IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION) CIVIL APPEAL NO: 01(f)-5-03/2019(W) MARIA CHIN V KETUA PENGARAH IMIGRESEN & MENTERI DALAM NEGERI

SUMMARY OF GROUNDS OF JUDGMENT OF
CHIEF JUSTICE TENGKU MAIMUN BINTI TUAN MAT

[1] In the interest of time, I will not repeat the background facts and the Leave Questions. I will just state the gist of my decision. But before I do that, I wish to state the following:

(i) This appeal emanates from a judicial review application and it has often been said that judicial review is concerned not with the decision but with the decision making process. *Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 has however made it abundantly clear that the courts are permitted to scrutinize not only the process, but the substance in appropriate cases.

(ii) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('*Semenyih Jaya*') concerned a land acquisition matter, in particular the role and power of the assessors but the reasoning or *ratio decidendi* concerned the judicial power under Article 121(1) of the Federal Constitution. *Semenyih Jaya* was applied and followed in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('*Indira Gandhi*') a case which concerned the power of the Registrar of Muallafs in Perak. The specific issue in *Indira Gandhi* was whether the civil court may exercise its power of

judicial review in respect of the decision of the Registrar of Muallafs. *Semenyih Jaya* and *Indira Gandhi* were then applied in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (‘*Alma Nudo*’) a criminal case, where the issue was whether the Court has the power to strike down the provision in the Dangerous Drugs Act 1952 on double presumptions as passed by Parliament.

(iii) *Semenyih Jaya* and *Indira Gandhi* were approved and applied in other criminal cases for example in *Dato’ Sri Najib bin Hj Abdul Razak v PP* [2019] 5 MLJ 44; *PP v Dato’ Sri Najib bin Abdul Razak* [2019] 4 MLJ 421 and *Saminathan a/l Ganesan v PP* [2020] 7 MLJ 681. This Court in *Peguam Negara Malaysia v Chin Chee Kow and another appeal* [2019] 3 MLJ 444 and in *JRI Resources Sdn Bhd v Kuwait Finance House* [2019] 3 MLJ 561 have also applied *Semenyih Jaya* and *Indira Gandh*i. *Peguam Negara v Chin Chee Kow* concerned the power of the Attorney General whereas *JRI Resources* was about the power of the Syariah Advisory Council.

(iv) Why *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* were followed in subsequent cases involving different fact patterns is because of the principle of *ratio decidendi*. *Ratio decidendi* is a legal term of a very elementary status. It relates to the legal reasoning of the courts as opposed to the decision itself. It is the *ratio decidendi* that serves to guide future cases. In that sense, facts do not matter much. What matters is the issue. And the issue before us in the instant appeal indeed relates to judicial power. As such, the *ratio decidendi* in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* are directly relevant and applicable to the present appeal.

(v) Although judicial precedent plays a lesser role in construing the provisions of the FC, there is no reason for this Court, not to adhere to the doctrine of *stare decisis*. It is of supreme importance that people may know with certainty what the law is. Little respect will be paid to our judgments if we were to overthrow today what we have resolved the day before, especially if it concerns our supreme law – the Federal Constitution.

[2] With that as the background, I will now proceed with my decision on the 3 leave questions posed. And for coherence and given the line of argument, I will deal with Question 3 first on the extent and scope of judicial power of the Courts in this country, followed by Question 1, and Question 2 will be addressed last.

Decision

Question 3

[3] Question 3 concerns the issue whether section 59A of Act 155 is unconstitutional. Learned counsel for the appellant asserted that ouster clauses such as the one in section 59A which excludes judicial review are invalid because they are inconsistent with Articles 4(1) and 121 of the Federal Constitution, which provides respectively, for the supremacy of the Federal Constitution and the judicial power of the Federation.

[4] Learned SFC conceded that judicial review is itself a basic feature of the Federal Constitution. Learned SFC nevertheless argued that –

(i) the drafting history of the Federal Constitution suggest that ouster clauses *per se* may not be invalid. This is because it was intended that the remedies available to a litigant in judicial review shall be in the hands of Parliament; and

(ii) in any event, the ouster clause in section 59A still permits challenge 'in regard to any question relating to the compliance with any procedural requirement of the Act' and accordingly, there is no need to determine, on the facts of this case, whether ouster clauses are constitutionally valid.

[5] Section 59A of Act 155 unequivocally excludes not only judicial review in subsection (1) but it also excludes any form of judicial review remedies in subsection (2). It is in this context that its constitutional validity will be addressed.

Constitutional Supremacy – a Historical Analysis

[6] It is beyond dispute that ours is a nation that observes constitutional supremacy. In *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, Suffian LP said at pg 113:

> "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.".

[7] Reading the provisions of Article 4 as a whole and in light of its forms in draft, and leaving aside some restrictions, the entire spirit of Article 4 is

that any law passed by the Legislature (Federal or State), for example, is liable to be struck down if it is inconsistent with the Federal Constitution.

[8] From the analysis of the structure of Article 4 and the Comment of the drafters of the Federal Constitution, it is apparent that the intention was to maintain the Rule of Law.

[9] Any law passed inconsistent with the provisions of Federal Constitution are void. But, it is obvious that the Federal Constitution is not self-executing. It cannot therefore proactively protect itself from breach. The organ of Government tasked with this onerous obligation is the judiciary. The power to do it is loosely described as judicial power and the mechanism by which it is done is called judicial review.

[10] The respondents have no quarrel with the argument that *Semenyih Jaya* and *Indira Gandhi* correctly held that judicial power is a basic structure of the Federal Constitution and that it is reposed singularly in the Superior Courts. What they submit is that the historical documents behind the formulation of the Constitution of Malaya (later Malaysia) was not available to counsel and judges in those cases. They submit that a perusal of these historical records will indicate that Parliament may make law to circumscribe the jurisdiction of the Courts including any relief that may be made available in judicial review. In the words of learned SFC, 'federal law may prescribe what the legislature considers as '*sufficient remedy*' to meet the demand of the circumstances. The very act of prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power.'

The Constitutional Validity of Ouster Clauses

[11] Perhaps the closest case where the validity of ouster clauses was first considered is the judgment of the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 ('*Sugumar – COA*'). There, the Court of Appeal observed that the 1988 amendment to Article 121(1) of the FC had no effect of removing judicial power from the Courts. Thus, Parliament's attempt to immunise itself from judicial review was an incursion into judicial power which simply cannot be done and hence an exercise in futility.

[12] The Court of Appeal was reversed on appeal to this Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('*Sugumar – FC'*). This Court held, in essence, that Parliament having declared that there should be no judicial review save on any procedural non-compliance with the Act, means exactly what it says.

[13] Learned counsel for the appellant argued that there have been numerous subsequent pronouncements by this Court in various cases which have either watered down or departed entirely from the *ratio* in *Sugumar – FC*. With respect, and for convenience, some of the cases cited by learned counsel, did so in *obiter*. It is sufficient to say that upon the pronouncements of the Federal Court in *Semenyih Jaya* (supra) and *Indira Gandhi* (supra), the decision in *Sugumar – FC* is no longer authority for the proposition it seems to make.

[14] It follows that the appellant has crossed the threshold set by the presumption of constitutionality in proving that section 59A is

unconstitutional and it is hereby struck down under Article 4(1) of the Federal Constitution.

[15] In the premises, Question 3 is answered in the negative.

[16] The above answer to Question 3 does not in any way suggest that the Courts are now supreme. As the guardian of the Federal Constitution, the Judiciary must forever remain mindful that there are certain matters in which it cannot trespass. The larger point to be made is that the Judiciary too must observe the doctrine of separation of powers.

[17] An important area which remains non-justiciable is matters which are derived from national security issues involving a high degree of secrecy. A strong authority for this is the decision of the House of Lords in the well-known case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('*CCSU*'). The *ratio decidendi* extracted from *CCSU* is that on the facts of certain cases, the Judiciary cannot tread into certain matters as they may fall within the prerogative of the executive. In the larger context, the reason for this self-imposed judicial exclusion is that the Judiciary is simply not armed with the expertise or the information to deal with those matters such as national security. For example, judges are not privy to intelligence reports and secret police investigations. Although ouster clauses were not in issue before their Lordships in *CCSU*, the lesson learned from that case is that the Judiciary has an inherent obligation to understand what it can and cannot adjudicate upon, given the inherent constitutional limits of the institution.

[18] Accordingly, given that the Federal Constitution is supreme and how this is translated through judicial power, and in light of the right of access

to justice, the rule can be summarised thus. All persons are equally entitled to approach the Courts for a ruling as to their rights and liabilities. The Courts are in turn constitutionally required to examine the claim on face value as they did in *CCSU*. However, whether the litigant is definitively entitled to the remedy sought is another matter entirely and it remains for the Courts to decide on the facts and circumstances of each case whether the subject matter is justiciable.

Question 1

[19] Question 1 concerns the validity of the travel ban imposed on the appellant and it rests on the following three related sub-questions:

(i) whether the travel ban, on the facts, was lawfully imposed under the Circular;

(ii) next, apart from the Circular, whether the law generally allowed the respondents to impose the travel ban; and

(iii) finally, even if the law allowed imposition of the travel ban, whether the travel ban was nonetheless pursuant to valid law.

The Circular

[20] Item 3 of the Circular grants the 1st respondent the power to suspend a passport for a period of three years against any person who 'memburukkan kerajaan Malaysia / negara dalam apa bentuk atau cara sekalipun'. However, on the facts, the respondents do not make the case that what they did was to suspend the appellant's passport. Instead, they

accept that what they did was to 'blacklist' her to restrict her travel despite the appellant having a valid passport.

[21] Even though the Circular does not spell out under which written law it was passed, learned SFC conceded during argument that the Circular was made purportedly under the authority of the Immigration Acts 1959/63 [Act 155].

[22] I have perused the Circular and I cannot find anything in the document suggesting, even remotely, that the respondents have the power to 'blacklist' a person holding a valid passport apart from the specific factual situation in which they lose their passport.

[23] It is unclear under what written law the Circular purports to exist. Even if we assume for a moment that the Circular has some force of law (which is doubtful), there is nothing in it to suggest that the respondents may impose a travel ban on the appellant on the reasons that were advanced in this case. Accordingly, I cannot conclude that the travel ban was valid if all the respondents had is the Circular.

[24] Flowing from the above, the real question is whether the respondents have the authority to impose a travel ban either under Act 155 or the Passports Act 1966 [Act 150] on a person who holds a valid passport. The respondents claim they have the power to impose travel bans under the purport of sections 3(2) and 4 of Act 155. Section 3(2) states that the Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia while section 4 essentially provides that the Minister may from time to time give

the Director General directions of a general character not inconsistent with the Act and that the Director General shall give effect to all such directions.

[25] Question 1 asks whether the power conferred on the 1st respondent under section 3(2), and by extension any directions made under section 4 are unfettered. With respect, the question, if read literally, is a non-starter and leads to an obvious answer. In light of the doctrine of supremacy of the Federal Constitution, constitutionalism and the Rule of Law, unfettered power is a contradiction in terms because every legal power must have its legal limits (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, at page 148 ('*Sri Lempah*')). So, that cannot be the real question that Question 1 seeks to ask and address. And to be fair, that is not the extent to which it was argued.

The Federal Court's decision in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 and the Right to Travel

[26] In this context, the appellant's argument is that firstly, the right to travel abroad is a fundamental right. Secondly, and accordingly, the right cannot be stripped away 'save in accordance with law'. Here, the argument is that Act 155 does not by clear language authorise the respondents to impose travel ban. There is thus, according to the appellant, effectively no law allowing the respondents to impose the travel ban. I therefore need to address the question from this context that is, whether the right to travel abroad is a fundamental right and secondly, whether the respondents had the legal power to curtail it.

[27] As stated earlier, the learned High Court judge relied on the authority of *Loh Wai Kong-FC*, to hold that the Government may restrict the right to travel abroad. It is perhaps appropriate to discuss the decision of Gunn Chit Tuan J (as he then was) in *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175 ('*Loh Wai Kong-HC*') and its fate on appeal before the Federal Court.

[28] In *Loh Wai Kong*, the applicant, a Malaysian citizen held a Malaysian passport and was granted a resident visa which entitled him to reside permanently in Australia. He returned to Malaysia from Australia to take up employment and upon his return, the Australian authorities indorsed his passport with 'Authority to Return to Australia'. Eventually, he was charged with two separate offences; one at the Sessions Court and the other at the Magistrate's Court. His passport was impounded at the Magistrate's Court but was eventually returned to him when he was placed on bail. The applicant's passport expired and he sought to renew it so that he could have his new passport stamped by the Australian immigration authorities with the same phrase 'Authority to Return to Australia'. At the Immigration Department, he was informed that his name was blacklisted by virtue of the charges levied against him and that his request to renew his passport was accordingly denied.

[29] Gunn J observed, on the authority of the majority judgment of the Indian Supreme Court in *Satwant Singh Sawhney v. Ramarthnam, Assistant Passport Officer, New Delhi & Ors* AIR 1967 SC 1836 ('*Satwant Singh'*) that the right to travel abroad is a fundamental right guaranteed by Article 21 of the Indian Constitution (the equivalent of our Article 5).

[30] The learned Judge however held that on the facts, the applicant was not entitled to the relief he sought because he had not complied with the requirements of the provisos to section 44 of the Specific Relief Act 1950.

[31] Despite winning in the High Court, the Government appealed to the Federal Court culminating in *Loh Wai Kong – FC* (supra). The Federal Court purported to 'allow' the appeal on the observation that the right to travel abroad is not a right contained in Article 5(1). In Suffian LP's words, travelling abroad is a privilege and not a right.

[32] There are several observations to be made about the judgment of the Federal Court in *Loh Wai Kong*. The first observation is that the principle purportedly expounded in the case, and as relied on by the respondents, is entirely irrelevant to the facts of the instant appeal. The issue in that case concerned the Government's refusal to renew a passport and not the imposition of a travel ban on a citizen who already possesses a valid and fully functional passport.

[33] The second observation is this. The principle is trite that a party may only appeal against the judgment of the Court and not the 'reasons for the judgment of the Court'. In other words, what may be appealed against is the decision and not any 'statement' or 'finding' of the written judgment. A party which has won cannot therefore appeal against a decision which was given wholly in his or her favour (see the case of *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145). The appeal by the Government in *Loh Wai Kong – FC* was thus incompetent and the findings of the Federal Court in that case were therefore made without jurisdiction. The holding that the right to travel abroad is a privilege and not a fundamental right is not therefore a binding precedent.

[34] It must then also follow that the reliance by the learned judge of the High Court on *Loh Wai Kong – FC* was, with respect, similarly misplaced. On this basis alone, the judgment of the High Court is liable to be set aside.

Whether the Right to Travel Abroad is a Fundamental Right

[35] Now, even if we were to apply *Loh Wai Kong – FC* (supra), it is my view that the overall development of constitutional jurisprudence in this country has significantly watered down the effect of the views of the former Federal Court in that case.

[36] The former Federal Court afforded Article 5(1) a narrow construction. With respect, the narrow construction can no longer withstand the powerful force of the river current that represents our present day constitutional law and theory.

[37] Does the right to travel therefore fit under the umbrella of 'life' and personal liberty? This is accordingly the prime question upon which Question 1 rests. To understand the significance of this, it is necessary to appreciate two pronouncements of the Indian Supreme Court in *Satwant Singh* (supra), and in *Maneka Gandhi v Union of India* (1978) 1 SCC 248 ('*Maneka Gandhi*').

[38] The decision in *Satwant Singh* was split three to two with the majority holding that the Government's discretion to withdraw passports impinged on an individual's right to personal liberty, was unlawful and that it also violated Article 14 of the Indian Constitution (our Article 8(1)) as the

discretion, not being governed by any law, was 'unchannelled and arbitrary'. The remedy of mandamus was therefore granted.

[39] In *Maneka Gandhi* (supra), the leading judgment of the case is that of Bhagwati J who observed that the right to travel abroad is contained in the general right of personal liberty protected by Article 21. His Lordship, as did the rest of the panel in the seven-member Bench, endorsed the majority view in *Satwant Singh* (supra).

[40] It is true that our Constitution must be interpreted in its own right and context given that it was drafted in circumstances unique to our political and legal history. But when it comes to fundamental liberties, apart from where the language or context of the black letter is itself inconsistent with such pervasive norms, I see no basis to deviate from something which is common ground. It will be recalled that our Federal Constitution, especially Part II, was drafted upon inspiration from our American and Indian counterparts.

[41] Grounded on high authority, I am therefore of the view that 'personal liberty' in Article 5(1), read prismatically and purposively, encompasses the right to travel abroad. I am persuaded to accept this for the reason that a Constitution is a living and organic document.

[42] Having held that the right to travel abroad is a fundamental right guaranteed to all persons under Article 5(1) of the Federal Constitution, it is obvious on the facts that the appellant's right has been breached.

<u>Legality of the Travel Ban</u>

[43] It was the respondents' submission that sections 3(2) and 4 of Act 155 confer on them the power to impose the travel ban. The section itself only envisions 'general supervision'. Section 4 similarly only allows the 1st respondent the power to issue directions of a 'general character'. There is nothing specific enough in the two sections which suggest firstly, how and when the respondents may restrict the fundamental right of a person to travel abroad. So, on a literal construction, sections 3(2) and 4 of Act 155 are no answer to the travel ban.

[44] Learned counsel for the appellant submitted that the power to impose a travel ban on international travel is similarly absent in the provisions of Act 150. Learned counsel for the appellant then proceeded to refer us to section 104 of the Income Tax Act 1967 which in the circumstances enumerated in that section, allows the 1st respondent to essentially impose a travel ban.

[45] After addressing us on the above provisions, learned counsel referred us to various authorities for the proposition that fundamental liberties cannot be curtailed unless upon the clear and express dictate of Parliament. It is sufficient to state just one of those authorities being the recent judgment of this Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141, which concluded that 'fundamental rights may only be disregarded if clear and express words of the legislature permit such abrogation'.

[46] I agree with learned counsel for the appellant that the travel ban is unlawful. There is no positive provision of law, setting out clearly and unequivocally that the respondents have the right to impose the travel ban

on the appellant. And, for reasons stated earlier, the Circular is certainly no such authority.

[47] For the foregoing reasons, I conclude that there is no law in place to allow the respondents to impose the travel ban.

[48] In the premises, Question 1 is answered in the negative.

Question 2

[49] In posing Question 2, the appellant seeks to argue that section 59 of Act 155 which excludes the right to be heard, is unconstitutional.

[50] The issue here is, if even if there is a law that validly restricts the right to travel, whether the said law can go to the extent of removing natural justice from the equation.

[51] Section 59 of Act 155 unequivocally excludes natural justice and hence purports to exclude procedural fairness guaranteed by Articles 5(1) and 8(1) of the FC. Without going through the detailed analysis set out in my grounds of judgment, it is my determination that the appellant has overcome the presumption of constitutionality. Section 59 is unconstitutional and it is hereby struck down.

[52] Question 2 is thus answered in the negative.

[53] Before leaving Question 2, I wish to explain why the respondents' answer in respect of Question 2 cannot be accepted. They argued that in appropriate cases, Parliament may by law exclude natural justice where

such intention is expressed with 'irresistible clearness'. They find support for this in the judgment of this Court in *Sugumar Balakrishnan – FC*.

[54] In respect of section 59 of Act 155, I give the same answer I gave earlier in respect of section 59A, that is, that *Sugumar Balakrishnan – FC* is no longer an authority for the proposition it makes in light of the two subsequent decisions of this Court in *Semenyih Jaya* (supra) and *Indira Gandhi* (supra).

[55] Learned SFC submitted that 'section 59 of Act 155 has expressed with irresistible clearness the intention of Parliament to exclude the right to be heard.' For reasons stated in the grounds of judgment, this 'irresistibly clear' exclusion is incongruous with our 'system of law' which constitutionally establishes procedural fairness. The presumption of constitutionality is accordingly rebutted and section 59 stands unconstitutional.

Remedies/The Appropriate Order

[56] I am minded to grant the reliefs prayed for by the appellant subject to certain modifications to suit the views that I have expressed in this judgment. The orders that I grant are as per prayers (2), (3), (4), (5), (6) and (7) of the appellant's application for judicial review. For clarity, prayer (2) is allowed without any reference to Article 10(1)(a) of the Federal Constitution.

'Constitutional Monetary Compensation'

[57] The above would have been sufficient to effectively dispose of this appeal. However, learned counsel for the appellant further argued that this Court should be minded to grant the appellant 'constitutional monetary compensation'.

[58] While I accept learned counsel's submission that the remedy of 'constitutional monetary compensation' fits the bill of 'all necessary and consequential relief, directions and orders that this Court think just' as prayed for by the appellant, the facts of this case do not justify the grant of such a remedy, as in my view, the remedies already granted meet the ends of justice.

Conclusion

[59] Based on the foregoing, the appeal is therefore allowed and the orders of the High Court and the Court of Appeal are hereby set aside. The remedies aforementioned are hereby granted. As is standard judicial practice in cases concerning public interest, there shall be no order as to costs. My learned sister Nallini Pathmanathan FCJ and my learned brother Harmindar Singh Dhaliwal FCJ have read this judgment in draft and have expressed their agreement with it.

Dated: 8 January 2021

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia

Note: This summary is merely to assist in the understanding the final grounds of judgment. The final grounds of judgment are the authoritative text.