JANATHA FINANCE AND INVESTMENTS LTD.
V.
LIYANAGE AND OTHERS

SUPREME COURT
SHARVANANDA, J., VICTOR PERERA, J., AND RANASINGHE, J.
S.C. APPLICATION NO. 127 OF 1982
JANUARY 24, 25, 27 and 31, 1983.

Fundamental Rights — Public Security Ordinance s. 5 — Regulation 14 (7) of the Emergency (Miscellaneous Provisions and Powers) Regulation No. 3 of 82 —Sealing of Printing Press — Constitution — Article 12 (1) Equality before the law and equal protection of the law — Article 12 (2), freedom from discrimination on the ground of political opinion — Ultra vires — Good faith —Article 15(7) of the Constitution — Reasonableness — Omnia praesumuntur rite esse acta.

(1) This Court can entertain and determine an application challenging, on the grounds of *ultra vires* and/or good faith, the validity not only of Regulation 14 (7) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 2 and 3 of 1982 but also of Orders made thereunder by the Competent Authority referred to in the said Regulations.

(2) Regulation 14 (7) is valid and cannot be assailed on the ground that it empowers a public officer to restrict, deny or suspend the fundamental rights of equality before the law and the equal protection of the law and the freedom from discrimination on the ground of political opinion. The interference authorised by Article 15 (7) is only by such restrictions as may be prescribed by law. Regulation 14 (7) passes the three tests involved in the expression "prescribed by law" namely, firstly, the law must be adequately accessible, secondly the norm to be a law must be formulated with sufficient precision to enable the citizen to regulate his conduct and thirdly, the interference must be brought about by a "law". The fact that the Regulation in question vests the power to make the Order in the Competent Authority does not detach from its validity.

The provisions of s. 2 of the Public Security Ordinance make the President the sole Judge of the existence or imminence of a state of emergency and of the necessity for the regulations. In the absence of bad faith or ulterior motive the jurisdiction of the Court is excluded.

Even where power is conferred in a subjective form which at first sight would seem to exclude judicial review the Court will intervene if there is any indication that the action complained of is outside the scope of the power relied upon as justifying such action. Regulation 14 (7) is framed not entirely in subjective terms and the Competent Authority is empowered to make an order under that Regulation only if he is satisfied of the existence of certain facts and the Court

can inquire whether it was reasonable for the Authority to be satisfied of the existence of those facts. The evaluation of those facts is for the Competent Authority alone, and the Court will not substitute its opinion for that of the Competent Authority.

The opinion which the Competent Authority had to form was twofold: Whether the printing press has been or is likely to be used for the production of documents and whether the contents of such documents are calculated to be prejudicial to the interests of national security.

Although the theory of uncontrolled and unfettered discretion no longer holds sway, the scope of judicial review is limited where the authority acts reasonably. If the decision is within the bounds of reasonableness it is no part of the Court's function to interfere. The Court must not usurp the discretion of the public authority which Parliament had ordained should take the decision. If there are reasonable grounds the judge has no further duty of deciding whether he would have formed the same belief. The standard of reasonablensss varies with the situation.

The maxim *praesumuntur rite esse acta* applies and where an order regular on the face of it is produced the burden is on the petitioner to rebut it.

The exercise of his discretion by the 1st respondent has not been unreasonable or capricious and the Orders impungned are valid.

Cases referred to :—

1. *Anisminic Ltd. v. The Foreign Compensation Commission* (1969) 1 All ER 208.
2. *Hirdaramani v. Ratnavale* 75 NLR 67
3. *Gunasekera v. De Fonseka* 76 NLR 246
4. *Siriwardena v. Liyanage,* S.C. Application No. 120/80 SCM 27.1.83.
5. *Liversidge v. Anderson* (1942) AC 206
6. *Redge v. Baldwin* (1963) 2 All ER 66, 76.
7. *IRC v. Rossminster Ltd.* (1980) 1 Al ER 80, 93.
8. *Secretary of State v. ASLEF* (No. 2) (1972) 2 All ER 949.
9. *A.G. of Saint Christopher v. Reynolds* (1979) 3 All ER 129 (P C.)

10. *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1976) 3 WLR 641.

11. *Roberts v. Hopwood* (1925) AC 578.

12. *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) 1 All ER 694.

13. *In Re W.* (An Infant) (1971) AC 682, 700.

APPLICATION against infringement of fundamental rights.

Nihal Jayawickrema with *Faiz Mustapha and V. J. C. Boange* instructed by *J. C. T. Kotalawela* for Petitioner.

M. S. Aziz Deputy Solicitor-General with *K. C. Kamalasabaysan, Senior State Counsel* for Respondents.

Cur. adv. vult

February 14, 1983
RANASINGHE, J.

The Petitioner, which is a private limited liability company carrying on the business of printers, engravers, typefounders, diesinkers, photographers, block-makers and said to be one of the most modern and sophisticated commercial printing establishments in Sri Lanka with equipment valued over Rs. 6,000,000/-, a work-staff of over 50 persons and a monthly turnover of about Rs. 750,000/- to Rs. 1,000,000/-, has instituted these proceedings for : a declaration that the Order, a copy of which is marked P2, made by the 1st Respondent on 20.11.82, purporting to be by virtue of the powers vested in him by Regulation 14(7) of the Emergency (Miscellaneous Provisions and Powers) Regulations No 3 of 82, directing the sealing of the Petitioner's printing-press situate at premises No. 140, Koswatte Road, Kalapaluwawa, is null and void for the reason that it constitutes an infringement by an executive or administrative act of the 1st Respondent of the fundamental rights guaranteed to the Petitioner by Article 12(1), to equality before the law and of equal protection of the law —, and 12(2), — to freedom from discrimination on the ground of political opinion — of the

Constitution : a direction to the 2nd Respondent to hand over possession of the said printing-press to the Petitioner: an order for compensation in a sum of Rs. 30,000/- per day, for each day that the Petitioner is prevented from engaging in its lawful business.

On 20.10.82, the day the presidential election was held in the Island, the President, by a proclamation published in the Gazette bearing No : 215/7 of 20.10.82, declared, around 6 p.m., a state of public emergency in Sri Lanka and brought into operation the provisions of Part II of the Public Security Ordinance (Chap. 40). On the same day the President, acting under the provisions of Sec. 5 of the said Public Security Ordinance, promulgated the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 2 of 1982; and did also, acting in terms of Regulation 2 of the said Emergency Regulations No. 2 of 82, appoint the 1st Respondent to be the Competent Authority for the purpose of Regulation 14 of the Regulations. On the 3rd November 82 the Order P1 was made by the 1st Respondent; and the 2nd Respondent, through his officers and agents took possession of and sealed up the aforesaid premises where the Petitioner carried on the Petitioner's said business of commercial printing. Therefore, on 20.11.82, the President made a further proclamation extending the said state of emergency; and the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 3 of 1982, were promulgated. On the same day the Order P2, dated 20.11.82, was also made by the 1st Respondent; and the 2nd Respondent continued to be in possession of the Petitioner's said premises until 3.1.83, on which said date—about three weeks after the institution of these proceedings — the said premises were handed back to the Petitioner.

The Petitioner has, in the petition averred : that the Chairman of the Board of Directors of the Petitioner-Company is Dr. Neville Fernando : that the other directors are the wife and children of the said Dr. Fernando : that the said Dr. Fernando has been engaged in active politics and was elected, as a member of the United National Party, to the Panadura seat in the then National State

Assembly at the General Election held in July 1977 : that, in December 1981, following upon differences which had arisen between Dr. Fernando and President Jayewardene, Dr. Fernando was expelled from the United National Party: that a resolution to expel Dr. Fernando from Parliament too was thereafter moved : that, on 23.12.81, before the said resolution was voted upon, the Petitioner, however, resigned from membership of Parliament : that, in or about July 1982, Dr. Fernando joined the Sri Lanka Freedom Party at the invitation of its president; Mrs. Bandaranaike, and has, since then, actively campaigned for that party at public meetings held throughout the Island : that, during the months of September and October 1982, Dr. Fernando addressed several public meetings in support of the candidature of the Sri Lanka Freedom Party nominee, H. S. R. Kobbekaduwa, for the office of President of the Republic in his contest against President Jayewardene : that, at such meetings, Dr. Fernando sought to expose the shortcomings of President Jayewardene's Government and was particularly critical of the leadership of President Jayewardene : that, during those two months, the Petitioner printed two pamphlets in support of the candidature of the said Sri Lanka Freedom Party nominee, a colour poster commemorating the second anniversary of the deprivation of the civic rights of Mrs. Bandaranaike and also two colour portraits of Mrs. Bandaranaike : that these documents were the principal propaganda material published on behalf of the Sri Lanka Freedom Party candidate at the said presidential election and were circulated and distributed extensively throughout the island : that, on 27.10.82, President Jayewardene announced that a general election would not be held on or before October 1983, as required by the Constitution, but that an amendment to the Constitution would be moved to extend the life of the Parliament for a further period of 6 years, and that the support of the people for such amendment would be sought at a Referendum : that all the Opposition political parties, including the Sri Lanka Freedom Party, protested at this move and declared their intention to campaign against the said proposed amendment : that, since 28.10.82, with a view to harassing the Opposition and thereby impeding its campaign, the government of President Jayewardene has, *inter alia*, arrested and detained

several members and office bearers of the S.L.F.P., searched the headquarters of the SLFP, closed down printing-presses at which election literature in support of the SLFP, presidental candidate had been printed : that, on or about 31.01.82, the Petitioner's aforesaid printing-press premises were searched by officers of the C.I.D. : that, on or about 1.11.82, Dr. Fernando himself was questioned by two officers of the C.I.D. whether Dr. Fernando had any knowledge about the publication of a political pamphlet in the form of a rice ration book : that Dr. Fernando denied any knowledge of any such publication : that the Petitioner neither printed nor undertook the printing of the said pamphlet : that thereafter, on 3.11.82, the Order P1 was made by the 1st Respondent, and the officers and agents of the 2nd Respondent took possession of the said premises of the Petitioner, and the premises were sealed up by them on the same day : that a second order, P2, was also made thereafter on 20.11.82 : that several institutions, such as the Associated Newspapers of Ceylon Ltd., the Times of Ceylon Ltd., the Independent Television Network Ltd., the State Printing Corporation, campaigned on behalf of President Jayewardene at the presidental election and have engaged themselves in campaigning support for the approval of the amendment to the Constitution at the Referendum : that the 1st Respondent has made the aforesaid Order P1 and P2 for an ulterior purpose, namely to victimise, punish and/or take revenge on Dr. Fernando for actively campaigning against and publicly criticising President Jayewardene, for printing literature for and on behalf of the S.L.F.P., and to deter, discourage and prevent Dr. Fernando from campaigning against the Government at the said Referendum, and also to cause financial loss and damage to the Petitioner : that the 1st Respondent has, in making the said Order P1 and P2, acted wrongfully, unlawfully and maliciously and in abuse of his powers, and has also acted under the dictation of President Jayewardene : that the 1st Respondent has not imposed a prohibition similar to that imposed on the Petitioner on any of the other companies persons and bodies similar to the Petitioner who are also engaged in the competitive business of commercial printing : that the Petitioner has suffered loss and damage in a sum of Rs. 30,000/- per day, during the period its

printing-press has remained sealed-up, from 20.11.82, upon the Orders of the 1st Respondent.

The 1st Respondent, in his affidavit dated 27.11.82, filed before the commencement of the hearing of this application, has, whilst repudiating the Petitioner's allegation that he had, in making the orders P1 and P2, been actuated by malice and that he had done so at the dictation of another for an ulterior purpose, taken up the position that : he had credible information that pamphlets and other material printed at the Petitioner's printing-press prior to and after the presidential election of 1982 were calculated to cause racial disharmony between the Sinhala and Tamil communities and also to incite the masses to resort to violence against the State : that he had credible information and he verily believes that the said press was concerned in the printing of spurious rice ration books : that he was of the view that the said press would continue to bring out publications of a similar nature which would jeopardise the maintenance of good order, and prejudice the interests of national security : that the said Orders, P1 and P2, were made by him upon a consideration of the material and information made available to him by the police and other official sources : that the Petitioner's application is misconceived in law, and cannot be maintained.

At the hearing before this Court learned Counsel appearing for the Petitioner urged several questions of law : that the provisions of Sec. 8 of the Public Security Ordinance (Chap. 40), and of Sec. 22 of the Interpretation Act (Chap. 2) as amended by Act No. 18 of 72, do not exclude the jurisdiction of this Court to entertain and determine applications made in terms of the provisions of Article 126(1) of the Constitution : that Regulation 14(7) of the Emergency Regulation Nos. 2 and 3 of 82 under which both P1 and P2 are said to have been made, is ultra vires Article 15(7) of the Constitution for the reason that the said Regulation itself does not restrict the exercise or operation of a Fundamental Right but empowers and authorises a public officer (namely the Competent Authority) to do so, and seeks not only to "restrict" a Fundamental Right but also to "deny" or "suspend" such Fundamental Right.

It was contended for the Respondent that : the validity of the Emergency Regulations in question and/or Orders made thereunder are not justiciable and this Court cannot question the validity and the legality of the said Orders : that in any event the moment an Order — such as P1 and P2 — regular and valid on the face of it and applicable to the Petitioner is produced, it is for the Petitioner to establish a *prima facie* inference of bad faith, abuse of power or an ulterior purpose before the Respondent could be called upon to set out the material upon which the Respondent acted.

It is now settled law that neither the provisions of Sec. 8 of the Public Security Ordinance (Chap 40) nor of Sec 22 of the Interpretation Ordinance as amended in 1972, operate to oust fully and finally the jurisdiction of the Courts in respect of the matters referred to in the said provisions, but that such exclusion would be operative only in respect of acts done in good faith and are ex facie regular, and which are not tainted by malice or by an abuse of power — vide the decision of the House of Lords in the case of *Anisminic Ltd. v. The Foreign Compensation Commission,*[1]; and the decisions of the Supreme Court in *Hirdaramani vs. Ratnavale,*[2]: *Gunasekera vs. De Fonseka,*[3] ; and *S.C. APN/GEN/6-20/74, H.C. Bandulla V/1/74 et al* (9 judges), S.C.M. 3.9.74.

Article 170 of the Constitution promulgated in 1978 defines "existing law", "existing written law", "law" and "written law". Article 168 (1) provides that unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall, *mutatis mutandis* and except as otherwise provided in the Constitution, continue in force; and sub article (2) states that, save as otherwise provided in the Constitution, existing laws, written laws and unwritten laws are not and shall not in any manner be deemed to be provisions of the Constitution. Chapter XVIII of the Constitution, which deals with Public Security provides, in Article 155 (1), that the Public Security Ordinancce as amended and in force immediately before the commencement of the Constitution be deemed to be a law enacted by

Parliament, and sub-article (2) provides that the power to make emergency regulations shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. In terms of Article 80 (3) once a Bill becomes law, no Court can inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever. This ouster clause, being operative only in respect of Bills becoming laws as set out in this sub-article, will not, therefore, cover emergency regulations. Article 16 (1) states that "all existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter". The Chapter so referred to is Chapter III which deals with Fundamental Rights, and commences with Article 10. Articles 10 to 15 spell out the Fundamental Rights. Article 17 gives the right to every person, who complains infringement or imminent infringement by executive or administrative action, of a fundamental right to which such person is entitled under the said Chapter III to apply to the Supreme Court as provided by Article 126. Article 17, coming as it does after Article 16, would not be a "preceding provision" as contemplated by Article 16, and does not therefore have to have way to any inconsistent provision contained in any other existing written law, such as the Public Security Ordinance or the Interpretation Act.

Furthermore, in the case of *B. A. Siriwardena et al vs. D. J. F. Liyanage et al.*[4], a Bench of five judges of this Court did, by a majority decision, entertain and determine an application, which challenged an Order made by the 1st Respondent himself (and executed by the officers and agents of the 2nd Respondent) in respect of another printing-press, under the self-same Regulation 14 as is impugned in these proceedings.

A consideration of the aforementioned Articles of the Constitution and the authorities, leads me to the view that this Court can entertain and determine an application — such as has been made by the Petitioner in these proceedings — challenging, on the grounds of ultra vires and/or of good faith, the validity not

only of Regulation 14 (7) of Emergency (Miscellaneous Provisions and Powers) Regulation Nos. 2 and 3 of 1982, but also of Orders - such as P1 and P2 — made thereunder by the Competent Authority referred to in the said Regulation.

The validity of the said Regulation 14 (7) is challenged on the grounds : that it does not itself restrict the exercise or operation of a Fundamental Right but empowers and authorises a public officer to do so: that it seeks not only to "restrict", but also to "deny" or "suspend" a Fundamental Right. The two Fundamental Rights which the Petitioner complains have been infringed are those set out in Articles 12 (1) and (2), namely the right to equality before the law, the equal protection of the law, and the freedom from discrimination on the ground of political opinion respectively. It is contended : that, in view of the provisions of Article 4 (d) of the Constitution, a Fundamental Right can be abridged, restricted or denied only in the manner and to the extent referred to subsequently in the Constitution : that the manner and the extent of such interference has been set out in Article 15 (7) : that the interference authorised by Article 15 (7) is only by "such restrictions as may be prescribed by law in ...." : that Regulation 14 (7) goes beyond imposing a mere restriction : that, in effect, it clamps down a complete closure, an act which would amount to a complete denial : that Regulation 14(7) does not, even if what it seeks to impose is only a restriction, constitute an interference "prescribed by law", as required by Article 15 (7), as any such restriction is not imposed by the sub-article itself, but is left to be imposed by another, namely the Competent Authority referred to therein. Learned Counsel submitted three requirements which were said to flow from the expression "prescribed by law": firstly, the law must be adequately accessible ; secondly, the norm to be a law must be formulated with sufficient precision to enable the citizen to regulate his conduct ; and thirdly, the interference must be brought about by a "law".

The said Regulation 14(7) is as follows :

"if a competent authority is of opinion that any printing press or a printing press under the control of any person,

has been or is likely to be used for the production of any document containing matter which is in his opinion calculated to prejudice the interests of national security or the preservation of public order or the maintenance of supplies and services essential to the life of the community or matter inciting or encouraging persons to mutiny, riot or civil commotion, the competent authority may by order direct that the printing press, or all or any of the printing presses under the control of that person, as the case may be, shall, so long as the order is in force, not be used for any purpose whatsoever or for any such purpose as is specified in the order ; and any such order may authorize any persons specified therein to take steps (including the taking possession of any printing press with respect to which the order is made or of any premises in which it is contained or any part of such printing press or premises) as appear to the persons so authorized to be necessary for securing compliance with the order."

An order made by a Competent Authority under this Regulation is subject to review by the President himself, and also by the Advisory Committee appointed by the President to which a party aggrieved by any such order could make representations.

A careful examination of the provisions of the said Regulation 14 (7) does show that the first and second requirements referred to above are already satisfied, and that any step by the Competent Authority in terms of the said paragraph would not amount to a total denial of any of the rights set out in Article 12 (1) and or (2). By virtue of the provisions of Article 15(7) of the Constitution, an emergency regulation made under the provisions of the Public Security Ordinance (Cap. 40), is, for the purpose of paragraph (7) of Article 15, considered to be "law".

The fact that the Regulation in question vests the power to make the Order in the Competent Authority does not detract from its validity. **De Smith's Judicial Review of Administrative Action** (4 edt) at page 300 states : "There is a strong presumption against

construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to it .... But the presumption is not irrebuttable, and in a Canadian wartime case the power of the Governor-General in Council to make such regulations as he might by reason of the existence of war deem necessary or advisable for the defence of Canada was held to be wide enough to enable him to sub-delegate to the Controller of Chemicals power to make Regulations .... It is doubtful whether implied authority to sub-delegate legislative power would ever be implied by the English courts save in time of grave emergency." **Bindra's : Interpretation of Statutes (6 edt) at page 695** refers to the American case of *Lock's appeal* in which the Court has stated :

> "To assert that a law is less than a law, because it is made to depend on a future event or act is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed or to things future and impossible to fully know. The Court cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside the halls of legislation."

The provisions of Sec. 2 of the Public Security Ordinance make the President the sole judge of the existence or imminence of a State of Emergency, and the necessity of bringing into operation the provisions of Part II of the said Ordinance. Part II vests the President with wide and extensive powers to deal with the emergency situation. The President's view of the necessity and the expediency of the regulations needed to combat the situation is conclusive of their necessity, and, in formulating them for the purposes of Sec 5, he is bound only by the provisions of Article 155(2) of the Constitution. He is the sole judge of the necessity for the regulations. It is the subjective opinion of the

President that matters ; and in the absence of bad faith or ulterior motive, the jurisdiction of the Court is excluded.

As set out earlier, what came up for consideration by this Court in *Siriwardena's case,* referred to above, were also the self-same Regulation 14 and an Order, similar to P1 and P2, made by the 1st Respondent under paragraph (3) of the said Regulation, which deals with the control of publication.

I am of the opinion that the Petitioner's submission in regard to the validity of the said Regulation 14 (7) must fail.

I shall now consider the submission made on behalf of the Respondents that the power conferred by Regulation 14 (7) on the 1st Respondent is in subjective terms and that, in the absence of bad faith, this Court cannot and must not intervene. As set out earlier, Regulation 14(7) empowers the Competent Authority to make an Order if he "is of opinion that any printing press ..... has been or is likely to be used for the production of any document containing matter which is in his opinion calculated to prejudice the interests of ...." This method of vesting authority, according to **De Smith : Judicial Review of Administrative Action — 4th edt** at page 362, in "a commonplace technique in emergency legislation, and it expected that the courts will show due deference not only to the opinion of the Executive that a state of emergency exists but also to the opinion of the Executive that particular facts exist calling for the exercise of detailed emergency powers granted by the Statute".

Any discussion of this subject in our Courts must perforce commence with the judgment of this Court in *Hirdaramani's case* (supra) delivered in December 1971, in which, after an exhaustive discussion by Chief Justice (H.N.G.) Fernando of the then English law on the subject with reference to a Detention Order made in terms of an Emergency Regulation, which corresponded to Regulations 2 and 3 of 1982 referred to earlier, this Court held that, once a Detention Order which is valid on its face, is produced,it is for the detainee to prove facts necessary to controvert the matter stated in the Detention Order and that if the

detainee fails to establish a *prima facie* case against the good faith of the authority who made the Order in question, the onus does not shift to the Permanent Secretary to satisfy the Court of his good faith. The views expressed in that case have been to a considerable degree been influenced by the majority decision in the English case of *Liversidge v. Anderson*[5] which was decided by the House of Lords in the year 1942, at the height of the Second World War. The emergency legislation of the Second World War gave the Executive extensive powers over both persons and property. The grant of power was couched in language which on a literal interpretation was sufficient to clothe almost any act which was claimed to have been done under the authority of such a grant. The Courts not only gave a strictly literal interpretation to subjectively worded grants, but also in their anxiety not to obstruct the war effort which required the entire attention of the Executive, they also declined - lest a judicial review of executive action be highly detrimental to the national interest — to interpret literally grants which *prima facie* enabled the Courts to review the reasonableness of the grounds for the exercise of discretionary powers that authorised summary deprivation of personal liberty —**De Smith - p 290 ; 349-350.**

During the last two decades, however, the pendulum has swung, and the English Courts have since steered away from the majority view expressed in *Liversidge's case* (supra), (referred to by Lord Reid in *Ridge v. Baldwin*[6] as "the very peculiar decision of this House", and by Lord Diplock in *IRC v. Rossminster Ltd*[7] in the words : "For my part the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right"); and to-day the Courts are resistant to the whole notion of uncontrollable power — **Wade : Administrative Law — 4th edition** — p. 338 — ; and the notion of unfettered administrative discretion has now been totally rejected — **Wade ps. 20, 342.** The Courts will not be readily deterred by subjectively worded statutory formulae from determining whether acts done avowedly in pursuance of statutory powers bear an adequate relationship to the purposes prescribed by the statute — *De Smith (supra)* p. 326 ; Secretary of *State v. ASLEF*[8] *AG of* Saint *Christopher v. Reynolds*[9]; *IRC v. Roseminster Ltd.* (1980 1 AER p 80 (Supra) ; *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*[10].

Having regard to what has been stated above it would seem that the present position is that, even where power has been conferred in a 'subjective' form, which at first sight would seem to exclude judicial review on the basis that it is a matter of "pure judgment", the Court would still disregard 'subjective' language if there is any indication that the action complained of is outside the scope of the power relied upon as justifying such action.

In *Siriwardena's case* (supra), (which is better known as the **"Aththa case")** the majority view, arrived at after an examination of *Hirdaramani's case* and the other relevant English authorities,in regard to the nature and scope of Regulation 14(3) — which is in terms similar to those in Regulation 14(7) under which the Order P2 relevant to those proceedings has been made by the 1st Respondent — is that : Regulation 14(3) is framed not entirely in subjective terms, and the Competent Authority is empowered to make an order under that Regulation only if he is satisfied of the existence of certain facts, and the Court can inquire whether it was reasonable for the Authority to be satisfied of the existence of those facts : that the evaluation of those facts is for the Competent Authority alone, and the Court will not substitute its opinion for that of the Competent Authority : that the phrase "preservation of public order" in this Regulation means the prevention of disorder or the maintenance of peace and tranquillity. It has also, however, to be noted that, in the course of the judgment, which embodied the majority view, Wimalaratne, J. did observe that where the opinion to be formed is that a publication is **likely to be** calculated to be prejudicial, then the opinion is a subjective opinion, which is similar to the opinion that has to be formed before a detention order is made, but that where the opinion is one that is formed on something that has **already been** published or is being published then the opinion is not a purely subjective opinion and is one that can be formed only if he is satisfied of the exsitence of certain facts, namely, the existence of publications which are calculated to be prejudicial to the interests of national security or the preservation of public order, and so on.

P2 is the Order impugned in these proceedings. It has been made on 20.11.82 by the 1st Respondent and is in the following terms :

> "By virtue of the powers vested in me by Regulation 14(7) of the Emergency (Miscellaneous Provisions & Powers) Regulations No. 3 of 1982, I, Don John Francis Douglas Liyanage, Secretary to the Ministry of State appointed to be Competent Authority for the purpose of Regulation 14, being of the opinion that the J. F. & I Printers, No. 140, Koswatte Road, Kalapaluwawa is likely to be used for the production of documents containing matter which is in my opinion calculated to prejudice the interests of national security, the preservation of public order, the maintenance of supplies and services essential to the life of the community, and matter inciting or encouraging persons to mutiny, riot or civil commotion, do by this order direct that the said printing press shall, so long as this order is in force, not be used for any purpose whatsoever; I also do hereby authorise the Inspector General of Police to take such steps (including the taking possession of the said printing press or of any premises in which it is contained) as appear to him to be necessary for securing compliance with this order."

The earlier order P1, made on 3.11.82, which was the first to be made by the 1st Respondent, was also in the same terms. It has to be noted straightaway that the opinion which the 1st Respondent has expressed in P2 (and also in P1) — unlike in the order in the *Aththa case* (supra) wherein the opinion expressed by the 1st Respondent is that, "there has been published in the Aththa newspaper matter ....." — is that the Petitioner's printing-press "is likely to be used for the production of documents ....." The opinion, which the Competent Authority has to form, in terms of Regulation 14(7), is twofold : whether the printing-press in respect of which an Order is to be made "has been or is likely to be used for the production of documents, and whether the contents of such documents are calculated to be prejudicial to the interests of national security and so on. The opinion expressed

by the 1st Respondent in P2 (and in P1) is, therefore, in terms of the judgment in the *Aththa case*, a subjective opinion.

The judgment in the *Aththa case* (supra) also refers to the views expressed by Chief Justice (H.N.G.) Fernando in the *Hidaramani 1980* (supra) in regard to the burden of proof once an Order, regular on the face of it is produced on behalf of the Executive. In the proceedings now before this Court the 1st Respondent has not pleaded that he is unable to disclose the facts and circumstances which led him to form the opinion, which he says he did, in asking the Order P2. On the contrary the 1st Respondent has disclosed to this Court the material he is said to have relied on, and the learned Deputy Solicitor-General, appearing for the Respondents has addressed this Court on the said material.

The judgment in the *Aththa case* (supra) also furnishes the answer to the submissions made by learned Counsel for the Petitioner in these proceedings : in regard to the meaning to be given to the words "preservation of public order" : and also in regard to the alleged total failure to exercise the discretion vested in the 1st Respondent by Regulation 14(7) as is evidenced by the 1st Respondent's reference in P2 (and in P1) to all the grounds stipulated in Regulation 14(7).

Now that the theory of uncontrolled and unfettered discretion free from judicial review no longer holds sway, the question that arises immediately is the scope of the judicial review, the nature and the extent to which the Courts should interfere in the exercise of a discretion, and the limits within which it is practicable to question the exercise of such discretion. The real question is — as **Wade (supra)** states at page 340 — whether the discretion is wide or narrow and where the legal line has to be drawn ; and that for this purpose, everything depends upon the true intent and meaning of the empowering Act. In the case of *Roberts v. Hopwood*"[4], Lord Wrenbury stated :

> "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not

> empower a man to do what he likes merely because he is minded to do so — he must in the exercise of his discretion do, not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

In the case of *Padfield v. Minister of Agriculture, Fisheries and Food*[12] which has been characterized by Lord Denning in 1971 as a "land-mark in modern administrative law", the House of Lords, having decisively rejected the theory of unfettered discretion, went on to indicate that in the end the assessment of the balance of public interest would be for the Minister himself and that, after a consideration of the public interest, whether he acts or not he may be criticised and held accountable to Parliament but that the Court cannot interfere. Commenting on this decision, **Wade** at page 344 observes : "But the distinction drawn by the House of Lords shows how a statute which confers a variety of discretionary power may confer wider or narrower discretion according to the context and the general scheme of the Act. Translated into terms of the traditional rule that powers must be exercised reasonably, this means that the standard of reasonableness varies with the situation. The pitfalls that must be avoided are those of literal verbal interpretation and of rigid standards".

In regard to the legal standard of reasonableness it must be noted that the doctrine that powers must be exercised reasonably has to be reconciled with an equally important doctrine that the court must not usurp the discretion of the public authority which Parliament had ordained should take the decision ; for, within the confines of legal reasonableness is the area within which the public authority has genuinely free discretion. Thus if the decision is within the bounds of reasonableness, it is no part of the Courts function to look further into the merits) — **Wade** p. 348. In this connection it is useful to recall what Lord Hailsham observed in the case of *In Re W. (An Infant)*[13] :

> "Two reasonable (persons) can perfectly reasonably come to opposite conclusions on the same set of facts without

> forfeiting their title to be regarded as reasonable . . . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions with which no Court should seek to replace the individuals judgment with (its) own."

These observations were cited with approval by Lord Salmon in the *Tameside case* (supra) where very important statements in regard to the legal standard of reasonableness were made both by the Court of Appeal and by the House of Lords. In the Court of Appeal Lord Denning expressed as follows at page 651:

> "Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that some one has been guilty of some discreditable or unworthy or unreasonable conduct, that is another";

and at page 652:

> "No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view."

In the House of Lords, Lord Salmon **at page 686-7,** as already stated adopted what Lord Hailsham L.C. stated in the case of **In re W (An Infant)** (Supra); and Lord Diplock **at page 681** observed:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

In the application of the legal standard of reasonableness in respect of acts done by public authorities in the exercise of powers which have been vested in them in subjective terms an important matter that has to be considered is the nature of the subject matter and the circumstances in which such discretion

has to be exercised. In discussing this aspect of this subject, **Smith** (supra) at page 349 states: "the criterion of reasonableness is not subjective, but objective in the sense that it is subject to formulation and application by a court of law. That is to say that the courts will readily interfere with the exercise of discretion if, from the nature of the subject matter or the surrounding circumstances (eg. the necessity for taking swift action for the preservation of public order), it would be difficult for anyone but the repository of the power to form an opinion as to the occasion for its exercise, or if it would be unfair to penalise the authority for a possible error of judgment in a doubtful case. In such a situation:

> If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict'- per Lord Atkin in *Liversidge's case (supra)".*

It is clear from what has been set out earlier that all discretion, even where there is a subjective element in it, must be exercised reasonably, and in good faith and upon proper grounds. Yet, there are situations, in which such words are used, where it is clear both from the subjective language and the context that the discretion granted is exceptionally wide. Such instances are most common in powers granted to meet emergency situations. In times of grave emergency it is unlikely that the theoretical judicial control will be able to come to play as the ingredient of policy is so large by comparison with the ingredient of ascertainable and relevant fact -**Wade - (supra) pages 375-6.** In regard to the exercise of a discretion in an emergency situation, Lord Denning M. R. expressed himself in *Secretary of State vs. ASLEF (No. 2) (supra)* at p. 967 as follows:

> ". . . . . but when he honestly takes a view of the facts or the law which would reasonably be entertained then his decision is not to be set aside simply because thereafter someone thinks that his view is wrong. After all this is an emergency procedure. It has to be set in motion quickly,

when there is no time for minute analysis of facts or of law. The whole process would be made of no effect if the Minister's decision was afterwards to be coined over word by word, letter by letter to see if he has in any way misdirected himself. That cannot be right. Take this very case. He made a mistake in . . . . . ; but that, in my opinion, was not sufficient to invalidate the application or the basis on which he acts."

Having considered the legal principles applicable to a situation, which arises upon an application such as the one that has been made by the Petitioner in these proceedings, where there is an interplay of the traditional roles of the Judiciary - as upholders of law and order and as protectors of the individual against inroads made by the Executive into his personal liberty and property - I shall now turn to consider the factual bases relevant to this application.

In considering the facts it has also to be borne in mind that the Respondents are entitled to call in aid the maxim *omnia praesumuntur rite esse acta* and that where an Order regular on the face of it - such as P2 (or P1) - is produced the burden is on the petitioner to rebut the presumption. How much evidence will be required depends on the facts and circumstances of each case. Where the grounds of attack are bad faith or unreasonableness or where the particular act is based upon the opinion of the person so making the order, the petitioner's task would be heavier - *Wade p. 293*; *Hirdaramani's case (supra)*; *IPC v. Rossminster (supra) per Lord Diplock at p.95.*

I have at an early stage of this judgment set out at length the factual position put forward by the Petitioner. The gravamen of the Petitioner's complaint is that the closure of the Petitioner's printing-press was not only an act of vengeance on the part of the Executive because of the bitter political differences the Chairman of the Petitioner's Board of Directors, Dr. Fernando, had had with the Government and the strong criticism of the President and his Government by Dr. Fernando, but is also an attempt to muzzle the Petitioner and Dr. Fernando by preventing the Petitioner's

printing-press from being used to turn out propaganda material to oppose the Government during the referendum-campaign; and that the Petitioner has been singled out for this harsh treatment because of the political opinion held by Dr. Fernando. It has, however, to be noted that: although the State of Emergency was declared on the evening of the 20th October and the Emergency Regulations were promulgated on the same day, the Order against the Petitioner was made only after the lapse of about a fortnight on 3.11.82, on which said date the report XI was submitted to the 1st Respondent: prior to 3.11.82 officers of the Criminal Investigation Department had, on 31.10.82, searched the premises in which the Petitioner's printing-press was installed and had, during the course of such search, taken charge of from Naomal Fernando, who is the General-Manager of the Petitioner-company and who is also the son of Dr. Fernando, a copy of the spurious rice ration-book which is said to have been distributed by the opposition parties during the presidential election: on 1.11.82 Dr. Fernando himself had also been questioned by these officers. If, as is maintained by the Petitioner, the 1st Respondent was prompted by such improper motives as are alleged in the petition, a period of even two weeks would be a comparatively long period for such a person as the 1st Respondent, who had the necessary power to act, to hold himself back.

The two-fold opinion expressed by the 1st Respondent in P2 (and in P1) is:

(i) that the Petitioner's printing-press is likely to be used for the production of documents, and

(ii) that the contents of such documents would be calculated to—

(a) prejudice:

(i) the interest of national security,

(ii) the preservation of public order,

(ii) the maintenance of supplies, and services essential to the life of the community; and

(b) incite or encourage persons to mutiny, riot or civil commotion.

The 1st Respondent has, in his affidavit dated 27.12.82 filed before the commencement of the hearing of this application before this Court, stated that:

(a) he had credible information that pamphlets and other material printed at the JFI Printers prior to and after the Presidential election 1982 was calculated to cause racial disharmony between the Sinhala and Tamil communities and also to incite the masses to resort to violence against the state;

(b) he also had credible information, which he verily believed, that the Petitioner's press was concerned in printing rice ration books identical or similar in form to books that were lawfully issued by the Food Commissioner, which were in his view likely to cause public disorder; and that he was also of the view that the said press would continue to bring out publications of a similar nature which would jeopardise the maintenance of good order and security in the country;

(c) the Orders in question, P1 and P2, were made by him on a consideration of material and information made available to him "by the Police and other official sources."

On 24.1.83, at the very commencement of the hearing before this Court, learned Deputy Solicitor-General tendered to Court, on behalf of the Respondent an affidavit, dated 17.1.83, from P.B.G. Aluvihare the Acting Director Criminal Investigation Department. Although the Respondents had no right to have this affidavit accepted by this Court as the time limit prescribed by the Rules of this Court for the filing of affidavits on behalf of the Respondents had expired, yet, it was accepted by this Court

because Mr. Jayawickreme, appearing for the Petitioners, expressly informed Court that he has no objection to it being accepted by this Court.

Thereafter, on the following day, 25.1.83, whilst Mr. Jayawickreme was making his submissions to this Court in regard to the aforesaid affidavit of the 1st Respondent, dated 27.12.82, in answer to a query addressed by this Court to learned Deputy Solicitor-General as to what the "material and information made available to me by the Police and other official sources" referred to in paragraph 14 of the 1st Respondent's said affidavit, were, he tendered to Court the document which was then directed by this Court to be marked XI. No objection was taken by Mr. Jayawickreme to the acceptance of the said document. In fact later on the same day Mr. Jayawickreme did, in the course of his submissions, state, with reference to the said document "X", that he cannot dispute it and that it may have been received. When the document was tendered and so marked "X", this Court indicated to the learned Deputy Solicitor-General that an affidavit identifying the said document "X" and giving details of the aforesaid "official sources" would have to be filed. When thereafter, the hearing was resumed on 27.1.83, learned Deputy Solicitor-General tendered to Court an affidavit dated 26.1.83, from the 1st Respondent. Thereupon Mr. Jayawickreme desired to have time to consider this affidavit, stating that he might have to object to its reception as it has been filed after the lapse of the one-week period and after he has concluded his submissions, and that it seems to change the complexion of the case, and he had to consider whether to apply to cross-examine the 1st Respondent. Thereafter, when further hearing was resumed on 31.1.83, Mr. Jayawickreme objected to the said further affidavit of the 1st Respondent, dated 26.1.83, being accepted on the grounds: that, as it has been filed after the 7 day period set out in Rule 65 (4) (ii) of the Supreme Court Rules of 1978, this Court has no power to accept it: that acceptance of it would cause prejudice to the Petitioner as it has been tendered after he, Mr. Jayawickreme, had drawn the attention of Court to certain significant omissions in the first affidavit and he had concluded his submissions, and that new material was now being tendered: that the Court would by accepting it reverse its

role to hear and determine this matter, and descend to the arena. After a consideration of the said objections this Court decided at that stage to admit the said affidavit, and informed Mr. Jayawickreme that he would be given, if he so desired, the opportunity of filing any further counter affidavits. Thereupon Mr. Jayawickreme immediately tendered to Court three affidavits, all dated 31.1.83, from: the Petitioner himself, the Petitioner's son. Naomal Fernando, who is also the General-Manager of the Petitioner-Company, and from a person named R.M. Jayantha an employee of the Petitioner-Company. Another affidavit from the Accountant/Secretary of the Petitioner-Company, in regard to the computation of the damages claimed by the petitioner, was also tendered along with the three affidavits referred to earlier.

On consideration of the objections referred to above, this Court was of opinion that they were not entitled to prevail. The time limits set out in the Supreme Court Rules 1978 are those that have been laid down for compliance by the respective parties in regard to the material that they desire the Court to consider in support of their respective positions, at the hearing. These procedural rules are strictly for the observance of those who are parties to the proceedings. They do not detract in any way from the inherent power of the Court to probe further any matter, which, the Court considers, should, in the interests of justice, be clarified. The Court is not bound to accept generalised statements made by the parties, and is and should be, entitled to direct the parties to file full particulars. Such a step would not amount to giving a party an opportunity to tender "new material". What was done on this occasion was to refer to a generalised statement in the 1st Respondent's affidavit and to ask for further particulars, and query what the "sources" so referred to were. Any reply given in elucidation of such a query had undoubtedly to be in the form of an affidavit. The evidentiary value to be attached to the averments in such a further affidavit is another matter, which is entirely for the Court to determine. If such an affidavit seems to the Court to render it necessary for the opposing party to be given an opportunity to file a counter-affidavit, the Court should - and Courts do in fact - grant such an opportunity. In fact, in applications made to this Court invoking

the jurisdiction of this Court, as is now being exercised in these proceedings, this Court has on several earlier occasions raised similar queries, and received in evidence further explanatory affidavits. Even in this case, after this Court decided to admit the said affidavit, this Court did grant the Petitioner an opportunity to file a further counter affidavit, and the Petitioner did file three such counter-affidavits. In fact the Petitioner seemed to have anticipated such a situation, and was in fact ready to make full use of it immediately. The procedure adopted by this Court does not, in any way, derogate from the duty of this Court to "hear and determine". Nor does it constitute a descent by this Court into the arena and having its vision clouded in any manner. There is no merit in the objection.

P.B.G. Aluvihare, in his affidavit referred to above, states that: he affirms to the contents of the said affidavit in his capacity as acting Director Criminal Investigation Department as the Direcor himself is presently out of the Island: that inquiries were conducted under the supervision of the Director by the officers of the Department upon confidential information which was received that the Petitioner's printing-press was printing pamphlets, posters and other material which was calculated to cause racial disharmony and affect the internal security of the State: that he also received similar information which indicated that the Petitioner's printing-press had been involved in printing spurious rice ration books: that the details of the nature of the information so received and of confidential inquires made into such information were communicated to the 1st Respondent by the Director before the first Order (P1 of 3.11.82) was made by the 1st Respondent.

In the aforesaid further affidavit, dated 26.1.83, of the 1st Respondent, the 1st Respondent gives particulars of the "official sources" referred to in his earlier affidavit. They are: the members of the National Security Council, and "two highly placed officials of the Ministry of Defence", whose identity, he states, he is prepared to disclose to this Court. He also refers to the "advice" given to him by them. He also gives particulars of the information given to him by the Police: the communication addressed to a Deputy Inspector-General of Police by the

Director, Criminal Investigation Department, and which is the document the 1st Respondent has since handed over to the Attorney-General's department and is now before this Court marked XI: the taking into custody of spurious rice ration books from the premises of the Petitioner's printing-press.

Although the fact that the Police had actually taken charge of one such spurious rice ration book from the printing-press premises was not expressly averred in the first affidavit, the 1st Respondent did clearly state that he verily believes, upon credible information received by him that the Petitioner's printing-press "was concerned in" the printing of such spurious rice ration books. The Petitioner, has, through the counter-affidavits filed by its General-Manager and an employee, accepted the fact that the Police did, during the search carried out on 31.10.82, take charge of such a spurious rice ration-book. These affidavits give the Petitioner's version of how the Police did come to so take charge of the document. Whatever the correct version be — whether it was traced by the Police officers themselves or whether it was shown to the Police by Naomal Fernando himself—, the fact is that the document had in fact been taken charge of by the Police from the premises in question during the course of a search of the said premises. It is a circumstance that the 1st Respondent was entitled to take into consideration.

XI is dated 3.11.82, and is a document addressed by a very senior and responsible officer of the Police force, namely the Director Criminal Investigation, to his superior, the Deputy Inspector General, C.I.D. This document has been placed before the 1st Respondent on 3.11.82 itself, and has been taken into consideration by the 1st Respondent before he made the Order P1 on the same day. True, it is that the four institutions named in XI have not been expressly connected, on the face of XI itself, with the activities set out in paragraph (1) of XI. Yet, on a reading of the entirety of the document, it is clear that what is being sought to be conveyed is that the four printing-presses so named in the document are responsible for the printing of the literature set out in the first paragraph. It transpired, at the hearing before

this Court; that orders similar to those made against J.F. and I printers (the Petitioner Company) have also been made against the other three printing-presses, named in XI, as well. It is not as if the Petitioner alone, out of the four named in XI, had been singled out.

It was submitted on behalf of the Petitioner that the 1st Respondent should have contacted the Archives and the Registrar of Publications; for, he would then have been able to peruse the documents that are said to have been so printed by the Petitioner. Printers have no doubt, under the law, to forward such copies to the institutions referred to. It would, however, not be unreasonable to think that a person, who prints documents such as are said to have been so printed by the Petitioner, would not forward, as required by law, copies of such documents. The failure to contact these officials cannot, and must not, therefore, be counted against the 1st Respondent.

A consideration of the foregoing shows that the 1st Respondent had before him: the communications made to him by the "official sources", namely, the members of the National Security Council, and officials of the Ministry of Defence: and the information supplied by the Police in the form of, at least, the document XI, and also in regard to the spurious rice ration-book taken charge of by the Police during their search of the Petitioner's premises on 31.10.82.

The question that arises is whether the material so available to the 1st Respondent could be said to have been sufficent to justify the 1st Respondent's action in making the Order P2? Was it reasonable for the 1st Respondent to have decided to do what he did upon such material? It has to be remembered that the material placed before the 1st Respondent was so placed before him by senior responsible officers. Officers whose sense of responsibility and *bona fides* the 1st Respondent would have had no reason to doubt. The 1st Respondent would not himself have personally undertaken an investigation. Time was a decisive factor. If meaningful action was to be taken, it had to be speedy enough to prevent the mischief apprehended. Against this background is it possible to say that the 1st Respondent was wrong in doing

what he did on the 3rd and the 20th November 1982? It may be that another might have waited for more material before proceeding to act. The question, however, is whether the decision of the 1st Respondent to act in the way he did was such that no reasonable person would have done what he did? Was his decision to act so very unreasonable? Was his exercise of his judgment so hopelessly indefensible? Has the exercise of the discretion vested in him been wholly unreasonable and capricious? I think not. May be another would have not done what the 1st Respondent did; but the 1st Respondent cannot be said to have done what no reasonable person would have ever done in such cicumstances. The good faith, of the 1st Respondent, though attacked on the grounds of political vengeance, improper motives, failure to exercise his discretion, acting on the dictation of the President, and partiality has not been shaken.

In this view of the matter, I am of opinion that the Order P2 (and also P1) is valid. The Petitioner has, in my opinion, failed to establish that there has been an infringement by the Respondents of either of the Petitioner's Fundamental Rights recognized in Article 12(1) and (2) of the Constitution.

For the reasons set out above, I make order dismissing the Petitioner's application, but without costs.

SHARVANANDA, J. — I agree

VICTOR PERERA, J. — I agree.

Appeal dismissed.