PALIHAWADANA
v.
ATTORNEY-GENERAL AND TWO OTHERS

SUPREME COURT
ISMAIL J., SHARVANANDA J. AND WANASUNDERA J.
S.C. NO. 12 of 1979
27TH APRIL, 1979

Fundamental Rights - Articles 12(1) and (2) and 126 of the Constitution - Equality -Job Bank Scheme - Classification - locus standi.

Though Article 12 prescribes equality before the law and equal protection of the law, it has to be recognized that equality in any literal or abstract sense is not attainable. For the purpose of applying a particular law or operating an administrative scheme reasonable classification is permissible and a certain measure of inequality is permitted. What is prohibited is class legislation. Reasonable classification is not forbidden. The principle of Article 12 is that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed. The classification must not be arbitrary but should be based on real and substantial distinction bearing a just and reasonable relation to the object sought to be attained.

The infringement must be by executive or administrative action.

Article 12 does not confer a right to obtain State employment. It only guarantees a right of equality of opportunity to be considered for such employment.

The Job Bank Scheme vests arbitrary power in a Member of Parliament to select 1000 persons out of a vast number satisfying the eligibility criteria. Arbitrary selection of one thousand from the said class cannot be elevated to the rank of reasonable classification and to this extent the scheme violates the equality principle. The M.P. has power to determine whether a citizen satisfies the eligibility criteria. This power is valid and can be severed from the invalid part. The petitioner cannot claim to come into the class of persons satisfying the eligibility criteria whatever the M.P.'s bias against him. He has no locus standi to complain of infringement.

Cases referred to :

(1) *State of West Bengal* v. *Anwar Ali Savkar* AIR 1952 (SC) 75,
(2) *Ahuja's* case AIR 1952 (SC) 235,
(3) *Barbier* v. *Conolly* 1885 US 28 LE 923,
(4) *Bombay* v. *Balsara* AIR 1951 (SC) 318,
(5) *Budhan Chowdhury* v. *State of Bihar* AIR 1955 (SC) 191,
(6) *Dalmia's* case AIR 1958 (SC) 538,
(7) *Ex parte Virginia* 100 US 339,
(8) *Grigge* v. *Duke Power Co.* 401 US 214,
(9) *Gulf Colorado* v. *Ellis* (1987) 165 US 150,
(10) *Kardar Nath Bajoria's* case AIR 1954 (SC) 404,
(11) *Kathi Ranins Ranwali's* case AIR 1952 (SC) 123,
(12) *Krishnan Chander* v. *Central Tractor Organisation* AIR 1962 (SC) 602,
(13) *Louisville Gas and Electric Co.* v. *Coleman* (1928) 72 JS LE 770,
(14) *Qasim Razvi's* case AIR 1953 (SC) 156,
(15) *Middleton* v. *Texas Power & Light Co.* (1918) 249 US 152,

(16) *Southern Railway Co.* v. *Greene* (1909) 216 U.S. 400,
(17) *State of Madras* v. *Narasinga Rao* AIR 1968 (SC) 349,
(18) *State of West Bengal* v. *Anwar Ali* AIR 1952 (SC) 93,
(19) *Traux* v. *Raich* 239 US 533; 60 Lawyers Ed. 33,
(20) *Venkaraiah* v. *State* AIR 1969 (Mysore) 187,
(21) *Yickwo* v. *Hopkins* (1886) 118 U.S. 356.

APPLICATION Under Article 126 of the Constitution

Dr Colvin R. de Silva with *(Mrs) M. Muttettuwegama* and *Jayantha Wickremaratne* for the Petitioner.

G.P.S. de Silva, Deputy Solicitor-General, with *S. Ratnapala, State Counsel,* instructed by *T.G. Gooneratne, State Attorney,* for the Respondents.

Cur. ad. vult.

April 27, 1979
SHARVANANDA, J.

The Constitution of the Democratic Socialist Republic of Sri Lanka has recognized that man has certain natural or inalienable rights and that it is the obligation of the State, in order that human liberty might be preserved and human personality developed, to secure and promote them. It has incorporated them in Chap. III and enjoined by Article 4(3) that "the fundamental rights which are by the Constitution declared and recognised shall be respected, secured and advanced by all the organs of Government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided". The object of this provision is to ensure the inviolability of certain basic rights by the State and its organs and to establish a society founded on principles of justice, equality and freedom. A mere declaration of fundamental rights is illusory unless there is machinery for their enforcement. Article 17 guarantees the right to apply to the Supreme Court against the infringement or imminent infringement by Executive or administrative action of any fundamental right to which a person is entitled under the provisions of Chapter III. This Court is thus constituted the protector and guarantor of fundamental rights. The beneficial effects of this new jurisdiction cannot be over-emphasized. The Constitution has not only defined the citizens' fundamental rights, but has also provided a quick and efficacious remedy for their enforcement.

Article 126 of the Constitution guarantees to the subject the right to move the Supreme Court by way of a petition, in writing, for relief or redress in respect of any 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 of the Constitution. Thus, any person who complains of infraction of any of his fundamental rights by the Executive or administration is at liberty to move the Supreme Court for

the enforcement of such rights, and this Court has been vested with jurisdiction to grant such relief or make such declaration as it may deem just and equitable in the circumstances. To make out a case under this Article, it is incumbent on the petitioner that the action of the Executive affects or invades the fundamental rights guaranteed to him by the Constitution. As submitted by the Deputy Solicitor-General, the rights that could be enforced under this Article must be the rights of the petitioner himself who complains of infraction of such rights. This Court has a very wide discretion in the matter of granting the proper relief to suit the exigencies of the particular case. While this Court, in the discharge of its function, will naturally attach great weight to the judgement of the Executive, it has ultimately to exercise its own independent judgement in determining the validity of any impugned action of the Executive.

Complaining that the fundamental rights vouched to him by Article 12(1) and 12(2) of the Constitution have been infringed by the State, the petitioner in this case has invoked the jurisdiction of this Court under Article 126 of the Constitution. The specific question before this Court is whether the Government's scheme for the placement of the unemployed in State and Public sector institutions, popularly known as the Job Bank Scheme, is violative of the equality postulated by Article 12 of the Constitution, in that the petitioner has been excluded from access to State employment by the refusal of the Member of Parliament for the Hewaheta electorate to grant him a Job Bank application form. The petitioner states that he had not been nominated for such employment by the M.P. (Member of Parliament) for the reason that he belongs to the Lanka Sama Samaja Party, a political party opposed to the United National Party of which Mr Anura Daniel, the M.P. for Hewaheta, is a member. Counsel for the petitioner attacked the Job Bank Scheme as being discriminatory in character and unconstitutional, in that the Scheme operated to deny him equality of opportunity in the matter of State employment. He states that the scheme of recruitment vests in Members of Parliament the discretion to deny or limit the right or exercise of the right of citizens to seek recruitment to the Public, Judicial, or Local Government Services, or to Public Corporations and thus tends to infringe the fundamental right embodied in Article 12 of the Constitution. The burden of the petitioner's contention is that the Scheme vests in a Member of Parliament unfettered and absolute discretion to include or exclude persons, as he likes, from seeking State employment and that the Member could exercise this power in a manner involving discrimination between citizen and citizen within the class of persons that the Scheme is intended to benefit. He contended that the Scheme provided only for arbitrary selection and not for reasonable

classification. He stated that the Job Bank Scheme was a sophisticated form of the obnoxious 'chit system' that obtained under the last regime and that discrimination was a necessary consequence of its operation.

In their solemn resolve embodied in the preamble to the Constitution, the people of Sri Lanka have ranked equality with justice and freedom. This is as it should be - for equality is a postulate of justice. The concept of equality is basic to man and evokes an immediate response amongst us all. Nothing causes more resentment than a feeling that someone else is getting something which one is not getting. As Thomas Payne said, "the true and only basis of representative Government is equality of rights". Justice is conceived on the basis that all human beings have equal rights, in the sense that they should be treated alike. The nation of equality underlies all religious and political philosophies. "Equality before the law means that among equals, the law should be equal and it should be equally administered, that like should be treated like." (Jennings: *Law and the Constitution,* 5th Ed. at p. 50).

Article 12 of the Constitution lays down the general rule of equality that all persons are equal before the law and are entitled to equal protection of the law and that no citizen shall be discriminated against on grounds of race, religion, language, caste, sex, political opinion, place of birth or any of such grounds. Equality of opportunity is an instance of the application of the general rule. The fact that equality of opportunity is included in the Chapter dealing with Directive Principles (Article 27(6) does not, however, detract from its status as a fundamental right. It is to be noted that Article 12 does not confer a right to obtain State employment. It only guarantees a right of equality of opportunity for being considered for such employment.

Though Article 12 prescribes equality before the law and equal protection of the law, it has to be recognized that equality in any literal or abstract sense is not attainable. Its strict enforcement will, in fact, bring about the very situation it seeks to avoid. The fundamental act is, all men are alike. Some, by the mere accident of birth, inherit riches; others are born to poverty. Some acquire skills and qualifications while others are untrained. There are differences in social standing and economic status. It is, therefore, impossible to apply rules of abstract equality to conditions which predicate inequality from the start. Yet the words have meaning. What is postulated is equality of treatment to all persons in utter disregard of every conceivable circumstance of the difference, such as age, sex, education and so on and so forth as may be found

amongst people in general. Indeed, while the object of the Article is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between citizen A and citizen B who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law or operating an administrative scheme, reasonable classification is permissible and a certain measure of inequality permitted. The State is permitted to make unequal laws or take unequal administrative action if it is dealing with individuals or groups whose circumstances and situations are different.

What is prohibited is class legislation; but reasonable classification is not forbidden. The principle underlying the guarantee in Article 12 is not that the same rules of law should be applicable to all persons within the Democratic Socialist Republic of Sri Lanka, or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if, as regards the subject matter of the legislation or administration, their position is substantially the same. As there is no infringement of the equal protection rule, if the law deals alike with all members of a certain class, the State has the undoubted right of classifying persons and placing those who are substantially similar under the same Rule of Law, while applying different rules to persons differently situated. The classification must not be arbitrary but should be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained. "It must appear not only that a classification has been made, but also that it is one based upon some reasonable ground - some difference which bears a just and proper relation to the attempted classification" *(Gulf Colorado, etc., Co.* v. *Ellis* [9].

Willis, *Constitutional Law,* 1936 Ed. ps. 579 - 580, states:

> "The guarantee of equal protection of the law must mean protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and on liabilities imposed. The

> prohibition of the Amendment... was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation."

Colley, in his book on Constitutional Limitations (8th Ed. Vol. II, p. 803) states:

> "A statute would not be constitutional which should select particular individuals from a class or locality and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same locality or class are exempt."

Willoughy, in his *"The Constitutional Law of the United States"* (2nd Ed. p. 1937, paragraph 1273), observes:

> "It will have been seen that the requirement of equal protection of the law applied to all persons similarly situated or circumstanced. Hence, where there are rational grounds for so doing, persons or their properties may be grouped into classes, to each of which specific legal rights or liabilities may be attached. This legislative discretionary right applies to the exercise of all the powers of the State."

In *Southern Railway Company* v. *Greane* (16), Justice Day stated:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect of which such classification is imposed; and a classification cannot be arbitrarily made without any substantive basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

In *Budhan Chaudhry* v. *the State of Bihar* (5), a Constitutional Bench of seven Judges of the Supreme Court of India interpreted the true meaning and scope of Article 14 of the Indian Constitution as follows:

> "It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, *viz:* (i) that the classification must be founded on an intelligible differentia which distinguishes persons or

things that are grouped together from others left out of the group, and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of the classification and the object of the Act."

This clarification of the meaning and purpose of Article 14 of the Indian Constitution has been accepted in later cases as representing the correct legal position and I would, with all respect, adopt same as equally clarificatory of Article 12 of our Constitution.

It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. It depends on the objects of the legislation in view and whatever has a reasonable relation to the objects or purpose of the legislation is a reasonable basis for classification of the objects coming under the purview of the enactment.

It is not a reasonable classification but an arbitrary selection where selection is left to the absolute and unfettered discretion of the executive Government "with nothing to guide or control its action" *(State of West Bengal* v. *Anwar Ali* (1). For in such a case, the difference in treatment rests solely on the arbitrary selection by the Executive. If the statute does not disclose any government policy or object and confers on the Executive authority to make selection at pleasure, the statute would be held, on the face of it, to be discriminatory. If, however, the legislative policy is clear and definite and, as an effective method of carrying out that policy, a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such a case, the power given to the executive body would impose a duty on it to classify the subject matter of the legislation in accordance with the objectives indicated in the statute.The discretion that is conferred in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy to effectuate which the discretion is given.

A discriminatory purpose is not presumed. It must be shown, unless it is apparent on the face of the Act. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow, and a statute which is otherwise invalid as being unreasonable cannot be saved by it being administered in a reasonable manner.

Discrimination of persons in one class or similarly circumstanced should be avoided. The basis of classification must generally be so drawn that those who stand in substantially the same position in respect of the law are treated alike. This right of equality should pervade all spheres of State action, including administrative action of all kinds by Government bodies. But under the guise or pretence of doing what is constitutionally permissible, no colourable expedient which in substance and purpose seeks to effect discrimination can be sanctioned.

In the well known case of *Yickwo* v. *Hopkin* (21), the question was whether the provisions of a certain San Francisco Ordinance was invalid by reason of its being in conflict with the equal protection clause. The Ordinance provided that it should be unlawful for any person to engage in the laundry business in a wooden building within the corporate limits "without having first obtained the consent of the Board of Supervisors." At the time there were about 320 such laundries in the city, 240 of which were owned by Chinese persons. When they applied for licences to continue doing business, all those applied for by the Chinese were refused while all others were granted. The Court held that the Ordinance did not prescribe a rule or condition for the regulation of the use of the laundry property, to which all similarly situated may conform but that it conferred naked arbitrary power upon the Board to give or withhold consent. Vesting on authorities naked arbitrary powers to deprive a citizen of his right to carry on a lawful business was held to constitute an infringement of the Fourteenth Amendment. The Court looked beyond the letter of the Ordinance to conditions of the things as they existed in San Francisco and saw that under the guise of the regulation, arbitrary classification was intended and accomplished. Thus, a law or administration, apparently fair but which contains inherent possibilities for discrimination and arbitrary action, would be bad. Under colour of doing what is constitutionally permissible, the State should not be allowed to effect discrimination.

Since the Ordinance was capable of being and was so operated and enforced as to discriminate against the petitioner and all other subjects similarly conditioned, it was held to offend the Fourteenth Amendment. Observing that the equal protection of the laws is a pledge of the protection of equal laws, Justice Matthews,in the course of his judgement, stated:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems

to be intolerable in any country where freedom prevails, as being the essence of slavery itself", and continued,

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (118 U.S. 356 at 370).

"A State acts by its Legislature, its Executive, or its judicial authorities - it can act in no other way. The Constitutional provision (the Fourteenth Amendment) therefore must mean that no agency of the State, or the officers or agencies by whom its powers are exerted shall deny to any person within its jurisdiction the equal protection of the laws. Whosoever, by virtue of public position under a State Government, denies or takes away the equal protection of the laws violates the Constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's powers, his act is that of the State. This must be so, or the Constitutional prohibition has no meaning" *(Ex parte Virginia,)* (7).

The Constitution has established for this land The Rule of Law. It constitutes Sri Lanka into a sovereign, democratic republic and guarantees rights and freedoms to individuals side by side and consistent with the overriding power of the State to act for the common good of all. In a democracy functioning under a Rule of Law, it is not enough to do justice or to do the right thing; justice must also seem to be done and a satisfaction and a sense of security engendered in the minds of the people at large in place of a vague uneasiness. The standing of the body or authority on whom wide discretionary powers have been conferred is relevant in determining the validity of the grant of discretionary power. When a power is entrusted to a very high and responsible officer, he may be expected to act reasonably, objectively and without bias whilst discharging his duties. An M.P. however who has emerged victorious in a contested election cannot in the nature of things inspire confidence - at least in those who did not support him in the election - that he would administer any power or discretion vested in him objectively and dispassionately. The credibility gap is there. Hence any law or scheme which commits to the unrestrained will of such a person a discretion or power, the exercise of which will affect the citizens for the better of his electorate, or the worse,

vitally may tend to strike at the roots of the concepts of justice and equality which are the corner-stones of the Constitution.

The Job Bank Scheme, which is in operation today, provided as follows:

> "The Scheme envisages the nomination of one thousand unemployed persons by the Member of Parliament from his electorate. The criteria for nomination in the year ..... will be -
>
> (a) The person nominated must be unemployed as on .....
>
> (b) the unemployed person nominated should be between the age of 18 and 40 years on .....
>
> (c) In the family of the person nominated, there should be no income-earner, or the income must be so low that it is inadequate to sustain the unemployed person and other members in his family. Preference should be given to candidates who come from a family where no one is employed. The object is to give at least one person in an unemployed family a job.
>
> (d) The unemployed person should be a resident of the electorate. In case of doubt, a certificate from the Grama Sevaka should be obtained in support.

The Cabinet has decided that all non-staff grade vacancies, including casual vacancies in the Ministries, Government Departments, Corporations, Statutory Boards and Local Government Institutions, should be filled only through the Job Bank and that all recruitment should only be through the Job Bank and that any appointment outside the Job Bank is illegal and no salary/wage would be payable to such appointees and that the head of the institution concerned would be liable to be surcharged.

Thus it will be seen that no recruitment will be made to Government Departments or Corporations except through the Job Bank. Under the scheme, the application forms are issued only to a Member of Parliament for distribution to the one thousand selected unemployed persons. Unless one applies in the employment-registration form issued to the M.P., one has no chance of being considered for employment in Government institutions. The M.P. selects the persons for registration under the Job Bank Scheme

and supplies them the required forms. The M.P. thus stands at the gateway, and unless he opens the gate, one is completely shut out from the prospects of government employment. The M.P.'s discretion in the selection of potential employees is absolute.

In terms of the scheme, the M.P. will have to satisfy himself of the eligibility criteria, and out of the large class of persons who satisfy the eligibility criteria, he has to select one thousand persons for the issue of the application forms. The scheme sets out the purpose and policy of the Government and guidelines have been furnished to the M.P. to ascertain and fix the class of unemployed persons from whom the thousand will have to be selected by him. In fixing the class, the M.P. will have to act in conformity with the directions contained in the scheme. Though it is not very satisfactory that an M.P. should be given the power to classify, since he has not been given unguided discretion to determine the class, it cannot be said that there is not reasonable classification. If a law is constitutional, it would not be rendered unconstitutional because it gives an official a discretion which is capable of abuse. If the official exercises the authority *mala fide,* his action may be annulled as offending against the equal protection clause, but the statute cannot be invalidated in that score.

Dr. de Silva submitted that the scheme of recruitment which places in Members of Parliament the power to deny or restrict the right of citizens seeking recruitment to Government Service is *ex facie* discriminatory, in that it vests naked and arbitrary power of selection in the M.P. and that his discretion is absolute, uncontrolled and unguided. The Deputy Solicitor-General countered by stating that a Member of Parliament, in making a selection, is required to conform to the eligibility criteria prescribed by the scheme and hence his discretion is not arbitrary. He stated that a Member of Parliament is ordinarily familiar with the indigent circumstances of his constituents and is competent to make selection of the persons to whom application forms are to be given.

There can be no gainsaying the fact that the State must take measures to solve its unemployment problem. A wide discretion must be vested in it to formulate schemes for the provision of employment to unemployed citizens. The executive, being well aware of the needs of the people and the resources available to satisfy the said needs, is in the best position to assess priorities and to find ways and means to solve the unemployment problem. It will have to decide upon what objective criteria selection for eligibility for employment will have to be made. As the number of vacancies is small, while on the other hand the number of the

unemployed is large, it is evident that there must be some picking and choosing. So long as this is done on broad lines of principles and equality of opportunity afforded to the members of any selected class of unemployed persons, the Court cannot interfere. But if the scheme formulated by the State to solve the unemployment problem is discriminatory in character, it offends the fundamental right of equality, and this Court can and should strike it down as being violative of Article 12 of the Constitution. The Job Bank Scheme described in 2R1 and referred to above lays down the criteria for fixing the class of unemployed persons who become eligible for consideration by the M.P. for the issue of application forms. Dr de Silva contended that the criterion, namely that the income must be so low that it is inadequate to sustain the unemployed person or the other members of the family, is susceptible of large scale abuse in its application, as the subjective satisfaction of the M.P. is the deciding factor. In my view, a repository of such power is not left unguided as to the exercise of the discretion. The policy of the executive is clear and definite, and the discretion conferred is not arbitrary - it has to be exercised in conformity with the objectives set out in the scheme. In the circumstances, the criterion has to be flexible to avoid hardships. The possibility of large-scale abuse does not render invalid that part of the scheme which provides for the M.P. determining the class of persons out of which one thousand persons have to be selected.

It is not disputed that the class of persons who satisfy the aforesaid criteria far exceed in number the one thousand who are to be selected from them for nomination. In this situation the question arises on what basis or ground the selection of the said one thousand should be made by the M.P. out of that class. The scheme does not lay down any guidelines for selection, but leaves it to the M.P.'s uncontrolled and arbitrary discretion to make the selection. He may include or exclude persons according to his caprice and large-scale discriminatory treatment of persons within that class or category will result. If A and B belong to that class, the M.P. may issue the form to A but refuse it to B, though both are similarly circumstanced. Thus equality of opportunity is denied to the members of the class who satisfy the eligibility criteria and who are similarly placed. All of them should be treated alike and there should be no discrimination among them in connection with the issue of the application forms. Arbitrary selection of one thousand from the said class cannot be elevated to the rank of reasonable classification.

In the circumstances, discrimination is inevitable in the selection of one thousand persons by the M.P. Vesting of such naked and

arbitrary power in a M.P., the exercise of which will deprive large numbers of citizens of their opportunity to enter State Service militates against the concept of equality. The scheme lays down no rules by which its impartial execution is assured, or partiality and bias prevented. The excluded persons may legitimately attribute the non-issue of the application forms to them by the M.P. to improper influences and motives such as favouritism, partisanship, animosity, or bias which are easy of concealment and difficult to be detected and exposed.

Article 12 nullifies sophisticated as well as simple-minded modes of discrimination. The Job Bank Scheme enables the M.P. to confer a privilege upon the one thousand persons arbitrarily selected by him from a large class of persons, all of whom stand in the same relation to the privilege granted, and between whom and the person not so favoured, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege. In view of the fact that no directions have been given as to the principles of selection of the one thousand persons who are to be issued the Job Bank forms and as the scheme commits to the aforesaid unfettered and absolute discretion of the M.P. the selection of the one thousand persons, discrimination is inherent in that part of the scheme conferring power on the M.P. to select one thousand persons who should be issued Job Bank forms. I am of the view that that part of the scheme destroys or makes illusory the fundamental right guaranteed by Article 12 and is violative of the Constitution and is unconstitutional.

The Deputy Solicitor-General raised the objection that the petitioner has no *locus standi* to make this application under Article 126 of the Constitution. According to the affidavit of the Grama Sevaka Siripala, the petitioner's father is a retired Head Master and is eligible for a pension, and the petitioner's mother is an Assistant Teacher in receipt of a monthly salary of more than Rs. 700/-. According to the aforesaid affidavit, the petitioner's parents are further entitled to a higher land 10 acres in extent and paddy lands of 1 ½ acres in extent and house and property of the value of about Rs. 50,000/-. In view of these facts deposed to by the Grama Sevaka and not denied by the petitioner, the petitioner is not a person who satisfies the eligibility criteria stipulated in the Job Bank Scheme. Hence, the petitioner is not a member of the class who would have been eligible for nomination and issue of the Job Bank form in terms of the scheme and cannot legitimately complain of discrimination against him on the ground that he is a member of the Lanka Sama Samaja Party. From the affidavit of Anura Daniel, the M.P. concerned, it would appear that he has not even addressed his

mind to the eligibility of the petitioner under the Job Bank Scheme. According to the said affidavit, the M.P. had exhausted the Job Bank forms and hence was unable to issue the form to the petitioner It would appear from the affidavits filed of record that persons in the electorate were not even made aware of the existence of the Job Bank Scheme or of the issue of the Job Bank forms. The M.P. does not disclose in the affidavit by what process or on what basis he came to select a thousand persons for the issue of the Job Bank forms. Those facts reinforce the contention that under the Job Bank Scheme, an M.P. could, without any check, discriminate among citizens of the electorate. The thousand forms issued to him were not sufficient for distribution to all those who satisfied the eligibility criterion set down in the Job Bank Scheme. Be that as it may, confronted with the objection respecting the petitioner's status, Counsel for the petitioner submitted that the Job Bank Scheme was bad *in toto* and the petitioner was therefore entitled to come to this court praying to have such a scheme declared unconstitutional, as it stood in the petitioner's way of seeking a Government job. The case of *Traux* v. *Raich* (19) supports the proposition that it is open to an employee who had lost his job because an unconstitutional status prohibited his master from employing him, to have a declaration that the said statute was unconstitutional even though his employment was at will, as it was clear that his services were terminated by reason of the statute.

In the view I have formed that the Job Bank Scheme is partly valid to the extent that it vests the power in the M.P. to determine whether a citizen satisfies the eligibility criteria and is invalid only in respect of the other half, viz. in providing for the arbitrary nomination of one thousand persons out of the class of citizens who fulfil the eligibility criteria and since the invalid part can be severed from the valid part and the petitioner can in no objective view, claim to come in the class of persons who satisfy the eligibility criteria, whatever the M.P.'s bias against him be, the petition will have to be dismissed inspite of the fact that the Job Bank Scheme is unconstitutional to the respect indicated above.

Accordingly the petitioner's application is dismissed but there will be no costs.

WANASUNDERA, J.

This is the first application filed before us, by virtue of our jurisdiction under Article 126 of the Constitution to hear and determine questions relating to the infringement or imminent infringement by

executive or administrative action of any fundamental rights guaranteed by the Constitution. The petitioner complains that the failure on the part of the 2nd respondent, the Secretary, Ministry of Plan Implementation and the 3rd respondent, A.G.A., Patha Hewaheta, and Chairman, Job Placement Committee, for the Hewaheta Electorate, to issue him an application form for the registration at the Job Bank, is violative of the equal protection guarantees contained in Article 12(1) and (2) of the Constitution.

The petitioner, who is a resident and a voter of the Hewaheta Electoral District, is a young man, 24 years old, and claims to possess all the necessary qualifications for employment in the non-staff grades in Government Service, State Corporations, Statutory Boards, and Local Government Institutions. he is also an active member of the Lanka Sama Samaja Party - a political party now not having any representation in Parliament - and is the secretary of that party branch at Marassana.

The petitioner has averred that in December 1978 he became aware for the first time, through certain articles appearing in the daily papers (X1 and X2), that recruitment for employment in the aforementioned services would be through the Job Bank. It would appear that, from about March 1978 a number of steps had been taken by the Government in this connection, but the petitioner states that he was unaware of such action.

In consequence of this information, on the 1st January 1979, the petitioner wrote to the 3rd respondent asking for an official form to enable him to apply for registration in the Job Bank. The petitioner received no reply, although the receipt of this letter has been admitted by the 3rd respondent.

On the 14th of January 1979, an official announcement entitled "Employment through Job Bank" by Dr Wickrema Weerasooriya, Secretary, Ministry of Plan Implementation, appeared in the Sunday Observer (X3). This announcement stated that all non-staff grade vacancies, including casual vacancies in the services mentioned earlier, would be filled only through the Job Bank operated by the Ministry of Plan Implementation, and implemented through the Central Computer in Colombo and through District Job Banks as implemented by the Government Agents and Assistant Government Agents at Kachcheri level.

On the 22nd of January 1979, the petitioner had interviewed the 3rd respondent, but was unable to get any relief from him. The petitioner then came to know that the issue of forms for the

application for registration at the Job Bank was being done through the Members of Parliament and accordingly, on the 23rd of January 1979, he wrote to the Member of Parliament, Hewaheta asking for an application form. The petitioner states that he did not receive a reply.

The Member for Hewaheta, Mr Anura Daniel, in his affidavit has stated that he had finished distributing the forms sent to him in terms of the Job Bank criteria as early as the 3rd of August 1978. He denies that he discriminated against the petitioner, and added that the petitioner's request for a form came along after he had distributed the forms that were given to him.

The petitioner then sought relief from the 2nd respondent, but was informed that he could not help the petitioner as only the applicants registered at the Job Bank would be considered for employment.

Both the 2nd and 3rd respondents have filed affidavits disclosing material relating to the constitution and operation of the Job Bank Scheme. From this material we can gather some particulars as to what the Job Bank Scheme is and how it was sought to be operated. Learned Counsel for the petitioner took advantage of this material to formulate certain issues which were the main arguments in support of the petition. The scheme had apparently originated in a series of Cabinet decisions prior to the adoption of the present Constitution. For all practical purposes we may regard the Circular Letter 2R1 dated 12th January 1978 sent to all the Members of Parliament by the then Prime Minister and Minister of Plan Implementation as the basis of the Scheme.

The scheme as envisaged here is designed to meet in some measure the massive problem of youth unemployment in this country. The Government has considered the problem urgent enough to give it priority and has undertaken the task of creating as many jobs as possible to bring about some relief. The scheme envisaged the registration of 1,000 persons per electorate per annum. This would enable 168,000 persons to be registered for employment in respect of the 168 electorates.

According to the scheme, the 1,000 persons from each electorate have to be nominated by the Member of Parliament. The whole thrust of the petitioner's case was directed at this point, for, assuredly, the Member of Parliament was the key factor in this scheme. The rest of the scheme, however, was hardly commented on and appears to be fair and satisfactory. According to X1, filed by

the petitioner, Job Bank applications of those who possess G.C.E. (Ordinary Level) or a higher qualification are dealt with at the central level where the data would be fed into the Central Computer and graded according to qualifications. When some vacancy has to be filled, a list of names graded by the Computer in the order of merit is sent for selection. The cases of those whose qualifications are below the G.C.E. (Ordinary level) are handled at district level by the District Job Bank. Even in this case, the applicants will be graded according to qualifications. Certainly, in so far as this part of the process is concerned, there is justification for the Government view that under this scheme, persons with suitable qualifications will have priority over persons less qualified in the selection for employment.

I shall first dispose of certain incidental and subsidiary matters before coming to the said issue in this case. To begin with, Dr Colvin R. de Silva said he foresaw a challenge coming one day to the electoral-wise scheme of distribution which, he submitted, was fundamentally discriminatory, having regard to the uneven and uncertain spread of the unemployed in this country. This question was not pressed by Counsel, nor has the necessary material been placed before us for a ruling. We are therefore not called upon to make a pronouncement now on this matter.

On the other hand, the learned Deputy Solicitor-General took up a matter of jurisdiction, namely, that having regard to the assets of the petitioner's family, to which reference will be made later, the petitioner has no *locus standi* to maintain this application.

He next argued that the petitioner has no right now to maintain this petition in respect of the Job Bank Scheme for 1978, which he added had originated prior to the enactment of the present Constitution. He developed this argument by saying that the petitioner did not become entitled to a cause of action to maintain this petition, for his rights have in no way been interfered with, as the application forms had already been distributed by the time the petitioner approached the authorities. Dr Colvin R. de Silva replied that at no time, until the close of the argument, had the State taken up the position that the petitioner was out of time; nor has the State pleaded a lack of *locus standi* or a lack of jurisdiction in the pleadings. Dr Colvin R. de Silva submitted further that the material filed in this case, specifically documents X3 and X8, clearly indicate that the Job Bank Scheme was a continuing fact and continues in operation. The continuation of the scheme beyond September 1978 could still enable the petitioner to seek a declaration of the total invalidity of the scheme. I am inclined to agree with him that the

Job Bank Scheme continued in operation beyond September 1978 - the time of the present Constitution - and throughout the whole of 1978. But the question still remains as to whether that portion of the scheme has vested certain functions in the Member of Parliament, and action has been completed by him before the enactment of the Constitution could be brought within the operation of the Constitution.

Learned Deputy Solicitor-General also drew our attention to Article 16 of the Indian Constitution, which specifically provides for equality of opportunity in matters of public employment. He pointed to the absence of such a provision under our Constitution. I do not think that this is of any great significance, for the Directive Principles contained in Article 27(6) of our Constitution clearly indicate that our Constitution is no less interested in ensuring the equality of opportunity to all citizens as the Indian Constitution. In any event, it has been held that Article 16 of the Indian Constitution is only a particular application of the general principle of equality contained in Article 14, which is the equivalent of our Article 12. Accordingly, the absence of an Article similar to Article 16 of the Indian Constitution cannot be regarded as in any way limiting the full operation of the guarantee of equality contained in Article 12. *State of Madras* v. *Narasinga Rao,* (17)

The scheme as contained in 2Ra laid down certain eligibility criteria for the purpose of nomination by the Member of Parliament. Since the number of the unemployed would exceed the number of jobs that would be available, the intention was to give preference to persons who were economically in a most disadvantageous position. This was a laudable object.

Dr Colvin R. de Silva however submitted that every unemployed person, without exception, has the right to apply for a job without let or hindrance and the Government had no right to lay down criteria which would shut him out or act as a hurdle to his aspirations. Since the constitutional provisions may be applicable to a part, if not the whole of the scheme, this may be a convenient place to make certain observations on the relevant constitutional provisions that may govern this case or which may be useful for the future.

The petitioner relied on the equal protection guarantees contained in Article 12(1) and (2) as the basis of this application to Court. Article 12(2) provides against discrimination on the grounds of race, religion, language, caste, political opinion, etc. I will come to this provision later in my judgement. Article 12(1), which is the

provision generally most relied on and wider in scope than 12(2), appears to embody two separate concepts; but the overall intention of this provision is to ensure equal administration of justice. In short, this Article states that all State action would be tested by the standard of legality and that all persons will be granted the equal protection of the law.

Equal protection carries with it, of necessity, the doctrine of classification; for, inequalities and disabilities whether natural, social, or economic may have to be taken into account if justice and fairness is to be achieved as a final result. Equal protection requires generally that all persons who are placed in similar circumstances should be treated alike and for this purpose it would be legitimate to differentiate between persons or things on the basis of clear and intelligible distinctions or differences which must have a rational relationship to the object to be achieved.

The main principles applicable to this guarantee of equal protection is fairly well known and has been worked out in those jurisdictions from where we have borrowed these provisions. *Louisville Gas and Electric Company* v. *Coleman,* (13); *Barpier* v. *Conolly,* (3); *Dalmia's* case, (6); State of *Bombay* v. *Balsara,* (4).

These decisions recognize a number of leading principles relating to the application of the equal protection guarantee. Some of those which are relevant to the present case will not be mentioned; but it must be borne in mind that in their application, due allowance will have to be made for certain differences peculiar to our Constitution.

(1) It must be assumed that the Legislature understands and correctly appreciates the needs of its own people, and its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds. *Budhan Chowdhury* v. *State of Bihar,* (5); *Middleton* v. *Texas Power & Light Co.,* (15).

(2) The principle of equality does not mean that every law must have universal or uniform application to all persons irrespective of differences inherent by nature's attainment or circumstances. The State must be allowed to classify persons or things for legitimate purposes.

(3) The classification to be acceptable must be based on some real or substantial distinction bearing a just and reasonable relation to the objects sought to be attained.

(4) There is freedom to recognize degrees of harm and to limit restrictions to cases where the need is considered the greatest or most acute.

(5) In any permissible classification, mathematical nicety, or perfect equality is not expected.

(6) Although on the face of it, a law or executive action may display a legitimate classification, it is permissible, when necessary, to look behind the law and see whether it works or is being worked in a discriminatory fashion. *Grigge* v. *Duke Power Company,* (8); *Yickwo* v. *Hopkins,* (21).

(7) If the classification is not made by the law itself, it could be left to the discretion of the executive to select and classify the persons or things, and this may be done according to guidelines laid down by the Legislature, or in the light of policy or objects of the Law. The conferring of an arbitrary or uncontrolled power in subjective terms, without sufficient safeguards, would be held to violate the equal protection guarantee, unless it can be shown to be necessary or reasonable under the circumstances. *Anwar Ali Sarkar's* case, (1); *Kathi Raning Rawal's* case, (11); *Ahuja's* case, (2); *Quasim Razvi's* case (14); *Kadar Nath Bajoria's* case, (10).

From the foregoing it is clear that Dr Colvin R. de Silva's submission that no classification can be permitted is not a valid statement of the law, even if the Constitution applies.

Of the criteria in 2R1, sub-paragraph (c) came in for special consideration. Dr. Colvin R. de Silva discussed this sub-paragraph and also brought in aid certain material contained in two counter-affidavits filed by the petitioner to show that the criteria in sub-paragraph (c) vested an arbitrary discretion which in effect amounted to no criterion. This material admitted by the State is most revealing and shows how the Member of Parliament had sought to interpret and apply this criterion and it had resulted in his distributing, the application forms to persons in varying circumstances.

Turning once again to sub-paragraph (c) of 2R1, it would be observed that the first criterion in paragraph (c), namely, that the applicant comes from a family which has no income earner is formulated in objective and concrete terms so as to confer a sufficient guideline to a selector. This paragraph, however, contains an alternative criterion which is worded as follows:

"Or the income must be so low that it is inadequate to sustain the unemployed person and the other members of the family."

Clearly the first criterion must have priority over the latter. But the wording in sub-paragraph (c) does not seem to enjoin this in a mandatory form. It merely states, "preference ought to be given to candidates who come from families where no one is employed."

The learned Deputy Solicitor-General argued that this criterion was objective and would be essentially a matter of fact that, having regard to the permutation and combination of facts and circumstances pertaining to this criterion, no further guidelines were possible and that, in matters of this nature, the Member of Parliament would be the best judge of the situation.

Learned Deputy Solicitor-General emphasized the inherent complexity of adjusting diverse elements in a matter of this kind and pleaded that the Court should allow a large discretion to the State in this matter. He cited the dictum of Holmes, J. to the effect that "the machinery of Government will not work if we do not allow a little play in the joints". I am not unmindful of the problems and difficulties faced by a Government, especially in working an important and massive scheme like the one before us; nor do I wish to create any unnecessary problems for the Government that may make its task more difficult than it is. Courts have always been ready to make allowance for the special difficulties a Government may have to face, but what we face here is a pure question of interpretation. It is relevant to ask whether these provisions have been correctly interpreted and applied, but on the facts before us, this cannot give rise to a constitutional issue.

The counter-affidavits filed by the petitioner reveal that on the one hand a large number of unemployed youths have not been issued application forms by the Member of Parliament although they come from families without a single wage earner. Those families have been issued with rice ration books which indicate that they belong to the poorest class. The six instances given are cases from his own village and found at short notice. In interpreting the criteria in sub-paragraph (c), one would have expected that this category of persons would be exhausted first, before coming to the second category; but this has not been done.

In a separate affidavit, the petitioner enumerates more than twenty cases where the Member of Parliament has sought to apply the second criterion in sub-paragraph (c). These cases have not

been disputed by the petitioner, and the suggestion that they are so few also cannot be accepted when one thinks in terms of the whole electorate. The cases reveal that the Member of Parliament has selected persons from families owning substantial properties - houses and lands - and where they are also in receipt of incomes and pensions. A few of those cases may be examined. In one case, two daughters of a person have been issued with Job Bank application forms. Their father pays income tax and the family owns over 20 acres of high-land and several acres of paddy-lands. The father is also a share-holder of a shop. A brother of the applicants manages a tobacco barn and another brother is an employee of the University of Peradeniya. Both these brothers are unmarried. In another case a brother and a sister have been issued with Job Bank application forms; their mother is an attendant at the Government Hospital and their father is an interpreter mudaliyar of a District Court. It was also alleged that the members of this family are registered voters of another electorate and are able to show only a few months' residence in the electorate. In a third case, the applicant's father is a Depot Inspector of the Ceylon Transport Board, and the mother is an assistant teacher. In another case, the applicant's mother is a retired assistant teacher and an unmarried elder brother is a teacher. Another unmarried older brother is a driver in the People's Bank. In yet another case, the members of the applicant's family consist of three school teachers, a Grama Sevaka, and the family owns a row of business premises and runs a hotel.

Both in the petitioner's pleadings and counsel in the course of his argument also indicated that the scheme, when operated by the Member of Parliament, must necessarily lead to discrimination, especially on the ground of political opinion. The amount of control vested in the Member of Parliament seems inordinate. The nomination by the Member of Parliament provides the 'gateway' for a person to advance towards employment. Dr Colvin R. de Silva drew our special attention to the working of 2R1, to the form, and to the contents of the guide for filling the form. The forms have to be distributed by the Member of Parliament, then collected and returned by him. Counsel for the petitioner summed up the situation by saying that no person can even obtain the form to apply for a job, much less get himself registered, without the blessings of the Member of Parliament.

In his petition, the petitioner has averred that he discovered that the Member of Parliament for Hewaheta had entrusted the application forms he had received to his party organization and any person who applied for a form from him was referred to that organization.

The petitioner supported this with an affidavit from a person named Mr Godamunne, a member of the LSSP who has been denied a form. Mr Anura Daniel has however denied the allegation that forms were distributed through the party branches. He has not however referred to any guidelines adopted by him to distribute these forms. He has specially averred that he had in fact given an application form to the younger sister of Mr Godamunne referred to earlier. Mr Godamunne has since then given a further affidavit where he offers an explanation why his sister got a form. He says that all the adult members of his family, except him, are active supporters of the Member of Parliament and that a sister of his is an office bearer and an active worker in the UNP Women's Organization. He has also averred that his mother is a teacher earning Rs. 600/- per month. He has an unmarried brother who is a clerk in a State Corporation earning Rs. 300/-. They own about 3 acres of paddy and about 5 acres of highland. Their residence is also worth about Rs. 30,000/-.

A number of other cases are also referred to in the counter-affidavits, where it is alleged that forms were given to members of the political party to which the Member of Parliament belonged while members of other political parties have not received forms.

Dr Colvin R. de Silva however refrained from making an allegation of *mala fides* against the Member of Parliament, Mr Anura Daniel. As regards the criteria in sub-paragraph (c) of 2R1, his submissions, as I understood them, were that due to the vagueness of the criteria Mr Daniel was able to apply that criteria in the way he wished. The affidavits filed by the State, including that of Mr Daniel, affirm that all the forms issued to the Member of Parliament were distributed in terms of the criteria. The State has however filed an affidavit from the Grama Sevaka of the petitioner's village to show that the petitioner's family itself has substantial income and property. This has been done apparently to show that the petitioner is disqualified from coming under the criteria set out in sub-paragraph (c) of 2R1. It is said that the petitioner's father is a retired headmaster of a school and the petitioner's mother is an assistant teacher in receipt of a monthly salary of more than Rs. 750/-. It is also alleged that the petitioner's family possess 10 acres of highland, 1 ½ acres of paddy, and their residence is worth about Rs. 50,000/-.

On comparison, I can see no significant difference between the position of the petitioner's family and the position of most of the families set out in the petitioner's counter-affidavit. If this material proves anything, it only goes to show that the second criterion in

sub-paragraph (c) can be interpreted by two persons in different ways and thus lend itself to the exercise of an arbitrary and uncontrolled discretion, whether or not the constitutional provisions applied. This brings me to a consideration of some of the main criticisms of this scheme.

Dr Colvin R. de Silva has submitted that the use of Members of Parliament as the operative element in the working of this scheme was bad and undesirable. According to him, this is a type of power that should be vested only in a public officer, who would be directly amenable to the powers of the Court, and not in a politician. He also stated that by making use of a member of the Legislature, whose traditional duty it is to keep a check on the actions of the executive, the Government was interfering with, or removing an essential safeguard in our system of government. There is undoubtedly some substance in this criticism. But the enmeshing of the executive and the Legislature is by no means foreign to our country or Constitution. We have it in the Cabinet system, and the present trend towards a system of District Ministers seems to be a further extension of this concept. No constitutional provision was referred to in support of this argument, and I think that this concerns a matter of policy rather than the law. Having regard to the magnitude of the problem of unemployment in this country I do not think that we can question the wisdom of the Government in seeking to make use of the elected representatives of the people to assist it in solving this problem, provided there are proper safeguards to prevent injustice. The affidavit filed by the Secretary, Ministry of Plan Implementation, set out certain reasons for doing so. It states -

> "The preliminary selection of the applications was left to the Member of Parliament who, as the duly elected representative of the People, would have a special knowledge of the socio-economic conditions of the persons in his electorate, and the concentration of unemployment in specific localities, which knowledge would make him eminently qualified to apply the aforesaid criteria for selection. The Members of Parliament were directed by the said Circular Letter dated 12th January 1978 (2R1) to make their selections according to the said criteria."

I do not think that this Court is in a position to say whether the vesting of this function in the Member of Parliament would result in the blurring of the demarcation between the executive and the legislature, or would tend to cut across party lines and loyalties and interfere with the orderly administration of the country. But the

Government should be alive to certain undesirable features in this development for which proper safeguards should be laid down. The charges levelled in this case against the scheme are serious and it has been alleged that thousands of eligible youths have been shut out from getting benefits under the scheme or have been kept ignorant of the scheme and how it works. Some of these allegations have unfortunately not been properly met. Admittedly the pivot on which the whole scheme revolves is the Member of Parliament. The vital discretion vested in him at the level of the initial operation of the scheme, it seems to me, was never intended to be operated as an uncontrolled and arbitrary power, whether or not the constitutional provisions applied. In my view there is implicit in this scheme the duty on the Member of Parliament to exercise the powers proposed in him in a fair and rational manner so that there will be no inequality in the administration of the scheme. But unfortunately a wrong exercise of the power before the enactment of the Constitution will not offend the constitutional provisions and hence not fall within the ambit of this petition.

We have seen in this case that the criterion in sub-paragraph (c) has been availed of in an arbitrary manner to amount almost to the vesting of an absolute discretion. No guidelines have been formulated by the Member of Parliament to channel the discretion towards fairness and impartiality.

I must advert once again to the two Articles relied on by the petitioner, namely, Article 12(1) and 12(2). Let me reiterate that these are constitutional provisions and will govern acts only subsequent to the enactment of the Constitution. In Article 12(2) the words "discriminated against" are used. We do not find them in Article 12(1). The case law in respect of the corresponding provisions in other countries show that in respect of Article 12(1) there is usually a presumption that State action is reasonable and justified and this presumption stems from the wide power of classification which the Legislature has of making laws for different persons, groups and things. The words "discriminated against" in Article 12(2) means, "make an adverse distinction with regard to, or distinguish unfavourably from another". This applies to all State actions and any action of the State showing discrimination will have to be justified. It has been said that discrimination involves an element of bias and the placing of a Member of Parliament in the pivotal position in this scheme, unless due precautions are taken, may carry with it a tendency to bias. The natural inclination of a Member of Parliament, to whatever political party he may belong, would be to treat his supporters more favourably than his opponents. It may be possible to counteract this tendency to bias by

laying down suitable guidelines which must be faithfully followed. it is in virtue of this difference that it is generally argued that it is safer to vest these powers in a public officer rather than in a politician. In the present case, there is no evidence of any such guidelines. Even if the constitutional provisions are deemed not to apply, no fair or rational procedure has been adopted to ensure that the most qualified and suitable persons were given the application forms from all those who were qualified and were desirous of applying for employment. For this purpose, due public notice of the scheme is, in the first instance, essential. *Venkataiah* v. *State,* (20); *Krishnan Chander* v. *Central Tractor Organisation,* (12). But a violation of these standards anterior to the enactment of the Constitution would be of no avail to the petitioner.

It may be useful to set out the requirements generally of a rational and fair scheme. There is then, first, the need for the advertisement of a post. Then every person who is interested in the job should be given an opportunity of tendering an application. These applications will, of course, have to conform to the criteria or qualifications laid down. Where the criterion vests a discretion, it must not be uncontrolled or arbitrary. A problem arises when a very large number of applicants qualify for a limited number of jobs. In such an event, a further selection is necessary. Comparing the present case, this would be the actual selection of the 1,000 applicants to whom the forms will be given. The selection is not as such related to the minimum qualifications required, but at this point a certain discretion is allowed to the selector to choose the person who in his opinion may best fulfil the duties of the office. This selection will have to be done fairly and honestly. Undoubtedly, since we are not dealing with any particular office but with a general category of persons with more or less similar qualifications, the subjective element will tend to predominate. But for that very reason and because the selector is a Member of Parliament, it is necessary that he adopts and abides by some fair and rational system for the purpose of this selection even if the constitutional provisions do not apply. Once elected, a Member of Parliament represents the entire electorate and it is only on that basis that this power has been vested in him and can be justified. No material however has been placed before us showing an orderly and rational system by which the rights of persons were dealt with at any of these stages.

There remains finally a matter mentioned by Dr Colvin R. de Silva, namely, the discrimination against the SLFP Members of Parliament. This affects 8 of the 168 electorates. An affidavit from Mr Maitripala Senanayake, Chief Whip of the Sri Lanka Freedom Party

was filed at a somewhat late stage of the case. The State, however, did not have sufficient time to file a counter-affidavit and to give us particulars as to why or under what circumstances this came to be done, except to check on this matter and to make the bare statement that the Cabinet had made a decision to that effect. In X5, produced by the petitioner, Mr Ananda Dassanayke, SLFP Member of Parliament for Kotmale has stated in Parliament that even at the commencement of the scheme, when some opposition Members of Parliament went to obtain their forms, the public officer attending to the matter refused to issue them forms, saying that they had been directed not to issue the forms. On the other hand, the Secretary, Ministry of Plan Implementation, in his affidavit before us, has maintained that the scheme is to register 1,000 persons per electorate, limiting the total number to 168,000, thereby implying that the distribution should be made in all the electorates. He has, however, not referred to the subsequent Cabinet decision. In the absence of more material on this matter and an opportunity to the State to file detailed counter-affidavits explaining the position, I do not think I would be justified in holding that the original scheme has in some way been superseded. The present development, which was admitted by the State, is consistent with a variation in the operation of the scheme. This decision to exclude the specified electorates would appear to be discriminatory and violative of Article 12.

In the result, I hold that, on the material before me, the Job Bank Scheme 1978, which had been devised to give relief to the unemployed, is valid and in order. In so far as the criteria are concerned, criteria (c) in 2R1 appear to have been wrongly interpreted and applied. But, since this has been done prior to the enactment of the Constitution, such action is beyond the reach of the constitutional guarantees. There is however the assurance that any acts, whether of this Scheme or of any future scheme, subsequent to 7th September 1978 will have to conform rigorously to the equal protection and non-discrimination provisions assured to the people. The impugned matters in this petition, however, fall outside this point of time.

As far as the petitioner is concerned, having regard to the disclosure of the assets of his family, which he had not denied, he could not seek qualification in terms of sub-paragraph (c) of 2R1. On his own showing, he cannot avail himself of this criterion if it is properly interpreted and applied. In any event, his claim does not rise to a constitutional question.

As regards the exclusion of the SLFP electorates, I have taken the view, on the available material, that that violation goes to the implementation of the scheme and does not render the scheme itself invalid. That violation, therefore, has no direct impact on the petitioner's application, although persons in those electorates, who are affected by it, may well claim a remedy.

In those circumstances, the petitioner would not be entitled to relief, but I make no order of costs against him.

ISMAIL, J.

The petitioner in this case states he is twenty four years of age and possesses all the qualifications necessary for employment in the non-staff grades in Ministries, Government Departments, Corporations, Statutory Boards and Local Institutions. He is also a resident and an elector of the Hewaheta electoral division. He is also an active member of the Lanka Sama Samaja Party and the Secretary of the Marassana Branch of that Party. He states that he became aware of what is commonly called the Job Bank Scheme after he read X1 published in the Sinhala newspaper "Silumina" on 10th December 1978. He thereafter read a further publication in the "Sunday Observer" of 31st December 1978 which is an English publication. He draws special attention to the news notice X2 where it is stated that it had been determined that all non-staff grade vacancies in Ministries, Government Departments, Corporations and Statutory Boards should be filled only through the Job Bank as implemented through the Central Computer in Colombo, and through Government Agents and Assistant Government Agents at Kachcheri Level.

He has also annexed X3 a copy of the Sunday Observer of 14th January 1979 which indicates that this was a Government decision to fill all non-staff grade vacancies including casual vacancies in Ministries, Government Departments, Corporations, Statutory Boards and Local Institutions through the Job Bank Scheme.

Since he became aware of the existence of the Job Bank Scheme and as he was unemployed at that time and since employment could only be got through this scheme he wrote letter marked X4 dated 1.1.79 to the Chairman of the Job Placement Committee, that is the 3rd respondent asking for an official form in order to make an application to be forwarded to the Job Bank for registration. He received no reply from the 3rd respondent and he states that he interviewed the 3rd respondent on 22.2.79 at his office. The 3rd respondent is said to have admitted the receipt of

the letter X4 and had indicated to him that he was unable to issue to the petitioner an application for registration as he and his committee had not received any such forms.

At about this time he became aware of a certain discussion which had taken place in the Parliament and has drawn attention to this by filing X5 a copy of the uncorrected Hansard of 8.12.78. According to X5 each of the 168 Members of Parliament were to be issued a thousand forms, and arrangements were being made to issue them to the Members of Parliament at the National State Assembly on 8.3.78.

He then addressed a registered letter X7 dated 23.1.79 to Mr Anura Daniel Member of Parliament for Hewaheta. In this letter he requested Mr Anura Daniel to provide him with an application form for registration with the Job Bank. The petitioner states that he indicated in that letter that if no application form was issued to him he would have to conclude that it was due to his political opinions. He received no reply. He also addressed another letter to the 2nd respondent X8 dated 31.1.79 asking for him to be issued with an application form for registration with the Job Bank. He had indicated in his letter that if no reply was received by 8.2.79 he would regard it as a refusal and he intended to take steps under Article 126 of the Constitution. He did not receive any reply up to 8.2.79 but subsequently he received X9 of 9.2.79 in which he stated he could not accede to his request.

The petitioner pleads that by the failure to issue the application form for registration at the Job Bank the 2nd and 3rd respondents have infringed upon the fundamental rights guaranteed to the petitioner as a citizen of Sri Lanka by Article 12(1) and 12(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and has asked for a direction from this Court to order the 2nd respondent to issue to the petitioner an application form for registration at the Job Bank and for other reliefs.

The 2nd and 3rd respondents have filed their respective affidavits with documents marked 2R1 to 2R3 and joint counter submissions. It is from these documents, particularly from 2R1 that one gets a true idea of what the Job Bank Scheme envisages and for what purpose this scheme had been put into operation. One of the objections taken by the respondents in the counter submissions is that certain eligibility criteria had been laid down in 2R1 and the petitioner does not come within the criteria and was therefore not eligible for election. It would appear from the counter submissions that the purpose for which this Job Bank Scheme had been launched is,

"Having regard to the magnitude of the problem of unemployment and the urgent necessity to provide employment initially to those who are economically in the most disadvantageous position it is essential that certain criteria should be adopted in the selection of persons for employment in the Public Service and State Institutions."

The application of the petitioner is resisted by the respondents on three grounds, (a) the petitioner was not eligible for selection, (b) that at the time he made a request for an application form, the Member of Parliament for that area had already completed the distribution of the thousand forms allotted to him and (c) that there is no evidence before Court to conclude that the petitioner was denied a form on account of political opinion held by him.

In order to envisage what is meant by the Job Bank Scheme the document 2R1 is a crucial document. This document emanates from the then Prime Minister and Minister of Plan Implementation and is addressed to each Member of Parliament. The document lays down that the Government had approved a new scheme for placement of unemployed in State and Public Sector Institutions as from 1st March 1978. The scheme envisages the nomination of thousand unemployed persons by each Member of Parliament from his electorate. The criteria for nomination for the year 1978 are laid down in sub-paragraphs, a,b,c and d of paragraph (1).

In the course of the argument before us Counsel appearing for the petitioner stated that he had nothing to urge against criteria Nos. a,b and d nor against the first condition in criteria (c) namely that in the family of the person nominated there should be no income earners but he strongly argued against the alternative in this criteria, viz. the income must be so low that it is inadequate to sustain the unemployed person and the other members in his family.

Counsel for the petitioner sharply criticized the provision made in the scheme which envisages the nomination of thousand unemployed persons by the Member of Parliament from his electorate. He contended that when the Member of Parliament is given the option of choosing thousand out of several thousands who are unemployed in his electorate for the purpose of nomination to this scheme he is given an unfettered choice of selecting whomsoever he wishes from the ranks of the unemployed. He also stated before us that it is unavoidable that by reason of certain political, social and personal affiliations, a particular Member of Parliament would necessarily in his selection of the thousand out of the many be

completely biased and in any event open to allegations of bias and discrimination. He further submitted that he is not in the position of an independent State Officer and would be subject to various pressures on account of party loyalty, political affiliations and social and even economic prejudices and in this context since no criteria had been laid down for this selection of this thousand out of the several thousands employed in that particular electorate a selection on such a basis must necessarily savour of discriminatory and partial treatment.

It is manifest from the document 2R1 that in the selection of this thousand out of the the several thousands unemployed in a particular electorate since no criteria for such selection has been laid down, the Member of Parliament in question has been given arbitrary powers to choose out of the unemployed one thousand at his whim and fancy.

The Deputy Solicitor-General who appeared for the respondents was unable to indicate to us on what basis the Member of Parliament would single the one thousand out of the unemployed in this electorate for nomination. I am, therefore, of the view that this provision in the scheme which entitles the Member of Parliament for a particular electorate to choose one thousand out of the unemployed in his area must either be done away with, or in the alternative, specific criteria should be laid down as to how this thousand out of the unemployed should be chosen by the Member of Parliament either by promulgating a set of rules or by specific directions being given in some other form regarding the choice from the ranks of the unemployed. As contended by Counsel for the petitioner an unfettered discretion left in an individual's hands seems to militate against the provision of the fundamental rights in Article 12 of the Constitution.

Commenting on the scope of the provision of Article 14 of the Indian Constitutional S.R. Das J. in *State of West Bengal* v. *Anwar Ali,* (1) paragraph 54 stated thus;

> "In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilites upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained."

Chandrasekhara Aiyar, J. at page 100 paragraph 75 (c) stated:

> "Discrimination may not appear in the statute itself but may be evident in the administration of the law. If an uncontrolled or unguided power is conferred without any reasonable and proper standards or limits being laid down in the enactment, the statute itself may be challenged and not merely the particular administrative act."

In the case reported in 1954 AIR Madras page 1100, Krishnaswami Nahudu, J. stated:

> "The test to judge whether a particular provision is discriminatory is not by finding as to whether it has been abused, but to see if, from the face of the enactment, there is a tendency or scope for discrimination in its ultimate operation."

Counsel next suggested that the alternative criteria in 1(c) would mean no criteria at all. He submits that there were no standard or rule set out and that it is left to the Member of Parliament to assess whether the income is so low, that it was inadequate to sustain the unemployed persons and the other members of his family. He stated that in such a situation it is only the personal estimate of the Member of Parliament in question that would matter. An estimate could vary from individual to individual and enable a Member of Parliament to discriminate against persons who are politically opposed to him and also against persons against whom he would have prejudices and against persons with whom he could not see eye to eye. The Deputy Solicitor-General took up the position that one should expect the Member of Parliament in question to act in a responsible manner but he was uanble to meet the argument that it left the door open to a particular Member of Parliament to discriminate in individual cases.

I am therefore of the view that in respect of this alternative criteria in paragraph 1(c) definite and tangible guidelines must be laid down in order to enable the Member of Parliament to make a fair and unprejudiced selection or in the alternative that this particular provision should be deleted from the criteria for selection.

The petitioner has averred in his affidavit of 2nd April 1979 that his sister Miss R.M.S.M.K. Godamunne who has this same property and income qualifications as the petitioner himself has been given a Job Bank Scheme application form by the Member of Parliament for Hewaheta while his application is resisted on the basis

that he does not come within eligibility criteria in 2R1. Counsel for petitioner lays this fact before us to illustrate how an unfettered discretion could be indiscriminately applied. The facts set out in this affidavit have not been contested by the respondents. In this affidavit several instances of persons who are not eligible for application forms on the basis of the criteria laid down have been indicated. It was therefore incumbent on the Member of Parliament to ensure that the selection of persons for nomination should have been on a fair and rational basis and with due publicity to the criteria laid down in 2R1. This scheme itself is undoubtedly vast and meant to benefit a large section of the citizens of this country who have been handicapped without employment and without means of subsistence and to achieve the purpose for which the scheme was meant, it is my view, that the selection should transcent political, social, personal and other considerations.

2R1 on the face of it bears the date 12 January 1978. This scheme according to 2R1 was to be effective as, in fact, from 1st March 1978. The petitioner in this case has filed his affidavits and contended that till December 1978 he was unaware of the existence of this scheme until he saw the publications X1 and X2 and it was only thereafter that he took steps in order to obtain registration forms. In view of the specific averments by the petitioner that there had been no publicity of any kind given either to the existence or implementation of the Job Bank Scheme till the 2nd respondent made certain statements as appearing in X1 and X2 in late December 1978, he had been denied the opportunity of submitting his applications for the necessary forms and that he was unaware of the fact that the Member of Parliament for Hewaheta had issued forms from as early as 8th March 1978, hence he had been greatly prejudiced. Deputy Solicitor-General was unable to throw any light as to whether there had been any publicity given either to the existence or implementation of this scheme prior to X1 and X2 referred to by the petitioner. It therefore appears to me that the absence of publicity with regard to the scheme must necessarily have seriously handicapped large numbers of unemployed in the various electorates and that such unemployed persons had been denied the opportunity of going before their respective Members of Parliament and asking the forms for registration in the Job Bank Scheme. In view of the magnitude of this scheme and the manifestly laudable intent of the scheme to enable unemployed persons to apply for and subsequently be provided with jobs in State and Public Sector Institutions, it appears to me that it was necessary that due publicity should have been given regarding the existence and implementation of this scheme in order to enable all unemployed persons who are eligible for nomination to apply for

the necessary forms which would have ultimately enabled them to be absorbed into the State and Public Sector Institutions. The absence of such publicity would in my view have grave prejudice whatever chances a genuine unemployed job seeker had of being employed under this scheme. The Member of Parliament who is only an individual cannot be expected to know each and everyone of the unemployed persons who would have been eligible for selection within his electorate. The Member of Parliament would therefore have only a limited knowledge of the extent of unemployment in any particular electorate and the handing over of application forms for nominations by the Member of Parliament in such a situation would be only to persons whom he knows to be unemployed and not to the unemployed at large within his electorate. Therefore, it appears to me that in a scheme of this magnitude and this importance due publicity should have been given right along from the inception of this scheme in order to ensure that all eligible persons would have equal opportunity to apply for nomination to this scheme.

The petitioner comes into Court by virtue of the provisions of Article 126 of the Constitution. Article 126(1) reads,

> "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".

The petitioner in this case has made this application alleging an infringement of a fundamental right and he alleges that for reasons set out in the sub-paragraphs of the petition, by the failure to issue an application form for registration with the Job Bank, the 2nd and 3rd respondents have infringed on the fundamental rights guaranteed to the petitioner by Article 12(1) and 12(2) of the Constitution in that in the operation of the scheme of recruitment through the Job Bank, firstly the petitioner has been denied equality before the law and equal protection of the law as guaranteed by Article 12(1) and secondly that the petitioner who is a citizen of Sri Lanka has been discriminated against on the ground of his political opinions in violation of Article 12(2). The redress he seeks therefore is for an order on the 2nd respondent to issue the petitioner an application form for registration at the Job Bank and such and other further reliefs as the Court may deem fit.

In order to invoke the provisions of Article 126 the petitioner must necessarily show that he comes within the criteria for nomination

indicated in 2R1. One cannot question the policy of the Government when the Government proposes in the first instance to give employment to persons who are unemployed and who had no ostensible means of subsistence. The Job Bank Scheme envisages the giving of jobs to that class of unemployed persons who had no ostensible means of subsistence at the relevant time. According to the criteria laid down in sub-paragraphs a,b,c, and d, in paragraph 1 of 2R1 it is not the entire group of employed persons who would be eligible for nomination to the Job Bank Scheme. It is only the persons who fall within the criteria set out in 2R1 who would be eligible for nomination. The criteria referred to is not discriminatory on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any of such grounds. When therefore, the petitioner pleads that there is an infringement or imminent infringement of any fundamental right declared and recognized by Chapter III in relation to him he must necessarily show that he comes within the criteria laid down in 2R1. If he does not come within this criteria there could be no question of any infringement or imminent infringement of any fundamental right declared and recognized in relation to him by Chapter III or IV.

The respondents have filed marked 2R3 an affidavit from the Grama Sevaka of Marassana Wasama of Pahatha Hewaheta. According to the facts stated in this affidavit the petitioner's father was a retired head master of a school and therefore eligible to a pension. The petitioner's mother was an Assistant Teacher teaching at Rajasinghe Maha Vidyalaya, Bopitiya in receipt of a monthly salary of more than Rs. 700/- inclusive of allowances. Further the petitioner's parents own, possess and enjoy highlands ten acres in extent, paddylands one and a half acres in extent and their residential house and property is worth about fifty thousand rupees. The petitioner's family consists of the petitioner, his younger sister and his parents. Further the petitioner's household had not been issued with rice ration books as they were above the income level for the issue of rice ration books. The facts stated in the affidavit have not been controverted or denied by the petitioner and no counter affidavits have been filed. In the circumstances it is clear, however much one may stretch and strain the alternative criteria in sub-para. (c) of paragraph 1 in 2R1 that the petitioner cannot come within the criteria laid down in 2R1 and would therefore not be eligible for nomination in the scheme envisaged in 2R1. The petitioner can only plead a violation or imminent violation of a fundamental right if he came within the criteria laid down in 2R1. Since he falls outside the criteria and would therefore not be eligible for nomination under the terms and conditions in 2R1 it appears to me that no fundamental right of the petitioner has been infringed or is

in the imminence of being infringed by executive or administrative action. It is only if he comes within the criteria that a Court can consider the second limb of his prayer, namely that he had been discriminated on the ground of his political opinion in violation of Article 12(2). Consideration of this aspect of the matter need not therefore be gone into as he does not fall within the eligibility criteria laid down in 2R1.

Counsel for petitioner also drew the attention of Court to X11, an affidavit filed by the Member of Parliament for Medawachchiya Electoral District No. 122. In this affidavit this particular Member of Parliament has stated that neither he nor any of the eight members of the Sri Lanka Freedom Party had been issued any of the forms indicated in 2R1 for nomination of unemployed persons in the Job Bank Scheme. Counsel appearing for the respondent did not contest the averments in the affidavit and was not in a position to indicate to Court that any forms at any time had been issued to all or any of the eight Members of Parliament belonging to that particular political party. No doubt this aspect of the matter tends to indicate that there had been some form of discrimination in the issue of forms to Members of Parliament. However this does not seem to touch the case of the petitioner and has therefore no relevance to the petitioner's application to this Court. Patently the petitioner is not a person who is eligible for nomination in any of these eight Electoral Districts and therefore the petitioner is not affected by any such discrimination assuming that there had been discrimination in the distribution of forms to the Members of Parliament. Viewing this matter in its broader aspect it appears to me that it would be desirable if all Members of Parliament irrespective of political affiliations had been issued with the forms referred to in 2R1.

Counsel for the respondents took up the objection that this Court has no jurisdiction to hear this matter since the violation the petitioner complained of took place prior to his coming into Court. He referred us to Article 172 of the Constitution. Sub-section 1 of this Article states that:

> "The provisions of Chapter I to Chapter XXIII shall come into force on the day appointed by the President by Proclamation."

He cited Government *Gazette* of 7.9.79 by which Chapters 1 to 25 of the Constitution were brought into operation from that date. Referring to paragraph 15 of the petition he contended that the violation complained of took place prior to 7.9.78. In such a situation, he submitted, violation of the provisions of the Constitution must be viewed prospectively and not retrospectively. No doubt 2R1

envisages a scheme of nomination for the year 1978. For instance X3 an extract from the Sunday Observer of 14th January 1979 clearly indicates that the Job Bank Scheme though inaugurated on 1st March 1978 was still in operation in 1979. The application of the petitioner is not restricted to the year 1978, his application has been made not with respect to the year but with respect to the scheme itself. I am of the view that recruitment to the Job Bank Scheme was never intended to be exhausted by applications made according to 2R1 in 1978 itself. Undoubtedly the Job Bank Scheme was made to absorb as many unemployed persons as possible. This was to be a scheme that was to be continued through the years and as such the petitioner fell within the quota laid down and he would be eligible for nomination even after 1978.

I am therefore inclined to the view that the Job Bank Scheme was only inaugurated in 1978 but jobs were to be given subsequently as and when they occurred and was a continuous scheme to last for several years and was in fact in existence even right up to now. I am of the disposition to reject the objection taken by the Deputy Solicitor-General as being without any merit.

My brothers Sharvananda J. and Wanasundera, J. have dealt fully with the law applicable to matters arising in this application and I find that I am in complete agreement with them.

Since the petitioner does not come within the criteria laid down in 2R1 he cannot invoke the provisions of the Article 126 of the Constitution and therefore I would dismiss this application. In considering the facts and circumstances of this matter I make order that the application be dismissed without costs.

Application dismissed without costs.