Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] MLJU 12

Malayan Law Journal Unreported

FEDERAL COURT (PUTRAJAYA)

TENGKU MAIMUN TUAN MAT CHIEF JUSTICE, ROHANA YUSUF PCA NALLINI PATHMANATHAN, ABDUL RAHMAN SEBLI, HASNAH MOHAMMED HASHIM, MARY LIM THIAM SUAN AND HARMINDAR SINGH DHALIWAL FCJJ

CIVIL APPEAL NO 01(f)-5-03 OF 2019(W)

12 January 2021

Gurdial Singh Nijar (Lim Wei Jiet, Abraham Au Tian Hui and Joshua Andran with him) (Sreenevasan) for the appellant.
Shamsul Bolhassan (Mohd Sabri Othman and Liew Horng Bin with him) (Senior Federal Counsel,Attorney General's Chambers) for the respondents.

Rohana Yusuf PCA, Abdul Rahman Sebli, Hasnah Mohammed Hashim and Mary Lim Thiam Suan FCJJ:

MAJORITY JUDGMENT OF THE COURTThe Facts

[1]The appellant was the chairperson of a non-governmental organization (NGO) known as "Bersih 2.0" and was a holder of a valid Malaysian passport. On 15.5.2016, after collecting her boarding pass at the Kuala Lumpur International Airport for a flight to South Korea, she was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country.

[2]No reason was given to the appellant for the travel ban, before or after the incident. The reason was only disclosed in the first respondent's affidavit filed in response to the present judicial review proceedings commenced by the appellant in the High Court on 28.7.2016.

[3]In gist, it was deposed to in the affidavit that on the first respondent's instruction, the appellant was blacklisted from leaving the country for a period of up to 3 years starting from 6.1.2016. The instruction was made pursuant to a circular titled *'Pekeliling Imigresen Malaysia Terhad Bil. 3 Tahun 2015'*. The ground for the blacklisting was that the appellant had disparaged the Government of Malaysia ("*Memburukkan Kerajaan Malaysia*") at different forums and illegal assemblies.

[4]The blacklisting and travel ban were however lifted by the respondents on 17.5.2016, i.e. two days after she was stopped at the Kuala Lumpur International Airport.

The Complaint

[5]According to the appellant, the facts as shown in the affidavit of the first respondent referred to events that had yet to occur when the travel ban was imposed. This, according to counsel, implies an admission that at the time the ban was imposed there was no real reason for its imposition and yet the respondents relied on section 59A of the *Immigration Act 1959/63* ("the Immigration Act") to say that even where there are no real reasons to justify the ban, their decision must be accepted and condoned by the court regardless and this begs the question: to whom will the citizen then turn when there is a contestation between the executive and the citizenry?

[6]It is the appellant's case that the inevitable consequence of the appellant's travel ban was to interfere with her freedom of speech guaranteed by Article 10(1) of the Federal Constitution, in particular her freedom to speak at an event in South Korea to receive a human rights prize in her capacity as a member of an NGO.

[7]On 28.7.2016, the appellant filed an application to judicially review the impugned decision on *inter alia* the following grounds; that the impugned decision is baseless, unreasonable, irrational and completely unfair; and that the 1st and/or 2nd respondent erred in law when they:

i. acted *ultra vires* and in excess of jurisdiction because there is no provision under the Immigration Act and/or other relevant statutes to bar a citizen from travelling overseas in similar circumstances;

ii. acted in breach of her fundamental right to travel abroad which right stems from the right to life under Article 5(1) of the Federal Constitution;

iii. acted in violation of her legitimate expectation to travel abroad due to the fact that at all material times, she possessed a valid passport and was never once informed at a reasonable period beforehand that she was going to be barred from travelling overseas;

iv. acted in breach of the principles of natural justice as guaranteed by the Federal Constitution and established principles of administrative law in arriving at the impugned decision without according her the right to be heard and/or opportunity to be consulted;

v. acted in breach of the requirements of procedural fairness when they failed to provide her with any grounds and/or reasons for the impugned decision and/or failed to respond at all to her reasonable query;

vi. failed to take into account the relevant consideration that she was travelling to South Korea to attend a human rights conference and receive a prestigious and internationally recognized award on behalf of a Malaysian NGO before an international audience;

vii. acted and conducted themselves in an irrational manner inconsistent with any other reasonable government authority tasked with an immigration policy and the welfare of its citizens.

The Reliefs Sought

[8]The reliefs sought by the appellant in the High Court were the following:

i. an order of certiorari to quash the decision made by the respondents to blacklist the appellant from travelling overseas, which was brought to the appellant's attention on the day she was scheduled to leave Malaysia on 15.5.2016 ("Impugned Decision");

ii. a declaration that the Impugned Decision made by the respondents to blacklist the appellant from travelling overseas in the circumstances is a breach of Article 5(1), Article 8 and/or Article 10(1)(a) of the Federal Constitution and as a result, unconstitutional and void;

iii. a declaration that the respondents do not have the power to reach the Impugned Decision and therefore acted in excess of jurisdiction;

iv. a declaration that the respondents do not have an unfettered discretion in arriving at the Impugned Decision;

v. a declaration that the respondents cannot act under *section 59* of the *Immigration Act 1959*/63 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular Article 160 read together with Article 4 of the Federal Constitution and relevant case law;

vi. a declaration that the following provisions of the Immigration Act 1959/63 are unconstitutional:

(a) *section 59*which excludes the right to be heard; and/or

(b) section 59A which excludes judicial review.

vii. an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas in similar circumstances; and

viii. in the alternative to (vi), an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas without furnishing her with the reasons and according her a right to be heard.

The High Court Decision

[9]The High Court dismissed the appellant's application for judicial review, essentially on the ground that since there is no constitutional right for a citizen to travel abroad as decided by the former Federal Court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 1 LNS 22; ; *[1979] 2 MLJ 33*, the government has the power to stop a citizen from leaving the country.

[10]As for the appellant's challenge on the right to be heard, the High Court held that the right is expressly excluded by *section 59* of the *Immigration Act*. It was further held that there is no statutory obligation reposed in the respondents to provide any reason for the travel ban or to inform the appellant of the reason.

The Decision of the Court of Appeal

[11]The appellant's appeal to the Court of Appeal was dismissed on the ground that it was rendered academic and hypothetical as the travel ban had been lifted. Relying on this court's decision in *Husli @ Husly bin Mok v Superintendent of Lands and Surveys & Anor* [2014] 9 CLJ 733; ; *[2014] 6 MLJ 766*, the Court of Appeal held that there was no utility in granting the declarations sought as there was no longer any live issue with the lifting of the travel ban.

[12]Crucially it was held that the issue before the court was the discretionary power of the respondents whose decision under section 59A of the *Immigration Act* is not amenable to judicial review.

The Preliminary Issue

[13]At the outset of these proceedings, the respondents raised a preliminary objection that the impugned decision sought to be challenged in the present appeal was rendered academic even before the commencement of the judicial review at the High Court as the travel ban had been lifted. It was submitted that there was no longer any real grievance to ground a judicial review.

[14]It was submitted that on the facts of the present appeal, as a matter of discretion, this court should refuse the invitation to consider the academic issues for the following reasons:

(i) there are no reported cases where one was barred from leaving the country solely on ground of having ridiculed the country. The present appeal is therefore only peculiar to its facts;

(ii) even if this court were to proceed with the appeal on the narrow basis of Question 1 and/or Question 2, the appellant still needs to pass the first hurdle imposed by the ouster clause as set out in Question 3;

(iii) this court in ***Loh Wai Kong*** [supra] and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 4 CLJ 105; ; *[2002] 3 MLJ 72* [***Sugumar Balakrishnan***] has considered and authoritatively adjudged upon the same issues raised in Question 2 and Question 3.

[15]The appellant, on the other hand, argued that the matter has not been rendered academic and that even if it is academic, this court should nonetheless proceed to determine the lawfulness of the decision due to the overwhelming public interest involved, citing *R v Secretary of State for the Home Department, ex parte Salem [1999] 1 AC 450* which this Court accepted in *Bar Council Malaysia v Tun Dato' Seri Arifin Zakaria & Ors And Another Reference* [2018] 10 CLJ 129.

[16]Courts are generally circumspect in exercising their discretion to hear hypothetical issues even in the area of constitutional law which is part of public law and the matter should be approached on a narrow basis: see *Tan Eng Hong v Attorney-General* [2012] SGCA 45 and as a general rule, the apex court has been consistent against answering abstract, academic, or hypothetical questions: see *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] MLJU 119*.

[17]The general principles applicable to a declaration based on public interest to overcome what is otherwise an academic exercise are summarized in *Rolls-Royce plc v Unite the Union [2010] ICR 1* as modified in *Milebush Properties Ltd v Tameside MBC [2011] EWCA Civ 270*. The two main features of the limitation of the court's discretion are justice of the case and the utility of the adopted measure.

[18]Having considered the competing arguments by the parties, I saw no merit in the preliminary objection raised and was of the firm view that this appeal must be heard on the merits.

The Leave Questions

[19]There were three leave questions posed for this court's determination and they were as follows:

Question 1

Whether section 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government?

Question 2

Whether *section 59* of the *Immigration Act* is valid and constitutional?

Question 3

Whether section 59A of the *Immigration Act* is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* *[2017] 3 MLJ 561* and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* *[2018] 1 MLJ 545*?

[20]The three questions are related one way or another and shall be dealt with together for convenience rather than to be considered separately in three different parts. Obviously the answers to questions 1 and 2 hinge on the answer to question 3, which is intrinsically concerned with the constitutional validity of ouster clauses. Given its importance in terms of priority, I shall begin with Question 3.

[21]It is relevant to note that what Question 3 asks is whether section 59A of the *Immigration Act* is valid and constitutional "in the light" of the decisions of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* *[2017] 3 MLJ 561* [***Semenyih Jaya***] and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* *[2018] 1 MLJ 545* [***Indira Gandhi***], cases which reaffirmed the principle that judicial power resides in the judiciary under the doctrine of separation of powers and which, according to the two cases, cannot be abrogated or removed even by constitutional amendment.

[22]Question 3 does not ask whether section 59A of the *Immigration Act* is inconsistent with any provision of the Federal Constitution and therefore void under Article 4(1). Specifically, it does not ask whether the section is void under Article 4(1) for being inconsistent with Article 121(1) of the Federal Constitution, which is the source and lifeblood of judicial power in the Federation.

[23]Question 3 reflects the underlying basis for this court's *obiter* observations in ***Semenyih Jaya*** and ***Indira Gandhi*** - that judicial power had been "removed" by the 1988 amendment to Article 121(1) of the Federal Constitution and that such removal of judicial power impinges on the doctrine of separation of powers and consequently any law passed by Parliament that ousts or circumscribes judicial power is void. One such law is section 59A of the *Immigration Act*, which ousts the power of the High Courts to judicially review the substantive decision of the decision maker, in this case the decision by the Director General of Immigration to impose the travel ban on the appellant.

[24]On the face of it, the observations in the two cases appear to give the impression that being in breach of the doctrine of separation of powers, Article 121(1) of the Federal Constitution is unconstitutional and has no force of law to confer on Parliament the power to enact ouster clauses such as section 59A of the *Immigration Act*.

[25]The decisions could be misinterpreted to mean that Article 121(1) of the Federal Constitution must bow to the doctrine of separation of powers. That could not have been what this court intended to say in the two cases. The doctrine of separation of powers simply means that the legislature, the executive and the judiciary do not intrude into each other's spheres of power - the legislature makes the law, the executive enforces the law and the judiciary interprets the law.

[26]What the doctrine prohibits is for the legislature to enforce the law that it makes, for the executive to interpret the law that it enforces, and for the judiciary to rewrite the law that it interprets. That, in essence, is what the doctrine of separation of powers is all about. Whatever may be the extent of power that the law confers on the three arms of government, the doctrine cannot be invoked to encroach into the imperatives of the Federal Constitution. Being the supreme law of the land, all three arms of government must adhere to its mandates, and this includes to empower Parliament through Article 121(1) to enact federal laws on the limits of judicial power.

Section 59A of the Immigration Act

[27]Section 59A of the *Immigration Act* is couched in the following language:

"59A. (1) There shall be no judicial review in any court on any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, "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) any writ of habeas corpus; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act."

[28]The section is presumed by law to be constitutionally valid and the burden of proof is on whoever alleges otherwise, with the qualification that the presumption is not to be stretched for the purpose of validating an otherwise invalid law: see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 1 LNS 180; ; *[1976] 2 MLJ 116*.

[29]Courts try to sustain the validity of an impugned law to the extent that is possible, and will only strike down a law when it is not possible to do so: see *PP v Su Liang Yu* *[1976] 2 MLJ 128*; *Ooi Kean Thong v PP* [2006] 2 CLJ 701; *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 4 CLJ 169; ; *[2005] 6 MLJ 289*; *Letitia Bosman v Public Prosecutor and other appeals* [2020] 8 CLJ 147; ; *[2020] 5 MLJ 277* [***Letitia Bosman***]

[30]Being a post-Merdeka law, section 59A of the *Immigration Act* is subject to Article 4(1) of the Federal Constitution, which established constitutional supremacy in Malaysia. The Article reads:

"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day **which is inconsistent with this Constitution** shall, to the extent of the inconsistency, be void."

(**emphasis added**)

[31]To be inconsistent with "this Constitution" means to be inconsistent with any Article of the Federal Constitution that relates to the legislative scheme of the impugned law. In the present case, the legislative scheme of section 59A of the *Immigration Act* is to limit the judicial review power of the High Courts to procedural non-compliance by the decision maker. Clearly that is within the competence of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution. The section is therefore not void under Article 4(1) for being inconsistent with Article 121(1).

[32]The purport of section 59A of the *Immigration Act* is merely to limit judicial power and is not a finality clause. This court in ***Semenyih Jaya*** had this to say on finality clauses:

"Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party."

[33]What is not amenable to judicial review under section 59A of the *Immigration Act* is only the decision that the decision maker makes. Procedural non-compliance is still amenable to judicial review.

[34]Ouster clauses are not an uncommon feature in our statute books. They are even found in the Federal Constitution itself. A good example is Item 2 Part III of the Second Schedule which provides:

"2. "A decision of the Federal Government under Part III of this Constitution shall not be the subject of appeal or review in any court."

[35]The key question for this court's determination in relation to Question 3 is whether legal remedy in the form of judicial review can be limited in its scope by an Act of Parliament, in this case by section 59A of the *Immigration Act*, which limits the legal challenge to procedural non- compliance.

[36]The main thrust of the appellant's argument is that by limiting the court's judicial review power to procedural non-compliance and denying it of the power to review the substantive decision itself, Parliament is in breach of the doctrine of separation of powers, which is a "basic structure" of the Federal Constitution.

[37]The questions that must follow are:

(a) Under the doctrine of separation of powers, does the court enjoy unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review?

(b) Is Article 121(1) of the Federal Constitution, under which section 59A of the *Immigration Act* is enacted, unconstitutional and therefore void for violating the doctrine of separation of powers?

(c) Is there no limit to judicial power, in the sense that not even the Federal Constitution can confer power on the legislative arm of government to legislate on the jurisdiction and powers of the courts?

[38]The appellant's contention is that being an ouster clause, section 59A of the *Immigration Act* is unconstitutional and has "no leg to stand on" in the light of the following trinity of cases: ***Semenyih Jaya***; ***Indira Gandhi***; and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 5 CLJ 780; ; *[2019] 4 MLJ 1* [***Alma Nudo Atenza***].

[39]According to learned counsel, these cases identified judicial review as a constitutional imperative operationalizing the rule of law underpinning of the Federal Constitution and its concomitant, the separation of powers and that these two concepts taken together were declared as the "basic structure" of the Federal Constitution, sacrosanct and inviolable and not amenable to amendment by recourse to Article 159 of the Federal Constitution.

[40]It was submitted that these decisions established general principles as to the power of the Courts under Article 121(1) of the Federal Constitution and that the principles cut across the specific factual matrix and subject matter of the cases and cannot be limited to their factual context such as land law and the like.

[41]The common thread among all three cases is "basic structure" of the Federal Constitution, which presumably is a reference to the doctrine of separation of powers housed in Article 121(1) of the Federal Constitution. The Article provides as follows:

> "(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) *(Repealed),*
>
> and such inferior courts as may be provided by federal law and **the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law**."

(**emphasis added**)

[42]The first thing to note with regard to this Article is that it is the constitutional provision that established the High Court of Malaya and the High Court of Sabah and Sarawak. Secondly, and very importantly, it provides, in explicit terms, that *"the jurisdiction and powers of the High Courts and inferior courts are as may be conferred by or under federal law"*. These are carefully chosen words which are intended to mean what they say and say what they mean, and that is, Parliament may by legislation determine the jurisdictional boundaries of judicial power.

[43]The combined effect of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** on "judicial power" was compendiously summarised by this court in *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569 as follows through Mohd Zawawi Salleh FCJ who delivered the majority decision (5-2) of the court:

(a) Judicial power is vested exclusively in the High Courts by virtue of Article 121(1) of the Federal Constitution. Judicial independence and separation of powers are recognized as "basic features" in the

basic structure of the Federal Constitution. The inherent judicial power of the civil courts under Article 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism (***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***);

(b) Parliament does not have power to amend the Federal Constitution to the effect of undermining the doctrine of separation of powers and independence of the judiciary, which formed the "basic structure" of the Federal Constitution (***Semenyih Jaya***); features of the basic structure cannot be abrogated or removed by a constitutional amendment (***Indira Gandhi***);

(c) Courts can prevent Parliament from destroying the basic structure of the Federal Constitution. And while the Federal Constitution does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the Federal Constitution but also for violation of the documents or principles that constitute the constitutional foundation (***Alma Nudo Atenza***);

(d) A constitution must be interpreted in the light of its historical and philosophical context, as well as its fundamental underlying principles; the foundational principles of a constitution shape its basic structure (***Indira Gandhi***);

(e) Judicial power cannot be removed from the judiciary; judicial power cannot be conferred upon any other body which does not comply with the constitutional safeguards to ensure its independence; non-judicial power cannot be conferred by another branch of government onto the judiciary (***Semenyih Jaya***).

Sugumar Balakrishnan

[44]In relation to section 59A of the *Immigration Act*, the decisions in ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** appear to be in conflict with the earlier decision of this court in ***Sugumar Balakrishnan*** which held that the section excludes judicial review on the substantive decision of the authority. The case also endorsed the validity of *section 59* of the *Immigration Act* (relevant to leave Question 2) which excludes the right of hearing. The section reads as follows:

> "59. No person and no member of a class of person shall be given an opportunity of being heard before the minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act."

[45]These are the same provisions of the Immigration Act that are being impugned in the present appeal. At the Court of Appeal stage of ***Sugumar Balakrishnan*** [*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* *[1998] 3 MLJ 289*], Gopal Sri Ram JCA (as he then was) who wrote the judgment of the court applied the "substantive fairness" test to hold that the second respondent's decision to direct a cancellation of the appellant's Entry Permit into the State of Sabah was null and void. Amongst others, the learned judge observed as follows:

(a) Judicial review is a "basic and essential feature" of the Federal Constitution and, excepting cases involving national security or national interest to which special consideration would apply, no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. section 59A of the *Immigration Act* therefore cannot and does not preclude the High Court from exercising its powers of judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds. An ouster clause in a statute, in any case, immunizes from judicial review only those administrative acts and decisions that are not infected by an error of law.

(b) Like the expression "life" in Article 5(1) of the Federal Constitution, which must receive a broad and liberal interpretation, the words "personal liberty" in Article 5(1) must similarly be interpreted. It follows that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by Article 8 of the Federal Constitution.

[46]The decision was reversed on appeal by this court. Mohd Dzaiddin FCJ (as he then was) who delivered the unanimous decision of the court gave the following reasons for overruling the decision:

> "Here, on a clear wording of s. 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder. In the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government and Others* *[1960] AC 260* at 286:
>
> > It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the

determination of his rights is not to be excluded except by clear words.

Our answer to Question No. 1 is therefore that **the combined effect of the exclusion of right to be heard provided in s. 59 of the said Act and the ouster clause provided in s. 59A thereof has excluded review in respect of the direction given by the State Authority under s. 65(1)(c) on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision**."

(**emphasis added**)

[47]Before us however, it was argued that ***Sugumar Balakrishnan*** was "wrongly decided" by this Court and should be overruled, for the following reasons:

(i) The statement that judicial review can be excluded by express words in an Act of Parliament flies in the face of ***Semenyih Jaya*** and ***Indira Gandhi***;

(ii) Its rejection of the substantive ground of jurisdiction in judicial review cases established in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1CLJ 147; ; 1997] 1 MLJ 145 [***R Rama Chandran***] is manifestly erroneous;

(iii) The case was decided *per incuriam* as it ignored a plethora of cases of high authority which established beyond peradventure that even widely worded ouster clauses cannot exclude judicial review. In particular it ignored the decision in *Che Ani Itam v PP* [1984] 1 CLJ 72 and *Ong Ah Chuan v PP* [1980] 1 LNS 181. In the upshot, ***Sugumar Balakrishnan*** has no binding effect as a precedent;

(iv) The decision bucks high authority established post-***Sugumar Balakrishnan***, namely *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 5 CLJ 321; ; [2008] 4 MLJ 665 [***Petrojasa***]; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; ; *[2010] 2 MLJ 333* [***Sivarasa Rasiah***]; ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***.

[48]It was submitted that accepting ***Sugumar Balakrishnan*** will:

(a) restore a position that has been rejected by high judicial authority which repudiated ouster clauses and which were cited with approval by this court in ***Indira Gandhi*** and ***Alma Nudo Atenza***;

(b) roll back on the development of the law on judicial review as the post ***Sugumar Balakrishnan*** decisions demonstrate;

(c) undermine the constitutional dimension of judicial review as a critical pillar of the basic structure of the Federal Constitution.

[49]The long and short of the argument is that ***Sugumar Balakrishnan*** is outdated and must be replaced with ***Semenyih Jaya*** and ***Indira Gandhi*** and that the Court of Appeal version of ***Sugumar Balakrishnan*** must be restored and affirmed by this court. The appellant's discordant with ***Sugumar Balakrishnan*** is that giving the court review powers only on the "extremely narrow ground" of procedural non-compliance curtails the power of judicial review, which "runs foul" of the decisions in ***Semenyih Jaya*** and ***Indira Gandhi***. Reference was made to the observation by Lord Steyn in *R v Secretary of State for the Home Department, ex p Pierson* [1988] AC 539, 591 where the learned law Lord said:

"The rule of law enforces minimum standards of fairness, both substantive and procedural."

[50]It was thus urged upon us that it is "about time" this court departs from ***Sugumar Balakrishnan*** and to continue with the recent trend of decisions that safeguard the sanctity of judicial review as *"part of"* the basic structure of the Federal Constitution, particularly now in the Immigration Act. From the appellant's point of view therefore, ***Sugumar Balakrishnan*** stands in her way and must be taken out of the way.

[51]The appellant's reliance on ***R Rama Chandran*** was for the proposition that courts have the power to "scrutinize such decisions not only for process, but also for substance". The upshot according to learned counsel is that judicial review cannot be ousted in its procedural and substantive aspects as its "all-encompassing reach" is now firmly entrenched in our administrative and constitutional jurisprudence.

[52]I shall deal with the arguments right away, not necessarily in the order that learned counsel presented his case. First, the contention that ***Sugumar Balakrishnan*** was decided *per incuriam* and therefore has no binding effect. The contention is untenable. In *Morelle Ltd v Wakeling* *[1955] 1 All ER 708* Sir Raymond Evershed MR said this of the concept of *per incuriam* at page 718:

> "We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given **in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned**: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence."

(**emphasis added**)

[53]In another Court of Appeal case, *Duke v Reliance Systems Ltd* *[1987] 2 WLR 1225*, Sir John Donaldson MR said at page 1228:

> "I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today."

[54]Our courts have accepted the proposition of law enunciated in these cases on the notion of *per incuriam*: see for example *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 6 CLJ 745; ; *[2010] 4 MLJ 651* and *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265; ; *[2018] 2 MLJ 590*.

[55]Having regard to the principles laid down in these cases, I am unable to accept the appellant's argument that ***Sugumar Balakrishnan*** was decided *per incuriam*. First of all, being a decision of the apex court, it is not subject to the *stare decisis* rule. It was therefore wrong for counsel to say that it has no binding effect as a precedent on the ground that "it ignored a plethora of cases of high authority which established beyond peradventure that even widely worded ouster clauses cannot exclude judicial review". Secondly and more importantly, it was not a decision that was reached *"in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision"* (***Reliance Systems Ltd***).

[56]The *ratio decidendi* of ***Sugumar Balakrishnan*** is that natural justice can be excluded by the clear words of section 59 and judicial review by the clear words of section 59A of the *Immigration Act*. There is nothing fundamentally or manifestly wrong with that as sections 59 and 59A of the Immigration Act were there in the statute book to the knowledge of the panel hearing the case.

[57]It was purely a matter of interpretation. This court cannot overrule ***Sugumar Balakrishnan*** based on the *per incuriam* rule just because it would have been decided differently if argued differently. As Sir John Donaldson MR went on to say in ***Reliance Systems Ltd***:

> "I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today."

[58]As for the argument that judicial review cannot be ousted in its procedural and substantive aspects as its "all-encompassing reach" is now firmly entrenched in our administrative and constitutional jurisprudence, that is not entirely correct because Edgar Joseph Jr FCJ in ***R Rama Chandran*** also noted that the extent of judicial review may be determined by legislative intervention. This is what the learned judge said:

> "To recapitulate, I had at the outset observed that supervisory review jurisdiction is a creature of the common law and is

> available in the exercise of the courts' inherent power but **its extent may be determined not merely by judicial development but also by legislative intervention**."

(**emphasis added**)

[59]Next, the submission that "an abundance" of this court's decisions post-***Sugumar Balakrishnan*** shows that section 59A of the *Immigration Act* is no longer good law and that the present judicial trend provides that access to justice is a fundamental right and that judicial review is an integral facet of the doctrine of separation of powers which is a "basic feature" of the Federal Constitution.

[60]For this proposition, we were referred, amongst others, to the three decisions of this court in (1) ***Petrojasa***; (2) *YAB Dato' Dr Zamry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* *[2009] 4 MLJ 24*; and (3) *Sivarasa Rasiah v Badan Peguam Malaysia & Another* [2010] 3 CLJ 507; ; *[2010] 2 MLJ 333* [***Sivarasa Rasiah***]. Particular emphasis was placed on the following observation by Arifin Zakaria FCJ (as he then was) in his supporting judgment in ***Petrojasa***:

> "The position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong. Therefore, the courts in the Commonwealth jurisdictions generally have held that the executive arms of the Government is amenable to the judicial review proceedings."

[61]In addition to the three local authorities, we were also referred to the Indian Supreme Court case of *Anita Kushwaha v Pushap Sudan AIR* 2016 SC 3506 where, in summing up, the court *inter alia* said:

> "26. To sum up: Access to justice is and has been recognized as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to citizens."

[62]Given the fact that our system of government subscribes to the rule of law, there can be no issue with ***Petrojasa's*** observation that the courts have moved away from the traditionalist approach that the government can do no wrong. Indeed, government decisions have been quashed or declared invalid by our courts on many occasions before and there is a good chance that that will continue to be the case.

[63]The observation by Arifin Zakaria FCJ in ***Petrojasa*** must be understood in the context it was made. In that case, the question before this court was whether judicial review proceedings may be taken against the appellants, the Minister of Finance and the Government of Sabah, to compel payment of the judgment sum as certified in the certificate issued under section 33(3) of the *Government Proceedings Act 1956*.

[64]The appellants had contended that judicial review did not lie against them to enforce payment of a judgment sum for to allow such an application would tantamount to allowing enforcement proceedings to be taken against the State Government through the back door. The argument was rejected. Clearly, the issue in that case was whether the Minister of Finance and the State Government of Sabah could with impunity refuse to comply with a valid court order.

[65]*Sugumar Balakrishnan*, on the other hand, was decided on a completely different legal basis, which was whether section 59A of the *Immigration Act* is valid law. It concerned the power of the legislature to make law, unlike ***Petrojasa*** which was concerned with the question whether judicial review could lie against the government. Given the divergent factual matrix between the two cases, the appellant's reliance on ***Petrojasa*** is misconceived.

[66]Last but not least, counsel's contention that ***Sugumar Balakrishnan*** "flies in the face" of ***Semenyih Jaya*** and ***Indira Gandhi*** by deciding that judicial review can be excluded by express words in an Act of Parliament.

[67]To begin with, both ***Semenyih Jaya*** and ***Indira Gandhi*** were not cases on section 59A of the *Immigration Act* whereas ***Sugumar Balakrishnan*** was. That probably explains why no mention at all was made of ***Sugumar Balakrishnan*** in the two cases. Neither was it referred to in ***Alma Nudo Atenza***, the other case that the appellant relied on, maybe for the same reason as well.

[68]In ***Semenyih Jaya***, the constitutional questions for this court's determination were:

(i) Whether section 40D(3) and the proviso to section 49(1) of the *Land Acquisition Act 1960* were ultra vires Article 121(1B) of the Federal Constitution particularly when read in the context of Article 13; and

(ii) Whether section 40D(1) and (2) of the Land Acquisition Act 1960 were ultra vires Article 121 of the Federal Constitution read in the context of Article 13.

[69]As for ***Indira Gandhi***, the questions for determination were:

(i) Whether the High Court had the exclusive jurisdiction pursuant to sections 23, 24 and 25 and the Schedule to the Courts of Judicature Act 1964 (read together with Order 53 of the Rules of Court) and/or its inherent jurisdiction) to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Perak Enactment;

(ii) Whether a child of a marriage under the Law Reform (Marriage and Divorce) Act 1976 (a civil marriage) who had not attained the age of 18 years must comply with both sections 96(1) and 106(b) of the Perak Enactment before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child; and

(iii) Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam could be issued in respect of that child.

[70]As can be seen, not only are the facts in ***Semenyih Jaya*** and ***Indira Gandhi*** different from the facts in ***Sugumar Balakrishnan***, but the constitutional and/or legal issues raised were also different. Therefore, the question of ***Sugumar Balakrishnan*** "flying in the face" of ***Semenyih Jaya*** and ***Indira Gandhi*** does not arise at all although the two cases appear to have "overruled" ***Sugumar Balakrishnan*** on the broad ground that Parliament cannot remove judicial power from the courts and consigning it to non-judicial bodies, in breach of the doctrine of separation of powers.

[71]The same goes with ***Alma Nudo Atenza***, a case on the constitutionality of section 37A of the Dangerous Drugs Act 1952. It was not a case on the constitutionality of ouster clauses although there are passages in the judgment that give the impression that Parliament has no power to destroy the "basic structure" of the Federal Constitution and that the courts can prevent that from happening. ***Sugumar Balakrishnan*** is therefore the prevailing authority on the constitutional validity of sections 59 and 59A of the Immigration Act and not ***Semenyih Jaya, Indira Gandhi*** or ***Alma Nudo Atenza***.

[72]It is a principle of great antiquity that the decision in each case must be confined to its own peculiar facts and circumstances. It is not every pronouncement by the court that counts as the *ratio decidendi* of the case. While *obiter dicta* are entitled to due respect, they cannot be placed on par with *ratio decidendi*. Care must be taken to separate the wheat from the chaff so to speak.

Article 4(1) of the Federal Constitution

[73]There is no dispute that section 59A of the *Immigration Act* was enacted pursuant to Article 121(1) of the Federal Constitution. It is this Article and not any other Article that vests judicial power of the Federation in the courts. section 59A of the *Immigration Act* was not, it will be noted, enacted pursuant to any other Article of the Federal Constitution which it could be inconsistent with and therefore void under Article 4(1).

[74]It is important to bear this in mind because the appellant seems to be making the argument that section 59A of the *Immigration Act* is void not because it is inconsistent with Article 121(1) but because it is inconsistent with some other Articles of the Federal Constitution, namely Article 5(1) - right to life and personal liberty, Article 8 (1) - equality before the law and Article 10(1) - right to free speech and expression. This is clear from the reliefs that the appellant prayed for in the High Court, amongst which was for a declaration that the decision by the Director General of Immigration to ban her from travelling overseas was unconstitutional and therefore void for breaching these three Articles of the Federal Constitution.

[75]With due respect, these Articles have no relevance whatsoever to the issue before the court, which is whether Parliament is vested with power by Article 121(1) of the Federal Constitution to enact section 59A of the *Immigration Act*. The answer to this question depends on whether Parliament had acted within the constitutional framework of Article 121(1) when it enacted the section and not whether the section is void for being inconsistent with Articles 5(1), 8(1) or 10(1) of the Federal Constitution.

[76]Even if, for the sake of argument, that the constitutionality of section 59A of the *Immigration Act* can be linked to Article 5(1) of the Federal Constitution (right to life and personal liberty) the appellant has no valid claim in any

event to a right to travel overseas: See ***Loh Wai Kong***. Furthermore, this line of argument is a complete deviation from the issue raised in Question 3 of the leave question, which is whether section 59A of the *Immigration Act* is valid and constitutional in the light of ***Semenyih Jaya*** and ***Indira Gandhi***. There is no reference at all in leave question 3 to Article 5(1), Article 8(1) and Article 10(1) of the Federal Constitution.

[77]The issue that this court is concerned with is the power of Parliament to make law, which has nothing to do with the right to life and personal liberty, the right to equality before the law and the right to freedom of speech and expression. To bring into the equation Articles of the Federal Constitution which have nothing to do with the power of Parliament to make law is to divert attention away from the real issue before the court. Clearly, the enactment of section 59A of the *Immigration Act* by Parliament is sanctioned by Article 121(1) of the Federal Constitution, thus making it a valid ouster clause. A valid ouster clause cannot be struck down under Article 4(1). As noted by Edgar Joseph Jr FCJ in ***R Rama Chandran***, the extent of judicial review may be determined by legislative intervention.

[78]Article 4(1) of the Federal Constitution is not intended to operate the way the appellant suggests it should operate. The Article is there to safeguard the supremacy of the Federal Constitution by preventing Parliament from passing any law it pleases and the provision only comes into play where there is inconsistency between any post-Merdeka law and the Federal Constitution and the inconsistency is irreconcilable with the terms of the relevant Articles of the Federal Constitution. Article 4(1) has nothing to do with judicial power of the Federation. The judicial power of the Federation is governed by Article 121(1) and not by Article 4(1), Article 5(1), Article 8(1), Article 10(1) or any other Article.

[79]The way Article 4(1) of the Federal Constitution works in relation to section 59A of the *Immigration Act* is to render the provision void if and only if it is inconsistent with any constitutional provision that confers it with the legitimacy and force of law. It is only Article 121(1) of the Federal Constitution that confers such legitimacy and force of law on section 59A of the *Immigration Act* and no other Article. For that reason, section 59A of the *Immigration Act* can only be void if it is inconsistent with Article 121(1) and not with any other Article of the Federal Constitution such as Article 5(1), Article 8(1), and Article 10(1) which have nothing to do with the power of Parliament to enact federal law pursuant to Article 121(1) of the Federal Constitution.

[80]It will be a strange working of the law if section 59A of the *Immigration Act* is to be struck down under Article 4(1) for being inconsistent with these other Articles of the Federal Constitution when it is not inconsistent with the Article that gives it the legitimacy and force of law. The proposition is as good as saying that Article 121(1) has no constitutional force of law and incapable of vesting power in Parliament to enact section 59A of the *Immigration Act*. The proposition is clearly unsustainable and must be rejected.

[81]Article 4(1) cannot be invoked to strike down just any post-Merdeka law that is inconsistent with just any Article of the Federal Constitution. The Article that the post-Merdeka law is inconsistent with must relate to the relevant subject matter and legislative scheme of the impugned law if the law is to be declared void under Article 4(1). To illustrate the point, a law passed by Parliament that is inconsistent with the right to life and personal liberty under Article 5(1) cannot be declared void under Article 4(1) for being inconsistent with the right to free speech and freedom of expression under Article 10(1). If at all it must be declared void, it is to be declared void under Article 4(1) for being inconsistent with Article 5(1) and not with Article 10(1). That, of course, is to state the obvious. In the present appeal, the appellant's complaint really is about her right to travel under Article 5(1) but she has conflated the issue with an alleged breach of her right to freedom of expression under Article 10(1).

[82]Likewise, Article 4(1) cannot be invoked to strike down any law that is inconsistent with itself as the Article does not operate by itself and on its own. It must be read in conjunction with any other relevant Article of the Federal Constitution. Thus, if at all section 59A of the *Immigration Act* is to be declared void, it is void not because it is inconsistent with Article 4(1) but because it is inconsistent with Article 121(1).

[83]It must be appreciated that Article 4(1) only operates as a mechanism to declare any post-Merdeka law void for being inconsistent with any other relevant Article of the Federal Constitution. The second part of Article 4(1) requires it to be read in conjunction with any other Article of the Federal Constitution before it can take effect. It does not operate by itself and on its own.

Irresistible Clearness of Parliament's Intention

[84]As mentioned, the source of judicial power in the Federation is Article 121(1) of the Federal Constitution and not any other Article. Without Article 121(1), the courts would have no judicial power to exercise, not even the limited power conferred by section 59A of the *Immigration Act*. The other Articles do not confer judicial power on the judiciary. They deal with different fundamental aspects of our everyday life.

[85]The expression *"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"* used in Article 121(1) is irresistibly clear and unambiguous and admits of no other interpretation. It will not offend any canon of constitutional interpretation if it is given a literal interpretation.

[86]In the context of the present case, the question is not whether Article 121(1) is or is not a "basic structure" of the Federal Constitution. Whatever the label, Article 121(1) is the governing provision on judicial power of the Federation. The proper question to ask in relation to "judicial power" of the Federation is, what are the terms of Article 121(1) of the Federal Constitution?

[87]In *Liyanage v The Queen* *[1967] 1 AC 259* the Privy Council observed, *inter alia*, that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived but of course no validity should be given to acts which infringe the constitution. section 59A of the *Immigration Act* must be read in that light and in that spirit.

[88]Clearly, it is a term of Article 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are *"as may be conferred by or under federal law"*. In the context of the present case, that "federal law" is section 59A of the *Immigration Act*. Thus, federal law has determined that the jurisdiction and powers of both High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision maker. Both the High Court of Malaya and the High Court of Sabah and Sarawak have no jurisdiction to travel outside the confines of that power.

[89]For the two High Courts to ignore the limitations imposed by section 59A of the *Immigration Act* in the name of separation of powers and judicial independence is to defy Article 121(1) of the Federal Constitution, which the two High Courts are not at liberty to do. Salleh Abas LP in *Lim Kit Siang v Dato' Seri Dr. Mahathir Mohamed* [1987] 1 CLJ 40; ; [1987] CLJ (Rep) 168; ; *[1987] 1 MLJ 383* once said:

> "The courts have a constitutional function to perform and they are **the guardian of the constitution within the terms and structure of the Constitution itself**; they not only have the power of construction and interpretation of legislation but also the power of judicial review - a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals *inter se*, **and in performing their constitutional role they must of necessity and strictly in accordance with the constitution** and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action."

(**emphasis added**)

[90]Given the clear language of section 59A of the *Immigration Act* and on the strength of the supporting authorities cited by the respondents, including ***Sugumar Balakrishnan***, I accept the following arguments by the learned Senior Federal Counsel as stating the correct position of the law:

(i) Parliament can depart from the general law or fundamental principles such as natural justice by expressing its intention with irresistible clearness: *R v Secretary of State for the Home Department; Ex parte Simms* *[2000] 2 AC 115*; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. Rules of natural justice regulating the exercise of statutory power may be excluded by plain words of necessary intendments: *Annets v McCann* (1990) 170 CLR 596. Courts are generally willing to find evidence of the intended exclusion of natural justice: *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Pearlberg v Varty (Inspector of Taxes)* *[1972] 2 All ER 6*; *Furnell v Whangarei High School Board* *[1973] AC 660*.

(ii) To ascertain whether the plain words of a statute connote the necessary intendment, it is only necessary to pay close attention to the relevant statute: *SZBEL v Minister for Immigration and Multicultural and Indigenuous Affairs* (2006) 228 CLR 152; *Kioa v West* (1989) 159 CLR 550. The conferral of an unconditional discretionary power to a public authority suggests that natural justice is not intended to apply: *Salemi v McKellar [No 2]* (1977) 137 CLR 396.

[91]Section 59A of the *Immigration Act* has expressed with irresistible clearness the intention of Parliament to exclude judicial review on the decision made by the Minister, the Director General, and, in the case of Sabah and Sarawak, the State Authority.

[92]The recent decision of the UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* *[2019] UKSC 22* [***Privacy International***] drives home the point in the clearest of terms. One of the questions posed for the determination of the court in that case was whether Parliament might by statute "oust" the supervisory jurisdiction of the High Court to quash the decision of an inferior court or statutory tribunal of limited jurisdiction, a question that is similar in pith and substance to the question posed in relation to section 59A of the *Immigration Act*. It was decided by majority (Lord Carnwath, Lady Hale and Lord Kerr) that:

> "… **Judicial review can only be excluded by "the most clear and explicit words**" (*Cart*, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind."

(**emphasis added**)

[93]There is no other way of reading this part of the judgment other than to ascribe to it what it means to say, which is Parliament can exclude judicial review by using clear unequivocal language in the statute. It was a reaffirmation of the principle laid down in *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government and Others* *[1960] AC 260* where Viscount Simonds said at page 286:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded **except by clear words**."

(**emphasis added**)

[94]The decision of the UK apex court in ***Privacy International*** shows that even in a country where Parliament is supreme, judicial review can still be excluded by an Act of Parliament and the court will uphold such law provided it is drafted in clear and explicit language.

[95]Post-***Sugumar Balakrishnan***, this was also the position taken by this court in ***Kerajaan Malaysia & Ors v Nasharuddin Nasir*** [2004] 1

CLJ 81 where at page 93 the court said that judicial review which is essentially a creature of common law can be excluded by statutory legislation if the words used are unmistakably explicit. At page 95, this is what Steve Shim CJ (Sabah & Sarawak) delivering the judgment of the court said:

> "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."

(**emphasis added**)

[96]In the circumstances I reject counsel's contention that ***Sugumar Balakrishnan*** was wrong in holding that judicial review can be excluded by express words in an Act of Parliament, in this case by the express words in section 59A of the *Immigration Act*. It is rather unfortunate that ***Semenyih Jaya*** and ***Indira Gandhi*** were not considered from this perspective, which both ***Sugumar Balakrishnan*** and ***Nasharuddin Nasir*** appropriately did.

Constitutional Interpretation

[97]One of the canons of constitutional interpretation is that the constitution must be interpreted in the light of its historical and philosophical context. This was acknowledged by ***Indira Gandhi***. But as correctly pointed out by the learned Senior Federal Counsel, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** were decided without the benefit of the historical records during the drafting stage of the Federal Constitution. Our attention was drawn to

the relevant records and minutes, which reveal the following salient facts in relation to "judicial power" of the Federation:

(a) The Alliance Party expressed in their Memorandum to the Reid Constitutional Commission ("the Reid Commission") that the judiciary should be completely independent both of the Executive and the Legislature; that the fountain of all justice should be the Yang di-Pertuan Besar; that there should be, besides the subordinate courts, a High Court with appeals therefrom to the Supreme Court; that the Supreme Court should also be vested with powers to decide whether or not the actions of both the Federal Executives and Legislatures were in accordance with the Constitution;

(b) During the hearing of the Alliance Party held on 27.9.1956, Dato' Abdul Razak confirmed that it shall be open to challenge as *ultra vires* actions of both the Federal as well as State Executive and Legislatures, including other administrative instructions;

(c) In the List of the Main Heads of the Subjects to be included in the Draft Constitution prepared by Justice Abdul Hamid under "Judiciary", item 59 provided for the Supreme Court, item 60 spelled out the powers and jurisdiction of the Supreme Court, while items 61 and 62 listed out respectively the composition, powers and jurisdiction of the High Court;

(d) In the 53rd Reid Commission Meeting of 15.10.1956, items 59– 62 were discussed and it was agreed that there should be a Supreme Court for the Federation and that instead of having a separate provision for the setting up of the High Court and its powers and jurisdiction, it is a matter reserved for Parliament to decide in the future whether or not to create a High Court. In the result, items 61 and 62 were omitted from the draft Constitution;

(e) In the same meeting, it was agreed by the Commissioner that the power and jurisdiction of the Supreme Court should be continued as at present (then) and the Supreme Court should have power to interpret the provisions of the Constitution. The Commissioner further agreed that any further appellate or revisional jurisdiction of the Supreme Court should be a matter for Parliament to decide by way of an Act of Parliament conferring the authority for the making of the necessary rules of court;

(f) In the Reid Commission Report, the Commission recognized that *"as the law now stands"* the jurisdiction of all courts was within the legislative powers of the Federation; and subject to the express terms of the Federation Agreement which provided for a Supreme Court consisting of a High Court and a Court of Appeal, **the powers of the Supreme Court were determined by federal law**. The Reid Commission did not see it necessary to propose any considerable changes in the arrangement. It recommended the continuance of the present (then) Supreme Court which retained the same powers and procedure. That was reflected in Articles 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the draft Constitution;

(g) The substantially same clauses agreed in the draft Constitution were translated into the Constitutional Proposals for the Federation of Malaya. For the first time, Article 121 made mention of the vesting of judicial power of the Federation as being reposed in a Supreme Court and such inferior courts "**as may be provided by federal law**";

(h) Article 121 proposed in the White Paper was officially adopted in the Constitution of the Federation of Malaya;

(i) Following the formation of Malaysia, the Malaysia Act (No. 26 of 1963) amended Article 121 of the *1957* Federal Constitution to establish three High Courts (paragraph [1] of the Inter-Governmental Report). According to the Report of the Inter-Governmental Committee 1962 ("the IGC Report"), each of the High Courts should have unlimited original jurisdiction and such appellate and revisional jurisdiction "**as may be provided by federal law**".

(j) The jurisdiction of the Supreme Court was narrowly confined to specific matters enumerated therein. Crucially, the IGC Report specifically reserved that provisions in the Federal Constitution establishing the High Court of the Borneo States, the appointment and removal of judges, and for the court's jurisdiction may not be repealed or amended without the concurrence of the governments of the Borneo States. The various recommendations pertaining to the judiciary in the IGC Report were implemented by sections 13 and 14 of the Malaysia Act 1963, which among others, vested the judicial power of the Federation *"in the three High Courts of co-ordinate jurisdiction and status"*.

[98]It is thus clear that based on the historical context of "judicial power", *viz.* Article 121 set out above, it can be surmised as follows:

98.1 First, it was the unmistakable intention of the Reid Commission that the jurisdiction, powers and procedures of the

Supreme Court then obtaining should be continued in independent Malaya post-Merdeka. The “basic structure” inherent in the judicial set- up then was that **jurisdiction and powers conferred unto a court were matters purely within the legislative powers of the Federation**.

The scope and extent of such jurisdiction and powers of the courts, with the exception of the Supreme Court whose jurisdiction was expressly conferred by the principal instrument, were determined by federal law. This is evident in Clause 14(1) and (3), and Clause 15 of the Malayan Union Order in Council 1946. Identical arrangement was adopted and followed in Clause 77(1), (2) and (5) of the Federation of Malaya Agreement 1948. This distinctive feature was consistently adopted and manifested in Articles 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the draft Constitution.

98.2 Second, *the conferral of court’s jurisdiction and powers by federal law is so entrenched in our constitutional history*, so much so that it was accepted as an unquestionable fact by the Reid Commission. Acceptance of this fact was fortified by the insertion of Clause 17 “Courts and Jurisdiction” in the division of various powers between the Federal and State governments during the drafting stage (the 41st Meeting of the Reid Commission on 5.10.1956).

98.3 Third, the Reid Commission did not consider this division of powers to be constitutionally offensive or contrary to the doctrine of separation of powers. In fact, the potential discordance between this arrangement and the doctrine of separation of powers was confronted during the drafting process. It was originally proposed by Sir Ivor Jennings for the tentative draft provisions on “Fundamental Liberties”.

Chief to those proposed tentative provisions which are relevant for the present purpose were Article 1 “Rule of Law”, Article 2 “Enforcement of the Rule of Law” and Article 3 “Liberties of the Person”. In the “Comments on the Draft”, Sir Ivor Jennings explained that the provision for enforcement by way of judicial review was meant to be extended to the whole Constitution and not merely to the Chapter on Fundamental Liberties.

These tentative provisions were discussed by the Reid Commission on 10.10.1956. Notably, the Commission recognized the principle of “non-justiciability” and expressed their view that matters which were not enforceable in court should not be included. It was also rather clear on the part of the Reid Commission that preventive detention and Emergency provisions should be treated narrowly from the general remedies proposed in Articles 2 and 3 for the enforcement of liberty of person.

The tentative provisions were drafted as “Second Draft”. Some major changes were introduced in the Second Draft: Article 2(1)(b)(iii), 2(2), and Article 3(5)(b). The combined effect of these changes was that remedies for enforcement of rights were to be generally prescribed by federal law, and that those remedies may be tightened or cut back in special circumstances.

The redrafted Article 2 was criticised at the Constitutional Commission Working Party stage. In the minutes of the Working Party, question was raised on the potential invalidation of an otherwise valid statutory ouster clause by Article 2 in the seemingly absolute terms it was then drafted. Constitutional experts in London were consulted on this issue. Ultimately, the Reid Commission removed the entire Article 2 and explained in the White Paper as follows:

> “The Article proposed by the Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impractical to provide within the limits of the Constitution for all possible contingencies. **It is considered that sufficient remedies can best be provided by the ordinary law.”**

(**emphasis added**)

[99]The net effect of omitting the entire draft Article 2 on enforcement of rights is obvious, that there is no “guaranteed” “constitutional right” to a perceived “unhindered access” to a court of law seeking for “full remedy”. **In other words**, **the type and extent of remedy available is a matter for the legislature to decide**.

[100]The Reid Commission quite evidently did not consider the issue as having any adverse effect on judicial power. Instead, by deferring their resolution to “ordinary law”, it shows that the real issue is rather the enforcement aspect, i.e. limitation on available remedy to an aggrieved party. This is the context in which the limitation on the court’s power of review under section 59A of the *Immigration Act* must be understood.

[101]In the result, **federal law may prescribe what the legislature considers as "sufficient remedy" to meet the demand of the circumstances**. The very act of prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power.

[102]Given the foregoing, I agree with the learned Senior Federal Counsel that in summary what it comes to is this:

(i) Ouster clauses are not *per se* constitutionally invalid. Properly understood, what is sought to be ousted is the availability of remedy for enforcement of rights, not the exercise of judicial power. Judicial power remains and will always remain with the judiciary unless and until Article 121(1) of the Federal Constitution is amended or repealed. In any case, it is inconceivable to think that in a democratic setting judicial power is reposed in any institution other than the judiciary;

(ii) Entrenched practice of the court's jurisdiction and powers prescribed by federal law does not violate the doctrine of separation of powers;

(iii) Limiting the scope and extent on available remedies for enforcement of rights by federal law does not impinge on judicial power.

[103]It is clear that based on the drafting history of the Federal Constitution:

(i) in as much as doctrines such as separation of powers, independence of the judiciary, rule of law, parliamentary democracy and constitutional monarchy formed part of the basic structure of the Malaya Constitution of 1957, one cannot ignore the fact that conferral of court's jurisdiction and powers by federal law is also a cornerstone of the Federal Constitution. In other words, it is also its basic structure;

(ii) the historical antecedent underlying the provision on judicial power in Article 121 is not seriously at variance with the reasoning pronounced by this court in ***Semenyih Jaya***. In any event, there is, on the facts of the present case, no removal of judicial power or conferral of judicial power to a non-judicial branch (as in ***Semenyih Jaya*** and ***JRI Resources***). In issue is rather the scope for enforcement of fundamental rights, the remedy which, according to the Reid Commission, should be governed by *"ordinary law"*.

Amendments to the Federal Constitution

[104]Historically, the "basic structure" (to use the term in the sense it was used in ***Sivarasa Rasiah***, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***) of the Federal Constitution had undergone the process of amendment more than once before. It may be argued that the Malaysia Act (No. 26 of 1963) which amended Article 121 of the *1957* Federal Constitution to establish and vest judicial power in three High Courts (Malaya, Borneo States and Singapore) is such an amendment when it altered the structure of the Courts under the 1957 Federal Constitution in quite a significant way. Therefore, amendments to the Federal Constitution is not something that has never been done before, which was also the case with India before the advent of ***Kesavananda Bharati*** and the cases that followed it.

[105]In much the same way as the case of a revolution, the Malaysia Act of 1963 and later Act 59/1966 passed after Singapore ceased to be part of Malaysia and where the present two High Courts were renamed, was without a doubt a radical change so fundamental and material in nature in the constitutional order of 1957 that it brought about a new and valid legal order not provided for or contemplated in the old order of the 1957 Constitution (*Makenete v Lekhanya* *[1993] 3 LRC 13*; *Mokosoto v King* *[1989] LRC (Const) 24*).

[106]If one were to accept as an unquestionable political fact that the Malaysia Act of 1963 and the constitutional amendment made to Article 121 must remain constitutionally valid at all times, it necessarily presupposes that Parliament may, by law or constitutional amendment, modify a "basic structure" of the Federal Constitution.

[107]Our own experience with the Malaysia Act of 1963 is the most defining testimony of the breadth of legislative power, showing that being a basic structure of the Federal Constitution *per se* is not inviolable. The legislature may still by law or constitutional amendment alter a "basic structure" of the Federal Constitution.

[108]If that were not to be the case, then *in arguendo* there is a compelling reason for this court to strike down the amended Article 121 brought about by the Malaysia Act 1963, in that the creation of the two High Courts and the vesting of judicial power in them is *ultra vires* the basic structure of the Federal Constitution, which vested judicial power of the Federation in the Supreme Court.

[109]In the converse, if the 1963 amendment which brought about the new Borneo High Court and the vesting of

judicial power in it were to be sustained, then it stands to reason that the subsequent 1988 amendment on Article 121 must likewise be sustained on the same reason that the legislature is not inhibited from altering a "basic structure" of the Federal Constitution.

Article 121(1) of the Federal Constitution

[110]Article 121(1) of the Federal Constitution needs further deliberation. To recapitulate, the appellant's argument is that section 59A of the *Immigration Act* is unconstitutional because it violates the doctrine of separation of powers, which is a "basic structure" of the Federal Constitution. This begs the questions:

(1) Does Article 121(1) of the Federal Constitution have any constitutional force of law?

(2) If the answer is in the affirmative, is section 59A of the *Immigration Act* void under Article 4(1) because it is inconsistent with Article 121(1)?

[111]For context and for ease of reference, Article 121(1) of the Federal Constitution is reproduced again below:

"

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) *(Repealed),*

and such inferior courts as may be provided by federal law **and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law**.".

(**emphasis added**)

[112]The words in bold set out the jurisdictional parameters of the two High Courts and inferior courts of Malaya and Sabah and Sarawak. The point to note here is that the jurisdiction and powers of the courts, as determined by Article 121(1) of the Federal Constitution are *"as may be conferred by or under federal law."* The expression used in the old Article 121(1) prior to its amendment in 1988 was *"**as may be provided by federal law**"*, which essentially means the same thing. Federal law means legislation passed by the federal legislature, i.e. Parliament. In our context, it refers to section 59A of the *Immigration Act* which confers on the two High Courts their jurisdiction and powers over immigration matters.

[113]Article 121(1) of the Federal Constitution is not free from controversy and has been the subject of sustained discussions *pro* and *contra* but the reality is that it is there in the Federal Constitution and has not been amended or repealed by Parliament; neither has it been struck down by any court of law of competent jurisdiction as being unconstitutional, probably because this court in the trinity of cases was not called upon to do so.

[114]But it could also be due to the view taken by ***Semenyih Jaya*** that being a "basic structure" of the Federal Constitution, Article 121(1) which houses the doctrine of separation of powers cannot be removed or repealed even by constitutional amendment. Ironically however, ***Semenyih Jaya*** disapproved of Article 121(1) and this is expressed in the following words of Zainun Ali FCJ who wrote the judgment of the court:

"[74] Thus, it is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) The doctrine of separation of powers; and

(ii) The independence of the Judiciary.

> **[75]With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art. 4(1)**."
>
> (**emphasis added**)

[115]The learned judge was of course referring to the 1988 amendment of Article 121(1) of the Federal Constitution which according to Her Ladyship had "removed" judicial power from the inherent jurisdiction of the judiciary. It was a tacit approval of the sentiment expressed by Richard Malanjum CJ (Sabah & Sarawak) (later Chief Justice) in his dissenting judgment on Article 121(1) of the Federal Constitution in the earlier decision of this court in *PP v Kok Wah Kuan* [2007] 6 CLJ 341; ; *[2008] 1 MLJ 1* where the learned CJ (Sabah & Sarawak) said:

> "At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> **[38]**The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law."

[116]What the learned CJ (Sabah & Sarawak) was saying is that Article 121(1) is incompatible with the doctrine of separation of powers and independence of the judiciary, which are "basic features" of the Federal Constitution, by giving Parliament the power to pass laws that make the courts "servile agents of a federal Act of Parliament".

[117]The sentiment is understandable and probably shared by many, but in all humility and with the greatest of respect, unless and until Article 121(1) of the Federal Constitution is amended or repealed by Parliament or struck down by a court of law of competent jurisdiction as being unconstitutional, the full force of the constitutional provision must be given effect to. The Federal Constitution is the supreme law of the land, which every single judge of the superior courts has solemnly sworn to uphold upon taking his or her oath of judicial office.

[118]The view that the majority took in ***Kok Wah Kuan*** was that the extent of judicial power depends on what federal law provides but which ***Semenyih Jaya*** disagreed with by saying that the majority had given a "narrow interpretation" of Article 121(1) of the Federal Constitution. It was suggested that the Federal Constitution has to be interpreted organically and with less rigidity, citing *Dato' Menteri Othman Baginda & Anor v Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; ; [1984] (Rep) 98; ; [1981] MLJ 29.

[119]It is unacceptable for the appellant to treat Article 121(1), which contains the term *"**the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"***, as if it is not there in the Federal Constitution on the ground that it impinges on the doctrine of separation of powers but at the same time to argue that it is a basic structure of the Federal Constitution which cannot be removed or abrogated even by constitutional amendment. That is a gross contradiction in terms.

[120]The appellant does not deny that section 59A of the *Immigration Act* was enacted pursuant to Article 121(1) of the Federal Constitution. What she rejects is the notion that Article 121(1) confers on Parliament the power to enact laws that circumscribe judicial power, which according to her violates the doctrine of separation of powers, which in turn violates the doctrine of basic structure as separation of powers is a basic structure of the Federal Constitution. However, she stops short of saying that Article 121(1) is unconstitutional, in particular that part of the Article which provides that "*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.*"

[121]In truth, therefore, the real target of the appellant's attack, using the doctrine of basic structure as a weapon, is Article 121(1) of the Federal Constitution. section 59A of the *Immigration Act* is merely a decoy. It is a collateral attack on Article 121(1) and a clever way of impugning the constitutional provision without actually asking for it to be

struck down as unconstitutional: see the recent decision of this court in *Ann Joo Steel Berhad v Pengarah Tanah & Galian Negeri Pulau Pinang & Anor* [2019] MLJU 843 on collateral attacks.

[122]The position that the appellant takes is wholly untenable. Being a provision that governs judicial power of the Federation, Article 121(1) of the Federal Constitution cannot be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law can override Article 121(1) of the supreme law, which stipulates in very clear language that the jurisdiction and powers of the High Courts and inferior courts are "*as may be conferred by or under federal law.*" The question of this express term of the supreme law being in violation of the doctrine of separation of powers does not arise.

[123]It is now settled that English common law concepts are to be applied only in so far as the circumstances permit and save where no provision has been made by statute law. This was made clear by Hashim Yeop Sani CJ (Malaya) in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 CLJ; ; [1990] 1 CLJ (Rep) 57; ; [1990] 1 MLJ 356 when he spoke of section 3(1) of the Civil Law Act 1956. This is what the learned judge said:

> "Section 3 of the Civil Law Act 1956 directs the courts to **apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law**. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ Rep 63; ; [1988] 2 MLJ 12."

(**emphasis added**)

[124]It is therefore for our courts now to develop our own common law but it must not be done at the expense of the Federal Constitution. The Interpretation Acts 1948 and 1967 by sections 3 and 66 define "written law" to include the Federal Constitution. The two sections are reproduced below:

> Section 3
>
> "written law" means –
>
> (a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;
>
> (b) Acts of Parliament and subsidiary legislation made thereunder;
>
> (c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and
>
> (d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;"
>
> Section 66
>
> "written law" means all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution;"

[125]The common law of England is excluded from the above definition of "written law". Thus, as far as judicial power of the Federation is concerned, Article 121(1) of the Federal Constitution is the highest form of written law in the land. Indeed, by virtue of Article 4(1), any post- Merdeka law that is inconsistent with the Federal Constitution is void to the extent of the inconsistency.

[126]*A fortiori*, if even a written law duly passed by Parliament is void under Article 4(1) where it is inconsistent with the Federal Constitution, it stands to reason that no common law doctrine can prevail over any provision of the Federal Constitution, and this includes Article 121(1). In any case, the doctrine of separation of powers, being a doctrine of universal application in any democracy, is already imbibed in Article 121(1) of the Federal Constitution, subject to the terms of the Article itself.

[127]The following observations by Azahar Mohamed CJ (Malaya) in ***Letitia Bosman*** at paragraph 48-50 of the

judgment although made in the context of Parliament's power to prescribe criminal punishment are pertinent to the point:

> **[48]** This leads me to the following question. Which branch of the Government then has the power to determine the measure of punishment or power to prescribe punishment? That question must be examined in the context of the FC. It bears noting in this regard that as lucidly stated by Joseph M Fernando in *Federal Constitutions, A Comparative Study of Malaysia and the United States*, at p. vii, "Constitutions are the basic fundamental laws of most modern nations and the highest source of legal authority. Constitutions provide for a pattern of Government and define the distribution of powers between the various organs of Government and the limits of the Government over the governed".
>
> **[49]** Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative branch of the Government to make laws with respect to any of the matters enumerated in cl. (1) art. 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, item 4 of the Federal List provides for "civil and criminal law", including in para. (h) "creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law".
>
> **[50]** An important point to note is that the words "with respect to" in art. 74 must be interpreted with extensive amplitude. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in widest amplitude. (See: *Raja Jagannath Baksh Singh v The State of Uttar Pradesh* [1962] AIR 1563, *The State Of Rajasthan v Shri G Chawla And Dr Pohumal* [1959] AIR 544 and *Elel Hotels And Investments Ltd v Union Of India 1990 AIR 1664). I have also discussed this area of the law in Mohd Khairul Azam Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 9 CLJ 309; [2019 1 LNS 1695; [2020] 1 MLJ 398. As observed by the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Other Appeals* [1997] 4 CLJ 253; [1997] 3 MLJ 23 at p. 273 (CLJ); p.37 (MLJ):
>
> > It is also well settled that the phrase 'with respect to' appearing in art. 74(1) and (2) of the Federal Constitution - the provision conferring legislative power upon the Federal and State Governments respectively- is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing in s. 51 of the Australian Constitution which confers Federal legislative authority:
> >
> > > A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary as wide as that of the Imperial Parliament itself: *R v Burah* *(1878) 3 App Cas 889*; *Hodge v. R* *(1883) 9 App Cas 117*. But the power is plenary only with respect to the specified subject."

[128]For the record, ***Letitia Bosman*** is a recent decision of this court that was decided by a majority of 8-1. With the greatest of respect to the learned judge in ***Semenyih Jaya***, it was incorrect for Her Ladyship to imply that Article 121(1) is "manifestly inconsistent" with Article 4(1) of the Federal Constitution. All Articles of the Federal Constitution are of equal standing as between themselves and are not subordinate to any other. As Raja Azlan Shah FJ explained in ***Loh Kooi Choon*** when he spoke of the effect of amendment to the Federal Constitution:

> "When that is done it becomes an integral part of the Constitution, **it is the supreme law, and accordingly it cannot be said to be at variance with itself**. A passage from the Privy Council judgment in Hinds v The Queen, supra, is of some assistance (page 392):
>
> > That the Parliament of Jamaica has power to create a court.... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first

amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution…"

(**emphasis added**)

[129]A distinction must be drawn between ordinary laws enacted in the ordinary way and Acts of Parliament that affect the Federal Constitution. It is federal law of the former category that is meant by "law" in Article 4(1): see *Mohamed Habibullah bin Mahmood v Faridah Bte Dato Talib* [1993] 1 CLJ 264; ; *[1992] 2 MLJ 793* at p. 813 where the Supreme Court held:

"It is true that the Constitution is the supreme law of the land. But 'law' in art 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang **Chin** Hock v PP* *[1980] 1 MLJ 70* at p 72:

In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. **It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution**."

(**emphasis added**)

The Basic Structure Doctrine

[130]I must start by saying that it is not so much the existence of "basic structures" in the Federal Constitution that gives rise to controversy. There is nothing wrong to describe the fundamental features of the Federal Constitution as its "basic structures". What poses a problem in the context of a written constitution is the application of the so-called "doctrine" of basic structure. Under the doctrine, any law passed by Parliament that "offends" the basic structure of the Federal Constitution is void.

[131]The difficulty with the doctrine is that "basic structure" is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

[132]The appellant's argument is that in the light of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***, section 59A of the *Immigration Act* has "no leg to stand on". What the appellant is saying in effect is that section 59A of the *Immigration Act* is void because the leg on which it stands, i.e. Article 121(1) of the Federal Constitution violates the doctrine of separation of powers by empowering Parliament to pass laws that limit judicial power, and by violating the doctrine of separation of powers, it violates the doctrine of basic structure. There is no denying that by invoking the doctrine of basic structure, the appellant is questioning not only Parliament's power to enact section 59A of the *Immigration Act* but also the constitutional validity of Article 121(1) itself. It is, in a manner of speaking, an attempt to kill two birds with one stone.

[133]The fact that both ***Semenyih Jaya*** and ***Indira Gandhi*** applied the basic structure doctrine is patently clear and is borne out by the following paragraphs in the judgment of the learned judge in ***Indira Gandhi***, who coincidentally was the same learned judge who wrote the judgment in the earlier case of ***Semenyih Jaya***:

Paragraph 22

"*Basic Structure Of The Constitution*

[22]Before dealing with the heart of the matter in these appeals, a clear understanding of the foundation, content and effect of the basic structure of the Constitution is in order."

Paragraph 33-34

"*Significance Of Basic Structure*

[33] The basic structure of a constitution is 'intrinsic to, and arises from, the very nature of a constitution.' (see Calvin Liang and Sarah Shi, '*The Constitution of Our Constitution, A Vindication of the* ***Basic Structure Doctrine***' Singapore Law Gazette (August 2014) 12). The fundamental underlying principles and the role of the Judiciary as outlined above form part of the basic structure of the constitution, being "something fundamental and essential to the political system that is established thereunder" (per Sundaresh Menon CJ in *Yong Vui Kong v Public Prosecutor* [2015] SGCA 11 [at [71]. It is well settled that features of the basic structure cannot be abrogated or removed by a constitutional amendment (see ***Kesavananda Bharati v State of Kerala*** AIR 1973 SC 1461).

[34] Further, as a feature intrinsic to and inherent in the constitutional order itself, **these principles are accorded supreme status as against any inconsistent laws**, in a political system based on constitutional supremacy. Article 4(1) of the Federal Constitution provides that the Constitution is 'the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'"

Paragraph 36

"[36] The Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; ; *[2017] 3 MLJ 561* has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art. 121(1). ***Judicial independence and the separation of powers are recognized as features in the basic structure of the Constitution***."

Paragraph 45-47

"*Significance Of Judicial Review As Part Of The Basic Structure*

[45]The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.

[46] In *Liyanage (supra)*, the issue before the Privy Council was the validity of an Act of Parliament which widened the class of offences triable by judges nominated by the Minister of Justice and removed the judges' discretion in terms of sentencing. The Privy Council held that the Act contravened the Constitution of Ceylon in usurping the judicial power of the judicature. Lord Pearce elaborated as follows (at pp. 291-292):

> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. *And thus judicial power may be eroded.*
>
> *Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.*

(emphasis added)

[47] Secondly, judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence. 'Parliament cannot just declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive, requiring an examination of the composition and powers of the new court' (see *Semenyih Jaya (supra)* and also Thio Li-

> Ann, *A Treatise on Singapore Constitutional Law* (2012: Singapore, Academy Publishing) at 10.054)."

(emphasis added)

[134]In the last sentence of paragraph 33 above, the learned judge made specific reference to ***Kesavananda Bharati***, the origin of the basic structure doctrine, in taking the view that "features" of the basic structure of the Federal Constitution cannot be abrogated or removed even by constitutional amendment. ***Alma Nudo Atenza*** took the same approach as can be seen from the following observation by Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court at paragraph 73:

> "[73] In fact courts can prevent Parliament from destroying the 'basic structure' of the FC (see ***Sivarasa Rasiah*** at para 20). And while the FC does not specifically explicate the doctrine of basic structure, **what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation**."

(**emphasis added**)

[135]By citing ***Sivarasa Rasiah*** it is obvious that the learned CJ (Sabah & Sarawak) was also referring to the doctrine of basic structure propounded in ***Kesavananda Bharati***. Undoubtedly, the "basic structure" doctrine featured prominently in ***Semenyih Jaya*** and ***Indira Gandhi*** and weighed heavily in the mind of the learned judge who wrote both judgments. As mentioned earlier in this judgment, ***Semenyih Jaya*** and ***Indira Gandhi*** could be misunderstood to mean that Article 121(1) of the Federal Constitution has removed judicial power from the courts and this violates the basic structure doctrine by violating the doctrine of separation of powers.

[136]Going by the appellant's submissions both written and oral, it is this alleged breach of the basic structure doctrine that forms the structural base of her argument that section 59A of the *Immigration Act* is void and ought to be struck down as being unconstitutional.

[137]Given the importance that ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** placed on the basic structure doctrine and given the appellant's heavy reliance on these three cases, it is incumbent on me to touch briefly on the doctrine – what is it all about, where does it come from and how it has shaped the direction of our constitutional jurisprudence.

[138]Indeed, leave Question 3 specifically asks this court to determine if section 59A of the *Immigration Act* is valid and constitutional "in the light" of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** and this is emphasized in the written submissions of learned counsel for the appellant where he contended that section 59A of the *Immigration Act* has no leg to stand on "in the light" of these three cases.

[139]Thus, what the appellant wants is for this court to strike down section 59A of the *Immigration Act* as unconstitutional on the ground that it violates the basic structure doctrine by violating the doctrine of separation of powers, not so much because it is inconsistent with the express terms of Article 121(1) of the Federal Constitution which provides that the jurisdiction and powers of the courts are *"as may be conferred by or under federal law*". The plain truth is, section 59A of the *Immigration Act* is not inconsistent with Article 121(1) and this should be obvious to the appellant.

[140]The basic structure doctrine is an Indian concept that was developed by the Supreme Court of India in *Kesavananda Bharati v State of Kerala AIR 1973 1461;* (1973) 4 SCC 225. The doctrine established the principle that the constitution can be amended but not its "basic structure" as Parliament's power to amend is not a power to destroy.

[141]The mischief that the doctrine aims to strike down is the abuse by the Indian Parliament of its power to amend the Indian Constitution by destroying its basic features. The doctrine therefore works on the footing that Parliament amends the constitution and the amendment destroys its "basic structure". It follows that where no amendment is made to the constitution, the doctrine has no application and is irrelevant.

[142]The doctrine made its first landing on our shores in *Loh Kooi Choon v The Government of Malaysia* [1975] 1 LNS 90; ; *[1977] 2 MLJ 187* [***Loh Kooi Choon***]. It was immediately rejected by the former Federal Court. This is what Raja Azlan Shah FJ (as he then was) delivering the judgment of the court (the other judgment being delivered by Wan Suleiman FJ) said:

> "Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it **is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions" – see** *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law …
>
> It is therefore plain that the framers of our Constitution prudently realized that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later …
>
> **There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment**. **A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally chosen by the Constitution for the exercise of the amending power**."

(**emphasis added**)

[143]It was a rejection by the former Federal Court of the idea that Parliament has no power to amend the Federal Constitution. ***Loh Kooi Choon*** was followed and reaffirmed in two other decisions of this court in *Phang* ***Chin*** *Hock v PP* [1979] 1 LNS 67; ; [1980] 1 MLJ 70 and *Mark Koding v PP* [1982] 1 LNS 15.

[144]The rejection by ***Loh Kooi Choon*** of the basic structure doctrine stood the test of time for some 33 years before it was overruled by this court through the judgment of Gopal Sri Ram FCJ in ***Sivarasa Rasiah*** in 2010, which then adopted the doctrine as part of our law. In overruling ***Loh Kooi Choon***, one of the reasons given by Gopal Sri Ram FCJ was that Raja Azlan Shah FJ committed an error of law in relying on the pronouncement by Lord Macnagthen in the *Vacher & Sons Ltd. v London Society of Compositors* [1913] AC 107, 118 which was made in the context of a country whose Parliament is supreme, unlike Malaysia where the Constitution is supreme. I shall revert to this issue later in this judgment.

Effect of *Sivarasa Rasiah*

[145]The adoption of the basic structure doctrine by this court through ***Sivarasa Rasiah*** marked the beginning of a sharp turn away from the position held by the former Federal Court in ***Loh Kooi Choon***. It changed our constitutional law in a fundamental way. The most far-reaching implication of the decision is that Parliament has no power by any means whatsoever to amend or to remove any "basic structure" of the Federal Constitution, not even by recourse to Article 159, hence ***Semenyih Jaya's*** pronouncement that no "basic structure" of the Federal Constitution can be abrogated or removed even by constitutional amendment. This means all "basic structures" of the Federal Constitution, whatever they are and without exception, must remain untouched by Parliament forever and in perpetuity, for better or for worse.

[146]It bears emphasis that what Article 121(1) of the Federal Constitution provides as it presently stands is that the jurisdiction and powers of the courts are *"as may be conferred by or under federal law"*. Applying the basic structure doctrine as advocated by the appellant, it must therefore follow that the vesting of power in Parliament by Article 121(1) to legislate on the parameters of judicial power must also be treated as a "basic structure" of the Federal Constitution, and being a basic structure, it must remain forever in the Federal Constitution and cannot be removed even by recourse to Article 159. It cannot be "amended" or "removed" by indirect means. It must remain a permanent feature of the Federal Constitution.

[147]In dealing with fundamental rights guaranteed by Part II of the Federal Constitution, this is what Gopal Sri Ram FCJ said in ***Sivarasa Rasiah***:

> "Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, **any statute (including one amending the Constitution)** that

offends the basic structure may be struck down as unconstitutional."

(**emphasis added**)

[148]This was a major departure from the basic structure doctrine itself which works on the footing that an amendment is made to the constitution and the amendment destroys its basic structure. The doctrine has no application where no amendment is made to the constitution, which was the case with ***Sivarasa Rasiah***. Obviously, the learned judge was not talking of a situation where an amendment has been made to the Federal Constitution, although he spoke of the need for prior sanction by the constitution itself. The effect of the decree by the learned judge is that any ordinary law passed by Parliament that "offends" the basic structure doctrine may be struck down as unconstitutional.

[149]This conflicts with Article 4(1) of the Federal Constitution which provides that post-Merdeka laws are void only if they are inconsistent with the Federal Constitution. In the context of the present case, section 59A of the *Immigration Act* can only be struck down as unconstitutional if it is inconsistent with the following term of Article 121(1) of the Federal Constitution - *"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.*"

[150]It is a term that defines the jurisdiction and powers of the courts under section 59A of the *Immigration Act*. The appellant has not shown how section 59A of the *Immigration Act* is inconsistent with this express and explicit term of Article 121(1) other than to say that it violates the doctrine of separation of powers, which she says is a "basic structure" of the Federal Constitution.

[151]The effect of ***Sivarasa Rasiah*** is that although Article 121(1) of the Federal Constitution, which vests judicial power in the courts, remains intact and is not affected by the enactment of section 59A of the *Immigration Act*, the section may still be declared void simply for offending a doctrine of law that "destroys" the basic structure of the Federal Constitution.

[152]Gopal Sri Ram FCJ made no mention of *Maneka Gandhi v Union of India* 1978 AIR 597 [***Maneka Gandhi***] in ***Sivarasa Rasiah*** but it is clear that His Lordship's view coincides with the decision in that case. In that case, the Indian Supreme Court extended the doctrine's importance as superior to any parliamentary legislation. It held that **no Act of Parliament can be considered law if it "violates" the basic structure of the Indian Constitution**. However, the Supreme Court fell short of saying that the doctrine is superior to the Indian Constitution.

[153]In the context of the present appeal, the question that needs a firm answer from this court is this - can a doctrine of law prevail over a written term of the Federal Constitution? Put another way, is a doctrine of law supreme or is it the Federal Constitution that is supreme?

[154]Given the change in character of the basic structure doctrine so soon after its inception in ***Kesavananda Bharati***, the application of the doctrine in Malaysia has not always been free from difficulty, largely due to the fact that there is no explicit exposition of what constitutes "basic structure" of the Federal Constitution.

[155]This is not surprising because even among the majority in ***Kesavananda Bharati*** (the case was decided by a majority of 7-6) the top judges of the Indian apex court had differing opinion on what "basic structure" of the Indian Constitution comprised and this is compounded by the fact that the claim of any particular feature of the constitution to be "basic" is to be determined by the court on a case to case basis: see *Indira Nehru Gandhi v Raj Narain AIR* 1975 SC 2299; *Minerva Mills Ltd & Ors v Union of India & Ors AIR* 1980 SC 1789.

[156]Thus, at the Court of Appeal stage of ***Sugumar Balakrishnan***, Gopal Sri Ram JCA (as he then was) declared judicial review as a "basic and essential feature" of the Federal Constitution. ***Semenyih Jaya*** recognised judicial independence and separation of powers as its basic structures. ***Indira Gandhi*** added other features, namely the rule of law, fundamental liberties and protection of the minority. In the case before us, learned counsel for the appellant suggested freedom of speech, personal liberty, right to travel and natural justice as forming part of the basic structure of the Federal Constitution. More will no doubt be added to the list. The proposition if accepted means that the stable doors are now wide open and the horses are ready to bolt out.

[157]Whatever may be added as forming part of the "basic structure" of the Federal Constitution, there can be no argument that post-Merdeka laws are only to be declared void under Article 4(1) if they are inconsistent with the Federal Constitution and for no other reason. In the present case, the question for the purposes of Article 4(1) is whether section 59A of the *Immigration Act* is inconsistent with Article 121(1) and not whether it is inconsistent with

any doctrine of law no matter how formidable the doctrine of law is. In any event a doctrine of law cannot prevail over the Federal Constitution.

[158]By relying on ***Sivarasa Rasiah***, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***, the appellant is suggesting that being in violation of the doctrine of separation of powers, Article 121(1) of the Federal Constitution lacks the force of law to give legitimacy to section 59A of the *Immigration Act*.

[159]As if the space occupied by Article 121(1) of the Federal Constitution is left *in vacuo*, i.e. saying nothing on the power of Parliament to legislate on the jurisdiction and powers of the courts, the appellant is now reading into the Article a doctrine of law that dilutes to the point of dissipation the Article's constitutional mandate that the High Courts and inferior courts shall have such jurisdiction and powers *"as may be conferred by or under federal law"*. For all practical purposes, it is the doctrine of separation of powers that now governs the jurisdiction and powers of the courts, in place of Article 121(1) of the Federal Constitution. Thus, any post-Merdeka law that circumscribes or "removes" judicial power from the courts in breach of the doctrine of separation of powers will be void and liable to be struck down as unconstitutional even where it is not inconsistent with Article 121(1).

[160]What the proposition amounts to is to elevate the status of the doctrine of separation of powers above that of the Federal Constitution. This is a dangerous proposition as it practically transforms the doctrine of separation of powers into the supreme law of the land in place of the Federal Constitution, effectively putting an end to constitutional supremacy that this country subscribes to as enshrined in Article 4(1) of the Federal Constitution which declares that "**This Constitution shall be the supreme law of the Federation**".

[161]The appellant's contention is probably inspired by the following statement by Richard Malanjum CJ (Sabah & Sarawak) in his dissenting judgment on Article 121(1) of the Federal Constitution in ***Kok Wah Kuan*** which Zainun Ali FCJ quoted with approval in ***Semenyih Jaya***:

> "At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws.
>
> …
>
> [38] **The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law**."

(**emphasis added**)

[162]The first paragraph above can be misunderstood as a repudiation of Article 121(1) of the Federal Constitution while the words in bold in the second paragraph can be misunderstood as recognising the doctrine of separation of powers as superior to the doctrine of constitutional supremacy.

[163]With all due respect, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** had been misconstrued and misapplied by the appellant. There is absolutely nothing in the judgments to say that Article 121(1) of the Federal Constitution has no force of law to confer on Parliament the power to enact ouster clauses such as section 59A of the *Immigration Act*. On the contrary, ***Semenyih Jaya*** in fact recognised the power of the legislature to enact laws limiting appeals by declaring the finality of a High Court order because to hold otherwise would be contrary to subsection 68(1)(d) of the Courts of Judicature Act 1964.

[164]*Semenyih Jaya* is authority for the proposition that a non-judicial body cannot bind the superior courts, ***Indira Gandhi*** for the proposition that Syariah courts are not of equal status to the superior civil courts while ***Alma Nudo Atenza*** is authority on the constitutionality of section 37A of the Dangerous Drugs Act 1952. They are not, first of all, cases on the validity of section 59A of the *Immigration Act*, an ouster clause that draws its legitimacy and force of law from Article 121(1) of the Federal Constitution and which this court in ***Sugumar Balakrishnan*** had held to be valid law.

[165]Further, even if they are ouster clauses, the impugned statutory provisions in the three cases are not ouster clauses in the mould of section 59A of the *Immigration Act*. Thus, the observations in those cases where they touch

on the constitutional point raised in the present appeal are at best *obiter dicta* and should not have been given too much emphasis on.

[166]To reiterate, the question to ask in the context of the present case is not whether section 59A of the *Immigration Act* is inconsistent with or is in violation of the doctrine of separation of powers or has destroyed the basic structure of the Federal Constitution but whether it is inconsistent with Article 121(1) of the Federal Constitution. That is the test to determine if the post-Merdeka law is void.

[167]And ***Semenyih Jaya, Indira Gandhi and Alma Nudo Atenza*** cannot be read, as the appellant seems to be reading them, as deciding that Parliament has no power to amend the Federal Constitution. As Suffian LP said 45 years ago in *Phang **Chin** Hock v PP* [1979] 1 LNS 67; ; *[1980] 1 MLJ 70*:

> "If it is correct that amendments to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words Art. 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite."

[168]Quoting the words of the Privy Council in *Bribery Commissioners v Ranasinghe* *[1965] AC 172* the learned judge went on to say:

> "… a constitution [certainly our constitution] can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions."

[169]Incidentally, Suffian LP's view accords with the view expressed by Lord Bingham in the Privy Council case of *Director of Public Prosecution of Jamaica v Mollison* *[2003] 2 WLR 1160* at 1170 where he said that *"a constitution is not trapped in a time-warp but must evolve over time to reflect the developing needs of society".*

[170]Zainun Ali FCJ in endorsing Gopal Sri Ram FCJ's opinion in ***Sivarasa Rasiah*** said in ***Semenyih Jaya***:

> "[81] Thus, *Sivarasa (supra)* made a frontal attack on *Loh Kooi Choon* (*supra*) where the Federal Court in *Sivarasa* tersely observed that:
>
> > ... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure. *(emphasis added)*"

[171]The statutory provision in ***Semenyih Jaya*** that was held to have violated the basic structure of the Federal Constitution was a section in the Land Acquisition Act 1960 which binds judges of the High Court to the opinion of the assessors in determining the quantum of compensation in land acquisition cases. It was so held because Parliament by enacting that section had consigned judicial power that is reposed in the courts by Article 121(1) of the Federal Constitution to the assessors. In the present case, it is section 59A of the *Immigration Act* that is said to have removed judicial power from the High Courts by limiting its scope.

[172]One of the sternest arguments made out by the appellant against section 59A of the *Immigration Act* is that it undermines the entire jurisprudence on judicial review so assiduously developed by the courts in the entire common law world. It would also mean, according to counsel, that arbitrary executive decisions, no matter how foul they may otherwise be, will be insulated, or immunized from examination by the judiciary, which the facts of the present case provide the clearest example.

[173]It is an attractive argument I must say but one that is not grounded on legal reality. With due respect to Professor Gurdial Singh Nijar, the question of undermining the entire jurisprudence on judicial review does not arise. In as much as the court abhors abuse of power by the executive, it has a higher duty to uphold the Federal Constitution.

[174]The whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people) through section 59A of the *Immigration Act*, a

federal law that derives its legitimacy and force of law from Article 121(1) of the Federal Constitution, which no unwritten rule of law or doctrine of law can override.

[175]In any case, it is incorrect to say that section 59A of the *Immigration Act* confers "absolute and unfettered" power on the decision maker. The provision only limits judicial power by confining it to any question relating to non-compliance with any procedural requirement of the Immigration Act. It is not a wholesale removal of judicial power to render the entire executive action absolutely non-justiciable.

[176]Learned counsel acknowledged that in matters which are clearly within the purview of the administrative authorities, the court cannot usurp the role of the executive, which the court would consider as non- justiciable. Citing the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* *[1985] AC 374* (***CCSU***), counsel gave the following examples of such non-justiciable matters: the grant of pardon, bestowing of honours, matters of high policy such as the conduct of foreign relations (treaty making powers) and matters of national security.

[177]It was argued that in such cases the court will enquire whether the matters are, in reality, the exclusive preserve of the executive consonant with the separation of powers doctrine. In other words, the court looks at the subject matter and determines on this basis whether the matter is justiciable or not and is not dependent on whether there is an ouster clause or not, quoting Lord Scarman in the ***CCSU*** case where the learned judge said:

> "Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

[178]It was pointed out that even in cases involving "high policy", judicial review cannot be excluded and this according to counsel is established by ***Indira Gandhi*** when it cited with approval the Singapore Court of Appeal decision in *Tan Seet Eng v Attorney-General and another matter* [2015] SGCA 59.

[179]Counsel is right, of course, but only where the law in question is contrary to the terms of the Federal Constitution, which is not the case with section 59A of the *Immigration Act* *vis-à-vis* Article 121(1) of the Federal Constitution.

Travel Ban

[180]I have determined that section 59A of the *Immigration Act* is valid and constitutional as it had been validly enacted by Parliament pursuant to the power vested in it by Article 121(1) of the Federal Constitution, which means the decision of the Director General of Immigration to impose the travel ban on the appellant is not subject to judicial review save in the manner prescribed. Only procedural non-compliance is. Therefore, the only question left to be considered is whether there was failure by the respondents to comply with the procedure prescribed by the Immigration Act or the rules made thereunder, if any, when imposing the travel ban.

[181]The appellant's argument, however, goes beyond that and beyond the ambit of Question 1 itself which is: "*Whether section 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government?*"

[182]It is quite clear that Question 1 does not question the discretionary power of the Director General to impose the travel ban under section 3(2) of the Immigration Act. In fact, it acknowledges that the Director General has such discretionary power. What it questions is whether such power is "unfettered", specifically whether a travel ban can be imposed for criticising the government, in this case *"Memburukkan Kerajaan Malaysia"*. At the hearing however, the appellant's argument took a completely different turn. It was submitted that on a plain reading of section 3(2) of the Immigration Act, it does not confer power on the Director General to impose a travel ban or to issue a circular that carries with it the force of law.

[183]In other words, what the appellant is now saying is that not only is the Director General of Immigration bereft of unfettered discretion to impose the travel ban, but that he does not even have the power in the first place to impose the travel ban. Section 3(2) reads:

> "The Director General shall have the **general supervision and direction of all matters relating to immigration throughout Malaysia**."

(**emphasis added**)

[184]The provision is clear and unambiguous. It confers on the Director General a broad power over "all matters relating to immigration". Like section 59A of the *Immigration Act*, the provision is presumed to be constitutionally valid and the burden is on the appellant to prove otherwise. Perhaps the starting point in considering this issue is to remind ourselves of what Marshall CJ said in the American case of *Marbury v Madison* (1803) 1 Cranch 137 in relation to the discretion vested in the executive. This is what the learned CJ said at page 170:

> "The province of the court is solely to decide on the rights of individuals, **not to enquire how the executive, or executive officers, perform duties in which they have a discretion**. Questions, in their nature political or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

(**emphasis added**)

[185]In determining the lawfulness of the Director General's decision to impose the travel ban under section 3(2) of the Immigration Act, it is important to keep in mind that by virtue of section 59 of the same Act, the decision is not subject to a right of hearing. For ease of reference, the section is reproduced again below:

> "59. No person and no member of a class of person shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act."

[186]I have mentioned earlier that this provision has been held to be valid by this court in ***Sugumar Balakrishnan***. I find no reason to depart from the decision. For this court to overrule the decision and to strike down *section 59* of the *Immigration Act* as unconstitutional would mean that even an illegal immigrant could challenge the Director General's decision in court. It is of course his right to do so but this goes to show how untenable the situation can be if *section 59* of the *Immigration Act* were to be struck down as unconstitutional.

[187]The fact that the respondents gave a wrong and invalid reason for imposing the travel ban on the appellant does not in any way alter the fact that in law they have no duty to provide reasons. Thus, even if the Director General was wrong in relying on a departmental circular which does not have any force of law to impose the travel ban, that does not turn his decision into a wrongful act if otherwise the decision was permitted by law, which is not subject to a right of hearing under section 59 and not subject to judicial review under section 59A of the *Immigration Act*.

[188]The appellant however argued that the scope and limits of such power must be circumscribed and not left open-ended. It was submitted that the section cannot be extrapolated to confer wide and untrammelled "substantive powers" that would include imposing travel bans on citizens, adding that by applying the maxim *expressio unious est exclusion alterius* (when one or more things of a class are expressly mentioned, others of the same class are excluded), the power to impose a travel ban or any restriction on the freedom of speech of a citizen by any means (much less through an administrative circular) is excluded from the purview of the Immigration Act.

[189]According to counsel, to suggest otherwise is to confer on the first respondent absolute and unfettered powers to impose a travel ban and this should not be countenanced by the court, citing *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; ; *[1979] 1 MLJ 135* where Raja Azlan Shah CJ (Malaya) (as he then was) delivering the judgment of the former Federal Court said that every legal power must have legal limits, otherwise there is dictatorship.

[190]Reliance was also placed on MP Jain's ***Administrative Law in Malaysia and Singapore*** (4th Edition) where the learned author writes at page 405:

> "The first principle of the rule of law is that an authority exercising discretionary power must act according to law, it should confine itself within the scope of, and not exceed, the powers conferred on it by law; **and if an authority exceeds those limits, then its act is invalid**."

(**emphasis added**)

[191]Comparisons were made between the Immigration Act and other statutes that give express power to the Director General of Immigration to prevent Malaysians from leaving Malaysia. The Passports Act 1966 ("the Passports Act") and the Income Tax Act 1967 ("the Income Tax Act") were cited as examples.

[192]Learned counsel went on to submit that there are "multifarious procedures" which the Minister and/or the Director General of Immigration was obliged to comply with before he imposes a travel ban. However, he did not provide details of the "multifarious procedures" under the Immigration Act or the rules made thereunder relating to a travel ban. The fact is, there is none in the Immigration Act.

[193]As a fall back, counsel relied on section 2 of the Passports Act and section 104 of the Income Tax Act to support his argument that there was procedural non-compliance with the Immigration Act by the respondents. Both sections are reproduced below:

Section 2 of the Passports Act

"(2) Every person leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport.

(3) An immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall answer the questions truthfully.

(4) An immigration officer may make on any passport produced under this section such endorsement as he thinks fit."

Section 104 of the Income Tax Act

(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying -

(a) all tax payable by him (whether or not due or due and payable);

(b) all sums payable by him under subsection 103(1A), (3), (5) or (7) or subsection 107B(3) or (4) subsection 107C(9), (10) or (10A);

(c) all debts payable by him under subsection 107A(2) or 109(2), 109B(2) or 109F(2),

may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

(2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subsection (1) -

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer,

the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia.

(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or subsection 115(2)."

[194]The Passports Act, which must be read together with the Immigration Act by virtue of section 13 of the former Act, does not prescribe any procedure either for imposing a travel ban. Therefore, the question of procedural non-compliance with the Passports Act by the Director General of Immigration does not arise.

[195]The Income Tax Act, on the other hand, does provide for the procedure as set out earlier but non-compliance with the procedure prescribed by the Income Tax Act is not non-compliance with the Immigration Act. Under section 59A of the *Immigration Act*, the court is only concerned with procedural non-compliance with the Immigration Act or the Rules made thereunder.

[196]Having admitted that the Passports Act and the Immigration Act do not provide the procedure for imposing a travel ban, learned counsel then asked the question: Does this mean that the respondents can rely on a general provision such as sections 3(2) and 4 of the Immigration Act to impose a travel ban premised on untrammelled discretion? He answered the question by saying that this simply cannot be the intention of the legislature – to give the respondents unlimited discretionary power by contrasting it with Parliament explicitly providing for a travel ban in the Income Tax Act on citizens and concomitantly prescribing elaborate and stringent conditions for its implementation.

[197]With due respect, the comparison drawn by learned counsel between the Immigration Act and the other two Acts is of no help in determining whether the Director General had been guilty of procedural non-compliance for purposes of section 59A of the *Immigration Act*. Section 2 of the Passports Act merely provides for the production of passports by every person upon entry to or departure from Malaysia. This has nothing to do with any breach of any procedural requirement by the respondents in imposing a travel ban under the Immigration Act or the rules made thereunder, which is the point that the appellant is trying hard to drive home.

[198]As for the procedure prescribed by the Income Tax Act, likewise the question of procedural non-compliance by the Director General of Immigration does not arise as the travel ban that was imposed on the appellant was not issued pursuant to a request by the Director General of Income Tax under section 104(1) of the Income Tax Act. The Director General of Immigration was exercising his power under section 3(2) of the Immigration Act and not in compliance with such request by the Director General of Income Tax when he imposed the travel ban.

[199]The issue therefore boils down to the question whether the respondents could rely on the general provisions of section 3(2) of the Immigration Act to impose the travel ban on the appellant, in the absence of any specific procedure prescribed by the Immigration Act. Section 40(1) of the Interpretation Acts 1948 and 1967 in my view gives the Director General of Immigration an implied power to impose the travel ban. The subsection reads:

Implied powers

"40(1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

[200]The Director General of Immigration must have such implied powers for otherwise how is he to enforce his powers, duties and responsibilities under the Immigration Act, the Passport Act and the Income Tax Act?

[201]I do not think the maxim *unious est exclusion alterius* invoked by the appellant has any application to the facts of the present case. The maxim cannot be applied simply by comparing the Income Tax Act (which prescribes the procedure) with the Immigration Act (which does not). They are not "one or more things of the same class". The Immigration Act and the Income Tax Act deal with completely different areas of the law and the Director General of Immigration only comes into the picture when there is a request for a travel ban by the Director General of Income Tax under section 104(1) of the Income Tax Act. The Income Tax Act has nothing to do with matters relating to immigration in as much as the Immigration Act has nothing to do with matters relating to income tax.

[202]It was further submitted that the Minister or the Director General cannot rely on section 3(2) to justify the travel ban because it alters the legal position in a drastic manner and impairs a person's fundamental right to free speech and expression under Article 10(1) of the Federal Constitution.

[203]It was argued that even if the Minister or the Director General of Immigration have the general power to impose the travel ban under the Immigration Act or the Passports Act, they have acted in excess of such power and their action fails the proportionality test as laid down by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 CLJ 631; [2009] 5 MLJ 301 [***Lee Kwan Woh***] where this court accepted the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19:

> "The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed. See, *Om Kumar v Union of India AIR* [2000] SC 3689."

[204]The issue raised in Question 1 had in fact been considered and determined by the former Federal Court in ***Loh Wai Kong***. One of two constitutional issues (the other being whether a citizen has a right to a passport) raised for the court's determination in that case was whether the learned High Court judge erred in law in holding that the expression "personal liberty" in Article 5(1) of the Federal Constitution included the right of a person, whether a citizen or non-citizen of Malaysia, to enter or leave the country whenever he desired to do so.

[205]To travel overseas, the respondent Loh Wai Kong needed a passport, which he did not have. In our case, the appellant already had a valid passport at the time the travel ban was imposed on her. The question is whether travelling abroad is her right in law. The former Federal Court answered the question in the negative. Suffian LP delivering the judgment of the court said:

> "These three arguments raise the following issue: does a citizen have a right to leave the country, to travel overseas, and a right to a passport?
>
> Article 5(1) speaks of personal liberty, not of liberty simpliciter. Does personal liberty include the three liberties? It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in art. 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in art. 9 which, however, only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein. With respect, we agree with what Mukherjee J said at p. 96 in *Gopalan* AIR 1950 SC 27:
>
> > In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: *vide* Dicey on Constitutional

> Law, 9th Edn., pp. 207,208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty.

> While the constitution by art. 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, **in our judgment, the citizen has no constitutional right to leave the country and travel overseas. Indeed, as to the latter how can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a fundamental right which every foreign country may lawfully reject**.
>
> **Does a citizen have a fundamental right to leave the country with or without a passport? In our judgment no such right is guaranteed by the constitution** and Mr. Jag-Jit Singh was with respect correct in saying that in certain circumstances the Government has power to stop a citizen (or indeed even a non-citizen) from leaving; certainly when, as in this case, there is a criminal charge pending against him. **It is impossible and undesirable to catalogue the other circumstances in which the Government may stop a person from leaving, and each case will have to be considered in the light of its own facts**."

(**emphasis added**)

[206]The case answers the question whether it is a right for a citizen to travel overseas, and to a passport. By parity of reasoning, if it is not a right for a citizen to travel overseas, it cannot be a breach of the law for the respondents to impose a travel ban on a citizen. And to say that the Director General of Immigration has no power to impose a travel ban under section 3(2) of the Immigration Act as contended by the appellant is to go too far and is plainly wrong. Nor would he be acting in excess of the limits of his power under section 3(2) of the Immigration Act by imposing a travel ban.

[207]In *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 4 CLJ 54; ; *[2018] 6 MLJ 670* the Court of Appeal ruled that the broad supervision powers of the Director General under section 3(2) of the Immigration Act encompasses the power to bar a holder of a Malaysian passport from travelling abroad on appropriate ground. In dealing with the appellant's contention that there is no provision in the Immigration Act which allowed the first respondent to bar the appellant from leaving Malaysia, Idrus Harun JCA (now Attorney General) who wrote the judgment of the court said:

> "However, the point in the contention of the appellant is that the respondents fail to state the source of power in coming to the decision and that there is no provision in law which allows the first respondent to bar the appellant from leaving Malaysia. Learned counsel contended that the term 'procedural requirements' includes jurisdictional requirements citing in support thereof the case of *Anisminic v. Foreign Compensation Commission* *[1969] 2 AC 147* which held that 'if Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists.' The ouster clause in s. 59A therefore does not apply as the decision of the first respondent is not within the jurisdiction of Act 155 and the first respondent consequently could not have exercised his powers thereunder.
>
> > [12] It is enough, when dealing with this contention, to say that by virtue of s. 3(2) of Act 155, the first respondent has the necessary power to bar the appellant from leaving Malaysia. Section 3(2) of Act 155 is couched in broader terms as to vest powers in the first respondent to have the general supervision and direction of all matters relating to immigration throughout Malaysia. For convenience, we quote s. 3(2) of Act 155 below:
> >
> > 3.(2) The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.
>
> It seems to us, there can be little doubt that the decision to impose a ban on the appellant from going abroad for the reason that he is under police investigation surely relates to immigration matters under Act 155. **We agree with the learned judge that the words "and direction to all matters relating to immigration" in s. 3(2) are readily capable of being construed to include a decision barring the appellant on appropriate ground from leaving the country**. Therefore, when this court is called upon to determine the validity of the impugned decision, we are satisfied that the attempt by the

appellant to persuade us to hold that the first respondent has acted without jurisdiction is completely untenable".

(**emphasis added**)

[208]The appellant's application for leave to appeal to this court against the decision was refused. Learned counsel for the appellant submitted that the High Court's reliance on ***Loh Wai Kong*** was erroneous as the learned judge failed to consider the intertwined nature of this case, that the respondents' action is predominantly an assault on freedom of speech and expression under Article 10(1) of the Federal Constitution, since the internal circular on which the travel ban was imposed purported to create an offence against the right to freely express one's view, including criticizing the government of the day.

[209]It was pointed out that under Article 10(2) of the Federal Constitution, only Parliament and not the Executive may restrict freedom of speech, citing *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor* [1992] 1 CLJ 72. Such restrictions according to learned counsel are only valid if they fall under the permissible restrictions under Article 10(2) i.e. "public order or morality" or "in the interest of the security of the Federation or any part thereof": ***Nordin Salleh*** and *PP v Azmi bin Sharom* [2015] 8 CLJ 921.

[210]The appellant's contention was that her freedom of speech and assembly had been breached by the respondents by being:

(i) punished with a travel ban of up to 3 years;

(ii) prevented from exercising her freedom of speech in the Gwangju Human Rights Award ceremony in South Korea.

[211]Learned counsel relied heavily on the decision of this court in ***Lee Kwan Woh*** where Gopal Sri Ram FCJ delivering the judgment of the court interpreted "personal liberty" as including other rights such as the right to travel abroad. It was an affirmation by the learned judge of an earlier decision of the Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; ; *[1996] 1 MLJ 261* where, in delivering the judgment of the court in his capacity as a Court of Appeal judge, the learned judge held:

> "... the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment..."

[212]*Loh Wai Kong* was dismissed by ***Lee Kwan Woh*** as "worthless as precedent". Learned counsel however conceded that a later decision of this court in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 4 CLJ 12; ; *[2016] 2 MLJ 309* held otherwise. In adopting ***Loh Wai Kong***, this is what Raus Shariff PCA (as he then was) said by way of *obiter* in delivering the majority decision of the court (Suriyadi Halim Omar and Zaharah Ibrahim FCJJ dissenting):

> "[149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. I therefore am inclined to adopt the approach of Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* that art 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right to travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art 9. On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a peguam syarie falls outside the ambit of art 5. Article 5 thus is of no help to the respondent."

[213]In view of the conflicting decisions of this court, learned counsel said there is a "crying need" to resolve this question: whether "personal liberty" under Article 5(1) of the Federal Constitution should be given an expansive or narrow interpretation.

[214]Like the fate that the appellant said should befall ***Sugumar Balakrishnan***, it was urged upon us that "the time is ripe" to review ***Loh Wai Kong*** in the light of subsequent apex court decisions which clearly set out the need to interpret the Federal Constitution *sui generis*, generously and liberally, taking into account the present day conditions.

Reliance was again placed on ***Alma Nudo Atenza***, which was also cited in support of the argument that the respondents had acted in excess of their powers as their action was disproportionate to the object of the Immigration Act.

[215]It was submitted that the administration of any immigration and passport legislation must accord with fair norms and be free from extraneous pressure. It was alleged that section 59A of the *Immigration Act* is "oppressive". I will give an immediate answer to this allegation of oppression by referring to Raja Azlan Shah FJ's statement in ***Loh Kooi Choon***. This is what His Lordship said:

> "Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box."

[216]It was submitted that in this globalized world of borderless communication, it would be a severe impairment of a citizen's right to travel, as travelling abroad has now become a norm necessitated by imperative needs rather than a privilege and that as we emerge into the 21st century we should shed rulings "reminiscent of a bygone era".

[217]The contention was that the right to travel interfaces with other constitutional rights, such as the right to freedom of speech and expression, which are inextricably linked, citing ***Maneka Gandhi***. Here again, the emphasis is on "basic structure" of the Federal Constitution, now extended to the right to travel abroad to deliver a speech.

[218]It needs to be pointed out that this court in ***Sugumar Balakrishnan*** disagreed with the view held by Gopal Sri Ram JCA (at the Court of Appeal stage of the case) that the words "personal liberty" should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. The court then went on to say:

> "We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Constitution under 'FUNDAMENTAL LIBERTIES' *viz*, protection against retrospective criminal laws and repeated trials (art. 7); equality (art. 8); freedom of speech, assembly and association (art. 10); freedom of religion (art. 11); rights in respect of education (art. 12) and rights to property (art. 13)."

[219]*Majlis Agama Islam Wilayah Persekutuan* is the third decision of this court, after ***Sugumar Balakrishnan*** and ***Loh Wai Kong***, that the appellant wants to be overruled after ***Loh Kooi Choon*** was discarded by ***Sivarasa Rasiah*** in 2010. This court must think long and hard before acceding to such request, and I do not think it is fair to describe ***Loh Wai Kong*** as a decision that is "reminiscent of a bygone era". The reasoning behind the decision is as applicable now as it was then. It was strictly a legal reasoning that has no relation to any time gap between now and then.

[220]In any event, that part of the decision in ***Lee Kwan Woh*** which dealt with the issue of "personal liberty" was made by way of *obiter* as the court was not called upon to determine the issue. ***Lee Kwan Woh*** was a criminal case and the issue for the court's determination was whether the trial judge had violated the appellant's constitutionally guaranteed right to a fair trial by virtue of Article 5(1) of the Federal Constitution and secondly, whether the trial judge had failed to judicially appreciate the evidence.

[221]It was only *en passant* that Gopal Sri Ram FCJ touched on the issue of personal liberty. ***Lee Kwan Woh*** is therefore not authority for the proposition that "personal liberty" includes other rights such as the right to travel abroad. That is not the *ratio decidendi* of the case.

[222]And so is ***Majlis Agama Islam Wilayah Persekutuan***, as the majority's view on the issue of "personal liberty" was also made in passing and therefore has no binding effect as a precedent. The issue in that case was whether a non-Muslim could be admitted as a *Peguam Syarie* to represent parties in any proceedings before the Syariah Court in Wilayah Persekutuan, Kuala Lumpur. The court was not called upon to decide on the right of any person to travel abroad.

[223]Therefore, the authority on the right to travel abroad is still ***Loh Wai Kong*** and not ***Lee Kwan Woh*** or ***Majlis Agama Islam Wilayah Persekutuan***. For the reasons proffered by Suffian LP in ***Loh Wai Kong***, I will, with respect, accept the exposition by the learned LP as good law notwithstanding counsel's contention that the decision in that case was made without jurisdiction on the ground that the appeal was made by the winning party instead of

the losing party. Whatever may be the status of the case as precedent, the fact remains that the constitutional issue of whether it is a right for a citizen to travel abroad was raised and fully argued by the parties and decided upon by the court. The decision was therefore in direct answer to the question posed for the court's determination. In fact, by arguing that the High Court in the present case had wrongly applied ***Loh Wai Kong***, counsel for the appellant impliedly accepts that the case is still good law except that it has no application to the facts and circumstances of the present case.

[224]Further, I do not think it is appropriate for the appellant to bring in the issue of freedom of speech in making the argument that it was her legal right to leave the country. The right to free speech is too remotely related to the question whether she had a right to leave the country to travel overseas and to the question whether section 59A of the *Immigration Act* is constitutional.

[225]To recapitulate, the appellant's case was that the travel ban imposed on her interfered with her freedom of speech and expression under Article 10(1) of the Federal Constitution. The respondents' answer to that assertion is that public interest dictates that the act of deriding one's own country is demonstrably undesirable, thus justifying the imposition of the travel ban.

[226]The peculiar facts of this case may not support the reason given by the Director General to impose the travel ban but the principle is far more important for this court to ascertain, i.e. whether the Director General of Immigration is empowered by section 3(2) of the Immigration Act to impose a travel ban on a citizen and whether the decision is subject to a right of hearing under section 59 and subject to judicial review under section 59A.

Basic Structure Doctrine v Article 4(1)

[227]I venture to think that the better way of resolving constitutional conflicts arising from the enactment of post-Merdeka laws by Parliament is to stick to the dispute resolution process inherent in Article 4(1) of the Federal Constitution rather than to factor in the basic structure doctrine, which works on the basis that Parliament amends the constitution and the amendment destroys its "basic structure" (***Kesavananda Bharati***) or a variation of it (***Maneka Gandhi***) which requires a mere "violation" of the "basic structure" of the constitution as a basis to strike down any post- Merdeka law. Article 4(1) of the Federal Constitution says:

> "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

[228]It is relevant to note that the drafters of the Federal Constitution had originally used the word "repugnant" instead of "inconsistent" in the Draft Articles 3 and 4 but finally settled for the word "inconsistent" as it exists in the present form.

[229]Article 4(1) is unique to the Federal Constitution and is not found in the Indian Constitution. That probably is the reason why the Indian Supreme Court in ***Kesavananda Bharati*** had to devise an ingenious mechanism in the form of a basic structure doctrine to curtail the power of the Indian Parliament to pass laws that destroy the basic structure of the Indian Constitution. As I have alluded to earlier, in Malaysia that safeguard is entrenched in Article 4(1) of the Federal Constitution.

[230]By recourse to this Article, there is only one issue that needs to be resolved by the court, and that is whether the post-Merdeka laws are "inconsistent" with the Federal Constitution. If they are, then the laws are void to the extent of the inconsistencies. There is no necessity to determine if they "destroy", "violate" or "offend" the "basic structure" of the Federal Constitution. This is not a mere matter of terminology, or of form rather than substance. These words give a different colour to the word "inconsistent" in Article 4(1) of the Federal Constitution.

[231]The dispute resolution by recourse to Article 4(1) is also made easier by the fact that the Article makes no distinction between what is "basic" and what is not "basic" in the whole structure of the Federal Constitution. As long as the impugned law is inconsistent with the Federal Constitution, it is liable to be struck down as being unconstitutional.

[232]To be "inconsistent with this Constitution" simply means to be incompatible with the relevant Articles of the Federal Constitution. In the context of the present case, the question is whether section 59A of the *Immigration Act* is incompatible with Article 121(1) of the Federal Constitution.

[233]To succeed in rebutting the presumption of the constitutionality of section 59A of the *Immigration Act*, all that

the appellant needs to do is to show that the provision is inconsistent with the terms of Article 121(1) and if so, how is it inconsistent with those terms.

[234]There is no necessity for the appellant to show, and for the court to determine, if Article 121(1) is or is not a "basic structure" of the Federal Constitution and whether section 59A of the *Immigration Act* has "destroyed", "offended" or "violated" its basic structure by violating the doctrine of separation of powers. These three words are more compatible with the word "repugnant" originally used by the framers of the Federal Constitution in the Draft Articles 3 and 4 but which was rejected and remains absent in the Federal Constitution.

[235]It bears repetition that ***Sivarasa Rasiah***, ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** are not cases on the constitutionality of laws passed by Parliament under Article 159 of the Federal Constitution to destroy its basic structure. They are cases on the constitutionality of ordinary post-Merdeka laws which were held to be void for violating the basic structure doctrine by violating the doctrine of separation of powers and therefore void under Article 4(1).

[236]The three cases are distinguishable from ***Loh Kooi Choon*** in that by an Act of Parliament, the Federal Constitution in ***Loh Kooi Choon*** was amended to deprive Loh Kooi Choon of his right of habeas corpus, which was alleged to have destroyed the basic structure of the Federal Constitution. Similarly, in ***Kesavananda Bharati***, the case that gave birth to the basic structure doctrine. That case dealt specifically with an amendment to the Indian Constitution that destroyed its basic structure. It was not a case on the effect of an ordinary law on the basic structure of the Indian Constitution.

[237]Likewise in the case before us, the issue is simply whether section 59A of the *Immigration Act*, being an ordinary post-Merdeka law, is void under Article 4(1) for being inconsistent Article 121(1) of the Federal Constitution. To factor in a doctrine that leaves wide open what constitutes "basic structure" in the dispute resolution process will only muddy the issue. Even if the basic structure doctrine applies, it will not help the appellant's case as its most basic element – amendment to the Federal Constitution - is missing.

[238]It is ironical to say the least that having strenuously argued that Parliament has no power to alter the basic structure of the Federal Constitution by operation of the basic structure doctrine, the appellant is now urging this court to recognize the "evolutionary nature" of the Federal Constitution "to accord with contemporary values and progress".

[239]The appellant even referred us to a case that is unfavourable to her, namely *Palm Oil Research And Development Board of Malaysia & Anor v Premium Vegetable Oils Sdn Bhd Sdn Bhd & Another Appeal* [2004] 2 CLJ 265; ; *[2005] 3 MLJ 97*. In that case, this court approved Lord Bingham's statement in *Reyes v The Queen [2002] 2 AC 235* which was also referred to in the case I have cited earlier, namely ***Director of Public Prosecution of Jamaica v Mollison*** (see paragraph 169 above) where the Law Lord said, *"a constitution is not trapped in a time-warp but must evolve over time to reflect the developing needs of society".* It would appear that the appellant is breathing fire and ice over the issue.

Parliamentary Supremacy

[240]The basic structure doctrine that ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza*** applied flowed from ***Sivarasa Rasiah***, the case that introduced the basic structure doctrine into our legal system by overruling ***Loh Kooi Choon*** and then broadening it by applying ***Maneka Gandhi***.

[241]I have mentioned earlier in this judgment that one of the reasons why ***Sivarasa Rasiah*** overruled ***Loh Kooi Choon*** was because Raja Azlan Shah FJ misdirected himself in failing to appreciate the difference between the power of Parliament in a country where Parliament is supreme and a country like Malaysia where it is the Federal Constitution and not Parliament that is supreme. It will be amiss of me not to say more on the subject.

[242]It is often said that since the constitution is supreme in Malaysia, Parliament cannot make any law it pleases, implying perhaps that in jurisdictions that subscribe to Parliamentary supremacy such as the UK, Parliament can pass any law it pleases.

[243]That, of course, is untrue because in both jurisdictions, any Act of Parliament that does not conform to the law can be declared void by the court. If the power of Parliament and the State legislatures in Malaysia is limited by the Federal Constitution so that they cannot make any law they please, so too is the power of the UK Parliament, not by a written constitution but by the rule of law so that it too cannot make any law it pleases. If in Malaysia the safeguard is Article 4(1) of the Federal Constitution, in the UK it is the common law.

[244]The position in England had been made clear 400 years ago by the judgment of Sir Edward Coke in *Thomas Bonham v College of Physicians* (1609) 77 646 where he said:

> "And it appears in our books, that in many cases, the common law will…controul Act of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, **the common law will controul it, and adjudge such Act to be void**; and … saith, some statutes are made against the law and right, which those who made them perceiving, would not put them in execution …"

(**emphasis added**)

[245]The common law concept of rule of law is embodied in Article 4(1) of the Federal Constitution. But even if Article 4(1) is not there in the Federal Constitution, it will be a stretch to argue that the Malaysian Parliament can pass any law it pleases. All branches of the government, both in the UK and in Malaysia are subject to the rule of law, and this of course includes the judicial arm of government.

[246]For this reason, it cannot be correct in my humble view, even without the benefit of hindsight, for ***Sivarasa Rasiah*** to say that when Raja Azlan Shah FJ in ***Loh Kooi Choon*** quoted the pronouncement made by Lord Macnaghten in the ***Vacher*** case, which was made in the context of a country whose Parliament is supreme, His Lordship had seriously misdirected himself on the law in rejecting the basic structure doctrine. Perhaps we can have another look at the pronouncement by Lord Macnaghten which Raja Azlan Shah FJ relied on in the ***Vacher*** case:

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. **But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature**."

(**emphasis added**)

[247]It is difficult to see how the above pronouncement of trite principle by Lord Macnaghten can be said to have coloured Raja Azlan Shah FJ's judgment or had so seriously prejudiced his mind that the former Federal Court had fallen into serious error in rejecting the basic structure doctrine propounded by the Supreme Court of India in ***Kesavananda Bharati***.

[248]In so far as legislative power is concerned, there is no difference in principle between jurisdictions that subscribe to Parliamentary supremacy and jurisdictions that subscribe to Constitutional supremacy. In both jurisdictions, Parliament subscribes to and is subject to the rule of law.

[249]Therefore, the distinction drawn between the power of Parliament in a country where Parliament is supreme and in a country where the constitution is supreme is a distinction of no significance in so far as it concerns the power of Parliament to enact ouster clauses such as section 59A of the *Immigration Act* pursuant to the power conferred on it by Article 121(1) of the Federal Constitution.

[250]In my view, ***Loh Kooi Choon*** did not commit any error of law in rejecting the basic structure doctrine. More importantly, the former Federal Court could not have been wrong in deciding that Parliament has power to amend any provision of the Federal Constitution so long as the process of constitutional amendment as laid down in Article 159(3) of the Federal Constitution is followed. To rule otherwise would be, in the words of Raja Azlan Shah FJ, to *"cut very deeply into the very being of Parliament"*.

[251]If we were to accept the appellant's proposition that sections 59 and 59A of the Immigration Act are void and ought to be struck down on the authority of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***, it would mean all of the following:

(1) The doctrine of separation of powers prevails over the doctrine of constitutional supremacy;

(2) It is the judicial arm of the government and not the Federal Constitution that is supreme as the judiciary can override the constitutional mandate of the Federal Constitution which vests power in Parliament through Article 121(1) to enact sections 59 and 59A of the Immigration Act;

(3) Article 121(1) is unconstitutional for violating the doctrine of separation of powers;

(4) Article 121(1) is void for being inconsistent with Article 4(1) of the Federal Constitution;

(5) Article 159 of the Federal Constitution is redundant and had been formulated in vain by the framers of the Federal Constitution as Parliament is powerless to amend any "basic structure" of the Federal Constitution;

(6) All post-Merdeka laws are void if they violate the doctrine of separation of powers, even if they are not inconsistent with Article 121(1) of the Federal Constitution;

(7) All ouster clauses, with the exception of those enacted pursuant to Article 149 are void, not for violating Article 121(1) of the Federal Constitution but for violating the doctrine of separation of powers.

[252]I am unable to accede to such profound proposition of law which has such far reaching implications. We will be heading in the wrong direction of the law if we were to accept the argument that the doctrine of separation of powers overrides the written terms of the Federal Constitution, the supreme and highest law in the land.

[253]The doctrine of constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the Federal Constitution. Further, based on the historical antecedent of the Federal Constitution, section 59A of the *Immigration Act* is not constitutionally objectionable. Therefore, I reject the appellant's argument that section 59A of the *Immigration Act* is unconstitutional and has "no leg to stand on" in the light of ***Semenyih Jaya***, ***Indira Gandhi*** and ***Alma Nudo Atenza***.

[254]In the upshot, I hold that sections 59 and 59A of the Immigration Act are not void for being inconsistent with Article 4(1) read with Article 121(1) of the Federal Constitution. The limitation of the court's review power by section 59A of the *Immigration Act* falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution and is not in breach of the doctrine of separation of powers, which cannot in any event prevail over the written constitution.

Conclusion

[255]For all the reasons aforesaid, my answers to Questions 2 and 3 are in the affirmative in that both sections 59 and 59A of the Immigration Act are valid and constitutional. However, on the peculiar facts and circumstances of this case, in particular the reason given by the Director General for imposing the travel ban, which reason turned out to be inappropriate, Question 1 has to be answered in the negative, that is, although the Director General has a discretionary power to impose a travel ban on a citizen, the discretion is not unfettered. For that reason, and for that reason only, the appeal is allowed in terms of prayer 4 of the Judicial Review Application, that is, a declaration that the respondents do not have an unfettered discretion in making the impugned decision. There shall be no order as to costs.

[256]My learned sisters, Rohana Yusuf PCA, Hasnah Mohammed Hashim and Mary Lim Thiam Suan FCJJ, who have had sight of this judgment in draft, concur with the reasons given and the conclusions reached.

Mary Lim Thiam Suan, FCJ

[257]I have read the judgment in draft of my learned brother, Abdul Rahman Sebli FCJ and I agree with the views expressed therein. I have nevertheless decided to add the following.

Findings & Decision

[258]For clarity, this is Question 1-

Question 1

Whether section 3(2) of the Immigration Acts 1959/63 ('Act 155') empowers the Director General with unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the Government.

[259]The respondents claimed that the power to impose travel bans or restrictions is reposed in section 3(2) of Act 155. The appellant on the other hand, urging this Court to answer this first question in the negative, argued that this

provision is “a general power only to supervise and to direct” and that it cannot be taken as conferring “a specific and substantive power on the 1st respondent to impose a travel ban on citizens or even a power to issue an administrative circular which purports to carry force of law”. This argument is deduced from a plain reading of sections 3(2) and 4 of Act 155 which the appellant submits does not contain any provision which specifically grants the Minister and/or the Director General of Immigration the power to impose travel bans on citizens. The same contention is made in respect of the Passports Act 1966 [Act 150]. The natural and ordinary meaning of these provisions do no more than set out the powers of the respondents “to supervise and to direct immigration matters” and cannot be extrapolated so as to confer wide and untrammelled substantive powers that would include imposing travel bans on citizens.

[260]It was further argued that in any event, these provisions, sections 3(2) and 4 of Act 155 cannot be interpreted as providing for a specific substantive power of imposing travel bans on citizens. The appellant relies on the established principles of statutory interpretation – see ***Bennion’s Statutory Interpretation*** (7th Edition) pages 81-83; as well as case law – see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [*[1979] 1 MLJ 135*](); and learned authors of administrative law – see ***MP Jain’s Administrative Law in Malaysia and Singapore*** (4th Edition), page 405.

[261]The appellant further argued that there are specific provisions in Act 155 which distinctively stipulate the powers, penalties and procedures for the respondents to deal with various matters such as restrictions on foreigners from entering Malaysia [sections 6, 9, 9A, 10, 12 and 15]; restrictions on the manner in which foreigners or foreign vessels depart from Malaysia [sections 17 and 31]; restrictions on foreigners remaining in Malaysia [section 15]. There are only two provisions dealing with citizens – sections 5 and 66; the former deals with the manner in which a citizen or foreigner enters or departs from Malaysia while the latter provide for restrictions on citizens entering East Malaysian States. There are, of course, the powers to investigative, detain and prosecute both citizens and foreigners, but it is in respect of violations of any of the matters already mentioned – see sections 35, 39 and 51. The appellant argued that none of these provisions contain or may be construed as to provide for a power to impose a travel ban or restriction on citizens; certainly not for the reasons explained by the respondents.

[262]Insofar as the Passports Act 1966 [Act 150] is concerned, the appellant contended that this Act deals only with the power as regard persons leaving Malaysia; but this Act, too, ‘stops short of giving the power to bar persons from leaving Malaysia’.

[263]This is contrasted with say, section 104 of the *Income Tax Act 1967* [Act 53]. In the circumstances of a person about or likely to leave Malaysia without paying the tax or sums set out in section 104(1)(a) to (c), the DG of Income Tax may issue to either the Commissioner of Police or the DG of Immigration, a certificate containing particulars of tax or any unpaid sums or debts with a request for that person “to be prevented from leaving Malaysia unless and until he pays all that tax, sums or debts or furnish security to the satisfaction of the DG of Income Tax for their payment. On receipt of such request, section 104(2) provides that the DG of Immigration “shall take or cause to be taken all such measures (including the use of reasonable force and seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect” to that request/certificate. Under section 104(3), a notice has to be served personally on the person concerned before the mechanism in section 104 operates. The imposition of the ban to travel is however, subject to judicial review – see *Hamzah HM Saman (Amanah Raya Bhd appointed based on the order dated 17 January 2007 representing the estate of Hamzah HM Saman, deceased) & Ors v Ronald Beadle* [*[2010] 6 MLJ 808*]().

[264]Because both Acts 155 and 150 do not similarly contain such comprehensive, elaborate and stringent provisions on travel ban, the appellant submitted that the respondents thus do not have unlimited discretionary power to do as they wish. More so, by way of an internal circular, as relied on in the facts in this appeal.

[265]The appellant also made the argument that express provisions must be prescribed to effect an alteration or an abrogation of her right to travel**–** see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama- Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [*[1999] 3 MLJ 1*](); *Malayan Banking Bhd v Chairman of Saeawak Housing Developers’ Association* [*[2014] 5 MLJ 169*](); *Panglima Tentera Laut DiRaja Malaysia & Ors v Simathari a/l Somenaidu* [*[2017] 2 MLJ 14*]l; *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [*[2020] 1 MLJ 141*]().

[266]It was also the appellant’s submissions that the ban impacted on her freedom of speech and assembly as provided under Article 10(2) of the Federal Constitution. Not only were the contents or reasons for the ban not made known to the appellant at the time when the ban was imposed; the events that lie at the heart of the ban had yet to take place. The appellant added that the allegation of “*Memburukkan Kerajaan Malaysia*” furthermore could not fall within the permissible restrictions generally understood for Article 10(2). The respondents’ reliance was said

to be “simply too remote, far-fetched and extremely problematic”. In fact, it was suggested that the respondents had “unilaterally and without sanction of Parliament created an offence of intending to criticise the Government of Malaysia in the future which warrants punitive measures, in this case, a travel ban”.

[267]In any case, the respondents’ action was said to arbitrary, and that it fails the proportionality test in which case, the respondents’ action was clearly unconstitutional – see ***Alma Nudo Atenza*** *[supra*].

[268]I am proceeding in the order of the questions as posed though it may be suggested that because of the presence of section 59A of Act 155, the Court is precluded from dealing with the very first question and that until and unless the third question is answered, the first question cannot be answered.

[269]I start with the strong presumption of constitutionality of sections 59 and 59A of Act 155. In *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, Eusoffe Abdoolcader SCJ enunciated and applied this principle – that “***there is a presumption – perhaps even a strong presumption – of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise***”. This principle and decision were cited with approval and followed by the High Court of Australia in *The Commonwealth of Australia & Anor v The State of Tasmania & Ors (the Franklin Dam Case)* [1983] 158 CLR 1, 165. His Lordship reiterated and applied this same principle in his dissenting judgment in *Mamat Daud & Others v The Government of Malaysia* [1988] 1 CLJ (Rep) 197, 211.

[270]In my view, the very sequence of the questions posed by learned counsel for the appellant is in itself a recognition of that principle. The maxim *omnia praesumunutur rite et solemniter esse acta* [all things are presumed to have been done rightly] applies to presume that the provisions of law and the acts carried out by the respondents are valid until established otherwise; especially where the legislation or the act complained of is not *ex facie* bad or null. This was explained in *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; where Jemuri Serjan CJ (Borneo) examined a line of authorities including *London & Clydeside Estates Ltd v Aberdeen District Council & Anor* [1980] 1 WLR 182; *Calvin v Carr* [1979] 2 WLR 755; *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295; *Smith v East Elloe Rural District Council* [1956] DC 736; *R v Panel on Take-Overs and Mergers, ex p Datafin PLC & Anor* [1987] 1 QB 815.

[271]In essence, these cases held that even if “a decision made contrary to the rules of natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law…;” that such orders “will remain as effective for its ostensible purpose as the most impeccable of orders”. In *R v Panel on Take-Overs and Mergers, ex p Datafin PLC* , Donaldson MR expressed the following view:

> “I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely, that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction …”

[272]One of the reasons for this approach is because of the doctrine of the separation of powers and that the Court, as respecter of that doctrine, proceeds on the basis that the legislature, Parliament, often said to have acted or decided in its wisdom, has seen fit to enact such legislation in those precise terms for whatever its reasons and that those reasons have been debated and have passed both Houses of Parliament and the legislation has obtained Royal Assent to become law or part of the law of this great nation. It is, however, entirely the role and within the sole jurisdiction and power of the Courts to give expression to the intention of Parliament as properly discerned from the wordings found in the ouster clause; what exactly is the impact and ambit such clauses – see *Abdul Razak bin Baharudin & Others v Ketua Polis Negara & Others* [2005] MLJU 388.

[273]Another reason why this approach is adopted is this - the presence of ouster clauses, finality clauses or even the argument of non- justiciability have never deterred the Court from examining any decision, dispute or complaint that is referred to the Court. Again, the law reports are filled with high authorities on how these ‘barriers’ have been treated by the Court and that it is really in the narrow area of policy, especially foreign policy and international relationships, public order and security, internal matters taken by the various State Legislative Assemblies, that the Court may decline intervention. Even then, it would be after the Court has satisfied itself that the subject matter is properly within the jurisdiction of the relevant authority.

[274]The recent decisions of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 3 MLJ 561 [*Semenyih Jaya*], *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors &*

Other Appeals [2018] 1 MLJ 545 [*Indira Gandhi*] and *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors & Other Appeals v Wong* [2020] 3 CLJ 757, amply illustrate this point. See also *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, and *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 [*Hotel Equatorial*].

[275]In ***Hotel Equatorial***, the Federal Court applied the approach taken in *Anisminic Ltd v The Foreign Compensation Commission & Another* [1969] 2 AC 147 where the House of Lords held that an ouster clause in the Foreign Compensation Act 1950 did not preclude the Courts from reviewing the decisions of the Foreign Compensation Commission on the basis of jurisdiction because such bodies or authorities may be stepping outside their jurisdictions in any number of ways. Lord Pearce explained:

> Such tribunals must, however, confine themselves within the powers committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decided as set out in the Act of Parliament. Again, if its instructed to give relied wherever on inquiry it finds that two stated conditions are satisfied, it cannot alter or restrict its jurisdiction by adding a third condition which has to be satisfied before it will give relief. It is therefore, for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction. This is the only logical wat of dealing with the situation and it is the way in which the courts have acted in its supervisory capacity.

[276]In ***Hotel Equatorial***, the ouster clause was in section 33B of the Industrial Relations Act 1967 which states in no uncertain terms that the decision of the Industrial Court "shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called into question in any court". In clear, unequivocal terms, this was what the Federal Court had to say of such clause:

> It is common ground that such a clause will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by certiorari proceedings if the Industrial Court has acted without jurisdiction or in excess of the limits of its jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

[277]This Court discussed ***Hotel Equatorial*** in ***Indira Gandhi***, opining at paragraphs [132] and [133] that "based on the principles in *Anisminic*, the lack of jurisdiction by the registrar renders the certificates issued a nullity. Section 101(2) cannot have the effect of excluding the Court's powers of judicial review over the registrar's issuance of the certificates. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the registrar's decision is immune from review, even in light of uncontroverted facts that the registrar had no jurisdiction to make such a decision. In any case, the language of s 101(2) itself does not oust judicial review. The section merely states that a certificate of conversion to the religion of Islam shall be conclusive proof of the facts stated therein…".

[278]The Court may further decline to examine and grant the particular orders or reliefs sought for any number of reasons but to stop the Court at the very threshold of scrutiny would be wholly ineffective.

[279]More importantly, it is readily inferred that section 59A recognises and accepts that the jurisdiction of the Court may never be ousted as it would offend the supremacy of the Federal Constitution as enshrined in Article 4 and as conferred on the Court under Article 121 and further spelt out in the Courts of Judicature Act 1964 [Act 91], to examine any challenge brought before the Court.

[280]These are the terms of section 59A:

> **Exclusion of judicial review**
>
> **59A.** (1) There shall be no judicial review in any court of any act done or any decision made by the **Minister or the Director General, or in the case of an East Malaysian State, the State Authority**, under this Act **except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision**.

(2) In this section, "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) any writ of *habeas corpus*; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act..

(**emphasis added**)

[281]It is quite clear from the terms of section 59A that it deals not only with the acts or decisions of the Director General but also those made by the Minister or in the case of Sabah and Sarawak, the relevant State Authority. Further, section 59A deals with matters beyond the right to travel. Hence, any attempt to impugn section 59A must take these serious implications into account.

[282]Section 59A does not seek to prohibit the scrutiny of the Court in absolute terms. It serves to limit that scrutiny, "**except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision**". Where the jurisdiction and power of the Court is interfered with in absolute terms as was the case in ***Semenyih Jaya*** where section 40D of the Land Acquisition Act 1960 reduced the role of the Court to the "sideline and dutifully anoint the assessors' decision", the Court has no hesitation in striking down such provision as offending the doctrine of basic structure as enshrined within Article 4. I will elaborate on this when dealing with the 3rd question. For the same reason, the Federal Court sustained the validity of sections 56 and 57 of the Central Bank of Malaysia Act 2009 in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners)* [2019] 3 MLJ 561.

[283]I understand ouster clauses such as that presented in section 59A may be similarly found in no less than 100 other pieces of legislation and the effect of striking down such a clause or similar clauses will have far reaching consequences. This is further reason why the Court should be slow in striking down provisions of the law on ground of invalidity; that it should only be done in the clearest of conditions and where the presumption of validity leads to no avail and brings injustice; or in this appeal, if it is established that section 59A is inconsistent with Article 4 and/or any other provision of the Federal Constitution.

[284]Operating thus from the first position or regime that section 59A is valid and that judicial review though somewhat circumscribed in the terms prescribed in section 59A, the issue that arises is not so much whether the respondents' power to impose travel bans is unfettered but whether there is any power to impose travel bans at all in the first place. There is no such thing as unfettered power or discretion and any authority, person or body who labours under such serious misconception, must relook at what was said in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, at page 148.

[285]In this first question, the issue thus is whether the respondents, in particular, the 1st respondent/Director General of Immigration can, using his powers under section 3(2) of Act 155 ban the appellant from travelling or departing from Malaysia where the appellant has criticised the government. In this appeal, the appellant asserts that she was only exercising her legitimate right to so criticise the government.

[286]I must further express my view that the approach taken thus far when confronted by such ouster clauses has, with respect, been somewhat literalistic. The term "procedural requirement" is not defined in Act 155. In my view, that term must include any and all procedure relating to or leading to and governing the impugned decision. The term does not carry a literal or grammarian meaning or construction where the Court exercising its supervisory power and jurisdiction of judicial review, merely looks at the "face" of the decision. The fact that the term 'procedural requirement' is used in relation to what *governs* the act or decision means that it is not a superficial mechanistic exercise but more. It envisages and calls for an examination of the enabling law, what it provides for and whether there has been any non-compliance or excess of the procedure under that enabling law. How can such an exercise be legitimately conducted unless and until the enabling law and its terms properly and validly identified and established. And, in exercising its supervisory jurisdiction as conferred under the Federal Constitution and the Courts of Judicature Act 1964, the Courts will use judicial jurisprudence and legal reasoning to examine the impugned decision, to find if the process of fair play as set out in prescribed procedures have been complied with.

The ***Wednesbury*** principles and the doctrine of proportionality are all examples of how the Courts exercise its powers of scrutiny. The Courts refrain from examining matters of substantive merit, save in the most exceptional cases – see *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145; *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; *Petroliam Nasional Berhad v Nik Ramli Bik Hassan* [2004] 2 MLJ 288; *Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] MLJ 1; where the need to do justice must surely prevail.

[287]Now, given that the appellant only learnt for the first time that she was banned from travelling abroad on the day of travel and at the KLIA, the logical place to start must be the respondents' explanation for the imposition of the ban. And, since the respondents never replied to the appellant's letter, their affidavit in reply becomes crucial.

[288]In this regard, the respondents' explanation came through an affidavit affirmed by its then Timbalan Ketua Setiausaha (Keselamatan), Kementerian Dalam Negeri [deponent]. This is what he deposed:

4 Dalam menjawab Affidavit Sokongan Pemohon, terlebih dahulu saya ingin menyatakan secara ringkas latar belakang yang membawa kepada keputusan larangan Pemohon ke luar negara:-

4.1 Pada 06.01.2016, saya telah memberi arahan melalui Pengarah Bahagian Keselamatan dan Passport agar Pemohon disenarai hitamkan atas KOD NAP KK0057 iaitu "Kes-Kes Khas" dengan arahan Semua Permohonan Mendapatkan Kemudahan Imigresen Hendaklah Ke Bahagian Keselamatan"

4.2 Sesalinan arahan tersebut dilampirkan dan ditanda sebagai "Eksibit MH-1".

[4]2 Nama Pemohon telah dimasukkan di dalam Sistem Senarai Syak Jabatan atas alasan tindakan Pemohon yang memburukkan Kerajaan Malaysia melalui forum yang dianjurkan iaitu "Forum People's Movement Can Bring Change" yang dijadualkan berlangsung pada 07.01.2016. Forum tersebut juga melibatkan seorang aktivis Indonesia bernama Mugiyanto.

4.3 Pemohon juga terlibat dalam penganjuran Perhimpunan Anti-Trans Pacific Partnership Agreement (TPPA) protes yang dijadualkan pada 23.01.2016 di mana boleh memburukkan kerajaan Malaysia melalui tindakan membantah TPPA menggunakan medium yang salah (perhimpunan haram).

4.4 Bagi kesalahan memburukkan kerajaan Malaysia, tempoh maksimum penahanan/penangguhan passport adalah selama 3 tahun. Walaubagaimanapun pembatalan/penangguhan tersebut boleh dilakukan pada bila-bila masa atas budi bicara Ketua Pengarah Imigresen Malaysia.

> Di antara Kes-Kes Khas untuk penangguhan passport/dokumen perjalanan termasuklah bagi kesalahan-kesalahan kes pengedaran dadah di dalam negara, tiada kebenaran untuk memasuki Isreal, memburukkan kerajaan Malaysia/negara dalam apa bentuk atau cara sekalipun, menjejaskan imej negara di luar negara dan permintaan oleh agensi-agensi yang berkaitan demi kepentingan negara.
>
> …

[6]Sebagai menjawab perenggan 19 Afidavit Pemohon No. 1, saya sesungguhnya menyatakan bahawa tiada peruntukkan undang-undang yang memperihalkan kewajipan bagi pihak berkuasa untuk memaklumkan kepada mana-mana orang sebelum disekat daripada keluar negara.

[7]Malah adalah menjadi tanggungjawab bagi mana-mana orang untuk menyemak status perjalanan mereka terlebih dahulu sebelum melakukan perjalanan ke luar negara. Di samping itu, Kerajaan telah menyediakan medium yang mudah untuk bagi mana-mana orang yang hendak ke luar negara untuk menyemak status melalui Portal Imigresen Semakan Status Kawalan Imigresen untuk warganegara Malaysia (SSPI).

[8]Merujuk kepada perenggan 20 Afidavit Pemohon No. 1, saya sesungguhnya menyatakan bahawa walaupun seseorang itu telah dikeluarkan passport dalam satu tempoh sah laku (5 tahun) tetapi pada bila-bila masa dalam tempoh berkenaan, passport itu boleh ditahan dari digunakan untuk ke luar negara. Mekanisme yang digunakan adalah dengan memasukkan nama seseorang di dalam Sistem Senarai Syak Jabatan Imigresen mengikut kesalahan dan tempoh penangguhan. Dalam hal ini, kes Pemohon diklasifikasikan di bawah Item 3 dalam Jadual Pekeliling Imigresen Malaysia Terhad Bil. 3 Tahun 2015.

…

[12]Seterusnya saya menyatakan bahawa Pemohon telah dimasukkan di dalam Sistem Senarai Syak Jabatan bermula 06.01.2016 lagi. Oleh yang demikian, dakwaan bahawa Pemohon dihalang ke Korea Selatan (untuk menyampaikan ucapan) pada 15.05.2016 di perenggan 33 dan 34 Afidavit Pemohon No. 1 adalah tidak benar memandangkan nama Pemohon telah dihalang daripada ke luar negara sejak 06.01.2016.

[13]Merujuk kepada perenggan 36 Afidavit Pemohon No. 1, saya menyatakan bahawa pada 17.05.2016, pembatalan nama Pemohon di dalam Sistem Senarai Syak Jabatan telah dikemaskini. Keterangan yang tercatat adalah arahan pembatalan Senarai Syak oleh TPB(H) Tuan Mohummad Hatta bin Kassim pada 17.05.2016 melalui PPI(H) Puan Mazlifah binti Zainal Abidin. Oleh yang demikian, kerisauan yang ditimbulkan tidak berbangkit.

[14]Merujuk kepada perenggan 37 dan 38 Afidavit Pemohon No. 1 dan saya menafikan bahawah Responden-Responden telah bertindak secara ultra vires dan melanggar hak asasi Pemohon di bawah Perlembagaan. Saya sesungguhnya menyatakan bahawa tindakan yang diambil adalah menurut peruntukan undang-undang yang relevan. Isu yang berbangkit ini akan dihujahkan oleh Peguam Persekutuan semasa pendengaran permohonan ini.

[289]In summary, the deponent admitted that it was he who had directed for the appellant's name to be blacklisted on the "Sistem Senarai Syak Jabatan" under "KOD NAP KK0057" for "Kes-Kes Khas" with an instruction that "Semua Permohonan Mendapatkan Kemudahan Imigresen Hendaklah Ke Bahagian Keselamatan". And, more significantly, that he had given such instruction not on the appellant's day of travel but as far back as 6.1.2016. The deponent's instructions were accordingly effected.

[290]The deponent elaborated in his affidavit in reply the reasons for his decision, that the appellant's name was blacklisted because she-

i. disparaged the Government of Malaysia at the "Forum People's Movement Can Bring Change"; and

ii. was involved in organising an unlawful protest [Perhimpunan Anti-Trans Pacific Partnership] where such protest could disparaged the Government of Malaysia.

[291]Both events for which the appellant was accused of had yet to take place at the time the respondents blacklisted her. The forum was scheduled for 7.1.2016, the day after the deponent gave his instruction while the protest was not till 23.1.2016. No explanation is available as to how this could have come to pass. What is available, is the further explanation that the offence of disparaging the Government of Malaysia carries a suspension of passport for the maximum period of 3 years. Curiously, all his reasons relate to events that had yet to take place but for unexplained reasons, he already had foreknowledge.

[292]The deponent further averred on behalf of the respondents that there are no legal provisions requiring the respondents to inform the appellant in advance of any restriction of travel overseas; that in any event, the appellant ought to have checked against the department's website for any restriction in travel prior to travelling. The respondents denied that its decision is *ultra vire*s and violates the appellant's fundamental liberties; that on the contrary the respondents have acted in accordance with the relevant law.

[293]More particularly, the respondents claimed that while the appellant may have been issued with a passport, that passport may, at any time, be restrained from being used for travelling overseas. This is through the blacklisting mechanism and as per Pekeliling Imigresen Malaysia Terhad Bil. 3 Tahun 2015 [Circular]. In the case of the appellant, she was classified under item 3 of the Schedule to the Circular.

[294]I must point out that the appellant denied the allegations in her affidavit in reply. There was no reply from the respondents.

[295]Given that the blacklisting of the appellant or the impugned decision was made pursuant to the Circular, that Circular must be examined in detail and properly. This is the Circular with the relevant Schedule B:

PEKELILING IMIGRESEN MALAYSIA TERHAD BIL. 3 TAHUN 2015

TATACARA PENGURUSAN PERMOHONAN PASPORT MALAYSIA ANTARABANGSA (PMA) YANG DILAPORKAN HILANG ATAU ROSAK DAN TEMPOH PENANGGUHAN PASPORT

1. **TUJUAN**

1.1 Pekeliling ini bertujuan memaklumkan keputusan **Kerajaan** mengenai tatacara pengurusan permohonan Pasport Malaysia Antarabangsa (PMA) gantian bagi kes kehilangan atau rosak serta tempoh penangguhan pengeluaran PMA baru kepada mereka yang didapati melakukan kesalahan jenayah dalam atau luar negara yang boleh menjejaskan imej negara.

2. **LATAR BELAKANG**

2.1 Pada masa ini semua permohonan gantian PMA yang dilaporkan hilang atau didapati rosak perlu mengikut prosedur yang telah ditetapkan seperti dinyatakan dalam Pekeliling Imigresen Malaysia Terhad Bil. 2 Tahun 2011.

2.2 Mengikut pekeliling tersebut pemohon tidak perlu membuat laporan polis bagi tujuan memohon PMA gantian bagi kes kehilangan kecuali disebabkan kecurian, rompakan dan ragut.

3. **ARAHAN BAHARU**

3.1 Semua permohonan untuk mendapatkan PMA gantian bagi kes kehilangan perlu disertakan dengan laporan polis (mandatori). Siasatan akan dijalankan berdasarkan laporan polis yang disertakan semasa memohon PMA gantian.

3.2 Arahan ini juga adalah terpakai bagi kes kehilangan di luar negara iaitu pemohon perlu mengemukakan laporan polis di negara berkenaan sebelum berurusan dengan Pejabat Perwakilan Malaysia bagi mendapat PMA atau dokumen perjalanan gantian.

3.3 Bagi kes kehilangan PMA di luar negara, pemohon tidak perlu membuat laporan polis di Malaysia bagi memohon PMA gantian.

3.4 Bagi kes gantian PMA yang rosak pula, pemohon perlu membawa bersama PMA tersebut semasa membuat permohonan.

3.5 Nombor pasport yang dilaporkan hilang hendaklah dibatalkan dan disenaraihitamkan di dalam sistem Jabatan supaya tidak disalahguna oleh pihak lain. Nombor pasport tersebut akan disalurkan kepada pihak PDRM untuk dimasukkan ke dalam Sistem INTERPOL.

3.6 Pegawai perlu mengingatkan pemohon bahawa **PMA yang telah dilaporkan hilang tidak boleh diaktifkan semula**.

3.7 Bagi melaksanakan keputusan Kerajaan ini, semua Pejabat Imigresen diarah untuk mengambil tindakan berikut:-

3.7.1 Tindakan terhadap permohonan PMA yang hilang atau rosak, tempoh penangguhan dan kelulusan seperti di **Lampiran A**.

3.7.2 Tindakan terhadap permohonan bagi yang melakukan kesalahan di dalam dan luar negara, permohonan boleh ditangguh seperti di **Lampiran B**.

3.8 Sekiranya pemohon hadir ke pejabat tanpa menyertakan laporan polis, semakan hendaklah dibuat melalui sistem pasport jabatan dan pegawai perlu mendaftar kes di menu **daftar kes kehilangan**. (Pasport akan terbatal secara automatik). Pemohon dinasihatkan membuat laporan polis untuk proses selanjutnya.

3.9 Butiran pemohon dan pasport yang dilaporkan hilang perlu dicatatkan di **Lampiran C** bagi tujuan rekod.

3.10 Carta Alir bagi proses permohonan kehilangan adalah seperti di **Lampiran D**

4. **KEPUTUSAN PERMOHONAN**

4.1 Keputusan permohonan gantian PMA atau penangguhan permohonan hendaklah dimaklumkan kepada pemohon dalam tempoh 5 hari bekerja dari tarikh permohonan lengkap diterima.

4.2 Kuasa mempertimbangkan permohonan diberi kepada:-

4.2.1 Pengarah / Timbalan Pengarah Bahagian Keselamatan dan Pasport;

4.2.2 Pengarah / Timbalan Pengarah Imigresen Negeri;

4.2.3 Ketua Bahagian Pasport;

4.2.4 Ketua Imigresen Cawangan;

4.2.5 Timbalan Ketua Imigresen Cawangan jika ketiadaan Ketua Imigresen Cawangan);

4.2.6 Ketua Atase Imigresen; dan

4.2.7 Timbalan Ketua Atase Imigresen jika ketiadaan Ketua Atase Imigresen).

4.3 Sekiranya pemohon membuat rayuan bagi kes penangguhan keputusan penangguhan hanya akan dipertimbangkan oleh **Ketua Pengarah Imigresen Malaysia.**

PEMBATALAN

Pekeliling Imigresen Malaysia Terhad Bil. 2 Tahun 2011 bertarikh 29 Mac 2011 adalah dibatalkan.

TARIKH KUATKUASA

Pekeliling ini berkuatkuasa mulai tarikh dikeluarkan.

LAMPIRAN B

TEMPOH PENANGGUHAN PASPORT/DOKUMEN PERJALANAN BAGI YANG MELAKUKAN KESALAHAN

BIL	KESALAHAN	TEMPOH PENANGGUHAN
1.	Terlibat dengan kesalahan kes pengedaran dadah di dalam negara. Nama pemohon terdapat di dalam Senarai Syak Jabatan atas permintaan PDRM	3 tahun atau mengikut keputusan PDRM
2.	Tiada mendapat kebenaran dari Kementerian Dalam Negeri untuk memasuki Israel	3 Tahun
3.	Memburukkan kerajaan Malaysia/negara dalam apa bentuk atau cara sekalipun.	3 Tahun
4.	Menjejaskan imej negara di luar negara kerana ditangkap dan dikenakan tindakan undang-undang serta dihantar pulang kerana: Melakukan jenayah Tinggal lebih masa; dan Bekerja tanpa permit yang sah.	3 Tahun

[296]Having scrutinised the respondents' explanation and the Circular, I find that both the explanation and the Circular suffer from several fatal flaws.

[297]Dealing first with the Circular and again operating on the principle of presumption of validity, that the Circular is valid and has force of law, it is quite clear from its own terms that it does not authorise the respondents to blacklist the appellant whether for the reasons proffered or at all. Second, the Circular is invalid.

[298]On the first ground, the Circular deals with how applications for replacement international passports which are lost or damaged are to be managed; and for the period of suspension of issuance of a new international passport to those who have committed criminal offences both within and outside the country which may jeopardise the image of the country. This is evident from the description of the Circular itself and from its paragraph 1.1.

[299]In the case of passports which have been lost or stolen, the passport number will be revoked and blacklisted in the respondents' system so that it will not be wrongly used by others – see paragraph 3.5. Such details will also be forwarded to the police for inclusion in INTERPOL's system. This makes perfect sense and understandably

serves to protect the holder of the passport whose passport has been stolen from wrongful use. The appellant's case does not fall under this scenario.

[300]In the second situation where the holder of the passport has committed some criminal offence whether within or outside Malaysia, following from paragraph 1.1, the issuance of a new passport may be suspended. See paragraph 3.7.2 – "permohonan boleh ditangguh seperti di Lampiran B".

[301]Again, the appellant's case does not fall within this scenario as she was not applying for another new international passport such that a new passport may not be issued to her for the relevant period, depending on the circumstances as set out in Lampiran B. The Circular thus does not apply to the appellant.

[302]Consequently, on the strength of the respondents' own Circular, the impugned decision is clearly invalid and offends its own procedural requirements and an order of certiorari ought to have been granted to quash the said decision. However, since the respondents have themselves removed the appellant from the blacklist even before the application for judicial review was filed but this was not known till later, then the appropriate order would be the grant of a declaration that the respondents have acted in excess of jurisdiction.

[303]On the second ground, I am of the firm view that the Circular is in any event invalid. There are several reasons for this conclusion.

[304]In order to answer the question of compliance with the procedural requirements, be it of the principal Act or any Regulations made under the principal Act, the source of the power to issue the Circular must be examined. In this respect, the Circular gives no indication of its source of enabling power; whether it be pursuant to Act 155 or Act 150. Further, even if this was a drafting flaw, neither legislation empowers the respondent, in particular the 1st respondent from issuing such circulars having a force of law to have the reaches that it did in the case of the appellant. At best, such circulars are only administrative and for internal use with no force of law at all.

[305]Although the learned SFC had conceded that the Circular is issued under Act 155, with respect, that concession including the appellant's acceptance, is not determinative. I am of the view that it is incumbent on the Court to carefully examine both Act 155 and 150 in order to determine first, which is the applicable law; and second, if there is some enabling power to make such circulars.

[306]In my view, Act 155, the Immigration Act, actually has no application and its reliance is misplaced. To a large extent, this is in fact the argument of the appellant; that Act 155 does not provide for matters of the nature contemplated by the respondents. Although the appellant was making the submission from the perspective of express power to impose travel bans, the primary argument of the appellant was that Act 155 does not provide for or govern the matters claimed by the respondents. In this respect, I agree.

[307]Act 155 deals with immigration. There are seven Parts in Act 155. Putting aside the Special Provisions for East Malaysia in Part VII [sections 62 to 74], and save for section 5, this Act deals with admission or entry into the country – Part II; the applicable and required documentation and procedure for such valid entry – Parts III and IV; removal of prohibited and illegal immigrations or persons who have unlawfully remained in the country – Part V; and the relevant powers related to such matters including powers of arrest and detention of the persons mentioned in Part V– Part VI.

[308]I have singled out section 5 in Part II as it is the only provision dealing with entry into or departure from the country that would be applicable to the appellant, as a citizen although sections 6 and 7 deal with the appellant's right, as a citizen, of entry into Malaysia, without a Permit or Pass, as defined under Act 155. The remaining parts of Act 155 do not apply to her including sections 9, 9A which empower the Director General of Immigration to prohibit entry or limit entry into Malaysia where he "deems it expedient to do so in the interests of public security, or by reason of any economic, industrial, social, educational or other conditions in Malaysia". In fact, the proviso to both these provisions expressly provide that any order made by the DG pursuant to these provisions "shall not apply to any citizen".

[309]It also becomes apparent that Act deals more with matters of entry and arrivals into Malaysia of non-citizens and how unlawful entries of such persons or persons without the necessary travel documentation, the substantial part of Act 155 has nothing really to do with her. As a citizen, the appellant is expressly guaranteed a right of entry without restrictions. So, the only provision relevant for the purpose of this appeal and which may be applicable to the appellant is on her right to depart from Malaysia. This is where section 5 of Act 155 comes in.

[310]Insofar as section 5 is concerned, it seeks not to provide that the appellant, as a citizen has a right to depart

from Malaysia. Instead, it provides for the prescription and declaration by the Minister of "approved routes" and "such immigration control posts, landing places, airports or points of entry". All entry and departure from the country must be through or from such declared points of entry. In other words, it is appellant's point of departure from Malaysia that is controlled by Act 155 and not her right to depart. In fact, Act 155 does not regulate the right of the appellant, as a citizen to depart from Malaysia save in respect of **where** the departure must take place. In the case of the appellant, it is not in dispute that on the fateful night, she was departing from a designated and declared point of entry or immigration control post, namely KLIA.

[311]Since Act 155 does not regulate the right to depart and by implication, the right to travel, then the Circular which claims to have its source of validity under this Act, is simply invalid. The compliance of any procedural requirement must necessarily refer to valid procedures that are enacted under the Act or the Regulations made thereunder. As Act 155 does not restrict the right to depart and to travel, there can be no Regulations made for such purpose; and if there are, its validity would be in serious doubt. The Circular would be in an even worse or more precarious position.

[312]The respondents attempt to argue that the Circular and thereby the ban or blacklisting of the appellant and/or passport was pursuant to the powers set out in section 3(2) of Act 155. This provision states that the Director General of Immigration "shall have the general supervision and direction of all matters relating to immigration throughout Malaysia". In my view, this power of supervision and direction may only be properly exercised in relation to matters already prescribed by Act 155 or by the Regulations made under Act 155. It may also extend to matters under Act 150 since both pieces of legislation come under the purview of the Director General of Immigration and are necessarily related. It cannot be in relation to matters outside Act 155 or Act 150, certainly not on matters governed by other legislation unless of course there are specific powers to that effect under those laws. Such general powers of supervision and direction even of all matters relating to immigration cannot, by any stretch of imagination, extend to a power, whether implied or express, to ban travel by citizens for reasons which are unrelated to immigration or passports, as we see in this appeal, that is, purportedly for scandalising or ridiculing the government, a matter which does not come within the purview of the original powers of the Director General of Immigration. The affidavit deposed by the Director General of Immigration does not indicate that he acted on the instruction of some other authority; rather it was entirely his decision; seeming to suggest a misconception that he has the power to regulate such behavior or conduct, which he does not.

[313]As I have attempted to show, Act 155 does not contain any provision regulating departure by citizens save in the manner as set out in section 5. Thus, the Director General of Immigration's powers of general supervision and direction in section 3(2) can only be in relation to section 5 and that is only on the matter of point of entry or immigration control posts; and cannot extend its reaches beyond those limits.

[314]The scrutiny, however, does not stop there. As I had said at the outset, the correct legislation must be identified; and if after the whole exercise, there is none, then the whole decision is a nullity. The appellant was unable to travel on 15.5.2016 because her document of travel, her valid passport, rightly or wrongly, had been blacklisted. It was not because, nor has it ever been suggested that she was departing Malaysia from an undeclared point of entry/departure.

[315]Since the appellant's departure was hindered or barred by reason that her document of travel, that is, her international passport had been blacklisted, Act 155 thus has no application. The relevant law on passports is the Passports Act 1966 [Act 150], an Act "relating to the possession and production of travel documents, by persons entering or leaving, or travelling within, Malaysia, and to provide for matters connected therewith".

[316]I am fortified when the Circular is examined, that it clearly deals with passports, whether replacement or new passports. Hence in my opinion, the proper legislation must be Act 150 and not the Act 155 which deals with immigration matters. Aside from suffering from being unable to meet the terms of the Circular itself, as already explained, Act 150 too, does not allow for the issuance of such circulars. I shall return to this point later.

[317]Under section 1 of Act 150, a "passport" is defined to mean "a valid passport which has been issued to a person by or on behalf of the Government of which he is a subject o or citizen and includes any form of valid document of identity issued for the purpose of travel by any Government and recognised as a travel document by the Government of Malaysia". Pursuant to section 2(2), every person, including the appellant, "leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport". And, under section 2(3), an immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall the questions truthfully". Under section 2(4), an immigration officer "may make on any passport produced under this section such endorsement as he thinks fit".

[318]Thus, it would appear that section 2 of Act 150 empowers the immigration officer to endorse as he thinks fit on the passport of any person, citizen or non-citizen, following from questions put and answers given.

[319]Two points arise here. First, while the immigration officer may endorse as he thinks fit, it is not an unfettered discretion. The endorsement or the exercise of the power under section 2 is always open to challenge and scrutiny by the Courts. Second, such endorsements in any case, logically, may only take place at the time of entry or in the case of the appellant, at the time of departure. It would be reasonable and also fair to say that the endorsement may extend to a prohibition of entry or departure or such similar remark. Again, it may only be lawfully endorsed at the time of presentation of passport, and only upon questions put and any answers given.

[320]While the respondents may have entered the appellant's name into its list, it is her passport and its details that are entered so that the respondents may control her movement into and from the country.

[321]But, as volunteered by the respondents, the endorsement or the blacklist was not affected at the time of departure on 15.5.2016 by the relevant immigration officer at KLIA. Instead, it was entered on 6.1.2016, in clear violation of the terms of section 2 of Act 150. Thus, the endorsement is for this other reason, invalid.

[322]In reviewing the impugned decision under Act 150, it is obvious that the terms of section 2 have not been complied with and the impugned decision is bad in law as well as on the facts.

[323]I must add that Act 150 does not empower the respondents, especially the 1st respondent to issue a Circular having force of law. And, this was a point that I had alluded to earlier.

[324]Section 11 empowers the Minister to make Regulations generally for the purpose of Act 150. The Circular is clearly not such Regulations made by the Minister; it is issued by the 1st respondent as the Director General of Immigration. The Circular thus cannot claim its source of enabling power to be housed in Act 150.

[325]The same may be said of section 12D of Act 150 which empowers the Minister, the 2nd respondent to give, from time to time, directions to the Director General of Immigration of a general or specific nature not inconsistent with Act 150 as to the exercise of the powers and discretion conferred on the Director General of Immigration by and the duties required to be discharged by the Director General of Immigration under Act 150 in relation to all matters which appear to the Minister to affect the policy of Malaysia. From the contents of the Circular, it is patently clear that the Circular was never issued under this power in section 12D; there was also no such claim or suggestion. If there were, it would fail as the Circular is clearly not a direction nor does it hold out to be issued or prepared pursuant to such direction from the Minister. Absent its source, the Circular upon which the respondents blacklisted the appellant, has no force of law.

[326]It then brings me to the point that I had made about the explanation offered by the respondents; that even if the Circular is valid, the respondents, certainly not the 1st respondent, have no power to ban or bar the appellant on the ground that she has criticised the government or that she has committed some offence in that respect. For that matter, the 1st respondent has no authority to bar any citizen on the ground that the citizen has committed some offence including the offence of disparaging the government unless it is an offence within Act 155 or even Act 150.

[327]This is because the 1st respondent and the immigration officers are not police and do not have police powers under the Police Act 1963. What the 1st respondent and the other immigration officers have by way of police powers is only what is expressly provided to them under Act 155 or even Act 150, or under any other specific law. This is evident from section Part VI of Act 155, in particular section 39. The police authority and powers given to every immigration officer to arrest, detain or remove is clearly only for the specific purpose of enforcing any of the provisions of Act 155, not some other legislation. The offences created in Act 155 relate to illegal entry into the country and the unlawful presence in the country and such similar offences. Act 155 does not provide for any offences on disparaging the government; neither does Act 150. I must add, the creation of such an offence must be expressly provided; there is no room for implying the existence of such an offence.

[328]The respondents have no power to cast upon themselves the right or authority to determine what conduct, action or speech of any person including a citizen, would amount to an offence of disparaging the government. That decision or determination is entrusted by Parliament to the bodies properly authorised under the relevant laws, for example Penal Code or Sedition Act, to act. In this respect, this would generally be the task and responsibility of the police. The respondents are not police and they have no power or authority to determine any offence of that nature or to even investigate or act, even if for a moment there was such an offence committed.

[329]Understanding thus the proper role, function and place of the 1st respondent under both Act 155 and Act 150 - that the 1st respondent has no business determining that the conduct or act of the appellant has disparaged or is disparaging the government, the second aspect of the first question must also be answered in the negative.

[330]In short, the 1st respondent is not a police officer and is in no position to make any determination that the appellant has disparaged the government. That task and duty is given to the police under the Police Act 1963. Hence, the 1st respondent's reasons, once made available to the Court to examine, "voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event" the Court is entitled to examine, evaluate and assess in order to come to a reasonable conclusion – see *Tan Sri Raja Khalid bin Raja Harun v Minister of Home Affairs* [1988] 1 MLJ 182 reveal an unlawful act on the part of the respondents.

[331]When the respondents' role in relation to Income Tax Act 1967 [Act 53] or the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 [Act 566] is examined, it will then be appreciated that neither of them, especially the 1st respondent, has any power to ban travel or to even blacklist a person. As explained by the appellant, Act 53 contains fairly elaborate detailed provisions on preventing a person in the circumstances mentioned in section 104 from leaving the country.

[332]Under section 104 of Act 53 and section 22A of Act 566, there are fairly stringent requirements of process that must be observed, including prior notification on the affected person of the intended act of travel ban or restriction, before any restriction is to take effect. It is quite apparent from those legal regimes that the authority or power to issue the certificate containing the necessary details of debt coupled with a request to the Director General of Immigration to prevent the person concerned from leaving Malaysia lies with those entities. Section 104(2) of Act 53 and section 22A(2) of Act 566 then directs the Director General of Immigration "to take or cause to be taken all such measures as may be necessary to give effect" to the certificate, including use of reasonable force, and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person. There are no such powers given to the Director General of Immigration or to the Minister, whether under Act 155 or Act 150.

[333]Consequently, the respondents' role and responsibility in relation to preventing anyone from leaving Malaysia, is merely facilitative in nature. The 1st respondent assists and facilitates another authority and he can do that as the control of borders or entry points and use of travel documents including passports are within his purview.

[334]Other laws containing provisions similar to section 104 of Act 53 and section 22A in Act 566 may be found in the following legislations, just to name a few – section 15A in Excise Act 1976 [Act 176]; section 17A in Customs Act 1967 [Act 235]; section 38A in Insolvency Act 1967 [Act 360]; section 74A in Stamp Act 1949 [Act 378]; section 27 in Tourism Tax Act 2017 [Act 791]; section 27J in Companies Commission of Malaysia Act 2001 [Act 614]; section 132 in Securities Commission Malaysia Act 1993 [Act 498]; Real Property Gains Tax Act 1976 [Act 169]; section 39 in Employees Provident Fund Act 1991 [Act 452]; and section 44 in Malaysian Anti-Corruption Commission Act 2009 [Act 694]. In each and every one of these legislations, the power to restrain the person from leaving Malaysia is expressly provided to the relevant authority or agency but never to the 1st respondent; and the 1st respondent's role and function is at all times, supportive, facilitative, assisting of that primary authority or agency. The position under Act 155 and Act 150 is no different; more so, when dealing with the offence that the appellant is alleged to have committed.

[335]All these various pieces of legislation show that there must be express power to restrict or ban a citizen from leaving Malaysia. Since there are no express provisions in both Act 155 and Act 150 empowering the respondents to restrict, prevent or ban any citizen from leaving Malaysia, that the 1st respondent's role is merely facilitative or to assist other departments or agencies who have express and specific power to restrict, prevent or ban any person from leaving Malaysia, the impugned decision is clearly invalid; and any purported exercise of such power in the future, must, under similar circumstances, be patently invalid.

[336]Consequently, within the procedural ambit of challenge, I find that the respondents have themselves fatally failed to abide by their own procedure and applicable law.

[337]It appears to have been overlooked that Act 150 does not contain any ouster clause, seeming to restrict the Court's power to judicially review the impugned decision. Clearly, this recognises that the respondents' discretion is not in the least, unfettered. And, as discussed, the impugned decision is necessarily and more properly a decision under the Passports Act and not the Immigration Act, the impugned decision must and ought to have been so examined by the High Court instead of readily accepting that it is Act 155 that applies. Applying the ***Wednesbury***

principles, the impugned decision is obviously flawed and, if not retracted, should have been quashed. In such circumstances, suitably couched terms for a declaration ought then to have been granted.

[338]Even if there was an ouster clause, regardless Act 150 or Act 155, it is readily apparent that the impugned decision is patently invalid and must be set aside; and its damage neutralised. Whether under the Circular [regardless Act 150 or Act 155] or under the terms of Act 150 itself, the decision of blacklisting and thereby prohibiting the appellant from departing the country is bad and invalid for all the reasons already set out.

[339]Although the blacklisting or endorsement had already been lifted, it is a matter of grave importance to the general citizenry and to the respondents too, that the validity of the impugned decision is still examined. As seen, the respondents have not only made a decision which is wholly irrational and unreasonable [the offending conduct attributable to the appellant had yet to take place], they have acted far in excess of their jurisdiction.

[340]The first question is thus answered in the negative.

Question 2

Whether section 59 of Act 155 is valid and constitutional?

[341]As for the second question, this deals with the right or opportunity to be heard before the Minister or the Director General of Immigration makes an order against the appellant in respect of any matter under Act 155 or any subsidiary legislation made under Act 155.

> **Exclusion of right to be heard**
>
> 59. No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

[342]Given that any departure may only be validly prohibited in the manner and conditions as set out in section 2(4) of Act 150, and in the case of the appellant, that was not done, there is thus a violation of section 2(4). Had section 2(4) been complied with, the matter of right to be heard would not have arisen as the 1st respondent, or his officers, may only endorse on the appellant's passport, after posing questions to the appellant. The respondents acted under their misconceived understanding that there was power and authority to ban or blacklist citizens such as the appellant for the reasons presented in their affidavits but any reliance on section 59 of Act 155, assuming the Act even applies, is entirely misplaced.

[343]Be that as it may, regardless the fact that the respondents had proceeded erroneously for the multifarious already reasons discussed, that does not mean that the Courts must invoke its jurisdiction to invalidate the provision under challenge. Since Act 155 has no application to the appellant in the particular facts of the appeal, and given that it applies to matters as espoused by her learned counsel, that is the Act is intended to deal with foreigners and their rights to enter, remain and leave Malaysia, the issue of section 59 and its validity is best examined when the appropriate circumstances present. The instant appeal is not such a circumstance.

[344]However, where Act 155 applies, the right to be heard is intrinsic to the whole fabric of the administration of justice where the rule of law demands that there must always be fair play. In the exercise of its supervisory jurisdiction, the Courts too have never been deterred by provisions of law which do not require that reasons for decisions be given, whether it is to enable an appeal to be undertaken [see *Rohana bte Ariffin & Anor v Universit Sains Malaysia* *[1989] 1 MLJ 487*] or simply for the person affected to know – see the extensive deliberations of the Federal Court on this issue in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* *[1999] 3 MLJ 1*. What had started off as an exception to the instances when reasons ought to have been given even though there is no statutory requirement to give reasons, has evolved into a norm - that the rules of natural justice require reasons to be provided.

[345]Although that view is expressed in the context of the obligation of decision-makers to give reasons, I see no distinction when it comes to the right to be heard, that before a decision is rendered in respect of any matter under consideration, the rules of fair play require that an accused be informed of the complaints against him, that he has an opportunity to explain, if he so wishes, before a decision is taken.

[346]There is no doubt in my mind that the actions or decisions of the respondents, as subordinate bodies

statutorily conferred specific powers must come under the supervisory jurisdiction of the Courts; that Parliament could not possibly leave such bodies or authorities free to do as they please; that in making any decision concerning a citizen as to his right to depart the country, that person does not need to be heard. The contrary must be the correct position in law – see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 where the Federal Court took the view that the rules of natural justice require that "no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative decision, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing".

[347]This is how the Courts have always addressed complaints of violation and breach of natural justice in that the complainants have not been afforded an opportunity to be heard, instead of invalidating the provision. The Courts, in exercising its supervisory jurisdiction, will read down the provision to see how such a provision has impacted, if at all the rights of the complainant. In fact, the presence of provisions providing for an opportunity to be heard before a decision is pronounced is still not a bar to the Court impeaching that decision on the ground that the opportunity to be heard was not a real, proper or effective hearing and that there has been a breach of natural justice – see *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] 1 MLJ 169, PC; *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 SC; *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17.

[348]Ultimately what is the real meaning and what amounts to an opportunity to be heard depends on the circumstances and nature of each case – see also *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 FC; ; [2012] 3 CLJ 577.

[349]Another aspect that appears to have been overlooked is that on the facts, only section 5 of Act 155 applies to the appellant, as a citizen. As pointed out earlier, Act 155 has a different purport, and that is to do with the entry of foreigners and how they are to remain in Malaysia. There is, however, another part to Act 155 which applies to the appellant as a citizen, but which I had not addressed earlier when dealing with the first question as this appeal stands on its own facts and which cautions me against rushing into answering the second question. Here, I am referring to Part VII of Act 155 which contains Special Provisions for East Malaysia from sections 62 to 74.

[350]Section 64 carries its own peculiar interpretation provisions; and at section 65 is a special provision conferring upon the State Authority certain "general powers":

> **General powers of State Authority**
>
> **65.**
>
> (1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State Authority, being directions-
>
> (a) requiring him not to issue a Permit or Pass, or a specified description of Permit or Pass, to any specified person or class or persons, or to do only for a specified period or on specified terms and conditions;
>
> (b) restricting the marking of endorsements on a Permit, Pass or Certificate; or
>
> (c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.
>
> (2) Where the Director takes any action in obedience or purported obedience to any directions given under subsection (1), and there is an appeal to the Minister against that action, the Minister shall not allow the appeal without the concurrence of the State Authority.
>
> (3) An order under section 55 shall not have effect as a special law for an East Malaysian State, except so far as its provisions are by the same or a subsequent order applied to those persons with the concurrence of the State Authority.

[351]The 'State Authority' is defined in section 62 as meaning "the Chief Minister of the State or such person holding office in the State as the Chief Minister may designate for the purpose by notification in the State Gazette."

[352]Given that section 59 [and for that matter section 59A] has application to Part VII of Act 155 and Act 155 is law that deals with entry of persons into the East Malaysian States for which there are special safeguards for the

constitutional position of Sabah and Sarawak as provided in Article 161E(4) of the Federal Constitution, it would be highly improper to find section 59 invalid for the reasons articulated by the appellant; without more and certainly not without having those States heard. The East Malaysian States may well have their justifications and sound reasons for not affording an opportunity to be heard before making its decision under any of the scenarios in section 65. But whether such justifications or reasons will withstand the scrutiny of the Court is entirely an exercise which I am not prepared to embark on; that is wholly speculative and wrong.

[353]As reminded at the outset of these discussions, section 59A impacts on powers of entities other than the 1st respondent and on matters other than the right to travel. The appellant, as I have said, has recognised from the very outset that her right to travel is not absolute, that her right may be curtailed. And, since section 59 has application beyond the factual matrix of the appellant's case which really is one of not falling within Act 155, I find that the second question must be answered in the affirmative.

Question 3

Whether section 59A **of Act 155 is valid and constitutional in the light of** *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('*Semenyih Jaya*') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('*Indira Gandhi*')?

[354]I note that this third question is posed in the context of ***Semenyih Jaya*** and ***Indira Gandhi*** instead of identifying the specific provisions of the Federal Constitution which are alleged to have been violated so as to render section 59A unconstitutional and invalid. From the submissions filed, it would appear that the argument is thus – that section 59A is unconstitutional because it impinges on the judicial power of the Court as enshrined in Article 121 and safeguarded by Article 4.

[355]In my view, there is no reason to doubt the constitutionality of section 59A, even if for one moment Act 155 applies. section 59A is not couched in absolute or total terms, offending Article 4 of the Federal Constitution or even Article 121, as discussed and understood in the various recent decisions of this Court. Its validity is saved by its own express limitations which the Court has read and applied with much circumspection. The provision does not inhibit the power of the Court to intervene, examine and/or set aside any decision made under Act 155.

[356]If at all the validity of section 59A arises, it is only in this limited and narrow respect and that is, since section 59A only provides for a procedural oversight of the respondents' decisions or actions, can the Court ever exercise its supervisory jurisdiction by judicially reviewing the decision or action on substantive merits, as was done in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145; and followed in *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; *Petroliam Nasional Berhad v Nik Ramli Bik Hassan* [2004] 2 MLJ 288; *Ranjit Kaur a/p Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] MLJ 1; *Tenaga Nasional Berhad v Yahaya bin Jusoh* [2014] 1 MLJ 483; *I & P Seriemas Sdn Bhd & Anor v Tenaga Nasional Berhad* [2016] 1 MLJ 261; and *Wong Yuen Hock v Syarikat Leong Assurance Sdn Bhd & Another Appeal* [2016] 1 MLJ 268.

[357]I am of the view that there is no need for me to address this aspect since the impugned decision is invalidated by reason of having failed to meet the procedural requirements as set; even if accepting those requirements are valid to start with. To examine the validity and constitutionality of section 59A for the reasons articulated by the appellant would amount to an overkill, almost smothering a fly with a sledgehammer. In any case, section 59A is law that Parliament is entitled to enact under the powers of legislation as found in Article 121 of the Federal Constitution; as explained by my learned brother Abdul Rahman Sebli FCJ.

[358]I must add that I do not agree with the submissions of the appellant on giving the term "procedural requirements" in section 59A such a narrow construction; that the wider ground of procedural impropriety which is traditionally a ground open to the Courts in an application for judicial review to examine administrative or other decisions of subordinate or inferior bodies are supposedly excluded. The principles of procedural impropriety or proportionality are legal principles that the Courts and legal counsel employ to examine a decision; to reason why a decision is proper or otherwise. These reasonings and principles can never be abrogated or abolished by a stroke of a pen in any statute without offending the principles of constitutional supremacy for the reasons already discussed in the trilogy of decisions of the Federal Court.

[359]In any case, the appellant accepts that her right to travel is not absolute. From her submissions, it may be readily deduced that the appellant is not asserting that she has an unrestricted absolute right to travel overseas. But, before I deliberate on the existence of this right, it bears well to remember that there is a distinction between the right to travel overseas and the right to leave one's own country. The right to travel is often dependent on personal inclinations and capabilities, particularly economic and financial. It is the right to leave one's own country

that is of greater significance as that is not specifically provided in the Federal Constitution unlike the right of movement within Malaysia as provided in Article 9. This is also borne out in the terms of international conventions that I will turn to shortly. The issue is whether Article 9 of the Federal Constitution implicitly recognizes the right to leave Malaysia, as is the approach in some jurisdictions.

[360]Be that as it may, the poser in the first question implicitly accepts that while a person, a citizen, has a right to leave one's own country even under international law, and there are several international conventions dealing with this right; it recognises that such right is not absolute and that there are restrictions on border controls. Amongst the international conventions are Article 12 of the International Covenant on Civil and Political Rights (ICCPR); and Article 13 of the Universal Declaration of Human Rights (UDHR):

Article 12 [ICCPR]

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The abovementioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre* public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Convention.

Article 13 [UDHR]

1 Everyone has the right to freedom of movement and residence within the borders of each State.

2 Everyone has the right to leave any country, including his own, and to return to his country.

[361]There is also a similar convention under the European Union, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto– see Article 2 on freedom of movement. Under that Protocol, the threshold which a member State must demonstrate has been met before a ban on movement is seen to be lawful in European law is that "the individual's personal conduct must constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it." – see ***Issue Paper on "The Right to Leave a Country" prepared by the Commissioner for Human Rights under the Council of Europe"***, October 2013, page 22. The ban cannot be disproportionate to the aim in preventing the person from leaving one's own country – see *Sissanis v Romania* , 25 January 2007 [application number 23468/02]. Further, any interference with the right to leave must strike a fair balance between the public interest and the individual's right to leave – see *Foldes and Foldesne Hajlik v Hungary* , 31 October 2006 [application number 41463/02]; and *Nalbantski v Bulgaria* , 10 February 2011 [application number 30943/04].

[362]Although Malaysia is not a signatory to the ICCPR, it is interesting to note that Article 12 of the ICCPR is not a non-derogable right in that States are permitted to restrict the right to leave in exceptional circumstances, is actually observed in this country. However, such restrictions must be provided by law. Those restrictions may include requiring documents of travel before the right may be exercised but in doing so, the State is required to make the travel documents available at a reasonable cost and within a reasonable time. The refusal to issue such travel documents and thereby the right to leave is permissible only in exceptional circumstances, must be on clear grounds, proportionate and appropriate under the relevant circumstances.

[363]Interestingly, this right to leave one's own country or this liberty of movement, suggested by the appellant as an "indispensable condition for the free development of a person"; has been viewed with caution – that it is "increasingly seen by developed states as an 'inconvenient' human right" – see paper prepared for the ***Policy Analysis and Research Programme of the Global Commission on International Migration*** by Colin Harvey and Robert P Barnidge Jr, Human Rights Centre at the School of Law, Queen's University Belfast [September 2005] [the Paper]. The Paper suggests that this right or liberty to leave one's own country must further recognize that it does not entail an automatic right to enter any other State; and that restrictions may be imposed on the right to leave [see Article 12(3) of ICCPR]. In fact, the "pressure is exerted on third countries to control the irregular moment of their own citizens"; and that a citizen cannot insist on his right to leave if leaving one's own country was in order to avoid completion of national service obligations as this restriction is seen as a 'reasonable restriction' – see *Lauri Peltonen v Finland* cited in the Paper. The same may be said where the restriction on the right to leave is

justified on the ground that it is 'provided by law and necessary for the protection of national security and public order'; that it is to curtail suspected terrorist activities – see case of *Mrs Samira Karker, on behalf of her husband, Mr Salah Karker v France* also cited in the Paper.

[364]I have taken the liberty of examining several other jurisdictions on the issue of whether the right to travel is at all a fundamental right, particularly those countries with written constitutions like us.

[365]First, Australia. Section 92 of the Australian Constitution provides:

> On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

[366]In its analysis of this provision, the Australian Law Reform Commission noted that in *Miller v TCN Channel Nine* (1986) 161 CLR 556, 581-2, Murphy J opined that "*The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the States and the States and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society… They are a necessary corollary of the concept of the Commonwealth of Australia.*

The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest." – see Australian Law Reform Commission Report in ALRC Report 129 – Traditional Rights and Freedoms – Encroachment by Commonwealth Laws.

[367]This view is however, not shared. In *Williams v Child Support Registrar* *(2009) 109 ALD 343*, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. That same Report recognized that freedom of movement "will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for reasons of public health and safety"; that the limitations must "generally be reasonable, prescribed by law, and demonstrably justified in a free and democratic society"; that limits or restrictions on freedom of movement have long been recognized by both common law and other statutes such as criminal laws, customs and border protection laws, citizenship and passport laws, environmental regulation, child support laws, migration laws, and laws restricting entry to certain areas such as parliamentary precincts, defence areas, or aboriginal lands.

[368]Next, is Chapter Two of the Constitution of South Africa which specifically provides in section 21 that "(1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic." This provision applies to all and is not confined to its citizens. However, sections 21(3) and (4) go on to provide that "(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic. (4) Every citizen has the right to a passport." This is substantive regulation of the right of persons to leave their territory. However, it must be remembered that section 21 is born out of the deep-seated concerns and pains from South Africa's apartheid history of egregious restrictions and denials on various rights, including the right to freedom of movement and residence– see discussions of the same in ***The Right to Freedom of Movement and Residence*** by Jonathan Klaaren [2nd ed Original Service: 03-07]. The 'pass laws' were said to be a 'defining feature of apartheid' where one of the most hated of apartheid restrictions on the rights of black South Africans resounded in a common refrain in the anti-apartheid struggle that 'black persons had no place to rest'. The writer opines that procedural regulations regarding departure from the country are clearly constitutional within the terms of section 21(2), that these provisions are "usually not intrusive and certainly yields benefits of information to the state in its efforts to promote development and, at least in the case of its nationals, to protect their rights beyond the borders of the territory."

[369]In the case of India, Article 19(1)(d) of the Constitution of India 1949 guarantees all citizens of India the right "to move freely throughout the territory of India" but this right is subject to reasonable restrictions as set out in Article 19(5) which are imposed in the interest of the general public or for the protection of the interest of any Scheduled Tribe. However, in *Satwant Singh Sawhney v D Ramarathnam* , Assistant Passport Officer, New Delhi & Ors AIR 1967 SC 1836 where the petitioner had contended that his personal liberty guaranteed under Article 21 of the Constitution of India had been infringed when the respondent called upon him to surrender the two passports which had been issued to him for the purposes of his travels abroad, the Supreme Court of India agreed with the petitioner that the right to travel abroad is part and parcel of personal liberty guaranteed under Article 21. Satwant Singh was considered by the High Court in *Loh Wai Kong v Government of Malaysia & Ors* *[1978] 2 MLJ 175*, where ultimately our Federal Court held that the right to travel abroad was in truth, only a privilege.

[370]These cases show that even if the right to travel or leave the country is regarded as falling within Article 9 of

the Federal Constitution, or even for one moment within Article 5, that right is not absolute. It is indeed only a privilege. This privilege is further reflected in the words found in every passport issued by the Immigration Department:

> "**Bahawasanya atas nama Seri Paduka Baginda Yang di-Pertuan Agong Malaysia, diminta semua yang berkaitan supaya membenarkan pembawa pasport ini melalui negara berkenaan dengan bebas tanpa halangan atau sekatan dan memberikan sebarang pertolongan dan perlindungan yang perlu kepadanya.**
>
> **This is to request and require in the Name of His Majesty Yang di-Pertuan Agong of Malaysia, all whom it may concern allow the bearer of this passport to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary**".

(**emphasis added)**

[371]In short, the right to leave our shores is not absolute. This right may be curtailed by reasonable means and on reasonable grounds. Those grounds are not met in this appeal and since I have concluded that the respondents do not possess any power or authority whatsoever to police the offence of disparaging the government [no provision of law has actually been identified by the respondents], the respondents cannot bar the appellant from leaving the country. That decision to ban the appellant from leaving is always subject to scrutiny of the Court and section 59A implicitly recognises that.

[372]Another aspect to section 59A is this – it prescribes the remedy or cause of action that affected persons including citizens may take in the event they wish to challenge any action or decision taken by the respondents under Act 155. It provides what the potential litigant may complain about or how he is to ground his complaints for a judicial review. This is consistent with the right of the appellant, as a citizen to have access to justice and in fact, is entitled to the equal protection of the law.

[373]Now, how the Court is to deal with the complaint when approached for the exercise of its supervisory jurisdiction is not a matter which is spelt out or can be dictated by the terms of section 59A. That power, authority or jurisdiction is provided for in Article 121 read with Article 4 and more specifically, in the Courts of Judicature Act 1964 [Act 91]. It is in those sources that the Court takes its power and jurisdiction, including inherent power; and it is through legal reasoning and jurisprudence that the Court determines whether its powers within its supervisory jurisdiction would be engaged in any particular cause. Legal principles of reasoning such as the rules of natural justice, the *audi alterem partem* rule; the *Wednesbury* principles of procedural impropriety, illegality, irrationality and unreasonableness [see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; and *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374], *mala fides*, abuse of process, are but a few such principles.

[374]In an application for judicial review, the Court exercises its supervisory jurisdiction as opposed to its original and appellate jurisdiction. In the exercise of its supervisory jurisdiction, the merits of the decision are not of primary concern; it is the process or the procedure that is scrutinized. And, in determining whether those processes or procedure have been complied with, the Courts use, amongst others, its powers and tools of principles and reasoning to reach its answer. As alluded to earlier when dealing with the first question, this task is not mechanical, passive or grammarian; it is a heavy responsibility carefully shouldered so that proper direction may be shown so that the same errors are not repeated; and generally, for better administration. These tools of reasoning can never be legislated; it would lead to sheer exhaustion.

[375]Consequently, once appreciated in that light, there is nothing unconstitutional or invalid in section 59A, especially in the context and circumstances of the appellant. This question is thus answered in the affirmative.

[376]In such circumstances, the Court must show its disdain and grant the declaratory order best suited to the prevailing facts as stated in my learned brother Abdul Rahman Sebli's judgment.

[377]My learned sister, Rohana Yusuf PCA, my learned brother, Abdul Rahman Sebli FCJ and my learned sister Hasnah Mohammed Hashim FCJ, have read this part of the judgment in draft and they concur with the reasons and conclusions reached.