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

1. Centre for Policy Alternatives,
   No. 6/5, Layards Road,
   Colombo 05.
2. Dr. Paikiasoothy Saravanamuttu,
   No. 3, Ascot Avenue,
   Colombo 05.
   Petitioners in SC/FR/91/2021

Sithara Shreen Abdul Saroor,
No. 202, W.A. Silva Mawatha,
Colombo 06.
Petitioner in SC/FR/106/2021

Ambika Satkunanathan,
No. 27, Rudra Mawatha,
Colombo 06.
Petitioner in SC/FR/107/2021

SC/FR/91/2021
SC/FR/106/2021
SC/FR/107/2021

Vs.

1. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

2. Major General (retd) G.D.H. Kamal Gunaratne,
   Secretary, Ministry of Defence,
   No. 15/5, Baladaksha Mawatha,
   Colombo 03.
3. C.D. Wickramaratne,
   Inspector General of Police,
   Police Headquarters, Colombo 1.
4. Major General Dharshana Hettiarachchi,
   Commissioner General of Rehabilitation,
   Bureau of Commissioner General of Rehabilitation,
   No. 462/2, Kaduwela Road,
   Ganahena, Battaramulla.

   Respondents

1. Dr. Malkanthi Hettiarachchi,
   7A, De Soyza Mawatha,
   Mt. Lavania.
2. Al Haj Abdul Jawad Alim Ualiyallah Trust & Maulavee K.R.M. Sahlan Rabbane,
   B.J.M. Road, Kattankudy 05.

   Intervenient-Respondents

Before: Buwaneka Aluwihare, P.C., J.
Murdu N.B. Fernando P.C., J.
Mahinda Samayawardhena, J.

Counsel: Viran Corea with Luwie Ganeshathasan, Khyati Wikramanayake and Thilini Vidanagamage for the Petitioners in SC/FR/91/2021.

Suren Fernando with Khyati Wikramanayake for the Petitioners in SC/FR/106/2021.

Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Githmi Wijenarayana for the Petitioners in SC/FR/107/2021.

Nerin Pulle, P.C., Additional Solicitor General, with Dr. Avanti Perera, Deputy Solicitor General for the Respondents.

Suren Gnanaraj with Rashmi Dias Goonewardena for the 1st Intervenient-Respondent.

Shehan De Silva with Naveen Maha Arachchige for the 2nd Intervenient-Respondent.

Argued on: 21.03.2022, 13.05.2022, 18.05.2023, 05.06.2023, 28.06.2023

Written Submissions:

By the Petitioners in SC/FR/91/2021 on 09.08.2022 and 03.08.2023

By the Petitioners in SC/FR/106/2021 on 15.03.2022 and 26.07.2023

By the Petitioners in SC/FR/107/2021 on 15.03.2022 and 31.07.2023

By the Respondents on 19.07.2023

By the 2nd Intervenient-Respondent on 14.03.2022 and 15.08.2023

By the 1st Intervenient-Respondent on 15.03.2022 and 23.10.2023

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

The petitioners filed these fundamental rights applications (SC/FR/91/2021, SC/FR/106/2021 and SC/FR/107/2021) in their own right and in the public interest on the basis that several fundamental rights guaranteed under Chapter 3 of the Constitution are violated by the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 1 of 2021 published in the Extraordinary Gazette No. 2218/68 dated 12.03.2021.

All three applications were supported together and the Court granted leave to proceed to the petitioners on the alleged violation of Articles 10, 12(1) and 13 of the Constitution. The Court also made an interim order suspending the operation of the said Regulations until the final determination of these applications.

Two petitioners were allowed to intervene. They are opposing the applications of the petitioners.

Arguments were taken up together and parties agreed to abide by a single judgment.

As stated in the Gazette, these Regulations were made by the President under section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 read with paragraph (b) of Article 4 of the Constitution.

The learned Additional Solicitor General appearing for the respondents submitted to Court that the primary purpose of promulgating these Regulations was the de-radicalization and rehabilitation of the misguided youth who either surrendered or were arrested following the horrific Easter Sunday attacks on 21.04.2019, driven by a violent extremist religious ideology.

While these fundamental rights applications were pending, the Bureau of Rehabilitation Bill was placed on the Order Paper of Parliament on 23.09.2022. This Bill was subsequently challenged in this Court for its constitutionality. On 04.10.2022, in SC/SD/54-61/2022, this Court ruled that the Bill as a whole was inconsistent with Article 12(1) of the Constitution and suggested ways to address the inconsistencies. Following this determination, the Bureau of Rehabilitation Act No. 2 of 2023 was enacted.

As section 3 of the Bureau of Rehabilitation Act states "*The objective of the Bureau shall be to rehabilitate drug dependent persons or <u>any other person as may be identified by law as a person who requires rehabilitation</u> and which may include treatment and adoption of various therapies in order to ensure effective reintegration and reconciliation, through developing socio-economic standards.*" This Act contains extensive provisions related to rehabilitation. I find that several Regulations overlap or conflict with the provisions of the Bureau of Rehabilitation Act because the Bureau of Rehabilitation Act was non-existent when these impugned Regulations were promulgated. If these impugned Regulations had been promulgated after the determination of the Bureau of Rehabilitation Bill and the enactment of the Bureau of Rehabilitation Act, it would have saved more judicial time.

The learned Additional Solicitor General submits that the Act provides for the rehabilitation framework, while these Regulations provide for the procedure for sending individuals for rehabilitation.

All parties unequivocally endorse the idea of rehabilitation and acknowledge that restorative justice is better than retributive justice. Retributive justice is based on the punishment of offenders whereas restorative justice is based on repairing harm and reconciling parties. Nevertheless, the petitioners assert that the impugned Regulations will not achieve this goal. They contend that the rehabilitation contemplated in the impugned Regulations is tantamount to pre-trial punishment.

Locus standi

The learned Additional Solicitor General raised a preliminary objection regarding the *locus standi* of the petitioners to file these applications. He reiterates this objection in his post-argument written submissions as well. His argument is that although the petitioners state that they invoke the fundamental rights jurisdiction in public interest, they have failed to present at least a single affidavit of an arrestee or surrendee who has expressed a view that he or she does not wish to take part in the process of rehabilitation in lieu of prosecution as envisaged by the impugned Regulations. I do not think that the Court should adopt such a strict attitude in the invocation and exercise of the fundamental rights jurisdiction.

All the petitioners (except the 1st petitioner in SC/FR/91/2021 which is a company) are citizens of Sri Lanka.

In SC/FR/91/2021 there are two petitioners. The 1st petitioner is a company incorporated under the Laws in Sri Lanka whose one of the primary objectives is to contribute to public accountability in governance through the strengthening of awareness in society of all aspects of public

and policy implementation. The 2nd petitioner is the executive director of the 1st petitioner company.

The petitioner in SC/FR/106/2021 is reportedly a human rights activist working as a member of the *Mannar Women's Development Federation and Women's Action Network* that work with women directly affected by armed conflict in Sri Lanka.

The petitioner in SC/FR/107/2021 was a member of the Human Rights Commission in Sri Lanka and is involved in rehabilitation processes in different capacities.

The literal reading of Article 126(2) of the Constitution indicates that the fundamental rights jurisdiction of this Court can be invoked by a person whose rights have been infringed or are about to be infringed by executive or administrative action. However, the contextual reading of the Constitution as a cohesive whole and the jurisprudential dimension reveal that the invocation of fundamental rights jurisdiction is not circumscribed by rigid boundaries or limited by isolated provisions. Instead, it is intended to be a flexible and dynamic instrument for safeguarding the rights and liberties of the People.

The Preamble of the Constitution itself recognises the fundamental human rights, amongst others, as an intangible heritage that guarantees the dignity and well-being of the people of Sri Lanka.

According to Article 3 of the Constitution, sovereignty is in the People and sovereignty includes the fundamental rights. Article 4(d) states that the fundamental rights shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, except in the manner and to the extent provided for in the Constitution.

According to Article 17, every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of Chapter 3 of the Constitution.

In accordance with Article 27(2)(a), the State is committed to establishing a democratic socialist society with one of its objectives being "the full realization of the fundamental rights and freedoms of all persons".

Article 28(a) states that the exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations and accordingly it is the duty of every person in Sri Lanka to uphold and defend the Constitution and the law.

The contours of fundamental rights jurisdiction have expanded over the years, and public interest litigation in response to violations and imminent violations of fundamental rights is no longer a new phenomenon in the global arena.

In the seminal case of *Bulankulama and Others v. Secretary of Ministry of Industrial Development and Others* [2000] 3 Sri LR 243 at 258, Justice Amerasinghe observed:

> *[T]he Supreme Court has "sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right…" The Court is neither assuming a role as "trustee" nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this Court, and this Court alone, by Article 126(1) of the Constitution.*

> *Learned counsel for the 5th and 7th respondents submitted that, being an alleged "public interest litigation" matter, it should not be entertained under provisions of the Constitution and should be rejected. I must confess surprise, for the question of 'public interest litigation' really involves questions of standing and not whether there is a certain kind of recognized cause of action. The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant.*

In *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others* [2008] 2 Sri LR 339 at 356, Justice Thillakawardane endorsed this view in the following manner:

> *With respect to the submission of standing, or locus standi, we concur with the opinion of the learned Judge in Bulankulama (supra), namely that petitioner in such public interest litigation have a constitutional right, given by Article 17, read with Articles 12 and 126, to bring forward their claims. Petitioners to such litigation cannot be disqualified on the basis that their rights happen to be*

> *ones that extend to the collective citizenry of Sri Lanka. The very notion that the organs of government are expected to act in accordance with the best interests of the People of Sri Lanka, necessitates a determination that any one of the People of Sri Lanka may seek redress in instances where a violation is believed to have occurred. To hold otherwise would deprive the citizenry from seeking accountability of the institutions to which it has conferred great power and to allow injustice to be left unchecked solely because of technical shortcomings. This position is consistent with several instances where this Court has held standing to be adequate.*

The petitioners in the instant applications have the *locus standi* to file these applications.

I will now consider the impugned Regulations separately to determine whether they violate Articles 10, 12(1), and 13 of the Constitution, as alleged by the petitioners.

The purpose of the Regulations

Regulation 1 provides the title of the Regulations. It captures the purpose of the Regulations and sets the tone for the rest.

> *These Regulations may be cited as the Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021.*

Article 10 of the Constitution reads as follows:

> *Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.*

Article 10 is a non-derogable and an entrenched provision. No restrictions can be placed on this Article. To amend Article 10, Article 83 requires a 2/3 majority in Parliament and approval through a referendum.

The freedom of thought, as enshrined in our fundamental rights, stands out as a cornerstone of democracy. The freedom of thought ensures that a person's mind remains beyond scrutiny. To infringe upon the freedom of thought is to undermine the very essence of a democratic society, for it is within the realm of individual thought that the roots of self-expression, personal liberty, human dignity and the flourishing of all other fundamental rights are nurtured.

The definition of "extremist religious ideology" presents inherent difficulties as religious beliefs may vary widely among individuals, with one person's religious ideology potentially appearing extreme to another. In the absence of clarity, there is a risk of arbitrary decisions being made where certain attitudes, behaviors, attire etc. can also be deemed as signs of extremist religious ideologies.

According to Article 10, the State cannot prevent a person from thinking or believing in some religious ideology on the basis that such thinking or belief is irrational or extreme. As I have already stated, Article 10 sets an absolute bar against such infringements. Nevertheless, if such person manifests his thinking or belief, freedom of thought can be restricted as permitted by Article 15 of the Constitution.

Whilst Article 10 guarantees freedom of thought to every person, Article 14(1)(a) guarantees freedom of expression of his thinking to every citizen. Article 14(1)(a) states "*Every citizen is entitled to the freedom of speech and expression including publication*". In *Fernando v. The Sri Lanka Broadcasting Corporation* [1996] 1 Sri LR 157 at 179, Justice Mark Fernando stated that "*Article 10 denies government the power to control*

men's minds, while Article 14(1)(a) excludes the power to curb their tongues."

Unlike freedom of thought, the freedom of speech and expression is not absolute. The full enjoyment of freedom of speech and expression is circumscribed by Article 15(2):

> *The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.*

According to Article 170, "law" means "*any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council*". This means the freedom of speech and expression can be limited by an Act of Parliament.

The manifestation of one's religion or belief is a fundamental right. Article 14(e) states:

> *Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.*

Freedom to manifest one's religion or belief is also subject to restrictions. Article 15(7) imposes restrictions on the manifestation of religion or belief.

> *The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just*

> *requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.*

For the purpose of Article 15(7), "law" includes not only Acts of parliament but also regulations made under the law for the time being relating to public security.

While Article 10 is theoretically absolute and untouchable, practically, it may not be so. It seems that learned counsel for the petitioners accept this.

Learned counsel for the petitioner in SC/FR/106/2021 says "*The role of the State, to be exercised in terms of the Constitution and the law, is limited to stepping in, in the event that imminent harm is to be caused to another. Even in the event that a person is prone to violence, the powers given to the State to prevent such harm do not extend to the power to brainwash, or to change the thoughts, conscience or religion of a person.*"

Learned counsel in SC/FR/91/2021 states "*the petitioners are not against the notion of de-radicalization and rehabilitation of persons holding violent extremist views. To the contrary, the petitioners strongly believe that rehabilitation is an essential pre-requisite of any progressive criminal justice system and when done properly and with due regard to the rights of persons, is the most appropriate way to deal with many persons who have violent extremist views.*"

In *Premalal Perera v. Weerasuriya* [1985] 2 Sri LR 177 at 192 Justice Ranasinghe (as His Lordship then was) stated that "*a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected that unless where the claim is so bizarre, so clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived*

the commands of his particular faith". That means, if the religious belief is "*so bizarre, so clearly non-religious in motivation*", the protection under Article 10 is not available.

But the question is how to draw the line between "*a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected*" and "*the claim is so bizarre, so clearly non-religious in motivation*"? What is the yardstick to decide that the religious belief is "*so bizarre, so clearly non-religious in motivation*"? People cannot be prosecuted, nay persecuted, for merely "holding religious ideology" which the State thinks to be "violent and extremist".

All seem to be in agreement that when there is an imminent threat in pursuit of "violent extremist religious ideology", the State can step in to prevent the harm for the greater benefit of all others. However, prevention of harm cannot be the pretext for arbitrary use of power to curb the rights of the People.

Although no issue of a legal nature arises from the title of a statute, the unqualified concept contained in the title of the impugned Regulations is inconsistent with Article 10 of the Constitution. This has been exacerbated by the fact that no definition has been provided for the term "violent extremist religious ideology" in the Regulations.

I must also note that in the Sinhala version of these Regulations, the word "violent" is not included in the title of the Regulations.

The objective of the Regulations

Regulation 2 deals with the objectives of the Regulations. However, a contextual reading of these objectives reveals that there is no nexus between the theme of the Regulations as manifested in the title and the

objectives of the Regulations. Regulation 2 is inherently illogical and irrational. It reads thus:

> *The objective of these regulations shall be to ensure, that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups after the coming into operation of these regulations is dealt with in accordance with the provisions of the Act, and that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.*

According to Regulation 2, the objective of these Regulations is not de-radicalization and rehabilitation of individuals holding violent extremist religious ideology. Regulation 2 does not expressly state such an objective.

Regulation 2 outlines two-fold objectives:

The first objective is "*to ensure that any person who surrenders or is taken into custody on suspicion of being a person who by words either spoken or intended to be read or by signs or by visible representations or otherwise, causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill will or hostility between different communities or racial or religious groups after the coming into operation of these regulations is dealt with in accordance with the provisions of the* ***Act***" (and not in accordance with the provisions of the impugned Regulations).

According to Regulation 9, "Act" means the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

I find it hard to understand this objective. Let me explain.

According to section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act, a person who "*by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups*" shall be guilty of an offence under that Act. These are the very same words used in Regulation 2 quoted above. The Act also includes provisions for individuals who are arrested on suspicion of engaging in the aforementioned acts. In this backdrop, it appears incongruous when Regulation 2 says after the coming into operation of the Regulations such persons are dealt with in accordance with the provisions of "the Act". The Act does not provide for rehabilitation.

The second objective is "*that persons who have surrendered or have been taken into custody in terms of any emergency regulation which was in force at any time prior to coming into operation of these regulations, continue in terms of these regulations, to enjoy the same care and protection which they were previously enjoying.*" If the care and protection provided to those individuals remain the same even after these Regulations, I fail to see any significance in this objective.

Alternative interpretations of these objectives may be possible but this shows the inherent vagueness, ambiguity, and obscurity in Regulation 2. If the stated objective of the Regulations is not clear, how can their impact and applicability be properly assessed or understood? The existence of such real uncertainties within legal provisions may give rise to subjective

interpretation and arbitrary enforcement of the law, which may undermine the rule of law and legal predictability. This violates Article 12(1) of the Constitution which states "*All persons are equal before the law and are entitled to the equal protection of the law*."

Who can be referred to rehabilitation?

Who can be referred to rehabilitation is set out in Regulations 3 and 5. Regulation 3 reads as follows:

> *Any person who, in connection with any offence under the provisions of,*
>
> *(a) the Act, or the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 published in the Gazette Extraordinary No. 2123/3 of May 13, 2019, surrenders or has surrendered to, or is taken or has been taken into custody by; or*
>
> *(b) the Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2019 published in the Gazette Extraordinary No. 2120/5 of April 22, 2019, has surrendered to or has been taken into custody by,*
>
> *any police officer, or any member of the armed forces, or to any public officer or any other person or body of persons authorized by the President by Order, may be referred to a rehabilitation programme in terms of the provisions of these regulations.*

Regulation 3 delineates three distinct categories of individuals who may be directed to rehabilitation. They are:

A person <u>who is in connection with any offence</u> under the provisions of:

(1) the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979
(2) the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019
(3) the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019

The term “connected with any offence” has not been defined in the impugned Regulations. Such a broad term permits the inclusion of virtually anyone under its scope, based on the subjective criteria of those authorised to arrest individuals under the impugned Regulations.

The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019, which were made under section 5 of the Public Security Ordinance No. 25 of 1947 as amended, have since lapsed. Consequently, persons cannot now be taken into custody under the aforesaid third category.

The Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 were made under section 27 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

People can still be taken into custody under the first and second categories because the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Regulations made thereunder are still in force.

Who can arrest individuals?

According to Regulation 3 of the impugned Regulations, persons in connection with any offence under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 can be taken into custody by

(1) any police officer,

(2) any member of the armed forces,

(3) any public officer,

(4) any other person or

(5) body of persons authorized by the President by Order.

There is no provision in the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 and the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 which confers the President or the Minister to exercise such power.

The words used in Regulation 3(a) are "Any person who…surrenders or has surrendered to, or is taken or has been taken into custody" thereby covering not only past acts but also future acts. The plain reading of Regulation 3 confirms that this is applicable to the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 and the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2019. Regulation 3, when read in conjunction with Regulation 9, confers a *sui generis* power of arrest.

The argument of the learned Additional Solicitor General that "*Regulation 3 does not in any way confer power on any authority to arrest a person under these Regulations, but makes reference to persons whose surrender or custody is in terms of other laws/Regulations*" is unacceptable.

Similarly, the argument of learned counsel for the intervenient respondents that "*Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 01 of 2021) does not envisage nor empower the arrest or taking into custody of persons thereunder and only applies to those who are arrested or taken into custody under the Prevention of Terrorism (Temporary Provisions) Act No.*

48 of 1979 as amended, Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 and the Emergency (Miscellaneous Provisions and Powers) Regulation No. 1 of 2019 and refers to categories of persons entitled to arrest thereunder" is also unacceptable.

Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 do not provide for arrest. Hence, before the impugned Regulations were made, arrest had to be done under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 identifies categories of persons who can arrest individuals. According to this Act, far from 'any person', even 'any police officer' cannot arrest individuals under the said Act. In terms of section 6(1) of the Act, "*any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorized in writing by him in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary arrest any person".*

Can Regulations override the principal Act?

Regulations made under the principal Act cannot override the principal Act unless it is expressly provided. The Regulations are expected to be consistent with and subordinate to the enabling Act. What cannot be done through an amendment to the principal Act cannot be done through Regulations made under the same Act. The principal Act passed by the legislature cannot be changed by the executive by Regulations.

According to section 17(1)(c) of the Interpretation Ordinance No. 21 of 1901 as amended, where any enactment confers power on any authority to make rules, "*no rule shall be inconsistent with the provisions of any*

enactment". Section 17(2) enacts that "*In this section the expression "rules" includes rules and regulations, regulations, and by-laws.*"

Section 27(1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, which invests the Minister with his rule-making power enacts "*The Minister may make regulations under this Act for the purpose of carrying out or giving effect to the principles and provisions of this Act.*" This does not permit the Minister to unilaterally extend or modify the enabling Act passed by Parliament. Such actions would constitute an encroachment on legislative power by the executive, which is contrary to the fundamental principles of democratic governance.

According to section 28 of the of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, "*The provisions of this Act shall have effect notwithstanding anything contained in any other written law and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other written law, the provisions of this Act shall prevail.*" Article 170 of the Constitution includes "Regulations" into the definition of "written law". This itself indicates that Regulations made under the Prevention of Terrorism (Temporary Provisions) Act cannot take precedence over the Act.

In the case of *The Attorney General of Ceylon v. W.M. Fernando, Honorary Secretary, Galle Gymkhana Club* (1977) 79(1) NLR 39 at 42-43, Justice Sharvananda (as His Lordship then was) stated:

> *A clear distinction has to be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in a resolution passed by the House of Representatives, a limb of the Legislature. A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation,*

> *the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made. (…) The doctrine that subordinate legislation is invalid if it is ultra vires, is based on the principle that a subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivatory nature and must be exercised within the periphery of the power conferred by the enabling Act. If a subordinate law-making authority goes outside the powers conferred on it by the enabling statute, such legislation will ipso facto be ultra vires.*

In *Ram Banda v. The River Valleys Development Board* (1968) 71 NLR 25, the Minister, purporting to act under the rule-making powers conferred on him by certain sections of the Industrial Disputes Act, made Regulation 16 of the Industrial Disputes Regulations, 1958. Regulation 16 provided that "*every application under paragraph (a) or (b) of section 31B(1) of the Industrial Disputes Act in respect of any workman shall be made within three months of the date of termination of the services of that workman*". The appellant workman's application was rejected by the Labour Tribunal on the ground that the date of dismissal was more than three months anterior to the application. On appeal, the Supreme Court held:

> *Regulation 16 is ultra vires the rule-making powers conferred on the Minister by sections 31A(2), 39(1)(a), 39(1)(b), 39(1)(ff) and 39(1)(h) of the Industrial Disputes Act inasmuch as it in effect takes away from the workman, on the expiry of the stated period of three months, the right given to him by the legislature to apply to a Labour Tribunal for relief, and to that extent nullifies or repeals the principal enactment.*

Section 39(2) of the Industrial Disputes Act provides that every Regulation made by the Minister should be placed before Parliament for approval and that on such approval and publication in the Gazette, it shall be "as valid and effectual as though it were herein enacted". Justice Weeramantry took the view that such approval does not confer validity on a Regulation which is outside the scope of the enabling powers. His Lordship stated at page 38:

> *The mere passage of such regulation through Parliament does not give it the imprimatur in such a way as to remove it, through the operation of section 39(2), from the purview of the courts. The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter devolves on the courts alone.*
>
> *Against such a background, to view section 39(2) as a clock of validity which may be thrown around rules which in fact are ultra vires would be to erode rather than protect the supreme authority of Parliament. Regulations clearly outside the scope of the enabling powers and passing unnoticed in the heat and pressure of parliamentary business may then survive unquestioned and unquestionable; and functionaries manifestly exceeding their powers would thereby be able to arrogate to themselves a de facto legislative authority which de jure belongs to parliament alone.*
>
> *For the foregoing reasons I cannot subscribe to the view that the mere passage of a regulation through Parliament gives it the imprimatur of the legislature in such a way as to remove it from the purview of the courts through the operation of section 39(2).*
>
> *The duty of interpreting the regulation and the parent Act in order to see whether the former falls within the scope allowed by the latter*

devolves on the courts alone. It is a principle that has often been asserted, and bears reassertion, that just as the making of the laws is exclusively the province and function of Parliament, so is their interpretation the province and function exclusively of the courts. In the total and exclusive commitment of this function to the care of the courts, tradition, law and reason all combine; nor is any organ of the State so-well equipped in fact or so amply authorised by law to discharge this function. It is self-evident that Parliament is not nor ever can be the authority for the interpretation of the laws which it enacts.

In the view stated above, the courts as the sole interpreters of the law are committed to the duty, despite section 39(2), to consider whether a regulation travels beyond the powers conferred on its maker. Any other view of the law seems fraught with danger to the subject for it would free the acts of creatures of the legislature from the checks and scrutinies which alone are effective in ensuring that the delegated authority while operating to the uttermost limits of its powers does not travel beyond.

I thus reach the conclusion that it is within the competence of this court to subject such regulations to the ultra vires test despite section 39(2) and for the reasons earlier set out, I hold the rule in question to be ultra vires.

In *River Valleys Development Board v. Sheriff* (1971) 74 NLR 505 the majority did not agree with the above judgment. However, *River Valleys Development Board v. Sheriff* was overruled in *The Ceylon Workers' Congress v. The Superintendent, Beragala Estate* (1973) 76 NLR 1, which held that *Ram Banda v. The River Valleys Development Board* had been correctly decided. The dicta of Justice Weeramantry in *Ram Banda v. The River Valleys Development Board* was followed by a series of subsequent

decisions. Those decisions include *Wickremasekera v. Ganegoda* (1973) 76 NLR 452, *Rahuman v. Trustees of the Mohideen Jumma Mosque* [2004] 2 Sri LR 250 and *Rathnakumara and Others v. The Postgraduate Institute of Medicine* (SC/APPEAL/16/2014, SC Minutes of 30.03.2016).

In the instant case, only the making of the Regulations and their publication in the Gazette in terms of section 27(1) and (2) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 have taken place, and not the approval by Parliament.

Regulation 3 is *ultra vires* the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It also constitutes an affront to Article 12(1) of the Constitution.

This also violates Article 13(1) of the Constitution which states "*No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*"

Who determines rehabilitation under regulation 3?

Regulation 3 provides for the arrest. Then the next question is who decides to send such persons having some "connection with any offence" under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 or the Prevention of Terrorism (Proscription of Extremist Organizations) Regulations No. 1 of 2019 or the Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 2019 to rehabilitation. The impugned Regulations do not provide for it. It is important to bear in mind that this category of persons is different from those who fall into the category described in Regulation 5. Regulation 3 is clearly vague.

According to Regulation 3, such arrestees "*may be referred to a rehabilitation programme in terms of the provisions of these regulations*",

not in terms of the provisions of the Bureau of Rehabilitation Act No. 2 of 2023, which became law after these Regulations. This leads to a further confusion whether there are two regimes governing rehabilitation.

Article 13(5) declares "*Every person shall be presumed innocent until he is proved guilty*".

Regulation 3 violates Articles 12(1), 13(1) and 13(5) of the Constitution.

Reintegration Centres

Regulation 4 provides for setting up of Reintegration Centres:

> *The Secretary to the Ministry of the Minister shall, from time to time approve Centres to be known as "Reintegration Centres" (hereinafter referred to as the "Centre") for the purpose of rehabilitating the surrendees and detainees. Upon such approval the Commissioner General of Rehabilitation shall by order published in the Gazette specify the category and the place of the Centres approved by the Secretary.*

According to Regulation 9, "Minister" means the Minister of Defence.

This Regulation is in direct contradiction to the framework established by the Bureau of Rehabilitation Act No. 2 of 2023.

In brief, under the Bureau of Rehabilitation Act, there are no Reintegration Centres but Rehabilitation Centers established by the Minister in charge of the subject of rehabilitation, not by the Minister of Defence or Secretary to the Ministry of Defence or Commissioner General of Rehabilitation. The administration, management and control of the affairs of the Bureau of Rehabilitation is vested in the Governing Council.

After the enactment of the Bureau of Rehabilitation Act, impugned Regulation 4 is no longer valid or sustainable. Regulation 4 cannot be given effect to over the provisions of the Bureau of Rehabilitation Act. The overlap between the provisions of the Bureau of Rehabilitation Act and Regulation 4 leads to ambiguity.

Regulation 4 violates Article 12(1).

Detention orders

Regulation 5 has four sub sections: 5(1) and 5(2) are standalone sections. They deal with distinct matters. 5(3) and 5(4) together deal with a separate matter.

Several questions arise out of this Regulation.

Regulation 5(1) reads as follows:

> *Any person other than a police officer to whom a person surrenders or who takes a person into custody in terms of regulation 3 shall hand over such surrendee or person taken into custody, to the Officer in Charge of the nearest police station within twenty four hours of such surrender or taking into custody.*

There is no ambiguity that Regulation 5(1) refers to first two categories of Regulation 3 mentioned above because this Regulation does not refer to past acts. It says any person other than a police officer to whom a person "surrenders or who takes a person into custody" shall hand over such person to the officer in charge of the nearest police station within twenty four hours. As I mentioned previously, individuals cannot be arrested in such a manner by "any person other than a police officer". Regulation 5(1) violates Articles 12(1) and 13(1).

Regulation 5(2) reads as follows:

> *Notwithstanding the provisions of regulation 3, where there is reasonable cause to suspect that a surrendee or detainee has committed an offence specified in regulation 3, the Officer in Charge of the police station in which such surrendee or detainee is held in custody shall submit a report to the Minister for consideration whether such surrendee or detainee shall be detained in terms of section 9 of the Act, for the purpose of conducting an investigation.*

This Regulation clears the doubt that a reference to rehabilitation in terms of Regulation 3 is done where there is not even a reasonable cause to suspect that the arrestee has committed an offence specified in Regulation 3. Reference to rehabilitation under Regulation 3 is not voluntary. This shows the illegality of rehabilitation under Regulation 3.

According to Regulation 5(2), where there is reasonable cause to suspect that a detainee has committed an offence specified in Regulation 3, the officer in charge of the police station shall submit a report to the Minister of Defence for consideration whether such person shall be detained in terms of section 9 of the Prevention of Terrorism (Temporary Provisions) Act for further investigation. This goes to show that the procedure in the impugned Regulations is *sui generis*. Otherwise, there is no reason to reiterate this within this Regulation.

Role of the Attorney General

Regulation 5(3) reads as follows:

> *Where in the course of such investigation it is disclosed that such surrendee or detainee has committed an offence specified in regulation 3 the matter shall be referred to the Attorney-General for appropriate action in terms of the law.*

According to this Regulation, during the course of an investigation (prior to its conclusion), if the police decide that the detainee has committed an offence specified in Regulation 3, the matter shall be referred to the Attorney General. It is important to note that this decision is made unilaterally by the police.

Regulation 5(4) states:

> *Where the Attorney-General is of the opinion that according to the nature of the offence committed a surrendee or detainee shall be rehabilitated at a Centre in lieu of instituting criminal proceedings against him, such surrendee or detainee shall be produced before a Magistrate with the written approval of the Attorney-General. The Magistrate may make order, having taking into consideration whether such surrendee or detainee has committed any other offence other than offences specified in regulation 3, referring him for rehabilitation for a period not exceeding one year at a Centre.*

This marks the second occasion where a unilateral decision is taken against the detainee that he committed the offence. The Attorney General can unilaterally decide that the detainee shall be rehabilitated at a Centre in lieu of instituting criminal proceedings. With the written approval of the Attorney General, the detainee is then produced before a Magistrate.

Under the Prevention of Terrorism (Temporary Provisions) Act, the Magistrate has no authority to release individuals on bail without the sanction of the Attorney General. In practical terms, with the written approval of the Attorney General for rehabilitation, the Magistrate has to make a perfunctory order for rehabilitation. That is the reality. This the Magistrate does, without a charge sheet, without trial, without conviction and without passing a sentence. The sentence for committing an unknown and undisclosed offence is rehabilitation. Notably, there is no

provision for a hearing to be given to the detainee before sending him for rehabilitation. The detainee can even be produced to the Magistrate at his residence with the written approval of the Attorney General for rehabilitation to get the formal order.

A careful reading of Regulation 5(4) confirms that the only matter the Magistrate can take into account is whether the detainee has committed any offence other than those specified in Regulation 3. If I may repeat, what it says is "*The Magistrate may make order, having taking into consideration whether such surrendee or detainee has committed any other offence other than offences specified in regulation 3, referring him for rehabilitation for a period not exceeding one year at a Centre.*" It does not say that the Magistrate may, having taken into consideration *inter alia* whether such surrendee or detainee has committed any offence other than the offences specified in regulation 3, refer such person to a Centre for rehabilitation for a period not exceeding one year. Here an individual is sent for rehabilitation without his informed consent. It remains unclear whether the alleged commission of other offences is considered in favor of rehabilitation or against it. The absence of proper judicial oversight throughout this entire process renders it inherently arbitrary.

Article 13(3) enacts that "*Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*" Article 13(3) does not fall under any of the restrictions recognised under Article 15. This Article is interrelated with Article 13(5), which upholds the presumption of innocence until proven guilty as a fundamental right. Article 13(3) cannot be rendered nugatory by denying a trial, as these Regulations do. The principle of fairness is not limited to the trial proper. It begins before the trial and continues after the trial in the event of a conviction.

Regulation 5 violates the fundamental rights guaranteed under Article 12(1) and 13(5).

The argument that all these decisions are reviewable and therefore no prejudice is caused to the rehabilitant is unacceptable. Litigation is time-consuming and costly. It is the duty of the State to take all precautionary steps to safeguard the fundamental rights of the subjects.

Revocation of the rehabilitation order

Regulation 6 deals with the subject of revocation of the rehabilitation order.

> *6(1) Where any surrendee or detainee who is referred to for rehabilitation by an order of a Magistrate under sub regulation (4) of regulation 5 acts in a manner that is disruptive to the rehabilitation programme or detrimental to the interests of the other surrendees or detainees who are under rehabilitation at the Centre, the Commissioner-General of Rehabilitation shall inform in that regard in writing to the Officer in Charge of the police station who applied to the Magistrate for rehabilitation of such surrendee or detainee.*
>
> *(2) Upon receipt of information from the Commissioner-General of Rehabilitation under sub regulation (1) of this regulation, the Officer in Charge of the police station who applied to the Magistrate for rehabilitation of such surrendee or detainee shall apply to the Magistrate to revoke the order for rehabilitation and refer the matter to the Attorney-General to consider whether such person shall be indicted in lieu of rehabilitation.*

The term "disruptive" can be interpreted in many ways; for instance, complaints against the condition of the Center can be considered as disruptive. According to this Regulation, the revocation of a rehabilitation

order is effected without any inquiry or hearing being afforded to the rehabilitant. Absence of due process infringes upon the principles of natural justice and fairness, thereby constituting a violation of Article 12(1).

It seems to me that this is a matter that should be addressed through the Bureau of Rehabilitation Act and not by way of Regulations made under the Prevention of Terrorism (Temporary Provisions) Act.

Section 26 of the Bureau of Rehabilitation Act provides for obstructions of the rehabilitation programme.

> *Any person who unlawfully obstructs or attempts to unlawfully obstruct any person employed in any Centre for Rehabilitation in the performance of his lawful duties under this Act, commits an offence under this Act and shall be liable on conviction after summary trial by a Magistrate to a fine not exceeding fifty thousand rupees or to imprisonment of either description for a period not exceeding six months or to both such fine and imprisonment.*

As previously mentioned, this is a consequence of these Regulations having been promulgated before the Bureau of Rehabilitation Act came into existence.

Extension of rehabilitation period

Regulation 7 deals with the extension of the rehabilitation period.

> *7(1) At the end of the period of rehabilitation specified in respect of a surrendee or detainee in the order made by the Magistrate under sub Regulation (4) of regulation 5, the Commissioner-General of Rehabilitation shall, having regard to the nature and progress of the rehabilitation of such surrendee or detainee, consider whether it is appropriate for the surrendee or detainee to be released or be subject*

to a further the period of rehabilitation, shall forthwith submit his recommendation to the Secretary to the Ministry of the Minister. The Secretary shall forthwith forward such report to the Minister.

(2) The Minister may, after perusal of the report submitted to him under sub regulation (1) of this regulation,

(a) order the release of such surrendee or detainee; or

(b) extend the period of rehabilitation for a period of six months at a time, so however that the aggregate period of such extensions shall not exceed a further twelve months. Each such extension shall be made on the recommendation of the Commissioner-General of Rehabilitation.

(3) The surrendee or detainee shall, at the end of the extended period of rehabilitation, be released.

This Regulation is *ultra vires* in several respects.

After obtaining an order for rehabilitation from a Magistrate for a maximum period of one year and after the completion of that one-year of rehabilitation, it is not within the purview of a Regulation to grant the Minister of Defence the authority to unilaterally extend the rehabilitation period for an additional year without the intervention of the Magistrate. This amounts to a usurpation of judicial power by the executive in violation of Article 3 read with Article 4(c) of the Constitution.

This is also done unilaterally without giving a hearing to the detainee.

This Regulation also violates Articles 12(1), 13(2) and 13(4).

Extension of the period of rehabilitation also seems to be a matter to be dealt with through the Bureau of Rehabilitation Act and not by way of

Regulations made under the Prevention of Terrorism (Temporary Provisions) Act.

According to the impugned Regulations, the Minister acts according to the recommendations of the Commissioner General of Rehabilitation. However, under the Bureau of Rehabilitation Act, the Commissioner General of Rehabilitation is the Chief Administrative Officer and the substantive decisions are taken by the Council which consists of eminent professionals in the relevant fields including rehabilitation and social integration.

The rehabilitation programme

Regulation 8 addresses the content of the program, the progress of the individuals undergoing rehabilitation, and some aspect of their welfare.

> *8(1) The Commissioner-General of Rehabilitation shall provide a surrendee or detainee with psycho social assistance and vocational and other training during the period of his rehabilitation to ensure that such person is integrated back to the community and to the society.*
>
> *(2) The Commissioner-General of Rehabilitation shall every three months from the date of handing over a surrendee or detainee for rehabilitation, forward to the Secretary to the Ministry of the Minister, a report on the nature and the progress of the rehabilitation programme carried out in respect of such person. The Secretary shall submit such report to the Minister.*
>
> *(3) A surrendee or a detainee referred for rehabilitation to a Centre may with the permission of the officer in charge of the Centre be entitled to meet his parents, relations or guardian as the case may be, once in every two weeks.*

These provisions are completely redundant. I reiterate that these issues must be addressed through the Bureau of Rehabilitation Act, not through the Prevention of Terrorism (Temporary Provisions) Act. It seems that these issues have already been addressed in the Bureau of Rehabilitation Act.

Lawful restriction of fundamental rights

Notwithstanding that the fundamental rights have been given the utmost recognition in our Constitution making it part of sovereignty which is inalienable, as I have already stated, Article 15 recognises permissible restrictions to fundamental rights. However, proportionality is inherent in Article 15. The restriction must be rational and commensurate with the objective to be achieved.

I must state at the outset that the learned Additional Solicitor General did not take up the position that the restrictions are within the constitutionally permissible limits. The State took up an unusual position that no restrictions were placed by the impugned Regulations.

For the purpose of the present applications, the relevant Articles are Articles 10, 12(1) and 13 because the Court granted leave to proceed only on alleged violations of these Articles.

I have already dealt with Article 10, which cannot be subject to any such restrictions.

Article 15(1) stipulates that the fundamental rights guaranteed by Articles 13(5) and 13(6) shall be subject only to such restrictions <u>as may be prescribed by law</u> in the interests of national security.

According to Article 15(7), the fundamental rights recognised by Articles 12, 13(1) and 13(2) shall be subject to such restrictions <u>as may be prescribed by law</u> in the interests of national security, public order and

the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

Article 170 defines "law" to encompass any Act of Parliament, laws enacted by any legislature before the commencement of the Constitution, and also includes an Order in Council.

Both 15(1) and 15(7) state that for the purposes of those two paragraphs, "law" includes regulations made under the law for the time being relating to public security.

Learned counsel for the petitioners especially relying on *Thavaneethan v. Attorney General* [2003] 1 Sri LR 74 argue that "regulations made under the law for the time being relating to public security" means "Regulations made under the law for the time being relating to the Public Security Ordinance" and therefore the restrictions placed on the fundamental rights by the Regulations made under the Prevention of Terrorism (Temporary Provisions) Act are against the Constitution and the rule of law.

The learned Additional Solicitor General, for reasons best known to him, avoided addressing this argument by asserting that "*the impugned Regulations do not restrict any fundamental rights of the petitioner or any other persons. As such, the respondents do not seek to engage in the redundant exercise of relying on the applicability of Article 15(7) of the Constitution and thereby attempt to interpret the said Regulations as "law" within the meaning of that provision.*" It is rather naive to submit that the impugned regulations do not restrict any fundamental rights when they obviously do.

Nonetheless, as the Court did not have the full benefit of the argument of the State on that important point of law (namely, whether the term "the law for the time being relating to public security" should be construed as "the law for the time being relating to Public Security Ordinance") and also in view of the conclusion I have already reached, there is no necessity to make a ruling on this point in the instant application. This matter can be fully considered in a suitable future case.

Learned counsel for the petitioners further argue that, as the impugned Regulations have been promulgated not by the Minister of Defence but by the President, as evident from the Gazette, they should be deemed null and void. In terms of section 27 of the Prevention of Terrorism (Temporary Provisions) Act, it is the Minister of Defence, not the President, who can make Regulations under the Act. Although the impugned Regulations have been signed by the President, it seems that, at the relevant time, the President had been functioning as the Defence Minister as well. In light of the conclusion I have already arrived at on the merits of this application, there is no need to make a ruling on this important point as well.

Conclusion

The Prevention of Terrorism (De-radicalization from holding violent extremist religious ideology) Regulations No. 1 of 2021 are in violation of the fundamental rights of the petitioners guaranteed under Articles 10, 12(1) and 13 of the Constitution. It is not practically possible for this Court to suggest amendments to rectify the Regulations to align with all fundamental rights due to their inherent flaws. The Court also makes the declaration that the impugned Regulations are null and void. The State shall pay a sum of Rs. 25,000 to each petitioner as costs of the application.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

Murdu N.B. Fernando P.C., J.

I agree.

Judge of the Supreme Court