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WONG ONG HUA & ANOR v. PP & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID SALLEH J
[ORIGINATING SUMMONS NO: WA-24-45-09-2021]
5 APRIL 2023
B [2023] CLJ (JT10)

Abstract – *(i) Although an extradition proceeding under s. 20 of the Extradition Act 1992 ('EA') is a committal proceeding, it is not entirely an administrative action devoid of judicial power. This can be seen in sub-ss. 1(b) and 1(c) of s. 20 on the issues of law that call for a judicial determination by the Sessions Court; and (ii) The word 'direction' by the Minister in s. 20 of the EA, which gives the impression that a Minister who is neither a judge nor a judicial personage can direct a judge of the Sessions Court to commit the fugitive criminal to prison to await the order by the Minister for his surrender, rendered the said exercise ultra vires art. 121 of the Federal Constitution ('FC'). It offends the doctrine of separation of powers which is contained in art. 4(1) of the FC.*

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E ***CRIMINAL PROCEDURE:*** *Extradition – Proceedings – Fugitive criminals – Minister made order under s. 4 of Extradition Act 1992 directing procedures under s. 20 to be applied to proceedings – Whether contravened art. 121 of Federal Constitution – Whether offended doctrine of separation of powers – Whether ss. 4 and 20 unconstitutional, null and void – Whether impugned sections ought to be struck down*

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CRIMINAL LAW: *Extradition – Fugitive criminals – Request made under art. 11 of Extradition Treaty between Government of United States and Government of Malaysia – Minister made order under s. 4 of Extradition Act 1992 directing procedures under s. 20 to be applied to proceedings – Whether contravened art. 121 of Federal Constitution – Whether offended doctrine of separation of powers – Whether ss. 4 and 20 unconstitutional, null and void – Whether impugned sections ought to be struck down*

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CONSTITUTIONAL LAW: *Federal Constitution – Article 121(1) – Whether contravened – Extradition proceedings – Request made under art. 11 of Extradition Treaty between Government of United States and Government of Malaysia-Minister made order under s. 4 of Extradition Act 1992 directing procedures under s. 20 to be applied to proceedings – Whether contravened art. 121 of Federal Constitution – Whether offended doctrine of separation of powers – Whether ss. 4 and 20 unconstitutional, null and void – Whether impugned sections ought to be struck down*

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I

The plaintiffs, said to be fugitive criminals, were arrested. In arresting the plaintiffs, the Royal Malaysian Police ('PDRM') was purportedly executing a provisional warrant of apprehension ('PWA') issued by the Magistrates' Court. The PWA, made under s. 13(1)(b) of the Extradition Act 1992 ('EA'), was issued against the plaintiffs based on a request made by the Government of the United States ('US Government') to the fourth defendant, the Government of Malaysia ('GOM'). The request was made under art. 11 of an Extradition Treaty dated 3 August 1995 between the US Government and GOM ('Extradition Treaty'). After the arrest was executed, the plaintiffs were ordered by the Magistrates' Court to be remanded for a period of 60 days pursuant to s. 16(1) of the EA. The Minister of Home Affairs ('Minister'), the second defendant herein, issued an order and signified to the Magistrate that the US Government had made a requisition for the return of the plaintiffs pursuant to s. 12 of the EA. Subsequent to that, the Magistrate ordered that the proceedings before her be transmitted to the Sessions Court. The plaintiffs' remand was extended until their appearance before the Sessions Court in accordance with s. 16(2) of the EA. The Minister also made an order under s. 4 of the EA to the Sessions Court Judge, directing that the procedures under s. 20 of the EA be applied to the extradition proceedings ('*prima facie* exclusion order'). The effect of his direction was to exclude *prima facie* evidence for extradition as envisaged under s. 19 of the EA. The plaintiffs filed this originating summons ('OS'), seeking, *inter alia*, a declaration that ss. 4 and 20 of the EA ('the impugned sections') were unconstitutional, null and void and of no effect being in contravention of the Federal Constitution ('FC') in particular arts. 4(1), 5(1) and (2), 8(1) and (2) and art. 121(1). The challenge against the constitutionality of ss. 4 and 20 of the EA was anchored on the ground that the due extradition process was already housed in s. 19 of the EA and that since the procedure was readily available under s. 19, there was no necessity for the defendants to resort to s. 20 of the EA. Section 19 is a default procedure for a committal order made in extradition proceedings and s. 19(2) allows the Sessions Court to receive any other evidence that may be tendered to show that the fugitive criminal should not be returned. In contrast, s. 20 of the EA does not allow the Sessions Court to receive evidence to contradict the allegation that the fugitive criminal has done, which constitutes the extradition offence for which his return is sought. The procedure in s. 20 simply means that as long as the requirements in sub-ss. 1(a) to (d) are fulfilled, the Sessions Court is bound to make an order of committal pending a determination whether to surrender the fugitive criminal or not. It was the contention of the plaintiffs that a fugitive criminal who is sought to be extradited pursuant to an Extradition Treaty that dispenses with the *prima facie* requirement is treated differently from a fugitive criminal sought to be extradited pursuant to another Extradition Treaty that does not contain such a provision. The line of argument was that the different treatment accorded by ss. 19 and 20 was

A *ex facie* discriminatory. In opposing the OS, the Senior Federal Counsel ('SFC') raised three major grounds: (i) the process of extradition is not part of the criminal justice system. It is a mere committal proceeding which is quite distinct from a criminal proceeding; (ii) since the extradition process is not a criminal proceeding intended to establish the guilt of a fugitive
B criminal or otherwise, the question of the Executive branch usurping the judicial powers does not arise. The doctrine of separation of powers, even if duly structured in the FC, is not violated; and (iii) there is no denial of the fundamental rights or a fair trial of a fugitive criminal since s. 20 of the EA has ample safeguards housed therein.

C **Held (striking down impugned sections):**

(1) A High Court is empowered under the Federal Constitution and has the necessary jurisdiction under the law to rule on the constitutionality of a specific provision in a statute. One of the exceptions to the doctrine of binding judicial precedent is that where a certain issue which is now
D the subject matter of a dispute, was not canvassed at the higher court, the *ratio* in the said judgment can be distinguished. (para 79)

(2) The role of the Sessions Court under the EA, in particular s. 20 thereof, is not strictly and exclusively administrative. On the contrary, complicated legal matters asserted by the Justice Minister envisage a
E judicial role to be undertaken by the Sessions Court and not by the Magistrate. If indeed the role is purely administrative, a Magistrate would be able to dispose of the application made under s. 20. (para 67)

(3) Reading s. 20, there is no doubt that there are issues of law to be
F deliberated by the Sessions Court before it makes any order. This court was not at all comfortable with the words 'where a direction has been given by the Minister under s. 4, the Sessions Court shall … commit the fugitive criminal to prison to await the order by the Minister for his surrender.' The juxtaposition of sub-ss. 1(b) and 1(c) of s. 20 of the EA
G on the production of supporting documents in relation to the offence or whether the alleged act of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia are issues of laws that call for judicial determination. It could not be construed as an administrative issue by any stretch of the legal imagination. More importantly, with s. 20 employing the word 'shall',
H it leaves no room for the Sessions Court to exercise its judicial discretion. The word shall in s. 20 denotes a mandatory requirement. (paras 70 & 71)

(4) In view of the mandatoriness of s. 20 of the EA, the judge would seem
I to sit by the sideline and dutifully commit the fugitive criminal to prison to await the order by the Minister for his surrender. The Sessions Court, for all intents and purposes, is practically prevented from applying its

mind and exercising independent discretion to determine whether the fugitive criminal can be committed to prison to await the order by the Minister for his surrender. The word 'direction' by the Minister in s. 20 of the EA gives the impression that a Minister who is neither a judge nor a judicial personage can direct a judge of the Sessions Court to commit the fugitive criminal to prison to await the order by the Minister for his surrender rendered the said exercise *ultra vires* art. 121 of the FC. It offends the doctrine of separation of powers which is contained in art. 4(1) of the FC 'as it provides for the Judiciary, as the guardian of the [Federal Constitution], to act as a check and balance against the Legislature and Executive. In this context, the [Federal Constitution] is not self-executory and therefore cannot act to protect itself.' (paras 75 & 79)

(5) In the circumstances, s. 20, read together with s. 4 of the EA, offended art. 121(1) of the FC and ought, therefore, to be struck down. This decision was based on art. 121(1) of the FC, which was sufficient for this court to make a declaration that the impugned sections were void for being unconstitutional under art. 4(1). The striking down of the impugned sections did not mean that the extradition process, in other cases, was put to an abrupt end. It did not have that effect. The authority could still proceed with the process under s. 19 of the EA even if there was a binding Extradition Treaty with a requesting state. The existence of an extradition treaty does not preclude the application of s. 19 of the EA. (paras 80-82)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***
Canada v. Schmidt [1987] SCR 500 ***(refd)***
Cartwright & Anor v. Superintendent of Her Majesty Prison's & Anor [2004] UKPC 10 ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin [2018] 3 CLJ 250 HC ***(refd)***
Devani v. Kenya [2015] EWHC 3535 (Admin) ***(refd)***
Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***
Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor [1993] 4 CLJ 211 SC ***(refd)***
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC ***(not foll)***
Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Lai Sien Kon [1977] 1 LNS 94 HC ***(refd)***
R v. Galbraith [1981] 1 WLR 1039 ***(refd)***

A *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor [2013] 5 CLJ 447 FC* ***(dist)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Vasiljkovic v. Commonwealth of Australia [2006] HCA 40 ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, s. 30
Extradition Act 1992, ss. 4, 5, 12, 13(1)(b), 16(1), (2), 19(2), (4), (5), 20(1)(a), (b), (c), (d), (e), (2)
Federal Constitution, arts. 4(1), 5(1), (2), 8(1), (2), 121(1)
Land Acquisition Act 1960, s. 40D(1)
C Subordinate Courts Act 1948, s. 59(2)

For the plaintiffs - Malik Imtiaz Sarwar, Tey Jun Ren & Khoo Suk Chyi; M/s JR Tey
For the defendants - Shamsul Bolhassan, Uma Devi Balasubramaniam & Noorul Fhaiez Mohd Nayan; SFCs

D *Reported by Suhainah Wahiduddin*

JUDGMENT

Wan Ahmad Farid Salleh J:

E **[1]** The facts in this originating summons are not seriously disputed.

[2] The plaintiffs are said to be fugitive criminals and were arrested on 14 September 2020. A fugitive criminal is defined under s. 5 of the Extradition Act 1992 ("EA") as a person:

F > ... who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia.

[3] In arresting the plaintiffs, the Royal Malaysian Police ("PDRM") was purportedly executing a provisional warrant of apprehension ("PWA"), G which was issued by the Kuala Lumpur Magistrates' Court on 11 September 2020. The PWA was made under art. 13(1)(b) of the EA. It states as follows:

> The matter having been filed for hearing on this day in the presence of Mr Mohd Ashrof Adrin Kamarul, Deputy Public Prosecutor on behalf of the Applicant [Public Prosecutor] **And After Reading** the Notice of H Application and the Affidavit filed herewith **And After Hearing** the abovementioned Deputy Public Prosecutor **It Is Ordered** that the application for provisional warrants of arrest to be issued against the Respondents under section 13(1)(b) of the Extradition Act 1992 [Act 479] be hereby granted. (emphasis added)

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[4] The PWA issued against the plaintiffs was based on a request made by the Government of the United States ("the US Government") dated 3 September 2020 to the fourth defendant, the Government of Malaysia ("GOM"). The request was made under art. 11 of an Extradition Treaty dated 3 August 1995 between the US Government and GOM ("the Extradition Treaty").

[5] Section 13(1)(b) of the EA provides that where a fugitive criminal is in or suspected of being in Malaysia, a Magistrate may issue a PWA of such fugitive criminal on such information and evidence and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence had been committed in Malaysia.

[6] After the arrest was executed on 14 September 2020, the plaintiffs were ordered by the Kuala Lumpur Magistrate's Court to be remanded for a period of 60 days from 14 September 2020 pursuant to s. 16(1) of the EA.

[7] On 8 October 2020, the Minister of Home Affairs ("the Minister"), the second defendant herein, issued an order and signified to the Magistrate that the US Government had made a requisition for the return of the plaintiffs pursuant to s. 12 of the EA. Subsequent to that, the learned Magistrate ordered that the proceedings before her be transmitted to the Kuala Lumpur Sessions Court. The plaintiffs' remand was extended until their appearance before the Sessions Court in accordance with s. 16(2) of the EA.

The Order Under s. 20 Of The Encik Awang

[8] On the same day, 8 October 2020, the Minister also made an order under s. 4 of the EA to the Sessions Court Judge, directing that the procedures under s. 20 be applied to the extradition proceedings ("*prima facie* exclusion order"). The effect of his direction is to exclude *prima facie* evidence for extradition as envisaged under s. 19 of the EA. The difference in the legal implication of these ss. 19 and 20 of the EA will be addressed in the later part of this judgment.

[9] Section 4 of the EA provides that where there is a binding arrangement entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the *prima facie* requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in s. 20 shall apply to such cases. Section 4 puts into effect the treaty obligation under art. 7(3) of the Extradition Treaty. Article 7(3) of the Extradition Treaty provides as follows:

> ... such evidence as would justify committal for extradition under the laws of the Requested State, provided that neither State shall require, as a condition to extradition, pursuant to this Treaty, that the other State prove a *prima facie* case against the person sought.

[10] In the context of international law, Malaysia is a dualist system. The validity of international law in a dualist domestic system, as in the Malaysian case, is subject to ratification by Parliament. If any authority is needed for the said proposition, it can be seen in the judgment of the Federal Court in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 FC. Raus Sharif FCJ (as the former CJ then was), in his judgment, held that:

> International treaties do not form part of our law, unless those provisions have been incorporated into our law.

[11] In short, by virtue of s. 4 of the EA, art. 7(3) of the Extradition Treaty is given legislative recognition.

[12] Since s. 20 is the subject matter of dispute in this case, I am reproducing it here *in toto*:

> (1) Where a direction has been given by the Minister under section 4, the Sessions Court shall:
>
> (a) after hearing any representation made in support of the extradition request;
>
> (b) upon the production of supporting documents in relation to the offence;
>
> (c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;
>
> (d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that:
>
> (i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;
>
> (ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;
>
> (iii) the offence is an offence under military law which is not also an offence under the general criminal law;
>
> (iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;
>
> (v) the fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;

(e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought, commit the fugitive criminal to prison to await the order by the Minister for his surrender.

(2) In the proceedings before the Sessions Court under subsection (1) the fugitive criminal is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict the allegation that the fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.

(3) In this section, "supporting documents" means:

(a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;

(b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;

(c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence.

[13] The order of the Minister under s. 4 of the EA ("the impugned order") *inter alia* states as follows:

Direction Of The Minister Under

Section 4

To a Judge of a Sessions Court,

Whereas, in the exercise of the powers conferred upon me by virtue of section 4 of the Extradition Act 1992 [Act 479], I, Dato' Seri Hamzah bin Zainudin, the Minister of Home Affair, do hereby direct that the procedures under section 20 of the Extradition Act 1992 [Act 479] be applied in relation to the extradition request from the Government of United States of America for the case of Wong Ong Hua (Nric No: 740704-08-5051) and Ling Yang Ching (Nric No: 88050908-5173) who are accused of the following offences within the jurisdiction of United States of America ...

[14] On 9 February 2021, the plaintiffs were granted bail on the condition that they each provide a bail bond of RM500,000 with two sureties. The plaintiffs complied with this condition and are now released on bail.

At The Sessions Court

[15] The plaintiffs filed an application at the Sessions Court to refer to the High Court questions that the plaintiffs contended had arisen regarding the effect of certain constitutional provisions pursuant to s. 30 of the Courts of Judicature Act 1964 ("CJA").

[16] However, by consent of both parties, the reference application was withdrawn pending the disposal of this originating summons ("OS").

The Originating Summons

[17] This OS is supported by the affidavits of the first plaintiff in encl. 3 ("AIS-3") and the second plaintiff in encl. 8 ("AIR-8"), respectively.

[18] In the OS, the plaintiffs seek *inter alia* for the following orders:

(i) a declaration that ss. 4 and 20 of the EA are unconstitutional, null, void and of no effect being in contravention of the Federal Constitution, in particular, art. 4(1);

(ii) a declaration that ss. 4 and 20 of the EA are unconstitutional, null, void and of no effect being in contravention of the Federal Constitution, in particular, art. 5(1) and (2);

(iii) a declaration that ss. 4 and 20 of the EA are unconstitutional, null, void and of no effect being in contravention of the Federal Constitution, in particular, art. 8(1) and (2); and

(iv) a declaration that ss. 4 and 20 of the EA are unconstitutional, null, void and of no effect being in contravention of the Federal Constitution, in particular, art. 121(1).

The Plaintiffs' Case

[19] The challenge against the constitutionality of ss. 4 and 20 of the EA is anchored on the ground that the due extradition process is already housed in s. 19 of the EA. Learned counsel for the plaintiffs submitted that since the procedure is readily available under s. 19, there is no necessity for the defendants to resort to s. 20 of the EA.

[20] Now, what is the difference between s. 19 and s. 20 of the EA? Section 19 is a default procedure for a committal order made in extradition proceedings. The procedure under s. 19(5) requires the Sessions Court to form the:

> ... opinion that a *prima facie* case is made out in support of the requisition of the country concerned, the Court shall commit the fugitive criminal to prison to await the order of the Minister for his surrender, and shall report the result of its inquiry to the Minister and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Minister.

[21] There is another safeguard for the fugitive criminal, which is stipulated under s. 19(2) of the EA. It is this. Sub-section (2) allows the Sessions Court to receive any other evidence that may be tendered to show that the fugitive criminal should not be returned.

[22] In contrast, s. 20 of the EA does not allow the Sessions Court to receive evidence to contradict the allegation that the fugitive criminal has done, which constitutes the extradition offence for which his return is sought. The procedure in s. 20 simply means that as long as the requirements in sub-ss. (1)(a) to (d) are fulfilled, the Sessions Court is bound to make an order of committal pending a determination whether to surrender the fugitive criminal or not.

[23] In short, learned counsel for the plaintiffs submitted that the Sessions Court is reduced to merely acting in an administrative capacity compared to a judicial one.

The Constitutionality Arguments

[24] Learned counsel for the plaintiffs submitted that ss. 4 and 20 ("the impugned sections") of the EA are in breach of an assortment of the provisions in the Federal Constitution that render them null and void on the ground of unconstitutionality.

[25] The arguments can be summarised as follows.

Articles 5(1) And 8(1) Of The Federal Constitution

[26] Learned counsel for the plaintiffs submitted that the impugned sections violate the right to a fair hearing as guaranteed by arts. 5(1) and 8(1) of the Federal Constitution. Article 5(1) provides that no person shall be deprived of his life or personal liberty save in accordance with the law. Article 8(1) guarantees that all persons are equal before the law and entitled to equal protection of the law.

[27] According to learned counsel, the effect of art. 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. The Federal Court in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 FC was of the view that art. 8(1) houses within it the doctrine of proportionality, which is the test to be used when determining whether any form of Executive, Legislative or Judiciary action is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[28] The Federal Court further held that the phrase "according to law" appearing in art. 5(1) strikes down all forms of State action that deprive either life or personal liberty in the widest amplitude in contravention of substantive or procedural law.

[29] Relying on the judgment of the Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 FC, learned counsel submitted that where a law infringes art. 8(1) in a way that it impacts a person's to a right to a fair trial under art. 5(1), it ought to be struck down.

A **[30]** The plaintiffs took umbrage in the impugned order made by the Minister to the Sessions Court. By making the impugned order, the Minister is, in effect, curtailing the plaintiffs' right to be heard in opposition to extradition proceedings as afforded to them by s. 19 of the EA. The exercise of power under s. 20 of the EA would mean:

B (i) A fugitive criminal is not entitled to adduce evidence to contradict the allegation that the fugitive criminal had committed an extradition offence for which his return is sought.

(ii) A fugitive criminal is denied to lead evidence to establish that a *prima facie* case is not made out, which he would otherwise have under s. 19(2) C of the EA. Section 20 has practically taken away the power of a Sessions Court Judge to direct his mind whether a *prima facie* case is made out in support of the requisition of the country concerned. The Sessions Court is otherwise empowered to discharge a fugitive criminal under s. 19(4) if it is of the opinion that a *prima facie* case is not made out.

D **[31]** In expanding his line of argument, learned counsel for the plaintiffs invited this court to conclude the *prima facie* requirement in extradition cases should be construed as a requirement "in accordance with the law" within the ambit of art. 5(1) the Federal Constitution.

E **[32]** My attention was drawn to the judgment of the English High Court in *Devani v. Kenya* [2015] EWHC 3535 (Admin). Sir Richard Aitkens (later LJ), in delivering the judgment of the court (with whom Leggatt J concurred), held that the District Judge who has to decide whether there is a case to answer for the purposes of the extradition must apply the test referred to at F the end of the celebrated passage in Lord Lane's judgment in *R v. Galbraith* [1981] 1 WLR 1039 CA but with the additional gloss that, in deciding whether there is a case to answer, the DJ should consider all the admissible evidence before him, including evidence, called on behalf of the requested person.

G **[33]** Learned counsel for the plaintiffs further submitted that the impugned sections are *ex facie* discriminatory and therefore offend the constitutionality guarantee of equality before the law under art. 8(1) of the Federal Constitution.

[34] It is the contention of the plaintiffs that a fugitive criminal who is H sought to be extradited pursuant to an Extradition Treaty that dispenses with the *prima facie* requirement is treated differently from a fugitive criminal sought to be extradited pursuant to another Extradition Treaty that does not contain such a provision. The line of argument is that the different treatment accorded by ss. 19 and 20 is *ex facie* discriminatory.

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[35] Learned counsel argued that the impugned sections are not only discriminatory but also arbitrarily discriminatory, which renders them unconstitutional; *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 FC.

Article 121 Of The Federal Constitution

[36] The Sessions Court is an inferior court established under art. 121(1) of the Federal Constitution. Section 59(2) of the Subordinate Courts Act 1948 provides that a Sessions Court shall have jurisdiction to hear any civil or criminal matter arising within the local limits of jurisdiction assigned to it under the said section.

[37] In the circumstances of the case, learned counsel for the plaintiffs submitted that where a Sessions Court exercises its powers under the impugned sections, it is exercising its judicial power. My attention was then drawn to the leading majority of the Supreme Court in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC. In delivering the majority judgment, Abdoolcader SCJ remarked that judicial power might be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties.

[38] It is the plaintiffs' submission that the impugned sections in the EA have reduced the role of a Sessions Court to an administrative function instead of a judicial one. If the requirements of sub-ss. (1)(a) to (d) of s. 20 are fulfilled, the Sessions Court would have no discretion but shall commit the fugitive criminal to prison to await the order by the Minister for his surrender.

[39] According to learned counsel, the implication of the impugned sections is that both Parliament and its delegate, the Minister, had improperly encroached on the judicial power of the Sessions Court. The empowerment of the Minister by the impugned sections has, in effect, precluded the right of fair hearing for a fugitive criminal guaranteed under the Federal Constitution.

[40] Learned counsel then urged this court to conclude that the impugned sections in the EA had encroached on the doctrine of separation of powers and therefore contravened art. 121(1) of the Federal Constitution.

The First, Second And Fourth Defendants' Response

[41] In response to the OS, the first, second and fourth defendants ("the defendants") have filed an affidavit in reply in encl. 38 ("AIS-38"), which was affirmed by Ramesh a/l Gopalan. Encik Ramesh is the Head of Transnational Crimes Unit at the Attorney General's Chambers ("AGC").

[42] Before me, the learned Senior Federal Counsel ("SFC") began his submission by raising two preliminary points. They are these. First, the learned SFC invoked the general presumption of constitutionality in every legislation passed by Parliament. Azahar Mohamed CJ (Malaya), in delivering the judgment of the majority of the Federal Court in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 FC, reiterated that the principle of presumption of constitutionality of legislation has very much become a part of the Malaysian jurisprudence. In the circumstances, according to the learned SFC, the burden is on the plaintiffs to rebut the presumption.

[43] Secondly, the learned SFC submitted that an extradition proceeding is a *sui generis* proceeding. My attention was drawn to the judgment of the Federal Court in *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447; [2013] 2 MLJ 478 FC. In delivering the judgment of the apex court, Raus Sharif PCA (as the former CJ then was) held as follows:

> ... extradition proceeding is in the nature of a committal proceeding. It cannot be equated with a trial proper. A committal proceeding of this nature is not a trial to determine the guilt of the appellant but only to determine whether the evidence adduced is sufficient to commit the appellant for the purpose of extradition.

[44] In short, the learned SFC, in relying on *Said Mir Bahrami*, submitted that while s. 20 of the EA may not have the usual safeguard as that of a trial and appear to be harsh or even "draconian", it remains a question of policy which had been debated and determined in Parliament and therefore not designed for judicial determination.

[45] In his substantive arguments in opposing the OS, the learned SFC has raised three major grounds:

(i) the process of extradition is not part of the criminal justice system. It is a mere committal proceeding which is quite distinct from a criminal proceeding.

(ii) since the extradition process is not a criminal proceeding intended to establish the guilt of a fugitive criminal or otherwise, the question of the Executive branch usurping the judicial powers does not arise. The doctrine of separation of powers, even if duly structured in the Federal Constitution, is not violated.

(iii) there is no denial of the fundamental rights or a fair trial of a fugitive criminal since s. 20 of the EA has ample safeguards housed therein.

Extradition Process Is Not Part Of A Criminal Proceeding

[46] The learned SFC contended that the doctrine of separation of powers does not mandate that the decision to surrender a person be regarded as an exercise of judicial power and given to the judicial arm of the Government. In expanding his argument, the learned SFC referred me to the judgment of

the High Court of Australia in *Vasiljkovic v. Commonwealth of Australia* [2006] HCA 40 HC. It was held that extradition is not part of the Australian criminal justice system since it involved no determination of guilt or innocence. The Australian apex court further held that the doctrine of the separation of powers does not mandate that the process of extradition be part of the administration of criminal justice.

[47] Based on the aforesaid proposition, the learned SFC submitted that the EA is consistent with the Federal Constitution on the following grounds:

(i) the Executive branch has the authority to conduct international relations, including entering into a binding Extradition Treaty on behalf of GOM.

(ii) the legislative branch is the authority empowered to enact laws relating to extradition in the form of the EA. In any event, the legislative branch can enquire into every Extradition Rreaty signed by the Executive branch, as the Treaty has to be laid before both houses of Parliament.

(iii) the Judiciary branch is the authority tasked to ensure that the Exercise of powers of the executive branch in extradition matters is within the fall corners of the EA and any relevant binding Extradition Treaty.

[48] As a general proposition, the learned SFC submitted that in cases involving extradition treaties, the notion is that the Executive is likely to be far better informed than the courts. For this reason, the courts should be extremely circumspect to avoid interfering unduly in decisions that involve good faith. The learned SFC referred me to the judgment of the Supreme Court of Canada in *Canada v. Schmidt* [1987] SCR 500 SC. The Supreme Court of Canada reminded us that, in cases like these, "judicial intervention must be limited to cases of real substance".

[49] On this ground, the learned SFC further contended that the impugned sections of the EA are grounded on the fundamental assumption that the requesting State, in this case, the United States, who signed the Extradition Treaty with Malaysia, is acting in good faith. More importantly, the learned SFC urged this court to assume that, based on good faith, the plaintiffs will receive a fair trial in the United States.

Administrative Function vs Judicial Power

[50] The learned SFC, in his submission, contended that s. 20 of the EA confers to the Sessions Court an administrative function to determine whether the requirements under sub-ss. (1)(a) to (e) have been satisfied for it to make an order for the committal of the fugitive criminal to prison. Again, relying on *Said Mir Bahrami*, the learned SFC reiterated that since a committal proceeding is not a trial, the question of usurpation of judicial

power by the Executive branch does not arise since the Sessions Court is not called upon to exercise its judicial power in making an order under s. 20 of the EA.

[51] In short, the SFC's contention is that there is no encroachment that would offend art. 121 of the Federal Constitution.

[52] The learned SFC, while conceding that the Federal Constitution does have the features of the doctrine of separation of powers, submitted that the doctrine is not absolute. The argument is that a provision of the law cannot be struck out as unconstitutional simply because it contravenes the doctrine; see *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 FC.

Alleged Denial Of Fundamental Rights And Fair Trial

[53] Finally, the learned SFC contended that the Federal Court had addressed the issue of a possible denial of a fugitive's fundamental rights in the application of s. 20 of the EA in *Said Mir Bahrami*. As alluded to earlier, the Federal Court was of the view that s. 20 accords both the prosecution as well as the fugitive criminal the opportunity to be heard fairly.

[54] My attention was also drawn to the majority judgment of the Privy Council in *Cartwright & Anor v. Superintendent of Her Majesty Prison's & Anor* [2004] UKPC 10 PC. In delivering the majority judgment of the Board (Lord Hoffman and Lord Rodger of Earlsferry dissenting), Lord Steyn was of the view that it is imperative of legal policy that extradition law must, wherever possible, work effectively. Further, the learned SFC submitted that there is no discrimination against the plaintiffs since s. 20(2), read together with s. 4 of the EA, only applies to the class of person to which surrender is requested by a foreign country, such as the US Government who had entered a binding extradition treaty with GOM.

[55] For the aforesaid reasons, the learned SFC urged this court to conclude that the impugned sections do not violate any articles of the Federal Constitution nor the doctrine of separation of powers structured therein.

The Analysis

[56] Let me begin at the beginning. While I can always appreciate the general proposition of the presumption of constitutionality in every legislation passed by Parliament, there were instances where the courts in Malaysia had struck down statutory provisions for contravening the Federal Constitution.

[57] For the avoidance of any doubt, a High Court is empowered and has the necessary jurisdiction under the law to rule on the constitutionality of a statute. The Federal Court in *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 4 CLJ 1; [2018] 3 MLJ 417 FC. Raus Sharif CJ, in delivering the judgment of the court, held that:

> Only challenges as to the competence of the legislative body to enact a law fall within the original jurisdiction of the Federal Court; all other grounds of challenge to the constitutional validity of a law are within the jurisdiction of the High Court.

[58] The learned SFC relied very heavily on *Said Mir Bahrami* to bring home his points that:

(i) the extradition proceeding is a mere committal proceeding and not a criminal one.

(ii) section 20 of the EA had been drafted in a comprehensive way which enables both the prosecution as well as the defence to be heard fairly.

[59] In deference to the learned SFC, I have gone through the judgment of the Federal Court with the proverbial toothcomb and come to an inevitable conclusion that the constitutionality of the impugned sections was never canvassed at the appeal nor determined by the apex court. What transpired was, learned counsel for the appellant, Encik Karpal Singh, in his submission, contended that the impugned sections of the EA, as well as art. 4(6) of the Extradition Treaty between GOM and the Australian Government, were "draconian provisions because by dispensing the proof of *prima facie*, the appellant had been deprived of his fundamental right of a fair trial".

[60] Unfortunately, the judgment of the Federal Court in *Said Mir Bahrami* did not refer to any provisions of the Federal Constitution. It is silent. This is only to be expected since there was no indication in the law report that Encik Karpal Singh anchored his attack on the constitutionality of the impugned sections.

[61] The long and short of it is this. The Federal Court on *Said Mir Bahrami* did not make any affirmative ruling on the constitutionality of the impugned sections.

[62] Make no mistake. I am bound by the doctrine of *stare decisis*. However, I am equally cognisant that when a particular point of law involved in the judgment is not perceived, addressed, canvassed or determined by a higher court, then the *ratio* that embodies the judgment can be distinguished. In legal parlance, it is referred to as *sub silentio*.

[63] This exception to the doctrine of binding precedent is not uncommon in Malaysia. In *Dato' Seri Anwar Ibrahim v. Khairy Jamaluddin* [2018] 3 CLJ 250; [2017] 11 MLJ 673, my learned brother Azizul Azmi Adnan J held that:

> ... it is not the case that I consider the cases involving Tun Dr Mahathir not to be binding authority on this court. They are indeed binding on me, to the extent that they are decisions of superior courts. Nonetheless,

A because the issue of s. 43 [of the Evidence Act 1950] was not canvassed before Their Lordships on those previous occasions, their decisions cannot be used as authority for the scope and application of s. 43.

The same approach was taken by Ajaib Singh J (later FCJ) in *PP v. Lai Sien Kon* [1977] 1 LNS 94; [1978] 2 MLJ 110 when he held:

B The question whether section 13 applies in every case of a conviction under any provision of the Prevention of Corruption Act or whether it applies only where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of the Act was not argued or discussed at all either in the High Court C or in the Federal Court and consequently no reasons were given by the Federal Court in deciding that section 13 applied in every case of a conviction under the Prevention of Corruption Act. Therefore it cannot be said that the decision of the Federal Court on this particular point to the effect that the provisions of section 13 are applicable in every case of a conviction under the Prevention of Corruption Act as stated in the D answer to the question reserved constitutes the *ratio decidendi* of the case so as to become a binding precedent on this particular point.

[64] This brings me to the next issue. Is the extradition process designed exclusively for the Executive and devoid of any judicial element? Does the Judiciary have any role assigned to it under s. 20 of the EA? In my view, E since the issue of the constitutionality of the impugned sections is raised, the proper approach would be to read the same in light of relevant provisions in the Federal Constitution.

[65] I would like to stress that even in the cases cited by the learned SFC, the power accorded to the Minister under the Act is not *carte blanche*. It is F not unlimited. It is subject to the Federal Constitution. In *Vasiljkovic*, for example, the Australian High Court insisted that:

The judiciary also has the power to enforce compliance by the executive authority with the Constitution, with the [Extradition] Act [1988] and with any other applicable laws.

G In *Schmidt*, it was held that:

Blind judicial deference to executive judgment cannot of course be expected. The courts have the duty to uphold the Constitution.

[66] In moving the Bill for the EA at the Dewan Rakyat, as reported in H Penyata Rasmi Parlimen Jilid I Bil 75 30 October 1991 @ 12501, the then Justice Minister, Syed Hamid Albar, had this to say:

Ditanya oleh Ahli Yang Berhormat dari Kok Lanas mengapa perbicaraan diletakkan di Mahkamah Sesyen dan dikatakan ini dianggap sebagai satu perkara yang membebankan. Alasannya ialah pada masa ini perbicaraan I kes-kes untuk ekstradisi didengar atau dibicarakan dalam Mahkamah Magistret dan peningkatan ke Mahkamah Sesyen adalah bertujuan untuk memberikan persoalan yang sering timbul dalam kes yang lebih rumit, iaitu

perkara undang-undang yang lebih rumit supaya dibicarakan dengan lebih teratur dan lebih teliti lagi oleh Mahkamah Sesyen yang terdiri daripada Hakim-hakim yang lebih berpengalaman daripada Magistret.

[67] The phrase "perkara undang-undang yang lebih rumit supaya dibicarakan dengan lebih teratur dan lebih teliti di Mahkamah Sesyen" indicates that there are legal issues to be involved. The role of the Sessions Court under the EA, in particular s. 20 thereof, is not strictly and exclusively administrative. On the contrary, complicated legal matters asserted by the Justice Minister envisage a judicial role to be undertaken by the Sessions Court and not by the Magistrate. If indeed the role is purely administrative, a Magistrate would be able to dispose of the application made under s. 20.

[68] I believe it is permissible for the courts to resort to Hansard as an aid of interpretation if a statutory provision is clearly open to two different constructions. The Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 FC held that in construing a statute, a reference to Parliamentary reports of proceedings or Hansard, as an aid to statutory interpretation, should be permitted where the enactment is ambiguous or obscure provided that the statement reported in Hansard was made by a Minister. I, however, take cognisance that while resorting to Hansard is permissible, that by itself, although meriting serious consideration, cannot be determinative of the issue since it is only available as an aid to interpretation.

[69] In the face of two possible different constructions on s. 20 of the EA – on the one hand, whether the role of the Sessions Court is purely administrative, and on the other, whether it is judicial, the speech of the Justice Minister, though not determinative, can be used as an aid of interpretation.

[70] Coming back to s. 20 of the EA. Reading s. 20, there is no doubt that there are issues of law to be deliberated by the Sessions Court before it makes any order. I have to say that I am not all comfortable with the words "where a direction has been given by the Minister under s. 4, the Sessions Court shall ... commit the fugitive criminal to prison to await the order by the Minister for his surrender". The juxtaposition of sub-ss. 1(b) and 1(c) of s. 20 of the EA on the production of supporting documents in relation to the offence or whether the alleged act of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia are issues of laws that call for judicial determination. It cannot be construed as an administrative issue by any stretch of legal imagination.

[71] More importantly, with s. 20 employing the word "shall", it leaves no room for the Sessions Court to exercise its judicial discretion. In my respectful view, the word "shall" in s. 20 denotes a mandatory requirement. The Supreme Court in *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 4 CLJ 211 SC was of the view that the word "may" is

A permissive, and the word "shall" is imperative. The same proposition can be seen in the Court of Appeal case of *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389 CA.

***Semenyih Jaya* Revisited**

B **[72]** The landmark ruling of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 FC is celebrated by many as the reassertion of the independence of the Judiciary. In short, the Federal Court held that it is not possible for Parliament to pass laws that have the effect of diluting the C exercise of judicial power by the Judiciary because the Federal Constitution, by virtue of art. 121 of the Federal Constitution, vests that power in the Judiciary.

[73] The issue in *Semenyih Jaya* was on the constitutionality of s. 40D(1) of the Land Acquisition Act 1960 ("LAA") that allowed two lay assessors, D and not the judge with whom they sat, to conclusively determine the amount of compensation in a land reference matter. In striking down the s. 40D for being *ultra vires* the Federal Constitution, the Federal Court held that the judicial power of the court resided in the Judiciary and no other as was explicit in art. 121(1) of the Federal Constitution. The discharge of judicial E power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages rendered the exercise *ultra vires* art. 121 of the Federal Constitution.

[74] Section 40D of the LAA imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of F them if their decision differs from each other in respect of the amount of reasonable compensation arising out of the acquisition. The Federal Court took exception to this and, in a strongly worded phrase, Zainun Ali FCJ, in delivering the judgment of the court, asked this question:

> Wherefore now stands the judge? It would appear that he sits by the G sideline and dutifully anoints the assessors' decision.

[75] Applying the law and asking the same question to the facts in the instant OS, wherefore now stand the judge of the Sessions Court? In view of the mandatoriness of s. 20 of the EA, the judge would seem to sit by the sideline and dutifully commit the fugitive criminal to prison to await the H order by the Minister for his surrender. The Sessions Court, for all intents and purposes, is practically prevented from applying its mind and exercising independent discretion to determine whether the fugitive criminal can be committed to prison to await the order by the Minister for his surrender.

[76] There is another aspect of my analysis. It is this. The Federal Court I in *Said Mir Bahrami*, adopted *in extenso* on the judgment of the then Federal Court in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977]

2 MLJ 187 FC, in holding that the question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided in Parliament, and therefore not for judicial determination.

[77] The Federal Court in *Semenyih Jaya* took cognisance that *Loh Kooi Choon* is subject to a frontal attack by another panel of the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 FC. In conclusion, I can only say that in view of *Semenyih Jaya* and *Sivarasa Rasiah*, the case of *Loh Kooi Choon* no longer represents the current constitutional position. I can safely say that it has been departed from. The end result would be that for so long as a provision in the statute is against the specific provision of the Federal Constitution, it has to be struck down under art. 4(1). It does not matter whether it is "harsh and unjust" or otherwise.

[78] The extension of the argument is that, and I say this with the greatest respect, all other cases that relied on *Loh Kooi Choon*, which include *Said Mir Bahrami*, should be viewed cautiously.

Findings

[79] In the result, my findings are as follows:

(i) a High Court is empowered under the Federal Constitution and has the necessary jurisdiction under the law to rule on the constitutionality of a specific provision in a statute.

(ii) one of the exceptions to the doctrine of binding judicial precedent is that where a certain issue which is now the subject matter of dispute, was not canvassed at the higher court, the *ratio* in the said judgment can be distinguished.

(iii) although the extradition proceeding under s. 20 of the EA is a committal proceeding, it is not entirely an administrative action devoid of judicial power. This can be seen in sub-ss. 1(b) and 1(c) of s. 20 on the issues of law that call for a judicial determination by the Sessions Court. Even the then Justice Minister recognised this in his speech in Parliament, as reported in Hansard and part of the speech can be used to aid the interpretation of s. 20 of the EA.

(iv) since s. 20 of the EA employs the word "shall", it leaves no room for the Sessions Court to exercise its judicial discretion and address its mind to come to a just conclusion.

(v) at the same time, the word "direction" by the Minister in s. 20 of the EA gives the impression that a Minister who is neither a judge nor a judicial personage can direct a judge of the Sessions Court to commit the

A fugitive criminal to prison to await the order by the Minister for his surrender renders the said exercise *ultra vires* art. 121 of the Federal Constitution. It offends the doctrine of separation of powers, which according to the Federal Court in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1 FC is contained in art. 4(1) B of the Federal Constitution "as it provides for the Judiciary, as the guardian of the (Federal Constitution), to act as a check and balance against the Legislature and Executive. In this context, the (Federal Constitution) is not self-executory and therefore cannot act to protect itself".

C (vi) following *Schmidt*, blind judicial deference to Executive judgment cannot of course be expected. In the final analysis, the courts have the duty to uphold the Federal Constitution.

[80] In the circumstances of the case, s. 20, read together with s. 4 of the EA, offends art. 121(1) of the Federal Constitution and ought, therefore, to D be struck down, and I so hold.

[81] This decision is based on art. 121(1) of the Federal Constitution, which to my mind, is sufficient for me to make a declaration that the impugned sections are void for being unconstitutional under art. 4(1).

E **[82]** The striking down of the impugned sections does not mean that the extradition process, in other cases, is put to an abrupt end. It does not have that effect. The authority can still proceed with the process under s. 19 of the EA even if there is a binding Extradition Treaty with a requesting State. The existence of an Extradition Treaty does not preclude the application of F s. 19 of the EA.

[83] In view of the complexities of the legal issues and that public interest is involved on the issue of constitutionality, I am not making any order as to costs.

G **[84]** There shall be no order against the US Government, the fifth defendant herein. Prayers (6) and (7) of the OS against the US Government are dismissed.

[85] Finally, in making directions under the impugned sections of the EA, it has not been shown to me that the Minister had acted with *mala fide*. H Therefore, I am not acceding to the request made by learned counsel for the plaintiffs the that the defendants be ordered to pay damages to the plaintiffs. In any event, no damages were pleaded in the reliefs sought in the OS.

I