1972 *Present:* **Alles, J., Wijayatilake, J., and Thamotheram, J.**

Mrs. S. GUNASEKERA, Petitioner, *and* A. RATNAVALE (Permanent Secretary, Ministry of Defence and External Affairs) and 7 others, Respondents

S. C. 43/72—Application for a Mandate in the nature of a Writ of Habeas Corpus under Section 45 of the Courts Ordinance

Public Security Ordinance (Cap. 40)—Constitutional validity of the Ordinance—Sections 2, 5, 6, 7, 8—Emergency (Miscellaneous) Regulations—Validity of Regulations 18 (1), 18 (10), 55—Detention Order issued by the Permanent Secretary, Ministry of Defence and External Affairs—Whether it is justiciable—Whether application for a writ of habeas corpus *may be made in respect of a Detention Order—Courts Ordinance, s. 45—Constitutional law.*

The corpus in the present application which was filed on 14th February 1972 for a writ of *habeas corpus* was taken into custody on a Detention Order dated 21st January 1972 which was renewed again by Detention Order dated 16th February 1972. The Detention Orders were issued by the Permanent Secretary, Ministry of Defence and External Affairs, under Regulation 18 (1) of the Emergency (Miscellaneous) Regulations made by the Governor-General by virtue of the provisions of section 5 of the Public Security Ordinance. Regulation 18 (1) provides:—"Where the Permanent Secretary to the Ministry of Defence and External Affairs is of opinion with respect to any person that, with a view to preventing such person from acting in any manner prejudicial to the public safety . . . it is necessary so to do, the Permanent Secretary may make order that such person be taken into custody and detained in custody."

The Permanent Secretary (1st respondent) filed an affidavit on 2nd March 1972 on information furnished to him by the Police relating to the insurgent activities of the detainee in connection with an armed insurrection throughout the greater part of the country during April 1971. In that affidavit he set down four grounds for his action.

An earlier *habeas corpus* application (Application S. C. 411/71) on behalf of the same corpus was made in consequence of his arrest on 5th December 1971 by a police officer purportedly under Emergency Regulation 19, but the arrest was declared by a Divisional Bench of the Supreme Court to have been unlawful solely on a technical ground. The grounds for the arrest were not examined by the Court. However, a few hours after his release on 21st January 1972, the corpus was taken into custody in pursuance of the Detention Order issued by the Permanent Secretary on the same day. The Detention Order had been signed by the Permanent Secretary before the order of release was made by the Supreme Court in the earlier application and was executed in the precincts of the adjacent Colombo Law Library while the detainee was having a consultation with his lawyers.

Held, (i) that on the return and affidavit of the respondents that the detention was under Regulation 18 (1) of the Emergency Regulations, and in the absence of proof by the detainee that the Permanent Secretary had an ulterior motive or acted for a collateral purpose and not for the purpose stated, the Detention Orders of 21st January and 16th February were *ex facie* valid. In such a case an application for a writ of *habeas corpus* cannot be successfully made.

(ii) that the failure of the Crown to bring to the notice of the Divisional Bench, before the order of release was made on 21st January 1972, that there was a Detention Order under Regulation 18 (1) which they intended to serve on the detainee after his release did not amount to malice in law. Nor could the mode of the detainee's arrest in the precincts of the Colombo Law Library affect the position in any way.

(iii) that the Public Security Ordinance is constitutionally valid. There is nothing in the Ordinance to indicate that Parliament abdicated its legislative authority. The Ordinance is one that could have been passed in the plenary exercise of legislative power.

(iv) that Emergency Regulation 18 (1) is *intra vires* of the Public Security Ordinance.

Per ALLES, J., and THAMOTHERAM, J. (WIJAYATILAKE, J., dissenting)—Emergency Regulation 18 (10), which provides that an order under Regulation 18 (1) should not be called in question in any Court on any ground whatsoever, is *intra vires* of the Public Security Ordinance. Emergency Regulation 55, which provides that Section 45 of the Courts Ordinance relating to issue of writs of *habeas corpus* by the Supreme Court shall not apply in regard to any person detained or held in custody under any Emergency Regulation, is also *intra vires* in so far as it refers to Detention Orders under Regulation 18 (1). In the case of a Detention Order under Regulation 18 (1) which is *ex facie* valid, the issue of good faith is not a justiciable matter. Regulation 55 ousts the jurisdiction of the Court even on the issue of good faith.

Observations by WIJAYATILAKE, J., on the reprehensible mode of arrest of the corpus on 21st January 1972, regardless of the time and place of arrest.

APPLICATION for a writ of *habeas corpus*.

P. B. Tampoe, with *K. Shanmugalingam* and *L. M. A. Silva*, for the petitioner.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *E. D. Wikramanayake*, Senior Crown Counsel, and *F. Mustapha*, Crown Counsel, for the respondents.

Cur. adv. vult.

May 26, 1972. ALLES, J.—

This is an application in the nature of a writ of habeas corpus ordering the respondents to bring before this Court the body of one P. C. Gunasekera to be dealt with according to law. An earlier application on behalf of the same corpus (S. C. 411/71) [1] was allowed by this Court on 21st January 1972 but the corpus was again taken into custody a few hours later on a Detention Order issued by the Permanent Secretary for Defence and External Affairs under Regulation 18 (1) of the Emergency (Miscellaneous) Regulations. That Emergency expired on 15th February 1972 and thereafter on 16th February a fresh set of

[1] *(1972) 75 N. L. R. 246.*

Emergency Regulations were promulgated under the Public Security Act and the detainee continued to be detained on an Order of Detention dated 16th February 1972.

The detainee was a teacher and was the President of the Lanka Jathika Guru Sangamaya at Habaraduwa and, before his marriage on 31st March 1971 to the petitioner, was residing in a portion of the building which housed the trade union office of the Habaraduwa branch of the Lanka Jathika Guru Sangamaya at Ahangama. The petitioner's affidavit supported by the incomplete affidavit of the detainee avers that the petitioner and her husband carried on their normal professional and social activities after 31st March 1971. It is however admitted that soon after the declaration of a State of Emergency on 16th March 1971, the detainee was taken into custody on 18th March, but was released on the same day. Prins Gunasekera, the Member of Parliament for Habaraduwa and an elder brother of the detainee, who has filed a lengthy affidavit in this case inquired from the Prime Minister why his brother was taken into custody and was informed by her that some subversive literature, which happened to be the autobiography of the North Korean leader Kim il Sung, and also some strands of wire, were reported to be in the detainee's possession. Prins Gunasekera has stated that the wire found in the possession of his brother were strands of thin wire used for the purpose of hanging Wesak lanterns, maps, charts, etc. and that the Police informed him that it could not in any way help in the manufacture of a hand bomb. Soon afterwards Prins Gunasekera was informed by Navaratnam, the Superintendent of Police, Galle, that his brother had been released.

Navaratnam in his affidavit filed in the previous application has stated that on 18th March the detainee had in his possession the following documents :—

(*a*) A map of Ahangama showing the location of the Ahangama Police Station indicating the mode in which it might be attacked ;

(*b*) Posters and newspapers of the Janatha Vimukti Peramuna (an organisation which was proscribed subsequently) and

(*c*) A set of five lectures setting out the reasons for and the methods by which the Government of Ceylon should be overthrown.

Navaratnam thought the evidence was insufficient at the time to establish that the detainee had committed an offence under the Emergency Regulations and, after consulting his superior officers, ordered the release of the detainee.

Commencing on 4th April 1971 attacks on Police Stations and other attacks of insurgency occurred all over the Island. It is now a matter, on which judicial notice may properly be taken, that there was an armed insurrection throughout the greater part of the country in early April last year which taxed the resources of the country to its utmost, resulting in considerable loss of life to both the civilian population, the Police and the armed forces. We are unable to share the complacent attitude of learned Counsel for the petitioner who submitted, that the views of the Judges in a previous application in respect of one Hirdaramani, were coloured by the state of affairs which in their view had taken place in April last year. I think it would be no exaggeration to state that never before in the history of this country, in recent times, had there been such a serious state of civil disturbances as that which occurred in the dark days of April last year.

The activities of the detainee naturally assumed a different complexion after 5th April 1971 and further investigations revealed—

(*a*) that the place where the detainee was residing on 18th March 1971 was the headquarters of the Janatha Vimukti Peramuna at Ahangama ;

(*b*) that in December 1970 the detainee had agreed to permit Newton Jayatunga *alias* Vipula, the District leader of the Janatha Vimukti Peramuna for Ahangama, who admitted participating in the attack on the Ambalangoda Police Station on the night of 5th April to reside in his house and do propaganda work for the Peramuna and assisted him and the Peramuna financially ;

(*c*) that the statements of Gunasiri *alias* Janaka, who led the attack on the Elpitiya Police Station, I. D. Siripala who admitted having led the attack on the Ambalangoda Police Station also revealed that the place where the detainee was residing on 18th March was the headquarters of the Janatha Vimukti Peramuna at Ahangama ; and

(*d*) that the name of D. H. Dayananda, who was remanded for insurgent activities appeared in a letter found in the possession of the detainee on 18th March.

The statements of the above persons were recorded by 14th July so that by the middle of July there was material on which the authorities were justified in coming to the conclusion that the detainee was closely associated with the activities of the Janatha Vimukti Peramuna, which party was alleged to be responsible

for the insurgency. The investigations continued until December 1971 and on 3rd December the statement of one George Ratnayake, who was remanded for insurgent activities and whose name transpired in the statements of Jayatunga, Gunasiri and Siripala referred to above, was recorded. P. C. Gunasekera was arrested by the Police on the night of 5th December 1971. P. C. Gunasekera in his incomplete affidavit has denied the allegations contained in Navaratnam's affidavit but this Court is concerned in this application only, whether the authorities had or had not material for the action they took.

The 1st respondent to this application, who is the Permanent Secretary to the Ministry of Defence and External Affairs filed an affidavit on 2nd March 1972 on information furnished to him by the Police relating to the insurgent activities of the detainee. In that affidavit he has set down the following grounds for his action :—

(*a*) that Newton Jayatunga who was the leader of the Janatha Vimukti Peramuna for the Ahangama District was residing in the house of the detainee ;

(*b*) that a map of Ahangama showing the location of the Ahangama Police Station and indicating the mode in which it may be attacked was in the possession of the detainee ;

(*c*) that a set of lecture notes used by the insurgents to excite disaffection to the Government was in the possession of the detainee ; and

(*d*) that posters and newspapers of the Janatha Vimukti Peramuna, a proscribed party, were in his possession.

It is apparent that the grounds furnished by the Permanent Secretary are the same as those mentioned by Navaratnam earlier and having regard to the fact that this Permanent Secretary was directly in charge of the Police Department, it is reasonable to assume that the Permanent Secretary was aware of this information long prior to the detainee's arrest on 5th December.

Prins Gunasekera was a member of the Sri Lanka Freedom Party. The Sri Lanka Freedom Party constituted the major party in the United Front which formed the Government in April 1970. From April 1971 he became a severe critic of the methods which the Government adopted to quell the insurrection and strongly criticised the actions of the Police and the Armed Services. It is not unlikely that some of his allegations in regard to the alleged

atrocities and excesses committed by the Police and the Armed Services were justified. He made representations to the Governor-General and the Prime Minister about these alleged excesses. In July 1971 he left Ceylon as a member of a Parliamentary delegation and contacted a Civil Rights leader, Lord Avebury, in England and invited him as a representative of Amnesty International to visit Ceylon and see for himself the conditions that prevailed in the country. Lord Avebury came to Ceylon sometime in September 1971 and visited various places in the company of Prins Gunasekera and Bala Tampoe, Advocate. After the lapse of a few days Lord Avebury's visa was cancelled by the authorities and he was asked to leave Ceylon. Prins Gunasekera continued to criticise the action of the Government in Parliament, made an abortive attempt with Dr. W. Dahanayake to have the Emergency debated in Parliament and was ultimately suspended from the membership of the Party on 1st October 1971. He crossed the floor of the House on 5th October 1971. Prins Gunasekera states that on 30th November 1971 there was an exchange of words between the Prime Minister and himself in Parliament and in support has produced the proceedings of that day reported in Hansard marked P 19. P. C. Gunasekera's arrest took place on 5th December. It has been strongly urged by Counsel for the petitioner that the arrest of P. C. Gunasekera on 5th December was an act of retaliation on the part of the Prime Minister because she bore animus towards Prins Gunasekera, and Counsel suggests that P. C. Gunasekera was the victim of a conspiracy between the Police, the Permanent Secretary and the Prime Minister. The simple answer to this suggestion is that the material in the possession of the Police against P. C. Gunasekera was available long before any political differences arose between Prins Gunasekera and the Prime Minister. The suggestion of Counsel is therefore not one that commends itself to me.

A Divisional Bench of this Court held that the arrest of P. C. Gunasekera on 5th December 1971 and his subsequent detention was unlawful and in Application S. C. 411/71[1] the Court released him from custody on the grounds that his arrest did not comply with the procedure set out in Regulation 19 of the Emergency Regulations. On 20th January 1972 at the conclusion of the submissions of Counsel the Court directed that the corpus be brought up at 12 noon on 21st January to be dealt with according to law. It is not denied that both Counsel who appeared at the hearing of that application, who were the same Counsel who appeared before us, intelligently anticipated the attitude of the Court in regard to the order that was to be made on 21st January and knew that the detainee would be released the following day.

[1] *(1972) 75 N. L. R. 246.*

After this was done the detainee left the Courts in the company of his lawyers and proceeded to the Law Library where he had a consultation at which his incomplete affidavit was prepared. He was subsequently arrested at 3.45 p.m. in the Law Library in pursuance of a Detention Order issued by the Permanent Secretary on the same day. Several affidavits have been filed by the lawyers appearing for the detainee and also by the Police officers who arrested him indicating that there was considerable confusion in the Law Library at the time of the re-arrest, but in my view, these matters are irrelevant to the issue now before us in regard to the validity of the Detention Order.

The Detention Order 1 R1 of 21st January 1972 and the subsequent Order 1 R2 of 16th February 1972 directed the detention of the detainee since the Permanent Secretary was of opinion that he should be detained in the interests of public safety and the maintenance of public order. There is no dispute as to the authenticity of the Order or the identity of the detainee. A Detention Order similar to that produced in this case was considered by the Divisional Court in *Hirdaramani's case*[1] (H. C. Application 354/71) which discussed the scope and validity of such an Order.

Many of the questions that have arisen for determination in this application have already been the subject of decision in *Hirdaramani's case.* I am generally in respectful agreement with most of the views expressed therein by My Lord the Chief Justice and my brothers Silva and Samerawickrame JJ. I do not propose therefore, to deal with the legal aspect of these questions except to indicate my concurrence. Certain other questions, however, such as the *vires* of the Public Security Act and the *vires* of Regulation 55 of the Emergency Regulations were not canvassed in that case and I will, in due course, express my views on these matters.

The learned Chief Justice has quoted *in extenso* from the speeches of the Law Lords in *Liversidge v. Anderson*[2] (1942) A.C. 206 and *Greene v. Secretary of State of Home Affairs*[3] (1942) A.C. 284 where the production of the Home Secretary's Order, the authenticity and good faith of which was not impugned was held to constitute a complete answer to an application for a writ of Habeas Corpus. In both cases the subjective test was held to be applicable, and the Court was of the view, that if the Home Secretary thought he had reasonable cause to believe that a person had to be detained and that the authorities should exercise control over him, there would be

[1] *(1971) 75 N. L. R. 67.*

[2] *(1942) A. C. 206.*

[3] *(1942) A. C. 284.*

a sufficient compliance with the Regulation. The learned Chief Justice also quoted passages from these two judgments which indicated the difficulty, if not the futility, of a challenge that a person who has stated an opinion did not in fact entertain it. To the citations already quoted I might add the observations of Lord Radcliffe in his comment on the *Liversidge* case. In *Nakkuda Ali v. Jayaratne*[1] 51 N. L. R. 457 at 462 he expressed himself in the following language :—

> "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. No doubt he must not exercise the power in bad faith : but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality."

The use of the word "opinion" in our Regulation 18 (1) is narrower than the words of the English Regulation. At least one may assume under that Regulation, that the Home Secretary would be reasonably satisfied that the detention was necessary. Under Regulation 18 (1) even a dishonest or wrong opinion is not justiciable. It is no doubt a very arbitrary power that is vested in a single individual, however high may be his rank, but as Lord Atkinson remarked in *Rex v. Halliday*[2] (1917) A.C. 260 at 273 :—

> "In almost every case where preventive justice is put in force some suffering or inconvenience may be caused to the suspected person. That is inevitable. But the suffering is under the Statute, inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm. It must not be assumed that the powers conferred upon the Executive by the Statute will be abused."

These observations are no more than a manifestation of the maxim *Salus populi suprema lex.*

The only English case where a successful challenge was made to a Detention Order is *Rex v. Home Secretary ex parte Budd*[3] (1941) 2 A. E. R. 749. In that case Captain Budd succeeded in his application for habeas corpus before a Divisional Bench (Humphreys, Singleton and Tucker JJ.). Humphreys J. described the Detention order as "worthless" because, it not only did not give the applicant proper information to enable him to exercise his

[1] *(1950) 51 N. L. R. 457 at 462.* [2] *(1917) A. C. 260 at 273.*
[3] *(1941) 2 A. E. R. 749.*

rights under regulation 18 B (4), but gave him wrong information and failed in its purpose of providing authority for the applicant's detention. On Budd's second arrest the Court (Viscount Caldecote L. C. J., Macnaghten J., Stable J. dissenting) held that it was sufficiently proved that the Home Secretary believed that the applicant was a person whom it was proper to detain under Regulation 18 B (1A). By the time Captain Budd appealed the decisions of the House of Lords in *Liversidge* and *Greene* had been delivered and his appeal was dismissed. The only matters which the Court of Appeal held were capable of inquiry were facts relevant to the legality of the detention, e.g., the bona fides of the Secretary of State, the genuineness of the Detention order and the identity of the appellant with the person named in the order. The Court also held that although Habeas Corpus had been rightly granted in the first instance it was no bar to a second detention. The English Judges, it will be noted, did not consider the grounds of challenge to good faith. In *Halliday, Liversidge* and *Greene* the production of the Detention Order, ex facie valid, was held to be a sufficient answer to a challenge, and incidentally the Court assumed that the detaining authority had acted in good faith. Lord Wrenbury in *R. v. Halliday* (supra) stated :—

> "No doubt every statutory authority must be exercised honestly. There is, I conceive, no other limit upon the acts that the regulations may authorise to achieve the defined object."

The learned Chief Justice has quoted the passages in the speeches of the Law Lords from *Liversidge* and *Greene* where they have proceeded on the basis that the detaining authority acted in good faith. What then is the relevant challenge which the detainee can establish to prove that the Permanent Secretary did not hold the opinion he said he had, when he made the order detaining the corpus ? He must, if he can, place sufficient material before the Court to establish that the Permanent Secretary could not have had the opinion and therefore there was no opinion proved as required under the Regulation. It is in this field that it will be open to the detainee to rebut the presumption of good faith by proving, if he can, that the Permanent Secretary had an ulterior motive or acted for a collateral purpose and not the purpose stated under the Regulation. These are some of the grounds of relevant challenge but can one seek to go behind the opinion of the Permanent Secretary, who, even if his opinion is wrong, may not be able to divulge the information on which he acted ? To this extent the decisions of the Indian Courts indicate that the law of Preventive Detention in India is more favourable to the detainee,

particularly those decisions decided after the Constitution was enacted in 1950. This distinction has been recognised by the learned Chief Justice in *Hirdaramani's case.*

There is a significant difference in the law regarding Preventive Detention in India and Ceylon. In India the liberty of the subject is recognised as a fundamental right (Vide Articles 21 and 22 of the Constitution). A Detention Order must be accompanied by a statement of the grounds which satisfies the requirements of Article 22 (5) of the Constitution and if the grounds are not so stated, the Detention Order is vitiated under Article 21. A Detention Order in India therefore has constitutional force. Since the grounds have to accompany the Order, if it is obvious that the purpose of the detention was a collateral purpose, e.g., to deprive him of his rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Courts—*Malvali v. The Commissioner of Police* [1] (1950) A.I.R. Bombay 202 or, although the satisfaction is subjective and therefore not justiciable, the grounds furnished are irrelevant to the Preventive Detention Act and foreign to the Act—*Rameshwar v. District Magistrate of Burdwan* [2] (1964) A. I. R. (S.C) 334, the order would be invalid. Even before the enactment of the Constitution, Rule 26 of the Defence of India Rules made under the Defence of India Act enabled the Central or Provincial Government, if it was *satisfied* with respect to any particular person, with a view to preventing him from acting in a manner prejudicial to the defence of the realm, the public safety etc., to detain him under a Detention Order. If, for instance, from a perusal of the Order it was clear that the authority or officer did not apply its or his mind, the order would be invalid—*Gokhale v. Emperor* [3] (1945) A. I. R. Bombay 212 or if the Court was satisfied that the Order under the Act is *ultra vires* or not made bona fide but for some collateral purpose—*Lahore Electric Supply Co. Ltd. v. Province of Punjab* [4] (1943) A. I. R. Lahore 41 or if the detainee can prove that there was no reasonable satisfaction that the Detention Order was made for the objects stated therein but for some ulterior object, *Kamala Kant v. Emperor* [5] (1944) A. I. R. Patna 354, the Detention Order in every such case would be vitiated for lack of bona fides.

It seems to me that just as the satisfaction of the detaining authority in the pre-Constitution era in India was open to a relevant challenge on the ground that the satisfaction was a sham or made with a collateral purpose or with an ulterior

[1] *(1950) A. I. R. Bombay 202.*
[2] *(1964) A. I. R. (S. C.) 334.*
[3] *(1945) A. I. R. Bombay 212.*
[4] *(1943) A. I. R. Lahore 41.*
[5] *(1944) A. I. R. Patna 354.*

object which might rebut the presumption of good faith, so also in Ceylon under Regulation 18 (1) these same matters, if it can be proved, may call upon the Permanent Secretary for an answer. The pattern is the same in England, India or Ceylon. If the detention is *ex facie* valid it is presumed to be honestly made. Then arises the almost impossible burden for the detainee to establish that the satisfaction or the opinon could not have been present due to other reasons.

I have set out in some detail the facts in the present case to discover whether any relevant challenge to the good faith of the Permanent Secretary has been established, but in my view, that presumption has not been rebutted. On the contrary the Permanent Secretary has disclosed to this Court relevant and cogent grounds why he thinks the corpus should be detained. There was no obligation on his part to state these grounds. Had it not been for the first application, the detainee himself would not have been aware of the grounds of his detention because the Permanent Secretary's affidavit was filed on 2nd March, and this application was filed on 14th February. There is no evidence that the detainee made any representations to the Advisory Committee and that the Chairman of the Committee informed him of the grounds for his detention. On the material available in the Permanent Secretary's affidavit I am unable to state that he did not act in good faith in issuing the Detention Order of 21st January. The suspected insurgent activities of the detainee were known to the authorities on 18th March, 1971; they assumed a sinister complexion after the events of April 1971; investigations subsequent to April and up to 3rd December revealed that the detainee was suspected of being closely associated with the insurgent movement. In consequence he was arrested on 5th December and he was released by the Court on 21st January 1972 on a technical flaw in regard to the mode of his arrest. When he was released on 21st January, the Permanent Secretary may well have come to the honest opinion, on the material available to him, that it was necessary in the interests of public security that he should be detained forthwith. It was submitted by learned Counsel for the petitioner that the situation in the country on 21st January did not warrant such drastic measures against the detainee. According to Prins Gunasekera's affidavit the only act of insurgency committed in the Habaraduwa electorate was a single instance of damage to the Police Station by an explosive on 5th April 1971 and since then conditions in Habaraduwa have been normal. This is however, no criterion to the conditions existing in the country. The very fact that the Emergency has been continued from month to month is indicative of the fact that conditions have not returned to normal and that the authorities have to continue to be vigilant. Under the Emergency powers,

restraint on individual liberty may be necessary as a matter of precaution and in the interests of the nation at large, and this may continue even after the danger of armed insurrection has passed.

Learned Counsel for the petitioner submitted, that even if there was no malice in fact there was malice in law, since the Crown did not bring to the notice of the Divisional Bench, before the order of release was made on 21st January, that there was a Detention Order under Regulation 18 which they intended to serve on the detainee after his release. In support, Counsel relied on the decision in *Subodh Singh v. The Province of Bihar*[1] (1949) A. I. R. Patna 247. In that case the Patna High Court held, that where the legality of the detention of a person under the first order of detention is under consideration, and the detaining authority has also a second order of detention against the same person, it is not open to the detaining authority to keep the second order of detention up its sleeve, and allow an order of release to be passed on the first order of detention, and then produce the second order of detention for the purpose of detaining the man after the order of release has been passed. The Court however held *inter alia,* that these observations would not apply when the Provincial Government *had no opportunity of producing the order of detention in reply to the rule issued by Court.* A more relevant decision is that of the Federal Court in *Basanth Chandra Ghose*[2] (1945) A. I. R. (F.C.) 18. It was held in that case, that where the earlier order of detention was defective on merely formal grounds, there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds was not examined by the Courts. The Court also held, that it was open to pass an order of detention against a person already in detention and that the second order of detention is not necessarily indicative of proof of bad faith. This view was endorsed by the Supreme Court of India in *Godavari S. Parulekar v. State of Maharashtra*[3] (1966) A. I. R. (S.C.) 1404 at 1407 where Sikiri J., after citing with approval the observations of Patanjali Sastri C.J. in *Narayan Singh Nathawan v. State of Punjab*[4] (1952) A. I. R. (S.C.) 106 stated that :—

> "The mere fact that the detention order is passed during the pendency of habeas corpus proceedings cannot by itself lead to the conclusion that the order is vitiated by malice in law. It depends on the circumstances of the case. The detenu would have to prove not only that the

[1] *(1949) A. I. R. Patna 247.*
[2] *(1945) A. I. R. (F.C.) 18.*
[3] *(1966) A. I. R. (S. C.) 1404 at 1407.*
[4] *(1952) A. I. R. (S. C.) 106.*

detention order has been passed during the pendency of habeas corpus proceedings but also that there are other facts showing malice."

In the previous application the detainee was arrested by the Police under the provisions of Regulation 19 and the argument in Court was confined to the legality of that arrest. The grounds for the detention were not examined by Court. There is no evidence that when the Court released the detainee from custody on 21st January there was any opportunity of producing the Order of Detention before the Court nor is there any evidence that the learned Deputy Solicitor-General, who represented the Crown on that occasion, was aware of the existence of a Detention Order. Even if he was aware of its existence he may have been reluctant to draw the attention of the Court to this fact, since it was foreign to the issues that had been canvassed in Court. The Permanent Secretary also probably realised that in the interests of public security it was essential that the detainee should be arrested as expeditiously as possible after his release. I do not think therefore, that the failure of the authorities to inform the Court of the pending re-arrest amounts to malice in law nor do I think that the mode of his arrest in the Law Library affects the position in any way. In *Christie v. Leachinsky*[1] (1946) A.C. 573 the accused, after being discharged was directed by the Police not to leave the dock and was directed to descend the steps into the cell below where he was re-arrested in the precincts of the Court. The House of Lords held that the imprisonment was justified.

The Detention Orders of 21st January and 16th February, being *ex facie* valid, the petitioner has failed to rebut the presumption of good faith and has not satisfied this Court that the Permanent Secretary did not have the opinion he claims he had when he issued the Detention Orders.

I will now proceed to discuss the *vires* of the Public Security Act which was raised by Counsel for the petitioner. The Public Security Act No. 25 of 1947 was passed on 16th June 1947 under the State Council (Order in Council) of 1931 as amended subsequently by the State Council (Amendment) Orders in Council 1934 and 1935. The Governor's powers in times of Emergency were contained in Article 49 which entitled him to assume control over any Government department, provided he made a full report to the Secretary of State. The Article further provided that " if the Governor with the advice and consent of the Council shall make provision by law to the satisfaction of the Secretary of State for the exercise by the Governor of *such* Emergency powers

[1] *(1946) A. C. 573.*

the Secretary of State may declare that this clause of this Article shall cease to have any effect." This Article does not give the power to the Governor to legislate, but only provides for the immediate control of a Government department with the approval of the Secretary of State and subject to review by the Council. The Public Security Act was passed under Article 72 of the Order in Council which enables the Governor "with the advice and consent of the Council to make laws for the peace, order and good government of the Island." The preamble to the Act states that it was passed with the advice and consent of the Council. This Act which has been passed by the Council is therefore good law and continues to operate as such by virtue of Section 91 of the present Constitution. I agree with the views of Sansoni J. in *Weerasinghe v. Samarasinghe*[1] 68 N. L. R. 361, 363 that there is nothing in the Public Security Act to indicate that Parliament has abdicated its legislative authority and that the Act is one that can be passed in the plenary exercise of legislative power.

The Public Security Act, being good law, one must necessarily consider the provisions of Section 8 of the Act in relation to Regulations 18. (1), 18 (10) and 55 which Counsel submits are *ultra vires* the provisions of the Act.

I entertain no doubts in regard to the *vires* of Regulation 18 (1). The empowering Section in the Act is couched in very wide language and enables the Governor-General to make Emergency Regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion.....and the language used in Section 5 (2) which authorises and provides for the detention of persons, makes it abundantly manifest that a Regulation similar to 18 (1) is *intra vires*. Indeed the language used in 18 (1) (*a*) and (*b*) merely echo the words of Section 5 (1) of the Act. Undoubtedly the powers given to the Permanent Secretary under Regulation 18 are very wide but there is no "inconclusiveness or ambiguity" in the language used which would entitle a Court to come to a conclusion, that since there is an encroachment of the private rights of the citizen, we should lean in favour of an interpretation that leaves private rights undisturbed. The observations of Lord Radcliffe in the Privy Council when he tendered the advice of the Board in *Attorney-General of Canada v. Hallet and Carey Ltd.*[2] (1952) A. C. 427 at 450 cited by Samerawickrame J. in *Hirdaramani's* case have therefore no application to the construction of Regulation 18 (1). As Lord Macmillan remarked in *Liversidge's case* at p. 252, in construing

[1] *(1966) 68 N. L. R. 361 at 363.* [2] *(1952) A. C. 427 at 450.*

the Defence Regulations made under the Emergency Powers (Defence) Act of 1939 in respect of persons detained in the interests of public safety or the defence of the realm :—

> " there could be no clearer evidence of the intention of Parliament to authorise the abrogation in the public interest and at the absolute discretion of the Secretary of State of the ordinary law affecting the liberty of the subject. "

In the interests of public security it is essential that the State should vest these wide powers in an executive officer of high rank in whom the Government has confidence and who must be presumed to act in good faith and with a due sense of responsibility. Speed and expediency are essential in the performance of his duties under the Regulation. The legislature has however not been unmindful of the possibility of abuse, and there are certain safeguards in Regulation 18 itself which enables a detainee to make representations to the authorities. Under Regulation 18 (5) the Permanent Secretary shall grant the detainee the earliest practicable opportunity to make his representations in writing to the Prime Minister and under Regulation 18 (6) he shall be informed of his right to make his objections to an Advisory Committee and the Chairman of the Advisory Committee shall inform the detainee of the grounds on which the Order under Regulation 18 (1) has been made against him and furnish him with such particulars as are, in the opinion of the Chairman, sufficient to enable him to present his case. It is only at this stage that the authorities need disclose their hand and inform the detainee of the grounds of his detention which would entitle him to enter a challenge to the legality of his detention. Any challenge that can be made prior to this stage can only be confined to the authenticity of the Order or to a case of mistaken identity. If therefore, the Order of Detention is valid on the face of it and relates to the person detained and is presumed to be made honestly, I cannot see how an application for a writ of Habeas Corpus can be successfully made. It is only when the grounds are disclosed to the objector that he can enter a relevant challenge that the Permanent Secretary could not have had the opinion stated in the Detention Order.

Regulation 18 (10) is repetitive of what is contained in Section 8 of the Public Security Act and is merely intended to give effect to the intention of the legislature that when a Detention Order is issued, the detainee is deemed to be in lawful custody and that his detention cannot be questioned in a Court of law.

The *vires* of Regulation 55 has been discussed at length by learned Counsel for the petitioner. Regulation 55 states that

Section 45 of the Courts Ordinance shall not apply to any person detained or held in custody under any Emergency Regulations. At the outset I might state that I am of the view the words "or held in custody" in the Regulation are *ultra vires* and I am in agreement with the observations of the Chief Justice in *Hirdaramani's case* that the Regulation could not have intended to oust the jurisdiction of the Courts in the case of an arrest which is not validly made under Regulation 19. Indeed in the previous application for Habeas Corpus the justiciability of an arrest and subsequent Detention under Regulation 19 was considered by this Court and the Divisional Bench unanimously came to the conclusion, applying the objective test, that the writ lay when the corpus was illegally arrested and unlawfully detained. Habeas Corpus was suspended under the Emergency Regulations for the first time after the death of the late Prime Minister, Mr. S. W. R. D. Bandaranaike and the suspension appeared in the same form in the Emergency Regulations that were promulgated in 1961, but whereas the previous Regulations were confined to the suspension of Habeas Corpus in the case of Detention Orders only, the suspension appearing in the present set of Regulations made it a separate Regulation applicable to all detentions. I do not think the legislature has achieved the purpose which it intended and in my view the suspension applies only to Detention Orders made under Regulation 18.

I got the impression from the somewhat rhetoric submissions of learned Counsel that he considered the present set of Emergency Regulations as some kind of Frankenstein monster (I am quoting his own words) which were intended in some measure to swallow the rights of the people and he was particularly vehement about the suspension of the writ of Habeas Corpus. I do not think there is anything alarming or startling about the suspension of the writ. In America and India although the liberty of the subject is enshrined as a fundamental right, the Constitutions of these countries have made provisions for the suspension of the right of Habeas Corpus in appropriate circumstances. Article 1, Section 9 (2) of the American Constitution states :—

> "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety requires it."

The power to suspend the writ belongs exclusively to Congress.

The Indian Constitution in Section 359 (1) provides for the suspension of the writ of Habeas Corpus when a Proclamation of Emergency is declared. No distinction is made

between times of war and times of peace. In England there is no special provision for the suspension of Habeas Corpus but a detention under the Regulations made under the Emergency Powers (Defence) Act has been upheld by the Courts of law in the interest of public safety, except where there has been an abuse of power or where there has been a *prima facie* wrong application of the power, as in a case of mistaken identity. Access to the Courts of law has never been barred.

In Ceylon the liberty of the subject has been enshrined as a fundamental right only in the new Constitution. Section 45 of the Courts Ordinance only recognises the powers of the Supreme Court to issue writs in the nature of Habeas Corpus to bring before the Court—

(*a*) the body of any person to be dealt with according to law ; and

(*b*) the body of any person illegally or improperly detained in public or private custody.

No doubt this right has been exercised by the Courts of law from time immemorial but the suspension of such a right has been recognised judicially, even before the Emergency Regulations were promulgated. An application for a writ of Habeas Corpus in respect of the body of W. A. de Silva was refused by the Supreme Court during the communal riots of 1915— 18 N. L. R. 277. Wood Renton C.J. referred to " domestic disturbances which present all the features of actual warfare and which justify such measures for the public security ".

The argument of learned Counsel for the petitioner was that, even if the detention is warranted under Regulation 18 (1), the Governor-General was not entitled by Emergency Regulation to take away the powers of the Courts contained in Section 45 of the Courts Ordinance. Two questions arise for consideration on these submissions :—

(*a*) Whether the regulation is within the empowering clause in Section 5 of the Public Security Act ; and

(*b*) Whether the suspension of Habeas Corpus is an interference with judicial power.

In regard to the first question, I think it is reasonable to infer that, if Regulation 18 permits the detention of persons who are likely to be a danger to public security, there is nothing inherently unreasonable in the Governor-General deciding that the validity of such detention should not be justiciable in a Court of law, particularly as the grounds for such detention

may be confidential and not available for inspection by the Court. In times of grave emergency individual liberty has sometimes to give way to the greater interest of the State but, as I remarked earlier, the subject is not without a remedy if he considers his detention unwarranted.

In regard to the second question, I do not think the suspension of the right of Habeas Corpus affects judicial power. It only affects jurisdiction. Reliance was placed by learned Counsel on some of the observations of Lord Pearce in *Queen v. Liyanage*[1] 68 N. L. R. 265 at 281 where he said that :—

> "So far as the Courts were concerned their work continued unaffected by the new Constitution, and the ordinances under which they functioned remained in force."

Lord Pearce was here referring to the judicial system established in Ceylon by the Charter of Justice 1833 and subsequently by later Ordinances and in particular the Courts Ordinance. That case dealt with criminal legislation which can be described as *ad hominem* and *ex post facto* and as such was an interference with the functions of the judiciary. The jurisdiction of our Courts depends on Statute and a Sovereign Parliament, as ours undoubtedly is, can by legislation oust the jurisdiction of the Courts from any field. This is what has been done in the enactment of Regulation 55.

The distinction between judicial power and jurisdiction has been admirably set out in the decision of the Divisional Court in *Anthony Naide v. The Ceylon Tea Plantation Co. Ltd.*[2] 68 N. L. R. 558.

The present Chief Justice has referred to the decisions in *Liyanage's case* and distinguishes that case from those instances where Parliament can take away the jurisdiction of the Court. The power to issue a writ in the nature of habeas corpus is a jurisdiction conferred on the Courts under Section 45 of the Courts Ordinance, which Parliament in the exercise of its plenary powers is entitled to take away by legislation. Learned Counsel for the petitioner quoted certain passages from the judgment of the Chief Justice in *Hirdaramani's* case which, in his submission, indicated that the learned Chief Justice had certain misgivings about the *vires* of Regulation 55. I am confident, that whatever misgivings Counsel thinks the Chief Justice appears to have had it would not have compelled the Chief Justice to hold that Regulation 55 was *ultra vires,* in the light of his own observations in *Anthony Naide v. Ceylon Tea Plantation Co. Ltd.*

[1] *(1965) 68 N. L. R. 265 at 281.*

[2] *(1966) 68 N. L. R. 558*

If written Constitutions like those of the United States and India, which recognise the liberty of the subject as a fundamental right, can make provision for the suspension of Habeas Corpus in their Constitutions in certain circumstances, I see no reason why our Sovereign Parliament cannot make such a provision by legislation and call for such a suspension in times of grave emergency. The House of Representatives however, under Section 5 (3) of the Act exercises control over emergency regulations. I therefore hold that Regulation 55, in so far as they refer to Detention Orders under 18 (1), is *intra vires*.

I have held in this case that the Detention Orders are valid and that both in fact and in law the good faith of the Permanent Secretary has not been rebutted. I have indicated earlier some of the matters which can constitute a relevant challenge to the issue of good faith, and if Regulation 18 (1) was considered independently of any other Section or Regulation the only grounds of relevant challenge would be the matters referred to earlier which, if it can be proved, may rebut the presumption of good faith. But one has to consider the important effect of Section 8 of the Act. If plain words have to be given their plain meaning the effect of Section 8 must necessarily be intended to oust the jurisdiction of the Court in regard to the right to question the validity of a Detention Order made under Regulation 18 (1) by way of Habeas Corpus. In such an event the issue of good faith also will not be justiciable.

The language used in Section 8 of the Act which prohibits any Emergency Regulation and any order, rule or direction made or given thereunder from being called in question in any Court makes the intention of Parliament manifestly clear. These are no doubt words which must necessarily shock the conscience of the Court and disturb any legal mind who has respect for the Rule of Law. As Viscount Simonds observed in *Smith v. East Elloe Rural District Council*[1] (1959) A.C. 736 at 750 "anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

> 'It may be' says Viscount Simonds in the *East Elloe case* 'that the legislature had not in mind the possibility of an order being made by a local authority in bad faith or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter for speculation. What is abundantly clear is that

[1] *(1956) A.C. 736 at 750.*

words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of wider words. Any addition would be mere tautology. But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, my Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings and it is just that test which paragraph 16 bars.'

and again on the same page he states—

'There is nothing ambiguous about paragraph 16; there is no alternative construction that can be given to it; there is in fact no justification for the introduction of limiting words such as 'if made in good faith' and there is less reason for doing so when those words would have the effect of depriving the express words 'in any legal proceedings whatsoever' of their full meaning and content.'

Lord Radcliffe said that "an order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead."

In *Anisminic Ltd. v. Foreign Compensation Commission*[1] (1969) 2 A. C. 147 the Court was concerned with the ouster clause in a different context. The Court was there dealing, not with an executive order but with the powers of a tribunal, which was vested under Section 4 (4) of the Foreign Compensation Act with certain judicial and quasi judicial functions. When the tribunal's area of authority, which was circumscribed by the words of Section 4 (1), was overstepped and the tribunal misconstrued the statutory definition of its own jurisdiction, it was open to challenge in a Court. Lord Pearce and Lord Wilberforce did not think that the *East Elloe case* was of any assistance in regard to the questions that arose for determination in the *Anisminic* case. This latter case cannot therefore assist in the construction of Section 8 of our Act.

I was inclined to take the view at one stage that since the ouster clause in the *East Elloe case* related to questions affecting property rights the principles stated therein need not necessarily apply to a case where the personal liberty of the subject is concerned particularly as Mrs. Smith in the *East Elloe case* was given a time limit within which she could place her grievances before the authorities. But I have searched in vain to find a cogent argument to meet the convincing grounds given by Lord

[1] *(1969) 2 A.C. 147.*

Radcliffe at pp. 767 and 768 of the judgment for holding otherwise. After dealing with the different ways in which statutory powers can be abused he states—

> "Probably most of the recognised grounds of invalidity could be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill will. However that may be, an exercise of power in bad faith does not seem to have any special prominence of its own among the causes that make for invalidity. It is one of several instances of abuse of power, and it may or may not be involved in several of the recognised grounds which I have mentioned. Indeed I think it plain that the courts have often been content to allow such circumstances, if established, to speak for themselves rather than to press the issue to a finding that the group of persons responsible for the exercise of the power have actually proceeded in bad faith."

I therefore take the view that Section 8 of the Act precludes the Court from considering the validity of Regulation 55 which is a Regulation that can properly be enacted under the empowering clause.

In considering the scope and effect of Regulation 55 in the *Hirdaramani case* the learned Judges of the Divisional Court confined their observations to the construction of Regulation 55, independent of the effect of Section 8 of the main Act, but there was a difference of opinion among them in regard to the scope of Regulation 55. My Lord the Chief Justice has taken the view that the Courts are precluded from considering "the only possible issue which can be raised when a Detention Order, valid on the face of it is produced before the Courts, namely the issue of good faith." That, in his view, could be the only intention that can reasonably be inferred when the Prime Minister recommended the enactment of Regulation 55 to the Governor-General. G. P. A. Silva and Samerawickrame JJ. however took the view that Regulation 55 will not apply to the case of a person detained under an invalid Detention Order made in the abuse of powers conferred on the Permanent Secretary, under Regulation 18 (1). If the invalidity is confined to the authenticity of the Order or the identity of the detainee I would agree, because in such a case the Permanent Secretary could not have entertained the opinion that is a condition precedent to the exercise of powers under Regulation 18 (1), but in regard to the issue of good faith, I am in entire agreement with the conclusion of the Chief Justice that in the case of a Detention

Order, which is *ex facie* valid, it is not a justiciable matter. With all respect to my brother Silva J. I am unable to agree that the words used in Regulation 55 has "not couched the relevant laws and regulations in such language as to preclude a Court from questioning the validity of an Order made or purported to be made by the Permanent Secretary". If plain words have to be given their plain meaning the conclusion is irresistible that the Prime Minister in recommending to the Governor-General the enactment of Regulation 55 intended to oust the jurisdiction of the Courts in regard to Section 45 of the Courts Ordinance in respect of Detention Orders issued under Regulation 18 (1). I take it, the reason for this is, that under Regulation 18, not only is the power entrusted to a single executive officer of high rank who must be assumed to enjoy the confidence of the Prime Minister, but the Prime Minister herself can consider the representations of the detainee who can thereafter avail himself of the Advisory Committee procedure. My brother Silva J. in support of his view that a Court is entitled to examine an "invalid order" of detention has expanded at length on the fact that Regulation 55 makes no distinction between Detention Orders made under Regulation 18 and a detention consequent on an arrest under Regulation 19. I have already indicated that in my view that part of Regulation 55 which deals with the detention of persons "held in custody" is *ultra vires* and this Court of which Silva J. was a member, in the previous application unanimously held that the objective test must be applied to an arrest and detention under Regulation 19. Regulation 19 does not contemplate an *order* of detention unlike Regulation 18. The detention in Regulation 19 is consequent on an arrest made under the Regulation and if the arrest is unlawful the detention is unlawful. I also cannot see how a Court can examine a valid Detention Order under Regulation 18 with any degree of satisfaction and go behind its validity when the Court must necessarily be restricted in its inquiries to affidavit evidence in considering the legality of the detention, and even in regard to that evidence, the Court may not be fully briefed owing to the confidential nature of the available material.

Regulation 55 therefore, in my view, ousts the jurisdiction of the Court even on the issue of good faith. The Detention Orders of 21st January and 16th February being valid Orders the corpus has been lawfully detained under the Emergency Regulations. The application for a Writ of Habeas Corpus is therefore dismissed.

This judgment was prepared prior to 22nd May 1972 although it is being delivered after that date.

WIJAYATILAKE, J.—

The question has arisen with regard to the legality and/or propriety of the detention of the corpus Pillage Charles Gunasekera on the " Detention " Orders made by the Permanent Secretary to the Ministry of Defence and External Affairs (the 1st respondent) on 21.1.72 and 16.2.72 under Regulation 18 (1) of the Emergency Regulations made by the Governor-General under section 5 of the Public Security Ordinance upon the recommendations of the Prime Minister.

Mr. Bala Tampoe learned Counsel for the petitioner in a very exhaustive and searching analysis of the law pleaded that the said Detention Orders are not valid in law and are a nullity for one or more of the reasons set out by him under six heads.

It would be convenient to deal with these grounds in the order set out by Mr. Tampoe, in the first instance.

(A) *Is the Public Security Ordinance ultra vires the Constitution ?*

It is submitted that this Ordinance No. 25 of 1947 is *ultra vires* as it has not been enacted in terms of Article 49 of the State Council Order in Council of 1931 as amended in 1934 and 1935. Mr. Pullenayagam, Deputy Solicitor-General, contends that this Article has no relevance to this question as it categorically refers to the control of a Government *Department* in times of an emergency and not precisely to the objects set out in the Public Security Ordinance. He has drawn our attention to Article 72 which gives the Governor legislative power in certain circumstances, and he accordingly submits that the *vires* of the Public Security Ordinance which has been enacted in pursuance of these powers cannot be questioned. On a scrutiny of Article 49 I am inclined to agree with Mr. Pullenayagam that it has to be restricted to the control of a Government Department and the relevant Article is 72 which has vested the necessary legislative powers in the Governor. It may be noted that under the Donoughmore Constitution the administration of the Government Departments was carried out under the control of Executive Committees consisting of members of the State Council, and it would appear that Article 49 had been framed with a view to meeting a breakdown of the administration in an emergency.

The question whether the Public Security Ordinance is constitutionally valid arose in the case of *Weerasinghe v. Samarasinghe*[1] 68 N. L. R. 361 and Sansoni J. held it was *intra vires*. With great respect I subscribe to this view.

[1] *(1966) 68 N.L.R. 361.*

(B) *Whether Regulation 18 (1) of the Emergency Regulations is ultra vires the Act and/or the Constitution ?*

Section 5 of the Public Security Ordinance provides for the Governor-General to make Emergency Regulations as appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community, and for this purpose he may authorize and provide for the detention of persons and *inter alia* provide for amending any law, for suspending the operation of any law and for applying any law with or without modification. Section 7 further provides that Emergency regulations so framed shall prevail over any other law.

In my opinion Regulation 18 (1) has been framed with a view to meeting a situation as contemplated under section 5 of the Public Security Ordinance—in the interests of public security at a time of national emergency. I have given my careful consideration to the submission of Mr. Tampoe but I am unable to agree that this Regulation is *ultra vires.*

(C) *Whether Regulation 18 (10) of the Emergency Regulations is ultra vires the Act and/or the Constitution ?*

This Regulation provides that an order under Regulation 18 (1) shall not be called in question in any Court on any ground whatsoever. This appears to be a repetition of section 8 of the Public Security Ordinance with an addition in its tail-end—"on any ground whatsoever". In my opinion this addition does make a difference as it would appear to bar access to the Courts even where an order is clearly mala fide. The object of this Regulation appears to be to close the right of the person detained to question the legality and/or propriety of such detention not only by way of an application for a writ of habeas corpus but to close every avenue available to the Courts of Justice. I do not think section 8 of the Public Security Ordinance has gone thus far. The object of vesting authority in the Governor-General under section 5 of the Public Security Ordinance is with a view to taking quick action when the nation is at peril in the public interest and the Governor-General has been given the authority to frame the necessary regulations which would result in a curtailment of the rights of a person in regard to his personal and proprietary rights ; but I do not think he has the power to deprive a person of his right of access to the Courts of Justice to question the legality and/or propriety of a detention even where it appears to be valid on the face of it on the ground of mala fide on the

part of the person purporting to make such order. The propriety of an apparently "legal" order may well be in question. Mr. Pullenayagam has submitted that only the avenue for relief by way of Habeas Corpus is closed by the operation of Regulation 55 but there may be other avenues by which a person aggrieved may seek relief, but as it appears to me Regulation 18 (10) purports to close all such avenues. I do not think our Legislature would ever have contemplated a situation where every access possible to the Courts of Justice is closed to an aggrieved party even at a time when the country may be at war or in a state of emergency. In my opinion the addition of the words "on any grounds whatsoever" in Regulation 18 (10) is in excess of the powers vested in the Governor-General and therefore this Regulation is *ultra vires* the Public Security Ordinance.

(D) *Whether Regulation 55 of the Emergency Regulations is ultra vires the Public Security Ordinance and/or the Constitution?*

Regulation 55 provides that section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation. By Section 45 of the Courts Ordinance the Supreme Court is authorized to grant and issue mandates in the nature of writs of habeas corpus to bring up before such Court—

(*a*) the body of any person to be dealt with *according to law;*

(*b*) the body of any person *illegally or improperly* detained in public or private custody and to discharge or remand any person so brought up or otherwise *deal* with such person *according to law.* The words italicized by me are significant. Thus it will be seen that the Courts Ordinance, the object of which is to amend and consolidate the Laws relating to Courts and their *Powers and Jurisdictions* has enshrined this fundamental right. In my opinion the substantive right has to be kept distinct from the powers and the jurisdiction of the Courts. This is a right which the people of this country have enjoyed from time immemorial and since the present judicial system was established in Ceylon by the Charter of Justice in 1833 by the British and thereafter by the Courts Ordinance No. 1 of 1899 the powers and jurisdiction of our Courts have been defined. The origin and history of this writ in England are lost in antiquity. It is said to have been in use even before the Magna Carta. Perhaps in our country with its ancient civilization this writ with variations in the procedure must have been in use for several centuries before the British occupation. It is the supreme right of the

subject which has been recognised by Parliament with emphasis even during the hearing of this case in presenting the Interpretation (Amendment) Bill.

The Public Security Ordinance as I have already observed makes provision for the Governor-General to take action on the advice of the Prime Minister or other Minister when the nation is at peril and it has vested in him wide powers to take control of the situation in the interests of public security and preservation of public order. Under section 5 (2*a*) he may make regulations to authorize and provide for the detention of persons. Under 5(2*d*) he may make regulations to provide for amending any law, for suspending the operation of any law and for applying any law with or without modification.

The question does arise whether sections 5 (2*a*) and 5 (2*d*) have vested the Governor-General with the power to make a regulation in the terms of Regulation 55 which has sought to deprive a person of his right to seek access to the Supreme Court by way of a Writ of habeas corpus. It must be kept in mind that the Governor-General has been given certain powers under the Public Security Ordinance, to enable him to take action in view of the existence or imminence of a state of public emergency. Sections 2 and 5 bring out very clearly the context in which the Governor-General is authorized to exercise his powers upon the recommendation of the Prime Minister or any other Minister; but in my opinion these sections do not go the length of suspending the rights of persons detained under the Regulations to seek access to the Supreme Court by way of habeas corpus under section 45 of the Courts Ordinance. However serious a public emergency may be if an official purports to make an "order" which in effect is no order as it is mala fide then it is in the public interest to give an opportunity to the party aggrieved access to the Supreme Court by way of habeas corpus. A denial of such right would certainly not be in the public interest. I do not think when the Public Security Ordinance was enacted in 1947 and amended thereafter in 1949 and 1953 the Legislature could have contemplated the suspension of this right altogether by way of Emergency Regulations.

Assuming that Regulation 55 is *intra vires* its implications were considered in relation to Regulation 19 in both the *Hirdaramani* case and the earlier Application made by *P. C. Gunasekera* and it was held that a detention under Regulation 19 does not fall within Regulation 55 and this Court in the latter case dealt with the corpus P. C. Gunasekera under section 45 of the Courts Ordinance and discharged him. With great respect I am in agreement with these decisions on this question.

This again shows that the Legislature could not have contemplated suspending the most vital fundamental human right a person in this country enjoys by way of a Regulation under the Public Security Act. The Legislature in its wisdom in the recent Interpretation Amendment Bill has taken particular care at the Committee stage to preserve the sanctity of this writ in no uncertain terms. In my view Regulation 55 falls outside the scope of the Public Security Ordinance and I accordingly hold that it *is ultra vires.*

It will be convenient to deal with heads (E) & (F) together.

(E) *Whether the purported detention orders made by the Permanent Secretary in respect of the corpus are ultra vires Regulation 18 (1) ?*

and

(F) *Whether the purported detention orders have been made mala fide, in law, for a collateral purpose or with an ulterior motive and/or mala fide in fact ?*

My brother Alles J. has set out the facts in detail and I do not think it necessary to repeat them. On the facts set out, I agree with my brother Alles J. that there were sufficient grounds for the Permanent Secretary to issue the detention orders. I am not satisfied that he had a collateral purpose or an ulterior motive as very eloquently and strenuously alleged by Mr. Tampoe. It may well be that the debates in Parliament influenced him to a degree but on the material available to him the dominant motive appears to have been to prevent the corpus from acting in a manner prejudicial to the public safety and/or the maintenance of public order. The mere fact that the corpus having been arrested on 18.3.71 was released thereafter by itself is no answer as things appeared in a different light after the insurgent movement showed its head conspicuously on 5.4.71. Therefore, in that context the material already available afforded an adequate ground for preventive detention. In the circumstances, I do not think the act of the Permanent Secretary could be treated as mala fide as he was well entitled to form an "opinion" on the material available to him.

The question does arise whether the issue of the first detention order under Regulation 18 when the Supreme Court was about to release the corpus from the detention under Regulation 19 is tantamount to malice in law. In the context of this case we have to keep in mind the fact that the corpus was discharged in the earlier Application owing to a technical defect in the procedure adopted in taking him into custody. It has been held

in a series of Indian cases already referred to by my brother Alles J. that there can be no legal objection to an irregular detention order being regularised by a subsequent detention order on the same material. In the circumstances, I fail to see the illegality or impropriety of the issue of the detention orders now in question.

The further question arises whether the failure to inform this Court of this detention order under Regulation 18 before the corpus was discharged, when it was evident that the Court was satisfied that the detention under Regulation 19 was illegal, is tantamount to malice in law. Was it an attempt to stultify and belittle the authority of this Court; or at least was it in bad form and an act of discourtesy to this Court ? Also does it amount to malice in law ? I must say this question is not free from difficulty. No doubt when an application by way of a Writ of habeas corpus is considered by this Court it is concerned with the legality and/or propriety of the detention of the corpus at the time the respondent answers unlike in a civil suit where the Court deals with the rights of parties at the institution of the action. So that if in the course of the proceedings a further detention order is made and the respondent seeks to rely on it then it is the duty of the respondent to draw the attention of Court to the fresh order and not wait till the corpus is discharged to take him into custody on such order. However, it may well be that in the instant case the situation was such that the Permanent Secretary may well have thought that a reference to the fresh detention order when the Court was proceeding to adjudicate on the legality or propriety of the earlier detention under Regulation 19 would amount to contempt of court or at least an attempt to influence the Court. I must say the reaction of a Judge could have been unfavourable if the respondents sought to refer to the detention order issued on 21.1.72, particularly as this order though issued had not been served on the corpus. It may have appeared to Court as a threat by the Executive. Even if Counsel appearing for the Crown was aware of this fresh order he may well have been on the horns of a dilemma as to the prudent course of action without offending the Bench sitting in adjudication and about to pronounce an order adverse to the Crown. The situation being so delicate I do not think this Court at this stage could treat this conduct as malice in law. Even if the failure of the Crown to draw the attention of Court to the Detention order of 21.1.72 made prior to the adjudication by Court on the same day is recognised as an error in law and therefore technically malice in law—in my opinion it is not of any avail to the corpus at this stage as the relevant Detention order in an Application under section 45 of the Courts Ordinance is the subsequent one made on 17.2.72 which was

made after the adjudication of Court. Mr. Tampoe submits that this being an extension of the earlier detention the taint of malice attaches to this order. On a scrutiny of this detention order I find that it is technically a distinct order and not a mere extension. Furthermore, the conduct of the respondent not amounting to malice in fact I do not think even if his conduct amounts to malice in law resulting from a legal omission such malice could flow from one detention to another.

In this context Mr. Tampoe has referred us to the mode of arrest. He submits that the facts, as set out in the affidavits in support of this application giving us a graphic picture of the arrest of the corpus in the Law Library adjunct to the Supreme Court in the course of a consultation amount to malice in law. On a perusal of the affidavits filed by both parties on this question, admittedly, the corpus had been arrested in the Law Library and that in the course of a consultation with counsel. I have given my anxious consideration to this episode without precedent in the history of our Courts and perhaps in the history of the Courts in any part of the World, and I am constrained to place on record my reactions to this episode in the light of the several affidavits filed by the parties. The conduct of the Police on this occasion appears to have been a reaction to the long delay in the consultation which gave rise to an unpleasant situation resulting in a virtual stampede. As the corpus was well within sight of the Police officers there is nothing to show that the lawyers there were seeking to conceal him or help him to escape. Be that as it may, one cannot overlook the fact that it was a most unfortunate display of temper in a delicate situation. One can well gauge the reaction of the public to an episode of this nature in this principal seat of Justice. However, on an assessment of the affidavit I am of the view that this was not a deliberate act on the part of the Police but only a thoughtless and hasty reaction to a situation almost surcharged with electricity at high pitch, a reaction which clearly would not have been in the contemplation of the Permanent Secretary. I am not satisfied that this act therefore amounts to either malice in fact or malice in law. At the same time I hope this unfortunate lapse will not be treated as a precedent. I am unable to agree that the case of *Christie v. Leachinsky* [1] (1946) A. C. 573 relied on by Mr. Pullenayagam could be adopted as a precedent for such arrests in a Law Library during a consultation.

Assuming that Regulation 55 is *intra vires* I might now consider the implications of Regulation 18 (1). This question has been dealt with at length in the *Hirdaramani* case. I do not think it necessary to advert to the several cases cited on this point as they have been already referred to by my brother Alles J.

[1] *(1946) A. C. 573.*

On a consideration of these decisions in the context of our Law, with great respect, I agree with the majority view in the *Hirdaramani* case that Regulation 55 will not apply to the case of a person under an invalid detention made in the abuse of the powers conferred on the Permanent Secretary under Regulation 18 (1). With great respect I am unable to agree with the view, if I have understood it correctly, that this Court is precluded from considering the issue of good faith merely because an Order valid on the face of it is presumed to be bona fide.

On my reading of the English cases I have taken the view that they do not go so far as to shut out the Courts altogether from *entertaining* an Application for a writ of Habeas Corpus and considering the question of mala fide where it is raised in the Application and there appears to be a prima facie case which invites adjudication by Court. How successful the petitioner will be is another matter. The question is whether this Court is precluded altogether from looking into this matter, it being a justiciable issue. For instance, if the Permanent Secretary has been misled by some subordinate officer and in the result he makes an Order which is clearly not in the public interest but to satisfy some private grudge could it be said that this Court has no jurisdiction to even look into an allegation of mala fide ? I do not think the *East Elloe* case stands in the way of arriving at the conclusion that this Court is not precluded from entertaining an Application of this nature. We have to keep in mind the context of the present case where the most valuable fundamental right of a human being is in question. In the *East Elloe* case they were dealing, no doubt, with a question of mala fide but the context was substantially different. It was a question affecting property rights and where the right to question a compulsory purchase order under the Acquisition of Land Act was prescribed in law. There the party affected had a right which was not exercised within a set period. In my opinion the rules of interpretation in that case should not be extended to a case such as this where the very right to question the order is challenged and there is no question of prescription. On the other hand the *Anisminic* case appears to be more in point although there they were dealing with the determination of a tribunal. I do not see how the Order of an executive officer who acts under the colour of the Emergency Regulations restricting the liberty of the subject which is mala fide can be distinguished. Here too he would be acting outside his jurisdiction as the Regulation clearly contemplates an Order based on an opinion formed bona fide. It may well be that in the result an inquiry into the question of mala fide may end in a blind alley and as was observed in *Nakkuda Ali v. Jayaratna* the reservation of

the case of bad faith is hardly more than a formality ; but that does not mean that this Court should shut its door to a person who on the face of his petition has a prima facie case of bad faith showing that the respondent has acted dishonestly and/or with an ulterior and/or collateral purpose and therefore in fact he had not exercised his "opinion" as contemplated under the Regulations. These Regulations have been made by the Governor-General under the Public Security Ordinance in the public interest so that, in my view, any exercise of an opinion which defeats the very object of the Legislature would be a justiciable issue. It may well be that when an Application for habeas corpus is filed, as in the instant case, the respondent would file an affidavit setting out the grounds for the Order as far as is practicable without endangering the security of the State and the petitioner will have the satisfaction of knowing the nature of the charge against him. It may well be that even when the respondent fails to file an affidavit setting out the grounds on a scrutiny of the averments in the petition the Court would hold that no prima facie case has been made out and the Application would accordingly be dismissed; but what is important is the satisfaction the petitioner derives that this Court has given ear to his complaint. How far a Court will probe into the complaint is a matter that is controlled by the degree of the emergency prevalent and the larger interests of public security, when sometimes the freedom enjoyed by the citizen in times of peace has to be restricted. But what I wish to emphasise is that although this freedom is restricted the right of the person concerned to question the legality and/or propriety of such restriction based on an Order made mala fide cannot be taken away, under our Law.

I agree that the discretion vested in the Permanent Secretary under Regulation 18 (1) should be given a subjective meaning, but as I have already observed according to the trend of the English decisions under Regulation 18B—*Lee's* case, *Budd's* case, *Liversidge v. Anderson* and *Greene's* case although the right of the person to question the legality of the detention has been reduced to almost nothing yet these decisions give a ray of hope to detainees to question their detentions when they have not been made bona fide. To what extent they could succeed is another matter—the avenue is left open. As Keir and Lawson comment in their book "Cases on Constitutional Law" 5th ed. at page 14 : "In time of war the maxim *salus populi suprema lex* has been used to justify a benevolent interpretation of statutes to the advantage of the executive. At any rate it seems that during a time of national danger the presumption in favour of the liberty of the subject is very much weakened". In my opinion

in the context of Regulation 18 (1) read with Regulation 55 the right to this "freedom" is restricted but not wiped out altogether.

Assuming that Regulations 18 (10) and 55 are *ultra vires* as I have already observed, what is the effect of Regulation 18 (1) ? In my view in interpreting it the maximum *salus populi suprema lex* has to be kept in mind, and I think even in this context it is the subjective test which applies and the respondent would be justified in lifting the veil, as in the instant case and the *Hirdaramani* case up to a point.

A further question arises whether in any event section 8 of the Public Security Ordinance precludes this Court from questioning these Emergency Regulations or orders, rules and directions given thereunder. On a close reading of this provision it appears to me that it can apply only to Emergency Regulations duly made within the scope of section 5 of this Ordinance and to orders, rules or directions validly made under such Regulations. If such orders are not validly given they would not be "orders" within the meaning of section 5 ; so that in effect this Court has the power and jurisdiction to question the legality and/or propriety of an order purported to have been made mala fide. The question as to how far this Court can or will probe into this matter will depend on the response to the Application by the respondent in the context of the emergency at hand. As in the instant case the respondent may lift the veil a little to show that the detention has been made bona fide. It may well be that in a particular case, when the nation is at extreme peril, in the public interest, the respondent may not be able to lift the veil at all. Be that as it may, the petitioner will, at least, have the satisfaction that he has been heard. This would, in effect, be a useful check on the Executive which in its own interests should act with restraint in the public interest. Mr. Pullenayagam has referred us to the Divisional Bench judgment in *Anthony Naide v. Ceylon Tea Plantation Co. Ltd. of London*[1] 68 N. L. R. 558. But in that case the Rent Restriction (Amendment) Act No. 12 of 1966 dealt with jurisdiction and not with judicial power.

In the instant case the 1st respondent has set out certain grounds. With great respect I am in agreement with my brother Alles J. whose judgment I have had the advantage of perusing, that there was adequate material for the Permanent Secretary to form his opinion bona fide in the interests of public security, particularly the ground that the corpus had a map showing the mode in which the Ahangama Police Station may be attacked.

[1] *(1963) 68 N. L. R. 558.*

In the light of this ground relied on by the Permanent Secretary I do not think this Court can accept the submission that he has not exercised his opinion bona fide in the interests of public security.

In the result this Application for a writ of habeas corpus must stand dismissed.

THAMOTHERAM, J.—

The Petitioner challenges the detention orders under which her husband was and is being held, as being mala fide. In the Habeas Corpus application relating to Hirdaramani my Lord the Chief Justice held that if regulation 55 made under the Public Security Ordinance was *intra vires* it deprived this Court of the power to review a detention order under 18 (1) of the Regulations. He pointed out that the only possible issue which can be raised when a detention order valid on its face is produced was the issue of good faith. G. P. A. Silva, S.P.J. and Samerawickrame J. held that Regulation 55 did not have that effect and that it was always open to the petitioner to challenge the bona fides of a detention order. All three Judges, however, agreed that if the correct position was that this Court had jurisdiction to investigate the bona fides of a detention order under Regulation 18 (1) there was an initial burden on the petitioner which was very heavy if not impossible. This flows from the fact that the essence of the allegation of a petitioner in such a case as this is that although the Permanent Secretary states he had the required opinion he did not have it in fact. In other words he was stating an untruth in the detention orders and in his affidavit.

In *Liversidge v. Anderson*[1] A. C. 1942 p. 296 Viscount Maugham stated " It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State formed partly at least on grounds which he is not bound to disclose ". Lord Atkin in the same case stated " the result is that the only implied condition is that the Secretary of State acts in good faith. If he does that and who could dispute it or disputing it prove the opposite ? The Minister has been given complete discretion whether he should detain a subject or not ". My Lord the Chief Justice having quoted the above passages remarked " this observation 'who could dispute the good faith of the Secretary of State or disputing it prove the opposite' points forcefully to the difficulty or even to the futility of a challenge that a person who has stated an opinion did not in truth hold it.....even a

[1] *(1942) A. C. 296.*

mistaken opinion will not invalidate a detention order and want of good faith can be established only by proof positive that the Permanent Secretary did not indeed form that opinion". Quoting further passages from this and the *Greene case* he remarked "these passages indicate how narrow and even purposeless would be the scope of an investigation into the question whether the Permanent Secretary did not in fact form the opinion stated in this order". G. P. A. Silva, S.P.J. said "where objective tests are contemplated the Court has naturally a wider area of inquiry before considering the question of exercising its power to issue a writ while in a case where the subjective test is applicable the area of inquiry is extremely narrow . . . . . The third category involves only a subjective test and it is that category which we are faced with in this case. The order to detain the Corpus is based only upon the opinion held by the Permanent Secretary. If he held the opinion before making the order it is immaterial whether his opinion was right or wrong provided it was honest i.e. in good faith". Samerawickrame J. pointed out that "the petitioner was thus alleging both that the 1st Respondent had made the order in bad faith and that he had falsely set out in the order that he had formed the opinion that it was necessary to make a detention order when in fact he had not formed such an opinion, but had made the order for an ulterior purpose. He was in effect alleging fraud. The burden of proving such an allegation is on the party who makes it and it is a heavy burden to discharge. The raising of mere suspicion is not sufficient".

I have referred to the heavy burden on the petitioner to establish mala fides, if he is permitted to do so, for two reasons. It has a relevance to the question whether Parliament intended mala fides to be an exception to the general words in Section 8 of the Public Security Ordinance which state that no Emergency Regulation and no Order, Rule or direction made or given thereunder shall be called in question in any Court. In cases where only the subjective test is applicable to a grant of discretionary power the only matter which could be questioned is the bona fides of the order. The second reason is that it helps to decide whether the petitioner in the instant case has come anywhere near discharging the burden cast on her to establish mala fides.

What then are the facts relied on by the petitioner to discharge her burden in this case ?

On the 18th March 1971 her husband was taken into custody by the Ahangama Police. Mr. Prins Gunasekera M. P., a brother of the Corpus, telephoned the Hon. Prime Minister. She assured

him that she would set in motion an immediate investigation into the circumstances which led to his brother's arrest and if his brother was exonerated of any allegation he would be released forthwith. On the same day about 5.30 p.m. the Corpus was released.

It is pertinent to see what material there was against the Corpus at this stage. In the affidavit of Mr. Navaratnam, S.P., he states that P. C. Gunasekera was arrested on the 18th March on suspicion of being concerned in conspiring to overthrow other than by lawful means a Government established by law, and that on this date he had with him a map of Ahangama showing the location of the Ahangama Police Station, indicating the mode in which it may be attacked, posters and newspapers of the Janatha Vimukthi Peramuna and a set of five lectures setting out the reasons for and method by which the Government of Ceylon should be overthrown. It must be remembered that no Police Station had been attacked as on this date. These facts would have assumed greater significance in the light of what happened on the 5th April and thereafter when the insurgents attacked several police stations throughout the Island. Mr. Navaratnam stated that the Corpus was released on the 18th as the evidence available at that time appeared to be insufficient and that he had ordered further investigations to be made.

On 4.12.71 at about 10.30 p.m. the Corpus was arrested again by Mr. A. T. de Fonseka, A.S.P., when he was in his parental home. This arrest it was claimed was unjustified and mala fide. It was for the ulterior motive of punishing Mr. Prins Gunasekera, M.P., the brother of the Corpus against whom the Hon. Prime Minister had an animus and the Permanent Secretary being an officer under her control merely carried out her wishes. In order to examine this allegation it is necessary to consider the events which took place between the dates of the two arrests, viz., between 18.3.71 and 4.12.71.

The Petitioner claims to be able to speak to this period and affirms that her husband did nothing to justify the second arrest. It was during this time that she married the Corpus and lived with him in his parental home.

Her brother-in-law Mr. Prins Gunasekera however did many things to annoy the Government. From the very onset of the incidents in April 1971 he held the view that the Government had been ill advised in relying heavily upon armed retaliation against the insurgents and killing the country's youth instead of seeking a long term political solution to the problem of unrest among the youth of his country. He communicated these views to the Governor-General and to the Prime Minister

He left Ceylon as a member of a Parliamentary delegation to England in July 1971 and while he was there the Ceylon Committee sponsored by the Bertrand Russel Peace Foundation, London, came to be formed. As representations were made regarding prisoners held without trial, Amnesty International sent out a representative to Ceylon in the person of Lord Averbury. Mr. Prins Gunasekera received him at the Katunayake Airport on the 17th September 1971.

He accompanied Lord Averbury to Dadalla on 25.9.71 to verify the report that a group of persons had been lined up in front of an open grave and shot by the local Police in that graveyard.

Lord Averbury was in Ceylon from the 17th to the 28th September 1971. During this period Mr. Prins Gunasekera assisted him in getting about the country and obtaining whatever information was obtained as Lord Averbury was denied Government co-operation for his mission.

On 14.10.71 Mr. Prins Gunasekera received a letter from the Secretary of the S. L. F. P. alleging among other things that he had participated " in collaboration with one Lord Averbury in violating those steps taken for essential security by the Ceylon Government and also in the interest of the International reputation of the Coalition Government ". He was suspended from membership of the S. L. F. P. the same day. On 26.9.71 he published two advertisements in the *Aththa* and *Lankadeepa* newspapers calling for information about missing persons taken into custody by the Police and Army since April 5th 1971 with the view to securing a proper investigation of all such cases. On the 3rd December he moved in Parliament a cut in the Governor-General's vote. On the same day he sought to read a letter he sent to the Governor-General referring to what he termed the extermination of the youth by the armed forces. On the 4th December his brother was arrested for the second time. I have here given the more important averments in Mr. Prins Gunasekera's affidavit.

According to Mr. Navaratnam's affidavit, investigations were carried out into the offences committed by the insurgents in the course of which the following statements had been recorded :—

(1) On the 12th day of June, 1971 that of Newton Jayatunga *alias* Vipula, the District Leader of the Janatha Vimukti Peramuna, a proscribed party, for Ahangama. He admitted participating in the attack on the Ambalangoda Police Station on the night of 5th April, 1971.

(2) On the 16th day of June, 1971 that of T. H. Gunasiri *alias* Janaka, the Deputy Secretary of the Janatha Vimukti Peramuna, who admitted having led the attack on the Elpitiya Police Station on the night of 5th April, 1971.

(3) On the 17 day of June, 1971 that of I. P. Siripala *alias* Jagath, District Secretary for the Galle Province of the Janatha Vimukti Peramuna, who admitted having led the attack on the Ambalangoda Police Station on the night of 5th April, 1971.

(4) On the 14th day of July, 1971 that of A. H. Dayananda who was remanded for insurgent activities and whose name appeared in the letter found in the possession of the said P. C. Gunasekera on the 18th March.

(5) On the 3rd day of December, 1971 the statement of G. R. Ratnaike who was remanded for insurgent activities and whose name appeared in the statement of Jayatunga, Gunasiri, and Jayapala referred to above.

These statements referred to above, revealed that the place where P. C. Gunasekera was residing on the 18th of March, 1971 was the Headquarters of the Janatha Vimukti Peramuna at Ahangama and that this was permitted by him. The statements also revealed that in December 1970, the said P. C. Gunasekera had agreed to permit Newton Jayatunga, the District Leader for Ahangama, to reside in his house and do propaganda work for the said Janatha Vimukti Peramuna and assist him and the Janatha Vimukti Peramuna financially. The statement further revealed that plans were made prior to 5th April to attack the Ahangama Police Station.

I do not think any Court can say that on this material, Mr. Navaratnam, the Superintendent of Police, could not have had the required reasonable suspicion. The statements recorded would have been available to a Court, if it so desired.

The petitioner's Counsel urged that the conduct of Mr. Prins Gunasekera had annoyed the Prime Minister as the angry exchanges in Parliament showed. There can be no doubt that the conduct of Mr. Prins Gunasekara would have embarrassed the Government a good deal, at a time when the Government felt it was imperilled to the extent of having to seek foreign assistance in their effort to control the insurgents who were waging, what has been called, a " civil war ". This conduct might have provided a motive, if not good reason, for curbing the movements of Mr. Prins Gunasekera himself. But what the petitioner wants this Court to hold is that it provided a motive for the second arrest

of his brother, P. C. Gunasekera, whom Counsel for the petitioner has characterised as a harmless teacher. Proving that the Prime Minister was annoyed with him is not the same thing as proving that she acted mala fide in regard to the Corpus. In order to support his submission that the Government interned his brother in order to punish Mr. Prins Gunasekera, Counsel had to go to Nazi Germany to find an illustration. It is impossible, on this material, to hold that the arrest of the Corpus on 4.12.1971 was mala fide.

On 28th December 1971 the petitioner filed an application (411/'71) [1] for a mandate in the nature of a Writ of Habeas Corpus on the grounds that the arrest of her husband was illegal, mala fide and without lawful authority. On 1st January 1971 her husband was produced before the Supreme Court and released at about 12.20 p.m. At 3.15 p.m. the same day, the Police sought to arrest P. C. Gunasekera when he was giving instructions to his lawyers who were preparing an affidavit for him to sign. At the request of his lawyers the Police retired but returned again at 3.45 p.m. when they arrested him.

The petitioner's Counsel contended that this arrest amounted to flouting the authority of the Supreme Court in making non-effective its order in the earlier application. It was urged that the signing of the detention order even before the order of release was made and its non-disclosure to Court in the earlier application, amounted to contempt and was mala fide in law. Further, it was contended that the manner and place of arrest, the Law Library, was evidence of mala fide in law.

In considering these submissions, we must remember the following :—

(1) The " mala fide " must be that of the Permanent Secretary to the Ministry of Defence and External Affairs. This flows from the fact that the purpose of proving mala fide is to establish that the Permanent Secretary, although he has said he was of the requisite opinion, he was not. Now, this can only be proved by showing mala fide in the Permanent Secretary himself.

(2) It has been said that "mala fide in law is itself inferred when an order is made contrary to the objects and purposes of the Security Act or where the detaining authority permits himself to be influenced by considerations which he ought not to permit". The case of *Maledath Barathan Malayali v. The Commissioner of Police* [2] *A. I. R. (37) 1950 Bombay 202.*

[1] *(1972) 75 N. L. R. 246.* [2] *A. I. R. (37) 1950 Bombay, 202.*

(3) It is also necessary to compare the detention under Regulations 19 (8) and 20 with the detention order made under 18 (1).

The foundation of a detention order under Regulations 19 (8) and 20 is the arrest under Regulation 19 (1) which permits the arrest, without warrant, of any person "who is committing or has committed an offence under any Emergency Regulations or whom he has reasonable grounds for suspecting to be concerned in or to be committing or to have committed an offence under any Emergency Regulation".

The arrest can be made by any of the class of officers enumerated in the Section but the detention and custody in any place must be authorised by the Inspector-General of Police in regard to the first fifteen days. Detention thereafter has to be ordered by a Court of competent jurisdiction. The foundation of the detention is a valid arrest. Neither Section 8 of the Public Security Ordinance nor Regulation 55 can be a bar to testing the validity of an arrest, but if the validity of arrest is successfully challenged, the subsequent custody becomes unsupportable and without foundation.

Section 4 of the Bengal Criminal Law Amendment (Supplementary Act 1932) reads: "The powers conferred by Section 491 of the Criminal Procedure Code (same as Section 45 of our Courts Ordinance) shall not be exercised in respect of any person arrested, committed to or detained under the local Act or local Act supplemented by this Act". It will be seen that Regulation 55 has not been framed as widely as the Section quoted. It does not refer to arrests.

The purpose of detention under 19 or 20 is not preventive detention. It is detention prior to trial and based on the footing of an offence which is being committed or has been committed. The Permanent Secretary has no part to play in this. The detention follows a lawful arrest.

The detention under 18 (1) is of a totally different character. The detention here is preventive, based on the subjective opinion of the Permanent Secretary. If he is of a present opinion that the detention is necessary for any of the purposes specified, then he may make order that such person be taken into custody and detained in custody.

A person may be detained in custody under Regulations 19 (8) and 20 and a detention order may be made under 18 (1) while he is already under such custody under 19 (8) but the detention order should not be made for the ulterior purpose of depriving the detenu of any defence open to him under the former.

In *Maledath Barathan Malayali v. Commissioner of Police* (supra), the applicant was arrested for having committed an offence under the Criminal Law. Then investigations under the Criminal Procedure Code were started by the Police authorities and then he was detained by the Superintendent of Police and that detention was continued by the order made by the Commissioner of Police, with the result that the Police authorities thought it was no longer incumbent upon them to comply with the provisions of the Criminal Procedure Code and give effect to the safeguard provided therein and that the detenu need not be put up before a Magistrate for any remand application. Chagla, C.J. said "In our opinion, the alternatives open to the police authorities are very clear. When an offence has been committed, the police authorities may investigate it, in which case they must comply with the provisions of the law with regard to investigations or they may feel that the detention of the accused is more essential in the interest of the State and what is more important, is what he is likely to do, rather than what has already been done, in which case it will be open to them to detain him under the Security Act but they cannot pursue both the rights at the same time because *on the facts of this case,* it is apparent that these two rights are inconsistent and cannot be exercised at the same time. If an extraneous circumstance influenced the making of the order, then the order can never be said to have been made bona fide. Even if the detaining authority was satisfied in the eye of the law, it was an order which was made for a collateral purpose. It was made mala fide and it cannot be sustained."

From the facts of that case, it was found that the plaintiff's detention order was made to prevent the defence open to a person detained for committing an offence being availed of and this collateral purpose made the detention order invalid. In the instant case, the authorities waited till the detention based on the invalid arrest was terminated before arresting him again. The Executive was not making use of the detention order for any ulterior purpose. They waited till the termination of the detention based on an invalid arrest to serve a detention order under 18 (10).

It was contended that the reason for resorting to a detaining order under 18 (1) was to avoid scrutiny by the Courts of the grounds of arrest and it being held that there were no reasonable grounds for suspicion. One has only to look at the affidavit of Mr. Navaratnam, the Superintendent of Police, to be satisfied that there was no reason for the authorities to have had this fear. Moreover, the judgment in the first application implied that if

the Assistant Superintendent of Police had the material available to the Superintendent of Police, the arrest by the Assistant Superintendent of Police would have been justifiable.

"In a proceeding under Section 491 of the Indian Criminal Procedure Code (Section 45 of our Courts Ordinance), the Court has to consider the legality or otherwise of a detention of a particular person in public or private custody. The legality of the detention has to be considered not with reference to a particular order only. If there are more orders than one against a particular person on the date on which the question of a detention is under consideration it is certainly the duty of the detaining authority to produce the orders of detention in support of or in justification of the detention. I do not think it is open to the Government to keep a secret order of detention up its sleeve and allow an order of release to be based on the first order of detention and produce the second order of detention for the purpose of detaining that man after the order of release had been passed. To allow or encourage such a practice would be tantamount to stultifying the order of the Court."—Das J. in *Subodh Singh v. Province of Bihar*[1] A. I. R. (36) 1949, Patna 247.

The present case is very different to what Das. J. was commenting on. In that case, there were two detention orders relating to the detention, the legality of which was being inquired into. One was invalid, the other was valid. In this situation it was wrong to have allowed the Court to pronounce on the invalid order and direct the release while "keeping up its sleeve the detention order which was framed and relevant to the detention being inquired into".

In the present case, in the earlier proceedings the validity of the arrest on which the detention was based, was effectively challenged. There was no means of rectifying this detention until the Corpus was released and re-arrested by the Police Officer who had the suspicion. What was wrong or what needed rectification was the arrest by the wrong officer. Detention under 18 (1) could not have validated the detention being inquired into. There was a decision by the Executive to take the Corpus into custody under 18 (1) after he was released and for this purpose, a detention order was signed before the release. I do not think the non-disclosure of this decision to the Court evidenced mala fide. It had no relevance to the inquiry being conducted by Court. The question is, what was the legal effect of the order of release in the earlier application, made as it was, on the basis of the Corpus being not arrested validly? There was certainly no bar to his being arrested again on the

[1] *A. I. R. (36) 1949, Patna 247.*

same grounds by the officer who had the requisite suspicion nor was there a bar to his being arrested on a detention order. In these circumstances, I do not see any flouting of the Court's order in the earlier application and certainly no evidence of mala fide in the non-disclosure of the decision to serve a detention order on the Corpus once the earlier proceedings were concluded.

The case of *In re A. K. Gopalan*[1] A. I. R. 1953 (page 41) supports my view. There, it was held that the detention order issued for the purpose of flouting the decision of Court holding the previous order of detention on merits would be a mala fide order. But if the decision had proceeded on the ground that the law under which the prior order was made was invalid or that the order in itself was not in a regular form, a fresh order based under fresh legislation or in a valid form would not be necessarily mala fide.

" Where however the Government passes an order, even before the judgment is delivered, and allege that they pass the order because they anticipated the judgment to declare the prior order invalid on the technical ground that it did not mention the period of detention when they had no justification for such belief, and even the fresh order omits to rectify the defect, the circumstances leave no doubt that the intent of the Government was to flout the decision of the Court. Further, when having passed such an order, they refrain from mentioning it to Court so as to enable the Court to take the reason therefor into consideration before it pronounces judgment, it again is a circumstance which goes to show the indirect motive and the improper conduct of the Government. "

The facts in the present case are quite different and can be said to resemble the case quoted only if the Assistant Superintendent of Police Mr. Fonseka again arrested the Corpus after he was released. This would be flouting the authority of Court or ignoring its pronouncement in regard to the arrest.

In *Bhupendra De v. the Chief Secretary, Government of West Bengal,*[2] A. I. R. (36) 1949 Calcutta 633 CN 180 Full Bench, Harris C. J. said " I do not think that it can be contended that the fresh orders under the Bengal Law Amendment Act are mala fide merely because they were made with the intention of justifying detention which had been declared by the Courts to be unlawful. Orders on the Bengal Criminal Law Amendment Act were undoubtedly made to nullify the effect of the decision of this Court in the case of *Badal Bose and others v. The Provinces of West Bengal,* but even so, the orders are not necessarily mala fide.

[1] *A. I. R. 1953 p. 41.* [2] *A. I. R. 1949 Calcutta 633 CN 180.*

In the *Badal Bose case*, this Court expressed no opinion on the necessity for such detention. All that the Court held was that the orders were invalid as they were made under an Act which was not in force when the orders were made. Had the Court held that the orders were improperly made, even if the Act was not in force, different considerations would arise and in such a case, it might well have been argued that the orders under the Bengal Criminal Law Amendment Act were mala fide as it had been made to prevent the release of persons who had been detained for no good reason. In the *Badal Bose case* however, the Court expressed no opinion on the question whether there existed the fact or any ground which would justify detention under any law."

So also it is in the instant case. The Court ordered the release of P. C. Gunasekera on 21.1.72 only because he had been arrested by the wrong Police Officer. It made no pronouncement on the grounds set out in the affidavit of Mr. Navaratnam and even if the detention orders were based on the same grounds as set out in the affidavit of Mr. Navaratnam it gives no grounds for inferring mala fide in the Permanent Secretary. So again does the making of a detention order under 18 (1) rather than an arrest under 19 suggest mala fide so long as the grounds of arrest had not been held to be insufficient by the Court in the first application.

The fact that the detention order was got ready even before the release was made, again in the circumstances of this case, does not suggest mala fide nor is it contempt of Court as it must have become clear that the application was being argued only on the ground that the arrest was wrongly made and not that the grounds as stated in the affidavit were inadequate and that the release could only be ordered on the ground that the arrest was unlawful. The position would have been different if the release was ordered (if it was possible to do so) on the basis that the grounds for detention were inadequate. I am unable to see any evidence of mala fide from the fact that the Government arrested P. C. Gunasekera after he was released by the order of this Court on the ground that he had been arrested by the wrong Police Officer.

The arrest of the Corpus within a few hours of his release, in the Law Library, was strongly relied on as an indication of bad faith. It is indeed unfortunate that the arrest took place in the circumstances it did. To the lay mind, to the person ignorant of the law, it had all the appearance of a flouting of the authority of this Court but it was not so or else this Court would have taken appropriate steps.

I am unable to say how far the arrest at the time and place was unavoidable. I shall therefore say no more than that in my view, the manner, time and place of arrest by the police has no relevance at all to the question of the bona fides of the Permanent Secretary in passing the detention order.

As the majority in *re Hirdaramani* held that it was open to the petitioner to challenge the bona fides of the opinion of the Permanent Secretary under 18 (1) I have considered at length the material relied on by the petitioner. She has not discharged the burden placed on her.

I shall now give my opinion in regard to Section 8 of the Public Security Ordinance and Regulation 55. Regulation 18 (10) is only a repetition of Section 8.

This application involves a consideration of five fundamental concepts.

(1) The personal freedom of a subject.

(2) The discretionary power in an executive officer.

(3) Judicial review and control of this power.

(4) The supremacy of Parliament.

(5) The Rule of Law.

The last is a principle accepted by all democratic constitutions and is an expression used in the Universal Declaration of Human Rights. The I. C. J. in their Declaration of Delhi 1959 pointed out that in regard to the executive the Rule of Law meant that delegated legislation should be subject to independent judicial control. It is the absence of arbitrary power on the part of the Government. When such arbitrary power is necessary in the public interest the principle of the Rule of Law is still maintained by the Courts having the power of review and control of the exercise of discretionary power to ensure that the exercise is within the limits given by law.

It has always been recognised that times of grave national emergency demand the grant of special powers to the executive. There are times when it would be dangerous to maintain the normal limitations imposed by judicial control. In short a situation of emergency can justify both the grant of discretionary power in the executive and a limitation of judicial review and control. But both these can be done only by Parliament and the primary question a Court has to ask is what was the intention of the Parliament in a given case.

When the supremacy of Parliament is accepted, as it must be, the Court has to confine its power of review to examining the limits and legality of discretionary power. It should not be carried away by any feeling of outrage it may justifiably or otherwise have of the restrictions of personal freedom by Parliament and assert that the Parliament did not intend what the words of the statute properly construed would suggest. " The power of the Courts to control the exercise of discretionary power is subject to what Parliament has laid down and Parliament may exclude the Courts either expressly or indirectly by conferring discretions of such kind that there is virtually no possibility of challenge. Even the most revered principles of statutory interpretations are subject to the express words of the legislature ". (Wade and Philips (7th Ed.) p. 638).

It has always been recognised that in times of emergency the Government needs to take action quickly and in excess of normal powers. It feels constrained to enlarge discretionary powers of the Government by a general enabling statute. The Government relies mainly on delegated legislation for the exercise of emergency powers.

" Both the Minister and the Civil Servant may be ready to look impatiently upon the lawyer as obstructing the realization of policy. Especially is this so if the lawyer takes his stand in the past and is blind to changing social conditions. It is important that the lawyer of today should fill the role of constructive and not merely a destructive critic in the process of reconciling individual liberty with the public interest. The Rule of Law is still the basis of political liberty as it is understood by the European Democratic states and in the United States and within the British Commonwealth of Nations. But just as our legal forefathers in 17th century helped to secure that liberty by their contribution to the Parliamentary cause, so lawyers today can secure the survival of the Rule of Law by their insistence upon the impartial administration of Government Agencies especially in the field where the private rights of the individual appear to conflict with public interest. An understanding therefore of the administrative process is as vital to the lawyer as an appreciation of the Rule of Law is for the public service ". (Wade and Philips (7th Ed.) p. 624)

Lord Radcliffe remarked in *re East Ello* [1] " In point of fact whatever innocence of view may have been allowable to the lawyer of the 18th and 19th centuries the 20th century lawyer is entitled to few assumptions in the field. It is not open to him

[1] *1956 A.C. 736.*

to ignore the fact that the legislature has often shown indifference to the assertion of rights which Courts of law have been accustomed to recognise and enforce and that it has often excluded the authority of Courts of law in favour of other preferred tribunals".

I have made the above preliminary comments because I think they are relevant when one considers the intent of Parliament in .....

(1) Delegating power to the Governor-General under the Public Security Ordinance.

(2) In making provisions for preventive detentions.

(3) In seeking to limit Judicial review under Section 8 of the Ordinance.

Mr. Tampoe first argued that the Public Security Ordinance was invalid when it was passed in 1947 because the requirements of Section 49 of the Ceylon (State Council) Order in Council 1931 as amended by the Ceylon (State Council) amendments Order in Council 1934 and 1935 had not been observed. This argument is based on a misunderstanding of Section 49 which only reserved for the Governor the power in a State of Emergency to assume control of any Government Department and to issue such orders to that Department as he saw fit. It was open to the Governor with the advice and consent of the Council to make provisions by law for the exercise by the Governor of such emergency powers. In the event of this happening the Secretary of State could direct that clause of this Article should cease to have effect. In the event of it not happening the Governor would continue to have the same reserved powers.

The Public Security Ordinance was not passed for the limited purpose set out in Section 49. It was an Ordinance to provide for the enactment of Emergency Regulations in the interest of the Public Security and the preservation of Public order and for the maintenance of supplies and services essential to the life of the community. It was passed and could have only been passed under Section 72 of the Order in Council which provided for the making of laws for the peace, order and good Government of the Island.

Counsel next argued that Regulation 18 (1) was *ultra vires* of the Public Security Ordinance. Section 5 sub-section 2 of the Ordinance states that Regulations may so far as appears to the Governor-General to be necessary or expedient in the interest of public security and the preservation of public order and the

suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential to the life of the community authorize and provide for the detention of persons. This power given to the Governor-General by Parliament, he may, under Secion 6, delegate empowering such authorities or persons as may be specified to make orders, etc. for the purpose for which he was given such power. This means by virtue of Regulation 18 (1) the Permanent Secretary may do what the Governor-General could do under the Ordinance, viz., authorize and provide for the detention of persons.

Section 18 (1) empowers the Permanent Secretary in the given circumstances to authorize and provide for the detention of persons with the view to preventing the person detained from acting in any of the ways enumerated in that Regulation. In short Regulation 18 (1) carries out the intent of Parliament when it passed the Public Security Ordinance.

In regard to Regulation 18 (1) the next question is what significance should be attached to the words " Where the Permanent Secretary to the Ministry of Defence and External Affairs is of opinion ".

It is here that the cases *R. v. Halliday,*[1] *Liversidge,*[2] and *Greene*[3] have particular relevance to the point under consideration.

In the *Halliday case* the words granting power were " It appears to him expedient for securing public safety or the defence of the realm ". The main question discussed was whether the Regulation was *ultra vires* the enabling Act, but the point was argued that in so framing the grant of discretionary power the Habeas Corpus remedy had been virtually taken away. In answer to this, it was remarked that if the legislature chooses to enact that the subject can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been hitherto interned, the enactment and the order made under it if *intra vires,* do not infringe the Habeas Corpus Act. This answer while being correct does not contradict the position that the terms of grant of power can narrow the area of judicial control.

In the *Liversidge case* the words were " Have reasonable cause to believe a person to be of hostile associations ". It was held, Lord Atkin dissenting, that a Court of Law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter is one for the executive discretion of the Secretary of State. Referring to this case S. A. Smith says

[1] *1917 A. C. 260.* [2] *1942 A. C. 206.*

[3] *1942 A. C. 284.*

(Judicial Review, p. 274) "In the anxiety not to impede the war effort they decline to give a literal interpretation to a formula which prima facie enabled them to review the reasonableness of the grounds for exercising a discretionary power authorizing summary deprivation of personal liberty. Such a measure of judicial self restraint is unlikely to be repeated except in conditions of grave emergency."

This case illustrates the point which the learned Deputy Solicitor-General made, namely that the Courts received "the message" contained in the implication of the form of words used in granting discretionary power.

The jurisdiction of the Courts may be excluded indirectly if a statutory power is conferred upon an authority in terms which allow it to act, "If it is satisfied" "If it thinks fit" "If it appears to it" or "If in its opinion".

Where the connection between the subject matter of the power to be exercised and the purposes prescribed by statute is expressed to be determinable by the competent authority, all that the Court can do is to see that the power which it claims to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. *Carltana Ltd. v. Commissioner of Works*[1] (1943) 2 A. E. R. 580.

So the fact to be recognised is that Regulation 18 (1) is so framed that though the discretion may be in theory reviewable, in fact it is an absolute discretion. Challenging it successfully is almost impossible and in this fact the Parliament indicated to the Courts its intention as to extent of judicial control it desired, in the situation. The judicial review or control of discretionary power is thus in this case reduced to a "Formality" by the use of the words "If he is of the opinion". All that a Court can do is to see if the statutory power has been exceeded, abused, or discretion has been wrongfully exercised. Such a wrongful exercise of discretion may arise from consideration of irrelevant issues, from failure to consider relevant issues, from wrongful interpretation of the statute which granted the power or from improper motives. In practice it may not be easy to determine this in the case of a public authority which cannot or should not be required to disclose its administrative procedures or to produce its files. All this does not involve going behind the order to find out whether when the Permanent Secretary said that he was of opinion he was speaking an untruth. It is simply an inquiry into whether the Permanent Secretary acted within

[1] (1943) 2 A. E. R. 580.

the scope of his powers " there is always a perspective within which a statute is intended to operate ". *Rancavelli v. Duplessis*[1] (1959) S. C. R. 122 at 140.

Parliament may thus exclude or limit the Court's jurisdiction indirectly. It can also do so expressly and it is here that Section 8 of the Ordinance as well as Regulation 55 have to be considered.

Section 8 reads " No Emergency Regulation and no Order, Rule or direction, made or given thereunder shall be called in question in any Court ". We are here concerned with an order under Regulation 18 (1) and according to Section 8 this order shall not be called in question in any Court. This provision is in the Public Security Ordinance itself. The Parliament had intended it to perform a certain function. What was the intent of Parliament? The words are quite general, no exceptions are mentioned nor implied.

The contrary views in regard to a provision like Section 8 are well set out by Lord Reid in the *Anisminic case*[2] where the words considered were " A compulsory purchase order or certificate shall not be questioned in any legal proceedings whatsoever ". He said " The respondent maintains that these are plain words only capable of having one meaning. Here is a determination which is apparently valid. There is nothing on the face of the document to cast any doubt on its validity. If it is a nullity that could only be established by raising some kind of proceedings in Court. But that would be calling the determination in question, and that is expressly prohibited by statute. The appellants maintain that that is not the meaning of the words of this provision. They say that 'determination' means a real determination and not a determination which in the eyes of the law has no existence because it is a nullity. Or, putting it in another way, if you seek to show that a determination is a nullity you are not questioning the purported determination—you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned. "

Viscount Simonds said in *re East Elloe*[3] " But it is our plain duty to give the words of the Act their proper meaning and, for my part, I find it quite impossible to qualify the words in the manner suggested. It may be that the legislature had not in mind the possibility of an order being made in bad faith or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter of

[1] *(1959) S. C. R. 122 at 140.* [2] *(1969) 2 A. C. 147.*
[3] *1956 A. C. 736.*

speculation. What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 (equivalent to Section 8) bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words ? ".

Lord Morton of Henryton said " It would be impossible to predicate of any order or certificate that it was made in good faith until the Court had inquired into the matter, and that is what paragraph 16 prohibits... What the paragraph does is to enact in terms which seem to me very clear, that when a certain type of order or certificate has been made, it shall not be questioned in any court except in the limited type of case and for the limited periods specified in paragraph 15. "

Lord Radcliffe said in the same case, " I am bound to say that I think that the (petitioner) faces a very great difficulty in showing that what appears to be the absolute prohibition, " shall not be questioned in any legal proceedings whatsoever ", is to be understood in a Court of Law as amounting to something much less than such a prohibition. It is quite true, as is said, that these are merely general words : but then, unless there is some compelling reason to the contrary, I should be inclined to regard general words as the most apt to produce a corresponding general result ". Later in the same judgment Lord Radcliffe said, " At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that consequently all references to compulsory purchase orders in paragraph 15 or 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. And that brings us back to the question that determines this case : Has Parliament allowed the necessary proceedings to be taken ?. "

I have quoted these passages from the three Lords in the *East Elloe case* who held that in the face of a Section like 8 of the Public Security Ordinance it was not open to Court to inquire into an allegation of mala fide when the determination or order in question was prima facie valid. With all respect I agree with their reasoning. It is the only recent case decided by the House of Lords which deals with this question as it affects an executive discretion. There is nothing in Section 8 to suggest that Parliament intended mala fide to be an exception to the general terms in which Section 8 is couched.

The two Lords who dissented in the *East Elloe* case were Lord Somerwell and Lord Reid. The former said, "Parliament, without ever using words which would suggest that fraud was being dealt with has deprived a victim of fraud of all right of resort to the Courts..... If Parliament has done this it could only be by inadvertence". Lord Reid said, "There are many cases where general words in a statute are given a limited meaning. That is done not only when there is something in the statute itself which requires it, but also where to give general words their apparent meaning would lead to conflict with some fundamental principle. Where there is ample scope for the words to operate without any such conflict it may very well be that the draftsman did not have in mind and Parliament did not realize that the words were so wide that in some few cases they would operate to subvert a fundamental principle."

Viscount Simonds has characterised this argument as a matter of speculation and Lord Radcliffe had this to say about it. "The appellant's argument for an exception rests on certain reflections which do not seem to me to make up into any legal principle of construction as applied to an Act of Parliament . . . . . It is said that it would be an outrageous thing if a person who by ordinary legal principles would have a right to upset an order affecting him were to be precluded from coming to the Courts for his rights ..... when the order is claimed by him to have been tainted by bad faith. And perhaps it is. But these reflections seem to me such as must or should have occurred to Parliament when it enacted paragraph 16 (our Section 8). They are not reflections which are capable of determining the construction of the Act once it has been passed, unless there is something that one can lay hold of in the context of the Act which justifies the introduction of the exception sought for. Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not. in my opinion, a principle of construction for this purpose."

The reasoning of the majority in the *East Elloe case* commends itself to me. I cannot see anything in Section 8 to warrant reading into it an exception or qualification. The Courts may disagree with the intention of Parliament as revealed in the plain words of the Staute. This is no reason to argue that therefore, Parliament did not intend what the clear words indicate.

The *Anisminic case*[1] is not in conflict with *East Elloe*. My Lord the Chief Justice had pointed out in *re Hirdaramani* that that case deals with tribunals and not with executive discretion.

S. A. Smith says (Judicial Review, p. 267, 2nd Ed.) that the broad principles of a judicial discretion are particularly relevant to the scope of review of discretion vested in the Courts or tribunals analogous to Courts ..... They become less relevant and may sometimes be largely irrelevant when the character and functions of the repository of the discretions are far removed from those of a Court and when the discretion must be governed by general considerations of national policy.

Indeed at an early date the Courts drew a distinction between judicial discretion and executive discretion recognizing that it would be inappropriate to apply the same criteria to all classes of discretions and today Courts will often characterize a discretion as judicial when they wish to assert power of review, but as executive or administrative when they were to explain their inability or unwillingness to measure by reference to any objective standards."

Lord Pearce said in the *Anisminic case* "In my opinion the subsequent case of *Smith v. East Elloe* ..... does not compel your Lordships to decide otherwise ..... It might possibly be said that it related to an administrative or executive discretion and somewhat different considerations applied."

Regulation 55 states that Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any Emergency Regulations. Section 45 gives this Court authority to issue a writ in the nature of Habeas Corpus to bring up—

(*a*) The body of any person to be dealt with according to law.

(*b*) The body of any person illegally or improperly detained in public or private custody and to discharge or remand any person so brought up or otherwise deal with such person according to law.

[1] *(1969) 2 A. C. 147.*

Taking away this jurisdiction means that once this Court is satisfied that a person is detained or held in custody under any Emergency Regulation it cannot pronounce on the illegality or impropriety of the detention. Mala fide is only one ground on which a detention can be said to be illegal or improper. Obviously the purport of Regulation 55 is to prevent an investigation into all grounds of illegality and impropriety including mala fides.

We have now to consider the significance of the words " thereunder " in Section 8 and " under " in Regulation 55. These provisions come into play only when the Court is satisfied that the order is under an Emergency Regulation and similarly a detention or holding in custody is under such Regulation.

In *Bajirao Yamanappa of Hatgar v. Emperor*[1] *A.I.R.* (33) 1946 *Bombay* 32, Chagla J. said " Section 10 of the Ordinance 3 of 1944 provides that an order made under the Ordinance shall not be called in question in any Court and no Court shall have power to make any order under Section 491 Cr. Pr. C. (our Section 45 of Courts Ordinance) in respect of any order made under or having effect under the Ordinance or in respect of any persons the subject of such an order.

But it is clear that the jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order " made under the Ordinance ". It must be made by the detaining authority in the proper exercise of its power. It would not be an order " made under the Ordinance " if it was made merely in the colourable exercise of its power or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed all the safeguards. The order must not be made for an ulterior purpose, a purpose which has no connection with the security of the State, or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigations of the crime or to suspend the ordinary criminal tribunals of the land or prevent them from exercising the ordinary jurisdiction. The power conferred on the executive under the Ordinance are for the purpose of preventive detention . . . . . It is not competent to the Court to inquire into the sufficiency of the material and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order *appears in the record,* the Court

[1] *A.I.R. (33) 1946 Bombay 32.*

can scrutinize them in order to see what was the condition of the mind of the detaining authority when it made the order. These principles emerge from the various Indian decisions....

"When wide powers are given to the executive to deprive His Majesty's subjects of their liberty without the intervention of the Courts of law the detaining authority must consider each case with that care and caution which the exercise of so tremendous power should call for. The liberty of the subject is not to be lightly taken away. The satisfaction which the law requires on the part of the detaining authority before a subject can be detained is a reasonable satisfaction, a satisfaction not vitiated by any consideration which is foreign to the scope and object of the Ordinance ..... When the mind is directed not to the question of the security of the State but as to whether the Criminal Tribes Act should be used or not the detention can be questioned."

In every relevant Indian decision cited to us on this point the Court formed its opinion only on an examination of the Respondent's case. I am of the view that there is a burden on the Respondent to establish prima facie that the detention order in question was under an Emergency Regulation. Bona fides will be presumed unless the Respondent's case itself shows mala fides or raises reasonable doubts as to the bona fides of executive action. Sometimes the Respondent's case may contain two contradictory affidavits or some admission made by some official and the like. If the Respondent's case speaks with one voice that the Permanent Secretary had the required opinion, it is thereafter not open to the petitioner to challenge the prima facie case so established. In many cases it might suffice to produce the detention order alone. There may be cases where something more will be required. The burden on the Respondent is only to show that the order was under an Emergency Regulation.

It was contended that Regulation 55 was *ultra vires*. Mr. Tampoe said that this Regulation was introduced in a situation of panic immediately after the late Mr. S. W. R. D. Bandaranaike was shot and when Mr. Dahanayake was in charge of the Government. For the Crown it was contended that Section 5 (2) (*d*) of the Public Security Ordinance was wide enough to give *vires* to the Regulation. This Section states that the Governor-General may provide "for amending any law, or suspending the operation of any law and for applying any law with or without modification". I do not know whether the Parliament intended any interference with the Court's jurisdiction when it enacted this provision. In India a similar

provision was made by an Act and thus the intent of the legislature was very clear. However as the words in Section 5 (2) (d) are very wide and as Regulation 55 is really a suspension of a particular remedy and in regard to a particular class of cases and as such suspension cannot be said to be unnecessary for the main objects of the Public Security Ordinance, I hold that Regulation 55 is *intra vires*. Moreover, in my view Regulation 55 does not go very much further than Section 8. The letter says that an order under an Emergency Regulation shall not be questioned in any Court and the former says that this Court shall not have a particular jurisdiction, i.e., an authority to issue a writ in the nature of Habeas Corpus in respect of the same order. In a sense Regulation 55 is narrower as it is confined to the writ of Habeas Corpus and both provisions come into play only after a detaining authority satisfies Court that the detention is under an Emergency Regulation.

Very early we were satisfied on the Respondents' return that there was prima facie legal authority for the detention of the Corpus and that the detention was under 18 (1) of the Emergency Regulations. We however gave an opportunity to the petitioner's Counsel in view of the majority decision in *re Hirdaramani*[1] to discharge the very heavy burden cast on her and characterised as impossible or a mere formality. Mr. Tampoe who commenced his submissions stating that he was new to this field of law showed evidence of the enormous work he and his juniors had put into the case by making every point there was to be made on the basis of the numerous cases available on this subject. The learned Deputy Solicitor-General said that the procedure implied in the writ of Habeas Corpus was not intended for this purpose and that the whole argument of the petitioner's Counsel was an "exercise" in futility! I think there is much substance in this submission. What is described as a "festinum remedium" had taken fifteen days of hearing. What was meant to be a procedure for this Court to see whether there was legal authority for the detention turned out to be almost a legal action inviting an inquiry into an allegation of fraud. Perhaps one sees the justification for Section 8 and Regulation 55 in this fact.

This application is dismissed as I am satisfied on the return of the Respondents that the detention is under Section 18 (1) of the Emergency Regulations, and therefore it is not open to the petitioner to challenge in these proceedings the opinion of the Permanent Secretary.

Application dismissed.

[1] *(1971) 75 N. L. R. 67.*