1962 *Present :* **Sansoni, J.**

F. C. DE SARAM *et al.*, Petitioners, *and* F. D. L. RATNAYAKE (Commissioner of Prisons) *et al.*, Respondents

S. C. 37–40—Applications for Writs of Mandamus on F. D. L. Ratnayake, Commissioner of Prisons, and N. Q. Dias, Permanent Secretary, Ministry of Defence and External Affairs

Emergency (Miscellaneous Provisions and Powers) Regulations, 1962—Regulations 23(1) and 23(3)—Proper method of giving direction under proviso to Regulation 23(3)—Power of Governor-General to amend, suspend or modify any law—Person detained under Regulation 23(1)—Right to the benefits of prison rules applicable to civil prisoners—Prisons Ordinance (Cap. 54), ss. 71, 94—Public Security Ordinance (Cap. 40), ss. 5 (2) (d), 10—Effect of repeal of written law—Interpretation Ordinance (Cap. 2), s. 6 (3) (b) and (c).

Rights conferred by a repealed statute cannot be considered as rights which have been " acquired " by a person within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance unless there has been some proceeding instituted by or against him in respect of that right.

A person who is held in detention on orders made under Regulation 23 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations of the 9th January, 1962, is entitled, by virtue of Regulation 23 (3) to a writ of *mandamus* to enable him to receive visits from, and to communicate with, his relations and friends and his legal adviser in accordance with the provisions of Part IX of the Prisons Ordinance and the rules made thereunder. The application for *mandamus* will be granted even if, after the application has been filed, a new Regulation is published providing in general terms, without express provision relating to rights already acquired or to proceedings already instituted, that during its continuance all the provisions of Part IX of the Prisons Ordinance and the rules made under that Ordinance shall not apply to any person detained on an order made under Regulation 23 (1). But the application for *mandamus* will not be granted if it is initiated after the new Regulation has come into operation, even though the applicant would have been entitled to the benefits of the prison rules if he had filed the application for *mandamus* prior to the date when the new Regulation was enacted ; in such a case the person detained, who had not filed any application for *mandamus* before the new Regulation was framed, cannot be said to have acquired a right within the meaning of section 6 (3) (*b*) of the Interpretation Ordinance.

A direction given by the Permanent Secretary under the proviso to Regulation 23 (3) of the Emergency Regulations is very far removed from an executive act. It is necessary, therefore, to scrutinise with great care any document which, assuming that if issued in due form it would have legal validity, is said to have been issued under that proviso. The document must purport to have been made or issued under Section 10 of the Public Security Ordinance.

Section 6 (3) of the Interpretation Ordinance dealing with the effect of repeal of a written law is applicable also when the operation of a law is suspended.

The term " law " in section 5 (2) (*d*) of the Public Security Ordinance could mean either a statute or a regulation.

APPLICATIONS for writs of *mandamus* on the Commissioner of Prisons and the Permanent Secretary, Ministry of Defence and External Affairs.

G. G. Ponnambalam, Q.C., with *R. A. Kannangara* and *K. N. Choksy*, in support of Application No. 37.

G. G. Ponnambalam, Q.C., with *E. G. Wikramanayake, Q.C.*, *H. W. Jayewardene, Q.C.*, *R. A. Kannangara* and *K. N. Choksy*, in support of Application No. 38.

G. G. Ponnambalam, Q.C., with *Sam Kadirgamar*, *Stanley de Zoysa*. *W. T. P. Goonetilleke* and *R. Ilayperuma*, in support of Application No. 39.

D. S. Jayawickreme, Q.C., with *E. A. G. de Silva* and *Cecil de S. Wijeratne*, in support of Application No. 40.

E. G. Wikramanayake, Q.C., with *J. V. M. Fernando*, in support of Application No. 50.

Ananda Pereira, Senior Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, *Mervyn Fernando*, Crown Counsel, and *H. L. de Silva*, Crown Counsel, for the respondent in all 5 Applications.

February 8, 1962. SANSONI, J.—

I have heard arguments on applications Nos. 37, 38, 39, 40 and 50 which are applications for a writ of mandamus on the Commissioner of Prisons and the Permanent Secretary, Ministry of Defence & External Affairs on behalf of five persons who are held in detention at Welikade Prison on orders made by the Permanent Secretary under Regulation 23 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations appearing in *Government Gazette* No. 12,850 of 9th January last.

Since orders were made by me to issue notices on applications Nos. 37, 38, 39 and 40, another Regulation was published in *Government Gazette* No. 12,897 of 6th February. That Regulation provides that during its continuance all the provisions of Part IX of the Prisons Ordinance and the rules made under that Ordinance which relate to visits to, and the correspondence of, prisoners shall not apply to any person detained on an order made under Regulation 23 (1). Mr. Pereira informed me that this regulation was made by the Governor-General on the evening of 6th February. That answer, given to a question put by me, has a direct bearing on the order which I intend to make in these applications. It will mean that applications Nos. 37, 38, 39 and 40 will succeed, while application No. 50 will fail, for reasons which I now give.

The complaint of the petitioners is that, since these five persons were taken into custody they have been deprived of the statutory privileges which should have been made available to them according to the rules framed under the Prisons Ordinance, Cap. 44, which Rules have been made applicable to them by Regulation 23 (3) of the Emergency Regulations. That Regulation provides that a person detained in pursuance

of an order under Regulation 23 (1) shall be treated as though he were a civil prisoner within the meaning of the Prisons Ordinance. The rules as to civil prisoners are rules 190 to 211 and are to be found in Volume I of the volumes containing Subsidiary Legislation, (1938 Edition). Those rules deal with many matters but I mention in particular Rule 200 under which a prisoner shall be permitted to be visited by one person or (if circumstances permit) by two persons at the same time, for a quarter of an hour on any week day, during such hours as may from time to time be appointed by the Superintendent. Rule 201 provides that a prisoner shall, at his request, be allowed to see his legal adviser, (that is, his advocate or proctor) on any week day at any reasonable hour, and, if required, in private but (if necessary) in view of an officer of the prison. Rule 204 provides that paper and all other writing materials shall be furnished to a prisoner so that he can communicate with his friends or petition any authority or prepare a defence : it also provides that any written communication prepared as instructions for a proctor shall be delivered to the Superintendent to be forwarded without being previously examined by the Superintendent or any officer of the prison. Now these are rules which cannot be rescinded, suspended, or modified except by duly constituted lawful authority. Section 94 of the Ordinance provides that these rules are to be valid and effectual as if they are enacted in the Ordinance. The rules themselves had been framed under Section 71 of the Ordinance which makes it quite clear that the legislature realised that a prisoner should be allowed to receive visits from, and to communicate with, his relations, and friends and his legal adviser, although it also realised that rules framed under that section had to provide for the maintenance of discipline and order in the prison and to prevent crime.

When I ordered notices to be issued on applications Nos. 37, 38, 39 and 40, everybody was under the impression that these rules were still in full force; and when the argument was adjourned yesterday, the only matter which was put forward as affecting the application of these rules to the matters arising out of these petitions was the Regulation made by the Governor-General on the evening of the 6th February. During the course of the argument today, Mr. Pereira brought it to the notice of this Court that a direction, as I think he called it, had been given by the Permanent Secretary to the Acting Commissioner of Prisons dated 31st January, 1962. He submitted that this direction suspended the operation of these rules so far as those held in detention upon an alleged conspiracy to overthrow the Government were concerned. He relied on a document, bearing the date I have mentioned, which is marked " confidential ", and which is signed by an assistant secretary, on which to base his argument that Regulation 23 (3) does not really help these petitioners. He pointed to the proviso to that Regulation, upon which he submitted this document had been issued. That proviso reads : " Provided that the Permanent Secretary to the Minister of Defence & External Affairs may

direct that any such rule shall not apply or shall apply subject to such amendments or modifications as may be specified in such direction. The rules referred to in that proviso are, of course, the rules made under the Prisons Ordinance.

A close examination of this document reveals that it does not purport to have been made or issued under Section 10 of the Public Security Ordinance, Cap. 40. Under that section, "every document purporting to be an instrument made or issued by the Governor-General or other authority or person in pursuance of this Ordinance or of any emergency regulation, and to be signed by or on behalf of the Governor-General or such other authority or person, shall be received in evidence and shall until the contrary is proved be deemed to be an instrument made or issued by the Governor-General or that authority or person." Mr. Jayawickrema relied on this section and stressed that the document must purport to be made or issued in pursuance of an emergency regulation before it can be given the effect claimed for it under the proviso to Regulation 23 (3). It was further attacked by Mr. Ponnambalam as being merely some confidential communication, not published at any time, passing from an assistant of the Permanent Secretary to the Acting Commissioner of Prisons; he submitted that this was not the proper method of giving a direction under the proviso to Regulation 23 (3).

I feel bound to say that when the Permanent Secretary acts under that proviso, he is in effect exercising legislative power. The Regulation purports to invest him with that power and to authorise him to exercise it by dispensing with, or suspending the operation of a law, or by amending a law—the law in this instance being Regulation 23 (3). While the Public Security Act has conferred on the Governor-General power to make regulations and to amend, suspend or modify laws, it has not invested the Permanent Secretary with such power; and I doubt if the Governor-General can himself do so. A direction given by him under that proviso is very far removed from an executive act. One must therefore scrutinise with great care any document which, assuming that if issued in due form it would have legal validity, is said to have been issued under that proviso. How close the exercise of the Permanent Secretary's power under the proviso, assuming he had exercised it, comes to legislation can be seen when one takes into account the terms of the Regulation framed by the Governor-General on the 6th February. There is, so far as I can see, very little difference between the provisions of this document dated 31st January, 1962, and that Regulation of the Governor-General. Certainly the scope of the latter is wider, but the powers exercised by those who made both instruments are of the same order. In a matter which concerns personal rights and privileges, it is the duty of the Court to construe the relevant provisions strictly, and to see that all the prescribed conditions are observed. The legality of the attempt to interfere with those rights, which the persons detained had under the law, and which are only slightly lower than their liberty,

has not been established so far as it was sought to be established by the production of the communication dated 31st January, 1962, to the Acting Commissioner of Prisons.

Now there is one clear line of distinction which has to be drawn between applications Nos. 37, 38, 39 & 40 and application No. 50 and that is this : The first four were filed before the new Regulation was made on 6th February, while application No. 50 was filed after that Regulation was made. The question then is whether the new Regulation has the effect of withdrawing from the persons concerned in the first four applications the rights and liberties which they had acquired under the prison rules as they stood ; or putting it in another way, whether the proceedings which had been instituted before the new Regulation was made, should not be carried on and completed as if there had been no such Regulation. Section 6 (3) (*b*) & (*c*) of the Interpretation Ordinance, Cap. 2, is quite clear in its terms. It requires *express* provision to be made in any written law which repeals in part or in full a former written law. Where no such express provision is made, the later written law can have no force or effect so far as rights acquired or proceedings already instituted are concerned.

Indeed Mr. Pereira did not argue that the new Regulation had any retrospective effect. His submission on this part of his argument was that if the applications are allowed, the respondents will have to act in breach of the new Regulation, and in doing so will be acting illegally. He submitted that in applications for mandamus the Court will not issue the writ if its effect would be to compel the respondents to act in breach of the law. I cannot accept that submission. To answer it, I have to go back to the question whether rights that existed in any particular persons who were detained, can be taken away by the framing of a new Regulation which does not comply with the requirement of express provision contained in Section 6 (1) (3) of the Interpretation Ordinance. Such a Regulation cannot in any way deprive those persons of the rights which were already vested in them. If the Regulation cannot affect the rights of the persons detained, so far as applications Nos. 37, 38, 39 and 40 are concerned, then the respondents would be acting in conformity with the law in complying with a writ issued in those applications, because those rights which those persons had must be preserved to them. I see no point in the Ordinance providing in Section 6 (3) (*c*) that the action, proceeding or thing should be carried on and completed as if there had been no change in the law, if its ultimate result was going to be entirely vain and fruitless. The Regulation cannot affect the power and jurisdiction of the Court to enforce the rights of those persons, since those rights themselves are not in any way affected by the Regulation.

But with regard to application No. 50, the position is different, and the question that arises there is whether a person detained, who had not filed any application to this Court before the new Regulation was

framed, can be said to have acquired a right within the meaning of Section 6 (3) (*b*). In my view he did not acquire a right merely because of his detention. It is the initiation of a proceeding to avail himself of that right that gives him the protection of Section 6 (3). Authority for this is to be found in the case of *Abbot v. Minister of Lands*[1]. At page 431, the Lord Chancellor giving the judgment of the Privy Council put the question whether the power to take advantage of an enactment is a right accrued. He answered it in the negative. He went on to say : "The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be termed a right accrued within the meaning of the enactment". The enactment in question there was an Act of 1861, Section 22 of which ran : "Provided always that notwithstanding such repeal all rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal". I think the true rule is that rights conferred by a repealed statute cannot be considered as rights which have accrued in favour of an individual unless there has been some proceeding instituted by or against him in respect of that right.

Mr. Pereira also submitted that as the new Regulation only suspends the operation of the Prison rules and does not repeal them, Section 6 (3) of the Interpretation Ordinance has no application at all, since that section only refers to repeals. I cannot agree that the mere suspension of a law can have a more prejudicial effect than a repeal. Surely the greater (that is, repeal) will include the less (that is, suspension). If I am wrong here, then the ordinary rule will apply, that the rights of the parties to a pending proceeding have to be ascertained as at the time of the institution of those proceedings.

Mr. Wikramanayake also argued that the Public Security Ordinance did not justify the framing of a Regulation such as the one under question. He said that it did not come within the terms of Section 5 (2) (*d*) which enables the Governor-General to amend any law or suspend the operation of any law or apply any law with or without modification. I am unable to agree with him. "Law" within that section could mean either a statute or a regulation. Regulation 23 (3), to which I have already referred, made the Prison rules applicable to detained persons. When the new Regulation provided that Part IX and the rules made under the Prisons Ordinance shall not apply to persons detained, the Governor-General was either suspending the operation of a part of the Prisons Ordinance in so far as the particular detained persons were concerned, or was applying the Prisons Ordinance with a modification. It could also be said that he was modifying Regulation 23 (3) which had brought into operation the rules framed under the Prisons Ordinance.

[1] (*1895*) *A. C. 425.*

I think I have now dealt with the more important submissions made on these applications, submissions which have helped me considerably to arrive at my decision without the need for reserving judgment. In the result, applications Nos. 37, 38, 39 & 40 are allowed and application No. 50 is dismissed. The successful parties in each application will have their costs.

Applications 37, 38, 39 and 40 allowed.
Application 50 dismissed.