LEE KEW SANG v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS
FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ, CJ; SITI NORMA YAAKOB, CJ (MALAYA); ABDUL HAMID MOHAMAD, FCJ
CRIMINAL APPEAL NO: 05-23-2004 (J)
2 JUNE 2005

***PREVENTIVE DETENTION**: Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Amendments to Emergency (Public Order and Prevention of Crime) Ordinance 1969, effects of - Whether grounds to challenge detention order restricted - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C, 7D; Emergency (Public Order and Prevention of Crime)(Amendment) Act 1989*

***PREVENTIVE DETENTION**: Detention order - Application for habeas corpus - Whether grounds for application restricted to grounds of non-compliance with procedural requirements only*

***PREVENTIVE DETENTION**: Detention order - Application for habeas corpus - Approach of courts - Determination of non-compliance - Whether courts may create new procedural requirements*

***PREVENTIVE DETENTION**: Detention order - Application for habeas corpus - Grounds for habeas corpus - Whether Minister obliged to consider whether Criminal prosecution ought to be taken against detenu first - Whether Minister obliged to issue detention order within certain time-frame - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 7C, 7D*

***PREVENTIVE DETENTION**: Detention order - Power of Minister - Not to be confused with power of Attorney-General - Whether power of Minister to issue detention order distinct from power of Attorney-General to institute Criminal proceedings*

***PREVENTIVE DETENTION**: Detention order - Power of Minister - Judicial review of Minister's decision to issue detention order - Whether grounds for review restricted to grounds of non-compliance only*

The appellant was detained under a detention order issued by the Deputy Minister of Home Affairs Malaysia ('the Deputy Minister'), the first respondent, pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). He applied for the issuance of a writ of *habeas corpus*, contending that the order was invalid on the following grounds: (i) the Deputy Minister did not consider whether criminal prosecution ought to be taken against him; and (ii) the ground of detention was stale and remote in point of law to support his detention under the Ordinance. At first instance, the application was dismissed. The appellant thus appealed to the Federal Court. In the Federal Court, the Justices expressed concern that similar cases involving challenges to detention under the Ordinance; the Internal Security Act 1960 ('ISA 1960'); and the Dangerous Drugs (Special Preventive

Measures) Act 1985 ('DD (SPM) Act 1985'), were often decided without reference to relevant statutory provisions with the result that material statutory amendments were not given effect. In determining the appeal, the Justices found it necessary to emphasize the importance of several statutory amendments relating to judicial review in those statutes, specifically the amendments relating to the Ordinance.

**Held (dismissing the appeal)**

**Per Abdul Hamid Mohamad FCJ:**

**[1]** The Ordinance was amended by the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 ('Act A740') which came into force on 24 August 1989. Similar amendments were also made to the ISA 1960 and the DD (SPM) Act 1985, respectively by Act A739 and Act A738. Act A740, *inter alia*, inserted new ss. 7C and 7D into the Ordinance, which clearly restricted challenges to detention orders made by the Minister under s. 4(1) of the Ordinance to grounds of non-compliance with any procedural requirement, and nothing else.

**[2]** The cases decided prior to the amendments, *ie*, 24 August 1989, showed various grounds upon which the detention orders were challenged. *Mala fide* appeared to be the most important ground. Courts seemed to place lesser importance on procedural non-compliance unless the requirement was mandatory in nature. However, the amendments appear to have reversed the position by limiting the ground to only one ground - non-compliance with procedural requirements.

**[3]** Courts must give effect to the amendments. Thus, in a *habeas corpus* application where the detention order of the Minister is made under s. 4(1) of the Ordinance or, under equivalent provisions in the ISA 1960 or DD (SPM) Act 1985, the first thing the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof.

**[4]** In the instant case, the grounds forwarded for *habeas corpus* were clearly not within the ambit of the term 'procedural non-compliance'. There appeared to be no provision in the law or the rules - and neither was the Federal Court referred to any such provision - that required the Minister to consider whether criminal prosecution ought to be taken against the appellant or that the order had to be made within a certain time from the date of the alleged criminal acts. Thus, the grounds were not such that could be relied on in an application for *habeas corpus*, by virtue of ss. 7C(1) and 7D(c) of the Ordinance. On this ground alone, the application should be dismissed.

**[5]** The power of the Attorney General to institute criminal proceedings should not be confused with the power of the Minister to make a detention order.

These are two distinct powers under two different laws. The Attorney General and the Minister, respectively, have power given to them by the respective laws. Just as the Attorney General has power to institute proceedings but not the power to order detention, the Minister has power to order detention but not to institute proceedings. The law does not also require the Minister to first refer a matter before him to the Attorney General for his consideration whether to institute criminal proceedings before considering whether to issue a detention order. Their powers are separate and provided for by different laws. *Kanchanlal Maneklal Chokshi v. State of Gujerat* [1979] SCC (Cri.) 897 (not folld); *Hemlata Kantilal Shah v. State of Maharashtra & Anor* [1982] SCC (Cri.) 16 (not folld); *Murugan s/o Palanisamy & Ors v. Deputy Minister of Home Affairs [2000] 1 CLJ 147*; [1999] 6 MLJ 334 (not folld); *Chong Boon Pau v. Timbalan Menteri Dalam Negeri [2004] 4 CLJ 838* (not folld).

**[6]** With regard to the second ground, there is nothing in the law that requires the Minister to make an order, if he so wishes, within a certain time from the date of the alleged criminal activity. There is also no 'condition precedent' laid down in s. 4(1) regarding the time when the order should be made. There is no limitation period and thus there can be no non-compliance thereof. It is not the function of the court to create such a limitation period or a procedural requirement.*Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1986] 1 LNS 121*; [1988] 2 MLJ 638 (not folld); *MoganPerumal v. K/l Hussein Abdul Majid & 5 Ors [1998] 3 CLJ 629* (not folld); and *Abd Rahman Hj Maidin v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors [2000] 3 CLJ 8* (not folld).

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

Perayu telah ditahan di bawah perintah penahanan yang telah dikeluarkan oleh Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia ('Timbalan Menteri itu'), responden pertama, di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pembanterasan Jenayah) 1969 ("Ordinan itu"). Perayu telah memohon pengeluaran suatu writ *habeas corpus*, mendakwa bahawa perintah penahanan tidak sah di atas alasan-alasan berikut: (i) Timbalan Menteri itu tidak mengambil kira sama ada pendakwaan jenayah harus diambil terhadapnya; dan (ii) alasan penahanan adalah kebayuan dan terlalu jauh dari segi undang-undang bagi menyokong penahanannya di bawah Ordianan itu. Di tahap pertama, permohonan perayu telah ditolak. Perayu telah merayu kepada Mahkamah Persekutuan. Di Mahkamah Persekutuan, para hakim telah menyuarakan kegelisahan bahawa dalam kes-kes yang menentang penahanan di bawah Ordinan itu, Akta Keselamatan Dalam Negeri 1960 ('ISA 1960'); dan Akta Dadah Berbahaya (Langkah-Langkah Pencegasan Khas) 1985 ('Akta DD (SPM) 1985'), lazimnya diputuskan tanpa rujukan kepada peruntukan statutori yang relevan mengakibatkan pindaan peruntukan statutori tidak diberi kesan. Dalam memutuskan rayuan ini, para Hakim mendapati adalah perlu menekan kepentingan beberapa pindaan statutori berkaitan kajian semula kehakiman dalam Akta-Akta itu, khususnya pindaan berkaitan dengan Ordinan itu.

**Diputuskan (menolak rayuan itu):**

**Oleh Abdul Hamid Mohamad HMP:**

**[1]** Ordinan itu telah dipinda di bawah Akta Darurat (Ketenteraman Awam

dan Pembanterasan Jenayah) (Pindaan) 1989 ('Akta A740') yang berkuatkuasa sejak 24 Ogos 1989. Pindaan yang sama telah juga dibuat kepada ISA 1960 dan Akta DD (SPM) Act 1985, masing-masing dibawah Akta A739 dan Akta A738. Akta A740, antara lain, memasukkan ss. 7C and 7D baru ke dalam Ordinan itu, yang jelas menghadkan tentangan kepada perintah penahanan yang dibuat oleh Menteri di bawah s. 4(1) Ordinan itu kepada alasan tidak menuruti sebarang keperluan prosedur, dan bukan sebarang alasan lain.

**[2]** Kes-kes yang telah diputuskan sebelum pindaan itu, iaitu 24 Ogos 1989, menunjukkan berbagai alasan yang menjadi asas penentangan perintah penahanan. *Mala fide* nampaknya alasan yang paling penting. Mahkamah nampaknya memberi penekanan yang kurang kepada alasan tidak menuruti sebarang keperluan prosedur kecuali jika keperluan itu adalah suatu peruntukan mandatori. Walau bagaimanapun pindaan-pindaan itu nampaknya telah membalikkan situasi dengan menghadkannya kepada hanya satu alasan - tidak menuruti sebarang keperluan prosedur.

**[3]** Mahkamah harus memberi kesan kepada pindaan-pindaan itu. Jadi, dalam suatu permohonan *habeas corpus* di mana perintah penahanan seorang Menteri telah dibuat di bawah s. 4(1) Ordinan itu atau di bawah peruntukan yang serupa dalam ISA 1960 atau Akta DD (SPM) 1985, perkara pertama yang harus dikenalpasti ialah samada alasan yang dimajukan adalah satu yang jatuh di bawah maksud tidak menuruti sebarang keperluan prosedur. Bagi menentukan persoalan ini, mahkamah harus meneliti peruntukan undang-undang atau kaedah yang memberikan keperluan prosedur. Bukan tugas mahkamah mendirikan keperluan prosedur memandangkan bukanlah fungsi mahkamah membuat undang-undang atau kaedah. Jika tidak wujud sebarang keperluan prosedur maka persoalan menuruti sebarang keperluan prosedur tidak wujud.

**[4]** Dalam kes ini, alasan yang dimajukan bagi *habeas corpus* jelas tidak termasuk dalam terma 'tidak menuruti sebarang keperluan prosedur'. Tiada sebarang peruntukan undang-undang mahupun kaedah - dan Mahkamah Persekutuan tidak dirujuk kepada sebarang peruntukan sepertinya - yang memerlukan seorang Menteri menimbangkan sama ada pendakwaan jenayah harus diambil terhadap perayu atau bahawa perintah harus dikeluarkan dalam suatu masa yang diperuntukkan dari tarikh perlakuan jenayah yang didakwa. Jadi, alasan sedemikian tidak boleh dijadikan asas suatu permohonan bagi*habeas corpus*, memandangkan ss. 7C(1) and 7D(c) Ordinan itu. Di atas alasan ini sahaja permohonan ini harus ditolak.

**[5]** Kuasa Peguam Negara memulakan suatu pendakwaan jenayah tidak harus dikelirukan dengan kuasa seorang Menteri membuat suatu perintah penahanan. Ini adalah dua kuasa yang berbeza di bawah dua undang-undang yang berlainan. Peguam Negara dan Menteri masing-masing mempunyai kuasa yang diberikan kepada mereka di bawah undang-undang yang berkaitan. Seperti juga Peguam Negara mempunyai kuasa bagi memulakan pendakwaan jenayah tetapi tiada kuasa bagi memerintahkan penahanan, seorang Menteri juga mempunyai kuasa bagi memerintahkan penahanan tetapi bukan bagi memulakan pendakwaan jenayah. Undang-undang juga tidak memerlukan

seorang Menteri merujuk perkara di hadapannya kepada Peguam Negara terlebih dahulu bagi suatu penimbangan sama ada hendak memulakan pendakwaan jenayah sebelum menimbangkan sama ada hendak mengeluarkan suatu perintah penahanan. Kuasa-kuasa mereka adalah berasingan dan diperuntukkan di bawah undang-undang yang berlainan. *Kanchanlal Maneklal Chokshi v.State of Gujerat* [1979] SCC (Cri.) 897 (tidak diikuti); *Hemlata Kantilal Shah v. State of Maharashtra & Anor* [1982] SCC (Cri.) 16 (tidak diikuti); *Murugan s/o Palanisamy & Ors v. Deputy Minister of Home Affairs [2000] 1 CLJ 147*; [1999] 6 MLJ 334 (tidak diikuti); *Chong Boon Pau v. Timbalan Menteri Dalam Negeri [2004] 4 CLJ 838* (tidak diikuti).

**[6]** Berkaitan dengan alasan kedua, tiada sebarang keperluan undang-undang yang memerlukan seorang Menteri membuat sebarang perintah, jika ia berniat berbuat sedemikian, dalam kurungan masa tertentu dari tarikh sesuatu kelakuan jenayah yang didakwa. Tiada juga sebarang pra-syarat yang diperuntukkan di bawah s. 4(1) berkaitan masa bila perintah itu harus dibuat. Memandangkan tiada sebarang penghadan masa, maka persoalan tidak menuruti penghadan masa tidak wujud. Tidaklah menjadi fungsi mahkamah mewujudkan suatu penghadan masa atau sebarang keperluan prosedur. *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1986] 1 LNS 121*; [1988] 2 MLJ 638 (tidak diikuti); *Mogan Perumal v. K/l Hussein Abdul Majid & Ors [1998] 3 CLJ 629* (tidak diikuti); and *Abd Rahman Hj Maidin v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors [2000] 3 CLJ 8* (tidak diikuti).

**Case(s) referred to:**

*Abdul Rahman Hj Maidin v. Timbalan Menteri Dalam Negeri [2000] 3 CLJ 8 CA* ***(not foll)***

*An Ngoh Leong v. Inspector General of Police & Ors [1993] 1 CLJ 373; [1993] 1 MLJ 65* ***(refd)***

*Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1983] 1 LNS 49; [1984] 1 MLJ 67* ***(refd)***

*Che Su Shafie v. Superintendent of Prisons, Pulau Jerejak, Penang [1973] 1 LNS 11; [1974] 2 MLJ 19* ***(refd)***

*Chong Boon Pau v. Timbalan Menteri Dalam Negeri [2004] 4 CLJ 838 HC* ***(not foll)***

*Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 HC* ***(refd)***

*Chua Teck v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1989] 2 CLJ 414; [1989] 1 CLJ (Rep) 429 HC* ***(refd)***

*Hemlata Kantilal Shah v. State of Maharashtra & Anor [1982] SCC (Cri) 16* ***(not foll)***

*Inspector-General of Police & Anor v. Lee Kim Hoong [1979] 1 LNS 34; [1979] 2 MLJ 291* ***(refd)***

*Jagan Nath Biswas v. The State of West Bengal AIR [1975] SC 1516* ***(refd)***

*Kanchanlal Maneklal Chokshi v. State of Gujerat [1979] SCC (Cri) 897* ***(not foll)***

*Karpal Singh Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 CLJ 197; [1988] 1 CLJ (Rep) 632 HC* ***(refd)***

*Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor [1987] 1 LNS 67; [1988] 1 MLJ 45* ***(refd)***

*Md Sahabudin v. The District Magistrate 24 Parganas & Ors AIR [1975] SC 1722* ***(refd)***

*Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and Another Application [1993] 4 CLJ 336 SC* ***(refd)***

*Minister of Home Affairs, Malaysia & Anor v. Karpal Singh [1988] 3 MLJ 29* ***(refd)***

*Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC* ***(refd)***

*Mogan Perumal v. K/L Hussein Abdul Majid & Ors [1998] 3 CLJ 629 CA* ***(not foll)***

*Murugan Palanisamy & Ors v. Deputy Minister of Home Affairs [2000] 1 CLJ 147 HC* ***(not foll)***

*Re Application of Tan Boon Liat; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126; [1976] 2 MLJ 83* ***(refd)***

*Re Khor Hoi Choy; Khor Hoi Choy v. Menteri Dalam Negeri Malaysia & Ors [1986] 1 CLJ 55; [1986] CLJ (Rep) 403 HC* ***(refd)***

*Re PE Long & Ors; PE Long & Ors v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1976] 2 MLJ 133* ***(refd)***

*Re Tan Boon Liat [1977] 1 MLJ 39* ***(refd)***

*Re Tan Sri Raja Khalid Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid Raja Harun [1987] 2 CLJ 470; [1987] CLJ (Rep) 1014 HC* ***(refd)***

*SK Serajul v. State of West Bengal [1975] 2 SC (78)* ***(refd)***

*Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1976] 1 LNS 147; [1977] 1 MLJ 82* ***(refd)***

*Sukumaran Sundram v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia and Another Application [1995] 3 CLJ 129 HC* ***(refd)***

*Teh Hock Seng v. Minister of Home Affairs & Anor [1990] 2 CLJ 460; [1990] 3 CLJ (Rep) 232 HC* ***(refd)***

*Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132; [1988] 1 MLJ 293* ***(refd)***

*Yap Chin Hock v. Minister of Home Affairs & Anor and Other Applications [1989] 2 CLJ 860; [1989] 2 CLJ (Rep) 673 HC* ***(refd)***

*Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 1 LNS 199; [1975] 2 MLJ 279* ***(refd)***

*Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1986] 1 LNS 121; [1988] 2 MLJ 638* ***(not foll)***

*Zainab Othman v. Superintendent of Prisons, Pulau Jerejak, Penang [1975] 1 LNS 202; [1975] 1 MLJ 76* ***(refd)***

*Zakaria Jaafar v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and Other Applications [1989] 2 CLJ 691 (Rep); [1989] 2 CLJ 1101; [1989] 3 MLJ 318* ***(refd)***

**Legislation referred to:**

Criminal Procedure Code, ss. 254, 376

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

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 5(2)(b), 7C, 7D

Federal Constitution, art. 145(3)

Internal Security Act 1960, ss. 8, 8B(1), 8C, 8D, 73(1), (3)(a), (b)

Prevention of Crime (Procedure) Rules 1972, r. 3(2)

**Counsel:**

*For the applicant - RR Mahendran (Alvintharan Nair, RSM Rayer & Suresh Thanabalasingam with him); M/s RR Mahendran & Co*

*For the respondent - Fazillah Begum Abd Ghani DPP (Najib Zakaria DPP with her)*

*Reported by Andrew Christopher Simon*

**Case History:**

*High Court : [2004] 1 LNS 429*

**JUDGMENT**

**Abdul Hamid Mohamad FCJ:**

The appellant was detained at Pusat Pemulihan Akhlak, Simpang Renggam, Johor from 24 September 2003 under a detention order of the same date issued by the Deputy Minister of Home Affairs Malaysia ("the Deputy Minister"), the first respondent, pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance").

He applied for the issuance of a writ of *habeas corpus*, contending that the order was invalid on two grounds:

> i) the Deputy Minister did not consider whether criminal prosecution ought to be taken against him;
>
> ii) the ground of detention was stale and remote in point of law to support detention under the Ordinance.

The learned judge dismissed the application. The appellant appealed to this court. We heard the appeal and reserved our judgment. This is our judgment.

Before dealing with each of the grounds specifically, we think there is something more fundamental that covers both grounds that has to be dealt with first. This concerns the provisions of the Ordinance itself (and also other similar laws like the Internal Security Act 1960 ("ISA 1960") and the Dangerous Drugs (Special Preventive Measures) Act 1985 ("DD (SPM) Act 1985") at the relevant times when the cases referred to us were decided. Quite often, cases were cited and even decided without reference to the statutory provisions at the relevant time as if the statutory provisions had remained the same throughout and in so doing effect was not given to material amendments to the relevant statutes.

Power to order detention is provided by s. 4(1) of the Ordinance:

> 4. Power to order detention.
>
> (1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

The Ordinance was amended by the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 ("Act A740") which came into force on 24 August 1989. (Similar amendments were also made to ISA 1960 and DD (SPM) Act 1985 by Act A739 and Act A738, respectively.) Act A740, *inter alia*, inserted new ss. 7C and 7D into the Ordinance. The sections provide as follows:

7C. 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 Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

7D. Interpretation of "judicial review".

In this Ordinance, "judicial review" includes proceedings instituted by way of:

(a)

(b)

(c) a writ of *habeas corpus*; and

The provisions of ss. 7C and 7D are clear. The effect of the amendments is that, in a *habeas corpus* application such as in this case, the detention order made by the Minister under s. 4(1) of the Ordinance may only be challenged on ground of non-compliance with any procedural requirement, and nothing else.

Even though the words of s. 7C and 7D are clear, perhaps we should briefly look at the circumstances that had led to the amendments.

One of the earliest if not the first case in which a detention order made under the Ordinance was challenged is the case of *Che Su binti Shafie v. Superintendent of Prisons, Pulau Jerejak, Penang [1973] 1 LNS 11*; [1974] 2 MLJ 19. The order was challenged on the grounds that, first, there was a failure to observe the full provisions of s. 5(2)(b) of the Ordinance that requires the detainee to be furnished by the Minister with the grounds of his detention and, secondly, that the Minister was acting *mala fide*. On the first ground, Chang Min Tat J (as he then was) held that the failure to furnish the grounds of detention could not invalidate the order made by the Minister. On the second ground the learned judge held on the facts of the case, "no question of *mala fide* could arise as it was always open to the authorities to cure a defective order in the proceedings".

In the following year, a similar order was again challenged in *Zainab binti Othman v. Superintendent of Prisons, Pulau Jerejak, Penang [1975] 1 LNS 202*; [1975] 1 MLJ 76. In that case the writ of *habeas corpus* was issued as there was some doubt whether the order that was served was the one actually intended to be made by the Minister, there being two orders, one dated 8 August 1973 and the other 6 August 1973. The order dated 8 August was never served and the order purportedly dated 6 August had the figure "6" superimposed on the figure "8" which had been erased.

The next case that should be mentioned is *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 1 LNS 199*; [1975] 2 MLJ 279. In that case too, the detainee was detained under an order made pursuant to the same section and the same Ordinance under discussion. It is to be noted that in that case the main ground of challenge of the order

was *mala fide*, which the learned judge (Abdoolcader J, as he then was) held that the detainee had failed to prove.

In *Re P.E. Long @ Jimmy & Ors; P.E. Long & Ors v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1976] 1 LNS 132*; [1976] 2 MLJ 133, four grounds were forwarded including that the detention was outside the scope of the Ordinance and that copies of the purported detention orders served on the applicants were not signed and were not under the hand of the Minister. The learned judge held that the orders were valid and not justiciable in the absence of *mala fide*.

In *Re Application of Tan Boon Liat @ A. Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126*; [1976] 2 MLJ 83, the detention orders under challenge were made under the same Ordinance under discussion. The ground was that the detention orders were outside the scope of the Ordinance. The applications were dismissed and subsequent appeals to the Federal Court were also dismissed - see [1977] 2 MLJ 18.

Tan Boon Liat and the other detainees made another application in the High Court in 1976 - see [1977] 1 MLJ 39. Here there was a clear breach of procedural rule ie, the Advisory Board had not made its recommendation within three months of the detentions of the applicants. However, at the time the applications were made, the Advisory Board had made their recommendations though after three months. It was argued that their continued detentions after a lapse of three months were illegal and unlawful as within the three months the Advisory Board had not met to consider the representations made by the applicants and, following that, made representations to the Yang di Pertuan Agong. Arulanandom J held that while the procedural requirements had not been complied with, valid orders of detention were in force against the applicants and their detention was therefore legal.

In *Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1976] 1 LNS 147*; [1977] 1 MLJ 82, the facts are similar to *Re Tan Boon Liat* [1977] 1 MLJ 39. Hamid J (as he then was) dismissed the application. The learned judge, *inter alia*, held:

> (2) in this case there has been a failure to comply with the statutory direction but mere non-compliance with directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not render unlawful a detention lawfully made.
>
> The Federal Court allowed the detainees' appeals against the said judgments of Arulanandom J and Abdul Hamid J - see [1977] 2 MLJ 108. The Federal Court *inter alia*, held:
>
> (2) the failure of the Advisory Board to carry out its duty within the prescribed time in these cases rendered the continued detention after three months period to be unlawful as it could not be said to be in accordance with law;

In *Inspector-General of Police & Anor v. Lee Kim Hoong [1979] 1 LNS 34*; [1979] 2 MLJ 291, the detention under the same Ordinance was challenged on the ground that the Ordinance had not been laid before Parliament and therefore the Ordinance did not have the force of law and the detention unlawful. On additional evidence allowed by the Federal Court, the court held that the Ordinance had been properly laid before Parliament and

therefore had the force of law and the detention was lawful.

In *Athappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors[1983] 1 LNS 49*; [1984] 1 MLJ 67, the detention order made under the same section and Ordinance under discussion was again challenged. In dismissing the application Edgar Joseph Jr. J, (as he then was) held:

> (1) the subjective satisfaction of the Minister to detain a subject is not open to judicial review;
>
> (2) the vagueness etc. of the allegations of fact upon which a detention order is based does not relate back to the order of detention thereby vitiating it;
>
> (3) the mere fact that a subject has been detained under the law as to preventive detention following his acquittal in a Criminal Court does not *ipso facto* render his detention wrongful;
>
> (4) exceptionally, the courts will review the order for preventive detention if:
>
> (a) *mala fides* is alleged; or,
>
> (b) it is alleged that the grounds of detention stated in the order do not fall within the scope and ambit of the relevant legislation;
>
> or
>
> (c) it is alleged that a condition precedent for the making or the continuance of the order of preventive detention has not been complied.

It is to be noted that in 1985, the DD (SPM) Act 1985 came into force. Perhaps the first case that came to court under that Act is *Re Khor Hoi Choy; Khor Hoi Choy v. Menteri Dalam Negeri Malaysia & Ors [1986] 1 CLJ 55; [1986] CLJ (Rep) 403*. However, I do not think it is necessary to discuss it as the case lays down no new principle.

*Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor [1987] 1 LNS 67*; [1988] 1 MLJ 45, is yet another case of a detention order issued under s. 4(1) of the Ordinance which was challenged. In that case the detention order states that the period of detention was for two years from 12 December 1986 and that he was to be detained at Pulau Jerejak Rehabilitation Centre. However, the detainee was detained at the Muar police station from 14 December 1986 (the day he was rearrested) until some time in the morning of 16 December 1986 when he was removed to the Rehabilitation Centre in Pulau Jerejak.

In granting the *habeas corpus* and setting the applicant free; the learned judge held:

> (1) having regard to the provisions of the Ordinance, the requirements therein as to the place of detention even though procedural are mandatory in character and so breaches thereof cannot be condoned;
>
> (2) the applicant's period of detention in police custody at the Muar police station from December 14, 1986, until some time in the morning of December

16, 1986 when he was removed to the Rehabilitation Centre was wholly unauthorised and therefore in violation of Article 5(1) as being otherwise than in accordance with law;

(3) the Detention Order will not operate to salvage the case for the detaining authority for it specifically provided for detention at the Centre for two years from December 12, 1986 and cannot therefore have the effect of rendering legal the applicant's illegal detention at the Muar police station from December 14, 1986 until his removal therefrom on the morning of December 16, 1986;

(4) the detention of the applicant under section 4(1) was not procured by steps all of which were entirely regular nor was the court satisfied that "every step in the process" which led to such detention was followed with extreme regularity and therefore the court should not allow the imprisonment to continue. To hold to the contrary would in effect mean that the Minister had power to continue the detention of one who is being illegally detained;

(5) the Deputy Minister had unwittingly exceeded the powers conferred upon him by ordering the continued detention of one who was being illegally detained with the result that the Detention Order, even if valid, was not legally effective at the date of the service thereof to allow the detention of the applicant to continue;

(6) the applicant was entitled to be set at liberty.

*Per curiam* : " in a matter concerning the liberty of the subject - always a priceless asset - the court should walk very warily, preferring to interpret words and phrases in their ordinary and natural meaning than to embark on inferences or speculations about such a power."

Then comes the landmark judgment of the Supreme Court 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*. In that case, the detainee was detained under s. 73(1) and subsequently under s. 73(3)(a) & (b) of ISA 1960. He applied for *habeas corpus*. As we understand it, the judgment of the Supreme Court brought out a few important points but we need only state one which we consider to be more relevant to the present discussion, and that is that s. 73(1) and s. 8 are so inextricably connected that the subjective test should be applied to both. The court held that it cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s. 73(1). But if facts are furnished voluntarily and in great detail as in this case for consideration of the court, it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion. In that case, the Supreme Court found it difficult to disagree with the learned judge on his conclusion based on the facts furnished in court that the losses sustained by Perwira Affin Bank would lead to any organized violence by soldiers. The Supreme Court therefore affirmed the learned judge's decision to issue the writ of *habeas corpus*.

Less than two months after the Supreme Court delivered its judgment in *Re Tan Sri Raja Khalid (supra)*, the Supreme Court delivered its judgment in *Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132*; [1988] 1 MLJ 293. In this case the detainee challenged her arrest under s. 73 of the ISA 1960. I shall only refer to the issue of subjective

or objective test that should be applied by the court regarding the satisfaction of the police officer making the arrest (or the Minister making the detention order). The court noted that the submission that it was the objective test that should be applied was earlier made in *Tan Sri Raja Khalid* 's case *(supra)* and was rejected by the court although the court upheld the release of the detainee in that case because the arresting officer had sworn an affidavit to the effect that the arrest and detention related to allegations of bank fraud which was a criminal offence. The court, then held:

> (6) 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 by 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 the subjective test;

On 9 March 1988 Peh Swee Chin J (as he then was) delivered his judgment in *Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 CLJ 197; [1988] 1 CLJ (Rep) 632*. In this case, the detainee challenged the detention order issued under s. 8 of the ISA 1960. In that case six allegations were made against the applicant which formed the basis of the detention order. The Minister subsequently admitted that there was an error in the sixth allegation as the detainee did not on that date, time and place spoke of the issue alleged.

Peh Swee Chin J (as he then was), in allowing the application held:

> (1) there are three exceptions to the non-justiciability of the Minister's mental satisfaction in cases of this kind. They are (a) mala fide, (b) the stated grounds of detention not being within the scope of the enabling legislation, i.e. the Act, and (c) the failure to comply with a condition precedent;
>
> (2) *mala fides* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised;
>
> (3) although the error relating to the sixth allegation was probably made in the course of enquiries by the police, the Minister cannot rid himself of the error of the police because the process starting with the initial arrest of the applicant under section 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one. Such being the case, any period or any part of such one continuous process can be looked into to see if the care and caution have been exercised with a proper sense of responsibility for the purpose of ascertaining if the detention order was properly made;
>
> (4) viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form;
>
> (5) the sixth allegation, though an irrelevant allegation which the court can

> enquire into, was also an inaccurate allegation that can be treated as being outside the scope of the Act;
>
> (6) with regard to the contention that the detention order was necessary having regard to the first to fifth allegations, this court should not accede to the contentions.

On 11 May 1988 the appeal by the Public Prosecutor in *Koh Yoke Khoon (supra)* was dismissed by the Supreme Court. In brief the Supreme Court confirmed the judgment of the High Court that the detention of the detainee at the Muar police station pending removal to Pulau Jerejak Rehabilitation Centre was unlawful, as according to the order during that period he should be detained in *Pulau Jerejak Rehabilitation Centre* - see [1988] 2 MLJ 301.

At about the same time, Edgar Joseph Jr. J, in *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor [1986] 1 LNS 121*; [1988] 2 MLJ 638, *inter alia*, held that the criminal activities alleged against the applicant were too remote in point of law to justify the making of the order under s. 4(1) of the Ordinance.

On 19 July 1988, Peh Swee Chin J's judgment in *Karpal Singh (supra)* was reversed by the Supreme Court - see *Minister of Home Affairs, Malaysia & Anor v. Karpal Singh* [1988] 3 MLJ 29. In allowing the appeal the court held:

> (1) The learned judge in this case would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular, he failed to recognize that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. The learned judge therefore clearly misdirected himself.
>
> (2) Whether there is reasonable cause for the making of the detention order is something which exists solely in the mind of the Minister of Home Affairs and he alone can decide it and it is not subject to challenge or judicial review unless it can be shown that he did not hold the opinion which he professed to hold.
>
> (3) In this case the Minister of Home affairs had gone on affidavit to say that omitting the allegation of fact complained against, he would still have made the detention order having regard to the reports and the information relating to the conduct of the respondent upon which no doubt the rest of the allegations of fact were based. The learned judge was bound to accept these averments in the affidavit and could not inquire into the cause of the detention.
>
> (4) The flawed sixth allegation of fact was an error of no consequence which can be regarded as a mere surplusage especially in view of the affidavit of the Minister of Home Affairs is not subject to judicial review.

We shall not discuss the three cases decided by the High Court in the earlier part of 1989. They are *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731* (Edgar Joseph Jr J, as he then was), *Chua Teck v. Menteri*

*Hal Ehwal Dalam Negeri, Malaysia & Ors [1989] 2 CLJ 414; [1989] 1 CLJ (Rep) 429* (LC Vohrah J) and *Zakaria bin Jaafar v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. And Other Applications [1989] 2 CLJ 691 (Rep); [1989] 2 CLJ 1101*; [1989] 3 MLJ 318 (Mohtar Abdullah JC, as he then was ).

Then, on 18 August 1989, Edgar Joseph Jr. J (as he then was) decided in *Yap Chin Hock v. Minister of Home Affairs & Anor and Other Applications [1989] 2 CLJ 860; [1989] 2 CLJ (Rep) 673*, *inter alia*, that:

> (7) The subjective satisfaction of the Minister cannot be questioned. Ordinary criminal laws are meant to complement preventive detention laws and they are not substitutes for one another. The fact that the Minister chose to invoke the Act was not evidence that he failed to consider a course in criminal prosecution rather than preventive detention.
>
> (8) The delay in the detention of the second applicant was explained by the Deputy Minister and the submission on proximity is unacceptable.

This was perhaps the last case decided prior to the amendments to the Ordinance, ISA 1960 and DD(SPM) Act 1985 made by Act A740, Act A739 and Act A738 respectively, all of which came into force on 24 August 1989.

The cases appear to show that there were various grounds on which the detention orders were challenged of which *mala fide* appears to be the most important ground. Courts appear to have placed lesser importance on procedural non-compliance unless the requirement is mandatory in nature. The amendments appear to have reversed the position and in so doing limited the ground to only one ie, non-compliance with procedural requirements.

With the amendments, one would have thought that applications made after 24 August 1989 challenging the Minister's detention order under s. 4(1) of the Ordinance and similar provisions in ISA 1960 and DD(SPM) Act 1985 would be based on one ground only ie, non-compliance with procedural requirements. But, quite surprisingly, except for a few cases at High Court level, courts hardly refer to, whatmore rely on, the amendments. Examples of cases in which the court (High Court) relied on the amendments are *Teh Hock Seng v. Minister of Home Affairs & Anor [1990] 2 CLJ 460; [1990] 3 CLJ (Rep) 232* in which the court relied on similar amendments in the DD (SPM) Act 1985 and *Sukumaran s/o Sundram v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia and Another Application [1995] 3 CLJ 129*. The latter is a case under the Ordinance and s. 7C was specifically referred to and relied on in the judgment of the learned judge.

But, in other cases, no reference was made to the amendments or similar amendments in the other Acts and we shall look at some of those cases. In this respect, the focus will be mainly on the judgments of the Supreme Court, the Federal Court and the Court of Appeal. Even then, cases reported in 1990 to 1992 are omitted as those appeals, though heard by the Supreme Court after the amendments, might have been filed in the High Court before the amendments.

In *An Ngoh Leong v. Inspector General of Police & Ors.* [1993] 1 MLJ 65, the Supreme Court allowed the detainee's appeal because of a breach of r. 3(2) of the Prevention of Crime (Procedure) Rules 1972. The breach is clearly a procedural non-compliance. However, the

court did not refer to the amendment but decided on the ground that the rule was mandatory in nature.

In *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and Another Application [1993] 4 CLJ 336 (SC)* where the order made under s. 4 of the Ordinance stated the grounds of detention in the alternative, the Supreme Court held that the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention mechanically." No. reference was made to the amendments.

In *Abdul Rahman bin Haji Maidin v. Timbalan Menteri Dalam Negeri [2000] 3 CLJ 8 (CA)* where the appellant was detained under s. 6(1) of the DD (SPM) Act 1985, two grounds were forwarded.

> (i) the detention order failed to indicate whether the appellant's criminal activities were past or present and was vague and ambiguous and thus invalid; and
>
> (ii) there had been a long delay from the time of his last known act of criminal activities to the time the detention order was issued.

The Court of Appeal dismissed the argument. However, no reference was made to the amendment.

Something need be said about *Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 (FC)*. In that case the challenge was against the detention by the police under s. 73 of the ISA 1960. So, the provisions of ss. 8B and 8C of the ISA were not applicable because s. 8B(1) only talks about "any act done or decision made by the Yang di Pertuan Agong or the Minister." So, that case is not relevant to the present discussion.

In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD(SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

Coming back to present case, both the grounds forwarded are clearly not within the ambit of the term "procedural non-compliance." There does not appear to be any provision in the law or the rules, neither were we shown such a provision, that requires the Minister to consider whether criminal prosecution ought to be taken against the appellant or that the order must be made within a certain period from the date of the alleged criminal acts. There being no such procedural requirement, there can never be non-compliance thereof. In other words, the grounds are not such that could be relied on in an application for *habeas corpus* by virtue of

the provisions of ss. 7C(1) and 7D(c) of the Ordinance. On this ground alone, the application should have been dismissed.

In any event, we do not think that the first ground has any merits. Learned Counsel for the appellant relied on *Kanchanlal Maneklal Chokshi v. State of Gujerat* [1979] SCC (Cri.) 897; *Hemlata Kantilal Shah v. State of Maharashtra & Anor* [1982] SCC (Cri.) 16; *Murugan s/o Palanisamy & Ors. v. Deputy Minister of Home Affairs [2000] 1 CLJ 147* and *Chong Boon Pau v. Timbalan Menteri Dalam Negeri [2004] 4 CLJ 838*.

Two things should not be confused. First the power of the Attorney General to institute criminal proceedings and secondly, the power of the Minister to make a detention order.

The power to institute criminal proceedings lies with the Attorney General and is provided by art. 145(3) of the Federal Constitution:

> 145 (1)
>
> (2)
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or to discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

This is repeated with further details in ss. 254 and 376 of the Criminal Procedure Code. Suffice for me to reproduce the provisions of s. 376(1):

> 376(1). The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

On the other hand, power to order detention under the Ordinance lies with the Minister by virtue of s. 4(1) of the Ordinance which has been reproduced.

These are two distinct powers under two different laws. The Attorney General and the Minister, respectively, have power given to them by the respective laws. So, just as the Attorney General has power to institute proceedings but not the power to order detention, the Minister has power to order detention but not to institute proceedings. Just as it is not within the power of the Attorney General to consider making an order of detention, it is also not within the power of the Minister to consider the institution of criminal proceedings. What is the purpose of considering doing something that they, respectively, have no power to do? Indeed, if the Minister considers the institution of criminal proceedings, in a judicial review application, it would not be surprising to hear arguments that the Minister has exceeded his jurisdiction or that he has taken into consideration matters which he should not.

The law also does not require the Minister to refer the matter before him to the Attorney General first for his consideration whether to institute criminal proceedings before considering whether to issue a detention order. Similarly, the law does not require otherwise, ie, for the Attorney General to refer the matter before him to the Minister first for consideration whether the detention order should be made before considering whether to institute criminal proceedings. Their powers are separate and provided for by different laws.

Indeed, even the powers of the police to arrest a person that leads to the institution of criminal proceedings and to detain a person with a view of detention by the Minister are provided by different laws, the former mainly under the Criminal Procedure Code, the latter under the Ordinance.

So, the first thing that one should be clear about is that there are two distinct and separate laws for different purposes to be exercised by two different authorities. Once we get that clear, then the argument that the Minister should have considered the institution of proceedings first collapses. The Minister has no such power and indeed, it will be *ultra vires* his jurisdiction to do so. That should dispose of the first argument without even any reference to case law.

Regarding the cases referred to by learned counsel for the appellant, we do not think it is necessary for us to consider the two Indian cases. They are decided according to the laws in India. It is always very dangerous to quote passages from judgments, especially from other jurisdictions, and apply them without knowing and considering the relevant written laws in such jurisdictions and without paying sufficient attention to our own written laws. Such reliance can lead our law astray as has happened in the past.

*Murugan (supra)* and *Chong Boon Pau (supra)*, both judgments of the High Court are of no relevance to the point in issue. Indeed, it is surprising that the learned judge in *Murugan (supra)* was talking about the Deputy Minister having acted "mechanically and arbitrarily", "the satisfaction of the Deputy Minister" and the learned JC (as he then was) in *Chong Boon Pau (supra)* saying that "The Deputy Minister ought to have applied his mind to the question whether the detention under the Ordinance was most necessary and was to be preferred to one under the Child Act 2001". In both cases, no reference was made to the amendment.

On the second ground, it was argued that the grounds of detention were stale and remote in point of law to justify the detention order. No affidavits were filed by the police to explain the delay. Furthermore, the Deputy Minister failed to state his source of information in respect of the 7& frac12; months delay. Learned counsel for the appellant referred to *Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor* (supra), *Mogan a/l Perumal v. K/l Hussein bin Abdul Majid & 5 Ors. [1998] 3 CLJ 629* and *Abd. Rahman bin Haji Maidin v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors. [2000] 3 CLJ 8*.

Here too, in our view, to avoid confusing our own minds, we should begin from the basic law ie, the relevant provisions of the Ordinance before looking at decided cases. Citing passages from judgments without looking at the dates when those judgments were delivered, in view of the amendments to the Ordinance, is most dangerous. It may lead to errors of law. Even cases decided after the amendments must be considered in the light of the amendments, whether the amendments were considered in the judgments or not. Unfortunately, such arguments are still being heard, and the courts, unwittingly keep considering them, quite often without considering the amendment.

Again, out of deference to all concerned, let us look at the cases referred to by the learned counsel for the appellant.

In *Yit Hon Kit v. Minister of Home Affairs, Malaysia (supra)*, the detention order made by the Minister pursuant to s. 4(1) of the Ordinance was again challenged. One of the grounds put forward was that "the allegations of, the effect of which was that the applicant had returned to

Teluk Intan periodically during the years 1983 and 1984 to carry out his criminal activities stipulated therein, were so remote in point of time to the date of the making of the detention order dated 17 February 1986, that in the absence of an explanation for the delay (and there was none), it could not be said that the conditions precedent for the making of the detention order laid down in s. 4(1) had been satisfied."

After referring to *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors, (supra) SK. Serajul v. State of West Bengal* [1975] 2 SC (78); *Jagan Nath Biswas v. The State of West Bengal* AIR [1975] SC 1516 and *Md. Sahabudin v. The District Magistrate 24 Parganas & Ors.* AIR [1975] SC 1722, the learned judge held that "the criminal activities alleged against the applicant are too remote in point of law to justify the making of the detention order."

It must be noted that, first, *Yit Hon Kit (supra)* is a pre-amendment decision. Secondly, there is nothing in the law that requires the Minister to make an order, if he so wishes, within a certain time from the date of the alleged criminal activity. There is also no "condition precedent" laid down in s. 4(1) regarding the time when the order should be made. Perhaps, one justification one can offer is that, at that time, prior to the amendments, the court was looking at *"mala fide"* in the wider sense on the part of the Minister in making the order that the issue became relevant. Be that as it may, now, after the amendments, is there a "condition precedent" which must be a procedural requirement that the order may only be made within a certain time from the time of the alleged criminal activities? That is the pertinent question now and the answer is "No".

So, *Yit Hon Kit (supra)*, does not assist the appellant on this ground.

*Morgan a/l Perumal v. K/l Hussein bin Abdul Majid & 5 Ors. (supra)* is a judgment of the Court of Appeal. In that case too, the validity of the detention order made under s. 4(1) of the Ordinance was questioned. On the ground under discussion, the court, citing *Yeap Hock Seng (supra)* and *Yip Hon Kit (supra)* with approval, held that "the criminal activities of the appellant were some two years from the date of the detention order. In the absence of any explanation, we would also hold that they are far too remote to justify the detention."

The judgment of the Court of Appeal was delivered or issued on 21 January 1997 which was about eight years after the amendments in question (Act A740) that came into force on 24 August 1989. It is surprising that the amendments (ss. 7C and 7D) were neither referred to nor mentioned in the judgment. The judgment, and perhaps the arguments too, went on as if no amendments had been made to the Ordinance.

With respect, we do not think that the judgment can stand in the light of the new ss. 7C and 7D.

As regards *Abd. Rahman bin Haji Maidin v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Ors. (supra),* the detention order was made by the Deputy Minister under s. 6(1) of the DD (SPM) Act 1985. One of the grounds on which it was challenged was that the detention order was only issued on 7 October 1998 whereas the appellant's last known criminal activities were in February 1998. This gap was not proximate enough in time to justify the detention order. The court, in its judgment, also referred to *Yeap Hock Seng (supra)* and *Morgan a/l Perumal (supra).* However, the court distinguished the two cases:

> It would appear that the length of time calculated in the two cases cited, refers to the length of time the detainee was kept in custody before detention order was issued. It did not refer to the length of time the last act of criminal activities was known to the date the detention order was made.

and held:

> In the instant appeal, the Deputy Minister has affirmed that the delay was due to the length of time it took the police to investigate into the appellant's past activities. This we consider, is a legitimate and acceptable explanation and we say that on the circumstances of this appeal, the six months gap is not too remote as to render the detention order invalid.

Again, surprisingly, ss. 11C and 11D of DD (SPM) Act 1985, (which are similar to ss. 7C and 7D of the Ordinance and ss. 8C and 8D of the ISA 1960) were neither referred to nor mentioned.

Be that as it may, the amendments are there and must be given effect to by the courts. As we have said, there is no requirement anywhere in the law or the rules that a detention order must be made within a certain period of the alleged criminal acts. There is no limitation period, so to speak. That being so, there can be no noncompliance thereof. It is not the function of the court to create such a limitation period or a procedural requirement. The second ground also fails.

On these grounds, we dismiss the appeal.