KENGADHARAN RAMASAMY

v.

MENTERI KEWANGAN MALAYSIA & ANOR

Court of Appeal, Putrajaya
Yaacob Md Sam, Mohd Nazlan Mohd Ghazali, Azman Abdullah JJCA
[Civil Appeal No: W-01(A)-157-03-2020]
10 April 2023

Constitutional Law: *Legislation — Departure Levy Act 2019 and Departure Levy (Rate of Departure Levy) Order 2019 (PU(A) 213) — Whether conflicted with art 5(1) of the Federal Constitution and therefore invalid, void and unenforceable*

The appellant (plaintiff) had sought *inter alia* a declaration that the Departure Levy Act 2019 (Act 813) and the Departure Levy (Rate of Departure Levy) Order 2019 (PU(A) 213 Order) were in conflict with art 5(1) of the Federal Constitution (Constitution) and therefore, were invalid, void and could not be enforced with immediate effect. The plaintiff averred that the levy that was imposed by the defendants had interfered with and violated his constitutional guaranteed rights under art 5(1) of the Constitution to travel abroad. The High Court found in favour of the defendants and dismissed the plaintiff's suit on the ground that art 5(1) of the Constitution embodied only constitutional protection in relation to personal liberty and excluded any other rights such as the right to a passport or the right to travel. Hence, the instant appeal by the plaintiff and in support of which it was submitted that 'personal liberty' should be given a wider interpretation; that the right to travel and/or leave the country was a fundamental right guaranteed by art 5(1) of the Constitution and should not be subjected to payment of levy; that the direct and inevitable consequences of having to pay such levy had rendered that right to travel within and out of the country, ineffective and illusory; and that the imposition of the departure levy which was coupled with a criminal sanction, was disproportionate to the Government's aim of generating more revenue for the State. It was also submitted that art 5(1) of the Constitution should be interpreted in a wider sense, following the decision in *Alma Nudo Atenza v. Public Prosecutor* (*Alma Nudo*). The respondents (defendants) however, argued to the contrary in that Act 813 and the P.U.(A) 213 Order were constitutional, validly enacted and enforceable; that the imposition of the departure levy was a policy decision of the Executive/Government, and that the Court lacked the power to adjudge the same.

Held (dismissing the appeal):

(1) As was decided in *Government of Malaysia & Ors v. Loh Wai Kong (Loh Wai Kong)* 'the citizen has no constitutional right to leave the country and travel overseas', and anything to do with travelling abroad would be governed by

the laws. *Loh Wai Kong,* which involved a similar issue of 'restriction' to travel abroad as in the instant case, was not overruled by *Alma Nudo* and therefore remained valid, relevant and applicable to the instant case. Further, and as was clear from *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor*, the freedom under art 5(1) of the Constitution was still subject to the laws. On the facts and in the circumstances, appellate intervention in the High Court's decision was not warranted. (paras 22, 23, 24, 27 & 28)

Case(s) referred to:

Alma Nudo Atenza v. PP [2019] 3 MLRA 1 (distd)

Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 MLRA 160 (folld)

Lee Kwan Woh v. PP [2009] 2 MLRA 286 (refd)

Maharashtra SBOS & HS Education v. Paritosh AIR [1984] SC 1548 (refd)

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

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 1 MLRA 137 (refd)

Parvez Noordin Lokhandwalla v. State Of Maharashtra [2020] 10 SCC 77 (refd)

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 1 MLRA 511 (refd)

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

Legislation referred to:

Dangerous Drugs Act 1952, s 37A

Departure Levy Act 2019, s 9(1)(3)

Departure Levy (Rate of Departure Levy) Order 2019

Federal Constitution, arts 5(1), 8(1), 96, 121

Immigration Act 1959/63, ss 3(2), 59, 59A

Counsel:

For the appellant: Gopal Sri Ram (Srimurugan Alagan & Dr Shamser Singh Thind with him); M/s Srimurugan & Co

For the respondent: Suzana Atan SFC (Krishna Priya Veenagopal @ Venugopal with her); AG's Chambers

JUDGMENT

Azman Abdullah JCA:

Introduction

[1] This is an appeal against the decision of the High Court dated 27 February 2020 in respect of the constitutionality of the Departure Levy Act 2019 [Act 813] and Departure Levy (Rate of Departure Levy) Order 2019 PU(A) 213 Order) on the ground that it contravenes the constitutional right guaranteed by art 5(1) of the Federal Constitution to travel abroad.

[2] We heard the appeal on 4 January 2023 and the appeal was adjourned for decision. We delivered the decision on 14 March 2023. Having duly considered the appeal records and submissions of the respective counsel, we had unanimously dismissed the appeal of the Appellant. These are the reasons for our decisions.

[3] For ease of reference, parties will be referred to as they were in the proceedings before the High Court.

Background Facts

[4] In the High Court, the Plaintiff who is a practising advocate & solicitor had filed suit against the Respondents/Defendants whereby the Plaintiff sought to obtain the following orders *via* the Amended Originating Summons ("AOS"):

(a) a declaration that the Departure Levy Act 2019 (Act 813) and the Departure Levy (Rate of Departure Levy) Order 2019 (PU(A) 213) is in conflict with art 5(1) of the Federal Constitution and therefore is invalid, void and could not be enforced, with immediate effect;

(b) no order as to costs; and

(c) other relief deems fair, fit and just by this Honourable Court.

[5] In the AOS and as later elaborated in the affidavit, the Plaintiff averred that the levy imposed by the Defendants seriously interferes with and violates his constitutional rights guaranteed by art 5(1) of the Federal Constitution. In particular, the Plaintiff averred that he has constitutional guaranteed rights to travel abroad and any direct or indirect violation of such right is unconstitutional, null and void.

[6] The Defendants, on the other hand, submits that Act 813 and PU(A) 213 Order made thereunder are constitutional, validly enacted and enforceable. Reasons being are as follows:

(a) Act 813 validly enacted pursuant to art 96 of the Federal Constitution which provides that "no tax or rates shall be levied except as provided by federal law";

(b) PU(A) 213 Order is *intra vires* Act 813 whereby it is made under the provision of s 11 of Act 813 which give Ministerial power to fix the rate of departure levy or to vary or amend the rate by order published in the Gazette;

(c) the Plaintiff's reliance on art 5(1) of the Federal Constitution is misconceived.

Decision Of The High Court

[7] On 27 February 2020, the learned High Court Judge dismissed the Plaintiff's AOS. The main reason given is because art 5(1) of the Federal Constitution embodies only the constitutional protection in relation to personal liberty. It excludes any other rights such as right to a passport or a right to travel.

[8] The learned High Court Judge in her judgment agrees with the Defendants' submission that the case of *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 MLRA 160 is still relevant and does not intend to depart from the aforesaid decisions. Therefore, it is concluded that Act 813 and PU(A) 213 Order are valid and enforceable.

[9] Dissatisfied with the decision, the Plaintiff filed this appeal.

The Appeal

[10] The grounds of appeal are as per the Memorandum of Appeal which reads as follows:

> "[1] Hakim Mahkamah Tinggi yang bijaksana kilaf dari segi undang-undang dalam menolak Saman Pemula terpinda bertarikh 11 September 2019 tanpa sebarang perintah terhadap kos.
>
> [2] Hakim Mahkamah Tinggi yang bijaksana kilaf dari segi undang-undang dalam merumuskan dan/atau menyimpulkan bahawa ss 3, 9, 10, Akta Levi Pelepasan 2019 (Akta 813) tidak bercanggah dengan Artikel 4, 5, dan 8 Perlembagaan Persekutuan.
>
> [3] Hakim Mahkamah Tinggi yang bijaksana kilaf dari segi undang-undang dalam merumuskan dan/atau menyimpulkan bahawa Perintah Levi Pelepasan (Kadar Levi Pelepasan) 2019 [PU(A) 213] tidak bercanggah dengan Artikel 4, 5, dan 8 Perlembagaan Persekutuan.
>
> [4] Hakim Mahkamah Tinggi yang bijaksana kilaf dari segi undang-undang dalam merumuskan dan/atau menyimpulkan bahawa seorang warganegara Malaysia tidak mempunyai hak perlembagaan dibawah Artikel 5(1) Perlembagaan Persekutuan untuk keluar masuk daripada Malaysia.
>
> [5] Hakim Mahkamah Tinggi yang bijaksana kilaf dari segi undang-undang dalam merumuskan dan/atau menyimpulkan bahawa keputusan kes *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 MLRA 160 FC masih terpakai dan sah dan Mahkamah Tinggi terikat dengan keputusan tersebut.
>
> [6] Alasan-alasan Rayuan tambahan lain tertakluk kepada Alasan Penghakiman Mahkamah Tinggi.

Submissions

[11] The learned counsel for the Plaintiff submitted that a wider interpretation should be given to the expression of personal liberty, and not the restricted meaning given by the decisions of *Pua Kiam Wee v. Ketua Pengarah Imigresen Malaysia* [2017] MLRAU 365 and *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 MLRA 160. It was further contended that the High Court had failed to have regard to the recent decision of the Federal Court in *Alma Nudo Atenza v. Public Prosecutor* [2019] 3 MLRA 1 (*"Alma Nudo"*) which refer and adopted another Federal Court case of *Lee Kwan Woh v. Public Prosecutor* [2009] 2 MLRA 286.

[12] According to the Plaintiff, a right to travel is a fundamental right guaranteed under art 5 of the Federal Constitution. It is therefore unconstitutional to subject that right of travel and/or to leave the country, to a payment of levy. The direct and inevitable consequences of having to pay levy tax, if one wishes to leave the country, had rendered the right to travel within and out of the country ineffective and illusory.

[13] In any event, it was submitted by the Plaintiff that this Court should interpret art 5(1) of the Federal Constitution in a wider sense following the decision of *Alma Nudo* as follows:

> "[109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts (see *Lee Kwan Woh* at para 18)."

[14] Our attention was drawn to the Indian Supreme Court which has recently affirmed this aspect of right to personal liberty in *Parvez Noordin Lokhandwalla v. State Of Maharashtra* [2020] 10 SCC 77 as follows:

> "... There could be no gainsaying to that the right to travel abroad is a valuable one and an integral part of the right to personal liberty..."

[15] The Plaintiff also submitted that the imposition of departure levy is coupled with a criminal sanction whereby pursuant to s 9(3) of Act 813, it imposes a penal sanction on any person who contravenes subsection (1) of the said section. According to the Plaintiff, the infringement of art 5 through an imposition of penal sanction is disproportionate to the aim the Government sought to achieve i.e. to generate more revenue for the State.

[16] On the other hand, the Defendants in this appeal maintain their position as at the High Court in which they submitted that Act 813 and PU(A) 213 Order made thereunder are constitutional, validly enacted and enforceable.

[17] Learned Senior Federal Counsel (SFC) further submitted that the imposition of departure levy is a policy decision of the executive or the government and it is not within the powers of this Court to adjudge. In this regard, the SFC cited the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 1 MLRA 137 at p 157 wherein the Federal Court referred to the judgment of the Indian Supreme Court in *Maharashtra SBOS & HS Education v. Paritosh AIR* [1984] SC 1548 which said as follows:

> "The Court cannot as judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement... The legislature and delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from some legal infirmity, in the sense of it being wholly beyond the scope of the regulation making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."

[18] Therefore, according to counsel of the learned SFC, the Plaintiff's averments that Act 813 denies him of his constitutional right to travel as guaranteed under art 5(1) of the Federal Constitution is without merits. The SFC cited the case of *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 MLRA 160 and the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & another Appeal* [2002] 1 MLRA 511 in describing what constitutes personal liberty.

Our Decision

[19] It is first apposite that art 5(1) of the Federal Constitution be stated in its entirety, as follows:

> "5. Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> (3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (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 provision of this Clause shall be deemed to 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.
>
> (5) Clauses (3) and (4) do not apply to an enemy alien."

[20] Having considered the submissions, we are of the view that the question that we need to address is whether Act 813 and PU(A) 213 Order are constitutional, valid and enforceable? In this regard, we are of the view that first and foremost, we should understand the definition of personal liberty.

[21] To answer this, we are guided by the Federal Court decision in the case of *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 MLRA 160 which there are answers to the question of whether a citizen has a right to leave the country, to travel overseas, and a right to a passport which are almost similar to our case. The Federal Court had decided as follows:

> "Article 5(1) speaks of personal liberty, not of liberty simpliciter. Does personal liberty include the three liberties? It is well-settled that the meaning of words used in any portion of a statute − and the same principle applies to a constitution − depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in art 5(1), one must look at the other clauses of the article, and doing so, we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in art 9 which, however, only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions

set out therein, to move freely within the Federation and to reside anywhere therein. With respect, we agree with what Mukherjee J. said at p 140-141 in *Gopalan AIR* 1950 SC 27:

> In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: *vide* Dicey on *Constitutional Law*, Edition 9, pages 207-208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty."

While the constitution by art 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, in our judgment, the citizen has no constitutional right to leave the country and travel overseas. Indeed, as to the latter, how can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a fundamental right which every foreign country may lawfully reject."

[22] So far, we agree with the learned High Court Judge that the above case of *Loh Wai Kong* is still relevant. We are of the view that this case can be taken into consideration in deciding our present case because it involves almost similar issue which is the so-called "restriction" to travel abroad. As decided in *Loh Wai Kong* whereby the citizen has no constitutional right to leave the country and travel overseas, anything to do with traveling outside the country would be governed by the laws. That is why we have Immigration Act 1959/63 (Act 155) to regulate various aspects of immigration including the admission into and departure from Malaysia. And now before us we have Departure Levy Act 2019 and Departure Levy (Rate of Departure Levy) Order 2019 (PU(A) 213) where both are the laws enacted to impose levy when the person leaves Malaysia.

[23] It is apposite to emphasize that in regard to the submission of the Plaintiff that the learned trial Judge failed to have regard to the recent decision of the Federal Court in *Alma Nudo Atenza v. Public Prosecutor* [2019] 3 MLRA 1 in which the case referred and adopted another Federal Court decision of *Lee Kwan Woh v. Public Prosecutor* [2009] 2 MLRA 286, we are of the considered view that the case of *Alma Nudo Atenza* did not overrule *Loh Wai Kong*. For that reason, the decision of *Loh Wai Kong* remain valid and relevant to be applied in our case.

[24] We are conscious that a Court is bound to follow the decision of the Court above it in the judicial hierarchy. However, after careful consideration on the application of *Alma Nudo* to our case, we are of the view that the case of *Loh Wai Kong* is more relevant to be applied to our present appeal as it involves almost similar issue which is the so called "restriction" to travel abroad.

[25] *Alma Nudo*, on the other hand, concerned a decision of the Federal Court on the issue of whether s 37A of the Dangerous Drugs Act 1952 ('the DDA') was constitutional *vis-a-vis* arts 5, 8 and 121 of the Federal Constitution. The Federal Court had struck down s 37A of the Dangerous Drugs Act 1952 on the grounds of double presumption which was invoked by the trial Judge against the accused, as it was prescribed as being disproportionate to the legislative objective of the legislation. It is said that it was far from clear that the objective of securing the convictions of drug traffickers could not be achieved through other means less damaging to the accused's fundamental right under art 5 of the Federal Constitution and the unacceptably severe incursion into the right of the accused under art 5(1) was disproportionate to the aim of curbing crime and hence failed to satisfy the requirement of proportionality housed under art 8(1) of the Federal Constitution.

[26] Notably also that, the Federal Court in *Alma Nudo* concerned on unacceptably severe incursion into the right of the accused under art 5(1) of the Federal Constitution and it is said to be disproportionate to the aim of curbing crime. The Federal Court had applied proportionality assessment to establish whether there is a sufficiently important objective to justify the infringement of the right which is the right to presumption of innocence.

[27] We also refer to the Federal Court decision in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1 which held that that the first respondent which is Ketua Pengarah Imigresen had no power to impose the travel ban on the appellant in the circumstances of the case and the Federal Court further held that by majority, ss 59 and 59A of the Immigration Act 1959/63 were still valid and constitutional. From the decision in *Maria Chin*, it is clear that the freedom under art 5 of the Federal Constitution is still subject to the laws. In this regard, Abdul Rahman Sebli FCJ, majority, at para 23 stated that:

> "Section 3(2) of the Immigration Act clearly conferred on the first respondent a broad power over 'all matters relating to immigration'. The fact that the respondents gave a wrong and invalid reason for imposing the travel ban on the appellant did not in any way alter the fact that in law, they had no duty to provide reasons. Thus, even if the first respondent was wrong in relying on a departmental circular which did not have any force of law to impose the travel ban, that did not turn his decision into a wrongful act if otherwise the decision was permitted by law, which decision was not subject to a right of hearing under s 59 and not subject to judicial review under s 59A. On the strength of the Federal Court's decision in *Loh Wai Kong*, if it was not a constitutional right for a citizen to leave the country to travel overseas, it could not then be

a breach of the law for the respondents to impose the travel ban on a citizen. To say that the first respondent had no power to impose a travel ban under s 3(2) of the Immigration Act was plainly wrong. However, on the peculiar facts and circumstances of this case, the reason given by the first respondent for imposing the travel ban turned out to be inappropriate (see paras 624, 627, 629 & 644-646)."

Conclusion

[28] In the upshot, based on the aforesaid reasons, we agree with the High Court Judge and find no merit in this appeal to warrant our appellate intervention. The appeal is dismissed with no order as to costs. The order of the High Court is affirmed.

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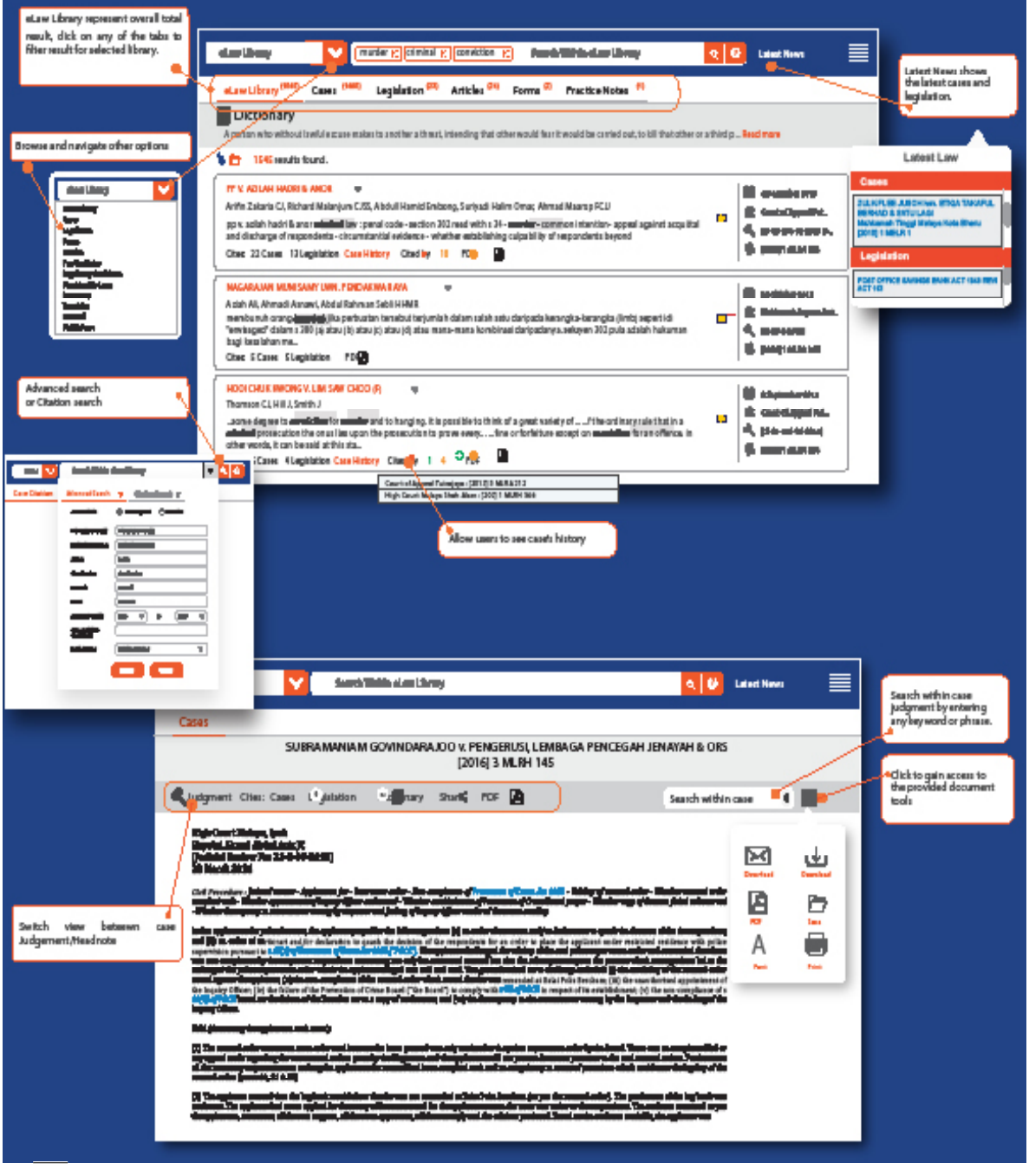

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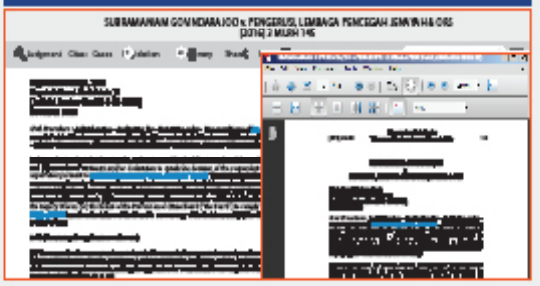

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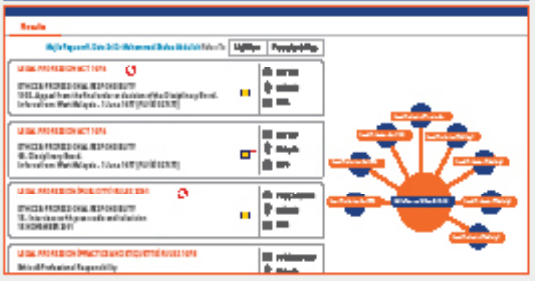

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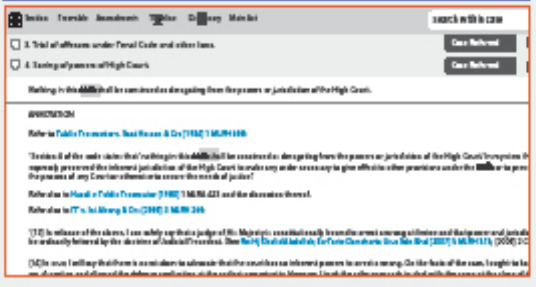

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