TISL v. Prime Minister's Office/Presidential Secretariat

RTICAppeal/05/2017 & RTICAppeal/06/2017

(Appeals heard as part of the meetings of the Commission on 12.06.2017 (RTIC Appeal/05/2017),19.06.2017(RTIC Appeal/06/2017), 08.08.2017, 25.09.2017, 06.11.2017 and 08.01.2018)

Record of Proceedings and Order delivered on 23rd February 2018

Present

Mr. Mahinda Gammampila	Chairman
Ms. Kishali Pinto-Jayawardena	Member
Mr S.G. Punchihewa	Member
Dr. Selvy Thiruchandran	Member
Justice Rohini Walgama	Member

In Attendance

Mr. Piyathissa Ranasinghe	Director General
Ms. Mathuri Maran	Legal Researcher
Ms. Agana Gunawardena	Junior Researcher

Information Request filed on;

(Presidential Secretariat- 03.02.2017)

(Prime Minister's Office- 03.02.2017)

Response by Information Officers on;

(Presidential Secretariat- 06.03.2017)

(Prime Minister's Office- 01.03.2017)

Appeal filed to Designated Officers on;

(Presidential Secretariat- 10.03.2017)

(Prime Minister's Office- 10.03.2017)

Response by Designated Officers on:

(Presidential Secretariat- 20.03.2017)

(Prime Minister's Office- 14.03.2017)

Appeal filed to RTI Commission on;

(Presidential Secretariat- 19.05.2017)

(Prime Minister's Office- 12.05.2017)

Written Submissions/Further Written Submissions filed on;

(By the Appellant: 25.07.2017, 23.10.2017, 04.01.2018 and 08.01.2018)

(By the Respondent: Presidential Secretariat: 31.07.2017, 08.09.2017 and 03.01.2018

Prime Minister's Office: 31.07.2017, 08.09.2017 and 02.01.2018)

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Counsel for the PAs (PMO/Presidential Secretariat):

Mr. Nerin Pulle, Deputy Solicitor General, Department of the Attorney General

Mr. Suren Gnanaraj, State Counsel, Department of the Attorney General

Appellant (TISL) represented by:

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Ms. Sankhitha Gunaratne, AAL, Manager- RTI, TISL

PAs (PMO/Presidential Secretariat) represented by :

Mr Saman Ekanayake, Secretary to the Prime Minister

Ms Luckshmi Jayawickrema, Additional Secretary, (Legal) Presidential Secretariat

Mr. Muditha Dissanayake, Legal Officer, Presidential Secretariat

Brief Description of the Facts

It is common ground that on 3rd February 2017, which was the same day as the operationalization of the Act, the Appellant (Transparency International, Sri Lanka) filed two information requests to two Public Authorities (viz; the Presidential Secretariat and the Prime Minister's Office under Section 24 (1) of the Act.

The request to the Presidential Secretariat was to obtain access to a certified copy of the Declaration of Assets and Liabilities of President Maithripala Sirisena for the years 2015 and 2016 as well as for a certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016. On the same day (ie; 3rd February 2017), the Appellant filed an information request under Section 24 (1) of the Act to the Prime Minister's Office requesting a certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016.

At the time, the Appellant had submitted the two information requests to the Secretary to the President and one information request to the Secretary to the Prime Minister on the basis that it was 'unable to obtain the name of the Information Officer' at the respective offices. It is pertinent to note that Section 23 of the Act states as follows;

> 23 (1) (a) Every public authority shall for the purpose of giving effect to the provisions of this Act, appoint, within three months of the date of coming into operation of this Act, one or more officers as information officers of such public authority and a designated officer to hear appeals.
>
> (b) Until such time that an information officer is appointed under paragraph (a) the Head or Chief Executive Officer of the public authority shall be deemed to be the information officer of such public authority, for the purposes of this Act.

The said information requests to the Presidential Secretariat were rejected on 6th March 2017 by the Information Officer which refusal was upheld by the Designated Officer of the said Public Authority (the Secretary to the President) on 20th March 2017.

Where the Appellant's information request to the Prime Minister's Office was concerned, it was rejected by the Secretary to the Prime Minister on 1st March 2017 (to whom the information request was addressed by the Appellant under Section 23 (1)(b) as aforesaid) and again reiterated on 14th March 2017.

Under and in terms of Section 32 (1) of the Act, on 22nd May 2017, this Commission received an appeal from the Appellant dated 19th May 2017 against the decision of the Designated Officer of the Presidential Secretariat. On 15th May, a similar Appeal was received dated 12th May against the decision of the Designated Officer of the Prime Minister's Office. Both Appeals impugned the rejection of the information requests on substantive grounds.

Matters Arising During the Hearings

When RTIC Appeal/06/2017 was first taken up for hearing before us on 19.06.2017, the following two preliminary questions of law were framed by the Commission and agreed by the parties to this appeal as requiring to be answered in both Appeals;

- Whether the requirement of averment of citizenship on the part of the information requestor in terms of Section 3 (1) of the RTI Act No.12 of 2016 read with Section 43 of the said Act is a mandatory requirement?

- Is the said requirement a fatal irregularity or a curable defect at the second stage of appeal before the Commission?

These questions were formulated consequent to the failure by the Appellant, in availing itself of the right to make an information request under Section 3 (1) read with Sections 24 (1) and 43 of the Act, to aver the fact of citizenship in the information requests consisting of letters written to the two Public Authorities on 3rd February 2017, which failure was manifest also in the consequent two Appeals filed to this Commission as aforesaid.

Where the preliminary questions of law were concerned, the parties agreed that submissions be made and Order delivered in respect of both Appeals together. As reflected in the hearings before this Commission on 19.06.2017, 08.08.2017, 25.09.2017, 06.11.2017 and 08.01.2018 and in the several Written Submissions filed thereto, the respective positions of the parties may be summarized as follows.

The Appellant contended that the failure to aver citizenship on its part had not been raised by the respondent officers of the said Public Authorities nor had the Appellant been asked to submit proof of citizenship and that therefore the said Public Authorities could not rely on this failure to sustain its case before the Commission. It was submitted that Section 3(1) of the Act is declaratory in nature and not prescriptive in its imposition of a requirement on a citizen filing a request for information and that to bring such a requirement in would undermine the 'central purpose' of the Act as implicit through the scope and ambit of the preamble to the Act.

The Appellant urged that this 'particular approach to interpretation' has been adopted by the Supreme Court in numerous instances (*Mundy v Central Environmental Authority* (2004), SC Appeal 58/2003, *Ghany v Dayananda Dissanayake* (2004) SC Appeal, 37/2003).

The Appellant moreover submitted that Section 24 of the Act does not contain a specific provision requiring the information requester to aver citizenship and that therefore to hold as such would result in imposing a 'condition not imposed by law' (Written Submissions of the Appellant received by the Commission on 25th July 2017). It was also argued that the Act (read together with RTI Regulation 09) limits the grounds of refusal of an information request strictly to those grounds specified in Section 5 of the Act and that consequently, the interpretation maxim *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned, others of the same class are excluded) supports the

position that no other basis for refusal of information other than what is spelt out in Section 5 must be cited.

In the Appellant's contention, this was buttressed by the reference to 'such restrictions prescribed by law' in Article 14A of the Constitution (brought in by the 19th Amendment) which Article is reproduced in the preceding paragraphs of this Order. In other words, the words 'prescribed by law' in Article 14A are limited to the statutory restrictions to the giving of information recognized by the Act which do not include the 'failure to aver citizenship.' It was urged that imposing a requirement to aver citizenship would be contrary to Regulation 03 as well as the contents of RTI 01 Form requiring a statement of citizenship by a requester but which also state that the use of that Form is not mandatory and that it will suffice if the request contains the essential information to identify the requested information. A heavy reliance was placed by the Appellant on the RTI Regulations and the Rules of the RTI Commission on Fees and Procedure to support this argument.

In any event, Learned Counsel for the Appellant submitted before us that the lapse therein could be corrected at the appeal stage before the Commission in accordance with Rule 17 relating to Defective Appeals in the Rules of the RTI Commission on Fees and Procedure.

For the two Public Authorities, the Learned Deputy Solicitor General strongly contended that, in terms of Article 14A (1) of the Constitution and Section 3(1) of the Act, it is only a citizen of Sri Lanka who shall have the right to access information in the custody of a Public Authority and in terms of Section 32 (1) of the RTI Act, it is only a citizen of Sri Lanka who shall have the right of appeal to the RTI Commission.

It is therefore a mandatory requirement at the time of preferring an appeal under Section 32 (1) of the Act, for the Appellant to establish either by way of an averment in the petition or by way of an affidavit that the Appellant is, in fact, a citizen of Sri Lanka and that this was a substantive requirement that goes to the core of whether the Commission will be seized and possessed with jurisdiction to hear and determine an appeal.

It was submitted further that the definitions of 'citizen' contained in Article 14A (the constitutional right to information) and Article 121 (1) of the Constitution (setting out the procedure whereby Bills are constitutionally challenged) are identical to the definition of 'citizen' in Section 43 of the RTI Act and that where a Constitution or a statute expressly reserves a right for the exclusive benefit of citizens, that the said right can only be exercised by a citizen.

Article 121 (1) of the Constitution states as follows;

> 121 (1). The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker.

> In this paragraph "citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

The State placed great reliance on the Determination of the Supreme Court in SC.SD 19/2016, SCM 23.02.2016) in respect of a Bill titled '*Budgetary Relief Allowance of Workers*.' In this instance, several petitioners which were trade unions had filed a challenge to a Bill under Article 121 (1) of the Constitution. The State raised a preliminary objection that the petition should be *rejected in limine* for non-compliance with mandatory provisions stipulated in Article 121 of the Constitution as material must be placed before Court either in the petition or in the affidavit that not less than three-fourths of the members of the petitioner's unions are citizens of Sri Lanka. As no such material was evidenced, the State contended that the Court was not seized of jurisdiction to make a determination on the petition.

Observing that 'admittedly there was no averment to show that not less than three-fourths of the members of the eight Unions are citizens' the Supreme Court referred to the Determination of the Court in the '*Telecommunications Bill'* (SC Special Determination 5/91/6/91 and 7/91) to the effect that the provisions contained in Article 121 are mandatory in nature and therefore it is necessary for strict compliance by parties who would be invoking the said jurisdiction.

The argument of Counsel for the petitioners that the petitioners are trade unions registered under the Trade Unions Ordinance and as such, they can sue and be sued were held by the Court to be insufficient for the purpose of the constitutional challenge as that lays out, ' a different constitutional requirement which has to be mandatorily complied with, 'if the language of the statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed and whatever it has in clear terms enacted must be enforced though it would lead to absurd or mischievous results. (*Vacher & Sons Ltd v. London Society of Compositers* (1913) All. E.R. at 121, per Lord Atkinson)

Accordingly it was held by the Court that the petitioners had failed to satisfy the requirements of Article 121(1) and 'this being so, this Court had no jurisdiction to proceed further with the petition as the jurisdiction of the Court has not been duly invoked.' The petition was rejected.

Refuting the Appellant's contention that there is no explicit reference in the Act to aver citizenship and that therefore, such a requirement does not exist, the Learned Deputy Solicitor General pointed to the fact that, even though there was no explicit requirement to aver citizenship in a petition in terms of Article 121 (1) of the Constitution, the Supreme Court had interpreted the Article in the aforesaid Determination as requiring such averment to be made.

It was submitted that where an Act of Parliament confers jurisdiction on a tribunal subject to conditions, any non-compliance with those requirements would be fatal to the maintainability of the applications. It was also submitted that Regulations under a statute or Rules thereto cannot be employed to overcome a jurisdictional requirement in a statute given that these are subordinate instruments and cannot override the provisions of the statute and that the principle of estoppel which the Appellant relied on

does not bar the Respondents from raising the non-averment of citizenship at a later stage as it is a matter that goes to the root of the Commission's jurisdiction.

Citing *Kandy Omnibus Company Ltd v. Roberts* (56 NLR 293), it was submitted that neither the acquiescence nor consent of parties can confer jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Further, that the Act is clear in the discretion that it permits the Commission in that under Section 32 (2), the Commission is expressly given the discretion to admit an appeal which is time barred while under Section 32 (1), a similar discretion is not afforded where there is a failure to aver citizenship by the Appellant.

In sum, the Respondents argued that the Appeals should be dismissed *inter alia* in view of the Appellant's failure to correctly invoke the appellate jurisdiction of the RTI Commission under Section 32 of the Act given that the Appellant is mandatorily required to plead and establish in the petition of appeal that the Appellant is a citizen of Sri Lanka within the definition of a citizen under the Act which is an incurable defect. The Learned Deputy Solicitor General cited *Perera v. Commissioner of National Housing* (77 NLR, 361) in support of his contention that the Commission is therefore precluded from proceeding to act or make any consequential orders notwithstanding the lack of jurisdiction and that any orders or proceedings would be null and void. Specific reference was made to the fact that no prejudice would be caused to the Appellant's right to submit a further request for information according to law.

Reliance was placed on *Attanayake v. Commissioner General of Elections*, (2011 1 Sri LR, 220) where the Court cautioned that where mandatory Rules are prescribed, these must be followed and where preliminary objections are raised in respect of non-compliance, these cannot be taken as 'mere technical objections.'

The decision of *Fernando v. Sybil Fernando*, (1996 2 SLR, 169) was also cited as authority that such an approach should not be seen as a blind devotion to procedures or a ruthless sacrifice of litigants to technicalities 'although parties on the road to justice may seek to act recklessly.' The Court's consequent observation in *Fernando* that 'if a party so decides to act recklessly, it is needless to say that such a party would have to face the consequences which would follow in terms of the relevant provisions' was emphasized (Written Submissions of the Respondents, dated 08.09.2017).

It was further argued by the Respondents that the Appeals cannot be maintained as the Appellant has failed to demonstrate that the information sought is required for the exercise and protection of a Citizen's right as required by the wording of Article 14 A (1) of the Constitution which provides the right to access information 'being information that is required for the exercise and protection of a citizen's right' and that merely alleging that the disclosure of information is of public interest will not suffice.

In counter, the Appellant maintained that under Regulations 04 and 05 of the RTI Regulations, Information Officers are required to 'render all assistance' to citizens making requests and must communicate to any discrepancies in a citizen's request enabling necessary corrections. In the present

case, the Information Officer/s did not bring any mistake or discrepancy in the information request to the notice of the Appellant.

Thus, in the event that the averment relating to citizenship is held to be a requirement, it was submitted that the Information Officer/s had not discharged the duties therein. It was contended that if a dismissal of the appeals were held to be warranted on the ground of failure to aver, this would amount to a dismissal on 'purely technical grounds' (Written Submissions of 23rd October 2017). Refuting the Respondent's contention that Section 32 (2) allows the Commission to admit appeals filed beyond the time bar but does not give a similar discretion to allow appeals where there is failure to aver citizenship, it was submitted that this discretion was 'fairly incidental' to the Commission's functions under the Act (*Attorney General v Crawford Urban District Council* (1962) 2 AER 147)

Learned Counsel for the Appellants also asserted that an application for requesting information under the Act (which can be made verbally/orally or in written form) is not comparable to the invocation of the Supreme Court's constitutional jurisdiction in respect of Bills by way of written petition and is different in nature. It was affirmed that Section 32 (1) of the Act does not involve the invocation of the jurisdiction of the Commission but states that an appeal may be made to the Commission. The Appellant's position was therefore that making a request for information in terms of the Act or making an appeal to the Commission is not analogous to the formal procedures involved in invoking the jurisdiction of the Supreme Court and that any procedural requirement imposed in respect of one act may not be imputed to the other, merely on the grounds that the two provisions are framed in a similar manner.

In specific response to the citation of *Perera v. Commissioner of National Housing* (77 NLR, 361) and *Kandy Omnibus Company Ltd v. Roberts* (56 NLR 293), the Appellant submitted the citation as authority for the principle that there are two classes of jurisdictional defects, namely patent lack of jurisdiction and latent lack of jurisdiction and that the failure to aver, if at all, falls into the class of latent lack of jurisdiction with the result that a party may be stopped from contesting the lack of jurisdiction by waiver, acquiescence or inaction. Consequently, the Respondents are estopped from raising the objection at the stage of appeal before the Commission and the Commission's decisions or orders in the present proceedings cannot amount to a nullity. The Appellant also refuted the argument of the Respondents that when making a request under the Act, the requester must be required to show the 'protection of a right' on the basis that the fundamental right of access to information as constitutionally secured in Article 14 (a) (1) is distinct from the statutory right established by the RTI Act.

Order

The relevant constitutional and statutory provisions

Article 14A of the Constitution (introduced under the 19th Amendment to the Constitution in 2015) states as follows;

> 14A. (1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-
>
> (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
>
> (b) any Ministry of a Minster of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;
>
> (c) any local authority; and
>
> (d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph."
>
> (2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> (3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens."

The constitutional right of access to information as aforesaid, is 'provided for by law' through Act No 12 of 2016. The relevant Sections of the Act are as follows;

> Section 3. (1); Subject to the provisions of section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a public authority.
>
> Section 43. In this Act, unless the context otherwise requires– "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens;

In addition, the relevant portions of Section 24 (1) and (2) which deals with the filing of information requests states that;

> 24. (1) Any citizen who is desirous of obtaining any information under this Act shall make a request in writing to the appropriate information officer, specifying the particulars of the information requested for:
>
> Provided that where any citizen making a request under this subsection is unable due to any reason to make such request in writing, such citizen shall be entitled to make the request orally

> and it shall be the duty of the appropriate information officer to reduce such request to writing on behalf of the citizen.
>
> (2) Where a citizen –
>
> (a) wishes to make a request to a public authority; or
>
> (b) has made a request to a public authority which does not comply with the requirements of this Act, the information officer concerned shall take all necessary steps to assist the citizen, free of charge, to make the request in a manner that complies with this Act.

Further, Section 32 (1) which enables appeals to be filed to this Commission states as follows;

> Any citizen aggrieved by:– (a) the decision made in respect of an appeal under section 31(1), may within two months of the communication of such decision; or (b) the failure to obtain a decision on any appeal made within the time specified for giving the same under section 31(3), may within two months of the expiry of the period so specified,
>
> may appeal against that decision or the failure, to the Commission and the Commission may within thirty days of the receipt of such appeal affirm, vary or reverse the decision appealed against and forward the request back to the information officer concerned for necessary action.

Of additional relevance are the contents of the RTI Regulations made by the Minister under Section 41 of the Act (hereafter RTI Regulations) and the Rules of the RTI Commission on Fees and Procedure the RTI Regulations made by the Minister under Section 41 of the Act (hereafter RTI Regulations) and the Rules of the RTI Commission on Fees and Appeal Procedure (viz; Gazette No 2004/66, 2017.02.03) under section 42 of the Act. In terms of Regulation No 3, requests for information should be made 'preferably' in the manner prescribed in RTI Form 01.

In terms of Form RTI 01, line 11 requires a requester to declare if she/he is a citizen of Sri Lanka. Regulation 3 states further that using RTI 01 is not mandatory. The Form RTI 01 states it will suffice if the request contains the essential information to identify the requested information.

The Preliminary Questions of Law

The preliminary questions of law that arise in this appeal are whether Section 3 (1) read with Sections 24 (1) and (2), 43 and Section 32 (1) of the Right to Information Act 12 of 2016 (hereafter the Act) requires incorporated or unincorporated bodies (emphasis ours) to aver citizenship (emphasis ours) when filing information requests under the Act and whether the said requirement is a fatal irregularity or a curable defect at the second stage of appeal before the Commission.

Inasmuch as this question arose in regard to the initial filing of the information requests under Section 24 (1), it was also a relevant question in the filing of the instant appeals before the Commission given the wording of Section 32 (1) of the Act which states that any citizen' may appeal to the Commission

against a decision of a Designated Officer within two months of the communication of such decision or where non-communication is concerned, within two months of the time statutorily specified for such decision

These questions arise in the specific context of incorporated or unincorporated bodies seeking to bring themselves within the ambit of Section 43 of the Act to assert the right to information by filing an information request to an Information Officer under Section 24 (1) of the Act which is thereafter appealed against to the Designated Officer under Section 31 of the Act and as aforesaid, to the Commission under Section 32(1) of the Act.

As such and as explicitly acknowledged by the Learned Deputy Solicitor General, these matters in dispute have no legal relevance in regard to information requests filed by individual citizens under Section 24 (1) which are alleged to lack the said averment. This distinction is important given the peculiar characteristics of Section 43 of the Act in the context of the relevant legislative intent underlying the Sri Lankan statute passed into law by the Parliament on 4th August 2016.

It is without a doubt that in giving decisions that affect the right to information of citizens under the Act, the Commission must exercise its powers within the four corners of the Act. It must, of necessity, be satisfied of its jurisdictional competence to proceed with appeals filed to it under Section 32 (1), subject to the fundamental caution that a right of appeal lies to the Court of Appeal against its Orders in terms of Section 34 (1) of the Act. Accordingly it was considered important that this Commission delivers a reasoned Order with full and fair consideration of the issues that have arisen for determination before entering upon the merits of the two appeals.

What is the effect of Section 3 (1) read with Sections 24 (1) and (2), 43 and Section 32 (1) of the Act on incorporated or unincorporated bodies being required to aver citizenship when filing information requests under the Act?

On what grounds was the Information Officer (IO) required to act under Section 24 (1) of the Act when he/she entertained the requests for information in question and made a determination or decision in that regard? There were two questions in that respect;

1) The first is a substantive question of law, namely whether the Prime Minister and the President's Declarations of Assets and Liabilities are liable to be disclosed under and in terms of the Act;

2) The second is whether the requirement of averment of citizenship was disclosed on the face of the information requests in terms of Section 3 (1) of the RTI Act No.12 of 2016 read with Section 43 of the said Act?

The IO did not refuse the request on the basis of (ii) above. The main contention of the Respondents was that, given that a request could be made only by a citizen as contemplated by Section 3(1) of the Act

read with Section 43 if the information requester is an organizational body, the failure to aver that fact was fatal to the application. The Appellant's argument was that there was no requirement to aver and even if so, that this requirement was directory if at all.

The competing positions taken by the parties in this matter appear to turn on distinctly differing conceptual understandings of the duties and responsibilities laid on Public Authorities and information requesters as well as more broadly, the nature and purpose of statutory Commissions such as the one constituted under the RTI Act.

The Appellant's position appears to be that the provisions of the Act read together with the Rules and Regulations made thereunder pertain to a process that is flexible to the extent that very little constraints should apply. This is in conjunction with the argument advanced on its behalf by Learned Counsel for the Appellants during the hearing on this matter on 08.08.2017 that no responsibility vests in an information requestor at all in making a request under the RTI Act and that the entire weight of the burden falls therein on Public Authorities.

It is granted that the formulation of Rules and the collaboration by this Commission with the nodal agency on the framing of Regulations gazetted by the Minister (viz; Gazette No 2004/66, 2017.02.03). were undertaken with the primary purpose of lessening burdens on information requesters given the unequal weightage of power and resources vested in the State as opposed to citizens=individuals and keeping in mind the underlying ethos of the Act being the principle of maximum disclosure as evidenced in its preamble which emphasizes the importance of the right of information in the promotion of democracy and participation in civic life.

However that is a very different matter to asserting that no burdens whatsoever lie on information requesters. Citation of *Mundy v Central Environmental Authority* (2004), SC Appeal 58/2003, *Ghany v Dayananda Dissanayake* (2004) SC Appeal, 37/2003) by the Appellant are therefore unhelpful in the circumstances of this case.

The duty of care therein is particularly pronounced when the said requesters have organizational resources and come in the cloak of incorporated or unincorporated bodies seeking reliefs afforded under Section 3 (1) read with Section 43 of the Act. Indeed specific responsibilities are imposed upon information requesters and Appellants within the scheme and structure of the Act, individuals and organsations alike.

While discretion can be exercised, that too must be within the limits of the law, for example in the context of Section 32 (2) where appeal petitions filed from decisions of the Designated Officer 'out of time' (ie; after the expiry of two months) may be accepted if the Commission is 'satisfied' that the appellant was prevented by a reason beyond his or her control from filing the appeal in time.

On the other hand, the Learned Deputy Solicitor General has exerted considerable effort to persuade the Commission that the very same strictures that apply to invoking the jurisdiction of Courts of Law are

applicable in full before the Commission. The force of that submission is premised, for instance, on equation of the constitutional procedure laid down in Article 121 in respect of 'invocation' of the constitutional jurisdiction of the Supreme Court with the 'procedure' (see the Marginal Note to that Section) contemplated under Section 24 (1) of the Act in respect of filing an information request and under Section 32 (1) of the Act which states that 'any citizen' aggrieved by a decision (or non-decision) of a Designated Officer 'may' appeal to the Commission within prescribed time limits.

These positions advanced by the Appellant and by Respondents, it must be confessed, are singularly uninviting for reason of the extreme viewpoints advanced by both parties. It may be of assistance therein to look at the nature and scope of statutory appellate Commissions such as the body of which we are members, as established under the Act. Commissions of this nature are statutory appellate tribunals obligated to consider and weigh submissions and arguments adduced before it and to come to an objective decision on the same.

The powers of the Commission under this Act include *interalia*, to hear and determine any appeals made to it by any aggrieved person under Section 32 and to institute prosecutions under Section 39 (4) of the Act in respect of offences specified under Section 39 of the Act. Appeals lie to the Court of Appeal against the decisions of the Commission under Section 34 of the Act. In these circumstances, the Commission must necessarily be conscious of the fact that power that affects rights must be exercised in accordance with law 'and the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that were the antithesis of a judicial capacity' (per Lord Hodson in *Ridge v Baldwin*, (1964), AC, 40, at 130).

The submissions made by the Appellant relating to the need to aver citizenship not being included in Section 5 of the Act as a ground to refuse information is erroneous in our view as the failure to aver does not relate to a refusal of information in substantive respects. Instead, the cumulative effect of Sections 3, 24 (1) and 43 of the Act renders the requirement to aver citizenship a jurisdictional fact to be ascertained when an information request is filed by an incorporated or unincorporated body before an Information Officer. The maxim of *expressio unius est exclusio alterius* is therefore inapplicable in such instances.

The Appellant also contended that imposing a requirement to aver citizenship would be contrary to Regulation 03 and RTI 01 Form. The prescribed Public Notice in Regulation 3 states only that the use (emphasis ours) of the RTI 01 Form is not mandatory. This is quite distinct as to whether the requirement for an incorporated or unincorporated body to aver citizenship when filing an information request is a jurisdictional fact that needs to be established for the Information Officer to act under Section 25. In any event, the RTI Regulations are subordinate instruments to the main statute and as such, cannot countermand the statute.

The decision of the Indian Central Information Commission (CIC) in *Shri K. Balakrishna Pillai v. National Human Rights Commission* (No; CIC/OK/C/2008/00016, Minutes of 26th May 2008) was cited by the

Appellant wherein the CIC had stated that it is only 'in the rarest of rare cases' that a Public Authority may ask a citizen for 'proof' of citizenship. For the purpose of greater clarity, it must be noted that in the hearings before us on 8th August 2017 and referencing the Written Submissions of the Appellant (received on 25th July 2017), it was observed by this Commission that the distinction between the terms 'aver' and 'proof' should not be used interchangeably as if to mean the same requirement. It was pointed out that the matter in issue in these appeals concern the averment of citizenship *per se* where an incorporated or unincorporated body is concerned (viz Section 43 of the Act), as distinguished from requiring proof of citizenship.

The requirement in the context of the Sri Lankan law in relation to such bodies stems from Section 43 of the Act which is noticeably absent in the Indian Right to Information Act. As such, the decision of *Shri K. Balakrishna Pillai v. National Human Rights Commission* (No; CIC/OK/C/2008/00016, Minutes of 26th May 2008) cited by the Appellant has limited application in the present context. That being said, we agree with the reasoning of the Indian Central Information Commission in that case that requesters should be asked for proof of citizenship only in the rarest of cases and only where there is a *bona fide* doubt on the part of the Public Authority as to whether the information requester is a citizen.

Further, the Indian RTI Act refers to the right of information being available to all 'citizens' in Section 3 but states in Section 6 of that Act that information requests may be filed by ' a person' who 'desires to obtain any information.' In contrast, the Sri Lankan RTI Act, in the intention of its drafters, embodies a far stricter use of the term 'citizen' particularly in relation to organizational entities. This is borne out by the fact that the Constitution itself allows a certain category of rights to citizen and certain others to 'persons.' For example, a citizen has been afforded the right of non-discrimination in Article 12(2) as well as rights relating to *inter alia*, expression, association and movement in the several sub-articles of Article 14 (1) while 'a person' is given the benefit of a specific category of rights, including *inter alia*, the freedom of thought, conscience and religion (Article 10); freedom from torture (Article 11); right to equality (Article 12(1) and freedoms from arbitrary arrest, detention and punishment (Article 13 (1) to (5).

In fact, it is of note that Article 14A itself which brought in a right to information in 2015 not only allows the right to information only to citizens in sub-article (3) but also prescribes the manner in which an organizational body 'becomes' a citizen in exactly the same manner as Article 121 of the Constitution which states that a citizen may invoke the ordinary exercise of the constitutional jurisdiction of the Supreme Court in respect of Bills and that a citizen includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens. The relevant Constitutional articles are phrased in the same language as Section 43 of the RTI Act. The Commission cannot brush aside the fact that deliberate distinctions were drawn between these categories of rights with a particular constitutional condition attaching to instances where an incorporated or unincorporated body seeks the benefit of a particular right.

Moreover it is pertinent that RTI 01 form titled 'Application to Receive Information' as gazetted as aforesaid, prescribes in line 11 that the information requestor must aver citizenship. The said Regulation was concurred with by the Commission when the draft Regulations were sent by the nodal agency to the Commission for scrutiny in terms of Section 41 of the Act prior to the act of gazetting precisely for the reason that it was within the express contemplation of the Commission that the averment of citizenship arises from the application of Section 3 (1) read with Sections 24 (1) and 43 of the Act. Where an information requester is a body, corporate or incorporate, that duty is vested with a particular importance given the wording and impact of Section 43.

This Commission is not persuaded by the Appellant's argument that dire consequences will ensue if an information requester, being an organizational entity, is required to aver the fact of citizenship in the information request. It must be specifically noted that the matter before the Commission is limited to the application of Section 43 of the Act read with Sections 3 (1), 24 (1) and 34 (1) in the context of a body, whether incorporated or unincorporated, failing to aver citizenship. As discernible on the record of the Commission as at this date, only 4 appeals filed by organisations (incorporated or unincorporated) have failed to aver citizenship, including in another appeal filed by this same Appellant. This is out of an approximate number of 456 appeals filed by both individuals and organisations accepted by the Commission as fit for consideration under Section 32 (1) since the Act was operationalised on February 3rd 2017 in respect of which Orders have been handed down while other matters are pending. This is excluding a little more than 200 appeals which have been determined as not constituting proper appeals or defective due to other reasons.

In conclusion, there is no doubt in our minds that the averment as to citizenship, where a body, corporate or incorporate files an information request, is a jurisdictional fact that needs to be ascertained by an Information Officer in terms of Section 3 (1) read with Sections 24 (1) and 43 of the Act.

The constitutional provision from which the RTI Act draws its strength, namely Article 14A of the Constitution reflects a similar bar in regard to who may file fundamental rights challenges on the denial of the right to access information.

Where Article 121 of the Constitution is concerned, and in the Determination of the Supreme Court in SC.SD 19/2016, SCM 23.02.2016) in respect of a Bill titled '*Budgetary Relief Allowance of Workers*' in respect of challenges filed to Bills under Article 121 of the Constitution, we note the specific statement by the Court to the fact that '…admittedly there is no averment to show that not less than three-fourths of the members of the eight Unions are citizens'(emphasis ours).

Does failure to aver citizenship result in a loss of jurisdiction to entertain the Appeals?

Does failure to aver deprive the Commission of jurisdiction ('the power to decide') to entertain the Appeals?

For proper elucidation of that question and reversing that submission of the Respondents, let us ask the question as to what would be the consequence if a non-citizen makes an information request but avers citizenship falsely? Would that false averment vest the Commission with jurisdiction under the Act? In that view of the matter, it is clear that refusal/dismissal cannot be the only consequence of the mere failure to make an averment.

The majority ruling of the Supreme Court in *Nicholas* v. *Marcan Marker* (SC/Appeal No 30/81; SCM 24.3.1982; (1986) B. L. R.. Vol. 1. part VI at 245,) is of considerable assistance in deciding the matter in issue. The majority reversed the Court of Appeal decision (*Nicholas v. Macan Marker Ltd* (1981) 2 SLR 1) holding that dismissal of the application (for a writ of certiorari) was the consequence of failure to aver that the jurisdiction of the Court had not been previously invoked in accordance with Rule 47 of the Rules of the Supreme Court, 1978. The Appeal was allowed and the petitioner permitted to perfect his petition by the insertion of the missing averment.

Where the Act is concerned, it would be a very clear case of a lack of jurisdiction or failure of the power to act if, for instance, an information requester had come directly to the Commission from an adverse decision of an Information Officer, disregarding the appeal to a Designated Officer as the Act strictly mandates in Section 32(1) that an appeal to the Commission lies only from a decision of a Designated Officer under Section 31.

Indeed, in the procedure followed at the very outset by this Commission since the Act was operationalized on 3rd February 2017, appeals filed by purported appellants directly to the Commission from a refusal of the Information Officer to give the requested information without appealing to the Designated Officer, have not been accepted as 'proper appeals' by the Commission under Section 32 (1) of the Act. It may be that, in many of these cases, explanations proffered by citizens as to why they did not appeal to the Designated Officer are understandable. But even if the Commission may have empathy for such explanations, our appellate powers are limited by law and have to be necessarily exercised within those statutory limits.

Such a patent lack of jurisdiction may arise in other respects as well. Let us say in a hypothetical example, a non-citizen had presented himself or herself before this Commission and pleaded the indulgence of the Commission to entertain an appeal filed under Section 32 (1) on the basis that he or she had been living in Sri Lanka for a long period of time. That plea could not have been entertained for the reason that the Commission does not possess jurisdiction to determine or 'decide the matter' given the effect of Sections 3(1), 24 (1) and 43 of the Act.

As provided for by the Act, the right to information vests as of right in a citizen and the relevant Sections lay out the procedure in availing himself/herself/itself of that right. While there is a jurisdictional defect arising from the fact that there is no averment on the citizenship of the Appellant in the two information requests or in the two Appeals filed before us, does this relate to the 'form' or the 'invocation of jurisdiction'?

In *Edward v.de Silva*, Soertez, ACJ. stated as follows;

> "Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve exercise of it in irregularity".

The Learned Deputy Solicitor General has strongly pressed the decision of the Supreme Court in SC.SD 19/2016, SCM 23.02.2016)in respect of a Bill titled '*Budgetary Relief Allowance of Workers*' as relevant to the Commission in the determining that the Appeals before us should be dismissed *in limine*.

We are mindful of the Appellant's counter argument that, notwithstanding the same language used in both Article 121 of the Constitution and Section 43 of the Act, the 'invocation' of the jurisdiction of the Supreme Court in dealing with challenges to Bills under Article 121 of the Constitution is different from the procedures stipulated under the Act as the constitutional jurisdiction in respect of Bills is necessarily bound by strict rules as to time limits. That argument proceeded on the basis that petitions challenging Bills cannot be allowed to trespass beyond the strict condition that the constitutional jurisdiction of the Court may be 'invoked' within the said time limits and that no exceptions are entertained given that otherwise, the amendment of petitions would take the same out of the applicable time limits.

As detailed in the succeeding paragraphs of this Order and illustrating the difference in the exercise of constitutional jurisdiction in respect of Fundamental Rights petitions under Article 126 of the Constitution, discretion has been affirmed by the Court to award relief in appropriate circumstances even where there is non-compliance with mandatory Rules.

Perera v the Commissioner of National Housing (77 NLR 361) was also cited by the Respondents to support the contention that if the Commission proceeds to act or make any consequential orders notwithstanding the Commission's lack of jurisdiction, all such proceedings taken would be null and void and any orders made thereunder shall be a nullity (Written Submissions of the Respondents dated 02.01.2018). This case is authority for the principle that lack of competency of a Court or tribunal may arise in one of two ways; ether through lacking jurisdiction over the cause or over the parties which is fatal or though failure to comply with such procedural requirements as are necessary for the exercise of power.

As clearly stated by the Court, both are jurisdictional defects but attract different consequences. In the first case where the want of jurisdiction is patent, acquiescence, waiver and inaction cannot confer jurisdiction which a tribunal cannot have but in the second case of latent or contingent jurisdiction, acquiescence, waiver and inaction estops a party from raising the jurisdictional objection at a later stage.

The law relating to compliance or non-compliance with averments, whether mandatory or directory and though *prima facie* mandatory, whether a failure to aver could be curable in the exercise of discretion is contained in a plethora of decisions of the Supreme Court and the Court of Appeal in the context of interpretation of the Supreme Court Rules (vide; Hussain's Digest of Case Law – pages 1375 to 1380). Though the Commission is not part of the judicial hierarchy in this country, decisions of the superior courts may be useful in deliberating on this matter.

Attanayake v. Commissioner General of Elections, (2011 1 Sri LR, 220) and *Fernando v. Sybil Fernando*, (1996 2 SLR, 169) were cited by the Learned Deputy Solicitor General as authorities for the proposition that non-compliance with mandatory requirements results in a lack of competency in the Commission and can only be met by a dismissal of the Appeals *in limine*. It must be noted that *Attanayake v. Commissioner General of Elections*, (supra) was a matter where jurisdiction of the Court had been properly invoked but there had been non-compliance with Rules of the Supreme Court, 1990 pertaining to the non-issuance of notice on the Respondents and the fact that, if there is any need for extension of time, to do so by a proper application. *Fernando v. Sybil Fernando (*supra) dealt with the non-compliance by the party to provisions of the Civil Procedure Code relating to the requirement that the notice of appeal should be signed by the registered attorney-at-law.

But examination of relevant precedents in this regard indicates a palpable division of views in the Supreme Court where there is non-compliance of a party with the statute or the Rules of the Supreme Court. That being so, the weight of opinion inclines towards the view that such non-compliance does not automatically result in the dismissal of the petition or appeal.

To some extent it must be conceded that there are significant variations in judicial thinking in that some judges have proceeded on the basis that 'a mistake or oversight' (coupled with unwarranted delay in seeking to cure the lapse may result in a dismissal without further ado. In *Munasinghe Leela Nanda Silva v. TG Chandrawathie Wijesekera and Others* (S.C. H.C. C.A. L.A.Application No.449 /2014, WP/HCCA/KAL/128/2007(F); D.C. Kalutara Case No.6040/P; SCM 02nd September 2016), the Court was called upon to determine the consequences of non-observance of Rule 28 (5) of the Supreme Court Rules, 1990.

This Rule places an imperative burden and responsibility upon an Appellant or Petitioner to name a necessary party as a Respondent to a Petition of Appeal. Recapitulating a long line of decisions which upheld the view that non-compliance with a mandatory provision will result in rejection of the Appeal, the Court referred to Rule 28 (5) as an 'important provision of procedural law designed to ensure the due and proper dispensation of justice.' Non-compliance due to an "oversight" and or a 'mistake' (even if not deliberate") does not mitigate the lapse specially when it is taken in conjunction with a lapse of time. Failure to comply cannot be justified on the basis that it was unintentional.

The Court nevertheless observed, albeit in passing, that there is discretion to 'grant indulgence' in exceptional circumstances even on non-compliance of a 'mandatory' duty, 'where it has been

established that, the non-compliance was unavoidable or was caused by exceptional circumstances and *provided* there had been no fault, negligence or lack of diligence on the part of the Petitioner or Appellant or his Attorney-at-Law. On the facts of that case, judicial indulgence was not granted.

In *Chelliah v. Ponnambalam*, IV, SriK LR,61, at pages 64-65 in particular; See also 111 SriK LR, at page 1), the petitioner had omitted to append the proceedings of the lower Court to his petition. This was ruled by the Court to amount to non-adherence to the requirements of Rule 46 of the Supreme Court (Court of Appeal – Appellate Procedure – copies of records) Rules, 1978 which were mandatory in the first instance. The relevant principles of law are that discretion to allow the curing of lapses must be exercised having regard to the nature of the default, the circumstances in which it occurred and the prejudice to the other party.

On the facts of that case, that lapse was not satisfactorily cured as at no point had the petitioner asked for permission of the Court to file the proceedings but had instead tendered the proceedings after the petition was filed without application to the Court, notice to the other party and without permission being obtained. This was held by the Court to be grounds to deny the relief sought.

In other instances, a clear distinction has been made between mistake and negligence. Thus, as was observed by Kulatunge J. in *Packiyanathan v. Singarajah* (1991, 2SLR, 205) 'a mere mistake can generally be excused but not negligence, specially continuing negligence.'

In *Sri Lanka General Workers Union v Samaranayake* (1996) 2 Sri LR), the Court pointed to the fact that 'the failure to invoke the jurisdiction of a Court or tribunal within the prescribed time limit generally results in the Court or tribunal lacking the power to deal with the matter' but that here too, there are exceptions. *(*See also *Kariyawasam Widanarachilage Gathidu Ugeeshwara Perera and Another v. Upali Gunasekera*, Principal, Royal College and Others (S.C.F.R. Application 27/11, SCM 18.09.2014) which concerned the non-compliance of the petitioner with Rule 44(1)(b) of the Supreme Court Rules 1990 even though on the facts of that case, that discretion was refused).

In the authoritative thinking of *Kiriwanthie and Another v. Navaratne and Another* (1990 2SLR, 393), it was judicially emphasized that the consequences that should follow upon non-compliance cannot be 'mechanically applied.' Discretion may be exercised either through a dismissal or through imposing of a sanction. As observed by (the late) MDH Fernando J, the relevant question to be asked is if there was a want of *uberrima fides (*good faith) and if there was willful non-disclosure or deception? It is instructive to refer to the thinking of the majority in *Nicholas* v. *Marcan Marker* (SC/Appeal No 30/81; SCM 24.3.1982; (1986) B. L. R.. Vol. 1. part VI at 245,) which was to the effect that 'the drastic step of dismissal' was not warranted in regard to the failure to aver in that case, which was necessary to ensure that no second order can be made regarding the identical matter.

If that be the case in regard to courts of law and Rules of Court, it is a compelling argument that the RTI Commission established under Act, No 12 of 2016 must admit a greater degree of flexibility where there is non-compliance, particularly where the same relates to a failure to aver a jurisdictional requirement

per se. We are also reminded of the celebrated dictum of Abrahams CJ in *Vellupillai v. The Chairman Urban District Council Jaffna* (39 NLR 464, at 465) wherein His Lordship's observation that, "this is a court of Justice, it is not an Academy of Law" was cited with approval by the Supreme Court in *PG Gernel v. Nandasena* (Appellate Law Recorder, 2012 (1) at page 44). We are struck by the applicability of that dictum, more so to Commissions of this nature.

It is our view that the consideration of strict time limits applicable to petitions challenging Bills under Article 121 of the Constitution cannot weigh with the Commission which operates in entirely different circumstances under the Act. Consequently the fact of discretion being given to the Commission in respect of admittance of appeals after the lapse of time limits as provided for in Section 32(2) does not automatically mean that the discretion of the Commission is shut out where there is failure to aver citizenship when an incorporated or unincorporated body makes an information request or an appeal under the Act. It is important to note that the Act permits information requests to be made 'orally' (Vide Section 24(1)) which further buttresses the view that the jurisdictional fact of failure to aver is a latent defect which is capable of being cured.

Though we do not agree with the argument pressed by the Appellant that the discretion of the Commission, to allow an appeal by an incorporated or unincorporated body coming under Section 43 of the Act which does not contain an averment of citizenship, is 'fairly incidental' to the Commission's functions under the Act and we do not find the precedent cited by the Appellant as relevant to the question before us, we determine that the failure to aver citizenship in the circumstances of these Appeals does not deprive the Commission of jurisdiction to consider the same.

Do the instant Appeals warrant the exercise of the discretion to allow the Appellant to cure the lapse?

This question is complex in all its aspects and has merited our most anxious consideration. There is a statutorily prescribed appeal process laid down in respect of an information request before the Commission deliberates on a matter in appeal. It is on the material before him/her that an Information Officer is required to give his or her independent mind to a request for information and a Designated Officer is required to exercise his or her independent discretion in appeal. It is only consequently that an appeal may be lodged to the Commission under Section 32 (1).

However, there is also a duty lying on the Commission to take into account the equities of the matter. The core issue in the instant Appeals which, as aforesaid, is a failure to aver *per se* resulting in no prejudice caused to the Respondents. This is coupled with the fact that, as aforesaid, a statutorily available right of appeal must not be easily negated, best articulated by Ranasinghe, J. (as he then was) in *Karunadasa v. Wijesinghe* (1986, 1 SriLR, 358) that, in construing provisions dealing with the right of appeal, a broad construction which would preserve to an aggrieved party that right, rather than a strict construction which might abridge it must be preferred. That is an important consideration that must necessarily weigh in our thinking, given that the objective of the Act is to 'foster a culture of

transparency and accountability in Public Authorities' (viz; the preamble to the Act) in terms of which the Commission has been constituted as a statutory appellate tribunal.

On the one hand, even the legal status of the Appellant remains unclear on the face of the information requests in issue. Is the Appellant an incorporated body or an unincorporated body? There is no mention of the fact of the Appellant being a corporate in the letters written as information requests by the Appellant to the two Public Authorities on 3rd February 2017. Before this Commission, Learned Counsel for the Appellant submitted that the Appellant had filed its certificate of incorporation before the Public Authorities along with the said information requests. This claim is denied by the two Public Authorities.

Neither do the annexures to these appeals include a certificate of incorporation. In this respect, the Appellant's attention is drawn to Rule 13 (4) (v) which states that copies of other documents relied upon by the Appellant and referred to in his or her appeal must accompany the appeal which is filed before the Commission. These information requests, as evidenced on the facts, have been filed hastily on the very day of the Act being operationalized, ie February 3rd 2017. While the eagerness with which the Appellant hurried to avail itself of the benefits of the Act is undoubtedly salutary, greater care need to have been taken in filing the information requests, given also that the Appellant purports to be an organization engaging in training on the proper use of the RTI Act.

In any event, the Appellant's assertion regarding its certificate of incorporation being filed with the information requests has not been substantiated on the documentation and the factual position therein is unclear. By itself that was a technical defect that may have been rectified by the Appellant under and in terms of Rule 17 of the Rules on Fees and Appeal Procedure. That being said, the Commission takes cognizance of the argument of the Learned Deputy Solicitor General that an averment regarding corporate status (or inferring therein from an annexed certificate of incorporation) would not have sufficed to satisfy the statutory jurisdictional requirement. The Determination of the Supreme Court in SC.SD 19/2016 in respect of a Bill titled '*Budgetary Relief Allowance of Workers'* (SCM 23.02.2016) was cited as authority for the principle that, when claiming to be a citizen in terms of Article 121, averring capacity to sue and be sued by the petitioner would not satisfy the requirements of being 'a citizen'.

Specifically where the failure to aver citizenship was concerned, no reason had been adduced by the Appellant for the said failure, leaving the Commission in doubt. Was the failure to aver citizenship an 'mistake or oversight' in filing the information requests which was not corrected at the stage of an appeal being filed to the DO under Section 31 or in the papers filed before the Commission under Section 32 (1) on 12.05.2017 and 19.05.2017?

It is of note that the Appellant's contention has consistently been premised on the overriding basis that that there is no duty to aver at all, save and except a grudging concession by Counsel during oral hearings in these Appeals, that better care may have been observed by the Appellant in the filing of the papers. In fact, the position taken throughout by the Appellant is that no responsibility vests in an

information requestor in making a request under the RTI Act with the entire weight of the burden falling therein on Public Authorities, who are presumed to assume 'good faith' in these instances.

We must reiterate that we cannot, in good conscience, agree with that exuberant sentiment. The Commission recognizes that the balance of power between the State and a private citizen is often inequitable in the circumstances that the Act may be invoked. This is the reason that much care was taken in formulating its Rules (viz; Gazette No 2004/66, 2017.02.03) in order to minimize unnecessary formalities and to lessen the burden on citizens when filing an appeal under and in terms of the Act. That however cannot be taken as a cover for excusing an information requester from exercising a duty of care when filing information requests under Section 24 (1) or in filing appeals to the Commission under Section 32 (1).

The Appellant also cited two decisions of the Commission (*G. Dileepamuthan v. Secretary, Chief Minister's Ministry, Northern Provincial Council,* RTICAppeal/21/2017 (decision delivered on 10.07.2017) and *Dr. Kumarasiri Manage v. Secretary, Ministry of Education*, RTIC Appeal/No 65/2017 (decision delivered on 16.10.2017) and has cited the Commission's reminder in the later Order that 'it is bound to give effect to the spirit and letter of the Act with regard to the principle of maximum disclosure'.

As these decisions and others in similar vein handed down by us since the Act was operationalized on February 3rd 2017 disclose, this Commission has been applying the principle of maximum disclosure underlying the RTI Act where the substantive release of information is asked for. But where consequences arising from Jurisdictional defects are concerned, the same must be considered with the utmost gravity lest undue laxity in that regard impacts negatively on the smooth working of the substantive appeals procedure under the Act as evidenced so far.

It is also of note that Para 30 of the Written Submissions received by the Commission on 25th July 2017. states that ; 'It is respectfully submitted that the Appellant is a citizen in terms of Section 3(1) read with Section 43 of the RTI Act as it is a body incorporated under the Companies Act, No 7 of 2007 and not less than three-fourths of its members are citizens of Sri Lanka.' It is trite law however that statements made in Written Submissions do not qualify as averments requiring to be made by law.

On the other hand and even granted the above, it cannot be determined that there has been 'want of *uberrima fides (*good faith) or willful non-disclosure or deception' (*Kiriwanthie's Case*, supra) on the part of the Appellant in its failure to aver though a certain degree of deplorable carelessness has been evidenced. Moreover, it is relevant that no prejudice has been caused to the Respondents by the said failure nor had the Appellant been asked by the Respondents to cure this defect at any stage of the information requesting or appealing process before the Appeals came to the Commission. Had the Appellant failed to do so, despite being so asked, then it would have been a factor that militates against the exercise of discretion in these Appeals as an opportunity of amending the lapse would have been made available but had not been availed of by the Appellant.

Moreover it is manifest that care has also not been exercised by the Public Authorities. Both Information Officers and Designated Officers have not complied with their statutory duties to advice the info requestor under Section 24 (2) (b) of the Act where a request has been made 'which does not comply with the requirements of the Act.' Compliance with Regulation 4 of the RTI Regulations gazetted under the Act on 3rd February 2017 where an Information Officer is required to immediately communicate to the information requester any mistakes or discrepancies and make the necessary corrections is also not evidenced.

Section 24 (2) (b) casts this duty in a peremptory formula in that it states that where information requests which do not 'comply with the requirements of the Act' are made, the information officer 'shall' take all necessary steps to assist the citizen, free of charge, to make the request in a manner that complies with the Act. That the legislative intent envisaged a high standard of care in this respect is evidenced also by Section 32 (4) which states that '…the burden of proof shall be on the Public Authority to show that it acted in compliance with this Act in processing a request' (emphasis ours).

General duties arising on Information Commissions to 'promote the following of good practice by Public Authorities' in respect of Right to Information laws have been discussed and expounded upon in a variety of decisions by Commissions and by Courts in regard to information laws of nations. Information Commissioners are required to consider the duty of Public Authorities to assist requesters which is incumbent on government institutions during the 'processing of a request.'

Examining the duties that arose under the United Kingdom's Freedom of Information Act (FOA), 2000 for instance, the Information Tribunal did not agree with the thinking of the Information Commissioner who had decided in that particular case (*Barber v The Information Commissioner* (Appeal Number EA/2005/0004, decided on 11.11.2005), that the government institution did not have an obligation to respond to a request that was not clear. The Tribunal decided that the request was clear enough. It also states in *obiter* that the Commissioner should have critically reviewed the assistance provided by the government to the requester which was found to be wanting.

Where the Sri Lankan law is concerned, the duties and functions of this Commission pertain to not only 'hearing and determining any appeals' under Section 32 (1) (viz Section 15 (f) but also 'ensure the due compliance by Public Authorities of the duties cast on them under this Act.' In the yet early days of the operationalizing of this Act, it is important that these duties are clearly emphasized and conformed to.

Decision of the Commission

In these circumstances and for these reasons, the two preliminary questions of law are answered as follows;

> - Whether the requirement of averment of citizenship on the part of the information requestor in terms of Section 3 (1) of the RTI Act No.12 of 2016 read with Section 43 of the said Act is a mandatory requirement? **Where the requester is a body whether incorporated or**

unincorporated, the requirement of averment of citizenship is a jurisdictional fact to be ascertained by an Information Officer in the first instance.

- Is the said requirement a fatal irregularity or a curable defect at the second stage of appeal before the Commission? **It is a curable defect with discretion being employed in exceptional circumstances to enable the same**

The Appellant has urged that the Commission allow the Appellant to amend its papers in terms of Rule 17 of the Commission's Rules on Fees and Appeal Procedure. This Rule states that an Appeal may be returned to the Appellant if the Appeal fails to provide the requisite information or is otherwise substantially deficient. In our view, jurisdictional defects impugned in these Appeals cannot be cured by recourse to this Rule which applies to a situation where an Appeal is deficient on the merits of the substantive matter/s in issue (ie; for instance, where an Appeal is unclear in the information that is sought or is lacking relevant documentation in that regard) which were, in fact, the circumstances in the contemplation of the Commission at the time that the said Rule was formulated.

However, we are of the view that if the Commission allows the Appellant to aver citizenship at appeal stage, that will tantamount to the Commission taking the necessary steps in terms of its inherent powers under the Act to determine if the appellant has a right of appeal in satisfaction of the jurisdictional facts (albeit contingent) that must be ascertained under the Act. This Commission was not established as a court of law but for the 'purpose' of the Act, (vide Section 11(1) of the Act), which is to 'foster' a culture of transparency and accountability in Public Authorities (viz, the preamble to the Act). It must necessarily give effect to that clear legislative intention. This Commission is also acutely conscious that the right of appeal afforded by the Act must be preserved to the broadest extent possible rather than be thwarted by restrictive interpretations (*Karunadasa v. Wijesinghe*, *supra*).

Therefore in consideration of the equities in this matter and given that we not see any prejudice being caused to the Respondents by this Order, acting under the inherent powers in this Commission in terms of Section 32(1), we allow the Appellant to amend the papers to include the averment of citizenship as aforesaid. Further, in pursuance of the duty arising on this Commission under Section 14 (a), we determine that the Public Authorities have failed to ensure compliance with Section 24 (2)(b) read with Regulation 4 of the RTI Regulations gazetted under the Act on 3rd February 2017 to assist the requester/Appellant contrary to the intent and spirit of the legislation.

We direct the relevant Information Officers to act in accordance with Section 24 (2)(b) in responding to requests for information filed by incorporated or unincorporated bodies under Section 3 (1) read with Section 24 (1) and Section 43 of the Act. When information requests by such bodies are made, 'all necessary steps shall be taken' by the said Information Officers under Section 24 (2) (b) read with Regulation 4 of the RTI Regulations to advice the information requestor in order that any mistakes or discrepancies are noted and necessary corrections are made.

It is determined further that, having regard to the scope and object of the RTI Act, an averment to that effect *per se* made by an incorporated or unincorporated body will suffice to satisfy the mandatory requirements of Section 3 read with Sections 24 (1) and 43 of the Act. It is only in the rarest of rare cases and where sufficient reasons objectively are shown to exist awakening a *bona fide* doubt as to the said averment not being indicative of the correct factual position, that the Information Officer will be justified in law in requiring an incorporated or unincorporated body filing an RTI application under Section 24 (1) to furnish proof of the said averment, viz; to demonstrate by annexed material that three-fourths of such body are citizens.

We have considered the further preliminary objection raised by the State that the Appellant has failed to demonstrate that the information sought is required for the exercise and protection of a Citizen's right as required by the wording of Article 14 A (1) of the Constitution which states that the right to access information is limited to 'information that is required for the exercise and protection of a citizen's right' and that merely alleging that the disclosure of information is of public interest will not suffice.

We are of the view that this objection is not sustainable in that it is a question which goes to the merits of the matter given the inextricable linking of a right with the concept of 'public interest' and is best decided at that stage. For the purposes of this instant Order, it may suffice to affirm that the right sought to be exercised and information asked for should fall within the scope of 'information' and 'right to information' as defined under the Act subject always to the overriding concept of the 'public interest', in the context of which, it may be useful to refer to the thinking of the Supreme Court of India in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi and another,* [2013-2-L.W. 293 (Part 4)] at 301;

> *The expression 'public interest' has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression 'public interest' must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression 'public interest', like 'public purpose', is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [State of Bihar v. Kameshwar Singh (AIR 1952 SC 252) = (1952) 62 L.W. 527]. It also means the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake [Black s Law Dictionary (Eighth Edition)].*

We thank all Counsel for their assistance in this matter.

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