NIVESH NAIR MOHAN

v.

DATO' ABDUL RAZAK MUSA & ORS

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Mohd Zawawi Salleh, Zaleha Yusof, Harmindar Singh Dhaliwal, Rhodzariah Bujang FCJJ
[Criminal Application No: 05(RJ)-2-03-2021(W)]
30 July 2021

Civil Procedure: *Review Application — Natural justice — Breach — Application for review of decision of earlier panel of the Federal Court — Whether doctrinal basis of Basic Structure Doctrine should be re-examined — Whether earlier panel of the Federal Court formulated on point not put to parties — Whether applicant denied right to be heard — Whether decision was in breach of rules of natural justice — Whether the applicant was able to establish that the breach of natural justice occasioned a substantial miscarriage of justice- Rules of the Federal Court 1995, r 137*

Civil Procedure: *Review Application- Judicial Courtesy — Whether the decision of the earlier panel of the Federal Court was contrary to judicial courtesy and precedent — Whether the judicial courtesy point was a legitimate ground for review — Rules of the Federal Court 1995, r 137, Courts of Judicature Act 1964, s 77*

This was an application under r 137 of the Rules of the Federal Court 1995 to review and set aside the order of another panel of (earlier panel) this court dated 19 February 2021. The applicant was one Nivesh Nair Mohan ("detenu"), whose case stemmed from an application for *habeas corpus,* which the High Court dismissed. On appeal to this court, an earlier panel with a majority of 4-1 upheld the order of the High Court on 19 February 2021. The detenu was detained for two years pursuant to a detention order issued by the Chairman of the Prevention of Crime Board ("Board") dated 6 May 2019 under subsection 19A(1) of the Prevention of Crime Act 1959. He then filed an application for *habeas corpus* alleging that the detention was *ultra vires* and bad in law and that he ought to be released by order of the court. The primary basis of his allegation of *ultra vires* was premised on subsection 7B(2) as to the validity of the appointments of certain members of the board who ordered his two-year detention. As a corollary to the s 7B issue, the detenu also challenged the constitutional validity of s 15B, an ouster clause that the detenu argued was constitutionally invalid for violating cl (1) of art 4 and cl (1) of art 121 of the Federal Constitution. More specifically, para (ba) of subsection 15B(2) statutorily debarred any court from hearing any application for a writ of *habeas corpus*. The grounds in support of encl 1 was (1) there was a serious breach of natural justice as the applicant was not afforded an opportunity to address the judgments in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor*

["natural justice point"] and (2) the decision of the earlier panel of the Federal Court was contrary to judicial courtesy and precedent as it conflicted with the principles set out in *Alma Nudo Atenza v. Public Prosecutor & Another Appeal*; *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors*; and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat And Another Case* ["judicial courtesy point"].

Held (allowing encl 1 on ground (1)(a) of the review motion alone. The order of the earlier panel dated 19 February 2021 was set aside and the appeal was ordered to be re-heard on a date to be determined):

(1) In addressing the natural justice point, the standard that the applicant must meet to make out a claim that there was a breach of natural justice besides proving that breach, was that the applicant must also be able to establish that the breach of natural justice occasioned a substantial miscarriage of justice. In this respect, on the issues decided by the majority, it was abundantly clear that the applicant was not given notice and the opportunity to answer the issues of whether the constitutional questions were academic and his *locus standi* to bring the action. In the circumstances, the applicant made a case for breach of natural justice in that the *audi alteram partem* rule had not been observed. Further into that judgment, the requirements as to whether the breach of the right to be heard had occasioned injustice and whether the matter ought to be reheard on the facts have been met. (paras 16-18)

(2) The applicant's complaint was that both parties had proceeded on the basis that the Basic Structure Doctrine (BSD) was accepted in our law but disagreed as to the extent of its application. The detenu asserted that despite the narrow compass within which the submission was formulated and responded to by opposing counsel, this court, on its own volition, undertook to traverse through and unravel the jurisprudential theory anchoring the existence of the BSD. The court, on its own motion, found that the BSD was not our law. Since neither party attempted to revisit the doctrinal basis for the BSD, the majority judgment was clearly formulated on a crucial point which was not put to parties in breach of the rules of natural justice, leaving them with no means of redress. As such, a serious miscarriage of justice had been occasioned, in particular to the detenu, as that crucial point was decided against him. (paras 23-37)

(3) The judicial courtesy point was not a legitimate ground for review. The review process was not intended to operate as another tier of appeal. In the context of our written law, there was no difference in law between a judgment delivered by a smaller bench or a larger bench. This might be inferred from s 77 of the Courts of Judicature Act 1964, which provided that 'proceedings shall be decided in accordance with the opinion of the majority of the judges comprising the court'. The majority judgment of the court generally became law and binding precedent in all subsequent cases. Therefore, it was not a ground *per se* to overrule a subsequent decision of the smaller bench which had departed from the larger bench. A smaller bench, not following precedent

established by a prior larger bench, was not *per se* a ground of appeal, though it was a reason to subject the decision of the said smaller bench to higher scrutiny in a later case. If this was true in the context of appeals, then it must apply with greater force to review motions. It had been established that a plain error of law and nothing more (*per se per incuriam* decisions) did not satisfy the threshold for review. In sum, those aggrieved by the said decisions should revisit them in later cases. Review motions were not the appropriate recourse. (paras 40-43)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2004] 2 MLRA 474 (refd)

Alma Nudo Atenza v. Public Prosecutor & Another Appeal [2019] 3 MLRA 1 (refd)

Cheah Cheng Hoc v. Public Prosecutor [1985] 1 MLRA 353(refd)

Dalip Bhagwan Singh v. Public Prosecutor [1997] 1 MLRA 653 (refd)

Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor [2021] 2 MLRA 190 (refd)

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors [2018] 2 MLRA 1 (refd)

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 3 MLRA 1 (refd)

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and Another Case [2017] 4 MLRA 554 (refd)

Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd and Other Appeals [2021] 1 MLRA 1 (refd)

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan [2021] 4 MLRA 518 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 77

Federal Constitution, arts 4(1), 121(1)

Prevention of Crime Act 1959, ss 7B(2), 15B(2)(ba), 19A(1)

Rules of the Federal Court 1995, r 137

Counsel:

For the applicant: Gopal Sri Ram (Preakas Sampunathan, Ravin Jay, Yasmeen Soh & Karluis Quek with him); M/s Preakas & Partners

For the respondents: Shamsul Bolhassan (Muhammad Sinti & Liew Horng Bin with him); SFCs

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] Enclosure 1 is an application pursuant to r 137 of the Rules of the Federal Court 1995 to review and set aside the order of this court dated 19 February 2021.

[2] The applicant is one Nivesh Nair Mohan ('detenu') whose case stems from an application for *habeas corpus* which was dismissed by the High Court. On appeal to this court, the order of the High Court was upheld on 19 February 2021 by a majority of 4-1. This court delivered two written judgments - one on behalf of the majority ('majority judgment') and the other the dissenting judgment ('minority judgment').

[3] After carefully considering parties' written submissions and upon hearing their oral submissions, we were satisfied that the high threshold of review was made out and as such, we unanimously allowed encl 1.

[4] We now provide our reasons for the said decision.

[5] Unless expressed otherwise, our references to 'section/sections' is to those of the Prevention of Crime Act 1959 ('POCA 1959') and likewise, 'Article/ Articles' is to those of the Federal Constitution.

Salient Facts

[6] The detenu was detained for a period of two years pursuant to a detention order issued by the Chairman of the Prevention of Crime Board ('Board') dated 6 May 2019 under subsection 19A(1). He then filed an application for *habeas corpus* alleging that the detention was *ultra vires* and bad in law and that accordingly, he ought to be released by order of the court.

[7] The primary basis of his allegation of *ultra vires* is premised on subsection 7B(2). The subsection, as we understand it and without having set it out, stipulates that members of the Board shall hold office for a period not exceeding three years unless re-appointed. According to the detenu, the non-compliance was borne out by the fact that the 1st respondent did not reply to the detenu's averments/question as to the validity of the appointments of certain members of the Board who ordered his two-year detention.

[8] As a corollary to the s 7B issue, the detenu also challenged the constitutional validity of s 15B which reads:

> "Judicial review of act of decision of Board
>
> 15B. (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made

by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) In this Act, "judicial review" includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(ba) a writ of *habeas corpus*; and

(c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.".

[9] Put simply, s 15B is an ouster clause which the detenu argued is constitutionally invalid for being in violation of cl (1) of art 4 and cl (1) of art 121. More specifically, para (ba) of subsection 15B(2) statutorily debars any court from hearing any application for a writ of *habeas corpus*.

[10] Now, given the nature of the arguments, the principal issue is the validity of the detention of the detenu under s 7B of the *habeas corpus*. However, before that question could be dealt with, the preliminary question that arose was whether the application for *habeas corpus* is itself sustainable in light of the statutory bar against challenge imposed by s 15B.

The Review Motion

[11] As this was a motion for review and not an appeal, we do not consider it necessary to discuss in great detail the decisions of the courts below on the merits. We shall proceed to highlight the basis for the review motion.

[12] The grounds in support of encl 1 were as follows:

"(1) There is a serious breach of natural justice in the following instances:

a. Both parties agreed that the basic structure doctrine is part of the Federal Constitution. The Federal Court ruled otherwise without affording the applicant a right to be heard on this issue. The present matter was thus decided by the Federal Court based on an issue not raised nor addressed by parties.

b. The Federal Court relied on *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1, which is a judgment delivered after arguments in the appeal were herein presented. The applicant was not afforded an opportunity to address the judgments in *Maria Chin Abdullah*. There is therefore a breach of the rules of natural justice.

(2) The decision of the Federal Court is contrary to judicial courtesy and precedent as it conflicts with the principles set out in *Alma Nudo Atenza v. Public Prosecutor &Another Appeal* [2019] 3 MLRA 1, *Indira Gandhi*

Mutho v. Pengarah Jabatan Agama Islam Perak & Ors [2018] 2 MLRA 1, and *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and Another Case* [2017] 4 MLRA 554."

[13] For convenience, we shall refer to the first ground of challenge as the 'natural justice point' and the second ground, the 'judicial courtesy point'.

The Law Generally

[14] The law on review is trite having been repeated *ad nauseam* in numerous judgments. Out of those many judgments, it is sufficient that we refer to only two of them, namely, *Yong Tshu Khin & Anor v. Dahan Cipta Sdn Bhd and Other Appeals* [2021] 1 MLRA 1 ('*Yong Tshu Kin*') and *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor* [2021] 2 MLRA 190 ('*Anwar Ibrahim*').

[15] In respect of the general rule on review based on the allegation of breach of natural justice, this court recently observed in *Yong Tshu Kin* that:

> "[81] The ratio gleaned from the case is that a subsequent panel of the court need not have to examine its prior decision with a microscope to confirm that parties were accorded every opportunity to be heard on every microscopic point. Suffice to say that parties are allowed to canvass before the court each point striking to the substance of the case and that the court, in applying its own judicial mind and resources arrives at a decision on the law and on the facts of the case as submitted. It is one thing to say, on one side, that what was submitted was one thing but what was decided was something completely different and on the other, that while addressing the main issues (such as the leave questions), the court also found the need to address some other issues. Surely, the powers of the Federal Court as the apex court cannot be viewed so narrowly as to exist in a vacuum or be altogether pigeonholed into specific boxes only to be examined later under a magnifying glass whether such decision strayed from the confines of the perimeters so artificially established.".

[16] The passage to an extent establishes the standard that the applicant must meet to make out a claim that there was a breach of natural justice. Elsewhere in the same judgment, this court also explained further that in addition to proving that breach, the applicant must also be able to establish that the breach of natural justice occasioned a substantial miscarriage of justice (see: [93]-[99] of *Yong Tshu Kin*).

[17] As such, the judgment in *Anwar Ibrahim* is germane. It is the most recent judgment of this court to set aside a prior order of its own, on the ground of breach of natural justice. In finding that there was a breach of natural justice, this court through Harmindar Singh Dhaliwal FCJ said:

> "[73] Nonetheless, it seemed to us that in the end, at least as evident in the majority judgment, the whole matter evolved into a consideration of whether the applicant had the standing to bring the action since he had not shown how he was adversely affected in the sense that he had a real and genuine interest in the subject matter. This was in effect, as noted by the majority, the test of *locus standi* and was intertwined with the question of whether there was a real and

> actual controversy. In the end, the majority held the applicant had not satisfied this test and, in declining to answer the constitutional questions, decided that the questions posed were abstract, academic and hypothetical.
>
> [74] As was required of us, and as evident in the preceding segment, we had taken great pains to ascertain with precision as to whether the complaints by the applicant of a breach of natural justice had any merit. In this respect, it is at least clear to us that on the issues decided by the majority, the applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his *locus standi* to bring the action. In the circumstances, we were persuaded that a case for breach of natural justice had been made out by the applicant in that the *audi alteram partem* rule had not been observed. That, however, is not the end of the matter.".

[18] Further into that judgment, this court analysed whether the breach of the right to be heard had occasioned injustice and whether the matter ought to be reheard on the facts. This court found that those requirements were met.

[19] To be clear and to our understanding, *Anwar Ibrahim* was not a case where all the substantive arguments were addressed but that other complementary or subsidiary points were also addressed to arrive at the final outcome. Instead, the case shows that it was decided on an entirely distinct point upon which all parties were not invited to address and which otherwise left the appellant with no means of judicial redress. The high threshold of review was therefore made out, the original order was set aside, and a rehearing was ordered as the only form of redress considered possible.

Application Of The Law To The Facts

The Natural Justice Point

[20] In the present application, the detenu adopts a line of argument very close to the one taken in *Anwar Ibrahim*. Here, during the appeal, the detenu argued that s 15B is unconstitutional because it violates the pre-amendment cl (1) of art 121 and cl (1) of art 4. To advance this point, the detenu further argued that the post-amendment cl (1) of art 121 is unconstitutional as it violates the doctrine of basic structure ('BSD').

[21] The detenu also submitted that the respondents in this case proceeded on the basis that recent judgments of this court judicially recognised the BSD. In other words, counsel for the detenu argued that both parties were on common ground that the BSD doctrinally exists but that they only differed as to the extent of its application as regards the constitutional validity of s 15B.

[22] The detenu argued that despite the narrow compass within which the submission was framed and responded to by opposing counsel, this court on its own volition undertook to traverse through and unravel the jurisprudential theory anchoring the existence of the BSD. In other words, the court, on its own motion, found that the BSD is not our law.

[23] To prevent miscomprehension, the case here does not concern the substantive correctness or tenability of the applicant's argument on the merits. Instead, the applicant's complaint is that both parties had proceeded on the basis that the BSD was accepted in our law but disagreed as to the extent of its application. Yet, as alleged, the court found that the BSD did not exist in the first place and the question of its application did not even arise.

[24] We examined the majority judgment of this court on this issue and we were satisfied that the allegation by the detenu that a breach of natural justice had occurred, was made out. The following when viewed collectively, established the breach.

[25] Firstly, it is abundantly clear from the majority judgment that the majority judges did in fact re-examine the doctrinal basis for the BSD. After an extensive analysis on the subject, the majority concluded as follows:

> "[194] One must bear in mind the dangers of relying on concepts/theories which had developed mostly in foreign countries, as they evolved from the historical, social and political context of foreign nations. **The basic structure concept which took root in an alien soil under a distinctly different constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC**. There is a need for deeper analysis of the rationale and specific historical background which underpins such foreign doctrines, no matter how popular it may seem. The basic structure concept was accepted by the courts in India at the material time due to the political and social climate surrounding the composition of the executives and the judiciary at that time which was only peculiar to India then. Such is not the situation in this country.
>
> [195] The adoption of the basic structure doctrine would create a situation that although Parliament had followed the procedure in amending the laws as stated in art 159, nevertheless the courts can strike it down, if in the opinion of the courts that the amending law struck at the basic structure of the FC.
>
> Hence, the court will declare that Parliament has no power to amend that particular Article when art 159 FC allows it, if the correct procedure is followed. Does that not seem like the courts are over and above the FC, thus going against what art 4(1) provides?
>
> [196] **Hence, to sum up, on point no (iv): given the aforesaid, the basic structure doctrine is not applicable in construing the constitutionality of s 15B(1) of POCA in view of art 159. There is nothing stated in the FC as to which provision in the FC forms the basic structure**. To challenge the constitutionality of s 15B of POCA, it has to be tested against any of the provisions of the FC, not against the concept of basic structure. Section 15B of POCA derived its force of law and validity from art 149 of the FC. It cannot be said that s 15B oust the courts from exercising its powers under arts 4(1) or 121(1) of the FC. The courts can exercise its supervisory judicial powers in cases where there is non-compliance of procedural requirement.

Neither can it be said to contravene art 4(1) and to that extent contravenes the "basic structure" of the FC.".

[Emphasis Added]

[26] Next, we contrasted the legal findings of the majority to the summary of the respondents' submission which is summarised in paras 24 to 37 of the majority judgment. Most pertinently, the majority did not allude to any suggestion by the respondents that BSD is doctrinally wrong or most fundamentally, that it does not exist. The closest observations to this effect are as follows:

"[34] Guided by the consistent judgments of this court in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 MLRA 646, *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 1 MLRA 511, *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2003] 2 MLRA 399, *Abdul Razak Baharuddin & Ors v. Ketua Polis Negara & Ors and Another Appeal* [2005] 2 MLRA 109, *Chuah Kian Voon v. Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLRA 673, *Hemanathan Kunjraman v. Menteri Dalam Negeri, Malaysia Dan Tiga Lagi* [05(HC)-172-07/2019] the respondents submitted that the contention of the appellants that s 15B of POCA is unconstitutional is without merits. The aforesaid decisions of the Federal Court dealt with the issue of the constitutionality of ouster clauses similar to s 15B of POCA and it has been consistently established by this court through those cases that the ouster clauses are not unconstitutional.

[35] There is a presumption of constitutionality in every legislation passed by Parliament. The burden to prove otherwise, lies on the party who present the challenge (refer to *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 MLRH 611, *PP v. Pung Chen Choon* [1994] 1 MLRA 507). This presumption of constitutionality issue is addressed at paragraphs 68-74 of this judgment.

[36] The respondent submitted that the trilogy of cases, *Semenyih Jaya*, *Sivarasa Rasiah* and *Indira Gandhi* referred to by the appellant can be distinguished on its facts and issues involved and hence cannot be held in support of the contention by the appellants."

[27] The cases referred to in para 34 are cases where the courts have previously upheld ouster clauses. As for the cases in para 36 and as we understood it, the respondents referred to them to make the point that those cases did not rule that ouster clauses are constitutionally invalid. The respondents attempted to distinguish those cases on the facts and not so much on the broad principle. At best, it was an invitation to narrow the scope of the BSD as decided in those cases rather than to discard the doctrine entirely.

[28] The third indication of breach of natural justice is the plain language of the submission by Senior Federal Counsel ('SFC') for the respondents. For clarity, vide their Revised Submission dated 9 July 2021 in respect of the review motion, the respondents argued that:

"6.2 ... the Respondents expressly invited the court to revisit the concept of 'basic structure' enunciated in the trilogy of cases ie *Semenyih Jaya*, *Indira*

Gandhi and *Alma Nudo* (see para [4]-[5] Respondents' Submissions dated 15 June 2020). In the course of oral submissions, the Respondents expanded the argument in full by referring the court to historical documents showing the real intention of the framers of the Constitution. The arguments of the Respondents were approved and endorsed by the majority judgment at para [50]-[54]. In any event, 'even if the parties were in consensus that the doctrine is applicable or otherwise, [the Federal Court] is not entirely precluded from considering and ultimately deciding on the issue before it' (*Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan* [2021] 4 MLRA 518 per Hasnah Hashim FCJ at [272].

6.3 The net effect of the Respondent's argument, which was again approved by the majority at para [196] is that 'it is not the basic structure that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. Neither can it be said to contravene art 4(1) and to that extent contravenes the "basic structure" of the FC (see para [17] Respondents' Submissions dated 15 June 2020).".

[29] The above paragraphs when read in isolation might appear to suggest that the respondents did contest the existence of the BSD. However, in paras 6.2 and 6.3 above, the respondents refer to their submission dated 15 June 2020 and how they claim to have expanded it in their oral submission before the original panel specifically paras 4 and 5 thereof. However, a perusal of the submission dated 15 June 2020 tells a different story and we set it out below:

"**OUTLINE SUBMISSIONS**

4. It is submitted that: (i) **conferral of courts' jurisdiction and powers by federal law is a basic structure of the Constitution**; (ii) the entrenched practice of courts' jurisdiction and powers being prescribed by federal law does not violate the doctrine of separation of powers; (iii) limiting the scope and extent on remedies available for enforcement of rights by federal law does not impinge on judicial power.

5. The Respondents seek to persuade this Honourable Court, in the course of the following submissions, on the three points outlined above by undertaking a detailed study of the drafting records and minutes to ascertain the real intendment of art 121 of the FC. These crucial documents were regrettably unavailable to counsel as well as judges in *Semenyih Jaya* (2017), *Indira Gandhi* (2018), *Alma Nudo* (2019), and *JRI Resources* (2019).".

[Emphasis Added]

[30] In para 4 of the respondents' submission dated 15 June 2020, the respondents quite unequivocally submitted that the 'conferral of courts' jurisdiction and powers by federal law is a basic structure of the Constitution'. Further, if one reads the header to that part of the submission together with para 4, the respondents essentially outlined their submission in that way which further cements the point that they proceeded on the basis that the BSD is doctrinally correct and accepted.

[31] To drive the point further, the respondents even appear to have made the case that the BSD has existed since the time of Independence but that the detenu was attempting to overstretch it. This is what the respondents submitted in para 12 of the written submission dated 15 June 2020:

> "12. **The 'basic structure' inherent in the judicial set-up then was that jurisdiction and powers conferred unto a court were matters purely within the legislative powers of the Federation**. The scope and extent of jurisdiction and powers of courts, with the exception of the Supreme Court whose jurisdiction was expressly conferred by the principal instrument, were determined by federal law.".
>
> [Emphasis Added]

[32] With the greatest of respect, we found baffling and in defiance of candour that the respondents took the position during the hearing of the review motion that it was always their case that the very jurisprudential existence of the BSD ought to have been revisited. As can be gleaned from their submissions, read as a whole, that was never the case (both in their written and oral submissions).

[33] During the course of the hearing, learned SFC Liew Horng Bin attempted to convince us that the respondents did invite this court to re-evaluate the doctrinal basis of the BSD and, to this extent, SFC Liew insisted that he took us through each paragraph of his submission dated 15 June 2020 to convince us of that point. After taking us through those paragraphs, he then concluded that the 'net effect' of his submission before the appellate panel was that the doctrinal basis of the BSD should be re-examined. When we queried SFC as to the clear language of his submission from the paragraphs above-cited, and how they clearly suggest that the respondents accepted the existence of the BSD, SFC Liew's response was that those passages 'say what they say'.

[34] Further, we did not lose sight of the fact that there was a minority judgment and that the dissenting judge highlighted how the doctrinal existence of the BSD was accepted by the respondents in their submissions. For convenience, we reproduce the relevant paragraphs of the minority judgment:

> 'The Respondents' Submissions on the Constitutional Validity of Section 15B POCA
>
> [43] SFC Shamsul Bolhassan responded to the appellants' submission also by reference to the renowned trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. He accepted that judicial power is vested in the High Court and that Parliament cannot amend those constitutional provisions that comprise a part of the basic structure of the FC.
>
> [44] However he pointed out that in the context of the six appeals here relating to POCA, there was an entirely different legislative regime in place. POCA was one of a series of special laws relating to preventive detention enacted pursuant to art 149 FC. This was to be contrasted with the legislation in the trilogy of cases of which dealt with general laws enacted pursuant to art 74.
>
> ...

The Submissions of the AG in Maintaining that Section 15B POCA is Constitutional

[87] SFC Liew Horng Bin began his comprehensive submissions on behalf of the Attorney-General on this aspect by accepting and outlining the position in law as enunciated in the trilogy of cases, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*:

(a) Judicial power is enshrined in the High Courts under art 121 FC. The rule of law and the separation of powers denoting the independence of the Judiciary are fundamental features of the basic structure of the FC. The inherent judicial power of the civil courts under art 121 FC is "inextricably intertwined" with their constitutional role to provide a check and balance mechanism as envisaged by the FC;

(b) Parliament does not have the power to amend the FC to the extent of undermining its fundamental or basic features such as the doctrine of separation of powers and the independence of the Judiciary. ...

(c) The courts can ensure that Parliament does not destroy the basic structure of the FC. While the FC does not expressly refer to the doctrine of a basic structure, what it means is that a statute is open to judicial scrutiny for violations of the provisions of the FC, ...

(d) Judicial power cannot be removed from the Judiciary and equally cannot be conferred on other bodies in the absence of the constitutional safeguards afforded to an independent Judiciary; ...

(e) ...

(f) The FC is interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles comprising the structure of the FC ...

[88] The learned SFC submitted that in order to comprehend the meaning and content of the rule of law in the Federal Constitution, it is of relevance to study the history and background of art 4(1) FC. That takes us back to the original draft of the FC, ...

[89] In relation to judicial power it was reiterated, on behalf of the AG, that Parliament could limit the remedy issued by the Courts in the form of judicial review of *habeas corpus*, by confining any challenge as to constitutionality of a statutory provision, to procedural compliance of an impugned decision.

[90] As the learned SFC put it, the issue was whether it comprises a basic structure of the FC that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. This in turn called into question whether it was a basic structure of the FC that the Judiciary enjoys unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review.".

[35] We directed the attention of learned SFC Shamsul and Liew to the above paragraphs and they accepted that the minority judgment's summarisation of the respondents' submission was correct.

[36] We pause for a moment here to note that our case law is replete with reminders to advocates - whether from the Bar or public service - of the onerous duties of those in the legal profession. The highest duty of counsel - a duty which supersedes his or her duty to his client - is his duty to the court, which remains paramount in the administration of justice. Counsel are expected to make out their client's case to the best of their abilities but they cannot adopt the mindset that they must 'win at all costs' if that results in misleading the court or approbating and reprobating before different panels of the court. See generally for example: *Cheah Cheng Hoc v. Public Prosecutor* [1985] 1 MLRA 353.

[37] We found, as learned SFC Liew said, that the respondents' submission dated 15 June 2020 indeed says what it says and that parties were not at variance that the BSD exists in our Federal Constitution. What parties were at variance was whether judicial review remedies form part of the BSD. It follows that since neither party attempted to revisit the doctrinal basis for the BSD, the majority judgment was clearly formulated on a crucial point which was not put to parties in breach of the rules of natural justice leaving them with no means of redress. As such, a serious miscarriage of justice has occasioned, in particular to the detenu as that crucial point was decided against him.

[38] For the foregoing reasons, we found that ground (1)(a) of the review motion was of merit and on that point alone, we were satisfied that the prior order of this court dated 19 February 2021 ought to be set aside and the appeal reheard.

[39] As for ground (1)(b), with respect, we considered the detenu's reliance on *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1 ('*Maria Chin*') to be adjunct to ground (1)(a). It is not so much that the case itself was relied on without inviting parties to address it but that the majority relied on *Maria Chin* generally to establish the point that the BSD is non-existent in our law. We did not therefore have to consider this point as a separate point.

The Judicial Courtesy Point

[40] Having resolved the review motion on ground (1)(a), we did not find it necessary to consider ground (2) - the 'judicial courtesy point'. Be that as it may it was our considered view that ground (2) is not a legitimate ground for review.

[41] This court observed in *Yong Tshu Kin (supra)* that the review process is not intended to operate as another tier of appeal (see: *Yong Tshu Kin*, [78]).

[42] The point on judicial courtesy and *stare decisis* were addressed in the minority judgment of *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan* [2021] 4 MLRA 518 ('*Zaidi Kanapiah*'). After referring to the timeless observations of this court in *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 1 MLRA 653, it was stated thus in *Zaidi Kanapiah*:

"[33] ... Firstly, strictly speaking within the context of our written law, there is no difference in law between a judgment delivered by a smaller bench or a larger bench. This may be inferred from s 77 of the CJA 1964 which provides that 'proceedings shall be decided in accordance with the opinion of the majority of the Judges comprising the Court'. In terms of written law therefore, the number of judges from case to case does not strictly matter. This is because the majority judgment of the court generally becomes law and binding precedent in all subsequent cases. It is not therefore a ground *per se* to overrule a subsequent decision of the smaller bench which had departed from the larger bench.

[34] Be that as it may, the second portion of the passage establishes that the number of judges from case to case is nonetheless relevant in terms of the principles of *stare decisis* - a principle followed assiduously by our courts for nearly a century though it is not expressly contained in our written law. Viewed from this angle, the above dictum of Peh Swee Chin FCJ suggests that the strength and size of a bench in a previous case is one relevant factor when determining whether or not that previous decision ought to be followed in a subsequent case.

[35] Minimally, the non-compliance of a smaller bench of the same court in a subsequent case to a decision of the court delivered by a larger bench in the previous case goes to judicial integrity and courtesy. *Dalip* explained the circumstances in which the apex court ought to depart from its previous decisions which is an exercise not governed by the FC or statute. While it is true that there is no legal basis in written law to hold a smaller bench to the decision of a larger bench in a previous decision, it is a matter of *stare decisis* and judicial policy aimed at preserving public confidence in the Judiciary.".

[43] A smaller bench not following precedent established by prior larger bench is not *per se* a ground of appeal though it is a reason to subject the decision of the said smaller bench to higher scrutiny in a later case. If this is true in the context of appeals, then it must apply with greater force to review motions. In fact, it has been established that a plain error of law and nothing more (*per se per incuriam* decisions) do not satisfy the threshold for review. See: *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2004] 2 MLRA 474. In sum, those aggrieved by the said decisions should revisit them in later cases. Review motions are not the appropriate recourse.

Conclusion

[44] For the reasons aforesaid, we were satisfied that the detenu has met the high threshold of review and we accordingly allowed encl 1 on ground (1)(a) alone. We set aside the order of this court dated 19 February 2021 and we ordered the appeal to be reheard on a date to be determined.

The Legal Review

The Definitive Alternative

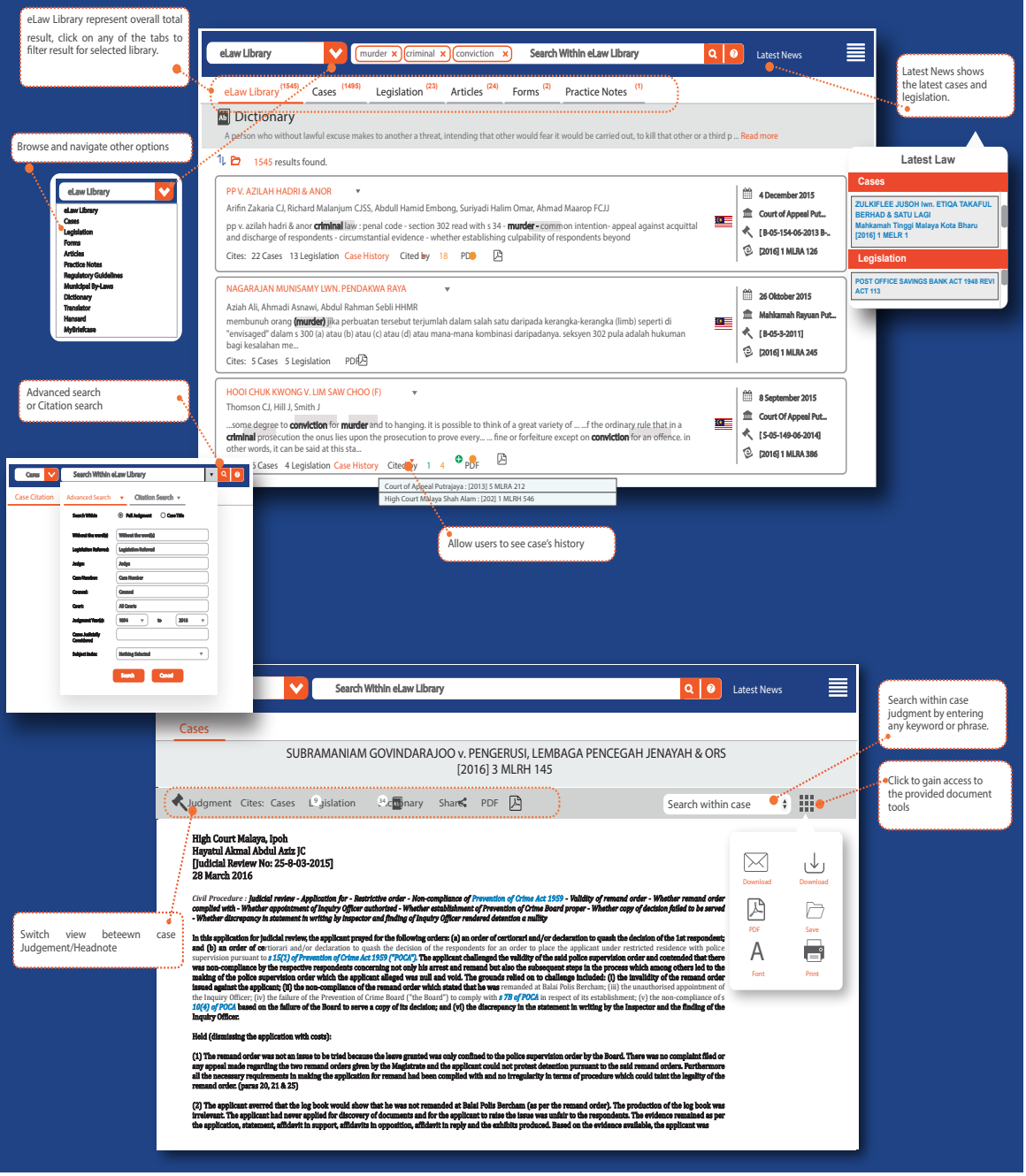
The Legal Review Sdn. Bhd. (961275-P)
B-5-8 Plaza Mont' Kiara,
No. 2 Jalan Mont' Kiara, Mont' Kiara,
50480 Kuala Lumpur, Malaysia
Phone: **+603 2775 7700** Fax: **+603 4108 3337**
www.malaysianlawreview.com

eLaw.my
The Digital Library

Introducing eLaw
Experience the difference today

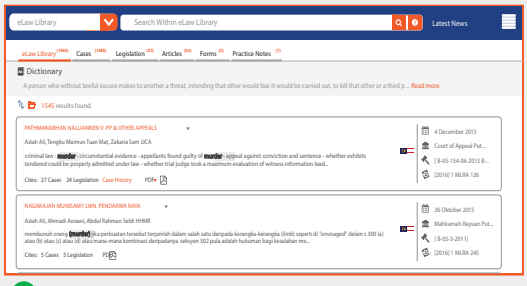
eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine – clearly the most efficient search tool for busy legal professionals like you.

A Snapshot of Highlights



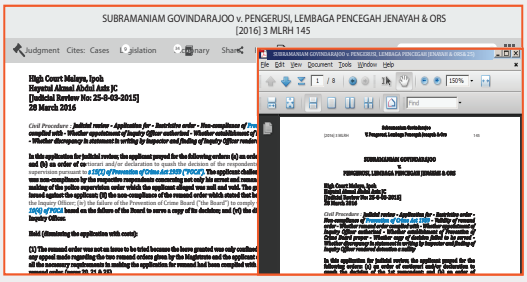
Our Features

Search Engine



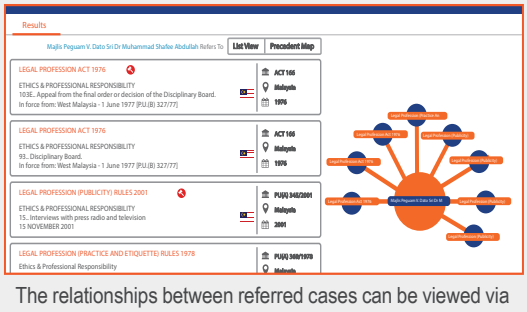
- Easier
- Smarter
- Faster Results.

Judgments Library



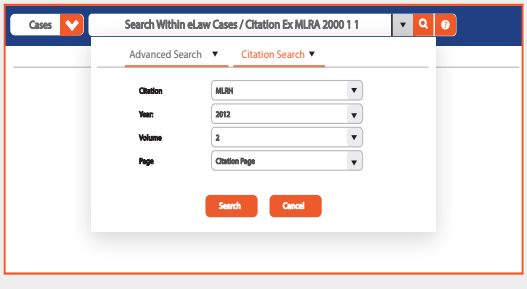
eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases



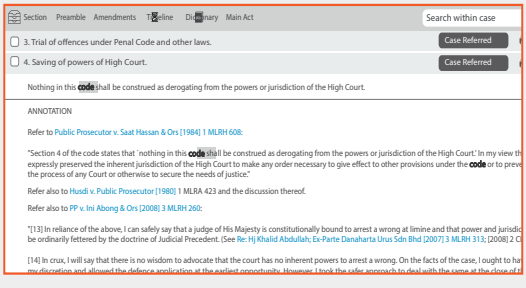
The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator



You can extract judgments based on the citations of the various local legal journals.*

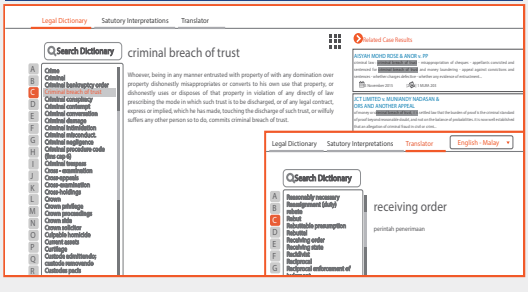
Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator



eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my

• *Malaysia* • *Singapore* • *United Kingdom*

The Legal Review
The Definitive Alternative

Uncompromised Quality At Unrivalled Prices

MLRA

The Malaysian Law Review (Appellate Courts) – a comprehensive collection of cases from the Court of Appeal and the Federal Court.

– 48 issues, 6 volumes annually

MLRH

The Malaysian Law Review (High Court) – a comprehensive collection of cases from the High Court.

– 48 issues, 6 volumes annually

MELR

The Malaysian Employment Law Review – the latest Employment Law cases from the Industrial Court, High Court, Court of Appeal and Federal Court.

– 24 issues, 3 volumes annually

TCLR

The Commonwealth Law Review

– selected decisions from the apex courts of the Commonwealth including Australia, India, Singapore, United Kingdom and the Privy Council.

– 6 issues, 1 volume annually

Published by The Legal Review Publishing Pte Ltd, Singapore

SSLR

Sabah Sarawak Law Review

– selected decisions from the courts of Sabah and Sarawak

– 12 issues, 2 volumes annually

> 80,000 Cases

Search Overruled Cases

Federal & State Legislation

Syariah Cases, Municipal Laws

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross searched and mined by a feature-rich and user-friendly search engine — clearly the most efficient search tool for busy legal professionals like you.

Call **03 2775 7700**, email **marketing@malaysianlawreview.com**
or subscribe online at **www.malaysianlawreview.com**