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

In the matter of an Application for Special Leave to Appeal in terms of Article 128 of the Constitution against the judgment of the Court of Appeal dated 31st October 2023 in case bearing No. CA/Writ/434/2022 filed in terms of Article 140 of the Constitution for a mandate in the nature of a Writ of Quo Warranto.

Hitihamilage Don Oshala Lakmal Anil Herath,
No. 22, Wata Mawatha,
Piliyandala.

Petitioner

Vs.

S.C. Appeal No. 11/2024
S.C. (S.P.L.) L.A. No. 306/2023
C.A. (Writ) Application No. 434/2022

1. Hon. Diana Gamage,
   State Minister of Tourism,
   No. 537/21, Country Glade Bungalow,
   Amaragoda Road, Hokandara North.

2. Hon. Tiran Alles,
   Minister of Public Security,
   15th Floor, "Suhurupaya",
   Battaramulla.

3. I. S. H. J. Ilukpitiya,
   Controller General of Immigration and Emigration,
   "Suhurupaya", Battaramulla.

4. Ranjith Madduma Bandara,
   General Secretary, Samagi Jana Balawegaya,
   72, Dr. N. M. Perera Mawatha,
   Colombo 08.

5. Dhammika Dassanayake,
Secretary General of Parliament,
Parliament of the Democratic Socialist Republic of Sri Lanka, Sri Jayawardenapura Kotte.

6. N. G. Punchihewa,
Former Chairman, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

6A. R. M. A. L. Rathnayake,
Chairman, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

7. S. B. Diwarathne,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
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7A. M. A. P. C. Perera,
Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

8. M. M. Mohammed,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

8A. Ameer Faaiz,
Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

9. K. P. P. Pathirana,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

10. P. S. M. Charles,
Elections Commission of Sri Lanka,
Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

11. Mahinda Deshapriya,
Former Chairman, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

12. N. J. Abeysekara, President's Counsel,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
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Rajagiriya.

13. Prof. Rathnajeewan Hoole,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

14. M. S. Karunaratne,
Chief Inspector of the Human Trafficking and Smuggling Division,
Criminal Investigations Department, Sri Lanka Police, York Street, Colombo.

15. Hon. Attorney General,
Attorney General's Department,
No. 159, Hulftsdorp, Colombo 12.

Respondents

AND NOW BETWEEN

Hitihamilage Don Oshala Lakmal Anil Herath,
No. 22, Wata Mawatha,
Piliyandala.

Petitioner-Appellant

Vs.

1. Hon. Diana Gamage,
State Minister of Tourism,
No. 537/21, Country Glade Bungalow,
Amaragoda Road, Hokandara North.

2. Hon. Tiran Alles,
Minister of Public Security,
15th Floor, "Suhurupaya",
Battaramulla.

3. I. S. H. J. Ilukpitiya,
Controller General of Immigration and Emigration,
"Suhurupaya", Battaramulla.

4. Ranjith Madduma Bandara,
General Secretary, Samagi Jana Balawegaya,
72, Dr. N. M. Perera Mawatha,
Colombo 08.

5. Dhammika Dassanayake,
Secretary General of Parliament,
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9. K. P. P. Pathirana,
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10. P. S. M. Charles,
Elections Commission of Sri Lanka,
Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

11. Mahinda Deshapriya,
Former Chairman, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
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12. N. J. Abeysekara, President's Counsel,
Former Member, Elections Commission of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
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13. Prof. Rathnajeewan Hoole,
Former Member, Elections Commission
of Sri Lanka, Election Secretariat,
P.O. Box 02, Sarana Mawatha,
Rajagiriya.

14. M. S. Karunaratne,
Chief Inspector of the Human
Trafficking and Smuggling Division,
Criminal Investigations Department, Sri
Lanka Police, York Street, Colombo.

15. Hon. Attorney General,
Attorney General's Department,
No. 159, Hulftsdorp, Colombo 12.

Respondent-Respondents

Before: **Hon. E. A. G. R. Amarasekara, J.**

Hon. K. Kumudini Wickremasinghe, J.

Hon. Janak De Silva, J.

Counsel:

Hafeel Farisz with Nishika Fonseka and Shannon Tillekeratne for the Petitioner-Appellant

Shavindra Fernando, P.C. with M. Skandarajah for the 1st Respondent-Respondent

Farman Cassim, P.C. with Vinura Kularatne and T. Abeyratne for the 4th Respondent-Respondent

Dishna Warnakula, D.S.G. with Rajin Gunaratne, S.C. for the 2nd, 3rd and 5th to 15th Respondent-Respondents

Written Submissions:

Petitioner-Appellant on 28.02.2024

1st Respondent-Respondent on 26.02.2024

4th Respondent-Respondent on 28.02.2024

Argued on: 13.02.2024

Decided on: 08.05.2024

Janak De Silva, J.

The 1st Respondent-Respondent ("1st Respondent") is a Member of Parliament and State Minister of Tourism. The Petitioner-Appellant ("Appellant") invoked the jurisdiction of the Court of Appeal in terms of Article 140 of the Constitution and sought a Writ of Quo Warranto requiring the 1st Respondent to show by what authority she claims to hold office and continues to function as a Member of Parliament of the Democratic Socialist Republic of Sri Lanka.

The Appellant alleged that the 1st Respondent is a British citizen and holder of British Passport bearing Nos. 094425352 and 521398876 and consequently has ceased to be a citizen of Sri Lanka. Therefore, the Appellant claims that the 1st Respondent is disqualified from holding office as a Member of Parliament. I will advert to this contention in greater detail later.

The 1st Respondent raised the following preliminary objections:

(1) The Appellant has failed to comply with Rule 3 (1) (a) of the Supreme Court Rules and hence it must be dismissed *in limine*.

(2) The facts are in dispute between the parties. That is the Appellant, the 1st Respondent and the 3rd Respondent-Respondent as evident from the pleadings and as such writ will not lie and the petition of the Appellant should be dismissed in *limine*.

(3) The relief sought in the petition of the Appellant is not conclusive, as such, granting such relief by this Court will be futile. Therefore, the petition of the Appellant should be dismissed *in limine*.

This application was heard by a divisional bench of the Court of Appeal. The majority ("majority judgment") upheld the preliminary objections and dismissed the application. The minority ("minority judgment") granted the Writ of Quo Warranto prayed for by the Appellant.

Aggrieved by the majority decision, the Appellant sought special leave to appeal which was granted on the following questions of law:

(1) Did the Court of Appeal err in law in its application of the law for a Writ in the nature of a Writ of *Quo Warranto*?

(2) Did the Court of Appeal err in law in failing to appreciate that in a Writ of *Quo Warranto* the burden of proving title and/or authority to Public Office is on the 1st Respondent?

(3) Did the Court of Appeal err in law in its application of principles of Writs of Mandamus and/or Procedendo and/or Certiorari in a Writ of *Quo Warranto*?

(4) Did the Court of Appeal err in law in not holding that the 1st Respondent is disqualified from holding office as a Member of Parliament upon her refusal to provide proof for her Sri Lankan citizenship in terms of the Law?

(5) Did the Court of Appeal err in Law in failing to appreciate that the Appellant's application relates to the franchise of the people of the Republic?

Court fixed this matter for argument on top of the list for 12.02.2024 and 13.02.2024. All parties were heard on these two days. At the conclusion of the hearing, all parties were granted two weeks' time to file written submissions. The Appellant, 1st Respondent and the 4th Respondent-Respondent have filed written submissions. Court is grateful to these parties for having assisted it by tendering detailed written submissions on time.

Before proceeding to deal with the merits, I wish to refer to the contention made by the learned President's Counsel for the 1st Respondent that parties were heard only on the preliminary objections and the majority judgment dismissed the application on the preliminary objections without going into the merits. An examination of the proceedings before the Court of Appeal and a plain reading of the majority judgment shows the fallacy of this contention.

The written submissions dated 27.03.2023 filed on behalf of the 1st Respondent states that they are tendered *on the Preliminary Objections and the main* application. The synopsis of the submissions tendered on behalf of the 1st Respondent dated 04.10.2023 states that they are tendered on the *entirety of the matters raised in the petition of the Petitioner with regard to the main application, subsequent counter affidavit of the Petitioner and the preliminary objections raised on behalf of the 1st Respondent*. In fact, the majority judgment after upholding the preliminary objections, went on to state (at page 27) that *"[t]he merits of the case also do not warrant the issuance of the Writ prayed for"*. Clearly the parties were heard on both the preliminary objections as well as the merits and the majority judgment considered the merits of the application as well in dismissing it.

Disqualification as Member of Parliament

The Appellant contends that the 1st Respondent is disqualified from holding office as a Member of Parliament in terms of Article 91 read with Article 89 of the Constitution.

Article 91 states that a person is disqualified to be elected as a Member of Parliament or to sit and vote in Parliament if, *inter alia*, he is subject to any of the disqualifications specified in Article 89.

According to Article 89, no person shall be qualified to be a Member of Parliament if he is not a citizen of Sri Lanka.

According to Section 2 (4) of the Citizenship Act No. 18 of 1948 as amended ("Citizenship Act"), a person is entitled to the status of a citizen of Sri Lanka either by right of descent or by virtue of registration as provided therein or by any other Act authorising the grant of such status by registration in any special case of a specified description.

In terms of Section 20(2) of the Citizenship Act, where a person is a citizen of Ceylon or Sri Lanka by descent and that person, by ***operation of law***, is at the time of his birth or becomes thereafter, also a citizen of any other country, that person shall on the 31st day of December, 1952, or on the day immediately succeeding the date of the expiration of a period of twelve months from the date on which he so becomes a citizen of that other country, or on the day on which he attains the age of twenty-two years, whichever day is in his case the latest, cease to be a citizen of Sri Lanka, unless before that day he renounces citizenship of that other country in accordance with the law therein in force in that behalf and notifies such renunciation to a prescribed officer.

According to Section 20 (5) of the Citizenship Act, a person who is a citizen of Sri Lanka by descent, ceases to be a citizen of Sri Lanka if he ***voluntarily*** becomes a citizen of any other country.

As the learned counsel for the Appellant correctly submitted, any person who ceases to be a citizen as aforesaid can, pursuant to Section 8 of the Citizenship Act, resume the status of citizen upon a declaration made by the Minister. A precondition for such declaration is that such person shall renounce citizenship of the other country in

accordance with the law. However, the Minister may exempt such person from such precondition and nonetheless make a declaration as to citizenship.

Therefore, for a Writ of Quo Warranto to be issued in this application, the following facts must be established:

(1) The 1st Respondent has ceased to become a citizen of Sri Lanka either voluntarily or by operation of law; and,
(2) The 1st Respondent has not resumed the status of a citizen according to law.

In considering whether they have been established, the burden of proof must also be addressed. I will consider these matters in conjunction with an examination of the majority judgment on the preliminary objections.

Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 ("Rules")

I am in agreement with the contention of the learned President's Counsel for the 1st Respondent that this is an imperative rule as in ***Shanmugavadivu v. Kulathilake*** **[(2003) 1 Sri.L.R. 215]** it was held that the requirements in Rules 3 (1) (a) and 3 (1) (b) of the Court of Appeal (Appellate Procedure) Rules 1990 (1990 Rules) are imperative.

The learned counsel for the Appellant relied on the decision in ***Kiriwanthie and Another v. Navaratne and Another*** **[(1990) 2 Sri.L.R. 393]** and contended that the non-compliance with the relevant rules does not require automatic dismissal. Nevertheless, in ***Shanmugavadivu v. Kulathilake*** **[supra. at page 220]** Bandaranayake J. held that *Kiriwanthie's* case was decided on the basis of Rule 46 of the Supreme Court Rules 1978 and therefore admittedly has no application to Rules 3 (1) (a) and 3 (1) (b).

Nevertheless, Rule 3 (1) (a) does not require that all originals or duly certified copies of documents must be annexed to the petition. It requires originals or duly certified copies of all the ***documents material*** *to such application* to be annexed to the petition. This was

confirmed in ***Urban Development Authority v. Ceylon Entertainments Limited and others*** **[(2004) 1 Sri.L.R. 95 at 98]** where Edussuriya J. held:

> *"[…] where an objection is taken on the ground that either the originals or duly certified copies of material documents have not been filed with the petition then the* ***Court of Appeal must before making a ruling on such objection consider the question whether such documents are material in deciding the questions urged by the petitioner in the application*** *[…]"* (emphasis added)

The learned President's Counsel for the 1st Respondent placed heavy reliance on the decision of the Court of Appeal in ***Sharmila Roweena Jayawardena Gonawela v. Hon. Ranil Wickremasinghe and Others*** **[CA/Writ/388/2018, C.A.M. 21.05.2019]**. However, there the Court of Appeal upheld the objection on the basis that documents marked P6a to P7e, annexed in support of averment 13 of the petition, are material documents for the determination of that application.

In this application, all documents which provide evidence of the citizenship of the 1st Respondent are material to the application. The originals or certified copies of such documents should have been annexed to the petition.

The majority judgment held that documents marked P8 and P11 are not originals or duly certified copies and hence are contrary to Rule 3 (1) (a).

Document P8 is a true copy of the editorial of the Sunday Island dated 01.11.2020 reporting that the 1st Respondent had voted for the 20th Amendment to the Constitution contrary to the stance of the Samagi Jana Balawegaya, the party from which she was appointed as a Member of Parliament from the National List. However, it is not a material document to the question of disqualification of the 1st Respondent.

Document P11 is a photographed copy of what the Appellant verily believes to be the information page of the British passport of the 1st Respondent. This is plainly a material document to the application of the Appellant. It is neither the original nor a certified copy.

Nevertheless, Rule 3 (1) (a) does not require that an application ***should*** be dismissed for every failure to comply with it. It states that the Court ***may***, *ex mero motu* or at the instance of any party, dismiss such application. The use of the word *may* connote discretionary power. The discretion must be exercised based on the facts and circumstances of each case.

In this application, the Appellant has tendered along with his petition, a certified copy of the complete case record of M.C. Colombo Case No. B 48037/01/2021 marked as P12. This, in addition to the B Reports, contains complete copies of certain statements made to the Police by the Deputy Controller of the Department of Immigration and Emigration and the 1st Respondent.

These statements have been recorded in the course of an investigation conducted by the Criminal Investigations Department ("CID") pursuant to a complaint lodged by the Appellant that the 1st Respondent is illegally residing in the country without a valid visa. Consequent to such investigations, the then holder of the office of 14th Respondent reported facts to the Colombo Magistrate's Court in Case No. B 48037/01/2021.

The majority judgment (at page 25) states that *these police statements do not amount to evidence as admissible under and in terms of the Evidence Ordinance*. This is a threadbare statement without reference to any particular provision in the Evidence Ordinance which deals with admissibility. Let me examine this statement in detail.

The statements contained in P12 were recorded during criminal investigations initiated in terms of Section 109 (5) of the Code of Criminal Procedure ("Cri.P.C") consequent to the complaint made by the Appellant.

Section 110 (3) of the Cri.P.C. states that a statement made by any person to a Police Officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court. The proviso states that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time. The 1st Respondent is not an accused person as no charges have been filed against her.

Moreover, the Cri.P.C. is according to its preamble an Act to regulate the procedure of the Criminal Courts. This an application made in terms of Article 140 of the Constitution.

Section 25 (1) of the Evidence Ordinance prohibits a confession made to a Police Officer from being proved as against a person accused of any offence. This has no application to the 1st Respondent as she is yet to be charged for any offence.

In ***Tunnaya alias Gunapala v. Officer-in-Charge, Police Station, Galewela*** **[(1993) 1 Sri L.R. 61 at 66]** Bandaranayake J. held:

> *"A consideration of the meaning and scope of s. 116 and of s. 136 (1) (d) of the Code thus becomes necessary. Section 116 is a section contained in that part of the Code dealing with the investigation of offences and the powers of Police Officers and inquirers to investigate. It is a step in the process of investigation. It is the counterpart of s. 114 which permits the release of an accused if evidence is deficient. Section 116 (1) requires that a suspect be sent in custody to a Magistrate's Court with jurisdiction when the information is well founded in the case of a non-bailable offence. That is to say that the suspect should be so forwarded when the Police Officer or inquirer comes to a conclusion that there is sufficient evidence in the sense that a substantial case is made out at an early stage of an investigation which can properly be sent before a Magistrate. Thereafter it is necessary for the Magistrate to make an order for the detention of the suspect. On the other hand, if*

the offence is bailable the section even permits the Police Officer or inquirer to take security from the suspect for his appearance before Court. The section also provides for productions to be sent to the Court immediately without being kept at the Police Station for further investigations if necessary, and for witnesses to be bound over to appear and testify at a trial. The fact that the Police can take bail and release the suspect if the offence is bailable under sub-section (1) and the fact that investigations can continue under sub-section (3) and the use of the word "suspect" and not "accused" in the language of sub-section (1) used to refer to this person clearly point to the fact that no proceeding has yet been instituted against that person as an accused."

The provisions in the Cri.P.C. apply only to criminal proceedings. There is nothing in the Cri.P.C. or the Evidence Ordinance which prohibits the use of the original or certified copies of the complete complaints or statements made to the Police in the course of any criminal investigation from being used by a civil court in civil proceedings.

In ***Jayanetti v. Mitrasena*** **(71 NLR 385 at 397)** Weeramantry J. held:

"It may indeed appear somewhat disconcerting that admissions made or information divulged by the accused person himself should be the very material upon which a criminal charge against him is proved, but, as in other areas of the criminal law, such a circumstance does not render the evidence inadmissible. The Evidence Ordinance lays down certain limits transgression beyond which will render statements of an accused person inadmissible at his prosecution, but short of this no principle of law is offended by the use against an accused person at his trial, of disclosures made by that person himself."

I am of the view that the provisions of the Cri.P.C. do not apply to proceedings pursuant to Article 140 of the Constitution. Neither does the prohibition in Section 25 (1) of the Evidence Ordinance.

One of the statements contained in P12, is one made by Ramawickrema Gamaachchige Champika Piyari Dinushan Ramawickrema, Duputy Controller, Department of Immigration and Emigration. He was in charge of the computer division of the Department of Immigration and Emigration. This statement had been made after checking the records in that division.

According to this statement, British passport bearing number 094425352 has been issued to one "Diana Gamage". She had arrived in Sri Lanka using this passport for the first time on 10.10.2004. Thereafter, she had travelled to and from Sri Lanka using this passport and had last left Sri Lanka on 30.06.2014.

Thereafter, she had used British passport bearing number 521398876 from 16.07.2014 to 05.10.2014 to travel to and from Sri Lanka.

She had obtained a Sri Lankan passport bearing No. N5091386 on 24.01.2014. The National Identity Card bearing No. 658534300V had been submitted to obtain this passport. She had used this to proceed oversees on 12.04.2014 and returned last on 03.01.2018.

On 07.08.2018 she had applied for a Diplomatic passport and had been issued a diplomatic passport bearing No. OL 5654794. She had used this diplomatic passport to proceed oversees on 04.04.2019 and last returned on 16.01.2020.

This evidence shows that "Diana Gamage" used British passport bearing number 521398876 from 16.07.2014 to 05.10.2014 to travel to and from Sri Lanka when at the same time she was holding a Sri Lankan passport bearing number N5091386 from 24.01.2014.

A statement from the 1st Respondent, Diana Gamage was recorded on 31.10.2022 which forms part of P12 [P17(a), pages 223-226 of Volume IV]. The learned President's Counsel for the 1st Respondent submitted that in the absence of an affidavit of any person who

claims to have recorded such statement accurately, this statement is inadmissible against the 1st Respondent.

I have no hesitation in rejecting this contention. This statement is contained in the certified copy of the complete proceedings in Colombo Magistrate's Court Case No. B48037/01/2021. Moreover, the 1st Respondent has not denied that this is her statement or claimed that it has been recorded inaccurately.

According to the statement made to the CID by the 1st Respondent, she was born in Sri Lanka and proceeded to Britain in 1981. Her mother is British and she obtained British citizenship through her. She admits to have used the British passports bearing numbers 094425352 and 521398876. She claims that she got her British citizenship cancelled after returning to Sri Lanka in 2014. She was never a dual citizen. According to Coomaraswamy [*The Law of Evidence*, Vol. 1 (Lake House Investments Ltd., 1989), page 361], *a party's statements adverse to his case are received as evidence of the truth of their contents both in civil and criminal proceedings*".

Let me at this point, address a fact most fascinating. The 3rd Respondent, Ilukpitiyage Srinath Harshadewa Jayasen Ilukpitiya, the Controller General of Immigration and Emigration has in his affidavit, at paragraph 19(ix)(d), stated that he is not aware whether the holder of the British passport bearing number 521398876 is the 1st Respondent. It is sufficient to state that the 1st Respondent, in her statement to the CID, as well as Ramawickrema Gamaachchige Champika Piyari Dinushan Ramawickrema, Duputy Controller, Department of Immigration and Emigration, after having examined the computer records of the Department of Immigration and Emigration, state otherwise.

I am of the view that the provisions of the Evidence Ordinance do apply to proceedings for judicial review with necessary adaptation.

The Evidence Ordinance does not prohibit the admission of the statement made by the 1st Respondent to the Police. In fact, it contains admissions made by the 1st Respondent on her British passport which are admissible in evidence in terms of Sections 17 and 21 of the Evidence Ordinance.

The statement of Ramawickrema Gamaachchige Champika Piyari Dinushan Ramawickrema, Deputy Controller, Department of Immigration and Emigration, contains evidence on facts in issue and relevant facts.

Moreover, the 3rd Respondent-Respondent, the Controller of Immigration and Emigration, has annexed to his affidavit marked R4, the entry and exit details which appear in the Border Control System for the British passport number 521398876. According to this document, the 1st Respondent is a British citizen. Notwithstanding this document having been tendered by a Respondent, it still is evidence which the Court should have considered.

In these circumstances, the majority erred in law in dismissing the application for the failure to tender the original or duly certified copy of P11, a photographed copy of the information page of the British passport of the 1st Respondent when P12 and R4, which are duly certified copies, provides the necessary evidence to establish that material fact.

Disputed Facts

The learned President's Counsel for the 1st Respondent contended that it is trite law that whenever facts are in dispute the writ jurisdiction of the Court of Appeal under Articles 140 and 141 of the Constitution will not apply. In support of this proposition, our attention was drawn to the decisions in ***Thajudeen v, Sri Lanka Tea Board and Another*** **[(1981) 2 Sri.L.R. 471],** ***Dr. K. Puvanendran and Another v. T.M. Premasiri and two Others*** **[S.C. 59/2008, S.C.M. 23.10.2008],** ***Wijenayake and Others v. Minister of Public Administration*** **[(2011) 2 Sri.L.R. 247],** ***Liyana Atukoralalage Done Thanuja Darshini and***

8 Others v. Ceylon Electricity Board and 21 Others **[C.A. Writ 410/2016, C.A.M. 22.05.2019].**

This is the correct exposition of the law. The issue is whether the material facts in this application are in dispute. Not every disputed fact is a material fact. It must be a fact, the existence of which must necessarily be proved, for the court to make a determination on the application for judicial review.

In order for the Appellant to succeed in this application it must firstly be established that the 1st Respondent became a British citizen. This must be done on a balance of probability.

The learned President's Counsel for the 1st Respondent submitted that the 1st Respondent has specifically denied being a British citizen and as such material facts are in dispute.

As explained more fully above, the material before us clearly establish that the 1st Respondent was a citizen of Sri Lanka by descent and sometime after proceeding to Britain in 1981, had obtained a British passport. The 1st Respondent was at one time the holder of British passports bearing numbers 094425352 and 521398876. She had used these two British passports to travel to and from Sri Lanka on several occasions, last on 05.10.2014. In ***Nrisingha Murari Chakraborty and Ors. v. State of West Bengal*** **[(1977) 1 M.L.J. (Crl) 327 at 328]** it was held:

> *"A passport is a document which, by its nature and purpose, is a political document for the benefit of its holder. It recognises him as a citizen of the country granting it and is in nature of a request to the other country for his free passage […]"*

According to Section 20(2) of the Citizenship Act, a person who is a citizen of Sri Lanka by descent ceases to be a citizen of Sri Lanka if he becomes a citizen of any other country by operation of law. Similarly, pursuant to Section 20 (5) of the Citizenship Act, a person who is a citizen of Sri Lanka by descent, ceases to be a citizen of Sri Lanka if he voluntarily becomes a citizen of any other country.

Therefore, the Appellant has established, on a balance of probability, that the 1st Respondent has ceased to become a citizen of Sri Lanka sometime after 1981. In these circumstances, it is questionable how 1st Respondent has obtained a Sri Lankan passport on 24.01.2014.

The next material fact that needs to be considered is whether the 1st Respondent has resumed the status of a citizen of Sri Lanka according to law.

As the learned counsel for the Appellant correctly submitted, any person who ceases to be a citizen as aforesaid can, pursuant to Section 8 of the Citizenship Act, resume the status of citizen upon a declaration made by the Minister. A precondition for such declaration is that such person shall renounce citizenship of the other country in accordance with the law. However, the Minister may exempt such person from such precondition and nonetheless make a declaration as to citizenship.

The question arises as to who must take on the burden of proving this material fact. Undoubtedly, the Appellant carries the overall burden of proof. Nevertheless, the Evidence Ordinance recognises that certain facts must be proved by the person having special knowledge. Section 106 reads as follows:

> *"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

Illustration (b) elucidates this provision as follows:

> *"A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*

Whether the 1st Respondent resumed the status of a citizen upon a declaration made by the Minister after renouncing her British citizenship in accordance with the law or whether the Minister has exempted her from such precondition is a matter entirely within the knowledge of the 1st Respondent. The burden of proving that fact is on the 1st Respondent.

There can be no difficulty for the 1st Respondent to obtain the relevant information through the use of the Right to Information Act No. 12 of 2016 or any other due process as she is a Member of Parliament and the State Minister of Tourism.

However, other than a mere denial of her British citizenship, the 1st Respondent makes no assertion of regaining the status of a citizen by due process. Instead, she has, at paragraph 4 in her affidavit, stated that there is a possibility of being named as a suspect and/or accused in Magistrate's Court of Colombo case No. B 48037/01/2021. Since the Constitution guarantees the presumption of innocence, the right to remain silent and a right to a fair trial, the 1st Respondent has been advised not to compromise such rights by answering each and every averment contained in the petition.

The position taken by the 1st Respondent is misconceived in law. The right to remain silent and the presumption of innocence are concepts that apply in criminal proceedings. They have no application to proceedings for judicial review. As was held in ***Khatri & Ors. Etc. vs State of Bihar & Ors.*** **[(1981) 1 SCC 627]** the pendency of a criminal proceeding cannot be urged as a bar against the Court trying a civil proceeding or a writ petition where a similar issue is involved.

There are instances where a person may be exposed to both criminal and civil proceedings concurrently. For example, in a road accident resulting in injury or death to another party, a driver of a vehicle is exposed to criminal proceedings in the relevant criminal court and civil proceedings in the District Court.

Where such person avoids answering the averments in the plaint in detail and makes a bare denial of every averment in the plaint, he will be impeded in raising issues which need to be specifically pleaded. That is a choice a person makes which has consequences in so far as the civil proceedings are concerned.

Besides, all what the 1st Respondent need have done is to provide the relevant declaration made by the Minister or the exemption granted to her. That may well have been the answer to the pending criminal proceedings. Instead of choosing that path, the 1st Respondent chose to take refuge under the right to remain silent and the presumption of innocence, which are concepts applied in criminal proceedings.

In these circumstances, I am justified in applying the principle in Section 114 (f) of the Evidence Ordinance which states that:

> *"The court may presume that evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it."*

Moreover, there are consequences even in criminal proceedings, if the accused choses to remain silent where the prosecution has made out a strong prima facie case. As Lord Ellenborough held in ***Rex v. Cocharane*** **[1814 Gurney's Report 479]**:

> *"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refuses to do so where a strong prima facie case has been made out and when it is in his own power to offer evidence, if such exist in explanation of such suspicious circumstances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

This dictum has been applied in many cases in Sri Lanka. [See ***Inspector Arendstz v. Wilfred Peiris*** **[10 C.L.W. 121 at 123],** ***R v. Seeder Silva*** **[41 N.L.R. 337 at 344],** ***King v. Wickramasinghe*** **[42 N.L.R. 313],** ***King v. Peiris Appuhamy*** **[43 N.L.R. 412 at 418],** ***King v. Endoris*** **[46 N.L.R. 498],** ***Queen v. Seetin*** **[68 N.L.R. 316],** ***Chandradasa v. Queen*** **[72 N.L.R. 160],** ***Beddavithanu v. Attorney-General*** **[(1990) 1 Sri.L.R. 275 at 278],** ***Republic v.***

Ilangathilake **[(1984) 2 Sri.L.R. 38],** ***Aruna alias Podi Raja v. Attorney-General*** **[(2011) 2 Sri.L.R. 44]**].

In ***Attorney-General v. Potta Naufer and Others*** **[(2007) 2 Sri.L.R. 144 at 202]**, Amaratunga J. rejected the contention that "[…] there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the Law of Sri Lanka. "

The Appellant has on a balance of probability established that the 1st Respondent ceased to be a citizen of Sri Lanka upon acquiring British citizenship and passport. Thereafter, the burden of proving that she resumed the status of citizen of Sri Lanka falls on the 1st Respondent in terms of Section 106 of the Evidence Ordinance.

In ***Buwaneka Lalitha Keembiwela and Others v. Geetha Samanmalee Kumarasinghe and Others*** **[S.C. Appeal 99/2017, S.C.M. 02.11.2017]** a similar question arose as to whether Mrs. Geetha Samanmalee Kumarasinghe was disqualified from being a Member of Parliament as she was a citizen of Switzerland. She had admitted that she was a citizen of Switzerland but had later given up the citizenship of Switzerland. The Court, applying Sections 101, 103 and 106 of the Evidence Ordinance held that the burden was on Mrs. Kumarasinghe to prove the date on which she gave up citizenship and that she had failed to do so.

For the foregoing reasons, I hold that it has been established that the 1st Respondent has ceased to be a citizen of Sri Lanka upon acquiring British citizenship. The 1st Respondent has failed to prove that she has resumed the status of citizen of Sri Lanka.

The learned President's Counsel for the 1st Respondent contended that the Appellant has not challenged the upholding of the preliminary objections by the majority judgment. I

see no merit in this contention. Question of law No. 1 is wide enough to capture this issue as well.

Relief Inconclusive

The learned President's Counsel for the 1st Respondent submitted that she holds office as a Member of Parliament by virtue of Gazette No. 2188/46 dated 14.08.2020 issued under the hand of the Chairman and Members of the then Election Commission. Therefore, the 1st Respondent will continue to hold such office until Parliament is dissolved or by a Gazette Notification issued by the Election Commission amending the said Gazette Notification insofar as the removal of the 1st Respondent's name from the said Gazette Notification.

As the Appellant has failed to pray for such a relief, as was done in ***Dilan Perera v. Rajitha Senaratne*** **[(2000) 2 Sri.L.R. 79]**, granting the relief prayed for by the Appellant will not remove the 1st Respondent as a Member of Parliament since the Gazette No. 2188/46 dated 14.08.2020 issued under the hand of the Chairman and Members of the then Election Commission remains valid. Accordingly, it was submitted that any relief prayed for by the Appellant will be a futile exercise. The decisions in ***Dayananda v. Thalwatte*** **[(2001) 2 Sri.L.R. 73]**, ***Wanninayaka Mudiyanselage Dhanapala and Others v. Nimal Kotawalagedera, Commissioner of Buddhist Affairs and Others*** **[C.A. (Writ) 243/2017, C.A.M. 07.11.2017]**, ***Ratnasiri and Others v. Ellawala and Others*** **[(2004) 2 Sri.L.R. 180]**, ***R. v. Fulham, Hammersmith and Kensington Rent Tribunal ex p Zerek*** **[(1951) 2 K.B. 1, 11]**, ***Jahruddin v. Magutumsab*** **[R.S.A. 783/1989, Karnataka High Court 05.09.1997]** were cited to buttress this contention.

This contention overlooks the basic purpose of the Gazette No. 2188/46 dated 14.08.2020 issued under the hand of the Chairman and Members of the then Election Commission. It is a Declaration made under Article 99A of the Constitution notifying that the persons whose names appear in the schedule thereto, including the 1st Respondent, have been

elected as Members of Parliament. This is a ministerial act that must necessarily be made at the conclusion of every General Election to appoint Members of Parliament. No determination is made on the qualification of the persons declared to be elected as Members of Parliament.

Such a declaration cannot in any way surpass a subsequent order made by a Court of competent jurisdiction declaring such a person to be disqualified to be a Member of Parliament and is thus not entitled to hold office as a Member of Parliament of the Democratic Socialist Republic of Sri Lanka. In ***Buwaneka Lalitha Keembiwela and Others v. Geetha Samanmalee Kumarasinghe and Others*** **[supra.]** Court rejected the contention that the only way to remove a Member of Parliament was by filing an election petition and that Article 140 of the Constitution cannot be invoked to remove a Member of Parliament.

It must be borne in mind that the Court of Appeal as well as the Supreme Court exercises the judicial power of the People when exercising the jurisdiction in terms of Article 140 of the Constitution. In this application, the Appellant has sought a Writ of Quo Warranto declaring that the 1st Respondent is disqualified to be a Member of Parliament and is thus not entitled to hold office as a member of Parliament of the Democratic Socialist Republic of Sri Lanka.

When a Court issues such a mandate in the nature of a Writ of Quo Warranto, the 1st Respondent *ipso facto* ceases to be a Member of Parliament. The declaration made by Gazette No. 2188/46 dated 14.08.2020 as an administrative step insofar as pertaining to the 1st Respondent ceases to be operative.

I reject the contention that issuing a Writ of Quo Warranto as prayed for in the petition is a futile act.

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The learned President's Counsel drew the attention of Court to the present status in the above case. On 24.04.2023, the learned Magistrate held that no arrest order will be issued for the arrest of the 1st Respondent. It was made as the CID has the power to take measures relating to the arrest for offences under the Immigrants and Emigrants Act No. 28 of 1948 as amended. The proceedings before the Magistrate's Court have since been laid by until such time the CID has concluded investigations or is in a position to name the 1st Respondent as a suspect. Accordingly, it was submitted that in the absence of a prima facie case, the issuance of a Writ of Quo warranto against the 1st Respondent is indefensible and not justifiable.

In response, the learned counsel for the Appellant submitted that facts were reported to the Magistrate on 21.03.2021 and that thereafter the matter strangely and startlingly remained in limbo with no investigation for over 18 months. It was submitted that such is a privilege only a very few people in the Republic are afforded, especially when suspected to have been in violation of the Immigrants and Emigrants Act. According to the Appellant, despite almost 3 years since the facts were reported, the 1st Respondent continues to function as a Member of Parliament with the law not taking its course as it would against any normal citizen.

In this appeal, Court is exercising its constitutional powers pursuant to Article 140 of the Constitution. There is no need to consider the position in the criminal proceedings. The CID may well have an explanation for the failure to conclude the investigations thus far.

Article 12 (1) of the Constitution states that all persons are equal before the law. The blindfold on Lady Justice depicts objectivity and impartiality. It is a direction to all judges, as well as all persons involved in the administration of justice, that all persons before the court should not be judged for their appearance, power, status, fame, or wealth, but solely for the strength of the claims or the evidence they are presenting. Our system of justice

does not, and in practice should not, have one law for those in positions of power, privilege and responsibility and another for those who are not.

As far as this matter is concerned, the admissible evidence before Court clearly establishes that the 1st Respondent lost her status as a citizen of Sri Lanka upon acquiring British citizenship. The 1st Respondent has failed to place any material before us to establish that she has resumed the status of a citizen of Sri Lanka.

In ***Buwaneka Lalitha Keembiwela and Others v. Geetha Samanmalee Kumarasinghe and Others*** **[supra. page 13-14]**, Sisira J. De Abrew held as follows:

> *"[…] I hold that if a candidate in a Parliamentary Election is a citizen of Sri Lanka and any other country*
>
> 1. *on the day of the Parliamentary Election or*
> 2. *on the day of taking oaths as a Member of Parliament*
>
> *he cannot be considered as a Member of Parliament and that the office of such person as a Member of Parliament is a nullity. I further hold that after taking oaths as a member of Parliament, if he becomes a citizen of any other country or continues to be a citizen of any other country, he too cannot be considered as a Member of Parliament and that the office of such person as a Member of Parliament is a nullity."*

The 1st Respondent is disqualified from being a Member of Parliament as she has failed to establish that she is a citizen of Sri Lanka.

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 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 1st 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.

The reference therein to *bona fide* appears to be an acceptance of the allegation made by the 1st Respondent that the Appellant is motivated by political considerations and the application has been made *mala fide*. I fail to see the relevance of this assertion where the evidence before Court establishes that the 1st Respondent ceased to be a citizen of Sri Lanka upon acquiring British citizenship and failed to resume the status of citizen of Sri Lanka according to law. She is thereby disqualified to be a Member of Parliament by the Constitution.

Franchise is a fundamental right of all citizens of Sri Lanka. Members of Parliament are appointed by the exercise of the franchise of the People. Thereafter, they exercise the legislative power of the People. The Constitution itself provides for the qualifications a person must have to become a Member of Parliament. Where a person so elected is disqualified of holding such office, any citizen of the country can invoke the jurisdiction of the Court of Appeal seeking a Writ of Quo Warranto calling upon the holder to show the authority under which he claims to hold such office.

For all the reasons more fully set out above, the majority judgment erred in law in upholding the three preliminary objections and refusing the relief prayed for by the Appellant on the merits. The minority judgment granted the relief prayed for by the Appellant without a consideration of the three preliminary objections raised on behalf of the 1st Respondent.

All the questions of law are answered in the affirmative.

Both the majority and minority judgments dated 31.10.2023 are hereby set aside.

I issue a Writ of Quo Warranto declaring that the 1st Respondent is disqualified to be a Member of Parliament and is thus not entitled to hold office as a Member of Parliament of the Democratic Socialist Republic of Sri Lanka.

The 1st Respondent shall pay the Appellant his costs in both courts.

Appeal allowed.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court