19 FEBRUARY 2021

PRESS SUMMARY FOR THE DISSENTING JUDGMENT IN THE FEDERAL COURT OF MALAYSIA FEDERAL COURT CRIMINAL APPEALS NO: 05(HC)-304-12/2019 (B), 05(HC)-308-12/2019 (B), 05(HC)-303-12/2019 (B), 05(HC)-305-12/2019 (B), 05(HC)-307-12/2019 (B) & 05(HC)-7-01/2020 (W) ROVIN JOTY A/L KODEESWARAN v LEMBAGA PENCEGAHAN JENAYAH & 4 ORS & 5 OTHER APPEALS

PRESS SUMMARY

1. Preventive detention describes the practice of incarcerating individuals without trial and without a conviction of guilt being made against them. They are imprisoned on the basis of allegedly having committed, or suspected of having committed crimes. The rationale for such detention is that if released they might commit additional crimes, posing a danger to society.

2. The **Federal Constitution ('FC')** under **art 149** allows Parliament to enact such legislation for the purposes of the security of the nation and society. The articles in the **FC** allowing for liberty, **art 5**, and several other articles namely **arts 9, 10 and 13** are suspended when such legislation is enacted. However **art 4(1)** which provides for constitutional supremacy and judicial power to strike down law which is inconsistent with the **FC** is not. Neither is judicial power, also found under **art 121**, nor the equality provision **article 8**. Neither are these fundamental provisions subordinated to **art 149 FC**.

3. In these 6 appeals the legislation under consideration is the **Prevention of Crime Act 2015 ('POCA')**, which was enacted pursuant to **art 149 FC**. An individual may be arrested without warrant by a police officer who has 'reason to believe' that the individual should be detained because the police officer suspects he has committed crimes. After arrest an Inquiry is held to allow the detained person to show cause why he should not be detained. The findings of the Inquiry are sent to the Minister of Home Affairs with the recommendation of the Inquiry officer. The Minister then decides whether to detain the person for a period of two years.

4. The only safeguard afforded to such a detainee is that a Board of Inquiry either endorses the Minister's finding or directs the detainee's release if satisfied by the detainee's representations. This term of detention can be renewed indefinitely. In essence this means that on the basis of the Inquiry and the decision of the Minister an individual can be held for periods of two years at a time, indefinitely, without going through the due process of an open trial and being lawfully punished by the judicial arm of government.

5. However, the decision of the Board of Inquiry and the Minister is not open to judicial scrutiny by reason of an ouster clause under **section 15B POCA**. The net effect is that the decision to detain the individual is placed beyond the scrutiny of the courts, save for procedural non-compliance. This refers to compliance with the number of days prescribed in **POCA** for the fulfilment of matters like delays in the transportation of the detainee, the filing of reports as well as the provision of forms for representations to be made etc. Other than such procedural matters, there is absolutely no room afforded by Parliament for the judicial arm to scrutinize the detention at all. The primary issue here is the constitutionality of **section 15B POCA** in light **of art 4 FC**. Where a complaint of unconstitutionality is involved, can an act of Parliament or a statutory provision crafted to exclude the scrutiny of the Court prevail? It should be emphasized that these appeals deal only with the ability of the courts to scrutinize the decision of the Inquiry Board and therefore the Minister. It does not mean that if the ouster clause is found to be invalid the exercise of discretion or power by the Minister or the Inquiry Board is automatically invalidated. That is a separate matter to be determined by way of administrative judicial review principles. But it is the

statutory provision that precludes the Court from even examining the decision for constitutionality that forms the basis for these appeals. This encroaches on the court's basic supervisory function of acting as a check and balance.

6. In my dissenting judgment I have, much as I did in **Maria Chin**[1], consider the ambit and construction to be accorded to **art 4(1) FC**. I have concluded that **art 4(1)** contains an express power of constitutional judicial review which cannot be excluded by Parliament in legislation such as **POCA**. This fundamental power of review is what ensures that the Judiciary fulfils its function as a check and balance vis a vis the Executive and Legislative arm. To that extent **art 4(1)** stipulates that the **FC** is the supreme law and encapsulates the separation of powers doctrine. It therefore cannot be excluded or ousted as **section 15B** purports to do. If **section 15B** is accorded its full effect it means that the reasons for the detention of individuals for separate periods of two years indefinitely cannot be scrutinized by the courts. It allows for the abuse of executive powers of detention for reasons other than specified in **art 149**.

7. By placing a blanket prohibition against any form of judicial scrutiny it means that individuals can be detained for long periods of time on the basis of the 'reasonable belief' of a policeman and the inquiry process conducted by the Board, based on the decision of the Minister. The Courts cannot ask, or be advised of the reasons for the detention. That runs awry of **art 4(1) FC** which accords the Courts the power of constitutional judicial review. Any law that prevents or seeks to prohibit such review as provided for expressly in the **FC**, is inconsistent with **art 4(1)** itself and is to that extent void. Article 149 does not exclude Art.4(1) and neither is it capable of doing so.

8. Separately and alternatively, the blanket prohibition against the Judiciary exercising its powers under **art 4(1)** also amounts to an encroachment of judicial power as contained in **arts 4(1) and 121**. Judicial power is not contained nor defined solely by **art 121**, as explained by the Right Honourable Chief Justice in **Maria Chin** (see footnote 1). This follows from the decisions of this Court in

[1] Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579

Semenyih Jaya[2] and **Indira Gandhi**[3]. The effect of **section 15B** is to take away the entrenched judicial power of constitutional judicial review. The net of such legislation is to subordinate the Judiciary to Parliament which again runs contrary to the fundamental tenets of the **FC**.

9. The earlier decisions of this Court which did not consider this issue at all can be attributed to our Courts adopting the English position of administrative judicial review. But the United Kingdom practices Parliamentary supremacy and not constitutional supremacy, which we are expressly bound to follow pursuant to **art 4(1) FC** (see also **Ah Thian v Government [1976] 2 MLJ 112**). So adopting their legal reasoning is, with the greatest respect, flawed, because those decisions did not consider the immutable fact that constitutional judicial review is contained in our **FC** which imposes upon the Courts to check if legislation is consonant with and falls within the **FC**. As **section 15B** comprises legislation enacted by Parliament, precluding the Courts from exercising their function of even ascertaining whether **section 15B** itself is constitutional, it follows that the section itself runs contrary to **art 4(1)** as it seeks to preclude the Courts from exercising their fundamental function of judicial review in relation to legislation. Put another way, **section 15B** which is a statutory provision enacted by Parliament, seeks to oust the effect of a provision of the **FC** itself, namely **art 4(1)**. That is simply untenable under constitutional law.

10. After examining the arguments of the learned Attorney-General's Chambers and learned counsel and considering the law in totality it is clear to me that **section 15B POCA** is unconstitutional and is therefore struck down. To allow it to remain would thwart access to justice in any real sense of the word.

11. What is the net effect of striking down **section 15B POCA**? As stated at the outset it does not mean that all detainees are thereby released. Neither does it mean that the Courts will embark on or encroach upon the executive powers of

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[2] Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC

[3] Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC

the Home Minister. Far from it. The Courts are as bound by the doctrine of the separation of powers as are the other arms of government. What will happen in reality is that the Courts will be entitled to undertake a judicial review of the Minister's exercise of his discretion choosing to detain a person over one or several terms of 2 years consecutively (rather than charge them and let them go through the due process of a trial and be punished appropriately by the judicial arm). However the Courts are aware that only such judicial review that is necessary and proportionate is to be undertaken, given that these are security matters with where the Executive has the primary expertise and role to determine these matters. The Courts are ill-equipped to undertake an expert inquiry in these matters. As such the Courts cannot usurp or seek to substitute their decisions in place of that of the Minister or the Inquiry Board. It is the legality of the decision in issue that is subject to judicial scrutiny. This means that the Minister's decision is authoritative unless it is found to be made with mala fides or for a collateral purpose. The courts can review the decision on the usual grounds of illegality, irrationality and procedural impropriety. In short, the courts possess the jurisdiction by virtue **of art 4(1)** to review the legality as opposed to the merits of the Board of Inquiry and thereby the Minister's decision.

12. As a consequence of my legal reasoning it follows that not only are matters disclosing procedural non-compliance available for review, other substantive matters are equally available for review in the course of determining habeas corpus matters. It is equally open to the Courts to review the constitutionality of the underlying legislation to ensure that it falls within the ambit of **art 149**, as that too is a matter of legality and constitutionality.

13. The Courts are not therefore restricted to counting the number of days between various reports or the transportation of detainees when reviewing these matters, as prescribed by **section 15B POCA**. That could not have been the intent and purpose of **art 4(1) FC**, as that would derogate from its express provision that the Judiciary undertakes the role of ensuring that legislation falls within the **FC**. **Section 15B** also has the effect of subordinating the Judiciary to Parliament, and relegating the superior courts to the position of ratifying all statutory provisions

without undertaking their fundamental role of reviewing such legislation for consistency with the **FC**.

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.