

TENNAKOON,
ASSISTANT SUPERINTENDENT OF POLICE
v.
T. P. F. DE SILVA, INSPECTOR GENERAL OF POLICE
AND OTHERS

SUPREME COURT.
FERNANDO, J.,
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPLICATION NO. 192/95
AUGUST 22, 1996.

Fundamental Rights – Article 12(1) 55 and 126 of the Constitution – Transfer of Public Officers – Norms mandated by the Fundamental Rights.

The petitioner is an Assistant Superintendent of Police. Having served at Kayts – an operational area for ten months, he was transferred to Kurunegala on 1.10.94 and from there to Matale on 25.01.95 and was attached to the Dambulla Division. On 20.05.95 by a Police message, the 1st respondent, The Inspector General of Police transferred him to Anuradhapura, without giving any reason. Nor was there any vacancy at Anuradhapura for the petitioner's grade. The petitioner alleged that his transfer was instigated by the OIC/Galewela, a

Sub Inspector of Police against whom the petitioner had taken action for serious acts of misconduct. The O.I.C. had connived with the 3rd respondent, Member of Parliament for Dambulla who had complained to the Senior Superintendent of Police Matale and the Deputy Inspector General of the range that the petitioner was conducting his duties with a political bias due to his close family ties with the United National Party. However, the I.G.P. stated that he was not personally aware of those complaints but transferred the petitioner after discussions with the S.S.P. Matale as problems had arisen of a working relationship between the M.P. and the petitioner. The I.G.P. added that the petitioner was not transferred on disciplinary grounds but to prevent a situation prejudicial to the exercise of police functions.

Held: (Anandacoomaraswamy, J. Dissenting)

- (1) In terms of Article 55(5) of the Constitution, the powers of appointment, transfer, dismissal and disciplinary control vested in the executive are subject to the fundamental rights jurisdiction of the Supreme Court.
- (2) Whilst the Court will not usurp the 1st respondent's discretion in regard to transfers, the Court cannot accept his subjective assertion as to the "lack of a working relationship" or "in the interests of the service" – for that would be to abdicate the duty to examine whether the 1st respondent's conduct fell short of the norms mandated by the fundamental rights.
- (3) The 1st respondent did not act on the basis of facts; instead of forming an independent opinion, he simply adopted the opinion, also unsupported by facts, of his subordinates; hence the transfer was unreasonable and arbitrary and infringed the petitioner's rights under Article 12(1).

Cases referred to:

1. *Senanayake v. Mahindasoma*, S.C. 41/96 S.C. Minutes 14th October, 1996.
2. *Faiz v. Attorney-General* (1995) 1 Sri L.R. 372.
3. *Wickramabandu v. Herath* (1990) 2 Sri L.R. 348, 365, 391.
4. *R. v. Civil Service Appeal Board ex P. Cunningham* (1991) 4 ALL ER 310.
5. *Jayatilaka v. Pathirana*, S.C. 656/95 S.C. Minutes 25th October 1996.

APPLICATION for relief for infringement of fundamental rights.

Chula Bandara with *D.K. Dhanapala* for petitioner.

Nihal Jayasinghe, D.S.G. for 1st, 2nd and 4th respondents.

Mohan Peiris with *Jayantha Fernando* for 3rd respondent.

October 30, 1995.

FERNANDO, J.

The petitioner is an Assistant Superintendent of Police (ASP). Having served at Kayts, an operational area for ten months, he was transferred to Kurunegala on 1.10.94, and from there to Matale on 25.1.95, where he was serving in the Dambulla Division under the Senior Superintendent of Police (SSP), Matale. By a police message received on 20.5.95 at 15.35 he was told that the then Inspector-General of Police, the 1st respondent, had transferred him to Anuradhapura. No reason or explanation was given. That message directed the DIG, Anuradhapura, to give him a suitable assignment, and the DIG, Matale, to make acting arrangements at Dambulla until a suitable replacement was sent.

The petitioner immediately appealed to the 1st Respondent by letter dated 23.5.95 (PB), requesting that the transfer be varied:

"Prior to my departure to Kayts there had been transfer orders for 05 A.S.P.'s and all of them got their transfer orders cancelled except myself. I was at Kayts for a period of 10 months . . .

02. When I was transferred to Dambulla I tried to get it cancelled owing (to) my personal difficulties. When I interviewed IG Police he informed me that I was transferred to Dambulla on a request of Mr. Monti Gopallawa.

03. I took over Dambulla District II there were several complaints of assaults against OIC/Galewela, SI Saman Sigera. I made inquiries into the allegations and proposed SSP/Matale to transfer OIC/Galewela.

04. There was an arrangement G.S.S. of Area to go on a protest march against OIC/Galewela as he too had assaulted G.S./Galewela. On receipt of the information I met AGA/Galewela and settled the issue . . .

I request my transfer order to Anuradhapura may be varied to Kuliypitiya division please."

Having received no response, the petitioner went to Anuradhapura on 4.6.95, and was told by the SSP, Anuradhapura, that he was not expecting the petitioner as the 1st respondent had previously transferred two officers to fill the two vacancies in his division, and that although there were no vacancies for the petitioner's grade he would be accommodated as an additional ASP in the Kebithigollewa Division – which is also considered an operational area.

In his petition dated 19.6.95 the petitioner claims that the transfer was in violation of his fundamental right under Article 12(1). Leave to proceed was granted on 22.6.95 but no interim order was made. While this application was pending, he was again transferred on 1.2.96 to Colombo, and thereafter on 15.7.96 to Tangalle – but the 1st respondent agreed to stay that transfer.

It is not in dispute that the 1st respondent had, by virtue of delegation, the power to transfer the petitioner. The only question is whether the way in which he exercised his undoubted discretion infringed Article 12(1).

SUBMISSIONS

The petitioner's position is that at Dambulla he had been performing and discharging his functions and duties, as a police officer, efficiently and correctly; that for this he incurred the displeasure of the 3rd respondent, a Member of Parliament, who therefore got him transferred; that was the only reason why the 1st respondent transferred him; and that was arbitrary and unreasonable. In his petition the petitioner had disclosed the fact that his wife's father and two brothers had been, and were, engaged in political activity in the North-Western Province, on behalf of the United National Party (UNP).

The 3rd respondent's contention is that the petitioner was not performing his duties without bias, but was indulging in political activity due to his close family ties with the UNP; that as a result he could not get the co-operation of any subordinate officer in his division; that the 3rd respondent's complaints to the petitioner's

immediate superiors the DIG, Matale (the 2nd respondent), and the SSP, Matale, – had no effect; that as a Member of Parliament he had the responsibility to ensure that State officials conduct themselves in a fit and proper manner and to bring to the notice of the administration any misconduct by them; and that accordingly he made a request to the 1st and 2nd respondents to transfer the petitioner in order to prevent a confrontation between the petitioner and those members of the public who were supportive of the Government. Mr. Mohan Peiris urged on his behalf that in any event he could not be held responsible for any infringement by the 1st respondent as he had only exercised his right to make representations to the 1st and 2nd respondents, and had not directed either of them to transfer the petitioner.

The learned DSG pointed out that the 1st respondent had denied that he acted upon the 3rd respondent's request. The 1st respondent had said nothing in his affidavit about the petitioner's wife's UNP connections. He submitted if such serious allegations had been brought to the 1st respondent's notice, the 1st respondent would certainly have inquired into the matter. The transfer was not for disciplinary reasons. It was only because there was no satisfactory working relationship between the 3rd respondent and the petitioner, and that made it undesirable to keep him because that conflict might have developed into a situation prejudicial to the exercise of police functions in that area. When it was pointed out that the 1st respondent had failed to say how, and on what material, he had concluded that there was such a lack of harmony, or who was responsible for it, the learned DSG maintained that it was unnecessary for the 1st respondent to furnish any such material.

FACTS

In support of his contention, the petitioner annexed copies of his letter dated 23.5.95 (P8), and of another, more detailed, letter dated 14.6.95 (P7) which he wrote to the 1st respondent (with copies to the President, the Prime Minister, and the Deputy Minister of Defence) in which he said:

" ... I had the unpleasant task of inquiring into the (atrocities) of this OIC of Galewela ...

1. An **assault** on RPC Rohana by SI Sigera OIC Galewela on 14.12.94 which I inquired and submitted my report accordingly by outward No. D. S. 724/94 refers.
2. A complaint of **bribery** amounting to Rs. 44,000/- made by one S.M.I.A. Fareed against OIC Galewela and two others of Galewela Police Station. A report was submitted by my outward No. 223/95 to be referred to the Bribery Commissioner.
3. A complaint of **unlawful arrest, assault and party rape** on Mrs. D. Hewavitharana 18.4.95 which was inquired into by me personally and all evidence recorded, which was incriminative against SI Sigera OIC Galewela. The victim was examined by DMO Matale. I had fixed an identification parade against SI Sigera and the P.CC concerned for (18.5.95?). My interim report was submitted by outward No. D.S. 254/95 as I was on orders of immediate transfer.
4. An **assault** on Stanley Wijeratne, the Grama Seva Niladhari of Galewela by SI Sigera OIC Galewela on 14.05.95 in broad daylight in the Galewela town which resulted in the fracture of the wrist of the Grama Seva Niladhari which resulted in his hospitalisation.

These allegations against SI Sigera, OIC Galewela were for corrupt practices, discreditable conduct which would bring disrepute to the good name of the police service. Most of the complaints were offences which fall within the Penal Code where the SI has to be charged in courts and under the Bribery Act. Hence I suggested that he be transferred out immediately as he could interfere with the witnesses or tamper with evidence.

The inquiries into the allegations against this SI are incomplete and the SI is sensing that it would end up in his interdiction, had

swiftly in connivance with the Hon. MP for Dambulla by giving a wrong impression that I am involved in anti-Government activities. A copy of the telegram sent by Hon. MP to IG Police is attached herewith as proof. The irony of the whole issue was the immediate unjustifiable transfer meted out to me out of Dambulla instead of initiating disciplinary action against SI Sigera, OIC Galewela.

However I earnestly request that if there is any such allegation against me to have this inquired into by the NIB or the SIU in fairness to justice I implore your goodself to have the inquiries mentioned by me against SI Sigera, OIC, Galewela concluded by a Senior officer and bring him to book.

In the meanwhile the SI should be transferred out of Galewela and placed on interdiction as it is undesirable for him to continue to function in office.

My final appeal to your goodself is to transfer me to a District close to Kurunegala Division ... as my wife is a Principal of a School in Hettipola and my daughter is being educated in Kurunegala."

In paragraphs 12 and 13 of his affidavit he referred to those matters again, stating that he had submitted reports in respect of all four investigations: three to the SSP, Matale, and the fourth to the Bribery Commissioner. In paragraphs 10 and 18 he referred to his letters P7 and P8, and said:

- *10. I state that if there are allegations of this nature against me, it is the duty of the 1st and 2nd respondents to inquire into the allegations and ascertain whether there was any truth in it and, if so, take disciplinary action against me. Without holding an inquiry, to transfer me on the request of the 3rd respondent, is contrary to the principles of natural justice ...
18. I state that my appeals to the first respondent made on 23.5.1995 and 14.6.1995 requesting him to reconsider his

decision and to cancel the transfer has not received any response from the 1st respondent ..."

The Petitioner also annexed to his petition copies of three telegrams handed in by the 3rd respondent at Dambulla at 12.40 on 19.5.95. The first was to the Deputy Minister of Defence. Having referred to previous requests made to him for the immediate transfer of the petitioner because the petitioner was criticising the Government and having disputes with officers loyal to the Government, the 3rd respondent asked that ASP Sumanabandara be appointed as ASP Dambulla, and the 3rd respondent transferred out. The other two telegrams were to the 1st respondent and the DIG, Matale, alleging that the 3rd respondent was discharging his duties in a way which caused disputes with the Galewela Police and requesting his immediate transfer. None of the telegrams give any particulars in support of the allegations they contain.

I must observe that, as to the ground for the requested transfer, the first telegram significantly differs from the other two: it alleges misconduct with a political favour while the other two mention problems with subordinates and that tends to confirm the petitioner's claim that he was conducting inquiries against his subordinates at Galewela.

In the 1st respondent's affidavit, filed on 17.10.95 (after obtaining three extensions, which would have given him quite enough time to obtain all necessary clarifications and information) there is a general denial of all the averments in the petitioner's affidavit, except those which are specifically admitted. This is what he then said:

"6. Answering paragraphs 4,6,7,8,9,11,18 and 20, I state that the 3rd respondent ... by telegrams P4, P5 and P6 complained that the petitioner is unable to enlist the co-operation of subordinate officers in his division and sought his transfer out of the Division. **P4, P5 and P6 never reached me for my personal attention.** However, I was aware through discussions with SSP, Matale, that **problems had arisen of a working relationship** between

the 3rd respondent and the petitioner. I state that I therefore considered the exigencies of this emerging situation and felt that if any officer **is unable to work in harmony with the elected members of Parliament** it would not be desirable for such officer to be retained in that Division. I felt that this conflict might develop into a situation that might be prejudicial and detrimental to the exercise of police functions in the area and in an effort to resolve this situation, I transferred the petitioner in the first instance to Anuradhapura Division. I state that **I was not influenced by malice or other considerations** nor to mete out any unequal treatment to the petitioner since often police officers have been transferred out of a particular area where they are unable to work in harmony with the elected members of Parliament. Such transfers are being effected in the interest of the police officers themselves and of the Department in general.

7. Answering paragraph 10, I state that the transfer order was made for the reasons set out at para 6 above, and not on grounds of proven misconduct.
8. Answering paragraphs 12 and 13, I state that the investigation into complaints set out therein has nothing to do with the petitioner's transfer. No reports in respect of these inquiries were forwarded to me by SSP, Matale." (emphasis added)

In paragraph 9 he stated that the petitioner was not transferred at the request of the 3rd respondent, and that the petitioner, being in a transferable service, has no fundamental right to be at a station of his choice. While wholeheartedly agreeing that he had no such fundamental right, it is sufficient to recall that Article 55 (5) of the Constitution makes it plain beyond any manner of doubt that the powers of appointment, **transfer**, dismissal and disciplinary control vested in the Executive, even when delegated, are subject to the fundamental rights jurisdiction of this Court. Thus the 1st respondent's power to transfer the petitioner is subject, *inter alia*, to Article 12, and this Court has not merely the power but the duty to

examine whether the 1st respondent exercised his discretion in conformity with Article 12(1).

I must now refer to the circumstances in which the 3rd respondent filed his affidavit. The petitioner had made him a party alleging that he had influenced and incited the 1st and 2nd respondents to transfer the petitioner "in an informal manner". He prayed for a declaration that his fundamental right had been infringed "by the respondents", and in the context of his pleadings that included the 3rd respondent. On the first date of hearing the 3rd respondent was absent and unrepresented; the others were represented and asked for further time to file objections. The Court granted the respondents three weeks time for objections and fixed the hearing for 16.11.95. Although not required to do so, the Court directed that the 3rd respondent be given notice of the date of hearing. However, he neither filed objections nor appeared on that day. On 16.11.95 the hearing was postponed for 2.2.96.

On 2.2.96 Mr. Mohan Peiris informed the Court that the 3rd respondent had filed objections, and moved that they be accepted. Counsel for the petitioner said that he had received a copy, but objected to their acceptance. It was found, however, that the objections were not in the record. Nevertheless, at the hearing Mr. Peiris was permitted to rely on those objections.

The motion dated 30.1.96 of the 3rd respondent's Attorney-at-Law stated:

"The 3rd respondent ... has been cited without any relief claimed against him. In the circumstances the 3rd respondent did not think it necessary to file a response. However, when the 3rd respondent through an abundance of caution referred this matter to Counsel, [he] was advised that it would be appropriate and prudent to file a response, notwithstanding that no relief has been claimed against him."

In his affidavit, after a general denial, the 3rd respondent stated:

- "3. I state that I admit having sent documents marked P4, P5 and P6. I further state that prior to making the request for the transfer of the petitioner, I have on several occasions complained to the Senior Superintendent of Police, Matale and Deputy Inspector General of Police of the range, that the petitioner was not conducting his duties without bias and was indulging in political activity due to his close family ties with the United National Party and that as a result of which neither can enlist the (cooperation) of any subordinate officer in his division.

I state that I, on several occasions told the petitioner that I will not interfere with his police duties but that he should not let his political views pervade the decisions taken by him in the maintenance of law and order. Notwithstanding personal requests by me, I had a number of complaints which I personally inquired into and found that the petitioner was motivated by political reasons in a number of investigations under his supervision.

I state that since my personal requests and the requests made by the petitioner's immediate superiors had no effect on the petitioner, I informed the 1st and 2nd respondents of this situation and finally requested that the transfer of the petitioner out of Matale District be considered as a matter of urgency, as such a move would be in everybody's interest.

I state that I have no personal malice or illwill towards the petitioner and that I only made a request of the 1st and 2nd respondents, to consider having the petitioner transferred as I genuinely believed that the petitioner was indulging in more than Police work, on account of his political affiliations as averred in paragraph 16 of the petitioner's affidavit. I state as a Member of Parliament for the area I have a responsibility to ensure that state

officials conduct themselves in a fit and proper manner and to bring to the notice of the administration any misconduct by the said officials. I therefore state that the complaints made by me of the petitioner, was to bring his conduct to the notice of his superiors, as I wanted to prevent a situation where there would have been a confrontation between the petitioner and those members of the public who are supportive of the Government..."

FINDINGS

The 3rd respondent did not deny that the petitioner had been investigating four serious complaints against the OIC and other officers of the Galewela Police. Although he said he had repeatedly complained to the petitioner's superiors, he did not say when he complained, and did not produce copies of his complaints; nor did the other respondents produce any note or record of any such complaints. Assuming that he did make complaints, it is therefore difficult to conclude that they were official complaints, or were regarded as such. Further, the substance of his complaints was that the petitioner was guilty of misconduct, in that he was indulging in political activity and let his political views pervade the decisions taken by him in the performance of his duties; and although the 3rd respondent claimed that he had inquired into a number of such complaints, and found them to be justified, yet he gave no particulars whatsoever. In the absence of any supporting material, it is not possible for this Court to conclude that those serious allegations were true, or even that there was ground for them. The learned DSG submitted that such serious allegations would have been inquired into if they had been brought to the notice of the IGP. If any such complaints had been made to the DIG, Matale, or the SSP, Matale they should have acted in the same way.

But even assuming the truth of the 3rd respondent's version that he did bring these serious allegations of misconduct to the notice of the

2nd respondent and/or the SSP, Matale, yet the averments in the 1st respondent's affidavit, and the submissions made on his behalf, are to the effect that no such allegations of misconduct were brought to his notice by the 2nd respondent or the SSP, Matale. It seems therefore, that whatever the 3rd respondent might have told those two officers, neither of them took action on his complaints or conveyed them to the 1st respondent. All that the SSP, Matale, appears to have done was to tell the 1st respondent that "problems had arisen of a working relationship between the 3rd respondent and the petitioner".

Hence the allegations set out in the 3rd respondent's affidavit cannot be relied on to explain or justify the 1st respondent's conduct. The petitioner's affidavit, and the documents annexed, raised many questions. Apart from the frequency of his transfers, resulting in two periods of service in operational areas, and his transfer to a place where he was, seemingly, not needed, without a replacement at his former station, the petitioner made out a strong case that he had investigated four serious offences: assaults on a RPC and another public officer, bribery, and rape. Further, the complaints were all the more serious because they were against police officers charged with the duty of upholding law and order. The DIG, Matale, who was the 2nd respondent, filed no affidavit, either to deny or to explain. The 1st respondent did not tender an affidavit, or even a report, from the SSP, Matale. The fact that the petitioner's immediate superiors did not venture to deny what he said gives rise to the legitimate inference that what he said was supported by the records available to them. Had there really been four such serious complaints, the most recent on 14.5.95, and a threatened protest march? Had the petitioner actually submitted four reports? Had the 1st respondent received the letters P7 and P8, and if so why did he not reply? what had happened to these investigations – had they been stifled, or duly pursued and found not to warrant further action? The 1st respondent had certainly a case to meet.

There is, of course, his general denial. That might have been quite sufficient to rebut averments, which were vague or general or lacking in particularity, or which dealt with incidental matters. But here the Petitioner's averments were specific, detailed, grave, and directly relevant to the facts in issue; further, the suspects were police officers, and the alleged victims included not only "ordinary" members of the public but a RPC and a public officer; and the incidents were intrinsically relevant to harmony between the police, and the public and public officers; the Petitioner claimed support from his official reports, three of which, it must be stressed, were made **before** the impugned transfer order; the 3rd respondent did not deny that the petitioner had conducted those investigations; and finally, not only did his superiors not deny his version, either to the 1st respondent or to this Court, but they appear to have refrained from conveying to the 1st respondent the counter-allegations made against him. While the 1st respondent chose to explain, to some extent, the three telegrams (of which only one was sent to him), in sharp contrast he said nothing direct about the letters P7 and P8. As for the reports, he may well have told the truth when he said that no reports were **forwarded** to him by SSP, Matale, but he did not go on to say either that SSP, Matale, had not told him **orally** about them during their discussions, or that there were **no** such reports. Considering that he took more than three months time to prepare his affidavit, it is difficult to accept that he made no attempt to check on the existence of those reports from the official files in Matale and Dambulla, and on the status of the investigations. In the absence of a clear statement by the 1st respondent, supported by relevant documents, the available evidence confirms the truth of the petitioner's version as to the complaints, investigations and reports.

I must now turn to the three telegrams. The simple question which the 1st respondent had to clarify was whether the telegram which the 3rd respondent had sent to him on 19.5.95 reached him **before** he made the transfer order the next day; and thereby influenced his decision. But without saying directly whether, and when, he received that telegram, he referred generally to the telegrams – all three telegrams – and says they never reached him "for his personal attention". Is it that his telegram reached his office, but was not brought to his notice before he made the transfer order? Or that it

reached his office only after? Or that it never reached his office? Although his affidavit is inexcusably vague, I will nevertheless assume in his favour that he became aware of the telegrams only after he had ordered the transfer; and knew only later that the 3rd respondent had complained about the petitioner, so that, as he says in his affidavit, the transfer was not at the request of the 3rd respondent.

As already noted the 1st respondent does not say that he took into consideration that the petitioner's in-laws were involved in UNP politics. Indeed, he asserts that there was no other consideration which influenced him, except that mentioned in paragraph 6.

Thus according to the 1st respondent, the only reason why he ordered the transfer of the petitioner was because "problems had arisen of a working relationship between the 3rd respondent and the petitioner"; it was not that problems "might" arise, but that they had arisen. But what those problems were, he did not say; nor did he say that the SSP, Matale, told him. Hence the only material before this Court is that the SSP, Matale, made the 1st respondent aware that certain unspecified problems had arisen which created an unsatisfactory working relationship between the 3rd respondent and the petitioner. This was a conclusion reached by the SSP, Matale, and not by the 1st respondent independently. We have not been told whether the SSP, Matale, had become aware of those "problems" through his own personal knowledge, or through official records or reports, or on hearsay; and while it is known that the 3rd respondent had complained to him, the evidence does not suggest that these were anything more than allegations of a general nature. In the absence of an affidavit, or even an official report, from the SSP, Matale, it is not possible for this Court to determine whether he is worthy of credit, and, if so, whether there was a reasonable basis for the conclusion which he conveyed to the 1st respondent. To sum up, then, the 1st respondent's position is that he was not aware, from any source whatsoever, of the facts which gave rise to the unsatisfactory working relationship between the 3rd respondent and the petitioner.

Thus the issue for decision becomes narrowed down to this: is this Court bound, or even entitled, to accept the 1st respondent's subjective assertion as to the lack of a satisfactory working

relationship – especially where that is only the unverified and unsupported conclusion of his subordinate? In my opinion, however wide the 1st respondent's discretion, he cannot simply say that he ordered a transfer "because of the exigencies of service", or "for disciplinary reasons", or "in the interests of the service", or "because of the lack of a harmonious working relationship", and expect this Court blindly to accept that assertion. While it is true that Article 126 does not authorise this Court to usurp the 1st respondent's discretion in regard to transfers, yet it does not allow this Court to accept a mere assertion of that sort – for that would be to abdicate its duty to examine whether the 1st respondent's conduct fell short of the norms mandated by the fundamental rights, and thus indirectly to invent a new official immunity *Senanayake v. Mahindasoma*⁽¹⁾. Let me add that, of course, different considerations would apply where national security is involved.

It is necessary to scrutinize more closely that particular ground for the exercise of a constitutional power or discretion to transfer: the lack of a satisfactory working relationship between a police (or indeed any public) officer, and an elected Member of Parliament. Many disturbing questions arise. Should the IGP act where this is in relation to **any** elected MP, whether from the party in power or in the opposition? How should he act if there is a good relationship with one group and an unsatisfactory one with an opposing group? Or a good working relationship with an elected MP and the converse with a Provincial Councillor in the same area? Would not any such principle become necessarily applicable to relations with other persons and groups – police officers *vis-a-vis* other public officers, or judicial officers, or ethnic or religious groups?

If a police officer may, with impunity, be transferred on that ground (without any need to consider the reasons for it) what signals would that give, firstly, to the transferred officer as to how he should perform his duties in his new station, and secondly, to his replacement? To act according to law in the public interest, or to avoid an unsatisfactory working relationship at all costs? As, for instance, by giving in to an unlawful request either to stifle an investigation into or a prosecution for an offence, or to pursue a frivolous and vexatious charge? The power to transfer exists in order to ensure an efficient service to the public, but without imposing an unfair burden on individual public

officers. Transfer on the ground of unsatisfactory working relationship will not only be unfair to the individual but will promote inefficiency and injustice.

These are not fanciful considerations as *Faiz v. Attorney-General*⁽²⁾. If there been no fundamental rights application, the IGP would have been faced with a situation in which there was "harmony" between police officers and two Members of Parliament as well as a Provincial Councillor, and "disharmony" between an efficient wild life ranger and both police and politicians. Should the IGP have refrained from transferring (let alone disciplining) the police officers, and should the Public Service Commission, instead, have transferred the wild life ranger – on the principle that there was no satisfactory working relationship between him and the police (and/or the politicians) which was so necessary for his duties? Had the Public Service Commission transferred the wild life ranger, would his successor have been inclined to perform his duties efficiently, honestly and impartially? A mere lack of a satisfactory working relationship is therefore no justification for transfer, although the reason for such disharmony might be. The law reports do not suggest that the situation in *Faiz v. Attorney-General (Supra)* was unique; or was the first of its kind; or the last.

In another context, in *Wickramabandu v. Herath*⁽³⁾, a Bench of five Judges referred to the need to scrutinize the reasons for a detention order issued by the Secretary, Defence and held a detention to be unlawful.

As to the failure to give reasons for administrative decisions, Wade's observations – in the context of judicial review – apply with even greater force in our fundamental rights jurisdiction, especially the equal protection of the law:

" . . . there is a strong case to be made for the giving of reasons as an essential element of administrative justice . . . Unless the citizen can discover the reason behind the decision, he may be unable to tell whether it is reviewable or not, **and so he may be deprived of the protection of the law.** A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the

giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others Although there is no general rule of law requiring the giving of reasons, an administrative authority may be unable to show that it has acted lawfully unless it explains itself." (Administrative Law, 7th ed, pp 542-543)

Among the cases he cites is *R. v. Civil Service Appeal Board, ex p. Cunningham*⁽⁴⁾, which was an application for judicial review of a decision assessing compensation for the unfair dismissal of a prison officer. It was held that:

" . . . the board should have given outline reasons sufficient to show that they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree The board's objection to giving reasons . . . is that this would tend to militate against informality and would lead to an undesirable reliance upon a body of precedent. I find this totally unconvincing. The evidence shows that those who advise applicants and departments do so frequently and must be well aware of the board's previous decisions and of the circumstances in which they were made. There must therefore already be a body of precedent. If the board have no regard to their previous decisions, they must be acting inconsistently and be failing to do justice as between applicants. This I am loathe to believe fairness requires a tribunal such as the board to give sufficient reasons for its decision to enable the parties to know the issues to which it addressed its mind and that it acted lawfully." (pp 319-320)

I hold that to justify a transfer of a public officer on the ground of the lack of a satisfactory working relationship with another person, a wholly subjective opinion, or a mere assertion to that effect, is quite insufficient. First, it is not at all enough to show that there are disagreements or disputes or **a mere lack of harmony** between them: the problem must relate to their **working** relationship. An act done by one person which impinges on the official duties of a public officer may create such disharmony, but that does not mean that

there is an unsatisfactory **working** relationship between them. A working relationship is that which exists between superior and subordinate, or colleague and colleague, in one workplace; or even between two persons in different departments, institutions or services, when the public interest requires that they work together. Nothing has been said in the pleadings or in the submissions to satisfy this Court that any working relationship was required between the 3rd respondent and the petitioner. The only material placed before the Court – apart from vague allegations – is that the petitioner was investigating certain offences. If at all he was required to have a working relationship with any one in regard to those investigations, Chapter XI of the Code of Criminal Procedure Act suggests that it was with the Magistrate's Court. The 3rd respondent had, indeed, the right to complain about the petitioner to his superior, but that has nothing to do with working relationships.

Let me assume, however, that such a working relationship **was** required, in the public interest. A bare assertion that it was unsatisfactory is not enough. The Court must ascertain whether there were grounds for that opinion, and, if there were, it must examine those grounds; upon such an examination the Court is not entitled to substitute its own opinion, simply because it disagrees with the 1st respondent; and it can only intervene if that opinion is found to be arbitrary, capricious, unreasonable, or discriminatory (or otherwise violative of fundamental rights).

Where there are grounds for holding that there is such a breakdown, in general a transfer of an officer would be neither lawful nor proper, unless he was culpably responsible for the breakdown. It is only exceptionally that the exigencies of service might justify an officer who was in no way to blame, and who was merely performing his duties. There may be *bona fide* disagreements between two officers, which disrupt the work of a workplace and which make it desirable, in the interest of the public and the service, that one be transferred. The officer concerned would, no doubt, be given an appropriate explanation. The case of *Jayatilaka v. Pathirana*⁽⁵⁾, is an illustration of a situation in which an officer not to blame was validly transferred, the other person involved not being within the disciplinary control of the appointing authority.

The contrary view would undermine the independence and integrity of the public service. It would encourage disharmony resulting from acts of interference by outsiders with the due performance of official duties (whether by public officers, judicial officers or others) to be regarded as an unsatisfactory working relationship, and entitle, or perhaps compel, the Public Service Commission, the Judicial Service Commission or other disciplinary authority, to transfer duty-conscious officers. It seems to me that the policy of the law is to discourage such acts; and, indeed, they seem to be contrary to sections 180, 183 and 186 of the Penal Code. The first illustration to section 180 suggests that such representations should be scrutinized:

"A informs the Inspector-General of Police that Z, a police officer, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Inspector-General to dismiss Z. A has committed the offence defined in this section."

Article 55 of the Constitution does not permit "exigencies of service", "lack of a satisfactory working relationship", and the like, to be used as gambits to move public officers around, as if they were just pawns on a chessboard.

I hold that the need for a working relationship between the 3rd respondent and the petitioner, in relation to the petitioner's duties, has not been established; that the evidence shows that the reason for any lack of harmony is not due to any lapse by the petitioner, but arose from the performance of his duties, in regard to which no impropriety – though alleged – had been proved; that the 1st respondent does not claim to have acted on the basis of facts, and instead of forming an independent opinion, he simply adopted the opinion, also unsupported by facts, of his subordinate; and that there is no reason to treat this case as being an exception. I therefore hold that the transfer was unreasonable and arbitrary.

LIABILITY OF THIRD RESPONDENT

Mr. Peiris submitted that the 3rd respondent would not be liable for an infringement by the 1st respondent because his conduct did not

amount to "executive or administrative" action and he only made representations about the petitioner's conduct. I entirely agree that any person, whether he is a private citizen or holds public office, is entitled to bring the alleged misconduct of a public officer to the notice of the disciplinary authority. One of the protections which the law affords to a public officer is that if such representations are false, and were made with the knowledge and intention specified in section 180 of the Penal Code, the penalties provided in that section will apply; as a corollary, it follows that such representations must be made officially, and not privately or secretly, and that they must be in writing or duly recorded.

If those safeguards are not observed, the power to scrutinize a transfer order, whether on appeal to the Public Service Commission or under Article 126, will become nugatory.

In *Faiz v. Attorney-General (Supra)* this court held that:

"... when an infringement by an executive officer, by executive or administrative action, is directly and effectively the consequence of the act of a private individual (whether by reason of instigation, connivance, participation or otherwise) such individual is also responsible for the executive or administrative action and the infringement caused thereby." (p. 383)

The 3rd respondent did make representations, to the Deputy Minister, the IGP, the DIG, Matale, and the SSP, Matale, and he did so in order to get the petitioner transferred. But on the one hand, the 1st respondent's position is that he ordered the transfer simply because there was a lack of harmony (and that there was a lack of harmony is not in dispute); and the evidence is that the reason for that lack of harmony was neither brought to his notice, nor concerned him in the least. On the other hand, there is no proof that, at the material time, there had been brought to the 1st respondent's attention, either the 3rd respondent's telegrams or any of the other complaints which the 3rd respondent had made to the Deputy Minister, the DIG, Matale, and/or the SSP, Matale. Thus it has not been proved that the infringement was effectively caused by the 3rd respondent's representations.

ORDER

I hold that the petitioner's fundamental right under Article 12(1) had been infringed by the 1st respondent.

Counsel for the petitioner stated at the hearing that he was pursuing this application primarily to vindicate the principle involved, and that he was no longer insisting upon reinstatement at Dambulla.

Accordingly I refrain from quashing the impugned transfer order, and direct the State to pay the petitioner a sum of Rs. 40,000/- as compensation and costs.

WIJETUNGA, J. – I agree.

Application allowed.

ANANDACOOMARASWAMY, J. (Dissenting)

I have read the Judgment of my Brother Hon'ble Fernando, J with whom my Brother Honourable Wijetunge, J agreed. I regret I am unable to agree with them and I give below my reasons.

This is an Application for a declaration that the petitioner's Fundamental Right guaranteed by Article 12(1) of the Constitution has been infringed by the respondents; to suspend the transfer of the petitioner until the final determination of this Application and for compensation in a sum of Rs. 250,000/-.

The facts relevant to this application are briefly as follows:-

The petitioner is a citizen of Sri Lanka and has been an Officer of the Police Department for the last 18 Years. He joined the Police Department on 15.10.1976 as a Sub-Inspector of Police and has served the Department of Police as an Inspector and also as a Chief Inspector, before he was promoted to the rank of Assistant Superintendent of Police with effect from 05.11.1993 along with another 116 Police Officers, and was posted to Kayts Police Division.

The petitioner, after serving his Six Months period in a terrorist area, was transferred back to Kurunegala Police Division with effect

from 01.10.1994 and, thereafter, to Matale Police Division with effect from 25.01.1995 as an Assistant Superintendent of Police, Dambulla Division II by the 1st respondent.

The petitioner was again transferred from Dambulla to Anuradhapura Police Division with immediate effect by the 2nd respondent, Deputy Inspector-General of Police, Matale on the instructions of the 1st respondent, without replacement.

As there was no response for his appeal against transfer he reported for work at the Office of the Deputy Inspector-General of Police of Anuradhapura on 04.06.1995.

When the petitioner met the Senior Superintendent of Police, he was informed that the S. S. P., did not expect the petitioner to come into Anuradhapura Division as the 1st respondent had transferred two Officers earlier to fill in two vacancies in his Division. The S. S. P., also informed that though there were no vacancies for the petitioner's grade, he would be accommodated as an Additional Assistant Superintendent of Police and was assigned to work as an Additional A. S. P., in the Kebitigollewa District.

The petitioner alleges that the transfer order is arbitrary and made not on grounds of exigencies of services or on disciplinary grounds or on his request, but at the instigation of the 3rd respondent who is a Member of Parliament for Matale District, for the reasons that the petitioner was critical of the Government and had many confrontations with Officers who are loyal to the Government and with Officers of the Galewala Police. No inquiry was held into the allegations levelled against the petitioner although he requested the 1st respondent to hold an inquiry into the allegations levelled against him. He complained that the transfer order without an inquiry is contrary to the principles of natural justice. He also averred that one Saman Sigera a young Sub-Inspector of Police had been brought from the Southern Division on a Special request of the 3rd respondent and made Officer in Charge of the Galewala Police Station, contrary to the norms of the Police Department to appoint a Senior Inspector of Police in charge of a Grade A2 Police Station. This Galewala Police Station comes under the supervision of the Assistant Superintendent of Police, Dambulla II, and therefore he had

to investigate into several complaints made by several persons against his subordinate Officer the above mentioned Saman Sigera the Officer in charge of Galewala Police. He had inquired into these complaints and submitted an Interim report to the Senior Superintendent of Police Matale and had recommended that the Officer in Charge of Galewala Police be transferred out of Galewala with immediate effect, but the petitioner was transferred out of Dambulla Division to Anuradhapura Division, which transfer according to the petitioner was to stop the investigations against the Officer in Charge of Galewala Police. It is the case for the petitioner that the 3rd respondent had been influenced by the Officer in Charge of Galewala Police to request the 1st and 2nd respondents and the Honourable Deputy Minister of Defence to transfer the petitioner out of Matale Division on arbitrary and discriminatory grounds. The 3rd respondent without hesitation accepted Sub-Inspector of Police Saman Sigera's version as the petitioner's wife hails from a family in which three members are closely involved in the United National Party. The petitioner's Father-in-Law was a Member of Parliament for Panduwas Nuwara Electorate from 1977 to 1988 and is the present Chairman of the Panduwas Nuwara Pradeshiya Sabah. One brother-in-law is the present Chief Minister of the North Western Province and the other is the present United National Party Organiser for Panduwas Nuwara and a former Member of Parliament for Kurunegala District from 1991 to 1994.

The case for the respondents is that the 3rd respondent complained that the petitioner was unable to enlist the co-operation of subordinate officers in his Division and sought his transfer. The respondents submit that problems had arisen of a working relationship between the 3rd respondent and the petitioner. The 1st respondent therefore considered the exigencies of this emerging situation and felt that if an officer was unable to work in harmony with the elected Members of Parliament it would not be desirable for such officer to be retained in that Division. It was felt that this conflict might develop into a situation that might be prejudicial and detrimental to the exercise of Police function in the area and in an effort to resolve this situation the petitioner was transferred in the first instance to Anuradhapura Division. The respondents were not influenced by malice or other consideration nor it was the intention to meet out any

unequal treatment to the petitioner. Often Police Officers have been transferred out of a particular area where they were unable to work in harmony with the elected Members of Parliament. Such transfers were effected in the interest of the Police Officers themselves and of the Department in general. It is the submissions of the respondents that the petitioner is in a transferable service and that he has no Fundamental Right to be at a station of his choice. The respondent also states that the transfer was not on grounds of proven misconduct nor the transfer to Anuradhapura District was intended to post the petitioner to a designated operational area within the Anuradhapura District. The respondents submit that they have acted in good faith and according to Law and deny that the petitioner's Fundamental Rights had been violated by them.

The 1st respondent frankly admitted that there was a complaint by the 3rd respondent, but he took an independent decision to transfer the petitioner in his own interest and in the interest of the Department and that he was not transferred because of the request of the 3rd respondent. The 1st respondent took the responsibility for his action to transfer the petitioner. As the 1st respondent has taken the responsibility for his action there is no need for a separate objection by way of affidavit from the other respondents.

The petitioner is in a transferable service and he has no Fundamental Right to be at a station of his choice. The transfer was effected on the ground of exigencies of service and not on disciplinary grounds or at the petitioner's request. Exigency has arisen at the petitioner's Station in Dambulla Division and therefore the petitioner was transferred out. It is irrelevant to say that there was no exigency at Anuradhapura for a transfer to Anuradhapura.

A transfer order to an Officer in a transferable service cannot give rise to an infringement of Fundamental Right except when the order comes frequently, maliciously or unreasonably, with a view to harass an Officer. In the instant case the Inspector-General of Police, the 1st respondent to whom the power to transfer his Officers is delegated has given reason for the transfer, although the reason may not be palatable to all. Instances are not uncommon both in Public Service

and even in Judicial Service that Officers are transferred out of a station when there is "Friction" in the area where they serve, irrespective of the truth or falsity of the allegations against the Officers. It is no reason that if an Officer is transferred out while in the process of investigating into offences, it will inhibit new officers taking over his duties. In such an event no officer can be transferred out as he will always be in the course of his duties investigating into offences.

After this application was filed the petitioner filed a further petition dated 22nd July, 1996 for a limited purpose of obtaining an interim order to suspend the transfer of the petitioner to Tangalle until the final determination of the original application. The original application was heard on 22nd August, 1996. In the subsequent petition the petitioner averred that on 01.02.1996 the petitioner was transferred from Kebitigollewa to Colombo Range and on 11.06.1996 he was transferred from Colombo Range to Transport Division and on 15.07.1996 he was transferred from Transport Division to Tangalle. He further averred that for One Year and Ten Months from 01.01.1994 to 15.07.1996 the petitioner had been transferred to Eight (8) Divisions.

This subsequent transfers of course is *prima facie* an infringement of Fundamental Right, but the respondents were never called upon to file objections to this second petition and therefore no adjudication can be made on this issue.

For these reasons I am of opinion that the petitioner's original application had to be dismissed. Accordingly I dismiss the application without costs.

Application dismissed.

By majority decision Relief granted.