
ABDUL RAZAK BAHARUDIN & ORS v. KETUA POLIS NEGARA & ORS AND ANOTHER APPEAL
FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ, CJ; SITI NORMA YAAKOB, CJ (MALAYA); ABDUL HAMID MOHAMAD, FCJ
CRIMINAL APPEAL NOS: 05-5-2004 (W) & 05-6-2004 (W)
10 OCTOBER 2005
[2005] 4 CLJ 445

***PREVENTIVE DETENTION**: Detention order - Detention under Internal Security Act 1960 - Whether an order of Minister under s. 8 may only be challenged on ground of procedural non-compliance - Whether this restriction applies to detention by a police officer under s. 73*

***PREVENTIVE DETENTION**: Detention order - Detention under s. 8 Internal Security Act 1960 - Procedural defects - Whether mala fide amounts to a "procedural non-compliance"*

All the appellants prayed for orders that writs of *habeas corpus* be issued for their release from detention. The applications were made under s. 365 of the Criminal Procedure Code and art. 5(2) of the Federal Constitution. The appellants were all arrested and detained under s. 73(3)(a) of the Internal Security Act 1960 ("ISA") and subsequently detained under the order of detention made by the Minister pursuant to s. 8(1) of the ISA.

Before the Federal Court, the following issues were raised: (i) "Jurisdictional threshold" - that the detention orders, grounds of detention and allegations of facts supporting the grounds of detention were made *ultra vires* the provisions of the ISA; (ii) That there had been procedural non-compliance. It was argued that the Minister applied his mind mechanically without proper consideration of the facts and law. It was argued that the Minister had failed to take into account, consider and state the possibility of launching a criminal prosecution. It was also argued that the grounds of detention and allegations of fact supporting the grounds of detention were not taken into account when the detention orders were issued. The grounds of detention were dated later than the allegations of fact. It was argued that that was fatal; (iii) That the report given to the Minister by DSP Yusoff bin Mohd. Amin was not disclosed in his affidavit in these proceedings

Held (dismissing the appeals)

Per Abdul Hamid Mohamad FCJ:

[1] Under s. 365 of the Criminal Procedure Code and art. 5(2) of the Federal Constitution, only one remedy is provided for: "release" or "set at liberty" which means the same thing.

[2] The court must give effect to the provisions of ss. 8B, 8C and 8D of the ISA. It means, *inter alia*, that an order of the Minister under s. 8 may only be challenged on the ground of procedural non-compliance. However, the restriction does not apply to a detention by a police officer under s. 73. Section 8B does not cover "an act done or decision made" by a police

officer as under s. 73.

[3] Sections 73 and 8 of the ISA are not "necessarily dependent" on each other. Unlike a challenge against the arrest and detention pursuant to section 73, a challenge against an act done by the Minister under s. 8 can only be mounted on the ground of procedural non-compliance. *Mala fide* is not a "procedural non-compliance". So, the test, whether subjective or objective, used to determine whether *mala fide* has or has not been shown is of no relevance now, in a challenge against an act done under s. 8. When *mala fide* itself is no longer an issue under s. 8, the test thereof is clearly no longer relevant. The issue now under s. 8 is whether a procedural requirement has or has not been complied with.

[4] A detention order made under s. 8 of the ISA may only be challenged on the ground of procedural non-compliance and nothing else.

[5] The detention orders having been issued *mala fide* was not a "procedural non-compliance". That is not a matter of procedure. That is challenging the grounds or reasons given by the Minister for issuing the detention orders, leading to the conclusion that the orders were issued *mala fide*.

[6] Regarding the allegation that the Minister had failed to consider criminal prosecution, there is no such "procedural requirement" provided by law.

[7] There is also no procedural requirement that the report given to the Minister by DSP Yusoff bin Mohd. Amin be disclosed.

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

Kesemua perayu memohon untuk perintah-perintah bahawa writ-writ *habeas corpus* dikeluarkan untuk pembebasan mereka daripada tahanan. Permohonan-permohonan tersebut telah dibuat di bawah s. 365 of the Kanun Acara Jenayah dan art. 5(2) Perlembagaan Persekutuan. Perayu-perayu telah diberkas dan ditahan di bawah s. 73(3)(a) Akta Keselamatan Dalam Negeri 1960 ("AKDN") dan telah kemudiannya ditahan di bawah perintah tahanan yang dibuat oleh Menteri di bawah s. 8(1) AKDN.

Di hadapan Mahkamah Persekutuan, isu-isu berikut telah dibangkitkan: (i) "Ambang bidang kuasa" - bahawa perintah tahanan, alasan-alasan tahanan dan pengataan-pengataan fakta yang menyokong alasan-alasan tahanan tersebut telah dibuat secara *ultra vires* peruntukkan-peruntukkan AKDN; (ii) Bahawa terdapat ketidakpatuhan prosedur. Dihujahkan bahawa Menteri telah membuat keputusan secara mekanikal tanpa sebaik-baiknya mengambilkira fakta dan undang-undang. Dihujahkan juga bahawa Menteri telah gagal untuk mengambilkira, menimbangkan dan menyatakan kebarangkalian memulakan pendakwaan jenayah. Juga dihujahkan bahawa alasan-alasan untuk tahanan dan pengataan-pengataan fakta yang menyokong alasan-alasan tahanan tersebut tidak diambil kira semasa perintah tahanan tersebut dikeluarkan. Alasan-alasan tahanan tersebut telah bertarikh selepas pengataan-pengataan fakta. Dihujahkan bahawa ini adalah memudaratkan; (iii) Bahawa laporan yang diberikan kepada Menteri oleh DSP Yusoff bin Mohd. Amin tidak dibentangkan di dalam afidavitnya di dalam prosiding ini.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad HMP:

[1] Di bawah s. 365 Kanun Acara Jenayah dan art. 5(2) Perlembagaan Persekutuan, hanya satu remedi diperuntukkan iaitu: "release" atau "set at liberty" yang membawa makna yang sama.

[2] Mahkamah mesti memberikan efek kepada peruntukkan-peruntukkan s. 8B, 8C dan 8D AKDN. Ini bermakna *inter alia*, bahawa satu perintah Menteri di bawah s. 8 hanya boleh dipertikaikan atas alasan ketidakpatuhan prosedur. Walau bagaimanapun, larangan tersebut tidak terpakai kepada satu penahanan oleh pegawai polis di bawah s. 73. Seksyen 8B tidak merangkumi "an act done or decision made" oleh seorang pegawai polis sepertimana di bawah s. 73.

[3] Seksyen 73 dan 8 AKDN tidaklah "saling bergantung" pada satu sama lain. Tidak sama seperti satu cabaran terhadap pemberkasan dan penahanan di bawah s. 73, satu cabaran terhadap tindakan yang diambil oleh Menteri di bawah s. 8 hanya boleh dibuat atas alasan ketidakpatuhan prosedur. *Mala fide* bukanlah satu "ketidakpatuhan prosedur". Jadi, ujiannya, sama ada subjektif atau objektif, yang digunakan untuk menentukan sama ada *mala fide* telah ditunjukkan adalah tidak relevan sekarang, dalam satu cabaran terhadap tindakan yang diambil di bawah s. 8. Bila *mala fide* tidak lagi menjadi satu isu di bawah s. 8, ujiannya adalah dengan jelasnya tidak lagi relevan. Isunya sekarang di bawah s. 8 adalah sama ada satu keperluan prosedur telah atau tidak ditepati.

[4] Satu perintah penahanan yang dibuat di bawah s. 8 AKDN hanya boleh dicabar atas alasan ketidakpatuhan prosedur dan bukan atas alasan-alasan lain.

[5] Perintah-perintah tahanan tersebut yang telah dikeluarkan secara*mala fide* bukanlah satu "ketidakpatuhan prosedur". Itu bukanlah satu perkara prosedur. Itu merupakan mencabar alasan atau sebab yang diberikan oleh Menteri untuk mengeluarkan perintah-perintah tahanan tersebut, yang membawa kepada kesimpulan bahawa perintah-perintah tersebut telah dikeluarkan secara *mala fide.*

[6] Berkenaan pengataan bahawa Menteri telah gagal mengambilkira pendakwaan jenayah, tidak ada "keperluan prosedur" sebegitu yang diperuntukkan oleh undang-undang.

[7] Juga tidak terdapat keperluan prosedur bahawa laporan yang diberikan kepada Menteri oleh DSP Yusoff bin Mohd. Amin perlu dibentangkan.

Case(s) referred to:

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

Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri & Ors [2005] 3 CLJ 914; [2005] 4 AMR 724 ***(refd)***

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

Murugan v. Palanisamy [2001] 1 CLJ 147 ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan And Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Re Tan Sri Raja Khalid Raja Harun, Inspector General of Police v. Tan Sri Raja Khalid Raja Harun [1987] CLJ 1014 (Rep); [1987] 2 CLJ 470; [1988] 1 MLJ 182 ***(refd)***

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

Legislation referred to:

Criminal Procedure Code, s. 365

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

Federal Constitution, art. 5(2)

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

Counsel:

For the appellants - Edmund Bon (Amir Hamzah Arshad & Edward Saw with him); M/s Chooi & Co

For the respondents - Mohamad Hanafiah Zakaria (Sharlyza Alis Sharkawi)

Reported by Amutha Suppayah

JUDGMENT

Abdul Hamid Mohamad FCJ:

When these two appeals came up before us, learned counsel for the appellants informed us that he was withdrawing the appeal by the first appellant (Abdul Razak bin Baharuddin) in Appeal No. 05-05-2004 (W) who had been released from detention. We accordingly struck off his appeal.

We heard both appeals and dismissed them. We now give our reasons.

Basically, all the appellants were asking for orders that writs of habeas corpus be issued for their release from detention. The applications were made under s. 365 of the Criminal Procedure Code which provides:

365. The High Court may whenever it thinks fit direct:

(a) any person who:

(i).....

(ii) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia, to be set at liberty;

Article 5(2) of the Federal Constitution provides:

5 (1).....

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall enquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

Under both provisions, only one remedy is provided for: "release" or "set at liberty" which means the same thing.

Coming back to the facts of the instant appeals, even though the dates of the relevant events, the places where the events took place and the police officers involved were different, the appellants were all arrested, detained under s. 73(3)(a) of the Internal Security Act 1960 ("ISA") and subsequently detained under the order of detention made by the Minister pursuant to s. 8(1) of the ISA.

Before us, arguments were raised under the following heads:

1. "jurisdictional threshold" - the detention orders, grounds of detention and allegations of facts supporting the grounds of detention were made *ultra vires* the provisions of the ISA.

2. there has been procedural non-compliance, and

3. the report of the Minister was not disclosed.

We shall refer to the arguments in more detail later. At this point, there is a more fundamental issue of law that has to be addressed. This concerns the provisions of ss. 8B, 8C and 8D of ISA which provides as follows:

8B. (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act

governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

8C. In this Act, "judicial review" includes proceedings instituted by way of:

(a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari;*

(b) an application for a declaration or an injunction;

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

(d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di- Pertuan Agong or the Minister in accordance with this Act.

8D. (1) Sections 8B and 8C shall apply to any proceedings instituted by way of judicial review of any act done or decision made by the Yang di-Pertuan Agong or the Minister under this Act, whether such proceedings were instituted before or after the coming into force of the Internal Security (Amendment) Act 1989 [Act A739].

(2) A reference to proceedings in subsection (1) shall not include a reference to proceedings which had concluded and in respect of which final decision of the court had been given before the coming into force of the Internal Security (Amendment) Act 1989, or to any appeal or application to appeal against such final decision.

In *Lee Kew Sang v. Timbalan Menteri Dalam Negeri and 2 Ors [2005] 3 CLJ 914*; [2005] 4 AMR 724, we had addressed this issue at length. However, in that case, the detention was under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("POPC"). Even though in the course of our judgment we did point out that the provisions of ss. 7C and 7D of POPC were the same as the provisions of ss. 8B and 8C of the ISA and that both the amendments took effect on the same date (24 August 1989), in that case we only decided on the effects of ss. 7C and 7D of POPC. Now, in these appeals, we think we should categorically decide on the effects of ss. 8B and 8C of the ISA.

In that case, we had traced the judgments of the courts in this country until the time the amendments were made. We had noted the various grounds on which the detention orders were challenged and the writs of *habeas corpus* were issued by the courts. Of importance was *mala fide*. We had also noted that perhaps the last judgment prior to the amendment was *Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 CLJ 197; [1988] 1 CLJ (Rep) 632*, a judgment of Peh Swee Chin J (as he then was).

Then came the amendments which reversed the law: what was considered as less important previously i.e. procedural non-compliance became important and what was considered as more important previously i.e. mala fide became non-consequential.

The constitutionality and the effect of those provisions had been considered by this court in *Kerajaan Malaysia & 2 Ors. v. Nasharuddin bin Nasir [2004] 1 CLJ 81*. In brief, this court had decided that s. 8B of the ISA was not unconstitutional and that the words of that section clearly excluded the court's review jurisdiction and that the court must give expression to

Parliament's intention.

Delivering the judgment of the court Steve LK Shim CJ (Sabah & Sarawak) said at p. 506:

Under s. 8, the Minister has been conferred powers of preventive detention. The powers can be said to be draconian in nature. They are obviously designed to stop or prevent subversive actions or actions prejudicial to public order or national security (see *Re Tan Sri Raja Khalid bin Raja Harun [1987] CLJ 1014 (Rep); [1987] 2 CLJ 470*; [1988] 1 MLJ 182). And s. 8B, being an ouster clause, has the effect of immunising (as I shall elaborate later) the powers of the Minister from judicial review. As such it plays an integral part within the whole scheme relating to the Minister's preventive powers and decisions made thereunder. In this sense, s. 8B is intrinsically linked to s8 thereby creating a combined effect in combating subversive actions or actions prejudicial to public order or national security. It falls squarely within the parameters of article 149(1) aforesaid. In the circumstances, s. 8B is not an unconstitutional provision. On that score, I must disagree with counsel for the respondent.

Given the validity and constitutionality of s. 8B, the next question for consideration is whether it can succeed in ousting the review jurisdiction of the court.

The learned CJ (Sabah & Sarawak) then proceeded to discuss various judgments of this court and others on the effects of "ouster clause", including *R. Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147* (FC) and *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan (and another appeal) [2002] 4 CLJ 105* and concluded:

Given the established authorities referred to, it cannot be said that the Federal Court in *Sugumar Balakrishnan* has broken any new ground in determining the extent and scope of ouster clauses. There is no paradigm shift. It has followed entrenched principles which can effectively be summed up as follows: that an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause.

Now, s. 8B of the ISA is almost identical to s. 59A of the Sabah Immigration Act. In my view, the words in s. 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious i.e. that the jurisdiction of the court is to be ousted in terms stated in s. 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention. Section 8B is therefore intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his discretionary power in accordance with the ISA except as regards any question on compliance with any procedural requirement relating to the act or decision in question.

Given the proper interpretation to be placed on s 8B what is the position in the instant case? Here, there is evidence that the impugned order was issued by the relevant Minister. There is also evidence that he had issued it in the exercise of his discretionary power under or in accordance with s. 8(1) of the ISA. Furthermore, evidence shows that all the necessary procedural requirements had been complied with by the Minister in issuing the detention order. Indeed, the respondent made no complaint on this score.

So, the issue regarding the constitutionality and the effect of s. 8B had been decided by this court even before we decided *Lee Kew Sang (supra)* in respect of s. 7C and 7D of POPC.

On my part, I must confess that, somehow at the time of writing the judgment in *Lee Kew Sang (supra),* I had missed out *Nasharuddin (supra).* As it turned out to be, I think it is good that it happened that way. It means that even based on my own independent reasoning and without being influenced by that judgment, which I would have certainly followed, I came to the same conclusion which was in turn agreed to by the learned Chief Justice and Chief Judge (Malaya).

We reiterate now that this court must give effect to the provisions of ss. 8B, 8C and 8D. It means, *inter alia*, that an order of the Minister under s. 8 may only be challenged on the ground of procedural non-compliance. However, the restriction does not apply to a detention by a police officer under s. 73. Section 8B does not cover "an act done or decision made" by a police officer as under s. 73.

Learned counsel for the appellants relied heavily on *Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 (FC)*. So, we might as well discuss that judgment right away. In *Mohamad Ezam (supra)* the issue was whether the police had acted *mala fide* in the arrest and detention of the appellant under s. 73 of the ISA. The detention order made by the Minister under s. 8 was not in issue. In fact, as can be seen from the judgment of Abdul Malek Ahmad FCJ (as he then was) at p. 362, Malik Imtiaz Sarwar, learned counsel for the appellants himself *inter alia,* argued:

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

And at p. 362:

(iii) while ss. 73 and 8 are connected, they are not "inextricably linked.

Thus, in all the judgments of the learned judges in that case, the focus was on the arrest and detention under s. 73 of the ISA, not on the detention order made by the Minister under s. 8. Thus when the learned judges talked about the test to be applied, which they held should be the objective test, that was only in respect of the arrest and detention under s. 73(1), not the detention under s. 8.

It was the learned counsel for the respondents in that case who argued that "Section 73(1) and s. 8 of the ISA are so inextricably connected that the subjective test should be applied to both" (page 497) relying on *Re Tan Sri Raja Khalid bin Raja Harun, Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] CLJ 1014 (Rep); [1987] 2 CLJ 470*; [1988] 1 MLJ 182 and *Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132*; [1988] 1 MLJ 293.

This court in *Mohamad Ezam (supra)* did not agree with that argument. Steve Shim (CJ Sabah & Sarawak) made it very clear in his judgment:

Examined in the context stated, it must mean that although ss. 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances.

Section 8 is not necessarily dependent on s 73(1) and *vice versa*. In the circumstances, it cannot therefore be said that they are 'inextricably connected'. In this respect, I must, with the greatest respect, defer from the view expressed in *Re Tan Sri Raja Khalid and Theresa Lim*.

The following points must be summarized regarding *Mohamad Ezam (supra).* In that case, Steve Shim, Chief Judge (Sabah & Sarawak), rejected the argument that ss. 73 and 8 of the ISA are so inextricably linked or connected that the subjective test must be applied to both. He held that although ss. 73(1) and 8 are connected, they nevertheless operate quite independently of each other under certain circumstances. The two sections are not "necessarily dependent" on each other. (The other judges were silent on this point). Secondly, the court held that in determining the allegation of *mala fide* with regard to the arrest and detention under s. 73(1), the objective test applies. This court in that case, did not say that mala fide is a ground for challenging the detention order under s. 8, neither that the objective test applies in respect of s. 8. Thirdly, *Raja Khalid (supra)* and *Theresa Lim (supra*), were not followed. But, that is only in respect of s. 73, not s. 8. *Mohamad Ezam (supra)* was only concerned with s. 73, not s. 8. This is because, in *Mohamad Ezam (supra)* this court disagreed that s. 73 and s. 8 are inextricably connected and are dependent on each other.

Another point that we must add, as we have said in *Lee Kew Sang (supra)*, is that both *Raja Khalid (supra)* and *Theresa Lim (supra)* were decided prior to the amendments that inserted ss. 8B, 8C and 8D into the ISA. As we have said too, those amendments do not affect s. 73, but they affect s. 8. The amendments have treated the acts done under two sections differently. That is another ground that supports the view that they are not inextricably connected. So, the objective test that was said by this court to be applicable to decide whether the arrest and detention by the police was *mala fide* in *Mohamad Ezam (supra)* was only in respect of s. 73.

In addition to the reasons given by Steve Shim CJ (Sabah & Sarawak) in *Mohamad Ezam (supra)* especially of the report for holding that s. 73 and s. 8 are not "inextricably connected", with which we agree, the amendments have clearly demarcated the two sections regarding the grounds for challenging the acts done thereunder. Unlike a challenge against the arrest and detention pursuant to s. 73, a challenge against an act done by the Minister under s. 8 can only be mounted on the ground of procedural non-compliance. *Mala fide* is not a "procedural non-compliance". So, the test, whether subjective or objective, used to determine whether *mala fide* has or has not been shown is of no relevance now, in a challenge against an act done under s. 8. When *mala fide* itself is no longer an issue under s. 8, the test thereof is clearly no longer relevant. The issue now under s. 8 is whether a procedural requirement has or has not been complied with eg, whether a copy of the order has been served as required by s. 11, to give just one simple example. If the service of the order is challenged, the Minister has to prove that it was served by affidavit and documentary evidence. Of course, the court should consider the evidence before deciding whether it is served or not.

We shall now summarize our discussion in one sentence: a detention order made under s. 8 of the ISA may only be challenged on the ground of procedural non-compliance and nothing else.

We also would like to make it clear that, in this judgment, we express no opinion whether this court was right or wrong in *Mohamad Ezam (supra)* in applying the objective test in respect of s. 73. All we say is that, even if that is the correct test, that is only applicable to s. 73. The

test, whether objective or subjective, is of no relevance anymore in respect of s. 8 after the amendments because the only issue under s. 8 now is whether there has been procedural non-compliance.

Furthermore, *Mohamad Ezam (supra)* must now be read in the light of *Nasaruddin (supra)*, a judgment of this court delivered two years later in which all the three judges were in fact members of the panel that decided *Mohamad Ezam (supra)*. This is particularly so in respect of the ruling in *Nasaruddin (supra)* to the effect that the legality or illegality of the detention under s. 73 is of no relevance in determining the legality or illegality of the detention order under s. 8. We agree with the view of this court in *Nasaruddin (supra)* on this issue.

We shall now look at the grounds forwarded to see whether each of them fall under such ground.

The first ground argued by the learned counsel for the appellants was that the detention orders, grounds of detention and allegations of fact supporting the grounds of detention were made *ultra vires* the provisions of the ISA. Hence the powers flowing from the ISA could not be exercised. In other words, the detentions were outside the scope of the ISA. Several points were raised under this head. They are:

1. the grounds of detention do not fall within the scope of ISA as there was no allegation of facts supporting future threat and there was no statement as to future threat. The use of the word "telah" (eg, "telah melibatkan diri dalam kegiatan-kegiatan yang "MEMUDARATKAN KESELAMATAN MALAYA""

2. the grounds of detention were different from the allegations of fact supporting the grounds of detention.

3. the difference in the usage: "boleh", "telah" and "akan".

4. the grounds of detention were speculative since the word "boleh" was used. That too was inconsistent with the grounds of detention regarding which the word "telah" was used.

5. "menjejaskan hubungan baik dua hala antara Kerajaan Malaysia dengan negara-negara jiran" could not be a ground of detention because, as I understand it, that is not a matter of internal security, and

6. the use of the word "alasan-alasan" raised the question whether there was only one ground or many grounds.

The crux of this argument is that the grounds of detention and the allegations of fact do not fall within the scope of ISA. Though not said by the learned counsel, it can be seen clearly that the learned counsel was alluding to the detention orders having been issued *mala fide*.

Is that a "procedural non-compliance"? We do not think so. That is not a matter of procedure. That is challenging the grounds or reasons given by the Minister for issuing the detention orders, leading to the conclusion that the orders were issued*mala fide.*

That would dispose of the first ground and we do not think that it is necessary to deal with

each of the points raised in support of that ground.

The second ground raised before us was what was termed as "procedural non-compliance". It was argued that the Minister applied his mind mechanically without proper consideration of the facts and law. It was not *bona fide.Mohamad Ezam (supra)* was cited as authority. Under this heading, it was argued that the Minister had failed to take into account, consider and state the possibility of launching a criminal prosecution. It was submitted that the facts alleged might constitute offences under the Penal Code and other legislations. The local case of *Murugan v. Palanisamy* [2001] 1 CLJ 147 was cited. It was also argued that the grounds of detention and allegations of fact supporting the grounds of detention were not taken into account when the detention orders were issued. The grounds of detention were dated later than the allegations of fact. It was argued that that was fatal. It was also argued that factual matters did not fall within the scope of the ISA.

As can be seen, the heading "procedural non-compliance" is a misnomer. The grounds relate more to the issue of *mala fide*. In any event, regarding the allegation that the Minister had failed to consider criminal prosecution, first, there is no such "procedural requirement" provided by law. Furthermore, we have dealt with this issue at length in *Lee Kew Sang (supra)* and we adopt our reasons given therein. All the other grounds given relate to *"mala fide"* regarding which we have stated our stand earlier.

The third and the last ground submitted before us was under the heading: "Report to Minister not disclosed". As to how this ground was argued we reproduce the outline submissions of the appellants on it, as we find it difficult to clearly state the learned counsel's arguments ourselves:

3. Report to Minister not disclosed

The Respondents failed to disclose the report ("Laporan mengenai hal keadaan penangkapan dan penahanan seperti di Lampiran 'A'") in the Affidavit of Yusoff bin Mohd. Amin affirmed on 2 December 2003 purportedly made under section 73(3)(c) ISA to the Minister. This is fatal and taints the detention orders in light of the issues in paras 1 and 2 above.

See:

(a) *Tan Hock Chan* [1996] 1 MLJ

(b) *Baharuddin bin Kamsin* [1996] 4 MLJ 184

(c) *State (Trimbole) v. The Governor of Mountjoy* [1985] IR 550

(d) *Koh Yoke Koon* [1988] 1 MLJ 45

3.1 Minister made all the detention orders only on the basis of investigations under section 73 ISA by the police and the reports of those investigations. There is no evidence of other investigations. This is not in dispsute.

See paras 5, 15, 25, 35, 45, 55, 65, 75 Affidavit affirmed on 17 December 2003

3.2 Chain of investigations by police led to making of the said orders. Without the

investigations, the detention orders could not or would not be made.

3.3 The investigations were flawed and/or pursued mala fide and/or pursued for a collateral purpose (ie, for a purpose other than what the legislature had in view in passing the ISA; and objective test to be applied but no evidence here adduced by police of such evidence or belief - see Ezam at 469), then the detention orders made on those investigations would necessarily be bad as they are linked. The basis of the detention orders were the investigations reports.

3.4 Further or alternatively, the facts alleged and/or grounds for detention under section 8 ISA must have already been present or must have already occurred or must have already been in the minds of the arresting officers when first arresting and detaining under section 73 ISA. If there are no grounds or grounds dissimilar from the grounds for detention under section 8 ISA, when the Applicants were first arrested and detained under section 73 ISA, then it must be that the reasons for the detention of the Applicants are non-existent and the section 8 orders were made improperly, for a collateral purpose and mala fide.

3.5 As the test for section 73 ISA investigations and detention is an objective one and in light of the above inconsistencies, this Honourable Court is entitled to enquire whether indeed the grounds for the section 8 orders or facts which gave rise to, or formed the basis of, the belief of the arresting officers were present when arresting the Applicants, the reasonableness of such grounds and whether the procedural requirements of section 73 ISA have been fulfilled.

3.6 Predicated on this, the report made under section 73(3)(c) ISA to the Minister is crucial. It must be produced to the court. Non-production warrants the drawing of an adverse inference against the Respondents.

3.6.1 The Respondents have waived immunity by referring to the report in the letter to the Minister. Hence, the report has been de-classified as secret.

3.6.2 "(Diklasifikasikan sebagai rahsia)" taken to mean that no report was actually adduced to the Minister and Minister was referring to a non-existent report?

If not that interpretation, then letter to Minister has been tampered with after the event and exhibited now representing the truth at material time. This is tantamount to using doctored evidence.

See:

(a) *AC Razia v. Government of Kerala & Ors* [2004] 1 LRI 167

(b) *Rajesh Gulati v. Govt of NCT of Delhi & Anor* [2002] 4 LRI 137

3.6.3 Why the necessity to refer to the report but then state that it is secret?

3.6.4 No explanation from the Respondents on this issue.

3.7 Notwithstanding the above, the satisfaction of the Minister under Section 8 ISA is subject to the objective test.

See:

(a) *Ezam* [2002] 4 MLJ 449

(b) *Chng Suan Tze* [1989] 1 MLJ 69

(c) *Senthilnayagam And Others v. Seneriratne And Another* [1981] 2 Sri LR 187

(d) *Liversidge v. Anderson* [1942] AC 206.

The points we would like to make are these: First, in fact, there is no difference between this ground and the first two grounds. Only a new reason or fact, ie, the report given to the Minister by DSP Yusoff bin Mohd. Amin was not disclosed in his affidavit in these proceedings. It is not alleged that there is a procedural requirement that it be disclosed and of course, there is none. It is used to again challenge the *bona fide* of the detention order, which as we have said, is not available. The reliance on *Mohamed Ezam (supra)* is again misconceived, for the reason we have stated earlier.

We do not think that it is necessary for us to discuss the cases cited by the learned counsel.

This ground too has no merits.

On these grounds, we had dismissed both the appeals.