8TH JANUARY 2021

PRESS SUMMARY FOR THE DISSENTING JUDGMENT OF NALLINI PATHMANATHAN FCJ
INTHE FEDERAL COURT OF MALAYSIA CIVIL APPEAL NO: 01(f)-5-03/2019(W)
MARIA CHIN ABDULLAH v KETUA PENGARAH IMIGRESEN & ANOR

PRESS SUMMARY

1. This appeal concerns questions relating to basic fundamental liberties. I am entirely in agreement with the judgment of the Honourable the Chief Justice Tengku binti Tuan Mat. Therefore, my decision forms part of the dissent against the majority judgment on the questions of law although we are all in agreement with the outcome of the appeal.

2. The net effect of the judgment of the majority of this Court is that:

   (i) In this day and age, namely the 21st century, the right to travel outside of Malaysia is not a fundamental liberty under Art 5(1) of the Federal Constitution, even if you have a valid passport – it is only a privilege;

   (ii) A person can be prohibited from travelling outside of Malaysia by the Director-General of Immigration by a law which is merely procedurally correct, without regard to its constitutional validity;

   (iii) A decision to prohibit any person from travelling outside of Malaysia is imposed at the discretion of the Executive;

   (iv) That decision of the Executive to prohibit or ban the citizen from travelling outside of Malaysia cannot be judicially scrutinized or reviewed by the superior Courts;

   (v) The law on which the decision was based is also immune from judicial scrutiny as to its constitutionality, because Parliament is entitled to legislate as it thinks fit;

   (vi) When any person is prohibited from travelling, he cannot object or be heard on the issue of why the decision to prohibit him from travelling outside of Malaysia is wrong, or why he ought not to be prohibited from travel;

   (vii) As such the superior Courts are limited in their powers of review. They may only administratively review statutes and acts or omissions of the

Legislature and the Executive, but not constitutionally review the same, if Parliament deems so.

3. That to my mind, and for the reasons articulated by the Chief Justice of Malaysia, are not tenable propositions in law under our Federal Constitution. The enactment of a statutory provision by Parliament denuding the Judiciary of its inherent powers of review, even partially, is not constitutional, by reason of Art 4(1) FC. Art 4(1) FC encapsulates the doctrines of the Rule of Law and significantly the separation of powers. In other words, these doctrines are not extraneous or imported concepts but comprise the basis of our FC.

4. There are 3 questions of law before the Court. I have dealt primarily with Question 3 which relates to the constitutional validity of section 59A of the Immigration Acts 1959/63. Section 59A is an ouster clause. That means that the clause enacted by Parliament seeks to prohibit the Court from examining the section for constitutional validity. Can Parliament do that? In England Parliament can do that because there is no written constitution as the highest source of law, and Parliament is supreme. However, in Malaysia our Federal Constitution is supreme as borne out by Art 4(1) FC.

5. Most of my decision deals with judicial power in Art 121(1) read subject to art 4(1) FC. Art 121(1) deals with judicial power. I have held that:

   (i) Art 121(1) cannot be construed in isolation. The starting point for the construction of judicial power in Art 121(1) must be Art 4(1). Why is that?

   (ii) It stipulates that the Federal Constitution is the supreme law of the land; in its second part it empowers the Judiciary to strike down any law that is inconsistent with the Federal Constitution to the extent of the inconsistency;

   (iii) As only the superior Courts can carry out this function, it follows that Art 4(1) enshrines the constitutional right of judicial review;

   (iv) The constitutional right of judicial review is to be contrasted with administrative judicial review;

   (v) Constitutional judicial review means that the superior Courts can test the constitutional validity of legislation and State action. Administrative judicial review is limited to reviewing State action for illegality, irrationality, proportionality and procedural impropriety. The latter is a very limited and narrow right of review when compared with constitutional judicial review which allows statutes and acts made under those statutes to be struck down and held to be void;

(vi) As this primary power of judicial review is contained in Art 4(1) FC, Art 121(1), which is the source of judicial power, has to be read together with Art 4(1). This is why it cannot be read in isolation.

(vii) This entire construction only arises by reason of the 1988 constitutional amendment to Art 121(1) which many have understood to have abrogated judicial power and made the Judiciary subordinate to Parliament;

(viii) I have held that this is a flawed construction because Art 121(1) must be read subject to and harmoniously with Art 121 (1) FC. This is because Art 4(1) encapsulates the rule of law and the separation of powers. It is important to comprehend that you do not need to utilize the express words "separation of powers" and "rule of law" in Art 4(1) in order for that article to be construed as encompassing those principles;

(ix) Reading Art 4(1) which contains the power of constitutional judicial review together with Art 121(1), it follows that judicial power was never abrogated or removed by the 1988 amendment to the FC;

(x) The words in the amendment which gave rise to debate are *"….and High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"*

(xi) This was understood to mean that the jurisdiction and powers of the superior courts was limited or abrogated to the extent determined by Parliament. A literal reading meant that the superior courts were subordinated to Parliament;

(xii) But how can this be a correct interpretation when Art 4(1) allows federal law to be struck down when it is inconsistent with any provision of the Federal Constitution? Put another way, how can the superior judiciary on the one hand be expressly allowed to strike down law, which includes federal law, and at the same time be subordinated to that same federal law? It is a legally incoherent proposition.

(xiii) Therefore, the only tenable answer is that the words "shall have the jurisdiction and powers as may be conferred by or under federal law" is that only the specification, description and arrangement of the powers of the superior courts is to be enacted by Parliament.

(xiv) Any such description or listing or setting out of the powers of the various courts in the hierarchy of the judicial arm of government by Parliament cannot derogate from the powers of the courts to act as a check and

balance vis a vis the executive and the legislature as expressly decreed in Art 4(1) FC.

(xv) Another reason why judicial power ought to be construed as stated is that our system of government is premised on a constitutional democracy which stipulates that the 3 arms of government, namely the legislature, judiciary and executive are co-equal. If the construction of the majority judgment is correct, it would amount to taking away the co-equal foundational basis of the Constitution and government in the nation, which is unsupportable as such a view endorses the construction that the Judiciary is subordinated to Parliament.

(xvi) Finally, another line of reasoning that supports such a harmonious construction is that 'law' or 'federal law' as stated in Art 121(1) FC must have the same meaning as 'law' in Art 4(1) FC. If not so, and the word 'law' in both articles carry different meanings, there would be confusion and the FC would be anomalous, unpredictable and unreliable, which cannot be correct.

(xvii) So, in answer to the question whether the jurisdiction and powers of the High Courts was curtailed by the 1988 amendment the answer is that it did not have that effect. The Legislature did not and could not remove any part of the judicial power of the High Courts by virtue of the amendment.

(xviii) If the 1988 constitutional amendment is nonetheless construed as having the effect of abrogating or diminishing or removing the constitutional power of review, which subsists to ensure the supremacy of the FC, it is void and struck down, as Art 4(1) FC comprises a part of the integral or basic components of the FC.

(xix) Therefore, I conclude that section 59A of the Immigration Acts is void as it seeks to oust the right of constitutional judicial review in Art 4(1).

(xx) This is consonant with the unanimous decisions of this court in Semenyih Jaya and Indira Gandhi which both held that the superior courts enjoy such a power of review as a basic feature of the FC.

(xxi) It therefore follows that the decision of this court in Sugumar Balakrishnan [2002] 4 MLJ 405 which upheld the constitutionality of s. 59A of the Immigration Acts is no longer good law because it failed to consider the constitutional right of judicial review in Art 4(1).

(xxii) Accordingly, I answer Question 3 in the negative.

(xxiii) I have answered Questions 1 & 2 in the negative for the reasons read out. As a consequence, I concur with the learned Chief Justice that the right to travel is a part of the right to life and personal liberty under Art 5(1) FC. It also follows that the decision of this court in Govt of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33 is no longer good law. So too the decision of the Court of Appeal in Tony Pua v Ketua Imigresen Malaysia & Anor [2018] 6 MLJ 670 which relied on Loh Wai Kong.

(xxiv) I therefore concur with the Chief Justice that s. 59A of the Immigration Acts is unconstitutional and is therefore void; secondly, that s. 59 of the Immigration Acts is also void and finally that with respect to Question 1, that the DG does not have unfettered discretion to impose a travel ban on the appellant, Maria Chin.

NALLINI PATHMANATHAN
Judge
Federal Court of Malaysia

Note: This summary is merely to assist in understanding the judgment of the court. The full judgment is the only authoritative document.