

**IN THE FEDERAL COURT OF MALAYSIA, PUTRAJAYA  
(CIVIL APPEAL NO. 01-01-2007 (W) )**

**BETWEEN**

**SELVARAJU A/L PONNIAH**

**... APPELLANT**

**AND**

**1. SURUHANJAYA PERKHIDMATAN AWAM  
MALAYSIA**

**2. KERAJAAN MALAYSIA**

**... RESPONDENTS**

**APPEAL FROM COURT OF APPEAL MALAYSIA  
(CIVIL APPEAL NO. W-01-27-1999)**

**QUORUM**

**ABDUL HAMID BIN HAJI MOHAMAD, FCJ (later PCA)  
NIK HASHIM BIN NIK AB. RAHMAN, FCJ  
AZMEL BIN HAJI MAAMOR, FCJ**

**14 September 2007**

## Judgment of the Court

1. On 9 November 2006, this Court granted leave to appeal on the following questions :
  - (1) Whether a detention order can be challenged in a collateral proceeding; and
  - (2) Where a person has been dismissed pursuant to a detention order whether time begins to run from the date of the detention order or from the date the decision of the Lembaga Rayuan is communicated to the applicant.
  
2. On 30 August 1991, the appellant, a driver with the Jabatan Peguam Negara, was suspended from his duties with effect from 5 August 1991 on the ground that he had been detained under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the PCO). The suspension was pursuant to General Order 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 (the G.O. 1980).

3. By letter dated 16 July 1992, the appellant was dismissed from service with effect from 6 July 1992. The appellant by letter dated 26 July 1992 appealed against the order of dismissal to the Lembaga Rayuan (the Board). On 19 October 1992 the Board made a decision dismissing the appeal and this decision was conveyed to the appellant vide a letter dated 26 November 1992.
4. On 24 November 1995 the appellant filed an action against the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent, the Government of Malaysia, seeking a declaration that the dismissal was null and void and of no effect on the ground that it was based on an invalid detention order.
5. The High Court dismissed the appellant's action. Appeal by the appellant was dismissed by the Court of Appeal. Hence the appeal before us. We heard the appeal on 31 July 2007. At the conclusion of the arguments of both sides, this Court unanimously dismissed the appeal with costs

and ordered that the deposit be paid to the respondents to account of their taxed costs.

6. We now give our reasons.

### **1<sup>st</sup> Question**

7. The appellant contended before us that the validity of the detention order upon which the appellant's dismissal was based could be challenged in a collateral proceeding in the nature of the civil suit filed by the appellant in the High Court. The detention was invalid as although a Deputy Minister of Home Affairs had the same power as a Minister of Home Affairs under Article 43A(2) of the Federal Constitution, the Deputy Minister who signed the detention order, could not be said to know the state of mind of the Minister, who was said in the detention order to have been satisfied that the appellant ought to be detained. In short he himself could not be said to have applied his mind as to which limb of section 4(1) of the PCO he was acting under.

8. With respect, we do not agree. We agree with the respondents that the validity of a detention order cannot be attacked in a collateral proceeding when written law precludes such an attack.

9. In **Boddington v British Transport Police (1998) 2**

**W.L.R. 639** the House of Lords at p651 said :

“.....in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. **There are situations in which Parliament may legislate to preclude such challenges being made .....**”

10. The **Boddington** case, supra, was referred to in

**McGuire v Hastings District Council (2002) 2 NZLR 577**

where the Privy Council at p590 reiterated that collateral challenges may be precluded by a statute :

“What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings .....

These passages are qualified, however, by **recognition that a particular**

**statutory context or scheme may exclude such collateral challenges, R v Wicks (1998) AC 92 being an example in the planning field.”**

(emphasis added)

11. In the present case the written laws that preclude a collateral attack of the detention order are Article 135(2)(d) of the Federal Constitution and General Orders 34 and 35 of the G.O. 1980 which are reproduced as follows :

**Article 135(2)(d)**

- (1) .....
- (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard :

Provided that this clause shall not apply to the following cases :

- (a) .....
- (b) .....
- (c) .....
- (d) where there has been made against a member of such a service any order of detention, supervision, restricted residence,

banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls.

### **General Order 34**

“(1) Where there has been made against an officer an order of detention, supervision, restricted residence, banishment or deportation, or where there has been an order imposing upon such officer any form of restriction or supervision by bond or otherwise under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration or protection of women and girls, the Head of Department shall apply for a copy of the order from the appropriate authority and upon receipt thereof, shall submit a report together with full particulars of the officer’s past record of service to the Appropriate Disciplinary Authority and the Head of Department shall recommend to the Disciplinary Authority whether the officer should be dismissed from the service, reduced in rank or otherwise dealt with depending on the degree of disrepute which the officer brings to the service.

- (2) Upon receipt of the report from the Head of Department, the Appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.”

### **General Order 35**

- “(1) Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Orders 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly; or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.
- (2) If as a result of the lesser punishment the officer is not dismissed, the question of his emoluments during the period of his suspension shall be at the discretion of the Director General of Public Services.”

12. Therefore, by its provision, Article 135(2)(d) clearly takes away the right of the appellant to be heard in the disciplinary proceedings taken against him solely on the existence of the detention order. Whereas General Orders 34

and 35 provide that the disciplinary authority of such proceedings is to decide on the appropriate punishment as provided for under General Order 36(i) of the G.O. 1980 upon the factual existence of the detention order. Thus, the legal power of the disciplinary authority allowed it to make a valid order to dismiss the appellant from the service notwithstanding that the validity of the detention order was in question.

13. It must also be pointed out that the appellant was making a collateral challenge by filing the writ and statement of claim to declare that his dismissal was null and void because the detention order used against him was not valid. We are of the view that the appellant could not challenge the validity of the detention order through the dismissal action that he brought. Firstly, the action was not framed as an action to challenge the validity of the detention, there being no prayer for a declaration that the detention order was null and void and the Deputy Minister not being made a party.

Secondly, challenging the validity of the detention order was an abuse of the Court's process because the appellant had failed to do so within the 36 months allowed by section 2(a) of the Public Authorities Protection Act 1948 (the Act) to attack the detention order which was made on 5 August 1991 and the time for the challenge expired on 4 August 1994 while the writ was only filed on 24 November 1995, a delay of more than 15 months after the expiry of the limitation period. This is a clear case to which the doctrine of collateral challenge does not apply.

14. In dealing with the G.O. 1980 we must remind ourselves that we are dealing with General Orders that have legislative effect and we must warn ourselves against adding words into them which were never intended (see **Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia (1994) 2 MLJ 114 SC**). General Orders 34 and 35 which bind the disciplinary authority to accept the factual existence of the detention order in making the order

of dismissal would similarly bind the High Court hearing any application challenging the validity of the detention order. In this regard, we find support in the passage of the judgment of Barwick CJ in **Twist v Randwick Municipal Council**

**(1976) 136 CLR 106** said at p110 :

“..... if the legislation has made provision for that opportunity to [be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.”

Thus, on the facts of the present case the appellant had failed to show that General Orders 34 and 35 were not complied with. The procedure was strictly followed and in our judgment there was no flaw in the decision making process of the disciplinary authority. In the circumstances, the answer to the 1<sup>st</sup> question is in the negative.

## 2<sup>nd</sup> Question

15. The 2<sup>nd</sup> question relates to whether, when a person has been dismissed pursuant to a detention order, whether the time begins to run from the date the decision to dismiss is made or the date of the communication of the decision of the Board to the appellant. In the instant case, the detention order was dated 5 August 1991. The appellant was dismissed from the service vide letter dated 16 July 1992 with effect from 6 July 1992. The appellant by a letter dated 26 July 1992 appealed against the order of dismissal to the Board. On 19 October 1992 the Board made a decision dismissing the appeal. This decision was conveyed to the appellant vide a letter dated 26 November 1992. On 24 November 1995 the appellant filed the action against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
16. It was contended by the appellant that time for purposes of the limitation period under section 2(a) of the Act commences from the date when the decision was communicated by the Board to the appellant, i.e. on 26

November 1992; and since the action was filed on 24 November 1995, the appellant was therefore within the limitation period of 36 months to file the action and cited **Md Aris bin Zainal Abidin v Suruhanjaya Pasukan Polis & Anor (2002) 4 MLJ 105** in support.

17. Section 2(a) of the Act states :

“Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions **shall** have effect :

- (a) the suit, **action**, prosecution or proceeding **shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of**, or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;”

(emphasis added)

18. In our judgment, section 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged. It is therefore clear that time starts to run from the act complained of and not the communication of the decision as contended by the appellant. The 'act' in the present case is the decision of the Board dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the time to file the action runs from the date of the decision and the last day to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 as contended by the appellant and not the date when the decision was made on 19 October 1992, then the provision in section 2(a) of the Act would have said so in the section. But here there was no such provision. A good example of such provision is found in section 23(1) of the Town and Country Planning Act 1976 which states :

“23. Appeal against decision of local planning authority

- (1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month **from the date of the communication of such decision to him, .....**”

(emphasis added)

Therefore, we hold that the contention of the appellant was misconceived. Such being the case, we find that the appellant’s action was time-barred as he was 39 days late when he filed the action.

19. In **Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd (2005) 3 CLJ 901**, Abdul Hamid Mohamad, FCJ (later PCA) delivering the judgment of the Federal Court, referred to the case of **Majlis Peguam & Anor v Tan Sri Dato’ Mohamed Yusoff (1997) 2 MLJ 271** where it held that the specific law (referring to the requirement of notices to be posted for 3 months under section 15(5) of the Legal Profession Act 1976) overrides the

general law under paragraph 8 of the Schedule to the Courts of Judicature Act 1964 (the CJA), which provides for enlargement or abridgment of time for doing any act, when limitation is explicitly provided for. Likewise, section 2(a) of the Act overrides paragraph 8 of the Schedule to the CJA for section 2(a) of the Act is a specific provision with no power to enlarge or abridge time. And to hold otherwise would be in direct conflict with section 25(2) of the CJA and therefore not in accordance with written law.

20. It is worthy of note that the purpose of section 2(a) of the Act is to give time period for any action brought against any person acting in execution of statutory or other public duty within 36 months after the act complained of. The 36 months period is incorporated into section 2(a) as a reasonable period of time for such action and it is not for the court to query legislation but merely to give effect to the will of Parliament as expressed in the law. It is in that spirit we say that the refusal of the Court of Appeal in **Md Aris**, supra,

to follow the decision of the Federal Court in **Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower (1983) 2 MLJ 54** is unjustified and in breach of the doctrine of stare decisis for not following loyally the decision of the higher court on the same matter. As **Mersing Omnibus**, supra, was the judgment of the Federal Court, the Court of Appeal was bound to follow it whether the Court of Appeal agreed with it or not (see **Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd (2006) 4 MLJ 113**; **The Co-operative Central Bank Ltd v Feyen Development Sdn. Bhd (1997) 3 CLJ 365**; **Subramaniam NS Dhurai v Sandrakasan Retnasamy & Ors (2005) 3 CLJ 539** per Ahmad Fairuz JCA (later CJ)). Indeed it is not for the Court of Appeal to question whether the procedure to require an applicant for certiorari to move the court for leave within 6 weeks from the date of the decision is fair or not. It is a matter for the Rules Committee acting under section 16 of the CJA to decide. As the law then stood, we rule that **Mersing Omnibus** is still good law with regard to the

interpretation of the ‘date of the proceeding’ under the then O 53 r 1A of the Rules of the High Court 1980 (the RHC) to mean the date of the decision of the Minister and not the date the decision was communicated to the appellant as held in **Md Aris**. In construing a statute or for that matter the RHC the duty of the court is limited to interpreting the words used by the legislature or RHC and to give effect to the words used by it. (See **NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd (1987) 1 MLJ 39; Vengadasalam v Khor Soon Weng & Ors (1985) 2 MLJ 449**). In **Md Aris**, however, the Court of Appeal read words which were not in O 53 r 1A of the RHC and this is a wrong thing to do and as such, the case should not be followed.

21. Accordingly, our answer to the 2<sup>nd</sup> question is that time runs from the date of the decision of the Board dismissing the appeal by the appellant on 19 October 1992 and not the date of communication of the order of dismissal to the appellant on 26 November 1992.

22. My learned brothers Abdul Hamid Mohamad, FCJ (later PCA) and Azmel Maamor, FCJ have read this judgment in draft and have expressed their agreement with it.

14 September 2007

**(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)**  
Judge  
Federal Court  
Malaysia

Counsel:

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