

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.63/2020

Sandresh Ravindra Karunanayake
No.1291/6, Rajamalwatte Road,
Battaramulla.

PETITIONER

-Vs-

1. **Hon. Attorney General**
Attorney General's Department,
Colombo 12.
2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.

5. Hon. Ranga Dissanayake

Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

6. The Registrar

Fort Magistrate's Court,
Colombo 01.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.64/2020

BadugodaHewaIndikaSaman Kumara

No.1/1, Ederamulla Road,
Mahambalangoda,
Ambalangoda.

PETITIONER

-Vs-

1. Hon. Ranga Dissanayake

Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

2. C.D. Wickramaratne

Acting Inspector General of Police,
Police Headquarters,
Colombo 01.

3. The Officer-in-Charge

Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.

4. Ampavila

Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.

5. Hon. Attorney General

Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.65/2020

S. Pathumanapan

No.29, 5/1, Fredrica Road,
Colombo 06.

PETITIONER

-Vs-

1. Hon. Ranga Dissanayake

Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.
5. **Hon. Attorney General**
Attorney General's Department,
Colombo 12.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.66/2020

Arjun Joseph Aloysius
No.52/1, Flower Road,
Colombo 07.

PETITIONER

-Vs-

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

2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.
5. **Hon. Ranga Dissanayake**
Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.69/2020

Kasun OshadeePalisena
No.21, Arethusa Road,
Colombo 06.

PETITIONER

-Vs-

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

2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.
5. **Hon. Ranga Dissanayake**
Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.71/2020

Chitha Ranjan Hulugalle
No.45D, West Tower,
No.1, Galle Face,
Colombo 02.

PETITIONER

-Vs-

1. **Hon. Attorney General**
Attorney General's Department,
Colombo 12.
2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.
5. **Hon. Ranga Dissanayake**
Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.
6. **The Registrar**
Fort Magistrate's Court,
Colombo 01.

RESPONDENTS

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application
No.75/2020

Geoffrey Joseph Aloysius
No.7, Queen's Avenue,

Colombo 03.

PETITIONER

-Vs-

1. **Hon. Attorney General**
Attorney General's Department,
Colombo 12.
2. **C.D. Wickramaratne**
Acting Inspector General of Police,
Police Headquarters,
Colombo 01.
3. **The Officer-in-Charge**
Financial Investigation Unit 1,
Criminal Investigation Department,
Colombo 01.
4. **Ampavila**
Senior Superintendent of Police,
Criminal Investigation Department,
Colombo 01.
5. **Hon. Ranga Dissanayake**
Hon. Magistrate,
Fort Magistrate's Court,
Colombo 01.

RESPONDENTS

BEFORE

:

A.H.M.D. Nawaz, J (P/CA),
Shiran Gooneratne, J. *and*
Sobhitha Rajakaruna, J.

COUNSEL

: C.A. (Writ) 63/2020 -Faisz Musthapha, PC with Rienzie Arsecularatne, PC Shavindra Fernando, PC, Faiza Marker, Senany Dayaratne, Riad Ameen, Chamindri Arsecularatne and Nisala Seniya Fernando for the Petitioner.

Milinda Goonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, Lakmini Girihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 64/2020 - Manoj Bandara with Kushani Thiyagaraj instructed by M/S. SudathPerera Associates for the Petitioner.

MilindaGoonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, Lakmini Girihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 65/2020 - Manoj Bandara with Hasitha Gamage instructed by M/S. Sudath Perera Associates for the Petitioner.

MilindaGoonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, LakminiGirihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 66/2020 – Navin Marapana, PC with Kaushalya Molligoda,Uchitha Wickremasinghe and ThanujaMeegahawatte for the Petitioner.

Milinda Goonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, Lakmini Girihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 69/2020 – Navin Marapana, PC with Kaushalya Molligoda, Uchitha Wickremasinghe andThanuja Meegahawatte for the Petitioner.

Milinda Goonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, LakminiGirihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 71/2020 – Faisz Musthapha, PC with Riad Ameen, Hafeel Faris, Sahan Kulatunge and Vishwaka Peiris for the Petitioner.

Milinda Goonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, LakminiGirihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

C.A. (Writ) 75/2020 – Navin Marapana, PC with Kaushalya Molligoda and Uchitha Wickremasinghe instructed by Sanath Wijewardana for the Petitioner.

Milinda Goonethilake SDSG with H. Jayasundera SDSG, Shaheeda Barrie SSC, Lakmini Girihagama SC, Udara Karunathilaka SC and Chathuri Wijesuriya SC for the Respondents

Argued on : 11.03.2020, 12.03.2020, 13.03.2020, 15.05.2020, 19.06.2020, 26.06.2020 & 29.06.2020.

Decided on : 07.07.2020

A.H.M.D. Nawaz, (P/CA)

On 06.03.2020 the learned Magistrate, Fort made order issuing warrants of arrest

against ten persons in a Case bearing No. B/16089/2020. Seven of these ten persons have made individual applications for judicial review of the warrants in the main and after we heard several days of arguments that focused on questions of law, we now proceed to set down our order on the question of notice and interim relief.

The seven persons who are variously described in the proceedings before the Magistrate, Fort as suspects/accused are as follows vis-à-vis their applications before this Court for judicial review.

1. Sandresh Ravindra Karunanayake (CA Writ No. 63/2020)
2. Badugoda Hewa Indika Saman Kumara (CA Writ 64/2020)
3. S. Pathumanapan (CA Writ 65/2020)
4. Arjun Joseph Aloysius (CA Writ 66/2020)
5. Kasun Oshadee Palisena (CA Writ 69/2020)
6. Chiththa Ranjan Hulugalle (CA Writ 71/2020)
7. Geoffrey Joseph Aloysius (CA Writ 75/2020)

A common denominator that runs through these applications to impugn the warrant of arrest is the allegation of apprehended bias on the part of the Fort Magistrate, which all the Petitioners allege in their separate applications and principally the complaint of apparent bias has emerged quite vehemently in the course of the arguments. The Petitioners also impugn the treatment of the further report filed by the Officer in Charge of Final Investigation Unit No.1 of the Criminal Investigation Department as a final report under Section 136(1)(b) of the Code of Criminal Procedure Act, No. 15 of 1979, when to all intents and persons the investigation are yet incomplete.

Further nuances that several days of arguments brought forth in its wake also turned on the advice given to police by the Honourable Attorney General to seek a warrant of arrest and even the certificate filed in terms of Section 8 (1) of the Offences Against Public Property Act, No.12 of 1982 is sought to be challenged by certiorari in the proceedings.

Since there is a commonality of complaints for notice, all counsel for the Petitioners and the learned Senior Deputy Solicitor General (SDSG) addressed us on these aspects though the SDSG took us through some portions of the Bond Commission report in order to join issue with the averments in CA Writ 63/20.

As is common knowledge, it needs no recapitulation that the Fort Magistrate's Court bearing No B/16089/2020 in which the learned Magistrate assumed jurisdiction to issue the impugned warrants relates to the issuance of treasury bonds that also found the subject-matter of a Presidential Commission Inquiry. As it was made out to us in the course of the arguments, the arrest warrants that were issued on 06.03.2020 pertained to the alleged involvements of the Seven Petitioners before us in relation to the two treasury bond auctions that were held on 29.03.2016 and 31.03.2016 and the B report that was considered by the learned Magistrate or allegedly treated by the Magistrate as a final report under Section 136 as contended by some Petitioners quite specifically referred to the two auctions and the proposed charges in the report emanate from the alleged involvement of the Petitioners along with others in the said auctions.

But we bear in mind that in these applications for judicial review this Court will only police the decision making process and not the merits of the involvements or even the offences allegedly committed by the Petitioners. What these applications for mandates in the nature of writs under Article 140 of the Constitution would entail is the process the learned Magistrate adopted to issue the warrant which is the decision or determination in the case.

What takes the cake as the traditional scope of judicial review under Article 140 of the Constitution is that classic formulation of Lord Brightman in *Chief Constable of the North Wales Police v. Evans* (1982) 1 WLR 1155:-

“Judicial review is concerned, not with the decision, but with the decision making process...”

If the decision-making process is flawed for illegality, irrationality and procedural impropriety the decision is rendered a nullity by *certiorari*.

Then in order to succeed in their applications for notice, the Petitioners must make out a “*prima facie*” case on the decision-making process that preceded the issuance of the warrant. What then are the grounds on which the decision-making process prior to the issuance of the warrant is sought to be impeached? As we made it clear, *apparent bias* on the part of the learned Magistrate, Fort was the pivotal theme on

which all the Counsel for the Petitioners advanced their case for a *prima facie* case, apart from some other grounds to which an allusion has already been made.

Under our jurisdiction in terms of Article 140 of the Constitution we start off with a *prima facie* case for issuance of notice. Dalton J in *Jinadasa v Weerasinghe* (1929) 31 NLR 33 gave the meaning of a *prima facie* case in the context of a claim for an injunction.

“.....the Court must be satisfied that there is a serious question to be tried at the hearing and ***that on the facts before it there is a probability that Plaintiff is entitled to relief.***”

The test for a *prima facie* case in applications for judicial review is not dissimilar. Though Rule 3 (4) of Part II of the Court of Appeal (Appellate Procedure) Rules 1990 which refers to issuance of notice upon the support of an application for the exercise of power under Article 140 is silent on the criteria to be fulfilled at the threshold stage, it is axiomatic that it has crystallized into a rule of law to insist upon a *prima facie* case.

The arguability principles to be made out by an applicant at the stage of support for notice in a writ application would include some well known criteria. The judge or judges before whom an application for judicial review is supported needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant notice without identifying an appropriate issue on which the case can properly proceed-see *R v Social Security Commissioner ex p Pattni* (1993) 5 Admin LR 219 at 223G. However voluminous the papers, or complex the putative issues, the task remains the same.

I hold that whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flaw such as unlawfulness, unfairness or unreasonableness. The vitiating ground must be arguably material to the impugned decision. That decision must be arguably amenable to judicial review-see *R v Chief Rabbi ex p. Wachmann* (1992) 1 WLR 1036 at 1037H.

What then is the case that has been set out before us? The argument was advanced that long prior to the issuance of the impugned warrants in the case, the learned

Magistrate had refused to assume jurisdiction and recused himself from hearing a treasury bond related case Fort Magistrate's Court Case bearing No B 8266/2018 which had also formed the subject matter of the Presidential Commission inquiry. It was contended that the learned Magistrate, Fort recused himself from hearing the case when it was brought to his notice by the officers of the Attorney General's Department on 8th November 2018 that as the spouse of the learned Magistrate was employed as a Senior Assistant Director in the legal division of the Central bank of Sri Lanka it was inappropriate for the judicial officer to continue to hear the case. He heeded to this request made by the Attorney-General's Department and made an order setting out his reasons as to why he was declining to hear the case. In the same breath he referred the case to the Judicial Service Commission making a request that another Magistrate be nominated to hear the case. Thereafter the Judicial Service Commission nominated the Chief Magistrate of Colombo to hear the aforesaid case bearing No B 8266/2018.

The complaint of apparent or apprehended bias on the part of the learned Magistrate emanates from this recusal. The Petitioners contended that having recused from hearing the previous case, the learned Magistrate is legally constrained to hear the instant case and issue a warrant. When the report was filed before him seeking a warrant, he should have stayed his hand-so argued the Petitioners.

In other words the Petitioners invoked one of the two fundamental principles of natural justice, *No man shall be a judge in his own cause*. Perhaps the best formulation is that of Coke: *Nemo debet esse iudex in propria sua causa*-see 8 Co Rep at 118a; 77 ER at 652.

So sacred is the principle that Lord Chief Justice Hobart is reported as saying in 1615 that 'even an Act of Parliament made against natural equity, to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia* ('the laws of nature are immutable') and they are *leges legum* ("the laws of laws")-see *Day v Savadge* Hob 85 at 87; 80 ER at 237.

From this contention flowed several days of argument as to whether the spousal nexus of the learned Magistrate to the Central Bank or anyone in the Central Bank

being investigated in relation to treasury bonds should disqualify him from hearing the case before him. The learned SDSG, no doubt on a prodding by this Court to indulge in an analysis of the applicable test pertaining to bias and having regard to the House of Lords decision of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) 1991 1 All ER 577, did justice to the task admirably by citing a plethora of cases as far afield as from the UK, Australia and the US and it redounds to his credit that he contended strenuously that it can by no stretch of imagination be argued that the Magistrate could be tainted by bias-see *Dimes v Grand Junction Canal Co* (1852) 3 HL Cas 759. 10 ER 301; *Locabail v Bayfield Properties* (2001) 1 All ER 65 and *R v Gough* (1993) 2 All ER 724.

Our own research has revealed that in *Webb and Hay v The Queen* (1994) 181 CLR 41: (1994) 122 ALR 41, decided by the High Court of Australia in 1994, Deane J suggested a fourfold classification of bias cases, based on three related but separate principles. First, there is the principle that no one should be in a position to decide a matter in which he has an interest, whether pecuniary or otherwise. Secondly, there is the principle of avoidance of partiality or bias. Thirdly, we have the principle that justice must not only be done but must also be seen to be done.

So the central argument turned on the quintessential question-Does the recusal by the Magistrate in the previous case operate even now so as to disqualify him from assuming jurisdiction and issuing the impugned warrant?

Of course in *Pinochet* (supra) a law lord was found to have sat on the first *Pinochet* case in the outcome of which he had a nonpecuniary interest. The case in question was an application for the arrest and extradition to Spain of the former Chilean head of state, General Augusto Pinochet, to stand trial for certain crimes against humanity allegedly committed while he was head of state of Chile. The question before the House of Lords was whether a former head of state enjoyed immunity from arrest and extradition. Besides the parties themselves three human rights groups were given leave to participate in the hearing as interveners. One of these bodies was Amnesty International, which had not only put in written submissions but was also represented by a team of four counsel, who addressed the court in favour of

extradition. By a majority of three to two the House of Lords decided against General Pinochet, one of the three Law Lords forming the majority being Lord Hoffmann, whose wife had worked for Amnesty International since 1977 and who himself was an unpaid Director and Chairman of a connected body known as Amnesty International Charity Ltd. The information about Lord Hoffmann's personal association with Amnesty International came to light only about a fortnight after the House of Lords' decision to extradite General Pinochet. The General's solicitors received an anonymous telephone call about the association and they lodged a petition asking for Lord Hoffmann's opinion to be declared invalid or, alternatively, for the decision of the House of Lords to be set aside. A fresh panel of Law Lords was summoned to give the petition. Delivering the leading speech Lord Browne-Wilkinson made the following observation:

“It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann: His claim is based on the requirement that justice should be seen to be done as well as actually being done”

It is in this case that the House of Lords declared that a non-pecuniary interest such as what Lord Hoffmann had would automatically disqualify the judge concerned. In such a situation the disqualification operates from the very beginning of the case and all orders made subsequently become null and void.

The learned SDSG argued that there was no such automatic disqualification of the Magistrate having regard to the facts and circumstances of the case whilst the Petitioners contended that there could not be more eminent a case for recusal than this case before the Magistrate. The learned SDSG sought to contend that the learned Magistrate's reasoning in his order dated 8th November 2018 for declining to hear the previous case was confined to an investigation of a friend of the Magistrate's spouse being conducted at that stage and as that qualifying factor has ceased to exist, it was competent to the Magistrate to have assumed jurisdiction in this instant case.

The learned SDSG also contended that the allegation of bias must have been raised before the learned Magistrate himself when Mr. Rienzi Arsekularatne, PC sought to represent the Petitioner Ravi Karunanayake just before the learned Magistrate of the

learned Magistrate proceeded to issue the warrant. But it was pointed out that the learned President's Counsel was denied an opportunity of making submissions and there were rival arguments on this question. The Petitioners argued that the tenor of recusal by the Magistrate in the 1st case makes it abundantly clear that he has applied the test of bias and the recusal should apply unambiguously to the facts and circumstances of the second case before him.

So the question arises before us whether the disqualification if any is automatic or the learned Magistrate is not disqualified at all notwithstanding his previous order.

On an overall conspectus of these submissions we take the view that we should fully consider the facts and circumstances of this case on affidavits at a final hearing. We also take the view that it is incumbent upon this Court to set down the correct test of bias in view of the multi-jurisdictional tests that have been advanced before us and we are unanimous in the view that this could be done only at a final hearing. There was also the argument that the learned Magistrate refused to issue any process for a person working in the Central bank when he proceeded to issue warrants only against these Petitioners and some others who are not before this Court.

So we take the view that a threshold of *prima facie* case has been met and we should hear the parties on affidavits of a final hearing and we should also advert to the fact that in addition to the multiple grounds that have been urged to impugn the warrant, another ground of impugnation is the issuance of the warrant under proviso (ii) to Section 139 (1) of the Code of Criminal Procedure Act, No 15 of 1979. It has been contended that a precondition to issuance of warrant under the above provision is institution of proceedings under Section 136 (1) of the said Code and it is common ground that no institution of proceedings has yet taken place since the investigations are yet incomplete. Thus an argument has been taken that the learned Magistrate has usurped a jurisdiction which he does not have and as such the issuance of warrant is vitiated. The learned SDSG countered this argument by saying that this error is rectified by the case of *Peiris v Commissioner of Inland Revenue* (1963) 65 NLR 457. In other words the argument is that acting under a wrong section by mistake does not vitiate the act of the learned Magistrate. Attractive as it seems, we cannot

but notice the force in the argument of the Petitioners that the learned Magistrate could not have been mistaken as he consciously applied Section 139. Be that as it may these are questions of law which we unanimously decide we have to go into at a final hearing.

Since we take the view that the Petitioners have made out a *prima facie* case and in view of the complexity of issues that require the resolution of this Court at a merit stage, we decide to issue notice of the applications on the Respondents.

In regard to the interim order that the Petitioners have all prayed for in their applications, we are guided by the principle whether the Court's final orders would, if the Petitioners are successful, be rendered nugatory. We have considered the balance of convenience and take the view that the learned Magistrate shall not make any orders of remand of these Petitioners until the final determination of these applications. We take this view unanimously as these Petitioners appeared in the Magistrate's Court upon a previous order of this Court and that the impugned order of warrant is yet not adjudicated upon.

We have given earnest consideration to the submissions of the learned SDSG and that we concur with him that the notice and any order that we issue should not obstruct any investigation to be conducted by the relevant Respondents in regard to the treasury bond auctions. Any arrest of the Petitioners during the pendency of the investigation will render obsolete or infructuous the final determination we will arrive at after a full hearing and in the circumstances we make the following orders.

1. The warrant of arrest ordered by the learned Magistrate on 6th March 2020 is stayed until the final determination of these applications.
2. This order will not impede or obstruct the conduct of any investigations by the relevant Respondents in regard to the treasury bond auctions held in 2016.
3. This order would not prevent any statements to be recorded from the Petitioners.
4. The learned Magistrate is directed to make any such order to aid the investigation in terms of the law upon the request of the relevant investigating officers save and except that the Petitioners shall not be arrested during such investigations and the learned Magistrate shall not make an order remanding the Petitioners, until this Court finally disposes of these applications.

PRESIDENT OF THE COURT OF APPEAL

A.L.Shiran Gooneratne, J.

I agree

JUDGE OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree

JUDGE OF THE COURT OF APPEAL