



22nd March 2021

PRESS SUMMARY FOR THE DISSENTING JUDGMENT IN
THE FEDERAL COURT OF MALAYSIA
CIVIL APPEAL NO: 01(f)-2-01/2018(W)
KOPERAL ZAINAL BIN MOHD ALI AND 6 OTHERS v
SELVI A/P NARAYAN & RITA A/P CHANDRAN
(JOINT ADMINISTRATORS OF THE ESTATE OF
CHANDRAN A/L PERUMAL, DECEASED)

PRESS SUMMARY

1. Custodial deaths are one of the most reprehensible of wrongs in a civilized society governed by the rule of law. All the more so, when those conferred with the responsibility of protection and care on behalf of the State, like the Appellants here, are themselves the perpetrators of inhumane acts and omissions of neglect or violence, resulting in the detainee's death. The sanctity of human life is the most cherished value of an evolved society. Accordingly, most legal systems identify, acknowledge and protect the right to life as the most basic of human rights. Malaysia is no exception. Such protection takes its form in **Art 5(1) of Part II of the Federal Constitution ('FC')**. It provides that no one shall be deprived of his life or personal liberty save in accordance with law.

2. Unfortunately, Chandran a/l Perumal was deprived of his fundamental right to life while being held in custody. He died while in police custody at the detention facilities of the Dang Wangi police station. The inquest found that Chandran had deliberately been deprived of essential medication to treat his medical condition. His family had advised of his medical condition and tried to hand over his medication but it was not accepted. He started behaving bizarrely and was then isolated in a cell with no toilet and a bare floor. He did not eat or drink during his detention. There were also

some injuries on his person which were assessed to have most likely occurred during the period of detention. The pathologist recorded his death as having occurred on the morning of 10 September 2012 at 7.48 am while the police recorded his death as having occurred some 12 hours later at 7 p.m. The cause of death was hypertensive heart disease. He was detained on suspicion of being involved in the kidnapping of a baby with two others. The High Court found subsequently that there was no basis for the complaint.

3. Chandran's administrators brought a claim against the appellants premised in tort under **section 7 and 8 of the Civil Law Act 1956 ('CLA')** as well as for the breach of Chandran's constitutional right to life.

4. Before us the question of law was this: "Whether **section 8(2) of the Civil Law Act 1956** is an absolute bar to the award of exemplary damages in an estate claim?" This issue arose because both the High Court and the Court of Appeal had awarded exemplary damages in the sum of RM200,000-00 for the breach of Chandran's constitutional right to life. It was contended for the appellants that pursuant to the said section of the **CLA**, Chandran's estate could not in law make any claim for exemplary damages. This is because **section 8(2) CLA** prohibits the grant of exemplary damages in an estate claim for wrongful conduct. Etymologically 'exemplary' is derived from the Latin word 'exemplum' which means 'example'. So when we speak of exemplary damages, it is to make an example of the persons or body that behaved abhorrently, resulting in the damage or loss, here the loss of life. So the awarding of exemplary damages against the Appellants, the police here, is to make an example of this case by awarding damages as a punishment and deterrence.

5. In 2018 the Federal Court in **Nurasmira's case**¹ held by a majority that exemplary damages were not available for custodial deaths under **sections 7 and 8 of the CLA**, even where the death of the deceased was as a result of a breach of the constitutional right to life. The net effect of the majority decision in **Nurasmira** and the majority decision in this case is that there is no redress to a person whose constitutional rights have been transgressed, despite a constitutional guarantee to that

¹ Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors and other appeals (Kugan and Gaur Chandram) [2018] 3 MLJ 184

effect in **Art 5(1) FC**. The minority judgment in **Nurasmira's case** allowed exemplary damages for the breach of a constitutional right to life.

My Decision and Analysis

6. I am, with the greatest of respect, unable to concur with the majority judgment in this case and in **Nurasmira**. I am of the view that the fact that as Chandran's life was taken otherwise than in accordance with law as guaranteed under **Art 5(1) FC**, this affords his estate a public law cause of action for the breach of his constitutional right to life. Such a claim cannot be brought under **section 8 of the CLA**. However, redress may be obtained in public law for the contravention of **Art 5(1) FC**. **Part II of the FC** sets out the fundamental rights available to every citizen in the land. When such rights are breached, it follows that the citizen is entitled to redress for such infringement. The claim for the breach of a fundamental right under the **FC** seeks a remedy which is different from that under the strictly circumscribed private law remedies in tort as established in **sections 7 and 8 of the CLA**. The fact that there subsists a basis or cause of action for the breach of such a constitutional right appears to be implicitly accepted by the majority decision in **Nurasmira**. However the Court went on to hold that there was no remedy available for such infringement of a fundamental right, save for the private law remedy under the **CLA**.

7. The decision in **Nurasmira**, which precludes redress for the infringement of a fundamental right, with respect, reduces the right to life enshrined in **Art 5(1) FC** to a mere illusion. The **FC** does in fact provide for remedies for the enforcement of the fundamental rights protected under **Part II**. That remedy is available to be exercised by the Judiciary under **Paragraph 1 of the Schedule to section 25 of the Courts of Judicature Act 1964 ('CJA')**. It provides the courts with the *'powers to issue to any person or authority direction, orders or writs..... or any others for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.'* Given the existence of a clear remedy it is open to the Courts to give redress to those who establish an infringement of the right to life.

8. It is not accurate to conclude that there is no manner of redress available to Chandran's estate for the inhumane end to his life simply because the remedies

afforded for a breach of his fundamental right to life is contained in a statute, namely the **CJA**, and not expressly within the **FC**, as was held in **Nurasmira** and applied here. The reasoning in **Nurasmira**, which has been accepted in the majority decision here, is that in many jurisdictions the mode of enforcement of an infringement of a fundamental right is set out expressly in the constitution itself, while it is not so in the **FC** here.

9. It is here that I depart from the reasoning in **Nurasmira**. Here the availability of this relief is in the **CJA** while the fundamental liberties are in **Part II FC**. This means that every High Court has the jurisdiction and power to afford relief to a citizen who has suffered from an infringement of his fundamental rights. There can be no right without redress. Rights and remedies are inextricably interwoven. Otherwise, these rights are nothing more than a series of lofty ideals with no hope of enjoying such illusory rights. Justice would not be served.

10. In **Rama Chandran's case**² Edgar Joseph Sr FCJ explained that the remedies set out in **Schedule 1 to paragraph 25 CJA** are primarily public law remedies and that *"...our courts are at liberty to develop a common law that is to govern the grant of public law remedies based on our own legislation... ultimately they must hearken to the provisions of our written law when determining the nature and scope of their powers."*

11. The courts should be vigilant to protect the rights of those in custody to ensure that they are not subject to custodial violence, but should be equally vigilant to ensure that falsely motivated and frivolous claims are rejected. This is in the interests of society and to enable the police to discharge their duties fearlessly and effectively. I have set out the criteria in full in my judgment. The present appeal is a fit and proper case for the executors to have brought an action against the appellants both in private law under tort as well as in public law for the contravention of his right to life under **Art 5(1) FC**. The second aspect of his claim namely this breach of his constitutional right to life allows his estate to receive redress for the failure of the State through its servants and agents, namely the appellants to safeguard this fundamental right. The

² R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1996] 1 MELR 71; [1996] 1 MLRA 725

damages of RM200,000-00 awarded by the High Court were clearly punitive in nature to indicate the Court's outrage at the conduct of the authorities, resulting in his unnecessary death. Chandran's death is after all both irrevocable and irreversible and the only possible remedy is monetary redress to his estate. For these reasons I answer the question of law which relates solely to **section 8(2) CLA** in the affirmative. However, I go on to state that although the **CLA** bars further relief in the form of punitive damages against the State, his estate is entitled to receive such punitive damages for the breach of his right to life under **Art 5(1) FC**. And that redress is contained in **Schedule 1 to paragraph 25 of the CJA**. I therefore dismiss this appeal with costs.

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.