IZUCHUKWU ORABUEZA v TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

CaseAnalysis

[2019] MLJU 663

Izuchukwu Orabueza v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] MLJU 663

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HIGH COURT (KUALA LUMPUR)

MOHD NAZLAN BIN MOHD GHAZALI, J

PERMOHONAN JENAYAH NO: WA-44-71-04/2018

3 January 2019

Luqman Mazlan (Shamsuddin & Co) for the plaintiff.
Norazlin Mohamed Yusoff (Siti Hajar binti Mat Radzi with her) (Deputy Public Prosecutor) for the respondent.

Mohd Nazlan bin Mohd Ghazali J:

JUDGMENTIntroduction

[1]This is an application for habeas corpus for an order for the immediate release of the applicant from detention which is alleged to be defective and not valid for non-compliance with the applicable mandatory procedural requirements.

[2]Following the conclusion of the hearing of the application, I dismissed the application, and highlighted the primary reasons for the same. This judgment contains the full reasons for the dismissal.

Key Background Facts

[3]The applicant was on 30 June 2017 arrested under Section 3(1) Dangerous Drugs (Special Preventive Measures) 1985 ("the Act") in Kuala Lumpur.

[4]Following police investigation, an officer under Section 3(2) (c) of the Act submitted on 10 July 2017 the arrest report concerning the applicant the to the Deputy Minister of Home Affairs ("the Deputy Minister") in order to adhere to the condition enabling the police to further investigate for more than 14 days.

[5]On 5 July 2017 the police investigating officer Inspector Zulkifli Md Daud recorded the statement of the applicant. The former was assisted by Detective Sergeant Major Letchumanarajan a/l Rajagopal who acted as English translator for the applicant. The investigating officer had also recorded the statements of other witnesses to complete the investigation.

[6]On 31 July 2017 the investigating officer submitted the full investigation report to the Deputy Minister and to the inquiry officer of the Home Ministry under Section 3(3) of the Act. The inquiry officer, Fithril Hakim bin Ab Jalil then conducted a physical investigation on the applicant on 22 August 2017. Statements of witnesses were also obtained. On 25 August 2017 the inquiry officer submitted the requisite report under Section 5(4) of the Act to the Deputy Minister.

[7]The Deputy Minister then on 28 August 2017 issued a detention order against the applicant under Section 6(1) for a period of 2 years effective the same date of 28 August 2017.

[8]The investigating officer then served on the applicant the detention order, the grounds for detention and the statement of facts together with three copies of Form 1 to make a representation on the same date of 28 August 2017 with the requisite explanation at 7pm at Lokap Berpusat Kuala Lumpur Jinjang Kuala Lumpur.

[9]The day after, on 29 August 2017 the applicant was admitted to Pusat Pemulihan Akhlak ("PPA") Simpang Rengam Johor. On the same day, Azman Mohd Ali, being the Officer in Charge of the PPA ("the OIC") further explained about the detention order, grounds for detention

and statement of facts, and of the applicant's right to make a representation to the Advisory Board.

[10]The day after, on 30 August 2017 the applicant submitted Form 1 to the PPA which was then delivered to the Advisory Board on the same day.

[11]On 8 September 2017, the Advisory Board had sent to the applicant a notice of hearing of representation (Form II) for a hearing scheduled for 20 September 2017 at 9am. This was postponed because the lawyer for the applicant, Dato' Rosal Azimin Ahmad had only been appointed and had also requested for time to issue subpoena to call the investigating officer.

[12]A subsequent hearing date of 5 October 2017 following notification via Form II by the Advisory Board on 20 September 2017 too was postponed given a death on a relative of the lawyer for the applicant.

[13]The hearing session was finally convened on 21 November 2017 following a notification on 5 October 2017 via Form II to the applicant.

[14]The applicant attended this representation hearing before the Advisory Board and represented by his lawyer Dato' Rosal Azimin. The applicant called two witnesses, namely the investigating officer and a friend by the name of Egwucheazu Sylvester Chimawho who gave evidence in the proceeding. During the session, Detective Sergeant K. Saundarajan a/l Krishnan acted as the English interpreter for the applicant.

[15]On 30 November 2017 after having considered the representation made by the applicant, the Advisory Board submitted its recommendation to Yang Di-Pertuan Agong, who assented to the same on 29 December 2017.

[16]This then led to the applicant filing a notice of motion on 19 April 2018 praying for a writ of habeas corpus be issued for his immediate release by reason of violation of the Federal Constitution and non-compliance with the Act.

[17]Hence the instant application before me.

The Primary Contentions of the Parties

[18]The applicant anchors his application that the detention is invalid for violations and non-compliances on one primary ground, as highlighted in his written submissions. It is the alleged deprivation of his constitutional right to be afforded with an interpreter of the language of his choice.

[19]As stated in his written submissions, the applicant argued that he was denied the services of an English interpreter throughout the period of his detention.

[20]For completeness, I shall herein deal with the complaint as raised in the affidavit and written submissions of the applicant which concerns the absence of English interpreter. I should add however that the affidavit in support of the applicant contained many and various complaints against the respondents, but the crux appears to be in relation to the absence of an English interpreter. This is further repeated in the applicant's written submissions which focused on the same single issue.

[21]Yet at the hearing, counsel for the applicant informed the Court that he was instead relying on one other issue only, which concerned the alleged non-compliance with Rule 3(5)of the Dangerous Drugs Rules (Special Preventive Measures) (Advisory Board Procedures) 1987 ('the Rules"). This the SFC objected to because the matter had not been raised earlier. The SFC asserted that this was a new issue not previously raised in the affidavit of the applicant. Neither was this issue mentioned in the written submissions of the applicant.

[22]Although I agreed that the matter was not directly nor specifically mentioned in the affidavit of the applicant, this was not exactly a matter that the respondents had no knowledge about. In the interest of justice I agreed to hear this new point raised by the applicant. I also gave time to the SFC to put in additional submissions at the continued hearing date of the application.

[23]This application is resisted by the respondents, being the Deputy Minister, the Director of the PPA, and the Government of Malaysia as the first, second and third respondents, respectively. They maintained that there were no flaws in the detention order, and a number of affidavits had been affirmed to reply to the instant habeas corpus application.

Evaluation & Findings of this CourtThe Law Relating to Habeas Corpus in the Act

[24]The source of the powers of the Court dealing with an application for *habeas corpus* is governed by Section 11C of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act") relevant parts of which provides as follows:

> **11C. Judicial review of act or decision of Yang di-Pertuan Agong and Minister**
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> (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.

[25]Pertinently, "judicial review" is defined thus:

> **11D. Interpretation of "judicial review"**
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> In this Act, "judicial review" includes proceedings instituted by way of:
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> (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
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> (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.

[26]In the leading Federal Court decision on this subject in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 2 MLJ 631, Abdul Hamid Mohamad FCJ ruled on the scope of habeas corpus in this often quoted in the following terms:-

> "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 sections 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".

[27]I am mindful that the complaint in this case concerns the stage subsequent to the issuance of the detention order. If it had been otherwise, the law is settled that any defects in the course of investigation, assuming there was one vis-à-vis the statement taking process of the applicant would not have made any difference to the validity of the detention order issued under Section 6(1) of the Act.

[28]On the settled authority of the Federal Court decision in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia* [2006] 1 MLJ 309 which defines authoritatively the exact parameters warranting judicial intervention by way of the issuance of writs of habeas corpus, prior defects, if any, which I disagree exist in this instant case before me, vis-à-vis the arrest and investigation process are of no relevance to the current detention order.

[29]For, in light of the important authority of *Mohd Faizal bin Haris*, as well as *Lee Kew Sang* which preceded it, and as reaffirmed by the Federal Court in the case of *L. Rajanderan R. Letchumanan v Timbalan Menteri Dalam Negeri & Ors* [2010] 7 CLJ 653 the case-law authorities have made it abundantly clear that any irregularity or defects concerning arrest and investigation are irrelevant once a detention order under Section 6(1) has been issued. This is the position unless the complaints, fully substantiated, are in relation to the pre-requisites to the making of the detention order as stated in Section 6(1), which in any event is not the situation in the instant case.

Issue 1 - Whether there was failure to provide English interpreter

[30]For the purposes of this judgment, for completeness I shall also briefly deal with the original complaint raised by the applicant on the absence of an interpreter.

[31]The applicant submitted that he was denied the assistance of an interpreter when the detention order and the Form 1 were served on him by the investigating officer and also in his interactions with other individuals concerning his detention and representation to the Advisory Board.

[32]A close scrutiny of the affidavits of the parties reveal that the allegation made by the applicant is without basis.

[33]First, even though the applicant did ask for the assistance of an English interpreter to the investigating officer during investigation whilst in police detention, and which request was entertained, as averred by the investigating officer, notwithstanding the presence of a police interpreter as mentioned earlier, the investigating officer could and did converse with the applicant in English in a manner that was understood by the applicant.

[34]The relevant parts of the reply affidavit of the investigating officer (Zulkifli bin Mohd Daud) dated 6 July 2018 made this clear, as follows:-

> "13. Pada 28.8.2017 jam 7.00 malam di Lokap Berpusat Kuala Lumpur, Jinjang, Kuala Lumpur, saya telah menyampaikan 1 salinan asal Perintah Tahanan, 1 salinan asal pernyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan fakta yang atasnya Perintah itu diasaskan dan 3 salinan Borang 1 dengan secukupnya kepada Pemohon.
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> 14. Salinan Perintah Tahanan, pernyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan fakta yang atasnya Perintah itu diasaskan yang dirujuk adalah seperti yang dilampirkan dan ditandakan sebagai eksibit "Z-1" dalam affidavit saya ini.
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> 15. Sebelum penyerahan eksibit "Z-1" dan 3 salinan Borang I, saya telah terlebih dahulu bertanya kepada Pemohon adakah Pemohon memahami bahasa Inggeris yang saya gunakan dan Pemohon telah memaklumkan kepada saya bahawa Pemohon memahami bahasa Inggeris yang saya gunakan dan Pemohon juga fasih berbahasa Inggeris. Untuk memastikan Pemohon faham, saya telah terlebih dahulu berbual-bual dahulu dengan Pemohon di dalam bahasa Inggeris dan Pemohon mengakui memahami perbualan tersebut. Selanjutnya, saya telah berkomunikasi dengan Pemohon dalam bahasa Inggeris sepanjang masa masa penyerahan dan juga penyempurnaan eksibit "Z-1" tersebut dan juga Borang I kepada Pemohon.
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> 16. Seterusnya saya telah menerangkan dalam bahasa Inggeris kepada Pemohon berkenaan isi kandungan dokumen-dokumen eksibit "Z-1" tersebut. Kemudian, Pemohon memaklumkan kepada saya bahawa Pemohon memahami penerangan yang telah saya berikan berkaitan isi kandungan dokumen-dokumen eksibit "Z-1" tersebut.
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> 17. Setelah Pemohon mengaku memahami semua penerangan tersebut, saya telah meminta Pemohon untuk menurunkan tandatangan Pemohon di muka surat 2 Perintah Tahanan tersebut sebagai pengakuan Pemohon telah menerima dan Pemohon telah memahami isi kandungan eksibit "Z-1". Selanjutnya, Pemohon telah enggan menurunkan tandatangan Pemohon pada muka surat 2 Perintah Tahanan tersebut walaupun telah mengesahkan bahawa Pemohon memahami segala penerangan saya berikan. Saya kemudiannya telah membuat catatan "subjek enggan tandatangan" di ruangan tandatangan Pemohon di muka surat 2 Perintah Tahanan tersebut dan saya juga telah membuat cattan "Setelah dibaca perintah tahanan subjek enggan tandatangan" pada ruangan bawah di muka surat 2 dan pada muka surat 3 pada eksibit "Z-1" tersebut. Saya telah membuat catatan "Setelah dibaca pengataan fakta subjek enggan tandatangan".

[35]At the time of the service of the detention order as well as other documents such as the Form 1, no English interpreter was provided because not only did the applicant not request for one, but also that the investigating officer was satisfied prior to effecting service of the same that his conversational English could be understood by the applicant as spoken by the investigating officer.

[36]Again this is supported by the averments by the investigating officer in the same reply affidavit as follows:-

> "18. Seterusnya, saya juga telah menerangkan kepada Pemohon dalam bahasa Inggeris berkaitan hak-hak Pemohon untuk Pemohon membuat representasi di hadapan Lembaga Penasihat dan hak-hak Pemohon untuk mendapatkan khidmat peguam dan memanggil saksi-saksi Pemohon semasa persidangan representasi Pemohon di hadapan Lembaga Penasihat. Seterusnya, Pemohon mengakui memahami penerangan yang saya berikan.
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> 19. Seterusnya pada waktu yang sama, saya juga telah menyampaikan 3 salinan Borang I dengan secukupnya kepada Pemohon bagi membolehkan Pemohon terhadap Perintah Tahanan kepada Lembaga Penasihat. Selepas menyerahkan Borang I tersebut, saya telah menerangkan dalam bahasa Inggeris berkenaan isi kandungan borang I tersebut kepada pemohon dan pemohon mengakui memahami isi kandungan Borang I tersebut.
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> 20. Seterusnya, saya juga telah memberitahu dan mengingatkan dalam bahasa Inggeris sekiranya Pemohon berhasrat untuk membuat representasi, Pemohon hendaklah melengkapan borang I tersebut dan menandatangani Borang I tersebut bagi tujuan dihantar kepada Setiausaha Lembaga Penasihat. Saya telah menerangkan kepaad Pemohon bahawa tujuan representasi dijalankan adalah untuk Pemohon membuat bantahan terhadap Perintah Tahanan tersebut.
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> 21. Seterusnya, saya meminta Pemohon untuk mengisi Borang I kerana Pemohon menyatakan Pemohon bercadang untuk mengemukakan representasi terhadap Perintah Tahanan tersbut kepada Lembaga Penasihat. Pemohon telah meminta saya untuk membantu Pemohon mengisi Borang I tersebut. Seterusnya saya telah merekodkan segala butiran keterangan yang diambil daripada Pemohon untuk diisi dalam borang I tersebut dengan menggunakan pen berpandukan maklumat yang telah diberikan oleh Pemohon. Setelah selesai mengisi Borang I tersebut, saya telah membacakan semula isi kandungan Borang I tersebut kepada Pemohon dalam bahasa Inggeris dan Pemohon mengakui faham.
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> 22. Selanjutnya saya juga telah memaklumkan kepada Pemohon bahawa catatan di ruangan representasi haruslah ditulis oleh Pemohon sendiri. Saya kemudiannya telah bertanya kepada Pemohon mengenai representasi yang hendak dikemukakan kepada Lembaga Penasihat dan Pemohon telah memaklumkan bahawa Pemohon belum bersedia untuk mengisi ruangan representasi pada Borang I tersebut dan ingin berfikir terlebih dahulu. Oleh yang demikian, ruangan representasi dalam Borang I tersebut dibiarkan kosong untuk Pemohon menulis sendiri representasi Pemohon.
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> 23. Saya juga telah menasihatkan Pemohon supaya membuat pemotongan di bahagian ruangan "Saya bercadang / tidak bercadang untuk hadir di hadapan Lembaga Penasihat" dan di bahagian ruangan "Saya bercadang / tidak bercadang untuk

diwakili oleh peguam bela" dalam Borang I tersebut. Seterusnya, Pemohon telah memaklumkan bahawa Pemohon tidak ingin membuat pemotongan di kedua-dua bahagian ruangan tersebut walaupun telah mengesahkan bahawa Pemohon telah memahami segala penerangan yang telah saya berikan dalam bahasa Inggeris. Saya menegaskan bahawa Pemohon telah menerima dan memahami isi kandungan Borang I yang telah diserahkan dan diterangkan kepada Pemohon.

24. Seterusnya, saya telah meminta Pemohon menurunkan tandatangan Pemohon pada bahagian bawah di kedua-dua muka surat Borang I tersebut sebagai akuan penerimaan oleh Pemohon dan akuan Pemohon telah memahami isi kandungan Borang I tersebut. Selanjutnya, Pemohon telah enggan menurunkan tandatangan Pemohon pada ruangan "Tandatangan atau tanda yang dibuat oleh Orang Tahanan" di muka surat 1 dan muka surat 2 dalam Borang I tersebut walaupun Pemohon telah mengesahkan bahawa Pemohon telah memahami segala penerangan yang saya berikan. Selanjutnya, saya telah membuat catatan "sabjek enggan tandatangan" di ruangan "Tandatangan atau Tanda yang dibuat oleh Orang Tahanan" di muka surat 1 dan muka surat 2 dalam Borang I tersebut. Saya sesungguhnya menegaskan bahawa Pemohon telah menerima dan memahami isi kandungan Borang I yang telah saya terangkan dalam bahasa Inggeris kepada Pemohon namun Pemohon masih enggan menurunkan tandatangan Pemohon. Salinan Borang I yang saya rujuk adalah seperti yang dilampirkan dan ditandakan sebagai eksibit "Z-2" dalam Afidavit saya ini".[emphasis added]

[37]At the same time it should also be emphasised that just because an interpreter had been provided on an earlier occasion does not mean that the applicant would need the assistance of the interpreter on subsequent occasions. The key consideration is whether the applicant understands the language of communication in his interaction with the officials representing the Home Ministry, the Police and the PPA and the Advisory Board in exercising his rights as a detainee in accordance with the applicable rules and regulations.

[38]In the case of *John Lim Kouk Hua lwn Timbalan Menteri Dalam Negeri, Malaysia & Lain-lain* [2003] 3 MLJ 363 the High Court instructively held as follows:-

"Perlu saya tegaskan di sini hanya kerana khidmat jurubahasa telah diguna untuk menterjemahkan penerangan yang telah dibuat dalam Bahasa Melayu oleh seseorang kepada seorang yang lain tidak bermakna orang yang diberikan penerangan itu tidak memahami Bahasa Melayu yang telah digunakan. Oleh itu, hujah yang diutarakan oleh peguam terpelajar fakta bahawa penggunaan penterjemah sebelum daripada pemohon dibawa ke pusat tahanan menunjukkan pemohon tidak boleh memahami serta berbahasa Melayu tidak boleh diterima sebagai fakta".

[39]Again, the averments of various officials in the instant case clearly show that they were satisfied that the applicant could understand the English spoken by them in their conversation with the applicant. For instance, the inquiry officer (Fithril Hakim bin Ab Jalil) affirmed in his reply affidavit of 9 July 2018 as follows:-

"9. Dalam siasatan fizikal tersebut, Pemohon telah hadir dan Pemohon juga telah diberi peluang untuk memberikan

keterangan tanpa sebarang paksaan. Sebelum memulakan siasatan, saya telah terlebih dahulu memperkenalkan diri saya. Kemudian, saya telah berbual-bual terlebih dahulu dengan Pemohon dalam bahasa Inggeris untuk memastikan Pemohon faham atau tidak bahasa Inggeris yang saya gunakan. Pemohon memaklumkan kepada saya bahawa Pemohon faham bahasa Inggeris yang saya gunakan. Setelah saya berpuas hati pemohon memahami bahasa Inggeris, saya telah bertanya sama ada Pemohon memerlukan jurubahasa. Pemohon memberitahu kepada saya bahawa Pemohon tidak memerlukan khidmat jurubahasa memandangkan saya berkomunikasi dengan Pemohon menggunakan bahasa Inggeris. Memandangkan Pemohon bukan warganegara Malaysia dan memahami bahasa Inggeris yang saya gunakan serta boleh berkomunikasi dalam bahasa Inggeris, justeru saya telah menggunakan bahasa Inggeris sebagai bahasa perantaraan untuk saya berkomunikasi dengan Pemohon sepanjang siasatan fizikal terhadap Pemohon dijalankan". [emphasis added]

[40]Further, the Officer in Charge of the PPA (Azman bin Mohd Ali) stated this in his reply affidavit of 6 July 2018:-

"7. Memandangkan Pemohon bukan warganegara Malaysia, saya telah menggunakan bahasa Inggeris sebagai bahasa perantaraan untuk saya berkomunikasi dengan Pemohon. Seterusnya saya telah bertanya kepada Pemohon sama ada Pemohon memahami bahasa Inggeris yang saya gunakan dan Pemohon memaklumkan Pemohon faham dan fasih berbahasa Inggeris. Sepanjang perjumpaan tersebut, saya telah menggunakan bahasa Inggeris dan Pemohon mengakui memahami bahasa Inggeris yang saya gunakan dan saya juga dapat berkomunikasi dengan Pemohon dengan lancar dan tanpa sebarang masalah. Tiada keperluan untuk Pemohon dibekalkan dengan jurubahasa memandangkan saya dapat berkomunikasi dengan Pemohon dalam bahasa Inggeris dengan lancar dan tanpa sebarang masalah. Pemohon juga tiada membuat permohonan untuk dibekalkan jurubahasa setelah ditanya oleh saya sama ada Pemohon inginkan jurubahasa".[emphasis added]

[41]Similar averments in the reply affidavit dated 21 May 2018 had also been made by the officer of the PPA (Shahrill Ramdzan bin Abd Hamid) who delivered Form II issued by the Advisory Board to the applicant, in the following terms:-

"4. Pada 13.9.2017 di PPA Simpang Renggam, Johor saya telah ditugaskan untuk menyampaikan kepada Pemohon sesalinan Notis Pendengaran Representasi (selepas ini disebut sebagai "Borang II") di bawah Kaedah 5(1) Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas)(Prosedur Lembaga Penasihat) 1987 (selepas ini dirujuk sebagai "Kaedah-Kaedah tersebut") bertarikh 8.9.20178 yang saya telah terima daripada Lembaga Penasihat. Saya kemudiannya telah membaca dan menjelaskan kepada Pemohon dalam bahasa Inggeris berhubung Lembaga Penasihat yang akan bersidang pada 20.9.2017 jam 9.00 pagi di PPA Simpang Renggam, Johor bagi maksud mendengar representasi Pemohon berhubung dengan Perintah Tahanan yang telah dibuat terhadap Pemohon. Saya terlebih dahulu telah berbual-bual dengan Pemohon menggunakan bahasa Inggeris dan saya telah berpuas hati bahawa Pemohon memahami bahasa Inggeris yang saya gunakan. Saya juga telah membaca dan menjelaskan kepada Pemohon tentang hak-hak Pemohon untuk membuat representasi di hadapan Lembaga Penasihat dan saya juga telah menerangkan kepada Pemohon bahawa Pemohon boleh hadir sendiri dan Pemohon berhak diwakili peguam bela dan memanggil saksi-saksi Pemohon semasa persidangan representasi Pemohon. Sesungguhnya, saya telah menggunakan bahasa Inggeris dan Pemohon mengakui memahami segala penerangan saya.

5. Seterusnya, pada 21.92017 di PPA Simpang Renggam, Johor saya telah ditugaskan untuk menyampaikan kepada Pemohon sesalinan Borang II bertarikh 20.9.2017 yang saya telah terima daripada Lembaga Penasihat. Saya kemudiannya telah membaca dan menjelaskan kepada Pemohon dalam bahasa Inggeris berhubung Lembaga Penasihat yang akan bersidang pada 5.10.2017 jam 9.00 pagi di PPA Simpang Renggam, Johor bagi maksud mendengar representasi Pemohon berhubung dengan Perintah Tahanan yang telah dibuat terhadap Pemohon. Saya terlebih dahulu telah berbual-bual dengan Pemohon menggunakan bahasa Inggeris dan saya berpuas hati bahawa Pemohon memahami bahasa Inggeris yang saya gunakan. Saya juga telah membaca dan menjelaskan kepada Pemohon tentang hak-hak Pemohon untuk membuat representasi di hadapan Lembaga Penasihat dan telah menerangkan kepada Pemohon bahawa Pemohon boleh hadir sendiri dan Pemohon berhak diwakili peguam bela dan memanggil saksi-saksi Pemohon semasa persidangan representasi Pemohon. Sesungguhnya, saya telah menggunakan bahasa Inggeris dan Pemohon mengakui telah memahami segala penerangan saya.

6. Seterusnya, pada 8.10.2017 di PPA Simpang Renggam, Johor saya telah ditugaskan untuk menyampaikan kepada Pemohon sesalinan Borang II bertarikh 20.9.2017 yang saya telah terima daripada Lembaga Penasihat. Saya kemudiannya telah membaca dan menjelaskan kepada Pemohon dalam bahasa Inggeris berhubung Lembaga Penasihat yang akan bersidang pada 21.11.2017 jam 9.00 pagi di PPA Simpang Renggam, Johor bagi maksud mendengar representasi Pemohon berhubung dengan Perintah Tahanan yang telah dibuat terhadap Pemohon. Saya terlebih dahulu telah berbual-bual dengan Pemohon menggunakan bahasa Inggeris dan saya berpuas hati bahawa Pemohon memahami bahasa Inggeris yang saya gunakan. Saya juga telah membaca dan menjelaskan kepada Pemohon tentang hak-hak Pemohon untuk membuat representasi di hadapan Lembaga Penasihat dan telah menerangkan kepada Pemohon bahawa Pemohon boleh hadir sendiri dan Pemohon berhak diwakili peguam bela dan memanggil saksi-saksi Pemohon semasa persidangan representasi Pemohon. Sesungguhnya, saya telah menggunakan bahasa Inggeris dan Pemohon mengakui telah memahami segala penerangan saya.

7. Saya sesungguhnya menyatakan bahawa saya telah menggunakan bahasa Inggeris sepanjang proses penyerahan Borang-Borang II kepada Pemohon kerana itulah bahasa yang dipohon untuk digunakan oleh Pemohon sepanjang masa penyerahan Borang-Borang II tersebut". [emphasis added]

[42]No less importantly, the provision of an interpreter to a detainee is not a requirement of law in this context. Ensuring that the matters pertaining to detention be explained is, as stipulated under Rule 3(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedures) Rules 1987. But making available an interpreter *per se* is not.

[43]This is an important point, for the fact that providing an interpreter is not a procedural requirement means, as so clearly ruled by the Federal Court in *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* as referred to above, that there cannot be a non-compliance thereof. And thus the basis for habeas corpus on this ground cannot be sustained. At the same time the same passage from *Lee Kew Sang v. Timbalan Menteri Dalam Negeri,*

Malaysia & Ors contains a clear reminder that it is not the function of the Courts to create procedural rules and requirements.

[44]Furthermore, in my view, there is no basis to disbelieve the statement made by the investigating officer with regard to the issue of the applicant's comprehension of the former's spoken English. These are averments made in affidavits and in the course of performing an official duty in which he had no personal interest given his qualification and position.

[45]In *Su Yu Min v Ketua Polis Negeri & Ors* [2005] 3 CLJ 875 the High Court observed:-

> "This is of course denied by Deputy Superintendent of Prison Mohd. Andri bin Md. Ridzwan who says he informed the applicant the contents of Form C and E in simple Malay and the applicant acknowledged that he understood the Malay language and what he was being informed of. I do not see any reason to disbelieve Mohd. Andri. He was performing an official duty in which he had no personal interest. On the other hand, the applicant here is trying to secure his release from restricted residence and it appears that he is not averse at putting a slant on things to suit his case. I do not see why, if Mohd. Andri undertook the task of informing the applicant about the contents in Form C and E, he should want to withhold information on a part of it as alleged by the applicant. It serves no purpose for him to do so".

[46]In any event, regard may also be had to Section 114 (e) of the Evidence Act 1950 which can be invoked in favour of the averments made by these officers. It reads as follows:-

> *Court may presume existence of certain fact*
>
> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume—
>
> .....
>
> (e) that judicial and official acts have been regularly performed;....."

[47]As such, I find neither merit nor substance in this ground of challenge raised by the applicant.

Issue No 2 - Whether there was non- compliance with Rule 3(5)

[48]Reference should now be made to rule 3(5) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedures) Rules 1987 ("the Rules") in the background context of Rule 3 which reads as follows:-

> **3. Procedure for making representations**
>
> (1) When any person is served with a detention order, the police officer serving the detention order shall at the same time-
>
> (a) inform that person of his right to make representations against the detention, order; and
>
> (b) provide him with three copies of Form I prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.
>
> (2) A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I duly signed by him to the Secretary through the Officer in Charge of the Police District where the detention order was served or the Officer in Charge of the place of detention.
>
> (3) When a detained person is brought to a place of detention, the Officer in Charge shall as soon as practicable remind the person of his right to make representations.
>
> (4) The Officer in Charge of the Police District where the detention order was served or the Officer in Charge, as the case may be, who receives any written representation in Form I shall forthwith forward such representation to the Secretary.
>
> (5) Where a detained person refuses to accept service of any document to be served on him under the Act or these rules, the Officer in Charge of the Police District where the detention order is served shall forthwith inform the Secretary of such refusal and it shall be presumed that the detained person is not making any representation against his order of detention.
>
> (6) A detained person who refuses to accept service of any document at the time when he was served with the detention order may request the Officer in Charge to serve Form I on him, and the Officer in Charge shall on such request being made, serve three copies of Form I on the detained person and inform the Secretary of such service. [emphasis added]

[49]The complaint of the applicant is simply this. The applicant had refused to sign the acknowledgment of the service of the detention order and the Form 1, as effected by the investigating officer. This is undisputed, as supported by averments made by both the applicant and the investigating officer in their respective affidavits, as reproduced earlier.

[50]Given the refusal of the applicant to sign the detention order, the investigating officer wrote *"sabjek enggan tandatangan"* at the space meant for the signature of the detainee at page 2 of

the detention order. At page 3, the investigating officer also noted *"Setelah dibaca pengataan fakta saspek enggan tandatangan".* The words *"sabjek enggan tandatangan"* were also written by the investigating officer on Form 1.

[51]The applicant therefore submitted that pursuant to Rule 3(5), in view of the refusal to sign the relevant documents, The OIC of the PPA should have forthwith notified the refusal to the Secretary of the Advisory Board. As no evidence has been shown that such notification was ever made, this constitutes non-compliance with the procedural requirement that renders the detention defective.

[52]The applicant submitted on the Federal Court decision of *S.K Tangakaliswaran v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 where Gopal Sri Ram FCJ reaffirmed that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority.

[53]Thus it was held that in a situation where averments from the authorities were conflicting:-

> "[6] …….. It is for the respondents to prove that the constitutional and statutory safeguards embodied in art. 151 and s. 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute. When considering whether a restraint upon liberty is in accordance with law it is to the evidence furnished by the detaining authority that a court must turn in the usual way. And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection. One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See, *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18. Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn. I must therefore respectfully reject the invitation of learned senior federal counsel to accept the secretary's evidence and reject that of the minister as inaccurate. Both affidavits were filed on behalf of the detaining authority and it is not, generally speaking, in accordance with the principles governing the evaluation of affidavit evidence that one deponent's version of the facts should be preferred to another when both are giving evidence for the same side.
>
> [7] Applying the principles I have referred to earlier in this judgment, it is my considered view that the respondents have failed to show that the recommendations of the Advisory Board were made to His Majesty within the three months

prescribed by art. 151 and s. 6(1). In these circumstances *habeas corpus* should have been issued by the High Court. Although the learned judicial commissioner in his judgment considered the points raised by the appellant he unfortunately overlooked this aspect of the case and as such his judgment is flawed and cannot stand".

[54]In that case, concerning a detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') the issue was whether the Appeals Board had submitted a recommendation to the Yang di-Pertuan Agong within the prescribed three months' time frame as required by Article 151(1)(b) of the Federal Constitution read with s. 6(1) of the Ordinance. The appellant was detained on 17 November 2008 pursuant to s. 4(1) of the Ordinance. The Home Ministry averred that the recommendation had not been made but the Appeals Board stated to the contrary.

[55]But the said discrepancy had not been anywhere explained. Given the conflicting version presented by the detaining authorities, the version more favourable to the applicant should prevail. Hence the refusal of the High Court to grant a writ of habeas corpus was reversed by the Federal Court.

[56]In the instant case before me however, there is no issue of conflict. At least not in the nature found in *S.K Tangakaliswaran* which discrepancy was whether or not the recommendation was actually sent.

[57]In the instant case before me, the point was the applicant did not sign on the relevant documents being the detention order and the Form 1. I think it is not in dispute that the respondents could not show that notification had been made to the Advisory Board under Rule 3(5). It was for the respondent to show compliance and they were not able to do so. That much is clear.

[58]But that alone does not mean that the non-compliance, if indeed it was one, would render the detention defective.
Was it refusal to accept service?

[59]First, Rule 3(5) refers to the need to inform the Advisory Board if the detainee refuses to accept service. It does not say notification is necessary if the detainee refuses to sign the

document. It is a given that putting one's signature on a document would strongly signify acceptance of the document but the absence of one's signature does not necessarily mean service of document had not been effected.

[60]Otherwise no legal process could ever be pursued if the person to be served with the legal papers can conveniently refuse to sign, despite the documents being not only delivered but actually even received by him, like what transpired in the instant case.

[61]In this case the applicant merely refused to sign on the documents. He cannot be heard to say and neither is he clearly saying that the documents were not validly given or served on him. On the basis of the reply affidavits of the representatives of the respondents as stated earlier, the applicant had viewed the documents, and even had custody of the documents when service was effected by the investigating officer. In this sense the decision by the applicant not to sign cannot be equated with his refusal to accept service. Thus, there is no infringement of Rule 3(5) at all.

Presumption under Rule 3(5) rebutted

[62]Secondly, Rule 3(5) requires notification be made to the Advisory Board in cases of refusal to accept service and that in such a situation there arises a presumption that the applicant did not wish to make a representation against the detention order.

[63]The focus of Rule 3 is to ensure that the interests of a detainee are properly safeguarded vis-à-vis the right to make a representation on his detention to the Advisory Board. That responsibility is imposed on the PPA who has the custody and supervision powers over the detainee like the applicant herein. The OIC of the PPA is duty bound to forward the copies of Form 1 to the Secretary of the Advisory Board forthwith upon receipt of the same by the OIC. The focus in this context is to ensure that a detainee has the right to make representation.

[64]It is also of relevance to mention the provisions on representations against detention orders which are contained in the Act itself. Section 9 reads as follows:-

9. Representations against detention order

(1) A copy of every order made by the Minister under subsection 6(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations to an Advisory Board.

(2) For the purpose of enabling a person to make representations under subsection (1) he shall, at the time of the service on him of the order-

(a) be informed of his right to make representations to an Advisory Board under subsection (1); and

(b) be furnished by the Minister with a statement in writing-

(i) of the grounds on which the order is made;

(ii) of the allegations of fact on which the order is based; and

(iii) of such other particulars, if any, he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board.

(3) The Yang di-Pertuan Agong may make rules as to the manner in which representations may be made and for regulating the procedure of the Advisory Board.

[65]It will be readily appreciated from the provisions of Section 9 on the right of representation that the crux concerns the existence of such a right be properly informed to the detainee and the matters that ought to be done to assist him vis-à-vis the documentation required to make a representation to the Advisory Board.

[66]In the instant case, as can be readily seen from the averments of the investigating officer as stated earlier, the applicant did wish to make a representation and the investigating officer did assist the applicant in filling up the pertinent Form 1 although the applicant maintained his refusal not to sign on any documents. There were plainly no departures on the part of the respondents from the requirements of Section 9 of the Act.

[67]And the equally crucial fact is that the request for a hearing of the representation by the applicant against his detention order was acceded to by the Advisory Board even though he did not sign off on the requisite Form 1. A hearing was conducted by the Advisory Board. There were even two postponements at the behest of the applicant, before the hearing was actually conducted on 21 November 2017.

[68]As such, even if there were a non-compliance with the notification requirement (which I disagree there is one) there is no true breach of Rule 3(5) because the presumption of the

applicant not intending to make a representation to the Advisory Board was on affidavit evidence so clearly and overwhelmingly rebutted.
In any event, a directory, not mandatory requirement

[69]Thirdly, even if one were still to argue that there was a breach of Rule 3(5) (which I again disagree), this would at its highest be a breach merely of a directory but not a mandatory requirement.

[70]This in my view is especially manifest given that the presence of a provision on the presumption in Rule 3(5), and also given the fact that the objective of Rule 3 is to afford the right of the detainee to make representation against the detention order, which was so plainly not in any way denied in the instant case.

[71]Thus in the case of *Muhamad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia& Ors* [2006] 4 CLJ 687 the Federal Court explained the distinction between the two in unmistakable terms as follows:-

> "[8] It follows that if a detention is procured by steps which are not regular the court is empowered to set aside the detention order. It means that every step which is necessary for the making of a detention order is subject to review by the court. The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199;; [1991] 3 CLJ (Rep) 649; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ 1037;; [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the court to intervene is limited to only matters of compliance with procedural requirements by s. 11C(1) of the Act which reads as follows:
>
> > There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary

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

[72]As such, even if there was a breach, it could only have been a breach of a directory requirement as by no stretch of the imagination can it contended that the applicant was in any discernible fashion prejudiced by any purported non-compliance in light of the subsequent fact that a hearing was convened to hear his represenbtation against the detention order. There was certainly more than substantial adherence to Rule 3 of the Rules and the underlying Section 9 of the Act.

[73]It is worthy of emphasis lest it be forgotten that the very purpose of Form 1 is to document a detainee's request for a representation hearing before the Advisory Board. In this instant case, the hearing did take place which, at the risk of stating the obvious, could only have occurred if the applicant had indeed made the representation.

[74]Accordingly, in my view, the absence of a notification on non-service to the Advisory Board is clearly less than material. The whole rationale for Form 1 - which is to afford a detained with a hearing - had been attained.

Reliance on Case law misconceived

[75]Neither can the applicant rely on the decision of the High Court in *Mohd Roslan bin Muhammad v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2016] 11 MLJ 751 to support its stance.

[76]There, a similar issue of compliance with Rule 3(5) had also been examined, where it was held that failure to show that the notification was made to the Advisory Board given the allegation of non-service was a non-compliance that rendered the detention order defective and justified the grant of the writ of habeas corpus.

[77]However, the counsel for the applicant later agreed that that case had been reversed by the Federal Court on appeal. Although it was said by the counsel that the setting aside was made on other grounds, no written confirmation could be furnished by either the counsel or the SFC on the reasons for the Federal Court allowing the appeal. The fact therefore remains that *Mohd Roslan bin Muhammad v Timbalan Menteri Dalam Negeri, Malaysia & Ors* has been reversed.

[78]In the case of *Pavithiran Nallasivam lwn. Pengerusi Lembaga Pencegahan Jenayah Malaysia & Yang Lain* [2017] 1 LNS 1571, the High Court mentioned thus:-

> "Pemohon tidak memfailkan afidavit balasan untuk menyangkal pengataan Inspektor Polis Manonmany dalam afidavit jawapannya. Peguam Persekutuan juga berhujah tiada langsung kelewatan dalam menyerahkan dapatan inkuiri kepada pemohon. Kes *Narayanan Murukaiya v. Menteri Dalam Negeri, Malaysia & Yang Lain (supra)* yang dirujuk oleh peguam pemohon fakta adalah berbeza, terdapat kelewatan dan kes *Mohd Roslan Muhammad v. Timbalan Menteri Dalam Negeri, Malaysia & Ors (supra)* yang juga dirujuk oleh peguam pemohon telah pun diketepikan oleh Mahkamah Persekutuan. Dakwaan peguam pemohon bahawa dapatan inkuiri tidak diserahkan dan hanya ditunjukkan kepada pemohon adalah tidak berasas sama sekali dan wajar ditolak oleh mahkamah. Isu ini juga tidak pernah diplidkan oleh pemohon dalam afidavitnya". [emphasis added]

[79]As such, the contention of the applicant on the purported breach of Rule 3(5) cannot be sustained and must be rejected.

Conclusion

[80]In view of the foregoing reasons, it is my judgment that the detention order issued under Section 6(1) of the Act is regular and valid. Accordingly, the application for a writ of habeas corpus is hereby dismissed.

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