

VINAYAGAMOORTHY, ATTORNEY-AT-LAW
(ON BEHALF OF WIMALENTHIRAN)
v.
THE ARMY COMMANDER AND OTHERS

SUPREME COURT.
AMERASINGHE, J.,
WIJETUNGA, J. AND
ANANDACOOMARASWAMY, J.
S.C. APPLICATION NO. 26/94
NOVEMBER 25TH, 1996.

Fundamental Rights – Articles 13(1) and 13(2) of the Constitution – Arrest and Detention – Emergency Regulations 17, 18 and 19.

The detenu was arrested by the Army, without a warrant in the Kotahena area under Regulation 18 of the Emergency Regulations. He was then detained under Regulation 19(2) at the Panagoda Army Camp for the prescribed period. Thereafter he was detained at the Panagoda Army Camp under Regulation 17(1), from where he was handed over to the Criminal Investigation Department where he continued to be detained.

Held:

(1) In deciding whether the arrest was in accordance with "procedure established by law" the matter in issue is not what subsequent investigations revealed, but whether at the time of the arrest the person was committing an offence, or that there were reasonable grounds for suspecting that the person arrested was concerned in or had committed an offence.

(2) The detenu was arrested on some vague, general suspicion, hoping that some evidence would turn up that might provide justification for the arrest and not on any reasonable grounds of suspicion. Hence the arrest was not in accordance with the procedure established by Regulation 18(1). Consequently, the arresting officer could not have been able to give the detenu the reason for his arrest. The arrest was, therefore, violative of Article 13(1) of the constitution.

(3) The detenu was arrested on 2.10.93 and not on 23.10.93 as stated by the respondents. He was not handed over to the nearest police station as required by Regulation 18(1), but detained at the Panagoda Camp which was not an authorized place of detention in terms of Regulation 19(4). The Secretary was not in fact satisfied that the detention under Regulation 17(1) was necessary but acted mechanically in issuing detention orders. The respondents failed to produce the detenu before a Magistrate within the time prescribed by regulation 19(3). His detention was, therefore, violative of Article 13(2) of the Constitution.

Per Amerasinghe, J.

"In order to prevent or minimise "disappearances or abuses", it is of paramount importance that the requirements laid down by the regulations should be strictly observed. They were not intended for merely cosmetic purposes, but for the sake of fulfilling the basic obligation of the state to ensure the personal security and liberty of all persons".

Cases referred to:

1. *Dumbell v. Roberts* (1944) 1 ALL ER 326.
2. *Mutthusamy v. Kannangara* (1951) 52 N.L.R. 324.
3. *Faiz v. Attorney-General* (1995) 2 Sri L.R. 372.
4. *Faurdeen v. Jayatileke S.C.* Application 366/93, S.C. Minutes 8 September, 1994.
5. *Chandra Kalyani Perera. v. Siriwardena and Others* (1992) 1 Sri L.R. 251, 260.
6. *Joseph Perera. v. Attorney-General and Others* (1992) 1 Sri L.R. 199, 235.
7. *Kumara. v. Rohan Fernando and Others S.C.* Application 22/90 S.C. Minutes 21 July 1994.
8. *Anura v. Rohan Fernando and Others S.C.* Application 23/90 S.C. Minutes 21 July 1994.
9. *Mahinda v. Rohan Fernando and Others S.C.* Application 31/90 S.C. Minutes 21 July 1994.
10. (a) *Peiris and Others v. Attorney-General* (1994) 1 Sri L.R. 1.
10. (b) *Secretary of State v. Tameside* 1976 3 ALL ER 665.
11. *Fernando v. Silva and Others S.C.* Application 7/89 S.C. Minutes 3 May 1991.
12. *Hirdaramani v. Ratnavale* (1971) 75 N.L.R. 67.
13. *Sasanasiritissa Thera v. De Silva and Others* (1989) 2 Sri L.R. 356.
14. *Leelaratne v. Cynn Herath S.C.* Application 145/86 S.C. Minutes 9 March 1987.
15. *Weerakoon v. Weeraratne S.C.* Application 42/92 S.C. Minutes 16 November 1992.

APPLICATION for relief for infringement of fundamental rights.

R. K. W. Goonesekera for petitioner.

V. K. Malalgoda, S.S.C. for respondents.

December 20, 1996

AMERASINGHE, J.

The petitioner, an Attorney-at-Law, filed an application under Article 126 of the Constitution on the 31st of January 1994 on behalf of Vijayam Wimalenthiran, alleging that the said Wimalenthiran's Fundamental Rights under Articles 11, 13(1), 13(2), 14(1)(g) and 14(1)(h) of the Constitution had been violated by the 1st, 2nd and 3rd respondents.

On the 8th of February 1994, the Court directed that the application be referred to the Human Rights Task Force for inquiry and report in terms of the Monitoring of Fundamental Rights of Detainees Regulations 1991. The Court directed the Task Force to make an appropriate order under Regulation 9 and required the Task Force to report to Court on or before the 25th of March 1994. The directions of Court were communicated by the Registrar by his letter dated the 11th of February 1994.

The Project Director of the Task Force in a report received by the Registrar on the 24th of March 1994 reported as follows:

"Officers of the HRTF have visited the CID 4th Floor and interviewed the detainee. He has been unable to identify or give names of any army officer who had inflicted bodily harm on him or treated him in a degrading manner as he says he was blindfolded. However our officers have reported that at present he appears to be in good health and he has no complain[ts].

With regard to the arrest and detention of the petitioner the Army Intelligence Unit has been unable to give a plausible explanation. The petitioner has been in detention for 142 days without being produced to a Court of Law. We were therefore obliged to direct the Secretary, Ministry of Defence to revoke the detention order and release the petitioner from custody."

When the report of the Task Force was considered by the Court on the 29th of March 1994, the petitioner was represented by the

Attorney-at-Law who had filed the application on his behalf, Mr. A. Vinayagamorthy, and the respondents were represented by Mr. S. Rajaratnam, State Counsel. The Court made the following order:

"The Human Rights Task Force has reported that the Army Intelligence Unit has been unable to give a plausible explanation for the arrest and detention of the petitioner. State Counsel undertakes to revoke the detention order and to release the petitioner if no indictment is sent to an appropriate High Court on or before 15.05.94; and in any event if such indictment is sent State Counsel undertakes that the respondents will revoke the detention order and release the petitioner if he is acquitted or discharged or if a suspended sentence is imposed on him in the High Court. In view of that undertaking Counsel for the petitioner does not wish to pursue this application even in respect of Article 11.

The petitioner claims to have been blindfolded continuously for two months from 2nd October 93 till 11th December 93, and also kept in solitary confinement at a house, which, Counsel says, belongs to the Army Intelligence Unit situated behind the British High Commission, close to the sea beach at Colpetty. He was thereafter detained at the 4th Floor of the Criminal Investigation Department.

The Human Rights Task Force is directed to forward a report to this Court on or before 26th April 1994 as to whether these two places were visited by officers of the Human Rights Task Force during the period 2.10.93 to 24.3.94, whether those places were inspected and the persons detained there were given an opportunity to make complaints or representations in terms of Regulation 2 (a) of the Human Rights Task Force Regulations."

The Registrar conveyed the directions of the Court to the Task Force by his letter dated the 18th of April 1994. In this report dated the 20th of April 1994, the Project Director of the Human Rights Task Force (HRTF) reported as follows:

"The HRTF has had no knowledge of any house belonging to the Army Intelligence Unit which is situated behind the British High

Commission. I wish to further respectfully submit that the HRTF has not received any complaints of persons being held at the given premises. As such no visits had been made to this premises.

The 4th Floor of the Criminal Investigation Department has been visited by officers of the HRTF quite frequently and on a number of occasions during the period 02.10.93 to 24.03.94.

The 4th Floor of the Criminal Investigation Department has been inspected periodically by officers of the HRTF. The persons detained at the 4th Floor of the Criminal Investigation Department have been given access to meet officers of the HRTF and they are given the opportunity to make any complaints or representations to our officers in terms of Regulation 2(a) of the HRTF Regulations."

In an undated communication received by the Registry of the Supreme Court on the 17th of June 1994, Mr. S. Rajaratnam, State Counsel for the Attorney-General, stated as follows:

"I respectfully wish to inform Your Lordships' Court that an undertaking was given in the above Application on 29th March, 1994 that an indictment would be forwarded against the Petitioner on or before 15th May, 1994.

This undertaking was given following a confession made by the petitioner stating that he was a member of a suicide squad directed by the LTTE to assassinate the late President Ranasinghe Premadasa.

Whereas subsequent to the above undertaking, a dossier has been forwarded to the Attorney-General regarding the investigation in respect of the assassination, which reveals a network consisting of many persons who have been independent of each other, assigned the task of assassinating the late President in a suicide attack;

Most of the suspects forming part of this conspiracy have been arrested, but there are others who are still at large and therefore, the investigations have not been completed;

In the circumstances, the Attorney-General is not in a position to forward indictment against the Petitioner until persons who were involved in the said assassination plot are arrested."

Although the petitioner had been willing to abandon his application in view of the undertaking given by learned State Counsel on the 29th of March 1994, having regard to the failure of the State to satisfy the conditions upon which such abandonment was proposed, the petitioner, with notice to the Attorney-General, on the 24th of June 1994 moved as follows:

"I most respectfully request that the Court be pleased to call this application in open Court on 5.7.1994 to enable me to request that I be allowed leave to proceed with this application.

In view of the report sent to this Court by the Project Director, Human Rights Task Force, I expected Vijayam Wimalenthiran to be released. The Director Human Rights Task Force has said in his report that he has directed the Secretary, Ministry of Defence to revoke the detention order and release him from custody. This has not been done so far. He has not been indicted as well."

On the 5th of July 1994 the motion was considered by the Court. Mr. Vinayagamoorthy appeared for the petitioner, and Mr. A. B. Meddegoda appeared for the Attorney-General. According to the journal entry in the record of the case, the Court decided as follows:

"Although the State Counsel gave an undertaking on 29.3.94 that this petitioner would be released if an indictment was not sent to the High Court before 15.05.94, State Counsel informs court that subsequently the Attorney-General's Department became aware of materials suggesting the petitioner's involvement in offences other than those of which he was originally suspected. He states that it was under those circumstances that the petitioner was not released.

Counsel for the petitioner moves that he be permitted to support his application for leave to proceed. He submits that the State

should in these proceedings produce the relevant Detention Orders, and that he has no objection to any material, which is of a confidential nature, being disclosed by the respondents only to court.

Support on 28.07.94."

When the application was supported on the 28th of July 1994, the Court granted the petitioner leave to proceed "for the alleged violation of Articles 13(1) and 13(2) only". Hearing was fixed for the 10th of November 1994. However for the various reasons that are set out in the journal, hearing was postponed on several occasions, for which no blame could be attached either to the Court or to any of the parties. Eventually the Court heard the arguments of counsel on the 25th of November 1996.

As we have seen, the petitioner was permitted to proceed with his application only in so far as it related to the alleged violation of Article 13(1) and Article 13(2) of the Constitution.

Article 13(1) of the Constitution provides as follows:

"13(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."

There are two versions of the facts. The petitioner in his application and affidavits on behalf of Vijayam Wimalenthiran, and confirmed by the affidavit of Wimalenthiran dated 3rd December 1994, set out his account of the events that took place as follows:

Vijayam Wimalenthiran, aged twenty-three, was taken into custody on the 2nd of October 1993 at about 3.30 a.m. at a lodge at No. 56 Old Moor Street, Colombo 12, by army officers, including Khan and Jayasuriya. He was blindfolded and taken to a house. He was detained in that place, blindfolded, till the 11th of December 1994. At first, the exact place of detention was not known. Later, however, he came to know that it was a building behind the Indian High Commission. He was detained in that building with one Arulappu

Jude Arulrajah. Pictures of the building are to be seen in the report of Amnesty International of February 1994 entitled "Secret detention in Colombo. The case of Arulappu Jude Arulrajah." The report states that Arulrajah was arrested on 2nd October 1993 from his lodge in Bambalapitiya. In another report of Amnesty International of February 1994 entitled "Balancing human rights and security; abuse of arrest and detention powers in Colombo", the following observations are made:

Some Tamil people have been arrested by groups of armed men in military or civilian dress, blindfolded and taken to secret places of detention where they have been held for at least a week ... It appears that the army, and possibly other sections of the security forces, have held people in different secret locations in and around Colombo. Amnesty International believes that one secret place of detention is an army camp located by the sea, off Galle Road, Kollupitiya, behind the Indian High Commission and the American Information Center ... Arullappu Jude Arulrajah was arrested on 2nd October 1993 at about 1.30 a.m. at his lodge in Bambalapitiya, by armed men in civilian dress. He was blindfolded, handcuffed and driven to the army camp behind the Indian High Commission, referred to above. It is alleged that he was held at this location until being transferred on or about 10th December to Panagoda Army Camp, which also does not appear to be in the list of authorized places of detention gazetted in June 1993. On or about 15th December he was transferred to the CID on the Fourth Floor, Colombo Police Headquarters ..."

The reports of Amnesty International were referred to by Wimalenthiran in his affidavit and produced by him and marked as P3.

On the 11th of December, Wimalenthiran's blindfold was removed and he was taken to the Army Camp at Panagoda. On the 15th of December 1993, he was handed over to the Criminal Investigation Department and remained in Police custody. Wimalenthiran did not commit any offence nor was he concerned in the commission of any offence and there were no reasonable grounds for his arrest and detention. He emphatically denies the allegations made by Senior Superintendent of Police Hemachandra that he was a member of the

LTTE and that he was in close touch with LTTE members. He was not informed of the reasons for his arrest. He was produced before a Magistrate on the 23rd of April 1994 and detained on the orders of the Magistrate. He was released on Bail on the 22nd of September 1995.

On the 29th of November 1994, the respondents filed an affidavit from Mr. O. K. Hemachandra, Senior Superintendent of Police, dated the 21st of November 1994. That affidavit sets out the respondents' version, which is as follows:

Wimalenthiran was taken into custody on the 23rd of October 1993 by the army at an army check point at Kotahena at 1730 hours. He was taken into custody "as there were reasonable grounds for suspecting him to be concerned in or to be committing or to have committed offences punishable under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1993," and he was so informed at the time of his arrest. In support of the circumstances of the arrest, a statement of Sergeant K. Gunadasa of the Army who made the arrest was filed of record marked 2R1. Wimalenthiran was detained at the Army Camp at Panagoda pending further investigations in pursuance of a detention order (2R2) made under Regulation 19(2). "Consequent to further investigations and material revealed thereby", Wimalenthiran was further detained at the Army Camp, Panagoda, in pursuance of detention order 2R3 issued under Regulation 17(1). He was handed over to the Criminal Investigation Department (CID) by the Sri Lanka Army on the 14th of December 1993, and thereafter detained at the CID in pursuance of a detention order issued under Regulation 17(1) marked as 2R4. He was further detained at the CID in pursuance of a detention order issued under Regulation 17(1) marked as 2R6. Wimalenthiran was produced before a Magistrate of Colombo on the 23rd of April 1994 and remanded to fiscal's custody. "Consequent to investigations conducted ... the evidence against him clearly establishes that he was an active member of the LTTE ... Further investigations ... revealed that around January 1993 he had been assigned the task of collecting information relating to the movements of the late President Premadasa and had been introduced to other LTTE cadres including

... Babu who had been assigned the task of assassinating the President ... In accordance with the evidence available it has been clearly established that Vijayam Wimalenthiran was closely associated with all the persons who had been entrusted with the task of assassinating the President and that he had collected and supplied information relating to the movements of the late President ..."

As we have seen, Article 13(1) of the Constitution provides that no person shall be arrested except according to procedure established by law. The respondents maintain that Wimalenthiran was arrested in terms of regulation 18(1), *inter alia*, provides that "... any member of the armed forces may ... arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in, or to be committing or to have committed, an offence under any emergency regulation ...".

In deciding whether the arrest was in accordance with "procedure established by law", the matter in issue is not what **subsequent investigations** may have revealed, but whether **at the time of the arrest** the person was committing an offence, or that there were reasonable grounds for suspecting that the person arrested was concerned in, or had committed an offence. Accepting, for the time being, the version of the respondents that Wimalenthiran was arrested at a check point by Sergeant Gunadasa of the Army, there was no evidence placed before the Court that the arrest was made either while Wimalenthiran was committing an offence, or that the Sergeant had any information that the person he was arresting had committed any offence, or that Sergeant Gunadasa had any reasonable ground for suspecting Wimalenthiran to be concerned in, or to have committed, an offence under any emergency regulation. The suspicions of Sergeant Gunadasa and his fervent hope, or even confident and honest assumption, that some evidence may eventually turn up to make his suspicions appear to be reasonable was not sufficient; Article 13(5) of the Constitution provides that "Every person shall be presumed innocent until he is proved guilty", and for that reason it is of importance that no person should be arrested under regulation 18(1) except on grounds in which the

particular circumstances of the arrest justified the entertainment of a reasonable suspicion. (Cf. per Scott LJ in *Dumbell v. Roberts* ⁽¹⁾, followed in *Mutthusamy v. Kannangara* ⁽²⁾, *Faiz v. Attorney-General* ⁽³⁾; *Faurdeen v. Jayetilleke* ⁽⁴⁾). I am not suggesting that Sergeant Gunadasa should have had clear and sufficient proof of the commission of an offence under the Emergency Regulations, or that he ought to have had information that provided anything like a *prima facie* basis for conviction: Sergeant Gunadasa could, in terms of regulation 18(1), have arrested Wimalenthiran although he had no clear and sufficient proof of the commission of the offence which he suspected Wimalenthiran to have been concerned in or to have committed. However, Sergeant Gunadasa ought to have had reasonable grounds, taking into account the circumstances, including the prevailing situation at the relevant time, (e.g. see *Chandra Kalyani Perera v. Siriwardena and Others* ⁽⁵⁾, *Joseph Perera v. Attorney-General and Others* ⁽⁶⁾) objectively regarded, that should have induced him to reasonably suspect that Wimalenthiran was committing, or had committed, or was concerned in the commission of, an offence under the Emergency Regulations. (See *Kumara v. Rohan Fernando and Others* ⁽⁷⁾, *Anura v. Rohan Fernando and Others* ⁽⁸⁾, *Mahinda v. Rohan Fernando and Others* ⁽⁹⁾).

In paragraph 6 of the affidavit of Senior Superintendent Hemachandra it is stated that Wimalenthiran "was taken into custody as there were reasonable grounds for suspecting him to be concerned in or to be committing or to have committed offences punishable under the Emergency (Miscellaneous Provisions and Powers) Regulations ...". However, no evidence was placed before the Court to support that bald assertion: It is necessary that the Court should be furnished with the relevant material so that the Court may be able to objectively determine the reasonableness of the suspicion that led to the arrest. In the absence of such evidence, one might with justification, as I do in the matter before me, conclude that Wimalenthiran was arrested by Sergeant Gunadasa and ordered to be detained by the Deputy Inspector-General of Police who made the Detention Order dated the 23rd of October 1993, on some vague, general suspicion, hoping that some evidence would turn up that might have provided justification for the arrest. The arrest of a person

on a speculative basis is insufficient to comply with the procedure established by Regulation 18(1). In arresting Wimalenthiran merely on vague grounds of suspicion and not on reasonable grounds of suspicion, the officer making the arrest was not acting in accordance with the procedure established by Regulation 18(1) and was therefore acting in violation of Article 13(1) of the Constitution. (See *Peiris and Others v. Attorney-General*⁽¹⁰⁾, followed in *Kumara v. Rohan Fernando and Others (supra)*). As we have seen, in its order of the 29th of March 1994 relating to the case before us, the Court took notice of the fact that the Human Rights Task Force had reported that the Army Intelligence Unit had even at that date been "unable to give a plausible explanation" for the arrest and detention of Wimalenthiran. What then were the reasonable grounds Sergeant Gunadasa had in October 1993 – either on the 2nd or 23rd day of that month – for making the arrest? He had none. Consequently, he could not have been able to give Wimalenthiran a reason for the arrest as required by Article 13(1) of the Constitution.

The Detention Order dated the 23rd of October 1993 conveys the impression – it is not clearly expressed – that Wimalenthiran was being held in custody as a person who "had committed" "an offence in contravention of Regulation/s 25 read with 34 and 37" or that the officer issuing the detention order had "reasonable ground for suspecting" the person ordered to be detained as a person "concerned in or to be committing or to have committed an offence in contravention of Regulation/s 25 read with 34 and 37 of the said Gazette Extraordinary (sic.)..." However, the respondents did not, either through the affidavit of Hemachandra or in their submissions, claim that Wimalenthiran was arrested while he was committing any offence. The Detention Order issued on the 23rd of October 1993 is in a standard form previously prepared into which other information, whether true or false, appropriate or inappropriate, has been routinely inserted. In any event, had the person detained been furnished with a copy of the Detention Order, could he have understood why he was being detained? If he had been given a copy of the Emergency Regulations as well, he could have found that Regulation 25 provides that:

"Whoever (a) commits any offence punishable under Sections 114, 115, 116 or 117 of the Penal Code; or (b) commits the murder or conspires to murder or attempts to murder, or wrongfully confines or conspires or prepares to wrongfully confine, the President or a Member of the Parliament, or a police officer or a member of the armed forces, or a public officer with the intention of inducing or compelling the President, Member of Parliament, police officer or member of the armed forces or public officer to exercise or refrain from exercising in any manner any of the lawful powers of the President, Member of Parliament, police officer, member of the armed forces or public officer; or (c) in any manner overawes, influences, coerces, prepares or conspires or attempts to overawe, influence or coerce, any person with the intention of inducing or compelling the Government of Sri Lanka, the President, a Member of Parliament, a police officer, a member of the armed forces or public officer, shall be guilty of an offence..."

What was it the person detained had done?

According to the Detention Order, Wimalenthiran was detained for contravening Regulation 25 "read with" Regulations 34 and 37. Regulation 34 provides that:

"No person shall knowing or having reasonable cause to believe that any other person is guilty of an offence under any emergency regulation give such other person assistance with the intent thereby to prevent, hinder or interfere with the apprehension trial or punishment of such person for the said offence."

What was the knowledge of the person detained? Who was the person detained seeking to protect? What was the offence such a person was supposed to have committed? No evidence was adduced by the respondents on these matters.

Regulation 37 provides:

"(a) Whoever becomes aware of an intention or an attempt or a preparation to commit, or the commission of an offence under any

emergency regulation shall forthwith give information thereof to the nearest Grama Niladhari or to the officer-in-charge of the nearest police station; (b) any person who willfully fails or refuses to give the information referred to in paragraph (a) shall be guilty of an offence."

What was the information that the person detained had and failed to disclose?

The Detention Order dated 1st January 1994, is in terms similar to that of the Order issued on the 29th of October 1993, except that it lists the names of 122 persons, including the name of Wimalenthiran. The Detention Order issued on the 8th of April 1994 lists the names of 121 persons including the name of Wimalenthiran.

The treatment of persons detained, was, as it were, on a wholesale basis. This is evident from the Detention Orders dated the 1st of January 1994 and the 8th of April 1994. Such an approach does not enable the Secretary to discharge his duty under Article 13(1) of the Constitution to give a person he has directed to be arrested and detained the reasons for doing so, if his only method of communicating his reasons was the Detention Order. Nor does it enable a person detained to make a case for his release to the Advisory Committee appointed under Regulation 17(4); for he must know the grounds upon which he is supposed to be a person who is likely to act in a manner prejudicial to the national security or the maintenance of public order.

Neither the officers who made the arrest, nor the police, nor the persons issuing the Detention Orders seem to have had any clear idea why Wimalenthiran was detained. Nor was their position much better at the time the Fundamental Rights application was filed. In fact, as we have seen, learned State Counsel in his memorandum to Court stated that it was decided to indict Wimalenthiran "following a confession made by the petitioner stating that he was a member of a suicide squad directed by the LTTE to assassinate the late President Premadasa." That 'confession' was obtained after the filing of the Fundamental Rights application. The Attorney-General, who had

sometime after State Counsel's undertaking given on the 29th of March 1994 to indict or release the prisoner, received a 'dossier' from the police, was not in a position to issue indictment even on the 17th of June 1994 for lack of sufficient information.

The Detention Orders issued under Regulation 17 on the 29th of October 1993, the 1st of January 1994 and the 8th of April 1994 fail to give reasons for the detention: They merely state that "being of opinion and with a view to preventing the person specified and residing at the place mentioned in Column I of the Schedule to this order from acting in any manner prejudicial to the National Security or to the maintenance of public order, it is necessary so to do", the person concerned is ordered to be detained. All that the person detained was told were the general objects and purposes of the detention as set out in Regulation 17(1). Whether a person is arrested under Regulation 18(1) or ordered to be detained under Regulation 17(1), he or she must be given **the grounds** - the material facts and particulars - for his arrest and detention. It is only when a person has such information that he or she will have the opportunity to rebut the suspicion entertained by the person making the arrest or show that there was some mistake as to identity. It is only when a person has been given the grounds for his or her detention, that meaningful steps could be taken to apply to the Advisory Committee to obtain release from custody. In failing to state the grounds for arrest and detention, Wimalenthiran's fundamental right to such information guaranteed by Article 13(1) of the Constitution was violated.

Where was Wimalenthiran arrested? According to him, he was arrested at a lodge at No. 56, Old Moor Street at which he was residing. On the other hand, Mr. Hemachandra, Senior Superintendent of Police, states in his affidavit that the arrest was made at an army check point at Kotahena. The Director of the Criminal Investigation Department in Annexure 'A' to his letter dated the 8th of September 1994 addressed to the Attorney-General with a copy to the Registrar of the Supreme Court, which has been filed of record, states that "The corpus was taken into custody at Navaraj Lodge, Colombo 13 by Sergeant K. Gunadasa of the Sri Lanka

Army." Discrepancies of this nature cast doubts on the credibility of the respondents' version.

At least this much is undisputed and clear: the arrest was made in Colombo and not in an administrative district within the Northern and Eastern Provinces, and therefore, the procedure established by law for the arrest and detention of Wimalenthiran must be that which was applicable to a person arrested outside the Northern and Eastern Provinces. This has an important bearing on the procedures established by law which the persons making the arrest had to follow.

Nor is it in dispute that the relevant law is that which was set out in the Emergency (Miscellaneous Provisions and Powers) Regulations of 17th June 1993 made by the President under Section 5 of the Public Security Ordinance and published in Gazette Extraordinary No. 77/16 of 17.06.1993.

Regulation 18(1) states that "Any... member of the armed forces may... arrest without warrant, any person who is committing or whom he has reasonable grounds of suspecting to be concerned in, or to be committing or to have committed, an offence under any emergency regulation... Provided however that any person arrested or detained in any administrative district outside the Northern and Eastern Provinces by a member of the armed forces shall forthwith, and in any event before the end of the period of twenty-four hours from such arrest or detention be handed over to the custody of the officer-in-charge of the nearest police station."

According to paragraph 13 of the affidavit of Wimalenthiran, and paragraph 3(e) of the affidavit of the Attorney-at-Law who filed the application on behalf of Wimalenthiran, Wimalenthiran was handed over to the CID on the 15th of December 1993. However, Senior Superintendent Hemachandra in paragraph 9 of his affidavit states that Wimalenthiran was handed over to the CID on the 14th of December 1993. If Wimalenthiran and Arulrajah were dealt with, as far as detention was concerned, in the same way, the Amnesty International report supports the version of Wimalenthiran and that of the Attorney-at-Law.

Even if it is assumed that the arrest was made on the 23rd of October 1993 and not on the 2nd of October 1993, there was a failure to comply with the mandatory requirement of Regulation 18(1) that the person arrested should have been handed over to the police "forthwith" and in any event, not later than twenty-four hours after the arrest. The safety of the citizen is better secured by ensuring that the custody of a person arrested should be with the civil, namely the police, rather than the military authorities; and it is best secured when custody is under judicial authority in an approved prison: For approved prisons are governed by laws, regulations and rules designed to protect persons admitted to them and are administered by trained personnel who are equipped to deal with incarcerated persons. Moreover, unlike the police, prisons officers have no interest in the success or failure of a prosecution and would, therefore, be less like to treat persons in custody without restraint for the purpose of eliciting information. Clearly the intention of Regulation 18(1) is that the person arrested should, as expeditiously as possible, be removed from the custody of the armed forces and placed in the custody of the appropriate civil authorities. In the circumstances, the propriety of the Deputy Inspector-General of Police, directing in his Detention Order of the 23rd of October 1993 that "Vijayan Wimalenthiran" (sic.) be detained for seven days at the Army Camp, Panagoda, rather than at a place of detention over which the Police had control, seems questionable. By detaining Wimalenthiran for more than twenty-four hours in military custody, the army officers failed to act in accordance with procedure established by law and thereby contravened the provisions of Article 13(1) of Constitution.

Moreover, the duty of the army officers making the arrest was to hand him over to "the officer-in-charge of the nearest police station." If, as Senior Superintendent Hemachandra states in paragraph 5 of his affidavit, Wimalenthiran was arrested at a check point at Kotahena, he should have been handed over to the officer-in-charge of the Kotahena Police Station and not to the Criminal Investigation Department. Senior Superintendent Hemachandra states in paragraph 9 of his affidavit that Wimalenthiran was handed over by the army to the Criminal Investigation Department. That was not what

Regulation 18(1) required, and therefore, the army officers were acting contrary to the procedure established by law and thereby transgressing the provisions of Article 13(1) of the Constitution.

The new regulations of June 1993 introduced several safeguards to ensure the security of persons who are arrested and detained under the Emergency Regulations. In order to prevent or minimize 'disappearances' and abuses, it is of paramount importance that the requirements laid down by the regulations should be strictly observed. They were not intended for merely cosmetic purposes, but for the sake of fulfilling the basic obligation of the State to ensure the personal security and liberty of all persons.

Regulation 18(7) provides that when an arrest is made under Regulation 18(1) it shall be the duty of the arresting officer, where the arresting officer is a member of the armed forces, to report to the Commanding Officer of the area within which the arrest is made, within twenty-four hours of such arrest. It shall be the duty of such Commanding Officer to "forthwith" notify the Human Rights Task Force of such arrest, setting out all the information relating to such offence in the form prescribed for such purpose by the Secretary.

Regulation 18(7) provides that where any person is taken into custody under the provisions of Regulation 18, it shall be the duty of the arresting officer to issue to the spouse, father, mother or any other close relative, as the case may be, a document in such Form as specified by the Secretary, acknowledging the fact of the arrest.

Regulation 19(4) casts two imperative duties on the Secretary of the Ministry of Defence, namely, (1) to cause to be published in the **Gazette** a list of all places authorized by him as places of detention for the purposes of Regulations 17 and 19; and (2) to notify the existence and the address of such places of detention to the Magistrate within whose jurisdiction such places of detention are located.

Regulation 19(5) requires the officer-in-charge of any place authorized by the Secretary as a place authorized for detention for purposes of Regulations 17 or 19 to furnish once every fourteen days

to the Magistrate within whose local limits of jurisdiction such place of detention is located a list containing the names of all persons detained at such place. The Magistrate shall cause a list to be displayed on the notice board of the Court.

Regulation 19(6) requires the Magistrate within whose jurisdiction any such authorized place of detention is situated, to visit such place of detention at least once in every month and it shall be the duty of the officer-in-charge of that place to secure that every person detained therein, otherwise than by an order of a Magistrate, is produced before such visiting Magistrate.

Mr. Vinayagamoorthy in his affidavit of the 4th of December 1994 specifically states that the respondents failed to comply with the procedures established by law by (a) not handing over Wimalenthiran to the Kotahena Police immediately after his arrest; (b) failing to notify the Human Rights Task Force; and (c) failing to inform the relatives of the person arrested. I find myself in agreement with Mr. Vinayagamoorthy. Indeed, I go further in holding that there is no evidence that the requirements of Regulations 18(7), 18(8), and 19(4), 19(5), 19(6) were complied with in this case.

Regulation 19(2) states that "Any person taken into custody in pursuance of the provisions of Regulation 18 may for the purpose of investigation of the offence in relation to which such person was arrested be kept in detention upon an order made by a police officer not below the rank of a Deputy-Inspector-General of Police ... in a place authorized by the Secretary ...". Regulation 19(4) provides that "The Secretary shall cause to be published in the **Gazette** a list, with the addresses of all places authorized by him as places of detention for the purposes of Regulations 17 and 19 ...". At the relevant time, the authorized places of detention were those published in **Gazette Extraordinary** No. 773/8 of June 29th, 1993. There were 343 authorized places including, prisons, police stations and certain army camps. The Panagoda Army Camp was not an authorized place of detention, and therefore, the detention order was bad in law, and since the detention under that order was not in accordance with the procedure established by Regulation 19, it was in transgression of

Article 13(1) of the Constitution. The Army Detention Camp, Panagoda, was listed as an authorized place of detention in **Gazette Extraordinary** No. 806/6 published on the 15th of February 1994. Admittedly, the order of the Secretary of Defence listing the Panagoda Camp as an authorized place of detention is dated the 1st of October 1993; however, until it was published in the **Gazette** as required by Regulation 19(4), it had no force or avail: it was at the relevant time, no more than a private proposal of the Secretary, and the Army Camp at Panagoda, during the period of time relevant to the matter before us, fell into the category of unauthorized, secret places of detention at which no person arrested under Regulation 18 could be lawfully detained.

Regulation 17(1) empowers the Secretary where he is satisfied upon the material submitted to him or upon such additional material as may be called for by him, with respect to any person, that with a view to prevent such person *inter alia*, from acting in any manner prejudicial to the national security or to maintenance of public order, it is necessary to do so, the Secretary may make order that such person be taken into custody and detained in custody for a period not exceeding three months ...". Regulation 17(3) provides that "Any person detained in pursuance of an order made under paragraph (1) of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorized by the Secretary and in accordance with instructions issued by him ...". The detention of a person at any place designated by the Secretary in a Detention Order issued by him does not make such a place one that is 'authorized by him'. Places 'authorized' by the Secretary for the purposes of Regulation 17 are such places as are specified by him as authorized, and of which public notice is given in the **Gazette**. This is very obviously the intention, for Regulation 19(4) provides as follows: "The Secretary shall cause to be published in the **Gazette** a list, with the addresses of all places authorized by him as places of detention for the purposes of Regulations 17 and 19 ...". Regulation 19(4) issued on the 17th of June 1993 clearly, in plain words, indicated that secrecy was to be displaced by publicity and openness: The Secretary to the Ministry of Defence in the exercise of the powers conferred on him by Regulation 17(1) may order the

detention of persons at specified places provided that he had given notification in the **Gazette** of those places. He cannot lawfully order that a person be detained at any other place. It is no defence that the Secretary at the relevant time was contemplating or had privately decided, that the Army Detention Camp at Panagoda was a suitable place for keeping persons in custody. The Army Camp at Panagoda, as we have seen, was not, at the time the Detention Order was issued nor during the period covered by that Order, namely a period of three months from 19th October 1993, a place authorized by the Secretary in accordance with the law.

The law takes a serious view of detention at unauthorized places: Regulation 19(8) provides that "No person shall be detained at any place other than a place of detention authorized by the Secretary and where any person had been detained contrary to this regulation the person or persons responsible for such detention shall be guilty of an offence under these regulations."

Senior Superintendent of Police Hemachandra states in paragraph 9 of his affidavit that Wimalenthiran was handed over to the Criminal Investigation Department by the Army on the 14th of December 1993 and was "thereafter detained at the Criminal Investigation Department in pursuance of a Detention Order issued by the 3rd Respondent in terms of the powers vested in him under the provisions of Regulation 17(1) ...". This was not the case, for on the 14th of December 1993 the Detention Order in operation was the one issued on the 29th of October 1993 in which the place of detention designated by the Secretary was the Panagoda Army Camp. In terms of Regulation 17(3) "Any person detained in pursuance of an order made under paragraph (1) of ... Regulation (17) ... shall be detained in such place as may be authorized by the Secretary **and in accordance with instructions issued by him ...**" Admittedly, as we have seen, the Panagoda Army Camp was not an 'authorized' place of detention when the Detention Order was made; but it was nevertheless the designated place of detention; and therefore, Wimalenthiran was not held, as required by Regulation 17(3), "in accordance with instructions issued by" the Secretary. Thus even the

Secretary defence, let alone members of Wimalenthiran's family, by looking at the Detention Order would not have been able to say where the person ordered to be detained was between the 14th of December 1993 and the 31st of December 1993. It was in the Detention Order dated the 1st of January 1994 that the place of detention is accurately designated.

The Detention Orders dated the 29th of October 1993, 1st January 1994 and 8th April 1994 were issued by the Secretary to the Ministry of Defence. Regulation 17(1) empowers the Secretary to the Ministry of Defence to order the detention of a person with a view to preventing such person from acting in any manner prejudicial to the national security or to the maintenance of public order. However, Regulation 17(1) confers the power "where the Secretary is satisfied upon the material submitted to him, or upon such further material as may be called for by him" that "it is necessary" to order the arrest and detention of the person. The Secretary of the Ministry of Defence is the third respondent. He did not state either in the Detention Orders or in an affidavit that he was satisfied upon the material submitted to him or upon such further material as may have been called for by him, that with a view to preventing Wimalenthiran from acting in any manner prejudicial to the national security or to the maintenance of public order, it was necessary to order his arrest and detention.

Learned Counsel for the petitioner submitted that Wimalenthiran was arrested without grounds that justified the entertainment of a reasonable suspicion and that therefore the arrest in the first place was not in conformity with Regulation 18(1). Nor were there grounds, he submitted, for the making of a preventive detention order. There was no explanation whatsoever by learned counsel who represented him why the Secretary issued the Detention Orders in the matter before us. All that we have is an affidavit from Senior Superintendent Hemachandra in which it is vaguely stated that "Consequent to further investigations and the material revealed thereby ... Vijayam Wimalenthiran was further detained at the Army Camp at Panagoda in pursuance of a detention order issued by the 3rd respondent in terms of the powers vested in him under the provisions of Regulation

17(1) ... 2R3"; and that "... Wimalenthiran was handed over to the Criminal Investigation Department by the Sri Lanka Army on 14.12.93 and thereafter detained at the Criminal Investigation Department in pursuance of a detention order issued by the 3rd respondent ... 2R4"; and that "Wimalenthiran was further detained at the Criminal Investigation Department in pursuance of a detention order issued by the 3rd respondent ... 2R6." No evidence was placed before us as to the material that was placed before the Secretary that enabled him to arrive at his decision. All we have is a bald assertion in the Detention Orders, that the Secretary was of the opinion that it was necessary to detain Wimalenthiran and the equally unhelpful explanations of Senior Superintendent Hemachandra as to the reasons for the detention of Wimalenthiran.

The Secretary may be said to be "satisfied" if his decision is reasonable in the sense that it is or can be supported with good reasons or at any rate be a decision which a reasonable person might reasonably reach. (Per Denning MR in *Secretary of State v. Tameside*⁽¹⁰⁰⁾ Where the Secretary's Order is challenged, as it has been in the matter before us, he must take steps to have the relevant material placed before the Court and establish his averment by 'proof positive' that he was "satisfied" in the relevant sense. (E.g. see *Kalyani Perera v. Siriwardena (supra)*; *Fernando v. Silva and Others*⁽¹⁰¹⁾, *Hirdaramani v. Ratnavale*⁽¹⁰²⁾ cited with approval in *Sasanasiritissa Thero v. De Silva and Others*⁽¹⁰³⁾; *Malinda Channa Pieris v. Attorney-General (supra)*). If the information could not have been made public, the Court should have been so informed. Had the Court been informed, it would have indicated the procedure to be followed that would, on the one hand have enabled the Court to assess whether there was material upon which the Secretary could have been satisfied, while on the other, ensuring confidentiality in the public interest. The accepted procedure is that the material is made available to the Chief Justice who will make the information available to the Judges nominated to hear the matter. (See *Leelaratne v. Cyril Herath and Others*⁽¹⁰⁴⁾). According to the Journal entry of the 5th of July 1994, learned counsel for the petitioner stated that he had "no objection to any material which is of a confidential nature being disclosed by the respondents only to the

Court." However, no material was placed before this Court to establish that the Secretary was "satisfied" in the relevant sense before he made the Detention Orders. On the other hand, as we have seen, the Human Rights Task Force in its report received by this Court on the 24th of March 1994 stated as follows:

"With regard to the arrest and detention of the petitioner the Army Intelligence Unit has been unable to give a plausible explanation. The petitioner has been in detention for 142 days without being produced to a Court of Law. We were therefore obliged to direct the Secretary, Ministry of Defence, to revoke the detention order and release the petitioner from custody."

Learned State Counsel in his memorandum to this Court, explaining the reasons for the inability of the Attorney-General even in June 1994 to indict Wimalenthiran, nevertheless stated that the undertaking to indict the prisoner "was given following a confession made by the petitioner stating that he was a member of a suicide squad directed by the LTTE to assassinate the late President Ranasinghe Premadasa." In his affidavit dated the 21st of November 1994, Senior Superintendent Hemachandra does not state that Wimalenthiran was a member of a suicide squad, but merely that he was "closely associated with" three groups of persons who had been "entrusted with the task of assassinating the President and that he had collected and supplied information relating to the movements of the ...late President." In any event, on what material were these conclusions based? When were they discovered? Was the material placed before and considered by the Secretary to the Ministry of Defence? I do not know, for the respondents failed to place any material before the Court on those matters.

The Supreme Court has on more than one occasion reminded the Secretary to the Ministry of Defence that he should be able to state that he **himself** came to form the opinion, and that the Secretary would not be acting in conformity with the requirements of Regulation 17(1) by acting mechanically as a rubber stamp at the behest of the police and signing Detention Orders without exercising his personal judgment in each case. (E.g. See *Weerakoon v. Weeraratne* ⁽¹⁵⁾;

Sasanasiritissa Thero and Others v. De Silva and Others, (supra); Malinda Channa Pieris and Others v. Attorney-General and Others, (supra). I am of the view that in the absence of materials to establish that the Secretary was "satisfied", and in the absence of even a statement to the effect that he was satisfied set out in an affidavit, that the Secretary was not in fact "satisfied" and that he had acted mechanically in issuing the detention orders.

There remains for consideration the question whether there was a violation of Article 13(2) of the Constitution which provides that:

"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."

Regulation 19(2) provides that a person taken into custody in pursuance of the provisions of Regulation 18:

"may for the purposes of the offence in relation to which such person was arrested be kept in detention ... for a period not exceeding sixty days reckoned from the date of his arrest under that regulation, and should at the end of the period be released unless such person is detained under the provisions of Regulation 17, or is produced before a court of competent jurisdiction ... Provided, however, that when any person is arrested in pursuance of Regulation 18 in any administrative district outside the Northern and Eastern Provinces in respect of any offence committed in any such area, he shall not be detained under these provisions for a period in excess of seven days and unless detained under the provisions of Regulation 17, shall be produced before a Magistrate before the expiry of such period of detention as is hereinafter provided or released from custody."

Wimalenthiran's position was that he was arrested on the 2nd of October 1993 at No. 56, Old Moor Street in the presence of his father.

Learned Counsel for the respondents repeatedly stated that if the father was present, an affidavit by the father should have been filed, and that in the absence of such an affidavit the respondents' assertion that he was arrested on the 2nd of October 1993 should be rejected. Mr. Goonesekere's simple explanation was that when the son was arrested, the father 'bolted' without trace of his whereabouts. Besides, there is other evidence supporting the version that the arrest was on the 2nd of October. In the petition and affidavit filed by Mr. Vinayagamoorthy, Attorney-at-Law, on behalf of Vijayam Wimalenthiran, it is stated that Wimalenthiran was taken into custody at "a lodge at No. 56, Old Moor Street" and thereafter detained in a building behind the Indian High Commission. The respondents' maintain that the arrest was made at a check point at Kotahena on the 23rd of October 1993 at 1730 hours. According to the Director of the Criminal Investigation Department, "the corpus was taken into custody on 23.10.93 at Navaraj Lodge, Colombo 13 by Sergeant K. Gunadasa of the Sri Lanka Army." According to Gunadasa's statement Wimalenthiran was arrested on the 23rd of October 1993 at 1730 hours and Arulrajah was arrested at Kotahena at a check point on the 24th of October 1993. According to the reports of Amnesty International referred to above, Arulrajah was arrested on 2nd October 1993. Learned Counsel for the respondents suggested that Wimalenthiran had obtained his date from the Amnesty International report. However, the 2nd of October was the date specified in the application to this Court embodying the instructions given by Wimalenthiran to his Attorney-at-Law. That application is dated the 31st of January and bears the date stamp of this Court marked "1994 - 1-31." The Amnesty International report was issued in February 1994. The report was submitted by Wimalenthiran with his affidavit of the 3rd of December 1994. The Amnesty International account of the case of Arulrajah, both with regard to the date of arrest, the places of detention at various times, and the sequence of events, corroborates the version of his co-prisoner - Wimalenthiran. There is no reason why Amnesty International should have invented the dates mentioned by them.

On the other hand, there was an understandable reason why the 1st, 2nd and 3rd respondents should insist that the arrest was on the

23rd of October: If the respondents admitted that the arrest took place on the 2nd of October, they would not have been able to explain the detention of Wimalenthiran from 2nd October – 23rd October, for they had no detention order covering that period. Learned Counsel for the respondents stated that it would have been possible for the Detention Orders to have been dated from the 2nd of October: the necessary implication that dates are capable of manipulation is, to say the least, disturbing. According to the affidavit of Mr. Vinayagamorthy dated the 31st of January 1994, Wimalenthiran was held at the secret place of detention by the sea till the 11th of December and then transferred to the Army Camp at Panagoda. On the 15th of December he was handed over to the CID. This is the sequence of events reported by Amnesty International with regard to Wimalenthiran's co-prisoner, Arulrajah. The Amnesty International report states that Arulrajah was arrested on the 2nd of October and detained at the army camp behind the Indian High Commission until he was transferred "on or about 10 December" to Panagoda Camp and handed over to the CID "on or about 15 December". I am of the view that Wimalenthiran was arrested on the 2nd of December 1993.

The period of detention specified in the Order issued in terms of Regulation 19(2) was seven days. In terms of the proviso to Regulation 19(2) any person arrested outside the Northern and Eastern Province in respect of any offence committed in such area shall not be detained for a period in excess of seven days, **and unless detained under the provisions of Regulation 17, shall be produced before a Magistrate before the expiry of such period as is hereinafter provided or released from custody.** Detention Orders under Regulation 17 were therefore issued on 29th of October 1993, 1st January and 8th April 1994 to enable Wimalenthiran to be kept in detention without being produced before a Magistrate. Since Wimalenthiran was arrested on the 2nd of October, 1993, it was no defence that Detention Orders under Regulation 17 had been issued covering the period 29th October 1993 till 23rd April 1994 when he was produced before a Magistrate. In my view, in terms of Regulation 19(3), since, as we have seen, there was no reasonable cause for

further detention, Wimalenthiran should have been produced before a Magistrate within forty-eight hours after the arrest on 2nd October 1993; or if, as the respondents contend, there was reasonable cause for detention, then within seven days from the 2nd of October 1993. Having failed to bring Wimalenthiran before a Magistrate within the prescribed time, whether the relevant time was forty-eight hours or seven days, the 1st, 2nd and 3rd respondents acted in violation of his Constitutional rights guaranteed by Article 13(2).

For the reasons explained in my judgment, I declare that Vijayam Wimalenthiran's fundamental rights under Article 13(1) and Article 13(2) of the Constitution were violated by the 1st, 2nd and 3rd respondents.

The State shall pay Vijayam Wimalenthiran a sum of Rs. 25,000/- as compensation and a sum of Rs. 5,000/- as costs.

WIJETUNGA, J. – I agree.

ANANDACOOMARASWAMY, J. – I agree.

Relief Granted.