

Shreen Saroor v. Prime Minister's Office

RTICAppeal(In-Person)/01/2018 - *Order under Section 32 (1) of the Right to Information Act, No 12 of 2016 and Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure)* – heard as part of a formal meeting of the Commission on 15.05.2018

Chairperson: Mr. Mahinda Gammampila
Commission Members: Ms Kishali Pinto-Jayawardena
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama
Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Shreen A. Saroor
Notice Issued to: Mr. E.M.S.B. Ekanayake, Designated Officer/ Secretary to the Prime Minister

Appearance/ Represented by:

Appellant - Ms. Shreen Saroor
Sankhitha Gunaratne, RTI Manager, TISL (accompanying Appellant)
Lakwijaya Bandara, TISL
Mangala Shanker, ALAC, TISL

Public Authority - Mr. Suren Gnanaraj, State Counsel, AG's Department
Hashini Jayasekera, Information Officer/ Assistant Secretary, PMO

RTI Request filed on	21.06.2017
IO responded on	22.06.2017 (Acknowledgment) 07.07.2017
First Appeal to DO filed on	22.07.2017
DO responded on	27.07.2017 (Letter received on 31.07.2017)
Appeal to RTIC filed on	06.10.2017

Brief Factual Background

The Appellant filed an information request with the Prime Minister's Office (PMO) on 21.06.2017 seeking the following information from the Secretariat for Coordinating Reconciliation mechanisms:

- A. Copies of proposals and/ or draft legislation and/ or concept notes and/ or documentation relevant to the commitments made by the Government of Sri Lanka in the United Nations Human Rights Council Resolution 30/1 (UN HRC 30/1) to:
 - a. Establish an office on missing persons
 - b. Establish a truth – seeking mechanism
 - c. Establish a judicial mechanism with a special counsel
 - d. Establish any other mechanism for the purpose of delivering truth, justice, reparations, or guarantees of non –recurrence
- B. Copies of reviews and/ or correspondence and /or documentation prepared by nation and/ or international consultants and / or experts with respect to the above mentioned proposals and/ or draft legislation and/ or concept notes and/ or documentation.
- C. Copy (s) of a roadmap of action plan with regard to the implementation of the UN HRC 30/1.

The Information Officer (IO) responded on 07.07.2017 stating that the two acts on the Office on Missing Persons were public documents and accessible on documents.gov.lk and citing the exemption of Section 5 (1) (m) for the remaining items requested stating that the matters are under consideration to be submitted to the Cabinet of Ministers for a decision. The Appellant then appealed to the Designated Officer (DO) on 22.07.2017. The Appellant stated that she received a letter from the DO on 31.07.2017 which contained two copies of letters sent to the Secretaries of the Ministry of National Integration & Reconciliation and the Ministry of Foreign Affairs in relation to her RTI request. The Appellant in her appeal to the Commission, did not consider this a decision of the DO and had stated that she had not received a decision from the DO. Not satisfied with the purported response of the DO, the Appellant appeal to the RTI Commission on 06.10.2017.

Matters Arising During the Hearing

The PA had filed written submissions with the Commission dated 03.05.2018. Therein the PA noted that the Appellant's appeal to the DO had indeed been responded to by letter dated 27th July 2017 and had attached a copy of the said letter. The PA noted that it had duly transferred the request of the Appellant to the Ministry of National Integration and Reconciliation and the Ministry of Foreign Affairs by letters dated 27. 07.2017 (with copy to the Appellant). It stated that it had acted in compliance with Regulation 4 clause 6 of the RTI Regulations gazetted under Gazette No. 2004/66 dated 03.02.2017 which states:

“If the request relates to information which the Information Officer is aware is held by another Public Authority, the Information Officer shall duly in written format

transfer the request to the concerned Public Authority and inform the citizen making the request accordingly within 7 days form the date of receipt of the request.”

Furthermore it noted that Regulation 4 clause 7 states that;

“A Public Authority shall not be required to collect information to respond to a request but it shall not refuse a request.....”

Accordingly the PA submitted that after transfer of the requests, the Appellant could not have legal recourse against the first PA under the RTI Act, its Rules and Regulations. Furthermore, the PA submitted that the appeal was bad in law as the Appellant had not disclosed the response by the DO. It also submitted that the appeal was time barred as the decision of the DO had reached the Appellant by 31.07.2017 but her Appeal was dated 06.10.2017 which was more than the two month time limit provided for an Appellant to appeal to the Commission according to Section 32 (1) of the RTI Act. No.12 of 2016.

The PA also noted in its written submissions that strictly without prejudice to its submissions regarding information not in its possession, custody, or control, it had proactively obtained some information from the appropriate PAs and would make available the following at the hearing of the Appeal:

With regard to Item A:

A. (a) Establish an Office on Missing Persons

- Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 (OMP Act) (available on website)
- Office on Missing Person (Establishment, Administration, and Discharge of Functions) Amendment Act, No. 9 of 2017 (available on website)
- Order under Section 1 (2) of the OMP Act (as amended) and published in the Gazette No. 2036/21 dated 12th September 2017

(b) Establish a truth seeking mechanism

- The Final Report of the Consultation Task Force on Reconciliation Mechanisms (CTF), 17th November 2016 (available on website)

(c) Establish a reparation office

- Cabinet Memorandum dated 5th March 2018 and the Cabinet Decision dated 6th March 2018

(d) Establish a judicial mechanism with a special counsel

- The Final Report of the Consultation Task Force on Reconciliation Mechanisms, (CTF) 17th November 2016 (available on website)

(e) Establish any other mechanism for the purpose of delivering truth, justice, reparations or guarantees of non – recurrence

- International Convention for the Protection of All persons from Enforced Disappearances Bill which was passed in Parliament on the 7th of March 2018
- Joint Cabinet Memorandum dated 11th December 2017 and Cabinet Decision dated 12th December 2017 on Sri Lanka’s accession to the Ottawa Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti – Personnel Mines and on their Destruction
- The Cabinet Memorandum dated 10.11.2017 and the Cabinet Decision dated 14.11.2017 on Sri Lanka’s accession to the Optional Protocol to the Convention against Torture and other cruel, inhuman and degrading treatment or punishment.

With regard to Item C:

Copy (s) of a roadmap of action plan with regard to the implementation of the UN HRC 30/1

- National Action Plan for the Protection and Promotion of Human Rights 2017 – 2021 launched on 01.11. 2017 (available on website)

At the Hearing the Appellant stated that she had asked for this information since as a human rights activist, she had conducted many workshops with affected people who were interested in obtaining information about what was going on with regard to transitional justice initiatives in Sri Lanka. The Appellant further stated that she and others had participated in the CTF process and therefore wanted to know if the CTF recommendations had been taken into consideration in the transitional justice initiatives being undertaken by the government.

She also observed that she and other activists working with families of the disappeared had been concerned regarding the fact that the Office of Missing Persons Act was ultimately passed into law without allowing affected persons the right to access confidential information submitted to the OMP and that it was important that all institutions established under the package of transitional justice reforms function transparently and with accountability. She pointed out that, often, activists in the periphery were not involved with law reforms planned in Colombo and that therefore she and the other activists had filed an RTI request for the above documents.

Counsel for the PA reiterated the submissions made in the written submissions of the PA. He clarified that with regard to information about the OMP, the request had been transferred to the Ministry of National Integration and Reconciliation to which the subject had been assigned and with regard to all other information, the request had been transferred to the Ministry of Foreign Affairs.

Counsel further stated that there had been a decision of the DO and two further letters which were copies of the transfer requests to the two concerned Ministries dated 27.07.2017, which had been sent to the Appellant. The Appellant had also written to the two ministries reminding them

about her request as a follow up. Counsel submitted that unless this fact was noted, it would seem as if the PA had written to the Ministries and was waiting for a response from them in order to collect and provide the information. This, he noted, would give a wrong impression.

The Appellant noted that while she received the response of the DO on 31.07.2017, she had not considered it as a response but only as a referral. She admitted that it had been a mistake on her part. She further stated that her reason for appealing to the Commission past the time period was due to her making follow up calls and requests with the said Ministries. She further noted that she and other activists were struggling to promote transitional justice since nothing concrete was being presented. The Appellant submitted that in the context of her information request she was not exactly aware of what information was available at that time and therefore had requested for all information that was available with the PA.

The RTI Manager of TISL noted that the PA had refused information citing Section 5 (1) (m) of the Act which states,

(m) the information is of a cabinet memorandum in relation to which a decision has not been taken;

She submitted that in order to invoke the exemption the officer would had to have perused the documents in question, which would imply that the information being sought was under the custody of the PA.

Counsel for the PA clarified in response that the reply of the information officer in regard to the citation of Section 5(1)(m) as an exception to refuse the information was on the basis of broadly assessing the information requested as including some documents that would have been before Cabinet at the time rather than in terms of knowing the specifics of the same.

When queried by the Commission as to what extent Section 5(1)(m) would apply at this stage of hearing of the appeal, to any of the documentation requested, Counsel for the PA stated that he was not aware of the exact status in regard to the matter and that as far as he was aware, all information that the PA had been able to obtain was now being furnished to the Appellant at the instant hearing. He contended that otherwise, the PA would be compelled to collect information from other Ministries and compile the information which was not a duty of the PA under the RTI Act, its Rules or Regulations. He reiterated that the information now being placed by the Public Authority before the Commission was out of respect for the RTI Commission upon receiving its notice to appear in this appeal.

Order

This information request pertains to matters relevant to Sri Lanka's transitional justice process and therefore concern information that is vital to the public interest.

In particular, where the drafting of laws are concerned, this Commission reiterates its observations in *Gomez v Ministry of Social Empowerment, Welfare and Kandyan Heritage* (RTIC Appeal /51 /2018, RTIC Minutes, 27.02.2018) that ‘in many countries in the region as well as globally, draft laws are required to be presented before the public in advance and before the Bill is gazetted, in order to obtain public feedback on its contents which is a beneficial process leading to public consensus around the framing of legislation.’ This observation was made in the context of the fact that the definition of information in Section 43 of the Act expressly includes ‘draft legislation’ within its ambit.

In her appeal to the Commission dated 06.10.2017, the Appellant has referred to the two letters sent by the Public Authority to the Secretaries of the Ministry of National Integration & Reconciliation and the Ministry of Foreign Affairs dated 27th July 2017 in relation to her RTI request and this Commission is inclined to accept her explanation that the omission to file the letter of the Public Authority on that same date apprising her that the information requests had been transferred to the relevant Public Authorities (which letter had not been annexed to the appeal) was inadvertent rather than deliberate.

The Public Authority has also raised the question of delay on the part of the Appellant to appeal to the Commission within the time limits laid down in Section 32(1)(a) on the ground that the Appellant had not ‘established that she was prevented by a reason beyond his or her control from filing the appeal in time’ as required by Section 32(2). The Appellant has explained that she had been occupied in attempting to get the requested information through following up with the relevant Ministries to which the said information requests had been directed by the Public Authority during the months in question, before she filed an appeal to the Commission upon failing in that attempt.

We will this note this explanation of the Appellant of record as a satisfactory ground to explain delay under and in terms of Section 32(2) of the Act. It is also a relevant factor that Sri Lanka’s RTI Act is (relatively) still a new law and both citizens and Public Authorities are getting accustomed to the procedures and practices that need to be followed in filing information requests and appeals.

In regard to the material that has been furnished to the Commission, it is noted that its contents include the Cabinet Memorandum No 18/0430/702/008 dated 5th March 2018 relating to the establishing of an Office of Reparations signed by the Prime Minister and Minister of National Policies and Economic Affairs which information is information that would have been legitimately ‘within the possession, custody and control’ of the Public Authority in this appeal (viz; the Office of the Prime Minister) under and in terms of Section 3 of the Act.

It is further noted that the said Cabinet decision thereof on 6th March 2018 states that approval had been granted to establish an Office of Reparations as proposed in the Memorandum and that the Legal Draftsman had been instructed to draft legislation based on the draft attached as

Annexure 1 to the Memorandum which has also been furnished to this Commission. The furnishing of the said draft legislation on reparations as a result of this information appeal merits special mention, given this Commission's observations in *Gomez v Ministry of Social Empowerment, Welfare and Kandyan Heritage (supra)* as noted above.

Appeal adjourned for 10th July 2018 at 3 pm. It is directed that the Information Officers of the Ministries of National Integration & Reconciliation and the Ministry of Foreign Affairs appear before this Commission on this date as a necessary consequence of the forwarding of the Appellant's information requests to the said Ministries by letters dated 27. 07.2017.

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Chairperson: Mahinda Gammampila
Commission Members: Kishali Pinto-Jayawardena
S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Director-General: Piyathissa Ranasinghe

Appellant: Ms. Shreen A. Saroor
Notice Issued to: Mr. E.M.S.B. Ekanayake, Designated Officer/ Secretary to the Prime Minister

Appearance/ Represented by:

Appellant - Ms. Shreen Saroor
Sankhitha Gunaratne, RTI Manager, TISL
Lakwijaya Bandara, TISL

Public Authority - Suren Gnanaraj, State Counsel, Attorney General's Department
Sithara Gamage Information Officer (IO) Prime Minister's Office

Matters Arising During the Hearing:

The Commission queried as to whether there is any indication whether the documents requested will be released into the public domain in response to which the Commission was informed that

the Reparations Bill had been gazetted and was due to be taken up in Parliament in the coming weeks.

Considering the information request it was noted that information with respect to the establishment of a truth seeking mechanism would most probably be in the custody of the Ministry of National Integration and Reconciliation.

A clarification was sought from the Appellant as to the documents that are yet to be provided. It was noted that the information requested in relation to the establishment of an Office on Missing Persons and a mechanism for the purpose of reparations is redundant given that the Office on Missing Persons Act No 14 of 2016 had been passed and the draft Office for Reparations Bill has been tabled in Parliament. Further it appeared that information in relation to the truth – seeking mechanism was the only viable item of information requested for that needed to be addressed and that since it was unlikely that a judicial mechanism with a special counsel would be established documentation in relation to such is unlikely to be available. Accordingly, it was suggested that sub items a, c and d of item A be considered as provided or non-existent with which the Appellant agreed.

With respect to item C i.e. the Roadmap of Action Plan with regard to the implementation of the UN HRC 30/1 it was envisaged that the information would most probably be in the custody of the Ministry of Foreign Affairs as it was the Ministry which submitted the document before the UN.

The Appellant submitted that she envisages information with respect to reforms to the penal code would be needed. It was noted that whether or not this would fall within the UN Resolution was debatable as although it may be argued and the argument accepted that the Resolution clearly envisaged mechanisms for reparations for war crimes and crimes against humanity whether reforms to the Penal Code would fall within that would have to be substantiated. The Appellant then submitted that the proposed Counter Terrorism Act should also come within the ambit of the UNHRC 30/1 and that although there was international consultation there was no evidence to show progress made thereafter. As such it became evident that a specification of the items of information required was necessary, limiting the said request to that which can be reasonably expected to emanate from the UN HRC 30/1 Resolution.

The Appellant submitted that there are huge gaps in terms of what was intended by the Road map and what is practically being done. The Commission noted that it can direct only an issuance of what is available in the possession, custody and control of the PA and that issues or contradictions of the substantial content in the documents themselves do not fall within the purview of the Commission's jurisdiction.

Attention was drawn to the fact that although it was made out on the previous occasion and in the written submissions of the PA that the information was not in its possession, custody, or control of the PA that subsequently the draft Office for Reparations Bill was provided the Bill was in

fact produced before Parliament under the hand of the Prime Minister i.e. as a memorandum of the Prime Minister's Officer. Therefore the question remains as to how much of the information yet to be provided falls within the purview of the Prime Minister's Office and the extent of co-ordination conducted by the PA in the present instance in relation to the implementation of the UN Resolution.

In connection with the discussion on the issuance of Notices on the Ministry for Reconciliation and Ministry of Foreign Affairs, the IO of the PA submitted, that the subject of reconciliation had been passed between several Ministries. Similarly the OMP was until recently under the Presidential Secretariat until its transfer to the Ministry of National Integration, Reconciliation and Official Languages.

It became evident that information requested comes within/ overlaps with functions/ subjects allocated to three PAs including the Ministry of National Integration, Reconciliation and Official Languages.

Order:

The Appellant is directed that the remaining items of the information request that are yet to provided/ responded on are streamlined to limit the documentation requested to that reasonably envisaged by UNHRC Resolution 30/1. Namely,

- A. Copies of proposals and/ or draft legislation and/ or concept notes and/ or documentation relevant to the commitments made by the Government of Sri Lanka in the United Nations Human Rights Council Resolution 30/1 (UN HRC 30/1) to:
 - b) Establish a truth – seeking mechanism
- B. Copies of reviews and/ or correspondence and /or documentation prepared by nation and/ or international consultants and / or experts with respect to the above mentioned proposals and/ or draft legislation and/ or concept notes and/ or documentation. (i.e. establishment of a truth – seeking mechanism)
- C. Copy (s) of a roadmap of action plan with regard to the implementation of the UN HRC 30/1.

The Appellant agreed that sub items a and d of item A are deemed to be provided/ redundant. With respect to sub item c the Appellant agreed that existence of such information was a remote possibility.

It is directed that the Information Officers of the Ministry of National Integration & Reconciliation and the Ministry of Foreign Affairs appear before this Commission on this date as a necessary consequence of the forwarding of the Appellant's information requests to the said Ministries by letters dated 27.07.2017.

Next Date of Hearing: 04.09.2018