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

In the matter of an application under and in terms of Article 99(13)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC (Expulsion) No: 01/2023

Harin Fernando,
No. 276/4, Negombo Road,
Wattala.

PETITIONER

Vs.

1. Samagi Jana Balawegaya,
   815, E.W. Perera Mawatha,
   Kotte Road,
   Ethul Kotte.

2. Ranjith Madduma Bandara,
   General Secretary,
   Samagi Jana Balawegaya,
   815, E.W. Perera Mawatha,
   Kotte Road,
   Ethul Kotte.

3. Sajith Premadasa,
   President,
   Samagi Jana Balawegaya,
   815, E.W. Perera Mawatha,
   Kotte Road,
   Ethul Kotte.

4. K. A. Rohanadeera,
   Secretary General of Parliament,
   Parliamentary Complex,
   Sri Jayawardenapura, Kotte.

5. R. M. A. L. Rathnayake,
Chairman,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

6. M.A.P.C. Perera,
Member,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

7. A. Faaiz,
Member,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

8. H.M.T.D. Herath,
Secretary,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

9. Saman Sri Ratnayake,
Commissioner General of Elections,
Election Commission,
Elections Secretariat,
Sarana Mawatha,
Rajagiriya.

RESPONDENTS

Before: **Vijith K. Malalgoda, PC, J**
Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Dr. Romesh De Silva, PC with Ronald Perera, PC, M. Maharoof, Chandimal Mendis and Niran Anketell for the Petitioner

M. A. Sumanthiran, PC with Viran Corea, PC, Ermiza Tegal and Divya Mascranghe for the 1st and 3rd Respondents

Dr. Jayampathy Wickramaratne, PC with Pulasthi Hewamanne and Sampath Wijewardena for the 2nd Respondent

Sureka Ahmed Jayasinghe, Senior State Counsel for the 4th – 9th Respondents

Argued on: 12th October 2023, 23rd October 2023, 14th November 2023, 17th November 2023, 12th December 2023, 14th December 2023 and 23rd January 2024

Written Submissions: Tendered on behalf of the Petitioner on 2nd February 2024

Tendered on behalf of the 1st and 3rd Respondents on 5th February 2024

Tendered on behalf of the 2nd Respondent on 5th February 2024

Tendered on behalf of the 4th – 9th Respondents on 2nd February 2024

Decided on: 9th August 2024

Obeyesekere, J

The Petitioner is a Member of Parliament having been nominated by the Samagi Jana Balawegaya, a registered political party and the 1st Respondent to this application in terms of Article 99A of the Constitution. The issue that arises for determination in this application is whether the expulsion of the Petitioner from the 1st Respondent is valid.

This application was taken up for hearing together with SC (Expulsion) No. 2/2023. While the factual matters in both applications were almost identical, the legal arguments presented by the learned President's Counsel for the Petitioners in each application were different except for the common complaint that each of the Petitioners were not afforded a fair hearing prior to their expulsion from the 1st Respondent.

The Petitioner

The Petitioner states that he holds a Business Degree from Deak University, Australia and a Master's Degree in Business Administration from the University of West Scotland. The Petitioner had been elected to the Uva Provincial Council, first as a member in 2010 and later as the Chief Minister in 2014, and as a Member of Parliament in 2010 and 2015, on all occasions as a member of the United National Party, also a registered political party. At various times between 2015 and 2020, the Petitioner had served as a Cabinet Minister for Telecommunication, Digital Infrastructure, Foreign Employment and Sports.

The Petitioner states further that the 1st Respondent was formed in March 2020 and that he is a founder member of the 1st Respondent as well as a member of its decision making body known as the Working Committee. Pursuant to the Parliamentary Elections held in August 2020, the Petitioner having been nominated by the 1st Respondent to Parliament on its National List, was declared elected as a Member of Parliament. It is perhaps important to state that the 1st Respondent is the single largest party in Opposition in Parliament at the moment and that its leader, the 3rd Respondent is the Leader of the Opposition in Parliament.

Political developments in May 2022

The Petitioner states that post Covid-19 and particularly from the early part of 2022, the Country underwent a period of economic hardship hitherto unseen, with shortages in fuel, gas and essential food items. The Petitioner claims that depletion of the foreign currency reserves of the Country led to inflation reaching record numbers culminating with street protests and civil unrest, and that the Country was heading towards a national crisis. The Petitioner claims further that in this backdrop and in order to calm the waters,

the then Cabinet of Ministers resigned from office on 4th April 2022. The Petitioner states however that the protests and civil unrest continued unabated and on 9th May 2022, the then Prime Minister too resigned from office. As provided by Article 49(1) of the Constitution, the Cabinet of Ministers stood dissolved with the said resignation.

The Petitioner states that the 3rd Respondent was thereafter invited to accept the post of Prime Minister. This invitation and the situation prevailing in the Country at that time had been discussed at the Working Committee meeting of the 1st Respondent held on 10th May 2022. According to the minutes of the said meeting of the Working Committee [**1R2**] which had been attended by the Petitioner, as borne out by the signature sheet of the list of attendees at the meeting [**1R3**], the 3rd Respondent had informed the membership that various groups had invited the 1st Respondent to form a Government and that the Chief Buddhist Prelates had made a strong request for the 3rd Respondent to accept the post of Prime Minister. After several members had expressed their views, a decision had been taken that no member of the 1st Respondent shall accept office in a Government formed by any person other than its leader the 3rd Respondent. The said decision has been recorded in 1R2 in the following manner:

> "අවසාන වශයෙන් ගරු රාජිත සේනාරත්න මැතිතුමා විසින් කොන්දේසි වලට යටත්ව අග්‍රාමාත්‍ය ධුරය භාරගත යුතු බවත්, අප විසින් ඉදිරිපත් කරනු ලබන කොන්දේසි වලට ජනාධිපතිවරයා එකඟ නොවුණහොත් හෝ වෙනත් හේතුවක් මත වෙනත් අග්‍රාමාත්‍යවරයකු ජනාධිපතිවරයා පත්කළහොත් හෝ **එවැනි අග්‍රාමාත්‍යවරයකු යටතේ පිහිටුවන ආණ්ඩුවක සමගි ජන බලවේගයේ කිසිදු, මන්ත්‍රීවරයකු හෝ සාමාජිකයකු කිසිදු, තනතුරක් භාර නොගෙන යුතු බවට යෝජනා කරන ලද, අතර එකී යෝජනාව සභාව විසින් ඒකමතිකව අනුමත කරන ලදි.**"

On 12th May 2022,the Member of Parliament elected from the United National Party was appointed by the then President as the new Prime Minister. With the Working Committee of the 1st Respondent having already decided on its stance with regard to its members joining a Government of which the 1st Respondent was not a party, the 1st Respondent made a formal announcement by way of a press statement on 16th May 2022 [**1R1**] conveying the following decision taken by the Parliamentary group of the 1st Respondent on that date:

"ඒ අනුව වත්මන් ආණ්ඩුව විසින් ආර්ථිකය ගොඩනැගීම උදෙසා කරනු ලබන, රටට හිතැති යහපත් කටයුතු වෙනුවෙන්. **එහි තනතුරු ලබා නොගෙන**, පාර්ලිමේන්තු ක්‍රියාවලිය තුළින් සමගි ජනබලවේගයේ පුර්ණ සහය ලබා දීමට මන්ත්‍රී කණ්ඩායම් රැස්වීමේදී ඒකමතික තීන්දු, කරනු ලැබිය."

Having expressed the view that the 1st Respondent would extend its support to restore the economy but that it will not join the Government, the 1st Respondent went on to state in 1R1 that it would withdraw its support in the event an attempt is made to entice any Members of Parliament elected from the 1st Respondent to join the Government. Thus, the position of the Working Committee of the 1st Respondent reached with the participation of the Petitioner could not have been any clearer.

However, that did not deter the Petitioner, although a member of the 1st Respondent which was not a part of the then Government in Office, from joining the Government and being appointed the Cabinet Minister for Tourism and Lands on 20th May 2022. Pursuant to the resignation from office of the then President on 14th July 2022, Parliament, acting in terms of Article 40(1) of the Constitution, had elected the then Prime Minister as President on 20th July 2022. A new Prime Minister had thereafter been appointed on 22nd July 2022, and on the same date, the Petitioner had been appointed as Cabinet Minister of Tourism and Lands, once again of a Government of which the 1st Respondent was not a member. The Petitioner is currently functioning as the Cabinet Minister of Tourism, Lands, Sports and Youth Affairs.

<u>P2 and restrictions on members of the 1st Respondent</u>

The Constitution of the 1st Respondent, produced by the Petitioner marked **P2**, contains provisions that deal with the consequences that would flow where a member obtains membership in other political parties while holding membership in the 1st Respondent, and joining a Government of which the 1st Respondent is not a party. The relevant provisions in P2 are set out below:

"3.3 සාමාජිකයෙකුට වෙනත් දේශපාලන පක්ෂයක සාමාජිකත්වය දැරිය නොහැකි වන අතර, එසේ වෙනත් දේශපාලන පක්ෂයක සාමාජිකත්වය ලබාගතහොත් සහ/හෝ දරන්නේනම්, එනයින්ම එම සාමාජිකයාගේ සමගි ජන බලවේගය පක්ෂයේ පක්ෂ සාමාජිකත්වය අහෝසි වේ.

3.5 **කිසිදු සාමාජිකයෙකු කෘත්‍යාධිකාරී මණ්ඩලයේ පූර්ව අනුමැතියකින් තොරව වෙනත් දේශපාලන පක්ෂයක් හෝ දේශපාලන සංවිධානයක් විසින් ඇති කරනු ලබන පරිපාලනයක් තුළ තනතුරු භාර ගැනීමක් නොකළ යුතුය.**

3.7 කිසිදු සාමාජිකයෙකු කෘත්‍යාධිකාරී මණ්ඩලයේ පූර්ව අනුමැතියකින් තොරව වෙනත් දේශපාලන පක්ෂයක හෝ වෙනත් දේශපාලන පක්ෂයක් විසින් පාලනය කරනු ලබන ආණ්ඩුවකට හෝ පළාත් සභාවකට හෝ පළාත් පාලන ආයතනයකට හෝ සහයෝගය දැක්වීම හෝ සහයෝගය දැක්වෙන ප්‍රකාශ කිරීම හෝ සහයෝගය දැක්වෙන බවට ඇඟවෙන ප්‍රකාශ කිරීම හෝ නොකළ යුතුය.

3.8 කිසිදු සාමාජිකයෙකු කෘත්‍යාධිකාරී මණ්ඩලයේ පූර්ව අනුමැතියකින් තොරව වෙනත් දේශපාලන පක්ෂයක හෝ වෙනත් දේශපාලන පක්ෂයක් විසින් පිහිටුවනු ලබන පාර්ලිමේන්තුවේ හෝ පළාත් සභාවක හෝ පළාත් පාලන ආයතනයක හෝ විපක්ෂයකට සහයෝගය දැක්වීම හෝ සහයෝගය දැක්වෙන ප්‍රකාශ කිරීම හෝ සහයෝගය දැක්වෙන බවට ඇඟවෙන ප්‍රකාශ කිරීම හෝ නොකල යුතුය."

Thus, it would appear that obtaining membership of another political party while being a member of the 1st Respondent would result in the automatic cancellation of membership in the 1st Respondent. Furthermore, no member of the 1st Respondent shall accept office, join or assist a Government of which the 1st Respondent is not a member without the prior approval of the Working Committee of the 1st Respondent. It is a violation of the latter that (a) led to the suspension of the membership of the Petitioner in the 1st Respondent in the first instance, (b) formed the basis of the charge sheet that was issued to the Petitioner, and (c) culminated in the expulsion of the Petitioner from the 1st Respondent.

<u>Suspension of the membership of the Petitioner and calling for explanation</u>

Paragraph 3.13 of P2 provides as follows:

"3.13 පක්ෂයේ යම් සාමාජිකයෙකු විනය කඩකිරීමක් සිදුකර ඇති බවට පෙනී යන අවස්ථාවකදිද, පක්ෂයේ උපරිම යහපත සහ ආරක්ෂාව සඳහා වහාම එම සාමාජිකයාට එරෙහිව පියවර ගත යුතු බවට පක්ෂ නායකයාට පෙනී යන අවස්ථාවකදි ද, එම සාමාජිකයාගේ පක්ෂ සාමාජිකත්වය වහාම අත්හිටුවා ඒ සම්බන්ධයෙන් පක්ෂ සාමාජිකයාගෙන් නිදහසට කරුණු විමසීමට පක්ෂ නායකයාට බලය ඇති අතර, එම තීරණය ද, එම සාමාජිකයා විසින් නිදහසට කරුණු දක්වා ඇත්නම්, එකි කරුණු දැක්වීම ද, කෘත්‍යාධිකාරී මණ්ඩල රැස්වීමට ඉදිරිපත් කළ යුතු අතර කෘත්‍යාධිකාරී මණ්ඩලය විසින් එම පක්ෂ සාමාජිකයා සම්බන්ධයෙන් ගත යුතු ඉදිරි පියවර ගත යුතුය."

The above provision consists of two tiers of disciplinary control. The first is that the leader of the 1st Respondent has been empowered to suspend on his own initiative the membership of any member who has breached party discipline and to call for an explanation from such member or request such member to show cause. The leader of the 1st Respondent is thereafter required to place such material before the Working Committee of the 1st Respondent, thus bringing the first tier to an end. The second tier commences upon such material being placed before the Working Committee and obliges the Working Committee to decide on the future course of action with regard to such member.

With it being clear that the Petitioner had acted contrary to Paragraphs 3.5, 3.7 and 3.8 of P2, the 3rd Respondent, acting in terms of the powers vested in him in terms of the aforementioned Paragraph 3.13 of P2, suspended with immediate effect the membership of the Petitioner in the 1st Respondent by his letter dated 20th May 2024 [**P4(a)**]. The Petitioner has not challenged, either in this application or before any other forum, the above suspension of his membership.

P4(a) reads as follows:

"සමගි ජන බලවේගය පක්ෂ සාමාජිකත්වය අත්හිටු වීම

සමගි ජන බලවේගය පක්ෂය විසින් පිහිටුවනු නොලබන ආණ්ඩුවක තනතුරු භාර නොගත යුතු බවට පක්ෂය විසින් තීරණය කර තිබියදි. රනිල් වික්‍රමසිංහ අග්‍රාමාත්‍යවරයා වශයෙන් පිහිටුවන ලද, ආණ්ඩුවේ කැබිනට් අමාත්‍ය ධුරයක් ඔබ විසින් පක්ෂයේ කෘත්‍යාධිකාරී මණ්ඩලයේ පූර්ව අනුමැතියකින් තොරව භාරගෙන ඇත.

ඒ අනුව ඔබ විසින් පක්ෂයේ විනය කඩ කිරීමක් සිදුකර ඇති බව පෙනී යන හෙයින් ද, පක්ෂයේ උපරිම යහපත සහ ආරක්ෂාව සඳහා ඔබට එරෙහිව වහාම පියවර ගත යුතු බව මා හට පෙනී යන හෙයින් ද, පක්ෂ ව්‍යවස්ථාව 3.13 වගන්තිය මගින් මා වෙත පැවරී ඇති බලතල ප්‍රකාරව ඔබගේ පක්ෂ සාමාජිකත්වය වහාම අත්හිටුවීම."

By the same letter P4(a), the 3rd Respondent had requested the Petitioner to show cause, thus affording the Petitioner an opportunity of placing his side of the story and setting in motion the process of affording the Petitioner a fair hearing prior to any decision relating to his membership in the 1st Respondent being taken by the Working Committee. The relevant paragraph in P4(a) reads as follows:

"සමගි ජන බලවේගය විසින් පිහිටුවනු නොලබන ආණ්ඩුවක තනතුරු භාර නොගත යුතු බවට පක්ෂය විසින් තිරණය ගෙන තිබියදි එම තිරණයට එරෙහිව යමින් ඔබ විසින් රනිල් වික්‍රමසිංහ මහතා අග්‍රාමාත්‍යවරයා ලෙස පිහිටුවනු ලැබූ ආණ්ඩුවේ කැබිනට් අමාත්‍ය තනතුරක් බාර ගැනීමෙන් පක්ෂ ව්‍යවස්ථාවේ 3.5 සහ/හෝ 3.7 සහ/හෝ 3.11 වගන්ති උල්ලංඝනය කිරීමෙන් පක්ෂයේ විනය කඩකිරීම සම්බන්ධයෙන් **ඔබට නිදහසට කරුණු දැක්වීමට ඇත්නම්, එම කරුණු මෙම ලිපිය ලද දින සිට දින හතක කාලයක් තුළදි මා වෙත ලිඛිතව ලැබීමට සලස්වන මෙන්** පක්ෂ ව්‍යවස්ථාවේ 3.13 වගන්තිය යටතේ මා වෙත පැවරී ඇති බලතල ප්‍රකාරව මෙයින් ඔබට දැනුම් දෙමි."

While stating that he does not agree with the contents of P4(a), the Petitioner, by his letter dated 26th May 2022 [**1R8**] sought an extension of 30 days to respond to P4(a). The Petitioner claims that he submitted his explanation by letter dated 22nd June 2022 [**P5(b)**] wherein he explained the circumstances that led him to join the Government on 20th May 2022. While the receipt of P5(b) has been denied by the 1st Respondent, I must observe that P5(b) does not bear the signature of the Petitioner nor has the Petitioner submitted any proof to establish that P5(b) was in fact sent to either of the three Respondents.

Appointment of a Disciplinary Committee

Paragraph 3.13 of P2 requires the 3rd Respondent to place his decision to suspend, as well as the response of the Petitioner, if any, before the Working Committee of the 1st Respondent to enable the Working Committee to decide on the future course of action. By letter dated 15th November 2022 [**1R9**], the 2nd Respondent informed the Petitioner as follows:

"ඔබ විසින් සමගි ජන බලවේගය පක්ෂයේ විනය බරපතල ලෙස කඩකිරීමක් සිදුකර ඇති බවටද සහ/හෝ ප්‍රතිපත්ති උල්ලංඝණය කර ඇති බවටද සහ/හෝ බරපතල විනය විරෝධී ක්‍රියාවක් සිදුකොට ඇති බවටද සහ/හෝ කෘත්‍යාධිකාරී මණ්ඩලය සැහිමට පත්ව ඇති බැවින් ඔබට විරුද්ධව විනය පරක්ෂණයක් ආරම්භ කිරීමට කෘත්‍යාධිකාරී මණ්ඩලය තිරණය කොට ඇත.

ඒ අනුව ඔබට විරුදිධව විනය පරීක්ෂණයක් සිදුකර විනය පරීක්ෂණ වාර්තාවක් ඉදිරිපත් කරන ලෙසට පක්ෂ ව්‍යවස්ථාවේ ප්‍රතිපාදන ප්‍රකාරව ජනාධිපති නිතිඥ නලින් දිසානායක මහතා සභාපති වශයෙන්ද, ජනාධිපති නීතිඥ දිනාල් පිලිප්ස් සහ නීතිඥ සඳමල් රාජපක්ෂ යන මහත්වරුන් සාමාජිකයින් ද වන පරීදි විනය මණ්ඩලයක් කෘත්‍යාධිකාරී මණ්ඩලය විසින් පත් කර ඇත.

ඒ අනුව ඔබට විරුද්ධව පැවැත්වෙන එකි විනය පරීක්ෂණය මෙම විනය මණ්ඩලය විසින් පවත්වනු ඇත."

The Petitioner did not reply to 1R9.

Disciplinary proceedings

The Chairman of the Disciplinary Committee had accordingly informed the Petitioner by letter dated 12th January 2023 [**1R10a**] that the disciplinary inquiry has been scheduled for 24th January 2023 at the head office of the 1st Respondent, that the Petitioner is entitled to be represented by an Attorney-at-Law and that his presence is mandatory. A copy of the charge sheet signed by the Chairman of the Disciplinary Committee had been annexed to 1R10a.

Even though 1R10a is said to have been served on the Petitioner in Parliament, the Petitioner did not respond to 1R10a nor did he present himself before the Disciplinary Committee on 24th January 2023. The Disciplinary Committee did not proceed with the inquiry, although it was within their power to do so since 1R10a had been personally delivered to the Petitioner. By letter dated 5th February 2023 [**P4(b)**], the Chairman of the Disciplinary Committee had once again requested the presence of the Petitioner at a hearing scheduled for 24th February 2023. It was also conveyed by P4(b) that the presence of the Petitioner is mandatory and that any failure will result in the inquiry proceeding *ex-parte.*

The Petitioner responded to P4(b) by letter dated 23rd February 2023 [**P5(a)**] in which he stated that he is not in receipt of 1R10a and the charge sheet annexed thereto, and that in any event, the inquiry be postponed as he has a previously scheduled meeting on that date. The Disciplinary Committee had acceded to the said request of the Petitioner and by letter dated 15th March 2023 [**P4(c)**] re-submitted the charge sheet [**P4(d)**] and informed the Petitioner that, (a) the Committee has agreed to re-schedule the disciplinary inquiry for either 4th April 2023 or 26th April 2023, and (b) the Petitioner may choose one of the said two dates convenient to him and inform his decision to the Disciplinary Committee by 27th March 2023. The Petitioner was informed further that if he fails to respond, the inquiry would commence on 4th April 2023 and in the event he is not present on that date, the inquiry would proceed in his absence.

The Petitioner claims that he responded to P4(c) by letter dated 27th March 2023 [**P5(c)**] sent through an Attorney-at-Law. P5(c) is not on a letter head of an Attorney-at-Law nor

does it contain the name or the signature of the sender. P5(c) sought the withdrawal of P4(c) on the basis that the Disciplinary Committee has no legal authority to conduct an inquiry, even though P5(c) did not elaborate any further. Thus, even if one accepts that P5(c) was sent by or on behalf of the Petitioner, it is clear that having submitted himself to the jurisdiction of the Disciplinary Committee by P5(a), the Petitioner had a change of mind and was not going to participate at the proceedings before the Disciplinary Committee.

The events of 4th April 2023

Two important events took place on 4th April 2023.

The first important event that took place on 4th April 2023 is the filing of action by the Petitioner in the District Court of Nugegoda [Case No. SPL/625/2023] against the General Secretary of the 1st Respondent, the Chairman of the Disciplinary Committee and the leader of the 1st Respondent, naming them as the 1st, 2nd and 3rd defendants, respectively. Of the said defendants, the 1st and 3rd defendants are before this Court as the 2nd and 3rd Respondents. A copy of the plaint has been tendered marked '**P8**'.

The Petitioner had sought a declaration that the charge sheet P4(d) is null and void and *inter alia* a permanent injunction, interim injunction and an enjoining order preventing the three defendants from taking any disciplinary action against the Petitioner based on the charge sheet and P4(c). Although the Petitioner claims that he obtained an enjoining order on the same date, the Petitioner has not tendered a copy of the order delivered by the District Court. However, it is admitted that the Instructing Attorney-at-Law of the Petitioner had not taken steps to have the said enjoining order served on the Disciplinary Committee or to apprise the Disciplinary Committee of such order. Thus, when the Disciplinary Committee commenced its sittings at 4pm on 4th April 2023, there was no impediment to it proceeding with the inquiry against the Petitioner.

This brings me to the second important event that took place on 4th April 2023, that being, notwithstanding P5(c), to the fact that proceedings of the Disciplinary Committee commenced as scheduled at 4pm on 4th April 2023. The proceedings of that date have

been marked as '**1R20**'. Having recorded the fact that the Petitioner has not indicated which of the two days proposed in P4(c) are convenient to him and that the Petitioner is absent, the Disciplinary Committee had decided to proceed with the inquiry in the absence of the Petitioner. The Prosecuting Officer had led the evidence of the 2nd Respondent and produced some of the above documents to establish that the Petitioner had violated the provisions of P2 by accepting a ministerial portfolio in a Government of which the 1st Respondent was not a member.

The decision of the Disciplinary Committee has been tendered with the Statement of Objections marked '**1R21**'. I have examined 1R21 and it is clear that the Disciplinary Committee has considered the evidence, both oral and documentary, and thereafter found the Petitioner guilty of all charges for the reasons recorded therein. I must state that the Petitioner does not impugn the findings of the Disciplinary Committee, and for good reason.

Decision of the Working Committee and the expulsion of the Petitioner

The 3rd Respondent states that acting in terms of the powers vested in him by paragraph 13.3(xx) of P2, he summoned a meeting of the Working Committee for 18th July 2023. An extract of the minutes of the said meeting was tendered with the Statement of Objections of the 1st – 3rd Respondents [**1R26**], and the minutes themselves [**X1**] together with the signature sheet of the attendees [**X2**] were tendered thereafter supported by an affidavit of the 3rd Respondent. It is clear from the said minutes that the Chairman of the Disciplinary Committee had presented 1R21 to the 3rd Respondent and that in the absence of the 2nd Respondent, a summary of the report had been presented to the Working Committee by the Deputy General Secretary of the 1st Respondent. Having considered the said findings, the members of the Working Committee had unanimously decided to expel the Petitioner from the 1st Respondent.

This decision of the Working Committee has been communicated to the Petitioner by letter dated 18th July 2023 signed by the 3rd Respondent [**P9**].

Article 99(13)(a) of the Constitution and its proviso

The consequences that follow an expulsion of a Member of Parliament from the membership of the political party or independent group from which he was elected have been set out in Article 99(13)(a) of the Constitution.

Article 99(13)(a) reads as follows:

> "*Where a Member of Parliament ceases, by **resignation**, **expulsion** or **otherwise**, to be a member of a recognized political party or independent group on whose nomination paper (hereinafter referred to as the "relevant nomination paper") his name appeared at the time of his becoming such Member of Parliament, 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 Parliament** his seat shall not become vacant if prior to the expiration of the said period of one month he applies to the Supreme Court by petition in writing, and the Supreme Court upon such application determines that such expulsion was invalid. Such petition shall be inquired into by three Judges of the Supreme Court who shall make their determination within two months of the filing of such petition. Where the Supreme Court determines that the expulsion was valid the vacancy shall occur from the date of such determination*." [emphasis added]

The Petitioner, aggrieved by P9, invoked the above jurisdiction of this Court by his petition filed on 15th August 2023. The principal relief sought is a declaration that the decision to expel the Petitioner as communicated by P9 is invalid.

The nature of the jurisdiction of this Court

Prior to considering the two principal arguments presented by Dr. Romesh De Silva, the learned President's Counsel for the Petitioner, there are two matters that I must briefly discuss in order to place in context the manner in which I must consider the several issues that have been raised in this application.

The first is the nature of the jurisdiction of this Court when an application is made under Article 99(13)(a) of the Constitution. In **Gamini Dissanayake v M. C. M. Kaleel and Others** [(1993) 2 Sri LR 135; at page 198], Mark Fernando, J in the minority judgment stated as follows:

> "*Our jurisdiction under Article 99(13)(a) is* ***not a form of judicial review, or even of appeal, but rather an original jurisdiction*** *analogous to an action for a declaration, though* ***it is clearly not a re-hearing****. Are we concerned only with the decision-making process, or must we also look at the decision itself? Article 99(13)(a) requires us to decide whether the expulsion was valid or invalid,* ***some consideration of the merits is obviously required****…*." [emphasis added]

In the majority judgment delivered by this Court in **Tilak Karunaratne v Mrs. Sirimavo Bandaranaike and Others** [(1993) 2 Sri LR 90; at pages 101-102], Dheeraratne J stated that:

> "*The nature of the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99(13)(a) is indeed unique in character; it calls for a determination that expulsion of a Member of Parliament from a recognized political party on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member of Parliament becomes vacant.* ***It is this seriousness of the consequence of expulsion which has prompted the framers of the Constitution to invest that unique original jurisdiction in the highest court of the Island, so that a Member of Parliament may be amply shielded from being expelled from his own party unlawfully and/or capriciously.*** *It is not disputed that this courts jurisdiction includes, an investigation into the requisite competence of the expelling authority; an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature; an investigation as to whether there was breach of principles of natural justice in the decision making process; and an investigation as to whether in the event of grounds of expulsion being specified by way of charges at*

a domestic inquiry, the member was expelled on some other grounds which were not so specified ..." [emphasis added]

Having thereafter considered the submission of Mr. H.L. De Silva, PC appearing for the respondents in that application that even though Court could interfere if the decision of the expelling authority was unreasonable in the *'Wednesbury sense*', but since the decision to expel the petitioner was a political decision judges should not enter the political thicket, Dheeraratne, J stated that "*Our jurisdiction appears to be wider;* ***it is an original jurisdiction on which no limitations have been placed by Article 99(13)(a)***" and referred to the above passage of Mark Fernando, J in **Dissanayake** in support of his position. I must state that the views expressed by Mark Fernando, J have been referred to in almost every judgment delivered by this Court where the applicability of the proviso to Article 99(13)(a) has been considered.

In **Zainul Abdeen Nazeer Ahamed v The Sri Lanka Muslim Congress and Others** [SC Expulsion No. 01/2022; SC minutes of 6th October 2023] Padman Surasena, J considered *inter alia* the above decisions and the decisions in **Ameer Ali and Others v Sri Lanka Muslim Congress and Others** [(2006) 1 Sri LR 189], **Sarath Amunugama and Others v Karu Jayasuriya Chairman UNP and Others** [(2000) 1 Sri LR 172] and **Perumpulli Hewage Piyasena v Illankai Thamil Arsukachchi and Others** [(2012) 1 Sri LR 215] and stated as follows:

"*Thus, this court in all the previous cases has consistently taken and maintained the position that the nature of the jurisdiction this Court conferred on it by Article 99(13)(a) of the Constitution: is not a form of judicial review; is not even in the form of an appeal; is rather an original jurisdiction analogous to an action for a declaration; is not a re-hearing; is indeed unique in character and original in nature vested in the highest Court of the island; is a very wide jurisdiction; is an original jurisdiction on which no limitations have been placed by Article 99(13)(a); is sui generis; is original and exclusive;* ***is a jurisdiction to determine the validity or otherwise of an expulsion*** *in terms of the proviso to Article 99(13)(a) of the Constitution;* ***is neither injunctive nor discretionary****;* ***is indeed unique in character.*** *I agree with the above views consistently taken by this Court*." [emphasis added]

Standard of review

The second matter that I wish to address at the outset is the standard of review. In **Rambukwella v United National Party and Others** [(2007) 2 Sri LR 329; at page 341], this Court was confronted with the submission of the respondent that a political party is a private organisation consisting of its members who come together on the basis of a constitution of such Party and hence the expulsion of a member should be viewed from the same perspective as that of a member from a private club without introducing the high standard of review that apply in Public Law, and the opposing submission that in view of the serious impact that an expulsion has on the rights of the member the standard of review must be the same as under Public Law.

Chief Justice Sarath Silva, having considered the above submissions in the light of Section 7 of the Parliamentary Elections Act No.1 of 1981, the law relating to expulsion of a Member of Parliament from his or her membership of the political party on whose ticket such member was elected as it stood prior to the present Constitution of 1978 and the evolution of Article 99, held as follows:

> "*In view of the change of the Electrical System effected by the Fourteenth Amendment the review of the validity of a decision of expulsion has to be, in my view, now considered not only from the perspective of a vacation of the seat of the Member in Parliament but also from the perspective of the impact on the Electorate from which he was declared on the basis of preferential votes cast in his favour.* ***As a result of the expulsion by the Party the voters preferred candidate is removed from his seat in Parliament and replaced by a candidate who at the original election failed to obtain adequate preferential votes to gain election to Parliament.*** *In short the winning candidate is replaced by a candidate who has lost, as a result of the expulsion.* ***Thus in consequence of the expulsion not only the member loses his seat in Parliament but also there is a subversion of the preference indicated by the electors in exercising their franchise.*** *In view of these far reaching consequences I am inclined to agree with the submission of Mr. Wijesinghe, that* ***the standard of review of a decision of expulsion should be akin to that applicable to the review of the action of an authority empowered to***

decide on the rights of persons in Public Law*. Generally such review comes with the rubric of Administrative Law.*" [emphasis added]

I must state that the cumulative effect of the aforementioned views expressed by this Court over the last thirty plus years, with which I am in agreement, is that the jurisdiction conferred on this Court by the proviso to Article 99(13)(a) is indeed extremely wide and that the level of scrutiny is equally high. Having said so, I must lay down three matters that I wish to be guided by, in considering the several matters raised by the parties in this application.

Jurisdiction is not discretionary

The first is that the power conferred by the proviso to Article 99(13)(a) is not discretionary in nature and hence, I shall refrain from venturing into a consideration of any arguments that may be taken when this Court is exercising a discretionary jurisdiction. As in this application, an allegation was raised in **Perumpulli Hewage Piyasena v Ilankai Tamil Arasu Kadchi** [supra] that the Petitioner has suppressed or misrepresented material facts. Saleem Marsoof, PC, J having considered that issue, held as follows:

"*It is, however, unnecessary to probe deep into the submissions and counter submissions of learned Counsel on these contentious matters, as in my considered opinion, the jurisdiction of this Court to determine the validity or otherwise of an expulsion in terms of the proviso to Article 99(13)(a) of the Constitution is neither injunctive nor discretionary, and does not necessitate any inquiry into the conduct of the person invoking the said jurisdiction. Indeed, the mechanism provided by the said article to an expelled Member of Parliament to effectively have the date of vacation of his seat postponed for a further period not exceeding two months pending the determination by this Court of its validity or invalidity, does not necessarily confer on it a discretionary character as contended by the learned President's Counsel for the 3rd Respondent, as that is an automatic stay of vacation of seat mandated by the Constitution, and is not dependent on the exercise of any discretion by Court. This stay of vacation of seat is not granted by Court, but is conferred by the Constitution itself.*

The jurisdiction of this Court Conferred by Article 99(13)(a) of the Constitution is sui generis, original and exclusive, and does not confer any discretion to this Court to dismiss in limine an application filed there under merely on the ground of suppression or misrepresentation of material facts, as in cases involving injunctive relief or applications for prerogative writs." [page 222]

"I am therefore of the opinion that even in a case where there is cogent evidence to establish that an expelled Member of Parliament did not come to Court with clean hands, if this Court finds that the purported expulsion is invalid, "his seat shall not become vacant" and he will continue to hold office, and this Court does not have the discretion to make a contrary determination on the sole ground of suppression misrepresentation of material facts, or dismiss the application in limine. I am of the opinion that it is therefore not necessary to make any findings in regard to the question whether the Petitioner has suppressed or misrepresented any material facts in his petition or in the course of the hearing, and accordingly, the preliminary objection raised by the 3rd Respondent has to be overruled." [pages 223-224]

Similarly, I am not inclined to uphold the submission of the learned President's Counsel for the 1st and 2nd Respondents and the learned Counsel for the 3rd Respondent that the members of the Working Committee should have been named as respondents to this application. While serving as a Judge of the Court of Appeal, I have considered this identical submission in **Porakara Mudiyanselage Aruna Samantha Kumara v T.A.C.N. Thalangama and Others** [CA (Writ) Application No. 238/2020; CA minutes of 21st May 2021] where an expulsion of a member of a local authority by the political party to which such member belonged was challenged in a writ application filed in terms of Article 140 of the Constitution. With the jurisdiction vested in the Court of Appeal being discretionary and with the petitioners in that case having named as respondents some of the members of the working committee of the respondent political party and having sought permission to add the other members though a ruling had not been made, I exercised my discretion in favour of the petitioners and over ruled such objection *inter alia* for the following reasons:

(a) the failure to name all members of the Working Committee as Respondents has not prejudiced those who have been named/not named as Respondents; and

(b) the reasons for the expulsion can still be placed before this Court by the members who have been added as Respondents.

I would go a step further in this application by stating that I am exercising a Constitutionally vested jurisdiction which involves no discretion and that given what is being challenged is the decision of a political party to expel from its membership a Member of Parliament, the presence before this Court of the political party itself together with its General Secretary and its Leader would suffice in the Respondents seeking to justify the grounds for the expulsion.

Merits of the decision

The second matter that I shall be guided by is that although the merits of the decision to expel a member can be examined and has in fact been examined in several previous applications and can be examined in future applications as well, given the width and breadth of the jurisdiction of this Court, I must exercise caution in venturing into the arena of considering the merits of the decision that led to an expulsion of a Member of Parliament, especially in an application such as this where the violation is apparent and arises as a matter of policy on the part of the 1st Respondent.

Mr. M. A. Sumanthiran, the learned President's Counsel for the 1st and 3rd Respondents submitted that what has now happened is a tragi-comedy in that the Petitioner, having been elected to Parliament on the nomination list of the 1st Respondent, violates the Constitution of the 1st Respondent, crosses the aisle of Parliament, sits on the Government benches having accepted ministerial office, votes with the Government and is now challenging his expulsion from the Opposition ranks. He submitted further that the People *do not elect a Member of Parliament intending them to cross the aisle from side to side to satisfy their personal whims and fancies and destroying the very fabric of an electoral system*, and for that reason, party discipline is extremely important for the effective functioning of a political party and that primacy must be given to the political party over an elected member.

Kulatunga, J in **Jayatillake and Another v Kaleel and Others** [(1994) 1 Sri LR 319; at page 400] held that, "*In handling a crisis of the magnitude faced by the respondents and in dealing with men of the petitioners' caliber,* ***a political party must be allowed a discretion to decide what sanctions are appropriate for violations of Party discipline****; and if the Party decides, bona fide, to expel any member guilty of repudiating the Party, as the petitioners have done, this Court will not in the exercise of its constitutional jurisdiction impose such member on the Party. If that is done, Parliamentary Government based on the Political Party System will become unworkable*." [emphasis added]

In **Tilak Karunaratne v Mrs. Sirimavo Bandaranaike and Others** [supra; at page 111] Dheeraratne, J stated further that:

> "*A political party is a voluntary association of individuals who have come together with the avowed object of securing political power on agreed policies and a leadership.* ***Cohesion is a sine qua non of success and stability whether a political party is in power or in the opposition. To foster party cohesion discipline among its members becomes absolutely necessary.*** *Party disintegration has to be arrested by firm disciplinary measures that include expulsion which Article 99(13)(a) of our Constitution itself recognizes. The members of a party are bound together by a contract which is usually the party constitution, from which arises contractual obligations of the membership. These obligations are either express or implied*." [emphasis added]

A similar view has been expressed in **Dissanayake** [supra; at page 138], where Kulatunga, J stated that, "*Our Constitution confers primacy to the political party as against the individual M.P. The party carries the mandate of the electors and in turn gives a mandate to the M.P. The exercise of the rights of the petitioners qua MP's is subordinate to the requirements of party discipline and their freedom to agitate matters in public is constrained by reason of their obligations to the party which they have freely undertaken to honour*." Ms. Sureka Ahmed Jayasinghe, the learned Senior State Counsel appearing for the 4th – 9th Respondents submitted that this amorphous '*mandate of the people*' argument should not be used to undermine party discipline which, as made evident by such offices as party whips, is integral to our democratic form of government.

In this background, I am of the view that much deference as possible must be shown to the decision of the political party when it says that one of its members have violated its constitution and that it can no longer have that person as a member of that party. As submitted by Mr. Hejaaz Hizbullah, the learned Counsel for the 3rd Respondent in SC (Expulsion) No. 2/2023, *to demand that SJB continue to keep the Petitioner as a member of the party is like forcing a cricket team to share the dressing room with a player from the other side.* Unless in exceptional circumstances such as where malice or bias on the part of the decision maker is alleged and such allegations are supported by cogent evidence or where the expulsion is unlawful or capricious or the reasons given for the expulsion are flimsy, farfetched or imaginary, I am of the view that the merits of the decision that culminated in an expulsion is a matter that is best left within the domain of the relevant political party. As Kulatunga, J stated in **Jayatilake and Others v Kaleel** [supra; at page 234], "*a political party must be allowed a discretion to decide what sanctions are appropriate for violations of Party discipline*."

I must perhaps state that in this application, the necessity for this Court to examine the merits does not arise for two reasons. The first is that the reason for the expulsion is very clear and needs no further consideration. Party discipline is paramount and as submitted by the learned Senior State Counsel, there has been an unambiguous violation of an unambiguous rule by the Petitioner. The Petitioner was a founder member of the 1st Respondent and ought to have been fully conversant with the provisions of its constitution. Having been present at the Working Committee meeting on 10th May 2022 he was privy to the decision taken at such meeting that no member shall accept any post in a Government of which the 1st Respondent is not a party. Notwithstanding, he joins such a Government 12 days later. The second reason is that the Petitioner himself has not sought to impugn the decision on its merits at any stage of the process that commenced on 20th May 2022, except perhaps the explanation said to have been offered by P5(b).

Compliance with procedure

The third matter that I shall be guided by is that I must be satisfied that there has been substantial compliance with the procedure laid down in the constitution of the 1st Respondent, for the following reasons:

(a) The relationship between the Petitioner and the 1st Respondent is contractual and the Petitioner is entitled to demand that the contractual provisions be followed and adhered to;

(b) The standard of review is akin to that of an application where the principles of Public Law would apply;

(c) The consequence that follow an expulsion have an impact not only on the Petitioner but also on those who voted for him.

In **Dissanayake** [supra; page 234], Kulatunga, J observed that, "*The right of a Member of Parliament to relief under Article 99(13)(a) is a legal right and forms part of his constitutional rights as a Member of Parliament.*" A similar view was expressed in **Safiul Muthunabeen Mohamed Muszhaaraff v S. Suairdeen and Others** [SC Expulsion No. 02/2022; SC minutes of 29th February, 2024] where Priyantha Jayawardena, PC, J held that:

> "*Members of the Parliament exercise the sovereignty of the People. Further, they represent the voters/people in the country in Parliament. However, if a Member of Parliament is expelled from the party, he will lose his seat in Parliament. Hence it is imperative to hold a proper disciplinary inquiry before a decision is taken to expel a member from a political party. Furthermore, it is necessary to give a fair hearing to the member at the disciplinary inquiry*."

First past the post system

In order to place in context the first principal argument raised by the learned President's Counsel for the Petitioner, it is necessary to understand the evolution of the process by which persons were elected to Parliament in Sri Lanka. The Westminster model of Government, recommended by the Soulbury Commission in 1944 and adopted in the Ceylon (Constitution) Order in Council of 1946, provided that the legislature was to be bicameral consisting of the House of Representatives and the Senate. The House of Representatives consisted of 101 Members, 95 elected by the People and 6 appointed,

and the Senate consisted of 30 Members, of whom 15 were elected by the House of Representatives and 15 nominated by the Governor General. While the Senate came to be perceived as archaic and was abolished in 1971, there was a gradual increase over the years in the number of Members of Parliament. The framework remained the same under the 1972 Constitution, and by 1977, the number of Members of Parliament had reached 168 representing 160 electorates or constituencies.

Until the Parliamentary Election held in July 1977, any person desirous of being elected to Parliament could contest a particular electorate or constituency either as a nominee of a political party or as an independent candidate, with the name and symbol of the candidate clearly specified on the ballot paper. The voter would essentially vote for the individual concerned, although, as the results of the Parliamentary Elections held in 1970 and 1977 demonstrate, a particular party was preferred irrespective of the candidate put forward by such party resulting in such party obtaining a vast majority of the seats. Under this system, the person who secured the highest number of votes would be the winner and for this reason, this system was commonly referred to as the 'first past the post system'.

The learned President's Counsel for the Petitioner pointed out that under the first past the post system which is similar to the system that prevailed in England, once elected, it was open to any Member of Parliament to cross the floor and sit on the opposition benches or government benches, as the case may be, without such member losing his Parliamentary seat and that even though such Member may subsequently be sacked by the political party from which he or she may have been elected, such action will not disentitle such Member from continuing to be a Member of Parliament. The position remains the same in England to date, with Members allowed to change their party affiliation at any time. This is often referred to as "crossing the floor", because the Member of Parliament will usually change from sitting on the government benches to the opposition benches or *vice versa*. In fact, two private members' bills introduced in 2011 and 2020 in the British Parliament to force a by-election if a Member of Parliament changed political parties did not even make it to the second reading.

Towards proportional representation

The 1978 Constitution saw a radical departure from the above first past the post system. In their Report, under the heading of '*Proportional Representation*', the Select Committee of the National State Assembly appointed to consider the revision of the Constitution has stated as follows [page 141 at page 143]:

> "*The present system of Parliamentary elections has been the subject of considerable criticism in that representation in the Legislature is not fairly representative of political opinion in the electorates. Thus in 1970 the Sri Lanka Freedom Party with 36.9% of the total vote was able to secure 60.3% of the total number of seats in the Legislature, while the United National Party with 37.9% of the total vote was only able to secure 11.3% of the total number of seats. The converse occurred in 1977, when the United National Party with 50.9% of the total vote secured 83.3% of the seats, whereas the Sri Lanka Freedom Party with 29.7% of the total vote secured only 4.8% of the seats. Apart from its unfairness, this situation is not conducive to political stability.*
>
> *The deficiencies of this system have been recognized in many countries, particularly in Europe, and varying systems of proportional representation have been adopted in order to achieve more exact representation of the major political parties in the Legislature.*
>
> *The Draft Constitution marks a major change in the system of Parliamentary elections in this country by adopting a system of proportional representation, the details of which are to be found in Articles 135 to 139.*
>
> *Special mention ought however to be made of the following features:*
>
> *(a) A Delimitation Commission will divide the country into several electoral districts. [Article 136] These electoral districts will remain unchanged thereafter, avoiding the inconvenience and complexities of periodical changes in electoral boundaries. Further, electoral districts shall be the administrative*

districts (or combinations of administrative districts), thereby facilitating proper planning, administration and development;

(b) …

(c) The total number of seats has been frozen at 196, consisting of 36 seats (each of the 9 provinces being entitled to four seats independent of population) and 160 seats, which will be divided among the several electoral districts according to the number of registered electors in each electoral district. As population increases, the qualifying number of electors per seat will automatically increase, for this qualifying number is an arithmetical ratio (namely, the total number of registered electors divided by 160) and is not dependent upon the decision of any Delimitation Commission or other person or body. Further, since the system attempts to obtain fairer representation of the political opinions of the voters, the entitlement of seats is based on the number of registered electors in each electoral district and not upon the number of inhabitants or even citizens. This system will automatically provide for changes in representation necessitated by increases or shifts of population;

(d) ***Voting will be for recognised political parties*** *and groups of independent candidates (who have submitted* ***lists*** *of candidates)* ***and not for individuals****. This will have the added advantage of tending to reduce the intensity of the rivalries between candidates of different political parties. In the case of the death or resignation of a member, the vacancy will be filled, not by means of a by-election, but from among the other candidates on the list of the party or group to which such member belonged*; …" [emphasis added]

Thus, what was being proposed was for the Country to be divided into constituencies based on districts with each district being a single constituency and for a group of candidates to be presented for the entire district as opposed to having 160 constituencies contested by individual members. More significantly, the vote was to be cast to a political party as opposed to an individual, and the number of the Members of Parliament that were to be elected from each political party contesting a particular District was to be

determined on the number of votes that each party had obtained, thus eliminating a landslide victory that would normally have followed an election held on the first past the post system where the winner takes all.

Increase in the number of Members

Article 61(1) of the Draft Constitution [Annexure II to the aforementioned Report] provided that, "*There shall be a Parliament which shall consist of the Members elected by the electors of the several electoral districts constituted in accordance with the provisions of the Constitution*". Although the number of Members had not been specified, once enacted, Article 62(1) of the 1978 Constitution provided that, "*There shall be a Parliament which shall consist of 196 members elected by the electors of the several electoral districts constituted in accordance with the provisions of the Constitution*".

The above recommendations of the Select Committee found themselves into Chapter XIV of the 1978 Constitution titled, '*The Franchise and Elections*' as Article 98, of which the following paragraphs are relevant and hence are re-produced below:

> "*(1) The several electoral districts shall together be entitled to return one hundred and ninety six members.*
>
> *(2) The apportionment of the number of members that each electoral district shall be entitled to return shall, in the case of thirty-six members, be determined in accordance with the provisions of paragraph (4) of Article 96.*
>
> *(3) The apportionment of the number of members that each electoral district shall be entitled to return out of the balance number of one hundred and sixty members shall be determined in accordance with the succeeding provisions of this Article*."

Thus, 160 of the 196 members were to be elected on district basis, with Article 99(1) specifying that, "*At any election of Members of Parliament, the total number of members which an electoral district is entitled to return shall be the number specified by the*

Commissioner of Elections in the Order published in accordance with the provisions of paragraph (8) of Article 98".

In respect of the balance 36 members, Article 96(4) provided that, "*The electoral districts of each Province shall together be entitled to return four members (independently of the number of members which they are entitled to return by reference to the number of electors whose names appear in the registers of electors of such electoral districts), and the Delimitation Commission shall apportion such entitlement equitably among such electoral districts.*"

Thus, the total number of candidates that were to be returned for each electoral district, both in terms of Article 98(2) and Article 98(3) was to be determined by the Delimitation Commission and the names of those eligible to be nominated under Article 98(2) and Article 98(3) were required to be submitted in one nomination paper.

<u>Choosing of Members – position in 1978</u>

An electorate or constituency having been defined in terms of an electoral district, Article 99(2), as it stood in 1978, provided that, "*Any recognised political party or any group of persons contesting as independent candidates (hereinafter referred to as an "independent group") may for the purpose of any election of Members of Parliament for any electoral district, submit one nomination paper setting out the names, in order of priority, of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by one-third "*

Having submitted the names of the candidates for an electoral district on a single nomination paper in respect of those entitled to be appointed both under Article 98(2) and Article 98(3), which nomination paper I shall refer to as the "**District List**", Article 99(4) provided that, "*The recognised political party or independent group which polls the highest number of votes in any electoral district shall be entitled to have the candidate whose name appears first in the nomination paper of that recognised political party or independent group declared elected.*" Article 99(7) provided further that where a political party or independent group has secured sufficient votes to return more than one

candidate, additional candidate/s too shall be decided "*in the order in which their names appear in the nomination paper.*"

The position therefore was that although the names of the candidates on the nomination paper were known to the voter, it is the political party that decided in advance who its preferred candidates would be. A Parliamentary Election was not held under the above provisions, and its application was limited to the statute book.

14th Amendment to the Constitution

With a Parliamentary Election due, several significant amendments were made in 1988 to the Constitution by the 14th Amendment to the Constitution. Of them, I shall refer to three.

The first was to Article 62(1), which, pursuant to the amendment, provided that, "*There shall be a Parliament which shall consist of two hundred and twenty-five Members elected in accordance with the provisions of the Constitution*." Article 98(1) remained and thus, the total number of members that could be returned from all electoral districts remained at 196.

The second significant amendment was the introduction of Article 99A, which provided for the election of the balance 29 Members of Parliament, to be apportioned among the political parties and independent groups that contested the Parliamentary Election, on the basis of the total number of votes polled by such party or group at the said Election. The 29 persons who are declared elected as Members of Parliament in terms of Article 99A are commonly referred to as "**National List Members of Parliament**", and the list on which their names appear is commonly referred to as the "**National List**".

The third significant amendment brought about by the 14th Amendment was the complete repeal and replacement of Article 99. While the text of Article 99(1) remained the same, Article 99(2) introduced the concept of preferential votes or in other words, of the voter being entitled to vote for his or her preferred political party or independent group, and thereafter a further entitlement to vote for three of his or her preferred candidates out of those whose names appeared in the nomination paper of the political

party or independent group for which he or she had already voted. Thus, the voter had a direct bearing over the persons who would be elected as Members of Parliament, increasing their franchise.

Provisions in this regard are set out in Article 99(2), (3), (5) and (8), re-produced below:

Article 99(2) – "*Every elector at an election of Members of Parliament shall, in addition to his vote, be entitled to indicate his preferences for not more than three candidates nominated by the same recognized political party or Independent group*."

Article 99(3) – "*Any recognized political party or any group of persons contesting as independent candidates (hereinafter referred to as an "independent group") may for the purpose of any election of Members of Parliament for any electoral district, submit one nomination paper setting out the names of such number of candidates as is equivalent to the number of members to be elected for that electoral district, increased by three*."

Article 99(5) – "*The recognized political party or independent group which polls the highest number of votes in any electoral district shall be entitled to have the candidate nominated by it, who has secured the highest number of preferences, declared elected*."

Article 99(8) – "*The number of votes polled by each recognized political party and independent group (other than those parties or groups disqualified under paragraph (6) of this Article) beginning with the party or group which polled the highest number of votes shall then be divided by the resulting number and the returning officer shall declare elected from each such party or group, in accordance with the preferences secured by each of the candidates nominated by such party or group (the candidate securing the highest number of preferences being declared elected first, the candidate securing the next highest number of preferences being declared elected next and so on) such number of candidates (excluding the candidate declared elected under paragraph (5) of this Article) as is equivalent to the whole number resulting from the division by the resulting number of the votes polled by such party or group. The remainder of the votes, if any, after such division, shall be dealt with if necessary, under paragraph (9) of this Article*."

Accordingly, the political party that obtained the highest number of votes would initially be allocated one seat [the bonus seat] and the valid votes would thereafter be divided by the balance number of seats, thus determining the number of seats that should be apportioned among each political party based on the total number of votes obtained by such political party.

Procedure for appointment of National List Members of Parliament

The procedure that should be followed in determining the 29 'National List Members of Parliament' is set out in Article 99A, which reads as follows:

> "*After the one hundred and ninety six members referred to in Article 98 have been declared elected at a General Election of Members of Parliament, the Commissioner of Elections shall forthwith apportion the balance twenty nine seats among the recognized political parties and independent groups contesting such General Election in the same proportion as the proportion which the number of votes polled by each such party or group at such General Election bears to the total number of votes polled at such General Election and for the purposes of such apportionment, the provisions of paragraph (4), (5), (6) and (7) of Article 98 shall, mutatis mutandis, apply.*
>
> *Every recognized political party or independent group contesting a General Election shall submit to the Commissioner of Elections* ***within the nomination period*** *specified for such election* ***a list of persons*** *qualified to be elected as Members of Parliament,* ***from which it may nominate persons to fill the seats****, if any, which such party or group will be entitled to, on such apportionment. The Commissioner of Elections shall cause every list submitted to him under this Article to be published forthwith in the Gazette and in one Sinhala, Tamil and English newspaper upon the expiry of the nomination period.*
>
> *Where a recognized political party or independent group is entitled to a seat under the apportionment referred to above, the Commissioner of Elections shall by a notice, require the Secretary of such recognized political party or group leader of such independent group to* ***nominate within one week*** *of such notice, persons*

qualified to be elected as Members of Parliament (being persons whose names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election) to fill such seats and shall declare elected as Members of Parliament, the persons so nominated.

For the purposes of this Article the number of votes polled at a General Election shall be deemed to be the number of votes actually counted and shall not include any votes rejected as void."

The 15th Amendment to the Constitution saw the addition of a further paragraph to Article 99A in terms of which:

"*The Commissioner of Elections shall before issuing the aforesaid notice determine whether the number of members belonging to any community, ethnic or otherwise, elected to Parliament under Article 98 is commensurate with its national population ratio and request the Secretary of such recognised political party or group leader of such independent group in so nominating persons to be elected as Members of Parliament to ensure as far as practicable, that the representation of all communities is commensurate with its national population ratio.*"

Article 99A together with Section 64(5) of the Parliamentary Elections Act No. 1 of 1981, as amended, are the only provisions that relate to National List Members of Parliament.

Arguments of the Petitioner

That being the manner in which persons are chosen and subsequently nominated by a political party as National List Members of Parliament, and the Petitioner having been nominated by the 1st Respondent as one of its National List Members of Parliament, the learned President's Counsel for the Petitioner presented two principal arguments before us in support of his position that the expulsion of the Petitioner is invalid.

The first was that a person appointed to Parliament from the National List, is not subject to the provisions of Article 99(13)(a), and thus does not lose his seat in Parliament in terms

of Article 99(13)(a), even if such person ceases to be a member of the political party that nominated him to Parliament.

The second argument was that the principles of natural justice had not been adhered to prior to the expulsion of the Petitioner and that the Petitioner has been denied a fair hearing.

Interpretation of the Constitution

As the first argument requires me to consider the meaning that should be given to the words, 'nomination paper' in Article 99(13)(a), I shall at this stage briefly refer to the rules that I must be guided by in considering the said argument.

In **N.S. Bindra** – **Interpretation of Statutes** [13th edition, 2023], it has been stated as follows:

> "*In so far as the constitution is the source of validity for all statutory law; and it has distinct procedures both for its promulgation and amendment; the interpretation of the Constitution has not been seen akin to ordinary statutory interpretation. This distinction is well captured in the following exposition of the Rajastan High Court [State of Rajasthan v Shamlal [AIR 1960 Raj 256, pp 265-66] where the Court whilst expounding upon the meaning of Article 295 of the Constitution stated "Accustomed as we are in our day-to-day administration of justice to the interpretation of numerous statutes, we are apt to lose sight of the fact that the Constitution is unlike most of the statutes that we come across, has to be judged from somewhat different standards. The Constitution is the very framework of the body politics; its life and soul; it is the fountain-head of all its authority, the main spring of all its strength and power. The executive, the legislature, and the judiciary are all its creation, and derive their sustenance from it. It is unlike other statutes, which can be at any time altered, modified or repealed.* [Page 641-642]
>
> *"Both statutes and the Constitution in a way emanate from the same source, that is, the People, but there is difference in the mode of their enactment. While the Constitution is the direct mandate of the people themselves, the statute is an*

expression of the will of the legislature only, though the legislature is also the representative of the people. A Constitution is but a higher form of statutory law. The Constitution viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. A Constitution is the mechanism under which laws are to be made, and not merely an Act which declares what the law is to be. It is also well-settled that a Constitution must not be construed in a narrow or pedantic sense and the construction which is most beneficial to the widest possible amplitude of its power must be adopted". [Page 642]

Alles, J in **A.W.A.K Peiris and Another v K. D. D. Perera** [71 NLR 481], stated that:

"… it seems to me that in the task of constitutional interpretation, special considerations have to be applied. The Constitution is not an ordinary enactment of the legislature; in the words of Chief Justice Marshall in M'Culloch v. The State of Maryland [5 U S. Reports 4 Law Ed. 597 at 602], "we must never forget that it is a constitution we are expounding…" [page 488]

"Having regard to these general principles it will now be useful to consider the special considerations that have to be adopted in dealing with the task of constitutional interpretation.

Firstly in dealing with an enactment the constitutional validity of which is in issue, there is a presumption in favour of validity and the Court will not rule an enactment to be ultra vires unless the invalidity is clear beyond doubt." [page 489]

"Secondly, the Court must have regard to its special character as organic law and note that constitutional provisions are usually contained in terms of a general nature. Most constitutions deal with the framework of government. They do not contain provisions which are found in statutes passed in the normal exercise of legislative powers. ***Therefore when the question arises whether a term in the Constitution should be used in a narrow sense or given a broader interpretation, the Court should be inclined to use it in the latter sense unless there is something***

in the context or the rest of the Constitution which militates against such view.*"* [emphasis added; page 490]

"Thirdly, being organic law, cast in broad and general terms, it has always to be borne in mind that the framers of the Constitution intended to apply it to varying conditions brought about by later developments. ***This does not mean that the meaning of the legal expression changes but having regard to its generic form it is capable of being adapted to new situations****. The rule of generic interpretation is one that is commonly used not only to ordinary enactments but also to constitutional documents."* [emphasis added; page 491]

"Finally the Courts should give due effect to the declared intention of the legislature in seeking to interpret a document such as the Constitution. In the words of the present Chief Justice in Ranasinghe v. The Bribery Commissioners [(1962) 64 N.L.R. 449 at 450], "in examining an enactment with reference to any alleged Constitutional invalidity, a Court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible." [Page 492]

In **Vidanage v Pujith Jayasundara and Others** [SC (FR) Application No. 163/2019; SC minutes of 26th September 2022], seven Judges of this Court held that:

"It bears repeating that constitutional interpretation is different from statutory or common law interpretation because of the general and open-ended nature of the language used in Constitutions. Furthermore, the text of Constitutions is of an ancient origin and it concerns topics that are central to a country's basic political structures and values. These factors have helped develop a distinct set of constitutional interpretative techniques that require their judicious use in judicial interpretation. This distinction between constitutional interpretation and statutory interpretation was further highlighted by Chief Justice Dickson of the Canadian Supreme Court in [Hunter v Southam Inc., 1984 SCC OnLine Can SC 36; (1984) 2 SCR 145] in the following words:

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realties often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."

Having referred to the *sui generis* character of constitutional interpretation, this Court cited with approval the following passage of Dhavan J in **Moinuddin and Others v State of Uttar Pradesh** [AIR 1960 All 484]:

"*Firstly, if two constructions are possible the Court must adopt the one* ***which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or gives rise to practical inconvenience or make well-established provisions of existing law nugatory****. Secondly,* ***constitutional provisions are not to be interpreted and applied, by narrow technicalities but as embodying the working principles for practical government****. Thirdly, the provisions of a constitution are not to be regarded as mathematical formulae and that their significance not formal but vital.* ***Hence practical considerations rather than formal logic must govern the interpretation of those parts of a constitution which are obscure****. Fourthly, in choice between two alternative constructions, the one which* ***avoids a result unjust or injurious to the nation should be preferred****. Fifthly, before making its choice between two alternative meanings, the court must read the constitution as a whole, take into considerations its different parts and* ***try to harmonise them****. Sixthly, above all courts should proceed on the assumption that no conflict or repugnancy between different parts was intended by the framers of the constitution."* [emphasis added]

The first argument of the Petitioner

Thus, bearing in mind that in interpreting the provisions of the Constitution, the judicial approach should be dynamic rather than static, pragmatic and not pedantic, and elastic rather than rigid, I shall now proceed to consider the first argument of the learned President's Counsel for the Petitioner, strenuously presented before us, that a National List Member of Parliament is not subject to Article 99(13)(a) on the following grounds:

(a) Article 99(13)(a) is limited in application to those Members of Parliament whose names are contained in a "nomination paper" and since the names of National List Members of Parliament are not contained in a "nomination paper", Article 99(13)(a) has no application to National List Members of Parliament;

(b) In any event, the intention behind the election of National List Members of Parliament was to ensure that persons of eminence should be elected and as such, it was not intended to tie them down to party affiliations.

Nomination Period, Nomination Paper and the List

Referring to Article 99(3), the learned President's Counsel for the Petitioner correctly submitted that the names of those who are contesting under the District List are contained in a **nomination paper** that is filed by the relevant political party or independent group. He conceded that in terms of Article 99(13)(a), "*Where a Member of Parliament ceases, by resignation, expulsion or otherwise, to be a member of a recognized political party or independent group* ***on whose nomination paper*** *(hereinafter referred to as the "relevant nomination paper")* ***his name appeared at the time of his becoming such Member of Parliament****, his seat shall become vacant upon the expiration of a period of one month from the date of his ceasing to be such member:*"

It was submitted further that the names of those who are eligible to be elected in terms of Article 99A are not contained in a nomination paper but rather on a **list**, which list, according to Dr. De Silva, PC is not a nomination paper as contemplated by the Constitution and the Parliamentary Elections Act. It is also correct that the nomenclature used to refer to the District List and the National List in several Articles is different.

Referring to the use of the words '*nomination paper*' in Article 99(13)(a), Dr. De Silva, PC submitted further that the aforementioned consequence specified in Article 99(13)(a) is limited to those Members of Parliament whose names appear on a 'nomination paper' and that a person elected and/or appointed to Parliament from the list as set out in Article 99A is not subject to Article 99(13)(a) for the reason that their names are not on a 'nomination paper'. With there being no other provision relating to the expulsion of a Member of Parliament in the Constitution, it was his position that a National List Member of Parliament declared elected under Article 99A is not subject to the provisions of Article 99(13)(a), and that even though the political party that nominated such Member to Parliament may have expelled such Member, he or she shall continue to be a Member of Parliament.

In terms of Section 10(1)(a) of the Parliamentary Elections Act, in every Proclamation dissolving Parliament or in any Order requiring the holding of an election, the President shall specify, *"the period (hereinafter referred to as the "**nomination period**") during which **nomination papers** shall be received by the returning officer during normal office hours at his office;*". Section 10(2)(a) provides further that, "*The nomination period shall commence on the tenth day after the date of publication in the Gazette of the Proclamation or Order referred to in subsection (1) and expire at twelve noon on the seventeenth day after the date of publication of such Proclamation or Order …*".

Section 15(1) of the Parliamentary Elections Act provides that, "*Any recognized political party or any group of persons contesting as independent candidates (hereinafter referred to as an "independent group") may, for the purpose of an election of Members of Parliament for any electoral district, **submit one nomination paper** setting out the names, of such number of candidates as is equivalent to the number of Members to be elected for that electoral district, increased by three. Such nomination paper shall be substantially in Form A set out in the First Schedule to this Act*." I have already referred to the requirement to have one nomination paper in the light of Article 98(2) and (3).

Thus, the law provides that there be a **nomination period** during which the nomination paper for each electoral district must be filed.

I must at this stage refer to Clause 8 of the Fourteenth Amendment to the Constitution Bill relating to the balance 29 Members of Parliament, which reads as follows:

> "*After the one hundred and ninety six members referred to in Article 98 have been declared elected at a General Election of Members of Parliament, the Commissioner shall apportion the balance twenty nine seats among the recognized political parties and independent groups contesting such General Election in the same proportion as the proportion which the number of votes polled by each such party or group at such General Election bears to the total number of votes polled at such General Election and for the purposes of such apportionment, the provisions of paragraph (4), (5), (6) and (7) of Article 98 shall, mutatis mutandis, apply*.
>
> *Every recognized political party or independent group contesting a General Election shall submit to the Commissioner within the nomination period specified for such election a list of persons qualified to be elected as Members of Parliament, from which it may nominate persons to fill the seats, if any, which such party or group will be entitled to, on such apportionment*."

The above Bill had been referred to this Court by HE the President in terms of Article 122(1)(b) of the Constitution for a special determination as to whether the Bill or any of its provisions are inconsistent with the Constitution. The following passage from the Determination of this Court in the **Fourteenth Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1988) Vol. IV, 9 at pages 12-13] is relevant to the discussion of the issue before me:

> "*While no objection was raised in regard to the election of 196 members, it was submitted that the balance 29 seats were to be apportioned by the Commissioner of Elections among the recognized political parties and independent groups contesting the general election and ultimately nominated by the secretaries of the said two groups from the lists referred to under this clause or the nomination papers submitted under Clause 7(3). In short, the contention was that apportionment by the Commissioner and the nomination by the Secretary of the recognized political party*

or group leader runs counter to the principle of elections by the electors enshrined in Article 3 read with Articles 4(a) and 4(e) of the Constitution, in that it is an erosion of the franchise, which is an inalienable aspect of the sovereignty of the people.

However, learned Solicitor General emphasized that the apportionment is based on "… the same proportion as the proportion which the number of votes polled by each such party or group at such General Election bears with the total number of votes polled at such General Election…" [Article 99 (A)].

Learned Solicitor General urged that these were the operative words in Article 99 (A) and that they show that the apportionment is related to the exercise of franchise by the electors at the General Election. He accordingly urged that there is no erosion of the elective principle.

We have considered the respective submissions made in regard to this matter and our determination is that Clauses 3 and 8 of the Bill are not inconsistent with the provisions of Article 3 read with Article 4(a) and 4(e) of the Constitution and therefore do not require the approval of the People at a Referendum.

Mr. Samarasekera PC brought to our notice that certain matters in Clause 8 of the Bill need clarification. While the Bill provides, "the Commissioner of Elections shall cause the lists submitted to him under this Article to be published in the Gazette" there is no reference to the time of the publication of the Gazette, as to when this is to be published in the Gazette and that electors may not have adequate notice of the names on the list at the time of the poll.

Learned Solicitor General agreed that this publication could be done in the same manner and at the same time as in the case of nomination for the Electoral Districts as provided for in the Parliamentary Elections Act No. 1 of 1981." [emphasis added]

The above passage gives context to two matters. The first is that the words, "*The Commissioner of Elections shall cause every list submitted to him under this Article to be* ***published forthwith in the Gazette*** *and in one Sinhala, Tamil and English newspaper upon the expiry of the nomination period*" was added at the end of the second paragraph of

Article 99A at the Committee Stage of Parliament, thus ensuring that the National List is published in the Gazette during the nomination period and affording the voter the opportunity of knowing the names of those nominated by the party on the National List prior to exercising his or her franchise.

The second matter that the above Determination gives context to is that even though those persons on the National List are not directly elected by the voter, those on the National List become eligible to enter Parliament only as a result of the exercise by a voter of his or her franchise in favour of the political party or independent group on whose list such persons' name appeared. In the Determination of this Court on the **Provincial Councils Election (Special Provisions) Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII, 135 at page 141] it was observed that, "*the franchise is not restricted to merely voting at elections; it includes standing for elections, and, indeed, the entire election process from nomination to poll."*

Thus, it is clear that the National List of all political parties contesting a Parliamentary Election containing the names of those who are eligible to be elected in terms of Article 99A are also submitted during the nomination period, and are forthwith published in the Gazette. While it is correct to state that the nomenclature used to refer to the two lists are different, it is clear that the object that is sought to be achieved by both lists are one and the same, that being to **nominate during the nomination period** candidates or persons who are eligible to be elected to Parliament from a particular political party or independent group and thereby place before the electorate the names of the nominated candidates or persons to enable the electorate to exercise their franchise. Thus, the District List as well as the National List must stand on an equal footing.

The above object is clearly reflected in the Determination of this Court in the **Fourteenth Amendment to the Constitution Bill** [supra] and is borne out by:

(a) The third paragraph of Article 99A in terms of which, "*the Commissioner of Elections shall by a notice, require the secretary of such recognized political party or group leader of such independent group to **nominate** within one week of such notice, persons qualified to be elected as Members of Parliament (being persons whose*

names are included in the list submitted to the Commissioner of Elections under this Article or in any nomination paper submitted in respect of any electoral district by such party or group at that election) to"; and

(b) The second paragraph of Article 99A which provides that the party or group "*may **nominate persons** to fill the seats, if any, which such party or group will be entitled to, on such apportionment*".

The fact that the Petitioner has been **nominated** by the 1st Respondent has been admitted by the Petitioner in paragraph 5 of his affidavit where he states that, "*I later joined Samagi Jana Balawegaya, the 1st Respondent party and was **nominated** on the National List at the Parliamentary Elections in 2020*", and in paragraph 7 of his affidavit where the Petitioner states that, "*I am a Member of Parliament **nominated** from the National List in recognition of the colossal effort and contribution to the Party at the said elections.*"

Given the legislative history referred by me at the outset, it is clear that there has been a distinct shift from the direct election of an individual prior to 1978 to the party-based election of persons whose names are disclosed, after 1978. Prior to the 14th Amendment, there existed only one nomination paper for an electoral district from which all members were to be elected to that District. With the introduction of the 14th Amendment, a greater degree of discretion has been bestowed on a party in selecting the National List Members of Parliament. Thus, the legislative history demonstrates a shift towards a closer relationship between the elector and a political party, rather than a move towards individuals. In this context, the legislative history militates against giving Members of Parliament, who are elected without any preference being cast for them by electors, greater independence *vis-à-vis* their political party, than those who are elected from a political party through the preference votes of electors.

<u>Different categories of Members</u>

Not only is the granting of greater independence from their parties to National List Members of Parliament inconsistent with the legislative history, but such interpretation would create a situation where different categories of Members of Parliament would be

created. As submitted by Dr. Jayampathy Wickremaratne, the learned President's Counsel for the 2nd Respondent, this would lead to an absurdity.

Assuming the argument of the learned President's Counsel for the Petitioner is correct, Article 99(13)(a) can become applicable in five different ways to create five distinct categories of Parliamentarians.

The first category are those Members of Parliament whose names appear on the District List. When such Members of Parliament are expelled from the relevant political party on whose nomination paper their names appeared, Article 99(13)(a) would be triggered.

The second category are those Members of Parliament who were nominated as National List Members of Parliament, with their names having appeared on the National List submitted in terms of Article 99A. According to the Petitioner, these Members of Parliament, of whom the Petitioner is one, shall be immune from the provisions of Article 99(13)(a).

The third category of Members of Parliament are those who were nominated as National List Members of Parliament, but with their names having appeared on the District List, or in other words, unsuccessful candidates. According to the Petitioner's argument, these Members are not immune from the provisions of Article 99(13)(a) for the reason that their names appeared on a 'nomination paper'.

In terms of Article 99(13)(b), "*Where the seat of a Member of Parliament becomes vacant as provided in Article 66 (other than paragraph (g) of that Article) or by virtue of the preceding provisions of this paragraph the candidate from the relevant recognised political party or independent group who has secured the next highest number of preferences shall be declared elected to fill such vacancy.*" Thus, once a vacancy arises in the District List, the person who has obtained the next highest number of preferential votes shall fill such vacancy and such person shall be declared elected. The manner of filling vacancies arising in terms of Article 99(13)(b) is further elaborated in Section 64(1), (3) and (4) of the Parliamentary Elections Act. Accordingly, where all the candidates whose names appear in the nomination paper submitted by a recognized political party

in respect of an electoral district have been exhausted by election or otherwise or where none of the candidates whose names remain on such a nomination paper have secured any preferences, and thereafter a vacancy occurs, the Secretary of the said political party shall nominate a member of such party to fill the vacancy.

Thus, the fourth category of Members are those whose names did not appear on the District List submitted during the nomination period but have been nominated to fill a vacancy that has arisen on the District List upon the exhaustion of the names in the nomination paper. If the argument advanced on behalf of the Petitioner is accepted, the provisions of Article 99(13)(a) shall not apply to this category, as well, as their names did not appear in a nomination paper.

The fifth category are those Members who are nominated in terms of Section 64(5) to fill a vacancy that arises upon the resignation, expulsion or otherwise of a Member of Parliament nominated in terms of Article 99A. These vacancies could be filled by a person whose name is on the District List, the National List or by a complete outsider. On the Petitioner's argument, only if the replacement is made from the District List would Article 99(13)(a) apply. Other replacements will be immune from the provisions of Article 99(13)(a).

The absurdity of the argument of the Petitioner is clearly evident when it comes to the aforementioned, (a) third category, since a further distinction is being drawn between National List Members of Parliament, depending as to from which list they entered Parliament, (b) fourth category which seeks to draw a distinction between those who are elected to fill a vacancy on the District List, and (c) fifth category which too seeks to draw a distinction when filling a vacancy in terms of Section 64(5).

It certainly could not have been the intention of Parliament when it introduced Article 99A to have isolated those who are nominated to Parliament from the National List from the applicability of Article 99(13)(a) and to create these different categories of Members of Parliament. Whether a person is elected as a Member of Parliament on the District List as part of the 196 members or on the National List as part of the 29 members, their election is a reflection of the franchise of the People. Thus, conceptually, once elected,

there cannot be any difference between the Members of Parliament, and all Members of Parliament shall be entitled to the same privileges as much as they shall also be subject to the same disqualifications.

I must emphasise that whatever the category a Member of Parliament may belong to at the time of his election, once elected to Parliament, all Members of Parliament are equal and are subject to the equal protection of the law. Although stated in the context of recruitment to the Public Service, the following passage from the judgment of Chief Justice Parinda Ranasinghe in **Ramuppillai v Festus Perera, Minister of Public Administration, Provincial Councils and Home Affairs and Others** [(1991) 1 Sri LR 11 at page 26] captures the essence of the equality that must be maintained among all Members of Parliament:

> "*A consideration of the facts and circumstances of the two decisions of this Court, referred to above, and the principles laid down in the Indian cases, referred to therein, and also in the case of State of Kerala vs. Thomas (AIR 1976 SC 490, 507) it is clear: that the State is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Service are to be made: that for such purpose the State could take into consideration the over-all needs and matters of national interest and policy: that once such selections are made those taken in from such sources are integrated into one common class: that thereafter such appointees are "clubbed" together into a common stream of service and cannot thereafter be treated differently for purposes of promotion by referring to the consideration that they were recruited from different sources:* ***that their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequal once again****: that there should be no further classification amongst them* …" [emphasis added]

Persons of eminence

The learned President's Counsel for the Petitioner submitted that in any event, the intention behind Article 99A was to enable persons of eminence and repute, who may not want to contest an election, to be represented in Parliament and that such persons,

once declared elected, were expected to express their views and contribute to Parliament in the manner they saw fit without being constrained by the parochial considerations of party politics. He submitted further that Article 99A was an attempt at mimicking the lofty nature of contributions expected from an upper chamber in a bicameral system.

I have already stated that whether it be through the District List or the National List, the entry of every person to Parliament as a Member is a reflection of the franchise of the People, which franchise has been expressed in favour of the political party first and thereafter to the candidate, and for that reason, discipline within the party is important. Thus, eminence and repute does not and should not isolate a member from the provisions of Article 99(13)(a).

Having said that, I must refer to the third paragraph of Article 99A, in terms of which, once the Commissioner of Elections calls upon the secretary of a political party to nominate persons qualified to be elected as Members of Parliament, those "*persons whose names are included in the list submitted to the Commissioner of Elections under this Article or* ***in any nomination paper submitted in respect of any electoral district*** *by such party at that election"* are eligible to be nominated. Thus, the nomination from the National List is not limited to the category of eminent persons referred to by the learned President's Counsel for the Petitioner but even extends to those persons whose names appeared on the District List although they were unsuccessful at the election.

There is one final matter that I must advert to. The learned President's Counsel for the Petitioner submitted that even though Article 99(13)(b) specifically refers to the seat of a Member of Parliament becoming vacant by virtue of Article 99(13)(a), Section 64(5) of the Parliamentary Elections Act does not refer to Article 99(13)(a), and therefore the legislature has not contemplated those Members nominated through the National List losing their seat as a result of an expulsion. While in filling a vacancy under Section 64(5), the Secretary is not limited to nominating a person whose name did not appear on the National List submitted under Article 99A, I must state that, whether specifically stated or otherwise, with all Members being equally placed, the provisions of Article 66 as well as Article 99(13)(a) must apply with equal force to all Members of Parliament.

In the aforesaid circumstances, I am of the following view:

(a) What matters is not the nomenclature attached to the document by which the party nominates its candidates or persons eligible to be elected on the District List and the National List, respectively;

(b) The phrase "nomination paper" employed in Article 99(13)(a) cannot be viewed as a defined term of art, but rather a functional description alluding the nomination of a person by a political party. This interpretation appears to me to be the only sensible construction that could be arrived at;

(c) The determining factor shall be the object sought to be achieved by each of the lists;

(d) Eminence and repute do not give any Member of Parliament the right to act in breach of party discipline; and

(e) Once elected, all Members of Parliament shall be subject to the provisions of Article 99(13)(a).

The above view accords with the principles of Constitutional interpretation referred to by me earlier in that the term, "nomination paper" is used in a broader sense rather than a narrow sense [A.W.A.K Peiris and Another v K. D. D. Perera]; it ensures smooth and harmonious working of the Constitution and eschews absurdity and practical inconvenience [Moinuddin and Others v State of Uttar Pradesh]; and, it avoids interpretation with recourse to narrow technicalities and favours practical considerations rather than formal logic [Moinuddin and Others v State of Uttar Pradesh].

I am therefore not in agreement with the first submission of the learned President's Counsel for the Petitioner.

A fair hearing and natural justice

This brings me to the second argument of the learned President's Counsel for the Petitioner, that being the Petitioner has not been afforded a fair hearing by the 1st Respondent and/or its Working Committee and/or the Disciplinary Committee.

I must at this point state that Paragraph 13.3(i) of the constitution P2 clearly demonstrate that within the 1st Respondent almost all decisions are taken by its Working Committee. Other than the limited power vested in the 3rd Respondent to suspend the membership of a member of the 1st Respondent in terms of Paragraph 3.13 to which I have already referred, disciplinary control of the members of the 1st Respondent is vested by P2 exclusively in its Working Committee with the Working Committee having the power to appoint a Disciplinary Committee to consider disciplinary issues against its members. Concomitant with its power to take decisions on behalf of the 1st Respondent [Paragraph 13.3(i)] is the power conferred on the Working Committee to take disciplinary action against members of the 1st Respondent [Paragraph 13.3(iii)], decide on the course of action that must be taken once a member has been suspended by the 3rd Respondent [Paragraph 3.13], and appoint a Disciplinary Committee [Paragraph 3.12] to consider such matters.

The above provisions act as procedural safeguards to protect the rights of the members of the 1st Respondent and ensure that no single person can take any arbitrary or capricious decision that affects their rights as members. Thus, except the limited power conferred on the 3rd Respondent to suspend the membership of a member, full disciplinary control over a member is vested in and must be exercised by the Working Committee of the 1st Respondent.

Although it was submitted by Mr. Sumanthiran, PC that crossing the aisle would by itself justify expulsion, it has been accepted by our Courts time and again that a fair hearing must be afforded to a member prior to a decision being taken to expel such person from a political party or independent group. As Mark Fernando, J observed in **Dissanayake** [supra; at page 182], "*a decision made by an unbiased tribunal, after duly considering the views of those likely to be affected by it, is not only* ***more likely to be correct, but will be***

more acceptable and of better quality. Fairness to the individual facilitates a better decision by the tribunal*. The duty to give a fair hearing is as much a canon of good administration as of good legal or judicial procedure* ...". [emphasis added]

It is important that individuals are provided with the opportunity to participate in the decision making process prior to decisions affecting their rights being taken by public authorities and/or authorities vested with statutory power. This would promote the quality, accuracy and rationality of such process, and enhance the legitimacy thereof while at the same time improving the quality of decisions made by public authorities. As stated in **De Smith's Judicial Review** [Eighth edition, 2018] "*Procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision and so ensure the decision's integrity*" [page 341] and *"assist in achieving a sense that justice has both been done and seen to be done"* [page 342].

That procedural fairness is not frozen at any moment of time and is a '*constantly evolving concept*' [per Lond Bingham in Regina v H and Others [(2004) 2 A.C. 134] has been emphasised in **De Smith's Judicial Review** [supra; page 407] where the authors have stated as follows:

> "*The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject matter. The requirement necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully-fledged hearing with most of the characteristics of a judicial trial at the other extreme. What is required in a particular case is incapable of definition in abstract terms. As Lord Bridge has put it [vide Lloyd v McMohan [(1987) A. C. 625 at 702]]:*
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> > "*the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates*."

As Dheeraratne, J stated in **Tilak Karunaratne v Mrs. Sirimavo Bandaranaike and Others** [supra; at page 101], "*It is not disputed that this court's jurisdiction includes, an investigation into the requisite competence of the expelling authority; an investigation as to whether the expelling authority followed the procedure, if any, which was mandatory in nature.*"

In **Jayatillake and Another v Kaleel and Others** [supra; at page 394], this Court stated that, "……..*there are certain procedural safeguards which are recognised for ensuring fair hearings e.g. the accused should be supplied with a fair statement of the charges (Stevenson v United Road Transport Union), he should be informed of the exact nature of the charge (Labouchere v Earl of Wharncliffe), he should be given an opportunity of defending or palliating his conduct (Fisher v Keane). The opportunity should be fair, adequate and sufficient. Thus the right to be heard will be illusory unless there is time and opportunity for the case to be met - Paul Jackson 'Natural Justice' p. 63. An Oral hearing is another valuable safeguard which ought to be provided unless it may be dispensed with having regard to the subject-matter, the rights involved and the nature of the inquiry.*

It was held in **Tissa Attanayake v United National Party and Others** [(2015)] 1 Sri LR 319] that:

> "*Admittedly, the opportunity of a fair hearing may be limited in the circumstances. For instance, the time for responding to a charge sheet or making submissions may be reduced. Yet, the person is entitled to be told what he is charged with and afforded some opportunity of explaining himself. The Petitioner is a Member of Parliament and expulsion could lead to lose his seat. The very gravity of the matter required that at least a limited hearing ought to be given to the Petitioner."* [page 331]
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> *"… the observance of natural justice depicted in the maxim Audi Alteram Partem provides the foundation for the manner and form in which Administrative Law is applied. Whether or not the other party has reasons or defences to submit is not the issue. The basic issue is to provide the other party an opportunity to explain himself*." [page 334]

Having considered the above cases and the requirement to follow principles of natural justice, Surasena, J in **Zainul Abdeen Nazeer Ahamed v The Sri Lanka Muslim Congress and Others** [supra] stated as follows:

> "*The main ground on which the Petitioner has sought to canvass his expulsion from the party is the fact that the SLMC did not conduct a formal inquiry according to the law. For the reasons I have already set out above, I have held that the SLMC had not breached the Rules of Natural Justice in the instant case as it had granted ample opportunities for the Petitioner in the instant case to tender his written explanation as to why he had violated the party decision taken at the High Command meeting held on 21st November 2021. I have also held that the absence of a formal inquiry has not vitiated the decision of the SLMC to expel the Petitioner under the circumstances of the instant case. Therefore, the Petitioner is not entitled to succeed on this ground*."

While agreeing with the above view, Samayawardhena, J went on to state that, "*In my view, if he (the petitioner) did not show cause in response to P9, there is no necessity to fix the matter for the formal inquiry. The Petitioner cannot now be heard to say that the failure to hold a formal inquiry is a violation of the rules of natural justice. The rules of natural justice are not written in stone; whether or not these rules have been violated must be determined based on the unique facts and circumstances of each individual case*."

Has the Petitioner been afforded a fair hearing?

That being the legal position and being of the view that the Petitioner was entitled to be heard prior to a decision being taken, I shall first deal with the allegation that the Petitioner was not afforded a fair hearing by the Working Committee and/or the Disciplinary Committee prior to being expelled. This allegation is furthest from the truth. The mechanism provided in P2 does not require a hearing to be afforded by the Working Committee itself but instead provides for a hearing to be afforded by a Disciplinary Committee that is appointed by the Working Committee. To that extent, the grievance of the Petitioner is unfounded.

I have already referred to the correspondence between the 1st – 3rd Respondents on the one hand and the Petitioner on the other, commencing with P4(a) and culminating in P9. The Petitioner was invited by P4(a) at the first available opportunity to provide an explanation and/or show cause relating to his suspension. Whether the Petitioner submitted an explanation is in doubt. Having stayed its hand for a period of about five months, the Petitioner was put on notice by 1R9 that a Disciplinary Committee has been appointed to conduct a formal disciplinary inquiry. The Disciplinary Committee thereafter invited the Petitioner by 1R10a to present himself for an inquiry on 24th January 2023 and informed him that he is entitled to legal representation. A copy of the charge sheet together with the list of witnesses and documents were served on the Petitioner together with 1R10. Thus, the Petitioner was fully aware of the scope and ambit of the disciplinary inquiry and of the material that was to be presented at the said inquiry. Even though the Petitioner did not respond to 1R10, the Disciplinary Committee on its own volition postponed the inquiry to 24th February 2023 and informed him of such fact by P4(c). The Petitioner responded to the Disciplinary Committee for the first time with P5(a) and sought an adjournment on the basis that he has to attend a previously scheduled meeting at the Presidential Secretariat.

The Disciplinary Committee accepted the excuse offered by the Petitioner and afforded the Petitioner a further opportunity to participate at the formal inquiry and even went to the extent of giving the Petitioner a choice of two dates to choose from. It is then that the Petitioner challenged the authority of the Disciplinary Committee by P5(c), for reasons which had not been disclosed. The Petitioner thereafter clearly displayed his intention not to participate before the Disciplinary Committee by filing action in the District Court of Nugegoda.

In these circumstances, it is clear to me that the Disciplinary Committee has acted with patience and has afforded the Petitioner every possible opportunity of providing his side of the story and of being heard by an independent disciplinary body. The Petitioner could not have asked for more opportunities to present his case, and cannot blame others for his failure to attend the inquiry. Thus, the Petitioner cannot be heard to state that he was not afforded an opportunity of presenting an explanation for his actions.

The findings of the Disciplinary Committee, which included its findings that the Petitioner is guilty of all charges, have thereafter been placed before the Working Committee. It is the Working Committee which had arrived at the decision to expel the Petitioner after considering the said findings. I therefore see no merit in the argument of the learned President's Counsel for the Petitioner that the Petitioner was not afforded a fair hearing prior to the Working Committee taking a decision on 18th July 2023.

There is one other matter that I must advert to. The learned President's Counsel for the Petitioner submitted that it is necessary to place before Court the minutes of the meeting which confirmed the decision taken on 18th July 2023 to expel the Petitioner, once such decision is challenged. The requirement to tender minutes of meetings was considered in **Ameer Ali and Others v Sri Lanka Muslim Congress and Others** [supra; at page 198] where it was held that, *"Since the **final decision to expel the Petitioners** is said to have been made at this meeting **it was essential for the Respondents to have produced the minutes of the meeting that** indicate the persons who were present and the manner in which the serious issues raised by the Petitioners were considered before a final decision was made."* [emphasis added]. A similar view was expressed in **Safiul Muthunabeen Mohamed Muszhaaraff v S. Suairdeen and Others** [supra].

In the above two cases, this Court was referring to the minutes of the meeting that took the decision to expel the member concerned. In this case, not only have the minutes of the meeting that took the decision to expel the Petitioner been tendered but those minutes confirm that disciplinary proceedings were initiated by the Working Committee by appointing the Disciplinary Committee, and that the final decision to expel the Petitioner was taken by the Working Committee. While there is no requirement to tender the minutes by which the above decision was confirmed, in the above circumstances, I am satisfied that the Working Committee (a) met on 18th July 2023, (b) was apprised of the findings of the Disciplinary Committee, and (c) arrived at the decision to expel the Petitioner only after having considered the said findings.

Conclusion

In the above circumstances, I am of the view that the expulsion of the Petitioner from the 1st Respondent is valid. This application is accordingly dismissed, without costs.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, PC, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT