Mohd Roslan bin Muhammad v Timbalan Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (MELAKA) — CRIMINAL APPLICATION NO 44HBC-02-03/2016
MOHD FIRUZ JC
14 JUNE 2016

Criminal Procedure — Habeas Corpus — Application for — Service of detention order — Allegation by detainee that there was no proper service — Whether procedural requirements under relevant laws complied with — Whether mandatory — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6, 9(1) & (2) — Dangerous Drugs Act (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 rr 3 & 4

The applicant was detained under a detention order dated by the Minister responsible for internal security ('the Minister') pursuant to s 6 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). In this application, the detainee sought for an order of habeas corpus on the grounds that there was no proper service of the detention order by the police on the detainee himself; and there were certain procedural requirements of the Act breached by the respondent(s), namely, s 9(1) and (2) of the Act and rr 3 and 4 of the Dangerous Drugs Act (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules'). It was further submitted that the provisions were mandatory procedures which have to be adhered to strictly. The detainee also objected to the late filing of three affidavits in reply filed by the respondents as they deprived the detainee the right of replying. The main issues that arose for the court's determination were whether the late filing of the three affidavits deprived the detainee's right to reply and whether there was proper service of the detention order on the detainee:

Held, allowing the application:

(1) The court ruled against the use of the three affidavits as there was no application made by the respondents to file the affidavits concerned out of time nor an application for an enlargement of time to file the impugned affidavits; the affidavits were of no help for purposes of the application before the court; the statement made was prejudicial in nature. The detainee should have the right to reply to such allegation. Due to the directions given by the deputy registrar that all affidavits be exhausted by 27 May 2016, the detainee was indeed deprived of the right to reply (see para 12).

(2) Section 9(1) of the Act states that a copy of the detention order made by

the Minister shall be served on the person to whom it relates. The word 'shall' as used in the provision bears the meaning that the service of the order is mandatory. Furthermore, r 3(1), (1)(a) and (1)(b) of the Rules shows that, the detention order was not the only document that must be served on the detainee. Form 1 for the purposes of making his representations against the detention order must also be served on the detainee. Like the word 'shall' used in s 9 (1) of the Act, the word 'shall' in r 3(1) carries the meaning that the procedure is mandatory (see paras 16 & 34).

(3) The detainee chose not to sign the order. Ordinarily, a person who alleges a fact, bears the burden of proving it, as provided by s 101 of the Evidence Act 1950. However, in habeas corpus application, the situation differs. The detainee bears no such burden of proving that the detaining authority did not comply with the procedures. Although it was not disputed by the detainee that he was given the right to make representations before the advisory board, such non-compliance with procedure prescribed by law, could not be taken lightly on the guise that it did not prejudice the detainee's rights in view of the fact that he was accorded the right to be heard (see paras 18, 26 & 42).

(4) The failure to comply with such procedural requirement which time and time again has been held by the highest court in this country, vitiated the detention order issued. The court issued the writ of habeas corpus and ordered the release of the detainee (see paras 43 & 45).

[Bahasa Malaysia summary

Pemohon telah ditahan di bawah perintah tahanan bertarikh oleh Menteri yang bertanggungjawab untuk keselamatan dalam negeri ('Menteri') menurut s 6 Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta'). Dalam permohonan ini, tahanan menuntut untuk perintah habeas corpus atas alasan bahawa tiada penyerahan wajar perintah tahanan oleh polis kepada tahanan itu sendiri; dan terdapat keperluan prosedur tertentu Akta yang dilanggar oleh responden, iaitu, s 9 (1) dan (2) Akta dan kk 3 dan 4 Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) Peraturan-Peraturan 1987 ('Peraturan'). Dihujahkan bahawa peruntukan tersebut merupakan prosedur wajib yang perlu dipatuhi sepenuhnya. Tahanan tersebut turut membantah pemfailan lewat ketiga-tiga afidavit balasan yang difailkan oleh responden-responden kerana mereka melucutkan hak menjawab tahanan. Isu-isu utama yang timbul untuk penentuan mahkamah adalah sama ada pemfailan lewat ketiga-tiga afidavit melucutkan hak tahanan untuk menjawab dan sama ada terdapat penyerahan wajar perintah tahanan terhadap tahanan:

Diputuskan, membenarkan permohonan:

A (1) Mahkamah memutuskan menentang penggunaan ketiga-tiga afidavit kerana tiada permohonan yang dibuat oleh responden-responden untuk memfailkan afidavit berkenaan di luar masa begitu juga dengan satu permohonan untuk memanjangkan masa untuk memfailkan afidavit yang dipersoalkan; afidavit-afidavit tersebut adalah tidak berguna untuk B tujuan permohonan di hadapan mahkamah; penyataan yang dibuat bersifat prejudis. Tahanan sepatutnya mempunyai hak untuk menjawab dakwaan tersebut. Disebabkan arahan yang diberikan oleh timbalan pendaftar bahawa semua afidavit harus didengar pada 27 Mei 2016, tahanan sememangnya dinafikan hak untuk membalas (lihat perenggan C 12).

(2) Seksyen 9 (1) Akta tersebut menyatakan bahawa satu salinan perintah tahanan yang dibuat oleh Menteri hendaklah diserahkan kepada orang yang berkenaan dengan perintah tersebut. Perkataan 'hendaklah' seperti D yang digunakan dalam peruntukan membawa maksud bahawa penyerahan perintah tersebut adalah wajib. Tambahan pula, peraturan 3(1), (1)(a) dan (1)(b) Peraturan menunjukkan bahawa, perintah tahanan bukanlah satu-satunya dokumen yang perlu diserahkan kepada tahanan. Borang 1 untuk tujuan membuat representasinya terhadap E perintah tahanan juga perlu diserahkan kepada tahanan. Seperti perkataan 'hendaklah' yang digunakan dalam s 9 (1) Akta, perkataan 'hendaklah' dalam k 3(1) membawa maksud bahawa prosedur tersebut adalah wajib (lihat perenggan 16 & 34).

F (3) Tahanan memilih untuk tidak menandatangani perintah tersebut. Kebiasaannya, seseorang yang mendakwa sesuatu fakta, menanggung beban membuktikannya, sebagaimana yang diperuntukkan oleh s 101 Akta Keterangan 1950. Walau bagaimanapun, dalam permohonan habeas korpus, keadaan adalah berbeza. Tahanan tidak mempunyai G apa-apa beban membuktikan bahawa pihak yang menahan tidak mematuhi prosedur-prosedur. Walaupun tidak dipertikaikan oleh tahanan bahawa dia diberi hak untuk membuat representasi di hadapan lembaga penasihat, ketidakpatuhan dengan prosedur yang ditetapkan oleh undang-undang tersebut tidak boleh dipandang ringan atas samaran H bahawa ketidakpatuhan tersebut tidak memprejudiskan hak-hak tahanan bersandarkan fakta bahawa dia diberi hak untuk didengar (lihat perenggan 18, 26 & 42).

(4) Kegagalan untuk mematuhi keperluan prosedur tersebut yang mana dari I masa ke masa ditegakkan oleh mahkamah tertinggi di negara ini, melemahkan perintah tahanan yang dikeluarkan. Mahkamah mengeluarkan writ habeas corpus dan memerintahkan pembebasan tahanan (lihat perenggan 43 & 45).]

Notes

For cases on application for, see 5(2) *Mallal's Digest* (5th Ed,2015) paras 2457–2463.

Cases referred to

Datuk James Wong Kim Min Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min, Re [1976] 2 MLJ 245, FC (refd)

Lew Kee Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 2 MLJ 631; [2005] 3 CLJ 914, HC (refd)

Mohinuddin @ Moin Master v District Magistrate, Beed & Ors 1987 AIR 1977, SC (refd)

Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403; [2006] 4 CLJ 687, FC (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 6, 9, 9(1), (2)

Dangerous Drugs Act (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 rr 3, 3(1), (1)(b), (1)(a), (5), 4, Form 1

Evidence Act 1950 ss 73, 101, 114(g)

Federal Constitution art 5

Ahmad Zaidi Zainal (Ahmad Zaidi & Partners); (Luqman bin Mazlan with him) (Shamsuddin & Co) for the applicant.

Tarmizi bin Ahmad (Siti Shafinaz bt Salleh with him) (Federal Counsel, Ministry of Home Affairs) for the respondents.

Mohd Firuz JC:

[1] The applicant was detained under a detention order dated 5 October 2016 by the Minister responsible for internal security ('the Minister') pursuant to the provisions of s 6 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act').

[2] In the application before me, the detainee is seeking for an order of habeas corpus on the grounds that certain mandatory procedural requirements of the Act had been breached by the respondent/s.

BRIEF FACTS

[3] The detainee was arrested on 12 August 2012 at his work place in Petaling Jaya, Selangor. Thereafter, he was detained for a period of 60 days under s 3(1) of the Act. On 5 October 2012, a detention order dated on the same day was issued by the Deputy Minister of Internal Security under the Act. He was then taken to Pusat Pemulihan Akhlak Machang, Kelantan.

THE DETAINEE'S CASE

[4] It is the detainee's contention that:

(a) there was no proper service of the detention order by the police on the detainee himself; and

(b) he was not allowed to read, keep or peruse the detention order, the statement of facts against him and Form 1 (representation); the effect of which he did not have the opportunity to understand the reasons as to why the detention order was issued against him.

[5] The detainee's counsel submitted that the above breaches tantamount to non-compliance with ss 9(1) and 9(2) of the Act as well as rr 3 and 4 of the Dangerous Drugs Act (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules').

[6] Section 9 of the Act provides as follows:

(1) a copy of every order made by the Minister under subsection (1) of section 6 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 a representation to an Advisory Board.

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

(a) be informed of his rights 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 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.

[7] In addition to the above, there is also non-compliance with rr 3 and 4 of the Rules.

[8] It was further submitted on behalf of the detainee that the above provisions are mandatory procedures which have to be adhered to strictly. They are not directory in nature and hence, no discretion is allowed.

[9] The detainee's counsel also objected to the late filing of three affidavits in reply filed by the respondents on 31 May 2016 namely the affidavits of Rosdi bin Ahmad, Murali a/l Arumugam (both affirmed on 27 May 2016) and Mastura bt Abu Bakar affirmed on 30 May 2016. Based on the directive given by the deputy registrar the last date given for parties to exhaust the affidavits was on 27 May 2016 (in view of the hearing scheduled on 3 June 2016). Prior to this directive, the respondents had in fact been given numerous dates to file in their affidavits in reply (6, 12 and 20 May 2016). It was submitted that the late filing of the three affidavits had deprived the detainee the right of replying thereto.

THE RESPONDENT'S CASE

[10] Simply put, the respondents denied the detainee's allegations that the procedures applicable towards the detainee's detention has not been complied with.

[11] The federal counsel appearing for the respondents also urged this court to allow the said affidavits referred at para 9 above, to be used citing cases in which the Federal Court had allowed so.

DECISION ON OBJECTION ON THE USE OF THE THREE AFFIDAVITS FILED ON 31 MAY 2016

[12] Having read the contents of the affidavits concerned, I ruled against the use of the three affidavits for the following reasons:

(a) there was no application made by the respondents to file the affidavits concerned out of time nor an application for an enlargement of time to file the impugned affidavits;

(b) in view of the specific allegations with reference to the procedure which has not been complied with, I find that the affidavits are of no help for purposes of the application before me;

(c) with reference specifically to the affidavit of Rosdi bin Ahmad, which alleges that the applicant's (detainees) averments that the column on the right to make representations was written by someone else is not true and had bad intentions (see para 12 of encl 11), I find that the statement is prejudicial in nature. The detainee should have the right to reply to such allegation. Due to the directions given by the deputy registrar that

all affidavits be exhausted by 27 May 2016, the detainee was indeed deprived of the right to reply thereto. Furthermore, to my mind, the issue of whether the statements as contained in Form 1 of the Rules is a question of fact that the judge hearing the application has to decide based on the document itself, an issue that I will discuss in the later part of my decision.

THE LAW REGULATING AN APPLICATION FOR A HABEAS CORPUS ORDER

[13] Article 5 of the Federal Constitution states as follows:

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

[14] It is trite law that in dealing with a habeas corpus application of this nature, '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. 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 the courts should consider whether on the facts, there has been non compliance', see *Lew Kee Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914.

[15] In *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687, the Federal Court ruled that the court is empowered to set aside a detention order which are procured by steps which are not regular.

ISSUES RAISED BY THE DETAINEE/APPLICANT

Whether there was proper service of the detention order on the detainee

[16] As stated in para 6 above, s 9(1) of the Act states that a copy of the detention order made by the Minister *shall* be served on the person to whom it relates. The word 'shall' as used in the provision bears the meaning that the service of the order is mandatory.

[17] The detainee herein alleged that the detention order against him was not properly served as it was taken back by the officer concerned, Insp Fairuz Azma bin Fauzi. This fact is not disputed by Insp Fairuz in his affidavit (encl 6) save for the fact that according to him, the order was taken back for purposes of safe keeping and that the same was given to the detainee when the detainee arrived at the Pusat Pemulihan Akhlak Machang, Kelantan.

[18] Inspector Fairuz in para 8 of encl 6 said that he had informed the detainee that the detainee can choose not to sign the order if he did not understand its contents. Thereafter, the detainee refused to affix his signature on p 2 of the order. Inspector Fairuz then made the following note on the second page of the order (see exh 'FA2'):

> SUBJEK ENGGAN MENURUNKAN TANDA TANGAN SETELAH PERINTAH TAHANAN DIBACAKAN DISAKSIKAN OLEH SM 12108 ZAKI BIN MAMAT.

[19] The note above by Insp Fairuz carries the meaning that the detainee refused to acknowledge service of the order. The need to do so is in line with r 3 (as produced in para 7 above) which makes it mandatory for the police officer serving the detention order to obtain an acknowledgement of the receipt thereof.

Whether the detainee was given opportunity to state his objections or representation via Form 1

[20] At para 23 of his affidavit, the detainee avers that Form 1 (of the Rules) was not served on him and not explained in detail. The form was also filled in by someone else without his consent.

[21] It was the detainee's counsel's submission that given the fact that Form 1 was given to the detainee on 6 October 2015 in Machap and the fact that the same Form 1 reached the advisory board on the next day, 7 October 2015, it is evident that the detainee was not given the adequate opportunity to make his objections or representation via the very same Form 1.

[22] In response to the detainee's averments on this issue, Insp Fairuz at paras 9–14 of Insp Fairuz's affidavit, averred as follows:

> 9. Seterusnya, pada waktu yang sama, saya juga telah menyampaikan 3 salinan Borang 1 dengan secukupnya kepada Pemohon bagi membolehkan Pemohon mengemukakan representasi terhadap Perintah Tahanan kepada Lembaga Penasihat. Selepas menyerahkan Borang 1 tersebut, saya telah menerangkan dalam Bahasa Malaysia berkenaan isi kandungan Borang 1 tersebut. Pemohon memaklumkan kepada saya bahawa Pemohon mengakui memahami isi kandungan Borang 1 tersebut.

A 10. Seterusnya, saya juga telah menerangkan dalam Bahasa Malaysia berkaitan hak-hak Pemohon untuk membuat representasi di hadapan Lembaga Penasihat dan hak-hak Pemohon untuk mendapatkan khidmat peguam. Seterusnya Pemohon telah memaklumkan kepada saya bahawa Pemohon mengakui memahami penerangan yang saya berikan.

B 11. Seterusnya saya juga telah memberitahu dan mengingatkan dalam Bahasa Malaysia sekiranya Pemohon berhasrat untuk membuat representasi, maka Pemohon hendaklah melengkapkan Borang 1 tersebut dan menandatanganinya bagi tujuan dihantar kepada Setiausaha Lembaga Penasihat.

C 12. Saya juga telah menerangkan kepada Pemohon bahawa tujuan representasi dijalankan adalah untuk membuat bantahan terhadap Perintah Tahanan tersebut. Seterusnya, saya meminta Pemohon untuk mengisi Borang 1 tersebut berserta dengan representasi Pemohon di ruangan representasi. Pemohon telah mengisi Borang 1 tersebut dengan menggunakan pen kecuali ruangan representasi. Pemohon kemudiannya memaklumkan bahawa beliau belum bersedia untuk D mengisi ruangan representasi pada Borang 1 tersebut kerana ingin befikir terlebih dahulu. Pemohon juga telah membuat pemotongan kepada bahagian bercadang/tidak bercadang untuk diwakili peguambela pada Borang 1 tersebut. Saya sesungguhnya menegaskan bahawa Pemohon telah menerima dan faham isi kandung Borang 1 yang telah diterangkan kepadanya pada 05-10-2015.

E 13. Seterusnya, saya meminta Pemohon menurunkan tandatangan pada muka surat pertama *Borang 1* dan muka surat dua *Borang 1* tersebut sebagai akuan penerimaan dan akuan memahami isi kandung *Borang 1* tersebut. Saya juga telah memberitahu Pemohon bahawa beliau boleh untuk tidak menandatangani Borang 1 tersebut sekiranya beliau tidak memahami isi kandungan dokumen berkenaan. Kemudian, F Pemohon telah menurunkan tandatangannya pada muka surat pertama dan muka surat dua *Borang 1* tersebut seperti yang diminta dengan rela hati.

14. Selanjutnya, setelah saya selesai menerangkan isi kandungan Perintah Tahanan, pernyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan fakta yang atasnya Perintah itu diasaskan serta Borang 1 kepada Pemohon, saya G kemudiannya telah mengambil kembali Perintah Tahanan, pernyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan fakta yang atasnya Perintah itu diasaskan serta 3 salinan Borang 1 yang telah diserahkan kepada Pemohon untuk disimpan dalam simpanan sementara pihak polis. Selanjutnya, sebelum Pemohon dibawa dan dihantar ke Pusat Pemulihan Akhlak Machang, H Kelantan (selepas ini disebut sebagai 'PPA Machang, Kelantan'), saya telah menyerahkan kembali Perintah Tahanan, pernyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan fakta yang atasnya Perintah itu diasaskan serta 3 salinan Borang 1 tersebut kepada Pemohon.

I **[23]** In other words, it was the respondent's version that the detainee's averments on this issue is not true and that all proper procedures have been complied with.

THE COURT'S ANALYSIS ON ISSUE A

[24] Both s 9(1) of the Act and r 3(1) of the rules makes it mandatory for the detention order to be served against the detainee. The question is: was the detention order served or not?

[25] The detainee says that he wasn't served properly, whereas the serving officer (Insp Fairuz), said that the detainee refused to accept service of the order. This was supported by the note at p 2 of the Order.

[26] Ordinarily, a person who alleges a fact, bears the burden of proving it (see s 101 of the Evidence Act 1950). However, in habeas corpus application, the situation differs. The detainee bears no such burden of proving that the detaining authority did not comply with the procedures. This principle was reiterated by the Federal Court in the case of the *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705 wherein reference was made to the case of *Mohinuddin @ Moin Master v District Magistrate, Beed & Ors* 1987 AIR 1977 with approval:

> It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the court that the detention is not illegal or wrongful and that the petitioner is not entitled to relief claimed for ...

[27] The question before me then is: was the detention order served on the detainee and/or was it the detainee who refused to accept service?

[28] I need only to refer to r 3(5) of the Rules provides as follows:

> *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. (Emphasis added.)

[29] Based on para 4 of Insp Fairuz's affidavit, the order was served on the detainee on 5 October 2015 at 6pm at Lokap Berpusat, Indera Mahkota, Kuantan Pahang.

[30] Here, Insp Fairuz avers that the detainee refused to accept service of the detention order. Yet, there is no evidence produced by the respondents to show that the provisions of r 3(5) as produced in para 25 above has been complied with. This leads to the inference that the secretary of the advisory board was not informed of the detainee's refusal to accept service of the order. To my mind, the use of the word 'shall' in r 3(5) makes the compliance of its provisions mandatory.

[31] In addition thereto, whilst Insp Fairuz's did via exh 'FA1' aver that the detainee had refused to accept service of the detention order, resulting in him making the following note on the second page of the order:

> SUBJEK ENGGAN MENURUNKAN TANDA TANGAN SETELAH PERINTAH TAHANAN DIBACAKAN DISAKSIKAN OLEH SM 12108 ZAKI BIN MAMAT.

The notation was not countersigned by SM Zaki bin Mamat nor was the affidavit of SM Zaki bin Mamat adduced as evidence in court.

[32] I am mindful that the failure to adduce the affidavit of SM Zaki bin Mamat as part of the respondent's evidence, may attract the presumption of adverse inference under s 114(g) of the Evidence Act 1950 ('the EA'). However, in view of the non-compliance with r 3(5) which is a mandatory requirement, I am of the view that the first issue has been sufficiently dealt with.

THE COURT'S ANALYSIS ON ISSUE B

[33] Rule 3 of the Rules provides as follows:

> 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 the person of his right to make representations against the detention order; and
>
> (b) provide him with three copies of Form 1 prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.
>
> Rule 4 Form of representations
>
> (1) Any representations against a detention order may be made in writing.
>
> (2) The grounds for objections to the detention order or the reasons why the detention order should cease shall be given in Form 1 and where the form is not sufficient to contain the grounds and the reasons they may be written on a separate piece of paper to be attached to the annexure to Form 1.

[34] My reading of r 3(1), (1)(a) and (1)(b) of the Rules above shows that, the detention order is not the only document that must be served on the detainee. Form 1 for the purposes of making his representations against the detention order must also be served on the detainee. Like the word 'shall' used in s 9(1) of the Act, the word 'shall' in r 3(1) carries the meaning that the procedure is mandatory.

[35] The detainee alleges that he did not fill in Form 1. Somebody else did it. Insp Fairuz says it was the detainee who did it (see para 21 above). This was echoed by the affidavit of Rosdi bin Ahmad which I rejected due to late filing. Nonetheless, even if I were to consider and allow Rosdi's affidavit, it wouldn't have shed any light on this issue.

[36] What this means is that, the detainee is alleging that the hand writing in Form 1 is not his. The respondent disagrees.

[37] Section 73 of the EA does provide a method of determining this issue. Section 73 of the EA provides as follows:

> Comparison of signature, writing or seal with others admitted or proved
>
> (1) *In order to ascertain whether a signature*, writing or seal *is that of the person by whom it purports to have been written* or made, *any signature*, writing or seal *admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared* by a witness or *by the court with the one which is to be proved*, although that signature, writing or seal *has not been produced or proved for any other purpose*. (Emphasis added.)
>
> (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any other words or figures alleged to have been written by that person.
>
> (3) This section applies also, with any necessary modifications, to finger impressions.

[38] Under the above provision, the court may form its opinion on handwriting based on a comparison made by a witness or by itself. In *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19, the Federal Court gave effect to the provisions of s 73 of the EA and held that a judge can make comparison of any signature or writing.

[39] In so far as the signatures before this court are concerned, there are two documents in exh 'FA2'. One is the p 1 of Form 1. The other is p 2 of Form 1 which states that the contents of the form was read and translated by Insp Fairuz to the detainee. Both pages had the purported signature of the detainee.

[40] Having looked at both the signatures available on both documents, both look different to a certain extent. That being the case, I proceeded to look at the detainee's signature as affixed in the affidavit in support of this application before me (encl 2). The signature of the detainee can be found on the page containing the jurat to his affidavit. Have perused all the three

signatures, it is clear that the signature in encl 2 differs tremendously from that in exh 'FA2'. That being the case, I can safely conclude that the signatures in exh 'FA2' is not that of the detainee.

[41] As the signatures in exh 'FA2', is not that of the detainee, I am doubtful if the requisite Form 1 was indeed served on the detainee as alleged by the respondents.

CONCLUSION

[42] Although it was not disputed by the detainee that he was given the right to make representations before the advisory board, such non-compliance with procedure prescribed by law, cannot be taken lightly on the guise that it does not prejudice the detainee's rights in view of the fact that he was accorded the right to be heard.

[43] I hold the view that the failure to comply with such procedural requirement which time and time again has been held by the highest court in this country, vitiates the detention order issued.

[44] As stated by Lee Hun Hoe CJ (Borneo) (as he then was) in *Re Datuk James Wong Kim Min Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising the detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty, see *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.

[45] Writ of habeas corpus issued. The detainee is to be released forthwith.

Application allowed.

Reported by Afiq Mohamad