

IN THE HIGH COURT OF MALAYA IN ALOR SETAR

IN THE STATE OF KEDAH DARUL AMAN

CRIMINAL APPLICATION NO: KA-44-81-09/2018

In the matter of an application of  
*habeas corpus* by the Applicants in  
this action

AND

In the matter of complaints  
regarding denial and violation of  
the fundamental rights of the  
Applicants

AND

In the matter of Article 5 (1), 5 (2),  
5(3) and 8 of the Federal  
Constitution

AND

In the matter of wrongful and/or  
irregular detention of the  
Applicants at the Belantik  
Immigration Detention Depot,  
Kedah

AND

In the matter of Section 365 (a) (ii)  
of the Criminal Procedure Code  
[FMS Cap 6]

AND

In the matter of Section 367 of the  
Criminal Procedure Code

AND

In the matter of sections 4 and 5 of  
the Criminal Procedure Code

AND

In the matter of the inherent  
jurisdiction of the Court

1. RUWAIDA@ROYEDA BINTI MUHAMMAD SIDDIQ (ROHINGYA CHILD AGED 5)
2. MUHAMMAD IHSAN@MD YEHEAN BIN MUHAMMAD SIDDIQ (ROHINGYA CHILD AGED 10)
3. JANNATA NOYUM@JUNNOTOR NUEM BIN MUHAMMAD SIDDIQ (ROHINGYA CHILD AGED 11)
4. MOHAMMAD NOOR BIN MOHAMMADULLAH@MD NOR (ROHINGYA CHILD AGED 12)
5. SETARA BINTI MOHAMMADULLAH@SEYTAARA BEGOM (ROHINGYA CHILD AGED 14)
6. KAMAL HUSON BIN GUNI AHMAD (ROHINGYA CHILD AGED 13)
7. KAMAL HUSON BIN MUNIUZ ZAMAN (ROHINGYA CHILD AGED 14)

...APPLICANTS

AND

1. COMMANDANT, IMMIGRATION DEPOT BELANTIK, KEDAH
2. DIRECTOR, DEPARTMENT OF IMMIGRATION KEDAH
3. DIRECTOR GENERAL, DEPARTMENT OF IMMIGRATION MALAYSIA
4. MINISTRY OF HOME AFFAIRS MALAYSIA

...RESPONDENTS

DECISION

## INTRODUCTION

1. The Applicants are ethnic Rohingya Muslim children. As a result of the situation and issue concerning their citizenship in Myanmar, they have fled the country and sought asylum in this country, Malaysia.
2. In their efforts to enter Malaysia, on 3.4.2018, the Malaysian authorities detained a boat carrying 56 persons who are Rohingyas at the waters of Langkawi Island, Kedah. They were then referred and handed over to the Malaysian Immigration authorities for further action.
3. On 4.4.2018, Mr. Rosli bin Had, Assistant Director, Enforcement Unit, Malaysian Immigration Department, issued a detention notice pursuant to section 51(5)(b) Immigration Act, to detain the Applicants for 14 days, from 3.4.2018 until 16.4.2018, for the purposes of immigration investigations.
4. However, the Applicants were not brought before the Magistrate for a detention order to be issued on the Magistrate's consideration.
5. As to date, the Applicants were never prosecuted for any offence nor were they convicted of any offences under the Immigration Act.
6. On 16.4.2018, the Deputy Assistant Director, Immigration Department, Kedah, Mr. Phon a/l Ai Liap, issued a Removal Order pursuant to section 32(1) of the Immigration Act, and consequently the Detention Order against the Applicants.
7. Dissatisfied, the Applicants filed this Notice of Motion challenging, *inter alia*, the Removal Order and Detention Order as mentioned above and to seek for a writ of *habeas corpus* to be issued to enable the Applicants to be released by this Court on grounds that there is no finality to the Detention Order and there are also procedural irregularities.

## **Issues Raised**

8. Through their Learned Counsel, the Applicants raised the following issues –
- (a) Non Compliance With Mandatory Procedural Requirements within the Applicants' Substantive Rights;
  - (b) Whether there is a Defective and Irregular Detention Order and Deportation order;
  - (c) Whether the Detention Order and Deportation Order could be fulfilled within a Reasonable Time?
9. At the hearing on the previous date, parties have submitted and their respective written submissions were also filed in this Court. I also had the opportunity to hear oral submissions and have also read the written submissions and affidavits filed by the respective parties.

## **Decision of this Court**

10. In the circumstance, I have made my decision and they are as follows –
- (a) It is not disputed, section 3(3) of the Immigration Act 1959/63 clearly envisage the powers and the discretionary powers to the Director General of Immigration Malaysia or any authorised senior officers in carrying out its functions and duties. Case: *Pua Kiam Wee v Director General of Immigration & Anor. [2017] MLJU 902;*
  - (b) Learned Deputy Public Prosecutor submitted that the aforesaid powers also include the powers to detain and deport a non-citizen out of the country and according to the Learned Deputy Public Prosecutor, in the exercise of these powers, there is no requirement to provide any reasons or grounds. The Learned Deputy Public Prosecutor also referred to sections 31, 32(1) and 33 of the Immigration Act; that is the powers to deport any person found unlawfully remaining in Malaysia;

(c) The Learned Deputy Public Prosecutor also referred to section 56(2) of the Immigration Act which states as follows –

*“(2) Any person who is not a citizen unlawfully entering or reentering or attempting unlawfully to enter or re-enter Malaysia or unlawfully remaining in Malaysia shall whether or not any proceedings are taken against him in respect of the offence be liable to be removed from Malaysia by order of the Director General.”* (Refer to Tab A of the Respondents’ Submission)

(d) Based on this section 56(2) of the Immigration Act, the Learned Deputy Public Prosecutor submitted that the Removal Order and the Detention Order that was issued against the Applicants are valid;

(e) The Learned Deputy Public Prosecutor also referred to section 34 of the Immigration Act which gives the powers to the Director General of Immigration, Malaysia to detain a person who has been ordered to be removed from Malaysia;

(f) I agree with the Learned Deputy Public Prosecutor’s submission on the powers vested upon the Director General of Immigration, Malaysia to deport and detain a non-citizen before he is removed from Malaysia as entrenched in the provisions of the Immigration Act as regards the powers to remove and detain a non-citizen pending removal;

(g) Based on the above, I am satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not committed any procedural irregularities to allow a writ of habeas corpus to be issued to the Applicants. Refer to: *Lee Kek Keong v TMDN & Ors [2018] MLJU 234* and *Andrew a/l Thamboosamy v Superintendent of Pudu Prison, KL [1976] 2 MLJ 156*;

(h) Based on the above, this Court is of the view that the Detention Order against the Applicants is valid, particularly, since the Applicants are non-citizens and therefore have no permission to enter and remain in

Malaysia. Therefore, Article 5 of the Federal Constitution is not infringed;

- (i) Learned Counsel raised the issue of the need for the necessary protection and humanitarian assistance to be given to the Applicants by UNHCR, more so, in view that the 1<sup>st</sup> Applicant is only a 5 years old girl, and the other Applicants are children;
- (j) Based on the aforesaid factors, the Applicants cannot be allowed to continue to be detained at the Belantik Immigration Detention Centre which is managed by the Immigration authorities. On this issue, Learned Counsel referred this Court to Article 22 of the Convention on the Rights of the Child, where Malaysia is a Member State;
- (k) Without deliberating further, this Court is of the view that the continued detention of the Applicants at the Belantik Immigration Detention Centre is a direct violation of their rights as a child pursuant to the Convention on the Rights of the Child and the Child Act 2001 which guarantees protection and assistance to be given to children in all circumstances without regard to race, colour, gender, language, religion or distinction of any kind;
- (l) Based on these reasons, and with the powers vested upon the High Court, I accept the alternative prayer of the Applicants that they are allowed to be placed at a shelter which can protect and provide the necessary welfare to them. This Court is of the view that Yayasan Chow Kit is a suitable shelter which can provide the necessary welfare to the Applicants;
- (m) The Applicants as non-citizens are to be placed on a bail bond of RM500 each with a Malaysian surety. The Applicants safety and welfare are also to be ensured at all times they are at the shelter and they should be made available at all times whenever the authorities require them for

their further action, including to attend Court to answer to any charge (if any).

Prepared by,

-signed-

His Lordship Dato' Haji Ghazali bin Haji Cha  
High Court Judge  
Alor Setar  
Kedah Darul Aman

## **THE SOLICITORS AND THE APPLICANTS**

Mr. Collin Andrew (with Lee Shee Pin)

Messrs Collin's Law Chambers

Advocates and Solicitors

B-23-A-22, Tower B

The Scott Garden

289, Jalan Klang Lama

58100 Kuala Lumpur

Puan Nabilah Ahmad Po'ad for Public Prosecutor

Malaysia Immigration Department, Kedah

Tingkat 1 & 2 Bnagunan Kementerian Dalam Negeri (KDN)

Pusat Pentadbiran Kerajaan Persekutuan

Bandar Muadzam Shah

06500 Alor Setar, Kedah

### **Watching Brief**

Megalai ap V. Raman for

1) The Human Rights Commission of Malaysia,

Tingkat 11, Menara TH Perdana,

1001an Sultan Ismail,

50250 Kuala Lumpur

2) Bar Council Malaysia  
15 Leboh Pasar Besar  
50050 Kuala Lumpur

Rosman Azwan for Asylum Access Malaysia

**Observer:**

United Nations High Commissioner for Refugees (UNHCR)  
570, Jalan Bukit Petaling,  
50460 Kuala Lumpur

**CASE REFERRED:**

1. Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor [2017] MLJU 902
2. Mallal's Criminal Procedure, 4<sup>th</sup> Edition at page 551
3. Lee Kek Keong v TMDN dan lain lain [2018] MLJU 234
4. Andrew s/o Thamboosamy vs. Superintendent of Pudu Prison, K.L [1976] 2 MLJ 156

**STATUTES REFERRED**

1. Section 365(a)(ii) Criminal Procedure Code
2. Section 367 Criminal Procedure Code
3. Sections 4 and 5 Criminal Procedure Code
4. Section 51(5)(b) of Immigration Act