KETHEESWARAN KANAGARATNAM & ANOR

v.

PP

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Mohamad Zabidin Mohd Diah CJM, Harmindar Singh Dhaliwal, Abu Bakar Jais, Abdul Karim Abdul Jalil FCJJ
[Reference No: 06(RJ)-1-03-2023(B)]
5 January 2024

Constitutional Law: *Legislation — Constitutionality of — Anti-Trafficking in Persons and AntiSmuggling of Migrants Act 2007, s 61A — Whether s 61A unconstitutional, null and void by vesting judicial power unto itself — Whether s 61A violated fundamental right to a fair trial guaranteed to an accused — Whether s 61A violated right to equality guaranteed to an accused — Federal Constitution, arts 5(1), (8), 121(1)*

The appellants were two accused persons jointly charged in the Sessions Court for three offences under s 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("ATIPSOM") read with s 34 of the Penal Code. They pleaded not guilty to the charges and sought to challenge the constitutionality of s 61A of the ATIPSOM which was related to the deposition of trafficked persons or smuggled migrants. The Sessions Court transmitted the case to the High Court which decided the constitutional questions itself and dismissed the appellants' motion to transmit the special case to the Federal Court. On appeal, and upon agreement by both parties, the Court of Appeal set aside the High Court's decision and ordered the High Court to transmit the special case to the Federal Court. Hence, the present special case in which the appellants advanced the following three constitutional questions: (1) whether s 61A was unconstitutional, null and void by vesting judicial power unto itself, and Parliament acted in violation of the doctrine of separation of powers under art 121(1) of the Federal Constitution ("FC") in deciding "*prima facie* evidence"; (2) whether s 61A violated the fundamental right to a fair trial guaranteed to an accused under art 5(1) of the FC, and thus was unconstitutional, null and void; and (3) whether s 61A violated the right to equality guaranteed to an accused under art 8 of the FC, and thus was unconstitutional, null and void.

In respect of Question (1), the appellants contended that the problem with s 61A(1) was the words "any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition". It was their argument that what constituted *prima facie* evidence was a question requiring judicial assessment. The fact that Parliament had deemed certain facts or evidence (in this case depositions given in a certain instance spelt out in the section), was a legislative imposition on the Judiciary as to what constituted *prima facie* evidence, which was an incursion into judicial power in violation of art 121(1). As for Question (2), the appellants submitted that the

right to a fair trial included the concept of procedural and substantive fairness. Specifically in this case, a fundamental pillar of these concepts included the right of confrontation in the form of cross-examination. The appellants claimed that by virtue of s 61A, they could not cross-examine the deponents. This belied the notions of fair play and the principle of equality of arms by disabling them from testing the veracity of the evidence obtained by virtue of s 61A. And, finally, on Question (3), the appellants principally asserted that s 61A violated the principle of proportionality. The crux of their submission was that every accused person had the right to cross-examine the witness who testified against him. Section 61A was a disproportionate legislative measure in that the legitimate legislative aim (establishing and punishing the offence of human trafficking) did not commensurate to the measure of completely denying the accused person the right of cross-examination of the deponents.

Held (remitting this case to the High Court to make the appropriate orders and directions in accordance with this judgment, and otherwise according to law):

(1) Parliament's intention in enacting s 61A was to enable the Courts not only to simply accept the evidence of an illegal migrant in the form of a deposition but to render that evidence admissible by a positive statutory provision, notwithstanding the eventual deportation of that illegal immigrant back to his or her home State. Section 61A was broad in the sense that it favoured expediency even to the extent of allowing depositions in the absence of the accused. And it further allowed admission of those depositions as *prima facie* evidence of any fact stated in the deposition. It appeared, at least at this stage, that s 61A was introduced for a constitutionally acceptable purpose. In other words, the provision was enacted for a clearly discernible and legitimate purpose. The only issue was that while the purpose appeared valid and legitimate, whether s 61A was inconsistent with the constitutional provisions cited by the appellants, i.e. arts 121(1), 5(1) and 8(1) of the FC. (paras 45-46)

(2) *Prima facie* evidence was merely accepted at face value as being credible but it was by no means conclusive proof because such evidence remained rebuttable. Taking this conclusion to its logical end, it stood to reason that the Courts considering such evidence remained under the obligation to evaluate such evidence as they would any other evidence before using the correct standard respectively at the close of the prosecution's case and again at the close of the defence's case, if the defence was called. As a general rule of evidence, legal practice, prudence and good sense, that narrative must still be established or proven. Thus, the fact that s 61A rendered such evidence *prima facie* evidence merely meant that the depositions could be believed at face value − even when they went to the extent of establishing the ingredients of the charge. That, however, did not absolve the prosecution from substantiating the depositions with other evidence to establish the offence, whether it was assessed from the angle of proving a *prima facie* case or proving the offence beyond a reasonable doubt at the close of defence. The Court too remained under the obligation to appropriately weigh and evaluate the evidence on record at both stages of

the criminal proceeding (prosecution and defence stages). This remained true whether the witness testified indirectly *via* a deposition or directly in Court. (paras 77-78)

(3) Further, s 61A could only be used to admit depositions upon satisfying its preconditions, namely: firstly, that an order of removal had been made by the Director General against the person whose testimony was required, and, secondly, that such evidence was recorded before an official referred to in paras (a) or (b) of s 61A(1). If the prosecution failed to invoke s 61A, then it had little choice but to use other evidence to establish its case, short of locating and calling the victim/witness that could no longer be found. Premised on the above, any contention by the appellants to the extent that it suggested that s 61A rendered depositions properly recorded as conclusive proof of any fact stated in those depositions, was incorrect. Section 61A merely gave the respondents an evidential advantage given the inability to call those witnesses, while at the same time retaining their obligation to prove their case according to the accepted standards of criminal law and also retaining the judicial obligation to weigh and evaluate evidence. (paras 79-81)

(4) Hence, having examined s 61A, judicial power had in no way been abrogated, curtailed or subjugated to the Legislature by any means whatsoever. The use of the phrase "*prima facie* evidence" by no means had the conclusive effect as erroneously proposed by the appellants. In all cases, the defence retained the ability to call rebuttal evidence and the Judiciary retained the obligation to evaluate all the evidence at the close of the prosecution's case sufficient to warrant a conviction before calling for defence. In the circumstances, the appellants' contention that s 61A violated art 121(1) of the FC, must be rejected. In fact, the provision was entirely consistent with art 121(1). (paras 99-100)

(5) Section 61A was objectively fair given the unique circumstances presented by ATIPSOM cases which involved foreign victims brought into the country *via* illicit means. The ATIPSOM regime, in some respect, gave these victims' human rights some level of primacy by facilitating, in appropriate cases, their speedy return home *via* deposition orders. A balance was therefore struck by enabling the taking of their evidence without letting such victims languish, pending trial. A balance was also struck in the public interest in that the prosecution gained an evidential advantage in terms of the deposition. Yet, at the same time, the accused was allowed every latitude to question and challenge the evidence in the deposition by calling rebuttal evidence and to otherwise cross-examine all the other prosecution witnesses. Thus, insofar as the right to a fair trial was concerned, s 61A had fairly triangulated the rights of the accused, the victims and public interest. In the circumstances, s 61A was not violative of art 5(1) of the FC. (paras 127-128)

(6) As between s 61A and general criminal procedure applicable in the Criminal Procedure Code and the general law of evidence applicable by virtue of the Evidence Act 1950, there was discrimination between all accused persons against whom s 61A was applied and all other accused persons. This was

because if s 61A was applied, all accused persons in those trials could not cross-examine those witnesses as opposed to regular criminal trials where the victims if called, could be cross-examined. This was the intelligible differentia. In relation to the legitimate legislative aim, Parliament's intention behind the enactment of s 61A was laid out earlier. It was also earlier observed that s 61A triangulated the rights of the accused, the victims and the public. In this regard, s 61A was enacted for a legitimate legislative purpose and had sufficient nexus to that Parliamentary aim. And, while the deprivation of the ability to cross-examine appeared to be a disproportionate measure *vis-a-vis* other general criminal trials, the right to lead rebuttal evidence by the defence and the retention of the prosecution's general obligations to meet its heavy legal burdens (*prima facie* case and beyond reasonable doubt), remained. Therefore, s 61A, on the whole, was a proportionate intrusion into the right to a fair trial as against the legislative reasons for its enactment. For the foregoing reasons, s 61A did not violate art 8(1) of the FC and was not unconstitutional on this ground. (paras 147-150)

(7) In the upshot, the three Questions of law posed must all be answered in the negative. (para 151)

Case(s) referred to:

Abdullah Atan v. Public Prosecutor And Other Appeals [2020] 6 MLRA 28 (folld)

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

Amurthalingam Tamajeeren v. Public Prosecutor [2017] MLRHU 1378 (refd)

Dato' Seri Anwar Ibrahim v. Public Prosecutor [2010] 1 MLRA 131 (refd)

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 4 MLRA 452 (refd)

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

Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Anor [2021] 3 MLRA 384 (refd)

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

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

Mohd Najib Hj Abd Razak v. Government of Malaysia & Another Appeal [2024] 1 MLRA 69 (refd)

Muhammed Hassan v. Public Prosecutor [1997] 2 MLRA 311 (refd)

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan [2002] 1 MLRA 511 (overd)

PP v. Ong Cheng Heong [1998] 2 MLRH 345 (refd)

PS v. Germany [2003] 36 EHRR 61 (refd)

Public Prosecutor v. Gan Boon Aun [2017] 3 MLRA 161 (refd)

Public Prosecutor v. Kok Wah Kuan [2007] 2 MLRA 351 (folld)

Public Prosecutor v. Shahrulnizam Othman & Ors [2010] 3 MLRH 159 (refd)

Public Prosecutor v. Sumon Khan & Anor [2018] MLRAU 373 (folld)

Regina v. A (No 2) [2002] 1 AC 45 (refd)

Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 3 MLRA 260 (refd)

SIS Forum (M) v. Kerajaan Negeri Selangor (Majlis Agama Islam Selangor; Intervener) [2022] 3 MLRA 219 (refd)

ST Sadiq v. State of Kerala and others [2015] 4 SCC 400 (refd)

Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd And Other Appeals [2018] 3 MLRA 1 (refd)

Wong Shee Kai v. Government of Malaysia [2022] 6 MLRA 797 (refd)

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

Legislation referred to:

Akademi Seni Budaya dan Warisan Kebangsaan Act 2006, s 23(3)

Anti-Trafficking in Persons (Amendment) Act 2010, s 23

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss 12, 52(4), 61A(1)(a), (b), (2), (3), (4)

Arms Act 1960, s 22(2)

Courts of Judicature Act 1964, ss 30, 84, 85(2)

Criminal Procedure Code, ss 51A, 173(h)(iii), 180(4)

Dangerous Drugs Act 1952, ss 37A, 38(1), 38(2)

Electricity Supply Act 1990, ss 38(4), 40

Evidence Act 1950, ss 32, 33, 158

Federal Constitution, arts 4(1), 5(1), 8(1), (2), 121(1)

Immigration Act 1959/63, ss 40A, 56(2)

Income Tax Act 1967, s 106(3)

Penal Code, s 34

Prevention of Crime Act 1959, s 4

Other(s) referred to:

Phobe Bowden et al, '*Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?'* [2014] Vol 37, Melbourne University Law Review, p 539

United Nations Office on Drugs and Crime ('UNODC'), *'Evidential Issues in Trafficking in Persons Cases - Case Digest', p* 22

Counsel:

For the appellant: K Kumaraendran (MM Athimulan, Ashok Athimulan, Teh See Khoon, Shaarvin Raaj, Tinoshiny Arumugam, Yaw Xinying & Vikraman Rajo with him); M/s Kumar Partnership

For the respondent: Yusaini Amer Abdul Karim (Nahra Doliah & Dhiya Syazwani Izyan Mohd Akhir with him); AG's Chambers

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] The appellants are two accused persons jointly charged in the Sessions Court at Klang for three offences under s 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] ('ATIPSOM') read with s 34 of the Penal Code. They pleaded not guilty to the charges and sought to challenge the constitutionality of s 61A of ATIPSOM which relates to deposition of trafficked person or smuggled migrant.

[2] The Sessions Court transmitted the case to the High Court. The High Court however, decided the constitutional questions itself and dismissed the appellants' motion to transmit the special case to the Federal Court. On appeal, and upon agreement by both parties, the Court of Appeal set aside the High Court decision and ordered the High Court to transmit the special case to the Federal Court. Hence the present special case which is transmitted principally in accordance with ss 30 and 84 of the Courts of Judicature Act 1964 ('CJA 1964').

[3] For completeness, s 12 of ATIPSOM reads as follows:

> "Offence of trafficking in persons
>
> 12. Any person, who traffics in persons not being a child or not being a person who is unable to fully take care of or protect himself because of a physical or mental disability or condition, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years, and shall also be liable to fine."

[4] The three charges allege that in various years, the appellants had the common intention to traffic (in contravention of the said s 12) three different persons all of Indonesian origin. The first charge relates to one Anmuni Maria ('Anmuni') in 2012 to 2019; the second charge to one Fransisaka ('Fransisaka') in 2014 to 2019; and the third to one Yani Tri Anda ('Yani') in 2018 to 2019. For convenience, Anmuni, Fransisaka and Yani shall collectively be referred to as the 'Victims'.

[5] According to the appellants, as is required by s 51A of the Criminal Procedure Code ('CPC'), the respondent had prior to trial, duly delivered certain documents to the appellants for use in their defence. One of these documents are the respective Victims' depositions recorded under s 61A of the ATIPSOM. These depositions form the crux of this challenge as it is the appellants' position that the said s 61A is unconstitutional, void and of no effect. That said, these depositions are nowhere to be found in the record of appeal or any of the documents forming the basis for this reference. In any case, the questions raised in this reference are more of law than of fact.

[6] The appellants advance the following three constitutional questions ('Questions') for our deliberation, namely (and as shortened):

> "Question 1
>
> Whether s 61A of ATIPSOM is unconstitutional, null and void, by vesting judicial power unto itself, Parliament acted in violation of the doctrine of separation of powers under art 121(1) of the Federal Constitution in deciding the *prima facie* evidence?
>
> Question 2
>
> Whether s 61A of ATIPSOM violates the fundamental right to a fair trial guaranteed to an accused under art 5(1) of the Federal Constitution, thus is unconstitutional, null and void?
>
> Question 3
>
> Whether s 61A of ATIPSOM violates the right to equality guaranteed to an accused under art 8 of the Federal Constitution, thus is unconstitutional, null and void?".

[7] For easier comprehension and unless expressed or implied otherwise, any reference in this judgment to "sections" shall be taken to mean reference to that of the ATIPSOM and any reference to Article/Articles to that of the Federal Constitution ('FC').

Submissions

General Observations

[8] Before setting out the crux of the submissions of the respective parties, we think that the three questions may actually be grouped into two simpler points.

[9] The first point, which we shall refer to as the "Judicial Power Argument" seeks to argue that Parliament has, by enacting s 61A, relegated unto itself and in the same vein denied the Judiciary the judicial power. The appellants argue that this is violative of art 121(1).

[10] The second point, which we shall refer to as the "Fundamental Liberties Argument" is two-pronged. The first prong argues that s 61A is procedurally unfair to the accused and is therefore violative of the right to a fair trial guaranteed by art 5(1). The second prong alleges that s 61A violates art 8(1) which guarantees to all persons equality and equal protection before the law.

The Judicial Power Argument

[11] Article 121(1) of the Federal Constitution reads, in relevant part, as follows:

"Judicial power of the Federation

121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-

and such inferior Courts as may be provided by federal law; and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law".

[12] Article 121(1), as it stands now, has been the subject of controversy for a long while. Much was said about its interpretation after the original art 121(1) was amended *vide* Act A704 to its presently existing iteration. What is clear is that the interpretation to be afforded to the present art 121(1) read with art 4(1) has been settled beyond a shadow of doubt by numerous recent decisions of this Court.

[13] The most recent of these is *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 3 MLRA 260 [Case No: 05(HC)-7-01/2020(W)], decided on 25 April 2022] ('*Nivesh Nair*') which endorsed a case decided nearly two weeks before it in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 4 MLRA 452 ('*Dhinesh*').

[14] In light of *Nivesh*, the minority judgments of this Court in both *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1 ('*Maria Chin*') and in *Zaidi Kanapiah v. ASP Khairul Fairoz bin Rodzuan And Other Appeals* [2021] 4 MLRA 518 ('*Zaidi Kanapiah*') accurately reflect the state of our constitutional law as regards the so-called basic structure doctrine ('BSD') which is essentially the doctrine of constitutional supremacy and constitutional judicial review in art 4(1) as complemented by its device of judicial power in art 121(1).

[15] Other judgments of this Court which also clarify the scope and extent of judicial power *vis-a-vis* arts 4(1) and 121(1) include *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384 ('*Iki Putra*'), *SIS Forum (M) v. Kerajaan Negeri Selangor (Majlis Agama Islam Selangor; intervener)* [2022] 3 MLRA 219 ('*SIS Forum*') and *Wong Shee Kai v. Government of Malaysia* [2022] 6 MLRA 797. These judgments explain the concept of judicial review and how it is a powerful component of judicial power, separation of powers and check and balance.

[16] All of the above decisions either expressly or impliedly affirm the trilogy judgments of this Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat And Another Case* [2017] 4 MLRA 554 ('*Semenyih Jaya*'), *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1 ('*Indira Gandhi*') and *Alma Nudo Atenza v. Public Prosecutor And Another Appeal* [2019] 3 MLRA 1 ('*Alma Nudo*').

[17] Our statement of the law at this point is to address the respondent's submission which, in addressing the history behind art 121(1), appears to have referred to the majority judgment of this Court in *Public Prosecutor v. Kok Wah*

Kuan [2007] 2 MLRA 351 ('*Kok Wah Kuan*'). Considering that the minority judgments in *Maria Chin* and *Zaidi Kanapiah* in their entirety now restate the law in light of *Nivesh* and *Dhinesh*, we find it necessary to remind everyone that the majority judgment in *Kok Wah Kuan* has been overruled and is of no precedential value. Accordingly, cases that were decided among similar lines such as *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 1 MLRA 511 are in the same vein overruled and do not have any value as precedent.

[18] The recent cases, heavily condensed for brevity, stand as authorities for the proposition that art 121(1) in its present form no less preserves the sacrosanct concept of judicial power and judicial review. When read harmoniously with arts 4(1), 121(1) reposes judicial power and its concomitant device of judicial review, singularly in the Superior Courts. Any attempt to whittle away this power, or to replace it entirely whether by legislation or by an executive act is an incursion into judicial power and void under art 4(1). A very clear example of this is ouster clauses which were, in the past, a legislative attempt to oust the supremacy of the FC and as such, void for seeking to mute judicial power and scrutiny (*Maria Chin*, *Zaidi Kanapiah*, *Dhinesh* and *Nivesh - supra*).

[19] Having said the above, it has not escaped our mind the equally fundamental concept in constitutional litigation that legislation is presumed to be constitutional unless the party alleging invalidity can overcome the heavy burden of demonstrating otherwise. With this in mind, we think it is the appropriate junction now to set out the rivalling contentions on the Judicial Power Argument.

[20] Section 61A provides as follows:

> "Admissibility of deposition of trafficked person or smuggled migrant who cannot be found
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> 61A. (1) Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under s 32 or s 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the Court, there shall be admissible in evidence before that Court any deposition relating to the subject matter of that proceeding made by that person:
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> (a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or
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> (b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence,
>
> and any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition.

(2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.

(3) For the purposes of this section, a reference to:

(a) a "deposition" includes any written statement made upon oath; and

(b) an "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.

(4) Nothing in this section shall prejudice the admission as evidence of any other depositions."

[21] According to the appellants, judicial power must of necessity, include the power to decide controversies between the State's subjects or between the State and its subjects. In the context of criminal cases, this power must include the powers to accept a plea of guilty and sentence; to refuse the grant of bail in non-bailable offences; and the power to hear evidence when the accused pleads not guilty in a trial. The appellants then cite s 173 of the CPC for the point that under that section, the Court must be satisfied that the prosecution has made out a *prima facie* case.

[22] The appellants contend that the problem with s 61A(1) is the words "any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition". It is their argument that what constitutes *prima facie* evidence is a question requiring judicial assessment. The fact that Parliament has deemed certain facts or evidence (in this case depositions given in a certain instance spelt out in the section), is a legislative imposition on the Judiciary as to what constitutes *prima facie* evidence. And thus, according to the appellants, this is an incursion into judicial power in violation of art 121(1).

[23] The appellants' core contention on the Judicial Power Argument is best summarised in their own words as follows:

> "24. Section 61A of the Act is very clear that the Legislature has conferred the power to take deposition and the facts stated therein, without further proof, **shall be admitted as *prima facie* evidence.** The issue of *prima facie* evidence is within the jurisdiction of the Court. It is clear that the Sessions Court hearing the case cannot question the facts stated therein in the deposition, where the deposition taken before another Judge (who is not hearing) and is done in the absence of the accused. The legislation makes the unchallenged and untested facts stated therein in the deposition as conclusive *prima facie* proof. **We submit the power to decide whether a fact is *prima facie* evidence is a judicial power exclusively exercisable by a Court in the manner provided by s 173 of the Criminal Procedure Code and Evidence Act 1950. The power to decide *prima facie* is designated as a judicial power.** The Sessions Court under s 61A has **no power to reject the *prima facie* evidence of fact,** stated in the deposition. We humbly submit **it is a legislative incursion.**"
>
> [Original Emphasis]

[24] The appellants also appear to suggest that once a deposition is adduced and accepted as *prima facie* evidence, it in effect conclusively establishes the ingredients of the charge. This is what they say in their written submission:

> "26. We humbly submit, s 61A has the effect that once deposition is recorded before a Magistrate, in the absence of the accused and without offering for cross-examination of the deponents by the defence, the depositions shall become established and proved beyond *prima facie* evidence as to the ingredient of the charge under s 12 of the Act. We humbly submit, **s 61A is a rule by law. It does not exclude the application of the rule of law.**"
>
> [Original Emphasis]

[25] If we understand their position correctly, the appellants' stand is that the depositions being *prima facie* evidence effectively establish for the prosecution a *prima facie* case.

[26] In response, the respondent's position on the Judicial Power Argument, and in relevant part, is that s 61A does not oust judicial power. This is because in spite of that section, the Courts retain the power to evaluate the facts of a given case, weigh evidence and make their own findings over and above what is or is not stated in the deposition. In other words, the respondent argues that depositions adduced under s 61A though considered as *prima facie* "evidence" do not outrightly establish a *prima face* case. This is because, as argued, it remains the duty of the prosecution to prove its case and for the Court to sift and weigh through evidence to make findings of fact and decision thereupon.

[27] In this regard, the prosecution refers us to several decisions of the Courts below to support their contention. The most pertinent of these is the judgment of the Court of Appeal in *Public Prosecutor v. Sumon Khan & Anor* [2018] MLRAU 373 ('*Sumon Khan*'). We shall elaborate on this case later where it is appropriate to do so.

The Fundamental Liberties Argument

Article 5(1) - Fair Trial

[28] As alluded to earlier, the Fundamental Liberties argument is two-pronged. The first prong of it addresses the constitutional validity of s 61A from the perspective of the right to a fair trial guaranteed by art 5(1). The second aspect of it is the right to equal protection guaranteed by art 8(1).

[29] On the fair trial point, the appellants submit that the right to a fair trial includes concept of procedural and substantive fairness. Specifically in this case, a fundamental pillar of these concepts include the right of confrontation in the form of cross-examination. The appellants claim that by virtue of s 61A, they cannot cross-examine the deponents. This, in their submission, belies the notions of fair play and the principle of equality of arms by disabling them from testing the veracity of the evidence obtained by virtue of s 61A.

[30] The respondent refers to the judgment of this Court in *Public Prosecutor v. Gan Boon Aun* [2017] 3 MLRA 161 ('*Gan Boon Aun*') and accepts that though art 5(1) permits derogations from the rights to life and personal liberty by the *proviso* of "save in accordance with law", the *proviso* itself denotes that the law must be valid. The law in question must not be arbitrary or unfair, it must imply a fair trial in both procedure and substance, and among many other important facets, the law must not hamper access to justice.

[31] Upon accepting the above undeniable propositions, it is the respondent's case that s 61A does not deprive the appellants or any other person the right to a fair trial. In this regard, the respondent has referred to the legislative history of the introduction of s 61A to justify the rationale for its existence.

[32] Quite apart from the legislative history and the rationale for the provision, and in terms of the substance of the provision itself, the respondent accepts that while s 61A effectively renders depositions taken and adduced thereunder as *prima facie* evidence, the section does not deprive an accused person from adducing other evidence in support of his defence or from cross-examining other prosecution witnesses. In all this, the Court must still consider the facts of the case as a whole (including evidence and assertions raised by the defence) in its total evaluation of the case.

[33] And so, for primarily these reasons, the respondent submits that there is no dereliction from the right to a fair trial insofar as s 61A is concerned.

Article 8(1) - Equality Before The Law

[34] On art 8(1), the appellants principally assert that s 61A violates the principle of proportionality. The crux of their submission is that every accused person has the right to cross-examine the witness who testifies against him. Section 61A is a disproportionate legislative measure in that the legitimate legislative aim (establishing and punishing the offence of human trafficking) does not commensurate to the measure of completely denying the accused person the right of cross-examination of the deponents.

[35] The appellants also submit that s 61A unreasonably discriminates against the accused in a manner that is more unjustifiably drastic compared to other provisions of the ATIPSOM such as s 52. While s 52 for instance allows for cross-examination of the witnesses, s 61A does not. And, s 61A takes it a step further by rendering such evidence as *prima facie* evidence of the facts stated in the deposition. There is also no guiding or limiting factor in s 61A because it does not classify the types of accused persons it may be used against. It is therefore, in the appellants' submission, a completely indiscriminate provision and in violation of art 8(1).

[36] The respondent accepts the jurisprudence on art 8(1) as regards proportionality and reasonable classification but denies that these principles have been violated.

[37] Per the respondent, s 61A is a not a disproportionate legislative measure because it applies to the limited circumstances of when a person against whom an order of deportation has been made but testimony is required from them.

[38] As for reasonable classification, the respondent maintains that s 61A applies equally to all accused persons against whom s 61A has been successfully engaged. In other words, in cases where s 61A may be used by reason of the fact of removal/deportation of the victims* all such accused persons will be treated the same in terms of prosecution.

[39] On both the above bases, the respondent maintains that s 61A does not run afoul of art 8(1).

Analysis/Decision

Legislative History And Interpretation Of Section 61A

[40] Having set out the gist of the parties' rivalling contentions, and in view of inconsistent judicial decisions on the subject, we think that it is necessary to examine the legislative history of s 61A and the scope of its interpretation and/or how it is applied. In examining its history, we rely on the respondent's submission as the appellants have not indicated in any way that the respondent's recount is wrong or inaccurate.

[41] Section 61A was only inserted into the ATIPSOM by way of an amendment *vide* s 23 of the Anti-Trafficking in Persons (Amendment) Act 2010] ('Act A1385'). The Explanatory Statement in the corresponding Bill to Act A1385 is unhelpful in that it does not clearly explain the purpose of inserting s 61A. Even the Hansard for the first reading of the corresponding Bill to Act A1385 is not particularly elucidating. The only thing that was said in the Hansard for 15 July 2010, at p 13 was that the aim of s 61A was to cater for the admissibility of depositions of trafficked persons and smuggled migrants who can no longer be found.

[42] Nonetheless, in attempting to shed some light on the legislative intent behind s 61A, the respondent has referred us to s 40A of the Immigration Act 1959/63 [Act 155] ('Act 155') which is in *pari materia* with s 61A. We agree that since both provisions are in *pari materia*, the legislative history and intention behind the enactment of s 40A of Act 155 is applicable analogously to s 61A.

[43] On 4 April 2002, when introducing the Bill to Act A1154 (seeking to insert s 40A of Act 155) and referring to illegal immigrants as 'PTI', the then Deputy Minister of Home Affairs explained the rationale for s 40A of Act 155 as follows, at p 34 of the Hansard:

> "Fasal 7 seksyen baru 40A, pertama, setiap PTI yang diambil bekerja oleh majikan atau dilindungi oleh pelindung mereka akan diambil menjadi saksi kepada pendakwaan terhadap majikan dan pelindung mereka.

> Kedua, kerap kali PTI yang menjadi saksi terpaksa menghabiskan masa yang lama di depot-depot Imigresen, sementara menanti proses pembicaraan di Mahkamah selesai. Perbicaraan di Mahkamah lazimnya mengambil masa yang lama kerana sering ditangguhkan oleh beberapa faktor yang tidak dapat dielakkan.
>
> Ketiga, penahanan PTI yang menjadi saksi pendakwaan di depot-depot Imigresen dalam tempoh yang lama telah menimbulkan banyak masalah. Kerajaan terpaksa menanggung kos yang tinggi untuk perbelanjaan makan dan minum PTI tersebut. Adalah dikhuatiri juga apabila terlalu lama sesuatu kes berjalan, keadaan di depot-depot Imigresen menjadi sesak. Kesesakan di depot-depot Imigresen ini akan memudahkan berlakunya kejadian yang tidak diingini seperti pergaduhan dan rusuhan. Ini ditambah pula dengan faktor emosi PTI tersebut yang tidak stabil kerana ditahan terlalu lama untuk menjadi saksi Mahkamah, walaupun telah menjalani hukuman ke atas kesalahan yang dilakukan oleh mereka.
>
> Di samping itu, penahanan PTI yang lama di depot-depot Imigresen juga menjadi isu bagi negara-negara asal PTI tersebut, sebagai contoh, Kerajaan Thailand amat mengambil berat terhadap penahanan rakyatnya dalam tempoh yang lama dan sentiasa menggesa supaya mereka segera dihantar pulang.
>
> Keempat, sehubungan dengan itu, suatu seksyen baru iaitu s 40A dimasukkan ke dalam Akta 155 bagi membolehkan Mahkamah menerima pengakuan daripada PTI yang telah dihantar pulang ke negara asal sebagai keterangan *prima facie* terhadap majikan atau orang-orang yang melindungi mereka. Pengakuan sedemikian boleh dibuat di hadapan hakim Mahkamah Sesyen atau Majistret dan cara ini isu penahanan PTI dalam tempoh yang lama akan dapat diatasi."

[44] Parliament evidently passed s 40A of Act 155 and years later, the insertion of s 61A into the ATIPSOM. We find that the Parliamentary intent behind s 40A of Act 155 and by extension s 61A as can be gleaned from the Hansard passage above, is beyond clear. Taking note that criminal trials can take long, Parliament enacted s 61A for mainly the following reasons which we summarise from the above passage to be as follows:

(i) Illegal immigrants who are the subject of human trafficking are integral prosecution witnesses for charges relating to trafficking in persons and the smuggling of migrants. They are after all the primary victims and the subjects of the alleged offence.

(ii) As they are illegal immigrants, the Government must house them somewhere pending their testimony in a criminal trial. So, they are housed at immigration depots. This incurs government significant costs in housing them, feeding them, and providing them other needs essential to human beings. Logically, taxpayers pay the price.

(iii) The then Deputy Home Minister also explained that keeping such immigrants at immigration depots also exposes them to physical and mental harm for the following reasons:

a. Prolonged detention in the depots can cause significant deterioration in their mental and/or physical health.

b. Prolonged detention also exposes them to physical harm when unwanted and uncontrollable incidents such as riots or scuffles occur between detainees.

(iv) The prolonged detention of the trafficked or smuggled migrants for criminal trials also puts Malaysia in actual tension or risk of tension between the home State of the illegal immigrants and Malaysia.

[45] In light of the host of issues above, Parliament's intention is then abundantly clear which is to enable the Courts not only to simply accept the evidence of an illegal migrant in the form of a deposition but to render that evidence admissible by a positive statutory provision notwithstanding the eventual deportation of that illegal immigrant back to his or her home State. Section 61A is broad in the sense that it favours expediency even to the extent of allowing depositions in the absence of the accused. And it further allows admission of those depositions as *prima facie* evidence of any fact stated in the deposition.

[46] It appears to us, at least at this stage, that s 61A was introduced for a constitutionally acceptable purpose. We therefore accept the respondent's submission to that extent. In other words, the provision was enacted for a clearly discernible and legitimate purpose. The only issue is that while the purpose appears valid and legitimate, is s 61A inconsistent with the constitutional provisions cited by the appellants, that is, arts 121(1), 5(1) and 8(1)?

[47] Before we can even begin to consider the constitutional implications of s 61A, it is first of paramount importance that we interpret the section as it stands. This is because while the intention of Parliament is important, it is after all only an aid of interpretation. The judicial role requires that legislation must be read foremost as they stand (with regard to the Parliamentary intent behind its enactment) as opposed to giving primacy significance to the intended reading when such a reading is not supported by the actual words used or clearly implied.

[48] To explain this point, it is our view that a hypothetical example would at this stage be apposite. Let us assume that a statutory provision states that for a certain offence, the accused shall be punished with an imprisonment term of not more than 5 years. "Not more than" in this context suggests that 5 years is the maximum the Court can impose. However, in examining its legislative history, Parliament states that the intention of the provision was to punish offenders severely by providing a term of imprisonment of at least 5 years. This

suggests that 5 years is the minimum. In such a case, the Parliamentary intent is no substitute for the actual words of the statute and the Courts can only impose a maximum of 5 years imprisonment even if Parliament had intended for it to be more than that.

[49] Bearing the above basic principles in mind, we now move to interpret s 61A.

Interpretation

Structure Of Section 61A Of ATIPSOM

[50] For ease of reference, s 61A is reproduced again as follows:

> "Admissibility of deposition of trafficked person or smuggled migrant who cannot be found.
>
> 61A. (1) Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for an offence under this Act a testimony of any person in respect of whom an order of removal from Malaysia has been made by the Director General under s 32 or 33 or subsection 56(2) of the Immigration Act 1959/63 is required by the Court, there shall be admissible in evidence before that Court any deposition relating to the subject matter of that proceeding made by that person:
>
> (a) in Malaysia before a Sessions Court Judge or a Magistrate in the presence or absence of the person charged with the offence; or
>
> (b) outside Malaysia before a consular officer or a judicial officer of a foreign country in the presence or absence of the person charged with the offence, and any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition.
>
> (2) It shall not be necessary for any party in any proceeding to prove the signature or official character of the Sessions Court Judge, Magistrate, consular officer or judicial officer before whom the deposition under subsection (1) was made.
>
> (3) For the purposes of this section, a reference to-
>
> (a) a "deposition" includes any written statement made upon oath; and
>
> (b) an "oath" includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swear.
>
> (4) Nothing in this section shall prejudice the admission as evidence of any other depositions."

[51] From subsection (1), it is clear that s 61A only applies in cases where testimony is required from any person against whom the Director General of Immigration has made an order of removal either under:

(i) sections 32 or 33 of Act 155; or

(ii) subsection 56(2) of Act 155.

[52] Sections 32, 33 and subsection 56(2) of Act 155 are reproduced in their respective parts as follows:

"Removal of illegal immigrants

32. (1) Any person who is convicted of an offence under ss 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director General: Provided that no citizen convicted of an offence under s 5 shall be ordered to be removed from Malaysia under this subsection.

(2) ..."

Removal of persons unlawfully remaining in Malaysia

33. (1) Where the presence of any person in Malaysia is unlawful by reason of ss 9, 15 or 60 the person shall, whether or not any proceedings are taken against him in respect of any offence against this Act, be removed from Malaysia by order of the Director General.

(2) Any person in respect of whom an order of removal has been made under subsection (1) may appeal to the Minister in such manner and within such time as may be prescribed:

Provided that there shall be no appeal under this subsection against an order of removal under subsection (1) made in respect of any person whose presence in Malaysia is unlawful under s 9 by reason of any order made under para 9(1)(a) or by reason of the cancellation of a Pass or Permit under para 9(1)(b) or 9(1)(c) respectively, or unlawful under para 15(1)(c) or s 60 by reason of the expiry of any Pass relating to or issued to him.

56. (1) ...

(2) Any person who is not a citizen unlawfully entering or re-entering or attempting unlawfully to enter or re-enter Malaysia or unlawfully remaining in Malaysia shall whether or not any proceedings are taken against him in respect of the offence be liable to be removed from Malaysia by order of the Director General."

[53] The most important precondition for the invocation of s 61A and admission of the testimony of a trafficked person thereunder is that the Director General must have made an order of removal of the person under the foregoing provisions of Act 155 i.e. ss 32, 33 or subsection 56(2). As cases brought under the ATIPSOM are criminal cases, it must in every case be established by the prosecution that such an order of removal was in fact made. As such, we completely agree with and endorse the Court of Appeal's view in *Sumon Khan* that s 61A is not applicable in cases where the prosecution fails to adduce proof of the order of removal under the relevant

section of Act 155. In this regard, the Court of Appeal observed in *Sumon Khan*, as follows:

> "[43]... s 61A of the Act also requires that before the depositions of the Bangladeshis can be admitted as evidence, there must be an order for removal of the Bangladeshis issued by the Director General ('DG') of Immigration Department. In the present appeal, there was never any order of removal by the DG of Immigration ever produced by the prosecution. **The rationale of allowing admissibility of depositions of migrants persons under s 61A of the Act was to cater for situations where the migrants were removed by order of the DG of Immigration and hence their presence as witnesses could no longer be procured to support a charge under the Act against accused persons.** Hence the depositions (which are hearsay evidence) are allowed to be admitted. **Without the order for removal, these depositions cannot be admitted.** However, the prosecution could still adduce direct evidence by calling the subject i.e. the migrants themselves to testify, if they could be located."
>
> [Emphasis Added]

[54] It is therefore only fair and proper to conclude that the prosecution should only be allowed to invoke s 61A upon providing a factual basis for that invocation. As s 61A itself clearly provides the basis for that invocation, absent any proof of an order of removal being made under the application section of Act 155, s 61A cannot be relied upon by the prosecution. In practical terms, if the prosecution has recorded a deposition (in the manner prescribed by the section) and intends on introducing it under s 61A, such a deposition will not be admissible unless the prosecution can first establish, before the Judge presiding in the proceeding for an offence under the ATIPSOM, that the Director General had (under the relevant provisions of Act 155) made an order of removal against the person whose deposition is sought to be admitted.

[55] That is the first material procedural aspect of s 61A, i.e. when the section can be invoked. The second material procedural aspect is the persons before such depositions can be recorded and this is governed by paragraphs (a) and (b) of subsection 61A(1).

[56] Paragraph (a) simply stipulates that the deposition can be recorded before a Sessions Court Judge or a Magistrate. Paragraph (b) allows depositions to be recorded before a consular officer or a judicial officer of a foreign country, in both cases, whether under paragraphs (a) or (b), subsection 61A(1) allows the recording of depositions in the presence or absence of the person charged with the offence.

[57] Subsection 61A(2) merely states that the signature or official character of the officials mentioned in paragraphs (a) and (b) of subsection 61A(1) need not be proved. Subsection 61A(3) in turn defines "depositions" and "oaths" while subsection (4) renders any other depositions admissible without prejudice to s 61A depositions.

[58] This brings us to the substantive aspect of subsection 61A. Assuming both the material procedural formalities of s 61A(1) mentioned above are fulfilled, the last portion of subsection 61A(1) declares that "any such deposition shall, without further proof, be admitted as *prima facie* evidence of any fact stated in the deposition".

Interpretation Of "*Prima Facie* Evidence"

[59] It is substantially this phrase "*prima facie* evidence" that forms the essence of the constitutional challenge in this case premised on arts 121(1), 5(1) and 8(1). In addition to this phrase, the appellants also argue that the entire section, in excluding the ability of the accused to cross-examine, violates the appellants' fair trial and equality rights guaranteed by arts 5(1) and 8(1).

[60] To appreciate the arguments and in their proper context, we must first understand what "*prima facie* evidence" means. Before considering this question, we must first point out that s 61A(1) is not the only criminal provision in our statute books to employ this phrase. In the course of our research, we found many other criminal provisions use it. Other than s 40A of Act 155, of the many examples, some include: s 38(2) of the Dangerous Drugs Act 1952 [Act 234] ('DDA 1952'); s 40 of the Electricity Supply Act 1990 [Act 447]; s 23(3) of the Akademi Seni Budaya dan Warisan Kebangsaan Act 2006 [Act 653]; and s 22(2) of the Arms Act 1960 [Act 206]. We note that s 38(4) of Act 447 also uses that phrase although for civil claims and not for prosecutorial purposes.

[61] To take one example, subsections 38(1) and (2) of the DDA 1952 read as follows:

> "Ship or aircraft used for unlawful import or export
>
> 38. (1) If any ship or any aircraft is used for the import or export of any drug contrary to this Act or for the receipt or storage of any drug imported contrary to this Act, the owner and master thereof shall be guilty of an offence against this Act and liable to a fine not exceeding ten thousand ringgit unless it is proved to the satisfaction of the Court that the owner or master was not implicated in the placing or keeping of such drug on board the ship or aircraft and that the offence in question was committed without his knowledge, consent or connivance, and the ship or aircraft may be detained by order of the Court until security has been given for such sum as the Court orders, not exceeding ten thousand ringgit.
>
> (2) Except in the case of drugs consigned in accordance with an authorization issued under ss 19, 20 or 24 or in transit in accordance with s 21, **the finding of any drug on board any ship or aircraft shall be *prima facie* evidence that the ship or aircraft has been used for the importation or exportation of such drug contrary to this Act or for the receipt or storage of drugs imported contrary to this Act.**"
>
> [Emphasis Added]

[62] Subsection 23(3) of Act 653 provides as follows:

> "Criminal liability of office-bearers, etc., of a students' organization, body or group.
>
> 23. (1) ...
>
> (2) ...
>
> (3) In any prosecution under this section of an office-bearer of, or any person managing or assisting in the management of, any organization, body or group referred to in subsection (1), any document found in the possession of any office-bearer of, or person managing or assisting in the management of, such organization, body or group, or in the possession of a member of such organization, body or group shall be *prima facie* evidence of the contents thereof for the purpose of proving that anything has been done or purports to have been done by or on behalf of such organization, body or group."

[63] As is trite, section 61A and all other analogous provisions are presumed constitutional unless specifically challenged and the onerous burden to show otherwise in that challenge has been overcome. The fact that the use of the phrase "*prima facie* evidence" is common makes it easier for us to interpret based on existing judicial precedent.

[64] On the issue of interpretation, it is our observation that s 61A(1) serves two substantive purposes. The first is that it renders depositions recorded under that section admissible. We surmise that this is to overcome the rule of hearsay given that the deponents are no longer available to give their testimonies. The second aspect of s 61A is that after rendering such evidence admissible, it makes that evidence "*prima facie* evidence" of any fact stated in the deposition. What then is the meaning of *prima facie* evidence?

[65] For a start, there is a material difference between the two phrases - *prima facie* evidence and *prima facie* case. The distinction between these phrases was dealt with by Vincent Ng J who after surveying numerous authorities on what constitutes a *prima facie* case said this in *PP v. Ong Cheng Heong* [1998] 2 MLRH 345:

> "What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. To me, in the light of the Amendment Act A979, perhaps the most appropriate definition of 'a *prima facie* case' could be found in the Oxford Companion of Law (p 987), which has it as: "A case which is sufficient to call for an answer. **While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive"**,.. It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected."
>
> [Emphasis Added]

[66] In *Abdullah Atan v. Public Prosecutor And Other Appeals* [2020] 6 MLRA 28 ('*Abdullah Atan*'), this Court acknowledged Vincent Ng J's elucidation of the definition of a *prima facie* case (and hence the concept of *prima facie* evidence) even before the amendment to the CPC. This Court endorsed these views in [44] of *Abdullah Atan*.

[67] This Court in *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd And Other Appeals* [2018] 3 MLRA 1 ('*Ichi-Ban*') also had occasion to consider the phrase "*prima facie* evidence" as employed in s 38(4) of Act 447. In relation to this issue, the Court observed thus:

> "[59] The intention of the Parliament in enacting this provision is to give an evidential advantage to TNB. The amount stated in the s 38(4) written statement becomes the *prima facie* evidence of the amount that the consumer has to pay for the loss of revenue...
>
> [60] In *Taiwan Chief Precision Technology Sdn Bhd v. Tenaga Nasional Bhd* [2013] 5 MLRA 602, the Court of Appeal observed at p 607:
>
> > [23] The s 38 Statement is '*prima facie* evidence'. What does '*prima facie* evidence' mean? According to *Halsbury's Laws of England*, (4th Ed, Vol 17) at p 22, para 28:
> >
> > > '*Prima facie* evidence' means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention.
> >
> > [24] In that same paragraph, the meaning of 'conclusive evidence' is explained as follows:
> >
> > > 'Conclusive evidence' means that no contrary evidence will be effective to displace it, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown. Conclusive evidence does not mean exclusive evidence...'
>
> [61] **As rightly observed by the Court of Appeal, the fact that the written statement is *prima facie* evidence does not make it conclusive against both parties. The burden shifts to the consumer to present the rebuttal evidence. The consumer is free to rebut the evidence in the forms of evidence adduced by the consumer or even evidence adduced by TNB itself.**"
>
> [Emphasis Added]

[68] We accept that section 38(4) is a civil provision. Regardless, it is our view that the definition of '*prima facie* evidence' does not depend on the nature of the case ie whether criminal or civil. The accepted judicial definition of that phrase is that '*prima facie* evidence' is simply evidence that can be accepted at face value and which calls for rebuttal evidence from the other side to render it unbelievable or too incredible to rely on. The fact that *prima facie* evidence of a fact is produced does not automatically or conclusively prove a particular fact-in-issue which in the context of a criminal case, includes the ingredients of that charge.

[69] It follows that we cannot accept the appellants' contention in para 24 of their submission (which was cited above) that the phrase '*prima facie* evidence' means that "the ... Court hearing the case cannot question the facts stated therein in the deposition, where the deposition taken before another Judge (who is not hearing) and is done in the absence of the accused. The legislation makes the unchallenged and untested facts stated therein in the deposition as conclusive *prima facie* proof." In light of the judicially accepted definition of '*prima facie* evidence' above, the appellants' submission cannot be correct.

[70] We are inclined to accept the respondent's submission that when depositions under s 61A are tendered as evidence, even as *prima facie* evidence of any facts stated in the deposition, the prosecution is not absolved of its obligation to prove a *prima facie* case including but not limited to adducing further evidence that is available or in certain cases, corroborating the depositions.

[71] A *prima facie* case in a criminal context and in trials before the High Courts is defined in s 180(4) of the CPC as follows:

> "(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction."

[72] See also s 173(h)(iii) which accords '*prima facie* case' the same definition for trials before Magistrates.

[73] The only common denominator between '*prima facie* evidence' and '*prima facie* case' is the words '*prima facie*'. The implications of the two phrases are however vastly different. Just because one fact is considered *prima facie* evidence (even if those deposed facts themselves establish the ingredients of the charge) does not automatically mean that the prosecution has proved a *prima facie* case. There may very well be cases where even if a deposition is accepted as credible, the prosecution fails to prove a *prima facie* case or even if it does manage to prove its case as such, fails to prove the case beyond a reasonable doubt at the close of the defence's case.

[74] The legislative history of s 61A clearly suggests the need for a provision in terms of admissibility. Without the provision, no Court can accept such evidence because it would be bound to reject it as hearsay if the exceptions to hearsay are not proved. The legislative history is however, less clear as to why Parliament did not stop at regulating admissibility only and went a step ahead to render such evidence as *prima facie* evidence. In our own research, we came across a document prepared by the United Nations Office on Drugs and Crime ('UNODC') entitled 'Evidential Issues in Trafficking in Persons Cases - Case Digest' ('UNODC Case Digest') which might help shed some light for the reasons Parliament might have taken this approach with s 61A on depositions. At p 22, the UNODC in their comprehensive case digest had this to say:

> "In some cases, the only evidence available to the Court is the victim's testimony and the defendant's denial. In these cases, Courts are called upon to decide whether the victim's testimony suffices to convict a defendant, even when his or her allegations are denied by the defendant and it is a word against word situation. **Depending on the individual circumstances of the case, even when consistent and credible victim testimony is presented to the Court, such victim testimony, in itself, may be inadequate to support a conviction for trafficking in persons if there are no other pieces of evidence, as the prosecution may not be deemed to have shouldered its burden of proof "beyond reasonable doubt"**. This may be the case especially in common law systems, where the Court is not an active evidence gatherer, but rather relies on the prosecution to fulfil this role. **In these systems, the prosecution's failure to adduce further evidence, when it exists, may be viewed as a failure to use its best efforts to present a full picture to the Court or even a tacit admission as to the inherent weakness of the evidence not adduced. This may lead to the exoneration of the defendant.**"
>
> [Emphasis Added]

[75] The above passage clarifies that even in cases where victims of trafficking render clear and convincing testimony of human trafficking or smuggling, their testimony in many cases is insufficient by itself to sustain a conviction absent of further evidence (when it exists) to sustain the charge. If this is considered as a whole, then the rationale in *Ichi-Ban* extends to this case in that Parliament had intended to extend to the prosecution an evidential advantage given the immense hurdles they have to cross because of the tendency of trafficking cases where the main victims cannot render primary evidence resulting in the prosecution having to rely on secondary evidence in depositions.

[76] In other words, if we apply the UNODC Case Digest to our system of law, at the end of the day, the narrative recounted by the deponent or even a direct witness of trafficking in an ATIPSOM criminal proceeding is merely a narrative or recount of his version of his events. He or she might provide a recount of what they were promised, how they were brought and how they were treated.

[77] Further, it can be concluded from the cases explaining the differences between *prima facie* evidence and *prima facie* cases, *prima facie* evidence is merely accepted at face value as being credible but it is by no means conclusive proof because such evidence remains rebuttable. Taking this conclusion to its logical end, it stands to reason that the Courts considering such evidence remain under the obligation to evaluate that evidence as they would any other evidence before using the correct standard respectively at the close of the prosecution's case and again at the close of the defence case, if defence is called.

[78] As is a general rule of evidence, legal practice, prudence and good sense, a narrative must still be established or proved. Thus, at the risk of repetition, the fact that s 61A renders such evidence *prima facie* evidence merely means that the depositions can be believed at face value - even when they go to the extent of

establishing the ingredients of the charge. That however, does not absolve the prosecution from substantiating the depositions with other evidence to establish the offence, whether it is assessed from the angle of proving a *prima facie* case or proving the offence beyond a reasonable doubt at the close of defence. The Court too, remains under the obligation to appropriately weigh and evaluate the evidence on record at both stages of the criminal proceeding (prosecution and defence stages). This remains true whether the witness testifies indirectly *via* a deposition or directly in Court.

[79] Further, s 61A can only be used to admit depositions upon satisfying its preconditions, namely: firstly, that an order of removal has been made by the Director General (in accordance with the relevant sections of Act 155) against the person whose testimony is required, and secondly that such evidence is recorded before an official referred to in paragraphs (a) or (b) of subsection 61A(1). If the prosecution fails to invoke s 61A, then it has little choice but to use other evidence to establish its case short of locating and calling the victim/witness who can no longer be found.

[80] Premised on the above, we reiterate that any contention by the appellants to the extent that it suggests that s 61A renders depositions properly recorded as conclusive proof of any fact stated in those depositions as incorrect.

[81] We accept the respondent's position effectively that s 61A merely gives them an evidential advantage given the inability to call those witnesses while at the same time retaining their obligation to prove their case according to the accepted standards of criminal law while also retaining the judicial obligation to weigh and evaluate evidence.

The Judicial Power Argument

[82] We have restated the applicable cases earlier. In summary, where a violation of judicial power is alleged, a clear case must be showed indicating that such an occurrence has indeed taken place.

[83] In *Mohd Najib Hj Abd Razak v. Government of Malaysia & Another Appeal* [2024] 1 MLRA 69 (*Najib Razak*), the appellants argued that s 106(3) of the Income Tax Act 1967 ('ITA 1967') was unconstitutional for the reason that it violated art 121(1). This Court undertook a wholesome analysis of that section and the rest of the scheme and provisions of the ITA 1967 and ultimately arrived at the conclusion that the provision was not unconstitutional for the reasons advanced. In its analysis, the Court followed the recent case authorities on the correlation between arts 4(1) and 121(1) and set out guidelines for determining constitutionality of legislation in para 32 of the judgment. In dealing with s 106(3) of the ITA 1967, this Court cautioned that legislation that is challenged on grounds of constitutionality must be read in context as opposed to *in vacuo.* This is what the Court said:

> "[49] The Appellants effectively postulate that the section should be construed *in vacuo.* This is borne out in the Appellants' submissions (and those of the

> *amicus curiae*), as throughout their submissions, the Appellants (and *amicus*) have concentrated their arguments purely on s 106(3) ITA without once attempting to construe the subsection in the context of s 106 ITA itself or the Act as a whole. The entirety of the argument on the alleged usurpation of judicial power focuses on s 106(3) ITA. It is contended by the Appellants as stated earlier, that a literal application of s 106(3) ITA would effectively amount to the decision of the Inland Revenue 'usurping' the High Court of its judicial power to effectively determine disputes.
>
> [50] However, such an approach which focuses wholly on the subsection alone is likely to result in a construction which is different from an approach where the sub-section is read in the context of the section it is housed in, and the operation of the ITA as a whole. Moreover, the latter approach is the generally accepted mode of statutory construction approved by most jurisdictions."

[84] The tone and tenor of the judgment in *Najib Razak* (which dealt with arguments relating to judicial power) suggests that it is only upon a wholesome reading of an impugned provision that it can be concluded that a given law is violative of judicial power. If the legislation considered as a whole, does not abrogate judicial power, then it is not invalid on grounds of violation of art 121(1). This can be gleaned from the following passage in *Najib Razak*:

> "[89] In short, s 106(3) ITA cannot be viewed as abrogating, suspending or removing judicial powers because the Court is only facilitating collection and recovery under the ITA. It is not exercising its full judicial powers of hearing, adjudication or determination which arise under the dispute adjudication system stipulated in Part VI, s 2, Appeals under the ITA. The preclusion of issues relating to the quantum of tax payable or the basis of imposition of tax or whether a person is a 'chargeable' person or not are all matters that fall for consideration under the appeals procedure."

[85] Accepting *Najib Razak* and earlier cases decided on judicial power (*vis-a-vis*) arts 4(1) and 121(1)), what then would warrant the conclusion that judicial power has been abrogated? We think some concrete case examples would, in this regard, be relevant.

[86] In *Dhinesh*, it was successfully demonstrated how the ouster clause impugned therein sought to completely oust the constitutional device of not just administrative judicial review but also constitutional judicial review itself. The relevant ouster clause was thus struck down as violating arts 4(1) and 121(1). The same is true in the minority judgments in *Maria Chin*.

[87] In *Semenyih Jaya*, it was correctly argued that the relevant provision of the Land Acquisition Act 1960, even when considered against the background of the statute as a whole, treated the High Court Judge as a 'rubber stamp' as a Judge in that position is compelled to accept the opinion of two lay assessors as his own. This was a transgression of art 121(1) as being an incursion into judicial power.

[88] The minority in *Zaidi Kanapiah* which was eventually accepted as correct in *Nivesh Nair* held that s 4 of the Prevention of Crime Act 1959 was unconstitutional because it restricted a Magistrate's ability to make a judicial determination on the length of remand. In that case, Magistrates were compelled to issue remand orders for a fixed number of days if certain straightforward procedural conditions were met. This was correctly held to be violative of judicial power in art 121(1).

[89] In all the above assessments, it was correctly observed that judicial power had been totally ousted by virtue of legislation. In *Najib Razak*, this Court also made the important observation of distinguishing between what constitutes judicial power on the one side, and jurisdiction on the other (*Najib Razak*, [43]-[44]). We might also add that in making the assessment of whether judicial power has been violated, a proper line must be drawn between what constitutes judicial power and what constitutes the basis for the exercise of such powers. Parliament has no authority to impinge upon the former but has some latitude as regards the latter.

[90] In other words, one must also have regard for Item 4(e) of the Federal List which states as follows:

> "4. Civil and criminal law and procedure and the administration of justice, including-
>
> ...
>
> (e) subject to paragraph (ii), the following:
>
> (i)... the law of evidence;

[91] And thus, for the purposes of administration of justice, Parliament can in its wisdom make laws in relation to the regulation and acceptance of evidence. And in this regard, the genuine enactment of such laws, cannot reasonably in our view, be taken as a curtailment of judicial power. A case example perhaps might prove useful to illustrate this exact point is *Alma Nudo*.

[92] It will be recalled that in *Alma Nudo*, it was argued that s 37A of the DDA 1952 was unconstitutional because it violated, among other things, judicial power. The judicial power argument was rejected, in our view, on sound principle. The provision was nonetheless found to be unconstitutional because it violated arts 5(1) and 8(1). But for the sake of this judgment, it would be useful to address the judicial power argument raised in that case.

[93] Prior to *Alma Nudo*, this Court in *Muhammed Hassan v. Public Prosecutor* [1997] 2 MLRA 311 ('*Muhammed Hassan*') stated that the use of double presumptions was unduly harsh and oppressive. The Court also remarked that in light of the harshness of such a reading, the Court was not ready to read the presumption of possession into the presumption of trafficking. It was after this judgment that Parliament passed an amendment to the DDA 1952

to enact section 37A which expressly authorised the use of presumption upon presumption.

[94] In *Alma Nudo*, the judicial power point was addressed in such a way as to suggest that Parliament in enacting s 37A attempted to sit in an appellate jurisdiction against the Apex Court in *Muhammed Hassan* and overruled that decision. The judgment of the Indian Supreme Court in *ST Sadiq v. State of Kerala and others* [2015] 4 SCC 400 ('*Sadiq*') was cited in support of that contention. A more in-depth analysis including the facts in *Sadiq* can be found in the dissenting judgment in [501]-[505] of *Maria Chin* which now represents the law. The most pertinent observation in this regard is what was stated in [506] which is endorsed as part of this judgment, as follows:

> "[506] In light of the principles of constitutionalism embedded in art 4(1), the laws the Legislature can and cannot make is governed by a set constitutional spectrum. On the extreme left of that spectrum, we have 'laws' which purport to exclude judicial review before any Court including the substantive right to grant remedies for effective relief to uphold the cause of justice and the rule of law. Such laws are unconstitutional. In this area, there can be no risk of judicial supremacy given the range of judicially imposed controls on judicial power. On the extreme right of the spectrum, we have 'laws' which seek to directly usurp the judicial role by either legislatively determining the specific legal outcome on the facts of a given case (such as with bills of attainder) or which seek to directly annul judgments of the Court to alter the legal result from what was judicially determined between parties. Such laws are also constitutionally invalid. In the middle of the two extremes, we have the penumbral zone where the Legislature can enact laws going to jurisdiction, substantive legal rights and procedure as may be prescribed by the legislative entries in the Ninth Schedule subject to Part II of the FC or any other constitutional checks, for example, Part XI (arts 149-151)."

[95] The Federal Court's basis for rejecting the judicial power argument in *Alma Nudo* can therefore be clearly understood as it has been expressed as follows:

> "[84] Read in context, the three cases above do not stand for the proposition that any amendment to a law which has been interpreted by a Court is an impermissible encroachment into judicial power. On the contrary, the cases clearly recognise the power of the Legislature to amend a law which formed the basis of the decision of the Court. The effect of such an amendment is not to overrule the decision of the Court in that case, but to alter the legal foundation on which the judgment is founded. The earlier decision of the Court then becomes unenforceable for the interpretation of the newly amended law. But the decision itself which led to the amendment is not affected."

[96] As such, when in *Muhammed Hassan,* this Court expressed that such a reading of the DDA 1952 to allow for double presumptions was unduly harsh and oppressive absent clear language to that effect, Parliament changed the basis of the law by inserting a provision that allowed it. That provision was nonetheless unconstitutional because the use of double presumptions is a disproportionate measure. Regardless, *Alma Nudo* clearly explains the

distinction between a legitimate legislative exercise of enacting a procedural law on the one side, and dictating judicial decisions and the larger judicial process.

[97] In this regard, we find that Parliament is expressly empowered by the FC itself to enact laws relating to evidence which will necessarily be applied in Court. As has clearly been done in the past, different situations may require different laws to address those situations. For instance, in *Gan Boon Aun*, this Court held that the use of single presumption is a legally acceptable evidential measure. It cannot be viewed as violating judicial power and this has also been implied in the judgment of this Court in *Abdullah Atan* at [45]-[46].

[98] Without establishing a rule too wide, we opine that what remains paramount in an assessment of whether judicial power has been abrogated in violation of art 121(1) is to ask whether the Judiciary has been denied the complete ability to exercise its powers of adjudication in totality or that it has been rendered illusory. Going by *Maria Chin (supra)*, the pure and genuine enactment of laws that regulate evidential procedure cannot *per se* amount to such a dereliction.

[99] In the present case, having examined s 61A by itself and in context earlier, we find that judicial power has in no way been abrogated, curtailed or subjugated to the Legislature by any means whatsoever. It was earlier seen and clarified that the use of the phrase '*prima facie* evidence' by no means has the conclusive effect as erroneously proposed by the appellants. In all cases, the defence retains the ability to call rebuttal evidence and the Judiciary retains the obligation to evaluate all the evidence at the close of the prosecution's case sufficient to warrant a conviction before calling for defence.

[100] In the circumstances, we reject the appellants' contention that s 61A violates art 121(1). In fact, we find that the provision is entirely consistent with art 121(1).

The Fundamental Liberties Argument

Article 5(1)

[101] Having dealt with the first prong of the appellants' attack, we now come to the second prong which deals with the Fundamental Liberties Argument. The first part of this argument deals with the right to a fair trial which is indisputably guaranteed by art 5(1) - or more specifically, that the denial of the right to cross-examination of the deponents belies the right to a fair trial.

[102] The appellants have cited numerous authorities for the proposition that the right to a fair trial includes the rules of natural justice, and that an integral part of arts 5(1) and 8(1) include procedural fairness. We do not think these principles are in dispute. And so, at this stage, two questions need to be asked. Firstly, does s 61A completely exclude the right to cross-examine the

deponents, and secondly, assuming it does, whether that exclusion is contrary to the right to a fair trial.

[103] The respondent appears to take the position that even if the right to cross-examine is excluded, the exclusion of this right does not in itself mean that the accused is accorded an unfair trial. The circumstances of the case have to be considered as a whole and in this context, the accused retains the right to call rebuttal evidence. They also suggest that while the prosecution has the evidential advantage of adducing these depositions, they remain under the general obligation to prove the criminal charges in accordance with the standard required by the law. And thus, the respondent submits that when s 61A is considered as a whole against the ATIPSOM and general criminal procedure, the appellants' fair trial rights have not been abrogated.

[104] We set out s 61A earlier. The section begins with a non-obstante clause excluding all the provisions of the ATIPSOM and any other written law to the contrary. This would presuppose the exclusion of the Evidence Act 1950 and the provisions on cross-examination therein contained. Other than these broad exclusions, there is nothing expressly stated in s 61A that the accused does not have a right to cross-examine the deponents and so this warrants a more careful look at the section.

[105] The appellants have also referred us to s 52 which is more relevant to their arguments on art 8(1). That said, we think the section is still relevant in a proper assessment on whether s 61A does in fact exclude cross-examination. Section 52 reads:

> "Recording of evidence of trafficked person
>
> 52. (1) Where a criminal prosecution has been instituted against any person for an offence under this Act, the Public Prosecutor may make an oral application for the production of the trafficked person before a Sessions Court before which the criminal prosecution has been instituted for the purpose of recording that trafficked person's evidence on oath.
>
> (2) The Sessions Court Judge may, upon such application, issue a summons or order directed to the person in charge of the place of refuge where such trafficked person is placed, or to the enforcement officer who is investigating the circumstances of the case of a trafficked person, requiring him to produce the trafficked person at the time and place specified in the summons or order.
>
> (3) The Sessions Court Judge shall record the evidence of the trafficked person and complete such recording within seven days from the date of the production of that trafficked person before him.
>
> (4) In the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950.

(5) The Sessions Court Judge shall cause the evidence taken by him to be reduced into writing and, at the end of that writing, shall sign the same.

(6) Notwithstanding anything contained in this Act or any other written laws to the contrary, the evidence recorded under this section shall be admissible in evidence in any proceedings under this Act and the weight to be attached to such evidence shall be the same as that of a witness who appears and gives evidence in the course of a proceeding."

[106] At once, it is clear from sub-section 52(4) that a trafficked person who has been produced before a Sessions Court shall be examined in accordance with the provisions of the Evidence Act 1950. This means that there is clearly an obligation for the Sessions Court to allow the trafficked person to be cross-examined.

[107] By stark contrast, in light of the broad non-obstante clause in s 61A (excluding ATIPSOM's other provisions and all other written law to the contrary) coupled by a clear absence of any statement that the deponents can be cross-examined (unlike s 52), we agree with the appellants that s 61A excludes the right to cross-examine. At best, s 61A in subsections (1)(a) and (1)(b) allow the depositions to be recorded either in the absence or presence of the accused. But, "presence" here is merely in physical attendance with a view to observing and not to the extent of cross-examining.

[108] It follows that we agree entirely with the observations of the High Court in *Amurthalingam Tamajeeren v. Public Prosecutor* [2017] MLRHU 1378 ('*Amurthalingam*') which decides that unlike s 52, s 61A excludes the right to cross-examine and as such, an application by the accused to cross-examine a deponent under s 61A has no legal leg to stand on.

[109] Having accepted the appellants' contention that s 61A excludes absolutely the right to cross-examine, the only remaining question is whether this violates the guarantee of a right to fair trial in art 5(1). After thorough consideration of the contentions on this argument, it is our view that s 61A does not violate art 5(1) and does not violate the appellants' rights to a fair trial even if the ability to cross-examine has been excluded. We say so for the following reasons.

[110] Article 5(1) guarantees the right to life and personal liberty. This right, can however be abridged by law. And thus, in a regular criminal trial (unlike in most civil trials), the fair trial rights gain more visibility because the prosecution which represents the State has a greater leverage than the accused.

[111] One of the defining features of the right to a fair trial is the concept of 'equality of arms'. The prosecution has at its disposal the police which in turn have powers of search and seizure. 'Equality of arms' seeks to level the playing field such that the accused/defence is not disadvantaged purely by virtue of him not being institutionally powerful. This principle of equality of arms was expressly recognised and endorsed by this Court in *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2010] 1 MLRA 131 ('*Anwar Ibrahim*'), at [51].

[112] For these reasons, the general concepts in criminal law are given their due place such as the presumption of innocence, that the prosecution must prove its case beyond a reasonable doubt, that where an inference of fact is made, it should be done in a manner most favourable to the accused and among other things, that the accused can retain the right to remain silent without having an adverse inference made against him. These and other broader principles collectively constitute the facets of the right to a fair trial and as regards this right, it must be gleaned from whether as a whole, the criminal trial was compromised to the extent that the trial as a whole was unfair.

[113] Further, even though Malaysia is not a State-party to the International Covenant on Civil and Political Rights, reference to its jurisprudence has often been had in our Courts in the understanding of our own art 5(1), see, for example, *Anwar Ibrahim (supra)*.

[114] In this regard, the Human Rights Committee ('HRC') in General Comment 32 entitled 'Article 14: Right To Equality Before Courts And Tribunals And To A Fair Trial', had this to say in its observations on the right to a fair trial:

> "13. The right to equality before Courts and tribunals also ensures equality of arms. **This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.** There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision. **The principle of equality between parties applies also to civil proceedings, and demands, *inter alia*, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.** In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined."
>
> [Emphasis Added]

[115] What is clear from the above passage is that even internationally, it is recognised that certain deviations are allowed in criminal proceedings if the deviations can be justified on objective grounds. In the instant case, this deviation is in relation to offences under the ATIPSOM and that too only in a specific case relating to the inability to locate the victims stemming from their lawful deportation. As stated by the HRC "each side be given the opportunity to contest all the arguments and evidence adduced by the other party" and this is the central feature of the right to a fair trial, not the individual mechanical aspects of it.

[116] In this assessment, we have not overlooked the appellants' contention that cross-examination is a very important device in criminal cases which allows one to find a means to the truth or to put the defence's case forward. That said, criminal law has developed to recognise that in addition to the accused, the right to a fair trial requires in the words of Lord Steyn in

Regina v. A (No 2) [2002] 1 AC 45 ('*A No 2*') a 'triangulation of interests'. In this regard, Lord Steyn said, at [38]:

> "The only balancing permitted is in respect of what the concept of a fair trial entails: here account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context, proportionality has a role to play."

[117] The same observations, that is the right of the accused to a fair trial must take into account the rights of the victim and society at large was also fortified by the European Court of Human Rights in *PS v. Germany* [2003] 36 EHRR 61, at [22].

[118] Considering the above, it will be apparent that even in ordinary criminal trials, this principle of triangulation of interests has already been catered for in the Evidence Act 1950. Sections 32 and 33 embody the longstanding exceptions to the hearsay rule by allowing for the admission of certain types of evidence when conditions are satisfied. One of the largest aversions to hearsay is that its credibility cannot be established as the veracity of that information cannot be cross-examined. In this regard, s 158 of the Evidence Act 1950 which stipulates the rule applicable when such evidence cannot be cross-examined because it was adduced under ss 32 or 33, states thus:

> "What matters may be proved in connection with proved statement relevant under ss 32 or 33
>
> > 158. Whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

[119] The position above is not unique to only hearsay evidence in that evidence that cannot be cross-examined, is admissible in Court. In many other jurisdictions, it is also being recognised that while cross-examination is a very important aspect of a criminal trial, in light of the need to triangulate rights (balancing the rights of the accused with that of the victim and the society), there might be instances where the ability to cross-examine has to be limited. Examples include the examination of vulnerable victims such as children and disabled persons. While in those cases cross-examination may not be completely excluded, the Court has powers to limit the types of questions that can be asked. For a more detailed analysis on the discussion, see: Phobe Bowden *et al*, '*Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*' [2014] Vol 37 Melbourne University Law Review, 539.

[120] It is our understanding that the principle in every case is that in light of the need to balance foremost the interests of the accused and then the interests of the victims and public interest, greater emphasis ought to be accorded to

the substance of the trial than to its form. Cross-examination is not only about the fact of it enabling the questioning of adverse witnesses. What should be appreciated about the process is that it allows the accused to challenge evidence put against him and to put to the prosecution his version of the facts or even his entire defence or parts of it. In certain cases, the putting of the defence dispels any later notion that the defence is a sham or an afterthought. Hence, even if one right is missing in form, what remains of paramount significance is that the accused must at all times retains the means to challenge the case against him with a view to exculpating himself.

[121] As explained, what remains paramount in the right to a fair trial is the principle of equality of arms The accused, who must always be presumed innocent, must have every reasonable opportunity of defending himself by putting his best case forward, being heard in every material respect, and of having every benefit of the doubt. These categories are not closed.

[122] In assessing whether the right to a fair trial has been curtailed, the Court cannot be too focussed on piecemeal arguments that allege that a trial is unfair because certain features in a trial are missing as compared to other ordinary trials. In other words, the Court cannot lose the forest for the trees. The ultimate question is whether the exclusion of a procedural right has overridden the 'equality of arms' between the prosecution and the accused, and whether the trial as a whole has been unfair, resulting in a miscarriage of justice to the accused. The mere fact of the absence of cross-examination without any attendant indication of any miscarriage of justice or that the right to defend oneself has been jeopardised in any material way, is in our view, insufficient to lead to the conclusion that the accused's right to a fair trial has been violated.

[123] In our analysis and interpretation of s 61A earlier, we have concluded that it was enacted for the legitimate purpose of allowing the admission of ATIPSOM victims who have been lawfully removed from the country. Given these considerations, even the prosecution, after recording the depositions, is unable to further question the witnesses in Court by way of evidence-in-chief.

[124] It was also seemingly suggested that the prosecution can always wait for a witness to be deported and then rely on its s 61A deposition as conclusive evidence thereby avoiding the need to examine and cross-examine that witness in Court. We have established that this interpretation is misplaced. It appears to us to be more logical that given that the prosecution is not released by s 61A from its prosecutorial burdens, it would be more advantageous to the prosecution to call the witness directly or even rely on s 52's method of examination. The evidential advantage accorded to it is therefore only to the extent of being able to preserve evidence and to tender it as secondary evidence of the charge. We do not at all consider the 'equality of arms' between the prosecution and the accused disrupted in any way.

[125] The fact remains that '*prima facie* evidence' as interpreted earlier means that the evidence can be admitted and believed at face value but the accused

at all material times retains the right to call rebuttal evidence. He retains also the right to challenge all the other evidence put against him including the depositions that are adduced pursuant to s 61A.

[126] In the words of General Comment 32, we are satisfied that s 61A which is distinct from other criminal provisions allowing for cross-examination is "based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'. In fact, if one were to take the extra step of comparing this case to trafficking in drugs for example, drug trafficking cases actually involve the use of single presumptions that shift the burden of proof to the accused on a balance of probabilities. The restrained use of single presumptions itself is internationally acceptable and has been held to be valid in *Gan Boon Aun* and *Abdullah bin Atan*. More so in this case, no shifting of burden takes place, and as we have held, the depositions are not conclusive proof of the facts stated therein.

[127] In the circumstances, we find that s 61A is objectively fair given the unique circumstances presented by ATIPSOM cases which involve foreign victims who are brought into the country *via* illicit means. The ATIPSOM regime in some respect, gives these victims' human rights some level of primacy by facilitating, in appropriate cases, their speedy return home *via* deposition orders. A balance is therefore struck by enabling the taking of their evidence without letting such victims languish, pending trial. A balance is also struck in the public interest in that the prosecution gains an evidential advantage in terms of the deposition. Yet, at the same time, the accused is allowed every latitude to question and challenge the evidence in the deposition by calling rebuttal evidence and to otherwise cross-examine all the other prosecution witnesses.

[128] Thus, insofar as the right to a fair trial is concerned, it is our view that s 61A has fairly triangulated the rights of the accused, the victims and public interest. In the circumstances, and for the reasons explained above, we concur with the respondent that s 61A is not violative of art 5(1) and the appellants' arguments in relation to this are rejected.

Article 8(1)

[129] The second limb of the Fundamental Liberties Argument and the final argument in the appellants' artillery is that s 61A violates the right to equality before the law as enshrined in art 8(1).

[130] The jurisprudence of art 8(1) is beyond settled. In order to achieve equality in the truest sense of art 8, decided cases have held that discrimination is allowed except in certain cases. In relation to art 8(2), discrimination only on the grounds stated in that Article is prohibited against citizens unless expressly authorised by the FC. However, if an argument is made in respect of art 8(1), then the following must be shown.

[131] Firstly, there must be an intelligible differentia between the categories of persons (or classes of persons) that are classified within a certain group against persons (or classes of persons) who can be clearly classified outside of that group. In other words, the discrimination must be intelligible and clear - not arbitrary or wanton. The first element of art 8(1) looks for a clear distinction between who is discriminated. This assessment ensures that the discrimination is not done arbitrarily.

[132] The second element of art 8(1) which is usually the one at issue in most cases, looks at the basis of discrimination. Here, it must be established that the differentiation in the first element was enacted in furtherance of a legitimate legislative aim and that there is a reasonable nexus between the discrimination and that legislative aim. If there is no objective and justifiable reason for the discrimination, then in such a circumstance, the measure will have violated art 8(1).

[133] In relation to the second element, more recent cases decided in the past few decades such as *Alma Nudo*, also emphasise the importance of proportionality in the assessment of the measure. In other words, even if the legislative measure which is discriminatory was pursued for a legitimate aim, the measure may still be violative of art 8(1) if the extent of the measure taken is disproportionate to the legitimate legislative aim it seeks to achieve.

[134] In respect of art 8(1), the appellants argue that firstly, s 61A is indiscriminate because when compared to s 52, there is no clear guidance either in principle or on policy on the distinction between the two sections. In any event, the appellants argue that by disabling cross-examination, s 61A puts the accused at a less advantageous position than he would under s 52. By this token, it is their argument that s 61A by comparison to s 52 is a measure disproportionate to the legislative aim behind s 61A.

[135] The respondent firstly submits that there is an intelligible differentia because s 61A applies equally to all accused persons who are in a situation where the victim of the offence has been removed from the country. As such, there is a clear legislative basis for the application of s 61A and in all cases where the section is applied, it is applied in the same way. We accept these arguments because they are correct.

[136] As stated earlier, s 61A applies in cases where an order or removal has been made against the deponent under any of the provisions of Act 155 stated in subsection 61A(1). There is therefore an intelligible differentia defining the basis of when s 61A is and is not applicable. Further, when the section is applied, it is applied in the same way across all criminal trials. All such depositions are recorded as *prima facie* evidence of the facts stated in the deposition and remain admissible in Court. As such, while there is discrimination between trials that use s 61A and trials that do not, the circumstances that give rise to that discrimination are clear.

[137] In relation to the proportionality argument, the respondent's position is less clear as they rely mostly on the contention that legislation is presumed constitutional unless the heavy threshold of proving its invalidity is met by the person challenging it. In this regard, the question we must ask ourselves is whether the appellants have successfully established that s 61A is a legislative measure disproportionate to the aim it seeks to achieve.

[138] We hasten to add that while we have found that s 61A is not violative of the right to fair trial on objective grounds, the argument taken in relation to the art 8(1) proportionality takes a different nuance. While the right to a fair trial has been preserved, and we have found that s 61A applies equally to all accused caught by it, the question remains whether the fact of excluding cross-examination especially when s 52 allows it, is itself proportionate to the legislative aim basing the enactment of s 61A.

[139] The reasons for s 61A's enactment have been made clear earlier in this judgment. Section 52 was also cited earlier. Given the language of s 52, it only applies to a victim who is a "trafficked person" in proceedings where the subject of the charge is trafficking. Section 52 does not use the word "deposition" and clearly allows the recording of that witness's testimony as though he were appearing in Court to testify. Cross-examination of that witness is allowed.

[140] Section 61A by contrast to s 52 applies throughout the ATIPSOM (including trafficked persons and smuggled migrants) but the application of section 61A is conditional upon proof that the Director General of Immigration had made an order of removal against the person sought to be examined pursuant to the applicable provisions of Act 155.

[141] What is clear between the two sections (52 and 61A) is that under s 52, the prosecution is empowered to make an application to the Sessions Court to have produced the trafficked person from his place of refuge to give evidence in Court and record it in writing. The difference from a regular criminal trial is that the evidence is recorded including any cross-examination but for all intents and purposes, the witness gives evidence as though he is appearing in and rendering it in an ordinary trial. When understood in context, it presupposes that because the provisions of the Evidence Act 1950 apply, the prosecution is allowed to examine-in-chief, the accused can cross-examine and the prosecution can then reexamine the witness. All of this is reduced into writing and recorded as that witness's evidence.

[142] Section 61A on the other hand comes with the prerequisite that the prosecution must first tender positive evidence of deportation of the person whose testimony is required for an offence under the ATIPSOM. Only once that is done is the deponent allowed to render his testimony on oath. Based on an analysis of the difference in language between ss 52 and 61A, it is clear that s 52 refers as such to the examination of the witness in the sense of the Evidence Act 1950. Whereas s 61A excludes the Evidence Act 1950 and any testimony rendered is more a recount than it is as a result of an examination.

[143] In our analysis of decided cases on this issue, the case of *Public Prosecutor v. Shahrulnizam Othman & Ors* [2010] 3 MLRH 159 ('*Shahrulnizam*') comes to attention that can possibly suggest how depositions under s 40A of Act 155 and by analogy section 61A are recorded. In [17] of *Shahrulnizam*, it was suggested, that depositions in some cases may be prepared in advance and the deponent merely affirms that written statement before either the Sessions Court Judge, Magistrate, or a consular officer or a judicial officer of a foreign country. In our view, this is very similar to how affidavits are prepared in prevailing legal practice.

[144] If we view ATIPSOM as a whole, the distinction between ss 52 and 61A are apparent. Again, in the case of s 52, the relevant witness is called to Court and is examined as though he is a witness in a trial. The prosecution can examine-in-chief, followed by cross-examination by the defence and then re-examination if the prosecution deems it necessary - in accordance with the Evidence Act 1950.

[145] However, if we look at s 61A closely, considering that the provisions of the Evidence Act 1950 are excluded entirely, not only is the accused not allowed to cross-examine, the prosecution too cannot as such examine-in-chief or re-examine the deponent. The purpose of s 61A is not for the examination of the witness, but to furnish his testimony before he or she is deported or removed from the country. The deposition is then used later in trial if the prosecution establishes before the trial Court that the witness cannot be found by virtue of his deportation under the applicable provisions of Act 155.

[146] Reading s 61A in context, we find that there is in the first place, no discrimination against the appellants as regards ss 52 and 61A. The two provisions are entirely different provisions catering for different procedures for different circumstances which have been explained above. In any case, the basis for the application of s 61A over s 52 is clear in that the former applies when a witness can no longer be found by virtue of them having been deported pursuant to the applicable provisions of Act 155.

[147] Nevertheless, we find that as between s 61A and general criminal procedure applicable in the CPC and the general law of evidence applicable by virtue of Evidence Act 1950, there is discrimination between all accused persons against whom s 61A is applied and all other accused persons. This is because if s 61A is applied, all accused persons in those trials cannot cross-examine those witnesses as opposed to regular criminal trials where the victims if called, can be cross- examined. This is the intelligible differentia.

[148] In relation to the legitimate legislative aim, Parliament's intention behind the enactment of s 61A was laid out earlier. We have also earlier observed that s 61A triangulates the rights of the accused, the victims and the public. In this regard, we are convinced that s 61A was enacted for a legitimate legislative purpose and having sufficient nexus to that Parliamentary aim.

[149] And, while the deprivation of the ability to cross-examine appears to be a disproportionate measure *vis-a-vis* other general criminal trials, the right to lead rebuttal evidence by the defence and the retention of the prosecution's general obligations to meet its heavy legal burdens *(prima facie* case and beyond reasonable doubt), remain. We therefore find that s 61A, when read on a whole, is a proportionate intrusion into the right to a fair trial as against the legislative reasons for its enactment.

[150] For the foregoing reasons, we are unable to agree with the appellants that s 61A violates art 8(1). We therefore concur with the respondent that s 61A is not unconstitutional on this ground.

Conclusion

[151] Having addressed the arguments above, we hereby reproduce the Questions and our answers categorically as follows:

> "Question 1
>
> Whether s 61A of ATIPSOM is unconstitutional, null and void, by vesting judicial power unto itself, Parliament acted in violation of the doctrine of separation of powers under art 121(1) of the Federal Constitution in deciding the *prima facie* evidence?
>
> Answer: Negative. Section 61A does not violate the doctrine of separation of powers under art 121(1).
>
> Question 2
>
> Whether s 61A of ATIPSOM violates the fundamental right to a fair trial guaranteed to an accused under art 5(1) of the Federal Constitution, thus is unconstitutional, null and void?
>
> Answer: Negative. Section 61A does not violate the right to a fair trial guaranteed by art 5(1).
>
> Question 3
>
> Whether s 61A of ATIPSOM violates the right to equality guaranteed to an accused under art 8 of the Federal Constitution, thus is unconstitutional, null and void?
>
> Answer: Negative. Section 61A does not violate the right to equality before the law guaranteed by art 8(1)."

[152] In the circumstances, we remit this case to the High Court in accordance with s 85(2) of the CJA 1964 so that it can make the appropriate orders and directions in accordance with this judgment, and otherwise according to law.

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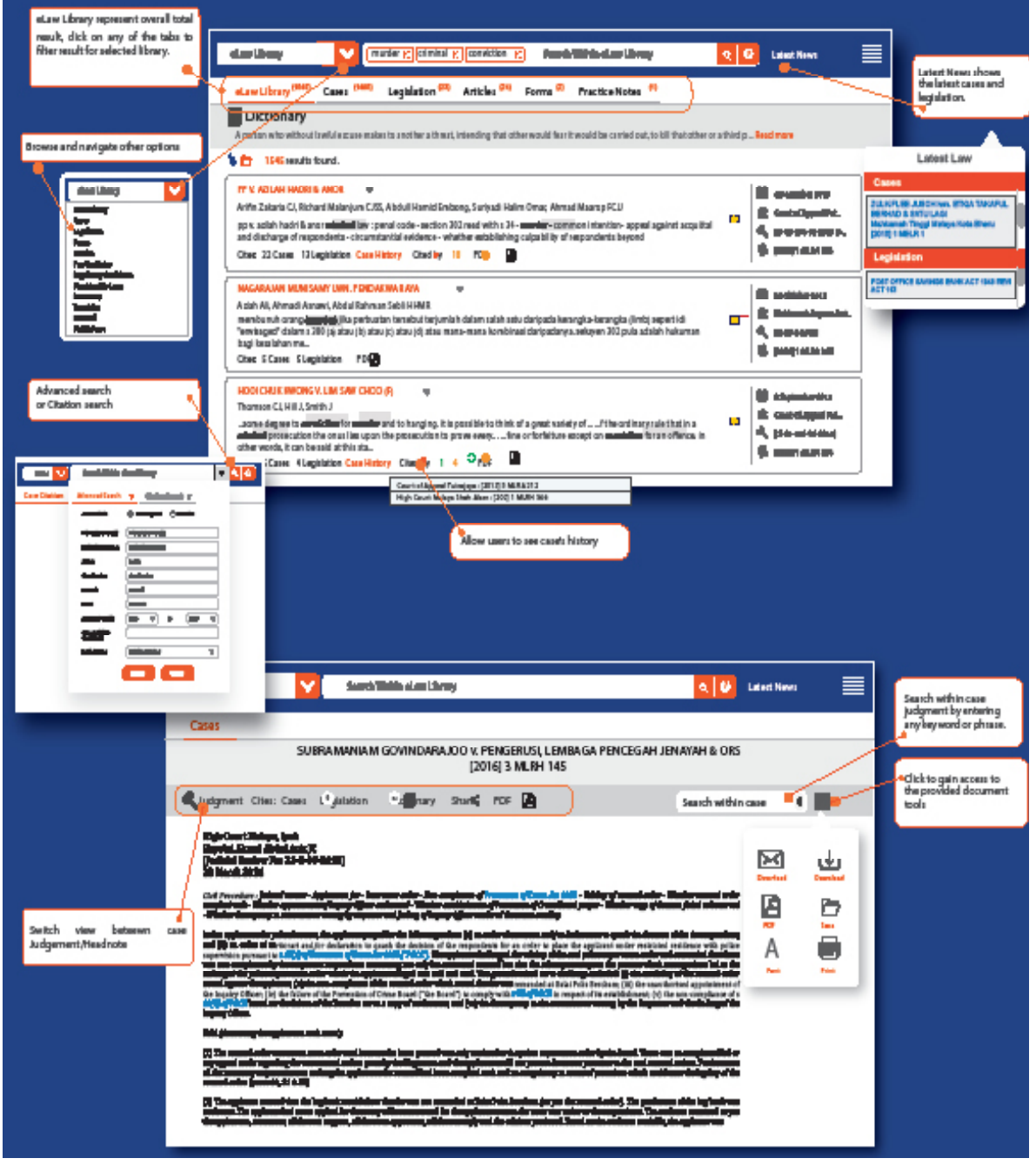

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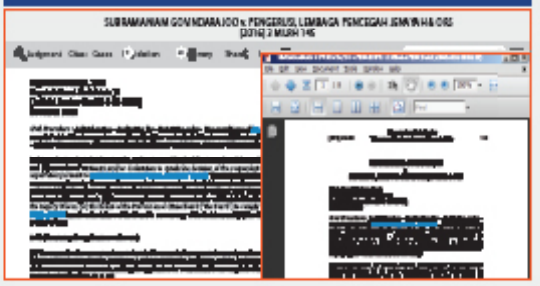

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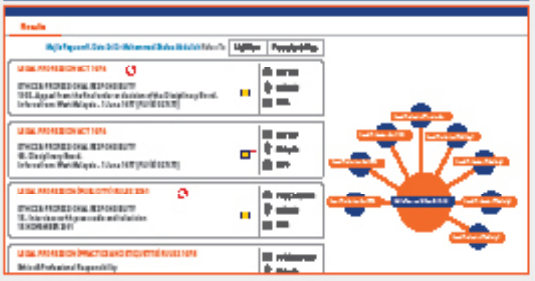

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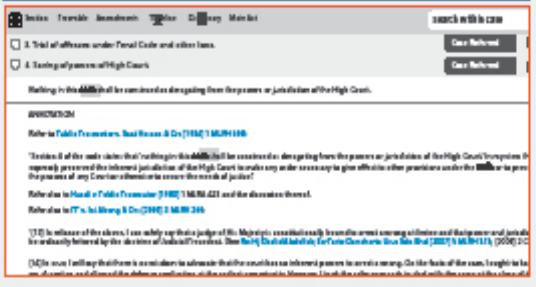

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