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

S.C. (FR) Application
No. 67/2008

1. Sirimasiri Hapuarachchi,
   Leader of the Party and General Secretary of the party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-Ela.

2. H.D. Keerthi Sampath,
   Executive Member of the Party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-ela.

3. Anil Chandrasekera,
   Chief Treasurer of the Party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-ela.

Petitioners

Vs.

1. Dayananda Dissanayake,
   Commissioner of Elections,
   Department of Elections,
   Elections Secretariat,
   P.O. Box 2,
   Rajagiriya 10107.

2. Hon. The Attorney-General,
   Attorney General's Department,
   Colombo 12.

Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Saleem Marsoof, J.

COUNSEL : K. Deekiriwewa with L.M. Deekiriwewa and Manel Herath for Petitioners

Viraj Dayaratne, SSC, for Respondents

ARGUED ON: 11.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Petitioners : 19.12.2008
Respondents : 23.12.2008

DECIDED ON: 19.03.2009

Shirani A. Bandaranayake, J.

The petitioners, who had formed a political party known as '*Eksath Janatha Peramuna*' (hereinafter referred to as the Party), complained that the refusal of the 1st respondent commissioner to recognize the aforementioned Party and the refusal to thereby grant the said Party the status of a recognized political party had infringed their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14(1)(c) of the Constitution for which this Court had granted leave to proceed.

The facts of the petitioners' case, as submitted by them, *albeit* brief, are as follows:

The petitioners had formed the said political party in 1999 and had formulated and adopted the party Constitution in the year 2000 at their 2nd annual national meeting (X2). The main objective of the said Party was to nominate candidates from the said Party to stand for General, Provincial and Local Elections as and when such elections are held. At the time of the filing of this application the Party had over 2200 members.

On 31.10.2007 the 1st petitioner, being the General Secretary had made an application to the 1st respondent Commissioner seeking registration of the Party as a recognized political party. That application had been returned as the 1st respondent Commissioner could not consider the said application in terms of Parliamentary Elections Act, No. 1 of 1981 (X4). Thereafter by letter dated 14.12.2007, the petitioners had again made an application to the

1st respondent, seeking registration of the Party as a recognized political party (X5). By letter dated 07.01.2008 the petitioners were called on behalf of the Party for an inquiry to be held on 16.01.2008 regarding the Party's application for registration (X6). On 16.01.2008, the petitioners had represented the Party at the inquiry held by the 1st respondent Commissioner.

By letter dated 21.01.2008, the 1st respondent Commissioner had rejected the application made by the Party for registration, without assigning any reasons for his decision (X7).

The petitioners submitted that in January 2008, at or about the time the petitioners had made their application on behalf of the Party, the 1st respondent Commissioner had accepted and registered five new political parties, namely,

1. *Okkoma Rajawaru Okkoma Wasiyo*
2. *Muslim Vimukthi Peramuna*
3. *Nawa Sihala Urumaya*
4. *Padmanada Eelam Janatha Viplavakari Vipulanari*
5. *T.M.V.P.*

The aforesaid parties, according to the petitioners, had not been actively engaged in political activities and the petitioners' Party had been in active politics since 1999.

The petitioners therefore claim the decision of the 1st respondent to reject their application without assigning any reasons is unreasonable, unfair and arbitrary and thereby had violated their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14(1)(c) of the Constitution.

Learned Senior State Counsel for the respondents did not dispute the fact that in his letter dated 21.01.2008, the Commissioner of Elections had not given any reasons for the rejection of the application preferred by the petitioners. Learned Senior State Counsel referring to the decisions in **Samalanka Ltd.** v **Weerakoon, Commissioner of Labour *et al*** ([1994] 1 Sri L.R. 405), **Karunadasa** v **Unique Gem Stones Ltd, *et al*** ([1997] 1 Sri L.R. 256) and **Yaseen Omar** v **Pakistan International Airlines Corporation and others** ([1999] 2 Sri L.R.

375), stated that the failure to give reasons by the Commissioner is not a fatal error and cannot be concluded to mean that there is no valid reason for the said rejection as claimed by the petitioners.

Accordingly learned Senior State Counsel for the respondents contended that in the circumstances, there had not been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

It is not disputed that in his letter dated 21.01.2008, sent to the petitioners informing that their application for registration had been rejected, the 1st respondent Commissioner does not refer to any reasons for his decision. The said letter (X7) is as follows:

" 2008.01.21

ලේකම්,
එක්සත් ජනතා පෙරමුණ,
306/සී, උතුරු බටගම,
ජාඇල.

මහත්මයාණෙනි,

දේශපාලන පක්ෂයක් වශයෙන් පිළිගනු ලැබීම සඳහා වූ ඉල්ලීම 1988 අංක 29 දරන පනතින් සංශෝධිත 1981 අංක 1 දරන පාර්ලිමේන්තු මැතිවරණ පනත

ඔබගේ 2007.12.14 දිනැති ඉල්ලීම හා ඉන් අනතුරුව 2008.01. 16 වන දින මගේ කාර්යාලයේදී පැවැත්වූ පරීක්ෂණයට ඔබගේ අවධානය යොමු කරවනු කැමැත්තෙමි.

02 **ඔබගේ ඉල්ලුම් පත ප්‍රතික්ෂේප කරන ලද බව කණගාටුවෙන් දන්වමි.**

. . . ."

As stated earlier, the main contention of the learned Counsel for the petitioners at the hearing was that no reasons were given by the 1st respondent for his decision. In the light of the aforementioned, it is apparent that it would be necessary to examine whether the failure to give reasons to petitioners by the 1st respondent had infringed the fundamental rights of the petitioners guaranteed in terms of Article 12(1) of the Constitution.

As stated earlier, learned Senior State Counsel strenuously contended that not giving reasons for the rejection of the petitioners' application is not a fatal error and the learned Counsel for the petitioners contended that such failure has amounted to a violation of the petitioners' fundamental rights and relied on the decision of this Court in **Karunadasa** v **Unique Gem Stones Ltd**. ([1997] 1 Sri L.R. 256).

The contention of the respondents regarding the question for the need to give reasons is that the failure to give reasons by the Commissioner is not a fatal error and cannot be construed to mean that there is no valid reason for the rejection of the petitioners' application as claimed by the petitioners. Further it was submitted that the failure to give reasons does not take away from the fact that the Commissioner formed his opinion after a proper inquiry and further the failure to give reasons by the Commissioner in his letter is not fatal as the reasons have been adequately explained to this Court by way of the 1st respondent's affidavit.

An examination of the decisions relied on by the respondents in support of their contention clearly shows that those decisions have spelt out the general position regarding the necessity to give reasons for a decision. For instance in **Samalanka Ltd.** v **Weerakoon, Commissioner of Labour and others** (supra) this Court had held that in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to adduce reasons, provided that the decision is made after holding a fair inquiry. The decision in **Yaseen Omar** (supra) also had been on the same line, where it was held that neither the Common Law nor principles of natural justice requires as a general rule that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. Considering the question that arose in that appeal it was held that there is no statutory requirement imposed on the Commissioner to give reasons for his decision.

The decision in **Karunadasa** v **Unique Gem Stones Ltd. and others** (supra) had taken the view that natural justice also means that a party is entitled to a reasoned consideration of his case.

Therefore it would be apparent that none of the decisions referred to earlier, which were relied on by the respondents supports the contention that not giving reasons for a decision by an administrative authority is not a fatal error.

In such circumstances, it would be pertinent to examine the legal position pertaining to the need to give reasons.

For a long period of time, as stated by Bandaranayake, J., in **N.S.A.M. Nanayakkara** v **Peoples Bank and others** (S.C. (Application) No. 525/2002 – S.C. Minutes of 20.06.2007) the commonly accepted norm in English Law had been that there is no general rule or a duty to state reasons for judicial or administrative decisions (**Pure Spring Co. Ltd.** v **Minister of National Revenue** ([1947] 1 D.L.R. 501, Statements of Reasons for Judicial and Administrative Decisions, Michael Akehurst, M.L.R. Vol. 33, 1970, pg. 154). As pointed out by Michael Akehurst, a statement of reasons is not required by the rules of natural justice and therefore there is no duty to state reasons for the decisions of Courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals (Michael Akehurst (supra)). This position was again considered in **Marta Stefan** v **General Medical Council** ([1999] 1 W.L.R. 1293) by the Privy Council, where it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987. Referring to right to reasons, S.A. de Smith (De Smith's Judicial Review, 6th Edition, 2007, pg 411) had clearly stated that,

> "On this view, a decision – maker is not normally required to consider whether fairness or procedural fairness demands that reasons should be provided to an individual affected by a decision because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety."

This position is well compatible with the theory that there is no general common law duty to give reasons for decisions (**Minister of National Revenue** v **Wrights' Canadian Ropes Ltd.** ([1947] A.C. 109), **R** v **Gaming Board for Great Britain, Ex.p. Benaim and Khaida** ([1970] 2 Q.B. 417), **Mc Innes** v **Onslow – Fane** ([1978] 1 W.L.R. 1520), **R** v **Civil Service Appeal Board Ex.p. Cunningham** ([1991] 4 All E.R. 310).

However, this position has changed dramatically and as pointed out by de Smith (supra, pg. 413),

> ". . . . it is certainly now the case that a decision – maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, so fast is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness usually will require a decision – maker to give reasons for its decision. **Overall the trend of the law has been towards an increased recognition of the duty to give reasons . . . .**" (emphasis added).

Thus it appears that although the common law had failed to develop any general duty regarding the need to give reasons, there are several exceptions to this general principle.

One clear method, as pointed out in **N.S.A.M. Nanayakkara** v **People's Bank** (supra) was through statutory intervention, which came into being by the recommendations of the Report of the Committee on Administrative Tribunals and Enquiries, commonly known as Franks Committee (Cmnd. 218 (1957)). The Franks Committee recommended the need to give reasons ((supra), para 98, 351), that came into being through the Tribunals and Inquiries Act, 1958, which was replaced by the Tribunals and Inquiries Act, 1992.

The Franks Committee Report of 1957 ((supra) at para 98), in fact highlighted the issue as to why reasons should be given, referring to ministerial decisions taken, after the holding of an inquiry.

> "It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. **Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out**" (emphasis added).

In addition to the above there are several other instances in which the common law had imposed a duty to give reasons for its decisions. One such method was developed on the basis that the absence of reasons would render any right of appeal or review nugatory. Thus in **Minister of National Revenue** v **Wrights Canadian Ropes Ltd.** (supra), which considered an appeal from an income tax assessment, the Privy Counsel stated that,

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action . . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal . . . . The Court is . . . always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are . . . insufficient in law to support it, the determination cannot stand . . . ."

A number of other decisions had taken a similar approach. For instance, in **R** v **Civil Service Appeal Board, *Ex parte* Cunningham** (supra), Lord Donaldson MR and McCowan and Leggatt, LJJ., had held that although there was no general rule that required administrative

tribunals to give reasons, that such an obligation could arise as an incident of procedural fairness in appropriate circumstances.

This approach had been followed in other cases. In **R** v **Secretary of State for the Home Department *Ex parte* Doody** ([1994] 1 A.C. 531), which considered whether the Secretary of State is required to inform the prisoner the reasons as to why he was deciding on a certain period of time for imprisonment, Lord Mustill expressed the view that, although there was no general duty to provide reasons, there was a duty to give reasons in that instance, as it would facilitate any judicial review challenged by the prisoner. Lord Mustill had clearly stated in **Doody** (supra) that,

> ". . . I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon, 'transparency', in the making of administrative decisions."

Another method and one which was extremely important from the practical point of view, indirectly imposed a requirement that reasons be stated and if not had decided that the result reached in the absence of reasoning is arbitrary. Thus in the well known decision in **Padfield** v **Minister of Agriculture Fisheries and Food** ([1968] A.C. 997), the House of Lords decisively rejected the notion that the absence of a duty to state reasons, precluded the Court from reviewing the reasons for the decision. It was therefore stated by Lord Pearce in **Padfield** (supra) that,

> "If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement.

Referring to reasons, fair treatment and procedural fairness, Galigan (Due Process and Fair Procedures, Clarendon Press, Oxford, pg. 437) stated that,

> "If the new approach succeeds, so that generally a statement of reasons for an administrative decision will be regarded as an element of procedural fairness, then various devices invented in the past in order to allow the consequences of a refusal of reasons to be taken into account will gradually lose their significance."

The necessity to give reasons was considered by this Court, as referred to in Bandaranayake, J.'s judgments in **Lal Wimalasena** v **Asoka Silva and others** (S.C. (Application) No. 473/2003 - S.C. Minutes of 04.08.2005) and in **N.S.A.M. Nanayakkara** v **People's Bank** (supra), in **Wijepala** v **Jayawardene** (S.C. (Application) No. 89/95 - S.C. Minutes of 30.06.1995, **Manage** v **Kotakadeniya** ([1997] 3 Sri L.R. 264), **Suranganie Marapana** v **The Bank of Ceylon and others** ([1997] 3 Sri L.R. 156) and in **Karunadasa** v **Unique Gemstones** ([1997] 1 Sri L.R. 256).

In **Wijepala** v **Jayawardene** (supra) considering the necessity to give reasons, at least to this Court, Mark Fernando, J., was of the view that,

> "The petitioner insisted, throughout that established practice unquestionably entitled him at least to his first extension and that there was no relevant reason for the refusal of an extension . . . .
>
> Although openness in administration makes it desirable that reasons be given for decisions of this kind, in this case I do not have to decide whether the failure to do so vitiated the decision. **However, when this Court is requested to review such a decision, if the petitioner succeeds in making out a prima facie case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons – and so also, if reasons are suggested, they were in fact not the reasons, which actually influenced the decision in the first place**" (emphasis added).

In **Manage** v **Kotakadeniya and others** (supra), where an application of a Post Master for his extension of service, upon reaching the age of 55 years was refused, Amerasinghe, J., was of the view that,

> "the refusal to extend the service of the petitioner was not based on adequate grounds."

The order of retirement was thus quashed on the basis that the petitioner in that case was treated unequally and that there had been discriminatory conduct against the petitioner.

In **Suranganie Marapana** v **The Bank of Ceylon and others** (supra) it was held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management and therefore it was held that the refusal to grant the extension of service sought was arbitrary, capricious, unreasonable and unfair. Considering the question in issue the Court had stated that,

> "Even though Public Administration Circular No. 27/96 dated 30.08.96 (P8), which was an amendment to Chapter 5 of the Establishments Code, does not have any direct application to the matter before us, it clearly sets out the attitude of the State in regard to the question of extension of service of public sector employees, when it states that where extensions of service of State Employees are refused **there should be sufficient reasons to support such decision beyond doubt**" (emphasis added).

It is also noteworthy to refer to the views expressed by Mark Fernando, J., in **Karunadasa** v **Unique Gem Stones** (supra) with reference to the need to give reasons to a decision, where it was stated that,

> ". . . whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable'; certainly the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion."

On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Moreover in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily, in coming to their conclusion. These aspects have been stated quite succinctly in the following passage, where Prof. Wade had expressed the view that, (Administrative Law, 9th Edition, pg. 522),

> "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound**

> **system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others"** (emphasis added).

And more importantly,

> "**Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully**" (emphasis added).

The importance of giving reasons, irrespective of the fact that there are no express or implied obligation to do so, had been clearly shown in many decisions and it would be pertinent to mention the views expressed in **Osmond** v **Public Service Board of New South Wales and Another** ([1985] L.R.C. (Const.) 1041) and **Marta Stefan** v **General Medical Council** (supra).

In **Osmond** (supra), the appellant was employed in the New South Wales Public Service. In 1982 he applied for promotion to the vacant post of Chairman of the Local Lands Board. He was not recommended for this appointment and appealed to the Public Service Board under section 116 of the Public Service Act 1979. Soon after his appeal was heard by the Board he was informed orally that it had been dismissed, although no written notice of the decision was ever given to him and requests for a written decision with reasons were refused on the ground that it was not the Board's practice to give reasons.

It was held that natural justice required that the appellant should be given the reasons for the decision of the Board in his appeal and Kirby, J. had stated that,

> "The duty of public officials, in making discretionary decisions affecting others in the exercise of statutory powers, is to act

> justly and fairly; this will normally impose an obligation to state the reasons for their decisions. Such an obligation will exist where the absence of reasons would render nugatory a facility provided to appeal against the decision or would diminish a facility to test the decision by judicial review and ensure that it complies with the law and that relevant matters only have been taken into account."

In **Marta Stefan** (supra), the question related to a doctor, who was subjected to suspension of her registration for varying periods following decisions of the Health Committee of the General Medical Council that her fitness to practice was impaired. In February 1998 her case came before the Health Committee again and the Committee concluded that her registration should be suspended indefinitely. The only reason given for the decision was that the Committee have carefully considered all the information presented to them and continue to be deeply concerned about her medical condition and that the Committee have again judged her fitness to practice to be seriously impaired and have directed that her registration be suspended indefinitely.

Allowing the appeal by the Doctor, it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987, but that in the light of its judicial character, the framework in which it operated and the provision of a right of appeal against its decisions there was a common law obligation to give at least a short statement of the reasons for its decision, that the extent and substance of the reasons would depend upon the circumstances and they did not need to be elaborate or lengthy, but they should be such as to tell the parties in broad terms, why the decision was reached. It was also decided that the doctor's case would be remitted to a freshly constituted Health Committee for rehearing with reasons to be given for its decision.

The petitioners had complained of the infringement of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. Article 12(1) of the Constitution deals with the right to equality and reads as follows:

> "All persons are equal before the law and are entitled to the equal protection of the law."

Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and, unfair decisions. As pointed out by Bhagwati, J. (as he then was) in **E.P. Royappa** v **State of Tamil Nadu** (A.I.R. (1974) S.C. 555),

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch."

In such circumstances to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.

As pointed out by Craig (Administrative Law, 4th Edition, 1999 pg. 430) referring to Rabin (Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement (44 U. Chi. L.R. 60)) the very essence of arbitrariness is to have one's status redefined by the State without an adequate explanation of its reasons for doing so.

It is therefore apparent that as pointed out by Prof. Wade (Administrative Law, supra pg. 527), the time has now come for the Court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness. Prof. Wade (supra) had further stated that,

> "Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them,"

It is to be noted that there have been instances where Courts had quashed the decisions when only vague reasons had been given (**Re Poyser and Mills' Arbitration** ([1964] 2 Q.B. 467) or in circumstances where ambiguous reasons were provided (**R** v **Industrial Injuries Commissioner, *Ex parte* Howarth** ((1968) 4 K.I.R. 621).

It is not disputed that in the instant application, although the 1st respondent had informed this Court his reasons for the refusal of petitioners' application for the recognition of the Party in question, that in his communiqué to the petitioners on 21.01.2008 (X7) referred to above, no reasons whatsoever were given, which in my view means a denial of justice, an error of law and more importantly in connection to this matter, the said decision to withhold the reasons is arbitrary, unfair and unreasonable within the framework of Section 12(1) of the Constitution.

In such circumstances for the reasons aforementioned I hold that the decision reflected in the document dated 21.01.2008 (X7) is null and void and therefore the 1st respondent had violated the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioners' application is accordingly allowed. I direct the 1st respondent to re-consider the application submitted by the petitioners and to give reasons for his decision following such re-consideration.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, J.

I agree.

Judge of the Supreme Court