PREMALAL PERERA

v.

WEERASURIYA AND OTHERS

SUPREME COURT

RANASINGHE, J. ATUKORALE, J. AND L. H. DE ALWIS, J.

S.C. APPLICATION No. 18 OF 1985.

MAY 16, 30 and 31, 1985.

Fundamental Rights of freedom of thought, conscience and religion, and of equality – Articles 10, 12 (1) and 14 (1) (e) and 4 (d) of the Constitution – Circular to deduct contribution from salary to the National Security Fund in the absence of objection – Can it amount to infringement of Fundamental Rights ?

The petitioner an employee of the Government Railway Department complained that a circular authorising the deduction of a contribution from him to the National Security Fund in the absence of objection by him infringes (1) his Fundamental Right of freedom of thought, conscience and freedom (Article 10, 14 (1) (e) of the Constitution) because the money is to be used to buy arms and weapons which will be employed in the destruction of human life and violence which is repugnant to the tenets of the Buddhist faith and belief which he professes and by requiring express objection forces him to make public his opinions with a view to singling him out for and exposing him to harassment and (2) his right to equality (Article 12 (1) of the Constitution) because employees of the Health Department for instance have not been called upon to contribute to the National Security Fund.

Held –

(1) The Fundamental Right of freedom of thought, conscience and religion is by our Constitution cast in absolute terms and it will have to give way only to any law, written or unwritten, which was in force at the time the Constitution came into operation but only to the extent of any inconsistency as between them.

(2) Beliefs rooted in religion are protected. A religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected. Unless the claim is bizarre and clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived the commands of his particular faith. The courts are not the arbiters of scriptural interpretation and should not undertake to dissect religious beliefs.

(3) A regulation neutral on the face of it may in its application nonetheless offend the constitutional requirement if it unduly burdens the full and free exercise of a right.

(4) The necessity to express objection openly to the deduction does not and cannot amount to a violation of the precept of petitioner's religion as asserted in the petition because no penal sanctions or disabilities are prescribed for objectors to the deduction and there was no interference in any way with the full and free practice by the petitioner of his religion.

(5) The material before Court was insufficient to decide whether the right to equality has been violated by the fact that Health Department employees were not called upon to make the contribution to the National Security Fund.

Cases referred to :

(1) *Reynolds v. U.S., 98 U.S. 145*

(2) *West Virginia State Board of Education v. Barnette 319 U.S. 624.*

(3) *Braunfeld v. Brown 366 U.S. 599.*

(4) *Sherbert v. Verner 374 U.S. 398.*

(5) *Wisconsin v. Yoder 406 U.S. 205.*

(6) *Thomas v. Review Board of the Indiana Employment Security Division 450 U.S. 707.*

(7) *Gillette v. United States 401 U.S. 437.*

(8) *United States v. Seeger 380 U.S. 163.*

(9) *Welsh v. United States 398 U.S. 333.*

(10) *Gallagher's case 366 U.S. 517.*

(11) *Elmore Perera v. Montague Jayawickreme, Minister of Public Administration et al [1985] 1 SLR 285.*

APPLICATION complaining of infringement of Fundamental Rights.

R. K. W. Goonesekera with *Desmond Fernando, J. Yoosoof* and *N. Punchihewa* for the petitioner.

S. Maharoof, Senior State Counsel for the respondents.

Cur. adv. vult.

July 10, 1985.

RANASINGHE, J.

On 17.12.84 the 1st respondent, who is the General Manager, Railway Department, issued the Circular, which has been marked IR2 in these proceedings, to the several officers of the Department, set out therein, directing them to deduct, from those employees of the Department, who signify their consent, in the specified form, to a deduction of a day's salary (or any larger sum) from their salary for the month of January 1985 as a contribution from them towards, what was then called, the National Security Fund. Thereafter, on 31.12.84, the 1st respondent issued the further Circular, P2, in regard to the self-same matter. P2 alters the basis upon which the deduction, referred to in the earlier Circular 1R2, is to be made. According to P2 such deduction is to be made from all those employed in the Railway Department, except those who inform the Accounts Section that they do not consent to the said deduction (මෙම අයකරගැනීම් අකමැති වන).P2 also sets out the reasons why such alteration in procedure is being made, viz : the need to make the contribution to the said Fund without delay within the month of January 1985 itself ; the lack of time within which to make such deduction after obtaining the consent, on account of the end-of-the-year transfers.

The petitioner, who joined the Ceylon Government Railway on or about 8.9 1977 as an unskilled worker, is presently attached to the Chief Mechanical Engineer's sub-department workshop at Ratmalana ; but has, however, been under interdiction from 5.7.80. The petitioner has made this application to this Court on 28.12.85, under the provisions of Article 126 (2) of the Constitution praying for declarations that the aforesaid Circular P2 violates the Fundamental Rights guaranteed to the petitioner by the provisions of Articles 10 and/or 12 (1) of the Constitution and that the deduction made by the 1st respondent in pursuance of the said Circular, P2, of a sum of Rs. 19 from his salary for the month of January 1985 constitutes an infringement of the said Fundamental Rights : Orders directing the 1st respondent to refund the said sum of Rs. 19 so deducted, and not to make any further deductions from the petitioner's salary.

The petitioner states : that, when he was paid his salary for the month of January 1985 on 31.1.85, he found that a sum of Rs. 19 had been deducted : that, upon his informing the officer, who paid him his salary, that he had not expressed his consent to any such deduction, he was informed of the Circular P2 which he then found exhibited on the notice-board : that he had no intimation of the Circular P2 before the said deduction was made from his salary for the month of January 1985 : that, in any event, there was no obligation cast upon him to communicate his objection to any such deduction : that he verily believes that the monies of the said National Security Fund are to be utilized, inter alia, for the purchase of arms and military equipment to be used for the destruction of human life, including those of the members of the minority Tamil Community who are protesting and agitating against the atrocities committed, with the approval of the Government, by the armed forces of the Government : that the petitioner, being a Buddhist, is against the taking of human life and the use of violence : that the use of violence, and of military operations, by the Government is in direct violation of the teachings and practice of Buddhism : that such deductions have not been made from the salaries of all public officers, for instance, the members of the Department of Health : that the armed services have also been used, by the Government, for the suppression of the protests of the University students and of anti-government literature, for the disruption of peaceful demonstrations, and against those who lost their employment as a result of the strike in July 1983 : that the procedure set out in P2 is a means of picking out those whose views are in conflict with the views of the party now in power with a view to subjecting them to political harassment and victimization : the petitioner, therefore, pleads that the said Circular, P2, and the consequent deduction of the sum of Rs. 19 from his salary for the month of January 1985, constitute an infringement of not only the Fundamental Right of the freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief of his choice guaranteed by Article 10 of the Constitution, but also the Fundamental Right of equality before the law and of equal protection of the law guaranteed by Article 12 (1) of the Constitution.

The 1st respondent accepts both the issuance of the two Circulars 1R2 and P2, and also the deduction of the said sum of Rs. 19 from the salary due to the petitioner for the month of January '85 ; and further states : that the said deduction was made in the belief that the

petitioner has consented : that the 1st respondent became aware of the petitioner's objection only after the institution of these proceedings : that, in view of the fact that the petitioner states he objects to such deduction, he, the 1st respondent, undertakes to refund the said sum of Rs. 19 to the petitioner : the said Circular P2 was not issued with any intention of singling out any employee of the department for harassment or victimization. The 1st respondent denies that P2 was either intended to or does violate any Fundamental Right of the petitioner.

The 3rd respondent, who is the Secretary of the Ministry of National Security, has, in his affidavit, set out how the contributions made to the National Security Fund were, and are, to be utilised.

The contents of the Circular P2 themselves, and the affidavit of the 1st respondent make it clear that the deduction referred to in P2 is to be made only from the salary for the month of January 1985, and that no further deductions were to be made. The operative period of P2 was confined to the month of January 1985 ; and it has ceased to be in operation thereafter.

Learned Counsel appearing for the petitioner submitted that the petitioner makes no complaint of a violation of any fundamental right of his in respect of the Circular 1R2. The petitioner's position is that, of the two circulars, it is only P2 that he alleges constitutes a violation of his fundamental rights, viz : those Fundamental Rights referred to in his petition, 1R2, though dealing with the self-same subject matter the petitioner submits, gives no room for him to complain of a violation of any fundamental right guaranteed to him by the Constitution. Learned Counsel further submitted : that it is the requirement, set out in P2, of an express objection in writing by those who do not want a deduction to be made, which distinguishes P2 from 1R2 and which makes it objectionable : that when, in order to prevent the deduction, he submits a written objection, he thereby makes public his religious beliefs, and also matters connected with his conscience and thoughts which he is under no obligation to disclose to anyone : that the said requirment compels him to do something which he would not otherwise have done nor could have been required to do concerning a matter in respect of which he had complete freedom to think and believe in : that the imposition of such a requirement operates to compel him to make a disclosure in regard to a matter, which he was free to keep to himself ; and thereby expose himself to penalties and to harassment.

Learned Counsel for the petitioner relied on several American decisions to support his contention that the said Circular P2 amounts to an infringement of the freedom of thought, conscience and religion the petitioner is entited to.

Article 10 of our Constitution guarantees to every person the "Freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief of his choice" ; and Article 14 (1) (e) "assures to every citizen the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching".

The First Amendment to the Constitution of the United States provides : "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ; . . . ."

In India Article 25 of the Constitution guarantees to all persons the "freedom of conscience and the right freely to profess, practise and propagate religion".

In India, the freedom so assured to every person is, however, made subject to the limitations set out in the same article in the Constitution itself. In America, the freedom of religion is declared in absolute terms and it has been left to the Courts to evolve exceptions to such freedom. With us in Sri Lanka the freedom of religion spelt out in Article 10 as set out above, has also been cast in absolute terms. This Article, along with Article 11, are the only rights, from and out of all the Fundamental Rights declared and recognized by Chapter III of the Constitution, which are not made subject to any restrictions. Whilst the exercise and operation of the rights set out in Articles 12, 13 and 14 are all made subject to the respective restrictions set out in Article 15, no such restriction can, however, be imposed in Sri Lanka upon the exercise and operation of the freedom of thought, conscience and religion so declared and recognized by the Constitution. In view, however, of the provisions of Article 16 (1) of the Constitution any existing written or unwritten law, which conflicts with any of the provisions of Chapter III – which includes the aforesaid Aricle 10 – will prevail over the provisions of the said Chapter.

The content and reach of the Fundamental Right of freedom of thought, conscience and religion, embodied in our *Constitution does not appear to have been considered by this Court earlier. In determining the nature and the scope of the said constitutional right,* a

consideration of the decisions handed down by the American and Indian Supreme Courts in respect of the corresponding rights embodied in the American and Indian Constitutions would seem to be both relevant and helpful.

In the case of *Reynolds v. U. S.* (1) which was decided by the Supreme Court of the United States, Reynolds, who was charged in the 1870s, while Utah was still a territory, in a territorial court with having committed bigamy, testified in his defence that Mormon doctrine, to which he adhered, did not merely permit plural marriages but required it, and that, if he failed or refused to practice polygamy "when circumstances would admit", he would be punished by "damnation in the life to come". Reynolds was convicted by the trial court ; and the conviction was affirmed by the Supreme Court. Chief Justice Waite, who delivered the opinion of the Court, did, in the course of the judgment, whilst laying down the now well-known "belief-action" distinction, pose the question whether those who make polygamy a part of their religion are excepted from the operation of the law prohibiting bigamy ; and proceeded to deal with it in this way :

> "If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished while those who do, must be acquitted and go free. This would be introducing a new element to criminal law. Laws are made for the government, of actions, and while they cannot interfere with the mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice ? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice ? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief ? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances".

In June 1943, six months after the attack on Pearl Harbour and the entry of the United States into World War II, the Supreme Court of the United States delivered the judgment in the case of *West Virginia State Board of Education v. Barnette*, (2) which is one of that group of cases which have since become famous as the "flag-salute" cases. What came up for consideration in that case was an application made on behalf of a Jehovah's Witness to restrain the enforcement of a resolution of the Board of Education of West Virginia that all teachers and pupils in the public schools established by the State of Virginia "shall be required to participate in the salute honoring the Nation represented by the Flag : provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly" The salute was to be accompanied by the making of also a pledge of allegiance. Failure to conform was to be dealt with by expulsion ; and readmission was denied until compliance. The expelled child was considered to be "unlawfully absent"and was liable to be proceeded against as a "delinquent", which meant that the parents or guardians of such child were liable to prosecution, and, if convicted, were subject to a fine not exceeding $ 50 and a term of imprisonment not exceeding thirty days. Justice Jackson, who delivered the opinion of the Court, stated : that the real issue in this matter was not whether people with religious scruples had to be excused from the flag-salute, but whether anyone can be required to salute the flag against his will : that the freedom asserted by the petitioners did not bring them into conflict with rights asserted by any other individual ; that the compulsory flag-salute and pledge require affirmation of a belief and an attitude of mind ; that that was really an issue of freedom of expression. In coming to the conclusion that the principle, which should decide the case, is that no one could be compelled by the government to profess a belief, Justice Jackson observed :

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us".

The Supreme Court accordingly affirmed the judgment of the lower court enjoining enforcement of the said resolution of the West Virginia State Board of Education. This group – "flag-salute" cases – has been considered the most "graphic illustration of the relationship between the constitutional protection of speech and religion".

The question, whether, even if religious belief cannot be a defence to all criminal charges, there are in America some cases where religious conscience can excuse compliance with the law, came to be considered by the Supreme Court in 1961, almost a century after the decision in *Reynold's case (supra)*, in the case of *Braunfeld v. Brown* (3) which said decision is, incidentally, also considered to be the "first-crack" in the "belief-action" distinction drawn by Chief Justice Waite in the *Reynold's case (supra)*. In this case the Supreme Court was called upon to consider the constitutionality of a criminal statute enacted in 1959 by the State of Pennsylvania (and better known as a "Sunday closing" law) proscribing the Sunday retail sale of certain enumerated commodities. Braunfeld and several other merchants of Pennsylvania, who were members of the Orthodox Jewish faith which requires the closing of their places of business and a total abstention of all manner of work from nightfall each Friday until nightfall each Saturday, and who were engaged in the retail sale of the commodities so proscribed instituted proceedings in the original court seeking a permanent injunction against the enforcement of the said "Sunday-closing" law, on the basis : that the enforcement of the said law will prohibit the free exercise of their religion because; due to the compulsion to close on Sunday, they will suffer economic loss, to the benefit of their non-Sabbatarian competitors if they also continue their Sabbath observance by closing their business on Saturday ; that in the result they will have either to give up their Sabbath observance, which is a basic tenet of their Orthodox Jewish faith, or face serious economic disadvantage by continuing to adhere to their Sabbath. Chief Justice Warren delivering the opinion of the Court stated : that the issue was whether the First and Fourteenth (which guarantee the equal protection of the laws) Amendments forbid application of the Sunday Closing Law to the petitioners ; that certain aspects of religious worship cannot, in any way, be restricted or burdened by legislation ; that compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden, the freedom to hold religious beliefs and opinion is absolute ; that state action in compelling (as in *Barnette's case)(supra)* school children to salute the

flag, on pain of expulsion from public school is contrary to the First Amendment when applied to those students whose religious beliefs forbade saluting a flag ; that the freedom to act, even when the action is in accord with one's religious convictions is not totally free from legislative restrictions ; that (as pointed out in *Reynold's case) (supra)* legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion ; that, if the purpose or effect of a law is to impede the observance of one or all religion or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterised as being only indirect ; that if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observances, unless the state may accomplish its purpose by means which do not impose a burden ; that, in this case, however, the statute does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets, the law simply regulates a secular activity, viz., setting one day of the week apart from others as a day of rest ; and as applied to the petitioners operates so as to make the practice of their religious beliefs more expensive ; they are not faced with as serious a choice as making their religious practices and subjecting themselves to criminal prosecution ; the option available to them is wholly different than when legislation attempts to make a religious practice itself unlawful. Having set out these grounds, Chief Justice Warren (with whom the majority concurred) held that the said statute cannot be said to be invalid either on its face or as applied. Although the majority rejected the claim based upon the Free Exercise claim (based upon the First Amendment), yet both the majority opinion and the dissenting judgment agreed that there could be cases in which exemption for religion might be required.

Adell Sherbert had been working in a mill in South Carolina for sometime prior to 1957. In 1957 she became a member of the Seventh-day Adventist Church, a basic tenet of which prohibits labour on Saturdays. The mill, which had been working only five days in the week, changed over to a six-day work week in 1959, and as A.S. would not work on Saturdays, she was discharged. A.S. could not find

other employment because the jobs, which were available, all required her to work on Saturday. A.S. then applied for State Unemployment Compensation. These benefits were also refused on the ground that she had failed "without good cause" to accept available suitable work when offered to her. A.S. then came into court. In the case of *Sherbert v. Verner* (4) the South Carolina Supreme Court rejected her contention, that the disqualifying provisions of the South Carolina Unemployment Compensation Act, in terms of which the benefits, which she would otherwise have been entitled to, were denied to her, abridged her right to the free exercise of her religion secured to her under the Free Exercise Clause of the First Amendment. The State Supreme Court held that A.S.'s ineligibility infringed no constitutional liberties because such a construction on the statute "places no restriction upon the appellant's (i.e. A.S.'s) freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience". Brennan, J., who had earlier dissented from the majority decision in *Braunfeld's case (supra)*, delivered the opinion of the Supreme Court of the United States (with which Warren, C.J., Black, J., Clark, J., who had all formed the majority in *Braunfeld's case, (supra)* concurred) holding in favour of A.S. that A.S.'s conscientious objection to Saturday work constitutes no conduct prompted by religious beliefs of a kind within reach of state legislation : that there was no compelling State interest enforced in the eligibility provision which justified infringement of A.S.'s First Amendment right ; that the disqualification from receiving the said benefit imposes a burden on the free exercise of A.S.'s religion.

The impact of the compulsory school attendance laws of the State of Wisconsin on the rights of those who profess the Amish religious faith, to the free exercise of their religious beliefs came up for consideration by the Supreme Court of the United States in the year 1972 in the case of *Wisconsin v. Yoder* (5). Wisconsin laws required the children to attend school until the age of 16. The three respondents Y., Y., and M., who were all members of the Old Order Amish religion declined to send their children, who were 14 and 15 years of age, to public school after completing the eighth grade, and were convicted of violating the State's compulsory attendence law. The respondents so refused because they believed that by sending them to High School they would not only expose themselves to the danger of the censure of the Church community but would also

endanger their own salvation and that of their children. The State accepted the sincerity of the respondent's religious belief. Chief Justice Burger, who delivered the opinion of the Court affirming the decision of the Supreme Court of Wisconsin in favour of the respondents, observed : that, in order for the State of Wisconsin to compel school attendence beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement or that there is a State interest of such magnitude as to override the interest claiming protection under the Free Exercise Clause ; that to have the protection of the Religion Clause, the claim must be rooted in religious belief ; that a regulation neutral on the face of it may in its application nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion ; that the First and Fourteenth Amendments prevent the State, however strong the State's interest in Universal compulsory education is, from compelling respondents to cause their children to attend formal High School at age 16.

The nature and the extent of the protection that is accorded in the United States to a citizen's belief rooted in religion was once again considered by the Supreme Court of the United States of America in 1980 in the case of *Thomas v. Review Board of the Indiana Employment Security Division* (6). Thomas, who was a Jehovah's witness and who was employed in a foundry and machinery company, was transferred from the roll foundry to another department of the company which produced turrets for military tanks. He claimed that his religious beliefs prevented him from participating in the production of war materials and requested a lay-off. When such request was denied him Thomas quit, asserting that his religious beliefs prevented him from participating in the production of war weapons. He then applied for Unemployment Compensation ; and the respondent Review Board denied him such benefits by applying the disqualifying provisions of the relevant statute, viz., that his voluntary termination was not based upon a "good-cause" arising in connection with his work. The Supreme Court of Indiana, reversing the decision of the Indiana Court of Appeal, denied Thomas relief on the ground : that "good cause" which justifies voluntary termination must be "job-related and objective in character" ; that, as Thomas had quit voluntarily for personal reasons he did not qualify for benefits ; that denying Thomas benefits would

create only an indirect burden on his free exercise right, and that the burden was justified by the legitimate state interest in preserving the integrity of the insurance fund and maintaining a stable work force by encouraging workers not to leave their job for personal reasons. Chief Justice Burger, delivering the opinion of the Supreme Court of the United States, which set aside the judgment of the Supreme Court of Indiana and gave Thomas relief, observed : that only benefits rooted in religion are protected by the Free Exercise Clause, which by its terms gives special protection to the exercise of religion ; that the determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, and the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question ; that religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit Constitutional protection ; that Thomas was put to a choice between fidelity to religious belief or cessation of work ; that where the state conditions receipts of an important benefit upon conduct proscribed by a religious faith or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behaviour and to violate his beliefs, a burden upon religion exists : that only interests of the highest order can overbalance legitimate claims to the free exercise of religion. The principles which had earlier been applied in *Yoder's case (supra)* and *Sherbert's case (supra)* were once again applied in this case.

The conscientious objector exemption found in the United States Selective Service Act came up for consideration by the Supreme Court of the United States in 1971, in the case of *Gillette v. United States* (7). Since 1940, the policy of the draft laws has been to extend the objection to all persons who have religious objections to all wars and to limit the exemption to those persons whose objections to war are "religious". In *Gillette's case (supra)* the challenge to the constitutionality of these laws came from Gillette whose objections were limited to the Vietnam War, rather than to war in general. Gillette in defending a prosecution for failure to report for induction contended that he viewed the Vietnam War as "unjust", and that based on a "humanist approach to religion" his decision not to serve in an unjust war was guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence. Justice Marshall rejecting the claim based on the Free Exercise Clause

stated : that the conscription laws, applied to such persons as others, are not designed to interfere with any religion, ritual or practice and do not work a penalty against any theological position : that the incidental burdens felt by persons in Gillette's position are strictly justified by substantial government interests that relate directly to the very impacts questioned.

In 1948 the American Congress defined, in sec. 6 (*j*) of the Universal Military Training and Service Act, "religious training and belief" as including "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" and excluding "essentially political, sociological or philosophic views or a merely personal code." In 1957 when Daniel Seeger applied for conscientious objector status he informed the draft board that he was not sure he believed in God, but that he did have a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." The draft board denied Seeger exemption on the ground that his views were not "religious" as defined in the said sec. 6 (*j*). It was contended that the "Supreme Being Clause" was unconstitutional because it distinguished between theistic and non-theistic religious beliefs. The Supreme Court of the United States upheld the constitutionality of the said sec. 6(*j*) – *United States v. Seeger* (8). Whilst doing so, the Supreme Court, however, laid down a definition of "religion" which took in beliefs like Seeger's. Observing that a narrow construction of the said sec. 6 (*j*) might exclude Buddhists and Hindus as persons whose views were not "religious," the Supreme Court stated that a view was religious if it was "a sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."

In 1970 the Supreme Court dealt with this issue again in the case of *Welsh v. United States* (9). This decision was made, when the reference to the Supreme Being was still part of the aforesaid sec. 6 (*j*) – the said reference to a Supreme Being was eliminated by Congress in 1967. Welsh's claim for conscientious objector states was turned down by the draft board on the ground that his views were not "religious". Justice Black, who delivered the opinion of the Supreme Court of the United States, took the view : that Welsh was entitled to an exemption under sec. 6 (*j*) because his views were religious ; that what is necessary for a conscientious objection to all

wars to be "religious", within the meaning of sec. 6(*j*) is that such opposition to war should stem from the objector's moral, ethical or religious beliefs about what is right and wrong and that such beliefs be held with the strength of traditional religious convictions ; that, if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in war at any time, these beliefs certainly occupy in the life of the individual "a place parallel to that filled by . . . . . God" in traditionally religious persons.

The effect of the corresponding Articles – 25 and 26 – of the Indian Constitution is to provide : that free exercise of religion is subject to the restrictions imposed by the state on grounds of public order, morality and health : that the state does not interfere in matters of religion, not only in regard to its doctrinal and ritual aspects, but also acts done in pursuance of religion, and that there is thus a guarantee for rituals, observances, ceremonies and modes of worship which are an integral part of the religion : that the "essential part" of a religion is primarily to be ascertained with reference to the doctrine of that religion itself, and would include practices which are regarded by the community as part of its religion.

Just as in the United State of America so too in Sri Lanka "the right to free religious expression embodies a precious heritage of our history" ; and in a pluralistic society "the protection of a self-expression, however unique, of the individual and the group becomes ever more important" ; and "the varying currents of the sub-cultures that flow into the mainstream of our national life give it depth and beauty."

A consideration of the provisions in the Constitution of Sri Lanka, which assure to the people of Sri Lanka the freedom to have and adopt a religion or belief of their choice together with the freedom to manifest such religion or belief – Articles 10 and 14(1)(*e*)–, against the background of not only the provisions of Article 4(*d*) of the Constitution itself, but also the aforementioned principles elucidated by the Supreme Court of the United States and the Supreme Court of India, makes it clear : that the guarantee of the freedom of religion, thought and conscience, like the rights set out in Articles 11, 13(3) and (4) is absolute, unfettered by even the likelihood of the imposition of any restriction whatsoever after the promulgation of the

Constitution : that such freedom will have to, if at all, give way only to any law, written or unwritten, which was in force at the time the Constitution came into operation, and that too only to the extent of any inconsistency as between them : that beliefs rooted in religion are protected : that the determination of what is a "religious" belief or practice does not depend upon a judicial perception of the particular belief or practice : that a religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected : that unless where the claim is so bizarre, so clearly non-religious in motivation, it is not within the judicial function and judicial competence to inquire whether the person seeking protection has correctly perceived the commands of his particular faith : that the courts are not the arbiters of scriptural interpretation, and should not undertake to dissect religious beliefs : that evidence of experts and of religious dignitaries may be considered by court only for the purpose of deciding whether the professed belief is rooted in religion : the only other issue the court could decide is whether the claimant honestly and sincerely entertained and held such belief : that no official, high or petty, can prescribe what is to be orthodox in religion or other matters of opinion or force citizens to proclaim by word or act their belief in them : that a regulation neutral on the face of it may in its application nonetheless offend the constitutional requirement if it unduly burdens the full and free exercise of a right : that where an employee is put to a choice between fidelity to a religious belief or cessation of work, the coercive impact on the employee is unmistakable : that, where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such benefit because of conduct mandated by religious belief and thereby puts substantial pressure on an adherent to modify his behaviour and to violate his belief, there exists then a burden on religion : that, in such a case while the compulsion may be indirect the infringement upon the exercise is nonetheless substantial : that even if the impugned law does not compel overt affirmation of a repugnant belief, nor even prohibit outright any of the complainant's religious practices, yet, if their effect is that the complainant may not simultaneously practise the religion or carry on his trade or employment without being hampered by a substantial disadvantage, the effect is that there is then a clog on the full and free exercise of religion.

The petitioner, as already set out earlier, makes no complaint against the first Circular, 1R2. It is the subsequent Circular P2, dated 31.12.84, that, he submits, violates his Fundamental Rights. The vital difference between the two Circulars is that the said deduction from the pay-sheet for the month of January 1985 was to be made, according to 1R2, only from those who expressly signify their consent in writing, in the specified form, to such a deduction. No deduction was to be made from a person who does not express such consent. All that a person, who did not desire to make such a contribution had to do to prevent the deduction was merely to remain silent. According to P2, however, the deduction was to be made from the pay-sheet, except from those who communicate their objection (අකමැති බව දක්වන අයගෙන් නැර). The deduction is to be made, unless an objection was raised. Both circulars required every employee of the department to do an act upon which the deduction by the accounts unit of the department was made to depend. The act of the employee, would, in the one case, be the written expression of consent. In the other, it would be the expression of an objection to each deduction. 1R2 required the deduction to be made only if there is an expression of consent. P2 required the deduction to be made, unless there was an expression of objection. P2 directs a deduction only if there is no objection expressed. If an objection is expressed there is then to be no deduction. Whether or not a deduction was to be made – whether under 1R2 or under P2 – ultimately depended entirely upon the wishes of the petitioner, and upon what he, the petitioner, did. The petitioner takes exception to the requirement, set out in P2, of the communication of an objection if the petitioner does not desire to make the contribution. What is being complained of as being objectionable is the compulsion to register expressly an objection where an employee does not agree to a deduction.

The petitoner does not want the deduction made because he does not desire to contribute towards the said National Security Fund, as the said Fund is to be used, inter alia, for a purpose which his religion does not permit him to subscribe to, viz. : purchase of military equipment.

That a Buddhist cannot, in keeping with the teachings of the Dhamma he has taken refuge in, destroy, or even lend support in any form to the destruction of, the life of any living being does not admit of any controversy. The respondents have not challenged in any way the

fact of the existence of such a religious tenet or precept which constitutes one of the five precepts – Pancha Seela – which any one professing the religion of Lord Buddha undertakes of his own free will. Nor do they challenge the genuineness and the sincerity of the petitioner's own assertion that he has undertaken the said precept in terms of which he must abstain form taking the life of any living being.

The objection, which has to be made by a person such as the petitioner, in terms of the requirement set out in P2, is not one which a Buddhist is prevented by the tenets or precepts of the religion he professes, from giving expression to. If such objection is not expressly registered, a deduction will be made under and by virtue of P2. Such a deduction made in the absence of an objection from a person, who has both the freedom and the opportunity to object, would amount to a contribution made at least with the acquiesence of such person. The expression of such a protest openly and without any reservations does not and cannot amount in any way to a violation of the precept of his religion asserted by the petitioner.

The petitioner further contends that the expression of an objection would result in his being singled out for victimization and harassment by the 1st respondent. The 1st respondent has categorically denied any such sinister purpose behind the imposition of the requirement embodied in P2. There is no material before this Court upon which it could now be said that the fears expressed by the petitioner are justified. The proclamation of one's views and opinions, which an express protest, such as is required by P2, would entail, would be no different from what would ensue from an expression of consent as is set out in 1R2. Whatever the form of expression be–whether as an expression of consent in terms of 1R2, or as an expression of protest as stipulated by P2–such expression must inevitably and unmistakably make public the views and beliefs inwardly entertained by such person upon the subject. If the expression in accordance with 1R2 does not cause any harm, the expression in accordance with P2 cannot cause any greater degree of harm. What injures the religious susceptibilities is not the requirement to make a communication – whether of consent or of objection–but rather the requirement to make a contribution from the monthly salary to the Fund set out in the said Circulars P2 and 1R2. If there is a protest, no deduction will be made, and there would be no contribution towards the Fund from such employee.

No penal sanction is attached to a failure to contribute to the said Fund. Nor is a person, who does not contribute made to suffer any disability. The circular does not compel any overt affirmation of any belief which is repugnant to the petitioner, as was done in *Barnette's case (supra)*. Nor does it prohibit outright any religious practice which, the petitioner desires to engage in as the law which was upheld in *Reynold's case (supra)* did. There is no economic or other material disadvantage the petitioner would be subject to if he does not agree to a deduction, as Adell Sherbert in *Sherbert's case (supra)* had to face. The petitioner was not confronted with a situation in which he had to choose between being true and faithful to an immutable tenet of the religion he professes and adheres to, or suffering a penalty or the infliction of a disability, as the petitioners in *Braunfeld's case (supra), Gallagher's case* (10), *Sherbert's case (supra), Yoder's case (supra)* and *Thomas' case (supra)* had to face.

In this view of the matter, I am of opinion that the expression of the objection which the petitioner had to make, as was required by the terms of the Circular P2, in order to prevent a deduction and thereby avoid making a contribution to the aforesaid National Security Fund, did not interfere in any way with the full and free exercise by the petitioner of his religion.

The petitioner's application, based upon a violation of the Fundamental Right embodied in Articles 10 and 14 (1) (*e*) of the Constitution must, therefore, stand dismissed.

The petitioner has also complained of a violation of the Fundamental Right under Article 12(1) of the Constitution – right to equality. The submission is : that such deductions have not been made from the salaries of all public officers : that, for instance, the employees of the Department of Health have not been called upon to do so : that, therefore, the petitioner has not been subjected to a disadvantage which other public servants have not been subjected to. Apart from the bare assertion made in the petition, which was supported in the petitioner's affidavit, no other independent evidence was exhibited to this Court along with the petition. The 1st respondent, in his affidavit, denied any such inequality of treatment and discrimination. Towards the concluding stages of the argument before this Court, learned Counsel for the petitioner moved, in his reply, to tender an affidavit to support the allegation that the employees of the Health Department

have not been required to make any such contribution. Learned Senior State Counsel appearing for the respondents objected to the said affidavit being accepted at that stage as he himself would not then have an opportunity to contradict the averments in any such affidavit and prejudice would be caused to the respondents. The application was, in these circumstances, refused by this Court.

The content and reach of Article 12 (1) of the Constitution was considered by a Full Bench of this Court recently, in the case of *Elmore Perera v. Montague Jayawickreme, Minister of Public Administration, et al.* (11). Having regard to the principles set out by this Court in the said judgment it appears to me that the material placed before this Court by the petitioner, to establish his claim under this heading, falls far short of what is required to enable him to obtain relief in respect of an infringement of the Fundamental Right embodied in the said Article 12 (1). This claim too must, therefore, fail.

The 1st respondent has, as set out earlier, undertaken to refund the aforesaid sum of Rs. 19, deducted from the petitioner's salary for the month of January 85. If the said sum has not yet been refunded, the 1st respondent should take steps to refund the said sum to the petitioner forthwith.

In view of the opinion I have formed in regard to the principal matter in issue in this application, I do not propose to consider the preliminary objection – which briefly is that, as the 1st respondent has agreed to refund the sum of Rs. 19 referred to in the petition, a further consideration of the application has become academic, and that a Court will not proceed to consider questions where a matter could be disposed of on other grounds – raised on behalf of the respondents to the hearing of this application.

The petitioner's application is, accordingly, refused, but without costs.

ATUKORALE, J.– I agree.

L. H. DE ALWIS, J.– I agree.

Application dismissed.