

**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 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(F.R.) Application No: 109/2021

1. Centre for Environmental Justice,
(Guarantee Limited),
No. 20/A, Kuruppu Road, Colombo 08.
2. Withanage Don Hemantha Ranjith Sisira
Kumara,
Director and Senior Advisor,
Centre for Environmental Justice,
No. 20 A, Kuruppu Road, Colombo 08.
3. Edirisinghe Arachchilage Sanjaya
Edirisinghe,
No. 30/6, Ragama Road,
Kadawatha.
4. Panchali Madurangi Panapitiya,
No. 565/44, Mihindu Mawatha,
Malabe.
5. Weerakkdoy Appuhamilage Manoja
Jayaswini Weerakkody,
No. 256/34C, Ruhunupura,
Thalawathugoda.

Petitioners

Vs.

1. Hon. Mahinda Rajapaksa,
Minister of Buddhasasana, Religious and
Cultural Affairs, and Urban Development
and Housing, and Economic Policies and
Implementation,
No. 135, Srimath Anagarika Dharmapala
Mawatha, Colombo 07.

2. Hon. R.M.C.B. Ratnayake,
Minister of Wildlife and Forest
Conservation,
Ministry of Wildlife and Forest
Conservation,
No. 1090, Sri Jayawardenapura Mw,
Rajagiriya.
3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

**Before: E.A.G.R. Amarasekara, J.
K.K. Wickremasinghe, J.
Janak De Silva, J.**

Counsel:

Ravindranath Dabare with Ms. Suwanthi Ponnampereuma for the Petitioners

Viveka Siriwardena ASG for the 1st, 2nd and 3rd Respondents

Argued On: 25.10.2021

Decided On: 01.12.2021

Janak De Silva, J.

The Petitioners, by petition dated 3rd April 2021, principally sought to impugn the Cabinet Memorandum dated 12th March 2021 [P10] submitted by the 1st and 2nd Respondents titled *“Taking a policy decision in respect of tamed elephants where judicial proceedings and investigations are being conducted and transferring the ownership”*. The Cabinet Memorandum [P10] sought *inter alia* the approval of the Cabinet Ministers to withdraw all cases in which legal action is being taken at present and to hand over these animals to their present owners according to the conditions of transferring these animals. Petitioners sought *inter alia* a declaration that the rule of law of the country will be seriously affected if the members of the executive Cabinet are allowed to interfere with the pending cases in the courts and allowed to arbitrarily take decisions with regard to pending litigation.

When this application was supported on 20th July 2021, the learned Additional Solicitor General appearing for the Attorney General brought to the notice of Court that in fact a Cabinet decision had been taken on 15th March 2021 on the impugned Cabinet Memorandum [P10] which has not been disclosed by the Petitioners. It was submitted that the application must be dismissed *in limine* as the Cabinet of Ministers were not named Respondents. Subsequently, the Petitioners requested that the Court authorize the filing of an amended petition, which was strongly opposed by the learned Additional Solicitor General.

Court allowed the Petitioners to file amended petition subject to any objections of the 1st and 2nd Respondents. Thereafter, an amended petition dated 16th August 2021 was filed to which the 1st and 2nd Respondent filed objections. This order pertains to these objections to the amended petition.

The first objection is that the original petition should be dismissed *in limine* for non-joinder of parties. It was submitted that the Petitioners should have made all the members of the Cabinet Respondents to the application since a Cabinet decision had been taken on the impugned Cabinet Memorandum [P10] by the time the original petition was filed.

The Petitioners have argued that the Cabinet decision was not published on the official website of the Cabinet of Ministers. I am not inclined to support this objection in the absence of a public source through which the Petitioners could have verified whether a Cabinet decision had been made. The Petitioners sought to file an amended petition as soon as the Cabinet decision was brought to their attention. I overrule the first objection.

The second objection is that both the original and amended petitions are time barred.

The impugned Cabinet Memorandum [P10] is dated 12th March 2021 whereas the original petition was filed on 9th April 2021. Thus, the assail of the Cabinet Memorandum [P10] is not time barred.

Admittedly the Cabinet decision was made on 15th March 2021, and the amended petition was filed on 20th August 2021. The Petitioners allege that they became aware of the Cabinet decision only when it was disclosed in open court on 20th July 2021. This court has held that time starts to run from the point of time the Petitioners became aware of the infringement or the imminent infringement [*Siriwardena and Others v. Brigadier J. Rodrigo and Others* (1986) 1 Sri.L.R. 384; *Gamaethige v. Siriwardena and Others* (1988) 1 Sri.L.R. 384].

Nevertheless, in my view, the Cabinet decision itself is not the act which, as has been alleged, would constitute an infringement of the fundamental rights of Petitioners. It is only when the Attorney-General, if he chooses to do so, acts on the impugned Cabinet decision that there may be, as alleged, an infringement of the fundamental rights of the Petitioners.

This court has recognized the notion of a continuing violation of fundamental rights [*Wijesekera and Others v. Attorney-General* (2007) 1 Sri.L.R. 38; *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others* (Waters Edge case) (2008) 2 Sri.L.R. 339; *Wijesekera and 14 Others v. Gamini Lokuge, Minister of Sports and Public Recreation and 20 Others* (2011) 2 Sri.L.R. 329].

In my view, there are situations where imminent infringements are also continuing. As a matter of fact, by definition, imminent infringements continue until a fundamental right is violated or the decision-maker changes his or her mind. Hence until the Attorney-General acts on the Cabinet decision or there is a change of mind of the Cabinet, the acts impugned by the Petitioners are allegedly continuing imminent infringements of the fundamental rights of the Petitioners. Accordingly, I conclude that the amended petition is not time barred and overrule the second objection.

The third objection is that the amended petition has been filed to cure the defects in the original petition which were brought to the notice of Court on behalf of the Respondents. No doubt the Petitioners have included several new prayers in the amended petition. They have also pleaded the Cabinet decision taken on the Cabinet Memorandum [P10] in addition to making all the members of the Cabinet Respondents to the application.

Nonetheless, this is a fundamental rights application filed in the public interest. The Petitioners allege that the impugned Cabinet Memorandum and decision are an attempt at political interference of national legislation and violation /an imminent threat of violation of the Fauna and Flora Protection Ordinance. It is further submitted that there is a breach/imminent breach of the rule of law.

Whilst the Cabinet Memorandum sought approval of the Cabinet Ministers to withdraw all cases where legal action is being taken at present and to hand over these animals to their present owners according to the conditions of transferring these animals, the Cabinet decision is to direct the Secretary, Ministry of Wildlife & Forest Conservation to bring the special reasons adduced in the Memorandum to the notice of the Attorney General and thereafter take necessary action in association with the Secretary, Ministry of Public Security and in consultation with the Attorney General to reach an amicable settlement with the relevant parties pertaining to the pending court cases, giving due consideration to the proposal (4.2) in paragraph 4.0 of the Cabinet Memorandum.

In *Attorney-General (on the relation of McWhirter) v. Independent Broadcasting Authority* [(1973) 1 All ER 689 at 697] Lord Denning succinctly described the role of the Attorney General of England as follows:

"It is settled in our constitutional law that in matters which , concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from . whatever quarter it may come. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law." [emphasis added]

Although there may be some differences in the two roles, these observations aptly apply to the role of the Attorney-General of Sri Lanka. In fact, in *Land Reform Commission v. Grand Central Limited* [(1981) 1 Sri.L.R. 250] this Court held that the Attorney-General has a duty to the Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth.

The Attorney-General is vested with extensive statutory powers in relation to criminal investigations and prosecutions. Such powers are held in public trust. They must be exercised for the due administration of justice according to the rule of law which is the basis of our Constitution. Any type of dictation from whatever quarter will compromise the independence of the Attorney-General unless such dictation is permitted by law. Any compromise of the independence of the Attorney-General will have a negative impact on the rule of law. The heart of the Petitioners' complaint is that the 1st and 2nd Respondents and the Cabinet of Ministers are interfering with the statutory powers of the Attorney General.

This is a serious allegation, which if true, has far reaching ramifications. According to Article 4(d) of the Constitution, it is the bounden duty of this Court to secure and advance the fundamental rights guaranteed by the Constitution. These are proceedings brought on behalf of the public at large. I hold that this Court must not allow procedural defects of the nature alleged in this matter to shackle its constitutional duty to examine the allegation of the Petitioners at the leave to proceed stage. Accordingly, I overrule the third objection.

I allow the amended petition dated 16th August 2021.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J.

I agree.

JUDGE OF THE SUPREME COURT

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT