DALAM MAHKAMAH TINGGI MALAYA SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
PERMOHONAN JENAYAH MTJ1 : 44-217-2008

DIANTARA

RAJA PETRA BIN RAJA KAMARUDIN

LAWAN

MENTERI HAL EHWAL DALAM NEGERI

GROUNDS OF JUDGEMENT

Raja Petra bin Raja Kamarudin the Applicant herein seeks a writ of habeas corpus under Section 365 (1) of the Criminal Procedure Code on the grounds that his detention under the Detention Order dated 23.9.08 (the Detention Order) pursuant to Section 8 of the Internal Security Act (the ISA) is unlawful for not having been effected in accordance with the Federal Constitution (FC) and the ISA.

On behalf of the Applicant two affidavits in support have been filed namely the affidavit of Mable @ Marina Lee affirmed on 28.9.08 (Mable's) affidavit and the affidavit of the Applicant himself affirmed on 29.9.08 (RPK's) affidavit.

In opposing the application the respondent have filed 10 affidavits including the affidavit of the Honourable Minister for Home Affairs Dato' Seri Syed Hamid bin Syed Jaafar affirmed on 16.10.08 (Enclosure 15).

In essence the basis of detention as appears in the grounds of detention are as follows:-

1. *The Applicant had wilfully, intentionally and recklessly published three articles written by the Applicant as well as reader's comments on the web blog Malaysia Today owned and operated by him that were critical of and*

insulted Muslims, the purity of Islam and the personality of the Prophet Muhammad S.A.W.

2. *The articles in issue were identified as:-*

   (a) *"Malays, the Enemy of Islam"*
   (b) *Let's send the Altantuya murderers to hell: and*
   (c) *I promise to be a good, non-hypocritical Muslim*

3. *The comment in issue was identified as one from a commentator named The Anti-Jihadist published in an article by the name of "Not all Arabs are the descendants of the Prophet".*

4. *The Applicant had written or published the 3 articles aforesaid concerning national leaders that were defamatory and false with the intention of undermining confidence and inciting public hatred against the Government which could affect public order and prejudice national security.*

Learned Counsel for the Applicant challenged the Detention Order under 4 heads of challenge, namely:-

1. *Section 8 ISA (under which the Detention Order was made) is void for being unconstitutional as it contravenes Article 149 of the Federal Constitution.*

2. *The Respondent did not have the jurisdiction to detain the Applicant as:-*

   (a) *The preconditions for the existence of jurisdiction were, and have not been fulfilled;*

   (b) *Such regulation of the Applicant's conduct as a Muslim as permitted under law is by virtue of Article 80 of the Federal Constitution exclusively within the domain of the State Authorities. The Federal Government and as such the Respondent, has no power in this regard.*

   (c) *The detention contravenes, Article 11 of the Federal Constitution of the rights of the Applicant.*

(d) The detention was in bad faith and as such ultra vires.

In advancing the challenge aforesaid learned counsel for the Applicant submits that the ouster clause under Section 8B of the ISA which precludes judicial review save on matters of procedure does not preclude scrutiny of jurisdiction and jurisdictional errors for being nullities and the ouster clause must be read strictly. The applicability and the effect of Section 8B will be dealt with in the course of my judgement herein.

The determination of the application herein to my mind would be based on two core issues namely the constitutionality of Section 8 of the ISA and the jurisdictional issue of the Minister in the issuance of the Detention Order.

The Constitutionality of Section 8 of the Internal Security Act.

The Internal Security Act 1960 is an Act of Parliament enacted pursuant to Article 149 of the Federal Constitution. Article 149(1) provides that:

If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to the maintenance to public order in , or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is in consistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

Now, it is clear from a plain reading or Article 149 that Parliament may legislate in a manner contrary to the fundamental liberties protected under Articles 5, 9, 10 or 13 or the Federal Constitution if Parliament believes that action have been taken or is being threatened to cause any of the circumstances listed in items (a) to (f) of Article 149. To do so, the Act of Parliament must recite that actions have been taken or is being threatened to cause the circumstances listed or any one of them. The Internal Security Act 1960 is an Act of Parliament that was passed pursuant to the exceptional powers accorded to Parliament under Article 149 of the Constitution. In the preamble to the Act, Parliament recites:

> *"An Act to provide for the Internal Security of Malaysia, preventive detention ,the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto".*

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia –

(1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and

(2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;

AND WHEREAS the action taken and threatened is prejudicial to the Security of Malaysia;
AND WHEREAS PARLIAMENT considers it necessary to stop or prevent that action;

Now therefore PURSUANT to Article 149 of the Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows:

> *Learned Counsel for the Applicant submits that the preamble to the ISA confines the application of the legislation only to the circumstances mentioned therein. The contention is that the legislature has expressly stated that the Act was designed to address actions taken or threatened by a substantial body of persons to cause the circumstances that correspond to the items listed as (a) and (d) of Article 149. Learned Counsel thus argues that no provision of the Act may deal with circumstances listed in the other items of Article 149. For this reason, Counsel submits that s.8 of the Act is unconstitutional as it does not fall within the ambit of items (a) or (d) of Article 149. Section 8(1) of the Act provides that:*
>
> > *"If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that person be detained for any period not exceeding two years (emphasis added)".*

From that part of the section to which emphasis has been lent, it is clear that it was designed to deal with three situations. The first is to prevent a detainee from acting in a manner prejudicial to the security of the country. The second is to maintain essential services in the country and the third is to maintain the economic life of the country. It was submitted for the Applicant that the first and second ground do not fall within the scope of items (a) and (d) of Article 149 but correspond instead with items (f) and (e) respectively. As for the third situation in s.8 of the Act, Counsel submits that it does not fall within any of the items in Article 149 and as such cannot be enacted pursuant to Article 149. For these reasons, Learned Counsel urges this Court to hold that s.8 of the Act is unconstitutional.

Now, it is common ground that the ISA was an Act of Parliament passed to counter the communist threat to Malaysia. It is settled law, however, that though the Act at the time designed to deal with the communist insurgency, the application of the Act is not limited to that threat only but to any other future threat of subversion whatever form it may be in. This is clear from the speech of Lord Diplock in ***Teh Cheng Poh v. PP (1979) 1 MLJ 50.*** In that case, Lord Diplock had occasion to consider Article 149 and the Act and his Lordship said:

> *"The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened* ***in the past*** *viz. that action of the kind described "has been taken or threatened".* ***It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause 2 of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence.*** *Where such an Act of Parliament confers powers on the Executive to act in a manner inconsistent with Article 5, 9 or 10, the action must be taken bona fide for the purpose of stopping or preventing subversive action of the kind referred to in the recital to the Act, for in order to be valid under Article 150(1) the provision of the Act which confers the power must be designed to stop or prevent that subversive action and not to achieve some different end (emphasis added)".*

The Supreme Court endorsed Lord Diplock's statement of law in ***Theresa Lim Chin & Ors. v. Inspector General of Police (1988) 1LNS 132,*** Salleh Abas LP delivering the judgement of the Court held:

> *"The next argument is that in view of Article 149, the ISA should be limited to communist insurgencies alone. To*

*support this proposition, we were invited to refer to paragraph 174 of the Reid Commission Report and to the speeches made by the late Prime Minister Tun Abdul Razak when moving the motion in Parliament to pass the Internal Security Bill. There had been some arguments as to whether or not it is proper for the court to advert to these documents. In our view, there is no hard and fast rule about this, and certainly the courts in this country, as well as the United Kingdom, admit such references but it is clear from the practice of the court that such reference is only to appreciate the legislative history of an Act, and it cannot be regarded as the basis of the determining factor for interpreting the Act or any provision of the Act. If we do that, the court will cease to be the ultimate interpreters of law because in the end what is law will be guided by what the politicians said in Parliament and indeed this has been asserted recently..... **The expression "that action" in our review has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provision of the Act there is nothing to show that it is restricted to communist activities** (emphasis added)".*

In ***Mohd Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals (2002) 4 CLJ 309,*** the Federal Court again restated that there is nothing in Article 149 of the Federal Constitution or in the ISA that gives rise to the interpretation that the latter is limited in its application to the communist threat only.

Although at first glance, the argument put forward by Learned Counsel for the Applicant seems forceful, much of the force in his argument is lost when viewed in light of the authoritative pronouncements by eminent jurists referred to above. For my part, I would also refer to the following words of Denning LJ in ***Seafood Court Estates Ltd. v. Asher (1949) 2 KB 481:***

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsman of Acts of Parliament have often been unfairly criticised. A judge, believing himself

to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work in the constructive task of finding the intention of Parliament .....".

Bearing in mind that the aim of the ISA is to prevent subversion and that the Act was prepared by a parliamentary draftsman without divine prescience and clarity, the Court cannot countenance an argument that would limit the scope of the application of the Act purely on the technical ground that its preamble failed to list all of the items in Article 149. I am of the view that as long as the Act in question is passed pursuant to Article 149 and the recital to the Act refers to a permissible item listed therein, the requirements of Article 149 is met. An Act of Parliament passed for the purposes of safeguarding national security ought not to be struck down on the grounds advanced by learned Counsel for the Applicant, which though ingenious, when properly considered may well be regarded as tenuous. Quite apart from the fact that I am bound by *stare decisis* to follow the decisions of the Federal Court on this issue, I find there is no merit in the contention made by learned Counsel for the Applicant that s.8 of the Act is unconstitutional for the reasons he has advanced. It is not surprising the recitals of the Act make reference only to items (a) and (d) of the Article 149, which was the action taken or threatened at the time the Act was enacted. What is important, though, is the fact that the law has not been annulled by Parliament pursuant to Article 149(2) and this is reason enough for Courts to hold that it is the intention of the legislature that the Act should continue in force to deal with any future threat in whatever form. It is my view, with respect, that it would be pedantic to adopt the interpretation that any future threat must come within the scope of items (a) and (d) of Article 149 in order for the Act to apply.

<u>The jurisdictional point</u> –
<u>Did the Minister act within jurisdiction</u>?

Learned Counsel for the Applicant's next salvo is that for the Minister to exercise his powers under s.8 of the Act to issue a

detention order, there must first exist the state of affairs contemplated under Article 149.

In addressing the jurisdictional point the preamble to the ISA has now to be construed as they now have effect as part of the Act with the amendment through the introduction of Section 15 of the Interpretation Acts 1948 and 1967 which came into force on 24.7.97 and which provides:-

> *"The long title and preamble and every schedule (together with any note or table annexed to the schedules) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation".*

In the light of Section 15 of the Interpretation Act the preamble has since taken on a role as an aid to understanding the scope of the legislation – in this case the ISA.

The preamble to the ISA provides as follows:-
Whereas action has been taken and further action is threatened by a substantial body of person both inside and outside Malaysia:-

1. *to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and*

2. *to procure the alteration, otherwise than by lawful means, of the lawful government of Malaysia by law established AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia.*

AND WHEREAS Parliament considers it necessary to stop or prevent that action.

The scope of the Ministerial power of detention is laid out in Section 8 of the ISA and from the express wording of Section 8(1) thereof it is clear that Parliament envisage three types of situation, namely:-

(a) *acting in any manner prejudicial to the security of Malaysia or any part thereof;*

(b) *acting in any manner prejudicial to the maintenance of essential services; and or*

(c) *acting in any manner prejudicial to the economic life thereof; or*

In this regard I am persuaded by learned Counsel for the applicant's submission that upon a consideration of Section 8(1) ISA together with the recitals in the preamble shows that the following are threshold considerations or "preliminaries to jurisdiction" namely:

(a) *the action has been taken by a substantial body of persons. As such, the persons detained must be a member of that substantial body of persons;*

(b) *further action is threatened by that substantial body of persons, and as such the detained person;*

(c) *the aim of the threatened action is:*

  (i) *to cause, and to cause a substantial number of citizens to fear organised violence against persons or property; AND*

  (ii) *to procure the alteration, otherwise than by lawful means, of the lawful Government;*

(d) *for the reasons set out above, the detained persons is a threat to for acting in a manner prejudicial to the security of the Federation.*

To my mind only where a state of affairs such as that described above exists can it be said that the Respondent is seized with the jurisdiction to make the detention order. In this regard Lord Morris made the following observation in ***Anisminic v. Foreign Compensations Commission (1969)2 A.C. 147:-***

> *"..... it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent t o it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or*

not the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists than a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists".

The House of Lord's decision has achieved two significant results – in that it not only diluted the efficacy of the ouster or privative clause by confining their protection to non-jurisdictional errors but also extended the scope of jurisdictional error .

Hence it is crystal clear that unless the specific pre-requisites are satisfied the power to issue the Detention Order cannot be lawfully invoked.

At the point of repetition, Parliament in its wisdom enacted the ISA for the specific purpose of combating "a substantial body of persons" intent on overthrowing the lawful government of Malaysia by unlawful and unconstitutional means.

To my mind the applicant herein cannot be by himself be considered to be "a substantial body of persons" with the consequent effect that the detention order of the Minister herein was beyond the scope of his powers.

A close scrutiny of the grounds in support of the Detention Order would show that it is not the Respondents case that the Applicant was a member of a substantial body of persons that had acted in a way to cause, and to cause fear of organised violence against persons and, property nor it is the respondent's case that being a member of such a body (which is negatived by the affidavit evidence herein) and by having taken such action and threatening further such action, the applicant is attempting to procure the alteration of the Government by unlawful means. In point of fact there is no basis for any conclusion that the Applicant has acted unlawfully at all in view of the pending criminal charges against the Applicant as the principle that a person is innocent until found guilty is the core of our legal system. In any event the grounds advanced by the Minister does not in any way goes towards establishing that the Applicant is a threat to national security.

On the ground of detention that the Applicant had insulted Islam the question that has to be addressed is whether the

Respondent has the necessary jurisdiction to act. To my mind the Respondent lacked the necessary jurisdiction for the reason that:

1. *issues pertaining to matters of the administration of Islam are within the purview of the State governments save for the Federal Territories of Wilayah Persekutuan and Labuan. The Applicant resides in Selangor and as such, by virtue of Section 10 of the Selangor Syariah Criminal Enactment falls within the jurisdiction of the State of Selangor where matters pertaining to Islam are concerned;*

2. *Article 80(1) of the Federal Constitution provides:*

   > *"Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws";*

3. *It is manifest that the Federal Government has no authority over matters over which the Legislative Assembly of the State of Selangor may make laws. Item 1, List II, 9th Schedule of the Federal Constitution is explicit as to the intention of the founders to leave matters of Islamic administration to the State. This is consistent with His Highnesses, the Rulers, being the Heads of Islam in their respective states;*

4. *That being the case, the matter of whether the Applicant had insulted Islam is a matter within the exclusive domain of the Selangor religious authorities. The Respondent cannot usurp that function. Though the Respondent does have authority over matters of security under the ISA, this authority does not empower the Respondent to determine issues pertaining to matters of Islam. It would be necessary for the Respondent to acquire confirmation from the state religious authorities or the state syariah courts that the action complained of is an insult to Islam or is otherwise in contravention to Islam before he can take steps under the ISA. This was the case where the Al-Arqam was concerned – they had been declared to be deviationist by the National Fatwa Committee;*

Again for the act of insulting Islam to amount to a threat to national security more must be shown by reference to the state of affairs contemplated under Article 149. In ***Ajay Dixit v. State of Uttar Pradesh AIR 1985 S.C. 18*** the Indian Supreme Court addressed the question of what amounted to acting in a manner prejudicial to security where Sabyasachi Mukharji, J. observed:-

> *"When the liberty of the citizen is put within the reach of authority and the scrutiny by courts is barred, the action must comply not only with the substantive requirements of the law but it should be with the forms which alone can indicate the substance. The learned judges further observe that the contravention 'of law' always affects 'order' but before it could be said to affect 'public order', it must affect the community or the public at large. One has to imagine three concentric circles, the largest representing 'law and order', the next representing 'public order' and the smallest representing 'security of State'. An act may affect 'law and order' but not 'public order', just as an act may affect 'public order' but not 'security of the State'. Therefore, one must be careful in using these expressions.*
>
> *In the decision of this court in* ***Arun Chosh v. State of West Bengal (1970) 3 SCR 288: (AIR 1970 SC 1228),*** *the question was whether the ground mentioned could be construed to be breach of public order and as such the detention order could be validly made. There the appellant had molested two respectable young ladies threatened their father's life and assaulted two other individuals. He was detained under Section 3(2) of the Preventive Detention Act. 1950 in order to prevent him from acting prejudicially to the maintenance of public order. It was held by this Court that the question whether a man has only committed a breach of law and order, or has acted in a manner likely to cause a disturbance of public order, is a question of degree and the extent of the reach of the act upon society. The test is: Does it lead to the disturbance of the even tempo and current of life of the community so as to amount to a disturbance of public order, or, does it affect merely an individual without affecting the tranquility of society. This Court found in that case that however reprehensible the appellant's conduct might be, it did not add up to the situation where it may be said that the community at large was being disturbed. Therefore, it could*

not be said to amount to an apprehension of breach of public order, and hence, he was entitled to be released".

In this connection, it is appropriate to address the ouster clause and the starting point is the observation by Lord Morris of Both-y-Gest in ***Anisminic v. Foreign Compensations Commission (1969) 2 AC 147:***

> *"It is sometimes the case that the jurisdiction of a tribunal is made dependent upon or subject to some condition. Parliament may enact that if a certain state of affairs exists then there will be jurisdiction. If in such case it appears that the state of affairs did not exist, then it follows that there would be no jurisdiction. Sometimes, however a tribunal might undertake the task of considering whether the state of affairs existed. If it made error in that task such error would be in regard to a matter preliminary to the existence of jurisdiction. It would not be an error within the limited jurisdiction intended to be conferred".*

The Federal Court has endorsed the **Anisminic** test in ***Pahang South Union Omnibus Co. Bhd. V. The Minister of Labour & Manpower & Anor (1981) CLJ (Rep) 74*** and ***Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor (1996)4 CLJ 687.*** The issue here is whether the High Court may determine if the Minister has satisfied the matters preliminary to the exercise of jurisdiction or if the power of the High Court to do so has been effectively ousted by the privative provision in s.8B of the Act. It is settled law that Parliament may exclude judicial review of an administrative action by clear use of language in a statute. This has been settled at the highest levels of courts in this country. In ***Kerajaan Malaysia & Ors. v. Nasharuddin Nasir (204) I CLJ 81,*** Steve Shim CISS said:

> *"An ouster clause may be effective is ousting the court's review jurisdiction if that is the clear effect that Parliament intended; that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause".*

What then is the language employed in s.8B of the Act? The section reads:

1) *There shall be no judicial review in any court of, and not court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision;*

2) *The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.*

Learned Counsel for the Applicant argues that the ouster clause in s.8B of the Act has no application where the matters preliminary to the exercise of jurisdiction have not been met. In such circumstances Counsel says, the detention order is itself nullity or has its provenance in a jurisdictional error. As such, the jurisdiction of the High Court cannot be said to have been excluded from reviewing an order which is a nullity or that is vitiated by jurisdictional error. In support, reliance was placed on the observations of Eusofe Abdoolcader J (as he then was) in ***Pahang South Union Omnibus Co. Bhd. v. The Minister of Labour & Manpower & Anor (1981) CLJ (Rep) 74*** where his Lordship said:

> *"Section 9(5) however incorporates a privative or ouster clause providing that a decision of the 1st Respondent under that section shall be final and shall not be questioned in any Court. The Privy Council reiterated in* ***South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Unions and Ors (1980) 2 MLJ 165: 3 WLR 318: 2 ALL ER 689*** *that such a clause would not preclude the jurisdiction of the High Court to review a decision by certiorari if it is vitiated by a jurisdictional error or is a nullity".*

In response, Learned Federal Counsel referred to the decisions of the Federal Court in ***Lee Kew Sang v. Timbalan Menteri Dalam Negeri & Ors (2005) 3CLJ 914*** and ***Abdul Razak***

bin Baharuddin & Ors v. Ketua Polis Negara & Ors and another appeal (2006) 1 MLJ 320. In both cases, judgement was delivered by Abdul Hamid Mohammad FCJ (as he then was). In the first case, his Lordship said:

> *"In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a habeas corpus application where the detention order of the Minister made under Section 4(1) of the Ordinance or, for that matter the equivalent sections in the ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded in one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then the courts should consider whether, on the facts, there has been non-compliance".*

In the second case, his Lordship said:-

> *"..... the amendments have clearly demarcated the two sections regarding the grounds for challenging the acts done there under. Unlike a challenge against the arrest and detention pursuant to s.73, a challenge against an act done by the Minister under s.8 can only be mounted on the ground of procedural non-compliance. Mala fide is not a "procedural non-compliance". So, the test, whether subjective or objective, used to determine whether mala fide has or has not been shown is of no relevance now, in a challenge against an act done under s.8. When mala fide itself is no longer an issue under s.8, the test thereof is clearly no longer relevant. The issue now under s.8 is whether a procedural requirement has or has not been complied with eg, whether a copy of the order has been served as required by s. 11, to give just one simple example. If the service of the order is challenged, the Minister has to prove that it was served by affidavit and documentary evidence. Of course, the court should consider the evidence before deciding whether it is served or not".*

Prior to both these cases, the Federal Court had in ***Kerajaan Malaysia & Ors. v. Nasharuddin Nasir (2004) 1 CLJ 81*** already concluded that with the advent of s.8B of the Act, the exercise of the Minister's discretion under the Act can only be questioned on the ground of procedural non-compliance. In this regard, Steve Shim CJSS said:

> *"Section 8B is therefore intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA except as regards any question on compliance with any procedural requirement relating to the act or decision in question".*

What then are the procedural requirements in the Act? There is a dearth of procedural requirements in relation to making a detention order under s.8 of the Act. Certainly nothing in the Act goes in the way of expressly referring to matters therein as procedural requirements. But regardless, as the preamble is to be construed and have effect as part of the an Act pursuant to s.15 of the Interpretation Act 1948 & 1967, there is merit in the contention that those matters in the preamble which are matters preliminary to the exercise of jurisdiction under the Act ought to come within the scope of what is termed in s.8B as "procedural requirement". The Federal Courts in all three cases referred to above have clearly settled that the exercise of discretion under s. 8 of the Act may only be reviewed on the ground of procedural non-compliance save for the reference to s.11 of the Act requiring service of the detention order in ***Abdul Razak's case,*** the procedural requirements of the Act have not been exhaustively defined in the Act or by the case law. It is thus my respectful view that the Federal Court in all three cases did not shut out the possibility that the lack of the threshold considerations mentioned in the preamble of the Act could amount to a procedural non-compliance.

Again in the course of considering the applicability and whether s.8B of the Internal Security Act has the effect of entirely ousting judicial review and prohibiting the courts from exercising any form of jurisdiction over the acts of the Minister it is necessary to consider the express wording of the clause 8B which I have reproduced earlier.

A reading of the express provisions of the ouster clause reveals that where any act is done or decision is made by the Minister when exercising his discretionary power in accordance with the ISA, then no judicial review is permissible. Judicial review is precluded or ousted where the Minister has acted, or exercised his discretion to make a decision, within the purview of the Act.

Effect has to be given to the express words "in accordance with the act" otherwise it would amount to excess verbiage. What do those words mean? They can only mean one thing namely that the Minister's decision is not completely unfettered and arbitrary but is confined by the provisions of the Act in question, here the ISA. The net result of according meaning to those words *"in accordance with the Act"* is that where the Minister has acted outside the purview of the express objects of the ISA, then he has acted outside the jurisdiction accorded to him by the Act. In short he has acted ultra vires the object of the Act. In such an instance the ouster clause does not come into play, or does not take effect. This result follows from a simple reading of the section 8B.

An application of a simple example suffices to support such a contention. If for example, the Minister were to say that the grounds for the exercise of his discretion are that the colour of the detainee's hair is red and therefore this is the basis for invoking his powers under the ISA, then the immediate clear and simple response to the effect of s.8B would be that the section would not in such a instance have the effect of ousting the jurisdiction of the Court in seeking to review the exercise of discretion. This is because the Minister in putting forward such grounds is clearly acting ultra vires his powers under the ISA. The Minister's powers under the ISA are circumscribed by the provision and object of the Act itself.

In order to ascertain whether the Minister has acted ***ultra vires*** the fundamental objects and provisions of the Act, the Courts are entitled to inspect and consider the grounds put forward by the Minister in explaining the basis for the issuance of the detention order. See ***Public Prosecutor v. Karpal Singh (1988) 1 CLJ 249.***

The four grounds of detention set out by the Minister has been reproduced in the earlier part of my judgement herein. The question to be asked however in deciding whether or not the

Minister has acted ultra vires or otherwise is this: Do the grounds set out in the Detention Order fall within the purview of s.8 of the ISA or the Recital to the Act (the preamble)? In other words do the grounds show that the detention is necessary:-

1. *To prevent the detainee from acting in any manner prejudicial to the security of Malaysia;*

2. *For the maintenance of essential services;*

3. *For the economic life of the country;*

4. *Because action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause a substantial number of citizens to fear organized violence against persons and property and to procure the alteration otherwise than by lawful means of the lawful Government of Malaysia.*

If the answer to the foregoing is no, then it follows that the grounds do not appear to fall within the purview of the objects of the Act, in which event it is ultra vires of the Act. If however the answer is yes, then it cannot be said that the Minister has acted ultra vires. To my mind the Minister cannot use the power conferred on him under the ISA to act arbitrarily as the very wording of Section 8B subjects him to act in accordance with the Act. Upon a scrutiny of the four grounds listed by the Minister it is my considered view that it does not fall within the purview of the objects of the ISA and hence the words, "in accordance with the act" mean that judicial review of acts done outside the scope of the Act are not ousted. The expression of the crucial words aforesaid can only mean that the discretion conferred on the Minister must be a discretion validly exercised under the law as an invalid exercise is no exercise of discretion at all with the inevitable consequence that an invalid exercise of discretion cannot be protected under the ouster clause from judicial scrutiny.

The above principle does not depart from ***Lee Kew Sang v. Timbalan Menteri Dalam Negeri (Supra).*** In that case, the Federal Court made it clear that the Courts could not review the substantive exercise of discretion by the Minister. In other words

the courts could not question or even consider whether the Minister was correct in arriving at his decisions to issue a detention order based on the surrounding facts. However the case is not authority for the proposition that ultra vires acts by the Minister are not subject to judicial review. The latter part of the case expressly considers the instance where the Minster purports to take the powers of the A-G, which the Court opines would amount to ultra vires. In other words the Federal Court expressly recognised and approved the power of the courts to exercise their powers of judicial review where the act of the Minister is ultra vires the statute in question. This was also the view of the Federal Court in Y.B. Menteri Sumber Manusia (1999)2 CLJ 471 where the following passage from ***General Electric Company Ltd. v. Price Commission (1975) ICR*** was adopted and approved in that it if the decision-making body goes outside its powers, or misconstrues the extent of it powers, then too, the Courts can interfere". In short the Federal Court decision does not in anyway shut out other grounds of challenge other than procedural non-compliance.

The principle that an order of detention can only be made or justified if the grounds of detention stipulated therein coincide with the ground or grounds of detention specified in the empowering statute namely the ISA is to my mind still good law and supported by high authority namely ***Re Tan Sri Raja Khalid bin Raja Harun (1988) 1 MLJ 132*** and ***Minister for Home Affairs & Anor v. Jamaluddin bin Othman (1989) 1 MLJ 418.*** In both the cases the then Supreme Court nullified the detention orders respectively for the simple reason that the grounds of detention proffered in the detention orders, namely substantial monetary loss caused to and suffered by a bank brought about by the detainee while he was a director and member of its loan committee in the former, and the propagation of the Christian faith amongst Malays and the conversion of six Malays to the Christian faith in the latter did not come within the scope of the provisions of Section 73(1) and Section 8 (1) respectively of the ISA.

The decision in the two cases aforesaid serves as a constant reminder to the detaining authority that it must not issue a detention order if it cannot base and justify the detention on at least one of the grounds stipulated in the particular detention statute relied upon i.e. ISA.

For the reasons aforesaid I accordingly allow the application herein and a writ of habeas corpus be and is hereby issued for the applicant to be produced before this Court for his immediate release.

[DATUK SYED AHMAD HELMY BIN SYED AHMAD]
Judge
High Court Malaya
Shah Alam

Dated: 07 November 2008

<u>Authorities:</u>

1. *Teh Cheng Poh v. PP (1979) 1 MLJ 50.*
2. *Theresa Lim Chin & Ors. v. Inspector General of Police (1988) 1 LNS 132,*
3. *Mohd Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals (2002) 4 CLJ 309,*
4. *Seafood Court Estates Ltd. v. Asher (1949) 2 KB 481:*
5. *Anisminic v. Foreign Compensations Commission (1969) 2 AC 147:*
6. *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Unions & Ors (1980) 2 MLJ 165: 3 WLR 318: 2 ALL ER 689*
7. *Kerajaan Malaysia & Ors. v. Nasharuddin Nasir (2004) I CLJ 81,*
8. *Pahang South Union Omnibus Co. Bhd. V. The Minister of Labour & Manpower & Anor (1981) CLJ (Rep) 74*
9. *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor (1996) 4 CLJ 687.*
10. *Lee Kew Sang v. Timbalan Menteri Dalam Negeri & Ors (2005) 3 CLJ 914*
11. *Abdul Raza bin Bacardi & Ors v. Ketua Polis Negara & Ors and another appeal (2006) 1 MLJ 320.*
12. *Public Prosecutor v. Karpal Singh (1988) 1 CLJ 249.*
13. *Ajay Dixit v. State of Uttar Pradesh AIR 1985 S.C. 18*

Counsel:

1. *Malik Imtiaz bersama Azhar Azizdan Haron, Ashok Kandiah, J.Chandra Sekant Pillai dan H.K. Neoh bagi pihak pemohon [Tetuan Mathews Hun Kandiah - Peguambela Peguamcara]*

2. *Abdul Wahab Mohd bersama Ahmad Dusuki bagi pihak Responden*