21, 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.4 of 1968

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:-

STEPHEN KALONG NINGKAN ... ... Appellant

- and -

GOVERNMENT OF MALAYSIA ... ... Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from a judgment and order of the Federal Court of Malaysia (Barakbah L.P., Azmi C.J. and Ong F.J.) dated the 1st December 1967 which dismissed a petition of the Appellant claiming declarations that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was invalid, or, alternatively that sections 4 and 5 of such Act were invalid. pp.124-125 pp. 8-18

2. The relevant statutory provisions are:-

Constitution of the Federation of Malaysia

150(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

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(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution or in the Constitution of the State of Sarawak, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the

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emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of Sarawak.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of Malays, or with respect to any matter of native law or custom in a Borneo state; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

Emergency (Federal Constitution and Constitution of Sarawak Act, 1966

3. (1) In Article 150 of the Constitution:-

(a) in Clause (5); after the word 'Constitution' where it first occurs, there shall be inserted the words 'or in the Constitution of the State of Sarawak'; and

(b) in Clause (6), after the word 'Constitution' at the end thereof, there shall be added the words 'or in the Constitution of the State of Sarawak'.

(2) The amendments made by sub-section (1) of this section shall cease to have effect six months after the date on which the Proclamation of Emergency issued by the Yang di-Pertuan Agong on the fourteenth

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day of September, 1966 ceases to be in force.

4. (1) Notwithstanding anything in the State Constitution, the Governor may, in his absolute discretion, summon the Council Negri to meet at such place and on such day or dates and after such period of notice as he shall think fit, and the provisions of the Standing Orders of the Council Negri shall, to the extent that they are inconsistent with the directions of the Governor contained in the Summons, be deemed to be suspended.

(2) In order to ensure that any meeting of the Council Negri summoned as aforesaid is duly held and that any business which it is expedient, in the opinion of the Governor, should be transacted thereat is duly transacted and concluded, the Governor may, in his absolute discretion, direct that any of the Standing Orders of the Council Negri be suspended and give any special directions which he may consider necessary.

(3) Any such directions as aforesaid shall be in the form of a message to the Council Negri addressed to the Speaker, and the Speaker shall comply therewith.

(4) If the Speaker fails to comply with any direction given by the Governor as aforesaid, the Governor may, in his absolute discretion, nominate any member of the Council Negri to act as Speaker, and the member so appointed shall have all the powers of the Speaker, for the purposes of that meeting.

5. (1) If at any meeting of the Council Negri, whether held in pursuance of the provisions of section 4 of this Act or otherwise, a resolution of no confidence in the Government is passed by the votes of a majority of those members present and voting, and if after such a resolution is passed the Chief Minister fails forthwith

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to resign his office and to tender the resignation of the members of the Supreme Council, the Governor may, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council.

(2) Where the Chief Minister and members of the Supreme Council have been dismissed as aforesaid they shall forthwith cease to exercise the functions of their respective offices and the provisions of the State Constitution shall thereupon have effect for the purpose of appointing a new Chief Minister and members of the Supreme Council and for all other purposes pursuant thereto.

3. On the 23rd February, 1967 the Appellant presented a Petition to the Federal Court of Malaysia, having obtained leave from Barakbah, L.P. pp. 8-18

The Petition, which was later verified by an affidavit by the Appellant, stated that the Appellant had been appointed Chief Minister of Sarawak by Instrument under the public seal on the 22nd July, 1963; on the 17th June 1966, the Governor of Sarawak had purported to declare that the Appellant no longer held that office, and to appoint Penghulu Tawi Sli as Chief Minister, but on the 7th September 1966, the High Court at Kuching had declared that the Appellant had never ceased to be Chief Minister and granted an injunction restraining Tawi Sli from acting as Chief Minister. On the 14th September, 1966, on the advice of the Cabinet of Malaysia, the Yang di-Pertuan Agong had declared a State of Emergency in Sarawak by the following Proclamation:

"WHEREAS WE are satisfied that a grave Emergency exists whereby the security of a part of the Federation, to wit the State of Sarawak, is threatened;

AND WHEREAS Article 150 of the Constitution provides that in the said circumstances WE may issue a Proclamation of Emergency:

NOW, THEREFORE, WE Tuanker Ismail Nasiruddin

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Shah ibni Al-Marhum Al-Sultan Zainal Abindin, by the Grace of God of the States and territories of Malaysia Yang di-Pertuan Agong, in exercise of the powers aforesaid do hereby proclaim that a State of Emergency exists, and that this Proclamation shall extend throughout the territories of the State of Sarawak".

4. The said Petition continued by alleging that at the material time there was no emergency in Sarawak and that the Proclamation was null and void since the Federal Cabinet well knew that no grave emergency existed whereby the security or economic life of Sarawak was threatened. Quotations from statements by the Deputy Federal Prime Minister, Tum Abdul Razak, made to a press conference on the 15th September and to Parliament on the 19th September were set out in the Petition, which referred to the State of Emergency as being caused by the Appellant's failure to follow accepted democratic practice by resigning as Chief Minister once he had lost the confidence of the Council Negri. The Petition then referred to statements made by the Appellant on the 17th September that there was no security situation in Sarawak causing a state of emergency, and continued by alleging that the Proclamation had been in fraudem legis since it had not been made to deal with a grave emergency, but for the purpose of removing the Appellant from his lawful position as Chief Minister of Sarawak. Reference was then made to the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 (hereinafter called "the Emergency Act 1966") which it was
pp. 19-22 alleged was contrary to the Agreement Relating to Malaysia, made in 1963 between the United Kingdom and Malaysia, and given statutory force in both countries. The Constitution of Sarawak, by Article 41, provided for its own amendment, which had not been followed in the passing of the Emergency Act 1966, with the result that the whole of the Emergency Act 1966, or at least sections 3, 4 or 5 were null and void. The Petition then recited that on the 20th September 1966 the Governor of Sarawak purporting to act under the Emergency Act 1966 had summoned the Council Negri which had passed a vote of no confidence in the Appellant, in consequence of which the Governor had

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dismissed the Appellant from the post of Chief Minister, and had appointed Penghulu Tawi Sli. The Appellant claimed declarations that the Emergency Act 1966, or alternatively clauses 4 and 5 thereof were null and void.

5. The Defence of the Respondent, dated the 28th April 1967, admitted a number of the allegations of fact in the Petition, but asserted that at the material time there had been a situation of emergency in Sarawak justifying the making of the Proclamation of Emergency. It asserted the validity of the Proclamation, the whole of the Emergency Act 1966, and the acts of the Governor of Sarawak under that Act.

6. The hearing of the Petition took place between the 5th and 7th September 1967 in the Federal Court of Malaysia (Barakbah L.P., Azmi C.J. Malaya, and Ong F.J.). Judgment was given by the Federal Court on the 1st December 1967 when the Petition was unanimously dismissed. pp. 29-79 pp. 124-125

7. Barakbah, L.P. began his judgment by referring to the events leading up to the Proclamation of Emergency and the relevant statutory provisions; he summarised the Appellant's contentions as being, first, that since the Proclamation was invalid, the Emergency Act 1966 was null and void, and, secondly, that purported amendments of the Constitution of Sarawak were null and void as being ultra vires the Federal Parliament, and in any event not made in accordance with Articles 159(3) and 161E of the Federal Constitution. On the first contention, the question which arose was whether the Court could entertain the issue of whether the Yang di-Pertuan Agong was acting in bad faith in having proclaimed the emergency; in his view, in an act of the nature of the Proclamation, issued in accordance with the Constitution, it was incumbent on the Court to assume that the Government had been acting in the best interest of the State, and not to permit any evidence to be adduced otherwise; the circumstances which brought about a Proclamation of Emergency were not justiciable. Reference had been made for the Appellant to authorities upon the power of the Court to review the exercise of delegated legislative powers, but the present case was in a different category; the existence of a state of emergency could only be pp. 79-89

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determined by the person making the proclamation, as had been said by Lord Dunedin in Bhagat Singh v. The King-Emperor 58 I.A.169. Once the Yang di-Pertuan Agong was satisfied that a state of emergency existed, it was not for the Court to enquire as to whether or not he should have been satisfied.

On the second contention, Article 150(5) expressly provided that during a State of Emergency Parliament could legislate upon any subject matter notwithstanding the other provisions of the Constitution if it appeared to Parliament that such a law was required by reason of the emergency. In such a case when acting under Article 150(5) Parliament was not fettered by Articles 159 (3) or 161, except in the specific cases expressly stated in Article 150(6A). The Federal Parliament was therefore able to amend the Federal Constitution and the Constitution of Sarawak and the Emergency Act 1966 had been validly enacted.

pp. 89-98

8. Azmi, C.J. Malaya, in his judgment dealt first with the question whether the validity of the Proclamation of Emergency could be questioned; he analysed the judgment in Bhagat Singh v. The King Emperor (supra) which turned upon the effect of section 72 of the Government of India Act, which, although in different language to the provision under consideration, had the same result that the person given the power of making a proclamation of emergency was the sole judge of whether or not an emergency existed. The case of King Emperor v. Benoari Lal Sarma (1945) A.C.14 was to the same effect. On the first point the application must fail.

On the second contention, Azmi C.J. found Article 150(5) of the Constitution clear in permitting Parliament to legislate free of restriction of other Articles of the Constitution during an emergency, and said that such extended power would extend to amending the Constitution of Sarawak otherwise than in accordance with that State Constitution, and without the need to obtain the concurrence of the Governor of Sarawak. The Emergency Act 1966 had therefore been validly passed.

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9. Ong F.J. began his judgment by saying that he could not agree with the other members of the Court that, under Article 150 of the Constitution, the Yang di-Pertuan Agong was the sole judge of whether a situation justified a Proclamation of Emergency. His Majesty, it was accepted, acted constitutionally on the advice of the Federal Cabinet, against whom the allegation of fraud had been made in the Petition, which allegation ought to be investigated by the Court, since the Cabinet had never claimed to be above the law and the Constitution. The Indian authorities relied upon by the Respondent were not conclusive, as the Government of India Act placed no restrictions on declaring a state of emergency, while Article 150 of the Malaysian Constitution specifically provided that the emergency must be one "whereby the security or economic life of the Federation or any part thereof is threatened"; it was the task of the Court to consider the facts of the case and determine whether the Appellant was correct in asserting that no such conditions existed. pp. 99-123

Ong F.J. then reviewed at length the facts set out in the Petition, and also referred to the findings in a judgment by Harley, Acting Chief Justice of Sarawak in an action brought in Sarawak by the Appellant against Penghulu Tawi Sli; Ong F.J. said that, as there had been no appeal, those findings should be considered as res judicata and conclusive. In addition the learned judge set out lengthy extracts from speeches made in the Federal Parliament on the 19th September 1966 by the Deputy Prime Minister and by Mr. Seenivasagam, the opposition member for Ipoh. After reviewing these matters Ong F.J. said that the crucial question was whether the Proclamation had been made not to deal with a grave emergency but to remove the Appellant from his office. His view was that the primary objective was to remove the Appellant, but that this was not necessarily incompatible with a genuine concern by the Cabinet over the security situation in Sarawak. His conclusion was that he was unable to say that the Cabinet's advice over the Proclamation was not prompted by bona fide considerations of security, and that the Appellant had failed to make out his case that the Proclamation of Emergency was invalid.

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10. The Respondent respectfully submits that the decision of the Federal Court was correct for the reasons given by Barakbah L.P. and Azmi C.J. and should be upheld. It is submitted that on a proper interpretation of Article 150 of the Federal Constitution the sole judge of whether a state of emergency, as defined in Article 150, existed is the Yang di-Pertuan Agong acting upon advice. The Article further does not permit of the enquiry sought by the Appellant in his argument, as a practical possibility, since the nature of the provision may well require an immediate Proclamation the validity of which ought not to be open to any enquiry in the courts. If any Proclamation made under Article 150 could be challenged, together with any legislation passed in consequence of it, on the ground that there was not in fact a grave emergency in existence which threatened the security or economic life of some part of the Federation, the discretion or judgment of the Court would thereby be substituted for the conclusion of the Yang di-Pertuan Agong, which would be an evident distortion of the language of Article 150. The Respondent relies upon the reasoning of the judgments of the Privy Council in the Indian cases cited in the Judgments of Barakbah L.P. and Azmi C.J. It is submitted that there is no significant difference between the wording of Section 72 of the Government of India Act and of Article 150 to justify the rejection of the principle stated in those cases, that where a discretion to declare a state of emergency is conferred upon a named individual it is not for the courts to seek to review the exercise of that discretion.

11. The Respondent respectfully submits that there are no grounds for asserting that the Emergency Act 1966 or any part of it was not validly enacted. It is submitted that Article 150(5) of the Constitution was deliberately worded to enable Parliament to legislate without restriction as to subject matter, in a period of emergency and for a limited period, subject only to such restrictions as are contained in Article 150 itself. It is further submitted that any restriction in the Constitution of Sarawak upon amending that Constitution can only operate in relation to

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amendments carried out under the Constitution of Sarawak, and can have no application to an amendment made by Federal legislation, if the amendment is otherwise within Federal power.

12. The Respondent does not wish to submit that the approach to the issues taken by Ong F.J. in his judgment was correct, or that it is permissible under the language of the Constitution for the Federal Court to enquire in any way into the considerations of the Cabinet when advising the Yang di-Pertuan Agong upon a declaration of a state of emergency. The material upon which Ong F.J. found it necessary to rely in the enquiry he undertook in his judgment is an indication of the unsatisfactory position the Court would be in if such a course were open to it. If however the submissions of the Respondent are not accepted it would be desired to rely upon the finding of Ong F.J. that the Appellant had not established that the Cabinet had not been prompted by bona fide considerations in tendering advice upon the making of the Proclamation of Emergency.

13. The Respondent respectfully submits that this appeal should be dismissed, with costs, and that the judgment of the Federal Court of Malaysia should be affirmed, for the following, among other

R E A S O N S

(1) BECAUSE the Proclamation of Emergency was validly made

(2) BECAUSE the validity of the Proclamation of Emergency was not open to enquiry in the Courts.

(3) BECAUSE the Emergency Act 1966 was validly enacted.

(4) BECAUSE the operation of Article 150 of the Federal Constitution permits the amendment of State Constitutions.

(5) BECAUSE legislation passed in accordance with Article 150 is expressly stated not to be fettered by other provisions of the Constitution.

(6) BECAUSE of the other reasons in the judgments of Barakbah L.P. and Azmi C.J.

MERVYN HEALD

No. 4 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N:

STEPHEN KALONG NINGKAN — Appellant

- and -

GOVERNMENT OF MALAYSIA — Respondent

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