IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC FR NO. 35/2024

Bulugaha Pathirannehelage Sarith
Maheeputhra Pathirathne,
No. 110/1,
Wataddara,
Veyangoda.

PETITIONER

Vs.

1. Hon. Mahinda Yapa Abeywardena,
(Speaker of the Parliament)
Chairman of the Constitutional Council.

2. Hon. Dinesh Gunawardena,
(Prime Minister)
Member of the Constitutional Council.

3. Hon. Sajith Premadasa,
(Leader of the Opposition)
Member of the Constitutional Council.

4. Hon. Nimal Siripala de Silva,
(Minister of Ports, Shipping and Aviation)
Member of the Constitutional Council.

5. Hon. Sagara Kariyawasam,
(Member of Parliament)
Member of the Constitutional Council.

6. Hon. Kabir Hashim,
(Member of Parliament)

Member of the Constitutional Council.

7. Dr. Prathap Ramanujam,
Member of the Constitutional Council.

8. Dr. Dilkushi Anula Wijesundere,
Member of the Constitutional Council.

9. Prof. Weligama Vidana Arachchige Dinesha Samararatne,
Member of the Constitutional Council.

10. Mr. Dhammika Dasanayake,
Secretary General to the Constitutional Council.

All 1st to 10th Respondents:
Constitutional Council,
Parliament of Sri Lanka,
Sri Jayewardenepura Kotte.

11. Hon. Attorney General
Attorney General's Department,
Colombo 12.

12. Dr. Mahim Mendis
301/1A,
Kotte Road,
Mirihana,
Nugegoda.

13. Venerable Dambara Amila Thero
Sri Purana Gallen Viharaya,
Kindelpitiya,
Horana.

And
Nalanda Wishwa Vidhyayathanaya,
Kuda Uduwa,
Horana.

14. Conganeige Anne Ruwani Niwanthika
Fonseka
No. 297,
Negombo Road,
Nagoda.

RESPONDENTS

BEFORE : **P. PADMAN SURASENA, J.**
ACHALA WENGAPPULI, J. &
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Faiszer Mustapha, PC with Amila Perera, Naveen Maha Arachchige, Mehran Careem and Shaheeda Barrie instructed by Sanjeewa Kaluarachchi for the Petitioner.

Ms. Kanishka de Silva Balapatabendi, DSG with Ms. Madhushka Kannangara, SC and Ms. Abigail Jayakody, SC for the 1st, 2nd, 4th, 5th, 10th and 11th Respondents.

M. A. Sumanthiran, PC with Ermiza Tegal, Divya Mascranghe for the 3rd and 6th Respondents.

Dr. Kanag-Isvaran, PC with Viran Corea, PC, Lakshman Jeykumar and Ermiza Tegal for the 7th, 8th and 9th Respondents.

Venuka Coorey instructed by Cooray and Cooray for the 14th Respondent.

Upul Jayasuriya, PC with Kasala Kameer, Sandamal Rajapaksha for the 13th Respondents.

Dinal Phillips, PC with Heshan Thambimuttu, Anushka Athulathmudali for the 12th Respondents.

ARGUED ON : 25-07-2024

DECIDED ON : 12-12-2024

P. PADMAN SURASENA, J.

The Petitioner in his Petition has stated that he is a citizen of Sri Lanka and an Attorney-at-Law by profession. As can be seen from the caption, the 1st Respondent is the Hon. Speaker of Parliament; the 2nd Respondent is the Hon. Prime Minster; the 3rd Respondent is the Hon. Leader of the Opposition in Parliament; the 4th Respondent is a Member of Parliament, the Hon. Minister of Ports, Shipping and Aviation and; the 5th and 6th Respondents are both Members of Parliament. While the 1st Respondent is ex-officio, the Chairman of the Constitutional Council, the 2nd, 3rd, 4th, 5th, and 6th Respondents together with the 7th, 8th and 9th Respondents are Members of the Constitutional Council. All of them have been made Respondents to this Petition in their capacities, respectively, as the Chairman and the Members of the Constitutional Council (hereinafter sometimes referred to as the Council). The 10th Respondent is the Secretary General to the Constitutional Council and the 11th Respondent is the Hon. Attorney General.[1]

The 12th Respondent, the 13th Respondent and the 14th Respondent have been added to the Caption, as the Court, by its Order dated 30-04-2024, had permitted the applications made by them seeking to intervene into this case. It is thereafter, that those three persons have been added to the caption as the 12th, 13th, and 14th Respondents by way of the Amended Caption filed with the Motion, dated 28-06-2024. As I could see from the Petitions filed by the intervenient Petitioners, the primary concern of the 12th, 13th and 14th Respondents has been to get the instant Petition dismissed and the Interim Order issued by the Court on 30-04-2024, dissolved.

At the outset, let me albeit briefly, set out the background of the issue relevant to this case. One of the Hon. Judges of this Court was to retire from service with effect from 16-11-2023. In order to fill the vacancy that was to be created by the said retirement,

[1] These are the positions held by the persons mentioned in this paragraph at the time of the conclusion of the argument of this case; the Parliament was subsequently dissolved on 24-09-2024.

the Secretary to His Excellency the President (by order of His Excellency the President), had nominated the Hon. Justice who presently holds the office of the President of the Court of Appeal by his letter dated 25-10-2023. (The said nominated Justice will hereinafter sometimes be referred to as the Nominee Judge). His Excellency the President has made this nomination in terms of Article 41C (1) read with Article 107 (1) of the Constitution. The Hon. Speaker as well as the Secretary to His Excellency the President have produced this letter (marked **A**), as an annexure to the respective affidavits they have filed in these proceedings.

After several deliberations which will be adverted to in this Judgment shortly, the Constitutional Council by majority view had decided not to approve the proposal by His Excellency the President to appoint the Nominee Judge as a Judge of the Supreme Court. The Petitioner in the instant case challenges the aforesaid majority decision of the Constitutional Council. Upon this Petition being supported, this Court having considered the submissions, by its order dated 30-04-2024, had decided to grant Leave to Proceed in respect of the alleged violations of the Petitioner's Fundamental Rights guaranteed under Article 12 (1) of the Constitution.

The Chairman and all the other members of the Constitutional Council, who have been made Respondents to this Petition, have filed their affidavits before this Court. At the outset, it would be relevant to note that these Respondents rely on more or less the same set of documents, although they have submitted those documents separately with their affidavits. The other Respondents (other than the Chairman and the members of the Constitutional Council) also did not dispute those documents. The case for the Petitioner as far as the said documents are concerned, is not different. This is because the Petitioner also relies on the same set of documents. Thus, at the outset, it is to be noted that both the Petitioner and the Respondents are not at variance with regard to the factual positions as revealed from the documents relevant to the proceedings before the Constitutional Council pertaining to the issue relevant to this case.

Article 41C (4) of the Constitution requires that the Constitutional Council shall obtain the views of the Chief Justice when discharging its functions relating to the appointment of Judges of the Supreme Court and the President and Judges of the Court of Appeal.

The Hon. Chief Justice has written the letter dated 06-11-2023, addressed to the Hon. Speaker as the Chairman of the Constitutional Council. The caption of this letter stands as *"Nomination sent by the Hon'ble President to be considered for the post of a Judge of the Supreme Court"*. The phrase *"With reference to your above titled letter dated 01.11.2023"* shows that the Hon. Chief Justice has sent the said letter as a reply to the letter he had received from the Hon. Speaker in his capacity as the Chairman of the Constitutional Council.

The Hon. Chief Justice by the said letter dated 06-11-2023 has conveyed to the Hon. Speaker who is the Chairman of the Constitutional Council, his (the Hon. Chief Justice's) concurrence, to appoint the Nominee Judge as proposed by His Excellency the President, as a Judge of the Supreme Court, to fill the vacancy created by the retirement of one of the Hon. Justices of this Court on 16-11-2023. The Hon. Chief Justice in the said letter, having briefly stated at the beginning about certain career achievements of the Nominee Judge, has also stated at the end of the said letter that he has no hesitation in concurring with the afore-stated nomination made by His Excellency the President. The 9th Respondent has produced this letter, marked **R 1 A**, with her affidavit. The other two Civil Society members, the 7th and 8th Respondents have also produced this letter, marked **R 1 A**, with their respective affidavits.

The Constitutional Council at its Thirty Fifth Meeting, held on 09-11-2023, had considered the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. At that meeting, the views of the Hon. Chief Justice, obtained as per Article 41C (4) of the Constitution, in respect of this nomination was also placed before the Constitutional Council for consideration by its members. In that meeting, after discussion, the Constitutional Council had decided to look into the possibility of obtaining certain specific information from the Hon. Chief

Justice relating to the Judges whose nominations are forwarded by His Excellency the President, for its approval. The 9th Respondent has annexed the minutes of the said Thirty Fifth Meeting of the Constitutional Council held on 09-11-2023, marked **R 1**. According to the said minutes, the Constitutional Council, after discussion, had requested the Hon. Speaker (Chairman of the Council) to write to the Hon. Chief Justice to explore the possibility of obtaining the afore-said information.

At the same meeting (the Thirty Fifth Meeting), the Council after discussion, had agreed to make the final decision with regard to the approval or disapproval of the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. The Council also decided to consider the other nomination forwarded by His Excellency the President, for the appointment of the next senior-most Judge of the Court of Appeal as the President of the Court of Appeal in the event of the Council granting the approval for the Nominee Judge to be appointed as a Judge of the Supreme Court.

According to the minutes of the Thirty Fifth Meeting of the Council, the Council after discussion had agreed to make the final decision in respect of these two nominations at the next meeting of the Council due to the absence of two of its members at the said Thirty Fifth Meeting.

The next meeting, which is the Thirty Sixth Meeting of the Constitutional Council, was held on 17-11-2023. In the course of that meeting, Hon. Speaker had informed the other members of the Council who were present, that he had written the letter to the Hon. Chief Justice seeking the possibility of obtaining more information regarding the Judges whose nominations are forwarded by His Excellency the President. The Hon. Speaker at this meeting had also tabled the said letter for the information of the members of the Council. This is the letter, dated 14-11-2023, written by the Hon. Speaker addressed to the Hon. Chief Justice, which the Petitioner has produced with his Petition, marked **P 1**. In the interest of all parties concerned, I prefer to reproduce the said letter, rather than paraphrasing its contents to avoid any possible distortion of its spirit. This approach is also warranted because, as I will explain later, the same

Petitioner had previously filed another Fundamental Rights Petition, the subject matter of which centred around this letter, thereby rendering it no longer confidential. The said letter reads as follows:

14th November 2023

Hon Jayantha Jayasuriya, PC
Chief Justice
Chief Justice's Chambers,
Supreme Court,
Colombo 12.

Dear Chief Justice,

Granting Approval for the Appointment of Judges to Superior Courts under Article 41C of the Constitution

The Constitutional Council considers its mandate to grant approval for the appointment of judges of the Superior Courts under Article 41C of the Constitution as a matter of great responsibility and is of the view that it needs necessary information to carry out its duty in an effective and efficient manner. The Constitutional Council, having taken into cognizance that Article 41C (4) provides for the seeking of views of the Chief Justice by the Constitutional Council in discharging its function relating to the appointment of Judges of the Supreme Court, and the President and Judges of the Court of Appeal, decided to ask from you whether it would be possible to provide information in relation to the following aspects of the Judges nominated, when your views are requested by the Constitutional Council;

a) *Performance of the Judge concerned in terms of the number of Judgments delivered and pending delivery for the last few years.*

b) The number of Judgments overruled by the Superior Court and any observations by the Superior Court in respect of the same.

c) The conduct of the Judge concerned and any notable contribution for the development of the legal jurisprudence etc.

I would very much appreciate if you could assist the Council in this regard.

Yours sincerely,
Sgd
Mahinda Yapa Abeywardana
Speaker

On 08-11-2023, the then Hon. Minister of Sports had raised certain concerns making certain negative remarks about the Nominee Judge in Parliament. The then Hon. Minister of Sports in the course of that statement had adversely criticized certain acts which he had attributed to the conduct of the Nominee Judge in his present post as the President of the Court of Appeal. Thereafter, on 09-11-2023, the Hon. Minister of Justice, Prison Affairs and Constitutional Reforms had also raised similar concerns in Parliament in relation to the conduct of the Nominee Judge as the President of the Court of Appeal. I would reproduce below, the portion of the statement made by the Hon Minister of Justice, Prison Affairs and Constitutional Reforms, on 09-11-2023 which is recorded in Hansard of 09-11-2023 (**R 3 B**). It is as follows:

මූලාසනාරූඪ ගරු මන්ත්‍රීතුමනි, අද පවත්වන විවාදය ගැන අදහස් ප්‍රකාශ කරන්න නොවෙයි මම බලාපොරොත්තු වෙන්නේ. ගරු විපක්ෂ නායකතුමා උදේ මතු කළ කාරණයක් පිළිබඳව පැහැදිලි කරන්නත්, ඊයේ පාර්ලිමේන්තුවේ කළ ප්‍රකාශයක් පිළිබඳව අධිකරණ ක්ෂේත්‍රය නියෝජනය කරන විනිසුරුවරුන් සහ නීතිඥවරු අතර විශේෂයෙන්ම ඇතිවෙලා තිබෙන යම්කිසි මතයක් පිළිබඳව කරුණු පැහැදිලි කරන්නත් මා බලාපොරොත්තු වෙනවා.

අපේ රටේ විනිසුරුවරු අධිකරණයේ ස්වාධීනත්වය, අපක්ෂපාතිත්වය ඉතාම ඉහළින් ආරක්ෂා කරන බව අපි පිළිගන්නවා. නමුත් යම්කිසි හුදකලා සිද්ධියක් හෝ දෙකක් නිසා මේ පාර්ලිමේන්තුව තුළ අධිකරණය පිළිබඳව දීර්ඝ වශයෙන් සාකච්ඡා කරන්නට යෙදුණා. මෙතැනදී අභියාචනාධිකරණයේ සභාපතිවරයාගේ ක්‍රියා කලාපය පිළිබඳව දීර්ඝ වශයෙන් සාකච්ඡාවට භාජන වුණා . ඇත්ත වශයෙන්ම පසුගිය කාල සීමාව පුරාවට නීති ක්ෂේත්‍රයක්

තුළත් නීතිඥ ප්‍රජාව තුළත් අළු යට තිබෙන ගිනි අඟුරක් වාගේ කථා වෙවී තිබුණු කාරණයක් තමයි ඊයෙ ඒ පුපුරලා ගියේ. හැබැයි, ඒක එක්තරා හුදකලා සිද්ධියක්, සිද්ධි මාලාවක්, එක් විනිසුරුවරයෙක් සම්බන්ධව.

One must bear in mind that all the members of the Constitutional Council except the 7th, 8th and 9th Respondents, are Members of Parliament who were present when Hon. Minister of Sports and Hon. Minister of Justice, Prison Affairs and Constitutional Reforms brought the above facts to light in Parliament. Therefore, there is no doubt that they had knowledge and insight into what was discussed in Parliament. There is also no doubt that they participated in the deliberations in the Constitutional Council being equipped with that knowledge.

It was in the above backdrop that, at the Thirty Seventh Meeting of the Constitutional Council held on 18-11-2023, the Council after discussion about this aspect, had decided to obtain views of the Hon. Chief Justice in relation to the afore-said statements made in Parliament regarding the conduct of the Nominee Judge before arriving at a decision on the proposed appointment of the Nominee Judge. Pursuant to the said decision, the Council had decided that the Hon. Speaker as the Chairman of the Constitutional Council should discuss this matter with the Hon. Chief Justice and agreed that the matter should be further considered at the next meeting of the Council.

According to the 9th Respondent the Council had again discussed this matter on or about 20-11-2023. At that meeting, as seen from **R 5**, the Council was informed that the Hon. Chief Justice had indicated that there was *"a practical difficulty to find the material to base on"*. Thereafter, pursuant to the Council members agreeing to take a secret vote on the proposed appointment of the Nominee Judge, three members had voted in favour and three members had voted against the proposal. Two members of the Council had abstained from voting. According to Article 41E (4) of the Constitution, no approval or decision made by the Council shall be valid unless supported by not less than five members of the Council present at such meeting. In view of this requirement in Article 41E (4), the Council had decided that it could not arrive at a

decision on the approval of the relevant nomination. The minutes of the Thirty Eighth Meeting of the Constitutional Council held on 20-11-2023, have been produced by the 9th Respondent, marked **R 5**. Pursuant to the decision made by the Council on 20-11-2023, it was decided to communicate to His Excellency the President, the fact that the Council could not arrive at a decision on the proposed appointment of the Nominee Judge on that day. In view of the Council not arriving at a decision on the proposed appointment of the Nominee Judge, the Council did not proceed to consider/approve the other nomination forwarded by His Excellency the President, for the appointment of the next senior-most Judge of the Court of Appeal as the President of the Court of Appeal.

On 05-12-2023, the Petitioner in the instant application, had filed the Fundamental Rights Petition bearing SC/FR/290/2023 to challenge the letter submitted by the Hon. Speaker addressed to the Hon. Chief Justice dated 14-11-2023 (**P 1**). The Petitioner in that Fundamental Rights Petition, had alleged that the said letter (**P 1**) had infringed his Fundamental Rights. The Petitioner in his Petition in the instant case, has stated that the contents of the said letter (**P 1**) which is in the form of a questionnaire, had flagrantly undermined the Independence of the Judiciary, contravened the principle of separation of powers, and was arbitrary, unreasonable and wholly irrational and therefore infringed upon his Fundamental Rights.[2]

The Petitioner has stated in his Petition in the instant case, that when the case bearing SC/FR/290/2023 came up for support before this Court, the Hon. Attorney General appeared in Court and conveyed to Court that the Constitutional Council had decided to withdraw the said letter (**P 1**) and would not proceed any further with regard to the questionnaire set out therein. It was upon that undertaking that the Petitioner had withdrawn the said SC/FR/290/2023 case.

According to the minutes of the Fortieth Meeting of the Constitutional Council held on 05-12-2023 (produced by the 9th Respondent, marked **R 6**), the Hon. Attorney General

[2] Paragraph 9 of his Petition.

along with an Additional Solicitor General and a Deputy Solicitor General, had attended the said meeting of the Constitutional Council. It could be seen as per the said minutes, that it was on the advice of the Hon. Attorney General that the Council had decided not to pursue the letter (**P 1**) addressed to the Hon. Chief Justice.

According to the minutes of the Forty Sixth Meeting of the Constitutional Council held on 19-01-2024, the 9th Respondent had raised concerns about an incident of three civil society members, i.e. 7th, 8th and 9th Respondents being excluded from the meeting that the 1st Respondent had with the Hon. Attorney General. The Council had also discussed as to how it should arrive at its decision with regard to the approval/non-approval of the Nominee Judge for the proposed appointment.

Thereafter, His Excellency the President, by the letter dated 09-01-2024, had written to the Hon. Speaker highlighting the importance of taking a decision with regard to the Nominee Judge to avoid the delay in appointment of Judges to the Supreme Court as it could adversely affect the Independence of the Judiciary and the effective administration of justice.

On 24-01-2024, the Hon. Leader of the Opposition also had raised certain negative concerns with regard to the Nominee Judge's conduct in relation to the contents of the written submissions filed on behalf of the Hon. Attorney General in Writ Application bearing No. CA (Writ) 377/2023. The 9th Respondent has produced a copy of the proceedings before Parliament which took place on 24-01-2024 (Hansard), marked **R 9**. The 9th Respondent has also produced a copy of the afore-said written submissions, marked **R 9 A**. The Leader of the Opposition had also sent a copy of the said written submissions via WhatsApp to the mobile phone of the 9th Respondent.

The 7th, 8th and 9th Respondents are persons appointed as members of the Constitution Council in terms of Article 41A (1) (e) (iii) and are not Members of Parliament. As the next meeting of the Council was approaching, the 7th, 8th and 9th Respondents had discussed and agreed that the 9th Respondent would draft on behalf of the Council, the reasons for the decision to be taken on the appointment of the Nominee Judge.

Pursuant to the said agreement, the 9th Respondent had drafted the reasons, marked **R 10**.

At the Forty Seventh Meeting of the Constitutional Council held on 30-01-2024, the Council had again considered the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. The Council having discussed the necessity to arrive at a decision without further delay, had agreed to cast votes openly to decide the matter. The voting then took place. The 3rd, 6th, 7th, 8th and 9th Respondents have cast their votes against granting the approval for the Nominee Judge to be appointed as a Judge of the Supreme Court. The 2nd, 4th and 5th Respondents have cast their votes in favour of the appointment. Accordingly, in terms of Article 41E (4) of the Constitution, the nomination of His Excellency the President to appoint the Nominee Judge as a Judge of the Supreme Court was not approved by the Council. The reasons given by the five members of the Council for not approving the nomination of the incumbent President of the Court of Appeal as a Judge of the Supreme Court are as follows:

> *Under Article 41C the Constitutional Council has been vested with the discretion to approve/disapprove nominations made by the President to several constitutional offices including the Court of Appeal and Supreme Court. When performing this function, the Council should act impartially and reasonably. In the exercise of the discretion vested in the Council, it must apply its mind to the decision, consider relevant factors, not consider irrelevant factors and exercise its discretion for the purpose for which it has been vested with the Council.*
>
> *This discretion has been vested with the Council to protect the independence and integrity of several constitutional institutions, including that of the judiciary. Public confidence in the independence and integrity of the justice system requires that judges are, and are also perceived to be impartial and beyond reproach. Ensuring the independence of the judiciary and public confidence in the judiciary is a primary responsibility of the Council.*

In CA Writ 377/2023 (decided 17 November 2023), oral and Written Submissions were made by the Attorney General's department on behalf of the Respondents, which suggest/allege attempts by the petitioner to 'bench fix' (to have matters taken up before the nominee) and thereby abuse the judicial process. The attention of the members of the Council was drawn to this serious suggestion/allegation due to the public reporting and debate on this matter. These submissions have since then been verified. We took note of the fact that these oral and Written Submissions were made by the Attorney General's Department, a constitutional institution that is required to act with independence. The Attorney General is recognized as the chief law officer of the State. The submissions are therefore to be taken serious note of. We further note that these submissions are not dealt with or refuted in the judgement of the Court of Appeal in the said writ matter.

It is the responsibility of the Council to take account of credible information and exercise our discretion to determine approval or disapproval of a judicial nominee, bearing in mind our responsibility to protect the actual and perceived independence and integrity of the judiciary. The Constitution does not envisage the Council making conclusive findings on credible allegations that are made but nevertheless requires the Council to exercise its discretion in the approving/disapproving nominations to judicial office.

Having deliberated this matter at length and having carefully considered it in light of the constitutional duty cast upon the Council, we have taken the view that we cannot satisfy ourselves on the suitability of the said nominee for appointment to the Supreme Court, the apex court of the country. The nomination, therefore, is not approved.

It is the afore-stated majority decision of the Constitutional Council which the Petitioner in the instant case has challenged.

The Petitioner in his Petition has asserted that he has filed this Petition in his own personal interest as well as in the interest and benefit of the public at large. He has complained that the said majority decision is arbitrary and/or unreasonable and/or wholly irrational. The Petitioner has further stated that the said decision has flagrantly undermined the Independence of the Judiciary, contravened the principle of Separation of Powers and the Rule of Law, and has infringed upon his Fundamental Rights and those of the general public. Petitioner has further stated that the Council has failed to act in a fair, reasonable and rational manner in conformity with due process and the Rule of Law.

The Petitioner has also stated in his Petition that the decision by the Council to withdraw the letter **P 1** has confirmed the complete illegality of the said procedure. It is his position that the majority decision of the Council is perverse and has jeopardized the process of administration of justice in this country. He has further asserted that the said decision is based on surmise and conjecture. It is the Petitioner's position that the Attorney General in the written submissions filed in CA (Writ) 377/2023 had not made any allegations against the Nominee Judge and therefore it is unreasonable for the Constitutional Council to reject the nomination on the allegation of bench fixing.

It is in the above background that the Petitioner in his Petition had prayed for the following main reliefs from this Court:

i. A declaration that the decision of the Constitutional Council not to approve the Nominee, i.e. the incumbent President of the Court of Appeal to the Post of a Judge of the Supreme Court, as reflected in **P 2** and **P 3**, is a violation of the Fundamental Rights of the Petitioner as guaranteed by Article 12 (1) of the Constitution, by the Constitutional Council and/or any one, more or all of the 1st to 9th Respondents;

ii. A declaration that the conduct of the 1st to 11th Respondents have violated the Fundamental Rights of the Petitioner as guaranteed by Article 12 (1) of the Constitution;

iii. An order setting aside the decision of the Constitutional Council set out at paragraph 08 of the Minutes, marked as **P 2**;

iv. A declaration that the communication in **P 3** has no force or avail in law;

v. A direction on the Constitutional Council and the 1st to 9th Respondents to approve the recommendation made by His Excellency the President to appoint the Nominee, i.e. the incumbent President of the Court of Appeal to the Post of a Judge of the Supreme Court.

As stated at the beginning of this Judgment, the 1st Respondent who is ex-officio the Chairman of the Constitutional Council, the 2nd Respondent who is the Prime Minister, the 3rd Respondent who is the Leader of the Opposition in Parliament, the 4th, 5th, and 6th Respondents who are Members of Parliament, and the 7th, 8th and 9th Respondents who are persons appointed as members of the Constitutional Council in terms of Article 41A (1) (e) (iii), have filed their affidavits before this Court and actively participated through their respective Counsel in the adjudication of this case. None of them at any time raised any argument that the decisions of the Constitution Council are not reviewable by this Court through the exercise of its Fundamental Rights jurisdiction. On the other hand, the Constitution has positively asserted the said jurisdiction in Article 41J which I reproduce below:

Article 41J

> *Subject to the provisions of Article 126, no court shall have the power or jurisdiction to entertain, hear or decide or call in question, on any ground whatsoever, or in any manner whatsoever, any decision of the Council or any approval or recommendation made by the Council, which decision, approval or recommendation shall be final and conclusive for all purposes.*

Thus, from now onwards, let me proceed on the premise that the decisions of the Constitution Council are reviewable by this Court in the exercise of its Fundamental Rights jurisdiction.

Let me now consider whether there is merit in the Petitioner's complaint that the majority decision of the Council is arbitrary and/or unreasonable and/or wholly irrational. In doing so, let me albeit briefly, touch on the law that should be applied when considering the above issue.

Lord Greene, in the landmark case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*,[3] introduced the ground of unreasonableness as a yet another ground upon which an impugned decision by an administrative body could be reviewed. As elucidated by Lord Greene in the passage cited below, prior to the introduction of the above ground, which has now established itself as trite law and is commonly known as Wednesbury Unreasonableness, the grounds upon which a decision of a public body could be challenged were limited.

> *"...The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.*
>
> *What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition.*
>
> *...*
>
> *When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of*

[3] [1948] 1 KB 223.

those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject- matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.[4]

There have been in the cases expressions used relating to the sort of things that authorities must not do, ... under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable." [5]

In the same case, Lord Greene has succinctly propounded, the role of Courts in reviewing the unreasonableness of an administrative decision as follows:

"I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant

[4] ibid, at page 228.
[5] ibid, at page 229.

that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to." [6]

Moreover, Lord Diplock in the seminal GCHQ case has further elucidated the test to be adopted by Courts to review such administrative decision by public bodies in the following paragraph:

"By 'irrationality' I mean what can now succinctly be referred to as 'Wednesbury unreasonableness'... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system..." [7]

The Superior Courts of our country, has time and again applied the afore-said test of unreasonableness, in numerous cases.

As has already been stated, the Petitioner in the instant case has challenged the decision of the Constitution Council not to approve the nomination of His Excellency the President to appoint the Nominee Judge as a Judge of the Supreme Court. Therefore, it would be necessary for me to briefly address the standards that a Judge is expected to maintain.

The Latin phrase *'Quis custodiet ipsos custodes?'* used by the Roman poet Juvenal, a work of the 1st and 2nd century, literally means *'who will guard the guards themselves?'* Although this phrase was originally used to denote the difficulties in effectively maintaining marital fidelity, it rings true for the problems encountered in the effective maintenance of judicial fidelity of the Judges in office. This may be perhaps why in legal parlance more often than not, the speakers on this subject state that, *'A judge,*

[6] ibid, at page 30.
[7] Council for the Civil Service Unions v. Minister for the Civil Service [1984] All ER 935 at 951.

like Caesar's wife, must be above suspicion.´ This analogy is drawn from an incident in 67 BC where Roman Emperor *Julius Caesar* divorced his wife *Pompeia* based merely on rumours of her adultery with no actual proof as to whether adultery was indeed committed, saying *"Caesar's wife must be above suspicion."*

Mr. Sumanthiran PC, in his submissions adverted to the commonly known phrase, *"A judge, like Caesar's wife, must be above suspicion".* This means that even a suspicion based on some evidence would be enough to taint the public trust reposed in a Judge.

Be that as it may, a Judge must decide each case based on the facts of that case, applying the relevant law in its correct perspective. If a Judge decides a case based on extraneous reasons, then he is not performing his duties in accordance with the law. After all, an appellate Court may only rectify an apparent judicial mistake, for it would not under normal circumstances be always possible to sense whether the Judge had also considered extraneous reasons when deciding a particular case. Thus, it is not unreasonable to expect such a high standard from a person who is being considered for an appointment as a Judge of the Superior Courts of the country as such a Judge would be exercising extensive powers of varied nature. This assumes much more importance when appointments are considered for Judges of the Supreme Court of the country as the law does not provide for any further appeal against Judgments of the Supreme Court.

I find that the quotation cited by the learned President's Counsel for the 7th to 9th Respondents from the work of Hon. Justice A. R. B. Amerasinghe on the 'Judicial Conduct Ethics and Responsibilities' is also on the same lines. It is reproduced below:

> *"...,the allegations, have not been against the judiciary as a whole or even against large numbers of judges, although, admittedly, 'when public confidence in one judge is shaken, public confidence in the judiciary as a whole is affected. That is the other side of the judicial independence coin".* [8]

[8]Amerasinghe A. R. B., *Judicial Conduct and Ethics and Responsibilities* (Sarvodaya Vishva Lekha 2002) 157, also cited at page 15 of the Written Submissions of the 7th to 9th Respondents, Volume II of the Case Brief.

His Lordship has further highlighted in his work, the connection between public confidence in the judiciary and the enforceability of its decisions as follows:

> *Be that as it may, the courts, and particularly the apex court of each country, wield great power and the community looks to the courts for the protection of minorities and individuals against the overreaching of their legal interests by the political branches of the government. Yet, unlike the other two arms of government, the judiciary depends entirely on public confidence for the exercise of its authority.*[9]
>
> *...*
>
> *The members of a civilized society do not wish to be ruled by raw power or by public clamour. Settled and secure democratic societies rest on the rule of law and the prevalence of the rule of law depends in turn on the acceptance of the decisions of the courts of law.*[10]

The above paragraphs clearly show the nexus between public confidence in the judiciary and the enforceability of its Judgments which underscores the importance of maintaining the judicial integrity all times at high levels.

Moreover, as pointed out by the learned President's Counsel for the 7th to 9th Respondents, Hon. Justice A. R. B. Amarasinghe in his work, has cited Stephen Parker, former Vice-Chancellor of the University of Canberra who explained the importance of public confidence in the judiciary for the maintenance of law and order in the following manner:

> *Courts largely depend upon public confidence in the law and its processes for compliance with their decisions: As soon as the independence of judges and magistrates come into question, so too does the impartiality of their decisions.*

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[9] ibid at 168, also cited at page 16 of the written submissions of the 7th to 9th Respondents, Volume II of the Case Brief.

[10] ibid at 172, also cited at page 16 of the written submissions of the 7th to 9th Respondents, Volume II of the Case Brief.

> *Crumbling confidence in the courts could have untold consequences for our sense of security and ultimately lead to the ugliest of situations. Courts, it has been said, are a civilised society's substitute for vengeance.*[11]

The above being the standards, a Judge is expected to maintain, let me next proceed to consider whether the majority decision of the Constitutional Council which the Petitioner in the instant case has challenged, is unreasonable in the 'Wednesbury sense'.

At the very commencement of this endeavour, it is necessary briefly to set out the background in which the Hon. Attorney General in the written submissions filed in case No. CA (Writ) 377/2023, had alleged certain insinuations about the procedure adopted in the disposal of that case in the Court of Appeal.

The subject matter in CA (Writ) 377/2023 was in relation to an impending arrest of the Petitioner of the said Writ Application as a suspect in a case where police had reported facts to Court in relation to an offence alleged to have been committed under the Penal Code and the ICCPR Act. The written submissions reveal that the Petitioner of the said Writ Application had previously filed another Writ Application bearing No. CA (Writ) 308/2023 and also a Fundamental Rights Application in this Court bearing No. SC FR 141/ 2023 on the same matter.

The said Writ Application bearing No. CA (Writ) 308/2023, was listed for hearing before the Hon. President of the Court of Appeal (the Nominee Judge) and Hon. Justice M. A. R. Marikar. As the President of the Court of Appeal (the Nominee Judge) had travelled overseas for official purposes, Hon. Justice Sobhitha Rajakaruna was appointed as the Acting President of the Court of Appeal. It was due to that reason that the Bench comprising of Hon. Justice Sobhitha Rajakaruna as Acting President of the Court of Appeal and Hon. Justice M. A. R. Marikar had commenced the hearing of the said case on 15-06-2023.

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[11] ibid at 166, also cited at page 16 of the written submissions of the 7th to 9th Respondents, Volume II of the Case Brief.

When the matter was taken up for support on 15-06-2023, the learned Senior State Counsel for the Respondents had raised certain preliminary objections. The Junior Counsel who had appeared for the Petitioner had moved for a postponement of the case indicating that the learned President's Counsel appearing for the Petitioner was 'indisposed'.

Despite the afore-stated application, being satisfied that the Petitioner before them would not be prejudiced as he was well represented and would have the opportunity of responding to the submissions on the next date, the Bench comprising Hon. Justice Sobhitha Rajakaruna and Hon. Justice M. A. R. Marikar had unanimously decided to allow the learned Senior State Counsel for the Respondents to raise those preliminary objections. Accordingly, the learned Senior State Counsel for the Respondents appears to have concluded the submissions with regard to the said preliminary objection. This was followed by the submissions of Mr. Sanjeeva Jayawardena PC, who had appeared for some parties seeking intervention in the case. Thereafter, that bench had fixed the matter to be resumed before the same bench on 21-06-2023.

When the case came up before the same Bench on 21-06-2023, the Petitioner who had right throughout agitated that the case must be heard as an extremely urgent matter, unexpectedly moved to withdraw the Petition with no prior indication and without sufficient or legitimate reason. The written submissions had alleged that up until that time, there was no indication whatsoever that the Petitioner would want to withdraw that case. The fact that the Petitioner had moved Court to take up the case for hearing on urgent basis initially must be noted as a significant factor at this juncture. Accordingly, the bench comprising Hon. Justice Sobhitha Rajakaruna and Hon. Justice M. A. R. Marikar had allowed the application for withdrawal and the matter was pro-forma dismissed. I must reiterate that it was the Petitioner who was eager to prevent his arrest as fast as possible who just on the second date of hearing had withdrawn the Petition giving no reason for such withdrawal. What follows next will confirm the suspicion that anyone would likely to have entertained about the Petitioner's withdrawal of that case in the aforesaid circumstances.

Almost three weeks after withdrawing the initial Writ Application, bearing No. CA (Writ) 308/2023, the Petitioner had subsequently filed the second Writ Application dated 10-07-2023 bearing No. CA (Writ) 377/2023. The said Writ Application had been filed on the same basis and the same facts praying for similar reliefs as pleaded in both CA (Writ) 308/2023 and the Fundamental Rights Application filed in the Supreme Courts bearing No. SC/FR/144/2023. What happened then? A Bench presided over by the Hon. President of the Court of Appeal (the Nominee Judge) and Hon. Justice M. C. B. S. Morais entertained the subsequent Writ Application, bearing No. CA (Writ) 377/2023, took it up for support on 04-10-2023 before them.

In the written submissions filed in the second Writ Application CA (Writ) 377/2023 (marked **R 9A**) it has been alleged on behalf of the Attorney General that the Petitioner had taken the steps to rectify all the shortcomings of the first Writ Application which the Attorney General took as Preliminary Objections.

In the said written submissions, the Attorney General had also alleged that the Petitioner's withdrawal of the first Writ Application (CA (Writ) 308/2023), without providing any reasons, after the Bench comprising two different Justices had commenced hearing the case during the time the President of the Court of Appeal (the Nominee Judge) was abroad, and the subsequent refiling of the same case under a different number to ensure it would be heard before the Bench where the President of the Court of Appeal (the Nominee Judge) was presiding, amounted to 'Bench hunting tactics'. In the course of the hearing of CA (Writ) 377/2023 it was alleged that the only reasonable inference for the Petitioner to file the same case twice, after taking steps to remedy all errors and shortcomings of the first case, was that the Petitioner was "indulging in Bench hunting tactics" for the Nominee Judge to hear this matter.

It was further submitted that the Court of Appeal could not and should not hear a case involving the same facts in issue and praying for similar reliefs which had already been pleaded in a Fundamental Rights Petition filed before the Supreme Court, as such a matter was already *sub-judice*. It was submitted on behalf of the Attorney

General that the manner in which the new case was filed, was the first of that nature in the judicial history of this Country. In addition to the attempts to surreptitiously avoid the Preliminary Objections already raised by the Respondents in the initial Writ Application, it was further submitted on behalf of the Hon. Attorney General that the Petitioner has completely suppressed the fact that there was a Fundamental Rights Petition bearing No. SC/FR/141/2023 which was filed by the Petitioner and several others regarding the same subject matter.

The Respondents in CA (Writ) 308/2023 had submitted for the consideration of Court several case laws to support the allegations of bench-fixing, drawing a parallel between the actions of the Petitioner in CA (Writ) 377/2023 and the instances referred to in those case laws. I would reproduce below some of those citations.

In *Shahzad Hasan Khan v. Ishtiaq Hasan Khan & Anr.*[12], the Supreme Court of India held thus:

> *"The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such a matter must be placed before the same Judge, if he is available for orders."*

[12] 1987 AIR 1613, decided on 28 April, 1987, at page 1615, also cited at page 9 in annexture **R 9 A**, of the Affidavit of the 9th Respondent in the case brief.

In *State of Maharashtra v. Captain Buddhikota Subha Rao*[13], the Court, placing reliance on *Shahzad Hasan Khan (supra)*, opined that:

> *"..... In such a situation the proper course, we think, is to direct that the matter be placed before the same learned judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be condusive to judicial discipline and would also save the Court's time as a judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency".*

In *Vikramjit Singh v. State of Madhya Pradesh*[14] it was held that *"... Otherwise, a party aggrieved by an order passed by one Bench of the High Court would be tempted to attempt to get the matter re-opened before another Bench, and there would not be any end to such attempts. Besides, it was not consistent with the judicial discipline which must be maintained by Courts both in the interest of administration of justice by assuring the binding nature of an order which becomes final, and the faith of the people in the judiciary..."*

Further, in *Jagmohan Bahl v. State (Nct of Delhi)*[15], in which the above Judgments are also cited with approval, the Indian Supreme Court went on to observe:

> *"...Needless to say, unless such principle is adhered to, there is enormous possibility of forum-shopping which has no sanction in law and definitely, has no sanctity. If the same is allowed to prevail, it is likely to usher in anarchy,*

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[13] 1989 AIR 2292, decided on 29 September, 1989, at page 2296, also cited at page 9 in annexture **R 9 A**, of the Affidavit of the 9th Respondent in the case brief.
[14] 1992 AIR SC 474, decided on 10th September 1991, at paragraph 3, also cited at page 9 in annexture **R 9 A**, of the Affidavit of the 9th Respondent in the case brief.
[15] Decided on 18 December 2014, at paragraph 13 of the Judgment, also cited at page 9 in annexture **R 9 A**, of the Affidavit of the 9th Respondent in the case brief.

> *whim and caprice and in the ultimate eventuate shake the faith in the adjudicating system. This cannot be allowed to be encouraged. In this regard we may refer to the pronouncement in Chetak Construction Ltd. V. Om Prakash and others, wherein this Court has observed that a litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand..."*

Having considered the afore-stated sequence of events in light of the contents of the written submissions filed on behalf of the Hon. Attorney General in CA (Writ) 377/2023, I can at once state that the practice referred to in that sequence of events whether it amounts to, or known as, Bench Fixing or Bench Hunting or any other, irrespective of the person responsible for it, be it a Petitioner or a Counsel or an Instructing Attorney or a Judge, would undoubtedly be a practice which must be condemned in no uncertain terms and immediately stopped. There is no doubt that any balanced and smooth system of administration of justice, any court system, any legal regime must immediately take steps to arrest such situations. However, in the case of the Writ Applications bearing Nos. CA (Writ) 308/2023 and CA (Writ) 377/2023, it appears to me that whoever who had successfully engaged in that practice was allowed to do so solely because of the inaction of the Court.

We have to bear in mind that the Judge whose nomination was forwarded by His Excellency the President to the Constitutional Council for approval, for him to be appointed as a Judge of the Supreme Court, was the President of the Court of Appeal at the relevant time. The material shows clearly that the second Writ Petition bearing No. CA (Writ) 377/2023 was entertained, heard and decided in favour of the Petitioner of that Application by a Bench presided over by him.

Given that this incident took place in the Court of Appeal, the question arises as to who should take the initiative to stop, whoever who had engaged in this kind of practices, which would destroy the whole judicial system of the country? In my view, it is primarily the President of the Court of Appeal, who must put in place, an appropriate and adequately robust mechanism to prevent such destructive practices

and to protect the whole Court system of the country. Unfortunately, the President of the Court of Appeal was the presiding Judge when this practice was allowed to successfully pass through his hands.

Be that as it may, the question before us is as to what the Constitutional Council should have done when the material relevant to the aforesaid incident was made available before it. The question before us is not to find out who exactly was responsible for that practice. In other words, the question before us is as to what the Nominee Judge as the President of the Court of Appeal did, to avert such practice. Did the Bench which he presided, at its least, consider the aforesaid submissions made on behalf of the Hon. Attorney General? The answer is clearly no. The bench presided over by him failed to even mention a word about this aspect in its Judgment. This was despite the written submissions filed on behalf of the Hon. Attorney General had given a prominent place to highlight this destructive practice. In the above circumstances, I am unable to accept the Petitioner's submission that the Constitutional Council should not have considered these material against the Nominee Judge.

As regards the role of the Constitutional Council, I observe that the Petitioner's position is no different. This is because the Petitioner himself,[16] has relied on the following observation made by this Court in its Special Determination on the Nineteenth Amendment to the Constitution. The said observation is as follows:

> *"The purpose and object of the Constitutional Council is to* ***impose safeguards in respect of the exercising of the President's discretion****, and* ***to ensure the propriety of appointments made by him to important offices in the Executive, the Judiciary and to the Independent Commissions****. It sets out a framework within which the President will exercise his duties pertaining to appointments"* [17]

[16] Paragraph 18 of Part I of the Written Submissions of the Petitioner, dated 19-07-2024 at page 12.
[17] SC/SD/04/2015, Decisions of the Supreme Court on Parliamentary Bills, (2014-2015) Vol. XII, page 26 at page 36. (Emphasis added)

In the instant case, the consideration before the Constitutional Council was the question of suitability of the Nominee Judge to be appointed as a Judge of the Supreme Court which is the apex Court of this country.

The wording of Article 4(c) provides for the Judicial power of the people to be exercised by Parliament through courts, tribunals and other institutions created by law. It has long been interpreted that it is the Courts which exercise the Judicial power independently for the benefit of the People. (Vide: *Hewamanne v. De Silva and Another*[18], *Premachandra v. Major Montague Jayawickrema and another* (Provincial Governors' Case)[19], *Dr. Athulasiri Kumara Samarakoon and Others v. Ranil Wickramasinghe and Others* (Economic Crisis case)[20].

There is no doubt that the Constitution assures to uphold, the Independence of the Judiciary for the People of this country. In order to achieve this, the Constitution has provided for numerous measures aimed at the protection and maintenance of the Independence of the Judiciary. One would observe that the Constitution has even proceeded to dedicate a whole section sub-titled 'Independence of the Judiciary' included in Chapter XV of the Constitution titled 'The Judiciary'.

One such Article found under Chapter XV of the Constitution is Article 107. Article 107 sets out the procedure for appointment and removal of Judges of the Superior Courts and the Chief Justice under sub-articles (1) and (2)-(3) respectively. Article 107(1) has been amended by the 21st Amendment to the Constitution to specifically qualify the absolute discretion of the power of appointment of Judges of the Superior Courts hitherto vested in the hands of the President by subjecting it to the approval of the Constitutional Council.

Apart from the above, Articles 107(5) and 108 seek to secure the Independence of the Judiciary through providing for both security of tenure and financial independence

[18] (1983) 1 Sri. L. R. 1, at 20.
[19] (1994) 2 Sri. L. R. 90, at 107.
[20] S.C. (F.R.) 195/2022 and 212/2022, S.C.M. 14-11-2023, at page 64.

respectively. Article 108 seeks to ensure financial independence of Judges, particularly through Sub-article (2) which prohibits the reduction of the salaries of Judges after appointment. Thus, one may not need any more reasons to understand that it is primarily to safeguard and protect the Independence of the Judiciary that the Constitution itself has put in place a filtering process in terms of Article 41C of the Constitution before any person could be appointed as a Judge of the Superior Courts.

The learned President's Counsel for the Petitioner attempted to stress that there is no proof to fix the responsibility for the afore-stated sequence of events relating to the allegations of bench fixing/hunting tactics in CA/Writ/377/2023 to the Nominee Judge. I have already adverted to above, the attitude shown to these questionable events by the Bench which was presided over by the Nominee Judge. That attitude is not at all acceptable. It is beyond the norms of the established practice of Courts. That is why perhaps the written submissions filed on behalf of the Hon. Attorney General referred to it as an incident occurred for the first time in the judicial history of this Country.

I have already stated that the Constitutional Council is not only entitled but also has a solemn duty to consider this kind of material which have emanated from more than one source against the conduct of the Nominee Judge. The Petitioner seems to be saying that it is unlawful for the Constitutional Council to probe into these allegations/conduct as such actions are not within its mandate. I cannot agree. There is no merit in that submission.

As stated above, it is well within the mandate of the Constitutional Council to write to the Hon. Chief Justice the letter **P 1** dated 14-11-2023, expecting the Hon. Chief Justice to comment on the conduct of the Nominee Judge for the Constitutional Council to take an informed decision.

The Petitioner claims that he is an Attorney-at-Law who is engaged in these litigations with a spirit of public interest. The Petitioner in his Petition has stated as follows:

> *"the present application has not been made for the benefit of the nominee. The application has been made out of public interest*

> *challenging the perverse, arbitrary and most unreasonable reasoning of the Council to reject the recommendation of the nominee. Hence, the nominee need not be made a party as an interested party. Further, it's inconceivable that any form of public interest litigation can be instituted as applicants would have to make all parties on behalf of whom the application is made to be parties (it is reiterated that this application is not made on behalf of the nominee)."*[21]

What did the public-spirited Petitioner do with regard to the letter **P 1**, to vindicate the rights of public? He came to this Court to challenge the issuance of the letter **P 1** by the Constitutional Council claiming to be acting in the interest of public. When the Constitutional Council refused to approve the name of the Nominee Judge for the appointment as a Judge of the Supreme Court, then the Petitioner states that the said decision of the Constitutional Council has 'flagrantly undermined the Independence of the Judiciary, contravened the principle of Separation of powers, is 'capricious', arbitrary, unreasonable, wholly irrational' and thereby infringed the Fundamental Rights of both the Petitioner and the rights of the citizens of the Republic under Article 12(1) of the Constitution.[22]

As I have already stated, the Constitutional Council wanted the information it sought through **P 1** to make the right decision about the Nominee Judge. That was their solemn duty. If they found that the Nominee Judge was in regular practice of those kind of things, the Constitutional Council is well within law not to approve that name.

In that sense the Petitioner's action to challenge the letter **P 1**, in my view, is not a genuine act on the part of the Petitioner. Most certainly it is not in the public interest, it is totally against the public interest and against the expectations of the provisions of the Constitution. This is because, in my view, such a move to block such information being received in the hands of the Constitutional Council would only benefit an unsuitable person to get his nomination passed through this important threshold.

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[21] Paragraph 18 at Part II of the written submissions for the Petitioner, dated 19-07-2024, at page 54.
[22] Paragraph 21 of the Petition, dated 13-02-2024.

Thus, I am of the view that the Petitioner lacks *uberrima fides*; he has filed the Petition in the instant case for collateral purposes and/or collateral considerations and/or at the behest or instigation of others as alleged by the 7th to 9th Respondents. Therefore, in my view, there was no legal basis for the Constitutional Council to withdraw the letter **P 1**. If advice was given to the Constitution Council to withdraw the letter **P 1**, it is wrong advice given without any legal basis for some other purpose other than the purpose of maintaining the Independence of Judiciary.

I observe that if the Petitioner did not previously file the Fundamental Rights Petition SC/FR/290/2023, in this Court to challenge the letter **P 1**, the Hon. Chief Justice would have provided the material requested by the Constitutional Council enabling it to consider all relevant material when deciding whether it should approve or disapprove the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. Then how can the Petitioner complain that the said letter (**P 1**) was arbitrary, unreasonable and wholly irrational and therefore had undermined the Independence of the Judiciary. In my view, it is the blocking of this information and not permitting its availability before the Constitutional Council which is obnoxious to the Rule of Law. In my view, the Petitioner in the instant case is attempting to unreasonably and unlawfully force the 3rd, 6th, 7th, 8th and 9th Respondents who are Members of the Constitutional Council to approve the name of the Nominee Judge with an unfounded allegation that the Constitutional Council had acted in an arbitrary and unlawful way. In these circumstances, I totally reject the said argument advanced by the Petitioner.

I have stated at the beginning of this Judgment that the Court by its Order dated 30-04-2024, had permitted the 14th Respondent to intervene in this case. Thus, the 14th Respondent too stands as a Respondent in this case. It would be pertinent at this stage, to refer to his stance. The 14th Respondent in his Statement of Objections dated 8th July 2024, had taken up the position that the Petitioner is trying to canvass for the Nominee, blatantly violating the constitutional harmony envisaged by the framers of

the Constitution undermining the functionality of the Constitutional Council.[23] The 14th Respondent had relied on the Judgment of this Court in SC/Appeal/11/2024, marked **R 14(a)**. It is the position of the 14th Respondent that this Court in that Judgment had commented on the practice of preparing Judgments by 'copying and pasting' the contents of the written submissions filed by parties. The same practice had been adopted in the impugned Judgment in that case pronounced by a Bench of the Court of Appeal comprising the Nominee Judge. The 14th Respondent claims that this too should have been a ground for the Constitutional Council to disapprove the nomination of such judges for appointment to the apex court. It is relevant to note that this Court in the said appeal had to say the following about the Judgment pronounced by the majority of a Divisional Bench of the Court of Appeal of which the Nominee Judge was the Presiding Judge.

> *I am constrained to address another point relied on by the Appellant, which has caused Court great concern. The learned counsel for the Appellant submitted that:*
>
> > *(a) The entire majority judgment, including the parts which are seemingly an analysis of the case before us, is directly from the written submission of the 1st Respondent and, accordingly, with no analysis in Law;*
> >
> > *(b) The parts of the majority judgment which is a reproduction of the said Written Submissions of the 1st Respondent is a blatant and manifest misapplication and misconstruction of the law pertaining to a Writ of Quo Warranto.*
>
> *In elaborating on this allegation, the Appellant contended that the content of the majority judgment (from pages 5 to 27) comprises, sequentially, a verbatim reproduction of the Appellant's petition before the Court of Appeal, the*

[23] Paragraph 6 of the Statement of Objections of the 14th Respondent, dated 08-07-2024.

Appellant's Written Submissions filed in March 2023 and the 1st Respondent's Written Submissions filed in May 2023.

In order to buttress this submission, the Appellant has with his Written Submissions tendered a table marked "X5" setting out each paragraph of the judgment and the corresponding paragraphs of the petition or the Written Submissions. According to this chart, there are 80 such places in the majority judgment.

According to the Appellant the only original parts of the majority judgment are found from the 3rd paragraph on page 26 of the judgment, a total of five paragraphs. According to the Appellant, the original paragraphs are as follows:

> *"The conditions required to apply to the court to issue a Writ is restricted in several ways. There is no bar or restriction on who can apply. Any person can apply as long as their fundamental or any other legal right is being breached. In cases where there is no breach of right, a question of public interest must arise with respect to the application. It should not be made for the sake of certain hidden political struggle or undercurrent. The applicant should act in public interest, and not expect any benefit or unethical gain through making the application. The application made by the applicant should be bona fide.*
>
> *A Writ is only granted to compel the performance of duties of a public nature and not merely of a private character, that is to say for the enforcement of a mere private right stemming from a contract of the parties. The Petitioner has failed to satisfy this court that he has a statutory right against the 1st Respondent.*
>
> *The preliminary objections are upheld. Accordingly, we see no merit in the Application of the Petitioner. For all the above reasons, this court is not disposed to grant the discretionary remedy asked for.*

The application of the Petitioner is an action of private nature and therefore not governed by any statutes of the Democratic Socialist Republic of Sri Lanka. As such the Petitioner is not entitled to invoke the Writ jurisdiction of this Court against the 1 Respondent.

The merits of the case also do not warrant the issuance of the Writ prayed for. As such the Petitioner's application warrants dismissal."

I have given anxious consideration to this submission of the Appellant and find that there is much merit in it. The majority judgment (from pages 5 to 27) indeed contains 80 parts as alleged by the Appellant, sequentially, which are either a verbatim reproduction or a slight variation (without any acknowledgment of the source) of the Appellant's petition before the Court of Appeal, the Appellant's Written Submissions filed in March 2023 and the 1st Respondent's Written Submissions filed in May 2023.

The only original five paragraphs of the majority judgment by far does not set out the correct principles that govern the issue of a Writ of Quo Warranto."[24]

It is a fact that this Court in the aforesaid Judgment had criticized the Judge who wrote the Judgment in the Court of Appeal by adopting a 'copy and paste' approach from the Petition and the written submissions filed by the parties. The 14th Respondent has attributed this practice as a practice engaged by the Nominee Judge. This material was not before the Constitutional Council. Hence the Council did not have the opportunity to consider it. However, in my view, if the Nominee Judge was responsible for adopting such a practice, it is certainly a matter which must attract the attention of the Constitutional Council when deciding whether it should approve the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the apex Court of the country.

[24] At Pages 29-30.

I observe that if the Petitioner did not challenge the letter **P 1**, it was well within the Hon. Chief Justice's means to provide such material when the Constitutional Council requested his views by **P 1**. Then that would have enabled the Constitutional Council to come to a right decision. As I have already mentioned, what jeopardises the public interest is the failure by the Constitutional Council to consider such negative practices of any Judge when such person's name is forwarded to the Constitutional Council for approval for such person to be appointed as a Judge of a Superior Court of the country. Therefore, I agree with the 14th Respondent's concern that the Petitioner in this Petition had attempted to canvass for the Nominee Judge in his own interest, which I cannot accept as being in the public interest.

Turning to the affidavit submitted by the Secretary to His Excellency the President, I find that the Secretary to the President had just produced the following documents: the recommendation by His Excellency the President to the Constitutional Council, seeking its approval to appoint the incumbent President of the Court of Appeal as a Judge of the Supreme Court (the letter dated 25-10-2023, marked **A**); the communication by the Hon Speaker dated 21-11-2023 addressed to his Excellency the President, marked **B**; the decision of the Constitutional Council which was dated 31-01-2024 sent by the Hon Speaker addressed to His Excellency the President, marked **C**. It is the position of the Secretary to His Excellency, that His Excellency the President has in all times acted in good faith in accordance with the Constitution and has not violated the Fundamental Rights of the Petitioner.

The 2nd, 4th and the 5th Respondents in their affidavits (all dated 18-06-2024), have stated that they cast their vote in favour of approving the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court while the majority of the members voted to disapprove the said nomination as reflected in the minutes of the Forty Seventh Meeting of the Constitutional Council held on 30-01-2024. All of them, i.e. the 2nd, 4th and 5th Respondents have annexed the documents: the recommendation by His Excellency the President to the Constitutional Council, seeking its approval to appoint the

incumbent President of the Court of Appeal as a Judge of the Supreme Court (the letter dated 25-10-2023, marked **A**); the communication by the Hon. Speaker dated 21-11-2023 addressed to his Excellency the President, marked **B**; the communication by His Excellency the President, dated 09-01-2024 addressed to the Hon. Speaker, marked **C**; the minutes of the Forty Sixth Meeting of the Constitutional Council held on 19-01-2024, marked **D**; the minutes of the Forty Seventh Meeting of the Constitutional Council held on 30-01-2024, marked **E**; the communication of the decision of the Constitutional Council not approving the appointment of the Nominee as a Judge of the Supreme Court to His Excellency the President by letter dated 31-01-2024, marked **F**; the minutes of the Forty Eighth Meeting of the Constitutional Council held on 19-02-2024, marked **G**.

It is significant to observe that none of these Respondents, namely, the 2nd, 4th and 5th Respondents have complained or even attempted to complain that the reasoning of the majority decision of the Council violates any provision of law. They only have asserted that they have cast their vote in favour of the appointment of the Nominee Judge. The 1st Respondent, Hon. Speaker has also correctly taken a neutral stand in this case. He has confined to his averments in the affidavit, to the role he has played as the Chairman of the Constitutional Council. The effect of the affidavit of the Secretary General of the Constitutional Council dated 12-03-2024, is no different. Thus, the composite position taken up by all the said Respondents is that there is nothing that had happened at their hands to substantiate any infringement of the Petitioner's Fundamental Rights.

However, to the surprise of Court, the learned Deputy Solicitor General made submissions before us attempting to convince us that the reasoning of the majority decision of the Constitutional Council is wrong when the Constitutional Council, inter alia, had relied on the written submissions tendered by the Attorney General in CA (Writ) 377/2023 to come to that conclusion. In view of the positions taken up by the Respondents, for whom the learned Deputy Solicitor General appears, we cannot see any basis upon which the learned Deputy Solicitor General could have made such submissions before us.

The Petitioner's position is that the decision of the Constitutional Council not to approve the name of the Nominee Judge to be appointed as a Judge of the Supreme Court has infringed his Fundamental Rights guaranteed by Article 12 (1) of the Constitution. The corollary of this position is that minority decision of the Constitutional Council to approve the name of the Nominee Judge to be appointed as a Judge of the Supreme Court is the legally valid decision. Having that in mind, let me now turn to the minority decision of the Constitutional Council.

I would commence this discourse with reproducing the reasons attached to the minority decision of the Constitutional Council, marked **R 11**, which is as follows:

> *The Hon Nimal Siripala de Silva stated that he is not in agreement with the aforesaid statement and requested to include the following statement in the Minutes.*
>
> *"The nomination sent by the Hon President is the President of the Court of Appeal who has been recommended for the Supreme Court. This person's recommendation to the office of the President of the Court of Appeal was unanimously approved by the same Council months ago. The Hon Chief Justice has also recommended this nominee, in writing, as a fit and proper person to be appointed as a Judge of the Supreme Court. As alleged by the Civil Society members of the Council, there is no provision to go into the merits of a Judgment and assessed by the Council. If a Judicial officer is unsuitable, he would be expelled otherwise he can walk up to the highest position. Such expulsion should be only by Constitutional provisions and there should be an impeachment motion passed by Parliament with 2/3 majority. Without adhering to that, the Council is not in a position to decide a person is unsuitable. This is a greater erosion of Justice and Fundamental Rights of Judicial Officers and interfering the Judiciary. This would be violating the Constitution if the Council adopts it in this nature. Therefore, myself, Hon Sagara Kariyawasam and the Hon Prime Minister are not inclined to accept the reasons given by civil society*

members taking in to account that there are no cogent reasons that have been given to reject this nomination.

The Hon Prime Minister agreed with the same. The Hon Sagara Kariyawasam informed that he does not agree with the statement made by the Hon Nimal Siripala de Silva in its entirety but however he approves the recommendation of the Hon President.

As stated above, the Petitioner states that the above view is the correct view which the Constitutional Council should have taken and approve the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. Let me consider this argument next.

I find that there are four main reasons provided in the above reasoning given by the 4th Respondent with which the 2nd and 5th Respondents had concurred. Let me start with the first of those reasons. It is the fact that the Constitutional Council had unanimously approved the Nominee Judge to be appointed as the President of the Court of Appeal some months ago. One must bear in mind that the material considered by the Constitutional Council in the instant matter was not available before it when it considered the approval of the Nominee Judge to be appointed as the President of the Court of Appeal previously. The written submissions filed on behalf of the Hon. Attorney General in CA (Writ) 377/2023 is dated 10-11-2023. The letter by which Hon. Chief Justice had given his concurrence for the appointment of the Nominee Judge, as a Judge of the Supreme Court was dated 06-11-2023. It was on 08-11-2023 that the then Hon. Minister of Sports had raised concerns about the Nominee Judge in Parliament, making certain negative remarks about the conduct of the Nominee Judge. It was at the Thirty Fifth Meeting, held on 09-11-2023, that the Constitutional Council considered, presumably for the first time, the nomination forwarded by His Excellency the President, to appoint the Nominee Judge, as a Judge of the Supreme Court. It was on 08-11-2023 that the Hon. Minister of Justice, Prison Affairs and Constitutional Reforms, had made a statement relevant to the issues raised by the then Hon. Minster of Sports on the previous date. Therefore, it is clear that the material which the 3rd,

6th, 7th, 8th and 9th Respondents had focussed when casting their votes against the approval for the Nominee Judge to be appointed as a Judge of the Supreme Court had come to light much after the Constitutional Council had unanimously approved the Nominee Judge to be appointed as the President of the Court of Appeal.

Moreover, when the Constitutional Council approves the name of a Judge of the High Court or an officer from the Attorney General's Department or any other person who does not belong to either of the above groups, it can only consider the conduct, performances, achievements and other related factors in relation to that person's career up to that point. On the other hand, the Judges holding different positions, namely, as a Judge of the Court of Appeal, the President of the Court of Appeal, a Judge of the Supreme Court, the Chief Justice have different levels of challenges to meet. Therefore, the fact that the Constitutional Council had unanimously approved the Nominee Judge to be appointed as the President of the Court of Appeal at a certain time should not prevent the Constitutional Council from revisiting the matter afresh for the next appointment, as a Judge of the Supreme Court.

As I have already stated, if the Constitutional Council fails to consider the material unearthed after it had approved the Nominee Judge for his appointment as the President of the Court of Appeal, I can simply say that it is obnoxious to the spirit of Article 12 (1) of the Constitution. Therefore, I am of the view that the first reason provided by the 4th Respondent with which the 2nd and 5th Respondents had agreed, i.e. the fact that the Constitutional Council had unanimously approved the Nominee Judge to be appointed as the President of the Court of Appeal some months ago, cannot be accepted as a lawful or justifiable reason.

Obviously, the Constitutional Council considered the Nominee Judge for the appointment to the post of the President of the Court of Appeal when the Nominee Judge was yet to assume duties as the President of the Court of Appeal. The President of the Court of Appeal has more important role to play than a Judge of the Court of Appeal. Indeed, the effectiveness and the quality of administration of justice would depend on the way the President of the Court of Appeal conducts himself and decisions

he takes towards making the Court of Appeal more effective to its users. The allegation which the Constitutional Council in this instance had considered is the conduct of the Nominee Judge in his capacity as the President of the Court of Appeal. Any officer holding its position as a trust to the general public must act in such a way that the trust reposed in him by the general public and the system is not breached. If the President of the Court of Appeal whose name has been cleared by the Constitutional Council to be appointed as the President of the Court of Appeal acts in breach of that trust after securing his appointment, then the question arises as to his suitability for the next appointment. For instance, if a person who has been appointed as the President of the Court of Appeal after approval by the Constitutional Council, develops a practice which is unbecoming of a Judge, the question arises as to whether the Constitutional Council is under an obligation to proceed to approve such Judge's nomination for the next higher post merely because it had earlier approved such Judge for the post he currently holds. In my view the answer clearly is no.

The second reason provided by the 4th Respondent with which the 2nd and 5th Respondents had concurred is the fact that the Hon. Chief Justice has also given his concurrence to appoint the Nominee Judge, as a Judge of the Supreme Court. The Hon. Chief Justice had given his concurrence by the letter dated 06-11-2023. I have already adverted to above, the time line with regard to adverse information against the Nominee Judge coming to light. The allegations made from several quarters against the Nominee Judge started coming to light since 08-11-2023 when the then Hon. Minister of Sports had raised negative concerns about the Nominee Judge in Parliament. Therefore, I observe that this material may not have been available before the Hon. Chief Justice. If such material had been available, the Hon. Chief Justice would have brought them to the attention of the Constitutional Council, at least as unverified observations. This is so when the 3rd, 6th, 7th, 8th and 9th Respondents had dutifully and rightly with the spirit of discharging their function entrusted to them by the citizens of this country through the provisions in the Constitution, namely Article 41C, had proceeded without any hesitation to consider such material when making their decision with regard to the appointment of the Nominee Judge to the Supreme Court.

Therefore, the second reason provided by the 4th Respondent with which the 2nd and 5th Respondents had agreed i.e., the fact that the Hon. Chief Justice has given his concurrence to appoint the Nominee Judge, as a Judge of the Supreme Court, also cannot be accepted as a lawful or justifiable reason.

The third Reason provided by the 4th Respondent with which the 2nd and 5th Respondents had concurred is the view that there is no provision for the Constitutional Council to go into the merits of Judgments. The reasoning provided by the 3rd, 6th,7th, 8th and 9th Respondents had never questioned the validity of any Judgment. All what they had considered was the conduct of the Nominee Judge. Indeed, one of the matters [item (c)] referred to in the letter dated 14-11-2023 (**P 1**), written by the Hon. Speaker addressed to the Hon. Chief Justice, is a request for the Hon. Chief Justice to comment on *"The conduct of the Judge concerned and any notable contribution for the development of the legal jurisprudence etc."* As I have already adverted to, if the Petitioner did not block this information from being received by the Constitutional Council by previously filing the Fundamental Rights Petition SC/FR/290/2023, the Hon. the Chief Justice would well have provided his comments/observations on this aspect of the conduct of the Nominee Judge thereby enabling the Constitutional Council to consider them when making its decision. I must also note another important feature here. The Constitutional Council had thought it fit to consider the views of the Hon. Chief Justice on the conduct of the Nominee Judge before making up their minds on the matter solely by themselves. Thus, I am unable to accept the argument of the Petitioner that the 3rd, 6th, 7th, 8th and 9th Respondents have acted in an arbitrary manner. I have also adverted to above, that the letter (**P 1**) was not arbitrary, unreasonable, irrational or had undermined the Independence of the Judiciary. I have also already held that it is the blocking of this type of information which had prevented the Constitutional Council from evaluating the expected comment by the Hon. Chief Justice, which is obnoxious to the Rule of Law. Therefore, I reaffirm that the Constitutional Council is entitled to take into consideration, the conduct of the Judge when it is called upon to consider the nomination for the suitability for such Nominee to be appointed to the next post.

The fourth reason provided by the 4th Respondent with which the 2nd and 5th Respondents had concurred is the view that a judicial officer if unsuitable, should be expelled from service and in the absence of such expulsion, such judicial officer is entitled to walk up to the highest position. In my view this statement is completely wrong in law, in fact and in practice. If this position is correct, the following questions arise: Why is the Constitutional Council there? What role the Constitutional Council has to play, when it is called upon to approve the name of a judicial officer to be appointed as a Judge of a Superior Court?

Firstly, if the above reason provided by the 4th Respondent is correct, then I see no positive role which the Constitutional Council can play in its decision-making process if the nominee is a sitting Judge. If the nominee is a sitting Judge and if he has not been expelled from service, then the Constitutional Council has no option but to approve the name of such sitting Judge. This is because the Constitutional Council can refrain from approving a nomination of a sitting Judge only if such person has been expelled from service. Then in the first place, such person would not be a sitting Judge. Secondly, for the Constitutional Council to refrain from approving a nomination of such a person on such basis, His Excellency the President should have nominated a former sitting Judge who has been expelled from service. This cannot happen. Moreover, if this reason is valid, then it would not be within the powers of the Constitutional Council to consider the conduct of such Judge, the competence of such Judge for a higher post, the suitability of such Judge, or the ability of such Judge to function as a Judge of a Superior Court. Additionally, it is a common occurrence that all persons who join the judiciary as Magistrates would not end up as High Court Judges; and all High Court Judges would not end up as Court of Appeal Judges; and all Court of Appeal Judges would not end up as Judges of the Supreme Court; and all Judges of the Supreme Court would not end up as Chief Justices. I do not think I should say any more than this, to show the fallacy of this reasoning.

I have also adverted to above, that the letter (**P 1**) was not arbitrary, unreasonable, irrational or had undermined the Independence of the Judiciary. I have also already

held that it is the blocking of this type of information which had prevented the Constitutional Council from evaluating the expected observations by the Hon. Chief Justice which is obnoxious to the Rule of Law.

In that sense it is wrong for the minority of the Constitutional Council to take a view that non-approval of the Nominee Judge's name in this instance would amount to a *'greater erosion of Justice and Fundamental Rights of Judicial Officers and interfering the Judiciary'.* Finding out about the Judge by whatever means the Constitutional Council can, and subsequently considering them carefully and objectively to arrive at a decision on the suitability of a nominee for the proposed appointment is the duty of the Constitutional Council. Therefore, the minority view that such a move 'would be violating the Constitution' if the Council adopts such a move, is not correct. Therefore, the reasons given by the three members of the Constitutional Council who voted to approve the name of the Nominee Judge lacks any legal or factual basis. Therefore, that view would amount to an arbitrary view.

The Petitioner also has deprived the Nominee Judge the opportunity of defending his actions/conduct since the Petitioner has not made the Nominee Judge a party to this case at least for notice. For the reasons best known to him, the Petitioner had pre-supposed that the 3rd, 6th, 7th, 8th and 9th Respondents have acted in an arbitrary manner to unlawfully refuse to approve the name of the Nominee Judge for the appointment as a Judge of the Supreme Court. Similarly, the Petitioner had pre-supposed that the reasons provided by the 4th Respondent with which the 2nd and 5th Respondents had concurred is reasonable and lawful. I have already rejected these arguments and given reasons.

For the foregoing reasons, I hold that none of the Respondents have infringed any of the Fundamental Rights of the Petitioner guaranteed by the Constitution. In the above circumstances, the Petitioner is not entitled to succeed in this application. I have already held that the Petitioner's action to challenge the letter **P 1**, is not a genuine act on the part of the Petitioner. I have also already held that the Petitioner's action to challenge the majority decision of the Constitutional Council is not a litigation in the

public interest but is totally against the interest of public and against the expectations of the provisions of the Constitution. I have also taken the view that the Petitioner has lacked *uberrima fides*; he has filed this Petition for collateral purposes and/or collateral considerations and/or at the behest or instigation of others. Having taken these aspects into consideration, I proceed to dismiss this Petition with costs fixed at Rs. 500,000 (Rupees five hundred thousand) each to the 7th, 8th and 9th Respondents [a total of Rupees 1.5 million], who not being Members of Parliament but being persons appointed as members of the Constitution Council in terms of Article 41A (1) (e) (iii) nevertheless had to retain Counsel to represent them in these proceedings, owing to the conduct of the Petitioner. The Petitioner is also directed to deposit another sum of Rs. 500,000 (Rupees five hundred thousand) in the Registry of this Court as costs of the State. Registrar is directed to take necessary steps to ensure the payment of these costs within 02 months from today.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI, J.
I agree,

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.
I agree,

JUDGE OF THE SUPREME COURT