# THAVANEETHAN
v.
# DAYANANDA DISSANAYAKE
# COMMISSIONER OF ELECTIONS AND OTHERS

SUPREME COURT
FERNANDO, J.
ISMAIL, J., AND
WIGNESWARAN, J.
S.C. No. 20/2002 (FR) WITH SC Nos. 25 AND 26/2002 (FR)
7TH OCTOBER, 2002

*Fundamental Rights–General Election– Parliamentary Elections Act–Sudden prevention of 55,000 voters including petitioners voting on alleged ground of national security–Mala fide exclusion of voters–Unlawful arrangements for VVIP voters to vote at their residence–Articles 12(1), 14(1) and 14(1)(h) of the Constitution.*

Arrangements were made to hold a General Election on 5.12.2001 throughout the Island including in the Batticaloa District in which the petitioners were voters, but living within the area under the control of the LTTE. Similar situations prevailed in the Vanni and Trincomalee Districts. The Commissioner of Elections (the 1st respondent) made arrangements to establish "cluster" polling stations for voters resident in the uncleared areas to vote within cleared areas, under Government control.

On the morning of 5.12.2001 the petitioners including a total of 40,000 voters in the Batticaloa District and 15,000 voters in the Vanni District were prevented from entering the cleared area by the army presumably on oral and secret instructions given by the Army Commander (the 3rd respondent) purportedly in the interest of national security and to ensure "free and fair elections" by preventing alleged infiltration of LTTE from uncleared areas to cleared areas to launch an attack. These grounds were not supported by evidence. On the other hand, the voters in the Batticaloa and Vanni Districts at the previous Parliamentary General Election had been against the ruling party; and the voters in the Trincomalee District had been pro-Government. In this context, the voters in the Trincomalee District entering from the cleared areas from the uncleared areas were not stopped.

The 3rd respondent did not inform the 1st respondent about the stoppage of voters. No steps were taken by the 1st respondent to annul the poll in the affected Districts or to postpone the same. At the same time, special arrangements were

made by a directive purporting to be under section 129 of the Parliamentary Elections Act to enable the President, the Speaker, the Prime Minister and three other Cabinet Ministers to cast their votes at their residences.

**Held:**

(1) The order to bar the petitioners (or a total of about 55,000 voters) from voting was *mala fide* for extraneous reasons probably to prevent voters from voting for the candidates of their choice. Thereby the petitioners' right to freedom of movement guaranteed by Article 14(1)(h) of the Constitution was infringed. That right and rights under Article 12(1) and 14(1)(a) could only have been restricted by law including Emergency Regulations made under the Public Security Ordinance (Articles 15(6) and 15(7) of the Constitution). A Regulation made by the President under the Prevention of Terrorism Act by the President calling upon the Army to assist the police did not permit the imposed restriction.

(2) The impugned restriction which precluded the petitioners from voting at the Election violated their freedom of expression under Article 14(1)(a) of the Constitution which freedom is a collective right enjoyed by them with all other voters. The petitioners are entitled to a free and fair election. Hence their right is not a personal right limited to them as individuals. Therefore, the petitioner's application is not a "public interest litigation".

(3) The 3rd respondent permitting the voters of the Trincomalee District to vote without any restriction and the 1st respondent permitting six important persons to vote at their residences infringed the petitioner's right to equality under Article 12(1) of the Constitution.

The purported direction under section 129 of the Parliamentary Elections Act authorizing special voting facilities was unlawful in that the said section had no application to the instant case. The favours granted to six VVIP and VIPP were also made *mala fide* and not based on rational grounds. On that ground also the 1st respondent infringed the petitioner's rights under Article 12(1)

**APPLICATION** for relief for infringement of fundamental rights.

**Cases referred to:**

1 *Mallows* v *Commissioner of Income Tax* (1962) 66 NLR 32

2. *Vadivelu* v *OIC Sithambarapura Refugee Camp Police Post* SC 44/2002 SCM 5.9.2002

3. *Dias v Secretary, Ministry of Defence* SC 604/2001 SCM 5.9.2002

4. *Karunathilaka v Dissanayake* (1999) 1 SRI LR 157 173-174

5. *Egodawela v Dissanayake* (Reported as Mediwake v Dissanayake (2001) SRI LR 177)

*J.C. Weliamuna* with *Lavangi Weerapana* and *Shantha Jayawardena* for petitioner in SC 20/2002

*K. Kanag-Iswaran* P.C. with *M.A. Sumanthiran* for petitioners in SC 25/2002

*Dr. Jayantha de Almeida Gunaratne* with *Kishali P. Jayawadena* for petitioners in SC 26/2002

*S. Marsoof*, P.C. Additional Solicitor General with *S. Barrie*, State Counsel for 1st to 5th and 28th respondents in SC 20/2002 and for the 1st to 6th respondents in SC 25/2002 and SC 26/2002

*Cur.adv.vult*

March 25, 2003

**FERNANDO, J.**

These three applications involve virtually identical issues connected with the Parliamentary General Election held on 5.12.2001.

The five Petitioners in these three applications are citizens of Sri Lanka registered to vote in the Batticaloa electoral district. They complain that on 5.12.2001, on their way to the polling stations allotted to them, army personnel prevented them from entering the areas in which those polling stations were situated (thus infringing their freedom of movement guaranteed by Article 14(1)(h); that in consequence they were prevented from voting (a denial of their freedom of expression guaranteed by Article 14(1)(a) read with Article 4(e); that although large numbers of voters in the Batticaloa and Vanni electoral districts were similarly prevented from voting – resulting in the absence of a free and fair poll – a repoll was not ordered in the affected areas (a further violation of their freedom of

expression); and that they were not treated equally with other voters and/or other sections of voters in Sri Lanka (in violation of their right to equality and equal protection guaranteed by Article 12(1). The Petitioner in SC (FR) Application No. 20/2002 ("the first Application") complains of a further infringement of Article 12(1) in that the Commissioner of Elections, the 1st Respondent, hastened to make special arrangements, not sanctioned by law, to enable a handful of voters to vote from the safety of their homes, although no action was taken to protect the exercise of his own right to vote.

When these applications were taken up for hearing on 7.10.2002, all Counsel informed us that the facts were not seriously in dispute and requested that all three matters be disposed of on written submissions, which were later filed.

## THE FACTS

It is sufficient to refer briefly to the facts disclosed in the petition in the first Application. The Batticaloa electoral district consists of three polling divisions, namely Kalkudah, Batticaloa and Paddirippu. Each of those divisions is sub-divided into a number of polling districts, for each of which there were one or more polling stations. In 2001 Kalkudah had 79 polling districts. For polling districts Nos. 70 to 79, there was only one polling station, namely, the Mankerny Roman Catholic Tamil Mixed School (halls Nos. 1 to 10). Hall No. 5 was the polling station for polling district No. 74, the Gramasevaka division of Vakarai central, where the Petitioner and his wife resided. In normal circumstances, they should have been allotted a polling station in or near Vakarai as they were residents of Vakarai. However, Vakarai was an "uncleared" area (i.e. an area not within the control of the Government and the armed forces of Sri Lanka), and in order to enable persons in "uncleared" areas to vote, polling stations were allotted to them in "cleared" areas. Such polling stations intended for voters in several different "uncleared" areas were, for convenience and security, situated in one location, in a "cluster". In order to vote at the Mankerny school, hall No. 5, the Petitioner and his wife had to cross from the "uncleared" to the "cleared" area, and that they had to do at the check-point (or entry point) at the Kadjuwatte Army Camp. The Petitioner's complaint is

that on arrival at that check-point at 10.15 a.m. on 5.12.2001, he (and about another 500 voters) were informed by the army officers present that they had received orders from their superior officers not to permit any one to enter the cleared areas that day. Nevertheless, hoping for a change of heart, they waited till 2.30 pm., but that decision was not changed, and they returned home disappointed.

The Petitioner stated that voters in the "uncleared" areas in the Batticaloa and Vanni districts were similarly prevented from voting, but not those in the Trincomalee district which the ruling People's Alliance had won at the previous Parliamentary General Election in 2000, securing 53,860 votes out of 133,130 valid votes polled. He further pleaded that:

".....the following persons are reported to have been given the voting right at their respective residences though they live in areas unaffected by war:

(a) President Chandrika Bandaranaike Kumaratunga
(b) Speaker Anura Bandaranaike
(c) Prime Minister Ratnasiri Wickremanayake
(d) Anuruddha Ratwatte

....no legal provision is prescribed to facilitate such persons to vote at their residences in this manner."

The Petitioners in the other two applications were similarly prevented, at various check-points, from entering "cleared" areas and voting at the polling stations allotted to them. They alleged that the decision taken by the 3rd Respondent to close the check-points was not in consultation with the 1st Respondent, and was motivated by political factors and not by a genuine security need. They pleaded that they were treated differently to registered voters in the rest of the country.

It is not disputed that at least 40,000 voters (out of a total of about 280,000) in the Batticaloa electoral district, and 15,000 voters (out of a total of about 210,000) in the Vanni electoral district, were similarly prevented from voting. The 1st Respondent nevertheless decided not to order a repoll in the affected polling stations.

All the Petitioners prayed for declarations that their fundamental rights under Articles 12(1), 14(1)(a) and 14(1)(h) had been infringed, and for compensation and costs, while the Petitioner in the first Application also sought a declaration that the voters in the "uncleared" areas of the Batticaloa and Vanni districts are entitled to vote without any hindrance from the Defence authorities as well as a repoll in those areas. The prayer for a repoll was not pressed in the written submissions.

**Documents called for by the Court**

The first Application was filed on 4.1.2002, and leave to proceed was granted on 24.1.2002. The Respondents were granted time till 11.3.2002 for objections. Since the matter was both important and urgent, as it concerned the franchise, an early date of hearing was fixed, namely 2.4.2002, but it could not be taken up till 7.10.2002. The 1st and 2nd Respondents (the Commissioner of Elections and the Returning Officer for the Batticaloa district) were directed to forward copies of (a) all correspondence with the Defence authorities pertaining to the closure of entry points from"uncleared" areas on 5.12.2002, (b) the material pertaining to the decision of the 1st Respondent not to annul the results of the poll for the Batticaloa district and not to hold a repoll, and (c) the material setting out the circumstances in which the aforesaid four voters were permitted to vote at their residences, and the relevant regulations or orders. The 3rd and 4th Respondents in the first Application (the Commander of the Army, and the Commander of the 23rd Division responsible for the Batticaloa district) were directed to forward copies of (a) the orders, messages and directives pertaining to the decision to close the entry points, and (b) the correspondence and communications between the 3rd Respondent and the officers of the Defence Ministry on that decision.

There was no response from the 4th Respondent. By letter dated 20.2.2002 written on behalf of the 3rd Respondent, the Registrar of this Court was informed that:

"all orders and instructions given to the subordinate officers *by the 3rd Respondent* with regard to the decision to close the entry points.... and the communication between the 3rd Respondent

and the officers of the Ministry of Defence were not written, but verbal." [emphasis added]

The Court order was to produce the orders, messages and directives pertaining to the decision to close the entry points. It was not confined to the orders, etc., given *by* the 3rd Respondent to his subordinates, but included the orders,etc. given *to* the 3rd Respondent, as well as orders, etc. given, by the 4th Respondent (and others in the Army) in order to implement that decision. However, not a single document pertaining to the decision to close the entry points, and the communication and implementation of that decision, was furnished. The Petitioners in the second and third Applications produced a copy of a facsimile message sent at 11.34 a.m. on 5.12.2001 from the Headquarters of the 23 Division to the Headquarters of the 233 Brigade:

"From GOC for Bde Comd. Convey the fol text to District Secretary Bco from GOC for Government Agent, District Secretary Bco and.... Returning Officer Bco.All entry points from uncleared area to cleared area have been closed based on intelligence reports, to prevent LTTE plans to disrupt the conduct of free and fair election and also to prevent the LTTE from infiltrating to the cleared area in the guise of voters."

The 2nd Respondent by letter dated 13.2.2002 forwarded to the Attorney-General copies of six documents, requesting that these be submitted to this Court. That was not done despite reminders from the Registrar. One of those documents was described as a "message received from Headquarters of 23 Division, dated 5.12.2001, of the Army delivered to me by the Commanding Officer of 233 Brigade, Batticaloa."

It is clear that there were "orders, messages and directives" pertaining to that decision and that they have been deliberately withheld from this Court.

The 1st Respondent failed to comply with the order made by this Court to submit the material in regard to the aforesaid four voters being permitted to vote at their residences. He filed an affidavit dated 8.3.2003 which in effect denied those allegations. It was only after this Court repeated that direction on 2.4.2002 that the 1st

Respondent submitted three documents. One was a Gazette Extraordinary No.1213/11 of 4.12.2001 containing an "Order under section 129 of the Parliamentary Elections Act":

> ".... having regard to the threat to the lives of the persons whose names are specified in Column II of the schedule to these regulations by the LTTE, [I] do hereby direct the *Returning Officer* of the Administrative Districts specified in Column I... to be present at the respective *premises described* in the corresponding entry in Column III.... on December 05, 2001 *during the hours of poll* and permit the aforesaid persons to cast their votes in respect of the Parliamentary General Election *in his presence* at the aforesaid premises....

| **Column I Administrative District** | **Column II Names of Persons** | **Column III Description of Premises** |
|---|---|---|
| Gampaha | 1.Chandrika Bandaranaike Kumaratunga | President's House, Fort, Colombo I |
| Kalutara | 2. Ratnasiri Wickremanayake | Temple Trees, Colombo 03 |
| Colombo | 3. Lakshman Kadirgamar | Wijerama Mawatha, Colombo 07 |
| Matara | 4.Mangala Samaraweera | Francis Samaraweera Mawatha,Gabada Weediya, Matara |
| Gampaha | 5.Anura Bandaranaike | Horagolla Walauwa, Nittambuwa |
| Kandy | 6. Anuruddha Ratwatte | Mahaiyawa, Kandy." [emphasis added] |

That Order did not purport to empower the Commissioner of Elections, or any one else, to issue further directions or instructions.

He also forwarded a photocopy of a letter dated 3.12..2001 written to him by the Secretary to the President ("the Secretary", with a copy to the Attorney-General, with its annexure dated 4.12.2001 from the Additional Director-General of the Directorate of

Internal Intelligence ("ADG/DII") to the 5th Respondent, the Inspector-General of Police.

The Secretary's letter stated:

> "This has reference to my telephone conversation with you *this afternoon* regarding the information received from very reliable sources within Sri Lanka and abroad that [the President, Prime Minister, former Speaker Anura Bandaranaike, Minister Ratwatte, Minister Kadirgamar and Minister Samaraweera are being targeted by the LTTE to be assassinated on the day of the Poll... *They have been advised by the security forces to avoid attending polling stations* to cast their vote as it would be impossible to ensure their safety... If they are to proceed to the polling stations to cast their vote, strict security arrangements would have to be made which would include checking the polling station, checking all those coming for voting etc. This would cause disorganization of the election process, and I therefore request you to look into the possibility of making alternate arrangements for them to cast their votes with any other authority you consider suitable.
>
> The Government Agent or the Asst Government Agent or any other similar level officer may be arranged to facilitate their voting. *These arrangements would be known only to you and the officer who is responsible for this function* for security reasons. I have annexed hereto a copy of *a report received from the Directorate of Intelligence...*which is self-explanatory. Please make the necessary arrangements and keep me informed the names of those officers."[emphasis added]

The ADG/DII's memorandum, titled "Threat to VVIP and VIPP" (copied to "DIG/PSD"), referred to information from "reliable and sensitive" sources -

> "....about a LTTE plan to assassinate the under-mentioned VVIP and VIPP during the Polling Day...[the President, the Prime Minister, Minister Ratwatte, former Speaker Anura Bandaranaike, and Minister Samaraweera]. Information of a specific threat on H.E.. the President and General Ratwatte was received earlier, too, from another sensitive source from

overseas last week.... Hence it is strongly suggested that all *precautionary methods* be taken *when the above-mentioned VVIP (and VIPP) have to visit a Polling Booth* to cast their vote, please." [emphasis added]

Both these documents bear the 1st Respondent's date stamp "04 DEC 2001" with "1,00 pm" written by hand. It is clear therefore that the report referred to in the Secretary's letter of 3rd December is the ADG/DII's memorandum of 4th December. That report could not have been available when the Secretary telephoned the 1st Respondent on the 3rd afternoon, and there has been no clarification as to the nature of the "information" which the Secretary conveyed to the 1st Respondent on that occasion.

**Documents produced by the Commissioner**

It is necessary to refer to some of the other documents produced by the 1st Respondent with his affidavit.

By letter dated 4.12..2001, the Deputy Leader of the Tamil Eelam Liberation Organization ("TELO") complained to the 1st Respondent that the Army had ordered the closure of the Vanni entry point, and asked him to request the 3rd Respondent to lift the restrictions, and, "if[that] is impossible, *to send a ballot box* with the government officials to the uncleared area and help them to register their votes".

In two letters dated 5.12 .2001, the Returning Officer, Vanni district, complained of the closure of the sole entry point which gave access to voters from the "uncleared" areas of Vavuniya and Mannar; he stated, without contradiction, that a decision had been taken at the Security Co-ordinating conference held as early as 6.11.2001 at the Security Forces Headquarters, Vanni, to keep that entry point open to allow voters of the "uncleared" areas to vote; and he stressed that that arrangement had been communicated to all contestant political parties, independent groups and election observers, and that the failure to open the entry point could be treated as misleading those parties, groups, and observers, as well as the voters.

On 5.12 .2001 the Returning Officer, Batticaloa, complained about the closure of all the entry points in Batticaloa; he also stated that he had received written complaints from party candidates that large-scale impersonation had taken place at the "cluster" polling stations. A Batticaloa Member of Parliament , Joseph Pararajasingham, also complained, adding that he had spoken to the 3rd Respondent who had claimed that they had taken a decision on the grounds of security and hence would not allow any person to come from the "uncleared" areas; he added:

> "This I feel is a decision taken by the Government to prevent the voters from exercising their rights which is a blow to democracy.... please use your powers and instruct the [3rd Respondent] to lift the blockade or declare the elections in the Batticaloa district null and void".

The 1st Respondent forwarded those complaints to the Secretary, Ministry of Defence, requesting him "to assess the situation and regulate any voters coming from these areas to cast their votes where the polling stations are clustered". The response, if any, was not produced.

The Centre for Monitoring Election Violence also joined in this chorus of protests, requesting that instructions be given to allow entry or that a repoll be ordered. It was emphasized that "the contesting candidates had earlier been given permission to campaign in "uncleared" areas [and] it is ironic that the people who were canvassed for their votes are now being denied their basic rights to cast their vote".

The 1st Respondent also produced the minutes of two meetings: one with the 3rd and 5th Respondents on 6.12 .2001, and the other with the representatives of political parties and independent groups on 7.12.2001. These documents established that the security forces did not consult him prior to closing the entry points; that the 3rd and 5th Respondents explained that this was due to security reasons, as otherwise LTTE cadres would have mingled with the voters and infiltrated into the "cleared" areas; that the 3rd Respondent maintained that there was only one entry point for Vanni, at which only 300 persons could be checked per nine hour day, while Batticaloa had a few entry points at which 2,500 to 3,000

could be checked; and that 15,000 voters in the Vanni district and 40,000 in Batticaloa were prevented from voting. As for a possible repoll, the 3rd Respondent stated that the situation would not change in the near future, and suggested that the poll be staggered over a three or four day period. The 1st Respondent did not consider that to be feasible, and decided not to order a repoll. He made no reference to the complaints of large-scale impersonation mentioned by the Returning Officer, Batticaloa.

**Newspaper reports**

In view of the uncertainty as to who was responsible for the impugned decision, and why and when it was taken, it is necessary to refer to certain newspaper reports and other documents produced by some of the Petitioners - not as evidence of the truth of their contents, but to appreciate the 3rd Respondent's respones to them, and to test the credibility of his affidavit.

The *Island* of Thursday 6.12 .2001 reported that:

> *"On a directive issued by the government* on Tuesday, five military controlled civilian entry and exit points [in Vavuniya and Batticaloa] were closed yesterday barring over 50,000 registered voters...government officials said..." [emphasis added]

The *Sunday Times* of 9.12..2001 quoted MP Pararajasingham:

> "....thousands of voters in the uncleared areas...had been prevented from voting by the security forces who closed the entry points into the cleared area reportedly *on a special directive from President Chandrika Kumaratunga...*" [emphasis added]

The Daily News of 13.12 .2001 reported:

> "The Army in a press release [issued on 5.12 .2001] justified the action as a move to ensure free and fair elections. 'To ensure free and fair elections in the cleared area of Vanni and Batticaloa entry points were not opened today. There were *credible intelligence reports* that the LTTE were plan-

ning to enter cleared areas in the guise of voters to create violence in order to disrupt free and fair elections'. But Vanni district TULF MP...[states] 'The hidden objective of the closure of entry points is *to prevent the TULF supporters...from voting'*..." [emphasis added]

In its preliminary report issued on 7.12 .2001, the European Union Observation Mission commented:

"The decision of the army to close check points at Vavuniya and Batticaloa prevented many thousands of people from exercising their right to vote. It would seem that there is no justification for this action and serious questions have to be raised **about the political motivation behind it."** [emphasis added]

Criticism and speculation about the decision and its motivation led the 3rd Respondent to respond. The *island* of 4.1.2002 reported thus:

**"Balagalle replies to criticism of army's conduct during polls**

The Army Commander at a meeting with the election monitoring group PAFFREL... sought to respond to severe criticism made against the army....*'It is bad for the army's morale to feel that it is politicized'* the Army Commander told the group... *the Army Commander himself had called the meeting.... to explain the events of Dec.5* According to PAFFREL....General Balagalle explaining the closure of the entry points.... had said that it had not *been done on the initiative of the army....* at a meeting on December 3 of the top brass of security forces the Inspector-General of Police had filed two reports that the LTTE planned to infiltrate and destabilize the East. This , he said, supplemented military intelligence reports *over previous weeks....* He had explained that deference had been given to the police reports as it was the Police force that was in charge of elections... The decision to shut down according to him was one *taken by the civilian authorities.* He had suggested alternatively that the elections be held on a staggered basis, that is over two days, to make it possible for the security forces to have enough numbers to keep the check points open. He had added that when there

was a call for a repoll in the East, he had informed the Commissioner of Elections that it would be possible for the security forces to keep the check points open and provide adequate security....The Army Commander [also referred to an army] platoon....specifically told to provide just protection to the Deputy Minister of Defence..." [emphasis added]

**Respondents' affidavits**

The 3rd Respondent did not refer to that report in his affidavit dated 11.3.2002 filed in these proceedings, but stated that:

(a) on 24.11.2001 the Inspector-General of Police (the 5th Respondent) requested that an additional 8,000 army personnel be made available so that police officers could be released for election duty;

(b) a conference was accordingly held at the Joint Operational Headquarters [it was not stated when] and it was pointed out that such a large number could not be provided as it would affect security arrangements;

(c) after further discussions [it was not stated when] between Director Operations of the Army and the senior police officer in charge of election security 99 platoons (of 30 men) were provided from non-operational areas in order to release police officers for election duty and another 72 platoons were placed on reserve in different districts to assist the police;

(d) in the context of inadequate reserve troops to handle the large number of persons who would be crossing over to the cleared areas in order to cast their vote in the Batticaloa and Vanni districts, and the *possibility* that LTTE cadres may use the opportunity to infiltrate into the cleared areas from the uncleared areas with the objective of disrupting the election, *certain discussions were held* [it was not stated when] *by him with Field Commanders;*

(e) "as the said *discussions* disclosed the dangers involved in permitting such a large number of persons crossing over to the cleared areas giving rise to security risks, whereby a

large number of voters in the cleared areas may be prevented from voting, a *recommendation was made to the Chief of Defence Staff to* close down all entry points from the uncleared areas to the cleared areas in Vanni and Batticaloa districts in order to prevent LTTE infiltration, which *recommendation was approved by the Chief of Defence Staff....*";

(f) action to prevent persons crossing from the "uncleared" areas was taken *bona fide* in the interest of national security, for the preservation of public order, and enable a peaceful election;

(g) on 6.12 .2001 he had agreed to provide security at a repoll provided the poll was staggered over a period of three or four day. [emphasis added throughout]

I find the 3rd Respondent's affidavit not worthy of credit for several reasons. First, scrutiny of the affidavit reveals several unsatisfactory features. The rights of over 50,000 voters were involved in a very important, highly controversial, and extremely sensitive matter, but the 3rd Respondent failed to give any explanation for not informing the 1st Respondent, for treating Trincomalee differently, and for the absence of any written record of the impugned decision and its communication. The affidavit did not even disclose whether that decision had been communicated to the President, as Commander-in-Chief and Minister of Defence, let alone other high officials of that Ministry and the other branches of the security forces. The necessary implication of his affidavit is that such an important decision (both the recommendation and the approval) was based - not on factual reports - but on a "possibility", and/or "dangers" disclosed at "discussions". It made no mention of a single report from any source whatsoever. Second, the position that there was no written record is inconsistent with the facsimile message of 5.12. 2001. Finally, apart from a general denial, the 3rd Respondent did not refer to the claim that he had called the press conference reported in the *Island* of 4.1.2002, or the accuracy of that report, which contains a wholly different account of the decision-making process.

Some of the glaring contradictions between the 3rd Respondent's explanation at the press conference and his affidavit are as follows. The former attributes the impugned decision to a meeting on 3.12. 2001 of the "top brass of the security forces", *including* the 5th Respondent, while the latter refers to a meeting on an unspecified date between the 3rd Respondent and the Field Commanders *without* the 5th Respondent; the former refers to police reports which confirmed previous military intelligence *reports*, while the latter refers only to *possibilities* and *dangers*; the former alleges that the impugned decision was *not on the initiative of the army* but was taken by the *"civilian authorities"*, while the latter unequivocally admits a recommendation by (or with the concurrence of) the 3rd Respondent to the Chief of Defence Staff to close the entry points; the former implies that the 3rd Respondent was *against* a closure, and had suggested that the poll be held, though staggered over two days, while the latter admits that he was *in favour* of the closure; and the former claims that the 3rd Respondent had informed the 1st Respondent that if a repoll was held that the entry points could be kept open and security provided, while the latter made this offer conditional upon the poll being staggered over three to four days.

The affidavits of the 1st and 3rd Respondents were not at all helpful. They denied all the averments in the Petitioners' affidavits "except those hereinafter specifically admitted"., then admitted two or three purely formal averments, and pleaded unawareness of three or four other averments; and finally answered the remaining twenty-odd averments by denying them (i.e. for the second time) "in so far as they were inconsistent with" some facts which they specifically pleaded. The result was that they did not "specifically admit" the greater part of the Petitioners' averments, which had therefore to be taken as denied. The matters denied in this way included the fact that the 6th to 17th Respondents were the General Secretaries of the Political Parties which contested the Batticaloa district, the electoral divisions of that district, the army checkpoints therein, the Gazette notification of the dissolution of Parliament, and fact that 1st Respondent had made arrangements for several persons to vote at their residences. Affidavits filed by State officials must facilitate, rather than hinder, the ascertainment of the truth.

The written submissions filed on behalf of the 1st to 5th Respondents on 20.11.2002 obscured the factual position even further:

> "On the eve of the election, army intelligence sources unveiled a plan by the LTTE to infiltrate into cleared areas in the East on the 5th of December, and *to lay under siege a large area and to attack several military bases* on or about [election] day.
>
> The seriousness of the security situation in the country was further confirmed as the Inspector General of Police was in possession of 2 intelligence reports clearly indicating that the LTTE was planning to enter in large number the cleared areas...These reports were produced at a conference held at Joint Operational Headquarters on the 3rd of December 2001 a mere 2 days prior to [election day]."

The Respondents' affidavits did not refer to any "siege" or attacks on military bases, or to a conference on 3.12 .2001 at which the 5th Respondent was present and produced intelligence reports in his possession. The conference of 3.12 .2001 was referred to only in the *Island* report of 4.1.2002, and the above submissions seem to accept the accuracy of that report, and give rise to further questions as to the "civilian authorities" to whom the 3rd Respondent attributed responsibility for the impugned decision.

The 2nd,4th and 5th Respondents did not file affidavits. The 5th Respondent passed away while these Applications were pending.

## THE ISSUES

Several questions arise for decision:

(1) Who took the decision to close the entry points, when, and for what reason?

(2) Was the closure of the entry points an infringement of the Petitioners' freedom of movement?

(3) (a) Was that closure an infringement of the Petitioners' freedom of expression?

(b) Was the failure to order and hold a repoll an infringement of the Petitioners' freedom of expression?

(4) Was that closure an infringement of the Petitioners' right to equality and the equal protection of the law?

(5) Was the 1st Respondent's "Order under section 129" an infringement of the Petitioners' right to equality and the equal protection of the law?

(6 If so, how grave were those infringements?

**DECISION TO CLOSE ENTRY POINTS**

There is no doubt whatsoever that on orders given by the 3rd Respondent, or with his concurrence or approval, army personnel did suddenly close the entry points in the Batticaloa and Vanni districts, and that neither the 3rd Respondent nor other high officers of the army informed the 1st Respondent, leaving him to learn of the closure only at the eleventh hour through others. The fact that a complaint was made by TELO on 4.12 . 2001 shows that the decision had become known that day, and hence must have been made on 4.12 . 2001 or earlier.

The failure to record, and to communicate, that decision in writing gives rise to grave suspicions as to its *bona fides*. That decision directly affected a significant number of citizens, and not just a handful; it related to the conduct of a general election of serious concern to all citizens (let alone election observers, local and foreign), particularly at a time when public confidence in the integrity of the electoral process was sinking fast. Furthermore, the decision was one that could only have been taken in the due exercise and discharge of public powers and functions, and must have been communicated to the civilian authorities. There was no need for secrecy. Indeed, the need was for publicity. It was therefore important that the decision should have been, and should also have been perceived as being, both lawful and fair. It should, unquestionably, have been promptly reduced to writing (so as to serve as evidence to guide those functionaries who had to act on that decision, cf *Mallows v Commissioner of Income Tax* (1), and communicated in writing. Respect for the Rule of Law required that the decision-making process, particularly in a matter relating to the franchise, should

not have been shrouded in secrecy, and that there should have been no obscurity as to what the decision was and who was responsible for making it (cf *Jayawardena v Wijayatilake,* [2001] 1Sri LR 132,143). If the 3rd Respondent was truthful when he stated that the decision was not recorded or communicated in writing, such secrecy - in the absence of some good reason for secrecy - points to a desire to conceal some illegality and/or impropriety. If, contrary to what the 3rd Respondent stated, the decision (and its communication) was in fact duly documented, the failure to produce the relevant documents establishes that they were withheld because their production would have disclosed some illegality and/or impropriety.

The real reason for the closure of the entry points remains shrouded in mystery. According to the 3rd Respondent, what was feared were LTTE infiltration, disruption and destabilization. A merely subjective or speculative fear was not enough to justify closure: there had to be an objective and reasonable basis for such fear. However, his affidavit discloses that his own recommendation as well as the approval of the Chief of Defence Staff was *not* based on any factual reports, but only on a "possibility", and on "dangers" disclosed in the course of discussions, of LTTE infiltration, disruption and destabilization - without any elaboration or supporting material. Had any one of ordinary intelligence been told during the election period that it was proposed to allow voters from "uncleared" areas to enter "cleared" areas in order to vote, his immediate response - without the benefit of any intelligence reports - would have been that there was indeed a danger of such infiltration, etc.

That LTTE cadres, some having voting rights, might mingle with voters and infiltrate into the "cleared" areas was by no means an unforeseen possibility that arose unexpectedly. For the reasons stated in the next paragraph, it is impossible to believe that this possibility occurred to responsible officials in high places only a day or two before polling day.

It was a known and obvious danger from the outset - just as there were other dangers in other districts and provinces. Those charged with assisting in the conduct of a democratic election do not cave in to such dangers, but prepare to meet them. That is why

the 1st Respondent and the security forces had been going ahead with arrangements to allow voters to enter the "cleared" areas (as the Returning Officer, Vanni, pointed out, four weeks previously the Security Co-ordinating conference at Vanni had decided to keep the Vanni entry point open);"cluster" polling stations were established for voters coming from "uncleared" areas; and candidates were allowed to campaign in the "uncleared" areas. Obviously all concerned were of the view that adequate safeguards could be taken in respect of the risks involved. The 3rd Respondent's affidavit did not disclose whether, and how, that situation had changed. Besides, if the 3rd Respondent truly believed that there had been a significant change in the situation, he was under an obligation immediately to inform the 1st Respondent who was responsible for the overall conduct of the election. The newspaper report of his press interview claimed that the 5th Respondent had filed two reports on 3.12. .2001, and the Respondents' written submissions make the same claim. Even if I were to treat the newspaper report as evidence, there are good reasons why the reports said to have been filed by the 5th Respondent cannot be accepted as being the real reason for the impugned decision: the 3rd Respondent claimed at that interview that there had been military intelligence reports received "over previous weeks". If that was true, it meant that well before 3.12 .2001 (and probably even before the meeting of 24.11.2001) military intelligence reports had confirmed to him what commonsense had already indicated - but the 3rd Respondent chose not to act on those reports, and did not even consider it worthwhile to inform the 1st Respondent. Further, none of those reports have been produced, no excuse has been offered for that failure, the 5th Respondent has not filed an affidavit, and the Court has not been told of their contents even in a general way. Either way, therefore, the 3rd Respondent has failed to establish that there were reasonable grounds, based on national security, for the closure of the entry points.

Of course, the security forces were entitled – and indeed obliged – to take those risks seriously. Careful search of persons crossing from the "uncleared" areas was essential. The real problem was the difficulty of searching large numbers of such voters within a short space of time. But that was not a difficulty which sud-

denly arose on 4.12.2001. It existed from the beginning, and was aggravated by the 5th Respondent's request on 24.11.2001 for 8,000 army personnel. If the real reason was that the army was unable to assign enough personnel to search voters, that should have been communicated to the 1st Respondent at once. Besides, if that was the reason, the army should not have closed the entry points completely, but should at least have searched the few who could be searched and allowed them to cross over. I must note also that there would have been no lack of personnel if the poll in the affected areas was taken on a later day, because then personnel from elsewhere could have been brought in.

That makes it necessary to consider why the 3rd Respondent kept the 1st Respondent in the dark. Had the 1st Respondent been informed promptly, there were other options which he could have considered. Section 24 of the Parliamentary Elections Act, No. 1 of 1981 ("the Act"), empowers the Commissioner of Elections – where it is necessary due to an emergency – to alter the location of a polling station and/or to postpone the poll in any electoral district. Section 33 empowers him to stipulate different hours of polling. If the real difficulty which the forces faced was the lack of personnel on 5.12.2001, the 1st Respondent may well have considered postponing the poll in Batticaloa to, say, the 10th and the poll in Vanni to the 15th; and he may have considered suitably relocating the "cluster" polling stations, perhaps to the entry points themselves. The question also arise whether section 24(3) – on the principle that the greater includes the lesser, or read with section 129 of the Act, to which reference is made later in this judgement – permitted the postponement of the poll in respect of *a part of* the electoral division; and also whether, on a similar basis, he could *extend* the hours of poll in respect of the "cluster" polling stations only. It is necessary to speculate as to what he might have done: the fact is that the failure to inform him prevented him from exploring the feasibility of alternative arrangements, consistent with national security, to enable a significant section of the voters to cast their votes. Having regard to the prompt and decisive action which he took within hours to ensure that a handful of "VVIP and VIPP" were able to vote in safety, one cannot exclude the likelihood of the 1st Respondent devising with equal urgency and ingenuity a course of action to protect the exercise of the franchise by 55,000 voters, albeit ordinary voters.

In the circumstances, the 3rd Respondent's unexplained failure to inform the 1st Respondent makes it likely that his real intention was to prevent them voting either then or later, knowing that, that would further the interests of parties or groups not hopeful of their support.

To sum up, the 3rd Respondent was wholly or mainly responsible for the decision to close the entry points; the danger of LTTE infiltration was a known danger, which could and should have been faced; there is no evidence that on the 3rd or the 4th of December that danger suddenly became so grave as to warrant the closure of the entry points; even assuming that it did, at least the few voters who could have been checked should have been allowed to enter the "cleared" area, and what is more the decision to close should not have been concealed from the 1st Respondent; and the secrecy, haste and other circumstances show that the decision was not *bona fide*, but motivated by extraneous considerations.

**Freedom of Movement**

Article 15(6) permits the freedom of movement guaranteed by Article 14(1)(h) to be subjected to restrictions imposed by "law" in the interests of national economy. Article 15(7) permits further restrictions in the interests of national security, public order, the protection of public health or morality, and for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society; and "law" includes regulations made under the law relating to public security.

In the written submissions tendered on behalf of the 1st to 5th Respondents, they "emphatically state" that measures to close the entry points were taken "under the specific powers vested upon them both by the Prevention of Terrorism (Armed Forces) Regulations No.10 of 2001 and the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, made operative by gazette notification No. 1212/15 of 28th November 2001"; that "the Respondents were left with no choice but to ensure security to the public at large even if it involved the restriction of movement of a category of persons seeking clearance to the cleared areas"; and

that "the said restriction of movement was imposed purely on the basis that any or all of such persons who were thus restricted were 'suspected terrorists'..... in the interest of preserving not only the fundamental rights but also the lives of thousands of other citizens who would otherwise have been affected."

I must note that the above submissions were made on behalf of the 1st and 2nd Respondents as well, and thus imply that they, too, now seek to justify the closure.

It was further submitted that Article 15(7) makes the fundamental rights recognised by Articles 12 and 14 subject to "such restrictions as may be prescribed by law in the interests of national security, public order..."; that 'law' *includes* regulations made under the law for the time being relating to public security"; that "the term "law" in the given context should essentially constitute an Act of Parliament *or its recognized equivalent promulgated in the interest of national security and public order, but is not restricted to regulations made under the Public Security Ordinance*"; and that although specific reference has been made to that Ordinance, Article 15(7) "extends to all Acts enacted for the maintenance of national security, public order, etc." The PTA, as its preamble shows, was enacted for the purpose, *inter alia*, of maintaining national security and public order; the regulations and Order made under the PTA constitute "law"; and the restrictions contained therein constitute "restrictions prescribed by law" for the purpose of Article 15(7).

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 ("the PTA") empowers the Minister (in Part III) to make detention orders and restriction orders in respect of **particular** persons suspected of unlawful activity. Our attention was not drawn to any provision authorizing restriction of movement in general, or in respect of unspecified persons.

Section 27 of the PTA empowers the Minister to make regulations for the purpose of carrying out or giving effect to the principles and provisions of that Act. The President, as the Minister, made and gazetted on 3.8.2001 the PTA (Armed Forces) Regulations No.10 of 2001, Regulation 2 of which provided:

> "The President may, where she is of the opinion that, for the purpose of giving effect to the principles and provisions of [the PTA] and for combating terrorism or other civil disturbances and for the purpose of maintenance of supplies and services essential to the life of the community, it is necessary to do so, by Order, call out the armed forces on active service *for the aforesaid purposes in such areas as may be specified in such Oder, for assisting the Police Force in carrying out their duties in terms of the aforesaid Act."* [emphasis added]

The President thereafter made an Order under Regulation 2, gazetted on 28.11.2001, calling out the "armed forces on active service [in specified areas including Batticaloa and Vanni] for the purpose of giving effect to the principles and provisions of the PTA and for combating terrorism or other civil disturbances, [etc]."

The essence of the Respondents' contention is that the PTA is a law relating to national security and/or public order; that "law" includes regulations under the law relating to public security, and that (1) the word "includes" indicates that other regulations (besides those under the Public Security Ordinance) are within that definition of "law", and (2) the PTA is in any event part of "the law relating to public security; and therefore that the PTA Regulations No. 10 of 2001 and the Order of 28.11.2001 are regulations that validly impose restrictions on Article 14(1)(h).

I agree that the PTA *is* a law relating to national security and/or public order, however the PTA itself does not impose any restrictions on freedom of movement, except in respect of specified persons, suspected of unlawful activity, in terms of orders made by the Minister. The PTA did not authorize any of the Respondents to impose any restrictions on the Petitioners' rights under Article 14(1)(h).

The word "includes" in Article 15(7) does not bring in regulations under other laws. "Law" is restrictively defined in Article 170 to *mean* Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of

the word "includes" was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security.

While at first sight "public security" may seem to cover much the same ground as "national security and public order", it is clear that "the law relating to public security" has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution. Article 15 does not permit restrictions on fundamental rights other than by plenary legislation – which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arise only upon a Proclamation of emergency, because such Proclamations are subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security. It is noteworthy that Article 76(2) expressly recognizes that Parliament may delegate to the President the power to make emergency regulations under the law relating to public security. Other regulations and orders which are not subject to those control made under the PTA and other statutes, are therefore not within the extended definition of "law".

In any event, neither the PTA Regulations nor the Order thereunder purport to impose restrictions on the freedom of movement. The PTA Regulations only authorize the making of an Order to call out the armed forces, for the limited purpose of assisting the Police Force, in carrying out their duties under the PTA.

I hold that there was thus no "law" validly imposing restrictions on the Petitioners' freedom of movement.

However, the freedom of movement is subject, independently of Article 15, to certain inherent limitations, just as the freedom of speech does not entitle a person to falsely cry, "Fire!" in a crowded theatre (cf *Vadivelu* v *O.I.C. Sithambarapuram Refugee Camp*

*Police Post* (2). Thus during a riot or a fire the police may justifiably restrict entry to an area to which the public would otherwise have a right of access if that was necessary in order to quell the riot or to fight the fire. If the army personnel at the various check-points had prevented the Petitioners from entering the "cleared" areas, *bona fide,* in order to protect national security or to prevent the disruption of the election, I doubt whether the Petitioners could have complained that their freedom of movement had been infringed. In this instance, however, the army personnel were carrying out orders given *malafide*, for extraneous purposes. As I have already observed, the failure to inform the 1st Respondent of the closure, and the fact that even the 300 voters who could have been searched at each entry point were denied entry, confirm that the denial of access was anything but *bona fide.*

Furthermore, it is clear that the restrictions thus placed on the freedom of movement of the Petitioners cannot be regarded as minor irritants (cf *Dias* v *Secretary, Ministry of Defence* (3) incidental to verifying identity and checking baggage reasonably necessary for regulating entry into "cleared" areas. It was well known that the Petitioners (and many others) wished to travel on 5.12.2001 in order to vote, and that even a few hours' delay would make such travel futile.

I therefore hold that the Petitioners' fundamental rights under Article 14(1)(h) have been infringed by the 3rd Respondent.

**Freedom of Expression**

It is not disputed that the closure of the entry points had the foreseen result of denying the Petitioners and numerous other voters the opportunity to exercise their right to vote. As I held in *Karunathilaka* v *Dissanayake* (4), the silent and secret expression of a citizen's preference, as between one candidate and another, by the exercise of his right to vote is an exercise of the freedom of speech and expression. That freedom was totally denied, and not merely delayed.

The Petitioners have also complained that other voters – the wife of the Petitioner in the first Application, other voters in the

same electoral district, and even voters in another district – have been prevented from exercising their right to vote. In *Egodawela* v *Dissanayake*[5] (reported as *Mediwake* v *Dissanayake)*, it was held, for the reasons stated at pages 210-213, that the right to vote had both an individual and a collective aspect. Being a Parliamentary General Election the result at the Petitioners' polling station affected the result in the Batticaloa electoral division, and that in turn affected the result nationally. The Petitioners thus had an interest in the results of all electoral divisions. Impairment of the rights of voters elsewhere diluted the value of their own votes. I do not regard the Petitioners' applications as being "public interest litigation" to enforce the rights of others, because it is not the right of others, or of the public, which they seek to vindicate, but an integral aspect of their own fundamental rights.

I therefore hold that the Petitioners' freedom of speech and expression under Article 14(1)(a) read with Article 4(e) has been infringed by the 3rd Respondent.

However, that infringement was not final. The law provided a remedy. The minutes of the meeting of 7.12.2001 show that the 1st Respondent himself recognized that the circumstances in which 55,000 voters were suddenly prevented from voting cried out for a repoll – it was quite plain that there had been no genuine poll in the affected "cluster" polling stations, and the decision in *Egodawela* (cf pages 201-202) was applicable. The 1st Respondent did not order a repoll only because the 3rd Respondent stated that security could not be provided unless the poll was staggered for three or four days. It is not easy to apportion blame, and I would only reiterate what I observed in *Egodawela*: the 1st Respondent made an honest effort – although inadequate – to ensure a genuine election, but his authority was insidiously undermined by withholding the necessary support and resources. It is the obligation of the State to ensure "the full realization of the fundamental rights and freedoms of all persons" and to "strengthen and broaden the democratic structure of government and the democratic rights of the People.... by affording all possible opportunities to the People to participate at every level in national life and in government" (cf Articles 27(2)(a) and 27(4)). Here, in one way or another, the State machinery has been manipulated to ensure the converse – a flagrant denial of the

fundamental rights of 55,000 voters, which made the election for the Batticaloa and Vanni districts neither free nor fair. The failure to order a repoll would only encourage future infringements.

I hold that the Petitioners' freedom of speech and expression was infringed by the 1st Respondent.

**Right to Equality**

The decision to close the entry points was neither *bona fide* nor merely mistaken; it was arbitrary, and intended to prevent the Petitioners exercising their franchise probably for political reasons.

There were aggravating factors. Other voters, similarly circumstanced, living in "uncleared" areas in the Trincomalee district were not subjected to similar restrictions, and there was not a word of explanation as to how the dangers of LTTE infiltration, disruption and destabilization were averted in Trincomalee. Remedial action in the form of a repoll was denied.

I therefore hold that the Petitioners' right to equality and the equal protection of the law under Article 12(1) was infringed by the 3rd Respondent.

**Order under Section 129**

Section 129 of the Parliamentary Elections Act provides thus for the "removal of difficulties"

> "If any difficulty arises in *first giving effect to any of the provisions of this Act*, the Commissioner may, by Order published in the Gazette, issue all such directions as he may deem necessary with a view to providing for any special or unforeseen circumstances; or
>
> to determining or adjusting *any question or matter for the determination or adjustment of which no provision or effective provision is made by this Act.*" [emphasis added]

I have already referred to the letter dated 3rd December sent by the Secretary to the President to the 1st Respondent, to which was annexed a copy of the memorandum dated *4th* December addressed by the ADG/DII to the 5th Respondent.

These documents gave rise to several queries. How did the Secretary's letter of the 3rd refer to and annex a copy of a memorandum which was written only the next day? How did the Secretary conclude, and the 1st Respondent decide, first, that Minister Kadirgamar was under LTTE threat when the memorandum did not mention him? And second, that the security forces had advised the six specified VVIP and VIPP to *avoid* attending polling booths, when the memorandum only advised that precautions be taken *when* they visited polling booths? Had the six VVIP and VIPP requested special voting arrangements? If, as claimed in the memorandum, information had previously been received of a specific threat to the President and General Ratwatte, why did the ADG/DII delay until 4th December to inform the 5th Respondent?

The 1st Respondent's affidavit did not contain a word about the circumstances in which he came to make his "Order under section 129". To clarify matters the Registrar was directed to request the Attorney-General to obtain from the 1st Respondent and submit:

"1. the material on the basis of which the 1st Respondent formed the opinion that there was a threat to the lives of the six persons specified in the Order dated 4.12.2001, including any police reports received by him;

2. the material containing any advice by the security forces to those six persons to avoid attending polling stations on 5.12.2001;

3. the material containing any request by or on behalf of the said six persons to vote elsewhere than at their allotted polling stations;

4. the directions or instructions given to the Returning Officers of each of the Districts mentioned in the Order dated 4.12.2001, pursuant to that Order."

The same three documents were sent again, without any other material relevant to items (1) to (3). In regard to item (4), copies were furnished of the instructions issued to the Returning Officers in regard to the voting procedure for five of the named persons – but not of the instructions relating to Minister Kadirgamar. Those instructions disclosed that special arrangements had been

made, quite contrary to the principles and procedures laid down in the Act. Each Returning Officer was directed to order an Assistant Returning Officer to collect the ballot paper of the named individual from the Senior Presiding Officer of the polling station, having placed the official mark thereon and enclosed it in a sealed envelope, to take it in a vehicle with a police escort to that individual's residence, to allow him to vote secretly in a closed room, to take that ballot paper in a sealed envelope to the polling station by vehicle with a police escort, and then to put the envelope into the ballot box. Safeguards – such as the application of indelible ink – considered essential in the case of ordinary voters were ignored.

The material available to the 1st Respondent did not disclose any threat whatsoever to Minister Kadirgamar, nor did it disclose that the security forces had advised the six VVIP and VIPP to *avoid* visiting polling booths. In the written submissions filed on behalf of the Respondents it was alleged that two intelligence reports, from internal intelligence sources, produced by the 5th Respondent on 3.12.2001, contained information about this possible assassination attempt, and that the 1st Respondent was apprised of the seriousness of that threat. Those reports were not produced, and the 5th Respondent did not disclose their contents in an affidavit, nor explain how the 1st Respondent had been informed. But that apart, if two such reports, from internal intelligence sources, were already in the 5th Respondent's possession on 3.12.2001, why was it necessary for the ADG/DII in charge of internal intelligence, to inform the 5th Respondent of that threat on the *4th* of December? There was also no evidence that any of the six VVIP and VIPP had requested any special voting arrangements, and the 1st Respondent should have realized that any one with basic democratic instincts would have squirmed in embarrassment at the very thought of even asking for such preferential treatment at an election. The privileges which the holders of high office enjoy on other occasions or at other times come to an end when it comes to the exercise of the right to vote on election day, for elections must be free, *equal* and secret – so that voters are equal, and must be treated equally.

It is clear beyond reasonable doubt that – whatever material the security forces may have had – the 1st Respondent himself did

not have any material on which he could reasonably have concluded that there was a serious threat to the lives of the six VVIP and VIPP and that the security forces had advised them to avoid attending polling stations. He acted blindly upon the unsubstantiated representations of the Secretary and extended quite extraordinary privileges to six persons without even receiving a request from them. I must also note the otherwise commendable promptitude which the 1st Respondent displayed on that occasion. Having received the Secretary's letter at 1.00 p.m. on 4.12.2001, his Order was made and gazetted the very same day, after having ascertained on his own the electoral districts and residences of the six VVIP and VIPP, but without the precaution of seeking the views of the Attorney-General (to whom that letter had been copied). The Petitioner in the first Application was therefore justified in complaining that 55,000 voters (including himself) from Batticaloa and Vanni were treated very differently: that a few who had the privilege of extensive security provided by the State were given the additional facility of voting at home, while from those who had no security at all even the right to vote had been stealthily taken away.

The 1st Respondent's Order was therefore arbitrary, unreasonable and discriminatory, and in violation of Article 12(1).

That Order was unlawful for several other reasons as well. Section 129 does not give the Commissioner of Elections any power to issue directions which are contrary to the fundamental principles of the Act. The Act requires, as a general rule, that voters must vote in person, and not by proxy; it is exceptionally, only, that voting by post is permitted for specified categories of persons – basically, because they may have official duties connected with the election itself. Further, voters are required to travel by public transport or on foot – unless with the prior written authority of the Returning Officer given on account of physical disability. "Voting at home" is alien to the fundamental principles of the Act. If the Commissioner had power under section 129 to introduce such procedures unasked, there is no reason why he did not establish procedures to enable, for instance, voting at embassies abroad by the many migrant workers who contributed so substantially to our national economy. Besides, the "difficulty " which section 129 contemplates appears to be a difficulty which the Commissioner (or his

staff) encounters in giving effect to the provisions of the Act – not any of the difficulties which individual voters may face in exercising their rights under the Act, for instance, because of death threats.

I hold that section 129 empowers the Commissioner of Elections to give directions only when there is a difficulty in *giving effect to* a provision of the Act: i.e. a difficulty experienced in *implementing* any provision of the Act, and not in dealing with a *casus omissus*. Although section 129 refers to "determining .... any question .... for the determination .... of which no provision .... is made", that power to determine a question not covered by the Act can only be exercised if initially the Commissioner had been faced with a difficulty in implementing some provision of the Act. Thus if the Commissioner took steps, for instance, to implement the provisions of the Act in regard to the postponement of the poll, or the ordering of a repoll, and if in so doing a question arose for which the Act had made no provision, then he could issue directions with a view to determining such question. A condition precedent to the exercise of the power conferred by section 129 is the existence of a difficulty in implementing any provision of the Act. In this case, the 1st Respondent was not faced with any such difficulty, but only with the alleged personal problems of six voters who apprehended serious difficulty in attending their allotted polling booths.

Further, the power under section 129 can only be exercised on the *first* occasion on which a particular difficulty arises. The alleged "difficulty" in this case was the inability to attend the allotted polling booth. Whether that difficulty arose because of death threats or other threats – from the LTTE, or a political party or an individual – or because threats of injury had been carried out and the victims were immobilized in hospital, made no difference. The Commissioner of Elections, in particular, would have been well aware that, that was by no means the *first* occasion on which that particular difficulty had arisen after section 129 was enacted.

Finally, the power to issue directions conferred by section 129 was a power to issue published *general* directions applicable to all similar situations, and not a power to make *ad hoc* decisions in respect of particular voters, on request or otherwise. To interpret "directions" otherwise would mean that if there were several similar complaints the Commissioner could issue directions only in respect

of the first, with the result that the other complaints would remain unremedied: resulting in unequal treatment. Faced with two possible interpretations of section 129, that which is consistent with equal treatment should be preferred to that which results in unequal treatment. If section 129 did empower the Commissioner to issue directions when there were threats deterring voters from attending their allotted polling booths, those directions should have covered all such instances, and should have applied to future elections as well – thereby effectively "removing" the difficulty. The failure to do so amounted to an infringement of Article 12(1). Besides, neither section 129 nor the impugned Order authorized the 1st Respondent to issue "instructions", especially unpublished secret instructions, governing the procedure for voting at home. Those instructions were also inconsistent with the gazetted Order: while the latter directed Returning Officers to be present at the residence of the VVIP and VIPP concerned, by the unpublished instructions the 1st Respondent directed the Returning Officers to delegate their functions to Assistant Returning Officers.

**Gravity of the Infringements**

The proved infringements were in themselves serious. The number of voters affected was so large that the elections in the Batticaloa and Vanni districts were neither free nor fair. The decision-making processes which resulted in those infringements were shrouded in secrecy, haste and bad faith. The infringements took place at a time when there was a serious erosion of public confidence in the integrity of the electoral process, and when it was extremely important to ensure that elections were free and fair, particularly in the "uncleared" areas – because citizens living in those areas needed reassurance, if peace and national reconciliation were to become realities, that elections would be truly democratic, that fundamental rights would be respected and protected, and that judicial remedies would be available for wrongdoing. In that context, the infringements were a national disaster.

**Order**

I grant the Petitioners in all three Applications declarations that their fundamental rights under Articles 12(1) and 14(1)(a) have been infringed by the 1st and 3rd Respondents, and that their fun-

damental rights under Article 14 (1)(h) have been infringed by the 3rd Respondent. I award the Petitioner(s) in each Application (a) a sum of Rs. 100,000 as compensation payable by the State (totalling Rs. 300,000), and (b) a sum of Rs, 30,000 as costs payable personally by the 3rd Respondent (totalling Rs. 90,000). I further award the Petitioner in the first Application a sum of Rs. 1,000 as nominal compensation in respect of the 1st Respondent's Order under section 129, payable personally by the 1st Respondent. All these payments shall be made on or before 31.5.2003.

**ISMAIL, J:** - I agree

**WIGNESWARAN, J:** - I agree

*Relief granted*