JAYATILLAKE AND ANOTHER
v.
KALEEL AND OTHERS

SUPREME COURT.
FERNANDO, J., KULATUNGA, J. AND
WADUGODAPITIYA, J.
SC APPLICATIONS 1 & 2/92
FEBRUARY 3RD, 5TH, 6TH, 7TH AND 11TH, 1992.

Expulsion from membership of political party – Conduct violative of the provisions of the party Constitution – Signing of impeachment motion against the President and revoking the signatures – Recommendation of Disciplinary Committee of Party's Working Committee – Constitution, Articles 10, 14(a), 38(2)(a) and 99 (13)(a) – Constitutional right to sign Notice of resolution of impeachment – Signing the Notice without knowing contents – Understanding that no disciplinary action would be taken against those who retract – Right to lead oral evidence – Affidavit sworn before deponent's own Proctor – Delegation of powers – Natural justice – Audi alteram partem rule – Oral hearing – Fair hearing – "Observances" and "Explanations" – Internal discussion – Deceitful conduct – Misconduct – Rules 3(d), 17(2) of the Party Constitution – Promissory estoppel – Future misconduct – Bias.

Two members of Parliament, Ariyaratne Jayatilleke and S. A. Muthu Banda the petitioners in applications No. 1 and 2/92 respectively challenged their expulsion from the United National Party a recognised political party hereafter referred to as the "party" in their respective applications made in terms of Article 99(13)(a) of the Constitution. In late August 1991 a sudden crisis occurred in the party in consequence of a notice of resolution (hereafter referred to as "the notice") for the removal of the President in terms of Article 38(2)(a) of the Constitution, being given to the Speaker. Eight members of Parliament were expelled from the Party by a resolution of the Working Committee passed on 06.09.91. Petitions filed by them were dismissed in *Dissanayake v. Kaleel* SC (Special) Nos. 4 to 11/91 – S.C. Minutes of 03.12.91.

The petitioner in SC 1/91 (hereafter referred to as 1st petitioner) is an Attorney-at-Law and he was the Project Minister for Minerals and Mineral-based Industries. He admittedly signed the Notice and claims he did so in pursuance of a Constitutional right, power or authority. On 18.09.91 he resigned from his Ministerial post. On 19.09.91 he wrote to the Minister of Industries that he signed the notice on a *bona fide* basis without reading it and without understanding what it was all about. Earlier by letter dated 30.08.91 (R1) the two petitioners and 114 other members of the (UNP) Group informed the Speaker that they do not support the said Resolution and those of them who had signed it were withdrawing and revoking their signatures and consent to it and as thus the Resolution did not

have the requisite number of signatories under Article 38(2)(b), it should not be placed on the Order paper or Order Book of Parliament. On 02.09.91 the group passed a resolution (R2) emphatically declaring and confirming its confidence in the President and stating that the signatures of the Group and some members of the opposition had been obtained through misrepresentation and deceit and called upon the Speaker to reject the illegal, unconstitutional and malicious move to remove the President. This resolution was signed also by the two petitioners and the 114 others. R1 and R2 were handed over to the Speaker on 03.09.91. In the letter to the Speaker or in the Resolution of the Group, the 1st petitioner does not claim that he signed the two documents without reading them, or through mistake, misrepresentation or compulsion.

The petitioner in S.C. 2/92 (2nd petitioner) also signed the Notice in purported pursuance of a Constitutional right. Although in Court he admitted signing R1 and R2, in an interview to the Divaina (of 13.09.91) and at a Press Conference at Mr. Athulathmudali's residence (Lankadipa of 23.09.91) he denied signing R2 and requested an inquiry by the Examiner of Questioned Documents. There was thus not even a suggestion that R1 and R2 were signed through mistake, misrepresentation or compulsion or that he did not intend to withdraw and revoke his signature on the Notice.

There was an understanding that no disciplinary action would be taken against those who retracted their signatures. The Speaker on 08.10.91 announced that the Notice did not have the required number of valid signatures and could not be proceeded with. A no-confidence motion was moved against the Speaker.

By letter dated 09.10.91 to the Chief Government Whip (the Whip) both petitioners requested a free vote on the 'No-confidence' motion in the exercise of their Constitutional Right and said they intended to vote for the motion as the Speaker had violated their privileges as Government Members of Parliament by making a wrong statement as to the validity of the Resolution.' The Group met on 09.10.91. The two petitioners were absent without excuse or reason. It was unanimously decided to vote against the "No-confidence" motion. This decision was conveyed about 10.00 a.m. on 10.10.91 in Parliament to the 2nd petitioner by letter dated 09.10.91 directing him to be present and to vote against the No-confidence" motion. The decision however could not be conveyed to the 1st petitioner as he could not be contacted and as he was not present in Parliament on 10.10.91. The 1st petitioner did not attempt to ascertain what decision had been reached on his request in his letter of 09.10.91 for a free vote. On 10.10.91 both petitioners were absent at voting time and did not vote against the motion. The question of disciplinary action against the petitioners and two others was considered by the Working Committee on 04.11.91. While it was decided not to take action against the two others (although one had not voted against the motion) as both had given a written undertaking not to work against the Party policies, in regard to the two petitioners it was decided to await the judgment in

the cases filed by eight other expelled members. The judgment was delivered on 03.12.91 affirming the expulsion. The Disciplinary Committee of the Party's Working Committee met at 7.00 p.m. on the same day and having considered the Report of the Disciplinary Committee decided that the General Secretary (2nd respondent) should write to the two petitioners to be present at a meeting of the Working Committee to be held on 06.12.91 at 8.00 p.m. for the purposes of discussing their conduct as Members of the Party as appeared from their letters of 09.10.91. No particulars were given. Letters dated 03.12.91 were sent by the Secretary to the petitioners but the petitioners did not receive them on or before 06.12.91. The Working Committee met on 06.12.91 and resolved to expel the petitioners from the Party with immediate effect. By letter dated 09.12.91 the Secretary informed the petitioners of their expulsion setting out six reasons. On 09.12.91 before receiving the letter of expulsion the 1st petitioner wrote to the Secretary (2nd respondent) explaining that he was absent as the letter of 03.12.91 was received after 06.12.91. On 12.12.91 the 2nd petitioner wrote in similar terms protesting that the steps taken against him were illegal. Neither petitioner requested another opportunity of appearing before the Working Committee. The Divaina of 10.12.91 reported the 1st petitioner as saying *inter alia* that he and the 2nd petitioner would join the Democratic United National Front (DUNF) and address the public at rallies of the Lalith-Gamini Group. The petitioner did not deny or explain this newspaper report.

In the letter of expulsion the petitioners were informed that if they so desire they could forward their written "observations" stating their position before 27.12.91. The petitioner replied on 26.12.91 answering the allegations. The Working Committee met on 30.12.91 and after considering the replies of the petitioners decided not to alter or reconsider the decisions reached on 06.12.91. This was communicated to the petitioners on the same day. On 03.01.92 the two petitions were filed. An application was made to lead oral evidence on behalf of the petitioners.

The essence of the allegations against the Petitioners was:

1. (a) Signing the Notice of resolution without prior internal discussion within the Party;
   (b) Continuing to support that Notice despite revocation and retraction of their signatures, without prior internal discussion;
2. Deceitful conduct towards the Party in regard to such revocation and retraction, as evidenced by their subsequent conduct (namely, their continued support of the Notice and their letter of 09.10.91;
3. Absence from Parliament on 10.10.91 and failure to vote with the Group, and failure to tender any reason or excuse up to 06.12.91 and;
4. Associating with the 8 expelled members in a public campaign against the Party and leadership, and the Executive Presidential System, without prior internal discussion.

Held:

1. It is the substance of the charges and not the form that is important.
2. The application to lead oral evidence was seen to be an attempt to cure the defects in the affidavits and not to enable the Court to determine which of the two conflicting versions was more probable and credible, and therefore disallowed.
3. An affidavit sworn before the deponent's own Proctor ought not to be received in evidence. Yet here the affidavits were not rejected because Counsel for the respondents did not object to their reception.
4. The Working Committee had delegated disciplinary powers to deal with the petitioners.

5(a). The *audi alteram partem* rule applies and the proceedings of the Working Committee considered independently of subsequent letters and events, were in breach of that rule because –

(a) the notice given was inadequate,

(b) the notices did not specify the allegation against the petitioners and were no more than an invitation for a decision.

(c) the Working Committee had several documents relevant to the Petitioners' conduct but did not disclose these to the Petitioners and invite their observations.

Yet to judge compliance by reference to the use of a specific form or formula, or the observance of a particular procedure or process, would inevitably confine and constrict a dynamic and expanding principle of substantial fairness within the stifling and static technicalities of form and procedure. Thus the question whether the Petitioners have been denied a fair hearing, or a fair opportunity to state their case, can never be made to depend on whether they were asked merely for "observations" and not for "explanations".

(b) In the context of all that happened in December 1991 the four days allowed to the petitioners (of which they needed only three) were sufficient to state their case and the manner in which they did so, had a direct bearing on the further question whether natural justice required an oral hearing and additional evidence.

6. A Member of Parliament has a constitutional right to sign a notice of impeachment in the exercise of an independent discretion and this does not extend to the signing of a document, contents unseen. The question is not 1st petitioner's responsibility or accountability **after** signing; but rather whether he exercised his discretion before affixing his signature. Had the document related only to 1st petitioner's **personal** affairs it might have been a mere question of responsibility or accountability; but this was a public matter relating to Constitutional powers and duties and it was a grave misuse of a Constitutional right to have signed, without knowledge of its contents, an indictment of the most serious kind known to our law.

The petitioners did not deny that there was no prior internal discussion, but claimed only that this question did not arise because the Notice was signed in the exercise of a Constitutional right.

7. Once the petitioners represented to the Speaker and to the Group that they retracted their signatures, alleging misrepresentation, deceit and malice, they could no longer be heard to say that the notice was valid, or that they signed it in the exercise of a Constitutional right (for they did not claim that the retraction was void). Here too they did not deny the absence of prior internal discussion before continuing to support the notice.

8. The petitioners were charged with deceitful conduct. Their subsequent conduct and their letters of 09.10.91 reasonably give rise to the inference that their retractions were not genuine. Their subsequent conduct and letters of 09.10.91 establish deceitful action towards the Party and the Group.

9. The petitioners admitted their absence from Parliament at voting time on 10.10.91 and merely denied that this constituted a breach of Party discipline. The issue was that the Petitioners were asked to state their position and they did so. But they failed to state factual matters peculiarly within their knowledge.

10. In respect of the first three allegations the primary facts were not in question. Whether those facts established deceitful conduct was a matter of inference. Whether they established misconduct warranting expulsion was a matter of law. That misconduct would have brought the Party into disrepute (Rule 3(d) of the Party Constitution), was contrary to the directive of the Group (Rule 17(2), and was generally in violation of fundamental obligations of loyalty and honesty owed to the Party and to fellow members.

11. In the context of the petitioners' course of conduct there is no denial of the fourth allegation. Assuming in favour of the petitioners that such criticisms were, or might have been, within the scope of their fundamental right to freedom of speech, yet the gravamen of the charge is the undoubted lack of prior internal discussion.

12. This is not a case where the petitioners had asserted that the expulsion decision of 06.12.91 was void and refused to participate in the subsequent proceedings; or participated without prejudice to that position. Here the Petitioners chose to participate in the subsequent proceedings, they were afforded an opportunity to state their case, and did so; the factors and circumstances were not at all complex, and they

could without any difficulty have stated their case in three or four days; and when they did so, the facts ceased to be in dispute except in regard to the fourth allegation; thereupon an oral hearing became unnecessary in regard to the first three allegations. They were, however, entitled to particulars and an oral hearing in regard to the fourth allegation but their pleading in Court indicated that on the fourth allegation too the facts were not really in dispute. In any event, the other three allegations were sufficiently grave to render expulsion a proper and appropriate penalty, and the defect in regard to the fourth was not fatal.

13. While natural justice entitles a person to a fair and accurate statement of the allegations against him, the mere fact that he had not been given formal notice of all the matters in which his conduct was to be called in question, did not necessarily entitle him to contend that the inquiry was in breach of the *audi alteram partem* rule.

14. In view of the fact that –

(a) the initial breach of natural justice was not deliberate,
(b) action was not taken to enforce, or to make legal consequences flow from the order of expulsion, and the fact that the Petitioner's participation in the subsequent proceedings gave the Committee a *locus paenitentiae*.
(c) the allegations were fairly and adequately, though not fully and precisely communicated, and
(d) a fair opportunity was given to the petitioners to state their case, and an oral hearing became unnecessary as the facts were undisputed in consequence of their replies,

the Petitioners' case had received – overall – full and fair consideration, and a fair result had been reached by fair methods. This is despite the fact that (a) the elaborate 'Guidelines for Disciplinary Inquiries' adopted by the Working Committee had not been followed and (b) the Petitioners had no opportunity of being heard in mitigation. The guidelines provide an exemplary procedure but they were not binding on the Working Committee.

15. Overall there had been a fair hearing and as for mitigation, the misconduct was so serious as to make mitigation impossible. In any event on 09.12.91 the Petitioners had virtually repudiated the Party and cast their lot with the DUNF.

16. The freedom of speech in public which an MP is entitled to is constrained by the requirements of Party discipline. Criticism or even condemnation of policies or ideas within a Party are legitimate even if it were to weaken the

Party's position in the country for the time being. In appropriate circumstances, even public criticism of Party Policies or personalities may become reasonable. However it is not permissible for a group of dissidents who seek to secure effective control of the Party on account of irreconcilable differences with the Party Leadership to conduct a campaign calculated to destroy the Party and yet retain their status as MPs belonging to such Party in Parliament. Our Constitution does not permit a Party within a Party. An MP who uses his right to freedom of speech to create a crisis situation violates his Party obligations and forfeits the protection of Article 14(a) of the Constitution. Such conduct cannot be described as an exercise of the right of freedom of thought and conscience guaranteed by Article 10 of the Constitution. Disciplinary proceedings can then validly be taken.

17. Although the petitioners were signatories to R1 and R2 and the Party had publicly declared that no disciplinary action would be taken against such signatories, there was no promissory estoppel created. There is an admission in R2 that the impeachment motion was malicious. By disowning the Notice the petitioners made amends for their misconduct and thereby acknowledged their commitment to the Party. By such act they obtained exemption from being dealt with for violating the Party Constitution by reason of their misconduct in signing the motion without first raising the issues with the Party. There was no promise by the Party to refrain from taking disciplinary action against them for future misconduct. They dishonoured their undertaking in R2 and showed beyond doubt that they had resumed their misconduct. Here there was no promise affecting legal relations between the parties. The party did not contract with the petitioners to confer on them the privilege of persisting with their misconduct without sanction.

18. A reasonable inference is that even at the time of signing R1 and R2, the Petitioners were loyal to the dissidents and signed these documents as a colourable device to avoid disciplinary action which might have led to the loss of their Party Membership and their status as MPs.

19. The rights of the petitioners to Party Membership are contractual. At the time of their expulsion, they had repudiated the UNP and were *de facto* members of the DUNF; and their expulsion constituted nothing more than the severance of the formal link between them and the Party. The decision to expel the petitioners is not vitiated by bias.

Cases referred to:

1. *Dissanayake v. Kaleel SC* (Special) Nos. 4 to 11/91 – SC Minutes of 03.12.91.
2. *Pakir Mohideen v. Mohamadu Cassim* [1900] 4 NLR 299.

3. *Cadar Saibu V. Sayadu Beebi* [1900] 4 NLR 130.
4. *Ridge v. Baldwin* [1964] AC 40, 132.
5. *Stevenson v. United Road Transport Union* [1976] 3 All ER 29, 41.
6. *Labouchere v. Wharncliffe* [1879] 13 Ch. D 346, 351.
7. *Davis v. Carew-Pole* [1956] 1 WLR 833.
8. *Russell v. Duke of Norfolk* [1949] 1 All Er 109.
9. *Posluns v. Toronto Stock Exchange* [1968] 67 DLR (2d) 165.
10. *De Verteuil v. Knaggs* [1918] AC 557; 118 LT 758.
11. *Pillai v. Singapore City Council* [1968] 1 WLR 1278. 1286.
12. *Stringer v. Ministry of Housing* [1971] 1 All ER 65, 75.
13. *Calvin v. Carr* [1979] 2 All ER 440, 448, 449, 452.
14. *Joseph Perera v. Attorney-General* SC Applications No. 107 - 109/96 - SC Minutes of 25.05.87.
15. *Dissanayake v. Sri Jayewardenapura University* [1986] 2 Sri. LR 264.
16. *Austin v. Keefe* 1971 US 402, 415, 419.
17. *John v. Rees* [1969] 2 WLR 1294, 1332 (citing unreported case of *Fountaine v. Chesterton*).
18. *Fisher v. Keane* [1878] XI Ch. D. 353, 360.
19. *R v. Immigrational Tribunal ex p. Mehmet* [1977] 1 WLR 795.
20. *Sloan v. General Medical Council* [1970] 2 All ER 686.
21. *Board of Mining Examination v. Ramjee* AIR 1977 SC 965.

APPLICATION under and in terms of Article 99(13) (a) of the Constitution challenging expulsion from recognised Political Party.

L W. Athulathmudali PC with *R. C. Gooneratne, Dr. Ranjit Fernando, Mahendra Amerasekera, Dhamsiri Fonseka, T. M. S. Nanayakkara, S. J. Liyanage, Nigel Hatch, Nalin Dissanayake, Miss Ranjini Morawaka, Miss Hyacinth Fernando and M. B. Handukumbura* for petitioners.

K. N. Choksy with *S.C. Crosette-Tambiah, Daya Pelpola, S. J. Mohideen, L. W. Jayawickrema, A. L. B. Brito-Mutunayagam, Ronald Perera and Lakshman Ranasinghe* for 1st to 4th respondents.

No appearance for 5th respondent.

Cur adv vult.

February 28th, 1992.
FERNANDO, J.

Two Members of Parliament applied to this Court, by petitions in terms of Article 99(13) (a) of the Constitution, challenging their expulsion from the United National Party ("the Party"), a recognised

political party. The questions of fact and law involved are almost identical, and both petitions were heard and determined together.

1. THE FACTS

In late August 1991 a sudden crisis occurred in the Party, in consequence of a notice of resolution ("the Notice") for the removal of the President, in terms of Article 38(2) (a) of the Constitution, being given to the Speaker. Eight Members of Parliament were expelled from the Party by a resolution of the Working Committee passed on 6.9.91. Petitions filed by them were dismissed by this Court *Dissanayake v. Kaleel* [1]

The Petitioner in S.C. 1/92 (the "1st Petitioner") is an Attorney-at-Law, who was Project Minister for Minerals and Mineral-based Industries; he admittedly signed the Notice, and claims that he did so in pursuance of a Constitutional right, power or authority; three weeks later, by letter dated 18.9.91, he tendered his resignation from his Ministerial post; in a personal letter dated 19.9.91 (P4) to the Minister of Industries he explained the matters which led him to resign. In that letter he said:

> "Coming to [the] immediate issue, I was never a member of the group that started the present movement. When the petition was brought to me, I signed it on a *bona fide* basis, **even without seeing it.** In Parliament, we have put our signatures to many other such documents. At the group meeting held immediately after this so-called plot, I and many others were non-plussed and remained silent spectators like some characters in a novel, unable to find a path to tread."

(Throughout this judgment I have added emphasis to key phrases which Counsel have subjected to scrutiny in their submissions.) It is clear that he had signed that Notice without reading it, and without understanding what it was all about, for he added:

> "But as time passed and the facts, accusations and counter-accusations started flashing either way **I began to understand** what this was all about ... the issue of certain allegations against ... the President."

The "group meeting" referred to was a meeting of the Government Parliamentary Group ("the Group") held on 2.9.91. By letter dated 30.8.91 (R1) the two Petitioners and 114 other Members of the Group informed the Speaker that:

> "We write to hereby inform you that we do not support the said Resolution.
>
> Those of us who have placed our signatures thereto do hereby withdraw and revoke our signatures and consent thereto.
>
> In the circumstances, the Resolution does not have the requisite number of signatories under Article 38(2) (b) entitling yourself to place the same on the Order Paper or Order Book of Parliament.
>
> The Resolution should therefore not be placed on the Order Book or Paper. Doing so will be contrary to the express provisions of the Constitution referred to above."

On 2.9.91, the Group passed a resolution (R2) which emphatically declared and confirmed its confidence in the President and the policies of the Government; vouched that the President had upheld the Constitution, and had never violated the Constitution, committed an unlawful act, or abused power; rejected the "clandestine move" to remove the President; and condemned those who had "obtained the signatures of certain Government and Opposition Members of Parliament **through misrepresentation and deceit".** The Group expressed dismay that the Speaker had entertained the Notice "with much haste and without verification", and called upon the Speaker to "reject the illegal, unconstitutional and **malicious** move to remove the President". This resolution was signed by the Petitioners and 114 other Members. R1 and R2 were handed to the Speaker in person by the signatories including the Petitioners, on 3.9.91. It was clear from P4 that the Notice was at least briefly discussed at the Group meeting. Although the 1st Petitioner states that there was only a general statement by the President denying the allegations made, he does not claim that he signed those two documents without reading them, or through mistake, misrepresentation or compulsion.

The Petitioner in S.C. 2/92 (the "2nd Petitioner") also signed the Notice in purported pursuance of a Constitutional right. In his petition to this Court he specifically admitted signing the letter of 30.8.91 and the resolution of 2.9.91. However, in an interview to the "Divaina" (R15C of 23.9.91) and at a Press Conference at Mr. Athulathmudali's residence (R15D, "Lankadipa" of 23.9.91) the 2nd Petitioner emphatically denied signing the resolution (pleading support for the President), addressed to the Speaker; he requested an inquiry by the Examiner of Questioned Documents to determine who had forged his signature. When those two documents were produced by the 2nd Respondent, as R1 and R2, the 2nd Petitioner filed a counter-affidavit containing an unqualified admission of those documents. There is thus not even a suggestion in this Court that R1 and R2 were signed through mistake, misrepresentation or compulsion; or that he did not intend to withdraw and revoke his signature on the Notice. The newspaper reports were not denied or explained contemporaneously, or even in the pleadings or submissions in this Court. I am therefore compelled to conclude that the 2nd Petitioner falsely denied signing the resolution R2.

Although Mr. Athulathmudali, P.C., submitted to us that the Petitioners had signed R1 and R2 in the interests of Group cohesiveness, that was not an explanation set out in their letters or affidavits and therefore cannot be accepted. Having signed the Notice, by later signing R2 they were representing to the Speaker and their co-signatories that their signatures on the Notice had been obtained through misrepresentation and deceit; and this is confirmed by their condemnation of the **"malicious move** to remove the President". Had they revoked their signatures as having been affixed by mistake, or misunderstanding, or some other reason, it was incumbent on them to have stated this in R2, or at least in their pleadings in these proceedings. Since the 1st Petitioner had signed without seeing the petition, and "began to understand what this was all about" only on 2.9.91, it is almost an irresistible conclusion that his signature had been obtained through misrepresentation, if not deceit.

In a speech to the Parliamentary Group on 18.9.91, the President stated that no disciplinary action would be taken against any Members who said that they had signed the Notice and later

retracted their signatures; he also said that a resolution to this effect would be adopted by the Working Committee. There is no evidence that such a resolution was passed, but the minutes of the Working Committee meeting of 6.12.91 refer to the "understanding" that no disciplinary action will be taken against such members.

On 8.10.91 the Speaker announced in Parliament that having inquired into the matter he was of the view that the Notice did not have the required number of valid signatures, and accordingly could not be proceeded with; this was the very decision which the Group had sought by R2. Notice was immediately given of a "No-confidence" motion against the Speaker. By letters dated 9.10.91 to the Chief Government Whip ("the Whip") both Petitioners requested a free vote on that motion, stating:

> "In the exercise of my rights as a Member of Parliament under Article 38(2) of the Constitution, I signed the Impeachment resolution and delivered it to the Speaker.
>
> By making a wrong statement as to the validity of that Resolution which had been signed and given by me, the Speaker had violated my privileges as a Government Member of Parliament. **For that reason** I intend to vote in favour of the No-confidence motion against him."

The Group met on 9.10.91; the two Petitioners were absent without any excuse or reason; it was unanimously decided to vote against the "No-confidence" motion, and to reject the Petitioners' request for a free vote. This decision was conveyed to the 2nd Petitioner by letter dated 9.10.91 (handed to him in Parliament at about 10.00 a.m. on 10.10.91) directing him to be present and to vote against the "No-confidence" motion. That decision, however, could not be conveyed to the 1st Petitioner, as he was not available at his Colombo and Divulapitiya residences where the Secretary to the Whip endeavoured to telephone him on the night of 9.10.91, and as he was not present in Parliament on 10.10.91. The 1st Petitioner did not attempt to ascertain what decision had been reached on his request for a free vote. On 10.10.91 both Petitioners were absent at voting time and hence did not vote against that motion, which was defeated.

At the Group meeting on 9.10.91 a direction had been given that two other Members – Dr. P. M. B. Cyril and Mr. R. Samaraweera – be also informed to vote against the No-confidence motion. Dr. Cyril had joined the eight expelled Members in their campaign, but voted against the motion and gave a written undertaking not to support or participate in criticism of the Party or its activities. Mr. Samaraweera did not vote against the motion, but later wrote to the 2nd Respondent stating that he had not participated, and would not participate, in any activity contrary to the Party policies. The question of disciplinary action against all four Members was considered by the Working Committee on 4.11.91. It was decided, in view of the letters sent by Dr. Cyril and Mr. Samaraweera, not to take disciplinary action against them; and to await the judgment of this Court in the cases filed by the expelled eight Members; that was delivered on 3.12.91.

The Disciplinary Committee of the Party's Working Committee met and submitted a report on 3.12.91; they recommended that disciplinary action be taken against the Petitioners, on account of several matters (the same matters which were later set out in the letter of expulsion (P1) dated 9.12.91). The Working Committee met at 7.00 p.m. on the same day and, having considered the Report of the Disciplinary Committee and the letters dated 9.10.91 written by the Petitioners, decided that "the General Secretary should write to these two members, requesting them to be present at a meeting of the Working Committee to be held on 6.12.91 at 8.00 p.m. for the purpose of discussing their conduct as members of the Party"; no particulars were given.

Letters dated 3.12.91 were sent by the 2nd Respondent (the General Secretary) by express post (certificates of posting have been produced) the same night to both Petitioners; to both Colombo addresses as well as their constituency addresses. The Petitioners state that the letters to their Colombo addresses never reached them; and that the letters to their constituency addresses were received on 9.12.91. It is unnecessary for us to decide whether and when those letters were received, because the parties have agreed, for the purpose of determining these proceedings only, that these letters had not been received on or before 6.12.91. By those letters, each Petitioner was informed only that the Working Committee had

considered his letter dated 9.10.91, and requested him to be present at a meeting fixed for 6.12.91 at 8.00 p.m. "for the purpose of discussing and considering your conduct as a member of the Party **as appears from your letter" dated 9.10.91,** and that if he did not attend, the Working Committee would proceed to consider the matter in his absence. No reference was made to the other matters set out in the report of the Disciplinary Committee.

On 6.12.91 the Working Committee duly met; assuming that the Petitioners had received notice, and noting that they had not sent any communication regarding their absence, the Committee proceeded to discuss their conduct. Several documents were tabled: the report of the Disciplinary Committee, letters dated 30.8.91 (R1), 19.9.91 (P4), and 9.10.91, the resolution dated 2.9.91 (R2), and "newspaper reports [unspecified] of public meetings held by the former expelled eight members at which [the Petitioners] were present". Six members of the Committee spoke; some referred to factual matters (e.g. that the 2nd petitioner had denied his signature to R1 and R2; that the decision to refuse a free vote had been conveyed to the 2nd Petitioner, but not to the first), and others expressed opinions (e.g. that the Petitioners' conduct was deceitful). The committee then resolved to expel them from the Party, with immediate effect, for the following reasons:

"1. That they were, on their own admissions, signatories to the Notice of Resolution under Article 38(2) of the Constitution to impeach H.E. the President, the Leader of the Party. Notwithstanding that they were signatories to the letter dated 30th August, 1991, addressed to the Speaker by Members of the Government Parliamentary Group and also to the Resolution of the Government Parliamentary Group of 2nd September, 1991, they have **persisted in maintaining their support of the said Notice** of Resolution.

2. Their conduct in **continuing to support the said Notice** of Resolution subsequent to their signing the aforesaid letter dated 30th August, 1991, and the said Resolution of 2nd September, 1991, and their letters dated 9th October, 1991, written to the Chief Government Whip, establish deceitful

action on their part towards the Party and the Government Parliamentary Group.

3. That whilst being members of the Party they have associated themselves with the public campaign carried on by the 8 former members of the Party who were expelled from the Party on 6th September, 1991, at which the Party policies and Leadership and more particularly the Executive Presidential system have been criticized.

4. That their aforesaid acts set-out at (1) and (3) above were committed without prior consultation with or discussion within the Party Organisation.

5. That despite their requests for a free vote on the Motion of No-confidence against the Speaker being refused by the Government Parliamentary Group, **they were not present** in Parliament on 10th October, 1991, to vote with the Government benches against the Motion, and **have up to date not tendered any reason or excuse** for such breach.

6. They have by their aforesaid acts violated Section 3(a), (b), (d); Section 9(d), (e), (f), (g); and Section 17(1), (2), (3), (6) of the Party Constitution."

The President and Mr. M. D. A. Gunatillake, M.P., did not participate in the discussion or in the voting.

By letters dated 9.12.91 (P1) the 2nd Respondent informed the Petitioners of their expulsion setting out the aforesaid six reasons. On 9.12.91, before receiving P1, the 1st Petitioner wrote to the 2nd Respondent explaining that he was absent as the Notice was received after 6.12.91. On 12.12.91, after receiving P1, the 2nd Petitioner wrote in similar terms to the 2nd Respondent, protesting that the steps taken against him were illegal. Neither Petitioner requested another opportunity of appearing before the Working Committee; and even if they were under no obligation to make such a request, it is relevant that the "Divaina" of 10.12.91 reported that on

9.12.91 the 1st Petitioner said that –

(a) he had decided not to institute proceedings to challenge the expulsion because he knew what the decision would be;

(b) he would join the newly formed Democratic United National Front, and work to safeguard democracy;

(c) the decision not to challenge the expulsion was reached after discussions the previous day;

(d) the other Member of Parliament, Muthu Banda, who had been expelled like him would act in the same manner;

(e) as he had the legal right to attend Parliament until 7th January 1992, he would participate in Parliamentary proceedings during that period;

(f) they had personally no objection to the U.N.P. or President Premadasa; but they would in the future too participate in the public campaign against acts, both undemocratic and harmful to the Party, done in order to entrench the dictatorship of a single individual; and

(g) he intended to address the public at rallies of the Lalith-Gamini group.

The Petitioners did not deny or explain this report either then or in the course of the proceedings. There is no evidence that the Respondents communicated the expulsion resolutions to the Secretary-General of Parliament, or took any action to make legal consequences flow from those resolutions. The 2nd Respondent wrote similar letters dated 21.12.91 to both Petitioners, to their Colombo and constituency addresses. He tried to maintain that each Petitioner had adequate notice, because the letters dated 3.12.91 had been sent by express post, and "furthermore, the fact that you were asked to attend the said meeting was known and spoken of to your knowledge in the Parliamentary Lobby, and also appeared in the

newspapers". This position the Respondents do not now seek to support; and what is relevant is the following:

> "Nevertheless, without prejudice to the above and although you do not seek such an opportunity or give any **explanation** in regard to your actions in your letter under reply, I write to inform you that if you so desire you could forward your **written observations stating your position** in regard to the items Nos. (1) to (6) set out in my registered letter to you dated 9.12.1991 (a further copy of which is annexed.) These written observations should reach me at the Party Headquarters "Sirikotha" by 4 p.m. on Friday, 27th December, 1991.
>
> I shall thereafter inform you by letter (which will be hand-delivered at your Colombo address on or before 31st December 1991, with copies sent under registered post) whether the Working Committee, having considered your observations, decides to rescind or vary or confirm its decision of 6th December, 1991.

These letters were received on 23.12.91; they had four days time, until the 27th, to reply, but they were able to reply on the 26th:

> **"Answering the allegations** contained in your letter of the 9th instant I wish to state as follows:
>
> 1. At the outset I would like to place on record my objections to the holding of a disciplinary inquiry against me by the Working Committee of the Party, as it is a body which is personally selected and appointed by the Leader of the Party alone, and under the Party constitution has no right, authority or power to conduct any disciplinary proceedings against a member of the Party and/or to expel such member. Under the constitution of the Party, it is the National Executive Committee which is vested with such right, authority or power. Further, neither the National Convention of the Party nor the National Executive Committee has the power to delegate its functions relating to the disciplinary control of members of the Party.

2. No disciplinary action can be taken against me by the Party on the alleged ground that I had signed the motion of resolution submitted to the Speaker under Article 38 (2) of the Constitution, to impeach His Excellency the President of Sri Lanka, who is also the Leader of the Party, by reason of the fact that the decision taken and/or the act done by me in signing the motion of resolution was pursuant to a right, power or authority conferred on me as a Member of Parliament under the aforesaid Article of the Constitution, which cannot be reviewed or controlled by the Party and/or any of its committees.

   No rule, convention or principle of the Party can override the Constitutional right, duty or responsibility conferred on me by the Constitution of the country which I, as a Member of Parliament, have sworn to defend and uphold.

3. I deny having indulged in any deceitful action against the Party and the Government Parliamentary Group.

4. I deny the allegation contained in paragraph 3 of your letter.

5. In view of the foregoing, the allegation contained in paragraph 4 does not arise.

6. My absence from Parliament on 10th October 1991, is not a violation of Party discipline.

7. I deny that I have violated any provisions of the Party constitution.

8. I urge that a proper and lawful inquiry be held to inquire into the allegations contained in your letter, at which I propose to adduce further evidence to refute the allegations contained therein.

The Working Committee met on 30.12.91; they endorsed the action taken by the 2nd Respondent in sending letters dated 21.12.91; and considered the Petitioners' replies dated 26.12.91. The legal objection in paragraph 1 was rejected. The explanation in paragraph 2 was rejected, particularly because the matters alleged

in the Notice had not been raised internally. In regard to paragraph 3, the view was taken that the Petitioner had deceived the Group and the Party into believing that they were withdrawing their signatures to the Notice and were joining in requesting the Speaker to reject it, but that their letters of 9.10.91 showed that they were standing by their signatures and disputing the Speaker's rejection thereof, although they themselves had called upon the Speaker to reject the resolution; that those letters showed that they were affirming the allegations in the Notice, although by their conduct they had conveyed the impression that they were no longer supporting those allegations. Dealing with paragraph 4, the committee observed that the Petitioners had merely denied the charge although the uncontradicted newspaper reports showed the contrary. Paragraph 5 was considered unacceptable because the Petitioners had not raised those matters internally. The Committee held that the Petitioners' unexplained absence from Parliament at voting time on 10.10.91 was a breach of Party discipline. The Committee decided that on a number of matters the Petitioners' position was in conflict with the recent judgment of this Court; that the Committee did have disciplinary authority; and that the Petitioners had not adduced any facts or reasons to justify further inquiry. Accordingly the Committee decided not to reconsider or alter the decisions reached on 6.12.91; this was communicated to the Petitioners the same day. On 3.1.92 these petitions were filed.

2. PETITIONERS' APPLICATION TO LEAD ORAL EVIDENCE

Mr. Athulathmudali, P.C., sought to lead the oral evidence of the Petitioners on two matters, relevant to their absence at voting time on 10.10.91: the fact and the contents of a telephone call by the 1st Petitioner to the Secretary to the Whip said to have been made on 10.10.91, and the precise contents of an admitted conversation between the 2nd Petitioner and Mr. M. L. M. Aboosally, M.P., Minister of State for Plantations on 10.10.91. Mr. Choksy, P.C., did not object. We requested Mr. Athulathmudali to state precisely what facts he proposed to establish by oral evidence.

In regard to the first matter, the 1st Petitioner had stated in his petition that he had been a heart patient (and this was admitted by

the Respondents); that he had chest pains on 10.10.91; that he went to the Cardiology Unit, where, according to a treatment sheet, certain drugs had been prescribed; that later he consulted a (private) General Practitioner, from whom he obtained the following medical certificate dated 10.10.91:

> "Mr. Ariyaratne Jayatilaka was seen by me on 10.10.91 with a history of pain in the chest and vertigo ? [sic] Anginal pain. He has been advised to rest for a few days."

Immediately thereafter he averred that "... he **communicated** his state of health to the Secretary to ... the Chief Government Whip", giving the impression that the "communication" was made **after** the visits to the Cardiology Unit and the private practitioner. However Mr. Athulathmudali P.C., stated that he sought to lead the 1st Petitioner's evidence to prove that he **telephoned** the Secretary in the morning on 10.10.91 **before** taking treatment. When asked whether the 1st Petitioner would testify that he informed the Secretary that he would be absent at voting time, Mr. Athulathmudali stated that he would not so testify, but that this was the necessary implication of his intimation as to his state of health. The pleadings could have, but unfortunately did not, make it clear whether it was in the morning or in the afternoon that the 1st Petitioner went to the Cardiology Unit; whether any doctor examined him, and if so, recommended rest; whether the private practitioner was consulted before or after the vote, and did anything more than recording the history as related by the patient. One thing is certain; the 1st Petitioner did not inform the Secretary in the morning that he would be unable to be present at voting time; and it is now common ground that there was no communication (by him or on his behalf) later that day after his visits to the cardiology Unit and the private practitioner. The Secretary deposed to the practice of recording messages regarding the inability of Members to attend Parliament; that the 1st Petitioner had not intimated that he would be absent; and denied that he had made a communication as set out in his affidavit. It is clear that the 1st Petitioner's position, even if oral evidence was permitted, would have been that he did not at any time on 10.10.91 inform the Secretary that he would be absent at voting time. He could perhaps have testified that when he said he was not well he meant that he would not be able to be present but he

did not say so in his affidavit. Since the 1st Petitioner had stated in his letter of 9.10.91 that he intended to support the No-confidence motion, we asked Mr. Athulathmudali whether the 1st petitioner, if not for ill-health, would have voted **for** that motion; Mr. Athulathmudali stated that if he had been able to attend Parliament, the 1st petitioner would have voted with the Group, **against** that motion. There is no explanation for the 1st Petitioner's failure to set out these facts in his affidavit or counter-affidavit; even in regard to the simple claim that he **telephoned** the Secretary, he deposed that he "communicated", leaving the Respondents in doubt as to whether such communication was written or oral, direct or indirect. It thus became clear that the real purpose of oral evidence was, at best, to supply the deficiencies in the pleadings and affidavits, and not to give the Court the opportunity of resolving a conflict between the affidavits of the opposing sides, by seeing and hearing the witnesses and deciding on their credibility.

In regard to the second matter, the 2nd Petitioner had stated in his petition that:

> " ... he was advised by Mr. M. L. M. Aboosally ... that he had just spoken to the President ... and that if the Petitioner was not in a position to vote with the Government against the said motion, that [he] should not be present when the vote on the said motion was taken."

Mr. Aboosally's deposed that "... he met the Petitioner in Parliament on 10.10.91 and in the course of conversation advised him to vote with the Government against the motion." Mr. Athulathmudali stated that the 2nd Petitioner's oral evidence was necessary to prove that Mr. Aboosally had informed him that the President had indicated, in effect, that abstention would not expose him to disciplinary action. It is intrinsically improbable that after a unanimous decision by the President and the Group at 5.00 p.m. on 9.10.91, conveyed through the Whip at 10.00 a.m. on 10.10.91, the President would soon thereafter convey an inconsistent direction through another intermediary.

Leaving aside that issue of credibility, it is impossible to understand why the 2nd Petitioner could not have directly made that

allegation in his affidavit, or even in his counter-affidavit, by stating "... and that **the President had said that** if the Petitioner was not in a position to vote with the Government against the said motion, that he should not be present ..." Mr. Athulathmudali's submission was that this was the necessary implication of the affidavit, but an affidavit (particularly on a point of crucial importance) must set out the facts clearly and precisely, leaving the other party and the Court in no doubt as to the facts alleged. It was submitted that, if not for what Mr. Aboosally told him, the 2nd Petitioner would have voted with the Government Group against the motion; inexplicably, this was not set out in his affidavit. Here too the need for oral evidence was to cure defective affidavits, and not to enable the Court to determine which of two conflicting versions was more probable and credible.

The application to lead oral evidence was therefore refused.

3. ADMISSIBILITY OF PETITIONERS' COUNTER-AFFIDAVITS

In the course of the submissions it was observed that the counter-affidavits dated 29.1.92, of both Petitioners had been sworn before one of the junior counsel appearing for them. Although it was suggested that he been retained only after 29.1.92, in fact his appearance had been marked on 13.1.92 and 27.1.92. In *Pakir Mohidin v. Mohamadu Casim* [2], it was held by Bonser, C.J., that an affidavit sworn before the deponent's own Proctor ought not to be received in evidence (see also *Cadar Saibu v. Sayadu Beebi* [3]. This rule of practice has been consistently observed, and would apply to an Attorney-at-Law today. It is a salutary rule intended to ensure that an affidavit is duly read; explained in the deponent's own language if it is in a language which he does not understand; understood; and then signed. The failure to observe this rule is all the more serious in this case: the 1st Petitioner is a person who had signed an important document (the Notice) without reading it; and the 2nd Petitioner is one who had repudiated his signature on R2, and whose knowledge of English, according to Mr. Athulathmudali, was not quite adequate. Mr. Athulathmudali moved for permission to file fresh affidavits in identical terms, but sworn before an independent Justice of the Peace. However Mr. Choksy stated that the Respondents did not object to the affidavits being received. It is in those circumstances

that we refrained from rejecting these affidavits, without in any way intending to weaken the authority of *Pakir Mohidin v. Mohamadu Cassim.*

4. JURISDICTION OF WORKING COMMITTEE

In *Dissanayake v. Kaleel*, we held that under the Party Constitution the National Executive Committee had the power to delegate its disciplinary powers to the Working Committee. Mr. Athulathmudali submitted however that the disciplinary power sought to be exercised in these cases could not be delegated, because it was only the Executive Committee which could exercise that power, under Rule 9(d):

> "The selected candidate shall be called upon ... to give a pledge that ... he will conform to the Principles, Policy, Programme and Code and of the Party [etc.] ... If he fails to do so **the Executive Committee shall take** all necessary action for the punishment of such offender."

He contends that the Party Constitution does not authorise the delegation of this power. Disciplinary powers are conferred in general terms by Rule 8(3) (a), and Rule 9(d) does not add to those powers; rather, it imposes a **duty** on the Executive Committee to take action. I hold that Rule 8(3) (m) authorises the delegation of all the powers of the Executive Committee, whether expressly enumerated (in Rule 8 or 9, or elsewhere) or not.

Mr. Athulathmudali next submitted that the Executive Committee had not in fact delegated its disciplinary powers to the Working Committee. The Petitioner originally averred that:

> " ... the resolution of the National Executive Committee purporting to vest such powers in the Working Committee on **19.4.91** was not duly passed as it had been merely proposed but not adopted";

and produced the relevant minute:

" ... The following resolution was proposed by Mr. P. Almon Peiris and seconded by Mr. Piyasoma Upali.

> It is hereby proposed that the Working Committee of the Party be vested with full powers to carry out the responsibilities and functions of the National executive Committee of the Party."

The 2nd Respondent thereupon produced the minutes of the Executive Committee meetings held on 19.4.91 and 7.9.91; the latter refers in identical terms to another resolution being proposed and seconded. In his affidavit he deposed to the fact that he was present at both meetings, and that both resolutions were unanimously adopted after they were proposed and seconded. He also produced minutes of several meetings held in 1988 and 1989, referring to similar resolutions in the same way.

The 1st Petitioner in reply stated that he was present at both meetings, where "the resolution empowering the Working Committee was not put to the House for adoption and was not therefore adopted". The 2nd Petitioner did not claim to have been present at either meeting. It is important that the 1st Petitioner did not make any mention in his first affidavit of what transpired on 7.9.91, but chose to do so only after the 2nd Respondent referred to that meeting. It seems very likely that he did not really pay much attention to what transpired on 7.9.91. It is therefore more probable than not that the resolution was adopted by the Executive Committee at its meeting on 7.9.91. Further, in the light of similar minutes at several previous meetings it is difficult to resist the conclusion that the Executive Committee did, in some form or another, and at some time or the other, express its approval of at least some of those resolutions. The Working Committee, in my view, did have the delegated disciplinary powers to deal with the Petitioners.

5. NATURAL JUSTICE: AUDI ALTERAM PARTEM

In *Dissanayake v. Kaleel* I set out my reasons for holding that the *audi alteram partem* rule applied. Mr. Choksy did not seek to argue that in the exercise of its disciplinary powers the Working Committee

was not bound by the *audi alteram partem* rule. Mr. Choksy also conceded that the proceedings of the Working Committee, commencing with the Disciplinary Committee meeting of 3.12.91 and ending with the letters of expulsion (P1) dated 9.12.91, considered independently of subsequent letters and events, were in breach of that rule. To assess the remedial effect of the subsequent proceedings, it is necessary to ascertain the nature and extent of the departure from Natural Justice: the more serious the breach, the more difficult to cure.

Firstly, the notice given was inadequate, as the Working Committee should have realized how uncertain it was that the letters dated 3.12.91 would be delivered in time; certainly, not in time to enable the Petitioners to prepare for an inquiry; hand delivery, telegrams and telephone messages could have been resorted to, if meeting on 6.12.91 was crucial; had the Petitioners attended on 6.12.91, they would have been entitled, as of right, to a postponement on account of the inadequacy of the time and the lack of particulars. Secondly, and even more serious, the notices did not specify the allegations against the Petitioners; they were no more than an invitation for a discussion, not even hinting at any danger of disciplinary action, let alone expulsion; even if the Petitioners had received the notices in time, but nevertheless kept away, the inadequacy of the notices was such as to preclude the Working Committee from coming to the findings set out in their minutes of 6.12.91 and the letters of expulsion (P1), for such allegations had not been communicated to the Petitioners even in a general way. The default in that respect is grave, because these allegations had already been set out in detail in the report of the Disciplinary Committee; a possible explanation might be that the Working Committee wished to have a conciliatory discussion first, but this does not appear in their minutes or in the 2nd Respondent's affidavits; further, although the Working Committee had wished to discuss the Petitioners' conduct as members of the Party, the 2nd Respondent's letter dated 3.12.91 confined the subject matter of the proposed discussion to their conduct **as appeared from their letters dated 9.10.91.** Finally, the Working Committee had several documents relevant to the Petitioners' conduct, but did not disclose these to the Petitioners and invite their observations.

Had the Petitioners instituted proceedings immediately upon receipt of the letters of expulsion, they would necessarily have succeeded. The question then is whether what transpired between 9th and 30th December amounted to a waiver of this right or cured these illegalities and irregularities. While it would normally be undesirable to treat newspaper reports as evidence, depending on whether or not they had been contradicted, here the protagonists had selected the press as one arena for battle. One such report related to the 1st Petitioner's statement to the press on 9.12.91 that both Petitioners had decided not to challenge the expulsion, to join the new political Party, and to continue their public campaign. The 2nd Respondent's delay in sending letters dated 21.12.91 had been explained as caused by Party activities, the S.A.A.R.C. Summit, and the S.A.F. Games. Those letters did not withdraw or suspend the expulsion. Indeed the 2nd Respondent could not have done so. They were in effect, an invitation to the Petitioners to read the findings in the letters of expulsion as charges or allegations, and to reply them. Perhaps the Petitioners might have been better advised to have refused to do so, unless and until the expulsions were *pro forma* withdrawn or suspended; or to reply without prejudice to their objections to the validity of the expulsions. But they elected to reply to this putative charge sheet, by their letters dated 26.12.91. Mr. Athulathmudali sought to explain away the many shortcomings in those replies on the basis that the Petitioners were by then preparing to file petitions in this Court; but that means that they were getting ready with the facts and documents to state their case in this Court, and hence could have submitted adequate replies with less difficulty; there was no lack of time, because they replied in three days, although they had one more day. He sought to draw a sharp distinction between "explanations" and "observations", and strenuously submitted that the Petitioners were not asked for an "explanation" but only for their "observations", accordingly, he said, they need not have done more than to admit or deny the allegations. That is not how the Petitioners understood it, for they proceeded to "answer the allegations", not only by mere admissions or denials, but by stating their position on a number of matters.

In the context, I can see no material difference between the two phrases; an "explanation" is a statement making plain one's position,

or accounting for one's conduct. Here what was required was "observations" of such a nature that consideration thereof would enable the Working Committee to rescind, vary or confirm its previous decision; a mere denial was therefore obviously insufficient. Further, written observations "stating your position" were called for, and that would be equivalent, for all practical purposes, to an explanation. But I do not wish to rest my decision on such narrow ground. Natural Justice is a living, growing and flexible concept. To judge compliance by reference to the use of a specific form or formula, or the observance of a particular procedure or process, would inevitably confine and constrict a dynamic and expanding principle of substantial fairness within the stifling and static technicalities of form and procedure. Thus the question whether the Petitioners have been denied a fair hearing, or a fair opportunity to state their case, can never be made to depend on whether they were asked merely for "observations", and not for "explanations". In the context of all that happened in December 1991, the four days allowed to them (of which they needed only three) were sufficient to state their case; and the manner in which they did so, had a direct bearing on the further question whether Natural Justice required an oral hearing and additional evidence.

The allegations against the Petitioners

Although both counsel approached the matter almost as if these were charges in criminal proceedings governed by the Code of Criminal Procedure, in my view it is the substance and not the form that is important. The essence of the allegations against the Petitioners was:

1. (a) Signing the Notice of resolution without prior internal discussion within the Party;

   (b) Continuing to support that Notice despite revocation and retraction of their Signatures without prior internal discussion;

2. Deceitful conduct towards the Party in regard to such revocation and retraction, as evidenced by their

subsequent conduct (namely, their continued support of the Notice and their letters of 9.10.91);

3. Absence from Parliament on 10.10.91 and failure to vote with the group, and failure to tender any reason or excuse upto 6.12.91; and

4. Associating with 8 expelled members in a public campaign against the Party policies, and leadership, and the Executive Presidential System, without prior internal discussion.

These allegations were said to constitute breaches of various provisions of the Party constitution.

In their reply to the first allegation, they admitted signing the Notice, but asserted that it was in the exercise of a Constitutional right. In *Dissanayake v. Kaleel,* I held that a Member of Parliament has a constitutional right to sign such a Notice, in the exercise of an independent discretion, and that this is a quasi-judicial power. I must, however, unequivocally, reject any suggestion that this right extends to the signing of a document, contents unseen. Mr. Athulathmudali attempted to justify the 1st Petitioner's conduct as a common practice, affirming his statement that "in Parliament we have put our signature [in this way?] to many other such documents", and submitted that the 1st Petitioner by signing took responsibility for whatever was in the Notice. The question is not his responsibility or accountability **after** signing; but rather whether he genuinely exercised his discretion **before** affixing his signature. Had the document related only to the 1st Petitioner's **personal** affairs, it might have been a mere question of responsibility or liability; but this was a public matter, relating to Constitutional powers and duties, and it was a grave misuse of a Constitutional right to have signed, without knowledge of its contents, an indictment of the most serious kind known to our law. The Petitioners did not deny that there was no prior internal discussion, but claimed only that this question did not arise because the Notice was signed in the exercise of a Constitutional right. In this Court, it was urged that since the President had said that disciplinary action would not be taken against Members who

retracted their signatures, the Petitioners could not be dealt with on this charge. Obviously, such a "pardon" was not unconditional: if the retraction was not genuine, or was revoked, the offence would be revived and would attract disciplinary action. Mr. Choksy, however, did not press this aspect of the first charge. In regard to the allegation of continuing to support the Notice despite the retraction of their signatures, the Petitioners did not deny the fact of continued support; their sole defence was that they signed the Notice in the exercise of their Constitutional right. Mr. Athulathmudali's submission was that since signing was protected, everything done subsequently, arising from or referable to such signing, was equally immune from challenge: an argument quite inapplicable to the 1st Petitioner, whose act of signing was not an exercise, but an abuse of his Constitutional right. In any event, the question of continued support after retraction of the signatures stands on an entirely different footing to the original act of signing. Once the Petitioners represented to the Speaker and to the Group that they retracted their signatures, alleging misrepresentation, deceit and malice, they could no longer be heard to say that the Notice was valid, or that they had signed it in the exercise of a Constitutional right (for they did not claim that the retraction was void). Here too the Petitioners did not deny the absence of prior internal discussion before continuing to support the Notice.

Second, the Petitioners were charged with deceitful conduct, based on two matters: continued support, subsequent to R1 and R2, and their letters of 9.10.91. As mentioned above, continued support was not denied, and their letter of 9.10.91 could not have been denied. Undoubtedly, by signing R1 and R2 they gave the impression that they had never supported, or no longer supported, the Notice. Was that genuine or was that an attempt to deceive the Group? Their subsequent conduct, and their letters of 9.10.91 which make no reference to R1 and R2, reasonably give rise to the inference that their retractions were not genuine. In the case of the 2nd Petitioner any other inference is not reasonably possible, in view of his false denial that he signed R2. But even ignoring that for the moment, let me examine the theoretical possibility that the retractions were genuine, and that they subsequently, and in good faith, changed their minds again. This is not a reasonable inference for several reasons. The Petitioners did not say so in their letters of 9.10.91, asserting

instead that the Notice was duly signed by them; it was a matter on which the burden of proof lay upon them, but even in their replies dated 21.12.91 they did not take up this position; it has not even been adverted to in their pleadings in this Court. Instead of stating their position on these factual matters which were within their exclusive knowledge, they merely denied that they had indulged in any, deceitful action. Further, in R2 they had repudiated their signatures as having been procured by misrepresentation and deceit, actuated by malice, so that any change of mind must have extended not only to the substance of the Notice but also to those vitiating factors. To overcome this hurdle, Mr. Athulathmudali sought to construe this allegation as meaning that the letters of 9.10.91 constituted deceitful conduct, and urged that internal letters, written in order to raise matters of conscience, could not be the subject of disciplinary action. This is not tenable. The allegation is quite plain. It is not that their conduct and/or their letters **constitute** deceitful action, but rather that "their conduct ... and their letter dated 9.10.91 ... **establish** deceitful action towards the Party and the Group"; i.e. that subsequent conduct and letters **prove** that previous behaviour (the purported retraction) was deceitful. He further submitted that R1 and R2 contained criticisms of the Speaker, and that the Petitioners too desired to give effect to their own criticisms of the Speaker's conduct in regard to the Notice. That submission ignores the fact that the Petitioners expressly specified their sole reason for losing confidence in the Speaker: namely for having wrongly treated their signatures on the Notice as invalid. The Speaker accepted their own representation and request to him, and it would be absurd to lose confidence in him for that reason. If they had said that the Speaker erred initially, in entertaining the Notice without adequate consideration of the validity of the signatures, or had been guilty of undue delay in acting upon R1 and R2, I could have appreciated this submission. But they did not criticise the Speaker on that ground.

Coming to the third allegation, the Petitioners admitted their absence from Parliament at voting time on 10.10.91, and merely denied that this constituted a breach of Party discipline. They did not deny that they had failed to tender a reason or excuse for their absence. The 1st Petitioner claims that he had communicated his state of health to the Secretary to the Whip; on 10.10.91 itself he had

obtained a medical certificate advising rest; Mr. Athulathmudali was not able to suggest any reason why a Member of Parliament should have obtained such a medical certificate except to excuse his absence on 10.10.91; and the 1st Petitioner is himself an Attorney-at-Law. If the truth is that the 1st Petitioner would have voted with the Group, but for his ill-health, why was this simple position not stated in his reply? The 2nd Petitioner claims a Presidential dispensation from the Group directive, conveyed through Mr. Aboosally: why did he not simply say "Mr. Aboosally will tell you that the President had said that I may keep away if I cannot vote with the Group, and if not for this I would have voted with the Group"? Mr. Athulathmudali submitted that if an oral hearing had been given, all these matters would have been clarified. But that is not the issue. The Petitioners were asked to state their position; they did so, and failed to deny simple allegations of fact, and omitted to state factual matters peculiarly within their knowledge; the scope of the inquiry was thereby narrowed, **by them.** Had they said, "We deny the allegations against us, and will state our position after full particulars of the matters alleged are furnished", the position might have been different. Here they chose to "answer the allegations", and by admitting (at least by implication) the material facts they greatly narrowed the scope of the inquiry.

It is convenient to summarize at this stage the position in regard to these three allegations. Signing the Notice and absence at voting time on 10.10.91 were expressly admitted. Signing R1 and R2, continuing to support the Notice subsequently, the letters of 9.10.91, and the failure (upto 6.12.91) to tender any reason or excuse for absence on 10.10.91 were admitted by necessary implication; in this Court they were not denied. The explanation that the Petitioners had *bona fide* changed their minds, between 2.9.91 and 9.10.91, was not tendered to the Working Committee, or set out in the pleadings in these proceedings. The reasons for absence on 10.10.91 were stated for the first time in their petitions to this Court; and even then it was not suggested that they would otherwise have voted with the Group. Thus in respect of these three allegations the primary facts were not in question. Whether those facts established deceitful conduct was a matter of inference. Whether they established misconduct warranting expulsion was a matter of law. That misconduct would have brought

the Party into disrepute (Rule 3(d)), was contrary to the directive of the Group (Rule 17(2)), and was generally in violation of fundamental obligations of loyalty and honesty owed to the Party and to fellow members.

The fourth allegation was based on newspaper reports, but this was not stated in P1. No particulars were furnished as to the dates, the places, and the criticisms complained of. This allegation was denied by the Petitioners and hence the Working Committee could not have come to a finding without an inquiry into the facts. Although Mr. Athulathmudali made no complaint in that respect, it is also unsatisfactory that at no stage did the Disciplinary Committee or the Working Committee identify the particular newspaper reports relied on. In the course of the proceedings in this Court a handful of newspaper reports were produced by the Respondents, relating to the period upto 6.12.91, which were not denied by the Petitioners. These reports show some degree of association with the 8 expelled Members, and some criticism of the President and the Executive Presidential System. Further, the "Divaina" report of 10.12.91 (which was **not** one of the reports acted on by the Working Committee) established the Petitioners' attitude: they would address public rallies of the expelled Members, and join their party, and oppose the Party leadership. However, all these do not lead to an irresistible conclusion of guilt. Further inquiry, disclosure of particulars, and an oral hearing was therefore necessary. However, these proceedings are not by way of review alone, and consideration of the merits is also required. Here again the Petitioners' legal submissions are found to be undermined by their pleadings: for in their counter-affidavits each Petitioner replied thus:

> "I deny that any of the alleged acts **if committed by me** is unlawful. I was **not the only one who pursued that course of conduct,** e.g. Dr. P. M. B. Cyril and Mr. Ravindra Samaraweera ... Dr. P. M. B. Cyril who appeared on the platform of the so-called rebels and who in his speeches had attacked the President ..."

An affidavit must state the facts within the personal knowledge of the deponent. If the Petitioners had not committed the acts alleged, they

could have directly denied the allegation in a straightforward manner; if they wished to add that Dr. Cyril had not been dealt with for conduct similar to the acts alleged, they could have said this as well. But what did they mean by the conditional denial (**"If committed by me"**) ; followed by the mitigatory admission (**"I was not the only one"**) ? I find this averment to be ambiguous as well as evasive. In the context of the Petitioners' course of conduct, the several unsatisfactory features of their affidavits, and the "Divaina" report of 10.12.91, I am constrained to hold that there is no denial of this allegation. Assuming in their favour that such criticisms were, or might have been, within the scope of their fundamental right to freedom of speech, (for the reasons stated in *Dissanayake v. Kaleel*), yet the gravamen of that charge is the undoubted lack of prior internal discussion.

In this state of the facts, it is necessary to consider whether the *audi alteram partem* rule had been complied with. This is not a case where the Petitioners had asserted that the expulsion decision of 6.12.91 was void, and refused to participate in the subsequent proceedings; or participated, without prejudice to that position; and it is unnecessary to consider that situation. Here the Petitioners chose to participate in the subsequent proceedings; they were afforded an opportunity to state their case, and did so; the facts and circumstances were not at all complex, and they could without any difficulty have stated their case in three or four days; and when they did so, the facts ceased to be in dispute except in regard to the fourth allegation; thereupon an oral hearing became unnecessary in regard to the first three allegations. They were, however, entitled to particulars and an oral hearing in regard to the fourth allegation, but their pleadings in this Court indicate that on the fourth allegation too the facts were not really in dispute. In any event, the other three allegations were sufficiently grave to render expulsion a proper and appropriate penalty, and the defect in procedure in regard to the fourth was not fatal.

While Natural Justice entitles a person to a fair and accurate statement of the allegations against him (*Ridge v. Baldwin*[4], *Stevenson v. United Road Transport Union*[5], *Labouchere v. Wharncliffe*[6]), the mere fact that he had not been given formal notice of all the matters in which his conduct was to be called in question

did not necessarily entitle him to contend that the inquiry was in breach of the *audi alteram partem* rule. Thus in *Davis v. Carew-Pole* [7] notice was given to the Plaintiff in respect of an allegation that he had trained a horse contrary to the National Hunt Rules. At the inquiry, without prior notice, his activities in regard to the training of two other horses were also considered, and an adverse order was made. No fact was in dispute in regard to the Plaintiff concerning the other two horses. It was held that the Plaintiff was not prejudiced by the lack of notice and therefore failed in his contention that there had been a breach of the *audi alteram partem* rule. In *Russell v. Duke of Norfolk* [8], a trainer whose license was withdrawn for doping contended that the inquiry was contrary to the principles of Natural Justice because only part of the analyst's certificate was read to him, omitting that portion which identified the particular drug. This omission was held insufficient to constitute a breach of Natural Justice.

The Effect of a Subsequent Hearing

I now turn to the question whether a subsequent (fair) hearing after a decision made in breach of the ***audi alteram partem*** rule, can validate that decision. This is not a case of a **deliberate** breach of Natural Justice, as the Working Committee attempted to give notice, and it is unnecessary to consider that situation. Even in other cases, "since the initial decision ... will almost inevitably have a prejudicial effect, the law ought to be slow to admit such dubious procedure" says Prof. Wade who refers to several precedents (Administrative Law, 5th Ed., pp 490-491); this passage was cited by Mr. Athulathmudali, who however did not discuss the several authorities therein cited, despite my invitation to do so. It is also discussed by Prof. S. A. de Smith (Halsbury's Laws, Vol. I, 4th Ed. paragraph 77) Decisions from Canada, Trinidad, England, Singapore and Australia, in a variety of situations, have been cited by them, and these I must now consider, without the benefit of counsel's submissions, in order to determine the validity of expulsions resolved upon after "such dubious procedure."

In *Ridge v. Baldwin,* [4] the relevant facts were that:

> "The watch committee were under a statutory obligation ... to comply with the regulations made under the [Police] Act. They

dismissed the appellant [on 7th March] after finding that he had been negligent in the discharge of his duty. Yet they had preferred no charge against the appellant and gave him no notice. They gave him no opportunity to defend himself, or to be heard. Though their good faith is in no way impugned, they completely disregarded the regulations and did not begin to comply with them." (at p. 113)

"On March 18 [the appellant's solicitor] was given not only a full but a courteous hearing by the watch committee but received no indication of the nature of the charges which his client had to answer, notwithstanding his repeated statements that he did not know what they were. It is plain, therefore, that if there were a failure on March 7 to give justice to the appellant this was not cured on March 18 when the watch committee confirmed their previous decision. At this hearing it was made plain by [the solicitor] that his client was not seeking reinstatement but only his pension rights of which he had been deprived by his dismissal. This position is maintained by the appellant through his counsel before Your Lordships." (at p. 129)

Lord Reid held:

"Next comes the question whether the respondents failure to follow the rules of natural justice on March 7th was made good by the meeting on March 18. I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil's case* [10]. But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing. Even so, three members of the committee changed their minds, and it is impossible to say what the decision of the committee would have been if there had been a full hearing after disclosure to the appellant of the whole case against him. I agree with those of

Your Lordships who hold that this meeting on March 18th cannot affect the result of this appeal." (at p. 79)

A case from Canada, *Posluns v. Toronto Stock Exchange*[9], can be contrasted. The Board of Governors of the Stock Exchange held an inquiry on 28th February into certain transactions entered into between the Daily Company (a member firm of which the Appellant was a director) and another firm (Lido).

"The appellant was present at the hearing of February 20th at which a statement was read reciting the facts known to the Board concerning the transactions in question and he was given an opportunity to explain his association with Lido. After considering the matter amongst themselves, the members of the Board called in the representatives of the Daly Company and announced that they were unanimously of the opinion that the company was guilty of six of the seven acts of omission preferred against it, including the first. After representations had been made on the company's behalf with respect to penalty, the matter was again considered and it was decided to impose the maximum fine of $5,000 on R. A. Daly, Jr.

There then occurred what the trial Judge referred to as an unfortunate error because the Board, instead of accepting the fact that it had completed the inquiry with respect to the Daly Company upon which it had properly embarked, went on to deal independently and additionally with the appellant ... After relatively little discussion, it was unanimously resolved that all prior consents given to the appellant as a director, officer and shareholder of the Daly Company be terminated forthwith and it was the general understanding that his association with the Daly firm was to be severed in all respects.

Although the President of the Daly Company was informed of the resolution withdrawing the appellant's approvals, no action was at that time taken by the Board to put the terms of the resolution into effect and on the following day representations were made to the Board that there should be a rehearing with respect to Posluns personal position. The Board acceded to this

request and a hearing was set for March 2nd on which date the same members of the Board were present who had conducted the February 28th meeting and a statement was read reviewing what had transpired at the meeting in so far as it related to the appellant. The appellant was represented at this meeting by counsel who was asked whether he wished to call additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. The appellant's counsel then made full representations to the Board and concluded with a plea in mitigation urging that the publication of the resolution withdrawing the approvals would do irreparable damage to the appellant and his family. There being no dispute as to the facts, the members of the Board adjourned to consider the matter in light of the interpretation placed on them by the appellant's counsel and in light of the submissions which he had made concerning the penalty to be imposed; in the result they concluded that the appellant's conduct was such as to warrant the withdrawal of the Board's approvals of his association with the Daly Company, but they agreed that the resolution directing that withdrawal passed at the meeting of Februrary 28th would not be acted upon or published if the appellant resigned by March 10th. The Appellant, however, decided not to tender his resignation and a letter was accordingly forwarded from the Board to the Daly Company giving formal notice of the resolution." (at p. 168-169)

The difference between the two cases was summed up thus:

From the above recital of the facts it will be apparent that the circumstances in *Ridge v. Baldwin* were quite different from those in the present case. In *Ridge v. Baldwin* the appellant was never told of the case which he had to meet, whereas Mr. Posluns knew what was complained of in his conduct some days before the first hearing. In *Ridge v. Baldwin* the appellant was given no opportunity to be heard at either meeting, whereas Posluns gave evidence and had a full opportunity to explain himself at the first hearing and declined, through his counsel, to add anything at the second hearing to the evidence which had already been taken. In *Ridge v. Baldwin* the plea

made by the chief constable's solicitor at the second hearing that his client should be permitted to resign was of no avail, whereas after listening to the submissions of Poslun's solicitor at the March 2nd hearing, the Board of Governors gave him ten days in which to resign and withheld official publication of the resolution passed against him until that period expired and Posluns had declined to resign.

In my opinion, the contention that the proceedings at the meeting on March 2nd were in the nature of an appeal from the decision of February 28th rather than a rehearing, leaves out of account the fact that the Board gave the appellant's solicitor full opportunity to call any evidence he pleased at the second hearing and that it was he and not the Board who made the election to abide by the evidence taken in February. He then reviewed all the circumstances afresh and advanced at every turn the construction of the facts which was most favourable to his client. In the result, although the Board of Governors did not change their ruling, they offered to withdraw it altogether if the appellant would resign. In my view also it is inconsistent to speak of the March 2nd hearing as an appeal when the disputed resolution was not formally published until March 10th." (at p. 173)

De Verteuil v. Knaggs [10], falls in between. A statute provided that:

"If at any time it appears to the Governor, on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom, it shall be lawful for him to transfer the indentures of such immigrants for the remainder of their respective terms of service to any other employer who may be willing to accept their services and pay the remaining indenture fee".

Upon a complaint by the Protector of Immigrants in regard to the treatment and conditions of immigrants on the appellant's estate, on 16.12.1915 the Governor, *ex parte*, and without affording an opportunity to the appellant to make any answer or explanation, made an order for the removal of the indentured immigrants from the

appellant's estate, and for the transfer of their indentures to some other employer; it does not appear that a particular employer was specified. The first intimation which the appellant received was in a letter dated 20.12.1915 from the Protector of Immigrants setting out four allegations. Thereupon the appellant sought and obtained a personal interview with the Governor on 23.12.1915, at which he was granted a fair opportunity of placing his answer to the allegations. Further clarification was furnished by letter dated 27.12.1915. On 7.1.1916 the Colonial Secretary informed the appellant that the Governor did not feel justified in cancelling the order. The appellant made two further attempts to persuade the Governor, who finally ruled that the immigrants must be removed and transferred to another estate the manager of which was willing to accept them. The Privy Council held that the Governor "did not proceed without giving fair notice to the appellant of the charges made against him, or without giving him a fair opportunity to make an answer to such charges." This case is similar to *Ridge v. Baldwin* in that the initial order, taken in isolation, was in breach of Natural Justice; it differs however from that case, and is similar to Posluns case, in that no steps were taken to publish the order or to make it enforceable, or to make legal consequences flow, and in that in subsequent proceedings a full and fair opportunity of meeting the case against him was given.

Those were cases of re-hearing by the same authority. The principle that a failure of Natural Justice at the original hearing may sometimes be cured by a "full re-hearing" by another body was recognised by the Privy council in *Pillai v. Singapore City Council* [11]. Having held that the rules of Natural Justice did not apply to the first tribunal, yet the Privy Council observed that even if they did apply, the subsequent proceedings cured the defect. Although they were by way of "appeal", those proceedings were in the nature of a re-hearing and evidence was called *de nova*. This was followed in *Stringer v. Minister of Housing* [12]. In *Calvin v. Carr* [13], the Privy Council dealing with an appeal from New South Wales, recognised that there was no absolute rule, either way, as to whether defects in Natural Justice at an original hearing can be cured through proceedings by way of appeal or re-hearing (at pp. 447-448); everything depends on whether after "examination of the hearing process, original and appeal as a whole", the Court is satisfied that "there has been a fair

result, reached by fair methods"; whether "the appellant's case has received, overall, full and fair consideration". (pp. 448, 449, 452).

Applying these principles, (a) the initial breach of Natural Justice was not deliberate; (b) action was not taken to enforce, or to make legal consequences flow from, the order of expulsion, and the fact that the Petitioners participated in the subsequent proceedings gave the Working Committee a *locus poenitentiae;* (c) the allegations were fairly and adequately, though not fully and precisely, communicated; and (d) a fair opportunity was given to the Petitioners to state their case, and an oral hearing became unnecessary as the facts were undisputed in consequence of their replies. I hold that the Petitioners' case had received – overall – full and fair consideration, and that there had been a fair result, reached by fair methods.

In coming to this conclusion, I have not overlooked Mr. Athulathmudali's submissions that (a) the elaborate "Guidelines for Disciplinary inquiries" adopted by the Party were not followed, and (b) the Petitioners had no opportunity of being heard in mitigation. while I agree that those guidelines embody exemplary procedures to be followed by Disciplinary Panels, they are not binding on the Working Committee. Even if the Working Committee ought to have complied with the spirit of those Guidelines, the ultimate question is whether, in the unusual circumstances of this case, there has been overall, a fair hearing. In regard to mitigation, the misconduct was so serious (and I have dealt with this aspect in *Dissanayake v. Kaleel)* as to make mitigation impossible. Apart from that, in response to a question from us, Mr. Athulathmudali submitted that the matters to be urged in mitigation were (i) the explanations for absence on 10.10.91, (ii) that Dr. Cyril and Mr. Samarawera were excused, and (iii) that the Petitioners voted with the Government on the Budget. These explanations should have been submitted, in defence and in mitigation, to the Working Committee. The conduct of Dr. Cyril and Mr. Samaraweera were far less serious, and could not be characterized as deceitful. Voting for the Budget was more a matter of the political survival of the Petitioners, rather than of support for the Group. In any event, on 9.12.91 the Petitioners had virtually repudiated the Party, and had cast their lot with the new D.U.N.F.

6. CONCLUSION

I determine that the expulsion of the Petitioners was valid. The proceedings of the Working Committee upto 6.12.91 were irregular and dubious, and could not have been sustained but for the subsequent proceedings, in regard to which complex questions of law arose. I therefore refrain from making any order for costs in favour of the Respondents.

KULATUNGA, J.

These applications (Special) Nos. 1 and 2/92 were of consent heard together as they involved the same issues and rested substantially on the same facts. The petitioners are Members of Parliament elected at the General Elections held in February, 1989 as Members of the United National Party (The 4th respondent) which is a recognised political party within the meaning of the Parliamentary Elections Act No. 1 of 1981. The 1st, 2nd and 3rd respondents are the Chairman, General Secretary and General Treasurer of the U.N.P. respectively; they are also members of the National Executive Committee and the Working Committee of the U.N.P. The 5th respondent is the Secretary-General of Parliament against whom no relief has been claimed; he has been joined only for the purpose of giving him notice of these proceedings.

The petitioners have invoked the jurisdiction of this Court under the Proviso to Article 99(13) (a) of the Constitution. Each of them seeks a determination that his expulsion from the membership of the UNP, communicated by the letter dated 09.12.91 under the hand of the 2nd respondent, was invalid. The decision for the expulsion of these petitioners has been made by the Working Committee of the UNP by its resolution adopted at a meeting held on 06.12.91. A copy of the Minutes of that meeting has been produced marked R10. The grounds for the expulsion of both petitioners are identical and are set out in the said resolution and in the letters sent to them on 09.12.91 copies of which have been produced marked P1 in each of these applications. Under Article 99(13) (a) of the Constitution the seats of these petitioners will become vacant by reason of their expulsion

from the membership of the UNP and they will be deprived of their status as Members of Parliament unless they obtain a determination from this Court that the impugned expulsion was invalid.

FACTS

The petitioner in application No. 1 has been a member of the UNP from 1970 and was elected as a MP in 1977 and in 1989. He was a member of the NEC of the UNP from 1977, and functioned as District Minister for Gampaha during the First Parliament. After his election in 1989 he was appointed a State Minister and later as a Project Minister which office he held until he resigned therefrom on 18.09.91. The petitioner in application No. 2 has been a member of the UNP from 1960 and a MP from 1989.

EVENTS LEADING TO THE EXPULSION OF THE PETITIONERS FROM THE UNP

PROCEEDINGS FOR THE REMOVAL OF THE PRESIDENT

The petitioners have been expelled for conduct alleged to be violative of the provisions of the UNP Constitution (P2) and arising by reason of certain activities by them in the aftermath of a campaign by some MPs to take proceedings under Article 38(1) (e) of the Constitution read with Article 38(2) for the removal of His Excellency Ranasinghe Premadasa from the Office of President of the Republic of Sri Lanka. Under Rule 7(1) of the UNP Constitution The President, being a member of the UNP, is also the Leader of the Party. A copy of the notice of resolution given to the Speaker under Article 38(2) (a) (sometimes hereinafter referred to as the impeachment motion) has been produced marked P3B. It is undated and bears no signatures. The petitioners state that the said notice of resolution had been signed by not less than one-half of the whole number of Members of Parliament; and that on 28.08.91 the Speaker informed the President by writing that he had entertained the said resolution in terms of Article 38(2) (b) and further drew the attention of the President to Proviso (C) to Article 70(1).

WITHDRAWAL OF PROCEEDINGS AGAINST THE PRESIDENT

The petitioners further state that subsequently, they with other members of the Government Parliamentary Group by a writing dated 30.08.91 addressed to the Speaker withdrew and revoked their signatures and consent to the aforesaid notice of resolution; they also signed a resolution adopted by the Government Parliamentary Group on 02.09.91 which, *inter alia*, called upon the Speaker to reject the notice of resolution. The respondents have produced these documents marked R1 and R2 respectively and state that they were presented to the Speaker on 03.09.91. Both documents state that the notice of resolution does not have the requisite number of signatures under Article 38(2) (b). In R1 the MPs state that they do not support the notice of resolution and that it should not be placed on the Order Book or Paper. In R2 they declare their confidence in the President, condemn the action of interested individuals and groups who have obtained the signatures of certain Government and Opposition MPs through misrepresentation and deceit, express surprise and dismay that the motion has been entertained with much haste and without verification by the Speaker and call upon the Speaker to reject "the illegal, unconstitutional and malicious move to remove the President from Office".

RESIGNATION OF PETITIONER NO. 1 FROM MINISTERIAL OFFICE

On 18.0-9.91 the petitioner in application No. 1 tendered his resignation from the Office of Minister. This was accepted by the President only on 02.11.91 (P5). In the meantime this petitioner addressed a letter to Hon. Ranil Wickremasinghe on 19.09.91 (P4) in which he set out the following matters as cause for his disillusionment as a member of the Government Parliamentary Group.

(i) His position as a MP has been reduced as he can do hardly anything for his constituents.

(ii) He cannot push through work at Ministry level due to the attitude of bureaucrats.

(iii) He is not being consulted on acquisitions of land.

(iv) Failure of "Janasaviya" in his electorate by reason of vital activities in that connection being entrusted to bureaucrats, to the exclusion of MPs who are kept in the periphery.

(v) Failure of the Government to grant a request by him for ensuring the future security of his family.

The petitioner proceeded to state that he was not a member of the group that started the movement against the Party; that he signed the notice of resolution "even without seeing it" as in the case of many other documents which they sign in Parliament; after some time, when accusations and counter accusations were being made, he began to understand what it was all about; that the President read out a list of allegations and denied them; and that there were rumours, gossip and newspaper stories which the President should have explained. As this was not done, he was unable to explain the truth to the voters. He therefore wished to resign his portfolio and become a "free UNP Member of Parliament".

PUBLIC CAMPAIGN AGAINST UNP LEADERSHIP PETITIONERS' ROLE

PETITIONERS' VERSION

The petitioner No. 1 states that between August-December 1991 he addressed public functions in Divulapitiya supporting the Government. As additional proof of their support for the Government, learned President's Counsel for the petitioners produced, with the leave of Court the Hansards of 22.11.91 (Y) which shows that both petitioners had voted with the Government in favour of the Appropriation Act 1992.

RESPONDENTS' VERSION

The 2nd respondent states that during this period the petitioners associated themselves at public political meetings with expelled UNP members. He also produced newspaper reports of such activities

and states that the petitioners have not denied the correctness of such reports. These reports clearly show that both petitioners had joined the "rebel" UNP MPs led by Messrs Lalith Athulathmudali, Gamini Dissanayake and G. M. Premachandra. Thus R15A and R15B, news reports in "Island" and "Lankadipa" respectively and R15E "Lankadipa" 23.09.91 carry news of the petitioner No. 2 joining the "rebels" at a public rally held at Kandy to explain the impeachment motion. This petitioner was garlanded by Mr. G. M. Premachandra on his arrival at the venue of the meeting and was again garlanded by Messrs Lalith Athulathmudali and Gamini Dissanayake when he came on the stage, amidst the lighting of crackers and applause. R15E carries his photograph taken when he was being carried to the stage by supporters.

R1 5C "Divaina" 23.09.91 carries news of a press interview given by the petitioner No. 2 and his speech in Kandy. He told the press that under the Executive Presidential System of Government, the power of MPs had been reduced to the extent that they are not even allowed to issue letters for obtaining jobs. This he explained was the reason for his joining "Lalith - Gamini Group" In his speech at Kandy, he admitted the signing of the impeachment motion but denied that he signed the resolution in support of the President which had been adopted by 116 MPs (R2). At that meeting Lakshman Seneviratne MP accused the Government of attempting to bribe him with an offer of Ministerial Office. R15D "Lankadipa" 23.09.91 carries news of a media conference held at the residence of Mr. Lalith Athulathmudali at which the petitioner No. 2 once again denied his signature on R2 and demanded that the signature purporting to be his signature be examined by the Examiner of Questioned Documents.

R15B "Lankadipa" 27.09.91 produced in application No. 1/92 is a news report announcing the holding of a series of public rallies by "Lalith - Gamini Group" in Kegalle, Badulla, Galle and Kalutara between 27th September and 7th October, 1991. The name of petitioner No. 1 appears in R15B as one of the MPs scheduled to speak on the subject of the impeachment motion. R15C "Divaina" 08.10.91 is a news report of the public rally held at Kalutara by the dissident UNP MPs. The petitioner No. 1 speaking there said that

they would fight on until victory, against all odds; that the UNP was ailing; and that when he consulted an astrologer on this, he was told that no treatment will cure the illness because the Party was bedevilled. As such, they had launched a campaign to exorcise the devil. R15D "Divaina" 10.12.91 report a press interview given by this petitioner on the previous day at which he said that as he knew what the judgment would be, he decided after a discussion not to challenge his expulsion in Court. Instead, he proposed to join the newly formed Democratic United National Front and to dedicate himself to the task of safeguarding democracy. He added that the petitioner No. 2 would do likewise.

R15F "Island" 22.01.92 is a news report of a press conference held by "rebels" Lalith Athulathmudali, Gamini Dissanayake, G. M. Premachandra and others along with the petitioners for celebrating the recognition of the DUNF by the Commissioner of Elections. They told the press "only Premadasa's Party opposed the registration of our Party" but amidst strong opposition and state pressure the Commissioner of Elections had delivered his verdict.

PETITIONERS' PLEADINGS REGARDING ALLEGED ASSOCIATION WITH UNP "REBELS"

Learned President's Counsel for the petitioners submitted that the alleged association of the petitioners at public meetings held by the expelled UNP MPs has not been proved and referred us to the counter affidavits of the petitioners wherein they have specifically answered this allegation. Each of them has averred thus:-

"I deny that any of the alleged acts if committed by me is unlawful. . . . I was not the only one who pursued that course of conduct, e.g. Dr. P. M. B. Cyril and Mr. Ravindra Samaraweera. I state that Dr. P. M. B. Cyril who appeared on the platform of the so-called rebels and who in his speeches had attacked the President . . . has not been subjected to any disciplinary action".

If as it appears, the petitioners have neither denied nor admitted nor stated that they are unaware of the allegation, the result is that there is no averment traversing the allegation and the Court is left

with the uncontradicted evidence placed by the respondents. In this state of affairs, I hold that the alleged association has been proved. The petitioners have also failed to traverse the averment contained in the 2nd respondent's affidavit that the petitioners have not contradicted the newspaper reports except to state that two of these reports published in January 1992 are untrue. The said reports state that the petitioners have been appointed district organisers for the newly formed DUNF; but the petitioners deny this. In view of this denial, I have excluded the said two news reports from the statements of facts.

DR. P. M. B. CYRIL AND RAVINDRA SAMARAWEERA

Dr. Cyril joined the UNP "rebels" at a public rally in Galle and in his speech said that he did so in the interests of democracy. Mr. Lalith Athulathmudali in his speech promised to bring out the members of the ruling party one by one to their camp. (P16 "Island" 06.10.91 and P17) Dr. Cyril also attended the rally held by the dissidents at Kalutara and made a speech there (P18 "Divaina" 08.10.91). On 10.10.91 Dr. Cyril voted against the no-confidence motion on the Speaker. Ravindra Samaraweera was absent in Parliament (P19 "Divaina" 11.10.91). Thereafter Dr. Cyril told a public rally in Ratnapura that he voted against the no confidence motion in the interests of party cohesion. (P20 "Divaina" 14.10.91). On 15.10.91 he addressed a letter (R 18) to the 2nd respondent wherein he gave an undertaking that in future he will not participate in meetings or discussions where Party Policies and Principles are criticised and reaffirmed his loyalty to the Party and its Leadership. He also promised to abide by the Party Constitution. On 25.10.91, Ravindra Samaraweera also gave a letter (R19) reaffirming his loyalty to the Party and its Policies, Principles and Leadership. He also informed that he had attended Parliament on 24.10.91 and voted with the Government Parliamentary Group approving the Proclamation for the continuation of the Emergency. In view of these undertakings, the UNP Working Committee decided on 04.11.91 not to take disciplinary action against Dr. Cyril and Ravindra Samaraweera. It was also decided to await the judgment of the Supreme Court in pending cases, before taking proceedings in the case of the petitioners (R20).

UNP POLICY AGAINST PARTY MEMBERS WHO WITHDREW SUPPORT FOR THE IMPEACHMENT MOTION

According to a statement which was widely circulated in the press on the 19th and 20th of September, 1991, His Excellency The President had announced that no disciplinary action would be taken against MPs who had retracted their signatures to the impeachment motion (24, P25, P26, P27, P28, P29, and P30). This issue was again raised at a press interview given by the 2nd respondent in December 1991. On being asked whether the MPs who signed the impeachment motion might join the DUNF through fear of victimisation, the 2nd respondent said that these MPs had promised to abide by Party discipline; the Party trusted them and consequently, they will not be victimised. (P23 "Island" 15.12.91).

OCCASION FOR DISCIPLINARY PROCEEDINGS AGAINST PETITIONERS

*** NO CONFIDENCE MOTION AGAINST THE SPEAKER**

Pursuant to the representations of Government MPs contained in R1 and R2, the Speaker announced in Parliament on 08.10.91 that having inquired into the matter, he was of the view that the notice of resolution did not have the required number of valid signatures and accordingly, it could not be proceeded with. Thereupon the Opposition moved a motion of no-confidence in the Speaker which was scheduled to be debated on 10.10.91.

PETITIONERS' REQUEST FOR A FREE VOTE FAILURE TO ATTEND PARLIAMENT ON 10.10.91

On 09.10.91 both petitioners addressed letters to the Chief Government Whip wherein they complained that after they had signed the impeachment motion in the exercise of their rights under Article 38(2) of the Constitution, the Speaker had made an erroneous statement regarding the validity of their signatures to the motion in derogation of their privileges as MPs and hence wished to vote in favour of the no-confidence motion against the Speaker. Accordingly they requested the Chief Whip to obtain for them permission for a

"free vote" (R3). Their request was rejected by the Government Parliamentary Group at its meeting held at 5.00 p.m. on 09.10.91, which neither petitioner attended. The Group decided to vote against the no-confidence motion and to instruct the petitioners also to vote accordingly. (see the affidavit of the Chief Government Whip R4 and annex X1 thereto). A letter dated 09.10.91 communicating this decision was delivered to the petitioner No. 2 in Parliament at 10.00 a.m. on 10.10.91 and his acknowledgement obtained on the copy thereof. (see R4 and annex X2 thereto). However, he was not present in Parliament at the voting on the no-confidence motion. The petitioner No. 1 was not available in the night of the 9th when the Secretary to the Chief Whip telephoned him to his residences, in Colombo and at Divulapitiya, to communicate the decision of the Government Parliamentary Group. Thereafter, he too absented himself at the voting time in Parliament on 10.10.91.

THE PETITIONERS' EXPLANATION FOR FAILING TO ATTEND PARLIAMENT

The petitioner No. 1 states that he had been a heart patient for some time (a fact which Mr. Choksy PC. conceded during the argument): that on 10.10.91 he had chest pain and visited the Cardiology Unit of the General Hospital where he obtained drugs, in proof of which he produced P6, copy of hospital record; he then met a private medical practitioner who recommended him rest for a few days (see P7 Medical Certificate dated 10.10.91). The petitioner says that he communicated his state of health to the Secretary to the Chief Whip. He does not clarify the mode of his communication or the time of such communication. The Secretary to the Chief Whip in his affidavit states that the petitioner did not at any time inform him of his inability to attend Parliament on 10.10.91.

The petitioner No. 2 states that Mr. Aboosally MP met him in Parliament on 10.10.91 and said that he had spoken to the President, and that if the petitioner could not vote with the Government against the no-confidence motion, the petitioner should not be present when the vote on the said motion was taken. Acting on the said representation, the petitioner was not present in the House at the

voting time. In other words, the petitioner contends that the President offered him the option to be absent which he accepted. Mr. Absoosally in his affidavit denies the version given by the petitioner and states that he only advised him to vote with the Government against the motion of no-confidence.

The above explanations have been tendered for the first time in affidavits of the petitioners tendered to this Court. Further, at the commencement of the arguments, learned President's Counsel for the petitioners informed us that had petitioner No. 1 been able to attend Parliament he would have voted with the Government; and that had the petitioner No. 2 remained in Parliament he would have voted with the Government under protest. This is also an explanation which the petitioners have not disclosed at any time prior to the present proceedings.

DISCIPLINARY PROCEEDINGS AGAINST PETITIONERS

On the evening of 03.12.91 after the delivery of the judgment in SC(Spl.) Nos. 4-11/91, the Disciplinary Committee of the UNP met and by its report (R8) recommended disciplinary action against the petitioners in view of the following:-

(a) they had signed the impeachment motion without prior discussion within Party;
(b) they then associated themselves at public meetings with the eight expelled MPs, which campaign was reported in newspapers without contradiction;
(c) they then signed R1 and R2 withdrawing their signatures to the impeachment motion, but thereafter applied for a free vote on the no-confidence motion against the Speaker for rejecting the impeachment motion;
(d) such conduct shows that they had by signing R1 and R2, deceived the Government Parliamentary Group and the Party; and
(e) they had failed to attend Parliament and to vote against the no-confidence motion on 10.10.91 despite the rejection of their request for a free vote, which lapse they had failed to explain up to that day.

The Working Committee which met at 7.00 p.m. on the same day considered the above report and the petitioners' letters dated 09.10.91 and decided to request them to attend its meeting on 06.06.91 at 8.00 p.m. (see R8, Minutes of the Working Committee meeting dated 03.12.91).

NOTICE TO PETITIONERS

The 2nd respondent by letters dated 03.12.91 (P8) dispatched by express post to their addresses in Colombo and in the outstations informed them that the Working Committee had considered their letters dated 09.10.91 and decided to request them to be present at a meeting on 06.12.91 at 8.00 to discuss their conduct as members of the Party as appearing from the said letters and that in the event of their failing to attend the Working Committee, it will proceed to consider the matter in their absence.

EXPULSION

On 06.12.91 the petitioners were absent when the Working Committee met. The 2nd respondent informed the Committee that the petitioners had been informed by express post to attend the meeting, in proof of which he had obtained certificates of posting (R6 and R7); thereupon the Committee proceeded *ex parte* and considered the disciplinary committee report R8, letters dated 09.10.91 written by the petitioners, R3, newspaper reports of public meetings held by the expelled UNP members at which the petitioners were present and the documents R1 and R2. The Committee agreed that the conduct of the petitioners subsequent to the withdrawal of their signatures to the impeachment motion was culpable; that it also indicated deceitful conduct towards the Government Parliamentary Group and the Party; and as such the petitioners were not entitled to immunity from disciplinary action accorded to members in consideration for signing R1 and R2. The Committee resolved to expel the petitioners from membership of the Party (see the proceedings of the Working Committee marked R10).

The decision of the Working Committee was communicated to the petitioners on 09.12.91 by registered post to their addresses in the outstations and in Colombo. The letter of expulsion (P1) is as follows:-

"Dear Sir,

EXPULSION FROM MEMBERSHIP OF THE UNITED NATIONAL PARTY

I write with reference to my letter to you dated 3rd December 1991, sent by express post . . . requesting you to be present at a meeting of the Working Committee of the Party fixed for 6th December 1991. You however, did not present yourself.

I hereby notify you that the Working Committee decided to expel you from membership of the United National Party with effect from 6th December 1991, for the following reasons:-

(1) That you were, on your admission, a signatory to the Notice of Resolution under Article 38(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka, to impeach His Excellency The President, The Leader of the Party. Notwithstanding that you were signatory to the letter dated 30th August 1991, addressed to the Speaker by members of the Government Parliamentary Group of 2nd September 1991, you persisted in maintaining your support of the said Notice of Resolution.

(2) Your conduct in continuing to support the said Notice of Resolution subsequent to your signing the aforesaid letter dated 30th August 1991 and the said Resolution of 2nd September 1991 and your letter dated 9th October 1991 written to the Chief Government Whip, establishes deceitful action on your part towards the Party and the Government Parliamentary Group.

(3) That whilst being a member of the Party you have associated yourself with the public campaign carried on by the 8 former members of the Party who were expelled from the Party on 6th September 1991, at which the Party Policies and Leadership and more particularly the Executive Presidential System have been criticized.

(4) That your aforesaid acts set out at (1) and (3) above were committed without prior consultation with or discussion within the Party Organisation.

(5) That despite your request for free vote on the Motion of No-confidence against the Speaker being refused by the Government Parliamentary Group, you were not present in Parliament on 10th October 1991 to vote with the Government benches against the said Motion, and you have up to 6th December 1991 not tendered any reason or excuse for your breach.

(6) You have by your aforesaid acts violated Section 3(a), (b), (d); Section 9(d), (e), (f), (g) and Section 17(1), (2), (3), (6) of the Party Constitution.

Yours faithfully,
Sgd. B. Sirisena Cooray
General Secretary
United National Party"

PROTEST BY PETITIONERS AGAINST PROCEEDINGS OF 06.12.91 AND SUBSEQUENT PROCEEDINGS BY THE WORKING COMMITTEE

Although the Working Committee inquired into the matter *ex parte* on 06.12.91 in the belief that the petitioners were in default of appearance, the petitioners state that the letters summoning them for the meeting had been received by them at the outstation address only on 09.12.91 (a fact which the Counsel for the respondents was prepared to accept for the purpose of these proceedings). The petitioners state the letters addressed to their Colombo addresses had not been received at all; and by their letters dated 9th and 12th December 1991 respectively, the two petitioners protested to the 2nd respondent informing that they could not attend the Working Committee meeting for want of notice. The letter of expulsion was received by each of them on 10.12.91.

The 2nd respondent wrote to the petitioners on 21.12.91. In his letter (P11) he maintained that the letters dated 03.12.91 had been sent by express post. Without prejudice to that position, he informed that if the petitioners wished to do so, they may forward written observations stating their position regarding items 1-6 in P1 to enable the Working Committee to decide whether it would rescind, vary or confirm its decision of 06.12.91.

The petitioners replied on 26.12.91(P12). Each of them said - "Answering the allegations contained in your letter of the 9th instant I wish to state as follows:-

1. At the outset I would like to place on record my objections to the holding of a disciplinary inquiry against me by the Working Committee of the Party, as it is a body which is personally selected and appointed by the Party alone, and under the party Constitution has no right, authority or power to conduct any disciplinary proceedings against a member of the Party and/or to expel such member. Under the Constitution of the Party, it is the National Executive Committee which is vested with such right, authority or power. Further, neither the National Convention of the Party nor the National Executive Committee has the power to delegate its functions relating to disciplinary control of members of the Party.

2. No disciplinary action can be taken against me by the Party on the alleged ground that I had signed the motion of resolution submitted to the Speaker under Article 38(2) of the Constitution, to impeach His Excellency, The President of Sri Lanka, who is also the Leader of the Party, by reason of the fact that the decision taken and/or the act done by me in signing the motion of resolution was pursuant to a right, power or authority conferred on me as a Member of Parliament under the aforesaid Article of the Constitution, which cannot be reviewed or controlled by the Party and/or any of its Committees. No rule, convention or principle of the Party can override the constitutional right, duty or responsibility conferred on me by the Constitution of the country

which I, as a Member of Parliament, have sworn to defend and uphold.

3. I deny having indulged in any deceitful action against the Party and the Government Parliamentary Group.

4. I deny the allegation contained in paragraph 3 of your letter.

5. In view of the foregoing, the allegation contained in paragraph 4 does arise.

6. My absence from Parliament of 10th October 1991, is not a violation of Party discipline.

7. I deny that I have violated any provisions of the Party Constitution.

8. I urge that a proper and lawful inquiry be held to inquire into allegations contained in your letter, at which I propose to adduce further evidence to refute the allegations contained therein".

The observations of the petitioners were considered by the Working Committee on 30.12.91 the minutes of which meeting have been marked R11. The 2nd respondent told the Working Committee that the petitioners had been called upon to forward written observations in view of the constitutional time limit for challenging their expulsion. The Working Committee was of the view that in the light of the relevant documents and the uncontradicted newspaper reports, the petitioners had not adduced sufficient facts or reasons to justify reconsideration or alteration of its decision on 06.12.91. The Committee also noted that the answer of the petitioners was in several respects contrary to the ruling given by the Supreme Court. The Committee declined the request for an oral hearing for the reason that the petitioners had requested for a hearing by the NEC, which request could not be accepted; and that in any event the available material did not call for further inquiry or hearing.

Accordingly, the 2nd respondent by letter dated 30.12.91(P13) communicated to the petitioners the Working Committee ruling that

their written observations did not disclose any valid reason to alter the decision made on 06.12.91.

GROUNDS OF EXPULSION

The precise grounds of expulsion as may be gathered from the letter P1 are as follows:

1. resumption of support for the impeachment motion which the petitioners had previously disowned by retracting their signatures thereto when they signed R1 and R2;

2. in signing R1 and R2 the petitioners did in fact deceive the Party and the Government Parliamentary Group to the belief that they were giving up activities which are contrary to the Party Constitution. This allegation is inferred from the conduct of the petitioners in writing the letter R3 in which they expressed their wish to vote in favour of the No-confidence Motion against the Speaker, and applied for a free vote for that purpose after the Speaker had rejected the impeachment motion at the request of 116 MPs, including the petitioners themselves;

3. associating with the public campaign conducted by the UNP MPs at which Party Policies and Leadership and the Executive Presidential System were criticised.

4. engaging in the acts set out at 1 and 2 above without prior discussion within the Party Organisation;

5. failure to vote in Parliament with the Government Benches on 10.10.91 without any excuse therefor after their request for a free vote had been rejected by the Government Parliamentary Group; and

6. by such conduct they violated provisions of the UNP Constitution which are more fully set out in P1.

It is my view that a member of the UNP is liable to disciplinary action by the Party only if it can be established that he has either

expressly or by necessary implication violated his contractual obligations to the Party and not otherwise. In other words the Party cannot establish heads of misconduct against members at its whim and fancy, independently of their contractual obligations under the Party Constitution. Such obligations may be express or implicit. It is presumably for this reason that para 6 of P1 invokes the provisions of the Party Constitution for the expulsion of the petitioners for conduct specified in items 1-5 thereof.

THE UNP CONSTITUTION

The following provisions of the UNP Constitution (P2) are relevant:-

Rule 3 (1) In accepting membership of the Party a person agrees –

(a) to accept the Principles, Policy, Programme and Code of Conduct of the Party;

(b) to conform to the Constitution and Standing Orders of the Party;

(d) not to take part in political or other activities which conflict or might conflict with the above undertakings and not to bring the Party into disrepute.

Office-bearers; line of authority

Rule 7(1) – The President of the country, if he is a member of the Party, shall be the Leader of the Party.

7(3) – Members of the Parliamentary Party shall be bound by orders and directions of the Leader and in his absence the Leader of the Parliamentary Party as to the conduct of matters in Parliament.

Parliamentary Elections; obligations of Party candidates and MPs

Rule 9(d) – A candidate shall be called upon to give a pledge that if he succeeds in entering Parliament on the Party Ticket he will conform to the Principles, Policy, Programme and Code of Conduct of the Party and that he will abide by the Standing Orders and the

Constitution of the Party and that he will carry out the Mandate of the Party; if he fails to do so, the Executive Committee shall take action for the punishment of such offender.

9(g) – Any candidate who after election fails to act in harmony with the Principles, Policy, Programme, Rules and Code of Conduct and Standing Orders of the Party shall be considered to have violated the Constitution.

Standing Orders of the Parliamentary Party

17(1) – Every member of the Parliamentary Party shall subscribe to a pledge of loyalty to the Party.

(2) – He shall vote in Parliament according to the Mandate of the Parliamentary Party conveyed through the Whip of the Party.

(3) – If any member has any conscientious scruples on any matter of Party Policy he may be free to abstain from voting, subject to the written approval of the Leader of the Parliamentary Party.

(4) – In the case of Private Members Bill or motions which do not raise any question of Party Policy or financial implications or on which the Government or the National Executive Committee has come to no decision, members shall be allowed an entirely free hand.

(6) – Members should take the fullest advantage of the opportunity at the Party meetings of raising questions of Party Policy concerning which they have doubts.

GROUNDS URGED AGAINST THE EXPULSION

The petitioners challenge the expulsion on the following grounds:-

1. Absence of jurisdiction in the Working Committee to take disciplinary action against the petitioners.

2. (a) The actions for which the petitioners were expelled are absolutely protected by the provisions of the Constitution of Sri Lanka and Statute Law in terms of which the petitioners were entitled to resort to such action.

   (b) Assuming the existence of limitations to their rights, the petitioners have acted within their rights.

   (c) The Party was, by reason of public representations made in the matter, estopped from taking disciplinary action against the petitioners.

   (d) In any event, expulsion is arbitrary and excessive.

3. Breach of the rules of natural justice.

ABSENCE OF JURISDICTION IN THE WORKING COMMITTEE

These petitioners have raised the same objection which was raised in *Gamini Dissanayake et al v. Kaleel*[1] viz. that the NEC alone is competent to exercise disciplinary power and that it cannot vest such power in the Working Committee in terms of Rule 8(3) (m) of the UNP Constitution. I see no reason to change the ruling of this Court in that case that the NEC may vest such power in the Working Committee. Learned President's Counsel for the petitioners did not press this objection except that in passing he submitted that disciplinary action against the petitioners for alleged violation of Rule 9 (d) may be taken by the NEC alone since that body is by name referred to in that rule as being the authority empowered to punish such offender.

Rule 9(d) requires a MP to honour the pledge given to the Party as candidate, that if he succeeds in entering Parliament on the Party

Ticket he will conform to the Principles etc. of the Party and carry out the Mandate of the Party. I do not think that the reference in this rule to the NEC is intended to preclude disciplinary action by the Working Committee for its breach where the NEC has vested its powers in the Working Committee by an authority under Rule 8(3)(m). In any event Rule 9(d) is not vital to proceedings against the petitioners, for the obligations referred to therein, except the duty of a MP to carry out the Mandate of the Party (which is not of much relevance in the instant case), are covered by other rules (which make no specific reference to the NEC).

The petitioners, however, make the point that in any event, the resolution of the NEC dated 19.04.91(P15) for vesting its power in the Working Committee has not been duly passed as it has been merely proposed and seconded but not adopted. There is no express statement in P15 (the minutes of the NEC) that this resolution has been adopted; however, the 2nd respondent in his counter affidavit states that this was done; and further that at the meeting of the NEC held on 07.09.91 (the minutes of which are marked R13), the Minutes P15 were adopted, and the said powers were again vested in the Working Committee. The 2nd respondent has also produced marked R21(a) – (e) copies of Minutes of other meetings of the NEC to show that various resolutions had been adopted, and Minutes have been maintained, in the same manner and form as in P15. In the circumstances, the absence of an express statement in P15 that the resolution in question was adopted does not compel me to conclude that it has not been duly passed. I hold that the resolution referred to in P15 has been duly passed and that the Working Committee has jurisdiction to take disciplinary proceedings against the petitioners.

VALIDITY OF THE GROUNDS OF EXPULSION

PROTECTION CLAIMED IN TERMS OF CONSTITUTIONAL AND STATUTORY RIGHTS

As in SC (spl.) 4-11/91 (*supra*) here too the petitioners invoke Article 38 of the Constitution and Section 3 of the Parliament (Powers and Privileges) Act (Cap. 383) as absolute protection of their conduct in relation to the impeachment motion, whether in signing it or in

persisting with their support for it, subsequent to R1 and R2, They invoke Article 4(a) and (e) read with Article 93 and Articles 10 and 14(1) (a) as protecting their conduct in associating with the political campaign carried on by the 8 expelled UNP MPs. They contend that the grounds of expulsion based on such conduct derogate sovereignty, their freedom of thought, conscience, speech and expression and their privileges as Members of Parliament assured by the aforesaid constitutional and statutory provisions; that their actions were directed to the promotion of one of the objectives contained in the UNP Constitution, namely the promotion of the political education of the people and their political, social and economic emancipation and the recognition of the fundamental rights of the people; that even if their actions contravene party discipline the rules, conventions or principles of the Party cannot override their constitutional and statutory rights; and as such their expulsion on the impugned grounds is invalid.

RIGHTS UNDER ARTICLE 38 OF THE CONSTITUTION

In my judgment in SC (Spl.) No. 4-11/91 (1) (*supra*) where the above issues clearly arose for decision, I have upheld the right of MPs to take proceedings under Article 38 of the Constitution or to agitate matters in public but after first raising the issues within the Party. In the instant case the said right is not directly in issue for the petitioners have been dealt with not for signing the impeachment motion but for persisting in maintaining their support of the said motion after retracting their signatures thereto. This in my view is much more a matter of Party discipline than it was in the previous case. Even the act of their signing the impeachment motion does not savour of the exercise of a constitutional right. Thus the petitioner No.1 had signed it even without seeing it. He is a holder of a Bachelor of Arts Degree and an Attorney-at-Law. If he signed it without knowing its contents *(which he says is the practice in Parliament adopted by some MPs when they sign important documents), it is quite probable that the petitioner No. 2 (who does not possess such academic or professional qualifications) himself signed the impeachment motion without knowing its contents. Such conduct does not constitute the exercise of constitutional rights under Article 38.

Thereafter both petitioners subscribed R1and R2 withdrawing their signatures and consent to the impeachment motion and called upon the Speaker to reject it; and when the Speaker acceded to their request, they became aggrieved and wished to support the No-confidence Motion moved by the Opposition for challenging the Speaker's ruling. We were also told by the learned President's Counsel that had the petitioner voted against the No-confidence Motion and the petitioner No. 2 would also voted against it, but subject to protest.

The 8 MPs who were expelled on 06.09.91 were consistent, even though they violated their obligations to the Party. These petitioners were inconsistent. They were either unable to make up their minds due to some weakness or were deliberately changing their views every moment for reasons best known to themselves. Such conduct would make it impossible to maintain Party cohesion which is vital to the proper working of the Parliamentary System of Government established under our Constitution. It is violative of the obligation of MPs under Rule 9(g) of the UNP Constitution to harmonize with the Policy and Code of Conduct of the Party and the pledge of loyalty to the Party which they have subscribed in terms of Standing Order 17(1).

RIGHT TO FREEDOM OF SPEECH

As regards the petitioners claim based on the right to freedom of speech, it is well settled that this is a valuable right which cannot be restricted or inhibited merely because comment may be inconvenient or embarrassing to particular persons wielding State power or the Government itself. Criticism may be strongly worded; and it has been said that this right "includes the freedom to speak foolishly and without moderation" *Joseph Perera* v. *Attorney -General* [14]. However, this right is subject firstly, to restrictions which may be imposed by law and permitted by Article 15 of Constitution e.g. in relation to contempt of Court, defamation or incitement to an offence; secondly there are certain limitations which are inherent in the exercise of the right e.g. having regard to the occasion for such exercise, the subject matter of comment and the obligations of the person exercising the right. Thus a student is bound by reasonable rules governing

conduct and in that context has the right to peacefully express his views in the appropriate manner. *Dissanayake v. Sri Jayewardenepura University* [15]. Similarly, public officers and Judges are subject to certain necessary constraints essential to the due performance of their official functions. As was held in SC (Spl.) Nos. 4-11/91 (*supra*), by analogy, the freedom of speech in public which a MP is entitled to is constrained by the requirements of Party discipline.

To what extent is the freedom of speech of a MP constrained by the requirements of Party discipline? No precise answer to this question is possible for each case has to be determined on its own facts and circumstances. However, some general observations are appropriate. Thus, it must be borne in mind that in the political arena one cannot demand the same degree of peacefulness as is required in educational institutions or in the public service. Further, as in the case of others who enjoy the right, criticism made by the MPs need not meet common standards of acceptability (see generally on the principle, *Austin v. Keefe* [16]).

Criticism or even condemnation of policies or ideas within a Party are legitimate even if it were to weaken the Party's position in the country, for the time being. In appropriate circumstances, even public criticism of Party Policies or personalities may become reasonable. However, I am unable to subscribe to a doctrine which would permit a group of dissidents, who seek to secure effective control of the Party on account of irreconcilable differences with the Party Leadership, to conduct a campaign calculated to destroy the Party and yet retain their status as MPs belonging to such Party in Parliament. The situation becomes worse when they establish a new Party in aid of such campaign and seek to attract the less important members of the main Party to join the new Party. Our Constitution does not permit a Party within a Party whether in the Government or in the Opposition. If that is legitimate, anarchy would be the result; and the public would suffer by it. A MP who uses his right to freedom of speech to create such a situation, whether as leader or as supporter, violates his Party obligations and exceeds the bounds of such freedom; he thereby forfeits the protection of Article 14(1) (a) of the Constitution.

Is the conduct of the petitioners in associating with the public campaign carried or by the expelled UNP MPs legitimate exercise of their right of freedom of speech? From the letter P4 addressed by the petitioner No. 1 and from press interview given by petitioner No. 2, it would appear that they were unhappy with the Party on account of the reduction of certain privileges they had previously enjoyed e.g. giving directions to Ministry officials to expedite work on projects, initiating acquisition of lands, wielding authority over officials in charge of social service programmes, issuing letters to voters recommending them for employment. Their opinion that there was a failure of democracy was partly due to this elimination of political influence in the administration. The petitioner No. 1 was also unhappy with the conduct of the President in failing to explain to the MPs the rumours, gossip and newspaper stories that followed the impeachment motion which he signed. He then retracted his signature and resigned his Ministerial Office to become a "free" UNP MP. A few days thereafter he joined the "rebels" and was billed to address their rallies in four districts on the subject of the impeachment motion. At the Kalutara meeting, he insinuated that President (the Leader of the UNP) is a devil who had to be driven out of the Party. On 09.12.91 he told the press that he would not challenge his expulsion as he knew what the judgment would be; that instead, he would join the DUNF and that the petitioner No. 2 would do likewise.

The petitioner No. 2 joined the "rebels" at a public rally in Kandy. He was garlanded and was carried to the stage amidst the firing of crackers. In his speech he blamed the Executive Presidential system for the reduction of the powers of MPs, reaffirmed his signature to the impeachment motion and falsely denied his signature to R2. He repeated his denial at a media conference held at the residence of Mr. Lalith Athulathmudali.

The petitioners who appear to have been inhibited against discussion within the Party issues relating to the conduct of the President and the Executive Presidential System expressed their grievances in public. That by itself may not have been a good ground for expulsion; but they went beyond and made a public display of Party indiscipline in the course of which one of them joined in

ridiculing the leader of his Party; he also cast aspersions on the impartiality of Courts. The other petitioner lied to the Public and the media denying his signature to R2, thereby giving credence to allegations made by other dissident MPs that certain Government MPs had forged some of the signatures in R2. The learned Counsel for the petitioners cautioned us against making pronouncements on political culture and appealed to us to make some allowance for some of the utterances made by the petitioner due to possible stress during this period. I am prepared to accept his caution and confine myself to the exercise of our constitutional jurisdiction. However, I cannot refrain from examining the speeches made by the petitioners; and after making every allowance I can, I am convinced that their speeches are not made in the legitimate exercise of their right to freedom of speech. They are, therefore. not entitled to the protection of Article 14(1) (a) of the Constitution.

FREEDOM OF THOUGHT AND CONSCIENCE

The above conduct of the petitioners cannot be described as an exercise of their right to freedom of thought and conscience guaranteed by Article 10 of the Constitution. The inconsistency of their actions and the vacillation of mind is imponderable; consequently the beliefs and doctrines they entertain are unascertainable. Even if the original 8 dissidents had some thoughts and views regarding the governance of the country which they vehemently advocated in the heat of their defection from the Party and in furtherance of their campaign against Party Leadership, though in derogation of their obligations to the Party, these petitioners have no clear views except as regards the deprivation of their 'powers' as MPs. What is clear beyond doubt is that they had from September 1991 repudiated the Party and collaborated with the dissidents in the establishment of the DUNF in violation of their obligations to the Party. In the circumstances, no question of protection under Article 10 arises and their conduct constitutes a valid ground for taking disciplinary proceedings against them.

SOVEREIGNTY ARTICLES 4(a) & (e) & 93 OF THE CONSTITUTION

Learned President's Counsel for the petitioners submitted that the above provisions are not altogether meaningless in determining the

rights of MPs, that Party cohesion does not require them to be totally silent and that their continued support of the impeachment motion was an exercise of the rights of the petitioners as elected representatives of the people. He relied on my judgment in Sc (Spl.) 4-11/91 (*supra*) where I held that although a MP is bound by his obligations to the Party, he is not a lifeless cog liable to be subject to unlawful or capricious orders or directions touching his rights Qua MP. The learned President's Counsel added that by writing the letter R3 (which is alleged to be evidence of deceptive conduct) the petitioners have acted within the Party and that their expulsion is based on allegations which might have been resolved at a proper inquiry. I shall presently consider R3 and the adequacy of the inquiry held against the petitioners. Suffice it to state at this stage that in view of their conduct, the petitioners are not entitled to complain of interference with their rights by lawful orders or directions.

ESTOPPEL

The petitioners state that in any event, inasmuch as they had been signatories to R1 and R2 and the Party had publicly declared that no disciplinary action would be taken against any MPs who were signatories to the said document, the Party was estopped from taking disciplinary action and hence their expulsion from the membership of the Party was bad in law. In support, they rely on the statements made by the President and were published in newspapers on 19th and 20th September 1991 and the press interview given by the 2nd respondent which was published in the newspapers on 15.12.91. The petitioners also rely on the fact that on 04.11.91 the Working Committee decided not to take disciplinary action against Dr. Cyril MP and Ravindra Samaraweera MP despite the fact that the former associated himself with the public campaign carried on by the dissidents in October 1991 and the latter failed to attend Parliament and to vote with the Government against the No-confidence Motion against the Speaker, on 10.10.91.

Halsbury 4th Ed. Vol. 16 para 1514 on 'promissory estoppel' states:-

"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to

affect the legal relations between them to be acted on accordingly, then, once the other Party had taken him at his word and acted on it, the one who gives the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him. but must accept their legal relations subject to the qualification which he himself has so introduced".

The author observes that this doctrine is derived from a principle of equity enunciated in 1877 and adds –

"The doctrine cannot create any new cause of action where none existed before, and it is subject to the qualification (1) that the other Party has altered his position; (2) that the promisor can resile from his promise on giving reasonable notice which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; (3) the promise only becomes final and irrevocable if the promisee cannot resume his position".

In his statements, the President announced that no disciplinary action will be taken against MPs who having admitted their signatures to the impeachment motion, retracted their signatures thereto and informed the Speaker that they were withdrawing their signatures, if their signatures appeared on the motion. The 2nd respondent told the press –

> "They (the MPs) have promised to abide by Party discipline and we trust them. They won't be victimised".

It is to be noted that in R2, 116 MPs including the petitioners made their request to the Speaker in the following terms:-

> "The Government Parliamentary Group accordingly calls upon the Hon. Speaker to take cognisance of this Resolution of the Government Parliamentary Group and reject the illegal, unconstitutional and malicious move to remove the President from Office".

There is an admission in R2 that the impeachment motion was malicious. If so, by disowning it the petitioners, *inter alia*, made amends for their misconduct and thereby acknowledged their commitment to the Party. By such act they obtained exemption from being dealt with for violating the Party Constitution by reason of their misconduct in signing the motion, without first raising the issues within the Party. They promised to abide by Party discipline. There was no promise by the Party to refrain from taking disciplinary action against them for future misconduct. What happened next was that from about 20.09.91 they rejoined the dissidents in carrying on their public campaign with reference to the impeachment motion and the executive Presidential System and finally, by writing R3, dishonored their undertaking in R2 and showed beyond doubt that they had resumed their misconduct. Quite plainly they are liable to disciplinary action for such misconduct.

Promissory estoppel has no application to the above facts. Here there is no promise affecting legal relations between the parties; the petitioners committed misconduct, made amends and gave a promise as to their future conduct; there was no legal or other fetter which precluded them from honouring that promise. The Party did not contract with the petitioners to confer on them the privilege of persisting with their misconduct without sanction. As such, the submission of the petitioners based on estoppel is without merit.

Dr. Cyril and Ravindra Samaraweera were also guilty of persistent misconduct but each of them gave a written undertaking not to engage in activities contrary to Party Policies and Principles and reaffirmed their loyalty to the Party and Leadership, whereupon the Working Committee decided not to take disciplinary action against them for their recent dereliction. At the time of the said decision, there was every indication that the petitioners had decided to join the DUNF. There was also no evidence of any desire on their part to reconcile with the Party. Logically, therefore the Working Committee might have taken disciplinary action against them; but they decided to await the decision of this Court in the pending cases filed by the 8 expelled UNP members. In the circumstances, the petitioners were not entitled to the same treatment as the other two MPs and hence

the decision to consider disciplinary action against the petitioners at a future date cannot be faulted.

COMPLAINT THAT EXPULSION IS EXCESSIVE

The petitioners also complain that the sanction of expulsion imposed on them is, arbitrary, excessive and totally disproportionate to any conduct on their part. In support, the learned President's Counsel for the petitioners strenuously attacked the 2nd and 5th allegations levelled against the petitioners, namely, the alleged deception of the Party and the Government Parliamentary Group when they signed R1 and R2 (as disclosed by their letter R3) and their failure to attend Parliament and to vote against the No-confidence Motion on the Speaker on 10.10.91, in accordance with the decision of the Group made on 09.09.91.

CHARGE OF DECEPTION

Learned President's Counsel submitted that the petitioners signed R1 and R2 for maintaining Party cohesion; nevertheless the petitioner No. 1 was genuinely unhappy and hence addressed P4 to Hon. Ranil Wickremasighe, the Leader of the House. Thereafter, both petitioners addressed R3 to the Chief Government Whip applying for a free vote on the No-confidence Motion on the Speaker. Both P4 and R3 were internal communications which cannot be used as a basis for expulsion; and that R3, even if it is interpreted as a withdrawal of the petitioners' signatures to R1 and R2 cannot justify the allegation of deception. The learned President's Counsel argued that the fact of signing R1 and R2, did not deprive the petitioners the right to question the procedure followed by the Speaker in rejecting the impeachment motion and hence they were justified in applying for a free vote.

In R3 the petitioners expressed their desire to vote in favour of the No-confidence Motion and applied for a free vote to enable them to vote according to their conscience. However, Standing Order 17(4) of the Party Constitution precludes the grant of a free vote *inter alia*, in the case of a motion which raises any questions of Party Policy. I think that the No-confidence Motion raised questions of Party Policy.

It is true that at the time of writing R3 the Government had made no decision in the matter and it was on the evening of 09.10.91 that the Government Parliamentary Group decided to vote against it. However, having regard to the background to the controversy and the fact that the said motion was moved by the Opposition, the irresistible inference is that all along, it must have been the Party Policy (known to every MP including the petitioners) to vote against the Motion; if so, the petitioners were not eligible for a free vote. At best they were eligible in terms of Standing Order 17(3) to apply for permission to abstain from voting on the ground of "conscientious scruples".

However, the petitioners had decided to vote in favour of the No-confidence Motion, hence the request for a free vote. What is the reasonable interpretation that may be placed on that request in the light of the facts known to the petitioners and the Party? Was it a genuine expression of their desire to vote according to their conscience, as claimed by them; or was it an implied repudiation of their representations in R1 and R2 which the petitioners never seriously intended to honour, when they signed those documents? If it was the latter, then the charge of deception becomes plausible. This question has to be decided in the light of the background facts which are discussed below.

(a) The petitioners had signed the impeachment motion without prior discussion of the issue within the Party and thereafter disowned the motion.

(b) Thereafter they joined the dissidents in their public campaign. Petitioner No. 2 joined it on or about 20.09.91. The petitioner No. 1 also joined it and was also billed to speak at public rallies in Kegalle, Badulla, Galle and Kalutara between 27th September and 07th October, 1991. During the campaign, the petitioner No. 2 denied his signature to R2 which shows that his intentions in signing that document had not been genuine.

(c) Both of them gave considerable support to the dissidents in mounting a sustained campaign against the Party and its Leadership while the decision of the Speaker on the impeachment motion was pending. At a rally held in Kalutara on

07.10.91 the petitioner No. 1 referred to the Party Leadership in disparaging terms. The Speaker rejected the impeachment motion on the 8th and on the next day both the petitioners applied for a free vote as they wished to support the No-confidence Motion against the Speaker. There is no evidence of any other Government MP making such an application, which indicates, that these two petitioners who had decided to persist in their support of the impeachment motion remained loyal supporters of the dissidents as on 09.10.91.

(d) Subsequent events confirm that these petitioners were indeed loyal supporters of the dissidents. Thus on 09.12.91 petitioner No. 1 announced that both he and petitioner No. 2 had decided to join the DUNF. On 21.01.92 they along with the 8 expelled UNP MPs publicly celebrated the recognition of the DUNF by the Commissioner of Elections.

In the light of the above facts and circumstances, it would be quite reasonable to infer that even at the time of signing R1 and R2, the petitioners were loyal to the dissidents and that they signed these documents as a colourable devise to avoid disciplinary action which might have led to the loss of their Party Membership and their status as MPs; and that the representations contained in R2 were not seriously intended to be honoured. I therefore hold that the charge of deception is established.

FAILURE TO ATTEND PARLIAMENT AND TO VOTE WITH THE GOVERNMENT ON THE NO-CONFIDENCE MOTION AGAINST THE SPEAKER

The explanation given by the petitioner No. 1 is that he had been a heart patient for some time and was ill on 10.10.91; and that he attended the Cardiology Unit of the General Hospital and obtained treatment. He also consulted a private doctor who advised rest. The petitioner states that on 10.10.91 he communicated his illness to the Secretary to the Chief Government Whip. The petitioner No. 2 says that he kept off from Parliament because Mr. Aboosally MP told him that if he could not vote with the Government he should not be present when the vote on the No-confidence Motion was to be taken;

and that acting on this representation, he was absent in the House when the vote was taken. He contends that the respondents were thereby estopped from taking disciplinary action against him on this ground.

According to the affidavit of the Secretary to the Chief Government Whip, which I accept, the petitioner No. 1 was not available either at his residence in Colombo or in the outstation when he tried to contact him over the telephone to inform him that the Government Parliamentary Group had rejected his request for a free vote and had directed him to vote against the No-confidence Motion. It is not the case for the petitioner that he was ill on the 9th or that he was unaware of the group meetings. If so, he should have attended that meeting or at least made inquiries as to what decision had been taken on his request. He did neither. He does not state the time at which he informed the Secretary to the Chief Government Whip he was ill on the 10th. He was not hospitalised that day. He collected his drugs and went away after consulting a private doctor. If as his Counsel informed us, he had contacted the Secretary to the Chief Government Whip over the telephone, he did not confirm it in writing; nor did he produce the medical certificate (P7) (which he had obtained on 10.10.91) either to the Chief Government Whip or to the Working Committee. In P7 the doctor records the history of pain in the chest given by the petitioner and recommends rest for a few days.

Learned President's Counsel for the petitioners informed us that if the petitioner No. 1 was able to attend Parliament on 10.10.91, he would have voted with the Government since his request for a free vote had been refused. If he was that keen and was precluded by illness from attending Parliament, he ought ordinarily to have confirmed that fact in writing. His failure to do so and his other conduct during this period show that he was firmly with the dissidents and hence did not wish to vote with the Government. He probably knew that had he attended Parliament, he had no choice but to vote with the Government and that his request for a free vote will not be allowed. So he decided to absent himself from Parliament under the cover of illness. The fact that he was not available on the telephone during the night of the 9th shows that he had made his decision on the 9th itself and was evading the Chief Government Whip. I do not

believe the petitioner's statement that on 10.10.91 he communicated his illness to the Secretary to the Chief Government Whip. I accept the Secretary's statement that the petitioner did not at any stage communicate his inability to attend Parliament.

Learned President's Counsel for the petitioners informed us that after the request of the petitioner No. 2 for a free vote was refused he decided to vote with the Government subject to protest but Mr. Aboosally made a representation which gave him the option to absent himself at the voting time. Mr. Aboosally admits speaking to the petitioner but states that he only advised the petitioner to vote with the Government. The petitioner No. 2 states that he was told that if he cannot vote with the Government he should not be present at the voting time. It is my understanding that on the basis of either version, the petitioner had been advised to vote with the Government. Assuming that Mr. Aboosally used the words attributed to him, I am unable to interpret them as giving this petitioner the option of absenting himself at the voting time. In any event, whatever was told to him, it was his duty to have remained in the House and to have voted with the Government in accordance with the decision of the Government Parliamentary Group which had been communicated to him in writing. Instead, he left the House because, as the evidence shows, he was even more committed to the cause of the dissidents and hence did not wish to vote with the Government. The explanation that he left the House at the instance of Mr. Aboosally is an afterthought. He failed to disclose it to the Working Committee when he made his observations on the charges against him. He has offered this explanation for the first time in this Court, which shows that it is not genuine.

In the result, the allegation based on the petitioners' failure to attend Parliament and to vote with the Government on 10.10.91 is established.

APPROPRIATENESS OF THE EXPULSION OF THE PETITIONERS FROM PARTY MEMBERSHIP

The deception established against the petitioners constitutes conduct which brings the Party into disrepute violative of Rule 3(1) (d) of the UNP Constitution. Any political party having such members

in its fold is likely to suffer loss of public confidence. The failure of the petitioners to vote with the Government on 10.10.91 is violative of Rules 3 (1) (a) & (b), 7(3), 9(d), 9(g) and in particular, Standing Order 17(2) of the UNP Constitution. Their conduct in associating with the political campaign conducted by the dissidents is violative of rule 3(1) (d) of the UNP Constitution.

It is evident that the petitioners have committed very serious acts of Party indiscipline. I do not think that the respondents have acted in an arbitrary manner in taking disciplinary proceedings against them. On the other hand they appear to have acted with considerable restraint in handling a serious crisis in the Party. In September, they expelled 8 members who spearheaded the campaign against the Party and its Leadership. No disciplinary action was taken against the MPs who retracted their signatures to the abortive impeachment motion. Dr. Cyril and Ravindra Samaraweera who had committed certain acts of indiscipline after they had signed R1 and R2 were absolved from disciplinary action in view of their undertaking to maintain Party discipline and the loyalty to the Party and its Leadership. These petitioners publicly repudiated the Party and were irreconcilable. The respondents have decided to expel them from the membership of the Party which punishment is, in my view, not excessive.

BREACH OF RULES OF NATURAL JUSTICE

A good part of the arguments of learned Counsel before us was on the question whether the disciplinary proceedings taken against the petitioners conformed to the principles of natural justice and the requirements of a fair hearing. Learned President's Counsel for the petitioners vehemently submitted that the rules of natural justice have not been observed and that the procedure adopted by the Working Committee was a mere pretence to comply with these rules; that the proceedings against the petitioners had been rushed through without a proper charge sheet; and that the petitioners were expelled by a procedure which is manifestly unfair, particularly for the reason that they have been denied an oral hearing which they had demanded.

Learned President's Counsel for the respondents replying at length submitted that the impugned disciplinary proceedings are in

substantial compliance with the rules of natural justice; that no prejudice has been caused to the petitioners; and that upon a consideration of the totality of the facts and circumstances of the case, the procedure adopted by the Working Committee was fair. He clarified that urgency is not a ground relied upon by the respondents for justifying the impugned expulsion. He submitted that the curtailment of the inquiry against the petitioners was an inevitable narrowing of the content of natural justice in the case and attributable to the conduct of the petitioners.

It is a matter of some regret to this Court that the respondents have left room for complaint on so important a question as the one relating to compliance with the rules of natural justice. I have therefore endeavoured to closely follow every submission made on this question by the learned President's Counsel for the respondents and set down in great detail the relevant facts, the grounds of expulsion and the objections thereto. I have, in the previous part of this judgment, carefully analysed the said grounds and objections and made my findings. One of the objects of that exercise was to understand the submissions of Counsel on this part of the case, in particular, the submission that no prejudice has been caused to the petitioners and that the procedure adopted by the Working Committee was fair in all the circumstances.

'AUDI ALTERAM PARTEM'

Even though we are too familiar with the principles of natural justice and, therefore, the subject needs no detailed discussion, it would be helpful to remind ourselves of the main requirements of natural justice. In *Ridge v. Baldwin* [4] at page 132 Lord Hudson summed up thus:–

> "No one, I think, disputes that three features of natural justice stand out – (1) the right to be heard by an unbiassed tribunal; (2) the right to have notice of charges of misconduct; and (3) the right to be heard in answer to those charges".

In *Fountaine v. Chesterton* (unreported) cited in *John v. Rees* [17] Megarry J. referring to the above dicta of Lord Hudson said:–

> "I do not think I shall go far wrong if I regard ... these three features as constituting in all ordinary circumstances an irrefutable minimum of the requirements of natural justice ..."

FAIR HEARINGS

In regard to requirements (2) and (3) above, there are certain procedural safeguards which are recognised for ensuring fair hearings e.g. the accused should be supplied with a fair statement of the charges (*Stevenson v. United Road Transport Union*) [5], he should be informed of the exact nature of the charge (*Labouchere v. Earl of Wharneliffe*) [6], he should be given an opportunity of defending or palliating his conduct (*Fisher v. Keane*) [18]. The opportunity should be fair, adequate and sufficient. Thus the right to be heard will be illusory unless there is time and opportunity for the case to be met – Paul Jackson 'Natural Justice' p. 63. An Oral hearing is another valuable safeguard which ought to be provided unless it may be dispensed with having regard to the subject-matter, the rights involved and the nature of the inquiry. Wade 'Administrative Law' 6th Ed. 543 states:–

> "A 'hearing' will normally be an oral hearing. But in some cases it may suffice to give an opportunity to make representations in writing, provided that any adverse material is disclosed and provided, as always, that the demands of fairness are substantially met".

In *R. v. Immigration Tribunal ex p. Mehmet* [19] the tribunal's decision and the resulting deportation order were quashed for failure to afford an oral hearing. One need hardly emphasise the need for such a hearing in inquiries involving such extreme punishments as the expulsion of a person from membership of a body. In the instant case it also involves the consequential loss of membership of Parliament.

This would make an oral hearing imperative unless there are overwhelming reasons for denying it.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

Having regard to the above requirements, it cannot be denied that the procedure followed by the Working Committee suffers from

apparent shortcomings. The Learned President's Counsel for the petitioners submitted that the petitioners had been denied the benefit of almost every one of the recognised safeguards in that –

(a) the letter P8 which required them to attend the Working Committee meeting on 06.12.91 does not constitute a charge sheet; that the said letter merely invites them to attend the meeting to discuss their conduct as appearing in their letter R3; and that the said letter does not disclose the several allegations referred to in the report of the Disciplinary Committee (R8) and the proceedings of the Working Committee (R9) pursuant to which it was decided to summon the petitioners. Counsel for the respondents concedes that P8 cannot be regarded as a charge sheet.

(b) P8 was received by the petitioners after 06.12.91 (conceded by Counsel for the respondents); and on 16.12.91 the Working Committee made an *ex parte* order of expulsion against the petitioners, acting on the basis of the recommendation of the Disciplinary Committee contained in R8.

(c) P1, the purported letter of expulsion dated 06.12.91 was the first intimation of the charges against the petitioners (conceded by Counsel for the respondents); P1 itself cannot be regarded as a proper charge sheet in that (1) it does not contain adequate particulars as regards the alleged association with the 8 expelled MPs; (2) the charge of deception is levelled purely on the basis of R3 (which is *per se* innocuous) and fails to mention all those matters which had been considered by the disciplinary committee as per R8.

(d) The letter P11 dated 21.12.91 calling for the written observations of the petitioners on P1, by 27.12.91, did not allow sufficient time to answer the allegations.

(e) The Working Committee refused to allow the petitioners' request for an oral hearing basing its refusal on grounds which are untenable e.g. (1) the constraint of the constitutional time limit for challenging the expulsion; (2) difficulty created by the objection to the jurisdiction of the Working Committee.

Learned President's Counsel for the petitioners submitted that the proper course would have been to suspend the expulsion and to have held an oral inquiry at which the petitioners could have fully defended themselves and that had this been done, the result may well have been different; that in any event, the hearing held after the expulsion was itself defective and invalid. Counsel relies on the following passages in Wade 'Administrative Law' 6th ed. 553:–

"What is an administrative authority to do if it has failed to give a fair hearing, so that its decision is quashed or declared void? It still has the duty to give a proper hearing and decide the case, but it has prejudiced itself by its defective decision, which it may well have defended in legal proceedings. It cannot be fair procedure to take a decision first and hear the evidence afterwards, even though the first decision is legally a nullity. But usually the only possible course is for the same authority to rehear the case. For that authority will be the only authority with statutory power to proceed, and there is therefore a case of necessity of the kind we have already met. In the case of a tribunal with variable membership the Court may order the hearing to be held by a differently constituted tribunal.

It was acknowledged in *Ridge v. Baldwin* that, if there was no alternative, the original body would have to reconsider the case as best as it could. Lord Reid said:–

> ... if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its latter decision will be valid.
>
> But in that case the hearing, when given by the Watch Committee, was defective in that the charges were not fully disclosed, so that the second decision was as void as the first".

Wade proceeds to cite *Posluns v. Toronto Stock Exchange* [9] where the 2nd decision was held to be valid "since everything possible was done to hold a full and fair hearing on the second occasion".

These are indeed formidable objections which, if not adequately met, would entitle the petitioners to relief. It would appear that after

the decision in SC (Spl) Nos. 4–11/91 (*supra*) the Working Committee wished to finalise action against these petitioners as contemplated by its decision R20; then they made the *ex parte* order of expulsion P1 in the *bona fide* belief that the petitioners were evading. However, P1 was not valid for the reason that (1) it was not preceded by the services of proper charges on the petitioners; and (2) the petitioners had no notice of the date of inquiry until after their expulsion. So the question for us is whether the subsequent proceedings by the Working Committee are valid.

I am of the view that in the context of the background events and the facts and circumstances considered earlier in this judgment P1 serves as an adequate charge sheet. The petitioners were aware of their own conduct as fully committed collaborators in the movement against the Party and its Leadership. No doubt they had voted with the Government in favour of the Appropriation Act. However, it is not a significant act of support. It was a step in their own interests in that had the Government suffered defeat on the Appropriation Bill, it may well have led to a dissolution of Parliament in which event the petitioners would have ceased to be MPs. The petitioner No. 1 claims to have supported the Government at some public functions in Divulapitiya; but he has not furnished any particulars to convince us that he indeed supported the Government. On the other hand, the available evidence clearly shows that he was fully with the dissidents. In these circumstances, it would be idle to believe that the petitioners were unable to understand the charges in P1. If they had any difficulty, they did not complain of it in their reply P12.

As regards the complaint that the denial of an oral hearing was unfair, I agree that the 2 grounds for that refusal referred to above are *ex facie* not sufficient grounds for such refusal. Learned President's Counsel for the petitioners submitted that the Working Committee, being prejudiced against the petitioners, never intended to hold a proper hearing on the charges levelled against them and hence refused the request for an oral hearing.

Learned President's Counsel for the respondents submitted that the answer of the petitioners to the charges did not justify an oral hearing in that –

(a) the answer was a bald statement of legal objections which are in conflict with the recent decision of this Court and a bare denial of the charges;

(b) the petitioners did not complain of any vagueness in the charges; nor did they mention the excuses which they have since given for their failure to attend Parliament on 10.10.91. Had they done so, the Working Committee might have permitted an oral hearing; and

(c) the objection to the jurisdiction of the Working Committee and the paucity of the explanations in the answer narrowed the ambit of the inquiry for which the petitioners alone were responsible.

Learned President's Counsel argued that these petitioners had finally defected from the Party and were in the process of joining the DUNF; that the facts did not warrant an inquiry; that there was nothing to mitigate; that their expulsion without an oral hearing did not in any way prejudice them; and that in all the circumstances, the proceedings were fair.

Learned President's counsel for the respondents cited certain decisions on the principles that Courts look to the substance rather than to the form of natural justice. These decisions are not on all fours with the instant case. Two of them are decisions in appeals to the Privy Council and the other is a decision of the Indian Supreme Court in a writ matter. Nevertheless, the reference to dicta in these cases would be of some assistance in determining the question before us.

In *Sloan v. General Medical Council*[20] the Privy Council upheld an order of the General Medical Council to remove the name of the appellant from the medical register notwithstanding the apparent vagueness of the charge. Their Lordships held that no prejudice had been caused to the appellant by the form in which the charge was framed and hence they were unable to say that the Committee did not hold due inquiry into the facts. In *Calvin v. Carr*[13] The owner of a horse was excluded from membership of the Australian Jockey Club for one year by an order of the Stewards. The owner's appeal to the Committee of the Club was dismissed, whereupon the owner sued

the Stewards and the Committee for a declaration that the decision of the Stewards was void for breach of the rules of natural justice and as such the Committee had no jurisdiction to make an order in appeal. The trial Judge held that the defects in the Steward's inquiry had been cured by the proceedings before the Committee. In the appeal to the Privy Council Their Lordships said –

> "The appellant's case had received, overall, full and fair consideration, and a decision, possibly a hard one, reached against him. There is no basis on which the Court ought to interfere, and his appeal must fail" (p. 452).

In *Board of Mining Examination v. Ramjee* [21] the Court held that the cancellation of the certificate of a shot firer in a coal mine was not invalid for non-compliance with a provision of the statute which regulates the procedure for such cancellation. Krishna Iyer J. said –

> "If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of" (p. 969).

ASSESSMENT OF THE CASE AGAINST THE PETITIONERS

I am of the view that the Working Committee had done everything possible to hold a full and fair hearing on the second occasion. The petitioners, however had defected from the Party and were irreconcilable. They were not interested in answering the allegations adequately and relied on mere jurisdictional grounds and bald denials. The learned President's Counsel for the petitioners told us that the petitioners were not bound to disclose their material or to disclose the reasons for their failure to attend Parliament on 10.10.91. If so, the petitioners are themselves to blame for their predicament. I have taken this view in the light of the following considerations:–

(a) The rights of the petitioners to Party membership are contractual. At the time of their expulsion, they had repudiated the UNP and were *de facto* members of the DUNF; and their expulsion constituted nothing more than the severance of the formal link between them and the Party. It follows that if they wished to remain in the Party they should have taken the initiative and co-operated with the Party by making a full and frank disclosure of their defence. If they failed to do so, they must take the consequences.

(b) In handling a crisis of the magnititude faced by the respondents and in dealing with men of the petitioners' calibre, a political party must be allowed a discretion to decide what sanctions are appropriate for violations of Party discipline; and if the Party decides, *bona fide*, to expel any member guilty of repudiating the Party, as the petitioners have done, this Court will not in the exercise of its constitutional jurisdiction impose such member on the Party. If that is done, Parliamentary Government based on the Political Party System will become unworkable.

I am satisfied that the disciplinary proceedings against the petitioners were, in all the circumstances, fair.

The petitioners have also alleged that one of the members of the Working Committee on 06.12.91 was Mr. M. D. A. Gunatilake MP who had been named in the impeachment motion as a beneficiary of Presidential favours; and that consequently the decision of the Working Committee to expel the petitioners is vitiated by reason of bias. However, the 2nd respondent states that Mr. Gunatilake, though present on 10.12.91, did not participate in the proceedings of the Working Committee. This is supported by P10. I accept the statement of the 2nd respondent and reject the said allegation of bias.

Accordingly, I reject the allegation that the expulsion of the petitioners is invalid for contravention of rules of natural justice.

CONCLUSION

For the foregoing reasons, I determine that the expulsion of the two petitioners in these applications (Special) Nos. 1 and 2/92 was valid. In the result, I dismiss their applications.

I make no order as to costs.

WADUGODAPITIYA, J. – I agree.

Applications dismissed without costs.