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

"IMMIGRATION BILL"

Dinidu de Alwis,
Molawatta Road,
Ihala Mahawewa,
Mahawewa.
Petitioner

SC/SD/82/2024

Vs.

Hon. Attorney General,
Attorney General's
Department,
Colombo 12.
Respondent

Before: Hon. Justice Yasantha Kodagoda, P.C.
Hon. Justice Achala Wengappuli
Hon. Justice Mahinda Samayawardhena

Counsel: Pulasthi Hewamanna with Harini Jayawardhana, Fadhila Fairoze and Linuri Munasinghe for the Petitioner.

Manohara Jayasinghe, Deputy Solicitor General with Sajith Bandara, State Counsel and Medhaka Fernando, State Counsel for the Respondent.

Introduction

A Bill titled "Immigration Bill" (hereinafter referred to as "the Bill") has been published in the Gazette on 12 June 2024, and was subsequently placed on the Order Paper of Parliament on 20 June 2024. This is in accordance with Article 78(1) of the Constitution.

The petitioner invoked the jurisdiction vested in this Court under Article 121(1) of the Constitution on 3 July 2024 challenging the constitutionality of several Clauses of the said Bill.

The Attorney General was Noticed by this Court in terms of Article 134(1) of the Constitution.

The hearing commenced at 10.30 am on 5 July 2024 and concluded by 5.00 pm on the same day. Written submissions of both parties were filed at approximately 4.30 pm on 8 July 2024.

Outline of the Bill

This Bill does not introduce a completely new legislative regime governing immigration and emigration or matters relating to passports and exit permits. Instead, while consolidating the provisions of those laws into one Act, it aims to also upgrade the existing laws to meet with contemporary requirements. The purpose of the Bill is discernible from its long title, which reads as follows:

> *A Bill to make provisions for controlling the entry into and departure of persons from Sri Lanka; controlling the stay of persons in Sri Lanka who are not citizens of Sri Lanka; for the issue of travel documents; for the repeal of the Immigrants and Emigrants Act (Chapter 351) and the Passport (Regulation) and Exit Permit Act, No. 53 of 1971; and to provide for matters connected therewith or incidental thereto.*

The existing Immigrants and Emigrants Act, No. 20 of 1948, had been enacted shortly after independence was granted to the Dominion of Ceylon on 4 February 1948. Since then, the scope of immigration and emigration has drastically expanded, presenting unprecedented challenges such as threats and attacks on national security, human smuggling, human trafficking, drug trafficking, money laundering, transnational organized crime, cybercrime and the spread of infectious diseases.

The Passport (Regulation) and Exit Permit Act, No. 53 of 1971, was enacted prior to Ceylon becoming a Republic.

The Bill has ten parts, each addressing different legal aspects of immigration and emigration.

The short title of the Bill and dates of operation are set out in Clause 1.

Part I of the Bill contains Clause 2 and Clause 3 and deals with preliminary matters. Clause 2 sets out the objects of the Bill and Clause 3 sets out the power of the Minister to grant exemptions to certain persons specified in that clause from the operation of certain Parts of the Bill.

Part II of the Bill contains Clause 4 to Clause 8, and deals with the administrative arrangements of the Bill including the officers who shall be appointed in order to exercise the powers under the Act, including Coast Guard Officers of the Department of Coast Guard, and their respective powers, duties and functions, as well as the power of the Minister to confer authorization to act on his behalf.

Part III of the Bill contains Clause 9 to Clause 40, and deals with matters pertaining to the issuance of visa and electronic travel authorization to every person other than a citizen of Sri Lanka or a person who has been

exempted from the application of this Act, including the statutory procedure, requirements, validity period, disqualification and cessation of the validity of a visa as well as the registration of a category of persons identified as Overseas Ex-Sri Lankans and matters related therewith.

Part IV of the Bill contains Clause 41 to Clause 61, and deals with the substantive legal principles and procedures applicable to entry into Sri Lanka and departure from Sri Lanka for both citizens and non-citizens, inclusive of identification, requirements upon entry and endorsements for entry and departure. Most notably, Clause 42 of this Part stipulates the right of entry of citizens of Sri Lanka. Further, this section stipulates the powers of the Minister and those of an immigration officer in relation to an entry or departure of persons.

Part V of the Bill contains Clauses 62 to 93, and stipulates the procedural requirements which ought to be followed on arrival in or departure of any person from Sri Lanka. Part V also sets out the capacity of immigration officers to examine persons on entry, as well as the procedure to detain persons for the purpose of examination and inspection by immigration officers.

Part VI of the Bill contains Clauses 94 to 101 and deals with the procedures applicable to the supervision of activities of persons other than citizens of Sri Lanka or any person who is exempted from the provisions of this Part by any Order under Part I. This Part confers on the Minister the power to direct removal and deport non-citizens from Sri Lanka.

Part VII of the Bill contains Clauses 102 to 123, and deals with the procedure to obtain a Sri Lankan travel document, emergency certificates, identity certificates, diplomatic passports or official passports from the immigration authorities and sets out certain offences

relating to travel documents. The powers of the Controller General in respect of the issuance, endorsement, cancellation and refusal etc. of a Sri Lankan travel document is also set out in Part VII.

Part VIII of the Bill contains three Chapters.

Chapter I deals with General Offences, and such offences are contained in Clauses 124 to 135. This Chapter also sets out general offences contained in the Bill and the procedure that would be applicable for the trying of such offences and the procedure with respect to granting bail.

Chapter II contains Clauses 136 to 139, and sets out the specific offence of human smuggling, including aggravated offences of human smuggling and documentary offences relating to human smuggling.

Chapter III comprises Clauses 140 to 160. It sets out procedures applicable to combatting the committing of offences specified in the Bill, including the procedures applicable for the arrest, detention, impounding of travel documents, seizure of suspicious travel documents and entry and search of vessels and premises. Further, this Chapter empowers the Minister and the Controller General authorized by the Minister, to rely on classified information relating to security or criminal conduct in order to make decisions and determine proceedings under the Act.

Part IX of the Bill comprises Clauses 161 to 167, which contains provisions pertaining to transnational proceedings in respect of the offences listed under the Bill.

Part X of the Bill, containing Clauses 168 to 185, is the General Part of the Bill. This Part deals with the power of the Minister to issue Regulations and the procedures applicable to the collection, use, processing, storage and disclosure of identifying information. It also includes provisions for the establishment of the Immigration Officers'

Reward Fund and contains interpretation to be given to certain key terms contained in the Bill. Additionally, this part sets out the provisions for the repeal and savings of the Immigrants and Emigrants Act, and Passport (Regulation) and the Exist Permit Act No. 53 of 1971.

We shall now consider the clauses challenged by the petitioner for their constitutionality, based on oral submissions of learned counsel and post-hearing written submissions submitted. We note that in certain respects, the content of the written submissions tendered on behalf of the petitioner differs from oral submissions, in that the learned counsel for the petitioner has dropped some of the clauses initially raised at the hearing and added new ones in the post-hearing written submissions. In the circumstances, we are compelled to consider the positions raised on behalf of the petitioner as contained in the written submissions. However, we are mindful that this places learned Deputy Solicitor General (DSG) at a distinct disadvantage, particularly as he has crafted his written submissions based on the oral submissions made by learned counsel for the Petitioner. Therefore, we shall be extremely conscious in that regard, so as to prevent any injustice to the respondents.

Clause 3

Clause 3 of the Bill reads as follows:

3. (1) Every person who-

(a) is a member of the Armed Forces of Sri Lanka; or

(b) is duly accredited to the Government of Sri Lanka by the Government of any other country; or

(c) is sent to Sri Lanka on a special mission by the Government of any other country; or

(d) is an expert, adviser, technician, or official of any organization whose salary or principal emolument is not payable by the Government of Sri Lanka and who is brought to Sri Lanka by the Government of Sri Lanka through any Specialized Agency of the United Nations Organization, or under the Point Four Assistance Programme of the Government of the United States of America, or through the Colombo Plan Organization (including its Technical Assistance Bureau), or any similar organization approved by the Minister; or

(e) is any trainee from abroad who is sent to Sri Lanka under any of the Technical Co-operation Programmes of the United Nations Organization and its Specialized Agencies or of the Colombo Plan Organization, or of any similar organization approved by the Minister; or

(f) has entered or is under an agreement to enter the service of the Government of Sri Lanka; or

(g) is a member of the official staff or household of any person referred to in any of the foregoing paragraphs (a) to (f); or

(h) is the wife or any dependent child of any person referred to in any of the foregoing paragraphs (a) to (g); or

(i) is a member of the crew of a ship in the territorial waters of Sri Lanka,

shall be exempted from the operation of Parts III, IV, V, VI and VII of this Act to such extent or subject to such conditions or restrictions as may be specified by an Order made by the Minister and published in the Gazette.

An Order under this subsection may be either an Order in respect of any person or group of persons, or an Order applicable to any class or description of persons, being in either case persons referred to in this subsection.

(2) The Minister may, by Order published in the Gazette exempt any person or class or description of persons for such specified period of time on the occurrence of any public emergency from any of the provisions of the Act to such extent or subject to such terms, conditions or restrictions as may appear to him to be necessary in the public interest.

The complaint of learned counsel for the petitioner is that this Clause as a whole is vague and overbroad, and the Minister's power to exempt persons from the provisions of the Act is unguided and unfettered, hence violative of Article 12(1) of the Constitution.

It is now settled law that vague and overbroad provisions in an enactment, which confer unguided and unfettered powers or discretion upon administrative officials, violate Article 12(1) of the Constitution.

However, we are not inclined to think that Clause 3 violates Article 12(1). The legislature cannot pass legislation that covers all possible contingencies in detail. Clause 3 empowers the Minister to make provisional orders to such extent or subject to such conditions or restrictions as may be specified by an Order made by the Minister and published in the Gazette. There are several inbuilt restrictions within this Clause.

Classification among persons does not violate Article 12(1) so long as it is based on an intelligible differentia. Reasonable classifications for legitimate purposes and differential treatment between such

classifications are permissible. What Article 12(1) seeks to prevent is differential treatment within the same classification.

Learned DSG explains that the objective to be achieved by this Clause is to provide the State with the necessary flexibility to exempt persons and/or groups of persons from the operation of certain parts of the Bill for certain operational and/or administrative needs, subject to conditions. We have no reason to disagree with this explanation.

The same provision is found in section 2 of the Immigrants and Emigrants Act, No. 20 of 1948, as amended, since 1948, which represents the existing law.

Section 2 of the Immigrants and Emigrants Act reads as follows:

2. (1) Every person who

(a) is a member of the Armed Forces of Sri Lanka; or

(b) is duly accredited to the Government of Sri Lanka by the Government of any other country; or

(c) is sent to Sri Lanka on a special mission by the Government of any other country; or

(d) is any expert, adviser, technician, or official whose salary or principal emolument is not payable by the Government of Sri Lanka and who is brought to Sri Lanka by the Government of Sri Lanka through any Specialized Agency of the United Nations Organization, or under the Point Four Assistance Programme of the Government of the United States of America, or through the Colombo Plan Organization (including its Technical Assistance Bureau), or any similar organization approved by the Minister; or

(e) is any trainee from abroad who is sent to Sri Lanka under any of the Technical Co-operation Programmes of the United Nations Organization and its Specialized Agencies or of the Colombo Plan Organization, or of any similar organization approved by the Minister; or

(f) has entered or is under an agreement to enter the service of the Government of Sri Lanka; or

(g) is a member of the official staff or household of any person referred to in any of the foregoing paragraphs (a) to (f); or

(h) is the wife or any dependent child of any person referred to in any of the foregoing paragraphs (a) to (g); or

(i) is a member of the crew of a ship in the territorial waters of Sri Lanka, shall be exempt from the operation of Parts III, IV, V, VI, and VII of this Act to such extent or subject to such conditions or restrictions as may be specified by order of the Minister. An order under this subsection may be either a special order in respect of any person or group of persons, or a general order applicable to any class or description of persons, being in either case persons referred to in this subsection.

(2) In accordance with any regulations made under this Act for the purpose of prescribing

(a) the classes or description of persons, other than those specified in subsection (1), to whom exemption may be granted from any of the provisions of this Act; and

(b) the extent to which or the terms, conditions or restrictions subject to which such exemption may be granted, the Minister

may by order exempt any prescribed class or description of persons or any person belonging to any such prescribed class or description, to the prescribed extent or subject to the prescribed terms, conditions or restrictions:

Provided that in the absence of any such regulations or on the occurrence of any public emergency, the Minister may so exempt any person or class or description of persons from any of the provisions of this Act to such extent or subject to such terms, conditions or restrictions as may appear to him to be necessary in the public interest.

In fact, according to the existing provision (section 2 of the Immigrants and Emigrants Act), the Minister can exempt such persons from the operation of Parts III, IV, V, VI, and VII of the Act by way of an Order, not by an Order that should be published in the Gazette, as the Bill proposes to do. The new provision advances the rights of the people rather than detracts from them. However, the presence of an almost identical provision in existing legislation is not a basis to conclude that the proposed provision is constitutional.

We note that this clause does not and in any event no provision of the law can confer unfettered discretionary authority on any official. Power must be exercised in terms of the law and the purpose for which such power is conferred on the relevant official by Parliament. The exercise of power must be in consonance with the object and purposes of the law, and must be exercised in good faith and in public interest. Furthermore, the Minister is expected to exercise this power of exemption in special situations, not as a routine measure and in conformity with the afore-stated principles. However, the written law need not make any reference to these principles, as the unwritten common law shall apply.

In view of the foregoing, we are in agreement with learned DSG that there is no necessity to interfere with Clause 3 of the Bill.

Learned DSG in his written submissions has stated that the term "wife" in Clause 3(1)(h) of the Bill (which is also found in the Immigrants and Emigrants Act since 1948) will be changed to "spouse" at the Committee Stage of Parliament.

Clauses 7 and 8

Clauses 7 and 8 read as follows:

> *7. (1) The President may, upon request of the Minister, for the purposes of this Act, by Order published in the Gazette, designate all or any of-*
>
> > *(a) the members of the Sri Lanka Army raised and maintained in accordance with the provisions of the Army Act (Chapter 357);*
> >
> > *(b) the members of the Sri Lanka Navy raised and maintained in accordance with the provisions of the Navy Act (Chapter 358); and*
> >
> > *(c) the members of the Sri Lanka Air Force raised and maintained in accordance with the provisions of the Air Force Act (Chapter 359),*
>
> *as authorised members of the Forces.*
>
> *(2) Within the area specified under subsection (4), an authorised member of the Forces shall, in respect of-*
>
> > *(a) any offence under section 46;*
> >
> > *(b) any offence under section 51;*

(c) any offence under section 124;

(d) any offence under section 126;

(e) any offence under section 136;

(f) any offence under section 137;

(g) any offence under section 138; and

(h) any offence under section 139,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the purpose only of exercising any power conferred upon a Peace Officer by that Act.

(3) The powers and duties conferred and imposed upon authorised members of the Forces by this section shall be exercised and discharged notwithstanding that such powers and duties are not conferred or imposed upon them by the provisions of the Army Act (Chapter 357), the Navy Act (Chapter 358), or the Air Force Act (Chapter 359).

(4) The Minister may, by Order published in the Gazette, specify the areas which the powers and duties under this Act may be exercised and discharged by the authorised members of the Forces.

(5) An authorised member of the Forces making an arrest without a warrant shall forthwith –

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the custody of a police officer.

8. (1) The President may upon request by the Minister, for the purposes of this Act, by Order published in the Gazette, designate

all or any of the Coast Guard Officers of the Department of Coast Guard, raised and maintained in accordance with the provisions of the Department of Coast Guard Act, No. 41 of 2009, as authorised Coast Guard Officers of the Department of Coast Guard.

(2) Within the area specified under subsection (4), an authorised Coast Guard Officer of the Department of Coast Guard shall, in respect of-

(a) any offence under section 46;

(b) any offence under section 51;

(c) any offence under section 124;

(d) any offence under section 126,

(e) any offence under section 136;

(f) any offence under section 137;

(g) any offence under section 138; and

(h) any offence under section 139,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the purpose only of exercising any power conferred upon a Peace Officer by that Act.

(3) The powers and duties conferred and imposed upon authorised Coast Guard Officers of the Department of Coast Guard by this section shall be exercised and discharged notwithstanding that such powers and duties are not conferred or imposed upon them by the provisions of the Department of Coast Guard Act, No. 41 of 2009.

(4) The Minister may, by Order published in the Gazette, specify the area in which the powers and duties under this Act may be exercised

and discharged by the authorised Coast Guard Officers of the Department of Coast Guard.

(5) An authorised Coast Guard Officer of the Department of Coast Guard making an arrest without a warrant shall forthwith-

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the custody of a police officer.

Clauses 7 and 8 deal with the authorisation of members of the Forces and the Coast Guard Officers to exercise certain powers under this Act for the purpose of assisting immigration officers to apprehend offenders under the provisions of this Act. The main difference between these two Clauses is that the former is applicable to Tri-Forces and the latter to Coast Guard Officers.

Learned counsel for the petitioner impugns these Clauses on several grounds. The main allegation is that those provisions are vague and overbroad and therefore violative of Article 12(1) of the Constitution.

Clause 7 is similar to section 7A of the existing Immigration and Emigration Act, which reads as follows:

7A. (1) The President may, for the purposes of this Act, by Order published in the Gazette designate all or any of

(a) the members of the army raised and maintained in accordance with the provisions of the Army Act,

(b) the members of the Sri Lanka Navy raised and maintained in accordance with the provisions of the Navy Act, and

(c) the members of the Sri Lanka Air Force raised and maintained in accordance with the provisions of the Air Force Act, as authorized members of the Forces.

(2) The powers and duties conferred and imposed upon authorized members of the Forces by this section shall be exercised and discharged notwithstanding that such powers and duties are not conferred or imposed upon them by the provisions of the Army Act, the Navy Act, or the Air Force Act.

(3) The Minister may, by Order published in the Gazette, specify the area or areas in which the powers and duties under this Act may be exercised and discharged by authorized members of the Forces.

(4) Within the area specified under subsection (3), an authorized member of the Forces shall, in respect of

(a) any offence under paragraph (a) of subsection (1) of section 45,

(b) any offence under subsection (2) of section 45 so far as it relates to paragraph (a) of subsection (1) of that section, and

(c) any offence under subsection (1) or subsection (2) of section 45A, be deemed to be a peace officer within the meaning of the Code of Criminal Procedure Act for the purpose only of exercising any power conferred upon a peace officer by that Act.

(5) An authorized member of the Forces making an arrest without warrant shall without delay hand the person so arrested to the custody of a police officer.

Coast Guard Officers were introduced by the Department of Coast Guard Act, No. 41 of 2009 to assist, *inter alia*, as stated in section 4(b), "*the Customs and other relevant authorities in combating anti-smuggling and anti-immigration operations*".

Learned counsel for the petitioner submits that phrases such as "all or any", "authorized members of the Forces", "specify the areas", "deemed to be a peace officer", "for the purpose only of exercising any power", "custody of a police officer" found in Clauses 7(1), 7(2), 7(4), 7(5), 8(1), 8(2), 8(4), 8(5), are vague, resulting in an inconsistency with Article 12(1) of the Constitution. Learned counsel further asserts that the Minister has been given unfettered discretion to designate all or any of the Armed Forces and Department of Coast Guard as authorized members of the Forces and Coast Guard Officers to specified areas within which such authorized members are empowered to act which might even be the entire island. He states that this raises the concern of increased militarization of civilian matters.

Learned counsel for the petitioner states that in Clauses 7(2) and 8(2), members of the Tri-Forces and Coast Guard Officers are deemed to be Peace Officers solely for exercising any "power" conferred upon a Peace Officer under the Code of Criminal Procedure Act, without corresponding reference to the "duties" imposed on such Peace Officers under the same Act, such as the use of minimum force and reasonableness.

He points out that different phraseology has been used within the Bill to cover similar situations, in that, in Clauses 7(5) and 8(5), "*hand over the person so arrested to the custody of a police officer*" has been used, whereas in Clause 144(1), "*hand over such person to the nearest police station*" has been used. Section 7A(5) of the existing Immigration and Emigration Act states that "*An authorized member of the Forces making*

an arrest without warrant shall without delay hand the person so arrested to the custody of a police officer."

He also states the word "forthwith" used in Clauses 7(5) and 8(5) is vague and open to (mis)interpretation.

Learned counsel for the petitioner also points out that, when the offences set out in Clauses 7(2) and 8(2) are compared with those of Clause 144(1), offences under sections 47, 142 and 143 have not been included into Clauses 7(2) and 8(2), without any rational basis.

Learned DSG states that the objective of Clauses 7 and 8 is to empower authorized members of the Forces and authorized Coast Guard Officers to make arrests without warrant in respect of specified offences to provide necessary assistance to immigration officers and police officers by enhancing the capacity to enforce the law and deal with offences under the Act. For instance, specified offences such as Human Smuggling into and from Sri Lanka (Clauses 136 and 137) and aggravated Human Smuggling (Clause 137) inevitably fall into the category of transnational crimes due to being committed not only within the Sri Lankan territorial waters but also in the High Seas. These are some of the primary transnational maritime crimes in dire need of penalization and deterrence. Therefore, learned DSG submits that these Clauses supplement the necessary expansion of authority for immigration officers and law enforcement to effectively implement the law.

We wish to note that, the policy of empowering members of the Armed Forces and the Coast Guard to assist immigration officers and police officers, is indeed a reasonable policy and can be recognized as very much in public interest. Given the fact that Sri Lanka is an island nation surrounded by a sea, it would be extremely challenging to call upon only immigration officers and police officers to enforce provisions of the

proposed law. The reliance on the Armed Forces and the Coast Guard is quite reasonable.

Clauses 7(5) and 8(5) include adequate safeguards ensuring that authorized members of the Forces and Coast Guard Officers "forthwith" notify the Controller General of any arrest and hand over the arrested person or persons to the custody of a police officer. Clause 144(2) requires the police to produce such persons before a Magistrate within 24 hours. We must note that, in comparison with the existing provisions, the safeguards have been strengthened through the Bill, not reduced.

However, we agree with learned counsel for the petitioner that due to vagueness in certain aspects, Clauses 7 and 8 are inconsistent with Article 12(1) of the Constitution.

These inconsistencies will cease to exist if amendments are made in the following manner:

In Clause 7(2),

I. to include to the scope of offences listed thereunder, Clauses 47, 142 and 143 and;

II. to include the words "and duties" after the words "any power" mentioned in the Clause so that Clause 7(2) will read as;

Within the area specified under subsection (4), an authorized member of the Forces shall, in respect of-

(a) any offence under section 46;

(b) any offence under section 47;

(c) any offence under section 51;

(d) any offence under section 124;

(e) any offence under section 126;

(f) any offence under section 136;

(g) any offence under section 137;

(h) any offence under section 138,

(i) any offence under section 139;

(j) any offence under section 142; and

(k) any offence under section 143,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the limited purpose of exercising any powers and duties conferred upon a Peace Officer by that Act.

In Clause 7(5),

I. to add the phrase "as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest" after the word "forthwith" mentioned in the Clause and;

II. to substitute the phrase "to the custody of a police officer" mentioned in Clause 7(5)(b) with the words "to the nearest police station to be dealt with in terms of the law", so that Clause 7(5) will read as;

An authorised member of the Forces making an arrest without a warrant shall forthwith as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest-

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the nearest police station to be dealt with in terms of the law.

In Clause 8(2),

I. to include to the scope of offences listed thereunder, Clauses 47, 142 and 143 and;

II. to include the words "and duties" after the words "any powers" mentioned in the Clause, so that Clause 8(2) will read as;

Within the area specified under subsection (4), an authorised Coast Guard Officer of the Department of Coast Guard shall, in respect of-

(a) any offence under section 46;

(b) any offence under section 47;

(c) any offence under section 51;

(d) any offence under section 124;

(e) any offence under section 126;

(f) any offence under section 136;

(g) any offence under section 137;

(h) any offence under section 138,

(i) any offence under section 139;

(j) any offence under section 142; and

(k) any offence under section 143,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the limited purpose of exercising any powers and duties conferred upon a Peace Officer by that Act.

In Clause 8(5),

I. to add the phrase "as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest" after the word "forthwith" mentioned in the Clause and;

II. to substitute the phrase "to the custody of a police officer" with the words "to the nearest police station to be dealt with in terms of the law" in Clause 8(5)(b), so that Clause 8(5) will read as;

An authorised Coast Guard Officer of the Department of Coast Guard making an arrest without a warrant shall forthwith as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest –

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the nearest police station to be dealt with in terms of the law.

Clause 144

Clause 144 reads as follows:

144. (1) Any authorised member of the Forces or any authorised Coast Guard Officer of the Department of Coast Guard may take into custody without a warrant a person who is suspected of committing any offence under section 47, 136, 137, 138, 139, 142 or 143 and shall forthwith hand over such person to the nearest police station.

(2) The officer in charge of the police station shall within twenty-four hours produce such person before a Magistrate having jurisdiction.

(3) The Magistrate may notwithstanding the provision of Code of Criminal Procedure Act, No. 15 of 1979 upon a certificate being filed by a police officer not below the rank of a Superintendent of Police to the effect that it is necessary to detain such person in custody for the purpose of carrying out investigations, order the detention of such person for a further period which shall not exceed forty-eight hours.

This Clause strengthens greater procedural safeguards which were non-existent in the Immigrants and Emigrants Act.

Clause 144(1) requires an authorized member making an arrest without a warrant for the listed offences to hand over the arrested person to the "nearest police station", offering greater protection compared to the current Act, which mandates handing over to the custody of a police officer.

Furthermore, the Bill stipulates that the officer-in-charge of the police station shall adhere to the twenty-four-hour time limit stipulated in the Code of Criminal Procedure Act in producing such person before a Magistrate. This is an essential procedural safeguard afforded to detained persons. In terms of section 48 of the present Act, a person can be detained for a period of two weeks without being produced before a Magistrate.

Learned counsel for the petitioner submits that Clause 144 violates Article 12(1) due to inherent inconsistencies between the marginal note and the substantive provision, as well as inconsistencies between this clause and Clauses 7 and 8.

Learned counsel also submits that Clause 144(2) violates Article 13(2) because the word "nearest" is not in this sub-clause.

Another point raised by learned counsel is the absence of a specific provision requiring persons arrested under Clauses 7 and 8 to be produced before the relevant Magistrates. This argument is based on different terminologies being used in Clause 144 on the one hand and Clauses 7 and 8 on the other. Learned counsel submits that drafting of Clauses 7, 8 and 144 reveals two enabling provisions for making an arrest without a warrant.

Moreover, learned counsel for the petitioner states that the absence of the requirement to notify the Controller General in Clause 144(1) contrasted with the inclusion of it in Clause 7(5) and Clause 8(5) gives rise to inconsistencies in the procedure, which is deemed to be one process by the State.

The inconsistency between Clause 144 and Clauses 7 and 8 has already been dealt with under the previous subheading "Clauses 7 and 8".

Learned DSG points out that Clauses 7 and 8 and Clause 144 constitute one process, not two different processes.

The marginal note denotes that the substantive provision is applicable to non-citizens whereas it does apply to both citizens and non-citizens.

We accept that Clause 144 contains several ambiguous aspects which offend Article 12(1).

There are inconsistencies between Clauses 7(5) and 8(5) on the one hand and Clause 144(1) on the other although learned DSG states that such Clauses deal with one process.

Clauses 7(5)(a) and 8(5)(a) require notifying only the Controller General of the arrest. These provisions do not mandate informing the Controller General of the subsequent steps taken. It is important to understand that these authorized officers are not police officers but members of the Forces

and Coast Guard Officers, who may lack the knowledge of procedure established by law that police officers expected to possess.

Accordingly, we take the view that those inconsistencies can be reconciled and the Article 12(1) violation will cease to exist if,

(a) the marginal note of Clause 144 is amended as "Procedure and powers in relation to the taking into custody of a person without a warrant",

(b) the proposed amendments to Clauses 7 and 8 are effected,

(c) Clause 144(1) is amended by adding at the end the phrase "and notify such handing over also to the Controller General" or words to the similar effect,

(d) in Clause 144(2) the phrase "to whom such suspect is handed over" is inserted after the words "police station",

(e) in Clause 144(2) the phrase "of receiving his custody" is inserted after the words "twenty-four hours",

(f) further, in Clause 144(2) "a Magistrate" is replaced with "the nearest Magistrate", and

(g) in Clause 144(3) the phrase "and upon being satisfied that there exists sufficient material to justify the allegation against the suspect," is inserted after the word "investigations".

Thereafter, the amended Clause 144 will read as follows:

144. (1) Any authorised member of the Forces or any authorised Coast Guard Officer of the Department of Coast Guard may take into custody without a warrant a person who is suspected of committing any offence under section 47, 136, 137, 138, 139, 142 or 143, and

shall forthwith hand over such person to the nearest police station, and notify such handing over also to the Controller General.

(2) The officer in charge of the police station to whom such suspect is handed over shall within twenty-four hours of receiving his custody produce such person before the nearest Magistrate having jurisdiction.

(3) The Magistrate before whom such suspect is produced may, notwithstanding the provision of Code of Criminal Procedure Act No. 15 of 1979, upon a certificate being filed by a police officer not below the rank of a Superintendent of Police to the effect that it is necessary to detain such person in custody for the purpose of carrying out investigations, and upon being satisfied that there exists sufficient material to justify the allegation against the suspect, order the detention of such person for a further period which shall not exceed forty-eight hours.

It is to be noted that learned DSG has stated in the written submission that the marginal note of Clause 144 will be amended as above at the Committee Stage of Parliament.

Clauses 53(c) and 55(4)

Clause 53(c) and Clause 55(4) read as follows:

53. Except in such circumstances as may be prescribed, no departure endorsement shall be granted to any person –

(...)

(c) who is a citizen of Sri Lanka and if such person has not been vaccinated against any disease or fulfilled any requirement under section 56 of this Act; or

(...)

55. (4) No endorsement shall be granted to a citizen of Sri Lanka if such person has not been vaccinated against any disease or fulfilled any other requirement as specified by an Order made under section 56.

Learned counsel for the petitioner submits that the use of the phrase "any disease" is overbroad and lacks reasonable excuses or qualifiers, thereby violating Articles 10 and 11 (degrading treatment).

Clauses 53 and 55 refer to "any requirement under Clause 56". It is further submitted on behalf of the petitioner that Clause 56 is applicable to citizens and non-citizens, and also uses the phrase "any specific disease" as opposed to "any disease" in Clause 53(c) and 55. The counsel for the petitioner also raises concern regarding the use of the word "an emergency", as being overbroad.

The objective of this Act, as per Clause 2, is "*to regulate immigration and emigration in a manner that is consistent with the national interest.*"

It is established that concerns of public health and safety are related to national interest. The fact that a country's national interest directly translates itself into the collective interest of the country's citizens, encompassing the citizenry's health and security is a well-established doctrine of belief, especially during a time consequent to the global turmoil faced by the world due to the Covid-19 pandemic.

As stated in Article 15(7) of the Constitution, the fundamental rights of Articles 12, 13(1), 13(2) and 14 may be restricted, *inter alia*, in the interests of "protection of public health". Further, as per Article 14A(2), the protection of health is one of the basis on which restrictions shall be placed on the right recognized by Article 14A, the right to information as

well. This encapsulates the importance of public health in furtherance of national interests and the obligation of the state to cooperate with other states towards the elimination of infectious diseases. Therefore, the requirement of vaccination against any disease by a person on entry or departure may be necessary, is quite reasonable, and does not become violative of any fundamental right.

Clause 58

Clause 58 reads as follows:

58. (1) A person to whom this Part applies shall –

(a) if required by an immigration officer, at the time of his entry into or departure from Sri Lanka, make a declaration whether he is carrying any written document, or any electronic device; and

(b) if required by an immigration officer, produce such document or electronic device for the examination by that officer.

(2) An immigration officer may –

(a) search any such person and any baggage belonging to him or under his control for any written document or electronic device;

(b) examine any written document or electronic device produced or detected under this section; or

(c) detain such person until the immigration officer finalizes any search or examination of any written document or electronic device.

(3) For the purposes of this section "written document" includes any letter, written message, memoranda, plan, photograph, or any pictorial representation.

This Clause is applicable to both citizens and non-citizens. Learned counsel for the petitioner states that use of the terms such as "any written document", "any electronic device", "detain" etc. without any guidelines is vague which could lead to arbitrary application of such provision, thereby violating Article 12(1). He says this permits immigration officers to search and examine any electronic device having private information without any rational basis.

This Clause is similar to section 19 of the Immigrants and Emigrants Act which reads as follows:

19. A person to whom this Part applies shall, on being required so to do by an authorized officer, at the time of his entry into Sri Lanka, make a declaration as to whether or not he is carrying or conveying any letters, written messages, memoranda or any written or printed matter, including plans, photographs and other pictorial representations, and if so required, shall produce to that officer any such letters, messages, memoranda or written or printed matter, and the officer may search any such person and any baggage belonging to him or under his control with a view to ascertaining whether such person is carrying or conveying any such letters, messages, memoranda or written or printed matter, and may examine and detain, for such time as that officer may think proper for the purposes of such examination, any letters, messages, memoranda or written or printed matter produced to him or found *on such search.*

Since electronic devices are now used *inter alia* to store private information by persons, it appears that granting uncontrolled power to

search, examine and detain people at the time of entry and departure from Sri Lanka can violate Article 12(1).

Learned DSG in the written submission indicates to Court that Clause 58 will be amended to reflect the following changes at the Committee Stage of Parliament.

> *(1) A person to whom this Part applies shall, if required by an immigration officer, at the time of his entry into or departure from Sri Lanka, make a declaration whether he is carrying any written document, or any electronic device.*
>
> *(2) An immigration officer may, where he has reasonable suspicion that any person has committed an offence under this Act or any other Act:*
>
> > *(1) search any such person and any baggage belonging to him or under his control for any written document or electronic device;*
> >
> > *(2) require such person to produce such document or electronic device for the examination by that officer;*
> >
> > *(3) examine any written document or electronic device produced or detected under this section; or*
> >
> > *(4) detain such person until the immigration officer finalizes any search or examination of any written document or electronic device.*

The existing inconsistency in Clause 58 can be avoided if Clause 58 is amended in the above stated manner.

Clause 78

Clause 78 reads as follows:

> *78. Any immigration officer, any police officer not below the rank of a Sub-Inspector of Police authorised by a Superintendent of Police or any prescribed medical officer may enter or board any vessel or aircraft, as the case may be, and detain and examine any person arriving or leaving Sri Lanka and require the production of any document by such person.*

This Clause is similar to Clause 39 of the Immigrants and Emigrants Act which reads as follows:

> *39. Every authorized officer is hereby empowered to enter or board any ship, and to detain and examine any person arriving in or leaving Sri Lanka, and to require the production of any documents by such person.*

This Clause applies to both citizens and non-citizens. Learned counsel for the petitioner argues that when this Clause is read together with Clauses 42 and 43, it violates Articles 12(1) and 14(1)(i) of the Constitution. According to Clause 42, any citizen can enter Sri Lanka without a visa as long as such person can establish his or her citizenship, and according to Clause 43, a citizen may be asked to produce a travel document at the point of entry.

We accept this argument and hold that unless "any document" in Clause 78 is amended in line with Clauses 42 and 43 in respect of citizens, Clause 78 shall be passed by the special majority of Parliament.

Clause 79

Clause 79 reads as follows:

79. For the purposes of any examination or inspection to decide whether a person shall be entitled to enter Sri Lanka under the provisions of this Act, any Order or regulation made thereunder, an immigration officer may direct a person to disembark and enter any place of the relevant approved port for such period as may be reasonably necessary for completing such examination or inspection: Provided that, an immigration officer shall endeavour to conclude such examination or inspection within a period of twenty four hours and decide whether a person shall be entitled to enter Sri Lanka under the provisions of this Act, any Order or regulation made thereunder.

This Clause is similar to section 20 of the Immigrants and Emigrants Act which reads as follows:

20. For the purposes of any examination or inspection under the preceding sections, a person who is directed by an authorized officer to disembark and enter any place on shore, may be detained at any place approved in that behalf by the Minister for such length of time as may be necessary for completing such examination or inspection.

This Clause is also applicable to citizens and non-citizens. When this Clause is read with Clauses 42 and 43, it violates Articles 12(1) and 14(1)(i) of the Constitution since, according to Clause 42, a citizen can enter Sri Lanka without a visa so long as he or she establishes citizenship, and according to Clause 43, a citizen can be asked to produce the travel document at the point of entry. According to Article 14(1)(i) of the Constitution, "the freedom to return to Sri Lanka" is a fundamental right guaranteed to every citizen. Therefore, once citizenship is established to the satisfaction of the immigration officer, along with the travel document, the entitlement to enter Sri Lanka cannot be left to the discretion of the immigration officer.

Unless Clause 79 is amended in line with Clauses 42 and 43 in respect of citizens, Clause 79 shall be passed by the special majority of Parliament.

Clause 81

Clause 81 reads as follows:

> *81. (1) Any person who arrives in Sri Lanka or who is about to depart Sri Lanka shall for the purposes of this Act –*
>
> > *(a) answer all questions and inquiries put to him by an immigration officer or any other officer authorised under this Act fully and truthfully, directly or indirectly, to establish his identity, nationality or occupation or bearing on any of the restrictions contained in this Act; and*
> >
> > *(b) disclose and produce to any such officer referred to in paragraph (a) on demand all documents, articles or things in his possession.*
>
> *(2) All such answers, documents, articles or things shall be admissible in evidence in any proceedings under this Act against the person making, disclosing or producing the same.*
>
> *(3) Nothing in this section shall be construed as rendering any such answer inadmissible in any other proceedings in which they would otherwise be admissible.*
>
> *(4) Any person who –*
>
> > *(a) refuses to answer any question or enquiry put to him under subsection (1);*

(b) knowingly gives any false or misleading answer to any such question or enquiry;

(c) refuses or fails to produce any document or article in his possession when required to do so under subsection (1); or

(d) knowingly produces any false or misleading document, commits an offence.

(5) Any person who commits an offence under subsection (4) –

(a) in the case of an offence under paragraph (a), (b) or (c) of that subsection, shall be liable on conviction, to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding six months or to both such fine and imprisonment; or

(b) in the case of an offence under paragraph (d) of that subsection, shall be liable on conviction to a fine not exceeding five hundred thousand rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.

This Clause applies to both citizens and non-citizens. Clause 81(2) permits answers, documents, articles or things given by any person (whether citizen or non-citizen) to be admissible as evidence in any proceedings under the Act to be passed.

Learned counsel for the petitioner states that such unqualified provision will lead to violate several fundamental principles in law including the doctrine against self-incrimination, Article 13(3) which guarantees fair trial, and sections 24-26 of the Evidence Ordinance which make confessions made under certain circumstances inadmissible. We agree with this submission.

This violation will cease to exist if at the end of Clause 81(2), the words "subject to the provisions of the Constitution and of any law" are added.

Clause 160

Clause 160 reads as follows:

> *160. (1) Classified information may be relied on, in making decisions or determining proceedings under this Act, if the Minister determines that the classified information relates to the matters of security or criminal conduct.*
>
> *(2) Where the provisions of subsection (1) apply, the Minister may authorise the Controller General to rely on the information to make a decision on the –*
>
> > *(a) issuance of visa;*
> >
> > *(b) arrival and departure processing;*
> >
> > *(c) removal and deportation process; and*
> >
> > *(d) supervision of activities of persons who are not citizens of Sri Lanka while in Sri Lanka.*
>
> *(3) Classified information relied on for the purpose of making any decision or determining any proceedings under this Act shall be kept confidential and shall not be disclosed.*
>
> *(4) All such classified information shall be securely recorded and maintained under the custody of the Controller General.*
>
> *(5) (a) For the purposes of this Act, "classified information" means information that the head of a relevant agency certifies in writing as*

being information that cannot be disclosed under the provisions of this Act, except as expressly provided for, because-

(i) the information is information of a kind specified in paragraph (b); and

(ii) disclosure of the information would be a disclosure of a kind specified in paragraph (c).

(b) Information falls within this subsection if it-

(i) might lead to the identification or provide details of the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the relevant agency;

(ii) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the relevant agency; or

(iii) has been provided to the relevant agency by the government of another country, an agency of the government of another country, or an international organisation, and this information that cannot be disclosed by the relevant agency because the government, agency, or organisation from which the information has been provided will not consent to the disclosure.

(c) Disclosure of information falls within this subsection if the disclosure would be likely-

(i) to prejudice the national security or defence of Sri Lanka or the international relations of Sri Lanka;

(ii) to prejudice the entrusting of information to the Government of Sri Lanka on a basis of confidence by the government of another country, an agency of a government of another country, or an international organisation;

(iii) to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, and the right to a fair trial; or

(iv) to endanger the safety of any person.

This Clause applies to both citizens and non-citizens.

Learned counsel for the petitioner submits that while classified information need not be disclosed as a matter of right, the principles of natural justice require provisions for its disclosure to ensure a fair trial; otherwise, it violates Article 13(3) of the Constitution.

This Clause deals with the use of confidential information in making decisions or determining proceedings under this Bill in relation to security and criminal conduct.

It is thus submitted by learned DSG that, given no State would allow the entry of a person into its country who poses a threat to national security or is deemed undesirable due to criminal conduct, this clause aims to authorize border control authorities to rely on confidential information when exercising their powers under this Act.

Learned DSG further asserts that the Clause provides for adequate safeguards against the abuse of the process, including the requirement for the Minister to determine whether the confidential information relates to security or a person's criminal conduct and specifying the purposes for which such information could be used.

Although the petitioner contended that Clause 160(3) violates a person's fundamental rights by not allowing them to know the confidential reasons for decisions regarding their visa, entry, or departure etc., learned DSG submits that non-citizens cannot complain as they are not entitled to a right of entry and are subject to the prerogative of the State in making such decisions.

Learned DSG asserts that in the event the Clause applies to citizens, any citizen aggrieved by a decision would be able to recourse to legal remedies to reverse, remedy or rectify such decision. He further submits that as per the Right to Information Act No, 12 of 2016, information can legitimately be denied when such confidential information relates to either security or a person's criminal conduct.

We are in agreement with the submission of learned DSG and are of the view that there is no basis to conclude that this Clause as presently constituted violates the Constitution.

Clause 142

Clause 142 reads as follows:

> *142. (1) The Minister shall for the purpose of the detention of persons whose detention has been required or authorised under this Act, establish detention centres, in suitable locations appropriate for such purpose by Order published in the Gazette.*
>
> *(2) The conditions to be maintained in a detention centre and the manner of administration of such centres shall be as prescribed.*
>
> *(3) Any person who violates a detention order and escapes the detention centre commits an offence under this Act and shall on apprehension be subject to the general law of the country.*

Learned counsel for the petitioner submits that the term "detention" is used in several places of the Bill with different meanings affecting the rights of both citizens and non-citizens, and the use of the term "violates a detention order" is unspecific, and violates Article 12(1).

We are in agreement with learned counsel that it is not clear in the scheme of the Bill who is empowered to issue specific "detention orders" and under what provision of law such orders can be issued. If any order which requires a person to be detained is to be considered as a detention order, we are of the view that a distinction should be drawn between citizens and non-citizens to avoid unconstitutionality.

Learned DSG in his written submission has informed Court that Clause 142(3) will be replaced with the following at the Committee Stage of Parliament.

> *Clause 142(3). Any person detained in terms of Section 145(2) who escapes or attempts to escape a detention center commits an offence under this Act and shall on apprehension be subject to the general law of the country.*

Persons detained under section 145(2) are non-citizens.

We are of the view that the inconsistency will cease to exist and this Clause shall be passed by simple majority if Clause 142(3) is amended in the above manner.

Clause 143

Clause 143 reads as follows:

> *143. (1) The Minister may for the purpose of the temporary holding of persons whose detention has been required or authorised under this Act, establish holding facilities, in suitable locations appropriate*

for such purpose by Order published in the Gazette inside a seaport or an airport until the detainee is handed over to the relevant agencies.

(2) The standards to be maintained at such holding facilities and the manner of administration of such facilities may be as prescribed.

(3) Any person who escapes a holding facility commits an offence under this Act and shall on apprehension be subject to the general law of the country.

Learned counsel for the petitioner drawing attention of Court to the term "holding facilities" used in Clause 143 and "holding centers" used in the interpretation section 183 states that various terms used throughout the Bill with no explanation or reasons as to their difference lacks clarity and thus violate Article 12(1).

We are unable to agree with this submission. Holding facility means the temporary holding of persons inside a seaport or an airport until the detainee is handed over to the relevant agencies, and holding center means a centre located anywhere other than at an airport or seaport for persons whose detention has been required or authorized under this Act.

Clause 149

Clause 149 reads as follows:

149. (1) A customs officer may seize a travel document if–

(a) a travel document is in the possession or control of any individual or not; and

(b) the travel document is inside a container, and irrespective of whether the container is in the possession or control of any

individual, the customs officer may search the container for the purposes of determining whether such document is inside.

(2) A customs officer may seize a travel document and arrest a person if without the permission of the Controller General under this Act, the said person carries a travel document which has been issued to another person.

(3) The customs officer shall produce the travel document seized and the person arrested under subsections (1) and (2) to the Controller General forthwith.

(4) This section does not authorise a customs officer to enter into any premises that such officer would not otherwise be authorised to enter.

(5) For the purposes of this section - (a) "container" includes baggage, a mail receptacle, and any other thing that could be used for the carriage of goods whether or not designed for that purpose; and (b) "customs officer" means an officer within the meaning of the Customs Ordinance (Chapter 235).

Learned counsel for the petitioner states that there is a difference between the marginal note of this Clause and the substantive Clause. While the marginal note uses "seizure of suspicious travel documents by customs officers", the word "suspicious" is absent in the substantive Clause. This absence allows customs officers to seize any travel document, regardless of suspicion, which is alleged to be violative of Article 12(1).

We see merit in this argument.

However, in the written submission, learned DSG has informed the Court that the following amendment will be made at the Committee Stage of Parliament to Clause 149(1):

> *Clause 149(1): A customs officer may seize a suspicious travel document whether such travel document is in the possession or control of any individual or not.*
>
> *Provided that where such travel document is inside a container, and irrespective of whether the container is in possession or control of any individual, the customs officer may, for the purpose of seizing the same, search the container to determine whether such document is inside.*

The amendment proposed by learned DSG will, in our view, resolve any existing inconsistency in Clause 149(1). This will allow the Clause to be passed by a simple majority of Parliament.

Clause 65

Clause 45, which is the precursor of Clause 65, reads as follows:

> *45. (1) The Minister may, by an Order published in the Gazette, declare any place in Sri Lanka to be an approved port of entry or an approved port of departure (hereinafter referred to as an "approved port") for the purposes of this Act.*
>
> *(2) The Minister may specify in the Order made under subsection (1), that an approved port or any part of an approved port is to be an approved place for entry processing generally, or only for a fixed period or for fixed periods of time in any day.*
>
> *(3) The Minister may specify in the Order made under subsection (1), that an approved port or any part of an approved port is to be an*

approved place for departure processing generally, or only for a fixed period or for fixed periods of time in any day.

(4) The Minister may, in case of an emergency, by Order made under subsection (1), specify that an approved port or any part of an approved port is to be an approved place –

(a) for entry or departure processing or entry and departure processing generally; or

(b) only for the separate and exclusive entry or departure processing of a particular person or class of persons: Provided that, the Minister shall, as soon as practicable and no later than within forty days of making such Order, place such Order before Parliament for approval and notification of such approval by Parliament shall be published in the Gazette. Any such Order which is not so approved shall be deemed to be rescinded from the date of such disapproval, without prejudice to the validity of anything previously done thereunder. Notification of the date on which an Order is deemed to be rescinded shall be published in the Gazette.

(5) Without prejudice to subsection (1), (2), (3) or (4) where a person, or a carrier requests for a separate and exclusive entry or departure processing of a person or a class of persons referred to in subsection (2), (3), or (4) or an entry or departure processing outside normal processing times, the Controller General may, require such person or carrier who makes the request to pay to the Controller General an administration fee at such intervals, and at such amounts or rates, as may be prescribed by the Minister by regulations.

(6) The person or the carrier referred to in subsection (4) shall pay the administrative fees for-

(a) the purpose of separate and exclusive entry or departure processing of a person or class of persons referred to in subsection (4);

(b) the entry or departure processing outside normal processing times; or

(c) in connection with immigration clearance performed by immigration officers at the place or part thereof.

Clause 65 reads as follows:

65. (1) The Minister may, issue a written notice requiring the owner or occupier of any approved port declared under section 45 as the relevant owner or occupier–

(a) to designate an area as an immigration area or zone as directed by the Minister;

(b) to provide and maintain in the immigration area or zone, at the relevant owner's or occupier's cost, such facilities and resources as the Minister considers necessary for the proper, secure and efficient functioning of the immigration area or zone including the provision of such facilities to the immigration officers whose duties require their presence within or at the perimeter of the immigration area or zone; and

(c) to permit the establishment of immigration offices and facilities within the immigration area or zone.

(2) The Minister may issue the relevant owner or occupier with such written directions as may be necessary –

(a) to ensure compliance with the provisions of this Act and the regulations made thereunder; or

(b) for the proper, secure and efficient functioning of the immigration and emigration area or zone.

(3) The relevant owner or occupier shall comply with the written notice or direction issued to him under subsections (1) and (2).

(4) Any relevant owner or occupier who fails to comply with subsection (3), commits an offence and shall be liable on conviction to a fine of not less than five hundred thousand rupees and not more than one million rupees and, in the case of a continuing offence, to a further fine of not exceeding hundred thousand rupees for each day or part thereof, during which the offence continues after conviction.

(5) Where an offence under subsection (4) is committed by a body corporate or a firm as the case may be, any person who is at the time of the commission of the offence, a director, manager, partner or other similar officer of the body corporate or the firm shall be deemed to be guilty of that offence unless such person proves that such offence was committed without his knowledge or connivance or that he exercised all due diligence to prevent the commission of that offence as he ought to have exercised having regard to the nature of his functions and all the circumstances of the case.

(6) In this section, "owner" in relation to any premises or place means any person who has an estate or interest in the premises or place and whose permission is necessary for the other person to enter such premises or place.

Learned counsel for the petitioner submits that maintenance of immigration areas or zones at the relevant owner's or occupier's cost,

places an unreasonable burden on an owner or occupier and is violative of Article 12(1). There is force in this submission. We find no provision in the Bill for private ports. According to Clause 45, approved ports for the purposes of the Act can be declared by the Minister. What is meant by maintaining such approved ports at the relevant owner's or occupier's cost is unclear and unreasonable, thus violative of Article 12(1).

Unless those concerns are properly addressed, we take the view that Clause 65 as presently constituted needs to be passed by the special majority of Parliament.

Clauses 171(1)(o) and 172(2)(h)

These Clauses read as follows:

> *171. (1) Identifying information collected under this Act may be used for the purposes of–*
>
> > *(...)*
> >
> > *(o) any other purpose the use of which is required or authorised by or under any other written law; and*
> >
> > *(...)*
>
> *172. (2) The Minister may specify one or more of the following purposes in the Order made under this section, as the purpose or purposes for which access or disclosure is authorised in accordance with any written law relating to data protection in Sri Lanka:-*
>
> > *(...)*
> >
> > *(h) any other purpose for which the disclosure is required or authorised by any written law;*

(...)

Learned counsel for the petitioner submits that the use of identifying information for "any other purpose" is overly broad and susceptible to abuse, thus violating Article 12(1). We are not inclined to think so. Clause 170(1) specifies that identifying information is collected from non-citizens and individuals suspected or alleged to have committed an offence under the Act. The scope of legislation cannot feasibly encompass every possible contingency.

Clauses impacting non-citizens

Learned counsel for the petitioner drawing the attention of Court to Clauses 21(1)(a),(b),(f),(i),(j),(k), 50(1)(a),(b),(f),(g),(m), 99(1)(a)(i),(ii),(iii) submits that the Controller General of Immigration and the Minister has been given unabridged discretion without any guidelines regarding disqualification for visa, endorsement of entry and deportation, which makes those provisions "unconstitutionally overbroad".

It is relevant to note that similar provisions are found in sections 11(2) and 31 of the Immigrants and Emigrants Act.

Section 11(2) of the Act reads as follows:

> *11. (2) Except in such circumstances as may be prescribed, no endorsement or visa shall be granted or issued to any person who*
>
> > *(a) is, in the opinion of the authority empowered to grant or issue any such document of entry, unable to support himself and his dependants; or*
> >
> > *(b) is a person of unsound mind, or is mentally defective; or*

(c) is certified by a prescribed medical officer to be a person whom, for medical reasons, it is undesirable to admit into Sri Lanka; or

(d) has been sentenced outside Sri Lanka for an extraditable offence within the meaning of any law which was or is in force in Sri Lanka relating to fugitive persons and their extradition; or

(e) is a prostitute or procurer or person living on the prostitution of others; or

(f) fails to fulfill such other requirements as the Minister may impose in the public interest by special or general instructions issued in that behalf; or

(g) is the subject of a deportation order in force under this Act; or

(h) is a stowaway; or

(i) is declared by order of the Minister under section 12 to be a prohibited immigrant or a prohibited visitor.

Section 31 of the Act reads as follows:

31. (1) The Minister may in any of the following cases make an order (in this Act referred to as a deportation order) requiring any person to whom this Part applies to leave Sri Lanka and to remain thereafter out of Sri Lanka;

(a) where that person is shown, by evidence which the Minister may deem sufficient, to be

(i) a person incapable of supporting himself and his dependants;

(ii) a person of unsound mind or a mentally defective person;

(iii) a prostitute, procurer or person living on the prostitution of others;

(iv) (a) a person whom, for medical reasons, it is undesirable to allow to remain in Sri Lanka;

(b) where that person has been convicted in Sri Lanka or in any other country and has not received a free pardon in respect of an offence for which a sentence of imprisonment has been passed and, by reason of the circumstances connected therewith, is deemed by the Minister to be an undesirable person to be allowed to remain in Sri Lanka;

(c) where that person has been sentenced outside Sri Lanka for an extraditable offence within the meaning of any law which was or is in force in Sri Lanka relating to fugitive persons and their extradition;

(d) where the Minister deems it to be conducive to the public interest to make a deportation order against that person.

(2) An order made under this section may be made subject to such terms and conditions as the Minister may think, proper.

(3) A person with respect to whom a deportation order is made shall leave Sri Lanka in accordance with the order, and shall thereafter so long as the order is in force remain out of Sri Lanka.

(4) A person with respect to whom a deportation order is made may be detained in such manner as may be directed by the Minister, and may be placed on a ship about to leave Sri Lanka.

(5) The master of a ship about to call at any port outside Sri Lanka shall, if so required by the Minister or by an authorized officer, receive a person against whom a deportation order has been made and his dependants, if any, on board the ship, and afford that person and his dependants a passage to that port and proper accommodation and maintenance during the passage.

(6) Any powers conferred by an order made by the Minister under this section may be exercised, in relation to any person, notwithstanding that such person is serving a sentence of imprisonment imposed by a court under this Act, or under any other law.

We are mindful of the fact that these Clauses are applicable only to non-citizens. As previously noted, in terms of Article 14(1)(i) of the Constitution, only "*Every citizen is entitled to the freedom to return to Sri Lanka.*" As learned DSG correctly submits, two important matters can be drawn from this expression: one is, citizens have the right only to return to Sri Lanka but they have no right to leave Sri Lanka. In the case of non-citizens, they do not have either. In that light, it is neither unreasonable nor unconstitutional to grant discretion, to be exercised fairly based on the facts and circumstances of each case, to the Controller General of Immigration and the Minister. This discretion allows them to make decisions regarding the entry and stay of non-citizens in Sri Lanka, in the interest of the State and its citizens.

Citizens and non-citizens are placed in different categories. Reasonable classification is not obnoxious to Article 12(1). In respect of non-citizens,

the movement into, out of and within a country is subject to special scrutiny, worldwide. Non-citizens cannot demand these rights as their entitlements. This can be regarded as a special feature of sovereignty. Hence, we do not think those Clauses are unconstitutional by being overbroad.

Clause 145

Clause 145 reads as follows:

> *145. (1) An immigration officer or a police officer may arrest a person who is not a citizen of Sri Lanka, suspected of committing an offence under subsection (1) of section 124 of this Act.*
>
> *(2) Notwithstanding anything to the contrary in any other written law, the Controller General or any police officer not below the rank of an Assistant Superintendent of Police may authorise in writing the detention of a person arrested under subsection (1), in any place established under section 142 or 143, until that person establishes his innocence or an Order is made by the Minister against that person under section 98 or 99:*
>
> *Provided however, if such person remains in detention at the expiry of a period of two weeks from the date from which he was first detained, such person shall be produced forthwith before a Magistrate to make any appropriate order.*

This is not a completely new section to be introduced for the first time. Section 48 of the Immigrants and Emigrants Act reads as follows:

> *Where any person is suspected of the commission of an offence under paragraph (a) of subsection (1) of section 45, it shall be lawful, notwithstanding anything in any other written law, for the Controller or any police officer of a rank not below that of an Assistant*

Superintendent, to authorize in writing the detention of that person in any place of detention approved by the Minister for the purpose of this section, until that person has established his innocence or an order is made against that person by the Minister in terms of section 28(2);

Provided that if such person remains in custody at the expiry of a period of two weeks from the date on which he was first taken into custody, he shall be produced forthwith before a Magistrate who shall make such order as he deems appropriate.

According to Clause 145(1), an immigration officer or a police officer may arrest a person who is not a citizen of Sri Lanka, suspected of committing an offence under subsection (1) of section 124 of this Act. Clause 124(1) deals with unlawful entry or remaining in Sri Lanka by non-citizens. It reads as follows:

124. (1) (a) Any person other than a citizen of Sri Lanka who enters and remains in Sri Lanka in contravention of any provision of this Act or any regulation made thereunder,

commits an offence and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding fifty thousand rupees or to imprisonment of either description not exceeding six months or to both such fine and imprisonment.

(b) Any person other than a citizen of Sri Lanka who enters Sri Lanka in accordance with the provisions of this Act or any regulation made thereunder, but remains in Sri Lanka after the expiry of the period for which he is authorised to remain under the provisions of this Act, commits an offence and be liable to a fine not exceeding fifty thousand rupees or to an imprisonment of either description not exceeding three months or to both such fine and imprisonment.

What is contemplated in Clause 124(1)—i.e., how a non-citizen entered Sri Lanka and how he or she remains in the country—is likely to be within the exclusive knowledge of such non-citizen. Therefore, the burden is on the non-citizen to prove it.

Learned counsel for the petitioner submits that Clause 145 is unconstitutional on several grounds.

Firstly, learned counsel states as follows:

> *Clause 145(1) empowers an immigration officer and a police officer to arrest for an offence under Clause 124(1), and by Clause 145(2) those arrested under Clause 145(1) may also be detained. However, Clause 124(1) is an offence for which authorised members of the Forces and Coast Guard officers, are also empowered to arrest [vide Clause 7(5) & 8(5) read with Clause 7(2) and 8(2)]. Yet, Clause 145(2), which provides an opportunity to prove one's innocence, is denied to a category of non-citizens simply on the basis that they were not arrested by an immigration officer or police officer. Thus, Clause 145(2) is inconsistent with Article 12(1) of the Constitution.*

According to this submission, learned counsel has no objection to the burden of proof being shifted to non-citizens arrested by an immigration officer or police officer. However, his concern lies in the denial of this opportunity to prove innocence when non-citizens are arrested by authorized members of the Tri-Forces and Coast Guard Officers. We think that this argument is artificial but acceptable on principle.

When non-citizens are arrested by authorized members of the Tri-Forces and Coast Guard Officers for an offence under Clause 124(1), pursuant to Clauses 7(5) and 8(5) in conjunction with 7(2) and 8(2), they must promptly hand them over to a police officer (as we now propose, to the nearest police station). It is naive to assume that upon such handover by

authorized members of the Tri-Forces and Coast Guard Officers, the opportunity to explain innocence would be denied to non-citizens. If such an opportunity is denied, then clearly the burden of proof would shift to the police to prove guilt.

To dispel any doubt regarding inconsistency with Article 12(1), we propose that Clause 145(2) explicitly include the requirement of proof of innocence when arrests are made by authorized members of the Tri-Forces and Coast Guard Officers. By doing so, any apparent inconsistency will cease to exist.

The next argument of learned counsel for the petitioner on Clause 145 too is artificial. It reads as follows:

> *"in any place established under section 142 or 143": Clause 145(2) permits for detention up to two (2) weeks at a place under Clause 142 or 143. However a 'holding facility' under Clause 143 is for the 'temporary holding of persons' within a 'seaport or airport' until the detainee is handed over to a relevant agency. We respectfully submit that under these circumstances, permitting the detention of a person under Clause 145(2) who has to prove his innocence and could be detained up to two (2) weeks, at a 'holding facility' (inside an airport or seaport) is unreasonable, overbroad and is thus inconsistent with Articles 12(1) and 13(1) of the Constitution.*

According to this argument, learned counsel has no objection to sending non-citizens straight to a detention centre, but objects to detaining them at a holding facility inside the airport or seaport. However, we find this argument without merit. These alternative arrangements are intended for the benefit of the arrestee. If the arrestee can establish that his or her entry to or stay in Sri Lanka is lawful, he or she is not required to be sent to a detention centre, which is typically meant for longer-term detention.

The final argument of learned counsel on Clause 145 is that requirement for a non-citizen to establish his or her innocence violates Article 13(5), which ensures fair trial. We are unable to agree with this contention because, as previously stated, how a non-citizen enters and remains in Sri Lanka is within the special knowledge of the non-citizen, not the State. Non-citizens have no right of free entry or remainder in Sri Lanka. The concept of shifting the burden of proof of a fact within the exclusive knowledge of the suspect or the accused is not a novel concept to the Sri Lankan Law and has a rational basis. It is to be noted that, the proviso to Article 13(5) of the Constitution provides that the burden of proving particular facts may, by law, be placed on an accused person. Section 106 of the Evidence Ordinance deals with facts which are especially within the knowledge of the accused. It states "*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*" It is impracticable and often impossible to prove the negative.

Learned DSG submits that even internationally, the burden of proof in relation to similar claims have been vested with the person seeking entry or remainder in such country. He quotes 8 USC § 1361 of the United States Code on a similar matter, which reads as follows:

> *Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other*

document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter. In any removal proceeding under part IV of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

Even in the United Kingdom, the burden of proving any status related to citizenship, the right of entry or the right of abode rests on the applicant asserting such a claim. This is statutorily sustained by section 3(8) and section 3(9) of the Immigration Act, 1971, which read as follows:

3. (8) When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is.

(9) A person seeking to enter the United Kingdom and claiming to have the right of abode there shall prove it by means of-

(a) a United Kingdom passport describing him as a British citizen,

(b) a United Kingdom passport describing him as a British subject with the right of abode in the United Kingdom, or

(e) a certificate of entitlement.

This position is reinforced through section 24 of the above Act, which sets out the law relating to illegal entry and similar offences. Section 24(4) and 24(5) reads as follows:

> *24. (4) In proceedings for an offence under subsection (B1) above of entering the United Kingdom without leave,-*
>
> > *(a) any stamp purporting to have been imprinted on a passport or other travel document by an immigration officer on a particular date for the purpose of giving leave shall be presumed to have been duly so imprinted, unless the contrary is proved;*
> >
> > *(b) proof that a person had leave to enter the United Kingdom shall lie on the defence.*
>
> *(5) In proceedings for an offence under subsection (D1) above of arriving in the United Kingdom without a valid entry clearance-*
>
> > *(a) any document attached to a passport or other travel document purporting to have been issued by the Secretary of State for the purposes of providing evidence of entry clearance for a particular period is to be presumed to have been duly so issued unless the contrary is proved;*
> >
> > *(b) proof that a person had a valid entry clearance is to lie on the defence.*

Learned DSG has informed the Court in his written submission that the existing Clause will be amended at the Committee Stage of Parliament in the following manner:

> *Clause 145(1) - An immigration officer or a police officer may arrest a person who is not a citizen of Sri Lanka, suspected of committing*

an offence under subsection (1) of section 124 of this Act and the burden of proving that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder shall lie upon such person.

Clause 145(2) - Notwithstanding anything to the contrary in any other written law, the Controller General or any police officer not below the rank of an Assistant Superintendent of Police may authorize in writing the detention of a person arrested under subjection (1), in any place established under section 142 or 143, until that person proves that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder, or an Order is made by the Minister against that person under section 98 or 99:

Provided however, if such person remains in detention at the expiry of a period of two weeks from the date from which he was first detained, such person shall be produced forthwith before a Magistrate to make any appropriate order.

It is our view that any existing inconsistency with Article 12(1) of the Constitution of this Clause shall cease to exist if Clauses 145(1) and 145(2) are amended to read as follows:

145. (1) An immigration officer or a police officer may arrest a person who is not a citizen of Sri Lanka, suspected of committing an offence under subsection (1) of section 124 of this Act. Upon being questioned by such officer, the burden of proving that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder shall lie upon such person.

(2) Notwithstanding anything to the contrary in any other written law, the Controller General or any police officer not below the rank of an Assistant Superintendent of Police may, upon application being made to him by the immigration officer or police officer who caused the arrest of such person, if he is satisfied that such person has entered Sri Lanka illegally or remains in Sri Lanka contrary to the provisions of this Act, authorize in writing the detention of such person arrested under subjection (1), in any place established under section 142 or 143, until that person proves that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder, or an Order is made by the Minister against that person under section 98 or 99:

Provided however, it shall be the duty of such immigration officer or police officer who caused the arrest to provide facilities as may be reasonably necessary to the arrested person to have access to any documentation to satisfy such immigration officer or police officer that his entry into Sri Lanka and remaining within Sri Lanka is lawful.

Provided further, if such person remains in detention at the expiry of a period of two weeks from the date first detained, such person shall be produced forthwith before a Magistrate, and such Magistrate shall be entitled to make any order as provided by law.

Clause 151(1)(a) and 151(2)

Clause 151(1)(a) and 151(2) read as follows:

151. (1) (a) Any police officer or any authorised member of the Forces not below the rank of corporal or leading seaman or an authorised officer of the Department of Coast Guard, or an immigration officer, may enter and search any vessel not being an aircraft in the

territorial waters of Sri Lanka or in the contiguous zone and arrest and take into custody any person on board such vessel who is suspected of the commission of any offence under section 46, 47, 51, 124, 126, 136, 137, 138 or 139 of this Act.

(...)

(2) Any immigration officer or police officer or any authorised member of the Forces not below the rank of a corporal or leading seaman or an authorised member of the Department of Coast Guard may forthwith seize and detain any vehicle, vessel or other means of transport, together with any equipment and accessories thereof, where any such officer has reasons to believe that any vehicle, vessel or other means of transport has been used in, or in connection with, the commission of any offence referred to in section 46, 47, 51, 124, 126, 136, 137, 138 or 139 of this Act.

Learned counsel for the petitioner argues that empowering certain authorized members of the Forces or Coast Guards under Clauses 151(1)(a) and 151(2) to enter, search, arrest, and seize for offences under Clause 47, despite Clause 47 not being listed under Clauses 7(2) and 8(2), is unreasonable. This is contrary to the scheme of the Bill, which designates these officers as Peace Officers only for offences specified in Clauses 7(2) and 8(2), thus potentially inconsistent with Article 12(1) of the Constitution. We agree with this submission. This inconsistency would be resolved if Clause 47 is included within the list of offences specified under Clauses 7(2) and 8(2).

Summary

(1) Clauses 7 and 8 are inconsistent with Article 12(1) of the Constitution due to vagueness in certain aspects of the Clauses and shall only be passed by the special majority of Parliament.

However, the said inconsistencies shall cease to exist if Clauses 7(2), 7(5), 8(2) and 8(5) are amended to read as follows:

7. (2) Within the area specified under subsection (4), an authorized member of the Forces shall, in respect of-

(a) any offence under section 46;

(b) any offence under section 47;

(c) any offence under section 51;

(d) any offence under section 124;

(e) any offence under section 126;

(f) any offence under section 136;

(g) any offence under section 137;

(h) any offence under section 138,

(i) any offence under section 139;

(j) any offence under section 142; and

(k) any offence under section 143,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the limited purpose of exercising any powers and duties conferred upon a Peace Officer by that Act.

(...)

(5) An authorised member of the Forces making an arrest without a warrant shall forthwith as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest-

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the nearest police station to be dealt with in terms of the law.

8. (2) Within the area specified under subsection (4), an authorised Coast Guard Officer of the Department of Coast Guard shall, in respect of-

(a) any offence under section 46;

(b) any offence under section 47;

(c) any offence under section 51;

(d) any offence under section 124;

(e) any offence under section 126;

(f) any offence under section 136;

(g) any offence under section 137;

(h) any offence under section 138,

(i) any offence under section 139;

(j) any offence under section 142; and

(k) any offence under section 143,

be deemed to be a Peace Officer within the meaning of the Code of Criminal Procedure Act for the limited purpose of exercising any powers and duties conferred upon a Peace Officer by that Act.

(...)

(5) An authorised Coast Guard Officer of the Department of Coast Guard making an arrest without a warrant shall forthwith as may be reasonably possible in the given circumstances and in any case, not later than twenty-four hours from the time of arrest –

(a) notify the arrest to the Controller General; and

(b) hand over the person so arrested, to the nearest police station to be dealt with in terms of the law.

(2) Clause 144 is violative of Article 12(1) and Article 13(2) of the Constitution and shall only be passed by the special majority of Parliament. The aforementioned inconsistencies shall, however, cease if the marginal note of Clause 144 is amended to read as "Procedure and powers in relation to the taking into custody of a person without a warrant", and Clause 144 is further amended to read as follows:

144. (1) Any authorised member of the Forces or any authorised Coast Guard Officer of the Department of Coast Guard may take into custody without a warrant a person who is suspected of committing any offence under section 47, 136, 137, 138, 139, 142 or 143 and shall forthwith notify the arrest to the Controller General and hand over such person to the nearest police station, and notify such handing over also to the Controller General.

(2) The officer in charge of the police station to whom such suspect is handed over shall within twenty-four hours of receiving his custody produce such person before the nearest Magistrate having jurisdiction.

(3) The Magistrate before whom such suspect is produced may, notwithstanding the provision of Code of Criminal Procedure Act No. 15 of 1979, upon a certificate being filed by a police officer not below the rank of a Superintendent of Police to the effect that it is necessary to detain such person in custody for the purpose of carrying out investigations, and upon being satisfied that there exists sufficient material to justify the allegation against the suspect, order the

detention of such person for a further period which shall not exceed forty-eight hours.

(3) Clause 58 is inconsistent with Article 12(1) of the Constitution and therefore shall only be passed by the special majority of Parliament. However, the existing inconsistency shall cease to exist if Clause 58 is amended to read as follows:

58. (1) A person to whom this Part applies shall, if required by an immigration officer, at the time of his entry into or departure from Sri Lanka, make a declaration whether he is carrying any written document, or any electronic device.

(2) An immigration officer may, where he has reasonable suspicion that any person has committed an offence under this Act or any other Act:

(1) search any such person and any baggage belonging to him or under his control for any written document or electronic device;

(2) require such person to produce such document or electronic device for the examination by that officer;

(3) examine any written document or electronic device produced or detected under this section; or

(4) detain such person until the immigration officer finalizes any search or examination of any written document or electronic device.

(4) Clause 78 is inconsistent with Article 12(1) and Article 14(1)(i) of the Constitution and shall only be passed by the special majority of Parliament. The inconsistencies shall cease to exist if the phrase

"any document" in Clause 78 is amended to be in line with Clauses 42 and 43 with respect to citizens.

(5) Clause 79 is inconsistent with Article 12(1) and Article 14(1)(i) of the Constitution, due to its contradiction with Clauses 42 and 43, and shall only be passed by the special majority of Parliament. However, if Clause 79 is amended in line with Clause 42 and 43, such inconsistencies shall cease to exist.

(6) Clause 81 is inconsistent with Article 13(3) of the Constitution and therefore shall only be passed by the special majority of Parliament. However, if an amendment is made to the end of Clause 81 to include the phrase "subject to the provisions of the Constitution and of any law", the said inconsistency shall cease to exist.

(7) Clause 142(3) is inconsistent with Article 12(1) of the Constitution and therefore, requires to be passed by the special majority of Parliament. However, if Clause 142(3) is amended to read as follows, such inconsistency shall cease to exist.

Clause 142(3). Any person detained in terms of Section 145(2) who escapes or attempts to escape a detention center commits an offence under this Act and shall on apprehension be subject to the general law of the country.

(8) Clause 149 is inconsistent with Article 12(1) of the Constitution and thus shall only be passed by the special majority of Parliament. The said inconsistency shall cease to exist if Clause 149(1) is amended to read as follows:

Clause 149(1): A customs officer may seize a suspicious travel document whether or not such travel document is in the possession or control of any individual.

Provided that where such travel document is inside a container, and irrespective of whether the container is in possession or control of any individual, the customs officer may, for the purpose of seizing the same, search the container to determine whether such document is inside.

(9) Clause 65 is inconsistent with Article 12(1) of the Constitution since what is meant by maintaining approved ports at the relevant owner's or occupier's cost is unclear and unreasonable. Unless those concerns are properly addressed, Clause 65 as presently constituted needs to be passed by the special majority of Parliament.

(10) Any existing inconsistency with Article 12(1) of the Constitution of Clause 145 shall cease to exist if Clauses 145(1) and 145(2) are amended to read as follows:

145. (1) An immigration officer or a police officer may arrest a person who is not a citizen of Sri Lanka, suspected of committing an offence under subsection (1) of section 124 of this Act. Upon being questioned by such officer, the burden of proving that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder shall lie upon such person.

(2) Notwithstanding anything to the contrary in any other written law, the Controller General or any police officer not below the rank of an Assistant Superintendent of Police may, upon application being made to him by the immigration officer or police officer who caused the arrest of such person, if he is satisfied that such person has entered Sri Lanka illegally or remains in Sri Lanka contrary to the provisions of this Act, authorize in writing the detention of such

person arrested under subjection (1), in any place established under section 142 or 143, until that person proves that his entry into Sri Lanka or his remaining within Sri Lanka is in accordance with the provisions of this Act or any regulation made thereunder, or an Order is made by the Minister against that person under section 98 or 99:

Provided however, it shall be the duty of such immigration officer or police officer who caused the arrest to provide facilities as may be reasonably necessary to the arrested person to have access to any documentation to satisfy such immigration officer or police officer that his entry into Sri Lanka and remaining within Sri Lanka is lawful.

Provided further, if such person remains in detention at the expiry of a period of two weeks from the date first detained, such person shall be produced forthwith before a Magistrate, and such Magistrate shall be entitled to make any order as provided by law.

(11) Clause 151(1)(a) and Clause 151(2) are inconsistent with Article 12(1) of the Constitution and shall only be passed by the special majority of Parliament. The said inconsistency shall cease, however, if Clause 47 is included in the listed offences under Clause 7(2) and Clause 8(2).

We wish to place on record our deep appreciation for the invaluable assistance provided by Mr. Manohara Jayasinghe, learned Deputy Solicitor General, representing the Hon. Attorney General, and Mr. Pulasthi Hewamanna, learned counsel for the petitioner, in the deliberations on this Bill.

Yasantha Kodagoda, P.C., J.
Judge of the Supreme Court

Achala Wengappuli, J.
Judge of the Supreme Court

Mahinda Samayawardhena, J.
Judge of the Supreme Court