

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of an application under and in terms
of Articles 17, 35 and 126 of the Constitution of
the Democratic Socialist Republic of Sri Lanka.

1. Centre for Policy Alternatives (Guarantee)
Limited,
No. 6/5, Layards Road,
Colombo 5.

2. Dr. Paikiasothy Saravanamuttu
No. 3, Ascot Avenue,
Colombo 5.

SC FR Application No. 449/2019

Petitioners

Vs

1. Hon. Attorney General
(in terms of the requirements of Article 35 of
the Constitution)

- 1A. Maithripala Sirisena
(former President of the Democratic
Socialist Republic of Sri Lanka)
No. 61, Mahagama Sekara Mawatha,
Colombo 7.

2. Hon. Attorney General
(in terms of the requirements of Articles
126(2) and 134 of the Constitution read with
Supreme Court Rule 44(3))

Attorney General's Department, Hulftsdorp,
Colombo 12.

3. Ranil Wickramasinghe
(Former) Prime Minister & Minister of
National Policies, Economic Affairs,
Resettlement & Rehabilitation, Northern
Province Development and Youth Affairs

Formerly at –

Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

Now at –

No. 117, 5th Lane,
Colombo 03.

4. John Amarathunga,
(Former) Minister of Tourism Development,
Wildlife and Christian Religious Affairs

Formerly at –

Ministry of Tourism Development, Wildlife
and Christian Religious Affairs
6th Floor, Rakshana Mandiriya,
No. 21, Vauxhall Street,
Colombo 02.

Now at –

No. 88, Negombo Road,
Kandana.

5. Gamini Jayawickrema Perera
(Former) Minister of Buddhasasana &
Wayamba Development

Formerly at –

Ministry of Buddhasasana & Wayamba
Development

No. 135, Sreemath Anagarika Dharmapala
Mawatha,
Colombo 07.

Now at –

No. 80, Kuruppu Road,
Borella, Colombo 08.

6. Mangala Samaraweera
(Former) Minister of Finance,
Ministry of Finance

Formerly at –

The Secretariat,
Lotus Road, Colombo 01.

Now at –

No. 141/5, Galkanuwa Road,
Gorakana, Moratuwa.

7. Lakshman Kiriella
(Former) Minister of Public Enterprise,
Kandyan Heritage and Kandy Development

Formerly at –

Ministry of Public Enterprise, Kandyan
Heritage and Kandy Development

Level 7, West Tower
World Trade Centre, Colombo 01.

Now at –
No. 121/1, Pahalawela Road,
Palawatta, Battaramulla.

8. Rauff Hakeem
(Former) Minister of City Planning, Water
Supply and Higher Education

Formerly at –
Ministry of City Planning, Water Supply and
Higher Education,
No. 35, Lakdiya Medura, New Parliament
Road, Pelawatta, Batteramulla.

Now at –
No. 263, Galle Road,
Colombo 03.

9. Thilak Marapana
(Former) Minister of Foreign Affairs

Formerly at –
Ministry of Foreign Affairs,
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Now at –
No. 13, Pelawatta Road,
Nugegoda.

10. Dr. Rajitha Senaratne

(Former) Minister of Health, Nutrition and
Indigenous Medicine

Formerly at –

Ministry of Health, Nutrition and Indigenous
Medicine “Suwasiripaya”
385, Ven. Baddegama Wimalawansa Thero
Mawatha, Colombo 01.

Now at –

No. 22B, Stanmore Crescent,
Colombo 07.

11. Ravi Karunanayake

(Former) Minister of Power, Energy and
Business Development

Formerly at –

Ministry of Power, Energy and Business
Development
No. 72, Ananda Coomaraswam Mawatha,
Colombo 07.

Now at –

No. 1291/6, Rajamalwatta Road,
Battaramulla.

12. Vajira Abeywardena

(Former) Minister of Internal & Home
Affairs and Provincial Councils & Local
Government

Formerly at –

Ministry of Internal & Home Affairs and
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No. 330, Dr Colvin R. de Silva Mawatha,
Union Palace, Colombo 02.

Now at –

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Colombo 03.

13. Rishad Bathiudeen

(Former) Minister of Industry & Commerce,
Resettlement of Protracted Displaced
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Vocational Training & Skills Development

Formerly at –

Ministry of Industry & Commerce,
Resettlement of Protracted Displaced
Persons, Co-operative Development and
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14. Patali Champika Ranawaka

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Development

Formerly at –

Ministry of Megapolis & Western
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Now at –

No. 88/1, Jayanthipura Road,
Battaramulla.

15. Navin Dissanayake

(Former) Minister of Plantation Industries

Formerly at –

Ministry of Plantation Industries
8th Floor, Stage II, Sethsiripaya,
Battaramulla.

Now at –

No. 09, Philip Gunawardana Mawatha,
Colombo 07.

16. P. Harison

(Former) Minister of Agriculture, Rural
Economic Affairs, Irrigation and Fisheries &
Aquatic Resources Development

Formerly at –

Ministry of Agriculture, Rural Economic
Affairs, Irrigation and Fisheries & Aquatic
Resources Development

No. 288, Sri Jayawardhanepura Mawatha,
Rajagiriya.

Now at –

Main Street,
Maradankadawala.

17. Kabir Hashim

(Former) Minister of Highways & Road
Development and Petroleum Resources
Development

Formerly at –

Ministry of Highways & Road Development
and Petroleum Resources Development
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Denzil Kobbekaduwa Mawatha,
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Now at –

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18. Ranjith Madduma Bandara

(Former) Minister of Public Administration,
Disaster Management and Livestock
Development

Formerly at –

Ministry of Public Administration, Disaster
Management and Livestock Development
Independence Square,
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Now at –

31/3, Kandawatte Terrace,
Nugegoda.

19. Gayantha Karunathilaka

(Former) Minister of Lands and
Parliamentary Reforms

Formerly at –

Ministry of Lands and Parliamentary
Reforms

“Mihikatha Medura”,

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Colombo 07.

20. Sajith Premadasa

(Former) Minister of Housing, Construction
and Cultural Affairs

Formerly at –

Ministry of Housing, Construction and
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2nd Floor, Sethsiripaya,

Battaramulla.

Now at –

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Lake Drive, Rajagiriya.

21. Arjuna Ranatunga

(Former) Minister of Transport & Civil
Aviation

Formerly at –

Ministry of Transport & Civil Aviation

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Battaramulla.

Now at –

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Nugegoda.

22. U. Palani Digambaram

(Former) Minister of Hill Country New Villages, Infrastructure and Community Development

Formerly at –

Ministry of Hill Country New Villages, Infrastructure and Community Development

No. 45, St. Michaels Road,

Colombo 03.

Now at –

No. 1/7B, Sri Saranankara Road,

Dehiwala.

23. Chandrani Bandara

(Former) Minister of Women & Child Affairs and Dry Zone Development

Formerly at –

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5th Floor, Sethsiripaya Stage II,

Battaramulla.

Now at –

C. 49, Keppetipola Mawatha,

Colombo 05.

24. Thalatha Atukorala
(Former) Minister of Justice & Prison Reforms

Formerly at –
Ministry of Justice & Prison Reforms
Superior Court Complex,
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Now at –
231/1, Stanly Thilakeratne Mawatha,
Nugegoda.

25. Akila Viraj Kariyawasam
(Former) Minister of Education

Formerly at –
Ministry of Education
Isurupaya, Pelawatta,
Battaramulla.

Now at –
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Buddhaloka Mawatha,
Colombo 07.

26. M.H.A. Haleem
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27. Sagala Ratnayake

(Former) Minister of Ports & Shipping &
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Formerly at –

Ministry of Ports & Shipping & Southern
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No. 19, Chaithya Road,
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28. Harin Fernando

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Foreign Employment and Sports

Formerly at –

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29. Mano Ganesan

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Official Languages, Social Progress and
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Formerly at –

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30. Daya Gamage

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Formerly at –

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32. Dr. R.H.S. Samaratunga
(Former) Secretary to the Treasury / Ministry
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Ministry of Finance
The Secretariat
Lotus Road, Colombo 01.

32A. S.R. Attygalle
Secretary to the Ministry of Finance
Ministry of Finance
The Secretariat
Lotus Road, Colombo 01.

33. J.J. Rathnasiri
(Former) Secretary
Ministry of Public Administration and
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34. Sumith Abeysinghe
(Former) Secretary to the Cabinet of
Ministers,
Office of the Cabinet of Ministers Republic
Building,
Sir Baron Jayathilaka Mawatha,
Colombo 01.

34A. W.M.D.J. Fernando
Secretary to the Cabinet of Ministers

35. Udaya Ranjith Seneviratne
(Former) Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 01.

35A. Dr. P.B. Jayasundera
Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 01.

36. Mahinda Rajapaksa
Prime Minister and Minister of Finance
Minister of Buddhasasana, Religious &
Cultural Affairs
Minister of Urban Development & Housing
Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha.
Colombo 07.

37. Nimal Siripala De Silva
Minister of Labour

6th Floor, “Mehewara Piyesa”,
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38. G.L. Peiris
Minister of Education
Isurupaya, Battaramulla.
39. Pavithra Devi Vanniarachchi
Minister of Health
“Suwasiripaya”
No. 385, Rev. Baddegama Wimalawansa
Thero Mawatha, Colombo 01.
40. Dinesh Gunawardena
Minister of Foreign Relations
Republic Building,
Sir Baron Jayathilake Mawatha, Colombo 01
41. Douglas Devananda
Minister of Fisheries
New Secretariat, Jayathilaka Mawatha,
Colombo 01.
42. Gamini Lokuge
Minister of Transport
7th Floor, Sethsiripaya Stage II,
Battaramulla.
43. Bandula Gunawardena
Minister of Trade
7th Floor, CWE Secretariat, No. 27,
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44. R.M.C.B. Rathnayake
Minister of Wildlife & Forest Conservation
No. 1090, Sri Jayawardhanapura Mawatha,
Rajagiriya.
45. Janaka Bandara Thennakoon
Minister of Public Services, Provincial
Councils & Local Government
Independence Square,
Colombo 07.
46. Keheliya Rambukwella
Minister of Mass Media
163, “Asi Disi Medura”,
Kirulapone Mawatha, Polhengoda,
Colombo 05.
47. Chamal Rajapaksa
Minister of Irrigation
No. 11, Jawatte Road,
Colombo 05.
48. Dalas Alahapperuma
Minister of Power
72, Ananda Coomarswamy Mw.,
Colombo 07.
49. Johnston Fernando
Minister of Highways
“Maganeguma Mahamedura”, 9th Floor,
216, Denzil Kobbekaduwa Mawatha,
Battaramulla.

50. Wimal Weerawansa
Minister of Industries
No. 73/1, Galle Road,
Colombo 03.
51. Mahinda Amaraweera
Minister of Environment
“Sobadam Piyasa”, 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.
52. S.M. Chandrasena
Minister of Lands
“Mihikatha Medura”, Land Secretariat,
No. 1200/6, Rajamalwatta Road,
Battaramulla.
53. Mahindananda Aluthgamage
Minister of Agriculture
80/5, “Govijana mandiraya”,
Rajamalwatta Lane, Battaramulla.
54. Vasudeva Nanayakkara
Minister of Water Supply
No. 35, New Parliament Road Pelawatta,
Battaramulla.
55. Udaya Prabhath Gammanpila
Minister of Energy
No. 80, Sir Earnest de Silva Mawatha,
Colombo 07.
56. Ramesh Pathirana
Minister of Plantation

11th Floor, Sethsiripaya Stage II,
Battaramulla.

57. Prasanna Ranathunga
Minister of Tourism
6th Floor, Rakshana Mandiraya,
No. 21, Vauxhall Street, Colombo 02.

58. Rohitha Abegunawardhana
Minister of Ports & Shipping
No. 19, Chaithya Road,
Colombo 01.

59. Namal Rajapaksa
Minister of Youth & Sports
No. 09, Phillip Gunawardana Mawatha,
Colombo 07.

Respondents

Before : Priyantha Jayawardena, PC, J
E.A.G.R. Amarasekara, J
Kumudini Wickremasinghe, J

Counsel : Suren Fernando with Luwie Ganeshathasan and Khyati Wickramanayake
for the Petitioners.

Faisz Mustapha, PC with Faiszer Mustapha, PC, Pulasthi Rupasinghe,
Keerthi Tillekaratne and Ashan Bandara for the 1A Respondent.

Dr. Avanti Perera, DSG for the 2nd, 32B and 33B Respondents.

Argued on : 14th September, 2022

Decided on : 29th February, 2024

Priyantha Jayawardena PC, J

The petitioners filed the instant application challenging the decision of the Cabinet of Ministers to grant the former President, the 1A respondent, to occupy his official residence after his retirement under the Presidents Entitlements Act No. 4 of 1986.

Facts of the case

The instant application was initially filed against the Attorney General in terms of Article 35(1) of the Constitution, alleging the infringement of Fundamental Rights of the petitioners and citizens of Sri Lanka. Upon the retirement of the former President, he was added as the 1A respondent to the application.

The petitioners stated that the Minister of Finance, by a Cabinet Memorandum dated 11th of October, 2019 recommended, *inter alia*, to allocate the residence that he was occupying as the President, which is situated at Mahagama Sekara Mawatha (Paget Road), Colombo 7 to be given to the 1A respondent after his retirement in terms of section 2 of the Presidents Entitlements Act No. 4 of 1986.

The petitioners further stated that in terms of Article 43(2) of the Constitution, when the Cabinet Memorandum regarding his retirement benefits was discussed and decided, the 1A respondent as the head of the Cabinet of Ministers presided over the said meeting. Hence, it was stated that the participation of the 1A respondent in the said Cabinet meeting is a violation of the principle of *nemo judex in causa sua* / conflict of interest and is demonstrative of the *mala fides* of the 1A respondent.

Moreover, the petitioners stated that though the former President is entitled to certain benefits under and in terms of the Presidents Entitlements Act No. 4 of 1986, the said power should be exercised according to the law and in a reasonable manner.

The petitioners further stated that the aforementioned residence occupied by the 1A respondent is of great financial value and is an asset of the country. Moreover, in October 2015, approximately Rs. 180 million was allocated from State funds for the renovation of the said residence and to merge two houses stating “*to bring into proper condition which is suitable for the use of the President*”. Hence, the petitioners stated that an allocation of a public asset used

by the President, which is of a high financial value, for the personal use of a former President is irrational, unreasonable, arbitrary, *ultra vires* and illegal.

It was further stated that the decision made by the Cabinet of Ministers goes beyond the scope of the said Act and violates the right to equality and equal protection of the law guaranteed to the citizens of this country by Article 12(1) of the Constitution.

After hearing the parties, the Supreme Court granted Special Leave to proceed with the instant application and an interim Order was made suspending the operation of the said Cabinet decision dated 15th of October, 2019. Hence, the 1A respondent vacated the premises in compliance with said interim Order.

Submissions of the petitioners

The learned counsel for the petitioners submitted that the 1A respondent was the former President and the head of the Cabinet of Ministers in terms of Article 43(2) of the Constitution at the time the Cabinet made the impugned decision with regard to his retirement benefits. Further, at the time the said decision was taken, the 1A respondent had participated in the said meeting of the Cabinet of Ministers as the head of the Cabinet of Ministers.

The learned counsel for the petitioners cited *Senarath and others v. Chandrika Bandaranayake Kumaratunga and others (2007) 1 SLR 59* and submitted that according to the principle of *nemo judex in causa sua*, a person should refrain from participating in taking decisions in respect of himself.

In the circumstances, the learned counsel further submitted that the 1A respondent chaired the meeting in which it was decided to grant him retirement benefits and hence, the said decision is a violation of the principle of *nemo judex in causa sua*. Moreover, the said Act does not provide for the granting of a residence fit for a President to be given to a former President.

Further, the Cabinet of Ministers cannot decide the entitlements that should be granted to the President upon retirement when he is holding office. Moreover, the President is constitutionally vested with the power to remove any Cabinet Minister or their functions and thus, exercises full control over the Ministers. Hence, the learned counsel for the petitioners submitted that

taking such a decision while the President is holding office would lead to a conflict of interest, which would result in an abuse of power.

It was further submitted that granting retirement benefits above and beyond the scope of Presidents Entitlements Act No. 4 of 1986 is a violation of the doctrine of equality enshrined in Article 12(1) of the Constitution.

The learned counsel for the petitioners further submitted that the decisions to grant entitlements to former Presidents are not policy decisions, but are decisions taken during the normal course of the business of the Cabinet of Ministers.

Submissions of the 1A respondent

The learned President's Counsel for the 1A respondent submitted that the 1A respondent is the former President of Sri Lanka and is entitled to certain benefits under Presidents Entitlements Act No. 4 of 1986. Accordingly, the former President is entitled to receive a residence under the said Act. As such, the Minister of Finance submitted a Cabinet Memorandum recommending, *inter alia*, to allocate the residence situated at Paget Road, used by the 1A respondent as his official residence, to be used as his residence after the cessation of his tenure. The said Memorandum was unanimously approved by the Cabinet of Ministers headed by the 1A respondent.

The learned President's Counsel further submitted that the instant application does not come within the jurisdiction vested in the Supreme Court in terms of Article 17 read with Article 126 of the Constitution as the Cabinet of Ministers are collectively responsible and are directly answerable to the Parliament. Accordingly, the legality of any Cabinet decision shall be reviewed and corrected only by Parliament and not by court. Therefore, the court cannot review the impugned decision of the Cabinet of Ministers dated 15th of October, 2019.

In this regard, he cited Article 43(1) of the Constitution which states;

"There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament."

In support of the above submissions, the learned President's Counsel cited the judgment delivered in *Tilwin Silva v. Ranil Wickremasinge and others* (2007) 2 SLR 15, where it was held;

“The Cabinet which consists of the President - Head of the Cabinet, the Prime Minister and the Cabinet of Ministers is in charge of the direction and control of the Government and they are collectively responsible to Parliament (Article 43 (1)). When these provisions are considered, in the light of the concept of collective responsibility of the Cabinet the President and the Cabinet are part of one unit that is collectively responsible.

The deliberation within the Cabinet amongst its members including the President, is a matter for the concern of the Cabinet and not of this Court.”

It was further submitted that section 2 of the Presidents Entitlements Act No. 4 of 1986 states;

“There shall be provided for every Former President and the widow of a Former President, during his or her lifetime, the use of an appropriate residence free of rent.”

Accordingly, the learned President's Counsel submitted that in terms of the said section, the former President is entitled to receive a suitable residence upon ceasing to hold office as the President of Sri Lanka. Thus, the decision made on the 15th of October, 2019 by the Cabinet of Ministers were done in conformity with the provisions of the said Act. Hence, it was submitted that the allocation of the residence at Mahagama Sekara Mawatha to the 1A respondent is in conformity with the provisions of the said Act and lawful.

Moreover, it was submitted that the said Act does not provide for a procedure for the allocation of retirement benefits, and, in particular, does not specify details in relation to the allocation of a residence to a former President.

Furthermore, the learned President's Counsel submitted that the said residence should be considered as an “appropriate residence” for the 1A respondent to reside upon ceasing his office as the 1A respondent occupied the said residence as his official residence during his entire tenure.

The learned President's Counsel further submitted that the 1A respondent is the head of the Cabinet of Ministers and as such, any meeting of the Cabinet of Ministers has to be headed by the President. Thus, a Cabinet decision cannot be taken without the participation of the head of the Cabinet. In the circumstances, the petitioner's statement that the 1A respondent has acted in violation of the principle of *nemo iudex in causa sua* is baseless. Additionally, as the former President was acting in terms of the Constitution, it is not possible to state that he acted *ultra vires*.

In this regard, the attention of court was drawn to Article 43(2) of the Constitution which reads;

“The President shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers.”

Moreover, the learned President's Counsel submitted that the petitioners relied on the decision of the Supreme Court judgment in ***Senarath and others v. Chandrika Bandaranayake Kumaratunga and others*** (*supra*) to show that the petitioners' rights guaranteed under Article 12(1) of the Constitution have been infringed. However, the facts of the two cases were different as in the case of Chandrika Bandaranayake, the ex-President was using her residence as an office after retirement, together with a large staff, whereas the Act does not provide for a grant of an office to a former President.

The learned President's Counsel also pointed out that the sum of monies allocated as retirement benefits for the former President Mahinda Rajapaksa and 1A respondent are in identical amounts.

Furthermore, it was submitted that the house under reference is not in a good condition and the petitioners were overstating its value. Moreover, Parliament had approved the allocation for the said house to be used by the 1A respondent. In this regard, the attention of court was drawn to the budget extracts from the Ministry of Finance website depicting the allocation of finances approved for the upkeep of the said residence.

Hence, it was submitted that the Presidents Entitlements Act No. 4 of 1986 is an exception to the concept of equality before the law and therefore, the Cabinet decision dated 15th of October, 2019 does not amount to a violation of the petitioners' Fundamental Rights guaranteed by Article 12(1) of the Constitution and accordingly, the application should be dismissed.

Does the Supreme Court have jurisdiction to entertain the petitioners' application?

The 1A respondent was residing at the home under consideration situated at Mahagama Sekera Mawatha, Colombo 7 since 2015, after he was elected as the President. Further, he carried out his official duties as President from the said residence. On the 11th of October, 2019, a Cabinet Memorandum titled "Facilities for former Presidents" was presented by the Minister of Finance to the Cabinet of Ministers to grant retirement benefits to the 1A respondent.

The said Cabinet Memorandum (marked and produced as 'P11') stated;

“

1.0 Introduction

*1.1 As His Excellency Maithripala Sirisena intends to retire as the Sixth Executive President of Sri Lanka following the forthcoming Presidential Elections, **this Cabinet Memorandum is presented for the purpose of providing His Excellency with entitlements of Former Presidents, as well as special facilities granted to Former Presidents by the Government taking into consideration special circumstances.***

*1.2 The Presidential Entitlements Act No 4 of 1986 and Supreme Court Application No. 503/2005 (FR) mentions the facilities provided to Former Presidents. Notwithstanding these facts, **Government has taken measures to provide special facilities to Former Presidents owing to special situations that have occurred during the tenure of presidency.***

*1.3 The island-wide drug eradication campaign launched by His Excellency the President to bring drug smugglers, who are subjecting Sri Lanka to a grave danger, before the law has resulted in a situation where **drug dealers with powerful national and international links pose a threat to the life of His Excellency.** This threat has widened with the action taken by His Excellency as the Minister of Defence to combat terrorist and extremist activities.*

2.0 Proposal

I propose the following facilities to be provided to His Excellency the President upon his retirement:

- i. Provide the **services of the Special Task Force** for the protection of His Excellency the President in view of matters mentioned at 1.3 above.*
- ii. **Take measures for the continuous use of His Excellency the President's official residence at No. 61 Mahagamasekera Mawatha, Colombo 7, after his retirement.***
- iii. Provide facilities provided at present to retired presidents, i.e official and other vehicles and commensurate fuel.*
- iv. Payment of water, electricity and telephone bills for the official residence and other facilities related to the official residence.*
- v. Provide two KKS to facilitate the work of His Excellency the President.”*

[emphasis added]

The said Cabinet Memorandum was approved by the Cabinet of Ministers headed by the 1A respondent on the 15th of October, 2019, to grant the residence situated at Mahagama Sekera Mawatha, Colombo 7 to the 1A respondent after his retirement as the President in terms of section 2 of the Presidents Entitlements Act No. 4 of 1986.

The decision made by the Cabinet of Ministers regarding the aforementioned Cabinet Memorandum (marked and produced as ‘P12’) stated;

“Cabinet Paper No.19/2946/108/239, a Memorandum dated 2019-10-11 by the Minister of Finance on "Facilities for former Presidents" the above Memorandum was considered by the Cabinet along with the further clarifications made by the Minister of Finance at this meeting. After discussion, it was decided to grant approval to the proposals in paragraph 2.0 of the Memorandum.

It was also decided to treat this decision as confirmed and to authorize the Secretary to the Cabinet of Ministers to convey the same to the relevant authorities for necessary action accordingly.”

A careful consideration of the said decision and the provisions of the said Act shows that it was not a policy decision of the Cabinet of Ministers but a decision to provide benefits under the said Act to the 1A respondent, made by the Cabinet of Ministers in their ordinary course of business.

Nevertheless, even if the impugned decision was to be considered as a policy decision, the courts have the power to consider such a decision if the decision is arbitrary and *ultra vires*.

A similar view was expressed in ***Sidheswar Sahakari Sakhar Karkhana Ltd. v. Union of India*** (2005) 3 SCC 369 where it was held;

“Normally the Court should not interfere in policy matter which is within the purview of the government unless it is shown to be contrary to law or inconsistent with the provisions of the Constitution.”

Further, in ***Ugar Sugar Works Ltd. v. Delhi Administration and others*** (2001) 3 SCC 635, the Indian Supreme Court observed;

“It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the Executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy.”

[emphasis added]

However, as stated above, the decision taken by the Cabinet of Ministers is not a policy decision and this court has the jurisdiction to consider the instant application.

Moreover, in *Priyangani v. Nanayakkara and others* (1996) 1 SLR 399 at 404-405, Fernando, J. reiterated the interrelationship between the Right to Equality guaranteed by Article 12 of the Constitution and Rule of Law. Furthermore, the Court held;

*“We are not concerned with contractual duties, but with the **safeguards based on the Rule of Law which Article 12 provides against the arbitrary and unreasonable exercise of discretionary powers. Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred - not at the whim and fancy of officials for political advantage or personal gain.**”*

[emphasis added]

Further, as stated above, given the facts and circumstances of the instant application, Article 43(1) of the Constitution cannot be construed as an ouster clause which can oust the jurisdiction of the court to entertain the instant application.

When do retirement entitlements become due?

The Long Title of the Presidents Entitlements Act No. 4 of 1986, states;

*“AN ACT to provide for the grant official residence and other allowances and facilities to **Former Presidents and to the widows of Former Presidents; to provide for the payments of pensions to such widows; and for matters connected with or incidental thereto.**”*

[emphasis added]

Further, sections 2 and 3 of the Presidents Entitlements Act No. 4 of 1986 states;

“2. Provision of residences.

*There shall be **provided to every Former President and the widow of a Former President, during his or her life time, the use of an appropriate residence free of rent:***

Provided that where for any reason, an appropriate residence is not provided for the use of such Former President for the widow of such Former President, there shall be paid to such Former President or the widow of such Former President, a monthly allowance equivalent to one-third of the monthly pension payable to such Former President or the widow of such Former President, as the case may be.

3. Payment of secretarial allowances and provision of official transport and other facilities.

(1) There shall be paid to -

*(a) every **Former President**, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to the President; and*

(b) to the widow of such Former President, a monthly secretarial allowance equivalent to the monthly salary for the time being payable to the person holding the office of Private Secretary to a Minister of the Cabinet of Ministers.

(2) There shall be provided to every Former President and the widow of such Former President, official transport and all such other facilities as are for the time being provided to a Minister of the Cabinet of Ministers.”

[emphasis added]

Accordingly, the word ‘former’ used in the Long Title and in sections 2 and 3 of the said Act shows that the provisions of the said Act are only applicable to former Presidents and widows of former Presidents. Hence, the entitlements provided in the said Act become due only after a President retires from office. Thus, no decision can be made to grant benefits under the said Act prior to a President retiring from his office. However, the decision of the Cabinet of Ministers under reference had been taken when the 1A respondent was functioning as the President of the Republic.

A similar view was expressed by this court in *Senarath and others v. Chandrika Bandaranayake Kumaratunga and others* (*supra*) at 71, where it was held;

“The petitioners made a further submission that in any event the entitlements in Act No.4 of 1986 are to “every former President and widow of a former President”. This is clearly seen in sections 2 and 3. Therefore it was submitted that the entitlement becomes effective only after a President ceases to hold office and acquires the status of former President. The entitlement cannot be granted whilst the person is holding the office of President.

In my view the provisions have been advisedly worded in this manner to avoid a situation as has happened in relation to the 1st respondent of the President himself or herself partaking in decisions as to the entitlements to be given after ceasing to hold office.

[emphasis added]

Furthermore, in the determination of *Re the Nineteenth Amendment to the Constitution (2002) 3 SLR 85*, a Divisional Bench of seven judges of the Supreme Court laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective “organs of the government are only custodians for the time being, that exercise the power for the People”. Therefore, “executive power should not be identified with the President and personalised and should be identified at all times as the power of the People”. Thus, the granting of public property and public funds for personalised usage for oneself after retirement would be considered an arbitrary and irrational abuse of the power bestowed upon the executive by the People.

Is the decision made by the Cabinet of Ministers *ultra vires*?

As stated above, the Cabinet Memorandum contained the retirement benefits to be given to the 1A respondent. Further, the said Memorandum stated that due to special circumstances that took place during the term of the 1A respondent, it was necessary to provide special facilities for him.

The special facilities proposed to be provided were to allow the President the continued occupation of his official residence after retirement and to provide the protection of the Special Task Force.

Moreover, the said Memorandum stated that the “*services of the Special Task Force*” were to be provided for the protection of the President's life which is endangered “*by local and international groups affiliated to the drug trade due to the programs he has put in place to bring to book those involved in the illegal drug trade while such threats have widened further due to actions he has taken against terrorism and extremism in his capacity as the Minister of Defense.*” This was implied to be the special circumstances during his tenure that necessitated the granting of special facilities.

However, other than the said mere statement in the Memorandum, no materials were submitted to the Cabinet of Ministers to substantiate the said assertion of the then Minister of Finance. Accordingly, there was no material before the Cabinet of Ministers to support the contents of the said Cabinet Memorandum at the time the impugned decision was made by the Cabinet of Ministers.

In 2015, the media reported that a supplementary estimate of Rs. 180 million was allocated to renovate and refurbish the official residence of the President. In response, on the 7th of October, 2015, the Media Division of the 1A respondent issued a press statement where the Secretary to the President stated that the “*government had to rehabilitate and improve the residence of the President by joining two old houses to bring it to proper condition which is suitable for the use of the President*”. Thus, this residence consists of **two houses merged in central Colombo**. Additionally, he stated that this residence was considered appropriate as the “*government had to provide security to the official residence of the President and to provide accommodation facilities for the security personnel of the President*”.

Furthermore, in the Counter Objections, the petitioners annexed two supplementary allocations (marked as ‘P13’ and ‘P14’) provided by the Department of National Budget. The said documents depict large amounts of State resources totalling Rs. 96,391,000, spent in 2015 for the renovation of the said residence of the President, and an additional amount of Rs. 84,297,000 allocated to construct a new building within the compound. These allocations were made when the 1A respondent was occupying the said premises as the President of the

Republic. Thus, there is no rational basis for affording a former President with a residence that was built to be used by the head of State.

A similar view was expressed in the case of *Senarath and others v. Chandrika Bandaranayake Kumaratunga and others* (*supra*), where it was held that the Memorandum submitted to obtain the decision to grant the residence stated that the “*the value of land requested is insignificant when compared with the entitlements she has given up and also proposes to forego in the future*”. However, the land was “*originally intended for the construction of the Presidential Palace and a sum of Rs. 800 million has already been spent by the State to develop the land for the purpose of such construction.*” Thus, it was held that a fully developed land near the Parliament cannot be considered “insignificant”. Furthermore, it was held that the residence cannot be considered “appropriate” according to section 2 of the said Act as it was a land developed for a different purpose.

Section 2 of the Presidents Entitlements Act No. 4 of 1986 provides a former President with “*the use of an appropriate residence free of rent*”. However, this residence is situated in a prime location and has used around Rs. 180 million State funds for renovation and amalgamation for the purpose of being used by the President to carry out his official activities. Thus, this specified residence cannot be considered as one singular house appropriate for a President retired from office. Hence, a high financial value public asset constructed to occupy a President of the Republic cannot be allocated to a former President who is no longer serving as the Head of the State.

The Presidents Entitlements Act No. 4 of 1986 bestows the Cabinet of Ministers with powers to decide the benefits a former President is entitled to. However, such a decision should be taken according to the provisions of the said Act. Any decision taken in violation of the powers conferred by the provisions of the Act or outside the scope of the said Act are *ultra vires* of the powers conferred by the said Act.

A similar view was expressed in De Smith’s Judicial Review of Administrative Action, 4th Edition at page 96 which states;

*“Substantive **ultra vires** may relate to matters of law and fact or to matters of discretion. Discretionary powers must be exercised for the purposes for which they were granted; relevant considerations must be taken into account and irrelevant considerations disregarded; they must be exercised in good faith and*

not arbitrarily or capriciously. If the repository of the power fails to comply with these requirements it acts ultra vires.”

[emphasis added]

Further, in Administrative Law, 10th Edition at page 30, H.W.R. Wade & C.F. Forsyth states;

“... the court will hold the order to be ultra vires if the minister acted in bad faith or unreasonably or on no proper evidence.”

As such, the retirement benefits that were granted without proper materials to substantiate the decision of the Cabinet of Ministers are beyond the powers granted by the said Act and are irrational, unreasonable, arbitrary, *ultra vires* and illegal.

Is there a violation of the principles of Natural Justice?

It is pertinent to note that the Presidents Entitlements Act No. 4 of 1986 grants entitlements only to former Presidents and their widows, which is contrary to Article 12 of the Constitution which enshrines the concept of equality before the law. No other holder of public office is granted such benefits. As such, in *Senarath and others v. Chandrika Bandaranayake Kumaratunga and others* (*supra*) at 77, the Supreme Court, held;

“It has to be noted that the Presidents Entitlements Act No. 4 of 1986 is a unique piece of legislation which grants entitlements only to former Presidents and their widows. Intrinsicly it is an exception to the concept of equality before the law, since no other holder of public office is granted such benefits. It appears that there is no similar legal provision in any other country.

The provisions of this Act being an exception in itself to equality before the law, have to be strictly interpreted and applied.”

[emphasis added]

Article 43(2) of the Constitution states that the President is the head of the Cabinet. Administrative law is founded on the two basic principles of natural justice, i.e.;

“a man may not be a judge in his own cause”/ “Nemo judex in causa sua” and “listen to the other side” / “Audi alteram partem”

Hence, if the President participates and/or sits as the head of the Cabinet of Ministers when a matter in which he has a personal interest is discussed and approved, such a decision is in violation of the principle of *nemo judex in causa sua*.

Moreover, in *Senarath and others v. Chandrika Bandaranayake Kumaratunga and others (supra)* at 71, Sarath N. Silva, CJ., held;

*“In official matters the general rule is that a person would refrain from participating in any process where the decision relates to his entitlement or in a matter where he has a personal interest. **“Nemo judex in causa sua” is a principle of natural justice** which has now permeated the area of corporate governance as well. **This salient aspect of good governance has been thrown to the winds by the 1st respondent in initiating several Cabinet Memoranda during her tenure of office and securing for herself purported entitlements that would if at all ensure only after she lays down the reigns of office and acquire the eligible status of a former President.**”*

[emphasis added]

In *S.P. Gupta v. Union of India (1982) AIR (SC) at 149*, Bhagawathi, J. observed;

“If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse of abuse of power by the State or its officers.”

Moreover, though Article 43(2) of the Constitution states that the President is the head of the Cabinet of Ministers, he can refrain from the decision making process if a matter related to him comes up before him or such matters can be taken up at the Cabinet of Ministers when an Acting President is functioning in place of the President in terms of the Constitution.

The concept of “*Quis custodiet ipsos custodes?*” (“*Who will guard the guards themselves?*”), would apply where the executive who acts as the custodian of the People’s power would abuse that power for personal benefits and not face any repercussions by the other branches of governance. Accordingly, the securing of personal benefits and advantages for himself by presiding over the Cabinet while still in power as the sitting President is a breach of the provisions of the Presidents Entitlements Act No. 4 of 1986, as it is intended for **former** Presidents.

Moreover, as stated prior, the aforementioned impugned decision of the Cabinet of Ministers violates the general principle of natural justice.

In the circumstances, I hold that the decision taken by the Cabinet of Ministers dated 15th of October, 2019, provided the 1A respondent with entitlements beyond the scope offered by the Presidents Entitlements Act No. 4 of 1986. Further, the said decision is arbitrary, unreasonable, *ultra vires*, illegal and amounts to a violation of the Rule of Law and the Fundamental Rights guaranteed to the petitioners and citizens of Sri Lanka under Article 12(1) of the Constitution.

Accordingly, the application is allowed, and I quash the aforementioned decision of the Cabinet of Ministers dated 15th of October, 2019 (marked and produced as ‘P12’).

No costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J

I agree

Judge of the Supreme Court

Kumudini Wickremasinghe, J

I agree

Judge of the Supreme Court