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

In the matter of an Application for the grant of mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Writ Application No. 425/19

1. Gamini Viyangoda,
   883/9, Flower Road, Ethul Kotte.

2. Prof. Chandraguptha Thenuwara,
   60/3A, 9th Lane, Ethul Kotte.

PETITIONERS

Vs.

1. R.M.P.S.B. Rathnayake,
   Controller General of Immigration and Emigration,
   Department of Immigration and Emigration.

2. P. Viyani Gunathilaka,
   Commissioner General,
   Department for Registration of Persons,

   Both of "Suhurupaya", Sri Subhuthipura Road, Battaramulla.

3. Hon. Vajira Abeywardena,
   Minister of Internal and Home Affairs and Provincial Councils and Local Government.

4. Gamini Senevirathna,
Secretary,
Ministry of Internal and Home Affairs and Provincial Councils and Local Government

3rd and 4th Respondents at
"Nila Medura", Elvitigala Mawatha,
Colombo 05.

5. Nandasena Gotabaya Rajapaksa,
26A, Pengiriwatta Road, Mirihana.

6. Hon. President Mahinda Rajapaksa,
117, Wijerama Mawatha,
Colombo 07.

7. C.D. Wickremaratne,
Acting Inspector General,
Police Headquarters.

8. Ravi Seneviratne,
Senior Deputy Inspector General of Police
Criminal Investigation Department.

9. G.S. Abeysekera,
SSP Director,
Criminal Investigation Department.

10. Mr. Lalitha Dissanayake,
Officer in Charge, Special Branch,
Criminal Investigation Department,

7th – 10th Respondents at
York Street, Colombo 01.

RESPONDENTS

Before: **Yasantha Kodagoda, P.C., J/ President of the Court of Appeal**
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Suren Fernando with Niran Anketell and Khyati Wikramanayake for the Petitioner

Nerin Pulle, Deputy Solicitor General with Dilan Ratnayake, Deputy Solicitor General, Dileepa Pieris, Deputy Solicitor General, Suren Gnanaraj, Senior State Counsel and Indumini Randeny, State Counsel for the 1st, 2nd, 4th and 7th – 10th Respondents

Chanaka De Silva, P.C., with Sachintha Kahandage, Niranjan Arulpragasam, Sewwandi Karaliyadda and Dilrukshi Paul for the 3rd Respondent

Romesh De Silva, P.C., with Palitha Kumarasinghe, P.C., M.U.M. Ali Sabry, P.C., Sugath Caldera, Ruwantha Cooray and Harith De Mel for the 5th Respondent

Gamini Marapana, P.C., with Navin Marapana, P.C., Ganesh Dharmawardena, Kaushalya Molligoda, Uchitha Wickremasinghe and Gimhana Wickramesurendra for the 6th Respondent

Supported on: 2nd October 2019, 3rd October 2019 and 4th October 2019

Written Submissions: Tendered on behalf of all parties on 4th October 2019

Order delivered on: 04th October2019

Reasons delivered on: 15th October 2019

Order of Court

This Application was filed on 27th September 2019, with Notice issued directly by the Petitioners to the Respondents. When this matter was mentioned on 30th September 2019, the 5th – 10th Respondents were represented by learned Counsel. Given the fact that handing over of nominations for the election of the President of Sri Lanka was to take place on 7th October 2019, and as the 5th Respondent had made his security deposit to contest the said election, the learned Counsel for the Petitioners sought to Support this matter at the earliest possible opportunity. This Court must record that all learned Counsel present in Court representing the Respondents were agreeable to have this matter Supported early and with the agreement of all learned Counsel, this Application was fixed for Support on 2nd and 3rd October 2019.

Due to the time taken by learned Counsel to present their respective cases and respond to each other's submissions, the oral hearing could not be completed by the end of 3rd October 2019. When this matter was resumed at 9.30am on 4th October 2019, the learned Counsel with permission from Court approached the Bench. The President's Counsel for the 5th Respondent moved that this Court pronounce its Order on the issue of Notice and the grant of interim relief on the 4th itself, given that the last date to place the security deposits was 12noon on Sunday, 6th October 2019, and the 5th Respondent, as well as the political party that he belongs to (Sri Lanka Podujana Peramuna), required adequate time to make alternate arrangements in the event an adverse Order was made by this Court. Learned President's Counsel subscribed to the view that the Court may pronounce its order on the 4th October 2019, and on a subsequent occasion may deliver reasons. Counsel representing all other

parties agreed to this proposal. As the Court had already informed all learned Counsel that it wished to receive the written submissions of the parties within six hours from the close of the oral hearing, the delivery of an Order with reasons by the end of 4th October 2019 was in any event not possible. It is necessary for this Court to emphasize that all learned Counsel for the parties submitted that they were agreeable for this Court to pronounce its Order on the 4th October 2019 itself and for the reasons for the Order to be delivered in due course. Proceedings relating to these hearings concluded by 2.00pm on the 4thOctober 2019. Written Submissions of all parties were tendered to the Chambers of the Judges by 3.30 pm. Consideration of this matter by the Judges took place in Chambers of the President both during the hearing and after the completion of hearing. Following the Judges having arrived at a unanimous finding, the Order was delivered in open Court on 4th October 2019 at 6.05pm. This Order contains reasons for the Order that was pronounced by Court.

The Petitioners filed this Application seeking *inter alia* the following reliefs:

a) A Writ of Certiorari to quash the Dual Citizenship Certificate annexed to the petition marked '**P13**' purported to have been issued to the 5th Respondent and/or the decision to issue such Dual Citizenship Certificate;

b) A Writ of Certiorari to quash Passport No. 8305500 said to have been issued to the 5th Respondent;

c) A Writ of Certiorari to quash National Identity Card No. 194917210010 annexed to the petition marked '**P11**' issued to the 5th Respondent.

Additionally, the Petitioner sought interim relief restraining the 5th Respondent from holding out, representing or claiming to be or acting on the basis that he is a citizen of Sri Lanka, and suspending the operation of the 5th Respondent's afore-named National Identity Card and Passport.

The reliefs sought in paragraphs (b) and (c) above are dependent upon the relief sought in paragraph (a) being granted by this Court. To elaborate, the Petitioners impugn '**1R5**' (the application submitted to obtain a passport) and '**P11**', on the basis that they were obtained by producing, according to them, the invalid Dual Citizenship Certificate '**P13**' and therefore, the Passport and the National Identity Card were also invalid.

The facts of this matter very briefly are as follows.

It is admitted between the parties that the 5th Respondent, Nandasena Gotabaya Rajapaksa, was born on 20th June 1949 in Sri Lanka to parents who were citizens of Ceylon, as Sri Lanka was then known. By virtue of the provisions of Section 5(1) of the Citizenship Act No. 18 of 1948 (as amended), the 5th Respondent became a citizen of Ceylon by descent.[1] It is not in dispute that the 5th Respondent voluntarily became a citizen of the United States of America on 31st January 2003. Section 20(5) of the Citizenship Act provides that a citizen of Sri Lanka by descent who voluntarily becomes a citizen of any other country shall cease to be a citizen of Sri Lanka. Accordingly, the 5th Respondent

[1] Section 5(1) reads as follows: 'Subject to the other provisions of this Part, a person born in Sri Lanka on or after the appointed date shall have the status of a citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka'; In terms of Section 2(2) of the Act, 'A person shall be or become entitled to the status of a citizen of Sri Lanka in one of the following ways only:- (a) by right of decent as provided by this Act; (b) by virtue of registration as provided by this Act or by any other Act authorizing the grant of such status by registration in any special case of a specified description.' In terms of Section 28 (1), "appointed date" means the 15th day of November, 1948. Thus, as at the time of his birth, the status of the 5th Respondent is to be recognized as a 'citizen of Sri Lanka by decent'.

ceased to be a citizen of Sri Lanka with effect from 31st January 2003 by operation of Section 20(5) of the Citizenship Act (as amended).

The 5th Respondent is said to have subsequently 'resumed' his citizenship of Sri Lanka on 21st November 2005 in terms of Section 19(2) of the Citizenship Act, which reads as follows:

> *"Any person who ceases, under subsection (1) of this section or section 20 or section 21, to be a citizen of Sri Lanka may at any time thereafter make application to the Minister for a declaration that such person has resumed the status of a citizen of Sri Lanka, notwithstanding the fact that he is, and continues to be, a citizen of any other country; and the Minister may make the declaration for which the application is made if he is satisfied that the making of such declaration would, in all the circumstances of the case, be of benefit to Sri Lanka."*

The 5th Respondent is 'said to have' been issued with the 'purported' 'Dual Citizenship Certificate' marked '**P13**' on 21st November 2005. Thus, President's Counsel for the 5th Respondent submitted that, the 5th Respondent thereby became a 'Dual Citizen' of Sri Lanka and the United States of America.

Although the Petitioners have expressed doubt on the authenticity of '**P13**' in their petition to this Court, even to the extent of calling it a fraudulent document[2], during the hearing, it was agreed that the 6th Respondent had signed '**P13**', and that there is no dispute on this matter.

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[2] Paragraph 23 of the petition: "The purported document tendered by the 5th Respondent as his "Dual Citizenship Certificate" '**P13**' is manifestly and *ex facie* a fraudulent document in as much as *inter alia* the

During the hearing, it was submitted on behalf of the 5th Respondent that he renounced his citizenship of the United States of America in 2019 and thereby ceased to be a citizen of the United States of America. All Counsel submitted that, that event is of no specific consequence to the present matter before this Court, than for the submission by the learned President's Counsel for the 5th Respondent that the 5th Respondent would be rendered 'stateless' if his 'Dual Citizenship' is ruled by this Court to be invalid.

It is the position of the learned Counsel for the Petitioners that the issuance of the said Dual Citizenship Certificate '**P13**' which reflects the resumption of the status of citizenship of Sri Lanka by the 5th Respondent is a nullity, for the reason that the 6th Respondent who signed '**P13**' did not have the legal authority to do so on the date that he is purported to have signed '**P13**'. If this argument is accepted, the necessary consequence would be that the 5th Respondent would not be deemed to carry the status of a citizen of Sri Lanka as he had not resumed his status of citizenship of Sri Lanka as required by Section 19(2) of the Citizenship Act on 21st November 2005. If so, it was the argument of the learned Counsel for the Petitioners that everything that flows therefrom, including the issuance of a Sri Lankan passport by the 1st Respondent - Controller General of Immigration and Emigration to the 5th Respondent on 7th May 2019 ('**1R5**'), and the issuance of a National Identity Card by the 2nd Respondent - Commissioner General, Department for Registration of Persons to the 5th Respondent on 4th October 2016 ('**2R1**'), are unlawful and hence both such Passport and National Identity Card would have no recognition in law. More so, it was the submission of the learned Counsel

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document is purportedly signed 'for' a Secretary, in addition to the then President of the Republic (6th Respondent)."

for the Petitioners that, if the 5th Respondent does not enjoy the 'status of a citizen of Sri Lanka', he would not be eligible to tender his nomination to contest the Presidential Election scheduled for 16th November 2019. This is very broadly the basis of the Petitioners' Application to this Court.

It would be relevant to mention at this stage that the complaint of the Petitioners relate to events that transpired in 2005 and a consideration by this Court of the said complaint of the Petitioners would require this Court to consider the provisions of the Citizenship Act and the Constitution as they stood in 2005. This observation is made in view of the fact that Article 44 as it prevailed in 2005 has since been repealed by the amendments introduced through the 19th Amendment to the Constitution.

Thus, the application of the provisions of the Constitution to the facts and circumstances of this matter, is unlikely to have any relevance to the present era, particularly as Article 44 of the then Constitution which is at the epicenter of the debate in this matter significantly differs from Articles 43 and 44 of the Constitution as is stands following the 19th Amendment to the Constitution. It was submitted by Counsel that, the question which was debated before this Court in this matter had not come up for consideration in the past either before the Supreme Court or the Court of Appeal. Therefore, this ruling can be recognized as a 'one off' situation.

The Petitioners state that they became aware of several issues pertaining to the resumption of citizenship of Sri Lanka by the 5th Respondent, through a news article titled *'Officials wary to probe legality of Gota's citizenship'* published in the Daily Financial Times of 5th August 2019, annexed to the

Petition marked '**P1**'. This position of the Petitioners has been challenged by the 5th Respondent and would be addressed later.

The Petitioners state that as the 5th Respondent had indicated that he would be contesting as a candidate at the forthcoming Presidential Elections, they were "deeply concerned" about the allegations contained in '**P1**', as there was a potential threat of a person who is not a citizen of Sri Lanka becoming the President of this country.

It would perhaps be appropriate to refer at this stage to Article 92 of the Constitution, which reads as follows:

> *"Every person **who is qualified to be an elector** shall be qualified to be elected to the office of President unless he is subject to any of the following disqualifications –*
>
> *(a) if he has not attained the age of thirty five years;*
>
> *(b) if he is not qualified to be elected as a Member of Parliament under sub-paragraph (d), (e), (f) or (g) of paragraph (1) of Article 91;*[3]
>
> *(c) if he has been twice elected to the office of President by the People; and*
>
> *(d) if he has been removed from the office of President under the*

[3] It is observed that in terms of an amendment introduced by the 19th Amendment to the Constitution in 2015 to Article 91(1)(d), the categories of persons not qualified have been expanded to include a citizen of Sri Lanka who is also a citizen of any other country – vide Article 91(1)(d)(xiii).

provisions of sub-paragraph (e) of paragraph (2) of Article 38."

Article 89 of the Constitution, which sets out the disqualifications to be an elector, specifically provides in Article 89(a) that:

> *"No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely –*
>
> *(a) if he is not a citizen of Sri Lanka;"*

The above provisions make it abundantly clear that a person must be a citizen of Sri Lanka in order to be eligible to vote at an election, and that a person who is not a citizen shall not be entitled to vote at an election nor shall that person be entitled to present himself as a candidate at an election held to elect the President of this Country.

The Petitioners state that it being *undesirable and illegal* for a non-citizen to be elected as the President, they made two formal complaints dated 6th August 2019 and 8th August 2019, annexed to the petition marked **'P2'** and **'P3'** respectively, to the 7th Respondent - Acting Inspector General of Police. The Petitioners claim that they co-operated fully with the investigations that were conducted by the Criminal Investigation Department pursuant to their complaints. The Petitioners state further that they became aware that on 20th September 2019, the Criminal Investigation Department had filed a report in terms of the Code of Criminal Procedure Act No. 15 of 1979, as amended, in the Magistrate's Court of Colombo. A complete copy of the reports filed in that

case bearing No. B18843/01/19 by the Criminal Investigation Department together with the documents attached to such reports has been annexed to the Petition, marked '**P7**'.

As observed earlier, the complaint of the learned Counsel for the Petitioners is that the issuance of the 'Dual Citizenship Certificate' '**P13**' on 21st November 2005 is a nullity for the reason that the 6th Respondent – Hon. President Mahinda Rajapaksa (the then President of Sri Lanka) who signed '**P13**' did not have the legal authority to do so at the time it was signed. Before considering the legal provisions underlying the said argument, it would be useful to lay down the facts which are relevant to the said complaint.

An election to elect a citizen of this Country as its President was held on 17th November 2005. There were thirteen candidates at the said election including Hon. Mahinda Rajapaksa, the present Leader of the Opposition, who at that time was the Hon. Prime Minister. The results of the said election were announced on 18th November 2005 and the 6th Respondent - Hon. Mahinda Rajapaksa, by virtue of having secured the highest number of votes and more than one half of the valid votes cast at the election, as required by Section 56 of the Presidential Elections Act No. 15 of 1981, was declared elected President of the Democratic Socialist Republic of Sri Lanka. The Petitioners have produced with the Petition marked '**P14**', the Notice published in Extraordinary Gazette No. 1419/11 dated 18th November 2005, by the Commissioner of Elections under Section 64(2) of the Presidential Elections Act No. 15 of 1981 notifying the said election of the 6th Respondent.

A proclamation issued by the Secretary to the President, published in

Extraordinary Gazette No. 1419/12 dated 19th November 2005, which has been annexed to the petition marked '**P14a**', reads as follows:[4]

> *"Whereas His Excellency Mahinda Rajapakse was declared elected President of the Democratic Socialist Republic of Sri Lanka on the 18th day of November 2005 at an election held in pursuance of Article 31(3) of the Constitution.*
>
> *And whereas the term of office of the said President commenced, by virtue of Article 31(4) of the said Constitution, on the 18th day of November 2005;*
>
> *It is hereby proclaimed that His Excellency Mahinda Rajapakse has, by making and subscribing the affirmations set out in the fourth and seventh schedules to the said Constitution in the manner provided for in Article 32, read with Article 157A(7) thereof, on this 19th day of November, 2005, assumed the Office of President of the Republic of Sri Lanka."*

The appointment of Hon. Ratnasiri Wickramanayake to the Office of Prime Minister in terms of Article 43(3) of the Constitution was informed by way of another Notice published by the Secretary to the President in Extraordinary Gazette No. 1420/2 dated 21st November 2005, annexed to the Petition marked '**P15a**'. A further notification has been published in Extraordinary Gazette No. 1420/28 dated 23rd November 2005, annexed to the Petition marked '**P15f**', notifying that His Excellency the President, acting in terms of Article 44(1)(b) of the Constitution has appointed the persons mentioned

[4]Article 32(1) of the Constitution provides that, "The person elected or succeeding to the office of President shall assume office upon taking and subscribing the oath or making and subscribing the affirmation, set out in the Forth Schedule, in Sri Lanka before the Chief Justice or any other Judge of the Supreme Court."

therein, as Ministers in charge of the subjects mentioned against their names. This Court must observe at this stage that the appointment of 25 Ministers of the Cabinet of Ministers and the fact that the title of the subjects that had been assigned to such Ministers had been stated against their names, meant that the subjects assigned to each such Minister had been determined by 23rd November 2005. The notification informing the allocation of subjects and functions of each Minister, which had been published in Extraordinary Gazette No. 1422/22 dated 8th December 2005, has been annexed to the Petition marked '**P15b**', and reads as follows:

> *"Whereas I have in the exercise of powers vested in me under paragraph (1)(a) of Article 44 of the Constitution of the Democratic Socialist Republic of Sri Lanka, determined the number of Ministers and Ministries and the assignment of Subjects and Functions and Department and Statutory Institutions to the said Ministers:*
>
> *It is now hereby notified that the Subjects and Functions and Departments and Statutory Institutions in the charge of the various Ministers stand from the date hereof as indicated in the Schedule given below;*
>
> *All Subjects and Functions and Departments and Statutory Institutions not assigned specifically to any Minister* ***will continue to remain in my charge as President.***" (emphasis added)

The above events can thus be sequentially summarized as follows:

1) The 6th Respondent was elected President on 18th November 2005;

2) The 6th Respondent assumed office on 19th November 2005;

3) The Prime Minister was appointed on 21st November 2005;

4) **The 6th Respondent signed the Dual Citizenship Certificate of the 5th Respondent on 21st November 2005**;

5) Ministers were appointed on 23rd November 2005; and

6) The subjects and functions that were assigned to such Ministers were determined on 8th December 2005.

The Petitioner's primary contention before this Court, even though several other matters were alluded to, was that the 6th Respondent did not have the legal authority to sign the 'Dual Citizenship Certificate' of the 5th Respondent marked '**P13**' as at 21st November 2005. In other words, the issue before this Court is whether on the relevant date – i.e. 21st November 2005 - the 6th Respondent – who by then had assumed the Office of President, could have exercised powers vested in a Minister under an Act of Parliament and in particular the Citizenship Act, without having first complied with the provisions of Articles 44(1) and (2).

Articles 44(1) and 44(2) as they prevailed during the relevant time (i.e. 2005), are re-produced below:

"(1) The President shall, from time to time, in consultation with the Prime Minister, where he considers such consultation to be necessary-

a. determine the number of Ministers of the Cabinet of Ministers and the Ministries and the assignment of subjects and functions to such Ministers; and

b. appoint from among the Members of Parliament, Ministers to be in charge of the Ministries so determined.

(2) The President may assign to himself any subject or function and ***shall remain in charge of any subject or function not assigned to any Minister*** *under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45*[5] *and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President."* (emphasis added)

There is no dispute between the parties that in terms of Article 32(2) of the Constitution, upon the assumption of the office of President on 19th November 2005, the 6th Respondent ceased to be a Member of Parliament[6]; that the 6th Respondent thereby ceased to be the Prime Minister, by virtue of Article 47(c)

[5] Article 45(1) deals with the appointment of Ministers who are not members of the Cabinet and their Ministries, subjects and functions.

[6] Article 32(2) reads as follows: "Upon such assumption of office the President shall cease to hold any other office created or recognized by the Constitution and if he is a Member of Parliament, shall vacate his seat in Parliament. The President shall not hold any other office or place of profit whatsoever."

of the Constitution[7]; and that the consequence of the 6th Respondent ceasing to hold the office of Prime Minister was that in terms of Article 49(1) of the Constitution, the Cabinet of Ministers that existed on 18th November 2005 stood dissolved as at 19th November 2005.[8]

It was submitted by the learned Counsel for the Petitioners that upon the Prime Minister ceasing to hold office, Article 49(1) required the President to appoint a Prime Minister and the Ministers of the Cabinet of Ministers in terms of Article 43(3) and Article 44(1)(b) of the Constitution, respectively, and that *'this was the principal duty of the President as soon as he assumed office'*.

Relying on the provisions of Article 44(1) of the Constitution, the learned Counsel for the Petitioners submitted further that *'the immediate course of action which the President should have taken was to:*

1) *Appoint as Prime Minister, the Member of Parliament who commanded the confidence of Parliament (Article 43(3));*

2) *Determine the number of Ministers of the Cabinet of Ministers (Article*

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[7] Article 47(c) reads as follows: "The Prime Minister, a Minister of the Cabinet of Ministers, any other Minister or Deputy Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he - (c) ceases to be a Member of Parliament."

[8] Article 49(1) reads as follows: "On the Prime Minister ceasing to hold office by removal, resignation or otherwise, except during the period intervening between the dissolution of Parliament and the conclusion of the General Election, the Cabinet of Ministers shall, unless the President has in the exercise of his powers under Article 70, dissolved Parliament, stand dissolved and the President shall appoint a Prime Minister, Ministers of the Cabinet of Ministers, other Ministers and Deputy Ministers in terms of Articles 43, 44, 45 and 46:

Provided that if after the Prime Minister so ceases to hold office Parliament is dissolved, the Cabinet of Ministers shall continue to function with other Ministers of the Cabinet as its members, until the conclusion of the General Election. The President may appoint one such Minister to exercise, perform and discharge or may himself exercise, perform and discharge the powers, duties and functions of the Prime Minister, and the provisions of Article 48 shall, *mutatis mutandis*, apply."

44(1)(a));

3) *Determine the assignment of subjects and functions to such Ministers (Article 44(1)(a));*

4) *Appoint from among the Members of Parliament, Ministers to be in charge of the Ministries so determined (Article 44(1)(b))'.*

The learned Counsel for the Petitioners also submitted that the Constitutional duties imposed on the President by Articles 43(1) and 44(1) are cast in mandatory terms, by the use of the word, 'shall' in both articles.

On this basis, the learned Counsel for the Petitioners submitted that **it is only after the mandatory acts** required of the President in terms of Articles 43(3) and 44(1) have been complied with, that the provisions of Article 44(2) would come into operation and that it is only at that stage that the President can start exercising the functions of a Minister as provided by Article 44(2). Elaborating further, the learned Counsel for the Petitioners submitted that it is only after the Ministers, Ministries and subjects and functions have been determined in terms of Article 44(1), that the President can assign to himself any subject or function that has not been assigned to a Minister.

The Petitioners argument then is that until the President has appointed a Cabinet of Ministers, he cannot exercise any powers vested in a Minister including any powers vested in a Minister by an Act of Parliament.

In response to a question by this Court, the learned Counsel for the Petitioners expressly qualified his argument by stating that there is no restriction on the President exercising any powers vested in the President *qua* President in terms of the Constitution or any other law, and that such powers are sufficient to govern the Country until the appointment of a Cabinet of Ministers. He pointed out in particular to the provisions of the Public Security Ordinance which confers powers on the President to deal with any emergency situation.

If the issue before this Court is to be clearly circumscribed at this stage, it is whether in terms of the Constitution, as applicable at the time, the President could have exercised the powers vested in the Minister in terms of the Citizenship Act, without first having complied with the provisions of Article 44(1).

The learned Counsel for the Petitioners sought legal support for his argument on the following basis:

1. The principal duty of the President is to act in terms of Article 44(1), which is cast in mandatory terms.

2. The President's power to assign to himself any subject or function in terms of Article 44(2) can only be exercised after appointing Ministers in terms of Article 44(1), since the deeming provision in Article 44(2)[9] is contingent upon the President determining the Ministries to be in his charge.

[9] i.e. *"accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President."*

The learned President's Counsel for the 5th and 6th Respondents and the learned Deputy Solicitor General for the 1st, 2nd, 4th, 7th -10th Respondents have countered the above argument of the learned Counsel for the Petitioners on the basis of two basic propositions. The first is that the President has **plenary executive power**, while the second is that the President is the **repository of executive power** and as such is entitled to exercise such power until the appointment of the Cabinet of Ministers and the assignment of subjects and functions to such Ministers.

The use of the term "**plenary**" gives rise to different connotations as explained in detail by the Supreme Court in **Sampanthan vs Hon. Attorney General and others**[10]. In the said case, the Supreme Court explained that when the term "plenary power" was previously used by the Supreme Court in **SC Reference 2/2003**[11] it simply meant *"'full power' or 'complete power' and should not be taken to and cannot be taken to mean a species of inherent unrestricted omnipotent power held by a Head of State which is akin to Royal prerogative power."* The Supreme Court went on to state that *"it must be remembered that the President, who is the Head of the State under the Constitution is but a creature of the Constitution. His powers are only those which are specifically vested in him by the Constitution and the law. Equally, the exercise of these powers by the President are circumscribed by the provisions of the Constitution and the law"*.

Having dismissed the position that "plenary powers" in the sense of unrestricted powers exist under the Constitution, the Supreme Court observed

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[10] SC (FR) Application No. 351/2018; SC Minutes of 13th December 2018.

[11] Reference made by the President to the Supreme Court in terms of Article 129(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

further in **Sampanthan vs Attorney General and others**[12] that *"a perusal of the opinion expressed by this Court in SC Reference No. 2/2003 shows that the term "plenary executive power" was used in the context of the aforesaid meaning of the word "plenary" as a reference to the fact that "complete" executive power including the defence of Sri Lanka and the control of the three Forces was vested in the President by the Constitution".*

It is to also be noted that in **Nallaratnam Singarasa vs Hon. Attorney General**[13] it has been held that, *"The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and the written law that derive its authority therefrom."* The Supreme Court has proceeded to hold that, *"there could be no plenary executive power that pertain to the Crown as in the UK and the executive power of the President is derived from the People as laid down in Article 4(b)."*

Thus, it is evident that any power that can be exercised by the President would have to be necessarily conferred upon him by the Constitution or any other written law, and that the exercise of such power is circumscribed by the Constitution. It is therefore important to note that the President does not derive the 'Executive' component of the peoples' sovereignty from any other source than from the Constitution and other written laws, and is circumscribed by the Constitution. Therefore, this Court cannot agree with the first part of the submission of the learned Deputy Solicitor General and learned President's Counsel for the 5th and 6th Respondents which was premised on the footing that the President is conferred with 'plenary executive power', which empowered and therefore enabled him to issue the 'Dual Citizenship

[12] Ibid. at page 38.
[13] 2013 (1) Sri LR 245 at page 255 -256. [SC Spl (LA) No. 182/99, decided on 15th September 2006.]

Certificate' '**P13**' in issue. It is to be noted that, on this point this Court concurs with the submissions made by learned Counsel for the Petitioners and the President's Counsel for the 3rd Respondent.

There is no dispute among the parties that the President has the power to assign to himself the relevant subject (of citizenship) or to remain in charge of that subject, and exercise the powers vested in the Minister in respect of that subject. **The point of variance is that, while the Petitioner argues that the said right is fettered or constrained by Article 44(1), the Respondents argue that it is not.** In these circumstances, the concept of "**plenary powers**" is unhelpful in determining the issue before this Court, since the issue is with regard to whether the exercise of the President's powers were subject to any restrictions under the Constitution.

Flowing from the above, the argument of the learned President's Counsel and the learned Deputy Solicitor General based on the fact that the President is the Head of the State, the Head of the Executive and the Head of the Government and the Cabinet in terms of Articles 30(1) and 43(2), too may not be helpful, since, the mere fact of being the 'Head' does not give any unrestricted power to the President, whose powers as seen above are certainly circumscribed by the Constitution.

Court will now consider the second argument advanced on behalf of the Respondents, excluding the 3rd Respondent. In arguing that the President is the repository of executive power, the learned President's Counsel for the 5th and 6th Respondents and the learned Deputy Solicitor General for the 1st, 2nd, 4th and 7th – 10th Respondents relied on the following:

1. It is the People who are sovereign, and not the Executive President, Parliament or any other. Article 3 of the Constitution dictates that "In the Republic of Sri Lanka Sovereignty is in the People and is inalienable."

2. Sovereignty of the People shall be exercised and enjoyed in the following manner:
   i) Legislative Power through Parliament
   ii) Executive Power through the President
   iii) Judicial Power through Courts

3. Article 4(b) of the Constitution, which reads as follows:

   "The executive power of the People, including the defence of Sri Lanka, **shall be exercised by the President of the Republic elected by the People".**

4. The fact that Article 44 (2) states that the President **"shall remain in charge of"** any subject or function not assigned to any Minister under the provisions of Article 44(1), means that the President is the repository of Executive power. The word "remain" connotes "continuity", and is linked to Article 4(b).

5. The fact that the President has the power to assign any subject or function to himself or other Ministers means the President is **the repository of that power**.

In support of their argument, the learned President's Counsel for the 5th and 6th Respondents and the learned Deputy Solicitor General brought to the attention of this Court the dicta in **Re Third Amendment to the Constitution**[14] where the Supreme Court observed that *"Article 4(b) envisages the executive power of the People being vested in and exercised only by the President* ***who has been elected by the People****. The foundation and justification for the grant of the executive power is election by the People. The election symbolizes the Sovereignty of the People.* ***It is fundamental to the exercise of the Sovereignty of the People that the repository of the executive power should be a person elected by the People.***" (emphasis added).

Thus, it was submitted that, in terms of the Constitution, the President is the repository of all executive powers.

On the other hand, the learned Counsel for the Petitioners and the learned President's Counsel for the 3rd Respondent drew the attention of this Court to the determination of the Supreme Court in **Re Nineteenth Amendment to the Constitution**[15] where the Supreme Court held as follows:

> *"The first two Articles in Chapter VIII of the Constitution are of crucial importance in describing the structure in which executive power was sought to be distributed. Article 42 states "The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security". Thus, the President's responsibility to Parliament for the exercise of Executive*

[14] Decisions of the Supreme Court on Parliamentary Bills (1978-1983) Volume I, page 141 at page 146.
[15] SC Special Determination Nos. 4/2015 – 19/2015.

power is established. Because the Constitution must be read as a whole, Article 4 (b) must also be read in the light of Article 42. ***Clearly, the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance.*** *(emphasis added)"*

However, the above statement is clearly in the context of the President's powers being fettered. **The point made by their Lordship's is to strike down the idea of an unfettered repository of Executive power, and not to deny that the President is the repository of Executive power conferred on him by the people through the Constitution.**

The learned Counsel for the Petitioners also relied on the following passage in **Re Nineteenth Amendment to the Constitution**[16] where, having referred to Article 43, the Supreme Court went on to state as follows:[17]

"This important Article underscores that the Cabinet collectively is charged with the exercise of Executive power, which is expressed as the direction and control of the Government of the Republic and the collective responsibility of Cabinet, of which the President is the Head. It establishes conclusively that the President is ***not the sole repository*** *of Executive power under the Constitution. It is the Cabinet of Ministers*

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[16] Ibid.

[17] Article 43 reads as follows:

" (1) There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament.

(2) The President shall be a member of the Cabinet of Ministers, and shall be the Head of the Cabinet of Ministers.

Provided that, notwithstanding the dissolution of the Cabinet of Ministers under the provisions of the Constitution, the President shall continue in office.

(3) The President shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament."

collectively, and not the President alone, which is charged with direction and control of Government.";

"Therefore the Constitution itself recognizes that Executive Power is exercised by the President and by the Cabinet of Ministers, and that the President shall be responsible to Parliament and the Cabinet of Ministers, collectively responsible and answerable to Parliament with regard to the exercise of such powers." (emphasis added)

The learned Counsel for the Petitioners also referred to the dissenting view of Wanasundera, J in **Re 13th Amendment to the Constitution**[18], where he held that the *"provisions of the Constitution amply indicate that there cannot be a government without a Cabinet...To take any other view is to sanction the possibility of establishing a dictatorship in our country, with a one man rule."*

It must be remembered that the above statement has been made in the context of the general situation where a Cabinet exists. It is unhelpful to rely on the general situation when this application involves a specific situation that had occurred when a Prime Minister was elected the President and the resulting gap between the election of the President and appointment of a Cabinet afresh.

This fact is evident from the following passage in **Re Nineteenth Amendment to the Constitution**[19] cited by the learned Counsel for the Respondents:

[18] (1987) 2 Sri LR 312 at 341.
[19] Supra.

*"**The People in whom sovereignty is reposed having made the President as the Head of the Executive in terms of Article 30 of the Constitution entrusted in the President, the exercise of the Executive power being the custodian of such power. If the people have conferred such power on the President, it must be either exercised by the President directly or someone who derives authority from the President. There is no doubt that the Executive powers can be distributed to others via President. However, if there is no link between the President and the person exercising the Executive power, it may amount to a violation of mandate given by the people to the President. If the inalienable sovereignty of the people which they reposed on the President in trust is exercised by any other agency or instrument who do not have any authority from the President then such exercise would necessarily affect the sovereignty of the People**. It is in this backdrop the Court in the Nineteenth Amendment Determination came to a conclusion that the transfer, relinquishment or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution. **Though Article 4 provides the form and manner of exercise of the sovereignty of the people, the ultimate act or decision of his executive functions must be retained by the President. So long as the President remains the Head of the Executive, the exercise of his powers remain supreme or sovereign in the executive field** and others to whom to such power is given must derive the authority from the President or exercise the Executive power vested in the President as a delegate of the President. The President must be in a position to monitor or to give directions to others who derive authority from the President in relation to*

the exercise of his Executive power. Failure to do so would lead to a prejudicial impact on the sovereignty of the People."(emphasis added)

This Court is mindful that its function is not to interpret provisions of the Constitution but to merely apply it to facts and circumstances (as presented by parties) of this Application. Keeping that in mind, and taking into consideration the above Determinations and the cited Judgments of the Supreme Court, this Court is satisfied that **as the Constitution stood at the time of the impugned conduct of the 6th Respondent, the President as the custodian of the Executive power of the People was the repository of the said Executive power**. It is the Constitution that had reposed such power on the President. Thus, the issue is whether that power is fettered by Article 44(1) and (2) in the specific circumstances relating to this Application.

As explained earlier, the Petitioners' argument is that it is the principal and immediate Constitutional duty of a newly elected President who has assumed office to appoint a Prime Minister and a Cabinet of Ministers. It is common ground that the President would have to appoint the Member of Parliament who in his opinion is most likely to command the confidence of Parliament as Prime Minister. In a multi-party democracy, the formulation of such an opinion may not be a straight-forward decision. The appointment of members of the Cabinet too may be a matter of protracted discussion and deliberation. It is no secret that the formation of a majority in Parliament may require political parties and individuals with different political ideologies and party affiliations to come together forming themselves into a formal or informal alliance and that such a process can take time. This is reflected in the Parliamentary Elections that took place on 2nd April 2004 where 82 members

were returned to Parliament through the United National Party and 105 members were returned to Parliament through the United People's Freedom Alliance, which was an alliance of nine political parties. While this was eight seats short of an absolute majority, it appears that the Alliance was subsequently able to form a Government with the assistance of other groups represented in Parliament. On that occasion, determination of the number of Ministers and Ministries and the assignment of Subjects and Functions had taken 26 days following the election, as borne out by the Notice published in Extraordinary Gazette No. 1338/9 dated 28th April 2004, annexed to the Petition marked '**P15d**'. It is perhaps a matter of relevance and interest that it is the same composition of Parliament that existed at the time the 6th Respondent was elected as President on 18th November 2005.

It is important to note that the Constitution does not specify a timeline within which the President is required to finalize the Cabinet and make ensuing appointments. The President has the power to change the Ministers of the Cabinet of Ministers and hence the use of the words "from time to time" in Article 44(1). Article 44(3) also lends supports to it when it provides that "The President may, at any time, change the assignment of subjects and functions and the composition of the Cabinet of Ministers." Indeed, it is not the position of the Petitioner that the appointment of the Prime Minister or Cabinet of Ministers by the 6th Respondent was unconstitutionally, unreasonably or arbitrarily delayed in November 2005. In fact, the documents filed by the Petitioners which have been adverted to earlier in this Order establish that the 6th Respondent did appoint (a) a Prime Minister two days after assuming office and (b) the Cabinet of Ministers four days after assuming office. Thus, in

colloquial terms it cannot be alleged that the 6th Respondent was getting ready to run an autocratic 'one man show'.

The Petitioners' argument is that even if there is a legitimate delay in constituting the Cabinet of Ministers, there can be no "direction and control" of the Government of the Republic, and the powers vested in Ministers across numerous statutes shall be in limbo during the intervening period. It is the view of this Court that, such a situation simply could not have been the intention of the framers of the Constitution. To paraphrase Justice Robert Jackson's famous dissent in **Terminiello v. City of Chicago**[20], if such doctrinaire logic is not tempered with a little practical wisdom it will convert the Constitution into a suicide pact. If the Constitution had intended such restrictions to be placed on the person by whom the Executive power of the People is to be exercised, the Constitution would have set out a time frame for the appointment and the establishment of the Cabinet and the assignment of subjects and functions to Ministers, and would have placed restrictions on the exercise of Executive power during the intervening period pending the Cabinet being appointed.

It was pointed out by the learned President's Counsel for the 5th and 6th Respondents and the learned Deputy Solicitor General, that the language in Article 44(2) clearly provides that the President shall **remain** in charge of any subject or function not assigned to any Minister. The Sinhala text of the Constitution basically gives the same meaning although the learned Counsel for the Petitioner sought to argue otherwise.[21] A linguistically accurate

[20] 337 U.S. 1 (1949).

[21] The Sinhala text of Article 44(1) and (2) reads as follows:

translation of the Sinhala text of Article 44(2) of the Constitution into English indicates that the word 'remain' should not have been included into the English text. The Sinhala term of 'remain' is "ඉතිරිව තිබෙන" (the transliteration being *'ithiriwa thibena'*). That term is not found in the Sinhala text of the Constitution. The Sinhala text, which this Court is obliged to give preferential recognition to, indicates clearly that the Constitution had conferred a 'duty' to the President to be 'in charge' of the subjects and functions not assigned to Ministers. Thus, during the intervening period of a few days between the new President having assumed office and his having appointed the Cabinet of Ministers and assigned subjects and functions to such Ministers and to other Ministers as provided by the Constitution, it is the view of this Court that the Constitution had conferred a **duty** on the President **to be in charge of all such subjects and functions not assigned to any Minister**.

Further, it is the view of this Court that a holistic reading of Article 44 (of even the English text) makes it clear that the deeming provision would be applicable whenever the President assigns a subject or function to himself and when the subject or function is not assigned to a Minister. There is no necessity for a

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(1) අග්‍රාමාත්‍යවරයාගේ අදහස් විමසීම අවශ්‍ය යයි ජනාධිපතිවරයා සලකන අවස්ථාවන්හි **අග්‍රාමාත්‍යවරයාගේ අදහස් ද විමසා ජනාධිපතිවරයා විසින්**, කලින් කල -

(අ) අමාත්‍ය මණ්ඩලයේ අමාත්‍යවරයන් සංඛ්‍යව ද, අමාත්‍යාංශ සංඛ්‍යාව ද, ඒ අමාත්‍යවරුන්ට පවරන විෂය සහ කාර්ය ද නිශ්චය කළ යුත්තේ ය; තව ද,

(ආ) එසේ නිශ්චය කරනු ලබන අමාත්‍යාංශ භාරව කටයුතු කිරීම සඳහා පාර්ලිමේන්තුවේ **මන්ත්‍රිවරයන් අතුරෙන් අමාත්‍යවරයන් පත් කළ යුත්තේ ය.**

(2) ජනාධිපතිවරයා **විසින් යම් විෂයයයක් හෝ කාර්යයක් තමාට ම පවරා ගැනීම කළ හැකි අතර මේ ව්‍යවස්ථාවේ** (1) වැනි අනුව්‍යවස්ථාවේ විධිවිධාන යටතේ හෝ 45 වැනි ව්‍යවස්ථාවේ (1) වැනි අනුව්‍යවස්ථාවේ **විධිවිධාන යටතේ හෝ යම් අමාත්‍යවරයකුට පවරනු නොලැබූ යම්කිසි විෂයයක් හෝ කාර්යයක් භාරව සිටිය යුත්තේ ය; තත්කාර්ය සඳහා තමා** භාරයේ තිබිය යුතු අමාත්‍යාංශ සංඛ්‍යාව නිශ්චය කිරීම ද කළ හැක්කේ ය. ඒ අනුව, ඒ **විෂයය හෝ කාර්යය පවරනු ලැබූ අමාත්‍යවරයා සම්බන්ධයෙන් ආණ්ඩුක්‍රම** ව්‍යවස්ථාවේ හෝ වෙනත් යම්කිසි ලිඛිත **නීතියක හෝ ඇති සඳහනක් ජනාධිපතිවරයා සම්බන්ධයෙන් වූ සඳහනක් ලෙස කියවා** තෙරුම් ගත යුත්තේ ය.

determination to be made on the number of Ministries for the deeming provision to become effective.

This Court is also of the view that any attempt to place Article 44(1) and 44(2) in that sequence would be to impose an artificial fetter on the President's exercise of Executive power during the period prior to the appointment of a Cabinet of Ministers. This is however not to say that the President can ignore the provisions of Article 44(1) altogether and without reasonable justification, govern the country over a long period of time, neglecting his Constitutional duty to appoint a Prime Minister, Ministers and assign subjects and functions to Ministers. That would indeed be unconstitutional, arbitrary and unreasonable. As noted above, the Constitution is silent as to when such appointments and assignment of subjects and functions would be made, and taken to its logical conclusion, the Petitioners argument would seriously jeopardize the effective functioning of the Government during the intervening period of even a few days.

It is therefore the view of this Court that the language in Article 44(2) read with Article 4(b) provides ample textual support for the proposition that following the assumption of office, **the newly elected President could have exercised powers conferred on a Minister by any written law until the Cabinet of Ministers was appointed.** As adverted to earlier, no opinion is expressed herein on the time that can be taken to appoint a Cabinet of Ministers or whether such a situation is justiciable. It is necessary to advert to the fact that the learned Counsel for the Petitioners did not allege that the 6th Respondent intentionally delayed the appointment of Ministers and assignment of subjects and functions to them, either for the President to exercise Ministerial power

and accord 'Dual Citizenship' to the 5th Respondent or for any other collateral reason. The view of this Court is that, the President should act in terms of the Constitution and in a reasonable manner in making the appointments referred to above and in the assignment of subjects and functions. It is necessary to reiterate that the Petitioners did not allege that the 6th Respondent intentionally delayed performing his Constitutional duties in terms of Articles 43 and 44 of the Constitution.

In the above circumstances, it is the view of this Court that the 6th Respondent, as the repository of the Executive power of the people, had the legal authority in terms of the Constitution to sign the 'Dual Citizenship Certificate' 'P13' on 21st November 2005 and that the argument of the Petitioners that 'P13' is a nullity therefore has no legal basis.

It is however to be noted that the Petitioners have brought to light that, there are certain discrepancies with regard to entries made and found in document marked '**1R1**' captioned 'Dual Application Registration' for the period 1st January 2005 to 4th December 2007. It was submitted by learned Counsel for the Petitioners and the learned President's Counsel for the 3rd Respondent that there are discrepancies in certain entries in the said Register (the original of which was presented to Court by the 1st Respondent) and certain information contained in '**P13**' and data entry sheets maintained in the digital data-base of the Government institution headed by the 1st Respondent, namely the Department of Immigration and Emigration. Learned Counsel for the Petitioners and the learned President's Counsel for the 3rd Respondent invited this Court to consider these alleged discrepancies particularly in the backdrop of the position taken up by the 1st Respondent that the original file which

ought to have contained the Application ostensibly filed by the 5th Respondent, internal entries of that department and the 'file copy' of '**P13**' not being available at his institution. It was the position of the learned Counsel for the 5th and 6th Respondents that, there was nothing suspicious in the entries found in the afore-stated documents. It is seen from the Reports filed in the Magistrates Court by the Criminal Investigation Department, that this is one matter based upon which a criminal investigation is presently being conducted. Thus, there is no incontrovertible evidence before this Court regarding the factual position pertaining to such disputed matters. This Court has from time to time expressed the view that a prerogative and exceptional remedy in the nature of a mandate of a Writ would not lie based on disputed facts. This Court cannot be expected to go on a voyage of discovery and arrive at factual findings relating to disputed facts. Thus, this Court does not wish to base its findings on such disputed facts, which are still under investigation by the police. This Court wishes to add that the Order contained herein would not have any bearing on the Criminal Investigation Department continuing with its investigation, should the law and investigational findings warrant it to do so.

For the sake of completeness, this Court would like to consider whether the application of the Petitioners should also have been dismissed *in limine* on the preliminary objections taken up by the learned President's Counsel for the 5th Respondent.

The learned President's Counsel for the 5th Respondent took up several preliminary objections with regard to the maintainability of this Application although he did not press them to be decided before considering the merits of the Application as it might have given the wrong impression to Court that the

5th Respondent cannot defend himself on the merits of this Application. Those preliminary objections included the following:

(a) Lack of *locus standi* on the part of the Petitioners to file this Application;

(b) The Petitioners being manifestly guilty of lashes;

(c) The non-joinder of necessary parties, in particular, the *Sri Lanka Podujana Peramuna (SLPP)*, which would gravely be affected in the event this Court allowed the Application of the Petitioners;

(d) Involvement of disputed questions of facts, which are still under investigation by the Police, thereby making the invocation of Writ jurisdiction not legally possible;

(e) The Petitioner being rendered 'stateless' in the event this Court grants the relief, which is against public policy, and in violation of International Law;

(f) The grant of the relief being in violation of the elective franchise of the People thereby depriving the voters an opportunity of casting their ballots for the candidate of their choice at the Presidential Election;

(g) The impossibility in law to grant the reliefs as prayed for in the prayer to the Petition and in particular that the grant of interim relief should not result in irreversible harm being caused to the interests of the 5th Respondent ;

(h) The undesirability to exercise equitable jurisdiction of the Court by way of writ in the given facts of this Application, which was filed *mala fide* by the political opponents for collateral purposes and not in the public interest.

In view of the findings arrived at by this Court on the merits of this Application, this Court is of the view that there is no necessity to separately deal with each and every preliminary objection mentioned above, as that would be only an academic exercise, and this Court is only a Court of Law and not an Academy of Law.

However, this Court wishes to deal very briefly with a few matters raised by learned Counsel for the 5th Respondent, as they, in the view of this Court, go to the root of this Application.

It was the position of the learned President's Counsel for the 5th Respondent that there cannot be a dispute that this is a politically motivated case. He submitted further that this Application had been filed strategically at the '*eleventh hour*' to put the 5th Respondent out of the fray for the Presidency. Together with his limited Statement of Objections, the 5th Respondent has *inter alia* tendered a Compact Disc with a transcript marked '**5R2**' containing a speech made by a prominent member of a rival political party indicating in advance the date of filing this Application through the two Petitioners, to convince this Court that this is not an Application filed by the Petitioners acting alone and in the public interest, but an Application made by the political opponents of the 5th Respondent with *mala fide* intentions.

'**P13**', the central document intended to be quashed by a Writ of Certiorari is dated 21st November 2005. This Application has been filed only on 27th September 2019, i.e., almost 14 years after the issuance of '**P13**' stating that *"there is also a grave urgency to support this matter for notice and interim relief inasmuch as inter alia the nominations for the Presidential Election have been called for on 07th October 2019"*[22]. That means, the Petitioners strategically filed this application giving only six working days (including the date of filing the application) prior to the nomination date to decide the matter for Notice and interim relief. The Petitioners have not stated a word about the delay in filing the Petition, but impliedly expected the Court to believe that they came to know about the question of dual-citizenship of the 5th Respondent through the *Daily FT* news item that appeared on 05th August 2019 marked '**P1**'.

The learned Deputy Solicitor General has tendered together with an affidavit of the 1st Respondent, the requests made in February 2019 to the 1st Respondent under the Right to Information Act requesting information with regard to the issuance of the dual citizenship certificate of the 5th Respondent. The said request, which was produced in response to one of the questions posed by the learned President's Counsel for the 5th Respondent to the 1st, 2nd, 4th and 7th – 10th Respondents, forms part of the documents tendered to this Court marked '**1R8**'. This demonstrates that this issue was in the domain of knowledge of certain persons at least since February 2019. This Court must state however that no allegation was made that there exists a nexus between the Petitioners and the person who made the said request.

[22] Vide the motion of the Attorney-at-Law of the Petitioners dated 30th September 2019.

The 5th Respondent in his limited Statement of objections and the learned President's Counsel in his submissions stated that, from the year 2005, (a) the 5th Respondent's name appeared in the 'voters list' as an eligible voter to exercise his franchise and he openly exercised that right; (b) openly functioned as the Secretary to the Ministry of Defence from 2005-2015; (c) openly functioned as the Secretary to the Urban Development Authority from 2010-2015, as a citizen in Sri Lanka without any objection whatsoever from anybody. There is no dispute that if there is unreasonable and unexplained delay, the Court can dismiss a Writ application *in limine*. We accept the argument of the learned Counsel for the Petitioners that if the impugned decision is, in the eyes of the law, a nullity, delay shall not be a ground to dismiss the application. But this Court has already taken the view that the impugned decision is not a nullity.

Even assuming what the Petitioners state in their written complaints to the 7th Respondent - Acting Inspector General of Police, marked **'P2'** and **'P3'** are correct, the Petitioners at least knew about the question of dual citizenship by 06th August 2019; i.e., about 2 months before the filing of this Application in this Court. Given the particular facts of this case, and especially the fact that nominations for Presidential Election was scheduled on 07th October 2019, it is the view of this Court that there is an unreasonable and unexplained delay in filing this Application.

The learned President's Counsel for the 5th Respondent submitted that it appears that the Petitioners have made the written complaints **'P2'** and **'P3'** *inter alia* with the intention of preventing the 5th Respondent who *"has publicly stated that he intends to contest as a candidate in an upcoming*

presidential election"[23] from contesting the said election. This is made clear by paragraph 18 of the Petition which states that "*the petitioners were deeply disturbed by certain news items published on 20th September 2019 suggesting that the Magistrate's Court of Colombo had rejected a request made for the arrest of the 5th Respondent*". If the Petitioners were driven by public interest (and there is no specific reference in the Petition to the fact that the Petition was filed in the public interest), there is no reason for them to personalize the matter and to have got "*deeply disturbed*" for not arresting the 5th Respondent on those complaints.

The learned President's Counsel for the 5th Respondent submitted further that any interim relief against the 5th Respondent would be irreversible as that would prevent the 5th Respondent from handing over his nomination on Monday, 07th October, 2019. He submitted further that if interim relief was refused and only Notice was issued, although the 5th Respondent could have handed over nomination, the political future of the 5th Respondent would have hung in the balance thereby denying the 5th Respondent an opportunity of competing with his opponents on a level playing field. It was the submission of the learned Counsel for the 5th Respondent that if Notice was issued and after several months or years after the second round of submissions, the Application of the Petitioners was dismissed, the damage has already been done.

The learned President's Counsel for the 5th Respondent submitted further that while rival parties are entitled to adopt their own strategies to achieve their political objectives, no one should be allowed to abuse the process of Court to achieve his or her ulterior motives.

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[23] Vide P2.

With regard to the question of *locus standi* to file a Writ Application, in **Wijesiri v. Siriwardene**[24], it was held that *it is not necessary to have a personal interest but it is sufficient if the applicant can show a genuine interest in the matter complained of and that he comes before Court as a public spirited person, concerned to see that the law is obeyed in the interest of all.*

In the circumstances, we are inclined to accept the argument of the learned President's Counsel for the 5th Respondent and the learned President's Counsel for the 6th Respondent that this is an Application filed for collateral purposes and not a genuine public interest litigation filed by the Petitioners as *"public spirited citizen[s] concerned to see that the law is obeyed in the interest of all!"*[25].

A party cannot ask for a Writ as of right. It is a discretionary relief as well as an equitable relief. When granting such a relief, the conduct of the party applying for it is intensely relevant.

In **Jayaweera v. Assistant Commissioner of Agrarian Services, Ratnapura and another**[26], it was held that: *"..the Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief."*

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[24] [1982] 1 Sri LR 171 at page 175.
[25] Ibid at 175
[26] [1996] 2 Sri LR 70.

This Court has held further in **Sukumaran v. The Maharaja Organisation and two others**[27] as follows:

> *"It is trite law that any person or persons seeking to invoke the discretionary powers of this Court whether by way of a writ application or an application in revision, must come to Court with clean hands."*[28]

In the case of **Namunukula Plantations Limited v. Minister of Lands and Others**[29] the Supreme Court has held as follows:

> *"If any party invoking the discretionary jurisdiction of a court of law is....shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person."*

It was the submission of the learned President's Counsel for the 5th Respondent that, if the relief prayed for by the Petitioners were to be granted, it would also cause irreparable harm to the interests and rights of the Sri Lanka Podujana Peramuna (SLPP) (which had nominated the 5th Respondent to stand election for the Presidency of Sri Lanka) and therefore, the said political party was a necessary party to these proceedings, and therefore, non-listing of the said party to this Application is fatal to the maintainability of this Application.

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[27] [2008] BLR 398 at 402.

[28] Vide also Mowbray Hotels Ltd. v. Hon. D.M. Jayaratne, Minister of Agriculture and Lands and others [2004] BLR 51 at 59, Fernando v. Commissioner General of Labour [2009] BLR 74 at 79, Namunukula Plantations Limited v. Minister of Lands [2012] 1 Sri LR 365 at 376.

[29] [2012] 1 Sri LR 365 at 378.

The Supreme Court in **Abayadeera and 162 Others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and Another**[30] described in the following manner as to who is a necessary party:

> *"It appears to us that the principle to be discerned from these cases is what was stated by Nagalingam, A.J. (in James Perera v. Godwin Perera 48 NLR 190) where an order would affect adversely a party who is not before Court, that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application."*

In **Rawaya Publishers and Other vs. Wijedasa Rajapaksha, Chairman, Sri Lanka Press Council and Others**[31] it was held by this Court that:

> *"In the context of writ applications, a necessary party is one without whom no order can be effectively made."*

It is not in dispute that, if this Court had held that '**P13**' is a nullity, it would not only directly impact the rights and interests of the 5th Respondent, it would gravely prejudice the interests of the SLPP. Thus, applying the above dicta, this Court holds that, non-citation of the SLPP as a Respondent is a fatal omission by the Petitioners, and hence on that ground too, this Application could have been dismissed.

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[30] (1983) 2 Sri LR 267.
[31] (2001) 3 SLR 213.

For the aforesaid circumstances, this Court does not see any legal basis to issue formal Notice of this Application to the Respondents. This Application is accordingly dismissed. This Court makes no order with regard to costs.

Yasantha Kodagoda, P.C., J

President of the Court of Appeal

Mahinda Samayawardhena, J

Judge of the Court of Appeal

Arjuna Obeyesekere, J

Judge of the Court of Appeal