MOHAMAD EZAM MOHD NOOR

v.

KETUA POLIS NEGARA & OTHER APPEALS

FEDERAL COURT, KUALA LUMPUR
MOHAMED DZAIDDIN CJ
WAN ADNAN ISMAIL PCA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
SITI NORMA YAAKOB FCJ
[BIL: 05-8-2001(W), 05-9-2001(W), 05-10-2001(W), 05-11-2001(W) & 05-12-2001(W)]
6 SEPTEMBER 2002

EVIDENCE: *Fresh or further evidence - Additional evidence - Criminal appeals, power of Federal Court to take additional evidence - Courts of Judicature Act 1964, s. 93(1) - "if it thinks additional evidence to be necessary" - Whether means additional evidence 'necessary or expedient in the interests of justice' - Requirements of 'non-availability', 'relevance' and 'reliability' - Ladd v. Marshall*

CRIMINAL PROCEDURE: *Judge - Recusal - Bias - Test to be applied - Real danger of bias test - Reasonable apprehension of bias test - Whether judge was right in refusing to recuse himself*

PREVENTIVE DETENTION: *Internal Security Act - Application and scope of - Whether enacted specifically and solely to deal with threat of communism in Malaysia - Whether to deal with all forms of subversion - Federal Constitution, art. 149 - Internal Security Act 1960, long title and preamble*

PREVENTIVE DETENTION: *Internal Security Act - Detention - Internal Security Act 1960, s. 73(1) - Exercise of discretion by police officer - Whether justiciable - Whether amenable to judicial review - Preconditions in s. 73(1), whether objective or subjective - 'Reason to believe' - Whether objectively justiciable - Whether court can examine sufficiency and reasonableness of police officer's 'reason to believe' - Whether burden on police to show compliance with preconditions in s. 73(1)(a) & (b) - Habeas corpus*

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Detention under s. 73 Internal Security Act 1960 - Total denial of access to legal representation for entire 60-day period of detention under s. 73 - Whether a breach of art. 5(3) Federal Constitution - Whether validated by art. 149 Federal Constitution - Whether Internal Security Act 1960 contains any provision proscribing access to legal representation during detention under s.* 73

PREVENTIVE DETENTION: *Internal Security Act - Detention - Right to counsel - Total denial of access to legal representation for entire 60-day period of detention under s. 73 Internal Security Act 1960 - Whether a breach of art. 5(3) Federal Constitution - Whether validated by art. 149 Federal Constitution - Whether Internal Security Act 1960 contains any provision proscribing access to legal representation during detention under s. 73*

PREVENTIVE DETENTION: *Internal Security Act - Detention - Internal Security Act 1960, s. 73 - Whether detention was for collateral or ulterior purpose - Intelligence gathering - Whether there was mala fide on part of police - Detention purportedly on grounds of militancy and threat to national security - Detainees not interrogated on alleged militant activities but on their political activities and beliefs*

PREVENTIVE DETENTION: *Internal Security Act - Application and scope of - Whether ss. 73 and 8 Internal Security Act 1960 'inextricably connected' - Whether can operate independently of each other - Whether right of non-disclosure under s. 16 applies to s. 73 - Whether right of non-disclosure under art. 151(3) Federal Constitution refers to allegations of fact or to grounds of detention - Whether art. 151(3) bars information concerning matters of national security from being disclosed to detainee or to court*

WORDS & PHRASES: *"additional evidence to be necessary" - Courts of Judicature Act 1964, s. 93(1) - Whether means additional evidence 'necessary or expedient in the interests of justice'*

WORDS & PHRASES: *"subversion" - Federal Constitution, art. 149 - Meaning of - Whether refers specifically and solely to subversion by communists*

WORDS & PHRASES: *"has reason to believe" - Internal Security Act 1960, s. 73(1) - Whether objective or subjective standard - Whether court can examine sufficiency and reasonableness of police officer's grounds of belief under s. 73(1)(a) & (b)*

The five appellants herein were political activists/reformists aligned to the former Malaysian Deputy Prime Minister, Anwar Ibrahim. (See *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215). On 11 and 12 April 2001, they were arrested and detained by the police under s. 73(1) of the Internal Security Act 1960 ('ISA'). The appellants' instant appeals to the Federal Court were from the decision of the High Court dismissing their applications for the writ of *habeas corpus* to secure their release from police detention.

At the hearing of the appeals, two preliminary issues were raised by the respondent, *viz* that: (i) the 2nd appellant's appeal was merely academic because he had since been released from police detention; and (ii) the remaining applications for *habeas corpus* ought not to have been directed against the respondent (the Inspector General of Police) but against the Minister of Home Affairs ('the Minister') because the appellants were no longer being detained by the respondent under s. 73 ISA but at the behest of the Minister under s. 8(1) ISA. Furthermore, the respondent also objected to the appellants' motions to adduce additional evidence in the instant appeals under s. 93(1) of the Courts of Judicature Act 1964 ('CJA').

The substantial issues that arose for determination were: (i) whether the High Court judge was right in refusing to recuse himself from hearing the appellants' applications for *habeas corpus*; (ii) whether the ISA was enacted (pursuant to art. 149 of the Federal Constitution) specifically and solely for the purpose of dealing with the threat of communism in Malaysia and, therefore, could not be used against the appellants; (iii) whether the preconditions in s. 73(1) ISA are objective – such that the court is obliged to examine the validity and reasonableness of the respondent's belief that there were grounds to justify the appellants' detention under s. 8 ISA and that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia; (iv) whether the total denial of access to legal representation for the appellants throughout the entire period of their detention under s. 73 ISA was a breach of art. 5(3) of the Federal Constitution; (v) whether there was *mala fide* on the part of the respondent in arresting and detaining the appellants; and (vi) the justiciability of the exercise of discretion by the police under s. 73(1)(a) and (b) ISA.

Held:
Per Abdul Malek Ahmad FCJ

[1] Since the basis for the detention orders signed by the Minister under s. 8 ISA was the outcome of the police investigations conducted on the appellants whilst they were being detained under s. 73 ISA, the

correctness of the decision of the High Court (that the appellants' detention by the police under s. 73 ISA was lawful) remained a live issue. (pp 346 g-h & 347 a)

[2] The additional evidence (comprising affidavits deposed by the appellants themselves) sought to be admitted by the appellants came within the ambit of s. 93(1) CJA in that they were 'necessary or expedient in the interests of justice'. (*Juma'at Samad v. PP* [1993] 3 SLR 338 and *Irtelli v. Squatriti & Ors* [1993] QB 83 followed). Furthermore, the evidence had satisfied the conditions of 'non-availability', 'relevance' and 'reliability' as enunciated in *Ladd v. Marshall* [1954] 3 All ER 745. (pp 348 h & 349 a-d)

[3] Applying the 'real danger of bias' test respecting the refusal of the High Court judge to recuse himself from hearing the appellants' *habeas corpus* applications, it did not appear, in the circumstances of the case, that there would be a real likelihood, in the sense of a real possibility, of bias on the part of the judge. Even if the less stringent 'reasonable apprehension of bias' test were applied, the same conclusion would have been reached. (See *Mohamad Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 which followed *R v. Gough* [1993] AC 646). (pp 349 h & 350 a-b)

[4] There is nothing in art. 149 of the Federal Constitution or in the ISA to indicate that the ISA is limited in its application to the communist threat only. Although the ISA was directed mainly against the communist activities that were prevailing at the time when it was enacted, the legislative purpose and intent of the ISA is to deal with **all** forms of subversion. Notwithstanding that the parliamentary materials and contemporaneous speeches at that time focused on the communist insurgency, the long title and the preamble to the ISA signify that it is **not** confined to the communist threat alone. (*Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 followed). (pp 359 f-h & 360 h)

[5] The elements of s. 73(1) ISA are **objective**. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* [1988] 1 LNS 162 followed). Consequently, the court is entitled to review the sufficiency and reasonableness of the respondent's reasons for believing that there were grounds to justify the appellants' detention under s. 8 ISA and that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia. From the evidence, particularly the affidavits deposed by the appellants and the respondent's affidavits

in reply thereto, it became clear that: (i) the appellants were not told of the grounds of their arrest; (ii) the police officers who arrested and detained the appellants did not really explain the reasons for their 'belief' under s. 73(1) ISA; (iii) the police officers who interrogated the appellants could only make bare assertions or denials whilst hiding under the cloak of s. 16 ISA and art. 151(3) of the Federal Constitution; (iv) the police interrogation and investigations conducted on the appellants after their arrest had **no connection** with the respondent's press statement that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia. The tenor of the questioning appeared to hinge on irrelevancy; and (v) the appellants were denied access to legal representation throughout the entire period of their detention under s. 73 ISA. For all these reasons, the appellants' detention by the respondent, purportedly under s. 73 ISA, was unlawful. (pp 367 h, 368 a-c, 369 i, 370 a-b, 378 a-b, 379 e-i & 380 a-b)

Per Siti Norma Yaakob FCJ

[1] The respondent's action in denying the appellants access to legal representation for the entire 60 days of their detention under s. 73 ISA was unreasonable and a clear violation of art. 5(3) of the Federal Constitution which violation could not be validated by art. 149 of the Federal Constitution. This denial of legal representation also supported the appellants' assertions that the ISA was being used for a collateral purpose and that there was *mala fide* on the part of the police in arresting and detaining them. Moreover, the ISA does **not** contain any provision which proscribes access to legal representation during the 60-day detention period under s. 73. (pp 387 g-h, 388 c, f-i & 389 a-b, h)

Per Mohamed Dzaiddin CJ (Federal Court)

[1] The appellants had discharged the burden of showing that their arrest and detention was not for the dominant purpose of s. 73 ISA, *ie*, to enable the police to conduct further investigations on the appellants' actions which, allegedly, were prejudicial to the security of Malaysia, but for the collateral or ulterior purpose of intelligence gathering which was wholly unconnected with national security. It was shown that despite the respondent's press statement that the appellants were detained because they were a threat to national security, the appellants were never actually interrogated on their alleged militant activities but rather on their political activities and beliefs. Hence, the exercise of the powers of detention by the respondent under s. 73(1) ISA was *mala fide* and improper. (pp 328 b-d, 331 d & 332 a-f)

Per Steve Shim CJ (Sabah & Sarawak)

[1] Sections 73 and 8 of the ISA are **not** 'inextricably connected'. Although both sections are linked, yet they can operate independently of each other. (*Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 and *Inspector General of Police v. Tan Sri Raja Khalid Raja Harun* [1988] 1 CLJ 39 departed from). Accordingly, the right of non-disclosure under s. 16 ISA, which does apply to s. 8 ISA, does **not** apply to s. 73 ISA. Further, the right of non-disclosure embodied in art. 151(3) of the Federal Constitution refers to the allegations of fact (evidential details) upon which a detention order is based and **not** to the grounds of detention, with the result that the article merely bars information concerning matters of national security from being disclosed to the detainee and **not** to the court. (pp 337 f-h, 338 a-b, h, 339 h-i, 341 a & 342 b-c, g)

[2] It follows, therefore, that the privilege of subjective judgment accorded to the Minister under s. 8 ISA is **not** extended to police officers in the exercise of their discretion under s. 73(1) ISA. The exercise of discretion by the police under s. 73(1) ISA is thus subject to the objective test and is, therefore, amenable to judicial review. The decision of the police officer, namely, whether he has the prerequisitory 'reason to believe' under s. 73(1) ISA to make the arrest and detention, is objectively justiciable. The burden is also on the police to satisfy the court that the preconditions constituting s. 73(1) ISA – which set out the jurisdictional threshold requisite to the exercise of the powers of arrest and detention – have been complied with. (*Minister of Law & Order & Ors v. Pavlicevic* [1989] SA 679 followed). From the affidavit evidence, the respondent herein had failed to discharge his burden under s. 73(1)(b) ISA, *ie*, it had failed to satisfy the court by way of material evidence that the police had sufficient 'reason to believe' that the appellants had acted or was about or likely to act in a manner prejudicial to the security of Malaysia. (pp 339 h-i, 342 h & 343 a-b, d-h)

[3] Although the court will not question the executive's decision as to what national security requires, yet it may and will examine whether the executive decision is in fact based on considerations of national security. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* [1988] 1 LNS 162 followed). (p 344 e-g)

[Appeals allowed; appellants' detention declared unlawful; writ of habeas corpus issued.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Kelima-lima perayu di sini merupakan aktivis/reformis yang bekerjasama dengan bekas Timbalan Perdana Menteri Malaysia, Anwar Ibrahim. (Lihat *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215). Pada 11 dan 12 April 2001, mereka telah ditangkap dan ditahan oleh polis di bawah s. 73(1) Akta Keselamatan Dalam Negeri 1960 ('ISA'). Rayuan-rayuan semasa perayu-perayu tersebut kepada Mahkamah Persekutuan adalah daripada keputusan Mahkamah Tinggi yang menolak permohonan-permohonan mereka untuk writ *habeas corpus* bagi menjamin pelepasan mereka daripada penahanan polis.

Pada pembicaraan rayuan-rayuan tersebut, dua isu awal telah dibangkitkan oleh responden, yakni bahawa: (i) rayuan perayu Ke-2 adalah akademik semata-mata kerana beliau telah sejak itu dilepaskan daripada penahanan polis; dan (ii) permohonan-permohonan selebihnya untuk *habeas corpus* sepatutnya tidak ditujukan terhadap responden (Ketua Inspektor Polis) tetapi terhadap Menteri Hal Ehwal Dalam Negeri ('Menteri tersebut") kerana perayu-perayu tidak lagi ditahan oleh responden di bawah s. 73 ISA tetapi atas perintah Menteri di bawah s. 8(1) ISA. Seterusnya, responden juga membantah kepada usul perayu-perayu tersebut untuk mengemukakan keterangan tambahan dalam rayuan-rayuan semasa di bawah s. 93(1) Akta Mahkamah Kehakiman 1964 ('AMK').

Isu-isu substansial yang berbangkit untuk penentuan adalah: (i) sama ada hakim Mahkamah Tinggi telah bertindak dengan betul dalam enggan untuk melepaskan dirinya daripada mendengar permohonan perayu-perayu tersebut untuk mendapatkan *habeas corpus*; (ii) sama ada ISA telah digubal (selaras dengan art. 149 Perlembagaan Persekutuan) secara khususnya dan semata-mata bagi tujuan menguruskan ugutan komunisme di Malaysia dan, oleh itu tidak boleh digunakan terhadap perayu-perayu; (iii) sama ada pra-syarat di dalam s. 73(1) ISA adalah objektif – yang sedemikian bahawa mahkamah adalah berkewajipan untuk meneliti keesahan dan kewajaran kepercayaan responden bahawa terdapatnya alasan-alasan untuk mewajarkan penahanan perayu-perayu di bawah s. 8 ISA dan bahawa perayu-perayu telah bertindak atau hampir atau berkemungkinan bertindak dengan cara yang boleh memudaratkan keselamatan Malaysia; (iv) sama ada penafian yang sepenuhnya kepada perayu-perayu tersebut untuk diwakili di sisi undang-undang sepanjang tempoh penahanan mereka di bawah s. 73 ISA merupakan suatu keingkaran akan art. 5(3) Perlembagaan Persekutuan; (v) sama ada terdapatnya *mala fide* di pihak responden dalam menangkap dan menahan perayu-perayu tersebut; dan (vi) sifat boleh dihakimi akan perlaksanaan budibicara di bawah s. 73(1)(a) dan (b) ISA.

Diputuskan:
Oleh Abdul Malek Ahmad HMP

[1] Oleh kerana dasar bagi perintah-perintah penahanan yang telah ditandatangani oleh Menteri di bawah s. 8 ISA adalah hasil daripada penyiasatan-penyiasatan polis yang dijalankan ke atas perayu-perayu tersebut ketika mereka sedang ditahan di bawah s. 73 ISA, ketepatan keputusan Mahkamah Tinggi (bahawa penahanan perayu-perayu tersebut oleh polis di bawah s. 73 ISA adalah sah di sisi undang-undang) kekal sebagai isu yang hidup.

[2] Keterangan tambahan (yang terdiri daripada afidavit-afidavit yang dideposkan oleh perayu-perayu tersebut sendiri) yang cuba dimasukkan oleh perayu-perayu tersebut adalah di dalam lingkungan s. 93(1) AMK iaitu ianya adalah 'perlu dan suai manfaat demi kepentingan keadilan'. (*Juma'at Samad v. PP* [1993] 3 SLR 338 dan *Irtelli v. Squatriti & Ors* [1993] QB 83 diikuti). Lagi pun, keterangan tersebut telah memenuhi syarat-syarat 'non-availability', 'relevance' dan 'reliability' sepertimana yang disebut dalam *Ladd v. Marshall* [1954] 3 All ER 745.

[3] Memakai ujian 'real danger of bias' keatas keengganan hakim Mahkamah Tinggi untuk melepaskan dirinya daripada mendengar permohonan-permohonan *habeas corpus* perayu-perayu tersebut, tidak kelihatan, dalam keadaan tersebut kes itu, bahawa akan berlaku kemungkinan sebenar, dalam ertikata kemungkinan yang sebenarnya, mengenai sifat berat sebelah oleh hakim tersebut. Meskipun jika ujian 'reasonable apprehension of bias' yang tidak sebegitu tegas dipakai, kesimpulan yang sama akan dicapai. (Lihat *Mohamad Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 yang mengikuti *R v. Gough* [1993] AC 646).

[4] Tidak terdapat apa-apa di dalam art. 149 Perlembagaan Persekutuan atau di dalam ISA tersebut untuk menunjukkan bahawa ISA adalah terhad dalam pemakaiannya kepada ugutan komunis sahaja. Meskipun ISA ditujukan secara utamanya terhadap aktiviti-aktiviti komunis yang menjadi-jadi ketika ianya digubal, tujuan dan niat perundangan adalah untuk menangani segala jenis bentuk subversif. Meskipun bahawa bahan-bahan parlimen dan ucapan-ucapan sezaman pada waktu itu tertumpu pada pemberontakan komunis, tajuk yang panjang serta mukadimah kepada ISA tersebut menandakan bahawa ianya tidak terbatas kepada ugutan komunis sahaja. (*Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 diikuti).

[5] Unsur-unsur s. 73(1) ISA adalah bersifat objectif. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* [1988] 1 LNS 162 diikuti). Akibatnya, mahkamah berhak untuk mengkaji semula kecukupan dan kewajaran alasan-alasan responden kerana mempercayai bahawa terdapatnya alasan-alasan untuk mewajarkan penahanan perayu-perayu tersebut di bawah s. 8 ISA dan bahawa perayu-perayu telah bertindak atau hampir atau berkemungkinan akan bertindak dengan cara yang boleh membawa kemudaratan kepada keselamatan Malaysia. Daripada keterangan tersebut, khususnya afidavit-afidavit yang dideposkan oleh perayu-perayu dan afidavit-afidavit respondan bagi menjawabnya, ianya menjadi jelas bahawa: (i) perayu-perayu telah tidak diberitahu mengenai alasan-alasan bagi penangkapan mereka; (ii) pegawai-pegawai polis yang menangkap dan menahan perayu-perayu tidak sesungguhnya menerangkan alasan-alasan bagi 'kepercayaan' mereka di bawah s. 73(1) ISA; (iii) pegawai-pegawai polis yang menyoal-siasat perayu-perayu hanya boleh membuat penafian-penafian atau penegasan-penegasan kosong belaka sambil berselindung di bawah s. 16 ISA dan art. 151(3) Perlembagaan Persekutuan; (iv) soal-siatan dan penyiasatan-penyiasatan polis yang telah dijalankan ke atas perayu-perayu tersebut selepas penangkapan mereka tiada kaitan dengan kenyataan akhbar responden bahawa perayu-perayu telah bertindak atau hampir atau berkemungkinan bertindak dengan cara yang boleh memudaratkan keselamatan Malaysia. Tujuan penyoalan tersebut nampaknya berhubung dengan perkara yang tidak relevan; dan (v) perayu-perayu dinafikan akses untuk diwakili di sisi undang-undang sepanjang tempoh penahanan mereka di bawah s. 73 ISA. Atas kesemua alasan-alasan ini, penahanan perayu-perayu tersebut oleh responden, kononnya di bawah s. 73 ISA, adalah salah di sisi undang-undang.

Oleh Siti Norma Yaakob HMP

[1] Tindakan responden dalam menafikan perayu-perayu untuk mendapatkan akses bagi diwakili di sisi undang-undang selama 60 hari keseluruhannya akan penahahan mereka di bawah s. 73 ISA adalah tidak wajar dan suatu perlanggaran yang nyata akan art. 5(3) Perlembagaan Persekutuan yang tidak boleh disahkan oleh art. 149 Perlembagaan Persekutuan tersebut. Penafian untuk diwakili di sisi undang-undang juga menyokong penegasan perayu-perayu bahawa ISA digunakan bagi satu tujuan kolateral dan bahawa terdapatnya *mala fide* di pihak polis dalam menangkap dan menahan mereka. Lagipun, ISA tidak mengandungi sebarang peruntukan yang melarang akses kepada representasi undang-undang ketika tempoh penahanan selama 60 hari di bawah s. 73.

Oleh Mohamed Dzaiddin KHN

[1] Perayu-perayu telah melepaskan bebanan untuk menunjukkan bahawa penangkapan dan penahanan mereka bukannya untuk tujuan dominan s. 73 ISA, iaitu, untuk membolehkan polis menjalankan penyiasatan-penyiasatan selanjutnya ke atas tindakan-tindakan perayu-perayu tersebut yang mana di dakwa memudaratkan keselamatan Malaysia, tetapi bagi tujuan kolateral atau tujuan tersembunyi berhubung dengan perhimpunan risikan yang mana sesungguhnya tiada kaitan dengan keselamatan negara. Adalah ditunjukkan bahawa meskipun kenyataan akhbar responden bahawa perayu-perayu telah ditahan kerana mereka merupakan ugutan kepada keselamatan negara, perayu-perayu tersebut sebenarnya tidak pernah disoal-siasat mengenai aktiviti-aktiviti militan mereka yang didakwa itu tetapi sebaliknya mengenai aktiviti-aktiviti dan kepercayaan politik mereka. Oleh itu, perlaksanaan kuasa-kuasa penahanan oleh responden di bawah s. 73(1) ISA adalah *mala fide* dan tidak wajar.

Oleh Steve Shim HB (Sabah & Sarawak)

[1] Seksyen-seksyen 73 dan 8 ISA tidaklah 'inextricably connected'. Walaupun kedua-dua seksyen tersebut dikaitkan, namun mereka boleh beroperasi secara bebas dari satu dengan yang lain. (*Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 dan *Inspector General of Police v. Tan Sri Raja Khalid Raja Harun* [1988] 1 CLJ 39 tidak diikuti). Sehubungan itu, hak ketidak-dedahan di bawah s. 16 ISA, yang mana sesungguhnya terpakai s. 8 ISA, tidak boleh dipakai pada s. 73 ISA. Selanjutnya, hak ketidak-dedahan yang termaktub di dalam art. 151(3) Perlembagaan Persekutuan tersebut merujuk kepada dakwaan-dakwaan fakta di atas yang mana satu perintah penahanan diasaskan dan bukan kepada alasan-alasan penahanan, yang bererti artikel tersebut hanya menghalang maklumat berhubung dengan perkara-perkara keselamatan negara daripada didedahkan kepada tahanan dan tidak kepada mahkamah.

[2] Di susuli, dengan itu, keistimewaan penghakiman subjektif yang diberikan Menteri di bawah s. 8 ISA tidak boleh dilanjutkan kepada pegawai-pegawai polis dalam melaksanakan budibicara mereka di bawah s. 73(1) ISA. Perlaksanaan budibicara oleh polis di bawah s. 73(1) ISA adalah dengan itu tertakluk kepada ujian objectif dan oleh itu boleh dikaji semula oleh sebuah mahkamah undang-undang. Keputusan pegawai polis tersebut, iaitu, sama ada beliau mempunyai 'reason to believe' yang diperlukan di bawah s. 73(1) ISA untuk

membuat penangkapan dan penahanan tersebut, adalah menurut matlamat boleh dihakimi. Bebanan adalah juga terletak pada pihak polis untuk meyakinkan mahkamah bahawa syarat-syarat awal yang membentuk s. 73(1) ISA – yang membentangkan takat bidangkuasa yang diperlukan untuk melaksanakan kuasa-kuasa penangkapan dan penahanan – telah pun dipatuhi. (*Minister of Law & Order & Ors v. Pavlicevic* [1989] SA 679 diikuti). Daripada keterangan afidavit, responden di sini telah gagal melaksanakan bebanannya di bawah s. 73(1)(b) ISA, iaitu, ianya telah gagal meyakinkan mahkamah melalui keterangan material bahawa polis mempunyai 'reason to believe' yang mencukupi bahawa perayu-perayu tersebut telah bertindak atau hampir atau berkemungkinan akan bertindak dengan cara yang boleh memudaratkan keselamatan Malaysia.

[3] Meskipun mahkamah tidak akan menyoal keputusan eksekutif tersebut berhubung dengan apakah yang diperlukan oleh keselamatan negara, namun ianya akan menentukan sama ada keputusan eksekutif itu adalah pada hakikatnya berdasarkan pertimbangan-pertimbangan keselamatan negara. (*Chng Suan Tze v. The Minister of Home Affairs & Ors* [1988] 1 LNS 162 diikuti).

Rayuan-rayuan dibenarkan, penahanan diisytiharkan salah di sisi undang-undang; writ habeas corpus dikeluarkan.]

Case(s) referred to:

Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 ***(refd)***

Assa Singh v. Menteri Besar, Johore [1969] 2 MLJ 30 ***(refd)***

Castorina v. Chief Constable of Surrey (unreported) (Archbold's Criminal Pleading, Evidence and Practice, 1993, vol 1, paras 15-144) ***(refd)***

Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals [1988] 1 LNS 162 ***(foll)***

Constitutional Reference No 1 of 1995 [1995] 2 SLR 201 ***(refd)***

Council of Civil Service Unions & Ors v. Minister For The Civil Service [1985] 1 AC 374 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 ***(refd)***

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Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129 ***(not foll)***
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MP Jain, *Administrative Law of Malaysia & Singapore,* 3rd edn, p 647

For the appellants - Sulaiman Abdullah (Sivarasa Rasiah, Christopher Leong, Malik Imtiaz Sarwar & Moganambal Murugappan); M/s Daim & Gamany
For the respondent - Dato' Seri Ainum Said AG & Dato' Abdul Gani Patail A-G (Dato' Azahar Mohamed, Mohd Yusof Zainal Abiden, Dato' Mary Lim Thiam Suan, Tun Abdul Majid Tun Hamzah & Kamaluddin Mohd Said SDPPs); AG's Chambers
Watching brief for Bar Council - Roy Rajasingam (Low Beng Choo)

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-15-2001]

Reported by Gan Peng Chiang

JUDGMENT

Mohamed Dzaiddin CJ:

This is an appeal by the appellants against the decision of the High Court Kuala Lumpur given on 25 April 2001 refusing to grant the writ of *habeas corpus* for their release. The appellants who were Reformasi activists were arrested and detained on 10 and 11 April 2001 under s. 73 of the Internal Security Act 1960 (the ISA).

There are several grounds of appeal put forward on their behalf contending that their arrest and detention are illegal. Leading counsel for the appellants has categorised them under five main heads. Each one of us will deal with the issues raised by counsel in our separate judgments.

To avoid any repetition, my learned brother, Abdul Malek FCJ has set out the chronology of events and the preliminary issues in his judgment.

I shall deal with the issue of *mala fides* raised by Tuan Haji Sulaiman.

In The High Court

The learned trial judge approached this issue by questioning whether the applicants have made out a case of *mala fide* against the respondent. In his Lordship's view this requires a consideration of whether the detention was made in bad faith and not the sufficiency of the grounds of detention.

The material parts of the respondent's affidavit disclosing the reasons for the detention read:

> 5. Pada akhir tahun 2000 aktivis reformasi telah membuat ketetapan untuk menggunakan dua pendekatan berikut bagi mencapai matlamat mereka:
>
> 5.1 Akan terus melibatkan diri dalam proses demokrasi yang normal serta system pilihanraya; dan
>
> 5.2 melalui cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militan menjelang Pilihanraya umum 2004.
>
> 6. Ke arah merealisasikan perancangan tersebut, satu kumpulan sulit yang dianggotai oleh lebih kurang 20 orang aktivis reformasi telah diwujudkan di KUALA LUMPUR. Sejak 6 JANUARI 2001 hingga 4 APRIL 2001, sebanyak 12 perjumpaan sulit telah diadakan oleh kumpulan ini bagi merancang untuk mempengaruhi rakyat membudayakan demonstrasi jalanan

dan perhimpunan kaum secara militan. Antara perancangan terpenting gerakan reformasi dalam masa yang terdekat ini adalah untuk menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di KUALA LUMPUR pada 14 APR 2001. Bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' di mana mereka merancang untuk mengumpulkan seramai lebih kurang 50,000 orang yang akan berhimpun di sekitar Kuala Lumpur. Perhimpunan serta perarakan ini berpotensi menjadi rusuhan.

7. Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka. Oleh itu tindakan di bawah sek. 73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah Sek. 8 AKDN 1960 kerana telah bertindak dengan cara yang memudharatkan keselamatan negara.

The motion for writ of *habeas corpus* was supported by an affidavit of Bahirah binti Tajul Aris, the wife of the 1st appellant. Apparently, parties agreed that arguments before the trial judge was based on the motion of the 1st appellant with the result binding on the other appellants. The relevant parts of her affidavit read:

11. Saya diberi sesalinan kenyataan akhbar bertarikh 11 April 2001 bertajuk "kenyataan Akhbar mengenai Penangkapan di bawah Akta Keselamatan Dalam Negari (AKDN) 1960" yang dikeluarkan oleh Responden kononnya sebagai alasan-alasan untuk tangkapan dan tahanan Pemohon dan enam orang yang lain. Sesalinan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda "BTA-2".

12. Kenyataan akhbar itu menuduh bahawa Pemohon terlibat dalam kegiatan yang boleh memudaratkan keselamtan negara dan telah bertindak secara militan dengan mengambil pendekatan seperti berikut:

a. telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher",

b. menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru hara semasa demonstrasi jalanan di sekitar Kuala Lumpur pada OKT 1998; dan

c. mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan untuk menyertai gerakan mereka.

Kenyataan akhbar juga menuduh bahawa Pemohon telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu keagamaan dan perkauman.

13. Saya berkata bahawa semua pengataan-pengataan ini dan tuduhan-tuduhan lain dalam eksibit BTA-2 adalah tidak benar dan adalah pembohongan yang dibuat oleh pihak Responden dengan niat *mala fide* yang bermotif politik. Pendirian saya disokong oleh kenyataan akhbar oleh Presiden Parti Rakyat Malaysia, Dr. Syed Husin Ali bertarikh 11 April 2001 bertajuk "Police tell lies to save Prime Minister." Sesalinan benar kenyataan akhbar tersebut ditunjuk kepada saya bertanda "BTA-3"

14. Di dalam kenyataan akhbar oleh pihak Responden, juga disebut bahawa Pemohon telah merancang perhimpunan haram yang militan pada 14 April 2001. Ini juga adalah satu pembohongan. Saya telah diberi surat-suratan di antara Jawatankuasa Memorandum Rakyat 14 April dan pihak SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) di mana adalah jelas bahawa perhimpunan itu bertujuan untuk menghantar satu memorandum kepada SUHAKAM. Jawatankuasa itu telah secara telus dan bersopan mengaturkan satu appointment dengan SUHAKAM untuk penyerahan itu. Sesalinan benar surat-suratan ini bertarikh 30 Mac dan 11 April ditunjuk kepada saya bertanda "BTA-4"."

The respondent in his affidavit in reply admitted to issuing the press statement and avers as follows:

6. Saya merujuk kepada perenggan 12 Afidavit Bahirah dan saya menyatakan bahawa kegiatan-kegiatan yang dimaksudkan itu tidak merujuk secara khusus kepada Pemohon tetapi merujuk kepada "Gerakan Reformasi" yang mana Pemohon adalah seorang ahli aktivis gerakan berkenaan.

7. Saya menafikan segala dakwaan-dakwaan yang terkandung di dalam perenggan 13 Afidavit Bahirah dan **menyatakan bahawa penangkapan pemohon bukan berniat *mala fide* yang bermotif politik tetapi adalah berkaitan dengan Pemohon yang boleh menggugat keselamatan negara.** (emphasis added)

8. Dakwaan-dakwaan yang terkandung di dalam perenggan 14 Afidavit Basirah adalah tidak benar dan dinafikan. Saya dengan sesungguhnya mempercayai bahawa perkara-perkara yang didakwakan olehnya adalah di Iuar pengetahuannya dan selanjutnya saya mengulangi apa yang saya telah katakan di dalam perenggan 6 kenyataan akhbar saya yang bertarikh 11/4/01.

The learned judge in dismissing the application held that the appellant had been arrested and detained in the exercise of a valid power. The learned judge also held that the requirements of s. 73(3)(a) and (b) have been complied with in authorising the further detention of the appellant and that

the detention orders showed that the officers concerned have applied their minds in authorising the detention.

Section 73(3)(a) and (b) provides:

> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

The learned judge had also considered whether the facts disclosed in the press statement are sufficient to enable him to conduct an objective test on the validity of the arrest and detention of the appellants. He was of the view that the press statement was only a partial disclosure and therefore it was not possible for him to ascertain whether the arrest and detention of the appellants were justified.

The learned judge was of the view that the facts disclosed in the press statement are not exhaustive and not in great detail rendering it impossible for him to apply the objective test.

For the above reasons, he was satisfied that the appellants had not discharged the burden on them to show that the respondent acted *mala fide* in their arrest and detention.

In This Court

Before us, Tuan Haji Sulaiman Abdullah raised the issue of *mala fides* on the following grounds:

1. Interrogation and investigation while in detention made no reference to the respondent's press statement against them. There were also long hours of interrogation.

2. Questions were not asked in relation to the alleged militant action. Appellants were subjected to intimidation and abuse.

3. Interrogations were on:

(a) political views

(b) involvement in creating turmoil/disturbances

(c) Dato' Seri Anwar Ibrahim's sexual activities

(d) opposition parties and their leaders

(e) sexual allegations

(f) street demonstrations

(g) Lunas by-election

(h) Source of funding of Keadilan

The appellants relied on the following affidavits, for which leave was granted on 6 August 2001 to adduce them as evidence in this appeal:

i) affidavit affirmed by Mohamed Ezam bin Mohamad Noor on 4 July 2001, (Ezam's affidavit);

ii) affidavit affirmed by Chua Tian Chang on 4 July 2001 (Chua's affidavit);

iii) affidavit affirmed by Hishamudin bin Rais affirmed on 4 July 2001 (Hishamudin's affidavit);

iv) affidavit affirmed by Saari bin Sungib on 4 July 2001 (Saari's affidavit);

v) further affidavit jointly affirmed by Mohamed Ezam bin Mohamed Noor; Chua Tian Chang, Saari bin Sungib and Hishamuddin bin Mohd Rais on 31 July 2001.

In essence, the facts deposed in the above-mentioned affidavits relate to the questions upon which they were interrogated; the conditions of the detention places and the manner in which the deponents were treated whilst under detention.

It was the contention of Haji Sulaiman that the respondent despite the direction of the court to file detailed affidavits by persons involved in the interrogation of the appellants merely filed general affidavits without condescending to particulars and without stating whether they had direct or personal knowledge of the events. Counsel submitted that the affidavits of the five deponents were hearsay.

Secondly, counsel submitted that the replies to the appellants' depositions were essentially bare denials and did not amount to credible denial.

Thirdly, he pointed out that the appellants' affidavits stated that the line of questioning during interrogations was not related to the issue that they were threats to national security and these questions were clearly unrelated to the key allegations in the respondent's press statement.

It was finally submitted that the detention was *mala fide*.

For the respondent, it was submitted that the purpose of detention under s. 73(1) ISA is to enable the police to conduct investigation in order to:

(a) gather more information in relation to the appellants' act and conduct which are prejudicial to the security of Malaysia;

(b) ascertain whether based on the information gathered, there would be grounds to justify the detention under s. 8 ISA and to report the same to the Minister.

As such, learned senior deputy Public Prosecutor submitted that, the interrogations on the appellants' political views; involvement in creating turmoil and disturbances; street demonstration; Lunas by-election and the source of funding of Keadilan would be relevant for the purposes of investigation. He relied on *De Smith's on Judicial Review of Administrative Action*, 4th edn where the author formulated five tests to determine the validity of a particular administrative action. The tests are as follows:

(i) what was the purpose for which the power was exercised?

(ii) what was the dominant purpose for which the power was exercised?

(iii) would the power still have been exercised if the actor had not desired concurrently to achieve an illicit purpose?

(iv) was any of the purposes pursued an authorised purpose?

(v) was any of the purposes pursued an unauthorised purpose?

Applying the subjective test and the first four tests enumerated above, senior deputy Public Prosecutor urged the court to hold that the arrest and detention of the appellants are lawful; that while on the face of it the interrogations relating to matters enumerated above may be irrelevant to national security and may be for the purposes other than the purpose intended under s. 73(1) ISA, the application of the subjective test and the four tests referred to above precluded the court from holding that the interrogations are not relevant for the purpose as intended in s. 73(1) ISA.

Finally, it was submitted that while the interrogations on those matters which appear to be irrelevant might possibly reflect some suspicion of *mala fide*, it cannot be taken for granted or considered sufficient proof by itself of *mala fide*. Further, merely being questioned on some matters which appear irrelevant to national security cannot by itself amount to *mala fide*.

In his reply, Haji Sulaiman submitted that the formulation as stated by the senior deputy Public Prosecutor with respect to the purpose of s. 73 ISA was incorrect. It would in fact allow the police to detain an individual for the purpose of building a case against the individual. This is not correct as by a clear reading of s. 73(1)(a) and (b), at the time of the arrest, the arresting police officer must have already come to a conclusion that the individual was a threat to national security. Investigations are then carried out for the purpose of ascertaining whether the individual will continue as a threat to national security. This is the dominant purpose of s. 73. This analysis of s. 73(1)(a) and (b) had been conceded by senior deputy Public Prosecutor Mohd. Yusof Zainal Abiden. As such, arresting the individual merely for the purpose of gathering intelligence with a view to detaining the person is not authorised under the ISA, or any other legislation for the matter. Counsel stressed that arresting an individual for that purpose is as such clearly illegal and outside the scope of s. 73.

Haji Sulaiman pointed out that senior deputy Public Prosecutor Dato' Azahar conceded on 6 August 2001 that the questions were asked for the purpose of intelligence gathering. He said this in denying that the questioning was *mala fide*. It follows that the appellants were arrested to allow the police to gather information. If so, by Dato' Azahar's own concession, the detention (for the purpose of questioning) was clearly outside the scope of the dominant purpose of s. 73.

With respect to *De Smith*'s formulation, Haji Sulaiman agreed that if a power is granted for one purpose is exercised for a different purpose that power has not been validly exercised. He however submitted that the five tests were incorrectly set out by the learned senior deputy Public Prosecutor and that the collateral purpose was the true purpose. It was further submitted that on the basis of each of the five tests, as well as on a consideration of their combined effect, the purported exercise of power under the ISA to arrest the appellants was an invalid exercise of power. He relied on what *De Smith* said at p. 333, "an improper motive or purpose may if it affects the quality of the act, have the effect of rendering invalid what is done".

Counsel also adopted what is stated at p. 334, "if a *prima facie* case of abuse of power by a public authority has been established, the failure of that authority to adduce any evidence in reply from which it can reasonably be inferred that the avowed purposes had in fact been pursued may lead a court to the conclusion that they have not been genuinely pursued". *a*

In reply to the submission on behalf of the respondent that the subjective test applies and that the court is precluded from holding that the interrogations are irrelevant for the purpose of s. 73(1) ISA, Haji Sulaiman urged us to depart from *Theresa Lim Chin Chin & Ors v. Inspector General of Polis* [1988] 1 CLJ 39; [1988] 1 CLJ (Rep) 135 and *Inspector General of Polis v. Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 and adopt the objective test as set out in *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162. *b* *c*

I pause to say that I have had the advantage of reading the draft judgment of Abdul Malek FCJ and I agree entirely with his view that the test for s. 73 ISA is an objective test following *Chng Suan Tze (supra)* and as such I can examine the various affidavits for the purpose of determining *mala fide* on whether the power under s. 73 was exercised improperly by the respondent. *d*

Ezam's affidavit avers *inter alia* that he was questioned on his political stand and the reasons why he opposed Dr. Mahathir, UMNO and Barisan Nasional. He also deposed that he was asked about his meeting with ASEAN leaders and that the police who interrogated him wanted to find out the strength of valid, international, political and diplomatic relationships that did not involve violence at all. Ezam's affidavit further deposed that the police were trying to gauge the strength or influence of Barisan Alternatif political parties and that it was no longer the question of national security. *e* *f*

Ezam's affidavit further deposed that he was interrogated on his financial resources; the party's financial resources; Datin Seri Wan Azizah bt. Wan Ismail's financial resources; attempts to split party leadership; other Barisan Alternative's parties problems; Barisan Alternative's plans; the financial sources during the 1999 general election and Lunas by-election; party and party youth wing structure; the *Dato' Seri Anwar Ibrahim*'s case; and questions concerning UMNO – the influence of Dato' Seri Anwar in UMNO. It was further averred that the interrogation party had asked the appellant to abandon Dato' Seri Anwar and that he could remain in the party but can no longer raise or fight issues about the injustice against Dato' Seri Anwar; that this issue was amongst the main focus of the interrogation on the appellant. (Para 39 & 40 of Ezam's affidavit refers) *g* *h* *i*

Vide para. 32 of the affidavit, Ezam avers *inter alia* that he was being interrogated continuously by a group of seven interrogating officers, beginning about 8 until 4 to 5 in the morning for two days running and they would begin again about 10am until 3 the next day.

At para. 47 of the affidavit he stated *inter alia*, that at all times of his detention, he was never cleanly informed of the details on why he was detained. Rather throughout the detention and interrogation period, he thought that he was detained because of his political beliefs, programmes and public awareness activities for the nation through political rallies held by parties in Barisan Alternative or political threats to Prime Minister, UMNO and Barisan Nasional, and not for the reasons stated by the Inspector General of Police in the press conference dated 11 April 2001.

Chua's affidavit avers *inter alia* that he was never told of the grounds or reasons for his arrest and detention; that his arrest and detention was a mere "fishing exercise" and politically motivated, all of which had nothing to do with national security. Chua's affidavit further states that he was asked about the opposition's strategy when it won the Lunas by-election; the Teluk Kemang by-election and why he joined Keadilan. He was also asked to state his views about the political situation in Malaysia; meritocracy, Malay rights and the Barisan Nasional government.

The Law

I need to rely only on two authorities.

(1) *Basu's Commentary on the Constitution of India*, 15th edn, vol. 2 p. 153 states:

> An order of detention is *mala fide* if it is made for a 'collateral' or 'ulterior' purpose, i.e. a purpose other than what the Legislature had in view in passing the law of preventive detention (i.e., prevention of acts prejudicial to the security of the State, maintenance of public order and so on). There is a *mala fide* exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of the law itself, or when it appears that the authority making the order did not apply his mind to it at all, or made it for a purpose other than that mentioned in the detention order.
>
> The question of *mala fides* has to be decided with reference to the facts of each case and the observations in one case cannot be regarded as a precedent in dealing with other cases.
>
> The onus of proving *mala fides* is upon the detenu, and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

(2) *In Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs Malaysia & Ors* [1975] 2 MLJ 279 it was held, *inter alia*, that (1) the onus of proving *mala fide* on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper on bad motive in order to invalidate the detention or order for *mala fide* and not mere suspicions and (2) where an order of detention is challenged on the ground of *mala fide*, what has got to be made out is not the want of *bona fide* on the part of the police, but the want of *bona fide* as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police.

Conclusion

The question for decision here is whether on the facts and circumstances of the case the appellants have dischanged the burden of showing that the respondent acted *mala fide* in their arrest and detention.

The thrust of the appellants' contention in this case is that the exercise of the powers of detention by the respondent under s. 73(1) ISA is *mala fide* and improper because from the evidence and circumstances of the case, their arrest and detention was not for the dominant purpose of s. 73 ie, to enable the police to conduct further investigation regarding the appellants' acts and conduct which are prejudicial to the security of Malaysia, but merely for intelligence gathering which is unconnected with national security.

My first observation is that despite the press statement of the respondent that the appellants were detained because they were a threat to national security, it is surprising to note from the appellants' affidavits that they were not interrogated on the militant actions and neither were they questioned about getting explosive materials and weapons. Clearly, from the affidavits which I highlighted above, the questions that were asked were more on the appellants' political activities and for intelligence gathering. I find that there is much force in the contention of learned counsel for the appellants that the detentions were for the ulterior purpose and unconnected with national security.

Secondly, the affidavits in reply affirmed by the five officers of the interrogating teams failed to state that they were directly involved in the interrogations as there were no details of them involvement. They also have not deposed that they had personal knowledge of the questions asked of the appellants. Their affidavits appear to be in the same format. Based on the above factors, it is safe to conclude that they are hearsay.

Thirdly, it is to be noted that the replies deposed by these officers to the averments of the appellants in their respective affidavits are bare denials. Here, I agree with Haji Sulaiman that the affidavits are grossly inadequate and cannot by any stretch of imagination amount to a credible denial on a credible rebuttal of the specific averments of the appellants that they were detained because of their political beliefs and not because they were a threat to national security.

Fourthly, in the context of the above observation on the quality of the respondent's affidavits in reply, I would adopt the statement in *De Smith*, at p. 334, that "if a *prima facie* case of abuse of power by a public authority has been established, the failure of that authority to adduce any evidence in reply from which it can reasonably be inferred that the avowed purposes had in fact been pursued may lead a court to the conclusion that they have not been genuinely pursued".

"*Mala fide* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose ie, for a purpose other than the purpose for which it is professed to have been exercised" per Peh Swee Chin J, (as he then was) in *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468, 473. It is in this context that I am satisfied that the appellants have discharged the burden of proving *mala fide* on the part of the respondent. In my judgment, the appellants have succeeded in showing that the respondent had acted *mala fide* in their arrest and detention under s. 73 ISA.

Accordingly, I would allow these appeals and issue the writ of *habeas corpus* for the appellants to be set at liberty and be released.

Lastly, with respect to the remaining grounds of appeal, I have had the opportunity of reading the draft judgments of my learned brothers, Steve Shim CJ Sabah & Sarawak and Abdul Malek FCJ and my learned sister, Siti Norma FCJ and I agree with the reasons and conclusion.

Steve Shim CJ (Sabah & Sarawak)

The Threshold Issue

I have read the judgments in draft of the learned Chief Justice Mohamed Dzaiddin and my learned brother Abdul Malek FCJ as well as my learned sister Siti Norma FCJ. Subject to what I have to say hereafter, I agree with their reasons and conclusions on the issues raised in these appeals. There is one significant point I need to elaborate on. This relates to the threshold

issue of the reviewability or justiciability of the exercise of discretion under s. 73(1)(a) and (b) of the Internal Security Act 1960 (hereafter "the Act"). For completeness, the whole s. 73 states:

> 73 (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudice to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.
>
> (4)-(5) (Repealed).
>
> (6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer.

(7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

On this issue, I will take the same approach as Wee Chong Jin CJ Singapore in *Chng Suan Tze v. The Minister Of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162 and examine it from two perspectives, namely, (a) whether the objective or the subjective test applies to the exercise of discretion under s. 73(1) of the Act; and (b) the effect of national security considerations on the reviewability of such discretion.

Whether Objective Or Subjective Test Applies

In construing the words "reason to believe" in s. 73(1), the learned High Court judge has adopted the subjective test in line with the two Federal Court decisions in *Re Tan Sri Raja Khalid bin Raja Harun* [1988] 1 CLJ 39; [1988] 1 CLJ (Rep) 135 and *Theresa Lim Chin Chin & Ors v. Inspector General Of Police* [1988] 1 MLJ 293. To better appreciate the propositions advanced in those cases, I find it necessary to highlight in extenso, the relevant passages therein. In *Re Tan Sri Raja Khalid (supra)*, Salleh Abbas, LP said *inter alia*:

The arrest and detention under section 73(1) is pending enquiries to see if an order under section 8 should be made by the Minister. It is clear from the language of the two sections that section 73 provides for the initial detention and cannot be divorced from section 8 of the Act which provides for the final detention.

And he later stated:

In simple language, what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines 'reason to believe' to mean 'sufficient cause to believe'. Who then is to decide what is sufficient cause under section 73(1) of the Act? That is the crux of the matter.

We hold that since section 73(1) and section 8 of the Act are so inextricably connected, the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under section 73(1).

This proposition was restated and expanded by Salleh Abbas LP in *Theresa Lim (supra)* as reflected in the following passages of his judgment:

Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under section 73 could be separated from the ministerial power to issue an order of detention under section 8. We are of the opinion that there is only one preventive detention and that is based on the order to be made by the Minister under section 8. However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police is entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under section 8. There can be no running away from the fact that the police power under section 73 is a step towards the ministerial power of issuing an order of detention under section 8, which the Attorney-General referred to as the initial stage in the process of leading to preventive detention. ...

It is clear from these provisions of the Constitution, and of the ISA, that the intention of the framers of the Constitution is that judges in the matter of preventive detentions relating to the security of the Federation are the executive. This is further supported by clause (3) of Article 151, which says that the Article does not impose an obligation on 'any authority' – a term much wider than "the authority on whose order any person is detained" – to disclose facts, whose disclosure would in its opinion be against the national interest. The authority here, in our view, includes those with powers dealing with preventive detention, not only the Minister and his staff but ... also the police who are involved in arresting and detaining a person pending the enquiry under section 73 of the Act ...

To show further that evidence or information relating to arrests and detentions, either at the initial stage, or in pursuant to a ministerial order, is excluded from public disclosure is section 16, which says that the Minister or any member of an Advisory Board or any public servant shall not be required to disclose facts or to produce documents which he considers to be against the national interest to disclose. Encik Sri Ram contended that this section is only confined to the provision of 'this chapter', and since the chapter under which section 16 is enacted is preventive detention pursuant to a ministerial order under section 8, it therefore cannot apply to the arrest at the initial stage pursuant to police power under section 73. This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under section 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under section 8, but nevertheless, it is within one scheme of the preventive detention legislation.

From the excerpts above, it seems clear that both *Re Tan Sri Raja Khalid* and *Theresa Lim* are decided principally on the basis that s. 73(1) and s. 8 are inextricably linked and as such, s. 16 of the Act which expressly applies to s. 8, should, by implication, also apply to s. 73(1), thereby giving rise to a situation where the court would be precluded from inquiring into the existence and/or sufficiency of the grounds under the section aforesaid. On that basis and reinforced by the provisions of cl. (3) of art. 151 of the Constitution, they hold that the subjective test should apply in determining the words "reason to believe" in s. 73(1). Everything, it seems, turns upon this inextricable connection between s. 73(1) and s. 8. Thus, it becomes an issue for consideration.

By "inextricably connected" I would take it to mean that s. 73(1) and s. 8 are wholly dependant on each other – that there has to be a police investigation under s. 73 before the Minister can properly exercise his discretion to issue a detention order under s. 8 or conversely, that no detention order under s. 8 can properly be issued by the Minister without the necessary investigation by the police under s. 73. In my view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the Minister. It would mean that the Minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s. 73. What matters of national interest are infinitely varied. So are matters of national security of the State. These are the concerns of the Minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may well be other public considerations of a political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s. 73 may stop short of submission or reference to the Minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the Minister. Does it then follow that the powers of the Minister under s. 8 have become impotent and stagnant?

Clearly, if it was the intention of Parliament to impose a mandatory obligation on the part of the Minister to consider the police investigation under s. 73 before he could issue a detention order under s. 8, Parliament would have expressly provided for it as she did in the Dangerous Drugs (Preventive Measures) Act 1985, wherein s. 3(1) states:

3(1). Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.

And s. 6(1) states:

6(1) Whenever the Minister, after considering:

(a) the complete report of investigation submitted under subsection (3) of section 3; and

(b) the report of the Inquiry Officer submitted under subsection (4) of section 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order') direct that such person be detained for a period not exceeding two years from the date of such order.

Quite clearly, in the case where the Minister is deciding whether or not to issue a detention order under the Dangerous Drugs (Preventive Measures) Act, he has to consider the police investigations or reports submitted to him. There is a mandatory obligation for him to do so. Such express provisions are conspicuously absent in s. 8 or s. 73 of the Act.

Examined in the context stated, it must mean that although s. 73(1) and s. 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s. 73(1) and *vice versa*. In the circumstances, it cannot therefore be said that they are "inextricably connected". In this respect, I must, with the greatest respect, defer from the view expressed in *Re Tan Sri Raja Khalid* and *Theresa Lim*.

Section 16 Of The Act

Given the conclusion above, the applicability of s. 16 to s. 73(1) becomes untenable. Section 16 states:

Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of the Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

The learned High Court judge, following the decisions in *Re Tan Sri Raja Khalid* and *Theresa Lim*, takes the view that the right of non-disclosure under s. 16 makes the test under s. 73(1) a subjective one. Here, I think it is important to note the actual wording in s. 16. It is expressly stated to be applicable only in relation to Chapter II, Part II of the Act. To read it as applying to s. 73 which falls under Part IV would clearly be contradicting the expressed intention of Parliament. It is interesting to note that this line of argument was canvassed before the Federal Court in *Theresa Lim*. In rejecting it, Salleh Abbas LP said this:

> This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under section 73. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under section 8, but nevertheless, it is within one scheme of the preventive detention legislation.

In my view, it must surely be a matter of common sense that any detention involves the restriction or curtailment of the liberty of an individual. Any detention order must necessarily result in the deprivation of freedom without trial and constitutes a serious transgression upon the fundamental liberty of a person. So serious indeed that Abdoolcader J in *Yeap Hock Seng v. Minister Of Home Affairs, Malaysia* [1975] 2 MLJ 279 was prompted to say at p. 281:

> The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State Ex Rel. Evans v. Broaddus* that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

Under s. 73(1), a person can be arrested and detained by the police pending enquiries for a maximum period of 60 days. This is quite different from the detention effected by order of the Minister under s. 8 which may extend to two years. Quite clearly, there are two separate detentions involved although they may conceivably fall within one scheme of the preventive detention legislation.

I pause here for a moment to reflect on that illuminating observation by Suffian FCJ (as he then was) in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129 when he said:

> Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of the Minister responsible to and accountable in Parliament, not to mere officials.

The highest authority referred to therein was the Yang di-Pertuan Agong. This was the position before the amendment to s. 8 was effected by the Internal Security (Amendment) Act 1971 (Act A61) which came into effect on 1 September 1971. It was the Yang di-Pertuan Agong who would issue the detention order through the Minister under s. 8 if satisfied that detention was necessary. In this connection, case authorities have taken the subjective test approach. In all of them, the detaining authority had been the Minister or the equivalent, someone representing the highest echelons of the executive and not mere officials. Indeed, Viscount Maugham had, as far back as 1942, sounded the alarm when he said in *Liversidge v. Sir John Anderson & Anor* [1942] AC 206 at p. 222:

> ... It is to be noted that the person who is primarily entrusted with these most important duties (in connection with detaining persons without trial in England) is one of the Principal Secretaries of State, and a member of the government answerable to Parliament for a proper discharge of his duties. I do not think he is at all in the same position as, for example, a police constable.

In my view, that observation is even more poignant when one takes into consideration the scope and extent of sub-s. (6) of s. 73 which states:

> (6) The powers conferred upon a police officer by subsections (1) and (2) may be exercised by a member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer.

Given the enormous powers conferred upon police officers including minor officials such as guards and watchmen and the potentially devastating effect or effects arising from any misuse thereof, it could not have been a matter of accident that Parliament had thought it fit that the right of non-disclosure under s. 16 should only be confined to those personalities and circumstances falling within the ambit of Chapter II of the Act and not beyond. It therefore makes sense that the subjective judgment accorded to the Minister under s. 8 cannot be extended to the police in the exercise of their discretion under s. 73(1).

Article 151(3) Of The Constitution

In *Theresa Lim*, Salleh Abbas LP has also relied on the provisions of cl. (3) of art. 151 of the Constitution as a significant factor in restraining or inhibiting the court's power of judicial review concerning the exercise of discretion by the detaining authority under s. 73(1). This is reflected in the following passage of his judgment:

> Secondly, section 16 of the ISA and Article 151 clause (3) clearly authorize the executive not to disclose any information relating to national security. In that event, the court could only be limited to what has been presented before it. ...
>
> If there has been no provision of clause (3) of Article 151 and section 16, the matter, of course, could be decided by the court, whether it was really in the interest of the security that such information should be withheld. ... In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus it is more appropriately described as a subjective test.

It is, I think, convenient to look at the whole art. 151 which states:

> 151 (1) Where any law or ordinance made or promulgated in pursuance to this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.
>
> (2) An advisory board constituted for the purposes of this Article shall consist of a chairman who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or High Court, or shall before Malaysia Day have been a judge of the Supreme Court and two other members who shall be appointed by the Yang di-Pertuan Agong.
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

There are two points to make on cl. (3) of art. 151. First, it relates to non-disclosure of facts upon which the detention order is based and not the grounds for the detention. And grounds are quite distinct from allegations of fact: (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129). In this regard, the observations made by Arulanandom J in *P.E. Long & Ors v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 when construing s. 3(1) of the Emergency (Public Order & Prevention Of Crime) Ordinance 1969 are particularly instructive. He said as follows:

> ... Counsel for the applicants argues that the affidavits of the officer does not give the grounds and that it is the duty of the courts to look into the grounds and see if the grounds are reasonable and if the grounds are not reasonable, Article 5(3) of the Constitution has been contravened. This submission is wholly without substance. Article 5(3) of the Constitution only states that the person arrested shall be informed as soon as may be of the grounds of his arrest and section 3(1) of the Emergency (P.O.P.C.) Ordinance, 1969, only states that any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1). No further conditions are required for a police officer to arrest a person under this section.

Subsequently, in the case of *Inspector-General Of Police & Anor v. Lee Kim Hoong* [1979] 2 MLJ 291, Harun J (as he then was) expressed a similar view but in a different context when he said:

> I should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that 'Lee was arrested because we have reason to believe that it is necessary for the prevention of crimes involving violence.

Still later in *Karam Singh*, Suffian FCJ (as he then was) took the opportunity to explain the difference between "grounds" and "purposes" with reference to the order of detention issued by a minister under s. 8 of the Act. This is what he said:

> The order of detention and the grounds, when read together, mean that because the executive thinks (grounds) that the appellant has since 1957 consistently acted in a manner prejudicial to the security of Malaysia, therefore the Yang di-Pertuan Agong is satisfied that it is necessary to detain the detainee with a view to (purposes) preventing him from doing the things specified in the order.

> Just as purposes are distinct from grounds of detention, so are grounds of detention distinct from allegations of fact on which the order of detention is based.

From the authorities cited, it seems clear that the grounds to be given by the detaining authority need merely consist of general information and not the evidential details more relevant to allegations of fact. It is in this light that, I think, s. 73(1)(a) ought to be construed. I shall expand on this shortly. In the meantime, I turn to the second point concerning art. 151(3). Here, I take the view that it must be read and construed in the context of cl. (1) thereof. It relates to non-disclosure of allegations of fact specifically to the detainee by the detaining authority on grounds of national security. In this respect, the comments by M.P. Jain in his book "*Administrative Law Of Malaysia & Singapore*, 3rd edn, at p. 647 relating to *Re Tan Sri Raja Khalid* are pertinent. It reads:

> But, on appeal by the government, the Supreme Court took an extremely restrictive view of the scope of judicial review of preventive detention orders. It ruled that the test for the exercise of the executive discretion in such cases was subjective, and the court could not insist on evidence being given for the existence of the security aspects in the specific case as there was no obligation on the part of the concerned authority to disclose any evidence to the court. The court referred to Article 151(3) of the Constitution under which the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. It may, however, be argued that Article 151(3) bars information from being disclosed to the detainee but not to the court. Article 151(3) obviously has reference to Article 151(1) and (2) under which the detaining authority has to supply the grounds of detention to the concerned detainee. The court is under a constitutional obligation to be satisfied that the detention was lawful. This obligation has been placed on the court by Article 5(1) and (2) of the Constitution. How is the court going to discharge this obligation if it is denied all relevant information.

I think there is merit in the proposition that art. 151(3) merely bars information concerning matters of national security from being disclosed to the detainee and not to the court as such. Indeed, there is nothing to indicate or suggest any such prohibition from disclosure to the courts for the purpose of judicial review.

Whether Preconditions In S. 73(1) Complied With

Given the reasons stated above, I take the view that as the arrest and detention by the police officer entail the curtailment of the liberty of a subject involving, as I have said, a basic and fundamental right, his exercise of discretion under s. 73(1) is therefore subject to the objective test and

thus reviewable by a court of law. The decision of the police officer is objectively justiciable. This means that the question whether a police officer has the required "reason to believe" when he makes the arrest and detention in reliance on s. 73(1) is objectively justiciable. The burden is on the police officer to satisfy the court that the preconditions constituting the said section which set out the jurisdictional threshold requisite to the exercise of arrest and detention have been complied with. Only if the preconditions specified therein are fulfilled can the police officer be said to have the rights flowing from the section: (see *Minister Of Law & Order & Ors v. Pavlicevic* [1989] SA 679).

What are these preconditions in s. 73(1)? Therein, the police officer must have reason to believe (a) that there are grounds which would justify detention of the detainee under s. 8 and (b) that the detainee has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. In this case, I think the affidavits filed by the respondent do indicate that at the time of their arrests, the detainees were told that they were arrested and detained for having acted in a manner likely to prejudice the security of the country. Based on the authorities cited earlier, this would be sufficient to comply with s. 73(1)(a). However, the situation is quite different with respect to s. 73(1)(b). Here, the burden is on the respondent to satisfy the court by way of material evidence that the detaining authority had reason to believe that the detainees had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. A thorough perusal of the affidavits filed by the respondent find them to contain nothing more than bare denials in response to the allegations contained in the affidavits affirmed by the respective appellants. This is hardly surprising given his reliance on s. 16 of the Act and art. 151(3) of the Constitution. No particulars have been disclosed in the respondent's affidavits to show that the appellants had acted or were about to act or were likely to act in any manner prejudicial to the security of Malaysia, etc. In the circumstances, para. (b) of sub-s. (1) of s. 73 has not been discharged by the respondent. Furthermore, the matters disclosed in those affidavits do not seem to have any bearing on the press statement issued by the Inspector-General of Police. In effect, the respondent has not discharged the initial burden of satisfying the court as to the jurisdictional threshold requisite under s. 73(1).

Effect Of National Security Considerations

I mentioned at the outset the necessity of examining the effect of national security considerations on the reviewability of the exercise of discretion of the detaining authority under s. 73(1). Indeed, this is one of the focal points in the respondent's case. Dato' Azahar has submitted that it is important to look at the subject matter on which the authority is called upon to decide – that if it concerns a matter of national security which is entirely the responsibility of the Government, the courts should not intervene. In short, the judicial process is unsuitable for reaching decisions on national security. He relies, quite obviously, on the English case of *Council Of Civil Service Unions & Ors v. Minister For The Civil Service* [1985] IAC 374. He cites at length various passages in the speeches of the Law Lords who heard the case but I think the following observation of Lord Fraser seems to sum up the thrust of his submission:

> Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

I accept the correctness of that proposition. The executive, by virtue of its responsibilities, has to be the sole judge of what the national security requires. However, although a court will not question the executive's decision as to what national security requires, the court will nevertheless examine whether the executive's decision is in fact based on national security considerations. Here, I would subscribe to the observation of Wee Chong Jin CJ (Singapore) in *Chng Suan Tze (supra)* when he said:

> It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded. In such cases, the decision would be based on a consideration of what national security requires, and the authorities are unanimous in holding that what national security requires is to be left solely to those who are responsible for national security. The Zamora and GCHQ case. However, in these cases, it has to be shown to the court that considerations of national security were involved. Those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security.

It is in the light of the principle enunciated that the present case has to be examined. In my view where the arrests and detentions of the appellants are said to be based on the belief of the detaining authority relating to the preconditions specified in s. 73(1)(a) & (b) of the Act, the court is perfectly entitled to inquire whether those preconditions have been complied

with. I have held earlier that the respondent has adduced sufficient grounds in compliance with s. 73(1)(a). However, the same cannot be said in respect of s. 73(1)(b). Here, the court is entitled to inquire into the basis for the detaining authority's reason to believe that the appellants had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia. As I have said before, on the basis of the affidavits filed by the respondent, there is nothing to indicate or suggest the existence of any material particulars or evidence in support of the detaining authority's reason to believe in terms of s. 73(1)(b) aforesaid.

Conclusion

For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s. 73(1) of the Act are therefore unlawful. In that context, I agree that the appeals should be allowed and the appellants released accordingly. However, as the undisputed facts show that the appellants ie, 1st, 3rd 4th and 5th appellants have now been detained by order of the Minister under s. 8 of the Act, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of a different exercise.

Abdul Malek Ahmad FCJ:

We sat on thirteen occasions from 6 June 2001 before we reserved judgment on 28 February 2002. In the process, the panel lost one of its members with the untimely demise of our learned brother Wan Adnan Ismail, President of the Court of Appeal, on 24 December 2001.

This situation is aptly and amply covered by s. 78 of the Courts of Judicature Act 1964 (hereinafter "the CJA") which states:

> **Continuation of proceedings notwithstanding absence of Judge**
>
> 78 (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

At the first sitting, on 6 June 2001, Dato' Abdul Gani Patail, in leading the prosecution team, raised two preliminary issues. The first was that the second appellant, who had been released four days earlier, was no longer a person being restrained of his personal liberty and the second was that the remaining appellants were then being detained under the powers of the Minister of Home Affairs (hereinafter "the Minister") under s. 8(1) of the Internal Security Act 1960 (hereinafter "the ISA").

As for the first preliminary objection, he stressed that since the second appellant had been released, his appeal was no longer a living issue and was purely academic. As for the second preliminary objection, he reiterated that the other four appellants were no longer under police custody as the Minister had ordered them to be detained under s. 8(1) of the ISA with effect from 2 June 2001. This undisputed fact makes mockery, he said, of the fact that the applications for *habeas corpus* are directed not against the Minister but against the Inspector General of Police (hereinafter "the IGP") as the respondent. Since they were no longer under police custody under s. 73 of the ISA, he added, the appeal has been rendered academic. The appropriate course of action, he suggested, was to file a writ of *habeas corpus* against the Minister.

Reference was made to *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 and *Re P.E. Long @ Jimmy & Ors; P.E. Long & Ors. v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133 to buttress his arguments.

In reply, Sulaiman Abdullah for the appellants submitted that as regards the first issue, the second appellant is facing a High Court order declaring his detention to be lawful and should he decide to take civil proceedings, the parties would remain the same and it could amount to *res judicata*.

All previous *habeas corpus* cases had decided that s. 73 and s. 8 of the ISA were inextricably linked. The Minister, he argued, made the order under s. 8 based on the police investigations while the appellants were being detained under s. 73 of the ISA. The validity of the High Court decision was therefore a live issue.

After a short recess, we unanimously held that the issue is still alive in view of the finding of the High Court that the detentions of the five appellants are lawful and decided that there was no merit to the preliminary objections. We accordingly ordered the appeals to proceed on the next hearing date.

On 10 July 2001, learned Senior Deputy Public Prosecutor Mohd. Yusof Zainal Abiden asked for a postponement as they had just been served with fresh affidavits. On 6 August 2001, we dealt with the two motions by the appellants to adduce evidence, the first dated 9 July 2001 and the second 1 August 2001, in the form of a number of affidavits filed by the appellants themselves and a few others who had been similarly detained.

For the appellants, Sulaiman Abdullah maintained that the word "necessary" in s. 93(1) of the CJA means "necessary in the interests of justice". He cited *Regina v. Parks* [1961] 1 WLR 1484 where the Court of Criminal Appeal in England held that the court would only exercise its discretion under s. 9 of the Criminal Appeal Act 1907 to admit further evidence when the evidence was not available at the trial, was relevant to the issue, and was credible evidence in the sense that it is well capable of belief, and that, applying that principle, the court would admit the evidence. Further, it held that the evidence, if given at the trial, might have created a reasonable doubt in the minds of the jury as to the guilt of the appellant, if that evidence have been given together with the other evidence at the trial.

The other authority referred to was the Singapore case of *Juma'at bin Samad v. Public Prosecutor* [1993] 3 SLR 338 where Yong Pung How CJ ruled that three conditions have to be fulfilled to justify the court taking additional evidence – non-availability, relevance and reliability. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given at the trial, it would probably have an important influence on the result of the case, although it need not be decisive; and thirdly, the evidence must be apparently credible, although it need not be incontrovertible. In short, the circumstances under which an application to introduce fresh evidence will be allowed are extremely limited.

The question, learned counsel argued, is whether the evidence was available at the time of trial. The appellants had no access to counsel then despite their requests. The affidavits in reply of the respondent alleging hearsay was general with no condescending particulars.

Learned counsel reiterated that the evidence sought to be adduced related to the questioning during detention. It was apparent, he added, that the reason for detention was not the real reason as from the questions asked, the appellants were being detained to obtain information about other individuals and political parties and there were attempts to induce them not to support the sacked Deputy Prime Minister.

This was a total misuse of the security provisions according to learned counsel. In fact, he submitted that the respondent's affidavit was in itself hearsay as there were no sources for the information and belief. All the authorities available were not on all fours. However, the additional evidence sought to be adduced here was the direct evidence of the appellants themselves which, because of its direct nature, relevance, pertinence and cogency, ought to be admitted.

Dato' Azahar Mohamed, speaking for the respondent, said that the established principle was that additional evidence ought to be admitted only in exceptional circumstances citing *R v. Jordan* [1956] 40 Cr. App. Rep. 152 and *R v. Stafford & Another* [1969] 53 Cr. App. Rep. 1 in support.

He added that the effect of the two motions to adduce further evidence was to delay the appeal proper and to prolong the matter. When questioned by the Bench, Dato' Azahar clarified that the appellants were arrested on 10 and 11 April 2001, the applications for *habeas corpus* were filed on 12 and 13 April 2001, the trial was fixed on 17 April 2001 for three days, and the decision was given on 25 April 2001. He conceded that the appellants were not able, for the period from 10 April to 25 April 2001, to put in the affidavits they are now seeking to put in for the appeals.

He explained that they were not given access to counsel as police were still continuing investigations. He alleged that the whole purpose of this exercise to put in additional evidence was to examine the methodology of the police questioning and to conduct a perusal of information provided to assess its value. He agreed that some of the questions may appear to be irrelevant to the appellants but they were necessary for the police to collect information.

The learned Senior Deputy Public Prosecutor submitted that the issue of the conditions of detention were not relevant to the legality of detention. He argued that the arrests on 10 and 11 April 2001 were for conduct prejudicial to security and all evidence in the affidavits were subsequent to the arrests and were bare assertions. He emphasised that only evidence prior to the arrests was admissible and it must have a bearing on the nature of the case.

In reply, learned counsel said all that they wanted to adduce though the additional evidence was the respondent's state of mind when the arrests and detention were effected. The gathering of information, he said, cannot be the reason for the detention. All the personal details asked for in the questioning were for a collateral purpose and not for the purpose they were arrested.

After a brief adjournment, we were unanimous that the applications to adduce further evidence ought to be allowed. We adopted and applied the principles in *Ladd v. Marshall* [1954] 3 All ER 745 because the three criteria stated therein have on the facts of these applications been complied with. On the meaning of "additional evidence to be necessary" in s. 93(1) of the CJA, we adopt the findings in *Juma'at bin Samad v. Public Prosecutor (supra)* and *Irtelli v. Squatriti & Others* [1993] QB 83 to mean "necessary or expedient in the interests of justice".

We consequently gave the respondent the opportunity to file affidavits in reply to the various allegations raised in the appellants' affidavits and adjourned the matter to a date to be fixed.

On the next hearing date on 15 October 2001, learned leading counsel for the appellants began his submissions by stating that they were categorising their arguments under five main heads namely:

(a) recusal;

(b) Article 149 of the Federal Constitution (hereinafter "the Constitution") and the ISA;

(c) section 73 of the ISA;

(d) the procedural requirements under s. 73 of the ISA; and

(e) access to legal representation as provided for under art. 5(3) of the Constitution and the effect of denial of such access.

However, on that day, we only heard arguments on the recusal.

Two days later, we gave a six page written decision on the recusal [2001] 4 CLJ 701. The concluding paragraph states:

> In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment at page 601 of the Appeal Record, there is no likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the *habeas corpus* application. We concede that the only common factor between the appellants

and the "Black 14" judgment of the learned judge is that the appellants were detained by the respondent for organizing demonstrations one of which was on 14 April 2001 which became the foundation for the "Black 14" allegation of the respondent. However, we do not think such circumstances do give rise to a real danger of bias on the part of the learned judge. Even if we apply the reasonable apprehension of bias test we would arrive at the same conclusion. It follows therefore that the issue whether the matter should be remitted to the High Court for rehearing or it should be dealt by this court does not arise.

In the result, we would dismiss this ground of appeal.

The second heading namely issues relating to art. 149 of the Constitution and the ISA was dealt with by Christopher Leong for the appellants. It was his contention that the ISA is an Act specifically and solely to deal with and to counter the communists and the communist threat because art. 149 of the Constitution authorises or empowers Parliament to enact or pass legislation in respect of specific acts or threatened acts by a substantial body of persons and that in enacting the ISA pursuant to art. 149 of the Constitution, it was for the specific and sole purpose of dealing with the communists and the communist threat.

Article 149 of the Constitution states:

149. Legislation against subversion, action prejudicial to public order, etc.

(1) If an Act of Parliament recites that action has been taken or threatened by a substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

Reliance was placed on the speech of Raja Azlan Shah Ag. LP (as he then was) in the Federal Court case of *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 where he said:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity' and more generosity than other Acts" (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with, the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129, 136.

Therefore, counsel added, we must look at the language used in the provision, which is in art. 149 of the Constitution, and in conjunction with this, one should look at and take into account the history and origin of the provision in order to implement the true intention of the framers of the Constitution. In order to ascertain the intention and purpose of a particular provision in the Constitution, resort may be had to the historical character and origin of the provision in question, and to this end

contemporaneous speeches and documents relating to that provision are allowed and should be referred to.

He conceded, however, that although the Constitution and its provisions should be construed with less rigidity and more generosity than ordinary statutes, this did not mean that the court is at liberty to stretch or pervert the language of the Constitution as decided in *Merdeka University Bhd v. Government of Malaysia* [1981] 1 CLJ 175; [1981] CLJ (Rep) 191.

He added that all constitutional provisions that provide for the fundamental liberties and rights of citizens must be given its widest and most liberal interpretation and application whereas any provision in the Constitution or any law which sought to restrict such fundamental liberties and rights must be given a narrow and restricted interpretation citing *Ong Ah Chuan v. Public Prosecutor; Koh Chai Cheng v. Public Prosecutor* [1981] 1 MLJ 64, *Chng Suan Tze v. The Minister of Home Affairs & Ors. and Other Appeals* [1988] 1 LNS 162, *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor.* [1999] 1 CLJ 481 and *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors. v. Datuk James Wong Kim Min* [1976] 2 MLJ 245 to illustrate the point.

Learned counsel pointed out that the words "that action has been taken or threatened by any substantial body of persons" are couched in the past tense. This clearly means, he said, that there must be an existing act or threat, that the acts or threats have occurred and are in existence at the time Parliament is deliberating on the passing of the law.

The reference to "any substantial body of persons" must be read and construed in tandem with the words "that action has been taken or threatened". Therefore, he argued, if the specific action or threatened action is communist activity, then the body of persons must be the communists and their agents and possibly their sympathisers.

He further submitted that quite apart from the language and wording of art. 149 of the Constitution itself, the stated rationale and intention behind that article is reinforced or supported by the historical background and contemporaneous documents of the time namely the Report of the Federation of Malaya Constitutional Commission 1957 (hereinafter "the report"). The relevant article came about as a result of the recommendations of the Reid Commission which are contained in the report.

There is no limitation, he said, to the number of times Parliament may have recourse to its use to deal with any number of specific acts it deems fit. However, each of such legislation must be individually addressed and considered by Parliament taking into account in its deliberations the specific

circumstances of the acts or threats and body of persons sought to be dealt with. Examples are the Dangerous Drugs (Special Preventive Measures) Act 1985 and the Dangerous Drugs (Forfeiture of Property) Act 1988. Article 149 of the Constitution, he stressed, was not intended to be used to enact omnibus laws.

Learned counsel was very much aware that similar submissions had been raised in the landmark decision of *Theresa Lim Chin Chin & Ors. v. Inspector General of Police* [1988] 1 LNS 132. Salleh Abas LP, in delivering the judgment of a three member panel of this court, dealt with the point in the following manner:

> The next argument is that in view of Article 149, the ISA should be limited to communist insurgencies alone. To support this proposition, we were invited to refer to paragraph 174 of the Reid Commission Report and to the speeches made by the late Prime Minister Tun Abdul Razak when moving the motion in Parliament to pass the Internal Security Bill. There had been some arguments as to whether or not it is proper for the court to advert to these documents. In our view, there is no hard and fast rule about this, and certainly the courts in this country, as well as the United Kingdom, admit such references but it is clear from the practice of the court that such reference is only to appreciate the legislative history of an Act, and it cannot be regarded as the basis or the determining factor for interpreting the Act or any provision of the Act. If we do that, the court will cease to be the ultimate interpreters of law because in the end what is law will be guided by what the politicians said in Parliament and indeed this has been asserted recently. For this purpose, we would like to refer to a statement by Cumming-Bruce LJ in *R. v. Hosenball* [1977] 1 WLR 767, at pp. 787-788:
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> > There are two other grounds relied upon by the appellant. One is founded upon a statement made by the Secretary of State for Home Affairs on the floor of the House of Commons to which we have been referred. It was suggested, as I understand it, that such rights as Mr. Hosenball might have having regard to the scrutiny of the Act might be enlarged by the statement of the Secretary of State in the House of Commons. I cannot accept as a matter of constitutional law and principle that where the rights of the subject or of a resident have been dealt with in an Act of Parliament a statement made by a minister in Parliament can have the effect of enlarging those statutory rights. The danger of assenting to such a doctrine is obvious. If a minister can enlarge the rights of a subject as laid down in an Act of Parliament by a statement on the floor of the House, it is but a short step to say that it is constitutional for a minister to restrict the rights of a subject by making a statement on the floor of the House.

> By our constitution, it is Acts of Parliament and not the acts of ministers, save when authorized by Act of Parliament or under the prerogative, that define the rights of subjects or of residents.
>
> The expression "that action" in our view has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provision of the Act there is nothing to show that it is restricted to communist activities.

It was the respectful submission of learned counsel that the Supreme Court was mistaken in law on the issue of the effect or probative value of the documents sought to be relied on. This was not a case of ordinary interpretation of the Act or its provisions in which situation the Supreme Court decision would have been correct at that time when it relied on *Hosenball*'s case.

However, he pointed out that the position has since changed in England by the decision of the House of Lords in *Pepper (Inspector of Taxes) v. Hart and Related Appeals* [1993] 1 All ER 42 where it was held that the courts should adopt the purposive approach to statutory interpretation and in doing so regard may be had to parliamentary material. In that case, however, the issue of constitutionality did not arise.

The seven member panel, with Lord Mackay LC dissenting, held that having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary material where:

(a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity;

(b) the material relied on consisted of statements by a minister or other promoter of the Bill which lead to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect; and

(c) the statements relied on were clear.

Furthermore, the use of parliamentary material as a guide to the construction of ambiguous legislation would not infringe s. 1, art. 9 of the Bill of Rights since it would not amount to a "questioning" of the freedom of speech or parliamentary debate provided counsel and the judge refrained from impugning or criticizing the minister's statements or his reasoning,

since the purpose of the courts in referring to parliamentary material would be to give effect to, rather than thwart through ignorance, the intentions of Parliament and not to question the processes by which such legislation was enacted or to criticise anything said by anyone in Parliament in the course of enacting it.

Similarly, it was held in the Singapore case of *Constitutional Reference No. 1 of 1995* [1995] 2 SLR 201 that a purposive approach should be adopted in interpreting the Constitution to give effect to the intent and will of Parliament and the approach required by s. 9A of the Interpretation Act (Cap. 1) required no ambiguity or inconsistency. This was clearly a case where resort to contemporaneous speeches and documents was sanctioned.

In *Hamdard Dawakhana v. Union of India* [1960] AIR 554, a five member panel of the Supreme Court of India declared:

> When the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary i.e. its subject matter, the area in which it is intended to operate, and its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all factors such as the history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy ... Further, in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge and the history of the times, and may assume every state of facts which can be conceived of as existing at the time of legislation.

Learned counsel concluded that the Supreme Court in *Theresa Lim*'s case was in error when it decided on this issue the way it did.

Dato' Azahar Mohamed for the respondent told the court that prior to the amendment to the Constitution *vide* the Constitution (Amendment) Act 1978 (Act A442) which came into force on 31 December 1978, the heading of Part XI of the Constitution was "Special Powers Against Subversion, And Emergency Powers" whereas after that amendment the heading is now "Special Powers Against Subversion, Organised Violence And Acts And Crimes Prejudicial To The Public And Emergency Powers".

Headings, he said have been used by the courts in order to ascertain the purpose of the provisions under consideration. In *Dixon and Another v. British Broadcasting Corporation* [1979] 2 All ER 112 at p. 116, both Shaw and Brandon LJJ referred to the heading 'Unfair Dismissal' of Part II of Schedule 1 to the Trade Union and Labour Relations Act 1974 and

to the heading 'Right of employee not to be unfairly dismissed' as giving the purpose in the light of which paras. 5 and 12 were to be interpreted. In Canada, headings have been used for purposes of interpretation. In *Law Society of Upper Canada v. Skapinker* [1984] 9 DLR (4th) 161, Estey J, speaking on behalf of a seven member panel of the Supreme Court of Canada on headings in the Charter, said at p. 176:

> The Charter, from its first introduction into the constitutional process, included many headings including the heading now in question ... It is clear that these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose. At the very minimum, the court must take them into consideration when engaged in the process of discerning the meaning and application of the provision of the Charter.

It was Dato' Azahar's contention that the heading can be used to act as a guide to find the meaning, intent and purpose of art. 149 of the Constitution and the critical word, he added, would be "subversion".

In *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; ([1992] 1 CLJ 72) Abdul Hamid Omar, LP said at p. 1130 (pp. 78-79):

> Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v. Fisher* [1980] AC 319 at p. 329, a constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.
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> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley (sic McKinlay) v. Commonwealth of Australia (sic The Commonwealth of Australia and Another)* [1975] 135 CLR at page 17:
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> > the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

Since the word "subversion" is not defined in the Constitution, Dato' Azahar argued that it should be given its ordinary meaning. In *Black's Law Dictionary* it is defined as "the process of overthrowing, destroying, or corrupting" whereas "subvert" in the *Concise Oxford Dictionary* is "overturn, overthrow or upset (religion, government, the monarchy, morality, etc)".

Dato' Azahar stressed that the term is of such a broad, catch-all nature that it includes all the actions referred to in art. 149 of the Constitution. In *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50, the Privy Council through Lord Diplock said:

> The Article is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past *viz*. that action of the kind described "has been taken or threatened". It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause (2) of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence. Where such an Act of Parliament confers powers on the Executive to act in a manner inconsistent with Article 5, 9 or 10, the action must be taken *bona fide* for the purpose of stopping or preventing subversive action of the kind referred to in the recitals to the Act, for in order to be valid under Article 150(1) (*sic*: presumably article 149(1) is meant) the provision of the Act which confers the power must be designed to stop or prevent that subversive action and not to achieve some different end.

He submitted that the legislative purpose of art. 149 of the Constitution is very clear, that is, to enable Parliament to enact laws to suppress and to prevent the recurrence of any form of subversion including, but not limited to, communist subversion. With such clarity of legislative purpose, the literal construction of that article would be to give it a plain and clear meaning and not to import into it words which are not there. The literal construction of the said article means that it enables Parliament to enact laws designed to stop and prevent actions described in paras. (a) to (f) of that article.

The Senior Deputy Public Prosecutor added that the legislation enacted pursuant to art. 149 of the Constitution is designed to deal with subversion. Subversive acts do not come only from the communists but also other subversive elements whose action is prejudicial to public order or security of the country. There is absolutely nothing in the article to indicate that the words "action has been taken or threatened" would necessarily mean communist actions or threats made by communists. It is also submitted that there is also nothing in the article to limit the enactment of laws only to specific acts or threats and in respect of bodies of persons specified at the time of the enactment.

To limit the scope of art. 149 of the Constitution to only a specific act of subversion, he said, would only manifest absurdities not intended by the framers of the Constitution. It was never the intention of the framers to restrict the application of that article to specific acts or threats and that every specific act or threat would require a specific piece of legislation. He reiterated that we must bear in mind that art. 149 of the Constitution provides powers of preventive detention. It is in essence an anticipatory measure.

Thus, if the argument of the appellants is to be accepted, he submitted, piecemeal legislation would have to be enacted to deal with threats such as communism, religious fanaticism, racism and any other forms of subversion. Therefore, if a religious group commits an act of subversion, no immediate and effective action can be taken to nip the anarchy in the bud but to wait for Parliament to enact a law to deal with that specific threat of religious fanaticism. He argued that subversion can flare at any time and by any substantial body of persons and the framers of the Constitution would have anticipated that subversive acts do not come from communists alone. Therefore, art. 149 of the Constitution was not couched in a specific manner merely to counter a specific menace but was termed in a broad manner so as to encompass any form of subversion.

He further said that we cannot go behind the ISA and ask if it was in fact designed to stop or to prevent such action. The recital is conclusive; it is not justiciable. According to the scheme of the ISA, Parliament has not sought to define activities which are prejudicial to national security. Preventive detention relates to national security which is the responsibility of the executive. It is for the executive to determine as a matter of policy and judgment whether activities are prejudicial to national security.

He continued by stating that it all boils down to the question whether the ISA was enacted to deal with only the threat of communism and nothing else. In *Public Prosecutor v. Lau Kee Hoo* [1983] 1 CLJ 21; [1983] CLJ (Rep) 336 where the question of whether the mandatory death sentence provided under s. 57(1) of the ISA is *ultra vires* and violates arts. 5(1), 8(1) and 121(1) of the Constitution was referred to the Federal Court, Suffian LP in delivering the judgment of a five member panel of that court said that "The ISA is legislation against subversion expressly authorised by art. 149 of the Constitution ... . True the ISA is designed to stop or prevent subversive action, but as the whole of it is valid and is (s)till in force, it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts".

In *Public Prosecutor v. Yee Kim Seng* [1983] 1 CLJ 38; [1983] CLJ (Rep) 824 which by coincidence was decided at around the same time as *Lau Kee Hoo*'s case *(supra)* the High Court, where a similar question arose, declared that the ISA, with all the provisions therein, is perfectly valid and there is nothing in it which contravenes the Constitution.

In *Re Tan Sri Raja Khalid bin Raja Harun; Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1987] 2 CLJ 470; [1987] CLJ (Rep) 1014, the High Court, after considering the lengthy affidavit of the police officer who arrested and detained the respondent under s. 73(1) of the ISA, held that there was no evidence disclosed that the respondent had acted in any manner which is prejudicial to the security of the country and accordingly ordered the release of the respondent forthwith.

The Supreme Court (Salleh Abas LP, Hashim Yeop A. Sani and Wan Hamzah SCJJ) [1988] 1 CLJ 39; [1988] 1 CLJ (Rep) 135 in dismissing the appeal, pronounced that the ISA enacted under art. 149 of the Constitution is "legislation essentially to prevent and combat subversions and actions prejudicial to public order and national security". It held that where a person who has been deprived of his liberty challenges the detention, it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown, it is for the detainee to show that the power had been exercised *mala fide* or improperly or made for a collateral or ulterior purpose.

Almost immediately after, in dealing with the same point, the Supreme Court (Salleh Abas LP, Lee Hun Hoe CJ (Borneo) and Hashim Yeop A. Sani SCJ) in *Theresa Lim*'s case *(supra)* said "nor are we persuaded to accept that the scope of the ISA, and in particular, preventive detention, should be limited to those involved in communist insurgency and subversion only.".

The learned Senior Deputy Public Prosecutor concluded that the above cases clearly show that the ISA is designed to stop or prevent subversive actions. As submitted earlier, the term "subversive activities" is broad and encompasses any activity designed to overthrow a government by force or other illegal means. There is nothing in the recital of the ISA to indicate the said Act is limited in its application to combat communist insurgencies only. Communist threats may be relevant years ago but the changing circumstances show that other forms of subversive activities may surface at any time.

Learned counsel for the appellants Christopher Leong in reply reiterated that it is beyond dispute that the purpose of the ISA and the intention of Parliament in passing the ISA Bill was to specifically deal with the communists and the threat they presented. No other acts or threatened acts by any other substantial body of persons were identified or addressed to Parliament at the material time. Parliament, therefore, is taken to have addressed its mind only to these acts and threats by this body of persons when enacting the ISA. The ISA was therefore enacted solely in respect of the communists and is thus restricted in its application and use to the communists. To apply the ISA thereafter for any other purpose would not only be unconstitutional and illegal but would, as earlier stated, be a breach of trust of Parliament.

He added that it is clear from the press statement and the affidavits of the respective arresting officers that there is no allegation whatsoever that any of the five appellants are communists or that their detention under the ISA was because they were or are communists. Further, none of the various acts or threats stated in the said press statement are alleged to be communist acts or threats. In fact, the respondent confirms in para. 6 of his affidavit that the activities or acts described therein are in respect of the "Reformasi Movement".

He ended his submissions by saying that it is inconceivable that Parliament ever intended the ISA to be used against the "Reformasi Movement". There was no such thing as the "Reformasi Movement" at the time Parliament deliberated on and subsequently passed the ISA. The specific acts, threats and substantial bodies of persons expressly stated and represented by the government, through the then Deputy Prime Minister, to Parliament were the acts and threats of the communists. As the mind of Parliament was never addressed to any other acts or threats by any other substantial body of persons, Parliament never gave its consent and cannot be deemed to have so consented in 1960 to the misuse of the ISA in this manner.

It is my view, however, relying on the authorities cited, that the purpose and intent of the ISA is for all forms of subversion but was more directed to communist activities which were prevailing at the time the law was enacted. The long title and the preamble indicate that it is not confined to communist activities alone although the speeches in Parliament concentrated on that form of activity. I would, therefore, follow the ratio in *Theresa Lim*'s *(supra)* case and rule in favour of the respondent on this issue.

Since the third point relates to s. 73 of the ISA and the fourth point refers to the procedural requirements under that same section, I am of the opinion that they could be dealt with together.

Malik Imtiaz Sarwar, who argued these grounds on behalf of the appellants, said that the elements of s. 73(1) of the ISA were that the arresting and detaining police officer has "reason to believe" that there are grounds which would justify a detention under s. 8 of the ISA under which the Minister would be satisfied that the detention is necessary with a view to prevent that person from acting, about to act, or likely to act, in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

He submitted that the courts have a right to inquire into the existence of the grounds for the following reasons:

(a) the elements set out are the jurisdictional threshold requisite to the exercise of the power of arrest. Only if the elements are fulfilled can the detaining authority be said to have the rights flowing from the section as held in *Minister of Law and Order & Others v. Pavlicevic* [1989] SA 679 where the court said:

> The issue may be stated thus: whether or not the evidence of Erasmus discharged the onus bearing upon the appellants of establishing that when Erasmus arrested and detained the detainee under s. 29(1) he believed that the detainee had committed an offence referred to in para. (a) of s. 29(1) or was withholding information relating to the commission of such an offence; and that Erasmus had reasonable grounds for holding that belief Or, as it is sometimes put, whether or not the jurisdictional fact or facts requisite to the exercise of the power of arrest and detention were shown to have existed.

(b) In *Re The Detention of S. Sivarasa & Ors* [1997] 1 CLI 471 where on an application for a revision of an omnibus remand order by the magistrate, the High Court held that s. 117 of the Criminal Procedure Code requires that there be "grounds for believing that the accusation or information" is well founded for the police officer to make his application for detention. These grounds are subject to judicial scrutiny. This being the case, it follows that a magistrate ought not to give a remand order without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case. If the necessities of the case for remand or further remand are not shown, no remand order should be made;

(c) it is a well recognised rule in the interpretation of statutes that the curtailment of the powers of the courts is, in the absence of an express or clear implication to the contrary, not to be presumed. The courts

will therefore closely examine any provision which appears to curtail or oust the jurisdiction of courts of law citing *Minister of Law and Order and Others v. Hurley And Another* [1986] (3) SA 568;

(d) there is no such ouster in relation to s. 73(1) of the ISA as an ouster is provided only in s. 8B of the ISA which by its express wording only applies to acts done or decisions made by the Yang di Pertuan Agong or the Minister. Section 8B of the ISA provides:

> **8B. Judicial review of act or decision of Yang di Pertuan Agong and Minister.**
>
> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the 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.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

(e) to say otherwise would be to make an unreasonable and unwarranted implication:

(i) both ss. 8 and 73 are clear and unambiguous;

(ii) that there is only one "preventive detention" ultimately is irrelevant. The ISA expressly provides for that ultimate decision to be arrived at in two stages: the first under s. 73, and the second, under s. 8;

(iii) while ss. 73 and 8 are connected, they are not "inextricably linked". Both sections can operate independently of each other in that under s. 73, no ministerial order is needed and under s. 8, no police investigation is necessary. Nothing turns on the reference by s. 73 to grounds under s. 8. If it did, then no detention could take place under s. 73 unless the Minister himself was satisfied, and the fact of this satisfaction was made known to the police. If this were the case, then there would be no need for s. 73. Vitiation of s. 73 would lead to vitiation of s. 8;

(iv) the cases of *Tan Sri Raja Khalid* and *Theresa Lim* were wrongly decided on this point. In addition to the foregoing, the decisions were inherently contradictory in that if a subjective approach was required under s. 73, it must be irrelevant whether or not evidence is disclosed to the courts;

(v) furthermore, such privilege as the detaining authority may have as regards disclosure of evidence must not be confused with the issue of whether the court can or cannot inquire into grounds of detention. The fact that evidence is not disclosed does not mean that the court cannot inquire. Allegations of fact are as much evidence of matters taken into consideration as the grounds of detention.

Learned counsel added that circumstances dictate that sometimes inroads must be made upon established principles of justice. The courts must adopt a strict approach in interpreting the ISA and must serve as a buttress between the executive and the individual.

There is a clear difference, he maintained, in the wording of s. 8(1) and s. 73(1) of the ISA. For the former, the phrase used is "if the Minister is satisfied" which makes it subjective. In the latter "has reason to believe" is objective.

Learned counsel submitted that the court is therefore entitled to enquire whether there are grounds, or facts which give rise to, or form the basis of, the belief of the detaining officer, the reasonableness of the grounds, and whether the procedural elements of s. 73(1) of the ISA have been fulfilled. Only then is the onus shifted to the appellants.

Section 16 of the ISA as regards the disclosure of information was also highlighted by learned counsel. The said section reads:

16. Disclosure of information.

Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.

Learned counsel said that the learned trial judge's findings in relation to the issue of the non-disclosure was that the section was not limited to Chapter II in Part II of the ISA but also to Part IV under which s. 73 was listed, that the right of non-disclosure under s. 16 makes the test under s. 8(1) and s. 73(1) a subjective one, that the court can only examine the sufficiency of the reasons for detention under s. 73(1) where the facts of a case are furnished voluntarily, exhaustively and in great detail. This means that the detaining authority must have disclosed all material facts. The test is in the event an objective one. In the event of a partial disclosure, the test would be a subjective one.

Learned counsel attacked these findings on the grounds that s. 16 of the ISA is of limited application and is of no relevance in so far as the detention under s. 73 is concerned. Further, it is expressly stated to be applicable only in relation to Chapter II of the ISA.

He continued by saying that to read it as applying to s. 73 would be clearly contradicting the expressed intention of Parliament. In the same vein, art. 151(3) of the Constitution applies only in the context of art. 151 in view of the opening words.

The respondent's reply was that the court cannot inquire and should not inquire into the existence of these grounds because it is a subjective test. It is the police officers who decide, based on the information and the facts, whether the appellants acted in a manner prejudicial to the security of Malaysia and that the grounds justify the detention.

In support, the case of *Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92 was cited where it was held that:

> The onus now lies upon the detainee to show that such power had been exercised *mala fide*. In this connection Basu's Commentary goes on to say:
>
> > 'Bad faith' in the present context has been interpreted to mean 'malice in law', i.e., inflicting a wrong or injury upon another person in contravention of the law, even though it may be without any malicious intention. Good faith is obviously wanting where there is a 'fraud on the statute', i.e. a misuse of the statute for a collateral purpose or a purpose other than that for which it was intended, – or, in other words a 'colourable use' of the statute.
> >
> > (a) When the condition precedent required by the statute is objective, the existence or not of the objective condition or facts and circumstances can be tested by the courts, *viz*., whether the circumstances which called for the issue of the order existed in fact.
> >
> > (b) But where the condition is subjective, *viz.*, the state of the mind of the authority issuing the order, "he is alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone but himself that these circumstances constituted a reasonable cause and belief'; in other words, the existence of the circumstances which called for the order cannot be questioned by the courts in this latter (subjective) case, and the only question left to the court is whether the authority exercised the power in good faith. The court cannot undertake an investigation as to the sufficiency of the materials on which such satisfaction was grounded.

> In a case of subjective satisfaction, the sufficiency of the grounds which gave rise to the satisfaction of the authority is not a matter for determination of the court, for, one person may be, though another may not be, satisfied on the same grounds.
>
> Where the authority is empowered to make an order upon a subjective condition, i.e., a particular state of his mind, e.g., 'on being satisfied' or 'having reasonable grounds for believing' that certain facts exist – once an order asserting that state of mind and belief has been proved in a valid form, by production of a duly authenticated order, the onus is on the person challenging the *bona fides* of the order to disprove the existence of that state of mind. The onus is obviously more difficult than that of disproving an objective fact. Mere evidence of the applicant that he does not know that there are any reasons for the authority's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the authority to explain and justify the assertion of his order.

It was also the contention of the respondent that the matter concerns preventive detention the basis of which is not a legal charge and the evidence not legally admissible. Due to the nature of the information which forms the basis of the arrest and detention, it is not suitable for the courts to adjudicate on such matters. In *Re Tan Sri Raja Khalid bin Raja Harun v. Inspector General of Police (supra)* it was held that what s. 73(1) of the ISA provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under s. 8 of the ISA and that person either has acted or is about to act in a manner prejudicial to the security of the nation. Section 73(1) and s. 8 of the ISA are so inextricably connected that the subjective test should be applied to both. The court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s. 73(1). It follows that the learned judge was in error when he said in his judgment to the effect that if there is evidence that the applicant has acted in a manner prejudicial to the security of the country, such evidence must be disclosed to the court to enable the court to be satisfied that the arrest and detention of the detainee under s. 73 is justified in the circumstances.

Similarly, in *Theresa Lim*'s case *(supra)*, the Supreme Court said that it is clear from the provisions of the Constitution and the ISA that the judges in the matter of preventive detention are the executive. This is supported by art. 151(3) which says that the article does not impose an obligation on any authority to disclose facts, whose disclosure would in its opinion be against the national interest.

In *Council of Civil Service Unions & Others v. Minister For The Civil Service* [1985] 1 AC 374, Lord Fraser of Tullybelton at pp. 401 and 402 remarked:

> National security
>
> The issue here is not whether the minister's instruction was proper or fair or justifiable on its merits. These matters are not for the courts to determine. The sole issue is whether the decision on which the instruction was based was reached by a process that was fair to the staff at GCHQ. As my noble and learned friend Lord Brightman said in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, 1173: "Judicial review is concerned, not with the decision, but with the decision-making process.
>
> I have already explained my reasons for holding that, if no question of national security arose, the decision-making process in this case would have been unfair. The respondent's case is that she deliberately made the decision without prior consultation because prior consultation "would involve a real risk that it would occasion the very kind of disruption (at GCHQ) which was a threat to national security and which it was intended to avoid." I have quoted from paragraph 27(i) of the respondent's printed case. Mr. Blom-Cooper conceded that a reasonable minister could reasonably have taken that view, but he argued strongly that the respondent had failed to show that that was in fact the reason for her decision. He supported his argument by saying, as I think was conceded by Mr. Alexander, that the reason given in paragraph 27(i) had not been mentioned to Glidewell J. and that it had only emerged before the Court of Appeal. He described it as an "afterthought" and invited the House to hold that it had not been shown to have been the true reason.
>
> The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Autority for both these points is found in *The Zamara* [1916] 2 AC 77. The former point is dealt with in the well known passage from the advice of the Judicial Committee delivered by Lord Parker of Waddington, at p. 107:
>
> > Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

Ultimately, it is the respondent's contention that the most important consideration is the subject matter upon which the authorities are called upon to decide. It concerns national security which is the responsibility of the Government. Only the Executive knows the act of the individual or the body of persons which is said to be prejudicial to the security of the nation, threat to economic life and so on and so forth. It is because it is not suitable for the courts to look at the existence of those grounds or the sufficiency of them.

It is submitted by the respondent that for a detention under s. 73(1) of the ISA, the investigation is more important. The purpose of the detention is to interrogate not so much as regards the act committed but whether or not in future, the act may be committed in like manner and be a threat to the country. The investigations are not to confirm. This is diffrrent from a detention under s. 117 of the Criminal Procedure Code (hereinafter "the CPC") which is to confirm the commission of an offence and to obtain legally admissible evidence. Here, the investigation is to ascertain whether or not there is any basis for the Minister to make an order under s. 8.

The Senior Deputy Public Prosecutor Dato' Azahar conceded that s. 16 of the ISA does not apply because it refers to a different chapter. Section 16 refers to the non-disclosure of information in the national interest. He urged the courts to depart from *Raja Khalid* and *Theresa Lim* and said that s. 16 is redundant as far as ss. 73 and 8 are concerned. The reason for that proposition is that if the test is subjective, that means there is nothing for the courts to look into and the police are not obliged to disclose the reasons. Therefore, s. 16 is effectively redundant.

He reiterated that s. 16 applies where the matter is proceeding before the Advisory Board and is only relevant for the hearings before that Board. Section 14 of the ISA provides the Advisory Board with powers that the courts here do not have. Section 16, therefore, only applies to those proceedings. This is a slight departure from *Tan Sri Raja Khalid*'s case. One cannot say it is a subjective test, he said, and then say that there is a requirement to disclose. The stand is that the courts cannot, except for s. 8B, look into the grounds. It is submitted that s. 16 is not really relevant unless there is something similar to s. 14 giving the courts power to require the authorities to disclose.

The gist of the respondent's submissions suggest that the line of questioning adopted as alleged in the affidavits of the appellants was for the sole purpose of gathering information and evidence to determine whether the acts already committed would recur in the future. In fact, this

point is conceded by both Senior Deputy Public Prosecutors Dato' Azahar and Mohd. Yusof Zainal Abiden in their submissions in denying that the questioning was *mala fide*.

This appears to go against the grain of s. 73(1) of the ISA as the police officer arresting anyone under that provision must have reason to believe that that person is a threat to national security and not arrest him for the purpose of building a case against him with the intention of getting enough evidence to get the Minister's order to detain him under s. 8 of the ISA. All the appellants had affirmed in their affidavits that they were never told the reasons at the time the arrests were effected.

The affidavits of the appellants seem to be in the same vein. Although the particulars are not exactly the same, the tenor of the questioning appears to hinge on irrelevancy and principally on matters which are not mentioned in the respondent's press statement explaining the arrests.

It is appropriate to refer to the press statement issued on 11 April 2001. The respondent's press statement had stated that the arrests and detention of the appellants and two others was because information had been received concerning their involvement in activities which affects national security. It is necessary for the police to conduct a thorough investigation on the information received. The reformation activities which started in September 1998 planned to overthrow the government through street demonstrations held on a large scale and to prepare to carry out militant action by taking the following measures:

(a) specific steps to obtain explosive items including bombs and grenade launchers;

(b) using molotov cocktails, ball bearings and various dangerous weapons to attack the security forces so as to create a commotion during street demonstrations in and around Kuala Lumpur in October 1998;

(c) obtaining assistance and support from martial arts leaders and informing ex-security officers and personnel to join their movement.

To contain the said reformation movement's militant trend, the police had taken action against 28 reformation activists under s. 73(1) of the ISA from 24 September 1998 up to 24 December 1998. The said police action had managed to control the situation temporarily.

Further, the press statement states that in the middle of 1999, the reformation movement activists reappeared using as a front a political party where a number of the members had carried out activities which could create racial tension through religious and racial issues. This includes the dissemination of false and shocking information like allegations that many Malays have been converted to Christianity during the Lunas by-election. Militant methods such as threatening, intimidating and scaring the public and voters were also carried out by the reformation activists during that by-election.

The press statement went on to say that at the end of the year 2000, the reformation activists had resolved to use these two approaches to achieve their goals. One is to continue to get involved in the normal process of democracy and the election system and the other through unconstitutional ways by holding large street demonstrations in militant fashion pending the general election in the year 2004.

To ensure that their plans materialise, a secret group of more than twenty rcformation activists had been formed in Kuala Lumpur. From 6 January 2001 to 4 April 2001, twelve confidential meetings were held by this group to plan ways to influence the people to culturise militant street demonstrations and illegal assemblies. One of the important immediate plans of this reformation movement is to promote huge street demonstrations called "Black 14" in Kuala Lumpur on 14 April 2001. To confuse the security forces, the assembly was called "the assembly to deliver the people's memorandum on human rights" whereby they planned to gather about fifty thousand people around Kuala Lumpur. This assembly and parade has the potential of turning into a riot.

The concluding paragraph of the press statement states that it is clear that the reformation activists are willing to carry out activities outside the scope of the Constitution and the laws merely to achieve their goal. Therefore, action under s. 73(1) of the ISA was taken because the police believe there are grounds to detain them under s. 8 of the ISA for acting in a manner that could jeopardise national security.

The respective five heads of the police interrogation teams who affirmed the affidavits in reply on behalf of the respondent did not really state that they were directly involved in the interrogation. Also, no particulars were forthcoming as regards the grounds of belief or the source of information. In essence, all the respondent's affidavits in reply to the additional evidence allowed to be put in at the commencement of the appeals are in essence bare denials or that nothing can be said by virtue of s. 16 of the ISA and art. 151(3) of the Constitution. The latter runs foul of the respondent's

concession that these provisions are not applicable to s. 73 of the ISA. In fact Dato' Azahar maintains that s. 16 applies only to hearings before the Advisory Board under s. 14 of the ISA.

In effect, what we are left with are just the appellants' affidavits which state that no questions were asked of the matters stated in the respondent's press release. The numerous unexplained blanked out entries in the relevant lockup diaries which have been produced have also not been explained despite numerous enquiries from the bench.

Relying heavily on the cases of *Tan Sri Raja Khalid, Theresa Lim* and the *Council of Civil Service Unions,* the respondent maintains that the test is subjective. It is the appellants' argument that the findings in both *Tan Sri Raja Khalid* and *Theresa Lim* are flawed as both cases went on the premise that s. 8 and s. 73 of the ISA are inextricably linked and consequently s. 16 of the ISA and art. 151(3) of the Constitution applied which would have the effect of denying the courts the power to review the detention as they could not enquire into the evidence which led to the detention.

In dealing with the *Tan Sri Raja Khalid* case *(supra),* M.P. Jain in his book *"Administrative Law of Malaysia and Singapore, Third Edition"* remarked at pp. 647 and 648 as follows:

> But, on appeal by the government, the Supreme Court took an extremely restrictive view of the scope of judicial review of preventive detention orders. It ruled that the test for the exercise of the executive discretion in such cases was subjective, and the court could not insist on evidence being given for the existence of the security aspects in the specific case as there was no obligation on the part of the concerned authority to disclose any evidence to the court. The court referred to article 151(3) of the Constitution under which the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. It may, however, be argued that article 151(3) bars information from being disclosed to the detainee but not to the court. Article 151(3) obviously has reference to article 151(1) and (2) under which the detaining authority has to supply the grounds of detention to the concerned detainee. The court is under a constitutional obligation to be satisfied that the detention was lawful. This obligation has been placed on the court by article 5(1) and (2) of the Constitution. How is the court going to discharge this obligation if it is denied all relevant information. However, the Supreme Court did uphold the High Court decision quashing the detention order and issuing *habeas corpus*. Referring to the affidavit filed by the concerned authority the court ruled that it did not reveal any ground which could be relevant to security. The court expressed the view that while it could not ask for evidence, it could certainly take cognizance of what was stated in the affidavit.

Two paragraphs later, he touched on the *Karpal Singh*'s case *(supra)* by stating the following:

> In Malaysia, in *Minister of Home Affairs v. Karpal Singh* [1988] 1 MLJ 468, out of the several facts on which the detention order was based, one fact was entirely wrong and non-existent. The High Court quashed the order and issued *habeas corpus* saying that the order was made 'without care, caution and a proper sense of responsibility'. However, the Supreme Court, on appeal, reversed the High Court and went to the extent of saying that preventive detention would not be illegal simply because the allegations of fact supplied to the detainee in pursuance of article 151(2)(1)(a) and section 11 of the ISA were 'vague, insufficient or irrelevant'. The court did not consider the full implications of article 151 which confers on the detainee the right of getting 'facts and grounds' from the detaining authority and of making 'representation'. How can he make an effective representation if the facts supplied to him for his detention are 'vague, insufficient or irrelevant'? The Supreme Court drew a distinction between 'facts' and 'grounds'. The court argued that while the grounds of detention were open to challenge on the ground of not being within the scope of the law, allegations of fact upon which subjective satisfaction of the Minister was based were not. But then the question arises: how can the 'grounds' be right if the facts on which they are based are wrong. The point to emphasise is that subjective satisfaction to detain a person has to be based on real facts and not on imaginary facts.

Later, at pp. 651 and 652, he said:

> It may even be plausibly argued that a privative clause in a preventive detention law is unconstitutional *vis-a-vis* article 5(1) and (2) of the Malaysian Constitution. Article 5(1) insists that a person cannot be deprived of his personal liberty save in accordance with law. Therefore, obviously, it is the function of the court to ensure that no person is detained otherwise than in accordance with law. Therefore, no statutory provision can take away this power of the court whether a particular detention order is in accordance with the relevant law or not. To say that a detention order even though not valid under the law is, nevertheless, unquestionable in the court *prima facie* seems to be inconsistent with article 5(1) and (2) of the Malaysian Constitution.

Sulaiman Abdullah for the appellants urged us to follow the subsequent trend in similar cases which now favours the objective test which would allow a greater check and balance on executive powers. *Chng Suan Tze v. The Minister of Home Affairs & Ors. and Other Appeals* [1988] 1 LNS 162 decided by the Singapore Court of Appeal is a case on point.

In *Chng Suan Tze*'s case *(supra)*, it was submitted that the exercise of the discretionary power under ss. 8 and 10 of the Singapore ISA is subject to the objective test and thus reviewable by a court of law and that to discharge this burden, the executive has to satisfy the court that there are objective facts in existence which justify the executive's decision. It was held that the President's satisfaction under s. 8, and the Minister's satisfaction under s. 10, of the Singapore law are both reviewable by a court of law as the subjective test adopted in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions. It was also held that although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations; similarly, although the court will not question whether detention was necessary for the purpose specified in s. 8(1), the court can examine whether the matters relied on by the executive fall within the scope of those specified purposes.

In *Karam Singh*'s case *(supra)*, a five member panel of the Federal Court in dismissing the appeal against the decision of the High Court dismissing the application by the appellant for a writ of *habeas corpus* held that:

(a) the learned trial judge was correct in holding that the appellant's detention had been made in the exercise of a valid legal power and therefore the onus lay on the appellant to show that such power had been exercised *mala fide* or improperly;

(b) the defect, if any in the detention order in setting out the objects and purposes of the detention in the alternative was a defect of form only and not of substance, it did not show that the executive had not adequately applied its mind to the desirability of detaining the appellant and therefore did not invalidate the order;

(c) the vagueness, insufficiency or irrelevance of the allegations of fact supplied to the appellant did not relate back to the order of detention and could not render unlawful detention under a valid order of detention; if, however, the appellant thought that the allegations were vague, insufficient or irrelevant, he should have asked for particulars; and

(d) the question whether there was reasonable cause to detain the appellant was a matter of opinion and policy, a decision which could only be taken by the executive.

In *Honey and Another v. Minister of Police and Others* [1980] (3) Tk Sc 800, it was held that the police could only rely on the protection of the ouster clause if they had complied with the necessary prerequisites. Since they had failed to do this, the court was accordingly entitled to enquire into the legality and validity of the arrest and detention. The onus was on the police to show on the probabilities that they had acted pursuant to the provision laid down in the law.

In the Zimbabwean case of *Minister of Home Affairs and Another v. Austin and Another* [1987] LRC (Const) 567, the Supreme Court was of the view that the detention order was defective in the information as to the reasons for detention. In drawing up the grounds of detention, it was incumbent upon the detaining authority to appreciate that the detainee must be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before a review tribunal. A bare statement that the detainee was a spy was not good enough.

It was also said that the expression in s. 17(2) of the regulations' "if it appears to the Minister" did not exclude judicial review. In relation to the detainees, the detaining authority had a duty to act fairly and, in considering whether he had, the court had to determine questions of irrationality, procedural impropriety or illegality. Though s. 17(2) was cast in subjective form, the Minister had to consider objective facts and the court could determine whether he had acted reasonably in doing so. There had to be sufficient information and facts to justify the Minister exercising his discretion to detain the respondents.

In *Katofa v. Administrator-General For South West Africa And Another* [1985] (4) 211 SWA, the South West Africa Supreme Court, in dealing with the Proc AG 26 of 1978 (SWA) which deals with the preservation of internal security and the arrest and detention of persons believed to be threatening such security said:

> As regards the question of what sufficiency of evidence is necessary for the discharge of the onus on a respondent in an application for an interdict *de libero homine exhibendo*, it had been contended for the respondent in the present matter that *his ipse dixit* was sufficient to discharge the onus. The Court, however, considered the wording of s. 2(1) of Proc AG 26 of 1978, which required the Administrator-General to be satisfied that a person has committed or attempted to commit acts of violence or intimidation, before he issues a warrant for such person's arrest and detention, and held that objective reasonable grounds has to exist to cause the Administrator-General to be satisfied and that he had to apply his mind to the consideration thereof. Furthermore, the Administrator-General is obliged to divulge these reasons to the Court to justify the detention and the Court is

entitled to consider whether they do in law justify the detention – the mere *ipse dixit* of the Administrator-General would not be sufficient, for the Court would not be able to judge therefrom whether legal grounds for the detention did exist.

In *Rahman v. Secretary Ministry of Home Affairs (Bangladesh) and Another* [2000] 2 LRC 1, the Supreme Court in Bangladesh, in allowing the appeal challenging the detention of a former President of that country, said:

(1) Under the Constitution the Supreme Court exercised jurisdiction to scrutinise executive acts, including orders of preventive detention, to determine whether a person was detained without lawful authority or in an unlawful manner. The law had never granted absolute power to either the government or the President to make detention orders. Moreover, the government's 'satisfaction', upon which a detention order was authorized by s. 3(1) of the Act, was not immune from challenge or judicial review and the authority making a detention order could never justify it merely by saying that the action was taken in the interest off (sic of) public safety and public order: it had to satisfy the court that there were such materials on record as would satisfy a reasonable person to justify the order of detention. That approach to 'subjective satisfaction' was materially different from that taken by the courts of India. (see p. 14, post). *Baqi Baluch v. Pakistan* 20 DLR (SC) 249, *Re Abdul Latif Mirza* 31 DLR (AD) 1 and *Re Sajeda Parvin* 40 DLR (AD) 178 applied.

(2) The grounds on which a detention order was made, under s. 8 of the Special Powers Act 1974 had to be communicated to the person affected, had to be clear, precise, pertinent and not vague. Irrelevance, staleness or vagueness of the grounds was sufficient to vitiate a detention order. An order of preventive detention could be made under s. 3 of the Act when the government was satisfied that the person was about to engage in a prejudicial act or acts and it was necessary to detain him for the purpose of preventing him from doing such act or acts. 'Prejudicial act' was defined, *inter alia*, in s. 2(f)(iii) of the Act as any act which was intended or likely to endanger public safety or the maintenance of public order. In the instant case there was no indication in the first ground that E had been about to do something which was likely to endanger public safety or the maintenance of public order: he had not been debarred from seeking election nor was his party banned. It appeared that the government had passed the order of detention against E because it had been anticipating a threat to public safety and public order from the students in case their proposed protest march materialised. However, such an order could not he justified as a legal order passed under the Act because it was an order made to prevent others (and not E) from committing prejudicial acts. It followed that E had committed no crime or illegality in telling the

BBC that he would start the election campaign for his party soon and that he had no regrets or excuses: nothing in the said utterances could justify an inference that E was about to engage in a prejudicial act or acts and consequently the order was liable to be declared to have been passed without any lawful authority. With respect to the second ground, since the order of detention had been passed on 11 December 1990 it was impossible on the part of the detaining authority to justify the order on the basis of the statements made on 16 December 1990 as the second ground was not before the detaining authority at the time the detention order was made. E's detention on public safety and public order grounds was therefore unfounded, unlawful, *mala fide* and against all good conscience and democratic norms. It was done for a collateral purpose in order to create a hurdle to him in contesting the forthcoming parliamentary election. (see pp. 5, 9-11, post). *Re Abdul Lattif Mirza* 31 DLR (AD) 1, *Shiv Prasad v. State of MP* AIR [1981] SC 870 and *Mahmood v. Bangladesh* [1991] 43 DLR 383 approved.

(3) The detention order was invalid also because, on its face, it showed that it had not been made in terms of s. 3(1) of the Act, which authorized such an order where the government was satisfied that it was necessary to prevent a person 'from doing any prejudicial act'. The order under review stated that the government was satisfied that the detention was necessary 'for maintaining public safety and public order' but that was not a ground recognized by the Act for the making of such an order. The terms of the order itself therefore demonstrated that the authority had not applied its mind to the proper consideration which under s. 3(1) was a condition to the exercise of the power to authorize detention. (see pp. 11-12, 15-16, post). *Dicta* of Roy Choudhury J in *Mahmood v. Bangladesh* [1991] 43 DLR 383 applied.

In *Fifita and Another v. Fakafanua* [2000] 5 LRC 733, several legal issues arose on the appeal: one of which was whether the arrest had been justified under s. 21 of the Police Act, which authorized a police officer to arrest without warrant a person whom he suspected on reasonable grounds of having committed an offence. It was decided by the Court of Appeal in Tonga in dismissing the appeal that the appellants had failed to justify the arrest of the respondent under s. 21 of the Police Act because they had not discharged the onus of providing evidence to answer affirmatively the two relevant questions. Firstly, did the arresting officer suspect that the person arrested was guilty of the offence? The answer to this question depended entirely upon findings of fact as to the officer's state of mind. Secondly, assuming that the officer had the necessary suspicion, were there reasonable grounds for that suspicion? This was a purely objective requirement. The dictum of Woolf LJ in *Castorina v. Chief Constable of Surrey* (1988) (unreported) as cited in Archbold's *Criminal Pleading, Evidence and Practice* (1993), vol. I, paras. 15-144 was applied.

In *Matanzima v. Minister of Police, Transkei and Others* [1992] (2) SA 401 Tk GD, it was held that the purpose of an arrest and detention under and in terms of s. 47 of the Public Security Act 30 of 1977 (Tk) is to interrogate the detainee. He cannot be detained for any other purpose and especially not to enable the police to continue and complete their investigations into a matter in connection with which he was detained. In the instant case the court held, on the return day of a rule *nisi* granted in an application for an order declaring the continued detention of the applicant's husband to be unlawful and for his release from such detention, that the reasonable inference to be drawn from the respondents' affidavits was that the applicant's husband was being detained pending continued investigations into an attempted coup in which he was suspected of having been involved, that the release of the applicant's husband would interfere with those investigations and that he would be interrogated as and when information was obtained in the course of those investigations. The court held that such was clearly not the purpose of s. 47 of the Public Security Act and that the continued detention of the applicant's husband was therefore unlawful. The rule *nisi* was accordingly confirmed.

In *Minister of Law and Order and Others v. Hurley and Another (supra)* it was held that the words "he has reason to believe" in s. 29(1) of the Internal Security Act 74 of 1982 imply that there must be grounds or facts which give rise to, or form the basis of, the arresting officer's belief and it cannot be doubted that it was the legislature's intention that these grounds be reasonable grounds. When regard is had to the serious consequences such an arrest and detention have for the individual, it is inconceivable that the legislature could have intended that a belief based on grounds which could not pass the test of reasonableness would be sufficient to provide justification for such arrest and detention. If the legislature had intended that the question whether reasonable grounds existed for a belief as required by s. 29(1) should be left entirely to the subjective judgment of the arresting officer, it would have used such language which made that intention clear as it had done in s. 28(1)(a) which provided for a subjective test in the case of a decision by the Minister. Although situations might arise when the police would, for security reasons, not be able to disclose information which was available to them, it should not be assumed that this would frequently arise or that the police on such occasions would have to disclose all their information and this did not outweigh the considerations which indicated that the words "if he has reason to believe" should be construed as constituting an objective criterion.

In *Minister of Law and Order and Others v. Pavlicevic (supra)*, the court on appeal found that the onus being upon the detaining officer, it was incumbent upon him to deal fully with all the elements of his decision and the grounds therefor, including the mental element of an offence under s. 54(2) of the Act. As to the conduct element, there was no doubt that, on the information referred to in his affidavit, the detaining officer had had reasonable grounds for believing that in the course of the strike, acts had been committed which fell within one or more of the categories listed in the paragraphs of s. 54(2) relied upon by him. As to the mental element, however, the court pointed out that the detaining officer had given no indication in his affidavit of the grounds upon which he had believed the mental element of the offence to have existed. On his own description of the strike as a sympathy strike, this had not been a situation in which the very facts themselves, or the nature of the conduct in question, considered in the light of the surrounding circumstances, proclaimed the acts constituting the conduct element as having been done with the intent to achieve one or more of the objects listed in paras. (a) to (d) of s. 54(1). The appellants' argument in support of such a construction failed for a number of reasons, among them being:

(a) that the detaining officer in his affidavit never stated that that was the inference he had drawn;

(b) purely on the information supplied by the detaining officer in his affidavit, such inference could not reasonably be drawn in that, save that the physical violence accompanying the strike was unusually extreme, the pattern of conduct in the SATS strike did not appear to have been different from the general run of strikes in the present age;

(c) the strike had lasted for less than three months and, in terms of the settlement which ended it, all that had been ostensibly achieved had been the re-employment of certain workers who had been dismissed during the strike and, seemingly, the improvement of hostel facilities, which appeared to have satisfied all concerned.

The court held that that seemed to negative the suggestion that the strike had had other objectives falling within the ambit of paras. (b) and (d) of s. 54(1). The court held that, in any event, even if the detaining officer had adverted to the mental element of the offence said to have been committed under s. 54(2), the facts recounted by him in his affidavit did not disclose reasonable grounds for believing that the mental element had been present when the conduct said to constitute such offence had taken place. The appeal was accordingly dismissed.

On the basis of these arguments and on a careful consideration of the authorities cited, I am more inclined to agree with learned counsel for the appellants that the test for s. 73 of the ISA is objective and I was, therefore, placed in a position where I could enquire as to the reasons for the belief of the relevant arresting officers when they arrested the appellants especially when they were all arrested before the so called "Black 14" day on 14 April 2001.

Durga Das Basu in his textbook *"Administrative Law"* at p. 544 of the 2000 reprint deals with *habeas corpus* thus:

> The object of issuing the writ is to ascertain whether there is any legal justification for the detention of the person in custody. The merit of the case or the moral justification for imprisoning the petitioner is no relevant consideration in a proceeding for *habeas corpus*. Thus, a person charged with treason or murder is entitled to be set at liberty, if his imprisonment has not taken place in due course of law.
>
> A detention, thus, becomes unlawful not only where there is no law to justify it but also where procedure prescribed by the law which authorises the detention has not been followed, and, in determining whether such procedure has been complied with, the Court applies a strict standard, not only in interpreting the terms of the statute but also in exacting a strict compliance with the requirements, so interpreted, in fact. The need for this strict standard was explained in the celebrated dictum of Brett, LJ, in *Thomas Dale*'s case [1871] 6 QB 376 (461):
>
> > It is a general rule which has always been acted upon by the Courts in England that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and if he fails to follows every step in the process with extreme regularity the Court will not allow the imprisonment to continue.
>
> These words are echoed in the observation of Sastri, CJ of our Supreme Court in *Ram Narayan v. State of Delhi* [1953] SCR 652 (655):
>
> > those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are, therefore, entitled to be released, and they are set at liberty fortwith.

In saying that *habeas corpus* would lie on either constitutional or non-constitutional grounds, the author listed the latter as follows at p. 549:

I. *Non-Constitutional*

(a) Where the order of detention is *ultra vires* the provisions of the Act, the order becomes a nullity and the detenu is entitled to obtain his release by *habeas corpus.* In India, this common law right to the restoration of liberty where it has been violated without authority of law has also been given a constitutional support by art. 21, so that in every case where a person has been detained without the authority of law or under an order which is *ultra vires,* there is a violation of the constitutional guarantee under Art. 21, and, consequently, on this ground an application under Art. 32 as well as under Art. 226 lies.

(b) Apart from a plain transgression of the terms of the statute authorising the detention, the detention may be illegal by reason of an abuse of the statutory power or a *mala fide* use of it and in such cases the detenu is entitled to obtain his release by *habeas corpus*.

(c) It will be equally bad if the detaining authority did not apply his mind to the statutory requirements or acts upon a misconstruction of the statute or upon materials which have no rational probative value to the grounds of obtention.

To recapitulate, we had disagreed with learned counsel for the appellants on the issue of recusal as we found no likelihood of danger of bias on the part of the learned trial judge, and even if we had applied the reasonable apprehension of bias test, we would have arrived at the same conclusion. On the second issue relating to art. 149 of the Constitution and the ISA, I am unable to agree with learned counsel that the ISA was an Act specifically and solely to deal with and to counter the communists and the communist threat.

However, for the third and fourth issues, I am more inclined to agree with learned counsel for the appellants that the test for s. 73 of the ISA is an objective test and I could enquire into the arresting officers' "reason to believe" when the appellants' arrests were effected relying on the affidavits and the affidavits in reply. As the appellants were never told of the grounds of their arrest and the arresting officers have not really explained the reasons for their belief and the interrogation officers have only made bare assertions hiding under the cloak of s. 16 of the ISA and art. 151(3) of the Constitution, resulting in all the evidence relating to the arrests and the interrogation after the arrests having no connection with the respondent's press statement, and since all the appellants had been denied access to legal representation throughout the whole period of the detention under s. 73 of the ISA as elaborated in the separate judgment of my learned sister Siti Norma Yaakob FCJ, and since I also agree with the conclusions in the draft judgments of my learned brothers, Mohamed

Dzaiddin CJ, and Steve Shim Lip Kiong, CJSS, I can only conclude that this is indeed a proper case to hold the detention of all five appellants to be unlawful.

In view of the above considerations, I am of the opinion that all five appeals ought to be allowed. Accordingly, the first, third, fourth and fifth appellants are hereby released.

Siti Norma Yaakob FCJ:

My judgment is confined to one aspect of the submissions made in these five appeals before us namely the issue of whether the provisions of art. 5(3) of the Federal Constitution relating to the right of an arrested person to be consulted and defended by a legal practitioner of his choice have been breached and the effect of such a breach. This is the fifth and last issue raised by the appellants.

Article 5 deals with fundamental liberties and in relation to cl. (3), it makes the following provisions.

> Where a person is arrested he shall be in formed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

It is common ground that the appellants were denied communication with their solicitors and family members during the whole period of their initial detention under s. 73(1) of the Internal Security Act 1960 ("the ISA") despite written requests made for that purpose.

We were referred to the first of such requests contained in a letter dated 12 April 2001, from Messrs. Daim & Gamani, solicitors for the first appellant, written two days after the latter's arrest and detention. The reply from the respondent came almost immediately the next day, confirming the arrest and detention, the reasons for such drastic actions under the ISA, the investigations that were then on-going and an assurance that there was no cause for alarm as to the first appellant's well being. No mention was made on the request for access. This prompted Messrs. Daim & Gamani to send a second letter the same day, drawing the respondent's attention to their request but the respondent had remained silent and had not responded at all. Similar requests were made by the other appellants but those requests also suffered the same fate as that of the first appellant's.

Case law as well as discourse into the subject have since defined and developed the scope and extent of the right of the arrested person to legal representation.

I begin with the case of *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30, where a question of law was referred to the Federal Court under s. 48 of the Courts of Judicature Act 1964. The question to be determined was whether the provisions of the Restricted Residence Ordinance authorising the detention and/or the deprivation of liberty of movement contrary to the provisions of the Federal Constitution are void. In answering that question in the negative, Suffian, FJ, (as he then was) had this to say:

> To sum up, in my judgment, the Restricted Residence Enactment is silent as regards the four rights guaranteed by article 5 to a person arrested under the Enactment, namely, the right to be informed as soon as may be of the grounds of his arrest, to be allowed to consult and be defended by a legal practitioner of his choice, and, if not sooner released, to be produced without unreasonable delay and in any case within 24 hours (excluding the time of any necessary journey), before a magistrate and not to be further detained without the magistrate's order. Such further detention must be in accordance with law, which law need not give him a right to an enquiry. Silence of the Enactment regarding the four rights does not make it contrary to the Constitution. Even if the Enactment is contrary to the Constitution, the Enactment is not void. The four rights should be read into the Enactment.

As such, a detainee's right to be consulted by a practitioner of his choice is to be read into the ISA.

Assa Singh was followed by *Ramli bin Salleh v. Inspector Yahya bin Hashim* [1973] 1 MLJ 54, where Syed Agil Barakbah, J, had to deal with the question as to when the right to legal representation under art. 5(3) begins in the case of a person who has been arrested and remanded in police custody. The learned judge held that such a right begins from the day of his arrest even though police investigations have not yet been completed. However the learned judge warned that when enforcing such a right it is subject to certain legitimate restrictions and these may relate to time and convenience to both the police and the person seeking the interview and the right should not be the subject of abuse by either party. For such consultation to be effective it should be allowed without the hearing of the police though in their presence. These were the very same safeguards and sentiments that were emphasised by Modi J, in the case of *Moti Bai v. The State* AIR [1954] Rajathan 241, where the provisions of art. 22(1) of the Indian Constitution, which have the same effect as our art. 5(3) were being questioned. That case was cited with approval by our Malaysian Court in *Ramlee bin Salleh (supra).*

These restrictions were also recognised in the case of *Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor.* [1971] 2 MLJ 137 where Wee Chong Jin, CJ, in interpreting art. 5(3) of the Constitution expressed his opinion that an arrested person is entitled to his constitutional right of legal representation after his arrest and the right must be granted to him within a reasonable time after his arrest.

Suffian LP in *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 went further to analyse the timing of the exercise of such a right in the following manner:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.
>
> With respect I agree with the view of Bhide J in *Sundar Singh v. Emperor* (AIR [1930] Lahore 945) who said at page 947:
>
> > The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must of course be prepared to support their action on substantial grounds.

Clearly *Ooi Ah Phua* states the law to be simply this. The right of an arrested person to legal representation starts from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice.

Hashim bin Saud v. Yahaya bin Hashim & Anor [1977] 2 MLJ 116, is yet another case of an arrested person who had been ordered to be detained under s. 117 of the Criminal Procedure Code. He was denied access to his counsel during the period of his detention despite a request made for that purpose. In a subsequent claim for damages for wrongful detention and denial of his right to consult his counsel, Harun J, acknowledged that

such a right begins from the moment of his arrest but held that the exercise of that right is postponed for so long as the arrested person is detained under s. 117 of the Criminal Procedure Code.

The Federal Court found that proposition of law to be erroneous and Raja Azlan Shah FJ, (as he then was) pronounced the law to be as follows:

> The correct view is that as stated by this court in *Ooi Ah Phua*'s, *supra*, case. In spite of the magistrate's order under section 117 C.P.C. the right of the arrested person to counsel is not lost. Such order is essential only on the basis that it renders legal detention which otherwise would have been illegal in view of the provision of clause 4 of art. 5 of the Constitution which exhorts that an arrested person if not released shall be produced before a magistrate within twenty-four hours and shall not be further detained in custody without the magistrate's authority. The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

Perhaps the case that answers the issue directly is that of *Theresa Lim Chin Chin & Ors. v. Inspector General of Police* [1988] 1 MLJ 293 where the Supreme Court asked and answered that tesue in the following manner.

> When should a detainee arrested under section 73 of the Internal Security Act be allowed to exercise his right under Article 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v. Officer-in-Charge, Criminal Investigations, Kedah/Perlis*. In other words the matter should best be left to the good judgment of the authority as and when such a right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police had deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

The *ratio decidendi* in *Ooi Ah Phua* and *Theresa Lim* places the burden on the detainee to show that there had been a breach of art. 5(3) by the detaining authority. This is contrary to that reached in *Hashim bin Saud*'s case *(supra)* which placed the burden on the police to show that giving effect to art. 5(3) would impede police investigations or the administration of justice.

Hashim bin Saud was decided eleven years earlier than *Theresa Lim* whilst *Ooi Ah Phua* was decided two years earlier than *Hashim bin Saud* and thirteen years earlier than *Theresa Lim*. As the latest judicial pronouncement on the subject of the burden of proof on the breach of the provisions of the second limb of art. 5(3) is that found in *Theresa Lim*, it follows that the test propounded by that case is to be followed as by

necessary implication the later decision represents the present state of the law and that the later decision prevails over the earlier decision. The rule of judicial precedent and a departure from a previous decision when it is right to do so has long been recognised by this court as seen from the case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, where at p. 662 of his judgment, Peh Swee Chin FCJ, had this to say:

> If the House of Lords, and by anology, the Federal Court, departs from its previous decision when it is right to do so in the circumstance as set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

It is the appellants' case that from the time of their arrests and detentions, the respondent had already decided to deny them access to their counsel. This is borne out by the respondent's conduct in refusing to entertain the appellants' written requests for access. Added to that is the reality of the whole situation when all the appellants were in fact prevented from any communication with their counsel throughout their detentions. In the case of the second appellant the duration of his detention was fifty two days, for unlike the other appellants, he was released before the expiry of his detention under s. 73(1) of the ISA.

We were also invited by Mr. Sivarasa Rasiah, counsel for the appellants to have regard to international standards when determining the extent and scope of art. 5(3). He argued that such standards would be of persuasive value and assistance when defining the substantive right under art. 5(3). He also pointed out that the approach taken by international communities and reliance on United Nations documents on the subject of legal representation has already received statutory recognition in this country by the passing of the Human Rights Commission of Malaysia Act 1999. That Act established the Human Rights Commission of Malaysia with functions to inquire, *inter alia*, into complaints regarding infringments of human rights which includes fundamental liberties as enshired in Part II of the Federal Constitution. Section 4(4) of the Act singles out the Universal Declaration of Human Rights 1948 ("the 1948 Declaration") to be one document for which due regard can be had when considering complaints of infringements of human rights insofar it is not inconsistent with the Federal Constitution.

In line with his argument, Mr. Sivarasa Rasiah, also referred us to two documents adopted by the United Nations General Assembly in 1977 and 1988 as forming part of the international standard relating to the Standard

Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment. Section C of the Standard Minimum Rules outlines the conditions under which persons awaiting trial and persons detained without charge should be subjected to and of particular interest is r. 93 which has the following provisions.

> 93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

Likewise emphasis is made of Principle 18 in the Body of Principles which contains the following provisions.

> Principle 18.
>
> 1. A detained or imprisoned person shall be entitled to communication and consult with his legal counsel.
>
> 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
>
> 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing of a law enforcement official.
>
> 5. Communication between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Encik Tun Majid bin Tun Hamzah, Senior Deputy Public Prosecutor for the respondent started his rebuttal by stating that reference to international standards set by the 1948 Declaration and several other United Nations documents on the right of access cannot be accepted as such documents are not legally binding on our Malaysian Courts. For this submission he relied on the case of *Merdeka University Berhad v. Government of*

Malaysia [1981] 1 CLJ 175; [1981] CLJ (Rep) 191 where the 1948 declaration was described as a non legally binding instrument as some of its provisions depart from existing and generally accepted rules. "It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law."

Merdeka University Berhad was decided in 1981. This begs the question as to whether acceptance of the 1948 Declaration as a non legally binding instrument has changed by virtue of s. 4(4) of the Human Rights Commission of Malaysia Act 1999. In my opinion the status and the weight to be given to the 1948 Declaration by our courts have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on Member States. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which Member States can ratify or accede to and those principles will then have the force of law.

The fact that regard shall be had to the 1948 Declaration as provided for under s. 4(4) of the Human Rights Commission of Malaysia Act 1999 makes no difference to my finding. This is so as my understanding of the pertinent words in the sub-section that "regard shall be had" can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them. This is further emphasised by the qualifying provisions of the sub-section which states that regard to the 1948 Declaration is subject to the extent that it is not inconsistent with our Federal Constitution. In any event on the particular facts of the appeals before us, I do not see the need to have regard to the 1948 Declaration as our own laws backed by statutes and precedents as seen from the cases that I have spelt out in this judgment are sufficient for this court to deal with the issue of access to legal representation.

On the same token I do not see the necessity to resort to r. 93 of the Standard Minimum Rules and Principle 18 of the Body of Principles as somewhat corresponding and parallel provisions are to be found in the Internal Security (Detained Persons) Rules 1960, made pursuant to s. 8(4)

of the ISA. Of particular interest is r. 81 which contains provisions as to the condttions under which a detainee is entitled to be visited by his relatives and legal adviser. What the Rules do not provide however is when the right to visit can be exercised. That is a matter of substantive law.

It is the respondent's contention that whilst he does not deny that the appellants have the right to counsel of their choice, that right is suspended throughout the period of their detentions under s. 73(1) of the ISA. He reasoned that the police have the maximum period of sixty days within which to conduct and complete their investigations as to whether the appellants have acted or about to act in any way prejudicial to the security of the country. The respondent submitted further that during the sixty day period, the police were entitled by law to go about their investigations without any form of interferance from any quarter. It is for that very reason that written requests for access were not entertained as investigations were then on-going but this cannot be interpreted to mean that there was outright refusal on the part of the police. Neither it is correct to conclude from the tone of their letter dated 13 April 2001, that the police had decided to deny access during the duration of their detentions. The respondent denies any form of bad faith on his part.

Sub-section (3) of s. 73 of the ISA allows the appellants to be detained for a period not exceeding sixty days without orders of detention being made against them under s. 8. This implies that a detainee may be issued with a s. 8 detention order or released altogether before the expiry of the sixty days. In the case of the second appellant he was released on the fifty second day of his detention, whilst detention orders under s. 8 were issued against the first, third, fourth and fifth appellants following their initial detentions under s. 73(1). Under these circumstances I consider that it is incumbent upon the police to act promptly and professionally in conducting their investigations into the acts and conduct of the detainees, so that the latter's fundamental rights to consult counsel of their choice will not become illusory or ineffective. They should not be made to wait indefinitely for the police to complete their investigations before they can have access to their counsel and that too after the expiry of the sixty day period. Whilst I appreciate that a balance must be drawn between the interests of the state on one hand and the interests of the detainees on the other, it is not unreasonable to expect the police to give priority to their investigations so that the rights of the detainees to seek legal representation will not be unnecessarily denied. In this respect, I am guided by the case of *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697 where our then Supreme Court adopted the test propounded by the Indian Supreme Court in the case of *Smt Manecha*

Ghandi v. Union of India AIR [1978] SC 597 when determining whether an impunged legislation violates any fundamental right guaranteed under the Constitution. The test is that the court should ask itself and consider whether the validity of State action "directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory".

On the facts of these appeals before us, I consider that allowing access only after the expiry of their detentions is conduct unreasonable and a clear violation of art. 5(3). It also supports the appellants' contention that denial amounts to *male fide* on the part of the police that the ISA was used for a collateral purpose. That collateral purpose is demonstrated by the fact that the appellants are facing several charges of being members of an unlawful assembly and that the ISA detentions were used to deny the appellants the right to give instructions to their counsel to defend them in the several charges they face.

Responding to the respondent's argument that under the ISA, the police has absolute powers during the entire period of the sixty day detention to refuse access under the guise that investigations were on-going, that same submission was raised in *Hashim bin Saud*'s case *(supra)*. In that case the High Court's finding that an arrested person's right to counsel is postponed for as long as he is detained under s. 117 of the Criminal Procedure Code has been held by this court to be erroneous. Although that case dealt with a s. 117 detention I consider that the principles of law are applicable to a s. 73(1) detention as well. Likewise I find no justification to support the respondent's argument. Moreover the ISA makes no specific provision that there is no right to counsel during the sixty day detention under s. 73(1) and I find no support in the respondent's contention in the case law that I have alluded to earlier in this judgment. Denying access during the earlier part of the detentions would have been acceptable to facilitate the police in their investigations but to stretch that denial throughout the duration of the sixty day period makes a mockery of art. 5(3)

Before I move on to consider the remedy available for a breach of the second limb of art. 5(3), I need to correct a finding of the learned trial judge that art. 149 of the Federal Constitution validated the denial of access by the police. This cannot be correct. All that art. 149 did is to make provisions that the ISA is valid even though it contains provisions contrary to or inconsistent with arts. 5 (relating to personal liberty), 9 (relating to prohibition of banishment and freedom of movement), 10 (relating to freedom of speech, assembly and association) and 13 (relating to rights to property) of the Constitution. As an example s. 73 of the ISA that allows

detention for more than 24 hours without the order of a magistrate contrary to art. 5(4) of the Constitution is valid by virtue of art. 149, where otherwise it would have been void as being inconsistent with art. 5(4).

The ISA makes no provision for denial of access to legal representation which would be inconsistent with art. 5(3). As such the ISA is still subject to the rights entrenched in art. 5(3) and art. 149 cannot be used to remove such a right.

Can *habeas corpus* lie to secure the immediate release of the appellants? I answer this by referring to some authorities.

In *Lee Mau Seng (supra)*, it was held that such a remedy is not availabe to persons like the appellants who after their arrests and under lawful detentions were refused their constitutional right under the second limb of under art. 5(3).

Ooi Ah Phua (supra) followed *Lee Mau Seng* and *habeas corpus* was refused on the ground that it is possible for a person to be lawfully detained and unlawfully denied communication with his lawyer.

Likewise in refusing to free an arrested person in police custody in the Indian case of *Sundar Singh v. Emperor* [1930] AIR Lahore 945, Bhide J, had this to say.

> It was argued by his Counsel that the police custody became "improper" as the police refused to allow even the prisoner's legal adviser to have access to him. This is somewhat a debatable point, and although I have come to the conclusion that the police were not justified in refusing the prisoner to be interviewed by his legal adviser, I think, this cannot by itself be considered to be sufficient ground for setting him at liberty at once in the circumstances of the case.

The rationale for refusing *habeas corpus* in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art. 5(3) will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy. It would be otherwise if for example there has been a failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of art. 5(3) and such failure would render his subsequent detention unlawful. Clearly it is the legal status of the detention that determines whether *habeas corpus* can issue to secure the freedom of a detained person as guaranteed by art. 5(2) of our Federal Consitution.

Denial of access is not the only ground relied by the apellants to secure their freedom. From the judgments of my learned brothers, Mohamed Dzaiddin, CJ, Steve Shim Lip Kiong, CJ (Sabah & Sarawak) and Abdul Malek Ahmad FCJ, the appellants have succeeded in establishing that their detentions under s. 73(1) of the ISA are unlawful on grounds other than denial of access. Under these circumstances *habeas corpus* will issue to secure their release, insofar as the first, third, fourth and fifth appellants are concerned.

Finally I concur with my brother judges that for the reasons appearing in our separate judgments all the five appeals are to be allowed.