IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for a mandate in the nature of Writ of Quo Warranto in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C A (Writ) Application

No. 362 / 2015

1. N W E Buwenaka

   Lalith

   Keembiela,

   Beddegama,

   Galle.

2. J K Amarawardhana

   8,

   Bovitiyamulla,

Yatalamatta.

3. A C Gunasekara

   "Lakshmi"

   Unawatuna,

   Galle.

4. J K Wijesingha

   48-10A,

   Main Street,

   Ambalangoda.

5. H L Prasanna Deepthilal

   60/1/1,

   Viskam Road,

   Galle.

PETITIONERS

-Vs-

1. Geetha Samanmali Kumarasinghe,
   No. 2,
   Temple Road,
   Nawala,
   Rajagiriya.

2. M N Ranasinghe,
   Controller General of Immigration and Emigration,
   Department of Immigration and Emigration,
   41,
   Ananda Rajakaruna Mawatha,
   Colombo 10.

3. Mahinda Amaraweera
   Secretary,
   United People's Freedom Alliance,

301,
T B Jaya Mawatha,
Colombo 10.

4. Dhammika Dasanayake,
Secretary General of Parliament,
Parliament of Sri Lanka,
Sri Jayawardhanapura,
Kotte.

RESPONDENTS

Before: Vijith K Malalgoda PC J (P/CA)

P Padman Surasena J

Counsel: J C Weliamuna for the Petitioners.

Manohara De Silva PC for the 1st Respondent.

Janak De Silva DSG with Suranga Wimalasena SSC for the 2nd and 4th Respondents.

Argued on:

2016-07-26, 2017-01-17, 2017-01-24, 2017-02-07, 2017-03-14.

Written Submissions tendered on: 2017-04-05.

Decided on: 2017 - 05 – 03.

JUDGMENT

P Padman Surasena J

1. BACK GROUND

The Petitioners in this application, being citizens of Sri Lanka, have challenged the 1st Respondent to show by what authority she claims to hold office as a Member of Parliament. The said challenge is on the basis that she is not qualified to hold office as a Member of Parliament as she is a holder of a dual citizenship. (i.e. citizenships of both Sri Lanka and Switzerland).

2. PRAYERS

It is on the above footing that the Petitioners in this application have prayed inter alia for;

i. A mandate in the nature of a writ of quo warranto requiring the 1st Respondent to show by what authority she claims to hold office as a Member of Parliament;

ii. A mandate in the nature of a writ of quo warranto declaring that the 1st Respondent is disqualified to be a Member of Parliament and thus not entitled to hold office as a Member of Parliament;

iii. A direction on the 2nd Respondent Controller General of Immigration and Emigration to submit before this Court, all documentation relating to the 1st Respondent's citizenship status, including the relevant Register of Dual Citizenship as at 2015-08-17 and 2015-09-01;

iv. Costs and other reliefs this Court shall seem fit.

3. ARGUMENTS FOR THE PETITIONER

The 1st Respondent has been elected as a Member of Parliament by the Parliamentary Election held on 2015-08-17 and had subsequently taken oaths as a Member of Parliament before the Speaker on 2015.09.01.

It is the submission of the learned counsel for the Petitioners that the 1st Respondent is a holder of a dual citizenship i.e. the citizenship of Sri Lanka as well as that of Switzerland, and that she had not divulged her dual citizenship at the time of submission of her nominations for the said election. It is the contention of the learned counsel for the Petitioners that the 1st Respondent is therefore not qualified to hold office as a Member of Parliament and/or to sit and vote in Parliament by virtue of Article 91(1)(d)(xiii) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter sometimes be referred to as the Constitution).

4. ARGUMENTS FOR THE 1ST RESPONDENT

The arguments advanced by the learned President's Counsel in reply to the contentions put forward by the Petitioners could broadly be categorized under five headings. They are as follows;

i. That the Court of Appeal has no jurisdiction to quash the election of the 1st Respondent.

ii. That the election of a Member of Parliament can be challenged only by way of an Election Petition.

iii. That the Petitioners have no locus standi to file an election petition or to seek judicial review.

iv. That no Court has jurisdiction to impeach or question proceedings of Parliament.

v. That the Petitioners have failed to establish before this Court that the 1st Respondent is a holder of a dual Citizenship at the material time.

5. TASK

The task of this Court in the backdrop of the above arguments primarily becomes three fold. This Court has to first go into the question whether it has jurisdiction to go into the matter in its hand[1]. If this Court answers that question in the affirmative, then this Court has to embark on the second task of ascertaining whether the Petitioners have the requisite locus standi

[1] i.e. arguments No. I, II, & IV above mentioned, put forward on behalf of the 1st Respondent.

to file this application[2]. If this Court holds that they indeed do, then this Court has to move on to the final phase of ascertaining whether there is sufficient ground to issue a writ of quo warranto as prayed for by the Petitioners[3].

6. ANALYSIS OF ARGUMENTS

THE ARGUMENT THAT THE COURT OF APPEAL HAS NO JURISDICTION TO QUASH THE ELECTION OF THE 1ST RESPONDENT.

With regard to this argument it is the submission of the learned President's Counsel on behalf of the 1st Respondent,

i. that it would be necessary for this Court to quash the declaration made by the Commissioner of Elections produced marked **P 4** if this Court is to declare that the election of the 1st Respondent is null and void,

ii. that in terms of the transitional provision 49 (3) (c) in the 19th amendment to the Constitution, 'any decision or order made or ruling given by the Commissioner of Elections under any written law prior to

[2] i.e. arguments No. III, above mentioned, put forward on behalf of the 1st Respondent.
[3] i.e. arguments No. V, above mentioned, put forward on behalf of the 1st Respondent.

the date on which the Election Commission is constituted under Article 103, shall be deemed, with effect from the date on which the Election Commission is constituted, to be a decision or order made or a ruling given, by the Election Commission,

iii. that therefore the declaration marked **P 4** made by the Commissioner of Elections under section 62 of the Parliamentary Elections Act being deemed to be a decision of the Election Commission, can only be quashed by the Supreme Court and not by the Court of Appeal.

First and foremost, it must be stressed here that this is not a proceeding in which the Petitioners have prayed for a writ of certiorari to quash the said declaration made by the Commissioner of Elections. However since the learned President's Counsel for the 1st Respondent has placed reliance on Article 104 H of the Constitution, this Court will proceed to consider its content which is to the following effect.

Article 104 H

"...The jurisdiction conferred on the Court of Appeal under Article 140 of the Constitution shall, in relation to any matter that may arise in the

exercise by the Commission of the powers conferred on it by the Constitution or by any other law, be exercised by the Supreme Court. ..."

A closer look at the above Article would show that for that Article to apply two basic requirements must exist. They are as follows.

i. It must be an occasion in which the Court of Appeal is required to exercise jurisdiction under Article 140.
ii. That occasion must be in relation to any matter that has arisen in the exercise by the Commission[4] of the powers conferred on it by the Constitution or by any other law.

It must be observed that Article 104 H has been brought in to the Constitution by its seventeenth amendment. It is an Article in Chapter XIV A which was inserted afresh into the Constitution by its seventeenth amendment. It must be borne in mind that the primary purpose of this chapter is to establish an Election Commission which is required under Article 104 B of the Constitution to exercise, perform, discharge all such powers, duties and functions conferred, imposed on or assigned to the said Commission or to the Commissioner General of Elections by the

[4] In terms of transitional provision 49 (3) (c) in the 19th amendment to the Constitution decisions of Commissioner of Elections referred to therein, shall be deemed, to be a decision of the Election Commission.

Constitution, and by the law for the time being relating to the election of the President, the election of Members of Parliament, the election of Members of Provincial Councils, the election of local authorities and the conduct of referenda, including but not limited to all the powers, duties and functions relating to the preparation and revision of registers of electors for the purpose of such elections and referenda and the conduct of such elections and referenda. Thus it is the duty of this Commission to enforce all laws relating to holding of any such election or the conduct of any such referenda, as has been specifically mentioned in Article 104 B (2). It is quite logical for the Constitution to have shifted the writ jurisdiction of the Court of Appeal to the apex Court of the land having regard to the important, decisive and unique nature of the crucial powers vested in the Election Commission.

It is important to remember that the Petitioners in this application have not impugned any matter arising in the exercise of powers by the Election Commission or by the Commissioner of Elections which could have attracted the application of Article 104 H of the Constitution. Neither the Election Commission nor its members nor the Commissioner General of Elections are respondents in this case. The complaint of the Petitioners is

not regarding any exercise of powers by the Election Commission or by the Commissioner of Elections (which would generally come to an end with the conclusion of the relevant election), but regarding an absolute disqualification that the Constitution has imposed to prevent any person with such disqualification from continuing to hold office as a Member of Parliament. Therefore it is the view of this Court that the contention on behalf of the 1st Respondent that this Court ceases to have jurisdiction to hear the matter in hand lacks any legal basis and that Article 104 H of the Constitution has no application to this case.

Further, the above argument even runs counter to another position taken up on behalf of the 1st Respondent that the proper way to challenge the election of the 1st Respondent is to file an election petition in the Court of Appeal. It is the Court of Appeal which is charged with the jurisdiction to hear Election Petitions as has been provided for in section 93 of the Parliamentary Elections Act and Article 144 of the Constitution.

Therefore it does not stand to reason to declare as alleged in the written submission[5] of the 1st Respondent that the petitioners are attempting to do what they cannot do directly since it is anyway the Court of Appeal which

[5] 3rd paragraph in page 5 of the written submission filed by the 1st Respondent.

has jurisdiction to decide on the election petitions under Parliamentary Elections Act.

THE ARGUMENT THAT THE ELECTION OF A MEMBER OF PARLIAMENT CAN BE CHALLENGED ONLY BY WAY OF AN ELECTION PETITION.

Learned President's Counsel on behalf of the 1st Respondent drew the attention of this court to section 92 (2) (d) and 93 of the Parliamentary Elections Act and Article 144 of the Constitution.

Section 92(2) provides that the election of a candidate as a Member shall be declared to be void on an election petition on any of the grounds mentioned therein, which may be proved to the satisfaction of the election judge. One such ground is that the candidate was at the time of his election a person disqualified for election as a Member[6].

Section 93 of the Parliamentary Elections Act provides that every Election Petition shall be tried by the Court of Appeal in terms of Article 144 of the Constitution.

[6] section 92(2)(d) of the Parliamentary Elections Act

Article 144 of the Constitution states that 'The Court of Appeal shall have and exercise jurisdiction to try election petitions in respect of the election to the membership of Parliament in terms of any law for the time being applicable in that behalf'.

It is on that basis that the learned President's Counsel for the 1st Respondent submitted that when a specific procedure is laid down that specific procedure and no other must be followed.

It would be important to bear in mind that the legal regime governing judicial review is different from that of the other actions which are regular in nature.

Article 144 of the Constitution has merely conferred forum jurisdiction to the Court of Appeal to try election petitions. However all the other questions such as the Place of trial of an election petition, as to who may present such election petition, as to what reliefs could be claimed, as to who should be made parties to such a petition, the contents of such election petition, special provisions relating to the procedure to be followed before an Election Judge and also as to what could be determined by an

Election Judge are governed by the various provisions in the Parliamentary Elections Act which is an ordinary statute.

In contrast, the writ jurisdiction of the Court of Appeal is exclusively governed by Article 140 of the Constitution. It does not depend on any other statute and thus is not subject to any other law. The following is an instance where this issue became the subject matter of discussion before the Supreme Court.

The Supreme Court in the case of Atapattu and others Vs. People's Bank and others[7], having considered the issue whether the powers vested under Article 140 of the Constitution could be diminished by a provision in the ordinary law stated as follows;

"..... The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause.

But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make Article 140 subject to

[7] 1997 (1) S L R 208.

the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail – an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" – I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of law, and against an ouster clause which tends to undermine it. ...."

The Supreme Court in that case held that the phrase "subject to the provisions of the Constitution" in Article 140 of the Constitution refers only to contrary provisions in the constitution itself, and does not extend to subject the Article 140 to the provisions of other written laws. As has been said by the Supreme Court in that judgment where the Constitution contemplated that its provisions should be subjected to the provisions of ordinary law it has specified it in terms such as "subject to any law" like that appears in Article 138. Thus the power that Article 140 vests in this Court cannot and should not be restricted by the provisions of the Parliamentary Elections Act.

Indeed this Court in the case of Dilan Perera Vs. Rajitha Senaratne[8] held that a writ of quo warranto lies to call upon a person to show by what authority he claims to hold a questionable office. This Court having considered this issue stated in its judgment as follows;

"....In this application question has been raised on behalf of the 1st respondent with regard to the Locus Standi of the petitioner to file this application. It is to be observed that quo warranto is a remedy available to call upon a person to show by what authority he claims to hold such office. Therefore the basic purpose of the writ is to determine whether the holder of a public office is legally entitled to that office. If a person is disqualified by law to hold statutory office the writ is available to oust him. Vide *Gunasekera Vs. Wijesinghe*. This writ would not be issued unless the statute itself clearly disentitles a person from holding such office. Vide *Martin Perera Vs. Madadombe*. In Mandamus the petitioner must show that he is a person aggrieved but this requirement is not necessary in quo warranto, since this writ seeks to prevent an occupier or a usurper of an office of public nature from continuing in that position. Therefore in these proceedings it would appear that any person can challenge the validity of

[8] 2000 (2) S L R 79.

an appointment to a public office irrespective of whether any fundamental or other legal right of that person is infringed or not. But the Court must be satisfied that the person so applying is bona fide in his application and that there is a necessity in public interest to declare judicially that there is an usurpation of public office. On the contrary, if the applicant concerned is not bona fide in his application, he cannot claim this remedy. Even though the applicant may not be an aspirant to the office, nor he has any interest in the appointment, he can still apply as an ordinary citizen. A member of a municipal body or a mere rate payer can challenge the right of a member to sit as a member in a municipality. Any person though not personally interested in the results of an election can apply for the writ of quo warranto. ..." [9]

In the instant case the petitioners are citizens of this country.

It is to be noted that the disqualification set out in Article 91 (1) (b) (xiii) is a disqualification specifically brought in by the 19th amendment to the Constitution. A closer look at the commencement of the said Article makes

[9] Please note that this excerpt would be relevant to the discussion of the next argument put forward by the 1st Respondent regarding locus standi of the Petitioners.

it clear that a person could become disqualified subsequently also. This is evident from Article 66 of the Constitution also. It has provided that;

The seat of a Member of Parliament shall become vacant;

a. ....

b. ....

c. ....

d. If he becomes subject to any disqualification specified in Article 89 or 91

e. .....

f. .....

g. If his election as a member is declared void under the law in force for the time being

h. ....

Section 108 of the Parliamentary Elections Act stipulates that;

(1) Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the Gazette:

(2) An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of the Election Judge within the time within which an election petition questioning the return or the election upon that ground may be presented.

Therefore it is clear that no one is able to challenge any person who usurps public office in violation of the Constitution after the above time limit. In any case filing of election petition could only be done by the persons referred to in section 95 of the Parliamentary Elections Act and no other.

The question that arises here as to what course of action is available to oust a person who would become disqualified after the lapse of the above time limits specified in the Parliamentary Elections Act.

It is the submission of the learned President's Counsel for the 1st Respondent that in such a situation all what the law provides for, is for the Attorney General to institute an action under Article 100 of the Constitution to recover Rs. 500/= per day of such sittings by such usurper.

Article 100 of the Constitution is as follows;

"Any person who

a) Having been elected a Member of Parliament but not having been at the time of such election qualified to be so elected, shall sit and vote in Parliament; or

b) Shall sit or vote in Parliament after his seat therein has become vacant or he has become disqualified from sitting or voting therein,

Knowing or having reasonable grounds for knowing that he was so disqualified or that his seat has become vacant, as the case may be, shall be liable to a penalty of five hundred rupees for every day upon which he so sits or votes to be recovered as a debt due to the Republic by an action instituted by the Attorney General in the District Court of Colombo. "

Parliament is the most crucial cornerstone of the very foundation of the constitution. It is the frontrunner institution charged with protecting and upholding the inalienable sovereignty of people of this country.

This Court is unable to agree with the submission of the learned President's Counsel that the law provides for a person who Knowing or having reasonable grounds for knowing that his seat therein has become vacant or he has become disqualified from sitting or voting therein, to continue to sit

and vote in Parliament unabated even when everyone else is aware that such person is not entitled to sit or vote as a Member of Parliament.

This Court does not think that it requires to give some more reasoning to justify its refusal to accept the said argument of the 1st Respondent due to its obvious absurdity.

In these circumstances this Court is unable to hold that the power vested in this Court by virtue of Article 140 of the Constitution cannot be applied to oust any person who usurp the public office in violation of Constitutional requirements and continue to function as Members of Parliament.

The case law relied upon by the learned President's Counsel, in particular Hendrick Appuhamy Vs. John Appuhamy[10] and Mansoor and another Vs. OIC Avissawella Police and another[11] are both cases in which the Court held that when a statute has created a specific remedy it is that specific procedure which should be followed and not the procedure set out in common law. Those were not cases in which provisions in an ordinary law Vis a Vis the provisions of the Constitution came to be in conflict. Further no such discussion or decision regarding that issue had been made in those

[10] 69 N L R 32.
[11] 1991 (2) S L R 75.

cases. Hence those cases have no application to the matter in hand where this Court has to decide whether Article 140 has been restricted by the provisions in an ordinary statute namely the Parliamentary Elections Act.

THE ARGUMENT THAT THE PETITIONERS HAVE NO LOCUS STANDI TO FILE AN ELECTION PETITION OR TO SEEK JUDICIAL REVIEW.

Learned President's Counsel for the 1st Respondent based this argument on section 95 of the Parliamentary Elections Act which states that an election petition may be presented to the Court of Appeal by any one or more of the following persons, namely:

a) Some persons claiming to have had a right to be returned or elected at such election
b) Some person alleging himself to have been a candidate at such election.

It is his submission that the petitioners do not fall within any of the above categories and as such they are not given any right by law to challenge an election under the provisions of the law enacted for that purpose.

This Court has to re-iterate the fact that this is an application for judicial review under Article 140 of the Constitution which prays for a writ of quo warranto. Section 95 of the Parliamentary Elections Act applies to filing of election petitions under the provisions of Parliamentary Elections Act. It cannot have any application to the powers vested in this Court by Article 140 of the Constitution.

It would be in order to set out at this juncture, the following paragraph taken from the judgment in the case of Forbes & Walker Tea Brokers Vs. Maligaspe and others[12].

" .....The tendency in the past seems to have been to limit locus standi to persons who had a particular interest or grievance of his own over and above the rest of the community. But in more recent years there is in England a veering away from that view and the concept of locus standi seems to have been progressively widened to extend standing, if I may use the words of Lord Denning, to almost "anyone coming to court to get the law declared and enforced". To deprive or to deny, as had been done in the past, locus standi to any applicant for judicial review merely because he (the applicant) happens

[12] 1998 (2) SLR 378

to share the injury complained of with others is utterly illogical as explained by Lord Wilberforce in the Gouriet case[13]. "A right is none the less a right or a wrong any the less a wrong because millions of people have a similar right or may suffer a similar wrong. It is illogical to treat the adequacy of interest of an applicant for judicial review to be as having being vitiated or wiped out by its being shared with a large or indefinite group of persons; on the contrary, each member of the definite group ought to be treated as a person "interested" or having a stake in the matter and accorded standing". .... "

The question of locus standi of an applicant in an application for a writ of quo warranto was discussed by this Court in the case of Dilan Perera Vs. Rajitha Senarathne[14] which this Court has already referred to in the course of the discussion pertaining to the previous argument put forward by the 1st Respondent[15]. As has been decided in that case, it is open for any bona fide applicant to apply for a writ of quo warranto to challenge the validity

[13] Gouriets Case – 1977 1 AER 696.
[14] Ibid
[15] Reference in this regard has been made in the foot note No. 9 above.

of an appointment to a public office since this writ seeks to prevent a usurper of such public office from continuing in that position.

Documents produced marked **P 2 (a)**, **P 2 (b)** **P 2 (c)** and **P 2 (d)** show that the Petitioners are people entitled to exercise their franchise to elect members to the Parliament from Galle District in the Parliamentary Elections held in 2015. They form part of people of Sri Lanka who are entitled to exercise their inalienable right to sovereignty vested in them under Article 4 (e) of the Constitution. Their sovereignty includes the exercise of their franchise at the election of Members of Parliament also. It would therefore suffice to state here that this Court is unable to agree with the submission of the learned President's Counsel for the 1st Respondent that the Petitioners will not have recourse to Article 140 of the Constitution to prevent any person who is disqualified by the Constitution itself, from continuing in office without any hindrance. This Court indeed cannot think of Article 140 being put to a better use than that of the present instance.

THE ARGUMENT THAT NO COURT HAS JURISDICTION TO IMPEACH OR QUESTION PROCEEDINGS OF PARLIAMENT.

As it is Article 4 (c) of the Constitution which the learned President's Counsel used as the platform to advance this argument, it would be convenient at the outset to set out here the relevant portions of that Article.

Article 4(c) of the Constitution.

4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:–

(.....)

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law; ..... "

It is the submission of the learned President's Counsel for the 1st Respondent that this Court has no jurisdiction to hear and determine this

case as it amounts to going into the matters relating to the privileges, immunities and powers of Parliament and of its Members and that Article 4(c) has imposed a bar for the exercise of judicial powers in that regard.

Further, it was submitted on behalf of the 1st Respondent that section 3 of the Parliament Powers and Privileges Act has removed the power of Court to impeach or question matters pertaining to proceedings of Parliament[16]. He relied on some material in his attempt to establish that the question whether a person is qualified to sit as a member in Parliament falls within the scope of parliamentary privilege and is therefore not cognizable by Courts.

Gomes Vs. M H Mohomed, Speaker of Parliament[17] which the learned President's Counsel for the 1st Respondent has relied upon, is an application praying for a writ of certiorari to quash the decision of the then Speaker of the Parliament that he "ceased to have entertained" a resolution to be laid before the Parliament under Article 38(2) (a) of the Constitution setting out allegations against the then President of the Republic. The said application also prayed for a writ of mandamus to

[16] Page 12 of the written submission filed by the 1st Respondent.
[17] 1991 (2) S L R 408

compel the then Speaker of the Parliament to lay the said resolution before the Parliament. Thus it is in that backdrop that this Court had stated that the "Parliament is the guardian of its own privileges and is the sole judge of the lawfulness of its own proceedings" and held in that case that the Court is precluded from examining that matter as it is part of the proceedings of Parliament.

It must be borne in mind that the judgment cited above has been so pronounced by Court after taking into consideration the issues raised in that case which, as has already been mentioned, also consisted an issue whether a writ of certiorari to quash a decision of the Speaker of the Parliament should be issued or not. Thus it is not justifiable for this Court to separate some statements pertaining to law from that judgment, interpret such propositions in isolation and make them applicable to the instant case which is an application for a writ of quo warranto challenging the 1st Respondent to show by what authority she claims to hold office as a Member of Parliament.

It should be stressed here that what Article 4 (c) sets out is one of the ways in which the sovereignty of the people[18] shall be exercised and enjoyed. It could therefore be seen that what the Parliament may directly exercise are;

the matters relating to the

i. privileges,
ii. immunities and
iii. powers

of Parliament and of its members

Article 67 of the Constitution states that "the privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act shall mutatis mutandis apply."

As the Parliament has not up until now passed any law to determine and regulate the privileges, immunities and powers of Parliament and of its Members except for several amendments to the existing Act, these matters

[18] Which is inalienable under Article 3 of the Constitution.

have to be determined and regulated according to the provisions of the Parliament (Powers and Privileges) Act.

Section 3 of the Parliament (Powers and Privileges) Act states as follows;

"There shall be freedom of speech, debate and proceeding in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any Court or place out of Parliament."

This Court by no means is questioning or impeaching or even attempting to do any of such things in this application. On the other hand only a Member of Parliament is entitled to enjoy the privileges, immunities and powers under both the Constitution and the Parliament (Powers and Privileges) Act. A person who has been disqualified by the Constitution itself cannot be a Member of Parliament. Therefore such person is not entitled to enjoy the privileges, immunities and powers under both the Constitution and the Parliament (Powers and Privileges) Act.

In this instance all what this Court has done is to require the 1st. Respondent to show by what authority she claims to hold office as a Member of Parliament in an application filed under Article 140 of the Constitution by some of the people in Sri Lanka who exercise their judicial

power as part of their inalienable sovereign power vested in them by virtue of Article 3 and 4 of the Constitution. This they have to exercise through Courts as has been stated in Article 4 (c) of the Constitution.

Learned President's Counsel for the 1st Respondent drew the attention of this Court to the following passage taken from a book. It is as follows;

"... The question of qualification to sit as a member of either house of Parliament falls within the scope of parliamentary privilege and is not, therefore, cognizable by courts of law except in so far as parliament has expressly provided for a judicial determination. The relevant statutory provisions do not empower the courts to award injunctions to restrain persons from sitting as members..."

This passage relied upon by the learned President's Counsel for the 1st Respondent is found at page 465 in de Smith's Judicial Review of Administrative Action; 4th Edition published in the year 1980.

Learned President's counsel for the Petitioners as well as the 1st Respondent have agreed[19] that the remedy by way of writ of quo warranto has been abolished in England as far back as in the year 1938. It must

[19] Paragraph 9.9 (a) at page 10 of the written submissions filed by the Petitioner & page 11 of the written submissions filed by the 1st Respondent.

also be noted that the above paragraph is a paragraph that deals with injunctive reliefs in general. The book states in its page 463 as follows;

"..... Until 1938 an information in the nature of a quo warranto (which had replaced the old prerogative writ of quo warranto) could be exhibited either by the Attorney General or, by leave of court, in the name of the King's Coroner and Attorney at the instance of a private prosecutor, to challenge the usurpation of public office. The proceedings although criminal in form, were deemed to be civil in character. In 1938 the information in the nature of quo warranto was abolished. It was provided that in any case where a person acted in an office to which he was not entitled and a quo warranto information would formerly have lain against him, the High Court could grant an injunction restraining him from so acting and if necessary, declare the office to be vacant. No such proceedings could be taken except by a person who would have been entitled to apply for a quo warranto information. Proceedings for an injunction in these circumstances must now be commenced by an application to the Divisional Court for judicial review. ..."

The above passages make a clear distinction amongst the following three concepts;

i. old prerogative writ of quo warranto

ii. exhibiting quo warranto information either by the Attorney General or, by leave of court,

iii. Proceedings for an injunction under such circumstances.

The above passage shows that each of the three concepts listed above had existed as the law in England at one point of time according to their chronological order in the above list. A careful consideration of the scheme of the book discloses that it is the third situation under item No. iii above that has been the subject matter of the discussion in the paragraph relied upon by the learned President's Counsel.

That being the prevailing position in England, it is prudent to now turn to the law applicable in Sri Lanka in this regard.

Article 140 of the Constitution states as follows;

"Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First instance or tribunal or other institution and grant and issue according to law, orders in the nature of writs of certiorari, prohibition,

procedendo, mandamus and quo warranto against the judge of any Court of first Instance or tribunal or other institution or any other person. ..."

Hence unlike the present position in England, this Court by virtue of the Constitution itself shall have full power and authority to grant and issue according to law, orders in the nature of writs of quo warranto.

Thus it is the view of this Court that no support would be accrued to the 1st Respondent from the above passage relied upon by the learned President's Counsel.

The case of Dilan Perera Vs. Rajitha Senarathne[20] is a good example of an instance where this Court issued a writ of quo warranto declaring the appointment of the 1st Respondent in that case as a Member of Parliament void and that he has no right to continue to hold office as a Member of Parliament. It is significant that the Petitioner in that case was also a Member of Parliament. Thus he has had all the access to the proceedings in Parliament. However it is interesting to note that he had chosen to move Court and not the Parliament, to have the impugned appointment declared void.

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[20] Ibid.

This Court indeed declared the appointment of the 1st Respondent in that case as a Member of Parliament void on the basis that he had entered into various contracts with government institutions to supply dental equipment and material and hence is guilty of having such interest in such contracts entered into with the state institutions or public corporations as contemplated by Article 91(1) (e) of the Constitution. This Court on that basis granted a writ of quo warranto as prayed for by the petitioner in that case declaring that the appointment of the 1st respondent in that case as a Member of Parliament void and that he has no right to continue to hold office as a Member of Parliament.

Thus, this Court is unable to agree with the contention of the learned President's Counsel that it has no jurisdiction to hear and determine this case for the reasons he sets out.

7. WHETHER THE 1ST RESPONDENT IS DISQUALIFIED?

It is under Article 91(1) (d) (xiii) of the Constitution that the Petitioners allege that the 1st Respondent stands disqualified to hold office. Hence the relevant portion of that Article is reproduced below.

Article 91(1) (d) (xiii) of the Constitution.

91. (1) No person shall be qualified to be elected as a Member of Parliament or to sit and vote in Parliament –

(a) .....

(b) .....

(c) .....

(d) if he is

(i) .....

.....

(xiii) a citizen of Sri Lanka who is also a citizen of any other country;...."

The 1st Respondent has admitted the followings;

i. That she contested the Parliamentary Elections held on 2015-08-17[21].

ii. That she was nominated to contest the said General Election from UPFA[22].

[21] Paragraph 5 of the affidavit of the 1st Respondent.

iii. That she was elected as a Member of Parliament[23].

iv. That the said Parliamentary Elections were held on 2015-08-17[24].

v. That she took the oath of office as a Member of Parliament on 2015-09-01[25].

vi. That she was interviewed by the Sunday Observer[26].

vii. That she received the letter referred to in paragraph 13 of the petition, from the Petitioners[27].

viii. That she was elected by the people of Galle District[28].

Thus the consideration of the question whether the 1st Respondent is disqualified under Article 91(1) (d) (xiii) of the Constitution could be narrowed down to the question whether the 1st Respondent is 'a citizen of Sri Lanka who is also a citizen of any other country' as envisaged in that Article.

The 3rd Petitioner in his affidavit has claimed that the 1st Respondent is a holder of a dual citizenship, (i.e. citizenship of Sri Lanka and that of

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[22] Paragraph 7 of the affidavit of the 1st Respondent.
[23] Paragraph 7 of the affidavit of the 1st Respondent.
[24] Paragraph 8 of the affidavit of the 1st Respondent.
[25] Paragraph 10 of the affidavit of the 1st Respondent.
[26] Paragraph 12 of the affidavit of the 1st Respondent.
[27] Paragraph 15 of the affidavit of the 1st Respondent.
[28] Paragraph 19 of the affidavit of the 1st Respondent.

Switzerland), and had not divulged her dual citizenship at the time of submission of her nomination to contest the said election.

The said nomination paper has been produced marked **P 1** wherein the 1st Respondent has signed certifying that she is not subject to any disqualification for election[29].

It must be noted with significance that the 19th Amendment which brought in the disqualification set out in Article 91(1) (d) (xiii) of the Constitution was certified by the Speaker of Parliament on 2015-05-15. This date assumes significance because it had deliberately brought in this fresh disqualification into the Constitution before approximately two months before the date on which the nomination paper had been handed over (i.e. on 2015-07-09).

The current travel document details report issued on 2015-08-26, by the Department of Immigration & Emigration produced marked **P 7**, clearly states that the holder of that travel document is a dual citizen. The 2nd Respondent being the Controller General of the Department of Immigration and Emigration, in his affidavit filed before this Court has not denied the authenticity of this document. Effect of his assertions therein is compatible

[29] Last column in the nomination paper marked **P 1**

with the material part of **P 7** which is that the 1st Respondent has been a holder of a dual citizen as at 2015-08-26 which is the date **P 7** has been issued. The 1st Respondent has been content by offering a bare denial[30] of the averments in paragraph 11 of the petition and the corresponding averments in the affidavit inclusive of the document marked **P 7** and stop at that.

It would thus be the time now to consider further the position taken up by the 2nd Respondent. The 2nd Respondent being the Controller General of Immigration and Emigration of the Department of Immigration and Emigration has taken up the following positions in his affidavit filed before this Court.

i. That according to the departmental records, the 1st Respondent had applied for dual citizenship of Sri Lanka/Switzerland on 2006-08-29 and was registered as a dual citizen on 2006-08-29 under the Citizenship (Amendment) Act No. 45 of 1987[31].

ii. The dual citizenship certificate bearing No. 17096 has been issued to the 1st Respondent on 2006-09-19[32].

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[30] Paragraph 13 of the affidavit of the 1st Respondent.
[31] Paragraph 4(a) of the affidavit filed by the 2nd Respondent.
[32] Paragraph 4(a) of the affidavit filed by the 2nd Respondent.

iii. That the 1st Respondent had on 2015-10-30, had applied for a diplomatic passport and had requested that the same be issued without an endorsement that she is a dual citizen[33].

iv. That the 1st Respondent had submitted a letter dated 2015-09-11 (produced marked **R 2**) issued by the Registry and Citizenship services, Canton of Bern indicating that Mrs. Geetha Samanmali Fuhrer, nee Kumarasinghe, is released from Swiss Citizenship[34].

v. That Hon. Attorney General advised him to request the 1st Respondent to clarify paragraph 4 of her letter dated 20015-09-11 and to provide evidence that she has been released absolutely from Swiss Citizenship[35].

vi. 1st Respondent did not respond when she was called upon to do so as per the Attorney General's above advice.

The letter dated 2015-10-30 containing the advice of the Attorney General has been produced marked **R 4** and the letter dated 2015-11-02 written by the 2nd Respondent to the 1st Respondent has been produced marked **R 5**.

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[33] Paragraph 4(c) of the affidavit filed by the 2nd Respondent.
[34] Paragraph 4(d) of the affidavit filed by the 2nd Respondent.
[35] Paragraph 4(f) (iii) of the affidavit filed by the 2nd Respondent.

It is to be noted that in any case the effect of the order marked **R 2** would be only from the date of its issue which is 2015-09-11. This means that the 1st Respondent had been holding an unfettered dual citizenship at least up until that date.

In the letter dated 2015-10-30 written and signed by the 1st Respondent, she has admitted that at least at one point of time she has been a holder of dual citizenship. This is clear from the phrase ".... මා ද්විත්ව පුරවැසි භාවයෙන් මිදී ඇති බැවින් ....". It is thus clear that it is an admission on the part of the 1st Respondent that she had up until that time been a holder of a dual citizenship. The 1st Respondent has opted not to offer any explanation on the above evidence.

Paragraph 4 of the letter dated 2015-09-11 (produced marked **R 2**) states that "the Registry and Citizenship Services inform the registry office of the home municipality of the release from Swiss Citizenship as soon as it becomes absolute." This clearly means that the 1st Respondent has not yet been absolutely released from the Swiss Citizenship. The 1st Respondent chose not to respond to the letter written to her by the 2nd Respondent calling upon her to explain the real position and to produce further evidence on this aspect. Further she has chosen to continue with that silence before this Court also. In these circumstances inclination of this Court to draw an adverse inference against the 1st Respondent would be irresistible.

Thus it would be inevitable that this Court would conclude on the above material that the 1st Respondent, contested the said Parliamentary Election,

was elected, and subsequently took oaths in the office as a Member of Parliament and thereafter sat and voted in Parliament as a Member of Parliament whilst also being a citizen of any other country namely Switzerland.

8. CONCLUSION

For the reasons set out above, it is the conclusion of this Court that the 1st Respondent has failed to satisfy this Court that she has any authority to claim to hold office as a Member of Parliament. Therefore this Court is of the considered opinion that the 1st Respondent is disqualified to be a Member of Parliament in terms of Article 91(1) (d) (xiii) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

In these circumstances and for the foregoing reasons we decide to grant and issue a mandate in the nature of a writ of quo warranto declaring that the 1st Respondent is disqualified to be a Member of Parliament and that therefore she is not entitled to hold office as a Member of Parliament;

We also direct that 1st Respondent must pay costs of this application to the Petitioners.

Further, we also direct the Attorney General to consider taking steps to recover the fines payable by the 1st Respondent as a debt due to the State as has been provided for under Article 100 of the Constitution.

JUDGE OF THE COURT OF APPEAL

Vijith K Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL