PRESS SUMMARY

DATUK SERI ANWAR IBRAHIM v GOVERNMENT OF MALAYSIA & 1 LG

(Civil Appeal No: 06(RS)-1-03/2019(W)

Introduction

1. This is a special case referred to the Federal Court from the High Court pursuant to section 84 of the Courts of Judicature Act ("CJA").

2. The parties will be referred to as they were in the High Court. The Plaintiff filed an Originating Summons in the High Court seeking the following relief:

   (i) A declaration that section 12 of the Constitution (Amendment) Act 1983, section 2 of the Constitution (Amendment) Act 1984, and section 8 of the Constitution (Amendment) Act 1994 ("Amending Provisions") are unconstitutional, null and void, and of no effect;

   (ii) A consequential declaration that Articles 66(4) and (4A) of the Federal Constitution ("FC") are unconstitutional;

   (iii) A declaration that the National Security Council Act 2016 ("NSCA") is unconstitutional; and

   (iv) An injunction to restrain the National Security Council from taking any steps or acting on the NSCA.

3. In the course of proceedings, the parties agreed for constitutional questions to be referred to the Federal Court for determination under section 84 of the CJA. On 14.3.2019, the learned High Court judge referred the following two constitutional questions to this Court by way of a special case pursuant to section 84 of the CJA:

(i) Whether the Amending Provisions are unconstitutional, null and void and of no effect on the ground that they violate the basic structure of the FC;

(ii) Whether the NSCA is unconstitutional, null and void and of no effect on the following grounds:

(a) it became law pursuant to unconstitutional amendments;

(b) It was not enacted in accordance with Article 149 of the FC; and

(c) It violates the freedom of movement guaranteed by Article 9(2) of the FC.

4. The Federal Court by a majority declined to answer the questions posed and remitted the case to the High Court to be struck out. The majority judgment was delivered by Nallini Pathmanathan FCJ, with whom Azahar Mohamed CJM and Zawawi Salleh, Abang Iskandar Abang Hashim, Idrus Harun FCJJ expressed their agreement.

Broad grounds of majority judgment

5. Malaysia adopts the US or common law model of constitutional adjudication. Under this model, the constitutional validity of laws are generally reviewed in a system that is decentralised, in that all courts have the power to determine whether a law is unconstitutional. The apex court in the hierarchy is only the final court of appeal. The review is also generally concrete in nature, being conducted in the context of the facts and circumstances of the dispute before the court.

6. This can be contrasted with the European model, whereby the constitutional validity of laws is generally reviewed by a specialised constitutional court, and conducted in the abstract without referring to any factual context.

7. Two important consequences flow from the model of decentralised, concrete review in Malaysia. The first point to note is, constitutional questions can and should normally be determined by the High Courts at first instance. The role of the Federal Court is only as a court of final appeal; its jurisdiction to determine constitutional questions at first instance is limited and strictly construed. The second point is, as a general rule, the court will not review the constitutionality of a law in the absence of a concrete controversy. A real and actual controversy forms the basis for the review.

8. With regard to the first point, in our constitutional scheme, the Federal Court is not a constitutional court. It is the court of last resort in respect of constitutional issues, except those falling within its

narrowly construed original jurisdiction. The High Court can and should normally determine constitutional questions themselves at first instance.

9. The jurisdiction of the Federal Court to hear special cases referred to it by the High Court under Article 128(2) of the FC and section 84 of the CJA is part of the constitutional framework, and must be construed in its light. Section 84 CJA does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a *carte blanche* for all constitutional questions to be referred to and determined by the Federal Court in every case.

10. Section 84 states that when a special case is referred to the Federal Court, the Federal Court shall deal with, hear and determine it "in the same way as an appeal to the Federal Court". Where a special case is referred to the Federal Court under section 84, the Federal Court is not obliged to answer it in the terms posed, but retains a wide range of powers to deal with it in the same way as an appeal. This includes the power to decline to answer the question on the basis that it is abstract or academic.

11. The suggestion that the Federal Court has no choice but to answer any constitutional question referred to it in every case under section 84 CJA is misguided, and founded on a misunderstanding of the role and powers of the Federal Court.

12. With regard to the second point, it is well-established that the court does not determine constitutional questions in the abstract but in the context of the factual dispute from which they arise. The general

rule is that the court should not answer questions which are abstract, academic, or hypothetical.

13. The test for whether a matter is abstract or academic is whether there is an actual controversy affecting the rights and interests of the parties. A violation of constitutional rights can give rise to an actual controversy to be determined by the court. In the Malaysian model of concrete review, courts would not ordinarily treat the mere existence of a law as an actual controversy suitable for determination.

14. In exceptional cases, the very existence of a law can potentially constitute a violation of constitutional rights and thus give rise to an actual controversy. A party need not wait for an unconstitutional law to be used against him in every case in order to challenge its constitutional validity.

15. For instance, in the face of an exceptional law specifically targeted against a minority group, the very existence of which amounts to a real and credible threat to their rights – Holocaust-type laws would be an extreme example – the court is not obliged to stand idly by until the threat materialises. In the words of Lord Woolf ("Droit Public – English Style" (1995) Public Law 57 at 68), "If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent."

16. However, such cases are rare and exceptional. Without purporting to lay down any exhaustive test, the majority observed that where the law is specifically targeted against a particular group, or there is

a real and credible threat of the law being used against a party, these factors point toward the existence of an actual controversy affecting the rights of the party.

17. Turning to the present case, in the originating summons and the affidavit in support, the only facts stated by the Plaintiff are that he was imprisoned at the time of the action and that he brought the action as a citizen of Malaysia. The remaining contents of the affidavit were purely legal in nature, relating to the amendment to Article 66(4) of the FC, the enactment of the NSCA, and the alleged inconsistency with the provisions and basic structure of the FC. The Plaintiff did not assert that his rights have been affected by the Amending Provisions or the NSCA. No mention was made as to what rights, if any, of the Plaintiff or any other person have been affected or are threatened to be affected by the Amending Provisions or the NSCA.

18. Whilst recognising that in principle, the very existence of an allegedly unconstitutional law can give rise to an actual controversy, the majority considered that it has not been demonstrated that this case falls within that exceptional category. It was not alleged, for example, that the NSCA is a law specifically targeted at a particular group of which the Plaintiff is a part, or that the Plaintiff faces a real and credible threat of action under the NSCA which would be detrimental to his rights. It has not been shown that the very existence of the NSCA in the statute books interferes with the conduct of the Plaintiff's personal life or that of any other person. The mere assertion that the statute exists and that the Plaintiff is a

citizen, without more, is insufficient to give rise to an actual controversy.

19. In the absence of an actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. To answer the questions posed would be a significant departure from the trite rule that the court does not entertain abstract or academic questions, and a fundamental shift away from the common law model of concrete constitutional review. Exceptionally cogent reasons would need to be provided to persuade the Federal Court to undertake such a radical departure from established principle. In this case, the parties have not attempted to do so.

20. Although the constitutional questions posed are undoubtedly of importance, based on the cause papers before the court, the majority considered that this is not a proper case for the Federal Court to answer the questions in the abstract, and were constrained to go no further than to express their reservations as to the constitutional validity of the NSCA. In view of the particular circumstances of the case, the majority declined to answer the questions referred and remitted the case to the High Court.

Note: This summary is merely to assist in understanding the judgment of the court. The full judgment is the only authoritative document.