

IN THE FEDERAL COURT OF MALAYSIA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO: 05(HC)-304-12/2019(B)

CRIMINAL APPEAL NO: 05(HC)-308-12/2019(B)

CRIMINAL APPEAL NO: 05(HC)-303-12/2019(B)

CRIMINAL APPEAL NO: 05(HC)-305-12/2019(B)

CRIMINAL APPEAL NO: 05(HC)-307-12/2019(B)

CRIMINAL APPEAL NO: 05(HC)-7-01/2020(W)

CORAM:

ABANG ISKANDAR ABANG HASHIM, CJSS

NALLINI PATHMANATHAN, FCJ

VERNON ONG LAM KIAT, FCJ

ZABARIAH MOHD YUSOF, FCJ

HASNAH MOHAMMED HASHIM, FCJ

PRESS RELEASE
(the Majority Decision)

[1] The 6 appellants appealed against the decision of the learned Judicial Commissioner which dismissed the application by the appellants for a writ of habeas corpus in seeking for their release. The 6 appellants were ordered to be detained under section 19A (1) of Prevention of Crime Act 1959 (POCA) issued by the Chairman/Deputy Chairman of Prevention of Crime Board (Board) for a period of 2 years at the respective Pusat Pemulihan Khas (PPK).

THE ISSUE IN THE APPEALS

[2] The main issue is whether section 15B of POCA (an ouster clause provision) which purports to limit the exercise of judicial power is ultra vires Article 121(1) of the Federal Constitution (FC). However, the following 4 points were raised by the appellants in the course of arguments, namely:

- (i) section 15B of POCA which was enacted under Article 149 which ousts the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of **Article 4(1) of the FC**;
- (ii) the ouster clause in section 15B of POCA is an attempt by Parliament to suppress constitutional powers given to the courts as provided under **Article 121(1) of the FC**.
- (iii) section 15B of POCA encroaches on judicial power thus breaching **the doctrine of the separation of powers** between the 3 branches, namely the executive, legislative and the judiciary;
- (iv) section 15B of POCA which seek to oust the courts from exercising their rights under Article 4(1) of the FC contravenes that very Article and to that extent **contravenes the “basic structure” of the FC**.

DECISION:

Point (i): Whether section 15B of POCA which was enacted under Article 149 which ousts the jurisdiction of the courts to perform judicial review is unconstitutional by virtue of Article 4(1) of the FC.

[3] Article 4(1) of the FC states that the FC is the supreme law of the federation. It provides that any post-Merdeka law inconsistent with the provision of the FC is void. Pursuant to Article 4(1) of the FC written law may be invalidated by the courts under various grounds In our present appeal since POCA is federal law, the relevant grounds to challenge the impugned provision, pursuant to Article 4(1) of the FC, would be on the ground that, the federal law (POCA) is inconsistent with the FC. (Suffian LP in ***Ah Thian v Government of Malaysia*** [1976] 2 MLJ 112).

[4] Article 149 of the FC empowers Parliament to pass special preventive laws. Section 15B POCA, a post-Merdeka law, was enacted under Article 149 of the FC. Therefore section 15B POCA derives its force of law and validity from Article 149 of the FC as can be discerned from the preamble to POCA.

[5] It cannot be said that section 15B of POCA is unconstitutional by virtue of Article 4(1) of the FC. Article 4(1) cannot be invoked to strike down any law that is inconsistent with itself because the Article does not operate by itself and on its own. It must be read in conjunction with any other relevant Article of the Federal Constitution.

Point (ii): Whether the ouster clause in section 15B of POCA is an attempt by Parliament to suppress constitutional powers given to the courts as provided under Article 121(1) of the FC.

[6] We are of the view that section 15B(1) is not ultra vires Article 121(1), because Article 121(1) FC confers powers on Parliament to set up an institutionalised mechanism i.e. the Courts, whereby the extent of their powers and jurisdiction is said to be derived from federal law. POCA is the federal law (enacted by Parliament pursuant to Article 149), which provides the extent and manner as to how that power of the courts is to be exercised. Hence how could POCA be inconsistent or ultra vires Article 121(1) of the FC?. In any event, section 15B still maintain judicial power with the courts, not any other body as in **Semenyih Jaya**.

Point (iii): Whether section 15B of POCA encroaches on judicial power thus breaching the doctrine of the separation of powers between the 3 branches, namely the executive, legislative and the judiciary

[7] In the context of our constitutional structure based on the Westminster model, there is overlapping of functions and powers of the 3 branches of government, i.e. the rigid separation does not exists. This was explained in detail by the following authorities:

- Tun Hamid Mohammed, PCA (as he then was) in **PP v Koh Wah Kuan** [2008] 1 MLJ 1;
- Azhar Mohammed, FCJ (as he then was) in **JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd** [2019] 3 MLJ 561;

- Dato' Dr. Shad Saleem Faruqi in Document of destiny, the Constitution of the Federation of Malaysia at page 48.

[8] The executive, legislative and judicial functions are overlapping and cannot be separated in a water tight way. The existence of tribunals by statute exercising quasi-judicial power is an example of the absence of absolute separation of power as alleged. The test of constitutionality of any impugned provision is the FC itself. To what extent the doctrine of separation of powers applies depends on the provision of the FC. No provision of the law may be struck out as unconstitutional if it is inconsistent with the doctrine. (refer to **Loh Kooi Choon v Government of Malaysia** [1977] 2 MLJ 187.

[9] It is Parliament that confers the judiciary with the extent and manner of powers and jurisdiction through federal law (Article 121(1)). Thus, section 15B of POCA does not encroach on judicial power and neither does it breach the doctrine of the separation of powers between the 3 branches, as it still vest judicial power to the courts.

Point (iv): Whether section 15B of POCA which seek to oust the courts from exercising their rights under Article 4(1) of the FC contravenes that very Article and to that extent contravenes the “basic structure” of the FC.

[10] The concept of basic structure is premised on the principle that the constitution possesses a basic structure of constitutional principles which are not amenable to amendments or judicial review, i.e. there is an implied limitation on the power to amend the basic structure provisions of the Constitution. This concept of basic structure which was enunciated

in ***Kesavananda Bharati v State of Kerala*** AIR 1973 SC 1461, was considered and rejected by Raja Azlan Shah, FJ in ***Loh Kooi Choon v Government of Malaysia*** [1977] 2 MLJ 187 and Suffian L.P. in ***Phang Chin Hock v PP*** [1980] 1 MLJ 70. However ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** [2010] 3 CLJ 507 has embraced this concept which was subsequently followed by ***Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat*** [2017] 3 MLJ 561, and ***Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other Appeals*** [2018] 1 MLJ 545 which established that judicial review is part of basic structure. It has been perceived by certain quarters that on the basis of the trilogy of cases of ***Semenyih Jaya***, ***Sivarasa Rasiah*** and ***Indira Ghandi***, Parliament cannot amend the Constitution which destroys its basic structure and that limiting judicial review in section 15B of POCA affects the FC's basic structure.

[11] The basic structure concept is not applicable in our present context because:

- it ignores the provision of our FC, i.e. Article 159 which allows amendments to be made to the FC even if it is inconsistent with the FC (Article 4(1). By importing the basic structure concept “it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.” (as per Raja Azlan Shah FJ in ***Loh Kooi Choon***);
- it is not explicated in the FC which are the provisions of the FC amounts to basic structure. To declare any impugned provision of the law unconstitutional, it cannot be premised on a doctrine

or concept as it is unclear and indefinite subject to one's interpretation of what amounts to basic structure. It must be based on the provisions of the FC;

- The decision in **Sivarasa Rasiah** which was adopted by **Semenyih Jaya**, at best is only obiter because the constitutional issues and the facts in **Sivarasa Rasiah**, **Semenyih Jaya** and **Indira Ghandi a/p Mutho** has got nothing to do with amendment to the FC and there was no necessity to import the basic structure doctrine in the determination of those cases;
- It is not the basic structure of the FC that an aggrieved party enjoys the fullest form of remedy in challenging a public authority's decision; and
- it is not the basic structure of the FC that courts enjoy an unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by judicial review, due to Article 121(1);

The effect of *Privacy International v Investigatory Powers Tribunal and Others [2019] UKSC 22* and its application to section 15B of POCA:

[12] Essentially, the effect of **Privacy International** as can be captured from Lord Carnwath's judgment is that it is for the Courts to determine the extent to which an ouster clause restricts review or appeal in any particular situation. However, his view failed to consider the intention of Parliament in legislating s 67(8) of the Regulation of Investigatory Powers Act 2000, as traditionally it would have been the touchstone in determining the court's approach in interpreting any ouster clause, as it would be with any other statutory provision. The majority expressed concerns that the rule of law being undermined if Parliament is given the power to alter the

modes of judicial review of a decision of the executive when it is undertaken by a “judicial body” like the IPT which is not the court. In our present context, ***Privacy International*** is not an authority to establish that national security should be a basis in which judicial review should be totally excluded neither is it an authority to establish that judicial review may be used to scrutinise every aspect of executive’s action.

[13] Additionally, in determining the extent to which an ouster clause should be upheld, the court should have regard to the purpose and statutory context and the nature and importance of the legal issue in question.

[14] By applying ***Privacy International***, the ouster clause in section 15B(1) of POCA can still survive the constitutional challenge in the present appeal. What is of significance is that in Privacy International which placed importance on rule of law as a basis in its decision is from **a jurisdiction where there is no written constitution, unlike Malaysia where we have a written FC with specific provisions therein on powers of the courts and the legislatures and where the constitutionality of any impugned provision is tested against the provisions of the FC**. But most significant is that, ***Privacy International*** is not a case which dealt with preventive detention laws and the likes of the provision of Article 149 of the FC.

CONCLUSION

[15] The ultimate test for constitutionality of any impugned provision is the FC itself. Parliament is empowered by the FC to enact laws on the jurisdiction and powers of the courts. Article 121(1) provides for the

powers and the jurisdiction of the courts is to be provided by federal law. Section 15B of POCA, a federal law was enacted within the limit of what Article 149 of the FC allows. Its legitimacy and validity is derived from Article 149. Section 15B of POCA still maintain judicial powers with the courts. It does not vest judicial power to any other body. Therefore, it is not ultra vires Art 121(1) of the FC and is constitutional and is therefore valid.

[16] No provision of the law can be struck out if it is not inconsistent with the FC, although it is inconsistent with a doctrine. Such proposition runs contrary to the express provision of Article 4(1) which provides that “....any law passed after Merdeka day which is **inconsistent with this Constitution** shall, ...be void.”

[17] As the appeals by the 5 appellants who were represented by Encik Najib Zakaria, hinged on this single issue of constitutionality of section 15B (1) of POCA, their appeals therefore fall.

[18] As for the appellant, Nivesh Nair a/l Mohan who was represented by Dato' Seri Gopal Sri Ram, his appeal is dependent on the constitutionality issue and the procedural non-compliance issue, he failed to raise any procedural non-compliance in the decision making by the Board.

[19] Consequently, given the aforesaid, the appeals by all the appellants are hereby dismissed.

Dated: 19.2.2021.