the allocation. The 3rd Respondent did not deny this, and merely pleaded ignorance; and as there are no affidavits from the 5th Respondent, and the General Manager (Administration), there is no denial of those averments. There

is no reason to disbelieve the Petitioner. Indeed, her version is corroborated by another contemporaneous letter which she wrote to the Director of Establishments on 03. 11. 97, complaining that, as a result of improper influence exerted by the 9th Respondent, there was an attempt to get instructions from the Ministry in order to cause injustice to her. That letter was copied to the 2nd and 5th Respondents as well as the 6th, the Secretary to the Ministry.

This is therefore not a case in which the Petitioner decided to meet the Minister of her own volition: it was, rather, the 5th Respondent who virtually induced her to do that, not only by what he told her but also by his unreasonable delay in replying to the Minister.

When they went to the Ministry on 04. 11. 97 they found that the Minister was abroad; and so they met the 7th Respondent (the Deputy Minister, who was then the acting Minister), who checked the relevant documents, and wrote to the 2nd Respondent, the same day, as acting Minister. He drew attention to the fact that the Petitioner was first in the waiting list, and requested that necessary action be taken to have the disputed quarters promptly allocated to her. The 2nd Respondent thereupon directed the 1st Respondent, the Chairman of the Housing Committee, to "implement accordingly". The 1st Respondent issued the letter of allocation dated 06. 11. 97, which stated that if she did not go into occupation within ten days it would be presumed that she did not require the quarters, in which event her allocation would be cancelled, and she would be charged one month's rent. She gave up possession of her rented premises, and entered into occupation of the disputed quarters on 10. 11. 97.

The very next day - without any reason, without any opportunity of showing cause, and without any notice - that allocation was cancelled and she was ordered to vacate. She did not, and submitted an appeal to the 2nd Respondent on 12. 11. 97. On 03. 12. 97 she was told that she would be

charged penal rent with effect from 11. 11. 97. Again she appealed, on 04. 12. 97, to the 2nd Respondent. She received no response.

The Respondents' position is that that cancellation was because of a Ministerial order. There is a great deal of uncertainty and confusion about that order: Was such an order given? What was the Minister told before he gave that order? To whom was that order given - to the 4th Respondent or to the 5th? Was it an order (a) for the cancellation of the Petitioner's allocation, OR (b) only for an allocation to the 9th Respondent?

The alleged Ministerial order was not in writing, and there is no contemporaneous record of it. Reference has been made to it in correspondence and in the 3rd Respondent's affidavit.

The first reference to such an order is in a letter dated 11. 11. 97 signed by the 3rd Respondent in which the 4th Respondent's name has merely been typed. That letter stated that the 8th Respondent had ordered the cancellation of the allocation, but did not state *to whom* that order had been given.

The next reference is in a letter which the 2nd Respondent wrote to the Petitioner on 11. 11. 97, stating that because *the 5th Respondent* had informed him by letter dated 11. 11. 97 that the 8th Respondent had ordered *the 5th Respondent* to cancel the allocation, the allocation made by his letter dated 06. 11. 97 was cancelled. No letter from the 5th Respondent to the 2nd Respondent bearing the date 11. 11. 97 has been produced.

The third reference is in a letter dated 17. 12. 97 to the Director of Establishments in which the 5th Respondent stated that the 8th Respondent had ordered the allocation of the disputed quarters to the 9th Respondent. He did not say *to whom* that order had been given, and he did not claim that there was an order for *the cancellation* of the Petitioner's allocation.

Finally, in his affidavit the 3rd Respondent claimed that the 8th Respondent "had telephoned *the 4th Respondent* (i. e. the Additional General Manager, Administration) and told him by phone to cancel the letter of allocation". The 4th Respondent did not tender a supporting affidavit. The 3rd Respondent added that he discussed the matter with the 4th Respondent, and that they sent the 2nd Respondent a letter dated 11. 11. 97, "*signed* by the 4th Respondent . . .". In fact that letter was not signed by the 4th Respondent, nor did it state to whom the order was given.

On 12. 11. 97, the Petitioner appealed to the 2nd Respondent. Thereupon the 1st Respondent (on behalf of the 2nd Respondent) advised the 5th Respondent on 18. 11. 97 that the allocation had been made lawfully; that the Petitioner was in lawful possession; and that it was neither lawful nor equitable to cancel that allocation without notice and without reasons. He added that the 9th Respondent had no right to the allocation of the quarters next falling vacant, and that such an allocation would be contrary to the Establishments Code. The 5th Respondent's reaction was to direct the 2nd Respondent to inform the Petitioner that steps would be taken for her ejectment and the recovery of penal rent; that the 2nd Respondent did by his letter dated 03. 12. 97. The Petitioner appealed. Despite a reminder dated 16. 12. 97 the Petitioner received no reply to either of her appeals. Penal rent (namely, an additional Rs. 1,500 p.m.) was recovered from January 1998, with effect from 11. 11. 97, by deduction from her gross salary of Rs. 6,050 p.m. That penal rent not only amounted to 25% of gross salary, but was more than 50% of her take-home pay.

I have already referred to the Director of Establishments' letter dated 18. 05. 87, which indicated that the 9th Respondent was not eligible for allocation of quarters. When the Director of Establishments received the Petitioner's letter of 03. 11. 97, he asked the 5th Respondent for his observations. In his reply dated 17. 12. 97, the 5th Respondent referred to

advice given by the Director of Establishments in 1985 that the five-year rule in section 6.1.1 applied to the occupation of flats as well. However, he claimed that that was not being followed, and that accordingly the 9th Respondent was entitled to the disputed quarters, and that the 8th Respondent had ordered their allocation to the 9th Respondent. The Director of Establishments replied on 27. 01. 98 that if flats fell within the definition of "Government Quarters", section 6.1.1 would apply, and action contrary thereto would require Cabinet approval.

However, on 19. 01. 98, even before the 5th Respondent got the Director of Establishments' reply, quarters No. T. 3/5 at Ratmalana were allocated to the 9th Respondent. Consequently, the disputed quarters were no longer needed for her. Nevertheless, the Petitioner was sent a notice to quit, dated 31. 03. 98, issued under the Government Quarters (Recovery of Possession) Act, No. 7 of 1969. That was received by her only on 13. 05. 98, whereupon she filed this application.

MINISTERIAL ORDERS

The 2nd Respondent cancelled the Petitioner's allocation, stating (in his letter dated 11. 11. 97) that the Minister had ordered the 5th Respondent to do so. Neither the 2nd nor the 5th Respondent has filed an affidavit to that effect. Further, what the 5th Respondent said, in his letter dated 17. 12. 97, was that the Minister had ordered allocation to the 9th Respondent. There is thus no acceptable evidence of a Ministerial order (a) given *to the 5th Respondent*, (b) for *cancellation* of the Petitioner's allocation.

The 3rd Respondent, in his letter dated 11. 11. 97, did not say to whom the Minister gave the order for cancellation. Although in his affidavit he claimed that it was given to the 4th Respondent, that is only hearsay; it was not supported by an affidavit from, or even a document signed by, the 4th Respondent.

When there are such contradictions, inconsistencies and omissions as to the person to whom the Minister gave an order, and what that order was, it is difficult to hold that the Minister did in fact give an order for cancellation.

Even if I were to assume that the 8th Respondent did communicate with the 5th Respondent or one of his subordinates, there is uncertainty as to what exactly he had been told, and what exactly he "ordered". It may well be that he was not told that the Petitioner's allocation had been made after the matter had been reconsidered in October and after the 7th Respondent had looked into it. I cannot lightly presume that he directed cancellation or allocation regardless of legality or propriety.

There is no satisfactory evidence that the 8th Respondent had directed the cancellation of the Petitioner's allocation; and that he had in mind cancellation regardless of legality and propriety.

The question whether or not there was a Ministerial order cannot be left to speculation. There must be certainty both as to the fact of such order, and as to its contents, and that can only be ensured by having such orders properly documented. The observations in *Mallows v. Commissioner of Income Tax*,[1] are apposite. Dealing with a statutory provision that certain consequences would flow from the "opinion" of the Commissioner, it was held that:

". . . The opinion must not only be entertained generally, so to say, in the mind of the Commissioner, but the matter must be taken a step further *and translated into words in a document* so as to serve as evidence to guide those functionaries [who have to act on the basis of that opinion]."

The alleged Ministerial order for the cancellation of the Petitioner's allocation involved her vested rights. If that order was not conveyed in writing by the Minister, it should have

been *translated by the recipient into words in a document*, which would thereafter have been available in the relevant file, to serve as evidence to guide any one who had to deal with that allocation or its cancellation. All concerned would know with certainty what the Minister had said, without having to depend on any one's recollection. In this case, one of several things should have happened. Whoever received the order should have made a contemporaneous minute on the file; *or* the Ministerial order should have been acknowledged in writing; *or* correspondence pursuant to that order should have been copied to the 8th Respondent, making an appropriate reference to his order.

If a responsible Minister gives an order in the due discharge of his functions, he could have no objection to that order being placed on record in that way by the public officer to whom it is addressed. The failure to have proper documentary evidence of Ministerial orders, would encourage public officers to evade responsibility for their own acts, merely by claiming that they acted upon unrecorded oral Ministerial orders.

In these circumstances, I hold that the evidence does not establish that the 8th Respondent gave an order for the cancellation of the Petitioner's allocation.

I hold further that, in any event, the 8th Respondent had no power under the Establishments Code to order the allocation of quarters or the cancellation of an allocation; that any such order would not have been binding on the Allocating Authority, and would not have justified such allocation or cancellation. Consequently, the 1st to 5th Respondents must take responsibility for whatever they did in connection with allocation and cancellation, and cannot take cover behind Ministerial orders.

It follows that the pendency of the 9th Respondent's appeal to the Minister, in respect of a matter in which he had no legal authority, did not invalidate the allocation made on 06. 11. 97.

ELIGIBILITY

Section 1 defines "Government Quarters" to include "any type of accommodation" allocated for the purpose of residence. A flat is a "type of accommodation". Accordingly, the flat occupied by the 9th Respondent was "Government Quarters", and section 6.1.1 made her ineligible for another allocation for five years.

The allegation that the Petitioner was not eligible was based on her occupation - sole or shared - of quarters No. T. 3/7 from February 1990 to September 1994.

It is not disputed that those quarters were allocated to Mr G, and that the Petitioner was granted permission to share them, from the outset in February 1990. The allegation made on 03. 07. 94, that Mr G was not in occupation at the time of the flying squad inspection on 17. 06. 92, was not denied either by Mr G or by the Petitioner. Indeed, by promptly vacating the quarters they accepted that position. That shows that the Petitioner was the *sole* occupant for two years and three months, from June 1992 to September 1994. The disqualification created by section 6.1.1 arises only upon occupation "for more than half the full period permitted". Since the full period permitted (by section 6.1) is five years, *sole* occupation for less than two and a half years did not operate as a disqualification.

There is no material on which this Court can conclude that Mr G was not in occupation for any period prior to 17. 06. 92. The question of eligibility was for the Allocating Authority to determine, and the 1st Respondent as Chairman of the Housing Committee dealt with that matter exhaustively in his report dated 14. 10. 97. The 1st and 2nd Respondents have not sought to go back on those findings, and Senior State Counsel who now appears for them can hardly be heard to question his clients' findings. In any event, even if this Court

is entitled to review those findings, the Respondents have failed to produce the flying squad report, and the related documents, except for a photocopy of a handwritten statement said to have been made by the Petitioner, which is partly illegible, and partly ambiguous. They have produced extracts from electoral registers for 1993 and 1994 - which are not relevant to the period before June 1992.

There remains the submission that mere occupation for over four years - whether shared or sole - disentitled the Petitioner to an allocation in her own right.

Section 6.1 guarantees to an officer, who is allocated quarters of grades 2 to 4, a period of five years occupation. Section 6.15 imposes an obligation on him to vacate at the end of that "period of tenure". Although it adds "or when ordered to do so by the Allocating Authority", that does not give the Allocating Authority an absolute or unfettered right to evict an occupant. That only means that *if* the Allocating Authority has a right, *aliunde*, to order vacation (e. g. for breach of some regulation or condition) and calls upon the occupant to vacate, then the occupant must vacate, and section 7.1 indicates the remedy for default. Subject to that, section 6.1 guarantees a tenure of five years.

Section 6.1.1 is in the nature of a proviso to section 6.1 Section 6.1 confers an entitlement on officers allocated quarters of grades 2 to 4: the right to remain in occupation for five years. Section 6.1.1 imposes a disability on those who enjoy that right (or privilege) for at least half that period. That disability cannot be extended to the wider category of those who were not granted the *right* of occupation for that period, although they might in fact have occupied quarters for that period. An officer who is allowed to occupy quarters on the terms that he was obliged to vacate on demand does not come within section 6.1, and hence is not subject to section 6.1.1. An officer will not be subject to the disability unless he has first enjoyed the privilege.

A situation in which quarters are occupied by more than one officer may come about in several different ways. Section 6.9 provides that two officers may be simultaneously "allocated" the same quarters; and that one officer having been originally "allocated" quarters, another officer may later be permitted to "share" them. Further, section 6.3 provides that one officer may be "allocated" quarters, and the Allocating Authority may grant specific approval to another officer to "regularly occupy" a portion of such quarters.

Clearly, there was no "allocation" of quarters No. T. 3/7 to the Petitioner. Whether it was a case of her being allowed to "share" those quarters, or "regularly occupy" them, the letter dated 02. 02. 90 set out the terms of her occupancy. It is manifest that she had no *right* of occupation for five years; and that she was obliged to vacate not only if Mr G vacated, but even if Mr G continued in lawful occupation. She never had a *right* of occupation in terms of section 6.1, and she was therefore never subject to the disability created by section 6.1.1.

ALLOCATING TO THE PETITIONER

The Petitioner was eligible for allocation and was the first in the waiting list; the pendency of the 9th Respondent's appeal to the Minister was no bar to the allocation made to her.

The question arises whether that allocation was vitiated by the 7th Respondent's "request" that necessary action be taken to have the disputed quarters allocated to her - for just as the Minister had no authority to order cancellation of an allocation, the acting Minister had no power to order an allocation.

The Petitioner did not seek Ministerial intervention. There is no doubt that the 1st and 2nd Respondents were about to make an allocation in her favour, and would have done so but

for the 5th Respondent's intervention. Not only did he unreasonably delay submitting the report which the 8th Respondent had called for, but he virtually compelled the Petitioner to approach the Minister. In the circumstances, although the allocation was made *after* the 7th Respondent's letter, it was not made *because* of that letter. In a sense, the 7th Respondent's letter merely negatived the delay caused by the 8th Respondent's request for a report.

In the circumstances, I hold that there was a valid allocation in favour of the Petitioner, duly made on 06. 11. 97 by the 2nd Respondent acting in the exercise of his discretion, and not upon the dictates of the 7th Respondent.

CANCELLATION OF THE PETITIONER'S ALLOCATION

The allocation being valid, the Code contains no provision empowering or justifying its cancellation. Section 6.15 does not deal with cancellation, but with an order to vacate made by the Allocating Authority. The case before us does not involve an order to vacate - for which, in any event, there were no grounds.

Even if it can be argued (which I doubt) that the 2nd Respondent as Allocating Authority had an implied power to cancel an allocation, his views on the cancellation were promptly conveyed by the 1st Respondent, on his behalf, to the 5th Respondent: that the cancellation was neither lawful nor equitable. It is clear therefore that he acted on the directions of the 5th Respondent - who was acting in purported pursuance of an unproved Ministerial order - and not in the proper exercise of whatever discretion he may have had.

Another matter which vitiates the cancellation is that it was without reasons, without notice, and without hearing the Petitioner.

It is necessary to consider the 5th Respondent's conduct. He knew that the allocation to the Petitioner had been

recommended and decided upon, over and over again. His letter dated 17. 12. 97 shows that he nevertheless wanted the 9th Respondent to have the disputed quarters even though he knew full well that she was not eligible. Further, even after the 9th Respondent no longer needed the disputed quarters, he did not discontinue the efforts to evict the Petitioner and to levy penal rent. It is not surprising that he refrained from submitting a report to the Minister and from replying to the Petitioner's appeals.

ORDER

I grant the Petitioner a declaration that her fundamental right under Article 12(1) has been infringed by the 3rd and 5th Respondents. I quash the order cancelling the allocation of the disputed quarters, the order charging penal rent from her, and the notice to quit dated 31. 03. 98 served on her. The allocation dated 06. 11. 97 will stand, and she will be entitled to continue in occupation of those quarters in terms of the Establishments Code paying rent in terms of the Code, and to the refund, on or before 31. 08. 2000, of all penal rent deducted from 11. 11. 97 to date.

I turn to the determination of compensation. The Petitioner had already vacated the premises which she had taken on rent. Summary cancellation and a demand for immediate vacation was therefore wholly unreasonable and oppressive. The failure to give her a little time to find other accommodation points to malice. The levy of penal rent would have resulted - both to herself and to her children - in hardships which a refund, even with interest, can never adequately compensate. The public are entitled to expect efficient service from public officers like the Petitioner - but denying public officers fair treatment in relation to their employment and employment benefits results in demotivating them. In these circumstances, I award the Petitioner a sum of Rs. 100,000 as compensation, payable by the State on or before 31. 08. 2000. In regard to costs, the 3rd Respondent will

personally pay the Petitioner a sum of Rs. 5,000. and the 5th Respondent will personally pay her a sum of Rs. 25,000. on or before 31. 08. 2000.

WIJETUNGA, J. - I agree.

GUNASEKERA, J. - I agree.

Relief Granted.