IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 01((f)-5-03/2019(W)

BETWEEN

MARIA CHIN ABDULLAH … APPELLANT

AND

1. KETUA PENGARAH IMIGRESEN

2. MENTERI DALAM NEGERI … RESPONDENTS

SUMMARY OF JUDGMENT

Per Abdul Rahman Sebli, FCJ

[1] The salient facts are these. The appellant was the chairperson of a non-governmental organization (NGO) known as "Bersih 2.0" and was a holder of a valid Malaysian passport. On 15.5.2016, after collecting her boarding pass at the Kuala Lumpur International Airport for a flight to South Korea, she was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country.

[2] No reason was given for the travel ban, before or after the incident. The reason was only disclosed in the first respondent's affidavit filed in response to the present judicial review proceedings commenced by the appellant in the High Court on 28.7.2016. In gist it was deposed to in the affidavit that the appellant was blacklisted from leaving the country for a period of 3 years starting from 6.1.2016. The ban was issued pursuant to a circular titled *'Pekeliling Imigresen Malaysia Terhad Bil. 3 Tahun 2015'*. The ground for the

blacklisting was that the appellant had disparaged the Government of Malaysia ("*Memburukkan Kerajaan Malaysia"*) at different forums and illegal assemblies. The travel was however lifted by the respondents on 17.5.2016, i.e. 2 days after she was stopped at the Kuala Lumpur International Airport.

[3] It is the appellant's case that the inevitable consequence of her travel ban was to interfere with her freedom of speech guaranteed by Article 10(1) of the Federal Constitution, in particular her freedom to speak at an event in South Korea to receive a human rights prize in her capacity as a member of an NGO.

[4] There were three questions posed for our determination and they are as follows:

(1) Whether section 3(2) of the Immigration Act 1959/63 ("the Immigration Act") empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens as criticizing the government?

(2) Whether section 59 of the Immigration Act is valid and constitutional?

(3) Whether section 59A of the Immigration Act is valid and constitutional in the light of ***Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*** [2017] 3 MLJ 561 and ***Indira Gandhi a/p Mutho v***

Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545?

[5] The questions are related one way or another and shall be dealt with together. The answers to questions 1 and 2 hinge on the answer to question 3, which is intrinsically concerned with the constitutional validity of ouster clauses. Given its importance in terms of priority, I shall begin with question 3.

[6] The decisions of this court in ***Semenyih Jaya*** and ***Indira Gandhi*** which the appellant relied on in support of her appeal reaffirmed the principle that judicial power resides in the judiciary under the doctrine of separation of powers and which according to the two cases cannot be abrogated or removed even by constitutional amendment.

[7] Question 3 reflects the underlying basis for this court's *obiter* observations in the two cases - that judicial power had been "removed" by the 1988 amendment to Article 121(1) of the Federal Constitution and that such removal of judicial power impinges on the doctrine of separation of powers and consequently any law passed by Parliament that ousts or circumscribes judicial power is void.

[8] Being a post-Merdeka law, section 59A of the Immigration Act is subject to Article 4(1) of the Federal Constitution, which established constitutional supremacy in Malaysia. The purport of section 59A of the Immigration Act is to limit judicial power and is not a finality clause. What is not amenable to judicial review under

the section is only the substantive decision of the decision maker. Procedural non-compliance is still amenable to judicial review.

[9] The key question for this court's determination in relation to question 3 is whether legal remedy in the form of judicial review can be limited in its scope by an Act of Parliament, in this case by section 59A of the Immigration Act, which limits the legal challenge to procedural non-compliance.

[10] The appellant's contention is that being an ouster clause, section 59A of the Immigration Act is unconstitutional and has "no leg to stand on" in the light of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza v Public Prosecutor and another appeal*** [2019] 5 CLJ 780; [2019] 4 MLJ 1. The common thread among all three cases is "basic structure" of the Federal Constitution.

[11] Section 59A of the Immigration Act had in fact been considered by this court in ***Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*** [2002] 4 CLJ 105; [2002] 3 MLJ 72 where it was decided that the section is valid law and excludes judicial review on the substantive decision of the authority. The case also endorsed the validity of section 59 of the same Act (relevant to leave Question 2) which excludes the right of hearing.

[12] The appellant however submitted that ***Sugumar Balakrishnan*** was wrongly decided and should be overruled as it "files in the face" of ***Semenyih Jaya*** and ***Indira Gandhi***. With due respect, I am unable to agree with the submission and I find no compelling reason to depart from the decision. ***Sugumar***

Balakrishnan is therefore the prevailing law on the validity of sections 59 and 59A of the Immigration Act and not ***Semenyih Jaya***, ***Indira Gandhi*** or ***Alma Nudo***. The observations in these three cases where they touch on the constitutional point raised in the present appeal are at best *obiter dicta* and should not have been given too much emphasis on.

[13] There is no dispute that section 59A of the Immigration Act was enacted pursuant to Article 121(1) of the Federal Constitution. It is important to bear this in mind because the appellant seems to be making the argument that the provision is void not because it is inconsistent with Article 121(1) but because it is inconsistent with some other Articles of the Federal Constitution, namely Articles 5(1) – right to life and personal liberty, 8(1) – equality before the law and Article 10(1) – right to free speech and expression.

[14] With due respect, these Articles have no relevance to the question before the court, which is whether Parliament is vested with power by Article 121(1) of the Federal Constitution to enact section 59A of the Immigration Act. The answer to this question depends on whether Parliament had acted within the framework of Article 121(1) when it enacted the section and not whether the section is void for being inconsistent with Articles 5(1), 8(1) or 10(1).

[15] Article 4(1) of the Federal Constitution is not intended to operate the way the appellant suggests it should operate. The Article is there to safeguard the supremacy of the Federal Constitution by preventing Parliament from enacting any law it pleases and the provision only comes into play where there is

inconsistency between any post-Merdeka law and the Federal Constitution. Article 4(1) has nothing to do with judicial power of the Federation. The judicial power of the Federation is governed by Article 121(1) and not Article 4(1) or any other Article.

[16] It will be a strange working of the law if section 59A of the Immigration Act is to be struck down under Article 4(1) for being inconsistent with Articles 5(1), 8(1) or 10(1) when it is not inconsistent with the Article that gives it the legitimacy and force of law. The appellant's proposition is as good as saying that Article 121(1) has no constitutional force of law and incapable of vesting power in Parliament to enact section 59A of the Immigration Act. The proposition is clearly unsustainable and must be rejected.

[17] It must be appreciated that Article 4(1) only operates as a mechanism to declare any post-Merdeka law void for being inconsistent with any other relevant Article of the Federal Constitution. The second part of Article 4(1) requires it to be read in conjunction with any other relevant Article before it can take effect. It does not operate by itself and on its own.

[18] The expression *"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"* used in Article 121(1) of the Federal Constitution is irresistibly clear and admits of no other interpretation. It means that the jurisdiction and powers of the High Courts and inferior courts may be regulated by way of legislation.

[19] The question to ask in relation to the judicial power of the Federation is what are the terms of Article 121(1) of the Federal Constitution? In ***Liyanage v The Queen*** [1967] 1 AC 259, the Privy Council observed, *inter alia*, that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived but of course no validity should be given to acts which infringe the constitution. Section 59A of the Immigration Act must be read in that light and in that spirit.

[20] Clearly it is a term of Article 121(1) of the Federal Constitution that the jurisdiction and powers of the courts *are "as conferred by or under federal law"*. In the context of the present case, that federal law is section 59A of the Immigration Act. Federal laws has thus determined that the jurisdiction and powers of the High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision maker. The High Courts have no jurisdiction to travel outside the confines of that power.

[21] What is clear is that section 59A of the Immigration Act has expressed with irresistible clearness the intention of Parliament to exclude judicial review on the decision of the Minister, the Director General, and, in the case of Sabah and Sarawak, the State Authority.

[22] In ***R (on the application of Privacy International) v Investigatory Powers Tribunal and others*** [2019] UKSC 22 the Supreme Court of the United Kingdom, which is the apex court,

decided that judicial review can be excluded by clear and explicit words in an Act of Parliament. The case shows that even in a country where Parliament is supreme, as opposed to a country where the constitution is supreme, like Malaysia, judicial review can still be excluded by an Act of Parliament and the court will uphold such law provided the law is drafted in explicit and clear language.

[23] This was also the position taken by this court post-***Sugumar Balakrishnan*** as can be seen in ***Kerajaan Malaysia & Ors v Nasharuddin Nasir*** [2004] 1 CLJ 81 where Steve Shim CJ (Sabah and Sarawak) delivering the judgment of the court said that judicial review which is essentially a creature of common law can be excluded by statutory legislation if the words used are unmistakeably explicit.

[24] One of the canons of constitutional interpretation is that the constitution must be interpreted in the light of its historical and philosophical context. This was acknowledged by ***Indira Gandhi*** but as correctly point out by the learned Senior Federal Counsel, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo*** were decided without the benefit of the historical records during the drafting stage of the Federal Constitution. It is clear that based on the historical context of "judicial power", namely Article 121(1) of the Federal Constitution, it can be surmised as follows:

(1) It was the unmistakeable intention of the Reid Commission that the "basic structure" inherent in the judicial set-up then was that the jurisdiction and powers conferred unto a court

were matters purely within the legislative powers of the Federation;

(2) The conferral of court's jurisdiction and powers by federal law is so entrenched in our constitutional history, so much so that it was accepted as an unquestionable fact by the Reid Commission;

(3) The Reid Commission did not consider this division of powers to be constitutionally offensive or contrary to the doctrine of separation of powers.

[25] It is equally clear that based on the drafting history of the Federal Constitution:

(i) in as much as doctrines such as separation of powers, independence of the judiciary, rule of law, parliamentary democracy and constitutional monarchy formed part of the basic structure of the Malaya Constitution of 1957, one cannot ignore that fact that conferral of court's jurisdiction and powers by federal law is also a cornerstone of the Federal Constitution. In other words, it is also its basic structure.

(ii) the historical antecedent underlying the provision on judicial power in Article 121 is not seriously at variance with the reasoning pronounced by this court in ***Semenyih Jaya*** as on the facts of the present case, there is no removal of judicial power or conferral of judicial power to a non-judicial

branch. In issue is rather the scope for enforcement of fundamental rights, the remedy of which, according to the Reid Commission, should be governed by "ordinary law".

[26] Article 121(1) of the Federal Constitution in its present form provides that the jurisdiction and powers of the High Courts and subordinate courts are *"as may be conferred by or under federal law"*. Before its amendment in 1988, the expression used in the Article was ***"as may be provided by federal law"*** which essentially means the same thing. Federal law means legislation passed by the federal legislature, which is Parliament. In our context it refers to section 59A of the Immigration Act.

[27] The appellant does not deny that section 59A of the Immigration Act was enacted pursuant to Article 121(1) of the Federal Constitution. What she rejects is the notion that Article 121(1) confers on Parliament the power to enact laws that circumscribe judicial power, which according to her violates the doctrine of separation of powers, which in turn violates the doctrine of basic structure as separation of powers is a basic structure of the Federal Constitution. She however stops short of saying that Article 121(1) is unconstitutional, in particular that part of the Article which provides that *"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"*.

[28] In truth therefore, the target of the appellant's attack, using the doctrine of basic structure as a weapon, is Article 121(1) of the Federal Constitution. Section 59A of the Immigration Act is merely

a decoy. It is a collateral attack on Article 121(1) and a clever way of impugning the constitutional provision without actually asking for it to be struck down as unconstitutional.

[29] The position that the appellant takes is wholly untenable. Being a provision that governs judicial power of the Federation, Article 121(1) of the Federal Constitution cannot be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law can override Article 121(1) of the supreme law. The question of the express terms of Article 121(1) being in violation of the doctrines of basic structure and separation of powers does not arise.

[30] The view that ***Semenyih Jaya*** took was that Article 121(1) of the Federal Constitution is "manifestly inconsistent" with Article 4(1). With the greatest of respect, that cannot be correct because all Articles of the Federal Constitution are of equal standing as between themselves and are not subordinate to any other and therefore cannot be inconsistent with one another: See ***Loh Kooi Choon v The Government of Malaysia*** [1975] 1 LNS 90; [1977] 2 MLJ 187 (***Loh Kooi Choon***).

[31] For the purposes of Article 4(1) of the Federal Constitution, a distinction has to be drawn between ordinary laws enacted in the ordinary way and Acts of Parliament that affect the Federal Constitution. It is federal law of the latter category that is meant by "law" in Article 4(1): See ***Mohamed Habibulaah bin Mahmood v Faridah bte Dato Talib*** [1993] 1 CLJ 264; [1992] 2 MLJ 793.

[32] The doctrine of basic structure that ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo*** applied is an Indian concept developed by the Supreme Court of India in ***Kesavananda Bharati v State of Kerala*** AIR 1973 1461; (1973) SCC 225. The doctrine established the principle that the constitution can be amended but not its "basic structure" as Parliament's power to amend is not a power to destroy.

[33] The doctrine however poses a problem in its application to written constitutions such as our Federal Constitution. Under the doctrine, as broadened in ***Manekha Gandhi v Union of India*** 1978 AIR 597, any law passed by Parliament that "offends" the basic structure of the Federal Constitution is void.

[34] The difficulty with the doctrine is that "basic structure" is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is passed by Parliament is rendered void for violating the doctrine of separation of powers, even where the law is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

[35] The basic structure doctrine had in fact been rejected by the former Federal Court in ***Loh Kooi Choon*** when it was first introduced in Malaysia in 1975. The rejection means that Parliament retains the power to amend the Federal Constitution.

[36] The rejection of the basic structure doctrine by ***Loh Kooi Choon*** stood the test of time for some 33 years until it was overruled

by this court through the judgment of Gopal Sri Ram FCJ in ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** [2010] 3 CLJ 507; [2010] 2 MLJ 333. The adoption of the doctrine paved the way for the application of the principle that any law that offends the basic structure of the Federal Constitution is void, even where no amendment is made to the Federal Constitution that destroys its basic structure.

[37] This conflicts with Article 4(1) which provides that post-Merdeka laws are void only if they are inconsistent with the Federal Constitution, in the present case with Article 121(1) which provides that *"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."*

[38] The appellant has not shown how section 59A of the Immigration Act is inconsistent with the express and explicit terms of Article 121(1) of the Federal Constitution, other than to say that it violates the doctrine of separation of powers, which she says is a basic structure of the Federal Constitution.

[39] At the Court of Appeal stage of ***Sugumar Balakrishnan***, Gopal Sri Ram JCA (as he then was) declared judicial review as a "basic and essential feature" of the Federal Constitution. ***Semenyih Jaya*** recognized judicial independence and separation of powers as its basic structures. ***Indira Gandhi*** added other features, namely the rule of law, fundamental liberties and protection of the minority. In the case before us, learned counsel for the appellant suggested freedom of speech, personal liberty, right to travel and natural justice as forming part of the basic structure of the Federal

Constitution. More will no doubt be added to the list. Accepting the appellant's proposition means that the stable doors are now wide open and the horses are ready to bolt out.

[40] Whatever may be added as forming part of the basic structure of the Federal Constitution, there can be no argument that post-Merdeka laws are only to be declared void under Article 4(1) if they are inconsistent with the Federal Constitution and for no other reason. In the present case, the question for the purposes of Article 4(1) is whether section 59A of the Immigration Act is inconsistent with Article 121(1) and not whether it is inconsistent with any doctrine of law no matter how formidable the doctrine of law is.

[41] By relying on ***Sivarasa Rasiah***, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo***, the appellant is suggesting that being in violation of the doctrine of separation of powers, and therefore the doctrine of basic structure, Article 121(1) of the Federal Constitution lacks the force of law to give legitimacy to section 59A of the Immigration Act.

[42] As if the space occupied by Article 121(1) of the Federal Constitution is left in *vacuo*, i.e. saying nothing on the power of Parliament to legislate on the jurisdiction and powers of the courts, the appellant is now reading into the Article a doctrine of law that dilutes to the point of dissipation the Article's constitutional mandate that the High Courts and inferior courts shall have such jurisdiction and powers *"as may be conferred by or under federal law"*. For all practical purposes, it is the doctrine of separation of powers that

now determines the jurisdiction and powers of the High Courts and inferior courts, in place of Article 121(1) of the Federal Constitution.

[43] What the proposition amounts to is to elevate the status of the doctrine of separation of powers above that of the Federal Constitution. This is a dangerous proposition as it practically transforms the doctrine of separation of powers into the supreme law of the land in place of the Federal Constitution, effectively putting an end to constitutional supremacy that this country subscribes to as enshrined in Article 4(1) of the Federal Constitution which declares that "**This Constitution shall be the supreme law of the Federation**".

[44] With all due respect, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo*** had been misconstrued and misapplied by the appellant. There is absolutely nothing in the judgments to say that Article 121(1) of the Federal Constitution has no force of law to confer on Parliament the power to enact ouster clauses such as section 59A of the Immigration Act. On the contrary, ***Semenyih Jaya*** in fact recognized the power of the legislature to enact laws limiting appeals by declaring the finality of a High Court order because to hold otherwise would be contrary to section 68(1)(d) of the Courts of Judicature Act, 1964.

[45] ***Semenyih Jaya*** is authority for the proposition that a non-judicial body cannot bind the superior courts, ***Indira Gandhi*** for the proposition that Syariah Courts are not of equal status to the superior civil courts while ***Alma Nudo*** is authority on the constitutionality of section 37A of the Dangerous Drugs Act 1952.

They are not, first of all, cases on the validity of section 59A of the Immigration Act, an ouster clause that draws its legitimacy and force of law from Article 121(1) of the Federal Constitution and which this court had held to be valid law in ***Sugumar Balakrishnan***.

[46] Even if they are ouster clauses, the impugned statutory provisions in the three cases are not ouster clauses in the mould of section 59A of the Immigration Act. Thus the observations in the cases where they touch on the point raised in the present appeal are at best *obiter dicta* and should not have been given too much emphasis on.

[47] One of the sternest arguments made out by the appellant against section 59A of the Immigration Act is that it undermines the entire jurisprudence on judicial review so assiduously developed by the courts in the entire common law world. It would also mean, according to counsel, that arbitrary executive decisions, no matter how foul they may otherwise be, will be insulated, or immunized from examination by the judiciary, which the facts of the present case provide the clearest example.

[48] It is an attractive argument I must say but one that is not grounded on legal reality. With due respect to Professor Gurdial Singh Nijar, the question of undermining the entire jurisprudence on judicial review does not arise. In as much as the judiciary abhors abuse of power by the executive, it has a higher duty to uphold the Federal Constitution. The whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people)

through section 59A of the Immigration Act, a federal law that derives its legitimacy and force of law from Article 121(1) of the Federal Constitution.

[49] As section 59A of the Immigration Act is valid and constitutional contrary to the contention of the appellant, the decision of the Director General of Immigration to impose the travel ban on the appellant is therefore not subject to judicial review save in the manner prescribed. Only procedural non-compliance is.

[50] The only question left to be considered is whether there was failure by the Director General to comply with the procedure prescribed by the Immigration Act or the rules made thereunder, if any, in imposing the travel ban.

[51] The appellant's argument however went beyond that and beyond the ambit of Question 1 of the leave question, which does not question the discretionary power of the Director General to impose the travel ban under section 3(2) of the Immigration Act. Question 1 merely questions whether such power is unfettered. But at the hearing, the appellant's argument took a completely different turn. It was contended that not only is the Director General bereft of unfettered discretion to impose a travel ban, but that he does not even have the power in the first place to impose the travel ban.

[52] Comparisons were made between the Immigration Act and other statutes that give express power to the Director General to prevent Malaysians from leaving the country to support the appellant's argument that the power under section 3(2) does not

include the power to impose a travel ban. The Passports Act 1966 ("the Passports Act") and the Income Tax Act 1967 ("the Income Tax Act") were cited as examples.

[53] There is no dispute that the Immigration Act does not have any procedure for imposing a travel ban on a citizen. Nor does the Passports Act, which must be read together with the Immigration Act by virtue of section 13 of the Passports Act. Therefore the question of procedural non-compliance by the Director General of the two Acts does not arise.

[54] The Income Tax Act on the other hand does provide for the procedure but non-compliance with the procedure prescribed by the Income Tax Act is not non-compliance with the Immigration Act, unless a request had been made by the Director General of Income Tax under section 104(1). Under section 59A of the Immigration Act, the court is only concerned with procedural non-compliance with the Immigration Act or the rules made thereunder and not with other statutes.

[55] The issue therefore boils down to the question whether the respondents could rely on the general provisions of section 3(2) of the Immigration Act to impose the travel ban on the appellant, in the absence of any specific procedure prescribed by the Immigration Act. In this regard, I am inclined to the view that section 40(1) of the Interpretation Acts 1948 and 1967 gives the Director General of Immigration the implied power to impose the travel ban. He must have such implied power for otherwise how is he to enforce his

powers, duties and responsibilities under the Immigration Act, the Passports Act and the Income Tax Act?

[56] The issue raised in leave Question 1 had in fact been considered and determined by the former Federal Court in ***Government of Malaysia & Ors v Loh Wai Kong*** [1979] 1 LNS 22; [1979] 2 MLJ 33 (***Loh Wai Kong***). One of the questions raised in that case was whether the High Court was wrong in holding that the expression "personal liberty" in Article 5(1) of the Federal Constitution included the right of a person, whether a citizen or non-citizen of Malaysia, to enter or leave the country whenever he desired to do so.

[57] Suffian LP who delivered the judgment of the court answered the question in the negative, meaning to say it is not a matter of right for a citizen to travel overseas. By parity of reasoning, if it is not a right for a citizen to travel overseas, it cannot be a breach of the law for the Director General of Immigration to impose a travel ban on a citizen under section 3(2) of the Immigration Act. Nor would he be acting in excess of his power by imposing a travel ban.

[58] In ***Pua Kim Wee v Ketua Pengarah Imigresen Malaysia & Anor*** [2018] 4 CLJ 54; [2018] 6 MLJ 670 the Court of Appeal held that the broad supervision powers of the Director General under section 3(2) of the Immigration Act encompasses the power to bar a holder of a Malaysian passport from travelling abroad on appropriate ground.

[59] The appellant relied heavily on the decision of this court in ***Lee Kwan Woh v Public Prosecutor*** [2009] 5 CLJ 631; [2009] 5 MLJ 301 (***Lee Kwan Woh***) where Gopal Sri Ram FCJ delivering the judgment of the court interpreted "personal liberty" as including other rights such as the right to travel abroad. However, in ***Sugumar Balakrishnan***, which was a later decision, this court disagreed with the view.

[60] In any case that part of the decision in ***Lee Kwan Woh*** which dealt with the issue of "personal liberty" was made by way of *obiter* as the court was not called upon to determine the issue. ***Lee Kwan Woh*** was a criminal case and the issue for the court's determination was whether the trial judge had violated the appellant's constitutionally guaranteed right to a fair trial by virtue of Article 5(1) of the Federal Constitution and secondly whether the trial judge had failed to judicially appreciate the evidence.

[61] It was only *en passant* that Gopal Sri Ram FCJ touched on the issue of personal liberty. The case is therefore not authority for the proposition that "personal liberty" includes other rights such as the right to travel abroad. That is not the *ratio decidendi* of the case. Therefore the authority on the right to travel abroad is still ***Loh Wai Kong***.

[62] For the reasons proffered by Suffian LP in that case, I will accept, with respect, the exposition by the learned judge as good law notwithstanding the appellant's contention that the decision in that case was made without jurisdiction on the ground that the appeal was filed by the winning party instead of the losing party.

[63] Whatever may be the status of ***Loh Wai Kong*** as precedent, which ***Lee Kwan Woh*** dismissed as "worthless as precedent", the fact remains that the constitutional issue of whether it is a right for a citizen to travel abroad was raised and fully argued by the parties and decided upon by the court. It was therefore a decision that was in direct answer to the question posed for the court's determination. In fact, by arguing that the High Court in the present case had wrongly applied ***Loh Wai Kong***, counsel for the appellant impliedly accepts that the case is good law except that it has no application to the facts and circumstances of the case.

[64] Further, I do not think it is proper for the appellant to bring in the issue of freedom of speech in making the argument that it was her right in law to leave the country. The right to free speech is too remotely related to the question whether she had a right to travel overseas and to the question whether section 59A of the Immigration Act is constitutional.

[65] I venture to think that the better way of resolving constitutional conflicts arising from the enactment of post-Merdeka laws by Parliament is to stick to the dispute resolution process inherent in Article 4(1) of the Federal Constitution rather than to factor in the basic structure doctrine which requires a mere violation of the basic structure doctrine in order to justify the striking down of any post-Merdeka law as being unconstitutional.

[66] Article 4(1) is unique to the Federal Constitution and is not found in the Indian Constitution. That probably is the reason why the

Indian Supreme Court in ***Kesavananda Bharati*** had to come up with an ingenious mechanism in the form of the basic structure doctrine to curtail the power of the Indian Parliament to pass laws that destroy the basic features of the Indian Constitution. In Malaysia, that safeguard is entrenched in Article 4(1) of the Federal Constitution, which makes no distinction between what is basic and what is not basic in the whole structure of the Federal Constitution. As long as the impugned law is inconsistent with the Federal Constitution, it is liable to be struck down as being unconstitutional.

[67] It is my respectful view that the former Federal Court in ***Loh Kooi Choon*** did not commit any error in rejecting the basic structure doctrine propounded in ***Kesavananda Bharati***. More importantly, ***Loh Kooi Choon*** could not have been wrong in deciding that Parliament has power to amend any provision of the Federal Constitution so long as the process of constitutional amendment as laid down in Article 159(3) is followed. To rule otherwise would be, in the words of Raja Azlan Shah FJ, to *"cut very deeply into the very being of Parliament"*.

[68] If we were to accept the appellant's proposition that sections 59 and 59A of the Immigration Act are void and ought to be struck down on the authority of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo***, it would mean all of the following:

(1) The doctrine of separation of powers prevails over the doctrine of constitutional supremacy;

(2) It is the judiciary and not the Federal Constitution that is supreme as the judicial arm of the government can override the constitutional mandate of the Federal Constitution which vests power in Parliament through Article 121(1) to enact sections 59 and 59A of the Immigration Act;

(3) Article 121(1) is unconstitutional for violating the doctrine of separation of powers;

(4) Article 121(1) is void for being inconsistent with Article 4(1) of the Federal Constitution;

(5) Article 159 of the Federal Constitution is redundant and had been formulated in vain by the framers of the Federal Constitution as Parliament is powerless to amend any "basic structure" of the Federal Constitution;

(6) All post-Merdeka laws are void if they violate the doctrine of separation of powers, even if they are not inconsistent with Article 121(1) of the Federal Constitution;

(7) All ouster clauses, with the exception of those enacted pursuant to Article 149 are void, not for violating article 121(1) of the Federal Constitution but for violating the doctrine of separation of powers.

[69] I am unable to accede to such profound proposition of law which has such far reaching implications. We will be heading in the wrong direction of the law if we were to accept the appellant's

argument that the doctrine of separation of powers overrides the written terms of the Federal Constitution, the supreme and highest law in the land.

[70] The doctrine of constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the Federal Constitution. Further, based on the historical antecedent of the Federal Constitution, section 59A of the Immigration Act is not constitutionally objectionable. I therefore reject the appellant's argument that the section is unconstitutional and has "no leg to stand on" in the light of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo***.

[71] In the upshot I hold that sections 59 and 59A of the Immigration Act are not void for being inconsistent with Article 4(1) read with Article 121(1) of the Federal Constitution. The limitation of the court's judicial review power by section 59A of the Immigration Act falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution and is not in breach of the doctrine of separation of powers, which cannot in any case prevail over the written constitution.

[72] For the reasons aforesaid, my answers to Questions 2 and 3 of the leave questions are in the affirmative in that both sections 59 and 59A of the Immigration Act are valid and constitutional. However, on the peculiar facts and circumstances of the case, in particular the reason given by the Director General of Immigration for imposing the travel ban, which turned out to be inappropriate,

Question 1 of the leave questions has to be answered in the negative, that is to say, although the Director General of Immigration has a discretionary power to impose a travel ban, the discretion is not unfettered.

[73] For that reason, and for that reason only, the appeal is allowed in terms of prayer 4 of the Judicial Review application, *viz.* a declaration that the respondents do not have an unfettered discretion in making the impugned decision. There shall be no order as to costs.

[74] My learned sisters, Rohana Yusuf PCA, Hasnah Mohammed Hashim and Mary Lim Thiam Suan FCJJ, who have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

Per Mary Lim Thiam Suan, FCJ

[1] I have read the judgment in draft of my learned brother, Abdul Rahman Sebli FCJ and I agree with the views expressed therein. I have nevertheless decided to add the following.

[2] I start with the strong presumption of constitutionality of sections 59 and 59A of Act 155. In ***Public Prosecutor v Datuk Harun bin Haji Idris & Ors*** Eusoffe Abdoolcader SCJ enunciated and applied this principle – that "***there is a presumption – perhaps even a strong presumption – of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise***".

[3] In my view, the very sequence of the questions posed by learned counsel for the appellant is in itself a recognition of that principle. The maxim *omnia praesumunutur rite et solemniter esse acta* [all things are presumed to have been done rightly] applies to presume that the provisions of law and the acts carried out by the respondents are valid until established otherwise; especially where the legislation or the act complained of is not *ex facie* bad or null.

[4] One of the reasons for this approach is because of the doctrine of the separation of powers and that the Court, as respecter of that doctrine, proceeds on the basis that the legislature, Parliament, often said to have acted or decided in its wisdom, has seen fit to enact such legislation in those precise terms for whatever its reasons and that those reasons have been debated and have passed both Houses of Parliament and the legislation has obtained Royal Assent to become law or part of the law of this great nation. It is, however, entirely the role and within the sole jurisdiction and power of the Courts to give expression to the intention of Parliament as properly discerned from the wordings found in the ouster clause; what exactly is the impact and ambit such clauses – see ***Abdul Razak bin Baharudin & Others v Ketua Polis Negara & Others*** [2005] MLJU 388.

[5] Another reason why this approach is adopted is this - the presence of ouster clauses, finality clauses or even the argument of non-justiciability have never deterred the Court from examining any decision, dispute or complaint that is referred to the Court. Again, the law reports are filled with high authorities on how these 'barriers' have been treated by the Court and that it is really in the narrow

area of policy, especially foreign policy and international relationships, public order and security, internal matters taken by the various State Legislative Assemblies, that the Court may decline intervention. Even then, it would be after the Court has satisfied itself that the subject matter is properly within the jurisdiction of the relevant authority.

[6] The recent decisions of ***Semenyih Jaya***, ***Indira Gandhi*** and ***The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors & Other Appeals v Wong*** [2020] 3 CLJ 757, amply illustrate this point.

[7] I understand ouster clauses such as that presented in section 59A may be similarly found in no less than 100 other pieces of legislation and the effect of striking down such a clause or similar clauses will have far reaching consequences. The Court should be slow in striking down provisions of the law on ground of invalidity; that it should only be done in the clearest of conditions and where the presumption of validity leads to no avail and brings injustice; or in this appeal, if it is established that section 59A is inconsistent with Article 4 and/or any other provision of the Federal Constitution.

[8] It is quite clear from the terms of section 59A that it deals not only with the acts or decisions of the Director General but also those made by the Minister or in the case of Sabah and Sarawak, the relevant State Authority. Further, section 59A deals with matters beyond the right to travel. Hence, any attempt to impugn section 59A must take these serious implications into account.

[9] Section 59A does not seek to prohibit the scrutiny of the Court in absolute terms. It serves to limit that scrutiny, "**except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision**". Where the jurisdiction and power of the Court is interfered with in absolute terms as was the case in ***Semenyih Jaya*** where section 40D of the Land Acquisition Act 1960 reduced the role of the Court to the "sideline and dutifully anoint the assessors' decision", the Court has no hesitation in striking down such provision as offending the doctrine of basic structure as enshrined within Article 4. I will elaborate on this when dealing with the 3rd question. For the same reason, the Federal Court sustained the validity of sections 56 and 57 of the Central Bank of Malaysia Act 2009 in ***JRI Resources Sdn Bhd***.

[10] I must further express my view that the approach taken thus far when confronted by such ouster clauses has, with respect, been somewhat literalistic. The term "procedural requirement" is not defined in Act 155. In my view, that term must include any and all procedure relating to or leading to and governing the impugned decision. The fact that the term 'procedural requirement' is used in relation to what *governs* the act or decision means that it is not a superficial mechanistic exercise but more. It envisages and calls for an examination of the enabling law, what it provides for and whether there has been any non-compliance or excess of the procedure under that enabling law. How can such an exercise be legitimately conducted unless and until the enabling law and its terms properly and validly identified and established. And, in exercising its supervisory jurisdiction as conferred under the

Federal Constitution and the Courts of Judicature Act 1964, the Courts will use judicial jurisprudence and legal reasoning to examine the impugned decision, to find if the process of fair play as set out in prescribed procedures have been complied with. The ***Wednesbury*** principles and the doctrine of proportionality are all examples of how the Courts exercise its powers of scrutiny. The Courts refrain from examining matters of substantive merit, save in the most exceptional cases – see ***R Rama Chandran***; ***Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd***; where the need to do justice must surely prevail.

[11] Operating thus from the first position or regime that section 59A is valid and that judicial review though somewhat circumscribed in the terms prescribed in section 59A, the issue that arises is not so much whether the respondents' power to impose travel bans is unfettered but whether there is any power to impose travel bans at all in the first place. There is no such thing as unfettered power or discretion and any authority, person or body who labours under such serious misconception, must relook at what was said in ***Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*** [1979] 1 MLJ 135, at page 148.

[12] In this first question, the issue thus is whether the respondents, in particular, the 1st respondent/DG, using his powers under section 3(2) of Act 155, can ban the appellant from travelling or departing from Malaysia where the appellant has criticised the government. In this appeal, the appellant asserts that she was only exercising her legitimate right to so criticise the government. A circular issued by the 1st respondent is relied on for the ban.

[13] Having scrutinised the respondents' explanation and the Circular, I find both the explanation and the Circular suffer from several fatal flaws.

[14] Dealing first with the Circular and again operating on the principle of presumption of validity, that the Circular is valid and has force of law, it is quite clear from its own terms that it does not authorise the respondents to blacklist the appellant whether for the reasons proffered or at all. Second, the Circular is invalid.

[15] On the first ground, the Circular deals with how applications for replacement international passports which are lost or damaged are to be managed; and for the period of suspension of issuance of a new international passport to those who have committed criminal offences both within and outside the country which may jeopardise the image of the country. This is evident from the description of the Circular itself and from its paragraph 1.1.

[16] In the case of passports which have been lost or stolen, the passport number will be revoked and blacklisted in the respondents' system so that it will not be wrongly used by others – see paragraph 3.5. Such details will also be forwarded to the police for inclusion in INTERPOL's system. This makes perfect sense and understandably serves to protect the holder of the passport whose passport has been stolen from wrongful use. The appellant's case does not fall under this scenario.

[17] In the second situation where the holder of the passport has committed some criminal offence whether within or outside

Malaysia, following from paragraph 1.1, the issuance of a new passport may be suspended. See paragraph 3.7.2 – "permohonan boleh ditangguh seperti di Lampiran B".

[18] Again, the appellant's case does not fall within this scenario as she was not applying for another new international passport such that a new passport may not be issued to her for the relevant period, depending on the circumstances as set out in Lampiran B. The Circular thus does not apply to the appellant.

[19] Consequently, on the strength of the respondents' own Circular, the impugned decision is clearly invalid and offends its own procedural requirements and an order of certiorari ought to have been granted to quash the said decision.

[20] On the second ground, I am of the firm view that the Circular is in any event invalid. There are several reasons for this conclusion.

[21] In order to answer the question of compliance with the procedural requirements, be it of the principal Act or any Regulations made under the principal Act, the source of the power to issue the Circular must be examined. In this respect, the Circular gives no indication of its source of enabling power; whether it be pursuant to the Immigration Act 1959/63 Act 155 or the Passports Act 1966 [Act 150]. Even if this was a drafting flaw, neither legislation empowers the respondent, in particular the 1st respondent from issuing such circulars having a force of law to have the reaches that it did in the case of the appellant. At best, such

circulars are only administrative and for internal use with no force of law at all.

[22] Although the learned SFC had conceded that the Circular is issued under Act 155, with respect, that concession including the appellant's acceptance, is not determinative. I am of the view that it is incumbent on the Court to carefully examine both Acts 155 and 150 in order to determine first, which is the applicable law; and second, if there is some enabling power to make such circulars.

[23] In my view, the Immigration Act, actually has no application to the present appeal and its reliance is misplaced. To a large extent, this is in fact the primary argument of the appellant was that Act 155 does not provide for or govern the matters claimed by the respondents. In this respect, I agree.

[24] The respondents attempt to argue that the Circular and thereby the ban or blacklisting of the appellant and/or passport was pursuant to the powers set out in section 3(2) of Act 155. This provision states that the DG "shall have the general supervision and direction of all matters relating to immigration throughout Malaysia." In my view, this power of supervision and direction may only be properly exercised in relation to matters already prescribed by Act 155 or by the Regulations made under Act 155. It may also extend to matters under the Passports Act [Act 150] since both pieces of legislation come under the purview of the DG of Immigration and are necessarily related. It cannot be in relation to matters outside Act 155 or Act 150, certainly not on matters governed by other legislation unless of course there are specific powers to that effect under those laws. Such general powers of supervision and

direction even of all matters relating to immigration cannot, by any stretch of imagination, extend to a power, whether implied or express, to ban travel by citizens for reasons which are unrelated to immigration or passports, as we see in this appeal, that is, purportedly for scandalizing or ridiculing the government, a matter which does not come within the purview of the original powers of the DG of Immigration. The affidavit deposed by the DG does not indicate that he acted on the instruction of some other authority; rather it was entirely his decision; seeming to suggest a misconception that he has the power to regulate such behavior or conduct, which he does not.

[25] The scrutiny, however, does not stop there. As I had said at the outset, the correct legislation must be identified; and if after the whole exercise, there is none, then the whole decision is a nullity. The appellant was unable to travel on 15.5.2016 because her document of travel, her valid passport, rightly or wrongly, had been blacklisted. It was not because, nor has it ever been suggested that she was departing Malaysia from an undeclared point of entry/departure.

[26] In my opinion, the proper Act should be the Passport Act [Act 150], an Act "relating to the possession and production of travel documents, by persons entering or leaving, or travelling within, Malaysia, and to provide for matters connected therewith".

[27] I am fortified when the Circular is examined, that it clearly deals with passports, whether replacement or new passports.

[28] Pursuant to section 2(2), every person, including the appellant, "leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport." And, under section 2(3), an immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall the questions truthfully". Under section 2(4), an immigration officer "may make on any passport produced under this section such endorsement as he thinks fit".

[29] Two points arise here. First, while the immigration officer may endorse as he thinks fit, it is not an unfettered discretion. The endorsement or the exercise of the power under section 2 is always open to challenge and scrutiny by the Courts. Second, such endorsements in any case, logically, may only take place at the time of entry or in the case of the appellant, at the time of departure. It would be reasonable and also fair to say that the endorsement may extend to a prohibition of entry or departure or such similar remark. Again, it may only be lawfully endorsed at the time of presentation of passport, and only upon questions put and any answers given.

[30] While the respondents may have entered the appellant's name into its list, it is her passport and its details that are entered so that the respondents may control her movement into and from the country.

[31] But, as volunteered by the respondents, the endorsement or the blacklist was not affected at the time of departure on 15.5.2016 by the relevant immigration officer at KLIA. Instead, it was entered

on 6.1.2016, in clear violation of the terms of section 2 of Act 150. Thus, the endorsement is for this other reason, invalid.

[32] In reviewing the impugned decision under Act 150, it is obvious that the terms of section 2 have not been complied with and the impugned decision is bad in law as well as on the facts.

[33] It then brings me to the point that I had made about the explanation offered by the respondents; that even if the Circular is valid, the respondents, certainly not the 1st respondent, have no power to ban or bar the appellant on the ground that she has criticized the government or that she has committed some offence in that respect unless it is an offence within Act 155 or even Act 150.

[34] This is because the 1st respondent and the immigration officers are not police and do not have police powers under the Police Act 1963. What the 1st respondent and the other immigration officers have by way of police powers is only what is expressly provided to them under Act 155 or even Act 150, or under any other specific law. This is evident from section Part VI of Act 155, in particular section 39 which relates to offences of illegal entry into the country and the unlawful presence in the country and such similar offences. Act 155 does not provide for any offences on disparaging the government; neither does Act 150. I must add, the creation of such an offence must be expressly provided; there is no room for implying the existence of such an offence.

[35] The respondents have no power to cast upon themselves the right or authority to determine what conduct, action or speech of any person including a citizen, would amount to an offence of

disparaging the government. That decision or determination is entrusted by Parliament to the bodies properly authorized under the relevant laws, for example Penal Code or Sedition Act, to act. In this respect, this would generally be the task and responsibility of the police.

[36] In short, the 1st respondent is not a police officer and is in no position to make any determination that the appellant has disparaged the government. That task and duty is given to the police under the Police Act 1963. Hence, the 1st respondent's reasons, once made available to the Court to examine, "voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event" the Court is entitled to examine, evaluate and assess in order to come to a reasonable conclusion [see ***Tan Sri Raja Khalid bin Raja Harun v Minister of Home Affairs*** reveal an unlawful act on the part of the respondents.

[37] When the respondents' role in relation to section 104 of the Income Tax Act 1967 [Act 53] or section 22A of the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 [Act 566] is examined, it will then be appreciated that neither of them, especially the 1st respondent, has any power to ban travel or to even blacklist a person; certainly not for the reasons relied on by the respondents.

[38] Consequently, the respondents' role and responsibility in relation to preventing anyone from leaving Malaysia, is merely facilitative in nature save where it is in relation to offences under Acts 150 or 155 and the control of borders or entry points and use of travel documents including passports are within his purview.

[39] Other laws containing provisions similar to section 104 of Act 53 and section 22A in Act 566 may be found in the following legislations, just to name a few – section 15A in Excise Act 1976; section 17A in Customs Act 1967; section 38A in Insolvency Act 1967; section 74A in Stamp Act 1949; section 27 in Tourism Tax Act 2017; section 27J in Companies Commission of Malaysia Act 2001; section 132 in Securities Commission Malaysia Act 1993; Real Property Gains Tax Act 1976; section 39 in Employees Provident Fund Act 1991; and section 44 in Malaysian Anti-Corruption Commission Act 2009. In each and every one of these legislation, the power to restrain the person from leaving Malaysia is expressly provided to the relevant authority or agency but never to the 1st respondent; and the 1st respondent's role and function is at all times, supportive, facilitative, assisting of that primary authority or agency. The position under Act 155 and Act 150 is no different; more so, when dealing with the offence that the appellant is alleged to have committed.

[40] Consequently, within the procedural ambit of challenge, I find that the respondents have themselves fatally failed to abide by their own procedure and applicable law.

[41] It appears to have been overlooked that Act 150 does not contain any ouster clause, seeming to restrict the Court's power to judicially review the impugned decision. Clearly, this recognizes that the respondents' discretion is not in the least, unfettered. And, as discussed, the impugned decision is necessarily and more properly a decision under the Passports Act and not the Immigration Act, the impugned decision must and ought to have been so

examined by the High Court instead of readily accepting that it is Act 155 that applies. Applying the ***Wednesbury*** principles, the impugned decision is obviously flawed and, if not retracted, should have been quashed. In such circumstances, suitably couched terms for a declaration ought then to have been granted.

[42] Although the blacklisting or endorsement had already been lifted, it is a matter of grave importance to the general citizenry and to the respondents too, that the validity of the impugned decision is still examined.

[43] The first question is thus answered in the negative.

[44] On the second question concerning the validity of section 59, the right to be heard is intrinsic to the whole fabric of the administration of justice where the rule of law demands that there must always be fair play. In the exercise of its supervisory jurisdiction, the Courts too have never been deterred by provisions of law which do not require that reasons for decisions be given, whether it is to enable an appeal to be undertaken [see ***Rohana bte Ariffin & Anor v Universit Sains Malaysia*** or simply for the person affected to know – see the extensive deliberations of the Federal Court on this issue in ***Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan***. What had started off as an exception to the instances when reasons ought to have been given even though there is no statutory requirement to give reasons, has evolved into a norm - that the rules of natural justice require reasons to be provided.

[45] I see no distinction when it comes to the right to be heard, that before a decision is rendered in respect of any matter under consideration, the rules of fair play require that an accused be informed of the complaints against him, that he has an opportunity to explain, if he so wishes, before a decision is taken.

[46] There is no doubt in my mind that the actions or decisions of the respondents, as subordinate bodies statutorily conferred specific powers must come under the supervisory jurisdiction of the Courts; that Parliament could not possibly leave such bodies or authorities free to do as they please; that in making any decision concerning a citizen as to his right to depart the country, that person does not need to be heard. The contrary must be the correct position in law – see ***Ketua Pengarah Kastam v Ho Kwan Seng*** [1977] 2 MLJ 152 where the Federal Court took the view that the rules of natural justice require that "no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative decision, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing".

[47] This is how the Courts have always addressed complaints of violation and breach of natural justice in that the complainants have not been afforded an opportunity to be heard, instead of invalidating the provision. The Courts, in exercising its supervisory jurisdiction, will read down the provision to see how such a provision has impacted, if at all the rights of the complainant. In fact, the presence of provisions providing for an opportunity to be heard before a

decision is pronounced is still not a bar to the Court impeaching that decision on the ground that the opportunity to be heard was not a real, proper or effective hearing and that there has been a breach of natural justice – see ***B Surinder Singh Kanda v The Government of The Federation of Malaya***; ***JP Berthelsen v Director General of Immigration, Malaysia & Ors***; ***Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia***.

[48] Ultimately what is the real meaning and what amounts to an opportunity to be heard depends on the circumstances and nature of each case – see also ***Kerajaan Malaysia & Ors v Tay Chai Huat***.

[49] But what is important here and it appears to have been overlooked is that there is, however, another part to Act 155 which applies to the appellant as a citizen, but which I had not addressed earlier when dealing with the first question as this appeal stands on its own facts and which cautions me against rushing to answer this second question. Here, I am referring to Part VII of Act 155 which contains Special Provisions for East Malaysia from sections 62 to 74.

[50] Section 64 carries its own peculiar interpretation provisions; and at section 65 is a special provision conferring upon the State Authority certain "general powers":

[51] The 'State Authority' is defined in section 62 as meaning "the Chief Minister of the State or such person holding office in the State as the Chief Minister may designate for the purpose by notification in the State Gazette."

[52] Given that section 59 [and for that matter section 59A] has application to Part VII of Act 155 and Act 155 is law that deals with entry of persons into the East Malaysian States for which there are special safeguards for the constitutional position of Sabah and Sarawak as provided in Article 161E(4) of the Federal Constitution, it would be highly improper to find section 59 invalid for the reasons articulated by the appellant; without more and certainly not without having those States heard. The East Malaysian States may well have their justifications and sound reasons for not affording an opportunity to be heard before making its decision under any of the scenarios in section 65. But whether such justifications or reasons will withstand the scrutiny of the Court is entirely an exercise which I am not prepared to embark on; that is wholly speculative and wrong.

[53] As reminded at the outset of these discussions, section 59A impacts on powers of entities other than the 1st respondent and on matters other than the right to travel. The appellant, as I have said, has recognized from the very outset that her right to travel is not absolute, that her right may be curtailed. And, since section 59 has application beyond the factual matrix of the appellant's case which really is one of not falling within Act 155, I find that the second question must be answered in the affirmative.

[54] Moving to the third question I note that this third question is posed in the context of ***Semenyih Jaya*** and ***Indira Gandhi*** instead of identifying the specific provisions of the Federal Constitution which are alleged to have been violated so as to render section 59A

unconstitutional and invalid. From the submissions filed, it would appear that the argument is thus – that section 59A is unconstitutional because it impinges on the judicial power of the Court as enshrined in Article 121 and safeguarded by Article 4.

[55] In my view, there is no reason to doubt the constitutionality of section 59A, even if for one moment Act 155 applies. Section 59A is not couched in absolute or total terms, offending Article 4 of the Federal Constitution or even Article 121, as discussed and understood in the various recent decisions of this Court. Its validity is saved by its own express limitations which the Court has read and applied with much circumspection. The provision does not inhibit the power of the Court to intervene, examine and/or set aside any decision made under Act 155.

[56] If at all the validity of section 59A arises, it is only in this limited and narrow respect and that is, since section 59A only provides for a procedural oversight of the respondents' decisions or actions, can the Court ever exercise its supervisory jurisdiction by judicially reviewing the decision or action on substantive merits, as was done in ***R Rama Chandran v The Industrial Court of Malaysia*** and a host of other cases.

[57] I am of the view that there is no need for me to address this aspect since the impugned decision is invalidated by reason of having failed to meet the procedural requirements as set; even if accepting those requirements are valid to start with. To examine the validity and constitutionality of section 59A for the reasons

articulated by the appellant would amount to an overkill, almost smothering a fly with a sledgehammer. In any case, section 59A is law that Parliament is entitled to enact under the powers of legislation as found in Article 121 of the Federal Constitution; as explained by my learned brother Abdul Rahman Sebli FCJ.

[58] I must add that I do not agree with the submissions of the appellant on giving the term "procedural requirements" in section 59A such a narrow construction. The principles of procedural impropriety or proportionality are legal principles that the Courts and legal counsel employ to examine a decision; to reason why a decision is proper or otherwise. These reasonings and principles can never be abrogated or abolished by a stroke of a pen in any statute without offending the principles of constitutional supremacy for the reasons already discussed in the trilogy of decisions of the Federal Court.

[59] In any case, the appellant accepts that her right to travel is not absolute. From her submissions, it may be readily deduced that the appellant is not asserting that she has an unrestricted absolute right to travel overseas. Before I enter the discourse on the existence of this right, it bears well to remember that there is a distinction between the right to travel overseas and the right to leave one's own country. The right to travel is often dependent on personal inclinations and capabilities, particularly economic and financial. It is the right to leave one's own country that is of greater significance as that is not specifically provided in the Federal Constitution unlike the right to move freely throughout the Federation as provided in Article 9. This is also borne out in the terms of international

conventions that I will turn to shortly. The issue is whether Article 9 of the Federal Constitution implicitly recognizes the right to leave Malaysia, as is the approach in some jurisdictions.

[60] The poser in the first question implicitly accepts that while a person, a citizen, has a right to leave one's own country even under international law, and there are several international conventions dealing with this right; it recognizes that such right is not absolute and that there are restrictions on border controls. Amongst the international conventions are Article 12 of the International Covenant on Civil and Political Rights (ICCPR); and Article 13 of the Universal Declaration of Human Rights:

> **Article 12 [ICCPR]**
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. The abovementioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre* public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Convention.
>
> **Article 13 [UNDHR]**
>
> 1. Everyone has the right to freedom of movement and residence within the borders of each State.
> 2. Everyone has the right to leave any country, including his own, and to return to his country.

[61] There is also a similar convention under the European Union, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[62] Although Malaysia is not a signatory to the ICCPR, it is interesting to note that Article 12 of the ICCPR is, not a non-derogable right in that States are permitted to restrict the right to leave in exceptional circumstances, is actually observed in this country. However, such restrictions must be provided by law. Those restrictions may include requiring documents of travel before the right may be exercised but in so doing, the State is required to make the travel documents available at a reasonable cost and within a reasonable time. The refusal to issue such travel documents and thereby the right to leave is permissible only in exceptional circumstances, must be on clear grounds, proportionate and appropriate under the relevant circumstances.

[63] Interestingly, this right to leave one's own country or this liberty of movement, suggested by the appellant as an "indispensable condition for the free development of a person"; has been viewed with caution – that it is "increasingly seen by developed states as an 'inconvenient' human right" – see paper prepared for the ***Policy Analysis and Research Programme of the Global Commission on International Migration*** by Colin Harvey and Robert P Barnidge Jr, Human Rights Centre at the School of Law, Queen's University Belfast [September 2005] [the Paper]. The Paper suggests that this right or liberty to leave one's own country must further recognize that it does not entail an automatic right to enter any other State; and that restrictions may be imposed on the right to leave [see Article 12(3)]. In fact, the "pressure is exerted on third countries to control the irregular moment of their own citizens"; and that a citizen cannot insist on his right to leave if leaving one's own country was in order to avoid completion of national service

obligations as this restriction is seen as a 'reasonable restriction' – see *Lauri Peltonen v Finland* cited in the Paper. The same may be said where the restriction on the right to leave is justified on the ground that it is "provided by law and necessary for the protection of national security and public order'; that it is to curtail 'suspected terrorist activities – see case of *Mrs Samira Karker, on behalf of her husband, Mr Salah Karker v France* also cited in the Paper.

[64] I have taken the liberty of examining several other jurisdictions on the issue of whether the right to travel is at all a fundamental right, particularly those countries with written constitutions like us.

[65] First, Australia. Section 92 of the Australian Constitution provides:

> On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

[66] In its analysis of this provision, the Australian Law Reform Commission noted that in ***Miller v TCN Channel Nine*** (1986) 161 CLR 556, 581-2, Murphy J opined that "*The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society… They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest*." – see Australian Law Reform

Commission Report in ALRC Report 129 – Traditional Rights and Freedoms – Encroachment by Commonwealth Laws.

[67] This view is however, not shared. In ***Williams v Child Support Registrar*** (2009) 109 ALD 343, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. That same Report recognized that freedom of movement "will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for reasons of public health and safety"; that the limitations must "generally be reasonable, prescribed by law, and demonstrably justified in a free and democratic society"; that limits or restrictions on freedom of movement have long been recognized by both common law and other statutes such as criminal laws, customs and border protection laws, citizenship and passport laws, environmental regulation, child support laws, migration laws, and laws restricting entry to certain areas such as parliamentary precincts, defence areas, or aboriginal lands.

[68] Next, is Chapter Two of the Constitution of South Africa which specifically provides in section 21 that "(1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic." This provision applies to all, and is not confined to its citizens. However, sections 21(3) and (4) go on to provide that "(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic. (4) Every citizen has the right to a passport." This is substantive regulation of the right of persons to leave their territory. However, it must be remembered that section 21 is born out of the deep seated concerns and pains from South

Africa's apartheid history of egregious restrictions and denials on various rights, including the right to freedom of movement and residence – see discussions of the same in ***The Right to Freedom of Movement and Residence*** by Jonathan Klaaren [2nd ed Original Service: 03-07]. The 'pass laws' were said to be a 'defining feature of apartheid' where one of the most hated of apartheid restrictions on the rights of black South Africans resounded in a common refrain in the anti-apartheid struggle that 'black persons had no place to rest'. The writer opines that procedural regulations regarding departure from the country are clearly constitutional within the terms of section 21(2), that these provisions are "usually not intrusive and certainly yields benefits of information to the state in its efforts to promote development and, at least in the case of its nationals, to protect their rights beyond the borders of the territory."

[69] In the case of India, Article 19(1)(d) of the Constitution of India 1949 guarantees all citizens of India the right "to move freely throughout the territory of India" but this right is subject to reasonable restrictions as set out in Article 19(5) which are imposed in the interest of the general public or for the protection of the interest of any Scheduled Tribe. However, in ***Satwant Singh Sawhney v D Ramarathnam, Assistant Passport Officer, New Delhi & Ors*** AIR 1967 SC 1836 where the petitioner had contended that his personal liberty guaranteed under article 21 of the Constitution of India had been infringed when the respondent called upon him to surrender the two passports which had been issued to him for the purposes of his travels abroad, the Supreme Court of India agreed with the petitioner that the right to travel abroad is part and parcel of personal liberty guaranteed under Article 21. ***Satwant***

Singh was considered by the High Court in ***Loh Wai Kong v Government of Malaysia & Ors*** [1978] 2 MLJ 175, where ultimately our Federal Court held that the right to travel abroad was in truth, only a privilege.

[70] In short, the right to leave our shores is not absolute. This right may be curtailed by reasonable means and on reasonable grounds. Those grounds are not met in this appeal and since I have concluded that the respondents do not possess any power or authority whatsoever to police the offence of disparaging the government [no provision of law has actually been identified by the respondents], the respondents cannot bar the appellant from leaving the country. That decision to ban the appellant from leaving is always subject to scrutiny of the Court and section 59A implicitly recognizes that.

[71] Another aspect to section 59A is this – it prescribes the remedy or cause of action that affected persons including citizens may take in the event they wish to challenge any action or decision taken by the respondents under Act 155. It provides what the potential litigant may complain about or how he is to ground his complaints for a judicial review. This is consistent with the right of the appellant, as a citizen to have access to justice and in fact, is entitled to the equal protection of the law.

[72] Now, how the Court is to deal with the complaint when approached for the exercise of its supervisory jurisdiction is not a matter which is spelt out or can be dictated by the terms of section 59A. That power, authority or jurisdiction is provided for in Article

121 read with Article 4 and more specifically, in the Courts of Judicature Act 1964 [Act 91]. It is in those sources that the Court takes its power and jurisdiction, including inherent power; and it is through legal reasoning and jurisprudence that the Court determines whether its powers within its supervisory jurisdiction would be engaged in any particular cause. Legal principles of reasoning such as the rules of natural justice, the *audi alterem partem* rule; the *Wednesbury* principles of procedural impropriety, illegality, irrationality and unreasonableness [see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; and *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374], *mala fides*, abuse of process, are but a few such principles.

[73] In an application for judicial review, the Court exercises its supervisory jurisdiction as opposed to its original and appellate jurisdiction. In the exercise of its supervisory jurisdiction, the merits of the decision are not of primary concern; it is the process or the procedure that is scrutinized. And, in determining whether those processes or procedure have been complied with, the Courts use, amongst others, its powers and tools of principles and reasoning to reach its answer. As alluded to earlier when dealing with the first question, this task is not mechanical, passive or grammarian; it is a heavy responsibility carefully shouldered so that proper direction may be shown so that the same errors are not repeated; and generally for better administration. These tools of reasoning can never be legislated; it would lead to sheer exhaustion.

[74] Consequently, once appreciated in that light, there is nothing unconstitutional or invalid in section 59A, especially in the context and circumstances of the appellant. This question is thus answered in the affirmative.

[75] My learned sister, Rohana Yusuf PCA, my learned brother, Abdul Rahman Sebli FCJ and my learned sister Hasnah Mohammed Hashim FCJ, have read this part of the judgment in draft and they concur with the reasons and conclusions reached.

Signed
ABDUL RAHMAN SEBLI
Federal Court Judge

Signed
MARY LIM THIAM SUAN
Federal Court Judge

Dated: 8 January 2021