Abdul Kahar bin Ahmad & Ors v Jabatan Agama Islam Selangor & Ors [2022] MLJU 1920

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

NOORIN BADARUDDIN J

PERMOHONAN SEMAKAN KEHAKIMAN NO WA-25-375-12/2020

6 August 2022

Ameerul Aizat bin Noor Haslan (with Fahri Azzat and Iqbal Harith Liang) (Fahri & Co) for the applicants. Nur Irmawatie Daud (with Husna Abdul Halim) (Assistant Legal Advisor State of Selangor) for the first, second, third, fourth, fifth and sixth respondents.

Noorin Badaruddin J:

JUDGMENT

[1]On 14.4.2022, this Court allowed the Applicants' judicial review application partly and awarded damages of RM10,000.00 to each Applicants to be borne by the 1st and 5th Respondents.

[2]Vide the amended judicial review application (Enclosure 36), the Applicants seek inter alia for the following reliefs:

i. Declaration that *s. 23* of the *Syariah Criminal Procedure (Selangor) Enactment 2003* **("SCPE")** is null and void as it is inconsistent with Articles 5 and 8 of the Federal Constitution **("FC"),** natural justice and rule of law;

ii. Declaration that the Applicants were illegally detained; *

iii. Certiorari Order against the 4th and 6th Respondents' Order;

iv. Certiorari Order against the Syariah Criminal Cases against the Applicants;

v. Mandamus Order to obtain the Applicant's belongings;

vi. Damages against the Respondents for illegal detention.

Facts

[3]The Applicants were arrested by the 1st to 3rd Respondents on 20.9.2020 on the suspicions that they have committed syariah criminal offences and subsequently were brought to the 1st to 3rd Respondents' headquarters in Shah Alam.

[4]On the following day, the Applicants were brought before the 4th Respondent where the 1st to 3rd Respondents applied for the Applicants to be bonded. The said application was made pursuant to *s.23* of the *SCPE*. The 4th Respondent allowed the application and ordered the Applicants to be released on bail on condition that they must furnished bonds and guarantors, failing which, all the Applicants will be detained **('the** 4th **Respondent's Order').**

[5]The Applicants did not manage to comply with the 4th Respondent's Order due to the time constraint as it was already late in the evening. As a result, they were brought to their respective prisons i.e. the Sungai Buloh Prison for male adults, Pusat Koreksional Puncak Alam for kids, and Women's Prison in Kajang for female adults, to serve their detention together with the other inmates.

[6]Subsequently, the Applicants were released by the prison authorities as follows:

Applicants	Detained On	Released On	Number of Days In Detention
1 st 2 nd 4th	21.9.2020	22.9.2020	1
3rd and 14th	21.9.2020	24.9.2020	3
8th to 9th	21.9.2020	5.10.2020	15
7th	21.9.2020	9.12.2020	79
5th and 6th	21.9.2020	21.12.2020	92
10th to 13th	21.9.2020	28.12.2020	99

[7]No charges were preferred against any of the Applicants as to date and the Applicants were still reporting themselves to the District Islamic Religion Office.

[8]On 21.12.2020, the 6th Respondent issued a new Court Order altering the 4th Respondent's Order **("the 6th Respondent's Order")** in which it was ordered as follows:

i. All the Applicants are discharge not amounting to acquittal *(dilepaskan tanpa bebas)* on the 3rd Respondent's bail with one guarantor except for the 1st Applicant where the 1st Applicant need to furnish two guarantors.

ii. All the Applicants who are above 18 years old are ordered to report to the District Islamic Religion Office of their residency once a month. The previous order that requires the Applicants who are under 18 years old to report to the District Islamic Religion Office is cancelled.

iii. That the bonds are refunded to the Applicants and all the Applicants' previous guarantors are released.

iv. That this bail is extended until 22.6.2021.

[9]At the time this judicial review application was filed, the 6th Respondent was not yet made a party.

[10]The leave application was subsequently heard on 5.4.2021 and adjourned for decision on 12.4.2021 whereby this Court allowed the Applicants' leave application for judicial review against the Respondents. On 28.7.2021, this Court allowed the Applicants' application to add the 6th Respondent as a party and to make few amendments in respect of the 6th Respondent including some new facts.
Summary of the Applicants' Contentions

[11]Summarily, it is the Applicants' contention that:

i. *S.23SCPE* is unconstitutional and the 4th Respondent's Order is tainted with illegality, irrationality, improper procedures and disproportionality;

ii. The 6th Respondent's Order is irrational, improper and disproportionate

Summary of the Respondents' Contentions

[12]Summarily, the Respondents contend that:

i. This Court has no jurisdiction over the present matter;

ii. The criminal investigation by the 1st to 3rd Respondents cannot be challenged by way of judicial review;

iii. The 4th to 6th Respondents' power cannot be challenged by way of judicial review

Findings

[13]The crux of the matter herein relates to the detention of the Applicants which is said to be unlawful and illegal. The Applicants are not challenging the power of investigation or arrest by the 1st to 3rd Respondents. As such, the second ground of the Respondents' contention need not be addressed.

[14]Further, it must also be made clear that the Applicants are not challenging the competency of the State Government to legislate and as such the Applicants need not file a Petition to the Federal Court. The subject matter herein relates to the legality and/or constitutionality of *s.23 SCPE* which is contended to be inconsistent with the FC, natural justice and rules of law. In the case of *Iki Putra Mubarrak v Kerajaan Negeri Selangor* [2021] 3 CLJ 465**,** the Federal Court in affirming and distinguishing inconsistency and incompetency challenge had stated:

> *"[28] The words used in* arts. 4(3) and 128 (1) (a) of the FC *are that there relevant Legislature (Federal or State) 'has no power' to make laws which is another way of saying that they are 'incompetent' to do so. Where a law is made incompetently it would be void and invalid and liable to be struck down under* art. 4(1)*.*
>
> *[29] In this regard, the phrases 'inconsistency challenge' and 'incompetency challenge' are purely convenient nomenclature serving as a means to identify the procedure to mount the different challenges given their nature. As identified earlier,* ***the High Courts have jurisdiction to hear inconsistency challenges while incompetency challenges are reserved for the original jurisdiction of the Federal Court. The original jurisdiction of this court is exclusive simply because of the gravity of the allegation that the relevant Legislature has no power to make that law."*** [Emphasis added]

[15]In **Iki Putra** (supra) the challenge mounted therein relates to the competency of the Selangor Legislative Assembly to enact *s.28* of the *Syariah Criminal Offences (Selangor) Enactment 1995*. However, in the instant matter, the challenge is against the consistency of *s.23* of the *SCPE* being ultra vires and inconsistent with Articles 5 and 8 of the FC, natural justice and rules of law.

[16]Premised on the decision in *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780**,** the issue as to the validity of a provision of the law can be determined by this Court. In that case, the Federal Court stated:

> "[57] ***There are of course other grounds on which the validity of a law may be challenged. For instance, a law may be invalid because it is inconsistent with certain provision in the FC (***art. 4(1)***), or a State law may be invalid because it is inconsistent with a Federal law (art. 75). The court's power to declare a law invalid on any of these grounds*** 'is ***not subject to any restrictions, and may be exercised by any court in the land*** **and in any proceeding whether it be started by the Government or by an individual.' (See:** *Ah Thian v Government of Malaysia* [1976] 1 LNS 3; *[1976] 2 MLJ 112 art p.113)."* [Emphasis added]

[17]It is the Respondents' contention that this Court is not seized with the jurisdiction to hear the present matter as the reliefs sought by the Applicants are consequence to the powers exercised by the 4th and 6th Respondents relating to syariah offence and within the syariah jurisdiction. Needless to say, the Respondents are relying on Article 121 (1) and (1A) of the FC, provisions of which clearly demarcate the civil and syariah legal system. The Respondents further argued that the Applicants should have filed review at the Syariah High Court, or filed a Writ rather than a judicial review or should have filed a Petition to the Federal Court to invalidate the law. It is of the considered view that the Respondents' argument is untenable.

[18]Firstly, this issue was ventilated at the leave stage and this is an attempt to relitigate the same issues. Secondly, in *SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener)* [2022] 1 LNS 218 the Federal Court had stated that judicial review remains reposed solely in the civil courts. The Court explained as follows:

> *"[24] This court has consecutively and consistently held in its decisions in Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; *[2017] 3 MLJ 561 ("Semenyih Jaya"); Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; *[2018] 1 MLJ 545 ("Indira Gandhi"); and Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; *[2019] 4 MLJ 1 ("Alma Nudo") that the* ***judicial power of the Federation remains reposed solely in the civil courts.***
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> *[25]* ***A fundamental aspect of judicial power is judicial review. In this country, judicial review has two broad aspects. The first is constitutional judicial review and the second is statutory judicial review (also known as***

administrative judicial review). Both versions of it are primarily grounded on the concept of the doctrine of ultra vires - and this is explained further below.

Constitutional Judicial Review

[26] Granted that there is no specific legislative entry on the conferral of jurisdiction on judicial review, having regard to constitutional supremacy and the general power of supervision by way of constitutional judicial review, I opine that the jurisdiction for judicial review was intended to be conferred on the civil superior courts by way of the general empowering provision in cl. (1) of art. 4 of the FC *and not by reference to the Legislative Lists in the Ninth Schedule.*

[27] Constitutional judicial review is ingrained within cl (1) of art. 4 of the FC *which stipulates that the FC being supreme, any law inconsistent with it is void to the extent of the inconsistency with the FC. Two things are corollary to this mighty declaration.* ***First, the civil Federal Judiciary is the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC. This is by virtue of cl. (1) of*** art. 121 of the FC ***which stipulates that judicial power resides in the two High Courts - essentially the superior courts established under Part IX of the FC. This is the correct proposition of law whether pre-amendment or post-amendment of cl. (1) of*** art. 121.

[28] ***The second corollary feature of cl. (1) of*** art. 4 ***and the power to constitutionally review the validity of legislation is the concomitant power to review Executive action. This makes sense as it is usually, but not always, the exercise of Executive powers or discretions under written law that gives rise to constitutional litigation. A successful attack on the validity of the impugned legislation might also invalidate, as a result, those Executive powers or discretions. Statutory Judicial Review***

[35] While constitutional judicial review essentially concerns the invalidity of legislative and/or executive conduct to the extent that they are in excess of constitutionally permissible limits, ***statutory judicial review encompasses all other forms of judicial review that are not constitutional judicial review. It covers a wide spectrum of actions which include but is not limited to actions challenging executive orders, decisions and/or discretions; the decisions of inferior tribunals for example the Industrial Court; whether any subsidiary legislation is invalid on the grounds that it is ultra vires the parent statute, and so on. The list is inexhaustive.***

[36] Again, ***statutory judicial review cannot be defined outright but can be discerned from its features. These features include having a prayer for relief seeking any or all of the remedies specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 ("CJA 1964") premised on any of the usual grounds for judicial review to wit, illegality, procedural impropriety, irrationality or proportionality.***

[37] Statutory judicial review is different from constitutional judicial review because ***statutory judicial review applications involve supervising and checking the exercise of public law powers without a prayer per se for the invalidation of any statutory provision. A public law power may itself be a constitutional power but without any prayer for invalidation of the primary or parent Act, such an application would still be considered statutory judicial review.***

[38] A recent example of this would be the decision of this court in Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199; *[2021] 5 MLJ 209. There, the Attorney General cum Public Prosecutor's discretion to charge an accused person under cl. (3) of* art. 145 of the FC *was challenged on the traditional grounds of judicial review highlighted earlier. Even though the power was sourced from the FC, I consider the challenge in that case a statutory judicial review.*

[39] Thus, ***the nature of the review whether constitutional or statutory is not determined by reference to the law claimed to have been breached. What matters in the ultimate assessment is the nature of the remedy sought."*** [Emphasis added]

[19]Since the issue arising herein involves the invalidation of *s.23 SCPE* being inconsistent with Articles 5 arid 8 of the FC, natural justice and rules of law, the instant matter therefore fall under the category of Constitutional Judicial Review. In addition, since the 4th and 6th Respondents' Orders are also being challenged on the ground of illegality, irrationality, improper procedure and disproportionality, the instant matter would also fall under the category of statutory judicial review where in both instances to wit, Constitutional and statutory judicial review, this Court has the jurisdiction to hear the matter. Ultimately, as stated by the Federal Court in **SIS (Forum) Malaysia** (supra), the

nature of the review whether constitutional or statutory is not determined by reference to the law claimed to have been breached. What matters in the ultimate assessment is the nature of the remedy sought.

[20]Further, since this judicial review application is a challenge against the public authorities' powers, seeking for the invalidation of a provision in a statute, challenging the Orders made by the 4th and 6th Respondents based on the principle of administrative law and for the prerogative writ of certiorari and mandamus to be issued, a Writ action cannot be the proper mode as the facts of the matter are not disputed. It is also clear that Syariah Courts do not have the jurisdiction to hear matters relating to the invalidation of law under the Constitutional judicial review and the challenge on the Wednesbury principle under the administrative law under *Order 53 Rules of Courts 2012*. Therefore, Article 121 (1A) of the FC is inapplicable and irrelevant herein. In *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 3 CLJ 145 the Federal Court had stated:

> *"[87] The operation of* art. 121(1A) *in practice illustrates this proposition.* ***Clause (1A) does not remove the jurisdiction of civil courts where constitutional interpretation is concerned. Per Abdul Hamid Mohamed FCJ in Latifah (supra):***
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> > ***"Interpretation of the Federal Constitution is a matter for this court, not the syariah court.****" This is the case even where the determination of Islamic law is required for the purpose of such interpretation, as firmly reiterated by the Federal Court in Abdul Kahar b. Ahmad v. (Kerajaan Malaysia, intervener) and Anor* [2008] 4 CLJ 309; [2008] 2 MLJ 617:
> >
> > > ***Nowhere in the Constitution does it say that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the Syariah Court to do. The jurisdiction of Syariah Courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments...*** *Nowhere in the Constitution is there a provision that the determination by Islamic law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence,* ***there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done.***
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> *[88] In Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557; *[2007] 4 MLJ 585*, *Richard Malanjum Chief Judge Sabah and Sarawak expressed a similar view in his dissenting judgment:* ***Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing Art 121(1 A). In my view the said article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function.***
>
> *[89]* ***Clause (1A) also does not remove the jurisdiction of civil courts in the interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law, as was held in*** *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; *[1992] 1 MLJ 1*:
>
> > *The new cl. 1A of* art. 121 *of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts.* ***But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of muslim law... If there are dear provisions in the State Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment, (emphasis added)"*** [Emphasis added]

Section 23 SCPE and the 4th and 6th Respondent's Order

[21]*Section 23* of the *SCPE* states:

> *"Release of persons arrested*
>
> *23. No person who has been arrested by a Religious Enforcement Officer or police officer under this Enactment shall be*

released except on bond and bail or under the order in writing of a Judge or Chief Religious Enforcement Officer or of a police officer not below the rank of Inspector."

[22]This Court has examined the context of s.23 *SCPE* relied upon by 4th Respondent in making the impugned Order.

[23]Firstly, the 4th Respondent's Order is akin to a remand proceeding as the purpose is to give the investigation authority time to further investigate. The 4th Respondent's Order has no particular time limit but instead it enlarged the time for the 1st to 3rd Respondents to further investigate.

[24]Secondly, s. 23 *SCPE* allows the 4th Respondent to impose conditions (bond & bail) against the Applicants and each Applicant was imposed with different conditions (bond & bail). So, whilst the 1st to 3rd Respondents were given time to further investigate, the Applicants on the other hand were bound to comply with the conditions (bond& bail) in order for them to be released.

[25]Thirdly, s.23 *SCPE* is not only akin to a remand proceeding but also can be seen as a 'disguise to bail proceedings' except for the fact that in civil bail proceedings, the Judge can only impose conditions of bail & bonds after a criminal charge(s) is levelled against an accused which is not the case herein.

[26]Fourthly, whilst some of the Applicants were financially capable of complying with the conditions of the bond & bail, the other Applicants who were not, were detained up to 99 days in prison. Importantly, due to the 4th Respondent's Order, the Applicants were detained without any charges preferred against them whilst the investigation was still going on indefinitely. The detention period of the Applicants is tabulated below:

Applicants	**Detained On**	**Released On**	**Number Of Days In Detention**
1 st 2nd 4th	21.9.2020	22.9.2020	1
3rd and 14th	21.9.2020	24.9.2020	3
8th to 9th	21.9.2020	5.10.2020	15
7th	21.9.2020	9.12.2020	79
5th and 6th	21.9.2020	21.12.2020	92
10th to 13th	21.9.2020	28.12.2020	99

[27]It can easily be comprehended and as stated earlier, that the purpose of the 4th Respondent's Order is to give time to the 1st to 3rd Respondents to further investigate the syariah offence said to have been committed by the Applicants and this cannot be disputed to be similar to a remand proceeding in the civil court. In the civil remand proceedings under s.117 of the *Criminal Procedure Code* **("CPC"),** there is the 14 days maximum time limit to remand persons who are suspected of committing crime. However, there is no time limit expressed in the provision of s. 23 *SCPE*. Until and unless, the Applicants can satisfy the bond & bail conditions, they are to remain in detention. It is therefore clear that s.23 *SCPE* and the 4th Respondent's Order made thereunder infringed the Applicants' liberty and life when they were imposed with the conditions (bond & bail) without being charged with any offence.

[28]In fact, as at the time the present matter is heard, no charges were preferred against them. As such, the proceedings held before the 4th Respondent could not tantamount to a bail proceeding. It is trite that bail and bonds can only be imposed when a charge is preferred against a person for the purpose of securing their attendance in court.

[29]S.23 *SCPE* is clearly inconsistent with the rights guaranteed under the FC when it allows the 4th Respondent to impose conditions (bond & bail) against the Applicants when they were all still being investigated. Moreover, the provision is also unconstitutional as it allows imposition of timeless and infinite remand or detention period on the Applicants if they were to fail to come up with the bail and bond. This, transgress the very core of the fundamental liberty which is safely guarded and deeply embedded in the FC. Even in the civil remand proceedings there is the maximum 14 days of remand normally applies to persons who are being investigated with serious offences like murder. The provision of s.23 of the *SCPE* gives the impression that the Syariah offences are much serious then

murder. The timeless detentions of the Applicants herein more so those who were detained up from 15 to 99 days are indeed an encroachment of the Applicants' fundamental liberty. They are in fact sentenced without any criminal charge levelled against them and bereft of a trial to defend themselves. It is as though they have been punished without trial.

[30]The Applicants were also not afforded with the basic rights to be defended by a syarie counsel/practitioner before the 4th Respondent made the Order which led to their detention in the respective prisons.

[31]The fundamental principle of presumption of innocence has long been recognised at common law. It is a principle that lies at the very heart of criminal law which cannot be different from the Syariah criminal law and it is of the considered view that this well-entrenched principle is taken away by the provision of *s. 23 SCPE*. As such, the 4th Respondent's Order is tainted with illegality, irrationality, improper procedure and disproportionate. The Applicants' liberty and livelihood must be the prime

consideration especially when a few of the Applicants herein are minors. The 4th Respondent Orders were unnecessary, irrational and unreasonable.

[32]It is perplexing when one is to see the bail forms or "Borang Jamin" made under *s. 23* of the *SCPE* issued by the Syariah Courts to the Applicants where it is clearly stated for 3 times that the Applicants have been charged in Court. The "Borang Jamin" made pursuant to *s. 23* of the *SCPE* inter alia states as follows:

> *"Bahawa saya (nama)...No K/P:...yang tinggal di* ***yang***
>
> ***telah kena tuduh dengan kesalahan*** *adaiah dengan ini mengaku akan hadir di hadapan Mahkamah Syariah*
>
> *di pada jam.. .pada.... haribulan.... (atau pun pada masa*
>
> *dan haribulan lain yang diberitahu oleh Ketua Pegawai Penguatkuasaan Agama) kerana menjawab tuduhan ini;jika sekiranya saya tiada hadir sebagaimana yang tersebut maka saya mengaku akan membayar kepada Kerajaan*
>
> *Negeri Selangor wang sebanyak Ringgit Malaysia*
>
> *Bertarikh haribulan ....tahun 2020*
>
> *Nombor resit:*
>
> ***(Tandatangan yang kena tuduh)***
>
> *Saya (nama) No. K/P yang tinggal di*
>
> *yang sesungguhnya menjamin bahawa*
>
> ***orang kena tuduh tersebut*** *nama dan kesalahannya di atas akan hadir di hadapan Mahkamah Syariah dan/atau tempat yang tersebut di atas pada jam dan hari yang tersebut di atas kerana menjawab tuduhan yang akan di*
>
> *kenakan kepadanya; jika sekiranya dia tiada hadir sebgaimana yang tersebut maka saya jamin akan membayar kepada Kerajaan Negeri Selangor wang sebanyak Ringgit Malaysia* " [Emphasis added]

[33]Looking at the "Borang Jamin" made pursuant to *s.23* of the *SCPE*, it can be gleaned that at the time when the 4th Respondent issued the condition of (bond & bail) on the Applicants, the Applicants were treated as accused persons because they have to furnish bail & bond for their attendance in court. Question is, why were the Applicants treated and stated to be accused persons when there are no charges preferred against them where if they fail to pay the bail & bonds, they have to be detained?

[34]The provision of *s.23 SCPE* is against Article 5 FC. It allows and gives the Syariah Courts the powers to impose the bail & bond and when the persons arrested such as the Applicants were unable to furnish the bail & bond they have to be detained in prison. In this instant matter, two of the Applicants were detained for 99 days. This is until they are charged. If no charges are preferred against them, do they have to be detained indefinitely if they cannot come up with the bail & bond? It cannot be refuted that the Applicants have been punished not only before being

charged and proven guilty, but they have been punished without a complete investigation. The exercise of power under *s. 23* of the *SCPE* clearly violates the Applicants' rights to livelihood and personal liberty bestowed upon them by Article 5 and Article 8 FC.

[35]The 4th Respondent's Order made under *s.23 SCPE* is tainted with illegality, irrationality, improper procedure and disproportionate because firstly, there is no express provision to detain the Applicants if they are not able to furnish bail/bond. Secondly, it is irrational to detain the Applicants when there are no charges preferred against them. Thirdly, the 4th Respondent's Order is irrational because there is no time limit/period to detain the Applicants. Fourthly, *s.23 SCPE* is improper because it is a façade to bail proceeding when there is no legal representation during the hearing. Fifthly, *s.23 SCPE* is an improper procedure because it turns out to be a form of punishment without charges framed or preferred against the Applicants. Sixthly, *s.23 SCPE* is irrational because it runs contrary to the fundamental liberty and livelihood of persons arrested like the Applicants when detained. Lastly, the 4th Respondent's Order is irrational as it contradict with the "Borang Jamin" made pursuant to *s.23 SCPE*.

[36]The Respondents attempted to rely on *s. 118* of the *CPC* to justify the 4th Respondent's Order in imposing the bail & bond under *s. 23* of the *SCPE* pending investigation. The reliance on *s.118* of the *CPC* to justify *s.23* of the *SCPE* and/or the 4th Respondent's Order is misplaced. *S.118* of the *CPC* states:

> *"Police officer may require bond for appearance of complainant and witnesses*
>
> *118. (1) If upon a police investigation made under this Chapter it appears to the officer making the investigation that there is sufficient evidence or reasonable ground of suspicion to justify the commencement or continuance of criminal proceedings against any person, the officer shall require the complainant, if any, and so many of the persons who appear to the officer to be acquainted with the circumstances of the case, as he thinks necessary, to execute a bond to appear before a Magistrate's Court therein named and give evidence in the matter of the charge against the accused.*
>
> *(2) The officer in whose presence the bond is executed shall send it to the Magistrate's Court.*
>
> *(3) If any complainant or witness refuses to execute the bond, that officer shall report the same to the Magistrate's Court which may then in its discretion issue a warrant or summons to secure the attendance of the complainant or witness before itself to give evidence in the matter of the charge against the accused."*

[37]It is very clear that *s.118* of the *CPC* provides for bond (not bail in the form of money) to be executed by the police for the purpose of appearance of complainant and witnesses (not person arrested as in the instant matter) to appear in court to give evidence. Further, it must be emphasised that there is no detention under *s.118* of the *CPC* unlike *s.23* of the *SCPE* when the person arrested will be detained until they come up with the bail.

[38]It becomes more perplexing when it comes to the 6th Respondent's Order. The 6th Respondent's Order inter alia states:

> *"1.**Mahkamah memerintahkan Responden-Responden dilepaskan tanpa bebas dengan jaminan Ketua Penguatkuasa Agama Negeri Selangor dengan syarat seorang penjamin berusia 21 tahun ke atas, warganegara Malaysia dan bermastautin di Negeri Selangor kecuali Responden 1 (Abdul Kahar bin Ahmad) dengan dua orang penjamin berusia 21 tahun ke atas, warganegara Malaysia dan bermastautin di Negeri Selangor.***
>
> *2. Mahkamah memerintahkan Perintah bertarikh 27 Oktober 2020 untuk melaporkan diri di Penguatkuasaan JAIS di Pejabat Agama Islam Daerah bagi Responden-Responden yang berumur 18 tahun ke bawah adalah dibatalkan. Manakala bagi Responden-Responden yang berumur 18 tahun ke atas, Mahkamah memerintahkan Responden-Responden melaporkan diri di Penguatkuasaan Jabatan Agama Islam Negeri Selanor di Pejabat Agama Islam Daerah permastautinan masing-masing satu kali sebulan.*
>
> *3. Mahkamah memerintahkan bon Jamin dikembalikan kepada Responden-Responden dan penjamin-penjamin sebelum ini dilepaskan.*
>
> *4. Mahkamah memerintahkan jaminan ini dilanjutkan*
>
> *sehingga tarikh 22 Jun 2021.*"[Emphasis added]

[39]It is of the considered view that there is no legal basis for the 6th Respondent's Order. The 6th Respondent's Order is irrational and illegal as the order to discharge not amounting to acquittal (DNAA) is given without any criminal charge being made in the first place. The question is, what are the Applicants discharged but not acquitted from? The power given for the Syariah Court to DNAA is provided under *s.103 SCPA* when the syarie prosecutor declines to prosecute an accused already charged with an offence. A DNAA can be pronounce if the Judge finds the charge to be groundless under *s.96 (g)* of the *SCPE*. So, there is nothing before the 6th Respondent then to DNAA the Applicants at the material time.

[40]The imposition of conditions by the 6th Respondent for the Applicants to report themselves to the District Islamic Religion Office and that their bail was extended to 22.6.2021 also infringed the Applicants fundamental liberty, irrational and unreasonable when there is an infinite investigation since 2020 and no charges are preferred against them as to date. The 6th Respondent's Order is tainted with illegality, irrationality, improper procedure and disproportionate when the Applicants were bound by the imposition of the bails & bonds to attend the 22.6.2021 mention date (not trial).

[41]It is of the considered view that *s. 23 SCPE* is unconstitutional for being inconsistent with the Federal Constitution, against natural justice and rules of law. The order handed down by the 4th and 6th Respondents are illegal and unlawful. Both the 4th Respondent's and 6th Respondents' Orders are therefore, quashed.

[42]Having found the above, this Court is of the considered view that the 4th and the 6th Respondents are not to be made liable for the wrongful detention of the Applicants. Although they do not file any affidavit to state that they have issued the Order in good faith etc. this court is of the considered view that as judicial officers, they are deemed to have discharged their functions in good faith and in accordance with law notwithstanding the findings of the law being illegal/unconstitutional.

[43]This Court finds that the Applicants are entitled to be awarded with damages for their wrongful detention. This Court awards the Applicants RM 10,000 each as damages which are to be borne by the 1st and 5th Respondents.
Conclusion

[44]Premised on the above, the Applicants' application was therefore allowed (partly) with costs.
