IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF KUALA LUMPUR

[CRIMINAL APPLICATION NO: WA-44-32-02/2019]

BETWEEN

HEMANATHAN A/L KUNJRAMAN
(IDENTITY CARD NO.: 860321-59-5405) ... APPLICANT

AND

1) MENTERI DALAM NEGERI, MALAYSIA

2) KETUA POLIS NEGARA, MALAYSIA

3) PEGAWAI YANG MENJAGA PUSAT PEMULIHAN AKHLAK SIMPANG RENGGAM, JOHOR

4) KERAJAAN MALAYSIA ... RESPONDENTS

GROUNDS OF JUDGEMENT

A. BACKGROUND

[1] The Applicant, Hemanathan A/L Kunjraman, filed a Writ of *Habeas Corpus* against the legality of a Detention Order dated 17.8.2018 made by the Deputy Home Minister (the Deputy Minister) under section 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) ordering the Applicant to be detained at the Pusat Pemulihan Simpang Renggam, Johor (the Detention Centre).

[2] The Applicant was arrested under subsection 3(1) Act 316 and the investigation was carried out thereafter. Upon examining the reports the Deputy Minister exercised his duties and issued the Detention Order against the Applicant in accordance to Section 6 (1) Act 316 for a period of two (2) years with commencing on the same date as the Detention Order.

[3] On 19 August 2018, the Applicant made a representation against his detention to the Advisory Board. On 31 October 2018, after having considered the Applicant's representation, the Advisory Board made a recommendation to the Yang Di Pertuan Agong, who on the same date, affirmed the Detention Order that was issued by the Deputy Minister of Home Affairs (the Deputy Minister).

B. THE LAW

[4] The power of the Court to direct the Applicant to be released by Writ of *Habeas Corpus* is recognised under Article 5(2) of Federal Constitution, Paragraph 1 in Schedule under Courts of Judicature Act 1964, read together with Section 25(2) of the same act and Section 365 (a)(ii) of Criminal Procedure Code (CPC).

[5] The law is very clear that the application for Writ *Habeas Corpus* by the Applicant is made under Article 5(2) of the Federal Constitution. Thus, when the Applicant complaints that he has been unlawfully detained, the Court is to inquire into the complaint and, unless satisfied that the detention is unlawful, shall order him to be produced before the Court and release him. The burden is on the detaining authority to prove that the detention of the applicant is lawful. (See *S. K. Tangakaliswaran v. Timbalan Menteri Dalam Negeri & Ors* [2009] 6 CLJ 705 *dan Murugan A/L Supparamaniam v. Timbalan Menteri Dalam Negeri & Ors* [2010] 4 CLJ 405; [2010] 1 LNS 41; [2010] 4 MLJ 488)

[6] The Federal Court in *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129 held that the detention without trial which deprived the detained person of his fundamental liberties, the procedures relating to the detention under the statutes of which he is detained must be strictly followed.

[7] I am reminded it is trite that application for *habeas corpus* is only on the issue of non-compliance of procedures (see *Lew Kew Sang v. Timbalan Menteri Dalam Negeri & Ors* [2005] 3 CLJ 914). Any irregularities during the arrest or remand proceeding are not relevant (see *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613). It is sufficient for the Applicant to state that he is under wrongful detention and the burden is on the Respondent to satisfy the Court that the detention is not illegal or wrongful and the applicant is not entitled to the relief applied.

C. GROUNDS IN SUPPORT OF THE APPLICATION

[8] The issues of procedural non-compliance raised by the Applicant's counsel are as follows: -

[a] No evidence or explanation was given by the Respondents as to why the applicant was detained.

[b] The Applicant was detained only for past drug trafficking activities;

[c] Section 11C Act 316 is unconstitutional;

[d] The presence of police personnel as an interpreter during an investigation under the Section 5 of Act 316 was not complied with;

[e] The Deputy Minister does not have the power to carry out the duties of the Minister of Home Affairs.

D. ANALYSIS AND FINDING

[9] 1st and 2nd Issues: **No evidence or explanation was given by the Respondents as to why the Applicant was detained**. **The Applicant was detained only for past drug trafficking activities.**

[a] The Applicant submitted that there were no evidence to justify the 2 years detention without trial and the Detention Order was only based on hearsay evidence. Further, the Applicant was never prosecuted in court for his alleged involvement or actively being associated with any activities relating to drugs trafficking. The Respondents, however, submitted that the Applicant has a long history of drug trafficking and is still active in the trafficking of dangerous drugs

[b] I am mindful that Section 6 (1) (a) and section 6 (1) (b) Act 316 plays a very important role in making the Detention Order against the Applicant. The Deputy Minister must consider these reports before making the Detention Order. They are therefore pre-conditions to the exercise of power under section 6(3) Act 316 and they are part of the decision making process and amount to procedural requirements governing the exercise of the discretion by the Deputy Minister in making a Detention Order within the meaning of section 11C Act 316. A breach of this requirement is therefore subject to judicial review.

[c] The Deputy Minister has deposed that he received the following reports:-

[i] A report relating to the circumstances of the arrest and detention against the Applicant from the designated officer as per Section

3(2)(c) Act 316 .i.e. Assistant Commissioner of Police, Dalbir Singh A/L Tanah Singh;

[ii] A full report concerning the Applicant's activities from Police Inspector Nazarul Izwan Bin Abdul Manaf, Investigating Officer (IO) pursuant to the Section 3(3) of Act 316 on 31.07.2018; and

[iii] A complete written report by Investigation Officer of Ministry of Home Affairs, Nadia Binti Mohd Izhar (IO MHA) who has been appointed pursuant to the Section 5(4) of Act 316.

[d] As to the fact of the satisfaction of the Deputy Minister which led to the issuance of the Detention Order, the Supreme Court in *Chua Teck v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1989] 2 CLJ 414 had earlier ruled as follows:-

> *"[3] It is not open for the Court to question how and why the Minister is satisfied, as long as the Minister says that he is satisfied after considering all information available to him ....."*

[e] In this case the Deputy Minister is satisfied that the Applicant has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, and it is necessary in the interest of public order. By virtue of Section 6(1) Act 316, the Deputy Minister had ordered the Applicant to be detained after having considered the investigation report submitted to him in accordance with Sections 3(3) and 5(4) Act 316. The investigation report and the reasons given for the detention which has been considered by the Deputy Minister under Section 6(1) (b) Act 316 is regular and has complied with the mandatory requirement i.e. section 5(4) Act 316 that the applicant had been involved in drug trafficking activities. The Court is not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the

Deputy Minister's discretion unless *mala fide* on his part is shown. I find that the 1st and 2nd issues raised by the Applicant are unmeritorious and untenable.

[f] As to the complaints in respect of the date of arrest and Applicant's rights in relation to right as a detainee, being abused during detention and was not afforded a fair hearing before the Advisory Board, I find that they are not fully substantiated. The *habeas corpus* application is a challenge against the arrest and investigation of the Applicant. Any irregularity or defects concerning arrest and investigation are irrelevant once the Detention Order under Section 6(1) has been issued, unless the complaints, fully substantiated, are in relation to the pre-requisites to the making of the Detention Order as stated in Section 6(1), which is not the situation in the instant case.

[10] 3rd Issue: **Section 11C Act 316 is unconstitutional on the basis that it restricts the High Court in making judicial review as not to look to the substance or merits of the decision made but must confine itself to the issue of whether there has been a breach of any procedural requirements in the relevant legislation.**

[a] The Applicant submitted that Section 11C of Act 316 only authorises limited judicial review, which is to determine whether or not the procedure under the said act is complied with. Therefore, Section 11C is unconstitutional, and the court has the power to make any orders as may be necessary to prevent injustice or abuse of legal process, as protected by Section 4 of the CPC. The validity of the said provision is now doubted after the Federal Court ruling in the case *of Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* [2017] 5 CLJ *526* which was affirmed in the case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 3 CLJ 145.

[b] The first two above mentioned cases were relied upon by the Applicant to support the notion that section 11C is unconstitutional. In addressing the 3rd issue, I refer to the case of *Muhammad Jailani bin Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403 the Federal Court held that:

> *"[15] It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature."*

[c] I also refer to the Court of Appeal in the case of *Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 1 LNS 290 held that:

> *[7] It was submitted that the reports specified in section 6 (1) (a) and section 6 (1) (b) of the SPM Act play a very important role in making the restriction order against the appellant. The*

Minister must consider these reports before making the restriction order. They are therefore pre-conditions to the exercise of power under section 6(3) of the SPM Act. They are part of the decision making process. They amount to procedural requirements governing the exercise of the discretion by the Minister in making a restriction order within the meaning of section 11C of the SPM Act. A breach of this requirement is therefore subject to judicial review.

[d] Further, in the case of *Timbalan Menteri Keselamatan Dalam Negeri & Ors v. Ong Beng Chuan* [2006] 4 CLJ 762, the Federal Court explains the sub section 11(c)(1) as follows:

> *"[6] The resultant matter for consideration is whether the breach is subject to judicial review. A right to judicial review when there is a breach of a procedural requirement in the making of a detention order under the Act was considered by this court in Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC in the following words:*
>
> > *'The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1991] 3 CLJ Rep 649; [1991] 2 CLJ 1199; [1991] 3 MLJ 28; Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others [1992] 2 CLJ (Rep) 816 and Aw Ngoh Leang v. Inspector General of Police [1993] 1 CLJ 373; [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of*

direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements by section 11C(1) of the Act which reads as follows:

> *'There shall be no judicial review in any court of and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this act governing such act or decision'.*
>
> *It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di- Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements*

without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature'."

[e] At this juncture it is emphasized that the court has the power to make any orders as may be necessary to prevent injustice or abuse of legal process as protected by Section 4 CPC which says as follows:

"Saving of powers of High Court

4. Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court."

[f] It must be noted that the Parliament's intention in amending Act 316 by adding new section 11C and 11D is to preclude any judicial review or jurisdiction of any court over any act or decision of the Minister in the exercise of their discretionary power save in regard to questions on compliance with any procedural requirement governing such act or decision. As such, the court should give effect to the clear words of section 11C of the Act. In my view Section 11C Act 316 is an act passed by the parliament and as long as it is not repealed, the law is still in force and can still be used. In the case of *Loh Kooi*

Choon v. Government of Malaysia [1975] 1 LNS 90, it was held that the court is not the right quorum to deny parliamentary power to make laws.

[g] Based on the case of *Muhammad Jailani Kasim* (*supra*), *Kanagasingam Anantham* (*supra*) and ***Ong Beng Chuan***, it is clear that section 11C of Act 316 restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Therefore, I find that the submission by the Applicant that Section 11C Act 316 is unconstitutional does not hold water.

[11] 4th Issue: **The presence of police personnel as an interpreter during an investigation contrary to Section 5 (1) Act 316.**

[a] The Applicant submitted that Section 5 (1) of Act 316 is enacted to prevent abuse of power by the police by ensuring that the investigating officer is a knowledgeable person in law field and not someone who is not legally qualified. In this instance case, the assistance of Constable Darmaraj A/L Nageswaran has been procured to act as Tamil interpreter during the enquiry. On the other hand, the Respondent submitted that Section 5 Act 316 provides that only the investigating officer of the State cannot be appointed from the police officers or any individual who has been a police officer previously. In the Affidavit in Reply affirmed by Constable Darmaraj A/L Nageswaran, it is clear that he has only been assigned to be the interpreter to the Applicant and that the task has been properly carried out by him. Therefore such a position cannot be considered as non-compliance of Section 5 Act 316.

[b] Section 5 (1) reads:-

> *"(1) There shall be appointed by the Minister in writing such number of Inquiry Officers as may be necessary for the purposes of this Act:*
>
> *Provided that no police officer nor any person who is not legally qualified shall be appointed to be an Inquiry Officer."*

[c] From the reading of Section 5(1) Act 316, the Inquiry Officer shall be legally qualified but shall not be a police officer. There is no stipulation in section 5 as to the qualification of any interpreters to be used in the course of the inquiry conducted by the Inquiry Officer. I find that the use of a police officer as an interpreter does not contravene the provisions of section 5(1) as the Investigating Officers have complied with the statutory requirement of being legally qualified and not a police officer. The interpreter is not conducting the inquiry but the Investigation/ Inquiry Officers are. Hence, it cannot be gain said that there is contravention of Section 5(1) by the use of Constable Damaraj a/l Nageswaran as the interpreter.

[d] Further, I do not find any evidence of Constable Damaraj a/l Nageswaran having any personal interest in the subject matter of investigation and inquiry. Constable Damaraj a/l Nageswaran was merely a conduit through which the statement made by the Applicant was conveyed to the investigations/Inquiry officer. There is no evidence of bias on the part of Constable Damaraj as the interpreter. (See *Cheong See Leong v. Public Prosecutor* [1948] 1 LNS 169; [1948-49] MLJ Supp 56.*)* Additionally, the IO MHA has averred in her affidavit that the Applicant understood Malay and conversant in Tamil. The Applicant did not require an interpreter when asked but the investigation officer still provide the assistance for the interpretation/translation during the investigations and also during the inquiry. The same issue was raised *in Moganraj a/l Vijayan v. Menteri*

Dalam Negeri & 2 lagi [2016] 1 LNS 1285 and upon appeal, the decision of the High Court was affirmed by the Federal Court. Hence, I do not find any merit in this issue and therefore I consequently hold that the requirement under Section 5 Act 316 has been complied with.

[12] 5th Issue: **The Deputy Minister does not have the power to carry out the duties of the Minister of Home Affairs**.

[a] The Applicant submitted that under the Section 6(1) Act 316, only Minister, i.e. the 1st Respondent, can order to issue Detention Order and not the Deputy Minister. Section 2 Act 316, defined Minister as the Minister charge with the responsibility for internal security. The Respondent then submitted that by virtue of Article 43 (5) & (6) of the Federal Constitution, a minister (including a deputy minister) will have the power to be a minister as long as the Yang DiPertuan Agong decides to appoint him.

[b] I am unable to agree with the Applicant that the power to issue the Detention Order only vested with the Minister. Article 43A (2), the Deputy Minister shall also have the powers of Minister in discharging his related duties. The provision of Article 43 (5) and (6) are also apply to the Deputy Minister as they apply to the Minister. Therefore. I find that the issue raised by the Application is without merit.

E. CONCLUSION

[13] Based on the reasons discussed, I hold that the detention of the Applicant under subsection 6(1) of Act 316 is valid and hereby dismiss the application for a Writ of *Habeas Corpus*.

(ROZANA ALI YUSOFF)
High Court Judge
High Court Kuala Lumpur

Dated: 5 AUGUST 2019

COUNSEL:

For the applicant - Gunamalar; M/s Gunamalar Law Chambers
Suite C-3A-3A, Seri Gembira Avenue
No.6 Jalan Senang Ria, Happy Garden Kuala Lumpur

For the respondent - Adilah Roslan; Pejabat penasihat Undang-Undang, Kementerian Dalam Negeri
Aras 5, Blok D1, Kompleks D,
Pusat Pentadbiran Kerajaan Persekutuan Putrajaya

Case(s) referred to:

S. K. Tangakaliswaran v. Timbalan Menteri Dalam Negeri & Ors [2009] 6 CLJ 705

Murugan A/L Supparamaniam v. Timbalan Menteri Dalam Negeri & Ors [2010] 4 CLJ 405; [2010] 1 LNS 41; [2010] 4 MLJ 488

Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129

Lew Kew Sang v. Timbalan Menteri Dalam Negeri & Ors [2005] 3 CLJ 914

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613

Chua Teck v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1989] 2 CLJ 414

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat [2017] 5 CLJ 526

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak [2018] 3 CLJ 145

Muhammad Jailani bin Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403

Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 1 LNS 290

Timbalan Menteri Keselamatan Dalam Negeri & Ors v. Ong Beng Chuan [2006] 4 CLJ 703

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90

Cheong See Leong v. Public Prosecutor [1948] 1 LNS 169; [1948-49] MLJ Supp 56

Moganraj a/l Vijayan v. Menteri Dalam Negeri & 2 lagi [2016] 1 LNS 1285

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 5 (1), 6(1), 11C

Federal Constitution, art. 5(2)

Courts of Judicature Act 1964, s. 25(2)

Criminal Procedure Code, s. 365 (a)(ii)