

**PATHIRANA**  
**VS**  
**VICTOR PERERA**  
**(DIG PERSONAL TRAINING POLICE) AND OTHERS**

COURT OF APPEAL.  
SRISKANDRAJAH, J.  
CA 1123/2002.  
JUNE 21, 2006.  
JULY 21, 2006.  
SEPTEMBER 4, 2006.

*Writ of Certiorari – Quashing of a Circular – Locus Standi – Constitution-Articles 13(4), 55(5) and 126 – Laches? – Sinhala/Tamil text of the Establishment Code – Different from English Text? – Status of a public officer when legal or criminal proceedings are taken against him? – Mandatory provisions of the Establishment Code have to be followed.*

The petitioner who is the General Secretary of the Organization of Parents and Family members of the disappeared (OPFMD) and a brother of a “disappeared” person sought to quash a Circular letter issued by the 1st respondent to reinstate officers who have been interdicted following inquiry conducted by the Disappearance Investigation Unit(DIU) and charged in Court but subsequently bailed out in connection with the cases of disappearance of persons. The respondents raised two preliminary objections, namely (1) that the petitioner lacks locus standi and (2) laches.

**HELD:**

*per* Sriskandarajah, J.

“In application for writs the Courts have relaxed the rules of standing even wider than the rules of standing in Fundamental Rights applications in order to ensure good administration.”

- (1) The petitioner is the General Secretary of OPFMD, in addition the petitioner himself is directly affected by the disappearance of his brother - his home front has been left in total misery of life by the disappearance of his brother.

- (2) The impugned circular was issued on 05.01.2001 and the application was filed on 09.07.2002. The circular is an internal circular and the petitioner had come to know about the circular only when he received the reply from the 2nd respondent dated 18.04.2002. An application for a Writ of Certiorari will not be refused on the ground of delay, if the delay is not attributable to the petitioner. Laches could be excused if the order is a nullity. As the circular is a nullity there are no laches.
- (3) When an order is *ultra vires* and the order is acted upon the fact that quashing of that order would cause administrative inconvenience cannot be as criterion to refuse a Writ of Certiorari.
- (4) The provisions of paragraph 27.8 and 27.9 of the Establishment Code (E.Code) on which the respondents claim to have relied on have no application. The Police Officers after the investigation by the DIU and after the consideration of the Attorney General, were charged in courts for serious criminal offences relating to disappearance of persons and the cases are not concluded.
- (5) The respondents have no authority whatsoever to ignore the mandatory provisions of 27.10 Establishment Code in issuing the impugned Circular. The circular is *ultra vires*.
- (6) Reliance has to be placed on the Sinhala and Tamil text of the Establishments Code and not on the English translation. The proper construction of the words in the English text in para 27.10 should be read as "criminal offence or bribery or corruption and not as "criminal offence of bribery or corruption .

*Per Sriskandarajah. J. :*

"If criminal proceedings are taken against a public officer he should have been dealt with under paragraph 27.10 (E Code) he has to be considered as an officer who has passed the stage of taking into custody and/or remanded pending legal proceedings therefore he cannot be considered under para 27.8 or 27.9 – Vol. 2 of E Code. Under paragraph 27.10 if legal proceedings are taken against a public officer for a criminal offence, it is mandatory for the relevant Authority to forthwith interdict that officer."

**APPLICATION** for writ of certiorari.

**Cases referred to :**

1. *Lama Hewage Lal vs. Officer-in-Charge, Minor Offences, Seeduwa Police Station* – SCM 26.07.2004
2. *Shell Gas vs. Consumer Authority* - CAM 22.08.2004
3. *Consumers Association of Sri Lanka vs. Telecommunication Regulatory Commission of Sri Lanka and others* 2006 – Sri LR - 174
4. *Jayathilaka vs. Jeevan Kumaratunge* – CA 1312/2004 – BASL News August 2004
5. *In Re Green Movement of Sri Lanka* – CA 2047/2003 - CAM 06.06.2006
6. *Elmore Perera vs. Mavor Montegue Jayawickrema Minister of Public Administration and Plantation Industries and Others* 1985 1 Sri LR 285 at 335
7. *Public Services United Nurses Union vs. Montague Jayawickrema – Minister of Public Administration and Others* 1988 1 Sri LR 229 at 236
8. *R v. Electricity Commissioner exp. London Electricity Joint Committee Co. Ltd.* (1920) 1KB 171
9. *The Surveyors Institute of Sri Lanka vs. The Surveyor General and Others* 1994 2 Sri LR 319
10. *Virakeseri Ltd. vs. Fernando* 66 NLR 145
11. *Chas P. Hayley and Co. Ltd. vs. Commercial and Industrial Workmen and Others* 1995 2 Sri LR 42
12. *Congreve vs. Home Office* (1976) QB 623

*Hemantha Situge with W. R. Sanjeewa and M. K. P. Chandralal* for petitioner.  
*Farzana Jameel*, Senior State Counsel for respondents.

*Cur.adv.vult.*

October 9, 2006

**SRISKANDARAJAH J.**

The Petitioner in this application is seeking a writ of certiorari to quash a circular letter of 5th January 2001 issued by D. I. G. Personal and Training marked P5 directing all DIGG Ranges, SSPP Divisions (Territorial and Functional) to reinstate all officers who have been interdicted following the inquiries conducted by Disappearance Investigation Unit (DIU) and charged in courts but subsequently bailed out in connection with the cases of disappearance of persons. The Respondents raised two preliminary objections. The first objection is that the Petitioner has no legal interest with regard to the administrative decision of the Police Force and the

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second objection is that the Petitioner has failed to file this application within reasonable time from the impugned decision dated 05.01.2001.

I will first deal with the first preliminary objection on the question of standing first and the objection of delay will be dealt with at the end of this judgment.

The Petitioner submitted that he was subjected to a traumatic suffering during the period 1989 - 1990 due to the disappearance of his brother Seemonmeru Pathiranage Sudath Deshapriya Pathirana who disappeared on 10.12.1989. He is at present the General Secretary to the Organization of Parents and Family Members of the Disappeared (OPFMD). He further submitted that his brother was the Secretary of the Republic Health Workers Trade Union, affiliated to the Nava Samasamaja Party. In relation to his disappearance his mother made a complaint to the Police Station Borella and his father made a similar complaint to the Commission of Disappearances. Copies of the said complaints are marked as P2a to P2j. The Petitioner's brother is found among the disappearance list enlisted by the Commission of Disappearance in 1997 (P3). The Petitioner submitted that he and his home front has been left in total misery of life by the disappearance of his brother as the Petitioner was the sole bread winner of his family. When dealing with the standing of an applicant in a Fundamental Rights Application Bandaranayake J. observed, in *Lama Hewage Lal v. Officer-in-charge, Minor Offences, Seeduwa Police Station* <sup>(1)</sup>:

“A careful reading of Article 13(4) of the Constitution clearly reveals that no person should be punished with death or imprisonment except by an order of a competent court. Accordingly if there is no order, no person should be punished with death and unless and otherwise such an order is made by a competent court, any person has a right to live ... Article 13(4) should be interpreted broadly to mean that the said article recognizes the right to life impliedly and that by reading Article 13(4) with Article 126(2) of the Constitution which would include the lawful heirs and/or dependents to be able to bring an application in a situation where the death had occurred as a result of a violation of Article 11.”

In applications for writs the courts have relaxed the rules of standing even wider than the rules of standing in fundamental rights applications in

order to ensure good administration. In *Shell Gas v. Consumer Affairs Authority*<sup>(2)</sup> Marsoof J (P/CA) observed :

“Courts in Sri Lanka as well as in other jurisdictions have liberally interpreted rules of standing in regard to matters of vital concern to society... Time and time again, our Courts have repeated that the fact that the irregularity or the grievance for which redress is sought is shared by a large number of people or society as a whole would not prevent one of the many affected persons from seeking relief from the courts.... there can be no doubt that a consumer such as the intervenient-Petitioner will have *locus standi* to challenge an order or action of a statutory body such as the Consumer Affairs Authority in an appropriate case....”

An association or group that seeks to represent some or all of its members were also said to have standing in relation to the matters affecting the interest of their members; *Consumers Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and Others*<sup>(3)</sup> In *Jayathilaka v. Jeevan Kumarathunga and Others*<sup>(4)</sup> A person who has a long standing association and interest in a particular field such as sports was given standing to challenge an appointment of the Chef De Mission for Olympic Games. A movement called *Green Movement of Sri Lanka*<sup>(5)</sup> was given standing in C. A. (writ) Application No. 2047/2003 C. A. Minutes 06.06.2006 where the Green Movement of Sri Lanka having the objects of preserving the environment and natural resources of Sri Lanka, instituted proceedings on the complaint of the villagers who are directly affected but do not have sufficient resources to present their grievance before a court of law.

The Petitioner of this application is the General Secretary to the *Organization of Parents and Family Members of the Disappeared (OPFMD)*. In addition the Petitioner himself is directly affected by the disappearance of his brother. The Petitioner submitted that he and his home front have been left in total misery of life by the disappearance of his brother. The Petitioner's brother is found among the disappearance list enlisted by the Commission of Disappearance in 1997 (P3). In these circumstances this court holds that the Petitioner has *locus standi* to have and maintain this application.

The Petitioner submitted that during 1989-1990 when disappearance of persons both in north and south of the country were at its highest and the

violations of the rights of people were at optimum levels, persons had been taken into custody from their homes, at checkpoints or at round-ups and often confined incommunicado and tortured and many of them are no more, which includes his brother. A Presidential Commission was appointed by Her Excellency the President in or about 1995 June to inquire into these disappearances. Consequent to the finding of this Commission, the Attorney General had framed charges against more than 450 police and security force personnel against whom there is adequate evidence to prosecute them in Courts. Ordinarily any officer of State, be it the Police officer or otherwise, against whom a criminal case has been filed has to be interdicted from service until the conclusion of the case and dismissed if he is convicted. This was done in terms of the provisions in the Establishment Code, which *inter alia*, deal with disciplinary procedures against State officers.

The Petitioner further submitted that the 1st Respondent issued a circular with the approval of the 3rd Respondent marked P5 in violation of the provisions envisaged in the Establishment Code. The Petitioner contended that by the said circular all DIGG and SSPP are directed to re-instate all officers who have been interdicted following the inquiries conducted by the Disappearance Investigation Unit and charged in courts but subsequently bailed out in connection with cases of disappearances of persons; this direction is a violation of the provision of 27:10 of the Establishment Code Volume II.

It is admitted that the power of dismissal and disciplinary control of Police officers referred to in the said circular are governed by the Establishment Code of the Government of the Democratic Socialist Republic of Sri Lanka Volume II which came into force on 1st November 1999. According to the provisions of Chapter XLVIII 2:3 the powers of dismissal and disciplinary control of all Police Officers referred to in the said circular are vested with the Public Service Commission (during the relevant time) and these powers were delegated by the Public Service Commission by its letter dated 14th December 1992 (3R3) and annexure A gives the details of delegation.

It provides :

“The power of dismissal and disciplinary control of Police Officers of the rank of Chief Inspector, and Police Officers of and below the rank of

Inspector in the Police Department, *i.e.* all subordinate officers to whom disciplinary powers are not delegated, are delegated to the officers of staff rank (A.S.P. and above as given in the annexed schedule).

The 3rd Respondent contended that subsequent to the filing of cases in court the relevant officers were interdicted. Most of these cases based on the complaints made between 1989 and 1990 *i.e.* more than ten years ago and the accused were enlarged on bail but continued to be under interdiction. Some of these police officers filed SC Application Nos. 146/99, 147/99 and 152/99 and one of them applied to the Human Rights Commission by case No. 111/2000 stating that they were kept on interdiction unfairly for over 10 years. The 3rd Respondent further contended that considering the facts stated in the above applications, he issued circulars dated 05.01.2001, P5 (3R1) and 06.06.2001, 3R2 as per the authority vested in him under the provisions of 27:8 and 27:9 of Chapter XLVIII of the Establishments Code. It appears that P5 and 3R1 was issued by the 1st Respondent with the approval of the 3rd Respondent. The document 3R2 which gives discretion in implementing P5 (3R1) to Ranges DIGG was issued by the 3rd Respondent.

The Petitioner filed certified copies of the orders of the aforesaid SC Applications with his written submissions. It appears all the aforesaid applications were withdrawn and the Supreme Court has dismissed the said applications.

Chapter XLVIII of the Establishments Code provides in

- 27:8 When a public officer taken into custody by the Police or any other statutory authority is released from custody he should be reinstated. However, if such reinstatement would obstruct a formal disciplinary inquiry scheduled to be held by the Disciplinary Authority, the accused officer should not be reinstated but interdicted.
- 27:9 When an officer remanded pending legal proceedings against him is released on bail, he should be reinstated in service if the Disciplinary Authority determines that his reinstatement will not adversely affect the interests of the public service. If the disciplinary authority is satisfied that his reinstatement in service

will adversely affect the interest of the public service he should be further kept on compulsory leave. Similarly, where the Disciplinary Authority contemplates disciplinary action against the officer and his reinstatement is an impediment to the contemplated disciplinary proceedings the officer should be interdicted as appropriate. Procedure to be followed when a Court of Law or a Statutory Authority proceeds against a public officer is provided in paragraph 27 of Chapter XLVII of the Establishment Code. Paragraph 27:1 deals with a criminal offence punishable under the Law of Sri Lanka by a Court of Law is disclosed, paragraph 27:2 deals with an offence of bribery or corruption is disclosed and paragraph 27:3 deals with an offence punishable through a duly authorized statutory authority or institution (e.g. Director General of Customs, Commissioner General of Income Tax) for violating any provision in an Act passed by the Legislature of Sri Lanka is disclosed. Paragraph 27:8 deals with a public officer who had been taken into custody by the Police or any other statutory authority and released from custody and paragraph 27:9 deals with an officer remanded pending legal proceedings and released on bail. This position cannot be construed as a stage falling under paragraph 27:8 or 27:9 but it is a stage covered by paragraph 27:10.

Paragraph 27:10 provides:

27:10 where legal proceedings are taken against a public office for a criminal offence or bribery or corruption the relevant officer should be forthwith interdicted by the appropriate authority (the emphasis is mine)

Instead of the word “or” the word “of” is used in the English translation of the Establishment Code. The Sinhala version of the Establishment Code reads as “*criminal offence or bribery or corruption*”. The Establishment Code contains matters relating to public officers including powers of appointment, transfer, dismissal and disciplinary control based on cabinet approval. It is an official document and its original has to be in the official language. Therefore reliance has to be placed on the Sinhala and Tamil text of the Establishment Code and not on the English translation. It also appears that the criminal offences and the offence of bribery or corruption are dealt with separately in 27:1 and 27:2 and therefore the proper

construction of the words in the English text in paragraph 27:10 should be read as "criminal offence or bribery or corruption" but not as "criminal offence of bribery or corruption".

If criminal proceedings are taken against a public officer he should have been dealt with under paragraph 27:10. When legal proceedings are taken against a public officer he has to be considered as an officer who has passed the stage of taking into custody and/or remanded pending legal proceedings therefore he cannot be considered under paragraph 27:8 or 27:9 of Volume II of the Establishment Code. Under paragraph 27:10 if legal proceedings are taken against a public officer for a criminal offence it is mandatory for the relevant authority to forthwith interdict that officer.

In *Elmore Perera v. Major Montagu Jayawickrema, Minister of Public Administration and Plantation Industries and Others* <sup>(6)</sup> Wanasundara J. observed :

"The Establishments Code is the basic document relating to procedures of disciplinary action against public officers. It has been formulated by the Cabinet of Ministers under Article 55(4) of the Constitution in whom such a power is reposed. This formulation has the characteristics of a policy decision as it deals with the broad principles and procedures governing disciplinary action against officers of practically the entire public service in this country. The particular weight to be attached to this Code could be judged from the fact that public officers in this country under the new constitutional provisions have now been brought entirely within the domain of the Executive. Any complaints from public officers relating to their appointment, transfer, dismissal or disciplinary control, cannot be entertained by the ordinary courts and decisions of the Cabinet, the Public Service Commission, or their delegates in regard to any of the above matters cannot be canvassed in a court of law - Article 55(5). The only matter that a public officer can take to the courts - and that only to the Supreme Court under Article 126 - is a violation of a fundamental right and no other. The administration of the public service is now an internal matter of the Executive. It would however appear that the Cabinet, after due deliberation, has sought to formulate a Code of regulations containing fair procedures and safeguards balancing the requirements and interests of the Government with the rights of public officers, and the legal protection now provided by the law to public officers is contained in this Code. These procedures are

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therefore mandatory and cannot be superceded or disrgarded without due legal authority.”

The same view was expressed by Wanasundara J. with L. H. D. Alwis J. and Seneviratne J. agreeing in the *Public Services United Nurses Union vs. Montague Jayewickrema, Minister of Public Administration and Others* <sup>(7)</sup> at 236.

The contention of the 3rd Respondent is that he relied on the provisions in paragraph 27:8 and 27:9 of the Code and issued the impugned circular. The provisions in paragraph 27:8 and 27:9 on which the 3rd Respondent claims to have relied on has no application in this instant situation. Here, the Police Officers after an investigation by the Disappearances Investigation Unit and after the consideration of the Attorney General were charged in Courts for serious criminal offences relating to disappearance of persons and the cases are not concluded. As I have discussed above the 1st Respondent or the 3rd Respondent the Inspector General of Police has no authority what so ever to ignore the mandatory provisions laid down in paragraph 27:10 of the Code in issuing the impugned circular P5. In these circumstances I hold that the circular issued by the 1st Respondent on 5th January 2001(P5) with the approval of the 3rd Respondent to reinstate all officers who have been interdicted and charged in courts but subsequently bailed out in connection with cases of disappearance of persons is *ultra vires*. Atkin L. J. in *R. vs. Electricity Commissioners exp. London Electricity Joint Committee Co.* <sup>(8)</sup> held that the writ of certiorari will be issued “wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority.” In this instant case the 3rd Respondent has acted in excess of its legal authority in issuing the said circular. In *The Surveyors, Institute of Sri Lanka v. The Surveyor - General and Another* <sup>(9)</sup> Kulatunga J. with G.P.S. De Silva, CJ and Ramanathan J. agreeing issued a writ of cetiorari to quash a circular issued by the Surveyor - General as it is *ultra vires*.

I will now deal with the second preliminary objection raised by the respondents *i.e.* the application is belated. The impugned circular was

issued on 05.01.2001 and this application was filed on 9th July, 2002. The Petitioner submitted that the said circular is an internal circular sent by the 1st Respondent to all DIGG ranges, SSPP Divisions (Territorial and Functional) and the Petitioner came to know about the said circular P5 only when he received the reply from the 2nd Respondent dated 18.04.2002 (P4) to a letter written by his Attorney at Law on 08.03.2002. In *Veerakesari Ltd. v. Fernando*<sup>(10)</sup> the court held that an application for a writ of certiorari will not be refused on the ground of delay if the delay is not attributable to the petitioner. Senanayake, J. in *Chas P. Hayley and Co. Ltd v. Commercial and Industrial Workers and Others*<sup>(11)</sup> held that laches could be excused if the order is a nullity. In the above circumstances as the circular P5 is a nullity this courts over rules the second preliminary objection of laches.

The learned Senior State Counsel for the Respondents objected to the relief claimed by the Petitioner on an additional ground urged at the time of argument namely; that the impugned circular was in operation from 2001 January and if it is quashed by this court now it will cause administrative inconvenience. In view of this submission this court requested the Counsel for the Respondent to produce the list of officers who were benefited by the impugned circular. Document X, Y and Z were produced by the respondents giving the list of officers. A perusal of this list shows that twelve officers were reinstated after the circular came into effect and one of them were reinstated after this action was instituted. In *Consumers Association of Lanka v. Telecommunications Regulatory Commission of Sri Lanka and three Others (supra)* this Court held; citing *the Judgment Congreve v. Home Office*<sup>(12)</sup> that when an order is *ultra vires*, the order was acted upon and the quashing of that order would cause administrative inconvenience cannot be a criteria to refuse a writ of certiorari.

For the reasons stated above this Court issues a writ of certiorari quashing the circular dated 5th January 2001 issued by the 1st Respondent with the approval of the 3rd Respondent marked P5. The application for writ of certiorari is allowed with costs.

*Application allowed.*