

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

In the matter of an Appeal under and in terms of the proviso to Section 63(1) of the Provincial Councils Elections Act, No.2 of 1988 read with Article 138(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA/EXP/01/2019

Peduru Arachchige Sujith
Muthukumarana,
No.918, Yaya I, Viharagala Road
(Aliolura),
Suriyawewa.

Petitioner

Vs.

1. Hon. Mahinda Amaraweera,
General Secretary,
United People's Freedom Alliance,
No. 301, T.B. Jayah Mawatha,
Colombo 10.

2. United People's Freedom Alliance,
No. 301, T.B. Jayah Mawatha,
Colombo 10.
3. K.L. Dayananda,
Council Secretary,
Provincial Council of the Southern
Province,
Council Secretariat Office –
Southern Province,
Bope Road,
Kalegana,
Galle.
4. Mahinda Deshapriya,
Chairman,
5. Nalin Jayantha Abeysekera PC,
Member
6. Samuel Ratnajeevan Hoole,
Member,
4th to 6th Respondents are of;
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.
7. H.M.T.D. Herath,
Secretary,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

8. N.M. Mohamed,
Former Commissioner General of
Elections,
C/o Commissioner General of
Elections,
Department of Elections,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

8A. Saman Sri Ratnayake,
Commissioner General of Elections,
Department of Elections,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

Respondents

BEFORE : Hon. K. K. Wickremasinghe, J.
Hon. Mahinda Samayawardhena, J.
Hon. K. Priyantha Fernando, J.

COUNSEL : Mr. Shyamal. A. Collure, AAL, with A.P. Jayaweera, AAL, P.S.
Amarasinghe, AAL and Ravindu. S. de Silva, AAL for Petitioner.

Ms. Maheshika Silva, SSC for 3rd to 8th Respondents.

ARGUED ON : 07.10.2020

WRITTEN SUBMISSIONS : Petitioner on 28th September 2020

DECIDED ON : 20.11.2020

K.K.WICKREMASINGHE, J.

The Petitioner has made an application on 7th February 2019 to seek remedy in terms of Section 63 (1) of the Provincial Councils Election Act, No. 02 of 1988. This application is made in order to challenge his expulsion from the United People's Freedom Alliance (hereinafter referred to as the 'UPFA'). The Petitioner has filed documents marked **P1 – P8** along with the affidavit in order to challenge his expulsion.

According to the Petition, affidavit and the submissions of the Learned Counsel for the Petitioner reveals following facts.

1. The Petitioner had contested the general Elections held in August 2015 from the Hambantota District on the ticket of the UNP led United National Front and defeated. Thereafter, continued to serve as a **Provincial Councilor** of the Southern Province Provincial Council representing the UPFA.
2. Discharged his duties as a member of the Southern Province Provincial Council until about mid-January 2019. (minutes held on 08.01.2019 is marked as P4)

3. By letter dated 15.01.2019, the Petitioner was expelled from the above membership with immediate effect. Allegedly, for the violation of the Party Constitution and the policies of the above mentioned Party. (letter marked as P5)
4. Petitioner had come to know that the 1st Respondent by letter dated 15.01.2019 had informed the 3rd Respondent that the Petitioner was expelled from the said party on immediate effect. Further, by the same letter the 1st Respondent has requested the 3rd Respondent to inform the same to the Election Commissioner claiming that he was ceased to be a member of the Provincial Council of the Southern Province as a result of the expulsion. (A copy of the same is marked as P6).
5. The Petitioner received a letter dated 24.01.2019 signed by the 3rd Respondent referring to the above fact. (The 3rd Respondent had requested the Petitioner, whether he had taken steps in terms of Section 63 (1) of the Act) (marked as P7).
6. The Petitioner states that he has neither served with a charge sheet nor a disciplinary inquiry was held against him by the UPFA before the expulsion.
7. He further states that according to the provisions of the Act and Article 154 E of the Constitution, the membership of the Provincial Council lasts for 5 years until dissolution from the date of its 1st meeting.

Petitioner states that as a result of the expulsion order of the 1st Respondent, the 1st Respondent has violated the following provisions and caused injustice to the Petitioner.

1. Clause 6(5) of the Constitution (marked 'P8')
2. The expulsion is against his legitimate expectation, against the law, arbitrary, irrational, unreasonable, illegal, perverse, capricious, *mala fide*, *ultra vires*, and the same has been made in the absence and/or excess of jurisdiction and in violation of the rules of natural justice.

The Learned Counsel for the Petitioner claims that at the time of his application to this Court, the Provincial Council was not dissolved and therefore he is entitled to be a member of the UPFA until the expiration of 5 years unless he was removed according to the Law.

The Petitioner further states as follows;

- a) General Secretary is appointed to discharge powers and duties stipulated in clause 8 (3) of the Party Constitution. Since the Petitioner has contested the Provincial Council elections concerned on a nomination but decided upon by the Executive Committee in terms of Section 8 (3) (2) of the Party Constitution the 1st Respondent has no power or authority to take a decision to expel him from the membership of UPFA. Further stated that he had not been informed that Executive Committee has not taken such a decision to expel him. (Constitution is marked as P8)
- b) The letter of the 1st Respondent is a violation of the Clause 8 (3) (3) of the Constitution of UPFA and further its invalid.
- c) Disciplinary action contemplated in clause 6 (5) of the Constitution marked "P8" presupposes adherence to the rules of natural justice.
- d) Petitioner has neither informed of charges if any nor forwarded/ served a charge sheet or explanation called/ show cause called from him which amount to a procedural impropriety.
- e) Executive Committee of UPFA is not empowered to expel the Petitioner.
- f) Accusation stated in "P5" is vague and cannot justify.
- g) Decision taken by the General Secretary (1st Respondent) in P5 and P6 is invalid, therefore, the said expulsion is an absolute nullity.

- h) "P5" contain no provision to show how a disciplinary inquiry to be held and no right of appeal is provided. Therefore, the expulsion is arbitrary in any circumstance.

Accordingly, irreparable loss and damage has caused to the Petitioner.

In view of the above the Petitioner seeks to obtain an order of a determination that the said expulsion is invalid.

Before this Court pronounces the determination on the instant application, it requires an examination of the text of the section applicable and the judicial decision that have sought to interpret its text and brief evaluation of the text.

Section 63 (1) of the Provincial Councils Elections Act, No.2 of 1988 reads as follows;

"Where a member of a Provincial Council ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group on whose nomination paper his name appeared at the time of his becoming such member, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member."

Provided that in the case, of the expulsion of a member' of a Provincial Council his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Court of Appeal by petition in writing and the Court of Appeal upon such application determines that such 'expulsion was invalid. Such petition 'shall be inquired into by three Judges of the Court of Appeal who shall make their determination within two months of the filing of such petition. Where the Court of Appeal determines that the' expulsion was valid the vacancy shall occur from the date of such determination.

As per the aforesaid section, this Court has the jurisdiction to ascertain the validity of an expulsion of a member of a Provincial Council. Also whether the instant application is within the period of one month as specified in law.

Moreover, Article 154 E of the Constitution stipulates as follows;

“A Provincial Council shall, unless sooner dissolved, continue for a period of five years from the date appointed for its first meeting and the expiration of the said period of five years shall operate as a dissolution of the Council.”

It is brought to the notice of Court that the Provincial Council of the Southern Province had not been dissolved up to the time of lodging the present application.

- Therefore the expulsion of the Petitioner is a nullity

However at the time of argument the Provincial Council of the Southern Province is already dissolved and this application will be for academic purpose.

Noncompliance with clause 6 (5) of the Party Constitution

The requirement of a disciplinary action is embodied in Clause 6 (5) of the Party Constitution.

The said clause is reproduced as follows;

“සාමාජික පක්ෂයෙක් සන්ධානයෙන් ඉල්ලා අස්වුවද, එකී පක්ෂය මගින් නම් කොට ඕනෑම මැතිවරණයකට සන්ධාන ලැයිස්තුවෙන් ඉදිරිපත්ව තේරී පත්වූ අපේක්ෂකයෙකු හෝ සන්ධානය මගින් පත් කරන මන්ත්රීවරයෙකු පත්වීම පිළිබඳව විනයානුකූල පියවර ගැනීමට සන්ධානයට පූර්ණ අයිතියක් ඇත.”

It is submitted that the letter of expulsion (P5) dated 15.01.2019 cited no reason for expulsion of the Petitioner. Further stated that the Petitioner was neither informed of charges if any nor served

a charge sheet or show cause which warrants circumstances that infringes basic principles of natural justice.

The Petitioner contended that there was a breach of principles of natural justice on the premise that he was not given an opportunity of a disciplinary inquiry. Principles of natural justice are one of the historical foundational concepts that have been expanded to include the modern principles of procedural fairness. Essentially, natural justice requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect him. For example; adequate notice, fair hearing and no bias are basic requirements of natural justice.

In the case of ***Hewa Anthonige Piyasena Vs United People's Freedom Alliance and Others*** (CA 336/2015 – decided on 02.03.2017), it was specified that “*The test that has to be applied is an objective test and not a subjective test. The Respondents have not placed any material before this court to satisfy this objective test that an overwhelming reason or exceptional circumstances existed which merited the expulsion of the Petitioners or that it was done for the public good.*”

The Learned Counsel appeared for the Respondents did not challenge the fact that there was no inquiry held but confirmed that Provincial Council is already dissolved. Therefore, there is no doubt that there was no inquiry held.

Upon the perusal of the brief it is evident that the respondents have failed to afford a fair hearing to the Petitioner which defeats the basic principle of ***Audi alteram partem***.

It was held in ***R vs. Wilson*** (1835) 2 adon E 817, “*It is implied by Natural Justice.....that no one ought to suffer any prejudice....without having first an opportunity of defending himself*”.

As decided in ***Kelly CB in Wood Vs Wood (1874) LR9X190***, the rule of natural Justice was not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate.

As decided in ***Hewa Anthonige Piyasena Vs United People's Freedom Alliance and Others (CA 336/2015)*** by Justice Malalgoda on 02.03.2017, observed and followed the Judgement of Justice Kulatunga, in ***Dissanayake and Others v. Kaleel and Others*** as;

"the right of a M.P. to relief under Article 99(13)(a) is a legal right and forms part of his constitutional right as a M.P. If his complaint is that he has been expelled from membership of his party in breach of the rules of natural justice, he will ordinarily be entitled to relief; and this court may not determine such expulsion to be valid unless there are overwhelming reasons warranting such decision. Such decision would be competent only in the most exceptional circumstances permitted by law and in furtherance of the public good the need for which should be beyond doubt."

In view of the proposition laid down in the above mentioned judgment the 1st and the 2nd Respondents have to satisfy the Court that the Petitioner's conduct amounted to a non-compliance of the principles and the constitutional provisions of the party. Therefore, the above mentioned circumstances warranted the Respondent to expell the Petitioner for public good.

In the instant case the Respondents were unable to prove the reason for expulsion. Further it is evident that there was no inquiry or even a charge sheet was served to the Petitioner.

The letter of expulsion (**P5**) dated 15.01.2019 states that the reason for the expulsion is that the Petitioner was acting against the constitution and principles of the party and therefore he was expelled from 15.01.2019.

When following the reasoning in the above mentioned case, it is amply demonstrated that in the instant case, 1st and 2nd Respondents have not taken any meaningful action to follow rules of Natural Justice which warrants them to expell the Petitioner. Respondents were unable to show that the conduct of the Petitioner amounted to non-compliance of the constitution which constituted an exceptional circumstance warranting the expulsion without a hearing or that the expulsion of the Petitioner was for the public good.

As discussed in the case of *Hewa Anthonige Piyasena Vs United People's Freedom Alliance and Others (Supra)*, the Respondent have not placed any material before this Court to satisfy this objective test that overwhelming reason or exceptional circumstances existed which merited the expulsion of the Petitioner or that it was done for the public good.

At this juncture it is pertinent to note the observation of Paul Jackson in his book **Seminal Work on Natural Justice (Second Edition) 1979 at page 137;**

"There are at least three justifications for requiring a hearing even where there appears to be no answer to a charge. First, experience shows that unanswerable charges may, if the opportunity be given, be answered; inexplicable conduct be explained. Secondly, the party condemned unheard will feel a sense of injustice. Thirdly, suspicion is inevitable that a body which refuses a hearing before acting does so because of the lack of evidence not because of its strength."

As the expulsion amounts to a grave punishment, it is nothing but fail to give a hearing to the victimized Petitioner. When following judicial decisions it is our duty to follow principles of natural justice.

In *Abdul Majeed Vs Sri Lanka Muslim Congress and others* her ladyship Justice Shirani Bandaranayake held "In a situation where serious penalties are imposed culminating in expulsions of petitioners, it would be a pre-condition to afford them a fair hearing with adequate time to present an effective answer".

When considering above it is amply demonstrated by the Petitioner that the Respondents have failed to follow the rules of Natural Justice and also the Petitioner has acted under Section 63(1) of the Provincial Councils Election Act, No. 02 of 1988.

Accordingly, I hold that strict compliance with the principles of Natural Justice is a pre-condition to a valid expulsion from the Respondent party.

For the reasons set out above I determine that P5 and P6 has no force or avail in law and that it is in fact invalid.

I make no order as to costs.



JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,



JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J

I agree,



JUDGE OF THE COURT OF APPEAL