

JUDGMENT Express

[2021] 1 MLRA Selva Vinayagam Sures
v. Timbalan Menteri Dalam Negeri, Malaysia & Ors

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SELVA VINAYAGAM SURES

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

Federal Court, Putrajaya

Abang Iskandar Abang Hashim CJSS, Mohd Zawawi Salleh, Vernon Ong,
Zaleha Yusof, Zabariah Mohd Yusof FCJJ

[Criminal Appeal No: 05(HC)-270-11-2019(B)]

11 December 2020

Constitutional Law: *Fundamental liberties — Fundamental rights — Abridgment of fundamental rights — Constitutional safeguards — Whether courts ought to vigorously enforce such safeguards — Whether law authorising preventive detention ought to be strictly construed — Whether safeguards provided for protection of citizens ought to be liberally interpreted — Federal Constitution, art 151(1) — Dangerous Drugs (Special Preventive Measures) Act 1985, ss 9(1), 10*

Constitutional Law: *Fundamental liberties — Fundamental rights — Whether fundamental rights under Federal Constitution qualified and not absolute rights — Whether fundamental rights under Federal Constitution might be circumscribed by legislation — Whether right to personal freedom meant freedom from executive detention not authorised by law — Whether right to personal freedom did not mean freedom from executive detention — Whether powers of executive detention must be clearly prescribed by law — Federal Constitution, arts, 5, 9, 10 and 13 — Dangerous Drugs (Special Preventive Measures) Act 1985, s 6(1)*

Constitutional Law: *Legislation — Legislation against subversion, action prejudicial to public order, etc — Purpose and extent of art 149 Federal Constitution — Whether art 149 Federal Constitution enlarged to deal with social problems such as drug-trafficking — Whether art 149 affirmed the validity of legislation enacted against subversion, action prejudicial to public order, etc notwithstanding that such legislation at variance with fundamental liberties enshrined under Federal Constitution — Federal Constitution, art 149*

Preventive Detention: *Detention order — Dangerous Drugs (Special Preventive Measures) Act 1985 — Power to order detention and restriction of persons — Key ingredients to exercise of power under s 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether activity which had been taken or being threatened by substantial body of persons related to or involved in trafficking of dangerous drugs — Whether detenu a member of substantial body of persons — Whether Minister was satisfied that it was necessary in interest of public order that detenu be subject to preventive detention — Whether scope of powers under s 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 confined to substantial body of persons — Whether*

powers not applicable to detenu acting alone — Dangerous Drugs (Special Preventive Measures) Act 1985, s 6(1)

Preventive Detention: *Detention order — Dangerous Drugs (Special Preventive Measures) Act 1985 — Power to order detention and restriction of persons — Whether Dangerous Drugs (Special Preventive Measures) Act 1985 special specie of enactment on preventive detention — Whether fundamental liberties under Federal Constitution might be circumscribed under Dangerous Drugs (Special Preventive Measures) Act 1985 — Dangerous Drugs (Special Preventive Measures) Act 1985 — Federal Constitution*

Preventive Detention: *Detention order — Executive detention — Scope, nature & extent of executive detention — Whether fundamental rights enshrined under Federal Constitution are qualified rights — Whether such rights may be circumscribed by preventive detention law — Whether right to personal freedom does not mean freedom from executive detention, but freedom from executive detention not authorized by law — Whether powers of executive detention must be clearly prescribed by law — Federal Constitution, arts, 5, 9, 10 and 13 — Dangerous Drugs (Special Preventive Measures) Act 1985, s 6(1)*

Statutory Interpretation: *Construction of statutes — Long title, preamble and schedules — Whether long title, Preamble and Schedules to an Act ought to be interpreted, construed and read as part of Act — Interpretation Acts 1948 and 1967, s 15*

Statutory Interpretation: *Construction of statutes — Purpose of Act — Whether in construing provision of Act, due regard must be had to purpose or object of Act — Interpretation Acts 1948 and 1967, s 17A*

The appellant was detained under a detention order (“the Order”) issued pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (“Act 316”). The appellant challenged the detention order in the High Court through a *habeas corpus* application, but the application was dismissed. The appellant appealed directly to the Federal Court pursuant to s 374 of the Criminal Procedure Code (“CPC”). In the Federal Court, the appellant argued that the Order, its grounds and allegations of fact were *ultra vires* art 149 of the Federal Constitution (“FC”) and the Preamble to Act 316. The appellant’s argument essentially was that the grounds of the detention order, the allegations of fact and the Deputy Minister’s affidavit revealed that the appellant had acted alone without any participation from any other persons. There was no allegation that the appellant’s activities were being conducted in association with “a substantial body of persons”, as prescribed in the Preamble to Act 316. The Deputy Minister had failed to consider whether the appellant was carrying out the impugned activities alone or in association with “a substantial body of persons”. Thus, the detention was unjustified and unlawful.

Held (allowing the appellant’s appeal):

(1) Article 149 FC had been enlarged by the Constitutional Amendment Act 1978 to deal with not only subversion, but with any social problem, notably



drug-trafficking by use of special powers transgressing the fundamental-rights provisions of the FC. The purpose of art 149 FC is to enable Parliament, once any one or more of the six categories of action enumerated under paras (a) to (f) of cl (1) had occurred, to make law providing not only for its suppression but also for preventing its recurrence. Where such an Act of Parliament conferred on the Executive power to act in a manner inconsistent with arts 5, 9, 10 or 13 FC, the action must be taken *bona fide* for the purpose of stopping or preventing action of the kind envisaged under the Act. Section 149 FC affirmed the validity of legislation enacted against subversion, action prejudicial to public order, etc notwithstanding that such legislation might be at variance with the fundamental liberties contained in arts 5, 9, 10 or 13 FC. (paras 18, 33 & 41)

(2) Act 316 was a special *specie* of enactment on preventive detention under which the fundamental liberties prescribed under art 5 (liberty of the person), art 9 (prohibition of banishment and freedom of movement), art 10 (freedom of speech, assembly and associations) and art 13 (right to property) might be circumscribed. The singular feature of preventive detention was that the detenu was subject to detention without trial on the assumption that his release would not be in the best interest of society. The detenu was detained at the instance of the Executive (Executive detention) not for what he had done, but for what he might do in the future if he remained at liberty. (paras 19, 21 & 22)

(3) The rights under arts 5, 9, 10 and 13 were qualified and not absolute. Article 149 FC was a special provision under the FC as it authorised Parliament to enact law which circumscribed fundamental rights under arts 5, 9, 10 and 13 FC. The guaranteed right to personal freedom was not freedom from executive detention, but freedom from executive detention not authorised by law. The lack of legal authorisation was prohibited. The existence of executive detention powers and their exercise must be clearly prescribed under the law. (paras 24-27)

(4) Whilst art 149 FC authorised the abridgement of fundamental rights, there were two built-in constitutional safeguards under cl 1 of art 151. The first safeguard conferred on the detenu the rights: (i) to be informed of the grounds for his detention and the allegations of fact, on which the detention order was based; and (ii) to be given an opportunity of making representations against the detention order to an advisory board. The second safeguard related to a detenu's rights against continued detention without an advisory board having considered his representations and made recommendations on them to the Yang di-Pertuan Agong. With regard to the first constitutional safeguard, the right of the detenu to be informed of the grounds for his detention and the allegations of fact on which the detention order was made was provided under subsection 9(2) of Act 316 and the detenu's entitlement to make representations against the detention order to an advisory board was provided under subsections 9(1) and (2)(a) of Act 316. The second constitutional safeguard was spelt out in s 10 of Act 316 which provided that after considering the representations, the advisory board should make recommendations to the Yang di-Pertuan Agong as to whether to continue or lift the detention order. (paras 28-30)



(5) Part of the court's function was to see that the Executive acts within the law and did not encroach unnecessarily into the realm of liberty of the subject. The court must vigorously enforce whatever safeguards provided by law against the improper exercise of such power. Strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provided for the protection of any citizen must be liberally interpreted. (paras 32 & 34)

(6) The Interpretation (Amendment) Act 1997 ("the Amending Act") amended s 15 of the Interpretation Acts 1948 and 1967 ("IA") retrospectively. It also inserted a new s 17A which came into force on 25 July 1997. The amended s 15 required the long title, Preamble and Schedules to an Act to be interpreted, construed and read as part of the Act. The newly inserted s 17A further emphasised that in construing a provision of an Act, due regard must be had to the purpose or object of the Act, underscoring Parliament's intention that the interpretation and construction of any written law should have regard to the underlying purpose or object of the Act. Such was the codification of the purposive rule of construction, which was not merely confined to the provision of a section of the Act but also included the purpose or object manifested in the long title and Preamble of the Act. (paras 37-40)

(7) In the light of ss 15 and 17A IA, the purpose and object of Act 316 should be read into subsection 6(1) of Act 316 in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of art 149 FC. This was particularly important as art 149 justified the substantial restrictions on fundamental liberties even under normal circumstances (other than during an Emergency). To construe subsection 6(1) of Act 316 without reading into the purpose of the Act would be: (i) to render the declared purpose and object which was spelt out in the Long Title and Preamble as mere verbiage, and (ii) to render otiose the provisions of ss 15 and 17 IA. The power under subsection 6(1) of Act 316 might only be exercised if the following three key ingredients were set out in the grounds of the detention order and allegations of fact: (i) the activity which had been taken or was being threatened by a substantial body of persons related to or involved in the trafficking of dangerous drugs; (ii) the detenu was a member of a substantial body of persons; and (iii) the Minister was satisfied that it was necessary in the interest of public order that the detenu be subject to preventive detention. (paras 46-47)

(8) In the instant case, the only allegation was that the appellant was acting alone. There was no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons. Thus, the fact of the appellant was acting alone could not be deemed to fall within the ambit and scope of scrutiny under Act 316 which scope was confined to a substantial body of persons. The omission to set out all the three vital ingredients indicated that the mind of the Deputy Minister was really not applied to the question of the preventive detention of the appellant in the instant case. There was failure



to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of the instant case was bad in law. (paras 48 & 50)

Case(s) referred to:

Ahmad Yani Ismail & Anor v. Ketua Polis Negara & 3 Ors [2004] 4 MLRH 394 (ovrld)
Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 MLRA 290 (refd)
Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 1 MLRA 692 (refd)
Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri Malaysia & Anor [2016] MLRHU 361 (refd)
Nik Nazmi Nik Ahmad v. PP [2014] 4 MLRA 511 (refd)
PP v. Yuneswaran Ramaraj [2015] 6 MLRA 559 (distd)
Raja Petra Raja Kamarudin v. Menteri Hal Ehwal Dalam Negeri [2008] 8 MLRH 666 (refd)
Re Application Of Tan Boon Liat & Ors; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1977] 1 MLRA 521 (refd)
Re Datuk James Wong Kim Min; Minister Of Home Affairs Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 MLRA 132 (refd)
Teh Cheng Poh v. PP [1978] 1 MLRA 321 (refd)
Theresa Lim Chin Chin & Ors v. Inspector General Of Police [1987] 1 MLRA 639 (refd)

Legislation referred to:

Criminal Procedure Code, s 374
Dangerous Drugs (Special Preventive Measures) Act 1985, ss 4(1), 6(1), 9(1), (2)(a), 10, 11C
Federal Constitution, arts 5(1), 6, 7, 8, 9, 10(2)(a), (b), (c), 11, 12, 13(1), 79, 149(1)(a), (b), (c), (d), (e), (f), 151(1)
Interpretation Acts 1948 and 1967, ss 15, 17A
Interpretation (Amendment) Act 1997, s 3(2)
Peaceful Assembly Act 2012, s 9(1)

Other(s) referred to:

Francis Bennion on Statutory Interpretation, 2 Edn 1992, p 499
Sheridan & Groves, The Constitution of Malaysia, Malayan Law Journal, 5th Edn, 2004, p 594
Andrew Harding, The Constitution of Malaysia, A Contextual Analysis, Hart Publishing, 2012, pp 172, 176
Abdul Aziz Bari, Malaysian Constitution, A Critical Introduction, The Other Press, 203, pp192-197
Shad Saleem Faruqi, Document of Destiny, The Constitution of the Federation of Malaysia, Star Publications, 2008, pp 661-662



Counsel:

For the appellant: Najib Zakaria; M/s Najib Zakaria, Hisham & Co

For the respondents: Muhammad Sinti; SFC

JUDGMENT**Vernon Ong FCJ:****Introduction**

[1] On 22 November 2018, a detention order pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) was issued by the Deputy Minister of Home Affairs directing that the appellant be detained for a period of two years with effect from 22 November 2018 at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor. Section 6(1) authorises the Minister to make such order if he is satisfied that such person has been or is associated with any activity relating to the trafficking in dangerous drugs and that it is necessary in the interest of public order that such person be detained.

[2] The appellant filed an application at the High Court on 27 May 2019 for a writ of *habeas corpus* on the ground that the detention order was unlawful.

[3] At the High Court, the appellant's sole ground was that the respondents failed and/or refused to produce the appellant's statement which was recorded by the Investigating Police Officer ("IPO") pursuant to s 4 of Act 316. This failure and or refusal to produce the appellant's statement, submitted learned counsel for the appellant, amounted to a substantive procedural non-compliance which justified the writ of *habeas corpus* to be issued.

[4] Suffice it to state that the learned judge dismissed the appellant's application on the grounds that: (i) the IPO had carried a proper investigation and examination of the appellant under s 4(1) of Act 316; and (ii) the non-production of the appellant's statement did not breach any procedural requirement under Act 316. As the High Court's decision is in respect of a *habeas corpus* application, this appeal was brought directly to the Federal Court without leave pursuant to s 374 of the Criminal Procedure Code.

The Appellant's Submission

[5] Before us, learned counsel for the appellant raised a new point – that the detention order and the grounds and allegations of fact thereunder are *ultra vires* art 149 of the Federal Constitution ("FC") and the Preamble of Act 316.

[6] At the heart of the appellants' argument is that the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit revealed that the appellant is acting alone without any participation from any other persons; it did not allege that the appellant's activities were being conducted in association with a substantial body of persons.



[7] The preamble to Act 316 states that it is an Act to stop action which is prejudicial to public order which has been taken or threatened by “a substantial body of persons”. Act 316 is consonant with art 149 of the FC which provides that an Act of Parliament which recites that “action has been taken or threatened by any substantial body of persons” is valid even though it is inconsistent with any of the provisions of arts 5, 9, 10 or 13 of the FC. As s 15 of the Interpretation Acts 1948 and 1967 (“Interpretation Acts”) provides that the short title, the long title and the Preamble to Act 316 should be construed as part of Act 316, the activities of a single person cannot be deemed to be within the ambit and scope of scrutiny under the preventive legislations such as Act 316. As such, it was argued that the ambit or scope of Act 316 is only confined to a substantial body of persons (*Raja Petra Raja Kamarudin v. Menteri Hal Ehwal Dalam Negeri* [2008] 8 MLRH 666).

[8] It is therefore necessary to scrutinise the grounds and allegations of fact to ascertain whether the Deputy Minister had taken into account the factor that the appellant has been carrying out the impugned acts in association with a substantial group of persons (*Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri Malaysia & Anor* [2016] MLRHU 361). A scrutiny will show that it is not the respondents’ case that the appellant was a member of a substantial body of persons involved in trafficking in dangerous drugs.

The Respondent’s Submission In Reply

[9] Learned Senior Federal Counsel (SFC) appearing for the *respondents* argued that the preamble to Act 316 is not an operating part of the statute. The aid of the preamble is only to be taken when there is some doubt about the meaning of the operative part of the statute. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and when they do so, they cannot be cut down by reference to it. Therefore, the preamble to Act 316 is not relevant for the purposes of construction or considering the scope of the provisions of s 6(1) as there is no ambiguity whatsoever in the latter (*Re Application Of Tan Boon Liat & Ors; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1977] 1 MLRA 521; *Johnson Tan Han Seng v. Pp & Other Appeals* [1977] 1 MLRA 290 (FC); and *Ahmad Yani Ismail & Anor v. Ketua Polis Negara & 3 Ors* [2004] 4 MLRH 394 (HC)). Section 17A of the Interpretation Acts only enjoins a court to interpret a provision of an Act that would promote the purpose or object underlying the Act (*PP v. Yuneswaran Ramaraj* [2015] 6 MLRA 559 (CA)).

[10] It was also submitted that the appellant’s argument is inconsistent with the broad and practical approach that the Court has taken to see the scheme of the legislation both under the FC and Act 316 – to stop actions which is prejudicial to public order (*Theresa Lim Chin Chin & Ors v. Inspector General Of Police* [1987] 1 MLRA 639). Pursuant to art 149 of the FC, Act 316 confers



powers on the Executive to act in a manner inconsistent with arts 5, 9, 10 and 13 of the FC (*Teh Cheng Poh v. Public Prosecutor* [1978] 1 MLRA 321). Whilst conceding that there is nothing in the grounds or allegations of fact to say that a substantial body or persons is involved, SFC argued that the Court should take judicial notice that trafficking in dangerous drugs invariably involves other persons.

[11] At any rate, the preamble is merely a guide as to the object of Act 316. Section 6(1) can be invoked once the Minister is satisfied that: (i) the appellant has been or is associated with any activity involving the trafficking in dangerous drugs, and (ii) that it is necessary in the interest of public order that the appellant be detained. There is no requirement to show that there is a threat from a substantial body of persons involved in the activity (*Ahmad Yani Ismail & Anor v. Ketua Polis Negara & 3 Ors* [2004] 4 MLRH 394).

[12] Lastly, SFC argued that pursuant to s 11C of Act 316 the detention order may only be challenged on ground of non-compliance with any procedural requirement, and nothing else (*Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 1 MLRA 692).

Decision

[13] In essence, the appellant's argument is that the Deputy Minister failed to consider whether the appellant was carrying out the activities alone or in association with 'a substantial body of persons'. That the detention is only justified and lawful on the basis that the appellant was alleged to have been acting in concert or in association with a substantial body of persons - which allegation was absent on the record.

[14] This argument relates to the question of whether the long title and preamble to Act 316 should be construed and have effect in the interpretation of subsection 6(1).

Short Title, Long Title And Preamble To An Act

[15] As a general rule, every Act has a short title, a long title and preamble. The Short Title is specified in the Act and is used for convenience. This is the name by which the Act is known (and includes the year in which it was passed). The short title appears on the front page, but there is also a section within the Act (usually either the first or the last section) which specifies what the short title is. The Long Title sets out the subject, scope and purpose of the Act. This appears on the first page after the contents page, immediately before s 1 of the Act. The long title begins 'An Act...' and explains briefly the Act's content. Some long titles are quite detailed and informative but others are brief and convey little. It is important because it can be used in Court to interpret the Act. The Preamble appears immediately after the Long Title, and states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed and tends to be more comprehensive than a long title (Francis Bennion on *Statutory Interpretation* (2 Edn 1992) p 499).



[16] The long title and Preamble to Act 316 reads:

“An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.

[15 June 1985, PU(B) 305-1985]

Whereas action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened **by a substantial body of persons** both inside and outside Malaysia;

[Emphasis Added]

And Whereas Parliament considers it necessary to stop such action;

Now, Therefore, Pursuant to art 149 of the Constitution BE IT ENACTED by the 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:”

[17] It is clear from the long title and preamble that Act 316 was enacted pursuant to cl 1 of art 149 of the FC which is as follows:

“149. Legislation against subversion, action prejudicial to public order, etc.

- (1) 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, organized 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 alteration, otherwise than by lawful means, of anything by law established; or
 - (e) Which is prejudicial to the maintenance of 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 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 inconsistent with any of the provisions of arts 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of parliament; and art 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.”



[18] Paragraphs (e) and (f) were added into cl 1 pursuant to the Constitutional Amendment Act 1978 (Act A442); the effect of which was to introduce a totally different aspect and even purposes from the original provision (See AJ Harding, *Law, Government and the Constitution in Malaysia* [1996] 209). Therefore, the ambit of art 149 has been enlarged to deal with, not just with subversion, but with any social problem, notably drugtrafficking, by use of special powers transgressing the fundamental-rights provisions of the FC.

[19] Accordingly, Act 316 is a special *specie* of enactment on preventive detention under which the fundamental liberties prescribed under art 5 (Liberty of the person), art 9 (Prohibition of banishment and freedom of movement), 10 (Freedom of speech, assembly and associations) and art 13 (Right to property) may be circumscribed.

[20] In this context, one can appreciate the scheme of Act 316 in general, and of the power of preventive detention under subsection 6(1) in particular. Subsection 6(1) is as follows:

“Power to order detention and restriction of persons

6(1) Whenever the Minister, after considering:

- (a) The complete report of investigation submitted under subsection 3(3); and
- (b) The report of the Inquiry Officer submitted under subsection 5(4),

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a “detention order”) direct that such person be detained for a period not exceeding two years.”

Preventive Detention Law

[21] What is preventive detention? Preventive detention has been variously described as (i) an imprisonment that is putatively justified for non-punitive purposes, most often to prevent criminal acts, (ii) the imprisonment of a person with the aim of preventing him from committing further offences or of maintaining public order, and (iii) the holding of someone in jail or in an institution because he or she is regarded as a danger to the community. The singular feature of preventive detention is that the detenu is subject to detention without trial on the assumption that his release would not be in the best interest of society-specifically, that he would be likely to commit additional crimes if he was released.

[22] Preventive detention can also be described as the exercise of the powers of Executive detention. Executive detention is detention at the instance of the Executive for an indefinite period without charge and without trial. It is



typically imposed as a result of an administrative decision, taken in private, by government officials. Executive detention is designed to be employed in advance – as a preventive measure. Therefore, a detenu is detained not for what he has done, but for what he might do in the future if he remained at liberty.

[23] That the liberty of the person is a fundamental constitutional right cannot be overstated. The same can arguably be said for the fundamental rights provided under arts 9, 10 and 13 of the FC.

[24] However, the fact that the State can assume exceptional powers to restrict the freedom of its citizens is sanctioned under the FC. A perusal of arts 5, 9, 10 and 13 of the FC shows that the rights in question are qualified and not absolute. The art 5 right to life and liberty is qualified in that it may be restricted “in accordance with law” (see cl (1) of art 5). The same qualifying words are applied for the restriction on the right to property (see cl (1) of art 13). Article 9 on the right to freedom of movement and art 10 on the right to freedom of speech, assembly and association are also qualified as Parliament may by law impose restrictions on such rights (see cl (3) of art 9 and cl (2)(a) to (c) of art 10).

[25] In this connection, art 149 of the FC permits derogation from arts 5, 9, 10 and 13 of the FC in respect of legislation ‘against subversion, action prejudicial to public order, etc’. Therefore, art 149 is a special provision under the FC as it authorises Parliament to enact law which circumscribe the fundamental rights under arts 5, 9, 10 and 13.

[26] Given that the arts 5, 9, 10 and 13 rights are fundamental, it is not unexpected for art 149 and enactments restricting these fundamental rights to come under critical scrutiny. Article 149 has been described as a provision which “... gives great powers of government to Parliament when Parliament chooses to exercise those powers. Parliament’s Act must ‘recite’ that action has been taken or threatened. The actions or threats which could give rise to such appear as broad as language could provide for.” (See Sheridan & Groves, *The Constitution of Malaysia* (Malayan Law Journal, 5th Edn, 2004) at p 594). Learned author Andrew Harding noted that whilst art 149 of the FC allows art 5, as well as other fundamental rights provisions, to be overridden, “[o]ne of the difficulties with legislation as broad in substantive scope as it is narrow in procedural protection is that there is potentially no limit to the types of cases that can be regarded as coming under it.” (See Andrew Harding, *The Constitution of Malaysia, A Contextual Analysis* (Hart Publishing, 2012) at pp 172, 176); see also Abdul Aziz Bari, *Malaysian Constitution, A Critical Introduction (The Other Press, 203)* at pp192-197). According to another learned author Professor Shad Saleem Faruqi, a parliamentary law under art 149 is permitted to violate only four fundamental rights – arts 5, 9, 10 and 13. The clear intention of the FC is that art 149 can prevail over arts 5, 9, 10 and 13 only; that art 149 cannot override fundamental liberties on arts 6, 7, 8, 11 and 12 (See Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia*, (Star Publications, 2008) at pp 661-662).



[27] It must, however, be appreciated that the guaranteed right to personal liberty is not freedom from executive detention as described in para [22] above, but to freedom from executive detention not authorised by law. It is the lack of legal authorisation which is the subject of prohibition. What is important is that the existence of such powers and its exercise must be clearly prescribed under the law.

[28] Therefore, whilst art 149 authorises the abridgement of fundamental rights, there are two built-in constitutional safeguards provided by cl (1) of art 151.

Restrictions on preventive detention

151. (1) Where any law or ordinance made or promulgated in pursuance of this part provides for preventive detention:

- (a) The authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
- (b) No citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di- Pertuan Agong may allow.

(2) ...

(3) ...

[29] The first safeguard confers on the detenu the right: (i) to be informed of the grounds for his detention and the allegations of fact, on which the detention order is based, and (ii) to be given an opportunity of making representations against the detention order to an advisory board. The second safeguard relates to a detenu's rights against continued detention without an advisory board having considered his representations and made recommendations on them to the Yang di-Pertuan Agong.

[30] Insofar the first constitutional safeguard is concerned, the right of the detenu to be informed of the grounds for his detention and the allegations of fact on which the detention order is made is provided under subsection 9(2) of Act 316; the detenu's entitlement to make representations against the detention order to an advisory board is provided under subsection 9(1) and subsection 9(2)(a) of Act 316. The second constitutional safeguard is spelt out in s 10 of Act 316 which provides that after considering the representations, the advisory board shall make recommendations to the Yang di-Pertuan Agong as to whether to continue or lift the detention order.



Interpretation Of Preventive Detention Law

[31] Preventive detention is, therefore, the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a Court of law in which he is proved to have committed an offence punishable under penal law. It is a serious invasion of personal liberty.

[32] One of the functions of the Courts is to interpret the law. An inherent part of their function is to see that the Executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister Of Home Affairs Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 MLRA 132 (FC)). Whatever safeguards that are provided by law against the improper exercise of such power must be vigorously enforced by the Courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted.

[33] The purpose of art 149 is to enable Parliament, once any one or more of the six categories of action enumerated under paras (a) to (f) of cl (1) has occurred, to make law providing not only for its suppression but also for preventing its recurrence. Where such an Act of Parliament confers on the Executive to act in a manner inconsistent with arts 5, 9, 10 or 13, the action must be taken *bona fide* for the purpose of stopping or preventing action of the kind envisaged under the Act (see *Teh Cheng Poh v. Public Prosecutor* [1978] 1 MLRA 321 (PC)).

[34] Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore, strict compliance with the letter of the rule of law is the essence of the matter.

[35] In this instance, the long title to Act 316 declares that: (i) the object of Act 316 is to provide for the preventive detention of persons involved in illicit drug trafficking activities, and (ii) Parliament considers it necessary to stop such activities prejudicial to public order which has been taken or is being threatened by a 'substantial body of persons'.

[36] A careful scrutiny of the long title and preamble to Act 316 will lead to two observations. First, the long title had adopted the wordings of cl (1) of Art 149 to the effect that "action has been taken... and is being threatened by any substantial body of persons". Second, the long title had also recited the wordings "which is prejudicial to public order" obtained in para (f) of cl (1) of art 149.



Long Title, Preamble And Schedules

[37] Learned SFC's argument that the long title and preamble is not relevant for the purposes of construing or considering the scope of subsection 6(1) must be considered in the light of ss 15 and 17A of the Interpretation Acts. Section 15 was amended by the Interpretation (Amendment) Act 1997 (Amending Act). Prior to its amendment, s 15 read as follows:

Schedules

15. Every schedule (together with any note or table annexed thereto) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation.

[38] Section 15 was amended to read as follows:

15. Long title, preamble and schedules

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.

[Amendments Underlined]

The amendments in s 15 took effect retrospectively on 18 May 1967: see subsection 3(2) of the Amending Act. Be that as it may, pre-amendment, s 15 only requires every schedule to an Act to be interpreted as part of the Act. The amended s 15 further requires the long title and Preamble to be interpreted and have effect as part of the Act.

[39] It is also important to note that concomitant with the amendments to s 15, s 17A was inserted by the Amending Act to emphasise that in construing a provision of an Act, due regard must be had to the purpose or object of the Act. Section 17A which came into force on 25 July 1997 reads as follows:

Regard to be had to the purpose of Act

17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[Underlined Added]

[40] The declared purpose of the Interpretation Acts as manifested in the long title to the Act was for the application, construction, interpretation and operation of written law. Read in this light, s 17A underscores Parliament's intention that the interpretation and construction of any written law shall have regard to the underlying purpose or object of the Act. And s 15 as amended further emphasises the point by stating that the long title and Preamble and every Schedule shall be construed and have effect as part of the Act. That in



our view is the codification of purposive rule of construction, which is not merely confined to the provision of a section of the Act, but also includes the purpose or object manifest in the long title and preamble of the Act.

[41] The words ‘purpose or object underlying the Act’ bear particular significance in the interpretation of preventive law promulgated pursuant to art 149 of the FC. The purpose of art 149 of the FC is clear. It affirms the validity of legislation enacted against subversion, action prejudicial to public order, etc. notwithstanding that such legislation may be at variance with the fundamental liberties contained in arts 5, 9, 10 or 13 of the FC.

[42] Act 316 is one such legislation. Act 316’s underlying purpose is self-evident in its long title and Preamble – (i) the preventive detention of persons involved in illicit drug trafficking activities, and (ii) to stop action which has been taken or is being threatened by a substantial body of persons which is prejudicial to public order.

[43] It is settled law that whilst the material provisions of preventive detention law must be strictly construed, safeguards which the law provides for the protection of any person must be liberally interpreted. By reason of the foregoing, careful consideration must therefore be given to the scheme of subsection 6(1) both under the FC and Act 316.

[44] What is meant by the phrase ‘a substantial body of persons’? The word ‘substantial’ has been defined by the *Oxford Advanced Learner’s Dictionary*, 5th Edn as ‘large in amount or value; considerable’; ‘considerable’ is defined as ‘great in number or size’. ‘Body’ is defined as ‘a group of people working or acting as a unit (See *Oxford Advanced Learner’s Dictionary*, 5th Edn) or as ‘[a] number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie.’ (See *Words, Phrases & Maxims - Legally & Judicially Defined* Vol 2. Anandan Krishnan, LexisNexis 2008). The word ‘person’ refers to a human being as an individual or a human being, especially not identified (see *Oxford Advanced Learner’s Dictionary*, 5th Edn). In the light of the foregoing, we think that the phrase ‘a substantial body of persons’ refer to a large number of individuals acting in concert or working together for a common purpose. In the context of Act 316, we think that it refers to action which is prejudicial to public order which has been taken or is being threatened by a large number of individuals acting together in the trafficking in dangerous drugs.

[45] Notably, subsection 6(1) refers to two factors – (i) authorizes the Minister to exercise his power to make a detention order if he is satisfied that such person is involved in illicit drug trafficking activities and that (ii) it is necessary in the interest of public order to make the detention order. What is significant is the omission to refer to the involvement of ‘a substantial body of persons’ in relation to the public order element; which scope is clearly stated in the preamble as ‘action which is prejudicial to public order... has been taken... by a substantial body of persons...’.



[46] In the light of ss 15 and 17A of the Interpretation Acts, we are of the view that the purpose and object of Act 316 should be read into subsection 6(1) in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of art 149 of the FC. This is particularly important as art 149 which provides for special powers against subversion, etc gave justification for substantial restrictions on fundamental liberties even under normal circumstances (ie, to say, other than during an Emergency). We say so for two reasons. To construe subsection 6(1) without reading into it the purpose of the Act would be (i) to render the declared purpose and object which is spelt out in the Long Title and Preamble as mere verbiage, and (ii) to render otiose the provisions of ss 15 and 17 of the Interpretation Acts.

[47] For the foregoing reasons, we think that the respondents' argument that the Long Title and Preamble is not relevant for the purposes of interpreting subsection 6(1) is incongruous. It is clear that the power under subsection 6(1) may only be exercised if the following three key ingredients are set out in the grounds of the detention order and allegations of fact. One, that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. Two, that the detenu is a member of a substantial body of persons. Three, that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention.

[48] It also goes without saying that the Courts must be vigilant in individual cases to ensure that the Executive acts within the law and does not encroach unnecessarily into the fundamental liberties of the person. We have scrutinised the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit. We agree with counsel for the appellant that the only allegation is that the appellant is acting alone. There is no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons.

[49] The authorities cited by SFC, *Tan Boon Liat (supra)* and *Johnson Tan Ham Seng, (supra)* were decided before the amendment to s 15 of the Interpretation Acts. As such, we do not think that they are still applicable insofar as they relate to the construction of the long title and preamble to an Act. In *Ahmad Yani* [2005] (*supra*), Heliliah J (as she then was) held that the recital or Preamble to the Internal Security Act 1960 (ISA) provides merely a guide as to the object of the ISA; N S Bindra's, *Interpretation of Statutes* (8 Edn 1997) was cited in support. We have two points to make. One, N S Bindra's book was published before s 15 of the Interpretation Acts was amended; as such the opinion of the learned author must be qualified by the amended s 15. Second, although *Ahmad Yani* was decided after the Amending Act, the amended s 15 was not considered by the learned judge; had she done so, more probably than not, that she would have decided otherwise. For these reasons, *Ahmad Yani* is distinguishable and overruled. *Yuneswaran (supra)* concerns the interpretation of subsection 9(1) of the Peaceful Assembly Act 2012 (PAA). In that case



the Court of Appeal adopted the purposive approach pursuant to s 17A of the Interpretation Acts. It departed from the earlier decision in *Nik Nazmi Nik Ahmad v. PP* [2014] 4 MLRA 511 CA which held that subsection 9(5) of the PAA was unconstitutional. As in *Ahmad Yani*, the Court of Appeal in *Yuneswaran* did not apply s 15 of the Interpretation Acts; neither did the Court of Appeal construe and give effect to the long title and preamble as part of the PAA. In the circumstances, *Yuneswaran* is distinguishable and of no aid to the respondents' argument.

[50] We are, therefore, constrained to hold that the fact of the appellant acting alone cannot be deemed to fall within the ambit and scope of scrutiny under Act 316; which scope is explicitly confined to a substantial body of persons. The omission in setting out all the three vital ingredients indicates that the mind of the Deputy Minister was really not applied to the question of the preventive detention of the appellant in this case. There was a failure to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of this case is bad in law.

[51] For the foregoing reasons, we hold that the detention order is *ultra vires* art 149 of the FC and Act 316. It follows that the detention order is a nullity and is hereby set aside. A writ of *habeas corpus* is hereby issued and the appellant is set at liberty forthwith.





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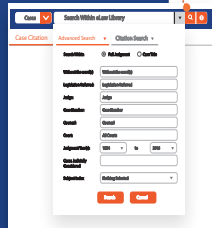
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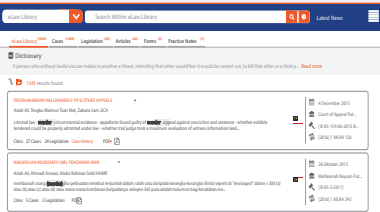
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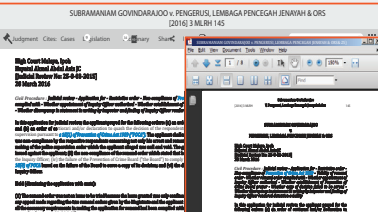
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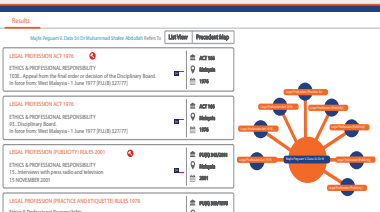
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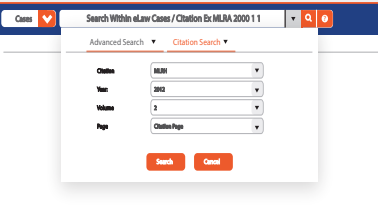
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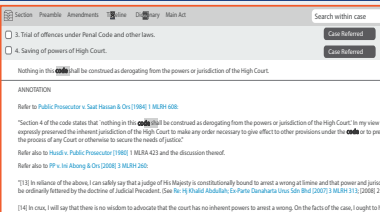
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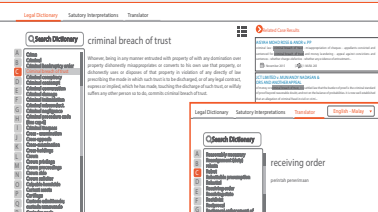
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