DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

PERMOHONAN SEMAKAN KEHAKIMAN NO. WA-25-386-12/2021

Dalam perkara laporan atau pengesyoran yang disediakan oleh Pasukan Petugas Khas yang ditubuhkan oleh Kerajaan Malaysia;

Dan

Dalam perkara Artikel-Artikel 5, 8 dan 10 Perlembagaan Persekutuan;

Dan

Dalam perkara Akta Rahsia Rasmi 1972;

Dan

Dalam perkara Seksyen 25(2) dan/atau Jadual, Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53, Kaedah-Kaedah Mahkamah 2012 dan/atau bidang kuasa sedia ada Mahkamah;

Antara

NORHAYATI BINTI MOHD ARIFFIN

(NO. K/P: 730225-10-5992) **…PEMOHON**

Dan

1. **MOHD RUSSAINI BIN IDRUS**

   (NO. K/P: 770330-09-5163)
2. **KERAJAAN MALAYSIA** **...RESPONDEN-RESPONDEN**

APPLICANT'S WRITTEN SUBMISSION (ENCLOSURE 18)

I Introduction

1. This is an application for judicial review in respect of the report prepared by the special task force set up by the 2nd Respondent to investigate the findings made by the Human Rights Commission of Malaysia ("**SUHAKAM**") in its decision dated 03.04.2019 (the "**Report**").

1.1. SUHAKAM found, amongst others, that it was more probable than not that the Special Branch unit in the Royal Malaysian Police ("**PDRM**") had abducted the Applicant's husband.

1.2. The Report was classified as an "official secret: under the Official Secrets Act 1972 ("**OSA**") by the 1st Respondent on 14.09.2020 (the "**Decision**").[1]

1.3. The Decision was communicated to the Applicant on 13.09.2021.

1.4. On 19.07.2022, this Honourable Court granted leave to the Applicant to commence judicial review proceedings. This Honourable Court overruled the Attorney-General Chamber's objection that this application is an abuse of process.

1.5. The Respondents have now confirmed that the Decision was made pursuant to section 2B, OSA and not under the Schedule to the OSA.[2]

1.6. With this confirmation, the Applicant will only be pursuing reliefs 1.3 to 1.5 in Enclosure 1 as follows:

[1] Enclosure 22, p.14 & Enclosure 3, p.256
[2] Enclosure 28, p.11, paragraph 21

a. A declaration that the Report does not fall within the definition of an "official secret" under section 2, OSA;

b. A direction of the nature of certiorari to quash the Decision; and

c. A direction of the nature of mandamus to compel the 2nd Respondent to release, provide or disclose the Report to the Applicant within seven (7) days from the date of this order.

2. In summary, it is the Applicant's contention that:

2.1. It is now trite that any exercise of discretion must be reviewed on an objective test. Section 16A, OSA does not change this.

2.2. The Respondents have not adduced any material to show that the Report is prejudicial to national security. On an objective assessment, there is no basis to conclude that the Report is prejudicial to national security.

II The key facts leading to this application

3. The Applicant is the wife of Amri Che Mat ("**Amri**").

4. On 18.11.2019, the Applicant filed a claim by way of Kuala Lumpur High Court Civil Suit No. WA-21NCvC-79-11/2019 against a number of public officers and the Government of Malaysia (the "**Civil Suit**").[3]

[3] Enclosure 3, p.64

4.1. The claim centers on the failure of the named Defendants in the Civil Suit to effectively investigate the abduction of Amri which happened close to midnight on 24.11.2016.

4.2. The particulars and details of the shortcomings in the investigation conducted by the Defendants are set out in paragraph 42 of the Statement of Claim.[4]

5. Prior to the filing of the claim, SUHAKAM had commenced an inquiry on Amri's abduction pursuant to section 12 of the Human Rights Commission of Malaysia Act 1999 (the "**SUHAKAM Inquiry**"). The said inquiry concluded on 06.03.2019.

6. On 03.04.2019, SUHAKAM issued its decision on the public inquiry (the "**SUHAKAM Report**").[5] SUHAKAM in effect came to the conclusion that on the evidence made available to it, it was more probable than not that Amri had been made the subject of an enforced abduction by the Special Branch unit of the PDRM. SUHAKAM also concluded that PDRM had failed to effectively investigate the matter.

7. On or about 23.05.2019, upon the release of the SUHAKAM Report, Minister of Home Affairs (the "**Minister**") announced that the 2nd Respondent had decided to set up a special task force to investigate the matters stated in the SUHAKAM Report (the "**Task Force**").[6]

7.1. On 26.06.2019, the Minister announced the 6 members of the Task Force.[7]

[4] Enclosure 3, p.82
[5] Enclosure 3, p.115
[6] Enclosure 3, p.202
[7] Enclosure 3, p.208

7.2. On 02.07.2019, the Minister announced that one of the members of the Task Force, Datuk Mokhtar Mohd Noor, voluntarily pulled out of the Task Force.[8]

7.3. On 10.07.2019, the Minister announced the appointment of two new members into the Task Force.[9]

7.4. On 10.12.2019, SUHAKAM announced that it was still waiting for the report from the Task Force (the "**Report**") which it was informed would have been done by then.[10]

7.5. On 16.01.2020, the Minister announced that the Task Force requested for more time to complete the Report. He said the Report would be ready in a month and submitted to him.[11]

7.6. On 30.08.2020, SUHAKAM called on the 2nd Respondent to make public the Report.

7.7. The 2nd Respondent did not publicly respond to this request.

8. On 25.05.2021, the Applicant filed a discovery application pursuant to Order 24, ROC in the Civil Suit for the Report to be disclosed to her.[12]

8.1. The Defendants in the Civil Suit filed their Affidavit in Reply on 13.09.2021 (the "**AIR**").[13]

8.2. The AIR was affirmed by the 1st Respondent as the Secretary of the Police Force Commission under the purview of the Ministry of Home Affairs. For

[8] Enclosure 3, p.213
[9] Enclosure 3, p.215
[10] Enclosure 3, p.218
[11] Enclosure 3, p.223
[12] Enclosure 3, p.228
[13] Enclosure 3, p.251

the first time, the 2nd Respondent took the position that the Report was an official secret under the OSA.

8.3. The 1st Respondent in the AIR did not state the basis on which the Report was, according to the 1st Respondent, an official secret. However, the 1st Respondent averred that if the Report is disclosed to the public, it would be against national interest.

a. It was not asserted that the Report had been classified pursuant to section 2B, OSA by a public officer certified under that section, nor was it asserted that the Report was to be deemed an official secret by reason of the Report falling within the ambit of the Schedule, OSA.

b. The 1st Respondent did not state in the AIR that he is a public officer certified under section 2B of the OSA. No certificate was adduced under section 16A of the OSA certifying the Report as an official secret.

8.4. In support, the 1st Respondent merely exhibited one page from a "Buku Daftar Suratan Rahsia Rasmi di Luar Jadual/Bawah Jadual Akta Rahsia Rasmi 1972" (the "**Register**"). The page states that the 1st Respondent had classified the Report as "Sulit" on 14.09.2020. The said page further does not shed any light on the basis of the classification.[14]

9. This led to the filing of the underlying application. The Applicant has since withdrawn her discovery application in the Civil Suit.[15]

10. In the Affidavit in Reply affirmed by the 1st Respondent at Enclosure 22, the Respondents for the first time adduced a certificate signed by the 1st Respondent on 14.09.2020 under section 16A, OSA purporting to classify the Report as an official secret (the "**Certificate**").[16]

[14] Enclosure 3, p.256
[15] Enclosure 9, p.6
[16] Enclosure 22, p.14

10.1. The Respondents also adduced a document stating that the Minister had appointed the 1st Respondent as a public officer under section 2B, OSA.[17]

10.2. Pertinently, the 1st Respondent did not state in the Certificate the basis on which the Report was classified as an official secret.

10.3. The basis was only stated in the body of the 1st Respondent's affidavit in Enclosure 22 as follows[18]:

> *"Saya juga mengesahkan bahawa laporan PPK tersebut telah dikelaskan sebagai Rahsia Rasmi di bawah Akta Rahsia Rasmi 1972. Kandungan laporan tersebut mengandungi perkara yang melibatkan keselamatan Negara. Laporan PPK tersebut ada menyentuh mengenai pengoperasian dan gerak kerja pihak Polis Diraja Malaysia (PDRM) yang tidak boleh didedahkan sewenang-wenangnya kepada orang awam. Hal ini kerana sekiranya didedahkan, ia akan memberi ruang kepada penjenayah dan musuh negara untuk mengambil kesempatan terhadap pengoperasian dan gerak kerja PDRM ini selaku pihak yang bertanggungjawab menjaga hal ehwal keselamatan negara"*

III Submission

A. Objective standard

11. It is now trite law that any exercise of discretion must be examined on an objective standard.

11.1. In reviewing any exercise of discretion, the subjective view of the officer is irrelevant. The court must ask itself whether a reasonable officer apprised of the material facts would be objectively satisfied that there would be prejudice

[17] Enclosure 22, p.12
[18] Enclosure 22, p.4

to national security. In ***Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307***, Gopal Sri Ram FCJ said[19]:

"[5] Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order."

11.2. It is beyond dispute that the objective test also applies to matters concerning national security. In ***Government of the State of Penang v Minister of Home Affairs & Ors [2017] 4 MLJ 770***, Tengku Maimun JCA (as she then was) said[20]:

*"[48**] The test to be applied in determining the exercise of the Minister's discretionary power in cases involving national security or activities prejudicial to public order can be found among others, in the following cases which are more relevant and which provide better guidance as regards the issue at hand**:*

(a)Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135;
(b)Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243;
(c)Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449;
(d)Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307;

[19] Enclosure 32, p.80
[20] Enclosure 32, p.100

(e)Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340;

(f)Dato' Ambiga Sreenevasan & Ors v Menteri Dalam Negeri & Ors;

(g)MKini Dotcom Sdn Bhd v Ketua Setiausaha Dalam Negeri & 2 Ors [2013] 6 AMR 668;

(h)Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; and

(i)Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and Another Appeal [2014] MLJU 1874; [2015] 2 CLJ 328.

[49] ***From the above cases, it is now trite that the test applicable in judicial review is the objective test where the court can consider the substance of the Minister's decision****."*

11.3. On appeal, the Federal Court agreed with this part of the Court of Appeal's decision.[21] The Federal Court reiterated that any assertions of prejudice to public order must be substantiated by evidence. In ***Menteri Hal Ehwal Dalam Negeri & Ors v Kerajaan Negeri Pulau Pinang [2020] 2 MLJ 141***, Zaharah Ibrahim FCJ said[22]:

"[97] What is clear to us from the Minister's affidavit is that the Minister's opinion that the PPS was being used for purposes prejudicial to public order has not been substantiated*. Can it be said that he still could exercise his absolute discretion to deciare the PPS an unlawful society?*

*[98****] We are of the considered view that where there is no reasonable basis for the formation of the opinion that the PPS was being used for purposes prejudicial to public order, the exercise of discretion by the Minister in making the impugned order is clearly unreasonable and irrational****."*

[21] The Federal Court allowed the appeal in part on a different ground

[22] Enclosure 32, p.126

11.4. A general averment in an affidavit that the subject matter is prejudicial to public order or national security is insufficient. There must be material to support such averment. In ***Hew Kuan Yau v Menteri Dalam Negeri & Ors [2022] MLJU 1571***, Ravinthran Paramaguru JCA said[23]:

> *"[26]* ***In respect of the allegation that the comic book promoted communism and supported its cause, we note that the Minister did not refer in his affidavit to any particular content of the comic book to show that to be the case. Instead, there is a general statement that the appellant promoted communist ideology in the comic book***.
>
> …
>
> *[35] In concluding this part of the judgment,* ***we would say that the relevant test is, whether a similarly circumstanced Minister after evaluating the facts fairly and reasonably would have come to the same conclusion. For reasons given above, we would answer the question in the negative as there was no evidence whatsoever to suggest prejudice to public order or likelihood thereof that permitted the invocation of the drastic power given in section 7(1) of the PPPA.***"

B. Same test applies to the OSA

12. There is no basis to apply any different test to the OSA.

The framework under the OSA

12.1. The term "official secret" was only introduced in the OSA by way of the Official Secret (Amendment) Act 1986 (the "**Amending Act**") which came into force on 01.01.1987.

[23] Enclosure 32, p.134

a. Prior to the coming into force of the Amending Act, the OSA did not contain the phrase "official secret".

b. It was an offence to, amongst others, take any document (as defined in section 2) from a "prohibited place". A "prohibited place" is defined in section 2.

12.2. With the coming into force of the Amending Act, the term "official secret" was introduced in section 2 along with a few other provisions and the Schedule.

a. There are two categories of documents that fall under the definition of "official secret" in section 2.

b. The first category is any document specified in the Schedule and any information and material relating thereto. The Schedule provides[24]:

"Cabinet documents, records of decisions and deliberations including those of Cabinet committees;

State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;

Documents concerning national security, defence and international relations."

c. The second category are documents classified as "Top Secret", "Secret", "Confidential" or "Restricted" by a Minister, Chief Minister of a State or any public officer certified under section 2B.[25]

[24] Enclosure 32, p.15
[25] Enclosure 32, p.12

d. In introducing the Amending Act in the House of Representatives on 05.12.1986, the then Prime Minister said that it was based on the United Kingdom legislation on official secrets. He also said it was necessary to safeguard national security. He said at pp.6081 and 6083[26]:

"Sebenarnya Akta Rahsia Rasmi memang sudah ada di Malaysia dan di hampir semua negara di seluruh dunia. Jika tidak, maka berhaklah pengintip ataupun spy negara asing mendapat semua maklumat. Akta Rahsia Rasmi Malaysia ditiru daripada Akta Rahsia Rasmi British kerana banyak undangundang kita dipungut terus daripada Britain.

…

Kes-kes yang dibawa ke Mahkamah melibatkan pembocoran rahsia yang serius yang menjejaskan kepentingan awam atau keselamatan negara."

12.3. As noted above, the Respondents have confirmed that the Decision was made under section 2B and not the Schedule.

12.4. Section 16A was also introduced by way of the Amending Act. It provides[27]:

"A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever."

<u>OSA is a restriction of fundamental rights</u>

[26] Enclosure 32, p.48
[27] Enclosure 32, p.13

12.5. It cannot be disputed that the OSA seeks to restrict fundamental rights in two aspects.

a. First, it restricts the right to information guaranteed under Article 10(1)(a), Federal Constitution.[28] In ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333*** ("***Sivarasa***") Gopal Sri Ram FCJ said[29]:

"For example, the freedom of speech and expression are expressly guaranteed by art 10(1)(a). ***The right to be derived from the express protection is the right to receive information, which is equally guaranteed****. See Secretary, Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal AIR 1995 SC 1236."*

b. For completeness, the Court of Appeal in ***Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia [2017] 3 MLJ 543*** ("***Haris Fatillah***") decided that a specific statute must be enacted by Parliament to provide for the right to information (see paragraph 44).[30]

c. It is respectfully submitted that this court should disregard ***Haris Fatillah*** for two reasons. First, it violates the doctrine of stare decisis in refusing to follow the binding decision of the Federal Court in ***Sivarasa***.[31] Second, the Court of Appeal's literal reading of provisions concerning fundamental liberties can no longer be sustained in light of the recent decision of the Federal Court in ***CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child)***

[28] Enclosure 32, p.6
[29] Enclosure 32, p.153
[30] Enclosure 32, p.177
[31] ***Co-Operative Central Bank Ltd v Feyen Development Sdn Bhd [1997] 2 MLJ 829***, at p.835 (Enclosure 32, p.186)

v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71, where Tengku Maimun CJ said[32]:

"[49] We believe that the answer to the question has been discussed an innumerable amount of times with the most recent being CTEB. ***The starting point is the understanding that fundamental rights and provisions must be construed as broadly as possible. Next, provisions which limit those rights must be construed as narrowly as possible****. Finally, judicial precedent must play a lesser part when construing constitutional provisions. One cannot afford to be pedantic or cling helplessly to tabulated legalism."*

d. In fact, the House of Lords when examining the United Kingdom Official Secrets Act 1989, concluded that the said statute infringes the right to freedom of expression. In ***Regina v Shayler [2002] 2 WLR 754***, Lord Bingham of Cornhill said[33]:

"24 In the present case ***there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression****. There can equally be no doubt but that the restriction was directed to objectives specified in article 10(2) as quoted above."*

e. Second, it infringes on the right of access to justice, which is a constitutionally guaranteed right under Article 5(1), Federal Constitution.[34] The Applicant would be deprived of a key document for the purposes of determining the issues in the Civil Suit.

12.6. As such, any restrictive provisions in the OSA must be construed narrowly, including section 16A.

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[32] Enclosure 32, p.209
[33] Enclosure 32, p.232
[34] ***Public Prosecutor v Gan Boon Aun [2017] 3 MLJ 12***, paragraph 9 (Enclosure 32, p.278)

Cases on section 16A

12.7. The said provision cannot be read as ousting the jurisdiction of the court. In ***Takong Tabari v Government of Sarawak [1994] MLJU 386***, Richard Malanjum J (as he then was) said[35]:

> *"**My reading of this section 16A is that it is not intended to probihit the admissibility in the Court of Law of a document certified as an official secret. Rather, it is only to ouster any action directed to question the reason or ground for the classification of a document as an official secret. Thus, it is not per se correct to say that once a certificate has been issued certifying that a document is an official secret it is completely excluded from being disclosed in court.** The relevant provisions of the Evidence Act 1950 are there to consider. In other words, classified documents attract the claim of privilege but they are not totally excluded from the applications of the relevant provisions of the Evidence Act 1950 in the Court of Law of this country.*
>
> ***In the instant case all the 1st Defendant has done was to produce the certificate certifying that the Document is an official secret and then relying on section 16A of the Act. Nothing was shown that the Document related to the "affairs of State" nor was it shown of any prejudicial effect on public interest by its disclosure**"*

Cases on documents concerning the "affairs of State"

12.8. This is consistent with the decisions of the apex court in dealing with similar provisions. The case law on section 123, Evidence Act 1950 is instructive.

[35] Enclosure 33, p.6

a. That provision states[36]:

"No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government."

b. The said provision was intended to protect documents that were injurious to public interest.

c. Prior to 1968, it was the position in England that a certificate by a Minister of the Crown would be conclusive that the document would be injurious to the public interest. The courts regarded itself bound by the certificate and would not disclose the document.

d. This changed with the decision of the House of Lords in ***Conway v Rimmer and Another [1968] 1 All ER 874*** ("***Conway***"). There, the House of Lords decided that the courts can override the decision of the Minister in appropriate cases. Where the Judge finds that the documents ought to be produced, he should first see them to determine if they can be made open to inspection (see p.888).[37]

e. The Federal Court in ***B A Rao v Sapuran Kaur [1978] 2 MLJ 146*** ("***B A Rao***") adopted ***Conway*** and held that the courts are the final arbiter of whether a document can be produced. Raja Azlan Shah FCJ said, at pp.149-150[38]:

[36] Enclosure 32, p.43
[37] Enclosure 33, p.22
[38] Enclosure 33, p.54

"Prior to Conway v Rimmer [1968] 2 AC 910 the position in England was that the court could not go behind the Minister's certificate that disclosure of a class of documents or the contents of particular documents would be injurious to the public interest. His certificate was conclusive. That was decided in the celebrated case of Duncan v Cammell, Laird & Co Ltd [1942] AC 624 which was followed in Ellis v Home Office [1953] 2 QB 135 ***. In Conway v. Rimmer, supra, the House of Lords held that the wide interpretation of Duncan v. Cammell, Laird & Co. Ltd., supra, was wrong and that the court could go behind a Minister's certificate claiming privilege and examine the documents in question (without their being shown to the parties) and decide whether or not the decision was justified. This judgment has now been put into statutory form viz. the Administration of Justice Act, 1970, enabling a court to order disclosure of documents, etc., applying specifically to the Crown, except that no such order may be made if the court considers "that compliance with the order, if made, would be likely to be injurious to the public interest*** *".*

…

In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately

to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining "affairs of State." In my opinion, "affairs of State", like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case.

I am of the view that the learned judge adopted the right and proper approach in the instant case by scrutinizing the affidavit of the Deputy Secretary-General of the Ministry of Health sworn to on December 14, 1976*, more than 1 years after issue of the Writ of Summons"*

f. A mere assertion that a document cannot be disclosed because it concerns the affairs of the state is insufficient. Raja Azlan Shah FCJ said, at p.151[39]:

"A mere assertion of confidentiality and that affairs of State are involved without evidence in support cannot, in my view, shut out the evidence sought by the respondents*. Paragraph 2 admitted that the Committee was set up by the Ministry to inquire into the death of the deceased at the Hospital Daerah Mentakab on June 1, 1973. The terms of Reference or any document relating thereto were not before the court. The affidavit went on in paragraph 3 to broaden the base by asserting that the inquiry was "to investigate into matters relating to the medical facilities and services and hospital administration existing in the Hospital Daerah Mentakab in 1973 with a view to make such comments and*

[39] Enclosure 33, p.56

*recommendations … to enable my Ministry to carry out its policy of promoting greater efficiency in hospital administration and the provision of medical services not only in respect of the Hospital Daerah Mentakab but also in respect of all hospitals throughout the country****." I am of opinion that this was uttered with tongue in cheek and with no other object than to suppress evidence which may or may not assist the respondents in their claim based on negligence of the appellant medical officers and the Government as their employer."***

g. It is important to note that in ***B A Rao***, the document that the Government sought to protect was findings of a Committee of Enquiry established by the Ministry of Health to inquire into the death of the deceased. The subject matter of the suit was the negligence of the public officers involved in the death.

h. The High Court judge (whose judgment was affirmed by the Federal Court) held that such reports cannot be prejudicial to public interest. It concerns the probity of the conduct of public officials. Mohamed Zahir J said, at p.149[40]:

"In the instant case there is no claim by the defendants that it is the practice of holding the enquiry and the documents are not claimed as class document. Counsel for the plaintiffs also referred to page 3075 of Woodroffe which reads as follows:—

"Departmental inquiry papers are not unpublished documents relating to affairs of State. When the probity of the conduct of a public servant is in issue, the State cannot screen his conduct on the ground that it is an 'affair of State' and is therefore sacrosanct."

[40] Enclosure 33, p.54

*From the affidavit of the Deputy Secretary-General of the Ministry of Health after applying the principles of law as I understand them to be**, I am not satisfied that the notes and findings of the Committee are affairs of State. They do not fall into the class of documents for instance police information or military secrets or concerning diplomatic relations. On the contrary the enquiry was instituted into the death of the deceased which is the subject matter of this Civil Suit and other matters, for instance, statements, remarks, or opinions must necessarily flow from the enquiry of the death of the deceased. The confidentiality as alleged is not specific, as in the case of police information where there was promise of confidentiality given to the informers otherwise no such information is obtainable in the future which is therefore disastrous for the State in its work for crime detection. In the instant case, it cannot be implied what information that was submitted to the Ministry of Health that needs protection from disclosure.**"*

Cases on provisions similar to section 16A, OSA

12.9. The Federal Court in ***Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545*** was confronted with a statutory provision similar to section 16A, OSA.

a. The challenge there concerned a certificate of conversion into Islam. Section 101(2), Administration of the Religion of Islam (Perak) Enactment 2004 provides[41]:

"A Certificate of Conversion to Religion of Islam shall be conclusive proof of the facts stated in the Certificate."

[41] Enclosure 32, p.44

b. The Federal Court adopted the principles in ***Anisminic Ltd v The Foreign Compensation Commission and Another [1969] 2 AC 147*** ("***Anisminic***") in deciding that no provision can have the effect of ousting the court's power of judicial review. Zainun Ali FCJ said[42]:

"[132] In our view therefore, ***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 power of judicial review over the registrar's issuance of the certificate. 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****. (Emphasis added.)*

[133] ***In any case, the language of s 101(2) itself does not purport to 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. The facts stated in the certificate are that the persons named have been converted to the religion of Islam, and that their names have been registered in the Registrar of Muallafs. In the instant appeals, the fact of the conversion or the registration of the appellant's children are not challenged. What is challenged is the legality of the conversion and registration****."*

[42] Enclosure 33, p.107

c. ***Anisminic*** was subsequently reaffirmed by the Federal Court in ***Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750*** (see paragraph 717).[43]

d. In the most recent Federal Court judgment concerning ouster clauses, the court held that section 15B, Prevention of Crime Act 1959, which purports to oust the judicial review power of the court, is unconstitutional. In ***Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356***, Nallini Pathmanathan FCJ said[44]:

"[212] As such, s 15B of the POCA being inconsistent with art 4(1) of the FC, is void and of no effect. It cannot operate to immunise all decisions made under POCA by use of the ouster clause save for procedural irregularities."

C. Application to the facts

13. Applying the trite principles above, the Certificate merely states that the Report is classified as an official secret under the OSA. It does not even state the basis for such classification.

13.1. Following the decisions cited above and applying section 16A in its natural meaning, the Certificate is only conclusive of the fact that the Report was classified as an official secret. The legality of such classification is an entirely different issue for this court to determine.

13.2. The Certificate itself does not mention national security. This was raised for the first time in the Affidavit in Reply of the 1st Respondent. It is now trite

[43] Enclosure 34, p.203
[44] Enclosure 34, p.288

that any explanations as to the decision stated in the affidavits "should be treated as merely elucidatory".[45]

13.3. Further, the burden now rests on the Respondents to justify the Decision.[46] The Respondent relied heavily on a "Arahan / Garis Panduan / SOP" made by the "Pejabat Ketua Pegawai Keselamatan Negara" ("**SOP**") in classifying the Report as an official secret.[47]

13.4. The Applicant had filed a Notice to Produce Documents Referred to in the Pleading to ask for the SOP.[48] The Respondents refused disclosure on the basis that the SOP was classified as "Terhad" under the OSA.[49]

13.5. This is in contravention of section 30A, OSA which provides that the manner of classifying any information or document under the OSA must be done by way of regulations made by the Minister.[50]

"The Minister may make regulations to carry out the purposes of this Act and, without prejudice to the generality of the foregoing words, may-

(a) prescribe the manner of classifying information, documents and other materials;

(b) prescribe the procedure for handling, storage and delivery of official documents and other information;

(c) prescribe the manner of disposing waste official documents;

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[45] ***Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1***, paragraphs 112 and 122 (Enclosure 33, p.237)
[46] See ***Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213***, paragraph 2 (Enclosure 33, p.264)
[47] Enclosure 22, p.6
[48] Enclosure 23, p.2
[49] Enclosure 25, p.2
[50] Enclosure 32, p.15

(d) prescribe the manner of communication of official information;

***(e) prescribe all other matters necessary to protect the safety or secrecy of any information or thing**;*

(f) provide for offences and penalties not exceeding a fine of five thousand ringgit or imprisonment not exceeding one year for the contravention of any provision of the regulations; and

(g) provide for the compounding of any of such offences."

13.6. Such regulations are subsidiary legislations. They must be published in the Gazette.[51] No such regulation has been gazetted.

14. As such, all that is left is the general averment of the 1st Respondent in his Affidavit in Reply that the Report contains information relating to national security.[52]

14.1. This is on the basis that the Report "touches" on the operational aspects of the police and if disclosed, could give room to enemies of the state to take advantage of such information.

14.2. With respect, this explanation is not only unreasonable but also illogical for the following reasons.

14.3. First, as accepted by the Respondents, the Task Force was set up by the 2nd Respondent to look into the findings made in the SUHAKAM Report which includes serious findings that the Special Branch unit in the PDRM had abducted Amri and that the PDRM had failed to effectively investigate the matter.

[51] See section 18(1)(c), Interpretations Act 1948 and 1967 (Enclosure 32, p.41)
[52] Enclosure 22, p.4

a. This concerns the conduct of public officers. The *ratio decidendi* of the decision in ***B A Rao*** is directly applicable. Governmental inquiries into such matters are of public concern.

b. The contents of the Report would have a material bearing in the Civil Suit.

14.4. Second, there is no concern of any terrorist activity, crime group or any threat to the security of the country. The Report concerns the conduct of PDRM in relation to the abduction of a Malaysian citizen. It is illogical to state that an inquiry into the conduct of officers in PDRM in such a context could be prejudicial to national security.

14.5. Third, no evidence or material has been put before the court to show how the contents of the Report, if disclosed, would affect national security. As noted above, the bare averment of the 1st Respondent is insufficient.

14.6. Fourth, this contradicts the conduct of the 2nd Respondent itself.

a. The 2nd Respondent publicly announced the setting up of the Task Force.

b. The 2nd Respondent publicly announced the appointment of the members of the Task Force.

c. When SUHAKAM asked about the status of the inquiry, the 2nd Respondent publicly announced that it the Task Force needed more time.

d. However, the Respondents then made the Decision without informing any party and only disclosed it when confronted with the discovery application in the Civil Suit.

e. The 2nd Respondent treated this as a matter of public concern and not merely as an internal inquiry. It cannot now resile on this representation.

15. In view of the foregoing, the Decision is clearly unreasonable, irrational and disproportionate. At the risk of repetition, it has been 6 years since the abduction of Amri. Until today, the Applicant and her family does not know about his whereabouts. They have every right to know the truth about what happened and obtain all relevant information for that purpose.

IV Conclusion

16. In view of the foregoing, the Applicant humbly prays that the application herein be allowed.

Dated 19th December 2022

Surendra Ananth

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Messrs Surendra Ananth

Solicitors for the Applicant

This **APPLICANT'S WRITTEN SUBMISSION (MERITS)** is filed by Messrs Surendra Ananth, solicitors for the Applicant abovenamed with an address of service at No.4, Dalaman Tunku, Bukit Tunku, 50480 Kuala Lumpur.

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