SHUDANGSHU CHANDRA

v.

KETUA PENGARAH IMIGRESEN MALAYSIA & ORS

Federal Court, Putrajaya
Nallini Pathmanathan, Harmindar Singh Dhaliwal, Rhodzariah Bujang FCJJ
[Criminal Appeal No: 05 (HC)-39-03-2021 (D)]
26 January 2022

Criminal Procedure: *Habeas corpus — Application for — Detention order — Challenge to detention under s 35 Immigration Act 1959/63 and subsequent deportation — Whether detention invalid and void — Notice of revocation of temporary visit employment pass — Whether further detention under s 34 of Act to facilitate deportation invalid — Whether deportation order mala fide*

Immigration: *Detention — Detention order — Habeas corpus, application for — Challenge to detention under s 35 Immigration Act 1959/63 and subsequent deportation — Whether detention invalid and void — Notice of revocation of temporary visit employment pass — Whether further detention under s 34 of Act to facilitate deportation invalid — Whether deportation order mala fide*

Preventive Detention: *Detention order – Application for habeas corpus — Challenge to detention under s 35 Immigration Act 1959/63 and subsequent deportation — Whether detention invalid and void — Notice of revocation of temporary visit employment pass — Whether further detention under s 34 of Act to facilitate deportation invalid — Whether deportation order mala fide*

The appellant, a Bangladeshi employee of a company ("employer"), was given a temporary visit employment pass ("pass") by the Immigration Department which was valid until 12 March 2021. He was arrested by immigration authorities on 5 September 2020 at 6.40 pm after being allegedly found working at a coffee shop whilst on leave, an offence under reg 39(b) of the Immigration Regulations 1963 ("Regulations"). The appellant was produced before a Magistrate who ordered his detention for 14 days under s 51(5)(b) of the Immigration Act 1959/63 ("Act") from 5 to 18 September 2020. On 15 September 2020, a compound for the offence was offered to the appellant which was accepted and his employer paid the compound fee of RM300.00 on his behalf. On that same day, he was detained under s 35 of the Act at the Immigration Depot Detention Center of Tanah Merah, Kelantan for 30 days. An administrative order was made by the Immigration Department's Head of Enforcement for action to be taken to deport the appellant. The employer's appeal against that decision was rejected by the Immigration Department's "Jawatankuasa Rayuan Imigresen Negeri" ("Committee") and his removal from Malaysia or deportation was ordered.

On 1 October 2020, he was remanded for 14 days by the Sessions Court and on the expiry of that remand order, the appellant was further detained under s 34 of the Act to facilitate his deportation from Malaysia as per the order of removal made on the same date. However, prior to that, the appellant had filed an application for a writ of *habeas corpus* challenging his detention order dated 15 September 2020. The High Court Judge ("HCJ") granted an interim stay of the deportation order until the disposal of the *habeas corpus* application and that stay order was extended until the disposal of his appeal before this court. The said extension was ordered after the HCJ delivered his decision to dismiss the appellant's application for the writ of *habeas corpus*. In this appeal, the appellant reiterated the issues raised by him in the High Court, which were: (i) the appellant's further detention on 15 September 2020 under s 35 of the Act was void, invalid and made *mala fide*; (ii) the notice of revocation of the pass dated 14 October 2020 was improper and also made *mala fide*; (iii) the detention under s 34 of the Act was invalid and made *mala fide*; and (iv) the deportation order was against the law and made *mala fide*. The deportation order was stated to be made under s 56(2) of the Act but the appellant did not commit such an offence under s 56(1).

Held (allowing the appeal):

(1) Since the appellant had committed an offence under reg 39(b) of the Regulations, he came under the phrase "a person reasonably believed to be a person liable to removal from Malaysia" as highlighted in s 35 of the Act and, therefore, as authorised by the said provision, his further detention of 30 days was permitted pending a decision on his removal from the country. The said s 35 was not contrary to art 5 of the Federal Constitution because, firstly, the clear proviso in art 5(4) on the requirement to produce the arrestee before a Magistrate within 14 days of his arrest applied to the initial arrest and detention and this requirement was clearly incorporated in s 51(5)(b) of the Act. Secondly, his further detention under s 35 was merely pending a decision whether to remove him. It was obvious from Part V of the Act in which the said section was legislated that a "person liable to removal from Malaysia" was one who had committed a transgression under the Act which warranted the exercise of the Immigration authority's power under s 51(5). Once that said decision to remove was made, then s 34 came into play. It was therefore a continuous process and given the incorporation of the proviso into s 51(4), there was no legal necessity to repeat the same requirement in s 35. (paras 6-7)

(2) As for issue (ii), s 3(3)(a) and (b) of the Act allowed the exercise of the Director General's power to be done by a Deputy Director General of Immigration or any other Senior Immigration Officer. Further, the said notice was served personally on the appellant. Although reg 19(3) of the Regulations used the words "sent to the holder of the pass", nonetheless, it was crystal clear from the words in the said provision that the intention of the legislative was to notify the pass holder of the said cancellation and there could be no better way to do that than to give the notice to him in person. The appellant further

submitted that the cancellation was made *mala fide* and against the interim stay granted by the HCJ. However, that interim stay was against the deportation of the appellant and given the contravention of the pass by him, as evidenced by the payment of the compound fee, that official move of the Department was more than justified. (paras 10-11)

(3) With regard to issue (iii), it was obvious from a clear reading of s 34(1) of the Act that the Director General was given the power to detain any person ordered to be removed whilst arrangements were being made for his removal. That was obviously the case with the appellant here for the order for his removal had been made. There was no such limitation for that section to only be utilised against offenders convicted of the said ss 5, 6, 8, 9 and 60 of the Act. It was to be noted that the appellant in this case was given, and did utilise, his right to appeal against his removal but that appeal was rejected by the Committee. (para 14)

(4) Concerning the final issue raised by the appellant, the wrong citation of the relevant provision in itself could not be evidence of *mala fide* and the issuance of the special pass was further evidence of good faith in respect of his detention. Nevertheless, that error had rendered the deportation order illegal and it must accordingly be set aside for the simple reason that the law was trite and entrenched that a detainee like the appellant was entitled to take full advantage of any technical imperfection which had the effect of invalidating the order that incarcerated him without trial or even with trial. No court of law should condone such an error in this case which actually was easily rectified by an application to amend the same. Consequentially, on this ground alone the appeal of the appellant was allowed as the appellant was entitled to be granted the writ of *habeas corpus*. (para 18)

Case(s) referred to:

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Lagi [1994] 1 MLRA 375 (folld)

Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors [2021] 6 MLRA 128 (refd)

Sajad Hussain Wani lwn. Ketua Pengarah Imigresen Malaysia & Satu Lagi [2007] 3 MLRH 335 (distd)

Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia & Anor [2017] MLRAU 365 (refd)

Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 MLRA 132 (folld)

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 4 MLRA 518 (folld)

Legislation referred to:

Federal Constitution, art 5(4)

Immigration Act 1959/63 , ss 3(3)(a), (b), 5, 6, 8(3), 9(4), 15, 34(1), 35, 36,

51(5)(b), 56(1), (2), 59A, 60
Immigration Regulations 1963, reg 39(b)
Prevention of Crime Act 1959, s 15B(1)

Counsel:

For the appellant: T Harpal Singh (Nadia Syaza Rahizam with him); M/s T Harpal & Associates

For the respondents: Mohd Suhairy Zakaria (Nur Shahmeera Mustafa with him); Federal Counsel

JUDGMENT

Rhodzariah Bujang FCJ:

[1] The appellant, a Bangladeshi was an employee of a company, RCM Cemerlang (M) Sdn Bhd ("the employer") who was given a temporary visit employment pass ("the pass") by the Immigration Department which was valid until 12 March 2021. He was arrested by the immigration authority on 5 September 2020 at 6.40 pm after being allegedly found working at a coffee shop whilst on leave, which act is an offence under reg 39(b) of the Immigration Regulations 1963 ("the Regulations"). The appellant was produced before a Magistrate who ordered his detention for 14 days under s 51(5)(b) of the Immigration Act 1959/63 ("the Act") from 5 September 2020 until 18 September 2020 and this can be seen from the detention notice to that effect which was issued and signed by Amran bin Abd Aziz, Senior Deputy Assistant Director of Immigration, Immigration Department of Malaysia. On 15 September 2020, a compound for the offence was offered to the appellant which was accepted and his employer paid the compound fee of RM300.00 on his behalf. On that same day, that is 15 September 2020 he was detained under s 35 of the Act at the Immigration Depot Detention Center of Tanah Merah, Kelantan for 30 days. An administrative order was made by the Immigration Department's Head of Enforcement for action to be taken to deport the appellant. The employer's appeal against that decision was rejected by the Immigration Department's "Jawatankuasa Rayuan Imigresen Negeri" (hereinafter referred to as the Committee) on 22 September 2020 and his removal from Malaysia or deportation was ordered. On 1 October 2020, he was remanded for 14 days by the Sessions Court and on the expiry of that remand order, that is 14 October 2020 the appellant was further detained under s 34 of the Act to facilitate his deportation from Malaysia as per the order of removal made on the same date, 14 October 2020. However, prior to the said date, on 5 October 2020, the appellant had filed an application for a writ of *habeas corpus* challenging his detention order dated 15 September 2020 on the grounds, firstly, that it was void as he had paid the said compound and was not a prohibited person who should be so removed and secondly, that the deportation order was made without giving him the opportunity to appeal to the Ministry of Home Affairs (sued as the 3rd respondent in this appeal).

Thus, when the matter came up for hearing before the learned High Court Judge, additional grounds for the issuance of the writ were canvassed, which are the validity of the notice of cancellation of the pass, the deportation order and detention order, all dated 14 October 2020. On 12 October 2020, the learned High Court Judge granted an interim stay of the deportation order until the disposal of the *habeas corpus* application and on 11 April 2021 that stay order was extended until the disposal of his appeal before this court. The said extension was ordered after the learned High Court Judge ("HCJ") delivered his decision on 28 February 2021 to dismiss the appellant's application for the writ of *habeas corpus*.

Decision Of The Learned High Court Judge

[2] On the issue of whether the re-arrest of the appellant on 15 September 2020 when his pass was still valid, His Lordship held that since his pass was revoked during the detention ordered by the learned Sessions Court Judge, this case is distinguishable from *Sajad Hussain Wani lwn. Ketua Pengarah Imigresen Malaysia & Satu Lagi* [2007] 3 MLRH 335, because Sajad was never brought before any Magistrate for further detention, his offence was in respect of immoral acts against the teaching of Islam and not one under the Act like the appellant here. Secondly, the detention of the appellant from the date of his arrest until that ordered by the Sessions Court Judge on 1 October 2020 was lawful as art 5(4) of the Federal Constitution allows 14 days after arrest of non-citizen for his production before a Magistrate. His Lordship also found no merit on the allegation that the appellant was not served with the notice of detention and deportation as the appellant, who is well versed in Bahasa Melayu as he affirmed his affidavit in support of the writ in Bahasa Melayu without aid of translator, had acknowledged receipt of the documents on 14 October 2020. The appellant, held His Lordship further, had also failed to show how he was prevented from lodging the appeal with the 3rd respondent under reg 26(1) and based on *Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia & Anor* [2017] MLRAU 365, there is no express or implied duty on the said Minister to give reasons for the cancellation of the pass.

The Appeal

[3] Before us, learned counsel for the appellant reiterated the stands taken by him in the High Court, which are:

(i) The appellant's further detention on 15 September 2020 under s 35 of the Act was void, invalid and made *mala fide*;

(ii) The notice of revocation of the pass dated 14 October 2020 was improper and also made *mala fide*;

(iii) The detention under s 34 was invalid and made *mala fide*.

(iv) The deportation order was against the law and made *mala fide*;

[4] Before delving into the merits of the above contentions, it must be noted that just about a week before the hearing of the appeal before us, that is 15 September 2021, the appellant had been released from his detention. That decision was made, according to learned counsel for the appellant, after parties were directed by us to submit on the issue the constitutionality of the ouster clause in s 59A of the Act. Given that fact, the learned Senior Federal Counsel submitted, at the commencement of the hearing of the appeal, that it be vacated since it is academic but which we did not accede to for the reason that this court in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 4 MLRA 518, have decided, at para 203 of the judgment of the Chief Justice Tun Tengku Maimun binti Tuan Mat, that the matter is not academic even after the release of the detainee. I will now proceed to consider the merits of the appeal in the following manner.

(I) Detention Under Section 35 Of The Act.

Section 35 provides as follows:

> "Section 35 - Power to arrest person liable to removal
>
> **Any person reasonably believed to be a person liable to removal from Malaysia under this Act** may be arrested without warrant by any immigration officer generally or specially authorized by the Director General in the behalf or by a senior police officer, and **may be detained in any prison, police station or immigration depot for a period not exceeding thirty days pending a decision as to whether an order for his removal should be made**."
>
> [Emphasis Added]

[5] Learned counsel for the appellant submitted that the said detention of the appellant was illegal because he was not a prohibited immigrant under s 8(3) or an illegal immigrant under s 56(2) of Act since he had a valid pass until 21 March 2021 and therefore, could only be detained after that pass was cancelled. Furthermore, submitted learned counsel, the appellant was also not produced before the Magistrate after his further detention on 15 September 2020 and which made the detention illegal as held in *Sajad Hussain's* case (*supra*) because a detainee must be produced before a Magistrate within 14 days as provided in the second proviso to art 5(4) of the Federal Constitution. That s 35, said learned counsel cannot override the said proviso because the said Article's application is only exempted against enemies of the State, of which the appellant was not.

[6] With respect to learned counsel, I am unable to accede to that submission for as rightly submitted by the learned Senior Federal Counsel ("SFC") since the appellant had committed an offence under reg 39(b), he comes under the phrase "a person reasonably believed to be a person liable to removal from Malaysia" as highlighted in reproduction of s 35 above and therefore, as authorized by the said provision, his further detention of 30 days is permitted pending a decision on his removal from the country. The said s 35 is not contrary to art 5 because,

firstly the clear proviso in art 5(4) on the requirement to produce the arrestee before a Magistrate within 14 days of his arrest applies to the initial arrest and detention and this requirement is clearly incorporated in s 51(5)(b). The above mentioned provisions read as follows:

"Article 5(4)

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be have been an integral part of this Article as from Merdeka Day:

Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days".

And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court."

[Emphasis Added]

"Section 51, Powers of search and arrest.

(1) ...

(2) ...

(3) ...

(4) ...

(5) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act—

(a) where any person who is a citizen is arrested or detained under this Act otherwise than for an offence against this Act, and has not been earlier released, he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time for any necessary journey), be produced before a Magistrate and shall not be further detained in custody without the Magistrate's authority; and

(b) where any person other than a citizen is arrested or detained under this Act, whether for an offence against this Act or otherwise than for such offence, and has not been earlier

> released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within fourteen days of his arrest or detention, be produced before a Magistrate who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act,
>
> and any provision of this Act or any subsidiary legislation made under this Act providing for the arrest or detention, otherwise than for an offence, of a person who is a citizen, or for the arrest or detention of a person other than a citizen, whether for an offence against this Act or otherwise than for such offence, shall be read as being subject to the provisions of paragraph (a) or (b), as may be applicable:
>
> Provided that the Magistrate before whom such person is produced under paragraph (a) or (b), as the case may be, shall not authorize or order the detention of such person for a period in excess of the maximum period which may be specified in the provision under which he is to be detained."

[7] Secondly, his further detention under s 35 was merely pending a decision whether to remove him. It is obvious from Part V of the Act in which the said section is legislated that a "person liable to removal from Malaysia" is one who has committed a transgression under the Act which warrants the exercise of the Immigration authority's power under s 51(5). Once that said decision to remove is made, then s 34 comes into play. It is therefore a continuous process and given the incorporation of the proviso into s 51(4) as stated earlier there is no legal necessity to repeat the same requirement in s 35. Learned counsel for the appellant has also referred us to the decision of Zaharah Ibrahim J (as Her Ladyship then was) in *Sajad Hussain Wani's* case (*supra*) which held that the detention of the applicant in that case whilst still having a valid pass was illegal. I would agree with the learned SFC that the facts in the said case are clearly distinguishable because it was an undisputed fact that the appellant (who at the time of his arrest for immoral conduct against the percepts of Islam also had a valid pass) was never brought before a Magistrate from the date of his arrest until the hearing of the writ for *habeas corpus*. Her Ladyship held that he should have been brought before a Magistrate within 14 days from the date of his arrest as required by the second proviso to art 5(4) which is reflected in s 51 (5) of the Act and as his detention was under s 35, the Magistrate could not order it for more than 30 days as stipulated under the Act.

[8] Her Ladyship further held that the detention under s 35 is only lawful after the pass had been cancelled because it clearly stipulates that power to arrest and detain is to be exercised on "a person liable to removal from Malaysia". Only after that pass is cancelled the provision in s 9 (4) of the Act would apply.

The said s 9(4) reads:

> "(4) Where a Pass is cancelled under paragraph (1) (b) or a Permit is cancelled under paragraph (1) (c)—
>
> (a) if its holder is present in Malaysia, he shall not remain in Malaysia after such cancellation and shall be removed from Malaysia in accordance with the provisions of this act, and he shall, thereafter, be prohibited from entering Malaysia; and
>
> (b) if its holder is outside Malaysia, he shall be prohibited from entering or re-entering Malaysia."

[9] In this case before us, the undisputed evidence is that the appellant was brought before the learned Magistrate right after his initial arrest and was brought before the learned SCJ on 1 October 2020 before the expiry of his 30 days detention under s 35, which was before the cancellation of his pass on 14 October 2020 as per the notice dated the same date (see exh RISM-1 to the affidavit of Ruzaana binti Mohamad affirmed on 29 December 2020 at p 165 of AR Volume 3). His re-arrest and detention under s 34 was done on the same day (see "exh LBJ-7" to the affidavit of Lelawati binti Jamaludin affirmed on 29 December 2020 at p 121 until 122 of AR Volume 3). As noted by the learned HCJ in his judgment, from 1 October 2020 until 30 December 2020, the appellant was brought before the learned SCJ seven times to extend his remand. Therefore, there was no contravention of the law of the like which had happened in *Sajad's case (supra)*.

(II) Cancellation Of The Pass Under Regultaions 19(3)

Learned counsel for the appellant submitted that the said cancellation was invalid because the notice of cancellation should have been sent via post to his last known address and if that failed, then to gazette it within seven days as provided by reg 19(3) and s 9 of the Act. That notice also should have been signed by the Director General or Deputy Director General of Immigration as required by s 9(7) but here it was signed by the State Deputy Director of Immigration, one Ruzaana binti Mohamed. The relevant provision of reg 19 is reproduced below:

> "Regulation 19-Cancellation of Pass and Forfeiture of Security (1) Without prejudice to any other specific power to cancel a Pass conferred by or under these Regulations, if the Controller is satisfied that the holder of any Pass issued under these Regulations **has contravened** or failed to comply with any provision of the Ordinance or of any of the Regulations, or with any condition imposed in respect of or instruction endorsed on such Pass he may -
>
> (a) forthwith cancel such Pass; and
>
> (b) in any case where security has been deposited under reg 18 of these Regulations, and whether or not the Pass is cancelled, direct the forfeiture of such security or any part thereof.

(3) Notice of the cancellation of any Pass or of the forfeiture of any security or any part thereof **shall be given to the holder of such Pass**: Provided that it shall be sufficient if such notice is forwarded by registered post to the last known address of the holder."

[Emphasis Added]

The relevant provision of s 9 is reproduced below:

"Section 9 - Director General's power to prohibit entry, or cancel any Pass or Permit.

(1) Notwithstanding anything contained in this act or in any subsidiary legislation made under this act, the Director General may—

(a) where he deems it expedient to do so in the interests of public security or by reason of any economic, industrial, social, educational or other conditions in Malaysia, by order, prohibited, either for a stated period or permanently, the entry or re-entry into Malaysia of any person or class of persons:

Provided that the order made under this paragraph shall not apply to any citizen or to the holder of any valid Pass or Permit;

(b) in his absolute discretion cancel any Pass at any time by writing under his hand; or

(c) cancel any Permit at any time by writing under his hand, if he is satisfied that the presence in, or entry into, Malaysia of the holder of any Permit is, or would be, prejudicial to public order, public security, public health or morality in Malaysia or any part thereof.

(3) Every cancellation of a Pass under paragraph (1) (b) or a Permit under paragraph (1) (c) shall come into force on the date of the cancellation, and the Director General shall, as soon as may be thereafter, **cause a notice of the cancellation to be sent to the holder of the Pass or Permit, as the case may be**, if his address is known, and if it is not known, shall cause the notice to be published in such manner as he deems fit."

[Emphasis Added]

[10] The raising of the above arguments are, again with respect, without any merit because firstly, s 3(3)(a) and (b) of the Act allows the exercise of the Director General's power to be done by a Deputy Director General of Immigration or any other Senior Immigration Officer. The said provision reads:

"Section 3. Appointment and powers of Director General and others.

(3) The powers and discretions vested in the Director General by this Act, and the duties required to be discharged by him may, subject to s 4 and to such limitations as may be prescribed, be exercised and discharged by-

(a) a Deputy Director General of Immigration or Director of Immigration; (a) a Deputy Director General of Immigration or Director of Immigration;

(b) any senior immigration officer authorized in writing in that behalf by the Director General."

Secondly, with regards to the service of the said notice, it is equally a nonissue because the said notice was served personally on the appellant. Although reg 19(3) uses the word "sent to the holder of the pass" as I had emphasised above, nonetheless, it is crystal clear from the words in the said provision that the intention of the legislative is to notify the pass holder of the said cancellation and there can be no better way to do that than to give the notice to him in person.

[11] Learned counsel for the appellant further submitted that the cancellation was made *mala fide* and against the interim stay granted by the learned High Court Judge. However that interim stay was against the deportation of the appellant and given the contravention of the pass by him, as evidenced by the payment of the compound fee, that official move of the Department was in my view, more than justified.

(III) Detention Under Section 34 Of The Act

[12] Learned counsel for the appellant submitted that the appellant's detention under s 34 of the Act pending his deportation was void and also made *mala fide* because only migrants who had been found guilty or have reasonable grounds for committing offences under ss 5, 6, 8, 9, 15, and 60 of the Act are liable to be deported back to their country of origin but not one like the appellant who had been fined or compounded for offences under the Regulation. It was learned counsel's stand that s 32 until 34 of the Act are only applicable to offenders convicted under s 5, 6, 8, 9, and 60 of the Act and he pointed out that s 9(1)(a) is clearly inapplicable to a Malaysian citizen and a valid pass holder. Learned SFC however highlighted to us in both his oral and written submissions the fact of the appellant being granted, on 11 April 2021 an interim stay of the deportation order pending the disposal of his appeal to this court. Therefore, said the learned SFC, there was no issue about the legality of his detention under the said s 34. Granted that this is so, but nevertheless for the sake of argument, I would still address the point raised by learned counsel for the appellant as follows.

[13] Now, with respect to learned counsel, I am not persuaded that s 34 is to be read in the said manner as submitted by him. It is clear from the headings and the reading of Part V of the Act which is titled "Removal from Malaysia" that each provision in the said Part V, that is s 31 until 36 caters for different situations pertaining to the removal. Section 31 is on removal of prohibited immigrants from Malaysia, s 32 is on removal of illegal immigrants, s 34 is on detention of persons ordered to be removed, s 35 is on power to arrest person liable to removal and s 36 on unlawful return of a person to Malaysia who had been so removed. Since we are concerned with s 34, I would reproduce the said section below:

"Section 34 - Detention of persons ordered to be removed

(1) Where any person is ordered to be removed from Malaysia under this act, such person may be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal:

Provided that any person detained under this subsection who appeals under subsection 33 (2) against the order of removal may, in the discretion of the Director General, be released, pending the determination of his appeal, on such conditions as to furnishing security or otherwise as the Director General may deem fit.

(2) Subject to the determination of any appeal under s 33, any person who is ordered to be removed from Malaysia may be placed on board a suitable vessel or aircraft by any police officer or immigration officer, and may be lawfully detained on board the vessel or aircraft, so long as the vessel or aircraft is within the limits of Malaysia.

(3) Any person who is detained in custody in pursuance of an order made by the Director General Under subsection (1) may be so detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Director General."

[14] Very obvious from the clear reading of s 34(1) above that the Director General is given the power to detain any person ordered to be removed whilst arrangements are being made for his removal. That is obviously the case with the appellant here for the order for his removal had been made. There is no such limitation as submitted by learned counsel for that section to only be utilised against offenders convicted of the said ss 5, 6, 8, 9 and 60 as stated above. It is to be noted that the appellant in this case was given, and he did utilise his right to appeal against his removal but that appeal was rejected by the Committee (see "exh LBJ-6" to the affidavit of Lelawati binti Jamaludin affirmed on 29 December 2020 at p 116 until 119 of AR Volume 3).

[15] Learned counsel for the appellant referred us to the case of one Mohammad Abu Shaleh who was granted a writ of *habeas corpus* by the High Court on the ground that the commission of an offence under reg 39(b) was not a serious offence which warrants his removal. The sealed order in the said case is reproduced below:

"Dalam perkara pengistiharan oleh Ketua Pengarah Imigresen bahawa MOHAMMAD ABU SHALEH - No. Pasport: BH0595881 adalah imigran larangan menurut seksyen 6 (1) (c) Akta Imigresen 1959/1963 dan oleh yang demikian, kehadiran mereka adalah bertentangan dengan undang-undang

DAN

Dalam perkara perintah pengusiran berkenaan pengusiran MOHAMMAD ABU SHALEH - No. Pasport: BH0595881

DI HADAPAN HAKIM AZMAN BIN ABDULLAH
PADA 30 OGOS 2018

DALAM MAHKAMAH TERBUKA

PERINTAH

PERMOHONAN INI yang ditetapkan untuk Pendengaran pada hari ini dengan kehadiran Harpal Singh, Peguam bagi pihak Pemohon dan Nurul Hanawi, Peguam Persekutuan bagi pihak Responden **DAN SETELAH MEMBACA** Notis Usul dan Afidavit yang difailkan **DAN SETELAH MENDENGAR** hujahan kedua- dua pihak yang tersebut di atas MAKA ADALAH DIPERINTAHKAN bahawa Permohonan untuk writ *habeas corpus* ini adalah **DIBENARKAN** dan **ADALAH JUGA DIPERINTAHKAN** bahawa Permohon tidak boleh ditangkap semula **sehingga program rehiring dan penempatan semula PATI dengan bayaran telah dibuat [dan tidak pernah dikembalikan jika menolak permohonan mereka] diberikan kepada Pemohon seperti yang dijanjikan menurut tempoh yang ditetapkan dan hak-hak mereka.**

DIBERI di bawah tandatangan saya dan meterai Mahkamah pada 30 Ogos 2018.

Bertarikh pada 30-Ogos-2018

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NUR AIN BINTI MUSTAPA
Penolong Kanan Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur"

[Emphasis Added]

[16] The same entities who are the respondents in this case, except that the Commandant of the Immigration Depot in the cited case is that of Seminyih, appealed to this court in *Ketua Pengarah Imigresen & Ors v. Mohammad Abu Shaleh* [Federal Court Criminal Appeal No: 05(HC)-234-10-2018 (W)]. Learned counsel submitted that the parties agreed to delete the further order as highlighted above and therefore, the rest of the decision of the learned High Court was affirmed. However, when I examined the sealed court order of this court, reproduced as part of Tab G of the appellant's Bundle of Authority, it very clearly states that the appeal of the appellants (ie the respondent's in this case before us) was allowed, meaning to say that the decision of the learned HCJ to issue the writ of *habeas corpus* was reversed, although the further order of the learned HCJ was set aside. I would for the sake of clarity reproduce the order below:

"DALAM MAHKAMAH TERBUKA
PADA 27 HARIBULAN FEBRUARI 2019
MPRJ NO: 05(HC)-234-10/2018 (W)

PERINTAH

RAYUAN INI yang ditetapkan untuk pendengaran pada 27 haribulan Februari 2019 dalam kehadiran Peguam Kanan Persekutuan Fazril Sani bin Mohamed Fadzil bagi pihak Perayu-Perayu dan Harpal Singh (Tan Cheng Yee bersama-samanya) Peguambela bagi pihak Responden DAN SETELAH MEMBACA Notis Rayuan dan Rekod-Rekod Rayuan yang kesemuanya difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang tersebut di atas MAKA ADALAH DIPERINTAHKAN bahawa rayuan Perayu-Perayu dibenarkan. Perintah Mahkamah Tinggi bertarikh 30 August 2018 dipinda dengan mengenepikan Perintah "bahawa Pemohon tidak boleh ditangkap sehingga program rehiring dan penempatan semula PATI dengan bayaran telah dibuat [dan tidak pernah dikembalikan jika menolak permohonan mereka] diberikan kepada Pemohon seperti yang dijanjikan menurut tempoh yang ditetapkan dan hak-hak mereka"

DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 27 Februari 2019.

tt

.....

AISHAH AMEERAH BINTI CHE JOHAN
Penolong Kanan Pendaftar
Mahkamah Persekutuan
Putrajaya"

Thus, with respect, there is again no merit in learned counsel's argument that the commission of an offence under reg 39(b) would not be a legal basis to order the removal of an immigrant like the appellant.

Ouster Clause

[17] I must state at the outset that the issue of whether s 15B(1) of the Act which is on the court's power to review the act or decision of the Board is constitutional was not raised by the parties either here or in the court below but they were requested by us to submit on it and which they did, comprehensively. However, it has occurred to me post that directive that this very issue on the constitutionality of s 15B is the subject of a pending appeal in this court when it allowed an application to review the decision of a five member panel in *Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors* [2021] 6 MLRA 128 [Federal Court Criminal Application No: 05 (RJ)-2-03-2021 (W)]. I was in that panel chaired by the Chief Justice Tun Tengku Maimun binti Tuan Mat, which allowed the said review and given the size of the earlier coram, it would not be wrong for me to surmise that a similar number of coram, if not more, would rehear the appeal which is currently fixed for hearing on 25 April 2022. In the circumstances and with the deepest of regret and profound apologies to both parties for what would be their wasted effort given the decision I am about to make, which is, that I am of the considered view that this issue would be better and more expeditiously dealt with at the rehearing of *Nivesh*'s case (*supra*).

Deportation Order Illegal And Made *Mala Fide*

[18] The deportation order is stated to be made under s 56(2) of the Act but the appellant did not commit such an offence under s 56(1). Learned counsel for the appellant submitted that the said order was therefore illegal and was made *mala fide* because he was not a person "liable to be removed" under s 56(2) and that he had a valid pass until 12 March 2021 when he was detained on 5 September 2020. He was thus not a prohibited immigrant as defined in s 8 of the Act. The learned SFC conceded orally at the hearing before us that the citation of that subsection was wrong but that the matter was in a way resolved because the appellant was given a special pass and handed over to his employer after the interim stay of the order was granted. In other words, he was not deported. In my view, the wrong citation of the relevant provision in itself cannot be evidence of *mala fide* and the issuance of the special pass is further evidence of the respondent's good faith in respect of his detention. Nevertheless, that error has rendered the deportation order illegal and it must accordingly be set aside for the simple reason that the law is trite and entrenched that a detainee like the appellant is entitled to take full advantage of any technical imperfection which has the effect of invalidating the order that incarcerates him without trial or even with trial. In relation to *habeas corpus* application, the above mentioned law in a detainee's favour was expressed in the often quoted decisions of *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 MLRA 132 and *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Lagi* [1994] 1 MLRA 375. No court of law should condone such an error in this case which actually is easily rectified by an application to amend the same. Consequentially, on this ground alone the appeal of the appellant is allowed as the appellant was entitled to be granted the writ of *habeas corpus* as prayed by him and thus the respondent's pre-emptive decision to release him must therefore be maintained.

[19] My learned sister and brother Judges, Nallini Pathmanathan, FCJ, and Harmindar Singh Dhaliwal, FCJ, have read this judgment in draft and have expressed their agreement with it.

Shudangshu Chandra
v. Ketua Pengarah Imigresen Malaysia & Ors

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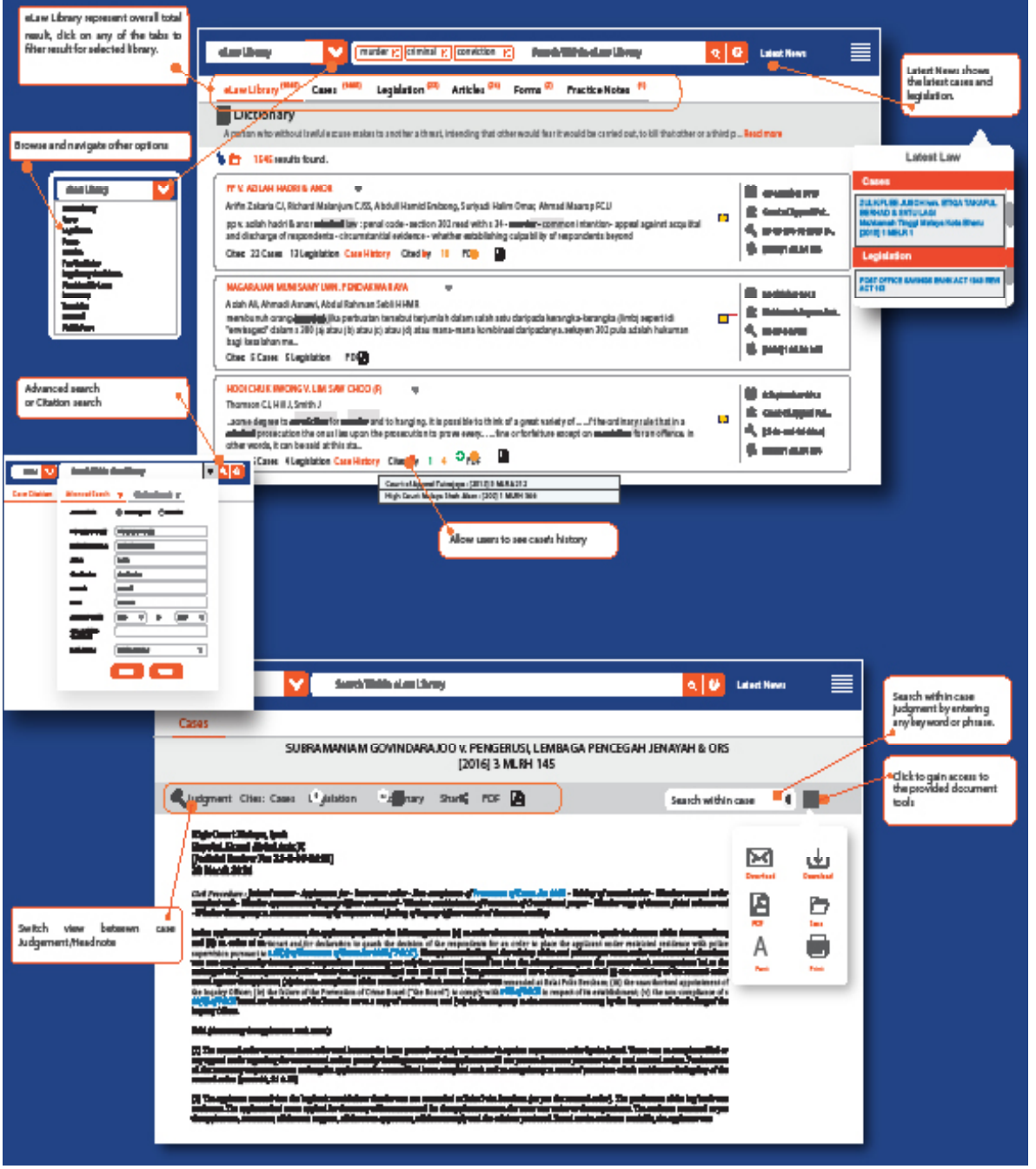

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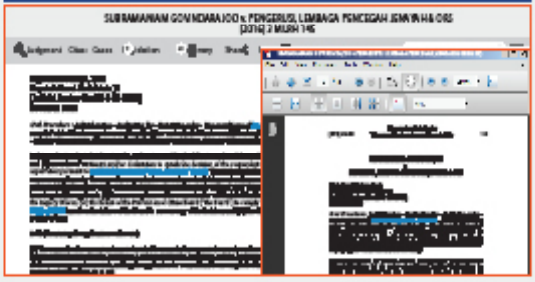

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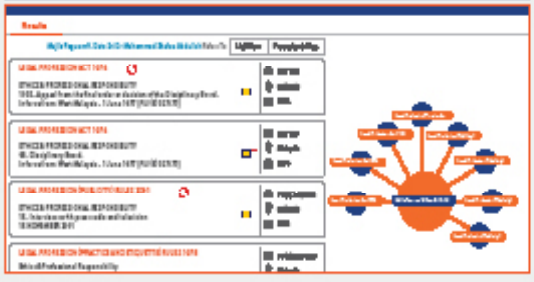

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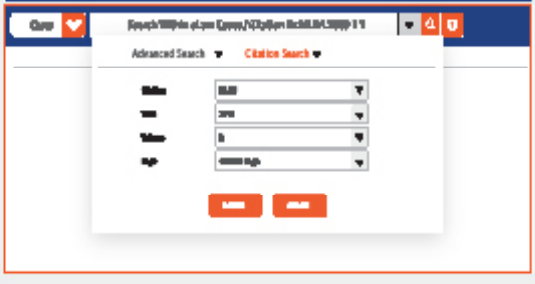

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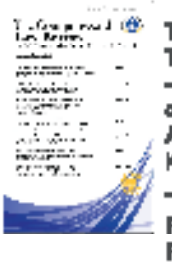

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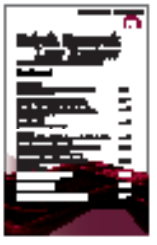

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