1971 *Present :* **H. N. G. Fernando, C.J., G. P. A. Silva, S.P.J., and Samerawickrame, J.**

JANAK HIRDARAMANI, Petitioner, *and* A. R. RATNAVALE (Permanent Secretary, Ministry of Defence and External Affairs) and 2 others, Respondents

S. C. 354/71—Application for a Writ of Habeas Corpus under Section 45 of the Courts Ordinance

Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971 (published in " Government Gazette " of August 15, 1971)—Regulations 18, 19, 20, 51, 52, 53, 55, 65—Detention Order made under Regulation 18 (1)—Habeas Corpus application—Affidavit filed by Permanent Secretary—Cross-examination of deponent—Permissibility—Power of Court to act upon affidavits—Civil Procedure Code, s. 384—Order of Permanent Secretary—Justiciability—Presumption of bona fides—Jurisdiction of Supreme Court to issue writs of habeas corpus—Whether it is ousted by Regulation 55 in the case of a detention order made in abuse of the powers conferred by Regulation 18—Courts Ordinance, s. 45—Ceylon (Constitution) Order in Council (Cap. 379), s. 51—Public Security Ordinance (Cap. 40), ss. 5, 5 (2) (d), 8.

The Permanent Secretary to the Ministry of Defence and External Affairs (the 1st respondent), acting in good faith under Regulation 18 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971, caused a person to be taken into custody on 1st September 1971 with a view to preventing the detainee " from acting in any manner prejudicial to the public safety and to the maintenance of public order ". In the present habeas corpus application made by the detainee's wife for the release of the detainee, the Permanent Secretary filed an affidavit in which he referred to the widespread armed insurrection which commenced in April 1971 and stated *inter alia* that he was satisfied, after considering certain material placed before him by the Police, that the detainee had taken part in certain foreign exchange smuggling transactions which were under investigation and that he should be prevented in future from engaging in similar transactions, which directly or indirectly helped to finance the insurgent movement.

Held, (i) that the petitioner was not entitled to make an application to cross-examine the Permanent Secretary on the latter's affidavit. *Mansoor v. Minister of Defence and External Affairs* (64 N. L. R. 498) overruled. Moreover, as a habeas corpus application is of a summary nature, the procedure followed in Chapter 24 and section 384 of the Civil Procedure Code may be followed and the final order of the Court can be made after a consideration of affidavits on both sides.

(ii) that Regulation 18 (1) authorises the Permanent Secretary to make an order for the taking into custody and detention of a person if the Permanent Secretary is of opinion that such order is necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order. If the detention order is produced and is valid on its face, it is for the detainee to prove facts necessary to controvert the matter stated in the detention order, namely, that the Permanent Secretary was of opinion that it was necessary to make the detention order for the purpose specified in the order itself. In the present case the petitioner failed to establish a prima facie case against the good faith of the Permanent Secretary and, therefore, the onus did not shift to the Permanent Secretary to satisfy the Court of his good faith. In the circumstances the Permanent Secretary need not have filed an affidavit at the stage when he filed it. A detention order made by the Permanent Secretary in good faith is not justiciable.

Held further by SILVA, S.P.J., and SAMERAWICKRAME, J. (FERNANDO, C.J., dissenting), that Regulation 55, although it provides that "Section 45 of the Courts Ordinance (which confers jurisdiction on the Supreme Court to issue writ of habeas corpus) shall not apply in regard to any person detained or held in custody under any emergency regulation", is not applicable in the case of a person unlawfully detained under an invalid detention order made in abuse of the powers conferred by Regulation 18 (1).

APPLICATION for a Writ of Habeas Corpus.

S. Nadesan, Q.C., with *H. L. de Silva*, *K. Ratnesar*, *R. D. C. de Silva*, *V. Jegasothy* and *Mahinda Gunaratne*, for the petitioner.

V. Tennekoon, Q.C., Attorney-General, with *R. S. Wanasundera*, Deputy Solicitor-General, *N. Tittawella*, Senior Crown Counsel, and *S. Sivarasa*, Crown Counsel, for the respondents.

Cur. adv. vult.

December 30, 1971. H. N. G. FERNANDO, C.J.—

This is an application for a mandate in the nature of Writ of Habeas Corpus ordering the respondents to bring before this Court the body of one B. P. Hirdaramani (hereinafter referred to as "the detainee") to be dealt with according to law.

(An earlier application No. 344/71 for the same relief was made by the wife of the detainee, but Counsel for the present petitioner preferred that the present application only be taken into consideration. The earlier application is therefore regarded as withdrawn.)

On 6th November 1971 this court issued notice on the respondents of the application made by the Petitioner, requiring them to show cause why the application for the issue of the Writ should not be allowed.

The detainee was taken into custody on 1st September 1971 upon an Order of the 1st respondent purporting to have been made under Regulation 18 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971, made under the Public Security Ordinance (Chapter 40) and published in the *Ceylon Government Gazette Extraordinary* of August 15, 1971.

In the affidavit filed with his petition, the petitioner, who is the son of the detainee, has averred—

(*a*) that on and after 1st September 1971 the detainee was detained in the office of the Criminal Investigation Department and was there interrogated by Police Officers with regard to certain transactions which are alleged to have been in contravention of the Exchange Control Act (Cap. 423), in pursuance of an investigation into those alleged offences;

(*b*) that in September 1971, officers of the Criminal Investigation Department searched the office of the Company known as Hirdaramani Ltd., of which the detainee is Managing Director, questioned the Manager of the Company in regard to the Bank accounts of the Company, and took certain books and documents into custody from the office;

(*c*) that on 20th September 1971 a sister of the detainee was summoned to the Criminal Investigation Department and questioned in regard to the alleged association of the detainee with certain persons suspected to have committed offences against the Exchange Control Act;

(*d*) that the detainee has been taken into custody " NOT with a view to prevent him from acting in any manner prejudicial to public safety and/or to the maintenance of public order, BUT for the purpose of assisting and/or facilitating the investigation by the Criminal Investigation Department into certain alleged offences under the law and into certain alleged contraventions of the Exchange Control Act (Chapter 423) alleged to have been committed by certain other persons and/or the detainee."

The 1st respondent, who is the Permanent Secretary to the Ministry of Defence and External Affairs, has filed in this Court a true copy of the Detention Order, together with an affidavit in which he stated *inter alia* that widespread acts of insurgency took place in April 1971 and that the armed insurrection had seriously aggravated the financial plight of the country, that police investigations into the insurgency and activities connected therewith have not yet been concluded, and

that the investigations revealed that the insurgent movement had been organised and launched with large scale financial and material support. The affidavit of the 1st respondent further states as follows :—

> " On a consideration of certain material placed before me by the Police I was satisfied that the detainee had unlawfully obtained a large sum of money in Ceylon by making or arranging payment abroad to the account or to the order of a person carrying on unlawful foreign exchange transactions and that this payment appeared to me to be inextricably connected with certain foreign exchange smuggling transactions under investigation and the statements recorded in the course of that investigation appeared to me to indicate that these unlawful transactions directly or indirectly helped to finance the insurgent movements and its activities in Ceylon.
>
> At all material times I was also of the view that the unlawful and illegal smuggling of currency in the manner, magnitude and circumstances mentioned above would constitute a danger to the security and the financial stability of the country.
>
> I was, therefore, of opinion with respect to the detainee that, with a view to preventing him from engaging in similar activities in the future and from acting in any other manner prejudicial to the public safety or the maintenance of public order, it was necessary that he should be taken into custody and detained in custody. Accordingly, on or about the 31st day of August 1971, in good faith, I made such order."

The petition was taken up for hearing on 15th November 1971, and learned Counsel appearing for the petitioner, first made certain submissions in support of an application that the Permanent Secretary should submit himself for cross-examination. Counsel's position was, substantially, that this Court should not act upon the averments in paragraphs 9, 10 and 11 of the affidavit of the Permanent Secretary because the truth of these averments is challenged by the petitioner, and that Counsel is entitled to cross-examine the Permanent Secretary, and will if permitted to cross-examine, be able to establish that these averments are untrue.

While conceding that in proceedings of this nature the cross-examination of a deponent to an affidavit is permitted only in exceptional circumstances, Counsel submitted that the circumstances of this case are exceptional for two reasons :—

(*a*) because the truth of these averments is challenged by the petitioner ; and

(*b*) because the nature of the investigations referred to in the affidavit of the petitioner *prima facie* reveals that the actual purpose of the detention in custody of the detainee was to facilitate investigations into certain alleged offences against the Exchange Control Act.

In support of his application to cross-examine the 1st respondent, learned Counsel relied on the case of *Mansoor v. The Minister of Defence and External Affairs*,[1] reported in 64 N. L. R. 498, and in 65 N. L. R. 502. In that case there was in this Court an affidavit of one H. T. Perera (an official of the Ministry of Defence and External Affairs), containing an averment that certain relevant papers had been duly submitted to the Minister of Defence and External Affairs. On a submission by the petitioner's Counsel that according to his instructions this particular averment was untrue, Sri Skanda Rajah J. made order allowing Counsel's application to cross-examine Mr. Perera, and the proceedings were then deferred. Thereafter, the Crown applied for permission to cross-examine the petitioner before Mr. Perera was cross-examined, and this application of the Crown was allowed by G. P. A. Silva J. Learned Counsel submitted before us that this was a precedent which supported his present application to cross-examine the 1st respondent. Counsel however does not appear to have been aware of the interesting sequel to the orders for cross-examination made in the case on which he relies. The case came up for hearing on 18th October 1963 before T. S. Fernando J. and the petitioner was then cross-examined by the Solicitor-General. I cite now from the judgment ultimately delivered on 18th October 1963 by T. S. Fernando J. after the petitioner in that case had been cross-examined:

"The application came up for final determination before me, and counsel for both sides contended that I was bound by the earlier interlocutory orders made by Sri Skanda Rajah J. and Silva J. I agreed that in dealing with the present petition I was so bound; indeed, any other view would have been fraught with much inconvenience to parties to the litigation. At the same time, I should for my own part like to observe, with much respect, that it seems to me that before cross-examination in respect of the case for the respondents is permitted, a Court must be satisfied that the petitioner himself has made out a case calling for answer.

In view of the interlocutory orders already made in this case I permitted the learned Solicitor-General to cross-examine the petitioner on his affidavit, and it became immediately apparent that the material allegation of the petitioner that formed the basis of this application was founded upon pure speculation. It was not founded even upon hearsay, although I must observe that an application in an affidavit which is based only on hearsay is itself valueless and calls for no refutation. The petitioner admitted that he did not know whether the application was or was not forwarded to the Minister. He admitted that he received a reply from the Minister that his application had been disallowed by her in terms of the Act. Indeed this reply formed part of his application to this Court for the relief he sought. His cross-examination was concluded with his answer that he made application to this Court merely because he was dissatisfied

[1] *(1963) 64 N. L. R. 498 and (1963) 65 N. L. R. 502.*

with the refusal of his application for citizenship. Learned counsel for him intimated to me at the conclusion of the cross-examination that he was unable to maintain the application."

Mansoor's case is thus an instructive example of the failure of great expectations which a petitioner in a case of this nature entertains when he proposes to cross-examine another party as to the truth of a matter of which the petitioner himself has no knowledge.

In the present case, the averment of the petitioner that the detainee was taken into custody NOT with a view to preventing him from acting in any manner prejudicial to the public safety or to the maintenance of public order, was not based on any knowledge which the petitioner had of the purpose which the Permanent Secretary actually intended to achieve or of the actual opinion which he had formed, when he made the detention order. Even the implication in the petitioner's affidavit that the interrogation of the detainee related solely to alleged contravention of the Exchange Control Act was not based on personal knowledge, for the petitioner was not present at these interrogations. Thus the substantive averment of the petitioner that the detention order was made for an ulterior purpose and not for the purpose specified in Regulation 18, depended only on an inference which the petitioner has reached, from such knowledge as he possesses.

After we had refused Counsel's application that the Permanent Secretary do submit himself for cross-examination, Counsel referred to the Indian case of *Emperor v. Bhiku*[1]. (A. I. R. 1950 Bom. 330). In that case there had been an order restraining a person from entering a certain area, and he was prosecuted for the alleged offence of entering the area in contravention of the order. It was held that the burden lay on the prosecution to establish positively the validity of the restraining order. In the course of the judgment, the Court observed that the officer who made the order "must step into the witness box" and satisfy the Court that the order was made in good faith. I need only say for present purposes that the Court did not in fact compel the officer to give evidence. But because there was no such evidence, the person charged was acquitted. Indeed, with only one exception, Counsel for the petitioner in the present case could cite no authority which might show that a petitioner in proceedings such as this is entitled to demand that the opposing party be ordered to give evidence. As to the exception, which is *Mansoor's case* decided by Sri Skanda Rajah J., it was in my opinion wrongly decided and must be overruled. The proper consequence of the failure to give evidence is only that in an appropriate case an adverse inference may be drawn.

It should be noted that the Indian judgment to which I have just referred was given in a case of a prosecution for an offence, and that the substantial decision was that the ordinary burden of proving the ingredient

[1] *A. I. R. 1950 Bom. 330.*

of an offence must be discharged by the prosecution. The judgment is no authority for the proposition that, if an executive order is challenged in habeas corpus proceedings, the officer making the order must testify as to good faith. Indeed the same Bench which decided the above case had previously ruled that there is no proper analogy between the prosecution for a contravention of an executive order, and proceedings in habeas corpus in which such an order was challenged—*Emperor v. Abdul Majid* [1].—(1949 A. I. R. (Bombay) 387).

I have now stated the reasons which moved the Court to refuse Counsel's application to cross-examine the Permanent Secretary. Other grounds which supported this refusal appear during later stages of the judgment.

After Counsel's application in regard to the cross-examination of the Permanent Secretary was refused by the Court, he made a further application that the affidavit filed by the Permanent Secretary be ruled out. We rejected this objection, but when considering the material contained in the affidavit, I shall bear it in mind that the petitioner had no opportunity to cross-examine the Permanent Secretary. For the present I must refer to the observation of Lord Halsbury (cited by Lord Reid in *Greene's case*) that habeas corpus "is not a proceeding in a suit, but a summary application by the person detained". That being so, it is legitimate to follow the procedure provided in Chapter 24 of the Civil Procedure Code which clearly permits the Court to act upon affidavits. In the instant case the Permanent Secretary is in the position of a respondent, and s. 384 of the Code entitles such a respondent to read affidavits or other documentary evidence; indeed the respondent may not adduce oral evidence without leave of the Court. Ordinarily therefore the final order of the Court can be made after a consideration of affidavits filed on both sides.

While the hearing of the application was in progress, Counsel for the petitioner applied to read in evidence three newspaper reports of an interview said to have been given in London in October 1971 by the Honourable the Prime Minister to a representative of a London newspaper. Although we glanced at these reports in response to Counsel's request, we are not aware upon which of the statements attributed in them to the Prime Minister, Counsel proposed to rely, nor are we aware of the purpose for which Counsel proposed to utilise the reported statements. The reports are filed of record, but were not admitted in evidence. The principal objection taken by the Attorney-General was that the reports are pure hearsay, and we agree entirely that it would be a most dangerous precedent to admit newspaper reports as proof of anything, other than the mere fact that the reports were published. We saw substance also in the objection that a statement made in October, even by the Prime Minister, can have little bearing on the question whether the Permanent Secretary entertained a particular opinion in September.

[1] *(1949) A. I. R. (Bombay) 387.*

Regulation 18 (1) of the Emergency Regulations authorises the Permanent Secretary to make an order for the taking into custody and detention of a person if the Permanent Secretary is of opinion that such order is necessary with a view to preventing that person from acting in any manner prejudicial to the public safety and to the maintenance of public order.

In the instant case, there has been no dispute as to the authenticity of the Detention Order, or as to its application to the detainee. Furthermore learned Counsel for the petitioner has conceded that the production of the Detention Order constitutes a complete answer to the petitioner's application for a writ of habeas corpus, subject only to the exception that if the good faith of the Permanent Secretary is challenged the Court must after investigation decide whether the order was made for an ulterior purpose and not for the purpose specified in the order itself. The propositions which have just been stated are based on the decisions of the House of Lords in two cases—*Liversidge v. Sir John Anderson* [1], 1942 A. C. 206; and *Greene v. Secretary of State for Home Affairs* [2], 1942 A. C. 284. In the former case a person detained under Regulation 18B of the Defence Regulations 1939 sued the Secretary of State in an action for damages for false imprisonment and in the latter case a person similarly detained applied for a writ of habeas corpus. In both cases it was held that, if in the opinion of the Secretary of State it was necessary to make a Detention Order, a plenary discretion was vested in the Home Secretary to decide whether he had reasonable grounds in making the order and that it is not open to a Court to consider the correctness of such a decision.

Many of the judgments in the House of Lords cited with approval this statement of Goddard L. J. in *Greene's case* in the Court of Appeal:—

> "I am of opinion that where on the return an order or warrant which is valid on its face is produced, it is for the prisoner to prove the facts necessary to controvert it."

This statement was cited with approval by Viscount Maugham in appeal (1942 A.C. at page 295). The judgment of many of the Lords of Appeal in *Greene's case* expressed the opinion that indeed the production of the detention order is sufficient without the need in addition to produce an affidavit.

In the instant case therefore, in the words of Goddard L. J., the question is whether the petitioner has proved facts necessary to controvert the matter stated in the detention order itself, namely, that the Permanent Secretary was of opinion that it was necessary to make the detention order for the purpose specified in the order itself.

Counsel for the petitioner in his original address insisted that a mere verbal challenge of the good faith of the Permanent Secretary sufficed to raise as a justiciable issue before the Court the question whether the

[1] *(1942) A. C. 206.* [2] *(1942) A. C. 284.*

Permanent Secretary had indeed held the opinion stated in detention Order. In his address in reply however, learned Counsel conceded that the issue of good faith will not arise for consideration unless and until (I quote Counsel's language) there is established a prima facie case that the Detention Order was made with an ulterior motive.

Counsel's contention has been that an ulterior motive on the part of the Permanent Secretary is prima facie established by the facts which appear from the affidavits of the petitioner, of the Permanent Secretary and of 3rd respondent, who is an Assistant Superintendent of Police of the Criminal Investigation Department. This ulterior motive, it was contended, consisted of the purpose that the detainee be kept in custody in order that intensive investigations, including intensive interrogation of the detainee, be conducted into certain alleged offences against the Exchange Control Act and the alleged smuggling of foreign exchange. At another stage of his argument, Counsel suggested that the detainee had been detained for a different ulterior purpose: because (so Counsel submitted) there was some suspicion that transactions by the detainee and others may have directly or indirectly been connected with the provision of financial assistance for insurgent activities, the detainee was taken and held in custody in order to facilitate further investigations regarding such transactions. In brief, the prima facie case wihch Counsel claims is established is that the purpose of the detention was the facilitation of investigations and interrogations.

Let me say at once that an inference that the detainee was taken into custody for the purpose for which Counsel contended readily arises upon the facts which have been established. They are:—

(1) The detainee was in fact arrested and taken into custody by an Officer of the Criminal Investigation Department.

(2) The order itself contains a direction by the Inspector-General of Police that the detainee should be detained at the office of the Criminal Investigation Department.

(3) Immediately after the arrest, the officer of the Criminal Investigation Department searched the house of the detainee and the office of the Company of which he is the Managing Director, interrogated the Manager of the Company, and took books and documents into custody.

(4) The detainee was interrogated at some length in his office and thereafter at the office of the Criminal Investigation Department.

(5) The detainee was kept in custody for more than two months at the office of the Criminal Investigation Department.

(6) In reply to an appeal made to the Honourable the Prime Minister by the wife of the detainee, the Secretary to the Prime Minister stated in a letter dated 20th September, 1971 " that it would not be possible to release Mr. Hirdaramani as yet, since it has been reported that the necessary investigations are not yet over ".

The fact that there had been, from the time of the arrest of the detainee, intensive interrogations and investigations is not controverted. Hence the question which this Court has ultimately to decide is whether the fact that such investigations actually took place, affords a ground for a decision by this Court that the purpose which motivated the making of the Detention Order by the Permanent Secretary was prima facie the facilitation of investigations and interrogations, and not prima facie the purpose of preventing the detainee from acting prejudicially to public order or public security. If, of course, the inference which Counsel for the petitioner invites the Court to reach is the proper inference on the available material, then this Court may call upon the Permanent Secretary for his answer.

All the judgments in *Greene's case* referred to the fact that in that case the good faith of the Secretary of State had not been challenged or impugned. For example, Lord Macmillan said :—

> " The result, in my opinion, is that the production of the Secretary of State's order, *the authenticity and good faith of which is in no way impugned*, constitute a complete and peremptory answer to the appellant's application. It justifies in law his detention in the absence of any relevant challenge of its validity, and there is no such challenge. It necessarily follows that the Secretary of State had no need to submit an affidavit." (A.C. 1942, p. 297)

Again in the case of *Liversidge*, Viscount Maugham observed :—

> " The result is that there is no preliminary question of fact which can be submitted to the courts and that in effect there is no appeal from the decision of the Secretary of State in these matters *provided only that he acts in good faith*." (A.C. 1942, p. 224)

Observations of this kind no doubt bear the implication that if the good faith of a person making a detention order is in fact relevantly challenged, then the Court may investigate and decide whether or not the order was in fact made in good faith. But these observations were made *obiter*, and presumably for that reason the judgments contain no explanation as to the requisite substance of a "relevant challenge" of good faith, or as to the considerations sufficient to meet such a challenge.

There are however observations in the judgments which assist in the consideration of matters which were left open in those judgments. For instance, Viscount Maugham stated :—

> " I will add that in the present case the circumstance that the Secretary of State is entitled to withhold from the court the grounds or some of the grounds on which he formed his belief constitutes a further reason why, if there had been no affidavit by the Secretary of State, the Divisional Court would have acted wisely in refusing the application for the writ. *It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State, formed partly at least on grounds which he is not bound to disclose.*" (A.C. 1942, p. 296)

A.

Lord Wright cited the opinion of Lord Denman C.J. :—

> " On a motion for a habeas corpus, there must be an affidavit from the party applying ; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a ' sufficient answer '." (A.C. 1942, p. 306)

Lord Wright then proceeded to state his own opinion :—

> " I think that this applies to the present case. The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good cause of the detention and needs no extrinsic justification. *It is*
> B. *good on its face unless and until it is falsified.*" (A.C. 1942, p. 306)

In *Liversidge's case* Lord Atkin's dissenting judgment refers to the consequences of the majority decision from which he himself dissented :—

> " The meaning, however, which for the first time was adopted by the Court of Appeal in the Greene case and appears to have found favour with some of Your Lordships is that there is no condition for the words " if the Secretary of State has 'reasonable cause' merely mean if the Secretary of State 'thinks that he has reasonable cause'." The result is that the only implied condition is that the Secretary of State acts in good faith. *If he does that—and who could dispute*
> C. *it or disputing it prove the opposite?—the minister has been given complete discretion whether he should detain a subject or not.*"

This observation " who could dispute the good faith of the Secretary of State or disputing it prove the opposite ?" points forcefully to the difficulty or even to the futility of a challenge that a person who has stated an opinion did not in truth hold it.

In the present context it will not by any means suffice for the petitioner to establish that the Permanent Secretary was mistaken in thinking that the detention of the detainee was necessary for the stated purposes. Even a mistaken opinion will not invalidate a detention order, and want of good faith can be established only by proof positive that the Permanent Secretary did not indeed form that opinion.

I must note that our Emergency Regulation No. 18 requires only that the Permanent Secretary should be *of opinion* that it is necessary to detain a person with a view to preventing him from acting prejudicially to public safety or the maintenance of public order. Viscount Maugham in the case of *Liversidge* pointed out that Regulation 18B requires the Secretary of State to have reasonable cause to believe two different things. In regard to the second thing, namely the belief in the need for the detention of a particular person he made the following observation :—

> " But then he must at the same time also believe something very different in its nature, namely, that by reason of the first fact, it is necessary to exercise 'control over' the person in question. To my mind this is so clearly a matter for executive discretion and nothing

else that I cannot myself believe that those responsible for the Order in Council *could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a Court of law.*"

. . . . . .

"Just as the fact that the act of the Secretary of State acting in a public office is prima facie evidence that he has been duly appointed to his office, *so his compliance with the provision of the statute or the Order in Council under which he purported to act must be presumed unless the contrary is proved.* There are scores of instances of such presumptions to be found in the books, none I think precisely in point, but many in which the principle was less necessary on the score of public convenience than the present". (A.C. 1942, p. 225)

Lord Macmillan said thus :—

"I turn now to the nature of the topics as to which the Secretary of State is under the regulation to have reasonable cause of belief. They fall into two categories. The Secretary of State has to decide (1) whether the person proposed to be detained is a person of hostile origin or associations or has been recently concerned in certain activities, but he has also to make up his mind (2) whether by reason thereof it is necessary to exercise control over him. The first of these requirements relates to matters of fact, and it may be that a court of law, if it could have before it all the Secretary of State's information—an important 'if'—might be able to say whether such information would to an ordinary reasonable man constitute a reasonable cause of belief. *But how could a court of law deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fact?* A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share. As Lord Parker said in *The Zamora* : "*Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law* or otherwise discussed in public"—pp. 253–254.

I have lettered A to G some passages in the citations from the judgments in *Liversidge* and in *Greene*. These passages indicate how narrow and even purposeless would be the scope of an investigation into the question whether the Permanent Secretary did in fact form the opinion stated in his order. Apart from the grave difficulty which any Court would have in considering whether a person, who has stated a particular opinion, did in fact entertain that opinion, there is in this case a special feature not present in ordinary cases. In an ordinary case, if the fact that a stated opinion was held by a party is challenged, the ordinary and best means of ascertaining whether in truth he formed that opinion is to consider

whether or not there existed facts which could have reasonably led him to form that opinion; but in the instant case the Permanent Secretary is unable to disclose relevant facts, for the reasons stated by him in paragraph 14 of his affidavit and also by the Attorney-General on behalf of the Crown. In the result an investigation by this Court as to the existence or non-existence of the Permanent Secretary's stated opinion would have to be reached without consideration of matters which in common sense would have a most important bearing on the question for decision. I find much in the passages which I have italicized in support of my opinion that the investigation which Counsel for the petitioner invites us to hold would be one in which the Permanent Secretary may be virtually unable to defend himself.

Let me at the same time attempt to set out my own views as to the nature of the facts, proof of which *may perhaps* justify this Court in investigating an allegation that an executive order was not made in good faith. If it is prima facie shown that an official who makes a particular executive order had an antecedent motive against the person affected by the order, or had an antecedent bias in favour of a person benefited by the order, then I think the Court may call upon the official to disprove the existence of bias or to establish that his action was not influenced by bias. But even if such antecedent bias was to be shown in the circumstances of the instant case, the special feature of the Permanent Secretary's inability to disclose facts leading to the formation of his opinion might well be a reason why a proper investigation cannot be held.

There have been rare instances, such as orders for the compulsory acquisition of land, in which a party is able to establish, by proof of the actual purpose for which the land is used or is to be used by the Crown, that the land was not in fact acquired for a public purpose. There may be instances in which the truth of a reason or an opinion stated by an official in an executive order, can be disproved by evidence of statements of the official containing some different reason or opinion, or tending to show that the stated reason or opinion is incorrect or untrue. It is also remotely possible that an opinion stated in an executive order is manifestly absurd or perverse.

Even if circumstances such as those I have suggested may justify a prima facie inference of bad faith, no such circumstances exist in the present case.

Counsel for the petitioner relied greatly on the judgment of Lord Atkin in the case of *Eleko v. The Officer Administering the Government of Nigeria*[1] (1931 A. C. 662). In that case Their Lordships of the Privy Council considered an order of the Officer Administering the Government of Nigeria restraining a person from entering a particular area. The Ordinance which conferred the power to make the order provided that it could be made only against a person (1) who was a native chief and (2) who had been deposed and (3) where there was a native custom requiring

[1] *(1931) A. C. 662.*

him to leave the area. The judgment of the Privy Council ultimately ordered that it was for the Government of Nigeria to establish by evidence the existence of the three facts which I have just mentioned, in order to justify the making of the order. Counsel's proposition in the instant case, was that just as much as the judgment in *Eleko's case* cast upon the Government of Nigeria the onus of proving the objective facts which had to exist before the restraining order was made against Eleko, the Permanent Secretary in the present case must establish the fact that he held the opinion stated in the detention order made by him. The judgments in the House of Lords in the cases of *Liversidge* and *Greene* contain only one reference to *Eleko's case*; Lord Wright (1942 A.C. at page 273) there stated in regard to *Eleko's case* :—

> " It was a question of the extent of authority given by the ordinance. That depended on specific facts, capable of proof or disproof in a Court of law, and unless these facts existed, there was no room for executive discretion. This authority has, in my opinion, no bearing in the present case, as I construe the powers and duties given by the regulation. There are also obvious differences between the ordinary administrative ordinance there in question and an emergency power created to meet the necessities of the war and limited in its operation to the period of the war. "

The judgment of Scott L. J. in the Court of Appeal in *Greene's case* [1] (1941) 3 A.E.R. 104, also pointed to the clear distinction between the power which the Government of Nigeria purported to exercise in *Eleko's case* and the power of detention conferred by Defence Regulations 18B :—

> " It was held that the ordinance in question made each fact a condition precedent to any exercise by the governor of the power to deport, and that each condition had to be established either by admission or proof before a court. On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise." (1941) 3 A.E.R. at p. 112.

Situations in which the decision in *Eleko's case* is properly applicable are illustrated by the case of *Rex v. Ahson and others* [2]. (1969) 2 A.E.R. 347.

The Commonwealth Immigrants Act 1962 gave an Immigration Officer an absolute discretion to refuse to a Commonwealth citizen admission into the United Kingdom, but this power of refusal was subject to certain conditions set out in the Act. These conditions were that a person entering the United Kingdom must be examined by an Immigration Officer within the period of twenty-four hours from the time when he lands in the United Kingdom, and that a notice refusing admission " shall not be given to any person unless he has been examined " within the said period. The Court of Appeal in England, following the decision in *Eleko's case* held that, when it is claimed that an Immigration Officer

[1] *(1941) 3 A. E. R. 104.* [2] *(1969) 2 A. E. R. 347.*

had no jurisdiction to refuse admission to an immigrant, it was for the Executive to prove that the jurisdiction in fact existed, and accordingly to prove affirmatively that the immigrant had in fact been examined by the Immigration Officer within the period of 24 hours from the time of his landing in the United Kingdom.

Both in the case of *Eleko* and in that of *Ahson and Others*, the justification for the exercise of statutory power depended on the actual existence of objective facts, and if those facts did not exist, the exercise of the statutory power was clearly unlawful. Such a situation is quite different from one in which a statutory power may be exercised if some authority is satisfied that certain facts did exist; and it is far remote from the situation in the instant case and from the situation in the cases of *Greene* and *Liversidge* in which the statutory power can be exercised if some authority is of opinion that it is necessary to exercise that power.

Consideration of the English decisions I have examined shows that there are really three different situations :—

(1) Where a power cannot be exercised unless certain physical facts exist. In such a case if the validity of the exercise of the power is disputed, then the executive must prove that the requisite facts actually existed.

(2) Where a power may be exercised by some authority if he is satisfied of the existence of certain facts. In such a case a Court can inquire into the circumstances, in order to ascertain whether it was reasonable for the authority to be satisfied of the existence of the facts.

(3) Where, as in the instant case, the power can be exercised merely because of an opinion that it is necessary to exercise it. In such a case the mere production of the instrument whereby the power is exercised concludes the matter, unless good faith is negatived.

In regard to the third category, it is no doubt true that the existence of a particular state of mind is a question of fact, in the sense that it is not a question of law; but ascertainment of the existence of a state of mind surely involves considerations and difficulties which do not enter into the ascertainment of the existence of pure physical facts.

I am satisfied for these reasons that the cases of *Eleko* and of *Ahson and Others* are of little assistance to the petitioner.

Let me now consider whether the inference admittedly open upon the facts on which the petitioner has relied is to be preferred by the Court to the presumption which prima facie exists that the Permanent Secretary did form the opinion stated in the Detention Order.

Counsel for the petitioner subjected the affidavit of the Permanent Secretary to an extremely critical examination. He contended that paragraph 9 of the affidavit, which purports to state the ground upon

which the Permanent Secretary formed the opinion of the necessity to make the Detention Order, was vague and uncertain, and even meaningless. In Counsel's submission, this assertion of a vague and meaningless ground was in itself an indication that the making of the Order was influenced by an intention to facilitate an investigation and interrogation, and not by the opinion stated in the Order itself.

Consideration of this submission and of matters which were urged in support of it has led me to the conclusion that it is based on certain assumptions which are not tenable in the circumstances of this case.

As to the meaning of the statement in paragraph 9, it is not as obscure as Counsel thought. The paragraph states that the detainee came to be suspected of having obtained large sums of money in Ceylon by the illegal sale of foreign exchange abroad ; that this payment abroad appeared to be inextricably connected with other transactions consisting of the smuggling of foreign exchange, and that statements recorded in the course of investigations into the other transactions appeared to indicate that they were connected directly or indirectly with the affording of financial assistance for insurgent activities. Upon such grounds, it would not be unreasonable or irrational for the authority responsible for public security to form the opinion that the activities of the detainee and the other persons engaged in illegal currency transactions may have been, and if continued may be, directly or indirectly of assistance to insurgents.

One assumption involved in Counsel's submission is that the Permanent Secretary had an obligation to disclose in his affidavit the grounds upon which he formed the opinion requisite for the making of the Detention Order. But Counsel himself conceded towards the end of the hearing that at the least a prima facie case of bad faith has first to be established by the petitioner, before there could be an onus on the Permanent Secretary to establish his good faith. Thus, at the stage when the affidavit was filed, there was no obligation on the Permanent Secretary to state the grounds of his opinion, even if he could do so without prejudice to the interests of security. No adverse inference can therefore be drawn from the circumstance that the grounds actually stated in the affidavit may be vague or incomplete.

Counsel argued that because paragraph (5) of Regulation 18 requires an Advisory Committee to inform a detainee of the grounds of his detention, the Permanent Secretary should be able to disclose the grounds to this Court. His failure to make an adequate disclosure is, so Counsel argued, a sign of bad faith. There is in my opinion more than one misconception upon which this argument depends.

In the first place, paragraph (5) of Regulation 18 does not require the grounds for detention to be stated unless the detainee has first himself made objections to an Advisory Committee. In the instant case, we are not aware that objections were made to an Advisory Committee by this detainee, and even if they were in fact made, we are not aware of the

grounds which the Advisory Committee thereupon stated to the detainee in terms of paragraph (5). Even if there be substance in Counsel's contention that the vagueness or insufficiency of the grounds stated to a detainee by an Advisory Committee can constitute a reason for suspecting bad faith in the making of a Detention Order, we are not called upon in this case to consider any grounds stated by an Advisory Committee.

The contention of Counsel to which I have lastly referred depended largely on certain decisions in India concerning Orders for preventive detention. The Constitution of India, in declaring the fundamental right of personal liberty, contains two important fundamental provisions :—

Art. 21.

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art. 22 (1).

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Art. 22 (5).

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest apportunity of making a representation against the order.

In the case of *State of Bombay v. Atma Ram*[1] (A.I.R. 1951, S.C. 157) the Supreme Court of India observed thus :—

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court..... We are of opinion that this Constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of the privilege under clause (6) of Article 22. That not having been done in regard to the ground mentioned ....., *the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21.*"

These observations were approved in a later case reported in A.I.R. 1957, S.C. 164. In my understanding, the principle recognized by the Supreme Court of India is that if the making of a Detention Order is not accompanied by a statement of grounds which satisfies the requirements of Article 22 (5), then the Detention Order itself is vitiated for the reason specified in Article 21, namely that the detention is not in accordance with the procedure

[1] *A. I. R. (1951) S. C. 157.*

established by law. In other words, a Detention Order in India, which is not accompanied by a due statement of the grounds of detention is void as being in breach of Article 21 of the Constitution.

It is now apparent that any resemblance between the purely *conditional requirement* in our Regulation 18 for a statement of grounds by an Advisory Committee, and the *peremptory Constitutional requirement* contained in Article 22 of the Constitution of India, is only superficial, and has led to a serious misconception. It suffices to add that any omission of the Permanent Secretary (even if there be such an omission in the instant case) to furnish grounds for detention in an affidavit, which need not have been filed at the stage when he filed it, cannot be compared with the failure on the part of a detaining authority in India to comply with a provision of the Constitution designed for the protection of a fundamental right.

This Court cannot ignore the fact that there had been early this year an actual armed insurrection in Ceylon, in an attempt to wrest power by force, that this attempt was put into action in numerous areas, that it had to be resisted by the Armed Forces of the State with foreign assistance, and that many lives were lost during these operations. When such conditions actually prevail, considerations of liberty have necessarily to be outweighed by the interests of the security of the State. And when action is taken by the authority entrusted with the protection of those interests, in purported pursuance of Emergency powers, such action does not fall to be tested by the Courts with the meticulous care and anxiety ordinarily devoted to cases of alleged infringements of personal liberty. The statement of Lord Finlay L.C. in *Rex .v. Halliday*[1] (A.C. 1917, p. 269) makes this clear :—

> "It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law."

As already stated, the case for the petitioner receives its strongest support from the undoubted fact that the arrest of the detainee was accompanied and followed by investigations and interrogations by the Criminal Investigation Department and by the seizure of books and documents from his home and the office of his Company. But the question is whether the fact that such investigations and interrogations did take place controverts the truth of the opinion stated in the Detention Order.

Counsel made much of the circumstance that the arrest and interrogations were made by the Criminal Investigation Department. But I see nothing significant in that circumstance ; the Court is aware that the Criminal Investigation Department has ordinarily to be responsible for investigations of matters affecting the security of the State, and

[1] *1917 A. C. 269.*

that questioning of detainees at the office of the Criminal Investigation Department was conducted in 1966 when a political conspiracy was suspected.

Again, regulations 51 and 52 of the Emergency Regulations expressly provide for the questioning of persons detained and for the removal of such persons to appropriate places for such questioning. If a particular individual is detained on suspicion that his activities had been or may be prejudicial to the public safety or public order, it is reasonable and natural that investigations and interrogations must follow concerning his own involvement in such activities, and the involvement of his associates. Indeed it would be strange if a detention is not succeeded by investigations of this nature.

I have referred in the course of this judgment to some of the averments contained in the affidavit of the Permanent Secretary, and I have observed that in accordance with the provisions of Cap. 24 of the Civil Procedure Code, the Court is entitled to take into account averments in such an affidavit.

In the instant case, as Viscount Maugham stated in *Liversidge*, compliance by the Permanent Secretary with the provision of the Statute under which he purported to act must be presumed unless the contrary is proved. The Court had therefore to commence by presuming the good faith of the Permanent Secretary. That being so, the material in paragraph 9 of the Permanent Secretary's affidavit has served merely to explain a matter which was in any event covered by the presumption.

Even if the fact that intensive investigations and interrogations did take place, could have led the Court to an inference that the Detention Order was made for an ulterior purpose, the affidavit serves to explain what had in the first instance to be presumed from the order itself, namely that the Permanent Secretary entertained some suspicion that the activities of the detainee may directly or indirectly be connected with the prevailing conditions of insurgency.

The only other averment in the Permanent Secretary's affidavit which I take into consideration is that in paragraph 12, which refers to an admission by the detainee that he had paid a sum of Rs. 1,729,000/- to certain foreign nationals in Ceylon in consideration of payments of foreign currency illegally made abroad to the credit of the detainee. With regard to this matter, the petitioner himself alleged, in paragraph 15 of his affidavit, that officers of the Criminal Investigation Department had questioned the Manager of Hirdaramani Limited with a view to ascertaining whether the Company had any transactions with a foreign Firm carrying on business in Colombo. Accordingly there is material in the petitioner's own affidavit to indicate that suspicion existed that a very large sum of money has been made available illegally by the detainee to foreign nationals, and the averment in the Permanent Secretary's affidavit serves only to explain a matter already referred to by the petitioner. The matter itself is of the utmost gravity and cannot

be compared to minor infringements of our currency laws. If a foreign Firm did not choose to exchange foreign currency in this country through normal banking channels, there might surely be justification for the suspicion that there was an intention to conceal their acquisition of Ceylon rupees, and a further intention to apply the funds thus acquired to secret purposes.

Lastly the Permanent Secretary has stated on oath in his affidavit that he acted in good faith because he had formed the opinion expressed in the Detention Order. He has also stated on oath, what has been repeated by the Attorney-General in Court, that the material upon which he formed his opinion cannot be disclosed in the public interest. These statements relate to matters the correctness of which the Court could ordinarily assume. In addition, however, the Permanent Secretary has stated that he is prepared to make the relevant material available for the perusal of the Court. Although we did not call for the disclosure of this material, I must regard the offer of disclosure as a mark of good faith.

I hold that the matters on which the petitioner has relied do not suffice to rebut the presumption that the Detention Order was made because the Permanent Secretary formed the opinion which is stated in the order. The preceding part of this judgment has disposed of the grounds upon which the application for the writ of habeas corpus was made by the petitioner. But as this has been in the nature of a test case it is necessary to consider certain arguments of the Attorney-General to the effect that the Court has no jurisdiction to inquire into the validity or good faith of a Detention Order which is valid in its face and applicable to a particular detainee.

The Attorney-General firstly relied for this argument on s. 8 of the Public Security Ordinance, which contains the following provision :—

> " No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court."

Similar provision, which in my opinion is apparently merely repetitive, is contained in paragraph (10) of Regulation 18 of the Emergency Regulations.

In the case of *Smith v. East Elloe Rural District Council*[1] (1956 A.C. 736), the House of Lords considered two provisions of an Act relating to the compulsory acquisition of land. Paragraph 15 of a Schedule to the Act provided that a person desiring to question the validity of a compulsory purchase order may within six weeks from the date of the order make an application to the High Court in respect of the order. Paragraph 16 provided that, subject to the provisions of paragraph 15, a compulsory purchase order shall not be questioned in any legal proceedings whatsoever. The majority of the Court held that after the expiration of the time limit

[1] *(1956) A.C. 736.*

specified in paragraph 15, the plain prohibition in paragraph 16 precluded the questioning of the validity of a compulsory purchase order, because that paragraph ousted the jurisdiction of the Court. The majority rejected the argument that paragraph 16 had no application if a compulsory purchase order had been made in bad faith.

The correctness of the decision in the *Elloe* case just cited was however doubted in the judgments of the House of Lords in the case of *Anisminic Limited v. Foreign Compensation Commission*[1] (1969) 2 A.C. 147. In this case there was a provision similar to that contained in s. 8 of the Public Security Ordinance providing that the determination of a Compensation Tribunal shall not be questioned in any Court ; but a majority of the House of Lords held that such a provision did not oust the power of the Courts to inquire into the question whether the Tribunal had acted within its jurisdiction. In view of the apparent conflict between two decisions of the House of Lords on the construction of provisions corresponding to s. 8 of the Public Security Ordinance, I find myself unable to reach with certainty a firm opinion as to the scope of s. 8. But I will assume, on the authority of the *Anisminic* case, that s. 8 has not achieved the purpose claimed for it by the Attorney-General.

The Attorney-General's argument, that the Court has no power to inquire or decide whether or not the Detention Order was made for an ulterior purpose, was supported on yet another ground. He referred firstly to s. 5 of the Public Security Ordinance, which empowers the Governor-General on the recommendation of the Prime Minister to make such Emergency Regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community; and in particular to the provisions of s. 5 (2) (*d*) that emergency regulations may provide for amending any law or for suspending the operation of any law. In pursuance of these powers, Regulation 55 of the Emergency Regulations provides that " Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation."

Counsel for the petitioner did not enter any challenge of the *vires* of Regulation 55. The Regulation purports to exclude the operation of s. 45 of the Courts Ordinance in the case of *any person who is detained or held in custody* under the Emergency Regulations, and thus to preclude a Court from issuing a Writ of habeas corpus in any such case.

The contention of Counsel for the petitioner in regard to the construction of Regulation 55 was based substantially on the decision in the *Anisminic case* to which I have already referred. That decision, which construed a provision that a determination of a Compensation Tribunal shall not be

[1] *(1969) 2 A. C. 147.*

called in question, was to the effect that the provision applied only to a valid determination, but not to a determination by which the Tribunal had misconstrued the statutory definition of its own jurisdiction.

I propose to consider only the judgment in this case of Lord Wilberforce ' which Counsel for the petitioner rightly praised for its clarity and forcefulness.

The judgment commences with emphasis on the circumstance that there had been a determination *by a tribunal* :—

> " In every case, whatever the character of a tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute : at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area ; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter..... Although, in theory perhaps, it may be possible for Parliament to set up a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country. The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability upon its decisions. These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal."

Lord Wilberforce thereafter referred to several earlier cases which involved the construction of statutes under which inferior Courts or tribunals or bodies have to exercise the power of deciding facts. In such cases if a certain state of fact must be shown to a tribunal to exist, before the tribunal can exercise its jurisdiction, then the ascertainment of the proper limits of the tribunal's power of decision is a task for the Court (Farwell L. J. 1910, 2 K. B. 859 at p. 880).

In considering the application of the principle recognized in the *Anisminic* case, the fact that the House of Lords was there concerned with the jurisdiction *of a tribunal* is worthy of repetition. But it does not follow that this principle is applicable in testing the validity of every *executive order*. Underlying many of the submissions of counsel for the petitioner in the instant case was his impression that an executive order is " inferior " to a judicial or quasi-judicial order, and that the former is therefore even more susceptible to review by the Courts than the latter. The error in such an impression, particularly in relation to an order

made under a provision like Regulation 18, is noted in the judgment of Scott L. J. in the Court of Appeal in *Greene's case* [1] (1941, 3 A. E. R. 104 at page 109) :—

"The whole regulation deals with a topic which is necessarily of a highly confidential character. It invites a decision, at least as a preliminary to action, by an executive Minister of the Crown who occupies a position of the utmost confidence, who has at his disposal much secret information which ought not to be made public—above all during a war—who is under a duty to keep that information and its sources secret, and finally, who cannot be compelled in any court to divulge what he considers ought not, in the national interest, to be divulged. All the King's courts recognise that inhibition and enforce it. The arguments which have been advanced in some of the cases rest expressly or impliedly on a contention that the Home Secretary, in making an order, is exercising a quasi-judicial function as if he had to hear both sides before coming to a decision on the preliminary issue. That contention is, in my view, wrong. His capacity is purely executive, as it is when deciding whether or not to deport an alien, as was pointed out by the Earl of Reading, L. C. J., in *R. v. Leman Street Police Station Inspector, Ex p. Venicoff*, and I adopt his words, at p. 80 :

'..... the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order. The responsibility is his'."

These observations were approved in the House of Lords in *Liversidge*. Lord Wright also commended the "wise words" of Lord Finlay in *R. v. Halliday* [2] (1917 A.C. 260) that the rule as to construing penal statutes in favour of the liberty of the subject has no reference to a case dealing with an executive measure by way of preventing a public danger. Lord Wright himself added :—

"It is essentially a matter of expert and instructed conclusion or suspicion whether or not the acts in which the subject has been concerned were such as to be prejudicial to the public safety or defence of the realm. Even more obviously is the belief or decision that by reason thereof it is necessary to exercise control over him a matter of executive discretion. It is clear that the control is preventive, not punitive, and that the action is not judicial, but executive. The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand the suspect's right to personal liberty

[1] *(1941) 3 A.E.R. 104 at 109.* [2] *(1917) A.C. 260.*

and on the other hand the safety of the state in the dire national peril in which during this war it has stood and stands." 1941, 3 A. E. R. at p. 375).

The observations which I have just cited confirm my opinion that the decision in the *Anisminic* case has no bearing on the construction to be placed on Regulations 18 and 55 of our Emergency Regulations. I need only add that Regulation 55, in expressly excluding the power of this Court to issue the Writ of Habeas Corpus, has done something which (in the words of Lord Wilberforce) " has so far not been done " in England.

What then was the purpose of Regulation 55, the validity of which (as I have already stated) was not challenged in this case ? We have here to construe not an enactment of Parliament and the intention of 155 Members, but a Regulation which has been validly made by the Governor-General on the recommendation of the Prime Minister, and therefore it is the duty of the Court to ascertain the intention of the Prime Minister in recommending the enactment of Regulation 55 and the intention of the Governor-General in enacting it.

The precise question which then arises is whether the intention underlying Regulation 55 was that the writ of habeas corpus will not lie in a case in which a person is detained because the Permanent Secretary has made an order for his detention. In this context it is in my opinion significant that only one officer is authorised by Regulation 18 to make a Detention Order, and that this one officer serves directly under the Prime Minister herself. It is also significant that Regulation 18 itself requires a detainee to be informed of his right to make representations to the Prime Minister ; this is presumably in order that the Prime Minister will consider any such representations, and that in an appropriate case such representations can result in the release of the detainee. Section 51 (2) of our Constitution provides that each Permanent Secretary shall, subject to the general direction and control of his Minister, exercise supervision over the Department or Departments in the charge of his Minister. I have no doubt whatsoever that if, upon representations made by a detainee, the Prime Minister directs that he should be released from detention, the Permanent Secretary will in fact authorise the release.

Every Permanent Secretary is appointed by the Governor-General on the recommendation of the Prime Minister. It is to me unthinkable that the Prime Minister would recommend for appointment as her own Permanent Secretary a person, other than one in whom she reposes the utmost confidence. I cannot imagine that the Prime Minister would have recommended the conferment of the power to make Detention Orders on the Permanent Secretary, without the confidence that he will exercise that power in good faith, and that if any control of the exercise of that power were considred necessary that control is vested in the Prime Minister herself by s. 51 of the Constitution.

My opinion for these reasons is that the intention with which s. 55 was enacted depended upon a presumption that the Permanent Secretary will act in good faith when he makes a Detention Order, and that accordingly there would be no need to permit the Courts to consider the only possible issue which can be raised when a Detention Order valid on its face is produced before the Courts, namely the issue of good faith. It seems to me that to attribute any different intention to the Prime Minister in recommending the enactment of Regulation 55 and to the Governor-General who then enacted it would be arbitrary and contrary to common sense.

Lord Atkin in his dissenting judgment in the *Liversidge case* stated that in England the laws are not silent in times of war. With the utmost respect I agree that the laws are never silent, but Regulation 55 is itself a law which surely was intended to speak. If the intention was that it should speak to the effect which suggests itself to me so obviously, then the Courts should not flout that intention. The only alternative is that for which Counsel for the petitioner contended, namely that Regulation 55 achieves nothing at all. That is an alternative which a Court must not adopt, save upon irresistible compulsion.

Counsel for the petitioner argued that, even if there had been an intention to prevent the Court from inquiring into the good faith of the Permanent Secretary, Regulation 55 had failed to carry out that intention; the expression "any person detained or held in custody under any emergency regulation" refers, in Counsel's contention, only to a person *validly* detained or held in custody and NOT to a person *actually* detained or held in custody.

Counsel pertinently referred to the case of a person being arrested and held in custody in purported pursuance of Regulation 19, which empowers *any* police officer or *any* member of the armed forces to arrest and detain "any person who is committing or has committed or whom he has reasonable grounds for suspecting to be concerned in or to be committing or to have committed any offence under any Emergency Regulation."

Counsel urged with much justification that Regulation 55 could not have been intended to oust the jurisdiction of the Courts in the case of an arrest which is not validly made under Regulation 19. There is firstly the fact that Regulation 19 confers powers of arrest and detention *on every police officer and every member of the armed forces;* that being so it would be quite unreasonable to assume that Regulation 55 was intended to oust the jurisdiction in Habeas Corpus to inquire into the validity of an arrest purporting to be made under Regulation 19.

More importantly, the form and subject-matter of Regulation 19 is such that an arrest would be lawful, only if facts which justify the arrest do actually exist, or if there are reasonable grounds for suspecting that such facts actually exist. The language of Regulation 19 clearly reveals an intention that an objective test has to be applied in determining whether an arrest is or is not valid, and the consequent intention that

the courts will apply that test and determine whether the arrest was valid. When therefore Regulation 55 purports to oust the jurisdiction of this Court to inquire into the validity of such an arrest, there immediately arises the question whether there was indeed an intention in Regulation 55 to over-ride the intention revealed in Regulation 19. In my opinion, that question has to be answered in the negative ; *firstly*, because the intention revealed in Regulation 19 must prevail unless it is negatived in the clearest possible terms ; and *secondly*, because a Court must hesitate to attribute to the Prime Minister and to the Governor-General the manifestly unreasonable intention that any and every arrest by any member of the Police or Armed Services must necessarily be accepted as valid by the Courts, if such member merely asserts that he acted under Regulation 19.

It is of interest in this connection to refer to what is probably the first instance, when it was sought in Ceylon to exclude the operation of s. 45 of the Courts Ordinance in relation to the exercise of Emergency powers. The Emergency Regulations of 1958 (Gazette No. 11,376 of June 27, 1958) contained in Regulation 29 (1) the same power to make a Detention Order as is now conferred by the current Regulation 18. Paragraph (10) of the former Regulation 29 provided as follows :—

> " Section 45 of the Courts Ordinance shall not apply in regard to any person detained in pursuance of an order made under paragraph (1) of this regulation."

Thus the intention of the former Regulation was to oust jurisdiction only in relation to detention orders made by the Permanent Secretary, and not in relation to arrests and to custody in consequence thereof. The draftsman of the present Regulation 55 has altered the language of the former Regulation 29 (10) by adding the words " held in custody ". I much doubt whether this addition sufficed to displace the intention inherent in the present Regulation 19 that the lawfulness of an arrest has to be determined by the Courts by the application of an objective test.

When, however, the context of Regulation 18 is compared with that of Regulation 19, *independently of Regulation 55*, significant distinctions are clear. The power of detention is conferred by Regulation 18 on a single officer of high rank, who is required by the Constitution to act under the immediate direction and control of the Prime Minister ; whereas the power of arrest under Regulation 19 is conferred on literally thousands of members of the Services who are subject only to some remote control. Next, it had to be conceded that a Court has no power to inquire into the reasonableness or validity of the opinion which induces the making of a Detention Order under Regulation 18 ; whereas the language of Regulation 19 clearly predicates that the Courts will apply an objective test in determining whether or not an arrest referred to in that Regulation is valid. Further, Regulation 18 gives to a detainee a statutory right of recourse to the Prime Minister ; whereas the right of course implicit in Regulation 19 is to the Courts.

In view of these differences which distinguish Regulation 18 from Regulation 19, my opinion that Regulation 55 could not have been intended to cover cases of arrests under Regulation 19, does not justify the further opinion that there was also no intention in Regulation 55 to cover Detention Orders made by the Permanent Secretary. The latter intention is so manifest and so reasonable that imperfections in the drafting of Regulation 55 cannot be permitted to defeat that intention.

In the opinion of my brother Samerawickrame, a possible purpose for which the draftsman introduced Regulation 55 was "to preclude the possibility of a review by a Court of a valid Detention Order." But even if the draftsman's purpose was to offer a superfluous and even presumptuous instruction to this Court, his purpose is not in fact achieved: for, if it be correct that the Court does have power to review an invalid Detention Order, the Court must inquire into *every Order which is challenged* and decide whether or not it is invalid. Indeed, in this case, my brothers and I have in fact reviewed what we have decided to be a perfectly valid Detention Order.

I hold that Regulation 55 deprived this Court of the power to review this Detention Order. I have myself reviewed the Order for two reasons. Firstly, because my brothers do not share my opinion as to the effect of Regulation 55. Secondly because an insistent and apparently confident challenge to the good faith of the Permanent Secretary was made in this case, and I consider that in the public interest this Court should pronounce upon the merits of that challenge ; I believe the learned Attorney-General thought likewise.

I must repeat that the arguments of Counsel for the petitioner did not raise for consideration in this case the question whether Regulation 55 is *ultra vires* of the enabling power, or the question whether the Regulation is inconsistent with the Constitution or with powers directly or indirectly conferred on the Courts by the Constitution. But, on the assumption that Regulation 55 is valid and effective, I am compelled to the conclusion that the jurisdiction conferred by s. 45 of the Courts Ordinance is ousted by Regulation 55, in the case of a Detention Order purporting to be made by the Permanent Secretary under Regulation 18. On this ground the petitioner's application has to be dismissed.

Alternatively, even if the jurisdiction of this Court is not ousted by Regulation 55, this application has to be dismissed on the ground that the petitioner has failed to establish a prima facie case that the Detention Order was made for an ulterior purpose.

G. P. A. SILVA, S.P.J.—

I agree that the Application for a writ should be dismissed.

It is not often that the Courts are called upon to decide questions such as the one that has arisen before us where a subject complains against restraints upon his freedom resulting from the exercise of executive

discretion. Such a situation invariably arises either during a war or during any other state of emergency declared by the Government. Even during a war or state of emergency, no less than in normal times, it is in these courts that the subject will seek refuge against any unjustifiable encroachments on his liberty and it is the duty of the courts to entertain his complaint and inquire into it with meticulous care. In the determination of the problem, however, the extraordinary conditions of a varied character that prevail during times of emergency compel the court to steer a course which preserves the fundamental freedom of the subject without overlooking at the same time the paramount consideration of the safety of the state. The latter consideration imposes on a court the unusual burden of maintaining an impeccable balance between the liberty of the citizen and possible danger to the State often involving the court's entry into areas of uncertainty due to lack of information which the court well knows is available to the executive but cannot for obvious reasons be given publicity in a court of law. These considerations have given rise to judicial pronouncements by eminent judges that are even conflicting in appearance but are reconcilable on reflection and tend to tilt the balance in favour of the executive when in doubt. This principle is based on the implied condition that the officer to whom the power to restrict the liberty of the subject is confided in the interest of the security of the state acts in good faith. I wish to illustrate this principle from extracts of two judgments of Lord Atkin. In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*,[1] he said :—

> " Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. "

In *Liversidge v. Anderson*[2], he made the following observation in his dissenting judgment which reflected his view in a case where the subjective test was applicable :—

> " The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that—and who could dispute it, or, disputing it, prove the opposite ?—the Minister has been given complete discretion as to whether or not he should detain a subject ".

[1] *(1931) A.C. 662 at 670.*

[2] *(1941) 3 A.E.R. 338.*

Regulation 18 (1) (*a*) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971 made under section 5 of the Public Security Ordinance provides :—

> " Where the Permanent Secretary to the Ministry of Defence and External Affairs is of opinion with respect to any person that, with a view to preventing such person from acting in any manner prejudicial to the public safety ..... it is necessary so to do, the Permanent Secretary may make order that such person be taken into custody and detained in custody. "

It is in pursuance of the powers vested in him by this Regulation that the Permanent Secretary to the Ministry of Defence and External Affairs issued an order that Mr. P. Bhagavandas Hirdaramani be taken into custody and detained. This order was issued to Mr. Wettasinghe, Assistant Superintendent of Police, who accordingly took the corpus into custody on 1st September, 1971 and detained him at the C. I. D. Headquarters, a place authorised by the Inspector General of Police by virtue of his powers under Regulation 18 (3) of the said Regulations.

Although the original contention of counsel for the petitioner was that a verbal challenge *simpliciter* by the petitioner of the absence of good faith on the part of the Permanent Secretary was sufficient for the court to call upon the Permanent Secretary to prove his good faith, he later conceded that it was necessary for the petitioner to establish a prima facie case that the detention order was not made in good faith. He further submitted that in order to succeed in establishing the absence of good faith it would be sufficient for the petitioner to show that in making the order for detention he had an ulterior purpose, the purpose suggested in this case being to facilitate the investigation of illicit dealings in foreign exchange. Counsel was unable to point to any specific direct evidence on which he could rely to establish this prima facie case but confidently asserted that there was a number of circumstances the inferences from which led to the irresistible conclusion of this ulterior purpose being the cause of the order for detention.

The following were the circumstances from which he sought support for his contention :—

(1) The duty of carrying into effect the detention order was entrusted to an officer of the C. I. D. even though the regulations permitted any police officer or member of the Ceylon Army, Royal Ceylon Navy or the Royal Ceylon Air Force to carry such order into effect.

(2) The Inspector-General of Police authorised the detention of the corpus in the C. I. D. Office, even though it was possible for him to authorise a prison, and he was taken there at 6.30 in the morning immediately after the arrest.

(3) The C. I. D. Officer who took him into custody also searched the house of the corpus and took certain documents into custody such as personal diaries and cheque counterfoils.

(4) Prime Minister's reply to Mr. Hirdaramani on 20th September that necessary investigations were not over.

(5) Averment in para 10 that investigations related to transactions in contravention of Exchange Control Regulations.

In regard to this last circumstance, I would wish to observe that, taken by itself, there is an element of speculation in the averment because the petitioner was not making this averment from personal knowldege but from conjecture or inference. Counsel however relied on the absence of a contradiction of this averment in the affidavit of the 3rd respondent, Mr. Wettasinghe, to show that the averment had substance. In considering whether a *prima facie* case of lack of *bona fides* has been established for the respondent to answer, however, I should like to consider the circumstances relied upon by the petitioner without reference to or support from the respondent's affidavit.

Counsel's contention is that the totality of these circumstances establishes that the reason for taking the corpus into custody was not to prevent him from acting in any manner prejudicial to the public safety but for the collateral or ulterior purpose of facilitating an investigation into alleged illegal exchange control transactions. If the last circumstance which I have just referred to is excluded as being based upon an intelligent conjecture at the highest, there is no other circumstance relied on which either by itself or in association with the other circumstances would lead to an inference that the C. I. D. were inquiring into an exchange control offence. The inference in my view falls short of that on the affidavit of the petitioner alone. If, however, the contention was that the continuous investigation at the office of the C. I. D. supported the inference that the corpus was detained in order to facilitate an investigation, but not an investigation of a particular offence, it is possible to agree with that contention. I can also see the force of such an argument if it is used for the purpose of leading up to the next argument that, upon a strict construction, the regulation does not permit a person to be detained if the only purpose is to facilitate an investigation even if the offence investigated was that of promoting or assisting insurgent activities against the established Government. For, if the regulation permitted such detention it would be lawful for a witness who has useful information to be detained for the purpose of investigating an offence committed by others. The regulation is clearly intended to detain a person only for the purpose of preventing him from acting in a manner prejudicial to the public safety. This however does not resolve the difficulty. The contention presupposes that the carrying out of an investigation by interrogating the corpus is inconsistent with the detention of the corpus for the purpose of preventing him from acting in a manner prejudicial to the public security. While an investigation

in the C. I. D. office is no doubt consistent with the corpus being only suspected of an offence, whether it be exchange control or insurgency, it is not at all inconsistent with the Permanent Secretary holding the opinion that he was concerned in acts prejudicial to the public safety and that his detention was necessary in order to prevent him from continuing such acts. For, quite apart from regulation 65 authorising the questioning of a detainee, it is most natural that if the corpus was detained because such an opinion was held, he would also be a storehouse of useful information for the Government and the most searching investigation was immediately demanded in the interest of security in order to discover what part he played, if he did, whether there were other participants in the offence and, if so, what their activities were. The contention of counsel is tantamount to saying that if the corpus was locked up in a prison without any investigation such action would not have indicated the *mala fides* of the Permanent Secretary while the immediate and continuous interrogation indicated a collateral purpose of facilitating inquiries into an offence unconnected with the insurgent movement or even into the insurgent movement itself and supported *mala fides* on his part. In fact this seemed to be the line of reasoning of counsel when, in answer to me, he stated that he would have been in a worse position to support this application if the detenue was taken from his home direct to a prison and confined than his having been detained at the C. I. D. office. With much respect, I do not see any substance in this contention. In my view, in a highly dangerous situation such as the one that this country experienced in the early part of this year it was most urgent and essential that any person who was suspected of assisting the insurgent movement and taken in for preventive detention should also be immediately interrogated with a view to obtaining all the information that the authorities could have collected. It would be idle to suggest that such interrogation negatived *bona fides* on the part of the official who issued the order of detention because the interrogation pointed to the collateral purpose of conducting or assisting an investigation.

Support was claimed for this contention from the letter sent by the Hon. Prime Minister to Mrs. Hirdaramani dated 20th September 1971 in reply to an appeal by the latter to release the corpus or, in the alternative, to subject him to house-detention pending further investigations. Much reliance for the contention that the corpus was detained in order to facilitate investigation was placed on the words " ..... it would not be possible to release Mr. Hirdaramani as yet, since it has been reported that the necessary investigations are not yet over ". The submission was presumably based on the absence of a reference in the Prime Minister's letter to anything other than investigations, the indication that the corpus could not be released because investigations were not completed and the omission of any intention to detain him after the completion of investigations. I cannot say that counsel was not justified in advancing such an argument in his support and the construction which he has

chosen to put on the relevant words of the letter is one which has merit. But this is certainly not the only construction. The letter is, I think, a statesmanlike and non-committal reply which gives the impression of the Prime Minister having an open mind and not stating one word more than is necessary and expedient in the circumstances. The words used in this letter leave the door open for a release of Mr. Hirdaramani after investigations are completed if they do not disclose his involvement in any suspected offence or to detain him if the investigations disclose the desirability of further preventive detention. The letter is of course silent as to what the offence is that is under investigation, but does not negative the offence being the same as the one contemplated by the Permanent Secretary when he issued the order for detention.

The position taken up in the letter is not at all inconsistent with an opinion being held by the Permanent Secretary that the offence regarding which Mr. Hirdaramani was suspected warranted preventive detention in the interest of public safety. It does not require much convincing for us to be satisfied that in order to justify an order under the relevant regulation the Permanent Secretary need only have some information on which he can conscientiously hold an opinion. It is not necessary for him to have evidence which establishes a case against the detainee beyond reasonable doubt as a court should have before convicting a person accused of an offence. This is essentially the reason why the holding of an investigation can be absolutely necessary when a person is taken in for detention. Considered from one angle, quite objectively, an immediate investigation is the surest index of the *bona fides* of the officer ordering the detention. The Police Service, of which the Criminal Investigation Department is a branch, being one controlled by the same Permanent Secretary who is authorised by the emergency regulations to make an order for detention, it is fair to assume that immediate and continuous investigations were set in motion by him. It seems to me that this was the only reasonable course for the Permanent Secretary to adopt in order either to confirm his opinion that the detention of the corpus was necessary or to revise his opinion and order his release if the investigations falsified the information on which he formed his original opinion and proceeded to make the order for detention. In other words, an investigation is a *sina qua non* after a person is taken in for detention under these regulations and such investigations could be a transparent index of the good faith of the Permanent Secretary and can turn out to be entirely in the interest of the detainee. This conclusion which I am compelled to reach seems to me to militate against the view contended for by counsel for the petitioner that the detention at the C.I.D. office and repeated investigations prove the presence of a collateral purpose in detaining Mr. Hirdaramani and present a *prima facie* case of absence of *bona fides* on the part of the Permanent Secretary and that the establishment of *prima facie* case shifts the burden on him to justify the order for detention.

This is not all. There are certain other factors to be gathered from the affidavit of the petitioner which weigh on the side of good faith of the Permanent Secretary rather than the opposite of it. Hirdaramani Ltd. and Hirdaramani Industries Ltd. of which Mr. Hirdaramani who is under detention is the Managing Director, have presumably been formed and registered with the blessing of the Government and the Government would not ordinarily be hostile to him without good reason. It is stated that these mercantile and commercial undertakings have been declared essential services under the Essential Services Order 1971 read with Emergency (Miscellaneous Provisions & Powers) Regulations and this fact tends to show that the Government recognised the services rendered by these establishments and was prepared, *inter alia*, to protect them against any hostile acts by their employees. The petitioner has further stated that Mr. Hirdaramani has at all times rendered assistance to the Government to preserve public order and safety. The Permanent Secretary who has issued the order is himself the one who is in charge of defence and internal security and if what is stated is true he is most unlikely to make an order which is so prejudicial to Mr. Hirdaramani unless he could not avoid it. It must also be assumed that this Permanent Secretary acted with full responsibility and, no malice or ill will on his part towards Mr. Hirdaramani being alleged, the court has to act on the strong presumption of his good faith in issuing the detention order.

I would like to emphasise again at this stage that I have so far considered the submissions of counsel for the petitioner on the basis of the latter's affidavit alone, not taking into account the averment that " the interrogation by the said Police Officers has been with regard to certain transactions which are alleged to be in contravention of the Exchange Control Act " for the reasons which I have stated earlier. I would observe that the wording of this averment which I have quoted above itself suggests that the fact referred to in the statement is not one of which he has personal knowledge and the evidence regarding this fact would be hearsay. For this reason it would not be legitimate for this court to act on that averment for the purpose of deciding the issue whether the Permanent Secretary was acting in good faith or not.

I shall now consider the impact of the averment in the affidavit that the offence investigated was one in contravention of the Exchange Control Act, on the basis that counsel submitted. The submission was that one of the circumstances showing a collateral purpose in the detention of the corpus was the fact that the investigation concerned an exchange control offence. He submitted that he was entitled to rely on this circumstance even though the affirmant's averment may be hearsay or conjecture because the fact averred is not contradicted in Mr. Wettasinghe's affidavit. I must say that this mode of circumventing hearsay does not commend itself to me. Proper and admissible evidence

must be placed before a court by the party relying on such evidence and it is not open to a court to treat hearsay as evidence because of support from the silence of the opposing party.

Even if one were to consider the rest of the averments in the affidavit in conjunction with a bare statement that the investigation related to an exchange control offence, many approaches would appear to suggest themselves in determining the question before us. In the first place having regard to the date of the detention, it is not irrelevant for the court to consider the question in the background of the insurgent movement in this country which compelled the Government to clamp down an islandwide curfew and to enact certain emergency regulations the scope of which itself is under consideration in these proceedings. It is reasonable to think that the success of this movement largely depended on the supplies of arms and ammunition which are incapable of being produced in this country. Foreign exchange of considerable proportions would be an essential prerequisite for obtaining such supplies from abroad and such foreign exchange cannot be obtained through legitimate channels. An offence against the Exchange Control Act would therefore be a natural and probable concomitant in an effort at a successful prosecution of the insurgent movement. In these circumstances an exchange control offence would be something germane to the insurgent movement and not one which is foreign to it. Even if the interrogation of the corpus related to exchange control offences therefore the investigation which was in train was not inconsistent with his involvement in activities which would in some way have assisted the insurgent movement and justified his detention. It is not as it were that the material available disclosed that the Police were investigating an offence and interrogating the corpus in regard to a matter which could not possibly have had the remotest connection with insurgent activities in which event there would be substance in a suggestion that the Permanent Secretary ordered the detention under the cloak of preventing the corpus from acting in a manner prejudicial to public security while in reality he did so in order to assist the investigation of an offence which could not conceivably have any bearing on insurgency. For the petitioner to rely on the circumstances enumerated by counsel for establishing a *prima facie* case of bad faith against the Permanent Secretary it is not sufficient in my view if the circumstances relied on only indicate a possibility of bad faith. If a conclusion of good faith is equally possible, that is to say, if the circumstances show that the Permanent Secretary could have honestly held the opinion which he did before making an order for detention the submission of counsel must fail. One must remember that an opinion is not something which is the equivalent of proof. The Permanent Secretary could therefore have formed an opinion even if the material available fell short of what is required for proof. In the words of Lord MacMillan in *Liversidge v. Anderson* (supra) " The question is one of preventive detention justified by reasonable probability, not of criminal conviction, which can only be justified by legal evidence. As I have indicated, a court of law

manifestly could not pronounce upon the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge, both of facts and of policy, which he had. However, the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him ". The burden on the petitioner to show that such material was not available to the authority ordering detention, which counsel for the petitioner offered to discharge when he made an application to cross-examine the Permanent Secretary on his affidavit, was both heavy and, to my mind, impracticable. It is impracticable because the material available to the Permanent Secretary can be legally withheld from the court as so clearly set out in the observation of Lord MacMillan, which I have just referred to. It is this same idea that Lord Justice Atkin gave expression to in the quotation which I referred to earlier.

As no *prima facie* case has therefore been made out against the good faith of the Permanent Secretary the onus does not shift on him to satisfy the court to the contrary. A return valid on its face and so accepted in this case by the petitioner, is an adequate answer to the petition. This view is supported by the decision in *R. v. Home Secretary ex parte Greene* [1] in which it was held that where the return, or the affidavit showing cause exhibits an order of commitment regular on its face, an affidavit by the Home Secretary is unnecessary, and that where an order regular on its face is produced, the onus is on the applicant to prove facts necessary to controvert it. The dictum of Lord Justice Goddard with which Lord Justice Scott and Lord MacKinnon agreed and which was later cited with approval in some of the judgments of the House of Lords expresses this position very clearly :—

> " I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. "

On the basis of this opinion and for the reasons which I have set out earlier, I think that the affidavit of the petitioner, even considered by itself, contains the justification for the Permanent Secretary's order for detention and would lend no support for the counsel's contention of bad faith.

While this conclusion disposes of the matter under consideration I desire to make a few observations on several other aspects which were dwelt upon by counsel during the very full argument that was addressed to us on both sides of the Bar. It can safely and reasonably be assumed that no public officer, wielding such onerous responsibilities as a Permanent Secretary to the Ministry of Defence and External Affairs, would venture upon the drastic and ill-advised course of ordering the detention of a

[1] *(1941) 3 A. E. R. 104.*

citizen of very high standing in the commercial world, if it was only for an infringement of an exchange control offence, and expose himself to the consequences of legal proceedings, even if no other consequence ensues. If such an assumption is correct and one proceeds on the further assumption that in interrogating the corpus the Police were investigating an exchange control offence of some magnitude which had further ramifications and implications, the possibility or even the probability of the investigation also having a close connection with the insurgent movement cannot be excluded. Viewed from this angle too therefore it can be said that the affidavit of the petitioner has not established a *prima facie* case of bad faith by pointing to a collateral purpose as being the object of the detention order in such a manner as to cast an onus on the first respondent to rebut it.

A glance at the affidavit of the first respondent has the effect of confirming the view which I have already formed on the affidavit of the petitioner. After referring to the widespread armed insurrection in this country which took place in April 1971 and strained to the utmost the military, administrative, financial and other resources of the State he states in this affidavit dated 12th November 1971 (the date is important) that Police investigations into the insurgency and activities connected therewith have not yet been concluded and that the investigations made so far revealed that the insurgent movement has been organised and launched with large scale financial and matérial support. He goes on to say thereafter in the crucial paragraph 9, much criticised by counsel for appellant as being vague, evasive and unintelligible in parts, to use only a few epithets, that certain material placed before him by the Police satisfied him of the following points :—

(1) That the detainee had unlawfully obtained a large sum of money in Ceylon by making or arranging payment abroad to the account or to the order of a person carrying on unlawful foreign exchange transactions.

(2) That this payment appeared to him to be inextricably connected with certain foreign exchange smuggling transactions under investigation.

(3) That the statements recorded in the course of that investigation appeared to him to indicate that the unlawful transaction directly or indirectly helped to finance the insurgent movement and its activities in Ceylon.

In paragraph 10 he states that at all material times he was of the view that the unlawful and illegal smuggling of currency in the manner, magnitude and circumstances mentioned would constitute a danger to the security and financial stability of the country. In paragraph 11 he states that he was of opinion with respect to the detainee that, with a view to preventing him from engaging in similar activities in the future and from acting in any manner prejudicial to the public safety or the maintenance of public order, it was necessary that he should be taken

into custody and detained and that on about the 31st August 1971 he made such order in good faith. If what is stated in paragraph 9 is correct it shows that the detainee had made available large sums of foreign exchange abroad to a person carrying on unlawful foreign exchange transactions in return for a large sum of money received by the detainee in Ceylon. Paragraph 12 shows that the detainee had made available to certain foreign nationals in Ceylon whose identity was undisclosed a sum of over 1¾ million rupees in return for payments to him in foreign currency. The time, magnitude and the illegality of these transactions considered together lead to the irresistible conclusion at least that the detainee was a person who had a command of very large sums of money both here and abroad and that he did not mind the illegality of the transactions so long as he profited by them. The material does not of course show conclusively that the detainee directly financed insurgent activities by these transactions. Even if he definitely had no intention to assist such activities, he himself may not be in a position to deny that the money which was involved in these transactions would have found its way into the hands of those who were promoting the insurgent movement. For the purpose of issuing an order for detention in the exercise of his powers under regulation 18 however it is not necessary for the Permanent Secretary to have material before him which would support a conclusion that the corpus was in some way fanning the insurgent movement. It is quite sufficient if he formed the opinion that the illegal transactions admittedly carried on by the corpus had as their destination some place from which assistance was obtained for the insurgent movement in Ceylon. So that even if the corpus was unaware that by his illegal exchange deals he was assisting the insurgent movement, if such deals produced that result it would have been quite reasonable for the Permanent Secretary to form the opinion that the only way in which the security of the state should be safeguarded so far as the corpus was concerned was by detaining him in order to prevent him from illicit transactions in foreign exchange which ultimately assisted the prosecution of the insurgent movement. I have examined the implications of this affidavit not because I consider it obligatory on the Permanent Secretary to meet any case established by the petitioner but partly to show how the view which I had formed on the petitioner's affidavit is supported and confirmed by the first respondent's affidavit and partly to consider whether there is merit in the submission of counsel for the petitioner that the first respondent's affidavit at its best does not show any responsibility of the detainee for promoting insurgent activities.

I should at this stage wish to say a word or two on the application by counsel for the petitioner to be allowed to cross-examine the first respondent on his affidavit so that he may show that the Permanent Secretary could not have held the opinion which he states in his affidavit as well as in his order for detention that he did. Even if a stage was reached in this case for the Permanent Secretary to be called upon to prove his good faith and the application of counsel for the petitioner

to cross-examine him on the affidavit was allowed it can be demonstrated that that course would have been futile, as was visualised in the observation of Lord MacMillan which I referred to earlier. The averments in the affidavit show that the Permanent Secretary had some material which for reasons of public security or public interest he was unable to disclose. The only way that counsel could have shown the court what he expected to show was by asking the Permanent Secretary what the information was that he had and perhaps what the sources of that information were. To this question the Permanent Secretary would have pleaded privilege and the court was in duty bound to allow him to refrain from answering that or any similar question. No useful purpose would therefore have been served by granting any application to cross-examine the Permanent Secretary on his affidavit. This is the reason why I stated earlier that the displacing of a presumption of good faith would be impracticable.

The only other matter regarding which I wish to express my views is the question whether an order made under the Emergency Regulations referred to is justiciable or not in view of the provisions of sections 5 and 8 of the Public Security Ordinance and regulations 18 (10) and 55 of the Emergency Regulations under consideration. Regulation 18 (10) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971 states that an order for detention made by the Permanent Secretary to the Ministry of Defence & External Affairs under regulation 18 (1) shall not be called in question in any court on any ground whatsoever. Regulation 55 makes provision to exclude the application of section 45 of the Courts Ordinance (which empowers this court among other things to issue Writs of Habeas Corpus) to persons detained or held in custody under an emergency regulation.

It is a well established rule of construction that statutes as well as subsidiary legislation which have the effect of infringing on the liberty of the subject must be very strictly construed. It behoves the court therefore in interpreting the above provisions to examine very carefully whether in the final form in which they appear they preclude inquiry by the court. It is beyond argument that the courts can inquire into a complaint by an aggrieved party, in the first instance, that any particular rule, regulation or by-law is *ultra vires* or that an enactment or rule has been misapplied in his case. It is also the undoubted duty of the court, after such inquiry, either to pronounce on the validity of the rule or regulation, or, where the validity is not in doubt, to decide *inter alia* whether any power conferred on the executive by such rule or regulation has been exercised in terms of such provision strictly construed. In this case counsel for the appellant does not even contend that the Permanent Secretary in terms of regulation 18 (1) has no power to make an order of detention, nor does he contend that the court's power to question an order are not taken away by regulation 18 (10) and Regulation 55. His only contention is that such an order should be validly made and when so made and only then will the provisions contained in regulation 18 (10) and regulation 55 preclude a court from calling such order in

question. For such an order to be validly made the Permanent Secretary must in my view form an opinion in good faith, as he appears to have done in this case, and in forming such opinion he may even take an incorrect decision by reason of wrong judgment on his part; but such an incorrect decision is not justiciable by reason of the provisions of section 8 of the Public Security Ordinance and regulation 18 (10) and, in the instant case, also by reason of regulation 55. If of course he acts in bad faith in making an order under regulation 18 (1), the provisions taking away the right of the court to call the order in question would not apply. On a very simple analysis of the language involved in this regulation, it seems to me that in such an event the court's jurisdiction to interfere remains untouched because, when the Permanent Secretary acts in bad faith, he has obviously not made the order for detention because he is of opinion that the person in respect of whom the order is made is likely to act in a manner prejudicial to the public safety and that he should be prevented from so acting but because the Permanent Secretary has some other obvious reason. Many such reasons can be imagined, the simplest of which is that the officer is actuated by a personal motive. To take a very simple illustration, supposing the Permanent Secretary had an inveterate enemy who, upon a charge of attempted murder of the Permanent Secretary had been sentenced to a period of imprisonment and the Permanent Secretary had information from the jail authorities that he had been threatening to achieve what he unsuccessfully attempted earlier on his return from jail. Supposing thereafter this man completes his term in prison and is released at a time when these emergency regulations are in operation and on the very day he returns home the Permanent Secretary issues an order ostensibly under regulation 18 (1) in the usual form stating that in his opinion this man's detention is necessary with a view to prevent him from acting in any manner prejudicial to the public security. In such a situation if an application for Habeas Corpus is made to this court in respect of this man who is detained under that order and evidence of the man's threats against the Permanent Secretary is available to court and the Permanent Secretary is unable to justify the legality of his order it would not be open to this court to say that it will not question this order because of section 8 of the Public Security Ordinance or Regualtion 18 (10) or Regulation 55 of the Emergency Regulations. However appreciative the court may be of the predicament of the Permanent Secretary and however solicitous it may be in regard to his personal safety, the court being also a servant of the law, it will be compelled to grant the writ. The remedy for the Permanent Secretary will be to provide himself with the necessary security through appropriate legal proceedings or otherwise but not to make a detention order which will be illegal and perverse and will be a patent abuse of the power granted by the regulation. I have of course given a very extreme case which is most unlikely to occur but such instances often help to illustrate the principle which one is concerned with. But of course cases do occur of colourable orders which on their face may bear the stamp of legality but whose real object will be bared on

even a superficial examination. Other instances may occur where even after very close examination the object of the order may be left equivocal. The *Soblen Case*[1] is a good illustration of such a borderline case as I am referring to. It was there that Lord Denning expressed the view that an act which is professedly for a legal purpose can in fact be for another collateral purpose and that a court can go behind the order to see if the executive had exceeded its jurisdiction and that if the Home Minister failed to furnish an answer his order can be upset. I am also reminded in this connection of the dictum of Lord Goddard to the effect that if the court does not interfere there is no remedy for a subject against an order which is clothed in the garment of satisfaction and that if the onus is not discharged the order must be held to be invalid. The argument in Soblen's case amply illustrated that there may well be cases of persons detained on the ground that their detention was necessary for the defence of the realm who have also committed other serious offences and that there may be cases where it is extremely difficult for a court to decide whether the detention was done in good faith or not and where the presumption of good faith of the officer ordering such detention is the factor that tilts the balance in favour of non-interference by the court.

It will thus be seen that mala fides will be an implied exception to any exclusionary provision of this nature which on the face of it precludes a court from questioning the validity of an order made thereunder. When a subject complains to court of an order restraining his liberty therefore a court is obliged not merely to take a look at the face of the order but to go behind it and satisfy itself whether it has been validly made. It will be most uncharitable to the legislature of a country in any part of the world for a court to hold that, in enacting a provision similar to those under consideration, its intention was to preclude a court from examining an order made under circumstances such as those I have endeavoured to illustrate. So to do would expose the courts to the criticism of interpreting the provision not in accordance with the reasonable intention of the legislature but in the teeth of it.

When, of course, an order is validly made by the Permanent Secretary and the court upon inquiry into the complaint of a person detained, is satisfied of its validity, I have no doubt that this court cannot call it in question on any ground whatsoever. That is to say, where in fact the Permanent Secretary is honestly of opinion with respect to any person, that, with a view to prevent such person from acting in any manner prejudicial to the public safety, it is necessary to do so, he may make an order that such person may be taken into custody and detained in custody, and when he has made such an order, it is not for a court to inquire into the reason for his order, the information on which he formed the opinion, the sources of that information and such other matters. I have already dealt with the reasons for this unprofitable and futile exercise which no Court, conscious of the scope of its duty will indulge in.

[1] *(1962) 3 A. E. R. 373.*

It is not as it were that the regulations did not provide a remedy for a subject affected adversely by such an order which is validly made and regarding which the jurisdiction of the court has been taken away by regulations 18 (10) and 55. The regulations while precluding a court from questioning such an order, have made available to the subject two other remedies in order to redress a justifiable grievance within a limited area. Regulation 18 (4) provides for a person aggrieved by such an order to make his objections to an Advisory Committee consisting of persons appointed by the Governor-General and regulation 18 (6), (7) and (8) prescribes the procedure to be followed by such Advisory Committee and empowers the Permanent Secretary to revoke the order for detention made by him after consideration of the report by the Advisory Committee. There is a second and more speedy means of redress which is provided by regulation 18 (5). This makes it obligatory on the Permanent Secretary to secure and afford an opportunity to every person against whom an order is made under the regulation the earliest practicable opportunity to make to the Prime Minister in writing any representations which he may wish to. Even though the regulation does not set out what remedy the Prime Minister can grant, this provision to my mind can only mean that there is an implied power conferred on the Prime Minister, after looking into the representations, to order the Permanent Secretary to revoke his order of detention and release the person against whom the order is made. I can only think that the purpose of this entire provision, even though it is silent on that aspect, is to vest in the Prime Minister, the supreme executive authority in the land, the power to revise the order of the Permanent Secretary if for any reason the Prime Minister takes the view that the order should not have been made with respect to the person making the representations. The Prime Minister will of course have the advantage of obtaining from the Permanent Secretary or otherwise all the information that is required which would not be made available to a court. It would also be presumably appropriate for the Prime Minister to forward any representations made by a party aggrieved to the Advisory Committee for suitable action in terms of the powers given to the Committee. It seems to me that there is a difference which is very important between the functions of an Advisory Committee and the implied powers conferred on the Prime Minister. While the Advisory Committee's functions end with the submission of a report to the Permanent Secretary, which he may consider but not necessarily act on, the Prime Minister will be able, after consideration of representations made, to order the Permanent Secretary even to release the detainee from his detention. That would exhaust the remedies available to a person validly detained and no court will be able to question the right of the Permanent Secretary to make such an order.

In regard to an invalid order which I have referred to earlier it is my view that neither regulation 18 (10) nor regulation 55 ousts the jurisdiction of a court to pronounce on it. It was of course open to the legislature, or the rule making authority as the case may be, if that was its intention,

to couch the relevant laws and regulations in such language as to preclude a court from questioning the validity of an order made or purported to be made by the Permanent Secretary but it has chosen not to do so. A reasonable inference therefore is that it did not wish to encroach on the functions of the judiciary and also preferred an impugned order of detention to be fully inquired into and decided upon by a court untrammelled by considerations which would necessarily influence the executive. Quite apart from the undesirability of the executive having to decide a complaint against itself, the view may have been taken that the executive did not have the machinery that a court had to inquire fully into complaints of such varied character as may be made by detainees and that the aggrieved party would also not have the opportunity of full legal representation which he will enjoy before a court of law. These reasons point to an intention not to take away the jurisdiction of the court from going into an order which is not validly made under the regulation, quite apart from the construction on the wording of the regulations which I feel compelled to put irrespective of these considerations. In a matter such as this where the liberty of the subject is involved, another fundamental rule of construction is that where two interpretations are possible a court should always lean towards the interpretation which preserves the liberty of the subject and not on the side which restricts it.

Finally, there is another matter arising from the presence of regulation 19 which makes the conclusion inevitable that the jurisdiction of the court to grant a writ of Habeas Corpus is not shut out by regulation 55 in respect of an illegal order. Regulation 19 empowers any police officer, any member of the Ceylon Army, Royal Ceylon Navy or Royal Ceylon Air Force, or the Commissioner of Prisons or any Superintendent, Assistant Superintendent or Probationary Superintendent of a Prison, or any Jailor or Deputy Jailor, or any Prison Guard, or Prison Overseer, or any other person authorized by the Prime Minister to search, detain for the purpose of search or arrest without warrant any person who is committing or has committed or whom he has reasonable grounds for suspecting to be concerned in or to be committing or to have committed an offence under any emergency regulations. These categories would numerically be very large. The powers conferred are in fact infinitely wider than the power of detention conferred on the Permanent Secretary by regulation 18. It is inconceivable that none of these officers numbering perhaps several thousands will act in good faith and that they will never at least err in their judgment in depriving a person of his liberty by exercising the powers of detention granted by this regulation. It is unthinkable that in making these emergency regulations there was an intention to deny any person aggrieved by a wrongful detention the right of access to a court or to take away the powers of the court to question the validity of the detention and, on being satisfied that such detention was illegal, to grant a writ of Habeas Corpus. And yet this will be the effect of regulation 55 if it is construed without any qualification because no distinction in its application is made in this regulation between a detention under regulation 18 and a detention under regulation 19.

In other words, regulation 55 in the present form would apply in the same way to a person detained on the order of the Permanent Secretary under regulation 18 as well as to a person detained by any police officer, any officer of the Ceylon Army, Royal Ceylon Navy or Royal Ceylon Air Force in any part of Ceylon not to speak of the other categories of officers enumerated in regulation 19. If one were to give regulation 55 the meaning that the power of the Supreme Court to issue a writ of Habeas Corpus in terms of section 45 of the Courts Ordinance is taken away in the case of a person detained or held in custody under any emergency regulation, irrespective of whether he is detained under a valid order or not, or in consequence of a wrongful arrest or not, the resulting position would be that such person will be indefinitely denied access to a court to secure his liberty even though his detention is illegal. No court can subscribe to a view that necessarily involves such a consequence. The requirement to produce such a person before a court of competent jurisdiction under regulation 20 appears to be for the limited purpose of obtaining an order from such court to detain the person produced in a prison and not to give him an opportunity to complain to that court regarding any other grievance such as unlawfulness of an arrest or detention. This is the reason why the construction, that this regulation must be read as meaning that section 45 of the Courts Ordinance shall not apply in regard to any person validly detained in custody under these regulations, is inescapable. Else we would find ourselves in a situation in which no person arrested and detained by the most junior officer belonging to any category enumerated in regulation 19 will have any remedy in a court of law.

It is to be noted that even the limited safeguards provided in regulation 18 for a representation to be made to the Prime Minister or to the Advisory Committee are not available to a person detained under regulation 19. This is yet another factor which makes the conclusion irresistible that it could never have been the intention of regulation 55 to exclude the jurisdiction of the court to issue a writ of Habeas Corpus in terms of section 45 of the Courts Ordinance in respect of a person who is the victim of an unlawful detention. It is also significant in this connection that a provision similar to regulation 18 (10) is not appended to regulation 19. This omission is strongly indicative of the intention in the regulations that, while a legal order of detention by the Permanent Secretary under regulation 18 (1) cannot be called in question in any court, any person arrested and/or detained by any of the numerous officers contemplated in regulation 19 can complain to a court against such arrest and/or detention and the court is not precluded from inquiring into the legality thereof. Moreover, the test in regulation 19 is clearly objective and is justiciable. The logical result thereafter would be that, in those cases where a person is unlawfully arrested and/or detained, the court will have the power to make an appropriate order. That being the reasonable construction of regulation 19 which, by implication, preserves the power of the court to intervene in respect of an unlawful arrest and/or detention.

I cannot see how, in interpreting regulation 55 a conflicting construction can be arrived at, which would oust the power of the court to intervene. This process of reasoning too confirms me in the view I have already expressed that regulation 55 is intended to remove the court's jurisdiction to issue a writ of Habeas Corpus only in respect of a lawful detention under any emergency regulation and not otherwise.

In conclusion, if I may summarise the question before us, in considering the issue of a writ of Habeas Corpus in the field of the exercise of executive discretion, three standards of requirement arise for a court. Two of these postulate an objective test while one of them postulates a subjective test. Where objective tests are contemplated, the court has naturally a wider area of inquiry before considering the question of exercising its power to issue a writ, while in a case where the subjective test is applicable, the area of inquiry is extremely narrow. In the first two cases, the conditions precedent to the exercise of the power by the executive which is complained against are capable of proof and, more often than not, there would be no objection to the disclosure of facts bearing on such conditions precedent in a court. One example would be where, in England, an order of deportation can be made, for instance, against an alien. If the person concerned takes up the position that he is not an alien but a British subject, the court will be entitled to ask for, and the Home Secretary will be able to furnish, proof of the conditions precedent, namely, that the person complaining is an alien. If the Home Secretary fails to prove the existence of the condition precedent, a writ will of course lie. The second category would be where a person, for instance, can be detained by the executive when he has committed an offence or when there is reasonable ground for suspecting that he was concerned in such offence. This seems to be the situation contemplated in our regulation 19 referred to earlier. Here too, for the purpose of deciding whether or not to issue a writ, when an application is made for the purpose, the court will be obliged to call for an explanation from the officer who was responsible for the detention as to what the offence was that the detainee committed or was suspected of being concerned in. Here, except perhaps in a few cases where a full disclosure may not be desirable in the interest of public security, the facts will be capable of proof and the court will be in a position, after such proof, to decide whether there was justification for the act of detention on the part of the executive. The third category involves only a subjective test and it is that category which we are faced with in this case. The order to detain the corpus is based only upon an opinion held by the Permanent Secretary. If he held the opinion before making his order, it is immaterial whether his opinion was right or wrong, provided it was honest, that is, in good faith. Secondly, the information which induced the opinion is not such as can be divulged in a court for reasons of public security. It is here that the following dicta of Lord Maugham and Lord MacMillan

In the *Liversidge Case* (supra), already cited more fully by My Lord the Chief Justice in his judgment, would apply even with greater force to the question before us :—

> " To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a Judge in a court of law."

per Viscount Maugham.

> " But how could a court of law deal with the question whether there was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fact ? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share. As Lord Parker said in *The Zamora* : ' Those who are responsible for the national security must be the sole judges of what the national security requires.' It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public '."

per Lord MacMillan.

It is obvious that, in this instance, there is a gulf which places the executive out of the reach of a court of law up to a point and a person complaining against an excess of power by the executive can only invite the court's interference by proof of mala fides on the part of the officer concerned, at least to the extent of creating in the mind of the court substantial and disquieting doubts as to his bona fides, which would warrant an explanation. Such proof, as I have endeavoured to analyse earlier, has not been forthcoming in this case, and the application for a Writ of Habeas Corpus must therefore necessarily fail.

SAMERAWICKRAME, J.—

The petitioner has averred that the Detention Orders made by the 1st respondent directing the taking into custody of B. P. Hirdaramani were illegal, null and void and that his detention in custody was illegal, wrongful and without legal authority and that he has not in law been detained under any of the provisions of the Emergency (Miscellaneous Provisions and Powers) Regulations. He accordingly prayed for a mandate in the nature of a Writ of Habeas Corpus ordering the respondents to bring before this Court the body of the said B. P. Hirdaramani to be dealt with according to law.

Regulation 18 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971, reads :—

> " Where the Permanent Secretary to the Ministry of Defence and External Affairs is of opinion with respect to any person, that, with a view to preventing such person—
>
> (*a*) from acting in any manner prejudicial to the public safety, or to the maintenance of public order, or to the maintenance of essential services ; or
>
> (*b*) from acting in any manner contrary to any of the provisions of sub-paragraph (*a*) or sub-paragraph (*b*) or paragraph (2) of regulation 38 or regulation 24 of these regulations,
>
> it is necessary so to do, the Permanent Secretray may make order that such person be taken into custody and detained in custody."

Mr. S. Nadesan, Q.C., who appeared for the petitioner conceded that it is not open to this Court to consider the sufficiency or insufficiency of the grounds on which the Permanent Secretary may form an opinion that it is necessary to make a detention order in respect of a person. The validity of an order does not depend on the existence of sufficient or logical grounds : if the Permanent Secretary does in fact form an opinion, whatever the grounds on which that opinion is based, the consequent detention order will be valid. The opinion of the Permanent Secretary making the order as to the matters specified in the Regulation is the only condition for the exercise of his powers. The Court cannot therefore substitute its own opinion for that of the Permanent Secretary.

It is however open to a party challenging a Detention Order to show, if he can do so, that the Permanent Secretary never had the opinion that it was necessary to make an order for the detention of the person named and that the Detention Order was not made because he had formed an opinion as required by the Regulation but for an ulterior object. For example, the order would not be in terms of the Regulation and would be a sham if the Permanent Secretary were to make it for a purely private purpose such as the detention of the rival to the woman he loved. Again, if there is overwhelming ground for believing that no reasonable Permanent Secretary could form the opinion that it was necessary to make a detention order in respect of the person affected, it might show that the Permanent Secretary was acting in bad faith and that the detention Order was not made on the basis of an opinion required by the Regulation but from an improper purpose.

The Detention Order was to the following effect :—

> " By virtue of the powers vested in me by paragraph (1) of Regulation 18 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 6 of 1971, I, Arthur Rajkumar Ratnavale, Permanent Secretary to the Ministry of Defence and External Affairs, being of opinion that, with a view to preventing the person specified in Column I of the

Schedule to this order and residing at the place shown in the corresponding entry in Column II of that Schedule from acting in any manner prejudicial to the public safety and to the maintenance of public order, it is necessary so to do, do hereby order that such person be taken into custody and detained in custody."

The position of the petitioner is that the Permanent Secretary had not in fact formed the opinion which he stated in the Detention Order but that he had made the order for the ulterior and collateral purpose of facilitating investigation. At first Mr. Nadesan submitted that it was to facilitate an investigation into offences committed in contravention of the provisions of the Exchange Control Act. At a later stage of the argument he was content to take the position that it was to facilitate an investigation into the origin, financing and working of the insurgent movement and the identity of the persons concerned in it. The petitioner was thus alleging both that the 1st respondent had made the order in bad faith and that he had falsely set out in the Order that he had formed the opinion that it was necessary to make a detention order when in fact he had not formed such an opinion but had made the order for an ulterior purpose. He was in effect alleging fraud. The burden of proving such an allegation is on the party who makes it and it is a heavy burden to discharge. The raising of mere suspicion is not sufficient—vide *Ashutosh v. State of Delhi*[1], A.I.R. 1953 S.C. 451.

Mr. Nadesan sought to establish his case in the following way. First he made the point that the facts set out in the petitioner's affidavit showed that from the moment the detainee was taken into custody an investigation commenced. He then submitted in reliance on certain Indian decisions that preventive detention excluded or at least was inconsistent with investigation and that detention and investigation could not stand together. He therefore invited the Court to draw the inference that the detention was effected for the purpose of facilitating the investigation.

There is no doubt that from the time that the detainee was taken into custody there was an intensive interrogation and investigation. In paragraph 14 of his affidavit the 1st respondent states :—

" Investigations into the origin, financing and working of the insurgent movement and into the identity of persons concerned in it, have been and are being made. The detainee has been questioned, in the course of these investigations more particularly in regard to his having made large sums of Ceylon currency available to foreign nationals in Ceylon."

I think that Mr. Nadesan's first point is established. I am however unable to agree with the submission he next made. There are no doubt Indian decisions which draw a distinction between preventive detention and " punitive " detention and hold that the nature of the former kind of

[1] *A. I. R. 1953 S. C. 451.*

detention is such that it is inconsistent with the investigation of an offence alleged to have been committed by the person detained. I think however that the situations in which such detention was ordered in India and the provisions relating to detention were different to the situation that obtained here and the regulations made under our Act. There was not in India, I think, at the times when those decisions were made widespread acts of insurgency and armed insurrection which threatened the security of the State itself. That such conditions obtained in Ceylon in April of this year this Court may even take judicial notice having regard to the Emergency regulations, the curfew, and the statutory orders made to deal with the situation and other circumstances which were notorious. In paragraphs 4, 5 and 6 the 1st respondent states :—

"4. On or about the 16th day of March, 1971, His Excellency the Governor-General, by reason of the existence of a state of public emergency, declared by Proclamation dated the 16th day of March, 1971, that Part II of the Public Security Ordinance shall come into operation in the interests of public security, the preservation of public order and the maintenance of supplies and services essential to the life of the community.

5. In April, 1971, widespread acts of insurgency took place throughout the length and breadth of the country straining to the utmost the military, administrative, financial and other resources of the State.

6. The armed insurrection, though brought under control, has caused great loss and damage to life and property, disorganised the administration in a number of areas, interfered with transport and communications and affected the distribution of food, fuel, and other articles essential to the life of the community. It has also seriously aggravated the financial plight of the country."

Where such conditions obtain and the origin of the conspiracy against the State has yet to be ascertained it appears to me that it is necessary not merely to detain persons to whom, in the opinion of the Permanent Secretary, Regulation 18 (1) applied but also to interrogate such persons and to obtain such information as it was possible to elicit in regard to the origin, financing and working of the insurgent movement. There are provisions in the Regulations that provide for such interrogation and investigation.

Regulation 65 states :—

"(1) Notwithstanding anything in any other law to the contrary, a person taken into custody and detained under any emergency regulation may, during the period of such custody and detention, be questioned by any police officer, or any other officer authorised by the Commander of the Army, Captain of the Navy or Commander of the Air Force, and it shall be the duty of the person so questioned to answer the question addressed to him.

(2) For the purpose of questioning any person taken into custody and detained under paragraph (1) or for any other purpose connected with such questioning, any officer referred to in paragraph (1) of this regulation may remove such person from any place of detention or custody and keep him in the temporary custody of such officer for a period not exceeding seven days at a time."

Regulations 51, 52 and 53 are :—

" 51. (*a*) A police officer or a person duly authorised under the Emergency Regulations, investigating into an offence under any emergency regulation shall, notwithstanding anything to the contrary in any other law have :—

(i) the right to question any person including a person detained or held in custody under any emergency regulation and to take such person from place to place for the purpose of such investigation during the period of such questioning, and

(ii) the right to take charge from any person so questioned any article or other thing including a document necessary for the purposes of such investigation.

(*b*) It shall be the duty of every person to give all assistance to a police officer or other person duly authorised, investigating into an offence under any emergency regulation ; and every person questioned under sub-paragraph (*i*) of paragraph (*a*) of this regulation shall truthfully answer all questions put to him and notwithstanding anything to the contrary in any other law shall disclose all information including the contents of any document, touching the subject matter of the investigation, irrespective of the capacity in which such person has received such information or knowledge of the contents of such document.

(*c*) It shall be the duty of every person questioned under paragraph (*a*) of this regulation to deliver to the police officer or a person duly authorised investigating into an offence under any emergency regulation any article or other thing including a document in the custody or possession of such person when directed so to do by such police officer or person duly authorised.

(*d*) A contravention of any of the provisions of this regulation or the breach of any duty imposed thereunder shall be an offence under the emergency regulations punishable under regulation 45 of these regulations.

52. During the period that any person is held in detention or custody a police officer investigating into an offence under any emergency regulations shall have a right of access during reasonable hours to any such person for the purposes of such investigation.

53. The powers of a police officer under any emergency regulation shall be in addition to and not in derogation of his powers under any other written law."

It appears to me that the factual situation in Ceylon at the relevant time required a combination of detention and investigation: the law allowed it. The Indian decisions relied on by the petitioner do not therefore apply. It may be that detention under Regulation 18 (1) is not preventive detention as commonly understood. This is, however, no more than the necessary consequence of the seriousness of the situation. The liberty of the subject is beyond doubt important but it must yield and give place to the interests of public security—*salus populi suprema lex.* Where the interests of public security permit it there is preserved to the detainee immunity from interrogation otherwise than under the safeguards provided for in the rules of Criminal Procedure. Where however danger to the public security is pressing such immunity must be sacrificed in the interests of the public good.

I am therefore unable to draw from the fact of investigation in this case the inference, contended for by Mr. Nadesan, namely, that the Detention Order had been made for the purpose of facilitating an investigation and not because of an opinion that it was necessary to detain the corpus to prevent him from acting in a manner prejudicial to the public safety. Logically too the fact that an investigation into the conduct of a person is necessary in no way excludes a possible necessity of his detention in the interests of public security.

Mr. Nadesan also submitted that the statements in the affidavit of the 1st respondent relating to the grounds for the opinion he had formed were vague and he invited the Court to draw an inference adverse to the 1st respondent. He commented in particular on paragraph 9 which reads:—

"On a consideration of certain material placed before me by the Police I was satisfied that the detainee had unlawfully obtained a large sum of money in Ceylon by making or arranging payment abroad to the account or to the order of a person carrying on unlawful foreign exchange transactions and that this payment appeared to me to be inextricably connected with certain foreign exchange smuggling transactions under investigation and the statements recorded in the course of that investigation appeared to me to indicate that these unlawful transactions directly or indirectly helped to finance the insurgent movements and its activities in Ceylon."

As I have indicated earlier this Court cannot substitute its own opinion for that of the Permanent Secretary nor can it examine the sufficiency or the weight or the logical relevance of the reasons for which the Permanent Secretary formed his opinion. In this paragraph of his affidavit he sets out grounds for his opinion which are neither irrational nor in any way absurd. The fact that they are not grounds which would appeal to the judicial mind when it considers the possible guilt or

complicity of the detainee is irrelevant. The Permanent Secretary is primarily concerned not with probable or even possible guilt of the detainee but with steps and precautions necessary to prevent and avoid danger to the public security.

Again, it is apparent from the affidavit of the 1st respondent that he was constrained by reasons of public security from placing before Court all the matters that were before him when he formed his opinion. The learned Attorney-General too stated from his place at the Bar that the interests of public security prevented the disclosure of all relevant facts. As he put it, all that was possible was for the Permanent Secretary to lift a corner of the veil and disclose sufficient facts to show that he in good faith formed an opinion. The necessity to maintain a cloak of secrecy over relevant matters may well account for vagueness in the affidavit. It does set out the seriousness of the situation in which the country was placed in that there were widespread acts of insurgency throughout the length and breadth of the country straining to the utmost the military, administrative, financial and other resources of the State as well as armed insurrection. The insurgent movement had been organised and launched with large scale financial and material support. There was material to show that the detainee had unlawfully obtained a large sum of money in Ceylon by means of an illegal foreign exchange transaction and that this payment was inextricably connected with other unlawful transactions which had directly or indirectly helped to finance the insurgent movement. There was an admission by the detainee that he had obtained a sum of Rs. 1,729,000 from certain foreign nationals in Ceylon whose names had to be withheld in the public interest in consideration of payments of foreign currency made abroad illegally to his credit or orders. The investigations into the insurgency and activities connected with the insurgency had not yet been concluded. The learned Attorney-General submitted that from the material it appeared that the activities of the detainee and other persons engaged in illegal currency transactions may reasonably be apprehended, if permitted to continue, to be directly or indirectly of assistance to insurgents and other subversive forces. There is substance in this submission.

As the making of a Detention Order is an official act there is a presumption that such an order has been validly made and therefore that it has been made in good faith. Upon a consideration of all the evidence and material before us I am of the view that the petitioner has failed to make out his case that the 1st respondent had not in fact formed an opinion in terms of Regulation 18 (1) in regard to the necessity of detaining the said B. P. Hirdaramani. I therefore hold that the Detention Order was validly made.

Mr. Nadesan also sought to clutch at a procedural straw. He submitted that the petitioner had made out a prima facie case and that the onus had shifted to the 1st respondent to establish the validity of the Detention Order. He submitted that it was because he had made out a prima facie case that he obtained the order for notice of the

application to issue to the respondents. Even assuming that these submissions are correct there was no onus on the 1st respondent to put before this court the reason for the opinion which he had formed and to satisfy this Court as to the validity, soundness, sufficiency or reasonableness of the reasons. The reasons or grounds of his opinion are for the 1st respondent's sole decision and are not justiciable by this Court. The only onus on the 1st respondent is to prove that he did in fact form the opinion contemplated by Regulation 18 (1) in respect of the detainee.

In certain enactments an order may be made only when certain facts objectively exist. Where an authority has power to make an order to deport an alien, the person against whom the order is made must be in fact an alien. It is not sufficient that the authority thought he was an alien. It is the objective fact and not the subjective opinion that is the condition precedent to the making of the order. In a well known Nigerian case there were several objective facts that were conditions precedent. In *Rex v. Secretary of State for Home Affairs, Ex parte Greene* [1], (1942) 1 K. B. 87 at 102, Scott L. J., referring to the Nigerian case 1931 A. C. 662, said :—

> "In the Nigerian case the relevant ordinance conferred on the Governor jurisdiction to deport if and only if, certain antecedent propositions were established or admitted as extrinsic facts : (1) the person to be deported must have been a native chief, (2) he must have been deposed ; and even then he could not be deported unless (3) there was a native custom requiring him to leave the area where he had been chief.
>
> It was held that the Ordinance in question made each fact a condition precedent to any exercise by the Governor of the power to deport and that each condition had to be established either by admission or proof before a Court. On none of the three was the Governor given by the Ordinance any power of discretionary discretion, nor did any question of confidential information arise."

In the case under consideration by us it is not an objective fact but the subjective opinion of the Permanent Secretary that is the condition of the exercise of the power. The question of confidential information also arises. Where an objective fact or facts must exist for a valid order to be made, a party disputing the order may dispute the existence of such fact or facts and if he makes out a prima facie case the onus will shift to the authority who made the order to show that the fact or facts which were conditions precedent to the exercise of the power of making the order did indeed exist. The reason appears to be that the authority has no jurisdiction to act unless the fact or facts did exist and once a prima facie case is made out tending to show that the facts did not exist, the authority had to prove that he had jurisdiction. It is not possible to assume that these considerations will apply where it is not an objective fact but a subjective opinion that is in question and the only matter that is justiciable is the good faith of the authority.

[1] *(1942) 1 K. B. 87 at 102.*

S. A. de Smith : Judicial Review of Administrative Action (2nd Edition) page 315 states, "If a discretionary power has been exercised for an unauthorised purpose it is generally immaterial whether its repository was acting in good faith or in bad faith. But where the courts have disclaimed jurisdiction to determine whether the prescribed purposes have in fact been pursued, because the relationship between the subject-matter of the power to be exercised and those purposes is placed within the sole discretion of the competent authority (as where a power is exercisable if it appears to that authority, or expedient for the furtherance of those purposes), they have still asserted jurisdiction to determine whether the authority has in good faith endeavoured to act in accordance with the prescribed purposes". There is in law a presumption of good faith in favour of an authority making an order and therefore the same consideration cannot apply as in the case of a challenge to objective facts which are conditions precedent.

I have dealt with this matter as there was a lengthy argument on it addressed to us by Mr. Nadesan. It appears to me however that the question of onus only arises where the evidence on either side is evenly balanced. In this case the petitioner has failed to make out the allegation made by him which was the basis of his application and upon all the evidence there is no difficulty in coming to a decision on this matter. Where such are the facts of a case, onus is immaterial. In *Robins v. National Trust Co*[1]., 1927 A.C. 515 at 520 Lord Dunedin said, "Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

I am therefore of the view that the Detention Order is valid and that B. P. Hirdaramani is lawfully detained under Regulation 18 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971.

Regulation 55 was cited to us. It reads: —

"Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation."

In view of my finding that B. P. Hirdaramani is detained under Regulation 18 (1) this clause will exclude the grant of relief under section 45 of the Courts Ordinance in his case. This is a further reason why the application for a writ of Habeas Corpus must fail.

What the position would be if the detention order was invalid and the detention of B. P. Hirdaramani was unlawful does not arise for consideration. As there has been argument on it I will briefly state my

[1] *(1927) A. C. 515 at 520.*

view. Clause 55 refers to a "person detained in custody" it does not state "purported to be detained" or "detained in custody under colour of any emergency regulation". This regulation takes away the right to habeas corpus. This is a valuable right for safeguarding individual liberty. A provision which restricts rights of this kind must be given no greater effect than the plain meaning of the words require. In *A. G. for Canada v. Hallet & Carey Ltd.*[1], 1952 A. C. 427 the Privy Council construed a provision and held that it did empower the taking away of a right but at page 450 Lord Radcliffe stated the general principle thus, "It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a strict construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the Court may properly lean in favour of an interpretation that leaves private rights undisturbed."

In respect of the provision which I am considering the position is stronger as the plain meaning of the words leads to an interpretation that would leave the right to the writ of habeas corpus undisturbed when the order of detention is invalid.

The question has been posed as to what has been gained by the inclusion of clause 55. It is no doubt true that in law the writ of habeas corpus will not issue to review a valid decision of a statutory authority. But it is also true that Courts sometimes tend to review such valid decisions. Amnon Rubinstein: Jurisdiction and Illegality at page 116 concludes a consideration of the topic with this passage :—

> "Logically, the writ of habeas corpus may issue only where the decision can be incidentally disregarded as a nullity ; experience shows that the courts, spurning logic, are ready to use the writ as a means of reviewing and, in effect, of invalidating an otherwise valid decision."

Section 45 of the Courts Ordinance empowers a writ to issue to bring up "the body of any person illegally or improperly detained." The use of the word "improperly" might be regarded as authorising a court to inquire into the propriety of a legal and otherwise lawful detention. Whether this is in law a possible view or not the draftsman may have included the clause to preclude any possibility of a review by court of a detention made by a valid detention order in view of past experience which, according to Rubinstein, showed that courts were sometimes ready to review valid decisions.

I am therefore of the view that Regulation 55 will not apply to the case of a person unlawfully detained under an invalid detention order made in abuse of the powers conferred by Regulation 18 (1).

I would therefore dismiss the application.

Application dismissed.

[1] *(1952) A. C. 427.*