SUNIL RODRIGO
(ON BEHALF OF B. SIRISENA COORAY)
v.
CHANDANANDA DE SILVA AND OTHERS

SUPREME COURT.
AMERASINGHE, J.
WIJETUNGA, J. AND
GUNAWARDANA, J.
S. C. APPLICATION (F.R.) 478/97
JULY 21 AND 22, 1997.

Fundamental Rights – Preventive detention – Order under Emergency Regulation 17 – Alleged conspiracy to assassinate the President – Offence under E.R. 24(b) – Detenu arrested on unverified information and vague suspicion – Validity of detention – Articles 13(1) and 13(2) of the Constitution.

The detenu was arrested by Police Officers on the 16th June 1997 acting on an order of the Secretary, Ministry of Defence of the same date. In his order the Secretary stated that he was acting by virtue of powers vested in him by regulation 17(1) of the Emergency Regulations published in Government Gazette (extraordinary) No. 843/12 of 4th November 1994. Regulation 17(1) states:

> "Where the Secretary is satisfied upon the material submitted to him or upon such further material as may be called for by him with respect to any person, that with a view to preventing such person.
>
> (a) from acting in any manner prejudicial to the national security or to the maintenance of public order ...
>
> (b) ...
>
> (c) ...
>
> It is necessary so to do, the Secretary may make order that such person be taken into custody for a period not exceeding three months..."

The order of the Secretary did not specify the period. But by an amending order dated 2nd July 1997 he sought to amend the order making it effective for a period of three months from 16th June 1997.

In his affidavit to court the Secretary stated by way of justifying his order that he was informed by the Inspector General of Police and other Senior Police

Officers that they had received reliable intelligence that the detenu had discussed with others about assassinating the President of Sri Lanka or causing physical harm to her and to create unrest in the country.

The information relied upon by the Secretary had not been verified either by Police Officers or by the Secretary himself. The Secretary notified the advisory committee under regulation 17 in writing of the fact of making the detention order on the basis of information he had received. The Police Officer who executed the order informed the detenu of the "purposes" of the arrest as contained in the order. But he was not informed of the reason for his arrest viz. the grounds and particulars therefor either at the time of the arrest or during his interrogation by the Police. Nor could the detenu hope, on the basis of the Secretary's notification, to receive from the Chairman of the Advisory Committee, in terms of regulation 17(9), the "grounds" and "particulars" relevant to the Secretary's decision.

Held:

1. The amendment of the original order of detention for specifying the period of detention did not remedy the defect. Hence the detention from 16th June to 2nd July 1997 was unconstitutional.

2. The court will not usurp the discretion of the Secretary and substitute its own views for that of the Secretary. However, the Court must determine whether on the material before him the Secretary was reasonably satisfied that the detenu should be arrested and detained.

3. In issuing the detention order the Secretary acted on unverified reports of Police Officers that were vague and suspicious. He abdicated his authority and mechanically signed the detention order. His decision was not only wrong but unreasonably wrong. It was not his opinion. The arrest made in pursuance of such an order was not according to procedure prescribed by law and therefore contravened Article 13(1) of the Constitution and was unlawful and invalid.

***Per* Amerasinghe, J.**

"The decision whether certain activities of a citizen constitutes a threat to national security is a matter for the Secretary and not of a Police Officer, whatever his rank might be. The power of the Secretary given by regulation 17(1) concerns physical liberty of persons, including those who have not yet,

nor never, committed an offence. It is therefore an exceedingly great power, indeed an awesome power, that must be exercised with corresponding degree of responsibility".

4. Conspiracy to murder the President is an offence under regulation 24(b), and so there was an offence the detenu was supposed to have committed which was the "reason" for his arrest and detention. He was not informed of that reason as required by Article 13(1) of the Constitution.

5. The detenu was not arrested under a procedure established by law. He was arrested on vague suspicion in circumstances that showed a reckless disregard for his right to personal liberty. In the circumstances by failing to produce him before a judge the respondents transgressed his rights under Article 13(2) of the Constitution.

Cases referred to:

1. *Secretary of State for Education and Science v. Tameside Borough Council* (1977) AC 1014.
2. *Nakkuda Ali v. Jayaratne* 51 NLR 457 (P.C.) (1951) A.C. 66 (P.C.)
3. *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds* (1979) 3 All ER 129 (P.C.)
4. *Director of Public Prosecutions v. Head* (1959) A.C. 83, 110.
5. *Dumbell v. Roberts* (1944) 1 ALL ER 326.
6. *Muttusamy v. Kannangara* (1951) 52 NLR 324.
7. *Faiz v. Attorney-General* (1995) 1 Sri L.R. 372.
8. *Faurdeen v. Jayetilleke and Others* S.C. Application 366/93 S.C. Minutes 8 September 1994.
9. *Channa Pieris v. Attorney-General* (1994) 1 Sri L.R. 1, 51.
10. *Siriwardena v. Liyanage* (1983) FRD (2) 310.
11. *Associated Provincial Picture Houses Ltd., v. Wednesbury Corporation* (1948) 1 K.B. 223, 229.
12. *Short v. Poole Corporation* – 1926 Ch. 66.
13. *In re H (An Infant)* 1971 A.C. 682, 700.
14. *Secretary of State v. ASLEF* (No. 2) (1972) 2 ALL ER 949.
15. *Joseph Perera v. Attorney-General* (1992) 1 Sri L.R. 199.

16. *Wijewardena v. Zain* S.C. Application 202/87 S.C. Minutes 24 July 1989.
17. *Dissanayake v. Superintendent Mahara Prison* (1991) 2 Sri L.R. 247.
18. *Brogan v. U.K. ECHR* 29 November 1988 Ser. A. N. 145 B.
19. *Fox, Campbell & Hartley v. U.K. UCHR* 30 August 1990 Ser. A. No. 182.
20. *Liversidge v. Anderson* (1941) 3 ALL ER 338; (1942) A.C. 206.
21. *Ridge v. Baldwin* (1963) 2 ALL ER 66, 76; (1964) A.C. 40 at 73.
22. *Janatha Finance and Investments v. D. J. Francis Liyanage* (1983) FRD (2) 373.
23. *Sasanasiritissa Thero and Others v. De Silva and Others* (1989) 2 Sri L.R. 356.
24. *Weerakoon v. Weeraratne* S.C. Application 42/92 S.C. Minutes 16. November 1992.
25. *Somasiri v. Jayasena and Others* S.C. Application 147/88 S.C. Minutes 1 March 1991.
26. *Kishori Mohan v. The State of West Bengal* AIR 1972 S.C. 1749.
27. *Mariadas v. Attorney-General* (1983) FRD (2) 397.
28. *Selvakumar v. Douglas Devananda and Others* S.C. Application 150/93 S.C. Minutes 13 July 1994.
29. *Shalini Soni and Others v. The Union of India and Others* (1980) 4 SCC 544.
30. *Gunasekera v. De Fonseka* (1972) 75 NLR 246.
31. *Wickramabandu v. Cyril Herath* (1990) 2 Sri L.R. 348.
32. *Munidasa v. Seneviratne* S.C. Application 115/91 S.C. Minutes 3 April 1992.
33. *Kumarasena v. Sriyantha* S.C. Application 257/93 S.C. Minutes 23 May 1994.
34. *Christie v. Leachinsky* (1947) A.C. 573.
35. *Vijaya Kumaranatunga v. G. V. P. Samarasinghe and Others* (1983) FRD (2) 347 (1983) 2 Sri L.R. 63.
36. *Shibban Lal Saksena v. State of U.P.* AIR 1954 S.C. 179.
37. *ICCU Devi Choria v. Union of India* (1980) 4 SCC 531, 539.
38. *Mallawarachchi v. Seneviratne* (1992) 1 Sri L.R. 181.
39. *Elasinghe v. Wijewickrama and Others* (1993) 1 Sri L.R. 163.
40. *Chandra Kalyanie Perera v. Siriwardena* (1992) 1 Sri L.R. 251.
41. *Lalanie and Nirmala v. De Silva and Others* S.C. Application 53/88 S.C. Minutes 6 April 1990.
42. *Edirisuriya v. Navaratnam* (1985) 1 Sri L.R. 100.

43. *Kumara v. Rohan Fernando and Others* S.C. Application 22/90 S.C. Minutes 21 July 1994.

44. *Ansalin Fernando v. Sarath Perera and Others* (1992) 1 Sri L.R. 411.

45. *Weerakoon v. Mahendra* (1991) 2 Sri L.R. 172.

46. *Fernando v. Kapilaratne* (1992) 1 Sri L.R. 305.

47. *Joseph Silva and Others v. Balasuriya and Others* S.C. Application 112-115/87 S.C. Minutes 26 May 1988.

48. *Gerstein v. Pugh* 420 U.S. 103, 95 S. ct. 854, 43 L. Ed 2d 54 (1975).

49. *Mohammed Faiz v. Attorney-General* S.C. Application 89/90 Minutes 19 November 1993.

50. *Nallanayagam v. Gunatilake* (1987) 1 Sri L.R. 293.

APPLICATION for relief for infringement of fundamental rights.

K. N. Choksy, P.C. with *Desmond Fernando, P.C. Kosala Wijetilake, P.C. M. D. K. Kulatunga, Hemantha Warnakulasuriya, S. Mahenthiran, Upul Jayasuriya, Lakshman Ranasinghe, Sarath Kongahage, Methsiri Cooray* and *Ronald Perera* for the petitioner.

C. R. de Silva, P.C. Additional *S.G.* with *Kolitha Dharmawardena, D.S.G. S. Samaranayake, S.C.* and *N. Pulle, S.C.* for the respondents.

Cur. adv. vult.

August 19, 1997.

AMERASINGHE, J.

This is a matter concerning the alleged infringement of certain fundamental rights declared and recognized by the Constitution.

Locus standi

The petitioner in this case, Mr. Sunil Kumara Rodrigo, is an Attorney-at-Law appearing on behalf of Mr. Bulathsinghalage Sirisena Cooray. Article 126 (2) of the Constitution states, *inter alia*, that where any person alleges that any fundamental right relating to such person has been infringed, he may himself or by an Attorney-at-Law, on his behalf apply to the Supreme Court by way of petition praying for relief or redress in respect of such infringement.

Reliefs sought

The petitioner prays that this Court be pleased to:

(a) grant the petitioner leave to proceed with this application;

(b) declare that the fundamental rights of Mr. Cooray guaranteed by Articles 12(1), 12(2), 13(1), 13(2), 14(1) (c) and 14(1) (h) of the Constitution have been violated by the 1st and/or 2nd respondents;

(c) direct that the said Mr. Cooray be released from custody and detention;

(d) direct the 1st and/or 2nd respondents to pay damages and/or compensation to Mr. Cooray in a sum of rupees ten million;

(e) make an interim order pending the hearing and final determination of this application releasing the said Mr. Cooray from custody and detention upon such terms and conditions as may be imposed by Court;

(f) make interim orders pending the hearing and final determination of this application permitting the said Mr. Cooray to be met by the petitioner and his lawyers, and examined when necessary by his Doctors, upon such terms and conditions as may be imposed by Court;

(g) for costs;

(h) for such other and further relief as to the Court shall seem meet.

Leave to proceed

With regard to the prayer set out in paragraph (a) of the petition, the Court (Fernando, Dheeraratne, Wadugodapitiya, J.J.) on the 24th of June 1997, after hearing counsel, granted leave to proceed in respect of the alleged violations of Articles 12(2), 13(1), 13(2), 14(1) (c) and 14(1) (h) of the Constitution.

Interim relief for release from custody

With regard to the prayer set out in paragraph (e) of the petition, on the 24th of June 1997, after hearing counsel, the Court denied the relief claimed: (S.C. minutes 24.06.97). Fernando, J. (Dheeraratne and Wadugodapitiya, J.J. agreeing) stated:

> "To grant prayer (e) would be, in effect, to grant the petitioner the substantive relief to which he would be entitled if he ultimately succeeds. Although the petitioner has established, *prima facie,* infringements of the aforesaid Articles, it has not been established that very probably the detention is void and will cause irreparable prejudice, and we do not consider that an interim order in terms of prayer (e) should be made at this stage: an early hearing would suffice."

Interim relief for legal and medical assistance

With regard to the prayer set out in paragraph (f) of the petition, on the 24th of June 1997, after hearing counsel, the Court granted the relief claimed: (S.C. Minutes 24.06.97). Fernando, J. (Dheeraratne and Wadugodapitiya, J.J. agreeing) stated:

> "In respect of prayer (f), Mr. Choksy submits that the detainee's lawyers have been denied access to the petitioner up to date; but Mr. de Silva states that an order has been made by the 1st respondent on 23.6.97, permitting access to the detainee's lawyers. He submits that the 1st respondent has power, under Emergency Regulation No. 17(4) to allow access to a detainee's lawyers.

Emergency Regulation 17(4) authorizes detention 'in accordance with instructions issued' by the Secretary. Even assuming that this would extend to allowing him to deny the right of access to a detainee's lawyers, in fact no such instructions were either set out in the Detention Order or issued thereafter. The detainee's lawyers should, therefore, not have been refused access to him, particularly after this application was filed. Had the detainee been detained in prison, it is common ground that under the Prison Rules, his right of access to lawyers would have been respected. That is the norm; and it is implicit in Emergency Regulation 17(4) that a person should not

be denied that right simply because he was detained elsewhere. Mr. de Silva referred to the proviso to Emergency Regulation 17(4) which states that the Secretary may direct that any provision of the Prisons Ordinance or the Rules, which would otherwise apply to a detainee, would not apply to him. While the Constitution recognises the power to make Emergency Regulations, overriding, amending or suspending the provisions of any statute, it is doubtful whether Emergency Regulations can confer on the Secretary any such power.

Mr. De Silva has no objection to the detainee having access to doctors.

The Court accordingly grants an interim order in terms of prayer (f). It is the petitioner and the attorneys-at-law (including [the] instructing attorney) who appeared for him today, who will have the right of access."

Articles 12(2), 14(1) (c), and 14(1) (h) not violated

Although leave to proceed had been granted for the alleged infringement of Articles 12(2), 13(1), 13(2), 14(1) (c) and 14(1) (h) of the Constitution, matters relating to the violation of the rights enshrined in Articles 12(2), 14(1) (c) and 14(1) (h) were not pressed by learned counsel for the petitioner.

In the circumstances, I declare that the violation of Articles 12 (2), 14(1) (c) and 14(1) (h) of the Constitution has not been established.

The remaining matters for consideration

The remaining matters for consideration by this Court are whether the fundamental rights of Mr. Cooray declared and recognized by Article 13 have been violated, and if so whether any or some or all of the reliefs prayed for in paragraphs (c), (d), (g) and (h) should be granted in the exercise of the power of the Court under Article 126(4) of the Constitution "to grant such relief or make such directions as it may deem just and equitable...".

Article 13(1) of the Constitution

Leave to proceed was granted for the alleged infringement of Article 13(1) of the Constitution. Article 13(1) states as follows:

"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

There are two rights that are recognized and declared by Article 13(1):

* A person shall not be arrested except according to procedure established by law;

* A person arrested must be informed of the reason for his or her arrest.

In applying the law to the facts of the matter before me, I have therefore to consider two matters in relation to the alleged violation of Article 13(1):

* Was Mr. Cooray arrested according to procedure established by law?

* Was Mr. Cooray informed of the reason for his arrest?

Was Mr. B. Sirisena Cooray arrested according to procedure established by law?

The Detention Order was *ex facie* defective on the question of the duration of detention:

It is not in dispute that Mr. B. Sirisena Cooray was arrested by Police Officers on the 16th of June 1997 acting on an order of the Secretary, Ministry of Defence, dated the 16th of June 1997. In his order dated the 16th of June 1997, the Secretary states that he was acting by virtue of the powers vested in him by paragraph 17(1) of the Emergency (Miscellaneous provisions and Powers) Regulations No. 4 of 1994 published in **Gazette Extraordinary** No. 843/12 of the 4th of November 1994.

Regulation 17(1) states:

"Where the Secretary is satisfied upon the material submitted to him, or upon such further additional material as may be called for by him with respect to any person, that with a view to preventing such person

(a) from acting in any manner prejudicial to the national security or to the maintenance of public order...
(b) ...
(c) ...

It is necessary so to do, **the Secretary may make order that such person be taken into custody and detained in custody for a period not exceeding three months..."**

The emphasis is mine.

Regulation 17(1) authorizes the Secretary to make an order **for a period.** The Order in this case dated 16 June 1997 does not specify the period of detention. The order is therefore not in accordance with the procedure prescribed by law for the arrest and detention of persons on the orders of the Secretary. Article 13(1) of the Constitution states that "No person shall be arrested except according to procedure established by law". The arrest and detention of Mr. Cooray on the 16th of June was therefore unconstitutional.

In paragraph 9 of his affidavit, the Secretary states as follows:

"... In view of the seriousness of the material contained in the intelligence reports, it was my intention to detain the detenu initially for a period of three months commencing 16 June 1997. Subsequently, I have by way of an amendment to the said Detention Order P1, made Order stating that the Order marked P1 referred to above would be effective for a period of three months commencing 16th June 1997. I produce a certified copy of the amending Order and an affidavit from ; Abeyweera who served the said Detention Order on the detenu marked 1R 2(a)."

Mr. Abeyweera states in his affidavit that he served the amended order on Mr. B. Sirisena Cooray and that Mr. Cooray accepted that order.

The amending order is dated 2nd July 1997. In it the Secretary states that he amends the order dated 16 June 1997 "by stating that the said order is effective from 16th June 1997 for a period of three

months. This amendment is to be considered as forming part and parcel of the said order dated 16 June 1997."

In my view, the effect of the amendment is merely to specify the period of detention, as required by law. That was done belatedly on the 2nd of July 1997. By stating that the amending order was to be regarded as "forming part and parcel" of the order, the defect in the order of the 16th of June does not stand remedied. Therefore the detention from the 16th of June to the 2nd of July 1997 was unconstitutional. I hold, however, that the Detention Order was *ex facie* valid from the 2nd of July 1997 on the question of duration.

The basis of the Secretary's decision required by Regulation 17(1).

Regulation 17(1) requires the Secretary to arrive at his decision to order the detention of a person 'upon the material submitted to him or upon such additional material as may be called for by him'. What was

(1) the unsolicited material submitted to the Secretary or

(2) additional material called for by him that satisfied him that the order of detention was necessary?

The unsolicited material submitted to the Secretary

Initially, there were three unsolicited reports submitted to the Secretary. The first was from the Inspector-General of Police (the second respondent); the second was from the Director of the National Intelligence Bureau; the third was from the Deputy Inspector-General of Police, Criminal Investigation Department.

The first report

With regard to the first report, the Secretary, in his affidavit, states as follows:

"... on 9.6.97 I received information in writing from the 2nd Respondent that certain persons who had been arrested in connection with a spate of armed robberies in the Gampaha police

area had in the course of interrogation stated that members of a group involved in the commission of dangerous criminal acts led by Arambalage Don Ranjit Upali *alias* Soththi Upali (presently in remand) had been making inquiries about the visit of Her Excellency the President to Nithambuwa (Sic.), Horagolla and Attanagalla. I was also informed that Soththi Upali was a close associate of [Mr. Cooray]. The 2nd Respondent also informed me that his intelligence unit had received reliable intelligence that the detenu has had discussions with certain members of the said group about assassinating or causing physical harm to Her Excellency the President and to create unrest in the country."

About which visit of the President were the inquiries being made? From whom had such inquiries been made? If the statements were made – they have not been produced before this Court – what sort of credibility should be attached to statements made by a gang of robbers? How could Soththi Upali who had been in prison custody for over a year be leading the group alleged to have been "involved in the commission of dangerous criminal acts"? The Inspector-General of Police had informed the Secretary that Soththi Upali was a close associate of Mr. Cooray and that Mr. Cooray had had discussions with certain members of Soththi Upali's group about assassinating or causing physical harm to the President and creating unrest in the country. What was the evidence? What steps were taken to check the accuracy of the information?

On the other hand, in his affidavit dated the 15th of July 1997, Mr. Cooray has categorically denied that he had any connection whatever with any members of the so called Soththi Upali group. He also states that the averment that he was a close associate of Soththi Upali is "false and made without any basis". He explains that he became acquainted with Soththi Upali as one of several workers sent to him by the late President R. Premadasa to assist him as Campaign Manager in connection with the Presidential and Parliamentary elections of 1988 and 1989. However, he states: "I have had no dealings with Soththi Upali and have not met or spoken to him since I ceased to be the General Secretary of the United National Party in 1994." The respondents have not challenged Mr. Cooray's averments either by way of affidavit or through the submissions of their counsel.

The second report

With regard to the second report, the Secretary, in his affidavit, states as follows:

> "... the Director of National Intelligence Bureau by report dated 11th June 1997 informed me that he had reliable intelligence that [Mr. Cooray] and three persons viz. U. L. Seneviratne, Wathudula Bandulage Somaratne alias Malwatte Some, Janaka Priyankara Jayamanne alias Sudu Mahatmaya and some other unidentified persons have had discussions about assassinating or causing physical harm to Her Excellency the President in the near future..."

The Secretary filed a copy of a letter dated the 3rd of July 1997 sent by him to the Chairman of the Advisory Committee appointed under Regulation 17(5) to enable the Chairman to communicate the "reasons" for the arrest and detention: (Paragraph 11 of the Secretary's affidavit). In that letter, the Secretary states that he had issued Detention Orders on Mr. B. Sirisena Cooray, Mr. U. L. Seneviratne, Mr. W. B. Somaratne and Mr. J. P. Jayamanne. The Secretary states as follows: "These Detention Orders have been issued by me after being satisfied on the material submitted to me by the D.I.G., C.I.D. to the effect that Mr. Sirisena Cooray has sought the assistance of certain persons to cause harm or to assassinate Her Excellency the President. Some of the persons allegedly identified are Upali de Silva, U. L. Seneviratne, W. B. Somaratne and J. P. Jayamanne. Further it is reported that some persons have been enlisted as Reserve Police Officers and given training in sophisticated weapons. Whereabouts of some such persons trained in weapon use are not traceable today. Any conspiracy to cause acts in furtherance of such a purpose was considered a serious threat to national security."

In his affidavit, Mr. Cooray emphatically denies that he had "any discussions with any person whomsoever about assassinating or causing harm to Her Excellency the President. The said allegation is utterly and completely false." What steps had the Director of the National Intelligence Bureau taken to check the correctness of the information? What was the basis for regarding the information as "reliable"? What is the connection between the Soththi Upali group

and the persons mentioned in the second report? After all, the conspiracy was supposed to be between Mr. Cooray and a gang of criminals led by Soththi Upali who 'directly or indirectly' had acquired properties close to the ancestral home of Her Excellency the President to harm or assassinate Her Excellency. The other person who were supposed to have participated in discussions with Mr. Cooray were said to be "unidentified", and so they could not be said to belong to the Soththi Upali group. Mr. Cooray states in his affidavit that he was questioned about his connections with the persons mentioned in the Director's report **after his arrest**. He states: "I was questioned about a visit made to me at my residence after my return by U. L. Seneviratne, member of the Western Provincial Council and ex M.M.C., and what we had discussed. I stated that the said U. L. Seneviratne called on me once complaining bitterly about his arrest and detention for a long period which he said was unlawful. I was questioned whether I knew Sudu Mahattaya, to which I answered in the negative. Subsequently, on 8th July I was asked whether I knew Malwatte Some. I answered I did not know him by name but if I am shown him it may be that I had met him casually." The respondents have not challenged Mr. Cooray's averments either by way of affidavit or through the submissions of their counsel.

The third report

With regard to the third report, the Secretary, in his affidavit, states as follows:

> "I state that T. V. Sumanasekera Deputy Inspector-General of Police, Criminal Investigation Department by a report dated 14.6.97 addressed to me informed me that he had received reliable intelligence that [Mr. Cooray] had sought assistance of certain members of a group involved in the commission of dangerous criminal acts to cause harm to or assassinate Her Excellency the President."

Which group was this? Was it Soththi Upali's group? If so why was it not named?

The Secretary's request for further information

The Secretary states in his affidavit that, by his letter dated the 14th of June 1997, he "sought further clarifications from the Deputy

Inspector-General of Police, Criminal Investigation Department on certain matters referred to in his report. I annex hereto marked 1R1 the said letter dated 14.6.97." 1R1 states as follows:

"I refer to your letter dated 14th June on the above subject.

Please identify the manner in which the persons mentioned in your report would be a threat to National Security."

Learned counsel for the petitioner submitted that this letter was written because the material furnished did not satisfy the Secretary that there were grounds for arresting Mr. Cooray. Learned Counsel for the respondents stated that Mr. Cooray had been a Mayor of Colombo and a former Cabinet Minister. Therefore the Secretary was acting cautiously, and wrote 1R1. I shall refer to this letter again, but I should like to dispose of one matter immediately. The Secretary, in exercising his powers of arrest, should **always** act cautiously, for the liberty of one citizen is no less important than that of any other, whatever his station in life was, is, or expected to be.

The response to the letter of the Secretary

With regard to the response he received, the Secretary, in his affidavit, states as follows:

"[The] Deputy Inspector-General of Police, Criminal Investigation Department by way of further report dated 16.6.97 confirming his earlier intelligence report about [Mr. Cooray] ... brought to my notice that the said Soththi Upali had either directly or through members of his group purchased lands in close proximity to the Horagolla Walauwa, the ancestral residence of Her Excellency the President and that two houses had already been constructed and another is presently under construction in these lands. He also informed me that his intelligence revealed that the said properties were acquired as part of a[n] elaborate conspiracy to cause physical harm to Her Excellency the President."

The secretary in his affidavit adds as follows:

"... the investigations conducted by the Criminal Investigation Department has now confirmed the correctness of the intelligence

regarding the acquisition and construction of houses in the said land (sic.) referred to above. Deputy Inspector-General of Police, Criminal Investigation Department in the said report among other details also brought to my notice that he received reliable intelligence that [Mr. Cooray] was planning to commit various acts of violence with the view of discrediting the Government and in this connection he has sought the assistance of some retired service personnel."

The author of the third report and the report of the 16th of June 1997, Mr. T. V. Sumanasekera, Deputy Inspector-General of Police, Criminal Investigation Department, in his affidavit dated the 8th of July 1997, states that the Inspector-General of Police, the author of the first report, had informed him, of the matters set out in the first report; and that in response to the directions given to him by the Inspector-General of Police, he instructed Inspector of Police Jagath Fonseka, the Officer in Charge of the Central Intelligence Unit of the Criminal Investigation Department to inquire into the matter. He states that he also directed his intelligence unit "to gather intelligence about the involvement of [Mr. Cooray] regarding a conspiracy to assassinate or cause physical harm to Her Excellency the President." Mr. Sumanasekera goes on to state as follows:

"7. I state that my intelligence sources revealed that certain members of the group involved in the commission of dangerous criminal offences headed [by] ... Soththi Upali (presently in remand) has had discussions with [Mr. Cooray] about assassinating or causing physical harm to Her Excellency the President ... My inquiries also revealed that the said Soththi Upali had either directly or through his relatives purchased properties in close proximity of the Horagolla Walauwa, the ancestral residence of Her Excellency the President. I annex hereto marked A2 the inquiry notes conducted by the intelligence regarding the purchase of the land referred to above in close proximity to the ancestral residence of Her Excellency the President. It has now transpired that these properties are situated within 1 km. from the ancestral residence of Her Excellency the President. I produce marked A3, A4 and A5 respectively the reports forwarded to me by Inspector of Police Jagath Fonseka, Officer in Charge of the Intelligence Unit and an affidavit from the said Jagath Fonseka under confidential cover for perusal of Your Lordships Court.

8. I state that on the intelligence and the information gathered by me I submitted a report dated 14.6.97 to [the Secretary] and in response to certain queries made by him I also submitted another report dated 16.6.97. I am advised that the said reports are being produced by [the Secretary] under confidential cover for your Lordships' perusal.

9. I state that according to the intelligence I have received ... Soththi Upali has masterminded and overseen a large number of murders, robberies and disappearances of persons carried out through a group of criminals led by him.

10. I state that my intelligence sources also revealed that Uswatta Liyanage Seneviratne, Wathudula Bandulage Somaratne alias Malwatte Some and Janaka Priyankara Jayamanne alias Sudu Mahattaya were also identified as being persons concerned in the said conspiracy."

As we have seen, Mr. Cooray has, in his affidavit, (1) dealt with the question of his alleged connections or discussions with the persons named by Mr. Sumanasekera as "persons concerned in the said conspiracy"; and (2) denied having had discussions with any person with a view to assassinating or causing harm to Her Excellency the President. As I have observed, Mr. Cooray's averments with regard to those matters have not been challenged in these proceedings.

Although Mr. Sumanasekera in his affidavit states that the discussions about the plot to harm or assassinate the President were held with "certain members" of a group of criminals "headed ... by Soththi Upali", as I have observed, according to the Secretary, there is no reference in his report dated the 14th of June 1997 to either Soththi Upali or his group. Nor, according to the Secretary, does he state in that report that the persons named as having had discussions with Mr. Cooray were members of Soththi Upali's group. In his affidavit Mr. Sumanasekera states that the persons named by him "were also identified as being persons concerned in the said conspiracy", but he refrains from stating that they were members of Soththi Upali's group.

Nor, according to the Secretary, is there a reference in Mr. Sumanasekera's report dated the 14th of June 1997 to the question of the acquisition of properties anywhere. However, as we have seen, the Secretary in his affidavit states that Mr. Sumanasekera had in his report dated the 16th of June 1997 referred to the acquisition of properties by Soththi Upali "either directly or through members of his group", "in close proximity to Horogolla Walauwa, the ancestral residence of Her Excellency the President ... acquired as a part of an elaborate conspiracy to cause physical harm to Her Excellency the President."

Sketch plans and investigation reports of police officers deployed by Mr. Jagath Fernando, Inspector of Police, on the instructions of Mr. Sumanasekera, have been filed for the confidential perusal of the Court. There is nothing in the material furnished to show that Soththi Upali "either directly or through members of his group" purchased lands in close proximity to the ancestral residence of the President. In any event, if the lands were purchased, as the Secretary states he was told by Mr. Sumanasekera, "as a part of an elaborate conspiracy", it would have been of crucial importance to state when the lands were acquired – a matter that could easily have been ascertained by asking the owners of the properties or by visiting the Land Registry. Mr. Cooray states in his affidavit that (after his arrest) he was questioned by the Police as to whether in his capacity as Minister of Housing and Construction he allotted any land to Soththi Upali in Horogolla. He had replied that he had no recollection of having done so. That again is a matter that could have been easily ascertained by asking the Government authority concerned. In any event, if a land had in fact been so allocated, how could that ever have been evidence of a conspiracy to assassinate Her Excellency the President? When Mr. Cooray was the Minister, Her Excellency the President had not yet been elected to office. The conspiracy, according to the Secretary, was not to harm or assassinate Mrs. Kumaratunga at the time when Mr. Cooray was a Minister: the conspiracy was to assassinate Her Excellency the President.

The Deputy Inspector-General, Mr. Sumanasekera, in his affidavit states as follows: "My inquiries also revealed that certain persons who had been enlisted to the Reserve Police Force at the instance of [Mr. Cooray] when he was a Cabinet Minister in the previous

government had been given intensive training by the Special Task Force (STF). I also received intelligence that some of the persons who were so recruited had deserted their posts and their present whereabouts are unknown."

Mr. Cooray in his affidavit states as follows: "... during the period 1989 to 1991, there was severe threat to Cabinet Ministers and other persons holding public office from the J.V.P. movement which was at its height. Accordingly, security officers attached to my security, and I believe also to the security of other high ranking personnel, were enlisted into the Reserve Police Force and trained by the Special Task Force in order to provide adequate security. I state that out of the eight security personnel recruited to the Reserve Police, four have reverted to their substantive posts in the Colombo Municipal Security Service, and four have retired ..."

The respondents have not challenged Mr. Cooray's averments either by way of affidavit or through the submissions of their counsel. And so there was, after all, nothing very alarming or mysterious about the former security staff of Mr. Cooray. What was the relevance of the averments made by the Deputy Inspector-General to the conspiracy theory?

The Secretary stated in his affidavit that the Deputy Inspector-General of Police had in his report dated the 16th of June 1997 brought it to his notice that he received reliable intelligence that "the detenu was planning to commit various acts of violence with a view of discrediting the Government and in this connection he has sought the assistance of some retired service personnel." The allegation relates to acts aimed at **discrediting the government** and not a conspiracy to assassinate or harm the President. The Secretary states that he "formed the opinion" that it was necessary to detain Mr. Cooray "having considered the matters referred to above and the material contained in the reports referred to above **pertaining to a conspiracy to assassinate or cause harm to Her Excellency the President and its grave implications for National Security and Public Order**." We are concerned in these proceedings with the grounds upon which the Secretary ordered the arrest and detention of Mr. Cooray; and those grounds, according to the Secretary, related

to a conspiracy to assassinate or harm the President. In any event, Mr. Cooray denies the allegation that he was planning to commit any acts of violence to discredit the government. The respondents have adduced no evidence or offered any submissions through their counsel on that matter.

Information supplied for confidential perusal by the Court

In addition to the facts and information referred to in his affidavit, the Secretary also placed the following documents before the Court for confidential perusal:

(i) The report of the Inspector-General of Police dated 9 June 1997;

(ii) The report of the Director of the National Intelligence Bureau dated 11 June 1997;

(iii) The report of the Deputy Inspector-General of Police, Criminal Investigation Department dated 14 June 1997

(iv) The report of the Deputy Inspector-General of Police, Criminal Investigation Department dated 16 June 1997.

The Secretary expressly states in his affidavit, that he was 'satisfied' on the basis of material contained in those reports.

Those reports do not materially add anything to the narration of their contents in the affidavit of the Secretary.

Was the Secretary "satisfied"?

Mr. Cooray was arrested and detained upon an order issued by the Secretary under the powers conferred on the Secretary by regulation 17(1). The opening words of the regulation state that such an order may be issued "where the Secretary is satisfied." The Secretary has declared in his affidavit that he was "satisfied and formed the opinion that it was necessary to detain... B. Sirisena Cooray to prevent him from acting in any manner prejudicial to the national security and the maintenance of public order." The regulation is framed in a subjective form. However, his own declaration is not

conclusive, for the decision does not relate merely to "a matter of pure judgment" per Lord Wilberforce in *Secretary of State for Education and Science v. Tameside Borough Council*[1] or to a matter where he had to be satisfied on "a matter of pure opinion". (Per Lord Denning in *Tameside* at 1025 C.A.). The opening words of regulation 17(1) "Where the Secretary is satisfied" do not, in my view, confer an absolute discretion on the Secretary; they serve "as a condition limiting the exercise of an otherwise arbitrary power: If the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power, the value of the intended restraint is in effect nothing.": per Lord Radcliff in *Nakkuda Ali v M.F. de S. Jayaratne*[2]. The words do not mean "Where the Secretary thinks"; nor do they mean "Where the Secretary believes". They mean that the Secretary was satisfied on reasonable grounds which were capable of supporting the Secretary's decision; and (2) the Secretary should not have misdirected himself on the law in arriving at his decision: *Secretary of State for Education and Science v. Metropolitan Borough of Tameside (Supra)*; *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds.*[3]

The Secretary had to be satisfied that it was necessary to detain Mr. Cooray to prevent him from acting in a manner prejudicial to national security and public order by causing harm to or assassinating Her Excellency the President. It is open to Mr. Cooray to show that the Secretary was not legally entitled to be satisfied. A person is legally entitled to be "satisfied" if he is "reasonably" satisfied: *Director of Public Prosecutions v. Head.*[4]

As Wade (p. 401) points out: "Taken by itself, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Greene MR); 'so wrong that no reasonable person could sensibly take that view' (Lord Denning); 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (Lord Diplock). "Our task is not to find whether the Secretary had taken leave of his senses, but whether he was "reasonably satisfied".

In doing so, we must have regard to the scheme and purpose of the relevant regulations made under the law for the time being

relating to public security – the Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 in this case; the applicable provisions of the general law of the land, including those contained in the Code of Criminal Procedure; and the "Supreme Law" – the Constitution. We should remind ourselves that Article 13(5) of the Constitution declares and recognizes that "Every person shall be presumed innocent until he is proved guilty". We should also bear in mind that "The principle of personal freedom that every man should be presumed innocent until he is found guilty applies also to the police function of arrest... For that reason it is of importance that no one should be arrested by the police except on grounds which the particular circumstances of the arrest really justified the entertainment of a reasonable suspicion,": per Scott LJ in *Dumbell v. Roberts*,[5] followed in *Muttusamy v. Kannangara*[6] per Gratiaen J; *Faiz v. Attorney-General*[7] per Perera J; and in *Faurdeen v. Jayetilleke and others*[8] per Perera, J; *Channa Pieris v. Attorney-General*.[9]

A person is "reasonably satisfied" if his decision is reasonable, "or can be supported with good reasons, or at any rate be a decision which a reasonable person might reasonably reach": per Denning MR in *Tameside* cited with approval in *Siriwardene v. Liyanage*[10]. "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary... alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account": per Lord Wilberforce in *Tameside* at 1047 followed in *Siriwardene* at 328-329.

In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[11] at 229 Lord Green MR said:

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to the use of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used as a general description of the things that must be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the

matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matters to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could dream that it lay within the powers of the authority. Warringtom LJ in *Short v. Poole Corporation*[12] gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." Commenting on Lord Greene's famous passage, Wade (7th Ed. 400-401) states as follows: "It explains how "unreasonableness", in its classic formulation, covers a multitude of sins... Unreasonableness has thus become a generalized rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question..."

On the other hand, the Court will not usurp the discretion of the Secretary and substitute its own views for that of the Secretary. Indeed, as Lord Hailsham observed: "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 individual's judgment with its own.": In *re H (An Infant)*[13]. When the Secretary "honestly takes a view of the facts or the law which could 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 law. The whole process would be made of no effect if the (Secretary's) decision was afterwards to be conned over word by word, letter by letter, to see if he has misdirected himself. That cannot be right ...": per Lord Denning in *Secretary of State v. ASLEF*[14]. The prevailing situation in the country will obviously be a matter that the Court will not ignore:

Cf. per Wanasundera, J. in *Joseph Perera v. Attorney-General*[15]; per Kulatunga, J. in *Wijewardena v. Zain*[16]; *Dissanayake v. Superintendent Mahara Prison*[17]. The Court also appreciates the difficulties inherent in the investigation and prosecution of certain offences, such as terrorist crimes or conspiracies to assassinate political leaders, and the need for acting quickly where national security or public order is involved. Yet, the exigencies of dealing with such crimes cannot justify switching the notion of reasonableness to the point where the essence of the safeguard secured by Article 13 (1) of the Constitution may be abrogated: Cf. *Brogan v. U. K. ECHR*[18], *Fox Campbell & Hartley v. U.K. European Court of Human Rights*[19].

The question for determination is whether, on the material before him, the Secretary was "satisfied" that Mr. Cooray should be arrested and detained. As we have seen, there were many mistakes and misunderstandings based on misleading advice as a result of which he misdirected himself. Moreover, the grounds on which he was supposed to have formed his judgment did not exist: What was the evidence that Soththi Upali was a 'close associate' of Mr. Cooray – that the members of Soththi Upali's gang held discussions with Mr. Cooray about assassinating the President – that Soththi Upali had 'directly or indirectly' purchased lands in close proximity to the ancestral home of the President as a part of "an elaborate conspiracy" to harm or assassinate the President? The police had their suspicions and hoped that some evidence might turn up to make their suspicions reasonable. However, vague, general suspicions and the fervent hope or even confident assumption that something might eventually turn up to provide a reasonable ground for an arrest will not do: *Channa Pieris* (*Supra*) at p.51. I hold that the Secretary was not legally entitled to be satisfied.

Other factors motivating the Secretary

The material in the reports (as conveyed to us through the Secretary's affidavit), as we have seen, did not provide grounds for the arrest. Why, then did the Secretary come to form his opinion that it was necessary to arrest and detain Mr. Cooray? The Secretary in his affidavit states as follows:

"... the Criminal Investigation Department, the National Intelligence Bureau and the 2nd Respondent had on several occasions forwarded intelligence reports regarding matters affecting the security of the State and Public Order. I also state that most of the intelligence set out in these reports have been subsequently found to be accurate.

... I had no reason to doubt the reliability of the intelligence reports submitted to me regarding the matter in question.

... in the recent past there had been a number of political leaders including Heads of State who had been assassinated. Investigations have revealed that these offences had been committed in pursuance of carefully planned conspiracies.

... I state that having considered the matters set out above and the material contained in the reports referred to above pertaining to a conspiracy to assassinate or cause physical harm to Her Excellency the President and its grave implications for National Security and Public Order I was satisfied and formed the opinion that it was necessary to detain the said B. Sirisena Cooray to prevent him from acting in any manner prejudicial to the National Security and the maintenance of Public Order. In the circumstances. I made (the) Order which has been produced marked P1..."

Self-misdirection

Learned counsel for the respondents submitted that the Secretary acted upon material placed before him by senior responsible officers and therefore believed in good faith that he had reasonable cause to believe that Mr. Cooray was involved in a conspiracy. In *Liversidge v. Anderson*[20], the majority of the House of Lords decided that the words "if the Secretary of State has reasonable cause to believe" meant "if the Secretary of State thinks that he has reasonable cause to believe" provided he acts in good faith. However, Lord Atkin, in his celebrated dissenting speech, held that the words "If the Secretary of State has reasonable cause to believe" meant what they said, namely that they gave only a conditional authority to the Secretary to detain any person without trial, the condition being that he had reasonable cause for the belief which leads to the detention order. The decision

of the majority in *Liversidge* supports the submission of learned counsel for the respondents, but as Lord Reid dissmissively observed in *Ridge v. Baldwin*[21] at 73, it was a "very peculiar decision" and is not regarded with favour. However, although Lord Scarman said in the same case that the ghost of the decision in *Liversidge* need no longer haunt the law, it seems to have now made another appearance. And perhaps in the hope that this Court would not exorcise that evil spirit, Mr. De Silva, whose arguments were all most vigorously but fairly and ably presented, cited the decision of the Supreme Court in *Janatha Finance and Investments v. D.J. Francis Douglas Liyanage and Others*[22].

In that case, the Competent Authority appointed under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1982 made an order under regulation 14(7) thereof sealing the petitioner's printing press. The petitioner alleged that the order was null and void as it constituted an infringement of Articles 12(1) and 12(2) of the Constitution which declare and recognize the right to equality. Ranasinghe, J. (as he then was), (Sharvananda, J. – as he then was – and Victor Perera, J. agreeing) at p. 396 said:

"The question that arises is whether the material so available to the 1st respondent could be said to have been sufficient 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 could 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 ...? 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 not have 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 circumstances. 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 ..."

In my view, a decision of the Secretary, does not become **reasonable** merely because the source of his information are the reports of senior police officers. It is evident from the affidavit of the Secretary that he was aware that those officers themselves had not personally gone into the matter, despite the extraordinarily seriousness of the matter, but were merely reporting that there was information from "reliable sources". The facts established in these proceedings, which were easily ascertainable before or soon after the arrest, show how unreliable they were. Are the so-called informants of the "intelligence" services solely sneaks concerned with furtively providing fault-finding information? Are there no police officers or informants who are independent and straightforward who might provide other information? How is it that in this case a great deal of material that might have been quite easily found out escaped the notice of the "intelligence" arm of the police? Is the "intelligence" service concerned with fact-finding or fault-finding? Be that as it may, the question in issue is not whether the Secretary's decision was based on information furnished by senior police officers; nor is it whether his decision was "hopelessly indefensible" or "wholly unreasonable and capricious" or simply wrong: What has to be decided by us is not whether the Secretary thought or sincerely believed that Mr. Cooray was conspiring to harm or assassinate the President, but that he was personally satisfied on reasonable grounds based upon the three initial reports submitted to him and the additional report submitted to him, that it was necessary to arrest and detain Mr. Cooray to prevent him from assassinating or causing harm to Her Excellency the President and thereby acting in a manner prejudicial to national security and/or public order.

Learned counsel for the respondents, Mr. De Silva, referred to the reasons given in the affidavit of the Secretary and submitted that in the light of the material contained in the reports, the Secretary was not only justified in issuing the Detention Order, but that he would have been guilty of a dereliction of duty had he refrained from doing so. On the other hand, learned counsel for the petitioner, Mr. Choksy, submitted that the material placed before the Secretary did not convince, and at any rate could not have reasonably persuaded, the Secretary to be satisfied that it was necessary to detain Mr. Cooray and that in the circumstances, the Secretary was not acting according to the procedure prescribed by Regulation 17(1) and was therefore acting in violation of Article 13(1) of the Constitution which states that no person shall be arrested except according to procedure established by law.

I agree that the Secretary was not obliged to carry out the investigations himself: But he had to satisfy himself, not merely on the material submitted to him but also upon "such further additional material as may be called for by him": (Regulation 17(1). He had the power to call for, and the duty to consider additional material. He was obliged to make his decision upon a proper self-direction of the facts upon which his judgment was based. He was obliged to call his own attention to the matters he was bound to consider. He failed to do so. It is of significance that whereas regulation 17(1) of the 1989 regulations states that "Where the Secretary to the Ministry of Defence is of opinion ...". the corresponding current (1994) regulation states that "Where the Secretary is satisfied upon the material submitted to him, or upon such further material as may be called for by him ...". Admittedly, there was nothing to prevent the Secretary calling for and considering additional material under the earlier regulation. However, the 1994 regulation specifically draws the attention of the Secretary to what he might do. The possibility that there might be two sides to the story did not prompt the Secretary to direct that Mr. Cooray's version be ascertained either from "intelligence" sources or from Mr. Cooray himself.

The Secretary in his affidavit admits that Mr. Cooray was neither questioned nor was his statement recorded prior to his arrest, but he adds that Mr. Cooray's statement was recorded after the Detention

Order had been issued. Mr. Cooray was arrested on the 16th of June 1997 and he was interrogated and his statements recorded on the 17th, 18th, 19th, 20th, 23rd and 24th June and on the 8th and 11th of July. He had been abroad from the 24th of June 1996 and returned to Sri Lanka on the 28th of April 1997. He was questioned about his family and his activities and movements after his return. However, although he was arrested and detained because he was supposed to have been involved in a conspiracy to assassinate the President, no questions were put to him with regard to that matter until Mr. Cooray himself had raised the matter with the officers interrogating him on the 23rd of June 1997.

He had read an article (produced and marked in these proceedings as document P3) appearing on the front page (and continued on page 5) of the Sunday Times of the 22nd of June under a banner headline stretching across the page "Plot against the President" in which the first four paragraphs state as follows:

"The detention of former UNP strongman Sirisena Cooray – in the headlines for the past six days with widespread conjecture and speculation – took a sensational turn last night when state television and radio announced that he was being grilled regarding an alleged plot to kill President Kumaratunga.

Soon after the bombshell announcement, CID chief T.V. Sumanasekera told The Sunday Times last night that they had received some information regarding an alleged plot against the President and every aspect was being probed.

"There is a little bit of evidence and we are continuing investigations on this line, " he said.

The state run media last night said Mr. Cooray had been arrested following information about a plot to assassinate the President, but Mr. Sumanasekera declined to confirm the state media reports."

The report goes on to speculate as to other reasons why Mr. Cooray was arrested. It may or may not explain why the matter of the alleged conspiracy was not pursued. I make no comment on that matter.

Mr. Cooray had also read an article (produced and marked in these proceedings as document P3 (a)) appearing on the front page of the Daily News of the 23rd of June under a banner headline stretching across the page "Plot will be disclosed soon" in which it was stated as follows:

"The details of the alleged plot to harm President Chandrika Bandaranaike Kumaratunga, uncovered recently, will be disclosed in the next few days," CID sources said yesterday.

The evidence pertaining to this plot uncovered during CID investigations into the activities of former UNP Minister B. Sirisena Cooray are now being put together, these sources added.

Following the discovery of this plot, the CID also arrested another suspect who is considered an expert marksman over the weekend. The CID said the suspect was able to fire on target using two pistols simultaneously.

CID sources said evidence showed that attempts had been made to hire underworld criminals to execute this plot.

Two other suspects said to be notorious underworld characters have also been taken into custody in this connection and the CID was looking out for firearms which had been in their possession.

CID sources said they were able to elicit more evidence from these two suspects during interrogation following their arrest.

Police Headquarters sources said a UNP politician released from remand custody had held a grand dinner which was attended by several underworld criminals as well as some leading businessmen.

The CID had earlier received snatches of information regarding an alleged plot to harm the President. The plot became more evident when the CID followed up. The evidence gathered during interrogation of Mr. Cooray (sic.).

Informed sources said Mr. Cooray had been arrested on information about an alleged political conspiracy. Mr. Cooray is alleged to have had meetings with several suspects released from jail recently.

CID sources said they hoped to reopen investigations into several earlier investigations, into several earlier incidents involving the underworld in an effort to unravel the mystery behind those incidents. Several opposition politicians too are to be questioned in this connection and two more underworld characters, to be arrested soon, will be produced as prosecution witnesses."

Mr. Cooray states in his affidavit – and this has not been controverted – that on the 23rd of June he drew the attention of the officers who were interrogating him on that day to these two news reports.

During the afternoon of the 24th of June, and only upon that occasion, was Mr. Cooray asked whether he was involved in a plot to assassinate or harm the President. The petitioner denied any involvement in such a conspiracy and requested specific particulars of the information alleged to have been received by the police against him so that he might respond; but he was not furnished with such information. The Court had earlier on that day granted the petitioner leave to proceed in this matter. What is the explanation for this extraordinary anxiety to be uninformed? Mr. De Silva submitted that it was a matter of police "technique" to first ascertain peripheral matters and then come to the relevant question. If those were his instructions, I must say that, placing myself in the position of a "reasonable man", I am quite surprised that it took over a week to get over the peripheral matters; and that it is a matter of amazement that when, according to the Secretary's affidavit, the Director of the National Intelligence Bureau had in his report of the 11th of June stated that the President was to be assassinated or injured "in the near future", no question was put to Mr. Cooray until he himself had raised the matter on the 24th of June. If the report in the Sunday Times that Mr. Sumanasekera had said that there was no more than "a little bit of evidence" is accurate, how does one reconcile that statement with what Mr. Sumanasekera reported to the Secretary? He has not filed an affidavit contradicting the accuracy of the Sunday Times report **which was an item of evidence in this case**.

There were, as we have seen, many things said in each of the reports of the police officers relied upon by the Secretary that were vague and suspicious. The Secretary did not call for any clarification

on the report of the Inspector-General of Police, nor on the report of the National Intelligence Bureau. With regard to the report of the Deputy Inspector-General of Police dated the 14th of June 1997, however, he says he sought clarification. But what did he ask?: "Please identify the manner in which the persons mentioned in your report would be a threat to national security." Surely, if the Secretary did believe the allegation that "the detenu had sought [the] assistance of certain members of a group involved in the commission of dangerous criminal acts to cause harm to or assassinate Her Excellency the President", there should have been no doubt in his mind that there was a threat to National Security? Why did he not also ask him whether it would have been a threat to public order when in the Detention Order and in his affidavit he states that the detention was ordered to prevent a threat to both national security and public order? They are two different things although they may co-exist. In his letter to the Chairman of the Advisory Committee the Secretary states that the arrest was made because of an alleged "threat to national security". There is no reference to public order. The Secretary of the Ministry of Defence required no education on the issue whether a conspiracy to assassinate or harm the President would affect national security? Surely, there was no need for him to be instructed by any person on that matter?. The decision whether certain activities of a citizen constitutes a threat to National Security is a matter for the Secretary and not for a police officer, whatever his rank might be. The power of the Secretary given by regulation 17(1) concerns the physical liberty of persons, including those who have not yet, nor ever, committed an offence. It is therefore an exceedingly great power, indeed an awesome power, that must be exercised with a corresponding degree of responsibility. There is public respect for the independence and impartiality of the Secretary, albeit tinged with latent reverential fear. The Secretary must fulfil public expectations and be independent and impartial.

Obviously, in appropriate circumstances, as for instance, in the *Janatha Finance and Investments* case (*Supra*), the Secretary may, rely upon the opinions, conclusions and recommendations of senior police officers. Each case, however, must depend on its own circumstances; but the cardinal, invariable principle in each case is that the person making the order of detention must be "satisfied".

It should be pointed out that in his letter dated the 3rd of July 1997 to the Chairman of the Advisory Board appointed in terms of Regulation 17(5), to enable the Chairman to inform the persons detained of the "reasons" for their arrest, the Secretary states that the Detention Orders on Mr. Cooray and three other persons "have been issued **after being satisfied on the material submitted to me by the D.I.G., C.I.D.** to the effect that Mr. Sirisena Cooray has sought the assistance of certain persons to cause harm to or to assassinate Her Excellency the President." The representations or submissions to the Advisory Committee made by a person arrested would be directed to responding to the stated grounds for the arrest. The grounds to be challenged would depend on the basis for the Secretary's order: The Secretary's letter very clearly indicates that there was but one source of information he relied on – the material submitted to him by the D.I.G., C.I.D. I am inclined to think, upon a reading of the Secretary's narration of what was contained in the reports referred to by him, that the Secretary was in fact persuaded by the D.I.G., C.I.D. to issue the Detention Order and that the opinion formed was not that of the Secretary.

In the matter before us, the Secretary in my view abdicated his authority and mechanically signed the Detention Order. As I have pointed out, the Secretary's decision was not reasonable in the sense that it was not supported with good reasons, and therefore it was not a decision which a reasonable person might have reasonably reached. His decision was not only wrong, but in my view unreasonably wrong. This happened because he did not satisfy himself but allowed himself to be misled. It was not his opinion: *Malinda Channa Pieris* (*Supra*) at p. 58. The matter before us is a good illustration of what Wade (p.401) describes as "self-misdirection" and therefore a case in which the Secretary cannot be held to have been "satisfied".

Taking a person into custody and detaining him in pursuance of such a decision is not in accordance with "procedure established by law" and it is therefore in violation of Article 13(1) of the Constitution: *Sasanasiritissa Thero and others v. De Silva and Others*[23] *Weerakoon v. Weeraratne*[24] *Somasiri v. Jayasena and Others*[25] *Dissanayake v. Mahara Prisons* (*Supra*) *Channa Pieris v. Attorney-General* (*Supra*) at p. 59.

The form and contents of Detention Order suggests it was mechanically issued.

The Secretary states in the Detention Order dated the 16th of June 1997 that he was making the order 'being of opinion and with a view to preventing the person specified and residing at the place mentioned in Column 1 of the Schedule to this order from acting in any manner prejudicial to National Security or to the maintenance of public order', it is necessary so to do ...

The order is set out in a standard, pre-prepared, form: the only variations between one case and the other relate to information, furnished at the bottom of the page of the order in a schedule, concerning (1) the date of the order; (2) the name and address of the person to be detained; and (3) the place of detention. The standard form used in this case follows the forms used when the 1989 Emergency Regulations were in operation when the Secretary was required to be of the 'opinion' that the detention was necessary to prevent the person ordered to be arrested and detained from acting in any manner prejudicial to national security or to the maintenance of public order. The Regulations introduced by **Gazette Extraordinary** 606/4 of 18 April 1990 substituted the word 'satisfied' for the word 'opinion'. Due to judicial interpretation, there may be no practical difference in the use of the terms: *Channa Pieris and Others v. Attorney-General and Others*, (*Supra*) at p. 58. But, the retention of the older term in the Form suggests a lack of spontaneity that one would expect from an individual acting in accordance with the specific obligation of being personally satisfied imposed on him by the provisions of the law he invokes: the form used suggests that the Secretary was driven not by his own thoughts but by the stimulus derived from an outside source: the letter to the Chairman of the Advisory Committee indicates that the Secretary relied on the report of the D.I.G. Moreover, the use of the words 'acting in any manner', borrowed from Regulation 17, rather than the specific manner in which the person ordered to be detained was suspected of being likely to act in a manner prejudicial to the National Security or to the maintenance of public order, raises doubts as to whether the Secretary did in fact give his mind to the question whether the person ordered to be arrested and detained was likely to act in a manner prejudicial to National Security or to the maintenance of public order:

had he been convinced, what was the difficulty in specifically stating his grounds, if he had any? In my view, he did not state any grounds because he had no grounds. The Police officers who advised the Secretary might have been hoping that some evidence might turn up; but at that stage all they had was mere suspicion based on what Mr. Sumanasekera had described in his interview reported in the Sunday Times of June 22 1997 – six days after the arrest in pursuance of the Detention Order – (which was filed as evidence in this case by the petitioner and not controverted) as "a little bit of evidence."

Regulation 17(1) empowers the Secretary to detain a person for the specific purposes laid down therein including the prevention of persons from acting in any manner prejudicial to the national security or to the maintenance of public order. As pointed out in *Kishori Mohan v. The State of West Bengal*[26], national security and public order are two different things. Admittedly, in the circumstances of a particular case, the Secretary might be satisfied that both national security and public order were in jeopardy. In such an instance, he should clearly indicate that that was the case. However, where he states, as in this case, that it was necessary to detain the person to prevent him from acting in a manner "prejudicial to the national security **or** to the maintenance of public order" (the emphasis is mine), the satisfaction of the Secretary, in the words of Shelat, J. in *Kishori Mohan* (*Supra*), "was on the disjunctive and not conjunctive grounds, which means that he was not certain... If he felt the necessity to detain the (person) from the activities described by him in the grounds of detention on the ground that those activities affected or were likely to affect both the public order and the security of the State he would, no doubt, have used the conjunctive "and" not the disjunctive "or" in his order. But, as the order stands, it would appear that he was either not certain whether the alleged activities of the (person ordered to be detained) endangered public order or the security of the State, or he did not seriously apply his mind on the question whether the said alleged activities fell under one head or the other and merely reproduced mechanically the language" of the regulations empowering detention.

On the face of it, the order suggests that the Secretary of the Ministry of Defence was acting mechanically without due regard to

the circumstances of the particular case in respect of which he was issuing the order of detention. As we have seen, orders signed mechanically show that the person making the order was not "satisfied" that the arrest was warranted. If he is not "satisfied", the Secretary is not empowered to issue a Detention Order. If he nevertheless issues such an order, an arrest made in pursuance of such an order is not according to procedure established by law and, therefore, contravenes Article 13(1) of the Constitution and is unlawful and invalid.

Was Mr. B. Sirisena Cooray given reasons for his arrest?

Article 13(1) of the Constitution not only states that no person shall be arrested except according to procedure established by law, but it also states that "Any person arrested shall be informed of the reason for his arrest."

The petitioner in his affidavit states that (1) the Detention Order did not state any reason for the arrest; (2) the Police Officers who made the arrest did not give Mr. Cooray any reasons for his arrest; (3) the Police Officers were not able to state any reasons upon being questioned; and (4) the Police Officers declined to record a statement of Mr. Cooray to the effect that he inquired from them as to how he was said to be acting in a manner prejudicial to the national security or the maintenance of Public Order. This is confirmed by Mr. Cooray in his affidavit.

The Secretary in his affidavit states that (1) the Detention Order "sets out the purposes for which [Mr. Cooray] was taken into custody and detained"; and that (2) Superintendent of Police Sisira Mendis who served the Detention Order has stated in his affidavit that he had informed Mr. Cooray of "the purpose" for which he was taken into custody and detained. The Secretary later states that he had by his letter dated the 3rd of July 1997 informed the Chairman of the Advisory Committee appointed in terms of Regulation 17(5) of "the reasons for the detention of [Mr. Cooray] to enable him inform [Mr. Cooray] of the same in terms of Regulation 17(9) of the said Regulations. "As we have seen, the information furnished to the

Chairman were not "reasons"; they were merely inferences. The letter to the Chairman of the Advisory Committee relates to Detention Orders served on Mr. Cooray and the three others who constituted a threat to national security by conspiring to cause harm to or assassinate the President.

The Detention Order does indeed set out the **purposes** for which Mr. Cooray was being arrested and detained: It states that the Secretary deemed it necessary to take into custody and detain Mr. Cooray "being of opinion and with a view to preventing ... [him] from acting in any manner prejudicial to the National Security or to the maintenance of public order." Mr. Mendis who executed the order also states that he informed Mr. Cooray of the "purpose" of the arrest. Article 13(1) of the Constitution, however, states that "Any person arrested shall be informed of the **reason** for his arrest." Arguably, having regard to the letter of the Secretary to the Chairman of the Advisory Committee, the Secretary appreciated the difference. However, he seems to have assumed that the task of giving **reasons** was the duty of the Chairman of the Advisory Committee when the arrest was one that was made in terms of Regulation 17(1) and that it was sufficient for him and the officer making the arrest to state the **purpose** of the arrest.

The whole scheme of the criminal law assumes it to be a basic need that an accused should clearly understand what he is supposed to have done. Section 23(1) of the Code of Criminal Procedure (CCP) states, *inter alia*, that "In making an arrest the person making the same ... shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested. "Section 53 states that "the person executing the warrant of arrest shall notify the substance thereof to the person arrested and, if so required by the person arrested, shall show him the warrant or a copy thereof signed by the person issuing the same." A magistrate holding a preliminary inquiry in a case triable by the High Court is required by section 146 CCP "to read over to the accused the charge or charges in respect of which the inquiry is being held." If at the end of that inquiry the magistrate does not discharge him, section 150 CCP requires the magistrate to "read the charge to the accused and

explain the nature thereof in ordinary language." Section 164 CCP provides, *inter alia,* that every charge shall state the offence with which the accused is charged and that it should be "read to the accused in a language which he understands." Section 165 CCP provides that particulars of the commission of the offence must be so stated as to give an accused sufficient notice of the matter with which he is charged. At a summary trial, the magistrate is required by section 182 CCP to frame a charge and read such charge to the accused. At a High Court trial, section 195 CCP requires that a copy of the indictment be served on the accused, and sections 196 and 204 CCP require that "the indictment shall be read and explained to the accused."

Article 13(1) of the Constitution elevates a principle that was a part of the ordinary law to the status of a fundamental right. When the relevant provision of the Indian Constitution were being discussed in the Constituent Assembly, Dr. Ambedkar – the moving spirit behind the draft – explained to the Assembly on September 15, 1949 that this was being done because the right to be informed of the reasons for one's arrest was one of the "most fundamental principles which every civilized country follows". Article 14 of the International Covenant on Civil and Political Rights states that among the "minimum guarantees" everyone is entitled to is the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

Mr. S. Sharvananda, retired Chief Justice, in his treatise on Fundamental Rights at page 141 (cited with approval in *Channa Pieris v. Attorney-General* (*Supra*) at p.67) explains why it is necessary that reasons should be given and why the reasons should be promptly given: He states as follows:

"The requirement that a person arrested should be informed of the reason for his arrest is a salutary requirement. It is meant to afford the earliest opportunity to him to remove any mistake, misapprehension or misunderstanding in the mind of the arresting authority and to disabuse the latter's mind of the suspicion which triggered the arrest and also for the arrested person to know exactly what the allegation

or accusation against him is so that he can consult his attorney-at-law and be advised by him: *Mariadas v. Attorney-General*[27]. All the material facts and particulars must be furnished to the arrested person because they are the reasons or grounds for his arrest to enable the arrested person to understand why he has been arrested ... The necessity to give reasons serves as a restraint on the exercise of power and ensures that power will not be arbitrarily employed."

It is insufficient for the person arrested to be given the purpose or object of the arrest, such as those set out in Regulation 17(1) and reproduced in the Detention Order in this case: *Selvakumar v. Douglas Devananda and Others*[28]. He must be given the reasons, i.e. the grounds – all the material and pertinent facts and particulars that went to make up the mind of the Secretary and not merely the inferences arrived at by the Secretary: *Shalini Soni and Others v. Union of India and Others*[29]. For it is then that the person will have information that will enable him to take meaningful steps towards regaining his liberty, e.g. by showing that there was a mistake or by rebutting a suspicion or explaining a misunderstanding, with the result that, perhaps after further inquiries, he may be saved from the consequences of false accusations: *Gunasekera v. De Fonseka*[30]; *Wickramabandu v. Cyril Herath*[31]; *Munidasa v. Seneviratne*[32]; *Channa Pieris v. Attorney-General* (*Supra*) at p. 68; *Faurdeen v. Jayetilleke* (*Supra*); *Kumarasena v. Sriyantha*[33]; *Christie v. Leachinsky*[34].

Mr. De Silva submitted that there was no requirement under the Emergency Regulations to give reasons for an arrest and in support of that view he cited the dictum of Kulatunga, J. in *Sasanasiritissa Thero and Others v. De Silva and Others.* (*Supra*) at 363-364 which followed the decision of this Court in *Vijaya Kumaranatunga v. G.V.P. Samarasinghe and Others*[35]. In *Kumaratunga*, Soza, J. (Ranasinghe, agreeing) observed: **"The contents of the order 'A' sufficiently apprised the petitioner that he was being arrested in contravention of Regulations 23 and 24 of the Emergency Regulations.** Among the offences specified in Regulation 24 there are the offences of arson and theft which are offences under the Penal Code for which arrest without a warrant is justifiable under the

Criminal Procedure Act. So here we have an arrest by a Police Officer **with reasons given** and despite the fact that he was acting under the authority of the detention order marked 'A', his action can be justified under the powers vested in him under the Code of Criminal Procedure. Such an arrest is in accord with the provisions of Article 13 (1)." The emphasis is mine. The petitioner in that case, according to Soza, J. was given reasons in the Detention Order. Soza, J. however, stated that Article 13(1) of the Constitution was subject to such restrictions as may be prescribed by law, including the Emergency Regulations. These regulations, he said, "overshadow the fundamental rights guaranteed by Articles 13(1) and (2) of the Constitution. Soza, J. went on to state as follows:

"... the communication of the reasons for the arrest at the time of the arrest is not imperative when the emergency regulations are in operation. This is obviously because if reasons are disclosed at the time of taking a person into custody, it may enable counteraction to be taken to frustrate the very purpose of the arrest and hamper and hinder the steps taken by the Government to protect the community and prevent grave public disorder. No doubt, a person being arrested must know why he is arrested. During times of national emergency, this requisite has to be satisfied in accordance with the Emergency Regulations at a later stage and soon enough for the detenu to make representations against his arrest and detention. According to Regulation 17(4) it is obligatory for one or more Advisory Committees to be set up consisting of persons appointed by the President. Any person aggrieved by an order made against him under Regualtion 17 may make his objections to the appropriate Advisory Committee. It is the duty of the Chairman of the Committee to inform the objector of the grounds on which the order under this regulation has been made and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case. It is, therefore, always open to the detenu to apprise himself of the grounds of arrest. The express provision in our Regulation stipulating that the Chairman of the Advisory Committee should inform the detenu of the grounds of detention implicitly makes a communication of reasons at the time of arrest unnecessary."

Mr. De Silva also referred to the judgment of Kulatunga, J. in *Wickremabandu v. Cyril Herath and Others* (*Supra*).

Kulatunga, J. at P. 381 stated as follows:

"As a matter of principle the requirement in Article 13(1) that an arrested person shall be informed of the reason for his arrest may no longer be limited to a person accused of a crime. In the context of the freedom from arbitrary arrest it can extend to a person arrested under any law for preventive detention. However, at Common Law the right was given to a person accused of a crime – *Christie v. Leachinsky*, (*Supra*); *Muttusamy v. Kannangara*, (*Supra*). The information of the ground of the arrest or of the offence has to be given, *inter alia*, to afford to the suspect an opportunity to show that there is some mistake as to identity – *Gunasekera v. Fonseka*, (*Supra*). It is this right which has been elevated to a fundamental right. Viewed in this background there can be no objection to a restriction of this right in its application to a person in preventive detention who is not arrested on suspicion for an offence, even though a total denial of the right may be questioned. Presumably for this reason laws for preventive detention including our Regulation 17 do not insist on the requirement to notify the ground of suspicion at the time of arrest ... Accordingly, I am of the view that Regulation 17 does not amount to a denial of the fundamental rights enshrined in Article 13(1) of the Constitution."

After setting out the provisions of the regulations relating to Advisory Committees appointed under Regulation 17, Kulatunga, J. at pp. 384-385 states as follows:

"Although there is no provision in Regulation 17 for serving on a detenu a copy of the order at the time of his arrest I am of the view that the detenu should at least be informed of the fact of his arrest on such order except where the exigencies of the case preclude it. A copy of the detention order should be given to the detenu. Under Article 22(5) of the Indian Constitution, the duty to afford the detenu the earliest opportunity of making representations against the order as well as to inform him of the grounds of the order are in the Authority making the order. The Supreme Court has held that in order

to make the right of making representations effective, the detenu should also be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation: *Shibban Lal Saksena v. State of U.P*[36].

Under Regulation 17(6) the duty of giving the grounds of the order and sufficient particulars is placed on the Chairman of the Advisory Committee to be complied with at a meeting to consider the detenu's objections. No doubt this procedure would hamper the formulation of his objections but since the regulation clearly contemplates the giving of such grounds and particulars at the commencement of the inquiry, I do not think that it will lead to injustice. If upon such communication the detenu applies for time to prepare his case, the Advisory Committee should grant a postponement. Further the fact that the sufficiency of particulars is made subject to the opinion of the Secretary cannot be construed as giving the Chairman an arbitrary power to withhold particulars which are vital to a fair hearing. However, the Secretary may decline to furnish particulars which he cannot disclose in the public interest."

Neither Soza, J. nor Kulatunga, J. stated that the communication of reasons was unnecessary when a person was arrested under the Emergency Regulations: what they did say was that the reasons need not be given at the time of the arrest and could be given later. Article 22(1) of the Indian Constitution states that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest." Article 13(1) does not provide for a time. That aspect of the matter is governed by the general law. Section 23(1) of the Code of Criminal Procedure states as follows: "In making an arrest the person making the arrest shall actually touch or confine the body of the person to be arrested unless there be submission to the custody by word or action and shall inform the person to be arrested of the nature of the charge or allegation upon which he is arrested." It is plain that the charge or allegation should be made known at the time of the making of the arrest and not subsequently. The fact that at the time of the hearing by the Advisory Committee the Chairman is required to inform the person objecting to his detention of the grounds on which the order of detention has been

made, does not carry with it the corollary that the person arrested should not be informed of the charge or allegation at the time of his arrest: As we have seen, judges in the criminal courts are required to explain the charges; but that does not mean that the obligation to state the charge or allegation prescribed by section 23(1) of the Code of Criminal Procedure is to be discarded. Soza, J. stated that "The express provision in our Regulations stipulating that the Chairman of the Advisory Committee should inform the detenu of the grounds of detention implicitly makes a communication of reasons at the time of detention unnecessary". As I have pointed out, the fact that the Chairman is required to communicate reasons does not lead to the conclusion that the person arrested need not be informed at the time of his arrest of the reasons for his arrest. They are matters apart. There are two rights: (i) the Constitutional right to be informed of the reason for arrest guaranteed by Article 13(1) of the Constitution; and (ii) the right to be informed of the grounds of arrest given by Regulation 17. The first is to enable a person arrested at the time of his arrest to obtain his freedom immediately by showing good cause for his release. The second is to enable him subsequently to make a case to the Advisory Committee for his release. They are quite separate and distinct rights and the provision of the second does not in my view wipe out or restrict the first.

Regulation 17(5) provides for the appointment of an Advisory Committee "for the purpose", it is said, of "this regulation". Presumably, it means "for the purpose of hearing objections to detentions made under this regulation", for Regulation 17 deals with various matters, including matters other than those concerned with Advisory Committees. Regulation 17(7) states that "Any person aggrieved by an order against him under this regulation may make his objections to such Advisory Committee". Regulation 17(8) states that "Any person aggrieved by an Order under this regulation is entitled to be informed of his right to make objections in writing to such Advisory Committee as aforesaid." Naturally, every person who is imprisoned would be hurt in spirit and have cause to complain of the infliction of wrong, oppression, or distress, real or supposed, caused by the order of imprisonment. Was Mr. Cooray informed of his

right? All that the Secretary states he did was to inform the Chairman of the Advisory Board the "reasons" the Chairman could give Mr. Cooray for his arrest. Assuming that a person detained necessarily feels aggrieved, what are the objections he would want to make to the Advisory Committee in terms of Regulation 17(7)? They relate to objections against the order of detention. How could he make meaningful, specific, objections unless he knows the grounds on which the Detention Order was issued? After stating that it is the duty of the Chairman of the Advisory Committee to inform the person objecting to his arrest of the grounds on which the order of detention was made, Soza, J. states: "It is, therefore, always open to the detenu to apprise himself of the grounds of arrest." With great respect, this is a non-sequitur: How is it 'always open' to a person arrested and detained to inform himself of the reasons for his arrest merely because the Chairman of the Advisory Committee is obliged to give him reasons? Reasons will be given only when the Committee meets. The duty of the Chairman of the Advisory Committee to inform the person detained arises when there is a meeting of the Committee held to consider the objections of the person detained: Regulation 17(9). Meetings of the Committee are held to hear objections: Regulation 17(9). How can the person detained make meaningful objections unless he has before him the reasons for his arrest? Kulatunga, J. did appreciate the problem, but His Lordship was of the view that after the intimation of reasons, further time should be granted to enable the person detained to prepare his case. That, with great respect, does not solve the problem: Regulation 17(7) states that "Any person aggrieved by an order against him under this regulation may make his objections to such Advisory Committee. Regulation 17(9) states "**At any meeting** of an Advisory Committee **to hear such objections as aforesaid** shall be presided over by the Chairman. It shall be the duty of the Chairman to inform the **objector** of the grounds on which his order under this regulation has been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case." The meeting is convened in the first place to hear the objections of the objector. In order to make objections so that a meeting may be convened, the person detained must have the grounds upon which the order was made.

In any event, could the Advisory Committee have at any time given Mr. Cooray the reasons for his arrest? The Secretary did write a letter to the Chairman of the Advisory Committee on the 3rd of July in which he refers to the Detention Orders of Mr. Cooray and three others. He states: "These Detention Orders have been issued by me after being satisfied on the material submitted to me by the D.I.G., C.I.D. to the effect that Mr. Sirisena Cooray has sought the assistance of certain persons to cause harm or to assassinate Her Excellency the President. Some of the persons allegedly identified are Upali de Silva, U.L. Seneviratne, W.B. Somaratne and J.P. Jayamanna. Further it is reported that some persons have been enlisted as Reserve Police Officers and given training in sophisticated weapons. Whereabouts of some such persons trained in weapon use are not traceable today. Any conspiracy to cause acts in furtherance of such a purpose was considered a serious threat to national security. This letter is sent to you for the purpose of ER 17 (9) published in Gazette Extraordinary No. 843/12 of 4.11.1994. "Assuming that this information was communicated by the Chairman to Mr. Cooray (in fact it was not so done), what could Mr. Cooray have done: Obviously, he was not going to have any objection to the conclusion that a conspiracy to assassinate the President was a threat to national security. But what could he say about "some persons" who were supposed to have been enlisted as Reserve Police Officers and trained in the use of sophisticated weapons? Who were these persons? How were they linked to Mr. Cooray or to the conspiracy? How was Mr. Cooray responsible for the fact that the whereabouts of those persons was not known? With regard to the statement that Mr. Cooray had sought the assistance of the persons named and others to harm or assassinate the President, Mr. Cooray could have baldly denied it, but he was not placed in a position in which he could object to the conclusion arrived at by the Secretary, for although the Secretary says that he gave the "reasons" for the arrest in his letter to the Chairman of the Advisory Committee, he did not in fact do so. As we have seen, Kulatunga, J. in *Wickremabandu* said that the Chairman should give the "grounds" and furnish the "particulars" on which the Secretary's decision was made so that the person detained could state his case. This is plainly stated in Regulation 17(9). When he stated that Mr. Cooray had conspired with certain persons to harm or assassinate the President, the Secretary was stating his inference

from certain facts: His duty was not merely to state his inference but also the grounds on which the inference was based.

In India, Article 22 (5) of the Constitution states: " When any person is detained in pursuance of an order made under any law for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order." There is no corresponding provision in the Constitution of Sri Lanka. The procedure for objection in Sri Lanka is set out in Regulation 17 (5) – (11). With regard to Article 22 (5), in *Shalini Soni and Others v. The Union of India and Others*, (*Supra*) the Supreme Court of India stated as follows:

"The Article has two facets: (1) the communication of the grounds on which the order of detention has been made: (2) opportunity of making a representation against the order of detention. Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say pertinent and proximate matters in regard to each individual case and excludes the element of arbitrariness and automatism (if one may be permitted to use the word to describe a mechanical reaction without a conscious application of the mind). It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went to make up the mind of the statutory functionary and not merely the inferential conclusion ... The matter may also be looked at from the point of view of the second facet of Article 22 (5). **An opportunity to make a representation**

against the order of detention necessarily implies that the detenu is informed of all that has been taken into account against him in arriving at the decision to detain him. It means that the detenu is to be informed not merely, as we said, of the inferences of fact but of all the factual material which have led to the inferences of fact. If the detenu is not to be so informed the opportunity so solemnly guaranteed by the Constitution becomes reduced to an exercise in futility. Whatever angle from which the question is looked at, it is clear that "grounds" in Article 22 (5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. In our view copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds".

The Court referred to the decision of the Supreme Court of India in *ICCU Devi Choria v. Union of India* [37], where it was stated that "If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds cannot be said to be complete without them..." (per Bhagwati, J. for the Court). In that case, it was held that if the requirement to give grounds of detention and furnish the materials relied upon had not been complied with, the continued detention of the detenu would be "illegal and void".

The Secretary has not stated the grounds of detention. He has merely stated an inference which he states was based on the report of the Deputy-Inspector General of Police. In the circumstances, it was imperative that that report should have been made available to Mr. Cooray. If the report contained material that was not in the public interest to disclose, the Secretary was at liberty not to give that report, provided that he did not state, as he did, that that report was the sole basis for his inference. What he was obliged to do was to state the grounds: he did not do that, but referred to the report as his grounds. The failure to comply with the requirements of Regulation 17 with regard to the matter of informing Mr. Cooray of the grounds of detention makes his continued detention illegal and void and violates Article 13 (1) of the Constitution.

Admittedly, the exercise and operation of the fundamental rights declared and recognized by Article 13 (1) of the Constitution, including the right to be informed of the reason for arrest, are "subject to such restrictions as may be prescribed by law in the interests of national security, public order" and certain other matters specified in Article 15 (7) of the Constitution. "Law", for this purpose includes regulations made under the law for the time being relating to public security and would, therefore, include the Emergency Regulations. Soza, J. in *Kumaranatunga v. Samarasinghe* (*Supra*) at p. 359 stated that the Emergency Regulations "overshadow the fundamental rights guaranteed by Articles 13 (1) and 13 (2) of the Constitution". If he meant that the Emergency Regulations towered above the Constitutional rights guaranteed by Articles 13 (1) and 13 (2) and cast those rights into the shade so as to obscure those rights with complete darkness, I would, respectfully, disagree with him. It comes as no surprise that the Emergency Regulations do no such thing. Why? Because it cannot do such a thing: An amendment or repeal of Constitutional provisions can only be effected in accordance with the provisions of Chapter XII of the Constitution. Emergency Regulations may, in terms of Article 155 (5), override, amend or suspend the operation of any law, **except the provisions of the Constitution.** On the other hand, if Soza, J. meant that the Emergency Regulations overspread the Constitutional rights with some influence by imposing certain **restrictions** on the operation and exercise of such rights, I would then, respectfully, agree with him. However, although such restrictions on fundamental rights may be imposed, they cannot be restricted to a point of denial: per Kulatunga, J. at p. 380 and p. 381; cf. per H. A. G. de Silva, J. (Fernando, J. agreeing) at p. 359 in *Wickremabandu* (*Supra*). Moreover, Emergency Regulations restricting the exercise and operation of fundamental rights may be made only for the reasons specified in Article 15 (7) of the Constitution and must be confined to those reasons in their construction and interpretation. "When provisions affecting the liberty of the subject are in question inroads into them must be strictly scrutinized and construed.": per Samarakoon, CJ in *Kumaranatunga v. Samarasinghe* (*Supra*). As an organ of government, the role of the judiciary is clear: Article 4 (d) of the Constitution states that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured

and advanced by all organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided." Any restriction of the exercise and operation of the fundamental rights declared and recognized by Article 13 (1) can only be made by "law": Article 15 (7). We are obliged to respect, secure and advance fundamental rights. We cannot impose restrictions on any fundamental right guaranteed by the Constitution: Such restrictions may only be prescribed by law – by an Act of Parliament or by regulations made under the law relating to public security. No such restriction has been imposed: *Channa Pieris v. Attorney-General, (Supra)* at p. 63.

In India, a distinction is drawn between ordinary arrests and arrests relating to preventive detention. Article 22 of the Indian Constitution makes its guarantee of the right to be informed of the grounds of arrest as soon as may be, inapplicable to any person who is arrested or detained under any law providing for preventive detention. There is no such distinction recognized by our Constitution. And as far as I can see, there is no law (including Emergency Regulations) that restricts the exercise and operation of the right to be given the reason for arrest declared and recognized by Article 13 (1) of the Constitution: *Channa Pieris v. Attorney-General, (Supra)* at p. 63. And although the Emergency Regulations expressly make inapplicable certain provisions of the Code of Criminal Procedure, section 23 of that Code is not one of those provisions. Therefore, persons who are arrested – whether under the provisions of the ordinary law or under the Emergency Regulations – have a Constitutional right to be informed of the reason for the arrest (*Channa Pieris v. Attorney-General, (Supra)* at p. 63); and a statutory right at the time of arrest to be informed of the nature of the charge or allegation upon which he is arrested.

Mr. De Silva submitted that preventive detention related to cases in which no offence had yet been committed, and that, therefore, no reasons could be given in such cases and, therefore, the law was that in cases of preventive detention no reasons were required to be given. He referred to the judgment of Kulatunga, J. in *Wickramabandu v. Herath and Others (Supra)*. At page 381, Kulatunga, J. states as follows: "The right of a person arrested to be brought before the

judge of a competent court is much more associated with a person accused of an offence for it is by such Court that he will be eventually tried. Such Court would also have the power to enlarge him on bail. These considerations do not apply to a person in preventive detention and hence such person may not be brought before a judge of a competent court." With great respect, I am unable to agree. The constitutional right of a person to be brought before the judge of the nearest competent court according to procedure established by law has no necessary connection with the Court that will **eventually** try him. The Court that may eventually try him, will, in respect of serious offences, be the High Court. Nevertheless, in accordance with the procedure established by law, after his arrest, a person would have to be brought before a magistrate, regardless of the fact that, by reason of the nature of the offence, the person may have to stand his trial in the High Court. Nor is the question of bail relevant. For instance, in respect of the offence of waging war or abetting the waging of war against the Republic (section 114 Penal Code), or in respect of the offence of giving false evidence with intent to procure the conviction of a person of a capital offence (section 191 Penal Code), or in respect of the offence of murder (section 296 Penal Code), a magistrate (nor for that matter a judge of the High Court) cannot release a person on bail except with the sanction of the Attorney-General: Section 403 Code of Criminal Procedure. Nevertheless, in accordance with procedure established by law, after his arrest, a person would have to be brought before a magistrate, regardless of the fact that, by reason of the provisions of law, including I might say the Emergency Regulations, the magistrate has no power to release the person on bail.

I am unable to agree with the submission of learned counsel for the respondents that there is no requirement to give reasons for arrest to a person ordered to be detained under Regulation 17 (1) because it is not possible since he has not yet committed an offence. It would not be possible to charge a person with the commission of an offence if no offence had been committed, but it is both possible and necessary to inform him of the nature of the **allegation** against him (Section 23 Criminal Procedure Code), and the grounds on which the Secretary was satisfied that it was necessary to take that person into custody: See the observations of the Supreme Court of India,

with which I respectfully agree, in *Shalini Soni and Others v. Union of India and Others* cited earlier in my judgment. In this case, the Secretary states in his affidavit that he did convey to the Chairman of the Advisory Committee the "reasons" for the detention which he was expected to convey to Mr. Cooray in due course. That was not really so – but that is another matter. At least he stated his inference, which however Mr. Cooray did not know until, after he had read the allegation reported in the newspapers, he was able to drag it out of his interrogators. Mr. De Silva also overlooked the fact that regulation 24 (b) states that whoever, *inter alia*, "... conspires to murder ... the President ... shall be guilty of an offence notwithstanding anything in any other law, and shall upon conviction before the High Court be liable to be punished with death or rigorous imprisonment for a period not less than five years and not exceeding twenty years and shall forfeit all his property." And so there was an offence he was supposed to have committed and there ought to have been grounds for that conclusion.

Although the Secretary issued the detention order on the 16th of June 1997, because he says he was satisfied that Mr. Cooray was involved in a conspiracy to assassinate or harm Her Excellency the President, yet, as we have seen, it was only on the 24th of June that he was asked about the alleged conspiracy, and that too after Mr. Cooray had read about it in the newspapers and drawn the attention of the police officers interrogating him to the news items. Even assuming that the duty to give reasons does not include the duty to give reasons at the time of arrest, the reasons must be given at the first reasonable opportunity: *Mallawarachchi v. Seneviratne*[38]; *Elasinghe v. Wijewickrama and Others*[39]; *Chandra Kalyanie Perera v. Siriwardena*[40]; *Lalanie and Nirmala v. De Silva and Others*[41]. In my view, there was a failure in this case to give reasons at the first reasonable opportunity.

The Alleged Violation of Article 13 (2) of the Constitution.

The petitioner was granted leave to proceed for the alleged violation of Mr. Cooray's rights declared and recognized by Article 13 (2) of the Constitution.

Article 13 (2) states as follows: "Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of presonal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

This Court has over and over again referred to that as a "salutary provision to ensure the safety and protection of arrested persons": See the decisions cited in *Channa Pieris v. Attorney-General*, (*Supra*) at p. 75.

It was not in dispute that Mr. Cooray had not been brought before a judge after his arrest. Mr. De Silva submitted that Mr. Cooray had been detained on a Detention Order made by the Secretary under Regulation 17 (1) of the Emergency Regulations and that therefore there was no obligation to produce him before a judge. He cited the following observations of Kulatunga, J. in *Wickremabandu v. Cyril Herath* (*Supra*) in support of his submission: "If as I have shown, rights under Article 13 (1) and (2) may be restricted by regulation in the interest of national security or public order, the next question is whether the provisions of Regulation 17 (1), (2) and (3) which by necessary implication deny the right of the detenu to be brought before a judge of a competent court or the provisions of Regulations 17 (4) and (5) would result in a "denial" of his rights under Article 13 (1) and (2) which is not permitted by Article 15 (7)."

If, as Article 15 (7) no doubt permits, the exercise and operation of the rights under Article 13 (2) may be restricted by regulations made under the law relating to public security, "the next question", in my view, is whether there are such regulations restricting the rights declared and recognized by Article 13 (2) of a person arrested on an Order of Detention issued by the Secretary by virtue his powers under Regulation 17 (1). There were no such restrictions imposed by the Regulations of 1989 which were applicable to the decision in *Wickremabandu* (1990); nor are any such restrictions to be found in the Emergency Regulations made on 04 November 1994 under which the Order of Detention was issued in the matter before us.

(There are some differences between the provisions of Regulation 17 of 1989 and 1994; but for the purposes of considering the dictum of Kulatunga, J. it is not necessary to go into those matters in detail).

Learned counsel for the respondents, citing the judgment of Kulatunga, J. in *Wickremabandu v. Herath and Others* (*Supra*), submitted that the right of Mr. Cooray to be produced before a judge in terms of Article 13 (2) of the Constitution had been taken away. Kulatunga, J. said nothing to support such a proposition. What he did say. (see pages 379-380) was that the regulations applicable at the relevant time had not taken away the right of a person detained under regulation 18 of the Emergency Regulations to be brought before a judge.

This is also the position today under the Regulations applicable to the case before us.

Kulatunga, J. however, did say (see page 379) that in terms of the decision in *Edirisuriya v. Navaratnam*[42], "the right of an arrested person could be taken away". Kulatunga, J. himself, however, seemed to be of the view, (see pages 380 and 381) and with that view, I respectfully, agree, that although **restrictions** could be imposed by regulations, there could be no denial by such regulations. However, *Edirisuriya v. Navaratnam* did not state that "the right of an arrested person could be taken away". Kulatunga, J. quotes the following words of Wanasundera, J. in that case immediately before his interpretation of the decision in that case:

"If it is intended to restrict the requirement of 13 (2) – which undoubtedly can be done by a suitable wording of the regulation so as to have a direct impact on Article 13 (2) itself, when national security or public order demands it – this must be specifically done. Article 13 (2) cannot be restricted without a specific reference to it. But this has not been done. Instead, we have a restriction imposed on the operation of sections 36-38 of the Code. In the result, the constitutional requirement that a detained person "shall be brought before the judge of the nearest competent court" remains unaffected. Though it will continue to exist in a truncated form still being a constitutional requirement: it must be complied with in a reasonable way within a reasonable time."

Regulation 19 (1) states that the operation of sections 36, 37 and 38 of the Code of Criminal Procedure Act shall not apply to and in relation to any person arrested under Regulation 18. This does not mean that the procedures set out in sections 36, 37 and 38 of the Code have been repealed with regard to arrests made under Regulation 18. Even with regard to arrests made under that regulation, the provisions of sections 36-38 of the Code "must be complied with in a reasonable way within a reasonable time": *Edirisuriya v. Navaratnam* (*Supra*). What is a "reasonable way" and a "reasonable time" is a matter for the Court to decide in the circumstances of a particular case. Moreover, where, in the opinion of the Court, a **purported** arrest under Regulation 18 cannot in law have been made under that Regulation, sections 36, 37 and 38 of the Code would be applicable.

In *Channa Pieris v. Attorney-General,* (*Supra*) at p. 102-104 the Court found that the petitioners could not have been arrested under Regulations 17 or 18, because there were no reasonable grounds, and that therefore the provisions of the Code of Criminal Procedure were applicable. In the circumstances, the failure to produce the petitioners before a judge within a reasonable time and not later than twenty-four hours was in violation of the procedure established by the Code, and consequently, a violation of Article 13 (2) of the Constitution. The Court said (at pp. 103-104): "Even if a person has been incarcerated following a procedure established by law, that does not completely terminate his or her right to liberty. That is a very basic and fundamental principle enshrined in the Constitution and supported by reason and abundant precedent. In the matters before us, the petitioners were not arrested under a procedure established by law; they were arrested on grounds of vague suspicion, in circumstances that showed a reckless disregard for their right to personal liberty, so that their right to be brought before a judge was particularly urgent. In failing to comply with the salutary provision relating to the production of the petitioners before a judge of the nearest competent court in this way, the respondents transgressed the rights conferred on them by Article 13 (2) of the Constitution."

In *Kumara v. Rohan Fernando and Others*[43], the respondents stated that the petitioner had been arrested under Regulation 18 (1)

for violating regulations 45 and 46. Regulation 45 created no offence. Regulation 46 created an offence, but in terms of the respondents' affidavits, the arrests had nothing to do with that offence. The Court held that in the circumstances the arrests were not made in accordance with the procedure prescribed by Regulation 18 (1). Perera, J. said: "The suspension of the operation of the provisions of the Code of Criminal Procedure is conditional upon the person being arrested under Regulation 18. Where a person is not arrested and kept arrested in pursuance of Regulation 18, Regulation 19 has no applicability. In such a case, the procedure established by law for the purposes of Article 13 (2) of the Constitution is the procedure prescribed by section 37 of the Code of Criminal Procedure." Accordingly, it was held that the failure to produce the petitioner before a magistrate within a reasonable time but not exceeding twenty-four hours, was a violation of Article 13 (2) of the Constitution.

In *Ansalin Fernando v. Sarath Perera and Others*[44], where a person was purported to have been arrested under Regulation 18 (1) although the ground for arrest was murder. Kulatunga, J. said that murder "as such" was not an offence under the Emergency Regulations and that therefore "it was an offence in respect of which an arrest can only be made under section 23 of the Code of Criminal Procedure in which event the suspect has to be produced before a Magistrate in terms of section 36 and within section 37 of the Code."

The question remains whether the rights declared and recognized by Article 13 (2) were, as suggested by Kulatunga, J. in *Wickramabandu* (*Supra*) at p.380 (see also *Weerakoon v. Mahendra*[45]; *Fernando v. Kapilaratne*[46], taken away by "necessary implication" by the provisions of Regulation 17 (1), (3) – earlier (2) – and (4) – earlier (3). Regulation 17 (1) empowers the Secretary, if he is satisfied – earlier "if he was of opinion" (I have already adverted to this matter) – that in order to prevent a person from acting in one or more of the ways specified it is necessary to do so, to order the detention of that person. Regulation 17 (3) authorizes any police officer or member of the armed forces to carry into effect an order made under Regulation 17 (1). Regulation 17 (4) provides that any person so detained shall be deemed to be in lawful custody and shall be detained at a place authorized by the Secretary (earlier, the Inspector-General of Police).

With great respect, why, as a matter of 'necessary implication', do those regulations take away the right of a person arrested to be produced before a judge? In my view, the supposed restriction is neither involved in what is expressed in the sub-paragraphs of regulation 17 of the 1989 regulations referred to by Kulatunga, J., nor in the corresponding sub-paragraphs of the Regulations applicable to the matter before us.

If restrictions are to be made on fundamental rights, they can only rest on the authority of a law plainly expressed by Parliament, or in regulations made under the law for the time being relating to public security. Such rights cannot be swept away by "implication" ... Why? Because the Constitution state in Article 15 (7) that restrictions on the exercise and operation of fundamental rights declared and recognized by Article 13 (1) and 13 (2) may only be those **prescribed by law**. "Constitutional guarantees cannot be removed or modified except in accordance with the Constitution. That, I believe, is a proposition that commends itself to general acceptance. I believe it is still a well-established and universally conceded principle. One might say that it is axiomatic": *Channa Pieris*, (*Supra*) at p. 81. As judges, we have our duties cut out for us: As an organ of government, the Constitutional duty imposed on the judiciary by Article 4 (d) of the Constitution is to respect, secure and **advance** fundamental rights. In *Wickramabandu*, (*Supra*) at pp. 379-380, Kulatunga, J. states: "The restriction of the requirement to produce the detenu before a Magistrate is presumably in consequence of policy and not on account of any absolute right to production." The right, as a matter of policy, may be restricted, but it has not been done. As Wanasundera, J. observed in *Edirisuriya v. Navaratnam*, (*Supra*): "If it is intended to restrict the requirement of 13 (2) ... this must be specifically done. Article 13 (2) cannot be restricted without a specific reference to it. But this has not been done ... In the result, the Constitutional requirement that a detained person shall be brought before the judge of the nearest competent court remains unaffected ...". The Constitutional right to be produced remains "untouched", as G. P. S. de Silva, J. (as he then was) observed in *Joseph Silva and Others v. Balasuriya and Others*[47]. What has been done is to suspend the operation of sections 36, 37 and 38 in respect of persons arrested under Regulation 18. Therefore, although a person must be brought

before a Judge, he may be brought within a reasonable time, although that may be in excess of the twenty-four hour limit prescribed by section 37 of the Code of Criminal Procedure. If such rights are to be **restricted,** that, in the homely words of a plain man, is not our business, for policy is not within our purview.

Whereas the 1989 regulations empowered the Secretary to order the taking into custody and the detention of a person, the current (1994) regulations go on to qualify that power by stating that the Secretary may make order that the person be taken into custody and detained "for a period not exceeding three months and any such order may be extended from time to time for a period not exceeding three months at a time. Provided however that no person shall be so detained upon an order under this regulation for a period exceeding one year. The period of detention of such person may be extended if such person is produced before a magistrate prior to the expiration of his period of detention, accompanied by a report from the Secretary setting out the facts upon which the person is detained and the reasons which necessitate the extension of such period of detention. Where the magistrate is satisfied that there are reasonable grounds for extending the period of detention of such person he may make order that such person be detained for a further period of time as specified in such order, which period should not exceed three months and may be extended by the magistrate from time to time." The following new subsection (2) was added in the 1994 Regulations (resulting in the renumbering of the subsections referred to above): "Where a person is produced before a magistrate in compliance with the provisions of paragraph (1) the magistrate shall examine the material placed by the Secretary in his report. The report shall be *prima facie* evidence of its contents. The Secretary shall not be required to be present or called upon to testify before the Magistrate."

Mr. De Silva submitted that the "procedure established by law" in the case of a person arrested and detained on an order made by the Secretary under Regulation 17 (1) was the procedure prescribed in Regulations (1) and (2). Consequently, such a person need not be brought before a magistrate unless and until it became necessary to extend the period of detention beyond one year.

I am unable to accept that submission: the provisions introduced in 1994 were, in my view, intended to impose certain restrictions on the exercise of the power of arrest and detention conferred by regulation 17 (1) on the Secretary: the Secretary, in the first place, was empowered to make an order which had to specify the period of detention. (As we have seen, the Secretary failed to do so, but when he realized that he had issued a defective order, he issued an amending order.) The Secretary is permitted to extend the orders from time to time for a period not exceeding three months at a time. That provision has the effect of compelling the Secretary to keep the matter of a detention under review so that if at any time he was satisfied that the detention was no longer warranted, he could order the release of the person imprisoned. (In this case the Secretary on the 3rd of July 1997 wrote to the Director of the National Intelligence Bureau as follows with regard to the orders he had issued in respect of Mr. Cooray and three other persons: "The Detention Orders have been issued for a period of three months. But the question of continued detention has to be kept under constant review. I would therefore like to have a fortnightly report on the progress of investigations into all these four Detention Orders, the first such report to be received preferably by Thursday 10th July 1997. Please make a note to send regular reports on the above basis thereafter.") The new provisions limit to one year the period of detention which the Secretary could eventually order. If in his opinion further detention is required, that must be upon the order of a magistrate to whom the Secretary must submit a report and before whom he must produce the person detained. The procedure established by those provisions relate to the question of **the extension of a person's period of detention beyond a year** and not with the procedure established by law for producing a person before a judge in accordance with the requirements of Article 13 (2) of the Constitution.

The purposes contemplated by Article 13 (2) are altogether different. The scheme of the ordinary criminal law (e.g. see sections 32, 33, 35, 36, 37, 54, 58, 116 Code of Criminal Procedure) is that any person who is arrested should be brought before a neutral person – a judge – without unnecessary delay, so that such a person may apply his 'judicial mind' to the information placed before him and

make an impartial determination of what course of action is appropriate in the light of the law applicable to the case: *Channa Pieris v. Attorney-General*, (*Supra*) at pp. 75-76 citing Sharvananda, **Fundamental Rights** at p. 142; *Gerstein v. Pugh*[48]; the decisions of the European Court on Human Rights reported in Vincent Berger's **Case Law of the European Court of Human Rights** in the **Schlesser** case, ECHR Decision on 04.12.79, the **Skoogstrom** case, ECHR Decision on 02.10.84 the **McGoff** case, ECHR Decision on 26.10.84; and per Goonewardene, J. in *Mohammed Faiz v. Attorney-General*[49]. The right to be brought before a judge recognized by the Code of Criminal Procedure was elevated to the status of a fundamental right. It happened in this way: The makers of the Indian Constitution were under pressure from certain groups to provide for "due process" in order to secure the personal liberty of citizens. When the Indian Constitutional Adviser, Sir B. N. Rau consulted Justice Frankfurter of the United States Supreme Court on the matter, he was advised to use the phrase "procedure established by law", because the phrase "due process" was imprecise, although in the context of the USA, by judicial interpretation over a century, the principles had become well established. The proposal of the Indian Drafting Committee to follow this advice was not enthusiastically received. As a compromise, it was decided, in the words of Dr. Ambedkar in his speech to the Constituent Assembly on September 15, 1949, to provide for "the substance of due process". This was done, as Dr. Ambedkar explained by "lift(ing) from the provisions of the Criminal Procedure Code two of the most fundamental principles which every civilized country follows as principles of international justice." The two principles were the right to be informed of the reasons for arrest and the right to be produced before a judge in accordance with procedure established by law. Dr. Ambedkar said: "It is quite true that these two provisions ... are already to be found in the Criminal Procedure Code and therefore probably it might be said that we are really not making any fundamental change. But we are, as I contend, making a fundamental change because what we are doing by the introduction of Article 15 A is to put a limitation upon the authority both of Parliament as well as of the Provincial Legislature not to abrogate these provisions because they are now introduced in our Constitution itself. It is quite true that the enthusiasts for personal

liberty are probably not content with the provisions of clause (1) and (2). They probably want something more by way of further safeguards against the inroads of the executive and the legislature upon the personal liberty of the citizen. I personally think that while I sympathize with them that probably this Article might have been expanded to include some further safeguards, I am quite satisfied that the provisions contained in Article 15 A are sufficient against illegal or arbitrary arrests." Article 13(1) and 13(2) broadly followed the Indian model. The right to be produced before a judge, as Wanasundera, J. observed in *Edirisuriya v. Navaratnam*, (*Supra*), "is more than a mere formality or an empty ritual, but is recognized by all communities committed to the Rule of Law as an essential component of human rights and fundamental freedoms", and it "behoves us therefore to see that provisions such as this, safeguarding human rights and freedoms, are exactly complied with." In *Nallanayagam v. Gunatilake*[50], Colin Thome, J. said: "Article 13 (2) embodies a salutary principle safeguarding the life and liberty of the subject and must be exactly complied with by the executive. In our view this provision cannot be overlooked or dismissed as of little consequence or as a minor matter." In *Brogan v. The United Kingdom* (*Supra*), in considering Article 5 (3) of the European Convention – which deals with the right to be promptly produced before a judge – in the context of terrorist cases, stated that the Article "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty." The Court said that "Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 (3) which is intended to minimize the risk of arbitrariness." It stated that "Judicial control is implied by the rule of law, one of the fundamental principles of a democratic society."

Neither the right to appeal to the Advisory Committee given by regulation 17, nor the fact that in terms of regulation 18 (6) there is a duty on the officer-in-charge of places of detention to ensure that every person detained therein, otherwise than by an order of a Magistrate, to produce such persons before a magistrate is what is contemplated by Article 13 (2) of the Constitution.

A right granted by the Constitution can only be removed by the Constitution and not by any other law. And so, in India, Clause 3 (b) of Article 22 of the Constitution provides that the Constitutional right to be produced before a judge is not available to a person who is arrested or detained under any law providing for preventive detention. The makers of the Constitution of Sri Lanka, however, did not write such an exception into its Constitution. That is essentially a matter of policy. There is nothing intrinsically special about preventive detention that makes it necessary to dispense with the requirement of production before a judge. Article 5.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge ...". Paragraph 1 (c) deals with (1) the case of persons lawfully arrested or detained "for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence"; and (2) a case in which a person has been arrested and detained **"when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."** The emphasis is mine.

Admittedly, Article 15 (7) permits the **restriction** of the operation and exercise of the rights guaranteed by Article 13 (2), in certain specified circumstances, by law, including Emergency Regulations. Regulation 19 (1) states: "The provisions of sections 36, 37 and 38 of the Code of Criminal Procedure Act No. 15 of 1979 shall not apply to, and in relation to, any person arrested under **Regulation 18.**" Mr. Cooray was ordered to be arrested and detained under **Regulation 17**. Sections 36 and 37 of the Code of Criminal Procedure therefore remain applicable to him. Those sections prescribe the procedure established by law that the officer carrying out the Secretary's order should have followed. Section 36 states: "A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case." Section 37 states: "Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the

case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate." Mr. Cooray has been in detention from the 16th of June 1997 without being brought before a magistrate. This is in violation of his fundamental right to be produced before a judge of the nearest competent court guaranteed by Article 13 (2) of Constitution.

For the reasons set out in my judgment, I declare that Mr. Bulathsinghalage Sirisena Cooray's fundamental rights guaranteed by Article 13 (1) and 13 (2) of the Constitution have been violated and that his arrest and detention is unlawful and illegal.

I direct the first respondent, the Secretary, Ministry of Defence, to forthwith order the release of the said Mr. Bulathsinghelage Sirisena Cooray from custody and detention.

The State shall pay the said Mr. Bulathsinhalage Sirisena Cooray a sum of Rs. 200,000/- as compensation and costs.

WIJETUNGA, J. – I agree.

GUNAWARDENA, J. – I agree.

Relief granted.