GAMAETHIGE
v.
SIRIWARDENA AND OTHERS

SUPREME COURT.
SENEVIRATNE, J., JAMEEL, J. AND FERNANDO, J.
S.C. APPLICATION No. 73/87.
MARCH 24, 1988.

Fundamental Rights – Removal of petitioner's name from waiting list for Government Quarters upon vacation of post – Article 12(1) of the Constitution – Discrimination.

Computation of time – Reckoning of time limit for filing application for relief under Article 126(1) of Constitution.

The petitioner was the General Secretary of the Sri Lanka Government Clerical Union and was released for full time trade union work. In view of petitioner's participation in a strike from 17.07.80 to 12.08.80, he was treated as having vacated his employment but later on appeal he was reinstated by letter dated 01.11.85. Earlier in 1973 the petitioner's name had been registered in the waiting list for Government Quarters. In June 1984 prior to the petitioner's reinstatement in service, the petitioner's eligibility for quarters was re-examined, and upon it being reported that he was not in service, his name was deleted from the waiting list for Government Quarters.

Soon after his reinstatement, the petitioner discovered that his name had been deleted from the waiting list and by letter dated 28.11.1985 requested the Director of Establishments to allocate quarters to him as any quarters became vacant as persons below in the waiting list had been allocated quarters. This letter was treated as a request for restoration to the waiting list. The Director of Establishments by letter dated 08.01.86 *refused the request. Thereupon the petitioner appealed by letter dated* 24.01.86 to the Secretary, Ministry of Public Administration through the Secretary, Ministry of Power & Energy but was informed that the decision of 08.01.86 could not be varied. A further appeal dated 08.01.87 evoked a similar reply dated 06.03.87. Yet another appeal dated 24.03.87 was rejected by letter dated 27.05.87. He filed the present application on 23.06.87. He alleged discrimination in that preferential treatment had been accorded to J. D. Silva, 9th respondent and four officers not on the waiting list and another employed on contract after retirement who had been given quarters though their names were not on the waiting list.

Held–

(1) The circumstances relating to J. D. Silva was different although the petitioner and he may have been in the same class or category and there was no invidious discrimination or unequal treatment of equals or equal treatment of unequals.

The other instances cited were of officers in a different and more responsible category. Hence petitioner's fundamental rights under Article 12(1) of the Constitution had not been violated.

(2) (Seneviratne, J., dissenting)
The petitioner's application to court is time-barred in terms of Article 126(2) of the Constitution on the application of the principle that the pursuit of other remedies judicial or administrative does not prevent or interrupt the operation of the time limit. The alleged infringement took place on 08.01.1986.

Per Fernando, J. "Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (*e.g.* of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."

Cases referred to:

(1) *Elmore Perera v. Jayawickrema (1985) 1 Sri L.R. 285, 295-297, 298, 299, 300, 321.*

(2) *Siriwardene v. Rodrigo (1986) 1 Sri L.R. 384, 387.*

(3) *Hewakuruppu v. de Silva S.C. application No. 118/84 S.C. Minutes 30.11.84.*

(4) *Mahenthiran v. Attorney-General S.C. Application No. 68/1980 S.C. Minutes of 14.08.1980.*

(5) *Jayawardena v. Attorney-General F.R.D. Vol. 1 p. 175.*

(6) *Gunawardena v. Senanayake F.R.D. Vol 1 p. 178.*

(7) *Hewakuruppu v. de Silva S.C. Application No. 169/84 S.C. Minutes 22.01.85.*

(8) *Edirisuriya v. Navaratnam (1985) 1 Sri L.R. 100, 105, 106*

(9) *Visuvalingam v. Liyanage (1983) 1 Sri L.R. 203.*

(10) *Jayasena v. Soysa F.R.D (Vol. 1) p. 97, 100.*

(11) *Velmurugu v. Attorney-General F.R.D. (Vol. 1) 180, 197.*

(12) *Mackie & Co. v. Molagoda (1986) 1 Sri L.R. 300, 309-313.*

APPLICATION under Article 126 of the Constitution.

D. W. Abeykoon with *K. S. Tilakaratne, K. Thiranagama* and *N. Punchihewa* for the petitioner.

P. Karunaratne, S.C. for 1st, 2nd, 3rd and 4th respondents.

May 19, 1988.

SENEVIRATNE, J.

I have read the judgment of my brother Fernando, J. He has come to two conclusions–

(1) that the petitioner has not satisfied Court that his fundamental rights under Article 12(1) of the Constitution have been violated,

(2) that the petitioner's application to this Court filed on 23.6.1987 is out of time, with reference to Article 126(2) of the Constitution.

The above conclusion (2) has been arrived at on the premises that the alleged infringement complained of has been on or about 8.1.1986.

I entirely agree with the finding in respect of No. (1) above, but I respectfully disagree with the finding on No. (2) above, that is, the determination of the period in terms of Article 126(2) of the Constitution considering 8.1.1986 as the relevant date. The facts pertaining to this application have been adequately set out in the judgment of Fernando, J.

The petitioner has been in the waiting list for allocation of general government quarters from 6.7.1973 in terms of Chapter XIX of the Establishment Code, Volume I (1985). The petitioner, who took part in the general strike from 17.7.1980 to 31.7.1980 referred to in this application was considered as having vacated the post by the operation of the relevant emergency regulations. The petitioner was only re-instated on 1.11.1985, and transferred to the Ministry of Power and Energy from the Ministry of Public Administration to which he was attached prior to the strike. Due to the vacation of the post the petitioner's name which was in the waiting list of officers for allocation of government quarters was deleted, and on re-instatement his name was included at a position in the list as at that time. After the resumption of office, the petitioner by letter dated 28.11.1985 addressed to the Director of Establishment the 3rd respondent requested that his name be restored to the original place in the waiting list (i.e. to the place in the list before he was deemed to have vacated the office and that quarters be allocated to him according to his original registration). The Director of Establishment by his letter dated 8.1.1986 informed him that

reasons that if his name is restored to the original place before the strike the entire list as it presently stood would be upset. Further, that such other officers will also apply for the restoration of their names to the original positions

My brother Fernando, J. has held that it was by letter dated 8.1.1986 that the alleged infringement of the fundamental rights on the case put forward by the petitioner occurred; as such determining the date in respect of Article 126(2) of the Constitution must be considered as 8.1.1986, and the one month must be determined as from this date. In coming to this conclusion my brother Fernando J. has stated that the subsequent administrative remedies that the petitioner sought, that is, by way of appeal cannot be taken into account as such appeals were after the determining date 8.1.1986. My brother Fernando J. has laid down a wider principle that a party even a public officer must come to Court within one month of the alleged infringement of the fundamental rights, and the delay caused by such party resorting to further administrative remedies cannot be taken into account in granting a discretionary extension of the time specified in Article 126(2) of the Constitution.

In this particular instance after the petitioner received the letter of 8.1.1986 from the Director of Establishment, the petitioner resorted to further administrative remedy by way of appeal to the Head of the Ministry, that is to the Secretary, Ministry of Public Administration. Such remedies by way of appeal are provided for in the Establishment Code, Chapter XXVIII. A Public Officer can resort to these remedies as of right. The Establishment Code, Chapter XXVIII, Section 5:1 is as follows:

> "Any officer may address an application or appeal to any duly constituted authority on any matter direcly affecting his personal interest. His superior officer is bound to forward every such application or appeal."

The last leg of this regulation is relevant in this instance because the petitioner had to communicate with the Director of Establishment, and later the Secretary, Ministry of Public Administration through the Secretary, Ministry of Power and Energy, and this channel of communication also has led to lapse of time. In considering the right of appeal in dealing with the public officer of this grade, the Court cannot

take into account that such an officer may even appeal to the Prime Minister or to His Excellency, and if so, that such time will also have to be taken into account. Firstly, no public officer can appeal to the Prime Minister as Prime Minister because no such appeal is provided for in the Code. An officer of this grade has no right at all to appeal to His Excellency. Such officer's right of appeal is to the Secretary of the Ministry and the Minister in charge of the Ministry. In any event, the Code provides for the procedure to be followed in the instance of a petition or appeal to the President—

Regulation 6:3.

"The President will entertain a petition only if relates to a subject on which he may properly be addressed under the Constitution. The petition addressed to the President on a matter falling within the function of a Minister will be referred to by him to the relevant Minister."

As the allocation of general quarters is a matter coming under the Ministry of Public Administration and dealt with by Secretary to the Ministry of Public Administration, this officer has a right to address an appeal to the Minister of Public Administration. The officer has not done so.

After the receipt of the letter of 8.1.1986(P) from the Director of Establishment, the petitioner addressed an appeal to the Ministry of Public Administration dated 24.1.1986(Q), in which he gave further grounds on which his application should be considered. The reply to this letter was a curt letter dated 2.4.1986 from an officer for the Secretary, Ministry of Public Administration stating that the decision by letter of 8.1.1986 cannot be changed. The petitioner then made a second appeal dated 8.1.1987 to the Secretary Ministry of public Administration giving another ground, that is, that a person whose name has been removed from the waiting list has been restored to the list and quarters allocated. (This is a reference to the allocation of quarters to the 9th respondent J. D. Silva. This allocation has been explained in the affidavit filed in this application by Edgar Fernando Director of Establishments and referred to in the judgment of my brother Fernando, J.) The reply to this appeal to the petitioner was also from the Senior Assistant Secretary for the Secretary by letter dated 6.3.1987 (T) informing him that the earlier decision by letter of 8.1.1986 cannot be changed. This is a curt reply and this officer has

not explained to the petitioner the circumstances under which the 9th respondent was allocated quarters. If the facts of the allocation of quarters to J. D. Silva was brought to the notice of the petitioner, he would have been undoubtedly satisfied and not made J. D. Silva a party to this application. the petitioner has then addressed a third appeal dated 24.3.1987 (U) to the Secretary Ministry of Public Administration, and he has on the top of the letter added those words and underlined–"to the personal attention of D. B. I. P. S. Siriwardene, Secretary, Ministry of Public Administration." In this appeal of 24.3.1987 he has given further grounds on which his application should be considered, and why the decision by letter of 8.1.1986 should also be reconsidered. The reply to this appeal was received by the petitioner by letter dated 27.5.1987 (V), by the Senior Assistant Secretary, Ministry of Power and Energy, who informed the petitioner that he has been requested to inform him that the decision conveyed by letter dated 8.1.1986 cannot be changed, in this letter (V) of 27.5.1987 it is not stated whether the Secretary, Ministry of Public Administration, Mr. Siriwardena himself has considered the appeal.

The petitioner has treated the letter dated 27.5.1987 (V), as the final reply to his application dated 26.11.1985 for allocation of quaters to him based on the original list, that is before he is alleged to have vacated post. The petitioner filed the present application in this Court on 23.6.1987, and the learned counsel for the petitioner submits that the time limit in respect of Article 126(2) should be determined with reference to the date 27.5.1987, the final refusal which he says has infringed the fundamental right of the petitioner in terms of Article 12(1) of the Constitution.

The petitioner in making this appeal to the Secretary, Ministry of Public Administration, who dealt with the allocation of quarters, has exercised a right granted to him by the Establishments Code, which has been issued under the authority of the Cabinet of Ministers exercising the powers conferred on it under Chapter XIX of the Constitution. I am of the opinion that as the petitioner has exercised a right, I should say, a fundamental right (in the administrative sense) of appeal available to him, the determination of the period for filing this application in terms of Article 126(2) of the Constitution should be considered as flowing from 27.5.1987 (V). On the facts of this application in my view 27.5.1987 should be considered the relevant

date on which there was the alleged violation of the fundamental rights of the petitioner set out in this petition. I am not considering 27.5.1987 as the date on the basis that a public officer before making this kind of application should exhaust all his administrative remedies as in the case of an application for a Writ.

As I am of the opinion that the determination of the time limit for filing this application in terms of Article 126(2) of the Constitution must be considered as from 27.5.1987, I hold that this application is within time. As I have agreed with my brother Fernando, J. in respect of the matter under head (1), the application is dismissed.

I do not order any costs as this petitioner has been out of employment from 17.7.1980 to 31.10.1985 for 63 1/2 months, without pay. He would not have drawn any pay during the period of strike, and in terms of Cabinet Circular dated 20.11.1980, by which Circular the petitioner was reinstated, paragraph 10(v) he would not have been paid up to the date he applied for reinstatement. The petitioner has suffered all this for exercising his legitimate trade union rights as an office-bearer of a trade union. The application is dismissed without costs.

JAMEEL, J: I agree with the judgment of my brother Fernando, J.

FERNANDO, J.

The Petitioner, a public officer, was in 1973 a clerk in the General Clerical Service. He applied to the Director of Establishments for General Service Quarters, and on 6.7.73 his name was registered in the waiting list for such quarters.

Chapter XIX of the Establishments Code classifies "Government Quarters" into two categories: "Scheduled Quarters", being quarters assigned to a particular post or grade within a department, and "General Service Quarters", being quarters which are not "Scheduled Quarters" (section 1). All quarters are graded according to floor area (section 2), and the eligibility of a public officer for quarters of a particular grade is related both to the category to which he belongs (i.e. staff, clerical or minor) and to his annual salary (section 3). The demand for quarters being far in excess of availability, detailed rules

have been formulated in regard to other criteria for eligibility, selection and allocation, and for the registration of applicants on separate "Waiting Lists" for each grade of quarters (section 4). Two provisions of section 4, which are relevant to certain submissions made to us, are as follows:

"4:3:9 If an officer refuses to accept quarters allotted to him, he will be placed at the bottom of the waiting list."

"4:4:1 The Allocating Authority may recommend deviations from the principles of selection outlined above for very special reasons with the prior approval of the Director of Establishments."

The Petitioner's application was for clerical grade quarters.

On being elected as the General Secretary of the Sri Lanka Government Clerical Union on 19.6.75, the Petitioner was released for full-time trade union work, and was attached to the Ministry of Public Administration, Local Government and Home Affairs from that date. Later, on being elected as the President of the Sri Lanka Independent Government Trade Union Federation, he was similarly released for full-time trade union work of that Union with effect from 19.11.78.

A general strike by public officers commenced on 17.7.80, and on 30.7.80 the 1st Respondent cancelled the Petitioner's full-time release for trade union work. The Petitioner by letter dated 31.7.80 informed the 1st Respondent that, as the Union of which he was a member had launched a general strike, he too should be treated as having been on strike from 17.7.80. On 12.8.80 that strike was called off. However the Petitioner (in common with other strikers) was unable to resume duties in the public service as he was treated as having vacated his employment.

In June 1984, prior to the Petitioner's reinstatement in service, the Petitioner's eligibility for quarters was re-examined, and upon it being reported that he was not in service, his name was deleted from the waiting list.

All the strikers who had previously been employed in the Ministry of Public Administration, and in Departments under that Ministry, were reinstated with effect from 1.7.85, with the exception of the

Petitioner and a few others. To the Petitioner's query, made by letter dated 17.7.85, as to why he had not ben reinstated, the 1st Respondent replied that the Petitioner had not been reinstated as he had failed to make an application for relief. Although the Petitioner states in his petitoin that he was thereafter reinstated *without any such application for relief*, it is clear from the Petitioner's reply dated 20.8.85 that he had made an application for relief addressed to the Secretary to the Cabinet (which the 1st Respondent admits); he also stated in that letter (although not in his petition) that he had made an application for relief to the 1st Respondent as well, a copy of which was not produced and which the 1st Respondent does not admit. The 1st Respondent's position was that, in terms of the Cabinet decision (a copy of which was produced) dealing with the manner in which officers who vacated their employment should be dealt with, "all matters in connection with the reinstatement of any person who vacated post is the function of the Cabinet Minister in whose Ministry he worked", and that the Secretary to the Cabinet was not the proper authority to whom an application for relief should have been made.

Since it was confirmed that the Petitioner had submitted an application for relief to the Secretary to the Cabinet, in terms of a general order made by the Minister of Public Administration, the Petitioner was reinstated by letter dated 1.11.85, and transferred to the Ministry of Power and Energy. That letter states that reinstatement is in terms of paragraph 7(ii) of the aforesaid Cabinet decision. That Cabinet decision drew a distinction between officers who had justifiable reasons for absence, (or who had been intimidated, or had attempted to attend work but were refused work) and officers who had been on strike. In regard to the first category, it was stipulated *inter alia* that they would be eligible:

> from the date of reinstatement (to) continue to enjoy all the rights and privileges that they were entitled to prior to the date of vacating post." (para 6(ii)).

No such provision was made in regard to the second category.

One of the complaints in the petition is that the 1st Respondent "deliberately and purposely delayed the carrying out of instructions issued by the Secretary to the Cabinet on 3.12.80 with regard to the reinstatement of strikers"; it is urged that, if not for such delay, the Petitioner would have been reinstated much earlier, certainly before

June 1984, and that his name would not have been deleted from the waiting list in June 1984. This allegation is unfounded. Firstly, it is clear from the Cabinet decision that reinstatement was a matter for the relevant Ministry; and the Petitioner ought therefore to have made an application for relief to the 1st Respondent as Secretary of that Ministry. The Petitioner's own averment in the petition is that he was reinstated *without any such application for relief*. In these circumstances, it is probable that an application had been made only to the Secretary to the Cabinet as claimed by the 1st Respondent. Secondly, even if an application for relief had been duly made, it is unlikely that he would have been reinstated prior to June 1984, for, as stated in his petition, all the strikers (apart from a few like the Petitioner who were not reinstated even then) had been called back only in July 1985.

Soon after his reinstatement, the Petitioner discovered that his name had been deleted from the waiting list, and by letter dated 28.11.85 requested the Director of Establishments to allocate quarters to him as soon as any quarters became vacant, as persons previously below him in the waiting list had been allocated quarters. Although this letter does not contain any apecific request that his name be restored to the waiting list, in the course of the argument Counsel on both sides dealt with it as if it were a request for restoration to the waiting list.

The Director of Establishments, by letter dated 8.1.86, refused this request, stating that when the Petitioner's turn came he was found to be ineligible as he was not in the public service, and that officers whose names were registered later in the waiting list were considered. It was further stated that application for quarters made by persons who were not eligible could not be considered, as that would amount to disregarding the existing waiting list, and as applications from a large number of others who had ceased to be eligible would also have to be considered; this would be contrary to the definite principle being followed in the Ministry, and accordingly the Petitioner's request could not be granted.

Thereupon the Petitioner appealed by letter dated 24.1.86 to the 1st Respondent, through the Secretary, Ministry of Power & Energy; to this a reply was sent by the Secretary, Ministry of Power & Energy, to the effect that the Director of Establishments had informed him that

the decision conveyed by the aforesaid letter dated 8.1.86 could not be varied. A further appeal dated 8.1.87 evoked a similar reply dated 6.3.87 that the appeal had been sympathetically considered, but that the original decision could not be varied. Yet another appeal dated 24.3.87, was similarly dealt with by letter dated 27.5.87.

On 23.6.87, the Petitioner filed this application alleging infringement of his fundamental rights by reason of discriminatory treatment. The Petitioner's specific complaint, and his only complaint, was that he had been subjected to discriminatory treatment by reason of a gross violation of section 4:2:2 of the Establishments Code, Which provides that–

> "Government Quarters Grades 5A, 5, 4, 3 and 2 situated in Colombo and controlled by the Secretary to the Ministry of Public Administration will be allocated according to the order in the waiting list maintained in respect of each grade of quarters."

He also specified certain instances in which preferential treatment was allegedly given to other officers, in support of his plea that he had been discriminatorily treated:

(*a*) The name of J. D. Silva (the 9th Respondent) had been deleted from the waiting list without quarters having been allocated to him, and had subsequently been restored upon an appeal being made by him;

(*b*) Four officers were named as having been allocated quarters although their names were not registered on a waiting list and/or they were not entitled to such quarters under Chapter XIX of the Code;

(*c*) Quarters were alleged to have been allocated to one named officer serving on contract basis after retirement;

(*d*) General Service Quarters in Colombo were alleged to have been allocated to two officers, outside the waiting list, for use as a chummery, without their families, although such quarters should be allocated only to married officers with children.

Counsel for the Petitoner, in the course of his submissions, contended that the Petitioner's complaint was of violations of Articles 12(1), 12(2) and 14(1)(*d*). When asked to particularise the Petitioner's allegations in regard to Articles 12(2) and 14(1)(*d*), his reply was that the discrimination under Article 12(2) was on the ground of political opinion, and that the non-restoration of his name to

the waiting list was on account of trade union activities, in violation of Article 14(1)(*d*). No allegation had been made in his petition or affidavit in regard to the Petitioner's political opinion, discrimination based thereon, or adverse action based on his trade union activities. Although there is a passing reference in his written submissions to Articles 12(2) and 14(1)(*d*), there is not even an averment, let alone evidence, in regard to any facts tending to support these allegations. The Petitioner is not entitled to rely on any such allegations; even if such matters had been duly pleaded, the Petitioner has not discharged the burden which lies upon him to satisfy this Court of the truth of his allegations. The allegations based on Articles 12(2) and 14(1)(*d*) have necessarily to be rejected.

At the commencement of the hearing, learned State Counsel raised two preliminary objections:

(*a*) The Petitioner had failed to file written submissions as required by Rule 65(1)(*f*);

(*b*) The petition should be rejected for non-compliance with Article 126(2) in that it had been filed more than one month after the infringement complained of.

THE PRELIMINARY OBJECTIONS:

Although copies of the written submissions had not been served on the Respondents and were not in the record, Junior Counsel for the Petitioner stated from the Bar that written submissions had been filed with the petition, and tendered copies, thereof. Learned State Counsel accepted this statement, and withdrew this objection.

After hearing Counsel on both sides, it became apparent that the question of compliance with Article 126(2) depended on whether the infringement complained of occurred on or about 8.1.86, upon the refusal to restore the name of the Petitioner to the waiting list, in which event the petition had not been filed within one month, or on or about 27.5.87, upon the Petitioner's final appeal being refused, in which event the petition had been filed in time. We therefore decided to hear Counsel in regard to the application itself in order to determine when the alleged infringement had occurred.

The principal complaint of the Petitioner is that his name had not been restored to the waiting list upon, or soon after, his reinstatement in service, with the consequence that he was not immediately allocated quarters. If such non-restoration was not in violation of fundamental right, the Petitioner cannot seek relief in proceedings under Article 126, however wrongful it may have been (*Elmore Perera v. Jayawickreme*). (1). If such non-restoration *was* in violation of a fundamental right; and it is on this assumption that we have to decide the preliminary objection, the Petitioner was entitled to apply under Article 126(2) within one month of the receipt of letter dated 8.1.86. It is clear, therefore, that the Petitioner's case must be that there had been a violation of his fundamental right on or about 8.1.86.

It was the Petitioner's contention, however, that although he might have been entitled to apply to this Court in January or February 1986, it was the refusal of his final appeal that constituted the operative infringement for the purpose of computing the time-limit of one month. This contention is untenable. If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point of time, the filing of an appeal or an application for relief, whether administrative or judicial, does not in any way prevent or interrupt the operation of the time-limit. Thus a person aggrieved by an unlawful arrest may institute civil proceedings for damages for wrongful arrest or may complain to the Ombudsman, under Article 156. If he is unsuccessful, in that his action or complaint is dismissed, he cannot claim that the computation of time for the purposes of a subsequent petiton under Article 126(2) commences from the date of such dismissal. That example relates to a judicial or constitutional remedy: the position of an aggrieved person can hardly be better if he opted to pursue an administrative remedy. The Constitution provides for a sure and expeditious remedy, in the highest Court, to be granted according to law, and not subject to the uncertain discretion of the very Executive of whose act the aggrieved person complains; if he decides to pursue other remedies, particularly administrative remedies, the lapse of time will (save in very exceptional circumstances) result in the former remedy becoming unavailable to him.

In *Siriwardene v. Rodrigo,* (2) the petitioners had ben granted leases under the Land Reform Law which were cancelled in 1979; they did not vacate these allotments, and by notice dated 23.8.82 it was

announced that these allotments would be distributed to persons who had the qualifications therein specified. Several of the petitioners filed applications in the Court of Appeal in September 1982 for writs to quash that notice and to prohibit action being taken in terms thereof; it was alleged that the action proposed to be taken in terms of that notice was in breach of the petitioner's fundamental rights. Those applications were later withdrawn, and applications were made under Article 126. It was held that the period of one month should be calculated from the date the petitioners became aware of the notice dated 23.8.82; thus the period when the matter was pending in the Court of Appeal was not treated as a suspension of, or interruption to, the operation of the time limit.

It appears that had the petitioners pursued the applications made to the Court of Appeal, a reference to this Court would have been required under Article 126(3); but the interesting question whether a petitioner who has delayed for over one month may nevertheless apply by way of writ to the Court of Appeal, and bring his grievance before this Court by means of a reference under Article 126(3) does not have to be decided in this case.

Apart from that possibility, any other interpretation of Article 126(2) would preclude expeditious disposal which is its undoubted object. An aggrieved person who chooses not to pursue his constitutional remedy, and later finds that other remedies are of no avail, can grant himself an extension of time, by the simple devise of filing yet an appeal; if he had previously appealed only to the Secretary to the Ministry, he will appeal to the Minister; or from the Minister, to the Prime Minister; and then to the President; or he will make a second or a third appeal, before ultimately deciding to petition this Court. Article 126 neither permits, nor was intended to permit, such a course of action: on the contrary, the remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed time, and if not so availed of, the remedy ceases to be available.

In *Hewakuruppu v. de Silva* (3) the Tea Commissioner had refused the petitioner's application for a subsidy on 18.10.83; he did not apply to this Court under Article 126(2) within one month, and on 13.7.84 appealed to the Tea Board. In that appeal reference was made to instances where other persons, similarly situated, had allegedly been granted subsidies: thus the petitioner had knowledge,

before 13.7.84, of the acts by comparison to which he had been subjected to unequal treatment. The decision of the Tea Board refusing relief was received by the petitioner on 4.9.84, and application to this Court was made on 4.10.84. It was urged in that case that the petitioner was entitled to exhaust administrative remedies before invoking the jurisdiction of this Court, and that Article 126 should be liberally interpreted. Although a strong case was established of unequal treatment, the Court nevertheless did not grant any relief as the petition was not filed in time. It was pointed out that the law did not provide for an appeal to the Tea Board, and that it was the decision of the Tea Commissioner which constituted the operative refusal of the petitioner's application for a subsidy. It was further observed that in any event the delay of nine months in placing the matter before the Tea Board could not be condoned.

In the case before us, the operative decision was the refusal of the petitioner's request by letter dated 8.1.86; the law makes no provision for an appeal therefrom, and the petition, not having been filed within one month thereof, is out of time. The petitioner has neither a right nor a duty to exhaust administrative remedies, but must come to this court promptly. Even if this Court has a discretion to grant relief, a delay of several months cannot be condoned.

The provisions of Chapter XXVIII section 5:1 of the Establishments Code, which were not referred to or relied on by Counsel at the argument before us, have pertinently been referred to by my brother Seneviratne, J., in his judgment; he regards these provisions as affording the petitioner a right of appeal against the the decision of the Director of Establishments contained in letter dated 8.1.86. Even assuming that the petitioner's subsequent letter dated 24.1.86 was written in the exercise of this right of appeal, that appeal was refused by letter dated 2.4.86 sent in reply thereto; and even in relation to that date, the petitioner is out of time.

However, the effect of the conferment on this Court of sole and exclusive jurisdiction to hear and determine questions relating to the infringement of fundamental rights by executive or administrative action is two-fold; firstly, this Court cannot give relief under Article 126 in respect of an executive act though clearly or flagrantly wrongful unless it is also an infringement of a fundamental right, and secondly,

no other court or tribunal can hear or determine any question relating to the infringement of a fundamental right by executive or administrative action, although it may give relief against other wrongful acts.

It is therefore necessary to analyse the nature of a petitioner's grievance. He may be aggrived by a decision adverse to him because it is discriminatory within the meaning of Article 12(1), or because, without being discriminatory, it is wrongful in terms of the applicable law or regulations. In the former case his only remedy is under Article 126(1); no other court or tribunal has jurisdiction. In the latter case, Article 126(1) is inapplicable. Further, if in the former case he opted to pursue some administrative remedy before some other tribunal, and if that tribunal did not grant him relief, the discrimination which he has been subjected to is the original discriminatory decision, and is not the decision of the appellate tribunal. If, therefore, the petitioner in this case had in fact been subjected to discriminatory treatment by the refusal of the Director of Establishments to restore his name to the waiting list, no appellate tribunal or authority had jurisdiction to hear or determine that question; his only remedy was by petition under Article 126. The decision of the appellate tribunal is not the source of discrimination: indeed, it would be proper for such a tribunal to decline jurisdiction on the ground that Article 126 confers exclusive jurisdiction on this Court. This the right of appeal, if any, which the petitioner had under the Establishments Code was only in respect of other wrongful acts; time spent in seeking to vindicate his fundamental rights in such an appeal does not prevent or delay the operation of the time-limit.

It is useful to appreciate that the remedy under Article 126(2) cannot be equated to the prerogative writs. Whether an applicant for the latter remedy has a right or a duty to exhaust administrative remedies, or whether the Court has a discretion to withhold relief where an applicant has failed to seek a possibly more convenient or expeditious remedy, or whether the pursuit of an administrative remedy is an adequate excuse for delay, may all be questions relevant to the grant of the prerogative writs; but they have no bearing on Article 126. The conferment of exclusive jurisdiction on this Court and the imposition of a time-limit is consistent with the need for the prompt invocation of the jurisdiction of this Court.

Counsel for the petitioner further contended that the provisions of Article 126(2) were directory only, and not mandatory: a question which has been considered in several decisions of this Court.

This question appears to have first been considered in *Mahenthiran v. Attorney General* (4). The acts of torture complained of were alleged to have been committed on 26.5.80, and the petitioner had been produced before a Magistrate on 28.5.80 who remanded him to Prisons custody. On that occasion Counsel seems to have watched the interests of the petitioner. The petitioner alleged that he was able to obtain proper legal advice only on 19.6.80. Application was made to this Court on 4.7.80: 8 days late. It was held:

> "Article 126 requires that the application to the Supreme Court must be made within one month of the date of the alleged infringement of the fundamental right. The petition is clearly out of time.
>
> Mr. Pullenayagam however contended that the time limit in Article 126 is not mandatory but only directory, and that this Court has a discretion, in a fit case, to entertain an application outside the time limit. Counsel for the State referred us to the time limits laid down in Article 126 and argued that the limits have been put in with a purpose and the Court should give effect to these time limits. Although there is much substance in the latter contention, it is unnecessary to decide the question now, as we are not disposed to entertain the application even if a discretion, as stated by Mr. Pullenayegam, is vested in us. The explanation given by the petitioner for the delay in presenting this petition does not in our view provide an adequate excuse for his delay."

In *Jayawardena v. Attorney General* (5) an application made more than one month after the alleged infringement was refused on the ground that the jurisdiction of this Court cannot be exercised after the lapse of one month from the date of the executive or administrative act complained of. In *Gunawardena v. Senanayake* (6) an application made more than one month after the alleged infrngement was dismissed. In *Hewakuruppu v. de Silva* (7) leave to proceed was refused where the time limit had expired. All these cases proceeded on the basis that the time limit is mandatory, although not expressly so stated, and the question whether the Court should exercise any discretion in favour of the petitioner was accordingly not considered.

In *Hewakuruppu v. de Silva* (3) too the question whether the time limit was mandatory or directory was not expressly discussed, but the possibility that the Court has a discretion is adverted to, although in the particular circumstances of that case the Court was of the view that the delay was excessive.

These decisions were considered in *Edirisuriya v. Navaratnam*, (8) and while reiterating that the time - limit of one month set out in Article 126(2) is mandatory, it was held that this Court has a discretion in a fit case to entertain an application made after the expiry thereof, but that in such cases the petitioner must provide an adequate excuse for the delay. Although, rightly, no attempt was made to define that exception, it is implicit in that decision that there is a heavy burden on a petitioner who seeks that indulgence. In that case, the petitioner was held in custody, allegedly *incommunicado* and therefore unable to take effective steps to invoke the jurisdiction of this Court (see also *Siriwardena v. Rodrigo,* (supra). Had this fact been established, on the principle *lex non cogit ad impossibilia* the petition would have been entertained. Ranasinghe, J. as he then was (with Sharvananda, C.J., agreeing) held on the facts that the petitioner did have adequate access to his lawyers, but Wanasundera, J., held that the extent of such access did not constitute the minimum of "facilities, time and freedom that is reasonably expected by the law in the case of a person so placed, so as to enable him to discuss his case and instruct counsel." Though there was disagreement as to the application of the principle. It was agreed that time runs unless there is a grave restraint on the freedom to take effective steps to invoke the jurisdiction of this Court.

The time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to legal advice) as would be necessary to involve the jursidiction of this court, this Court has discretion, possibly even a duty, to entertain an application made within one months after the petitioner ceased to be subject to such restraint. The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man-made disaster, would have to be considered in an appropriate case when it arises.

Counsel for the Petitioner also referred us to *Visuvalingam v. Liyanage* (9), in which the majority of this Court held that the provisions of Article 126(5) – requiring this Court to dispose of any petition under Article 126 within two months of the filing thereof – are directory only, and not mandatory. By a parity of reasoning, he urged, Article 126(2) must also be regarded as directory only. It is clear from the majority judgment (at page 226) that the reason for holding the time limit in Article 126(5) to be directory was that the fundamental right sought to be vindicated by an aggrieved party cannot be lost or denied "for no fault of his"; the lapse of the Court, in failing to dispose of an application within two months cannot operate to deprive him of his rights, in the absence of specific provision to that effect. This confirms my view that "fault" or delay on the part of a petitioner does not entitle him to claim an extension of the time limit under Article 126(2).

Three principles are thus discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (*e.g* of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist (*Siriwardena v. Rodrigo* (2). The pursuit of other remedies, judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases, on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.

The preliminary objection must therefore be upheld, and the petition has to be dismissed on this ground.

DISCRIMINATION CONTRARY TO ARTICLE 12(1):

The first of the allegations made by the Petitioner, in support of his plea of discriminatory treatment, is without foundation; it is clear from the correspondce between J. D. Silva and the Director of Establishments that a letter sent to the former regarding the allocation of a house was not received by him; upon his failure to respond, a notation was made against his name (probably referable to section 3:9 of the Code) that he was not interested in quarters; upon an appeal made by him stating that he had not received the aforesaid

letter, it was found that the letter had not been sent by registered post as required, and accordingly he was requested to meet the 4th Respondent regarding the allocation of quarters: quarters were allocated to him, but he refused to accept the same, and thereupon his name was deleted from the waiting list; perhaps under section 4:3:9 it would have been more correct to have placed his name at the bottom of the waiting list. Comparison of these two instances does not support a complaint of discriminatory treatment in regard to the non-restoration of the Petitioner's name to the waiting list. Although the Petitioner and J. D. Silva may have been in the same class or category, in that they were on the same waiting list, the circumstances in which their names were deleted, and passed over, respectively, were completely different. In the one case, J. D. Silva, an eligible applicant, was overlooked due to the failure to notify him in the usual manner; his name was not deleted on that occasion. In the other case, the Petitioner's name was deleted, and he was not allocated quarters, as he was then an applicant who had ceased to be eligible. In the former case, the error, when discovered, was corrected. In the latter, what was done in 1984 not having been an error, but being action in conformity with the relevant rules, no question of correcting an error arose. Since the Petitioner's reinstatement (unlike that of non-strikers) was not with the right to continue to enjoy all the rights and privileges to which he was previously entitled, he had no right thereby to be restored to the waiting list. Apart from the foregoing facts, our attention was not drawn to any rule or practice relating to the restoration of names to the waiting list. There has thus been no invidious discrimination; neither unequal treatment of equals nor equal treatment of unequals (see *Elmore Perera v. Jayawickreme* (10)). It is also relevant to mention that the Petitioner appear to have been aware of the restoration of J. D. Silva's name to the waiting list (which took place in late 1986) at the time he submitted his second appeal on 8.1.87.

In regard to the other three allegations the Respondents claim that the allocations were made in terms of section 4:4:1. All the persons mentioned held offices of responsibility, ranging from that of Vice-Chancellor, Public Relations Officers of Ministries, and Private Secretary or Personal Assistant to a Minister or deputy Minister. It is not suggested that they were of the same category, i.e., clerical Officers, as the Petitioner; or that they had been allocated quarters of the same grade as that applied for by the Petitioner; they would thus

not even have been on the same waiting list. It is for the Petitioner to prove his allegations to the satisfaction of the Court (*Jayasena v. Soysa* (10), *Velmurugu v. Attorney-General* (11), *Elmore Perera* (1) at 298-300). Here, the Petitioner's allegation that these persons were not on the waiting list and/or were not eligible for General Service Quarters amounts to an allegation that quarters were allocated *in breach of* the relevant rules. Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong (*Mackie & Co. v. Molagoda* (12)). Even if the Petitioner's allegation of wrongdoing were to be disregarded, and if the persons specified are regarded as having been allocated quarters in the exercise of the discretion under section 4:4:1, (as claimed by the Respondents) the Petitioner cannot succeed in establishing unequal treatment in the absence of proof that the Petitioner and those persons were equals, in that they were in the same class or category, and, more important, that they were unequally treated. There is no allegation that the discretion under section 4:4:1 had not been properly exercised: there is neither suggestion nor proof that the Petitioner had even applied to the "Allocating Authority" to be considered under this provision; or as to any circumstances relating to the Petitioner which might constitute the "very special reasons" which would entitle him to be considered under this rule. The Petitioner has thus failed to prove even one prior instance which is necessary to serve as the basis of comparison whereby the treatment meted out to the Petitioner may be shown to be discriminatory (*see Elmore Perera* (1) at pages 297-298).

The third and fourth allegations are also irrelevant, for the reason that the Respondents state that the original allocations were made in 1974 and 1977, before the Constitution came into operation, and even if true cannot be used as the basis of a complaint of discrimination.

The Petitioner has thus failed to prove discrimination in violation of Article 12(1), and for this reason too the petition has to be dismissed.

The Petition is therefore dismissed with costs fixed at Rs. 500.

Application dismissed with costs fixed at Rs. 500.